IN THE ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT,
THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES,
AND CANADA,
AND THE ICSID ARBITRATION RULES

DOUPS HOLDINGS, LLC

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/22/24

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), Article 14.D.7(2) of the United States-Mexico-Canada Agreement ("USMCA"), and Section 26.1 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the NAFTA and the USMCA. 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]

[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.

Definition of "legacy investment" (USMCA Annex 14-C Paragraph 6)

2. The USMCA Parties' consent in Paragraph 1 of Annex 14-C is limited to claims "with respect to a legacy investment." Paragraph 6(a) of Annex 14-C defines "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement." Paragraph 6(b) further provides that "'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994."

3. The claimant bears the burden of establishing a "legacy investment" within the meaning of Paragraph 6 of Annex 14-C.[2] This necessarily includes establishing that the alleged investment was "in existence on the date of entry into force of [the USMCA]."[3] In the absence of a "legacy investment," the claimant's claims are outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C and the tribunal lacks jurisdiction over them.

4. It should be underlined that in the absence of a survival clause in the NAFTA, the default outcome for investors was that they would lose the ability to bring any claims under the NAFTA following its termination, even if they were based on pre-termination conduct.[4] The USMCA Parties decided to permit the holders of "legacy investments" three additional years to bring certain claims that they would otherwise have lost upon the NAFTA's termination, and in doing so, the USMCA Parties were free to limit their consent as they chose. The fact that these limits,

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[2] *Bridgestone Licensing Services, et al. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 153 (Dec. 13, 2017). *See also* G.A. Res. 31/98, UNCITRAL Arbitration Rules, Article 24 (1976) ("Every party shall have the burden of proving the facts relied on to support his claim or defence."); BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("BIN CHENG") ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence[.]") (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* at 14, WT/DS33/AB/R (May 23, 1997)).

[3] USMCA Annex 14-C, ¶ 6(a).

[4] *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Award ¶ 146 (July 12, 2024) ("[A]bsent any transitory provision, the termination of NAFTA would have had the consequence not only that its substantive provisions would no longer be applicable past 30 June 2020, but also that investors would no longer be able to accept the offer to arbitrate contained in Section B, irrespective of the date of the alleged breach.").

including the definition of "legacy investment," exclude certain investors from asserting claims is a product of choices that the USMCA Parties made in drafting Annex 14-C.

Limitations on Claims for Loss or Damage (NAFTA Articles 1116(1) and 1117(1))

Standing to Bring a Claim

5. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the article invoked.[5] Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added)

6. Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise of another Party that it owns or controls for loss or damage incurred by that enterprise:

> An 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 another Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach. (emphases added)

7. Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury.[6] Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 1116. Where the investor seeks to recover loss or damage to an enterprise that the

[5] An investor may bring separate claims under both Articles 1116 and 1117; however, the relief available for each claim is limited to the article under which that particular claim falls.

[6] *See* North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. Doc. 103-159, Vol. I, 103rd Cong., 1st Sess., at 145 (Nov. 4, 1993) ("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 the investor.").

investor owns or controls, the investor's injury is only *indirect*. Such a derivative claim must be brought, if at all, under Article 1117.[7] However, Article 1117 is applicable only where the loss or damage has been incurred by "*an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly." (Emphasis added). Article 1117 does not apply where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor.

8. The United States' position on the interpretation and functions of Articles 1116(1) and 1117(1) is long-standing and consistent.[8] The United States agrees with Canada[9] and Mexico[10] that investors must allege direct damage to recover under Article 1116 and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed, if at all, under Article 1117. Pursuant to customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, "[t]here shall be taken into account, together with context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its

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[7] *See*, *e.g.*, Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) ("Caplan & Sharpe") (noting that Article 24(1)(a), nearly identically worded to NAFTA Article 1116(1), "entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor," while Article 24(1)(b), nearly identically worded to NAFTA Article 1117(1), "creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls").

[8] *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. 6, 2001); *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).

[9] *See*, *e.g.*, *William Ralph Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Government of Canada Counter-Memorial on Damages ¶ 28 (June 9, 2017); *id*. n.50 (authorities cited including Canada's prior statements on same); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Counter-Memorial (Damages Phase) ¶¶ 108-109 (June 7, 2001).

[10] *See*, *e.g.*, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United Mexican States (Damages Phase) ¶¶ 41-45 (Sept. 12, 2001) (explaining that Article 1116 allows an investor to bring a claim for loss or damage suffered by the investor and that Article 1117 allows an investor to bring a claim for loss or damage on behalf of an enterprise (that the investor owns or controls) for loss or damage suffered by the enterprise); *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Statement of Defense ¶¶ 167(e) and (h) (Nov. 24, 2003); *Alicia Grace v. United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Statement of Defense ¶¶ 529-37 (June 1, 2020).

provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ."[11] In accordance with these principles, the Tribunal must take into account the NAFTA Parties' common understanding, as evidenced by these submissions.[12]

9. The distinction between Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as 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."[13] As the *Diallo* Court further reaffirmed, quoting

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[11] Vienna Convention on the Law of Treaties, art. 31(3)(a)-(b), May 23, 1969, 1155 U.N.T.S. 331. Although the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is an "authoritative guide" to treaty law and practice. *See* Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971), S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, at 684, 685 (Dec. 13, 1971). *See also* International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 3, UN Doc. A/73/10 (2018) "ILC Draft Conclusions Treaty Interpretation" ("Subsequent agreements and subsequent practice under Article 31, paragraph 3(a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31."); *id.*, cmt. 3 ("By describing subsequent agreements and subsequent practice under article 31, paragraph 3(a) and (b), as 'authentic' means of interpretation, the Commission recognizes that the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty.").

[12] *See, e.g., Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (explaining that the approach advocated by claimant had "clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA," as evidenced by "their submissions to other NAFTA tribunals," and that "[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight."); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) (explaining that "the available evidence cited by the Respondent," including submissions by the NAFTA Parties in arbitration proceedings, "demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]'"); ILC Draft Conclusions Treaty Interpretation, Conclusion 4, cmt 18, (stating that subsequent practice under Article 31(3)(b) of the Vienna Convention "includes not only officials acts at the international or at the internal level that serve to apply the treaty . . . but also, *inter alia*, . . . statements in the course of a legal dispute . . . .").

[13] *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").

Barcelona Traction: "a wrong done to the company frequently causes prejudice to its shareholders." 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."[14] Thus, only *direct* loss or damage suffered by shareholders is cognizable under international law.[15]

10. How a claim for loss or damage is characterized is not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

11. Examples of claims that would allow a shareholding investor to seek redress for direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.[16] Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests—whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.

12. The second principle of customary international law against which Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.[17]

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[14] *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*"). *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.").

[15] *See Barcelona Traction* at ¶ 47 ("Whenever one of his direct rights is infringed, the shareholder has an independent right of action.").

[16] *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder's State that has espoused the claim) may bring a claim under customary international law.

[17] ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 512-513 (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).

13. Under these background principles, investors in a common situation are potentially left without a remedy under customary international law. 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/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is only directly suffered 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.[18]

14. Article 1117(1) addresses this issue by creating a right to present a claim not found in customary international law.[19] Where the investment is an enterprise of the host State,[20] an investor of another Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise. However, minority shareholders who do not own or control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same disputed measures.

[18] Some investment treaties allow an investment to assume the nationality of the investor that owns or controls that investment pursuant to ICSID Article 25(2)(b), therefore permitting an enterprise to bring a claim on its own behalf even though it was constituted under the laws of the disputing Party. *See, e.g.,* U.S.-Argentina Bilateral Investment Treaty, S. TREATY DOC. NO. 103-2, 103rd Cong., 1st Sess., art. VII(8) (1994) ("For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."); Energy Charter Treaty, art. 26(7), Apr. 16, 1998 (entry into force), 2080 U.N.T.S. 95; 34 I.L.M. 360 (1995).

[19] *See* Daniel M. Price & P. Bryan Christy, III, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, in THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 177 (Judith H. Bello et al. eds., 1994) ("Article 1117 is intended to resolve the Barcelona Traction problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.").

[20] *See* NAFTA Article 1139 ("enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there"); NAFTA Article 201 ("enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association").

15. Article 1116, in contrast, adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights.[21] Were shareholders to be permitted to claim under Article 1116 for indirect injury, Article 1117's limited carve out from customary international law would be superfluous. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."[22] Nothing in the text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.[23]

16. The above conclusions on the distinction between Articles 1116 and 1117 are reinforced in several complementary NAFTA provisions, all of which serve to recognize relevant principles

[21] Article 1116(1) derogates from customary international law only to the extent that it permits individual investors (including minority shareholders) to assert claims that could otherwise be asserted only by States. *See, e.g.*, Nottebohm (*Liechtenstein v. Guatemala*), 1955 I.C.J. 4, 24 (Judgment of Apr. 6) ("[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]") (internal quotation omitted); F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 86 (1974) ("[I]nternational responsibility had been viewed as a strictly 'interstate' legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) ("[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.").

[22] Elettronica Sicula S.p.A. (ELSI) (*U.S. v. Italy*) 1989 I.C.J. 15, ¶ 50 (Judgment of July 1989) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003); *see also id.* at ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[23] As noted earlier, the United States expressly drew a distinction between direct and indirect injury in its Statement of Administrative Action. *See supra*, note 6.

of domestic law[24] aimed at preserving the separate legal identity of a corporation,[25] promoting judicial economy,[26] and protecting the rights of creditors and other shareholders.[27]

17. For example, Article 1117(3) provides that claims brought on behalf of an investor under Article 1116(1) and an enterprise under Article 1117(1) that arise from the same events should be heard together by the same arbitral tribunal.[28] This provision promotes judicial economy by providing for the consolidation of claims, thereby reducing the risk of double recovery and inconsistent awards when the claims are based on the same events. Article 1117(3) also makes clear that nothing prevents an investor that owns or controls an enterprise, in an appropriate case,

[24] *See, e.g., Barcelona Traction* at ¶ 50 ("If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has . . . not only to take cognizance of municipal law but also to refer to it.").

[25] *See, e.g., Bolivar v. Pocklington*, 975 F.2d 28, 33 (1st Cir. 1992) ("a sole shareholder cannot commandeer corporation assets by discarding the corporate veil at his convenience"). *See generally* David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law," OECD Working Papers on International Investment, 2014/02, at 13-25 (2014) (discussing the impact that shareholder claims for indirect loss may have on corporate identity) ("Gaukrodger").

[26] *See, e.g., Johnson v. Gore Wood & Co.* [2002] 2 AC 1, 62 (House of Lords) ("If the shareholder is allowed to recover in respect of [indirect] loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. . . . Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."); *Gaubert v. United States*, 885 F.2d 1284, 1291 (5th Cir. 1989) ("Gaubert") ("One rationale behind this prohibition [on indirect loss] rests on principles of judicial economy."), *reversed on other grounds*, 499 U.S. 315 (1991).

[27] *See, e.g., Gaubert* at 1291 ("Another rationale for the prohibition [on shareholder claims for indirect loss] is fairness to creditors of the corporation. Common shareholders are usually at or near the bottom of the corporate financial pecking order. First come the secured then unsecured creditors, then the bondholders in order of preference, then the preferred shareholders, and lastly the common shareholders. Any recovery for injuries to the corporation is paid into the corporation, and the various creditors, bondholders, and equity-holders are 'paid' in that order. Were common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation."); Caplan & Sharpe at 826 (noting that with respect to art. 24(1)(b) of the U.S. Model BIT, substantively identical to NAFTA Article 1117(1), that the provision maintains the "distinction between the rights of shareholders and the corporation [and] prevents investors from effectively stripping away a corporate asset . . . to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors") (internal citation omitted).

[28] NAFTA Article 1117(3) reads in full: "Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interest of a disputing party would be prejudiced thereby."

from submitting claims under both Articles 1116 and 1117.[29] This allowance would be unnecessary if the controlling investor could claim for indirect loss under Article 1116(1).

18. Article 1117(4) is aimed at further reducing the possibility of multiple actions by preventing the investment, which includes an enterprise under NAFTA Article 1139, from bringing a claim on its own behalf.[30]

19. Articles 1121(1)(b) and 1121(2)(b) also reinforce the distinction between Articles 1116 and 1117, respectively, in order to reduce the likelihood of multiple actions and double recovery.[31] Regardless of whether an investor submits a claim for injury to its own interest under Article 1116, or to the interest of an enterprise that the investor owns or controls under Article 1117, the enterprise must waive its right to seek available remedies under domestic law for the same injury. Otherwise, a NAFTA Party could be forced to defend against such claims in concurrent or consecutive proceedings, risking duplicative and potentially inconsistent decisions for the same loss or damage arising from the same breach.

20. Finally, under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This requirement – which follows the practice of many domestic legal systems with respect to shareholder derivative actions[32] – is aimed at preventing the investor from effectively

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[29] For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay," the investor might be able to claim under Article 1116 damages stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 1117 damages relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations. A minority or non-controlling shareholder under such a scenario, however, could submit only a claim for direct damages – the loss of dividends – under Article 1116.

[30] *See* MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER THE NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1117-4 (2008 Supp.) ("[Article 1117(4)] is likely . . . designed to forestall the possibility that the investment could make one claim while its controlling owner advanced a different claim. The rule of non-responsibility should prohibit that result, in any event, but given the different approach taken in the ICSID Convention [under Article 25(2)(b)], the provision provides extra guidance to tribunals as to the route an Article 1117 claim should take.").

[31] *See, e.g., GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Final Award ¶¶ 116-121 (Nov. 15, 2004) (finding that "[t]he overwhelming implausibility of a simultaneous resolution of the problem [of double recovery] by national and international jurisdictions impels consideration of the practically certain scenario of unsynchronized resolution") (emphasis in original).

[32] *See* Gaukrodger at 19-20.

stripping away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.[33] Instead, any award in the claimant's favor will make the enterprise whole and the value of the shares and assets will be restored. This goal is reflected in Article 1135(2)(c), which provides that where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief.

21. Allowing an investor to claim for any indirect loss under Article 1116(1) would render the above framework ineffective.[34] For example, if an investor had the right to bring its own claim for loss or damage suffered by an enterprise, that investor might choose to make a claim under Article 1116(1) rather than Article 1117(1) in order to protect the award from creditors or other shareholders.[35] Under such circumstances, the provisions of Article 1135 – designed to ensure any award based on injury to an enterprise is paid to the enterprise in order to protect the interests of creditors and other shareholders – would be rendered meaningless.[36]

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[33] Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties. *See, e.g.*, Eduardo Jiménez de Aréchaga, Diplomatic Protection of Shareholders in International Law, 4 PHIL. INT'L L.J. 71, 77, 78 (1965).

[34] It is well-established under customary international law that provisions of a treaty must be interpreted in such a manner that renders their terms effective. *See* Territorial Dispute (*Libya v. Chad*), 1994 I.C.J. 6, ¶ 51 (Judgment of Feb. 3) (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness") (collecting authorities); *accord* Corfu Channel (*United Kingdom v. Albania*), 1949 I.C.J. 4, 24 (Judgment of Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

[35] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 452 (1st ed. 2009) ("It is difficult to imagine why a shareholder would elect to bring a claim for the account of its company if it had the option of bypassing the company altogether. The company might be liable to pay creditors, local taxes and discharge other obligations before distributing the residual amount of any damages recovered to the shareholders.").

[36] *See, e.g., Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Correction and Interpretation of the Award ¶¶ 12-13 (June 13, 2003) (revising the award to comply with the requirement of Article 1135(2) that damages under Article 1117 be paid to the enterprise). Allowing an investor to bring a claim for indirect loss under Article 1116 would also permit a class of claims (by minority shareholders and creditors, which do not own or control the enterprise at issue) never envisioned by the NAFTA Parties. In such a case, Article 1121(1)(b) would not prevent the enterprise from also seeking available remedies under domestic law for the same injury. Nor would Article 1117(3) require the consolidation of these investors' claims. As a result, there would be an increased risk of forum shopping, multiple actions, double recovery and inconsistent awards.

"Investor of a Party"

22. As noted above, Articles 1116 and 1117 permit an investor of a Party to submit to arbitration a claim that another Party has breached an obligation when certain conditions are met. Article 1139 of NAFTA defines "investor of a Party," in part, as an "enterprise of such Party, that seeks to make, is making, or has made an investment[.]" Pursuant to Article 201 "enterprise" means "any entity constituted or organized under applicable law . . . including any corporation, trust, partnership, sole proprietorship, joint venture or other association[.]" Article 201 further defines "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party[.]" Accordingly, subject to limited exceptions, an enterprise may submit a claim to arbitration under the NAFTA provided that it can show that it is an entity constituted or organized under the applicable law of a Party to the NAFTA other than the respondent.[37]

Causation and Damages

23. The ordinary meaning of Article 1116 requires an investor to establish the causal nexus between the alleged breach and the claimed loss or damage.[38] It is well established that "causality in fact is a necessary but not a sufficient condition for reparation."[39] The standard for factual causation is known as the "but-for" or "*sine qua non*" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if

[37] *See* NAFTA Article 1116(1) ("An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . ."); NAFTA Article 1139 ("investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;"); NAFTA Article 201 ("enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association").

[38] H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 422 (2d ed. 1985) (noting that it is generally the claimant's burden to "persuade the tribunal of fact of the existence of causal connection between wrongful act and harm"); *see Islamic Republic of Iran v. United States of America*, AWD 601-A3/A8/A9/A14/B61-FT ¶ 153 (July 17, 2009), 38 Iran-U.S. C.T.R. 197, 257 ("Iran, as the Claimant, is required to prove that it has suffered losses . . . and that such losses were *caused by* the United States.") (emphasis added).

[39] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 31, Commentary ¶ 10, U.N. Doc. A/56/10 (2001) ("ILC Draft Articles"). The Iran-U.S. Claims Tribunal reaffirmed this principle in the remedies phase of Case A/15(IV) when it held that it must determine whether the "United States' breach caused 'factually' the harm . . . and that that loss was also a 'proximate' consequence of the United States' breach." *Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT ¶ 52 (July 2, 2014), 39 IRAN-U.S. C.T.R. 359, 381 ("A/15(IV) Award").

the same result would have occurred had the breaching State acted in compliance with its obligations.[40]

24. The ordinary meaning of the term "by reason of, or arising out of" also requires an investor to demonstrate proximate causation. Proximate causation is an "applicable rule[] of international law" that under NAFTA Article 1131(1) must be taken into account in fixing the appropriate amount of monetary damages.[41] All three NAFTA Parties have expressed their agreement that proximate causation is a requirement under NAFTA Chapter Eleven.[42] In accordance with the customary international law principles of treaty interpretation reflected in

[40] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 43, ¶ 462 (Feb. 26); A/15(IV) Award at 381 (explaining that if "both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio sine qua non* of the loss the claimant seeks to recover.").

[41] *See* ILC Draft Articles, art. 31, Commentary ¶ 10. *See also Administrative Decision No. II (U.S. v. Germany)*, 7 R.I.A.A. 23, 29 (1923) (proximate cause is "a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating"); *United States Steel Products (U.S. v. Germany)*, 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix (U.S. v. Venezuela)*, 9 R.I.A.A. 119, 121 (undated) ("International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure."); *H. G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219, 225 (1927) (construing the phrase "originating from" as requiring that "only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]"). *See also* BIN CHENG at 244-45 ("[I]t is 'a rule of general application both in private and public law,' equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation.").

[42] *See, e.g., Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Amended Statement of Defense of the United States of America ¶ 213 (Dec. 5, 2003); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Fourth Submission of the United Mexican States ¶ 2 (Jan. 30, 2004) ("Mexico agrees . . . that Chapter Eleven incorporates a standard of proximate cause through the use of the phrase 'has incurred loss or damage by reason of, or arising out of' a Party's breach of one of the NAFTA provisions listed in Articles 1116 and 1117.") (footnote omitted); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶ 47 (Apr. 30, 2001) ("The ordinary meaning of the words 'by reason of, or arising out of' establishes that there must be a clear and direct nexus between the breach and the loss or damage incurred."). *See also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-3, Second Submission of the United States of America ¶ 31 (Apr. 20, 2020)) ("The ordinary meaning of the term 'by reason of, or arising out of' also requires an investor to demonstrate proximate causation."); *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-3, Comments of the Government of Canada in Response to the Second NAFTA Article 1128 Submission of the United States of America and the United Mexican States ¶ 5 (May 8, 2020) ("[T]he United States' submission with respect to limitations on loss or damage is in agreement with Canada's submissions. Inherent to the NAFTA requirement that recovery be limited to loss or damage 'by reason of, or arising out of' a breach is the need for the Claimant to show both factual causation and proximate causation.") (footnotes omitted).

VCLT Article 31(3)(a)-(b), the Tribunal must take into account this common understanding of the Parties.[43]

25. NAFTA tribunals have consistently imposed a requirement of proximate causation under Article 1116. The *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor,[44] and then subsequently clarified that "[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm."[45] In *Pope & Talbot*, the tribunal held that under Article 1116 the claimant bears the burden to "prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of."[46] The *ADM* tribunal required "a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury."[47] Accordingly, any claim for loss or damage cannot be based on an assessment of acts, events or circumstances not attributable to the alleged breach.[48]

[43] *See supra* paragraph 8 & n.11.

[44] *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNICTRAL, First Partial Award ¶ 316 (Nov. 13, 2000); *see also Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-17, Award, ¶¶ 259-261 (Mar. 24, 2016) (in finding it had jurisdiction over the claim and that the requirements of NAFTA Article 1116(1) were met, the tribunal noted the "measures identified must have a causal nexus with the Claimant or its investments.").

[45] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award ¶ 140 (Oct. 21, 2002) (emphasis in original); *see also Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award ¶¶ 212-213 (Jan. 31, 2022) (where the tribunal accepted Canada's argument with regard to the relationship between the challenged measure and the investor and that the challenged measure must "directly address, target, implicate, or affect the claimant" or have a "direct and immediate effect on the claimant.").

[46] *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages ¶ 80 (May 31, 2002).

[47] *Archer Daniels Midland Co. v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/04/05, Award ¶ 282 (Nov. 21, 2007).

[48] *See* ILC Draft Articles, art. 31, Commentary ¶ 9 (noting that the language of Article 31(2) providing that injury includes damage "caused by the internationally wrongful act of a State," "is used to make clear that the subject matter of reparation is, globally, the injury *resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act*") (emphasis added).

"Control" of an Enterprise

26. As noted above, Article 1117 authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor "owns or controls directly or indirectly." The NAFTA does not define "control." The omission of a definition for "control" 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.[49]

Consent and Waiver (NAFTA Article 1121)

27. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration", states in relevant part:

> 1. A disputing investor may submit a claim under Article 1116 only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

[49] *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. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27 (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"); *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award ¶ 194 (June 5, 2020) (in determining whether the claimant controlled the company under NAFTA Article 1117, the tribunal considered the claimant's legal control of the company but found it unnecessary to consider the claimant's *de facto* control of a the company given the facts, evidence, and case circumstances).

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

28. Because the waiver requirements under Article 1121 are among the requirements upon which the Parties have conditioned their consent, a valid and effective waiver is a precondition to the Parties' consent to arbitrate claims, and accordingly to a tribunal's jurisdiction, under USMCA Annex 14-C.[50] The purpose of the waiver provision is to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[51]

[50] *See Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award §§ 16, 31 (June 2, 2000) ("*Waste Management I* Award"); *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 73 (July 15, 2016) ("*Renco* Partial Award") ("[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 Detroit International Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA/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").

[51] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) ("*Thunderbird* Award") ("[t]he 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"); *see also Waste Management I* Award § 27 ("when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages") (emphasis added).

29. Similar to provisions found in many of the United States' other international investment agreements,[52] NAFTA Article 1121 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.[53] However, Article 1121 makes clear that as a condition precedent to the submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration, which would bar the claimant from initiating or continuing any proceeding in any other forum relating to the alleged breaching measure. A claim will not be considered validly submitted to arbitration unless and until it is accompanied by an effective waiver. The date on which a claim is submitted to arbitration for purposes of Articles 1120 and 1137 is therefore the date on which the effective waiver is submitted, assuming all other procedural requirements have been satisfied.

30. Compliance with the Article 1121 waiver obligation entails both formal and material requirements.[54] Formal requirements include that the waiver must be in writing and "clear, explicit and categorical."[55] As the *Renco* tribunal stated, interpreting a waiver provision in the U.S.-Peru Trade Promotion Agreement similar to Article 1121 of the NAFTA, the waiver provision 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.[56] NAFTA Article 1121 is thus "intended to operate as a 'once 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)."[57] That is, the waiver requirement seeks to give the respondent State

[52] For example, waiver provisions similar to Article 1121 of NAFTA can be found in Article 10.18.2 of the U.S.-Peru TPA, 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.

[53] Any such subsequent arbitration claim would be subject to the three-year limitations period for claims under NAFTA Articles 1116(2) and 1117(2).

[54] *Waste Management I* Award § 20; see also *Renco* Partial Award ¶ 73; *Commerce Group* Award ¶¶ 79-80.

[55] *Waste Management I* Award § 18; see also *Renco* Partial Award ¶ 74.

[56] *See Renco* Partial Award ¶¶ 95-96. *See also Waste Management I* Award § 19 ("It was from [the date of the notice of request for arbitration] that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.").

[57] *See Renco* Partial Award ¶ 99 (interpreting the similar waiver provision in Article 10.18 of the U.S.-Peru TPA).

certainty, from the very start of arbitration, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration. Accordingly, a waiver containing any conditions, qualifications, or reservations will not meet the formal requirements and will be ineffective.

31. Article 1121 also requires a claimant's waiver to encompass "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to" in both Article 1116 and Article 1117, with certain limited, specified exceptions. 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)."[58] 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."[59]

32. 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 owns or controls 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 Eleven breach. To allow otherwise would permit a claimant to circumvent Article 1121's formal and material requirements through affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of this waiver provision mentioned in the preceding paragraph of this submission.

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[58] *Thunderbird* Award ¶ 118 (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.").

[59] *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"). NAFTA Article 1121 does not require a waiver of domestic proceedings where the measure at issue in the NAFTA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

33. If all requirements under Article 1121 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*. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 1121. However, the tribunal cannot itself decide to allow a claimant 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 as a function of its general discretion to consent to arbitration.[60]

34. 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 1122(1). Under such circumstances, the tribunal would lack jurisdiction *ab initio*.

Most-Favored-Nation Treatment (NAFTA Article 1103)

35. Article 1103 requires each Party to accord to investors of another Party, and their investments, "treatment no less favorable than that it accords, in like circumstances, to" investors, or investments of investors, "of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

[60] *Waste Management I* Award § 31 (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). *See also Renco* Partial Award ¶ 173; *Railroad Development* Decision on Jurisdiction ¶ 61 (finding that "the Tribunal has no jurisdiction without 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").

36. If the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 1103 can be established. In other words, the claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party. Moreover, a Party does not accord treatment through the mere existence of provisions in its other international agreements such as umbrella clauses or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

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