IN THE ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

ACCESS BUSINESS GROUP LLC

Claimant

-and-

UNITED MEXICAN STATES,

Respondent.

ICSID CASE NO. ARB/23/15

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Procedural Orders Nos. 1 and 2, the United States of America makes this submission on questions of interpretation of the North American Free Trade Agreement ("NAFTA") and the United States-Mexico-Canada Agreement ("USMCA"). 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.[*]

[*] 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.

USMCA Annex 14-C

2. A State's consent to arbitration is paramount.[1] Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,[2] it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.[3]

3. Paragraph 1 of USMCA Annex 14-C provides the USMCA Parties' consent, with respect to "legacy investments," to the submission of claims for breaches of certain NAFTA obligations that allegedly occurred after the NAFTA entered into force and before it was terminated. That paragraph states:

> Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
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> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
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> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
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> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner

[1] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (2009) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. People's Republic of China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted).

[2] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

[3] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) ("*Renco* Partial Award") ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). *See also* CHRISTOPH SCHREUER, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski et al., eds. 2008) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008) (explaining also that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

> inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[4]

Paragraph 3 of Annex 14-C provides that claims may be submitted under Paragraph 1 for three years after the NAFTA's termination.[5]

4. Consent to arbitration in Annex 14-C was limited to allegations of breach of obligations under the NAFTA. Those obligations terminated on July 1, 2020, when the NAFTA was superseded by the USMCA. There could be no breach of the NAFTA's obligations after it terminated because the NAFTA no longer imposed obligations on the Parties. As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[6] Thus, Annex 14-C necessarily permits only claims for breaches of the NAFTA that are alleged to have occurred while the NAFTA was in force. The USMCA Parties did *not* consent in Annex 14-C to the submission of claims based on conduct that occurred *after* the NAFTA terminated.[7]

5. The NAFTA terminated and the USMCA entered into force on July 1, 2020.[8] The default position in customary international law, reflected in Article 70(1)(a) of the Vienna Convention on the Law of Treaties ("VCLT"), is that "[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with

[4] USMCA Annex 14-C, ¶ 1 (footnotes omitted).

[5] *See* USMCA Annex 14-C, ¶ 3.

[6] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/10 (2001).

[7] *See TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Award ¶ 177 (July 12, 2024) ("*TC Energy* Award") ("[T]he ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force.").

[8] Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada ¶ 1 ("Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA."). *See also* USMCA Annex 14-C, ¶¶ 3, 5-6 (discussing the "termination of NAFTA 1994").

the present Convention . . . releases the parties from any obligation further to perform the treaty."[9]

6. The NAFTA did not contain a survival provision binding the Parties to continue performing its obligations for a period post-termination. Nor did the USMCA Parties make such a commitment, explicitly or implicitly, with respect to the NAFTA's obligations in the USMCA. Thus, once the NAFTA terminated and the USMCA entered into force, the USMCA Parties ceased to be bound by the NAFTA's obligations, including the substantive investment obligations in Section A of NAFTA Chapter 11. Accordingly, because these obligations terminated upon the NAFTA's termination, there can be no breach based on post-termination conduct and no claim based on such conduct can be submitted to arbitration under Paragraph 1 of Annex 14-C.[10]

7. Annex 14-C did not extend the NAFTA's substantive investment obligations. Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which concern the NAFTA Parties' consent to arbitration.[11] NAFTA Articles 1116(1)/1117(1) and 1122 are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11, and are not part of the substantive investment obligations detailed in NAFTA Chapter 11, Section A. As the *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States* ("*TC Energy*") tribunal explained:

> The purpose of Annex 14-C to extend the consent of NAFTA parties to arbitrate claims that arose prior to NAFTA's termination is reflected in the treaty structures of USMCA and NAFTA, which

[9] Vienna Convention on the Law of Treaties, art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331 ("VCLT"). 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).

[10] *TC Energy* Award ¶¶ 146 ("[T]he USMCA parties could have agreed to make an exception to [the] general rule [under VCLT Article 70(1)] by extending the offer to arbitrate, by extending the substantive provisions of NAFTA, or both. The ordinary terms of Annex 14-C indicate that they agreed to extend the offer to arbitrate. They did however not agree to also extend Section A."); ¶ 151 ("Annex 14-C therefore establishes an exception to the expiry of Chapter 11. Because the scope of Annex 14-C is procedural (the offer to arbitrate), that exception has to be understood as an exception to the expiry of the offer to arbitrate. On the face of the text of Annex 14-C, it cannot be also understood as an exception to the termination of Section A (hence a provision operating as a sunset clause based on which Section A would have been extended for three years)."); ¶ 152 ("Annex 14-C is therefore only an exception to the expiration of NAFTA in respect to the offer to arbitrate. It is not an exception to the termination of Section A.").

[11] A detailed analysis of these similarities is available in the U.S. submissions in *TC Energy*. *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, U.S. Memorial on Preliminary Objection ¶¶ 67–71 (June 12, 2023).

> both include a set of substantive rules for the treatment of investments, found in the body of Chapter 14 of USMCA and Section A of Chapter 11 in NAFTA, and a set of jurisdictional and procedural rules for the arbitration of disputes concerning the substantive rules, found in Annex 14-C, 14-D, and 14-E of USMCA and Section B of Chapter 11 in NAFTA.[12]

8. The tribunal therefore concluded that "Annex 14-C . . . simply sets forth USMCA parties' consent to arbitrate certain claims," and "Annex 14-C addresses only procedural matters and does not impose substantive investment obligations."[13]

9. To the extent that a claimant asserts claims outside of the scope of the offer to arbitrate included in Annex 14-C — such as claims based on alleged conduct after the termination of the NAFTA — such claims would not engage the USMCA Parties' consent, and so would not create an agreement to arbitrate between the disputing parties with respect to such claims. Thus, the tribunal in *TC Energy* rejected an argument from the claimants in that case that Annex 14-C's reference to NAFTA Chapter 11, Section A, constituted a choice of law agreement whereby the parties agreed to apply NAFTA, even if terminated, to the claimants' claims.[14] The tribunal reasoned that "the agreement to arbitrate resulting from the acceptance of an offer contained in a treaty cannot have a broader scope than the offer to arbitrate itself. If the USMCA parties did not agree to extend Section A beyond 30 June 2020, the [c]laimants cannot have agreed by way of the Request for Arbitration to arbitrate claims based on events post-dating 30 June 2020."[15]

10. The United States has explained in more detail its interpretation of Annex 14-C to the USMCA in its submissions in support of its preliminary objection in *TC Energy Corp. & TransCanada PipeLines Limited v. United States*, ICSID Case No. ARB/21/63, which are available on the ICSID website. The tribunal in *TC Energy* upheld the U.S. preliminary objection in a thorough and well-reasoned award confirming the interpretation of Annex 14-C set forth above.[16]

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[12] *TC Energy* Award, ¶ 93.

[13] *Id.*, ¶ 94.

[14] *Id.* ¶¶ 199–207.

[15] *Id.* ¶ 202.

[16] *See supra* note 3.

11. The three USMCA Parties all agree that Annex 14-C permits only claims based on conduct occurring while the NAFTA was in force. In addition to its submissions in the *TC Energy* case, the United States has also taken this position in the *Alberta Petroleum Marketing Commission v. United States* ("*APMC*"), *Legacy Vulcan v. United Mexican States* ("*Legacy Vulcan*"), *Amerra Capital Management and others v. United Mexican States*, and *Coeur Mining, Inc. v. United Mexican States* arbitrations.[17] Mexico has expressed its agreement with the U.S. position in the *Legacy Vulcan*, *Cyrus Capital Partners v. Mexico*, *TC Energy*, and *APMC* arbitrations.[18] Canada likewise confirmed its agreement with this interpretation of Annex 14-C in *APMC* and in *Ruby River v. Canada*, where it observed that there is "consensus among the USMCA Parties" on this issue.[19]

12. VCLT Article 31(3) recognizes the important role that the States Parties play in the interpretation of their treaties by requiring interpreters to take into account "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;" and "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[20]

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[17] *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, U.S. Memorial on Its Preliminary Objection ¶¶ 9-98 (Oct. 15, 2024); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Second Submission of the United States of America ¶¶ 8-12 (July 21, 2023).

[18] *See, e.g.*, *TC Energy Corp. & TransCanada Pipelines Ltd. v. United States of America*, USMCA/ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶ 5 (Sep. 11, 2023) ("This consent [in Annex 14-C] is limited to the submission of a 'claim' alleging a 'breach of an obligation under … Section A of Chapter 11 (Investment) of NAFTA 1994.' A breach of a Treaty can only occur if that Treaty is in force. The NAFTA ceased to be in force as of July 1, 2020, and therefore a violation of Section A of Chapter 11 (Investment) of NAFTA was no longer possible as of that date."); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim ¶¶ 407-14 (Dec. 19, 2022); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Mexico's Rejoinder on the Ancillary Claim ¶¶ 258-87 (Apr. 21, 2023); *Cyrus Capital Partners, L.P. and Contrarian Capital Management v. United Mexican States*, USMCA/ICSID Case No. ARB/23/33, Mexico's Memorial on Jurisdiction ¶¶ 77–90 (June 4, 2024); *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Mexico's Submission Pursuant to Article 1128 of NAFTA ¶¶ 3–33 (Jan. 15, 2025).

[19] *Ruby River Capital LLC v. Government of Canada*, USMCA/ICSID Case No. ARB/23/5, Contre-Mémoire Sur Le Fond Et Mémoire Sur La Compétence Du Canada ¶ 262 (July 15, 2024) (English translation) (French original: "d'un consensus parmi les Parties à l'ACEUM"). *See also id.* ¶ 182 ("Annex 14-C of the USMCA . . . does not allow [Claimant] to submit to arbitration a claim relating to events giving rise to liability after June 30, 2020.") (English translation) (French original: "l'annexe 14-C de l'ACEUM . . . ne lui permet pas de soumettre à l'arbitrage une plainte portant sur des faits générateurs de responsabilité postérieurs au 30 juin 2020."); *Alberta Petroleum Marketing Commission v. United States of America*, USMCA/ICSID Case No. UNCT/23/4, Canada's Submission Pursuant to Article 1128 of NAFTA ¶¶ 4–18 (Jan. 15, 2025).

[20] VCLT, art. 31(3).

13. In accordance with VCLT Article 31(3), the Tribunal must take into account the USMCA Parties' common understanding of Annex 14-C.[21]

Consent and Waiver (NAFTA Article 1121 and USMCA Annex 14-C(1))

14. As explained above, USMCA Annex 14-C(1) provides that "[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA," for certain alleged breaches of the NAFTA that arose while that treaty was in force.[22] Assuming that a claim filed under Annex 14-C alleges a breach of the NAFTA that occurred while the NAFTA was in force, an agreement to arbitrate is formed upon the investor's consent to arbitrate in accordance with the procedures provided in Section B of NAFTA Chapter 11.[23] Thus, the USMCA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements detailed in the NAFTA. All three USMCA Parties have expressed agreement on this point in relation to similar consent language included in NAFTA Article 1122.[24]

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[21] *See, e.g.*, *Alicia Grace et al. v. United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Final Award ¶¶ 473-74 (Aug. 19, 2024) ("[T]he concurring statements submitted by the Non-Disputing Parties in the course of this arbitration alongside the positions of Mexico regarding dual nationals are to be understood as subsequent practice for the purposes of Article 31(3)(b) of the VCLT. . . . [I]n light of the common understanding of the NAFTA Parties regarding the application of the dominant and effective nationality test, the Tribunal finds compelling to proceed with its jurisdictional analysis within this framework."); *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 ¶¶ 188-89 (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'").

[22] USMCA Annex 14-C(3) provides that such consent expires three years after the NAFTA's termination.

[23] NAFTA Article 1121(1)(a) and (2)(a).

[24] *See, e.g.*, *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 2 (July 26, 2014) (stating that pursuant to Article 1122, no Chapter 11claim may be submitted to arbitration unless the required procedures were satisfied); *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case. No. 2009-04, Submission of the United States of America on Damages ¶ 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 11."); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2016-13, Submission of the United Mexican States 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/UNCITRAL, PCA Case No. 2012-25, Submission of the United Mexican States pursuant [to] Article 1128 of NAFTA ¶ 3 (Feb. 14, 2014) (stating that Article 1122's offer to arbitrate required

15. The procedures required to engage the NAFTA Parties' consent and form the agreement to arbitrate are found principally in NAFTA Articles 1116–1121. Moreover, by conditioning their consent in USMCA Annex 14-C(1) on the procedures established in NAFTA Chapter 11, Section B, the USMCA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements.

16. 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.
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> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (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

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, ¶ 52 (Apr. 30, 2001) (explaining that "the NAFTA Parties' consent to investor-State dispute settlement" is conditioned upon "*accordance with* the procedures set out in this Agreement" (emphasis in original) and that the "[f]ailure to observe these requirements means that an investor cannot access the dispute settlement mechanism under Section B of Chapter 11."); *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Second Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶¶ 7-31 (July 7, 2001) (accord). 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." VCLT, art. 31(3) (a)-(b) ("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[.]"). Although NAFTA Article 1131(2) also provides a manner by which the NAFTA Parties may interpret the NAFTA, nothing in that article states that it is the exclusive means by which the Parties may interpret the Agreement.

> 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.

17. 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.[25] 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)."[26]

18. Similar to provisions found in many of the United States' other international investment agreements,[27] 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.[28] However, Article 1121 makes clear

[25] *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) ("*Detroit Bridge* Award"); *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").

[26] *Int'l 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).

[27] 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.

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

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. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Articles 1120 and 1137, assuming all other relevant procedural requirements have been satisfied.

19. Compliance with the Article 1121 waiver obligation entails both formal and material requirements.[29] Regarding the formal requirements, the waiver must be in writing and "clear, explicit and categorical."[30] 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.[31] 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)."[32] That is, the waiver requirement seeks to give the respondent State 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.

20. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings with respect to the measures alleged to constitute a Chapter 11 breach in another forum as of the date of the submission of the waiver and thereafter. As the *Waste Management I* tribunal held:

> the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear that the waiver required under NAFTA Article

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

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

[31] *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.").

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

> 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver . . . .[33]

21. As the tribunal in *Commerce Group* explained in relation to a similar provision contained in CAFTA-DR Chapter 10, "[a] waiver must be more than just words; it must accomplish its intended effect."[34] Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.[35]

22. 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, as explained above: 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)."[36] 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."[37]

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[33] *Waste Management I* Award § 24 (emphasis added).

[34] *Commerce Group* Award ¶ 80.

[35] *Id*. at ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); see also *Detroit Bridge* Award ¶ 336.

[36] *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.").

[37] *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.

23. 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 11 breach. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 1121 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.

24. If all formal and material 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 itself cannot 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.[38]

25. 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*.

Respectfully submitted,

[38] *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").

[Signed]

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