IN THE MATTER OF AN ARBITRATION UNDER THE 2010 UNCITRAL ARBITRATION RULES

KBR, INC.,

Claimant

v.

THE UNITED MEXICAN STATES,

Respondent

Case No. UNCT/14/1

CLAIMANT'S REPLY ON PRELIMINARY QUESTION OF WAIVER

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Introduction

1. Claimant's waiver under Article 1121 of the North American Free Trade Agreement ("NAFTA") is valid and sufficient for three independently sufficient reasons. Policy and equitable considerations also support Claimant's position.

2. First, Claimant has waived its right to initiate or continue any and all proceedings with respect to the measures Claimant contends are breaches of NAFTA. NAFTA Article 1121 requires that KBR, Inc. and its fully-owned subsidiary COMMISA "waive their right to initiate or continue […] proceedings with respect to the measure of the disputing party that is alleged to be a breach" of NAFTA. KBR's claim here is that Mexico breached NAFTA by transforming COMMISA's hard-fought arbitral win (now worth almost half a billion dollars) into a US$106 million loss. Mexico achieved this through:

(a) the annulment (the "Annulment Decision") of a valid ICC award favorable to COMMISA (the "ICC Award"); and

(b) the improper enforcement of PEP's claim for US$106 million under the performance bonds posted by COMMISA, even though the only fact finder considered Mexico's state-owned company, PEMEX Exploración y Producción ("PEP"), to be the guilty party.

3. Claimant has waived its right to initiate or continue proceedings with respect to the Annulment Decision and the improper enforcement of PEP's claim for US$106 million under the performance bonds. Accordingly, Claimant's waiver is valid.

4. Claimant need not waive the ongoing New York and Luxembourg proceedings for the confirmation of the ICC Award, because they are not proceedings "with respect to" the Annulment Decision, the improper enforcement of the performance bonds or any other measure Claimant has alleged to be a breach of NAFTA.

5. COMMISA filed the New York proceeding under the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), and the Luxembourg proceeding under the Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Proceedings to confirm a foreign arbitral award under

the Panama and New York Conventions (collectively, the "Conventions") are designed exclusively to convert a vested right (here, the ICC Award) into a court order in the country of recognition and enforcement. The ICC Award is the exclusive measure in a confirmation proceeding under the Conventions; post-award actions to undermine the ICC Award are not. It is therefore impossible that the U.S. or Luxembourg proceeding is "a proceeding with respect to" the breaches alleged in the NAFTA arbitration. As both proceedings arose exclusively from and are with respect to the ICC Award, which is distinct from the measures Claimant considers a breach of NAFTA, they are not subject to Article 1121 waiver.

6. Second and independently sufficient, the New York and Luxembourg proceedings are not subject to Article 1121 waiver because they are confirmation proceedings, not claims for damages. Mexico has expressly acknowledged that the NAFTA Article 1121 waiver is limited to claims for "damages only." The confirmation proceedings seek to convert a vested right (the arbitral award) into an enforceable court order. They are not claims for damages. Accordingly, the proceedings fall outside the scope of Article 1121.

7. Third, as a practical matter KBR and COMMISA cannot waive the confirmation proceedings because COMMISA already has won them at the trial court level and Mexico and its State enterprise PEP currently control them on appeal. Both Luxembourg and New York courts have issued binding decisions confirming the ICC Award, which PEP has appealed. COMMISA cannot withdraw PEP's appeals, and the NAFTA waiver cannot be understood to require Claimant to ask that the courts eradicate binding orders and a judgment in COMMISA's favor issued *before* COMMISA submitted its NAFTA claim to arbitration.

8. Policy and equitable considerations support Claimant's position. NAFTA is the only forum available to KBR and COMMISA to challenge Mexico's actions in annulling the ICC Award and calling bonds to which it did not have a legal right. Mexico is seeking to use the waiver provision to deprive COMMISA of its rights under NAFTA. The three-year statute of limitations under NAFTA Articles 1116(2) and 1117(2) will have run by the time this Tribunal has made its decision on the waiver issue—something Mexico seems to have anticipated when it insisted on a lengthy procedural schedule and then attempted to exclude from its agreement to toll the statute of limitations a situation where KBR and COMMISA are required to re-file with a

new tribunal.[1] NAFTA's waiver provision was surely not intended to deprive an investor of its only opportunity to obtain justice for Mexico's breaches, particularly given the unique circumstances presented in this case.

9. Mexico's attempt to run the clock so that KBR loses its right to seek relief is but one example of its using every opportunity to deprive an investor of its rights. Here, PEP induced KBR's foreign investment in Mexico by promising to arbitrate, a directly on-point statute authorized PEP to arbitrate, PEP agreed that the arbitrators could decide jurisdiction, and PEP did not appeal the Tribunal's unanimous interim award retaining jurisdiction (the "Preliminary Award").

10. Only after losing on the merits did PEP disclaim its own promises with the help of Mexico's Collegiate Court. The Annulment Decision deprived COMMISA of its arbitral victory, and foreclosed the opportunity to meaningfully vindicate its claims or contest PEP's illicit collection of more than 100 million dollars under the performance bonds. In a decision rife with errors, deviations from Mexican law and self-serving findings, Mexico's Collegiate Court retroactively applied a sweeping no-arbitration rule to enable PEP to renege on its valid promise to arbitrate and to undo COMMISA's hard-fought arbitral win. The Collegiate Court's judgment not only wiped out the ICC Award and prohibited any further arbitration, it left COMMISA without a remedy.

11. Moreover, even though the only neutral fact finder—the ICC Arbitral Tribunal—concluded that PEP is the breaching party and could not collect on the bonds, PEP has, with the help of Mexican courts, collected on US$106 million in performance bonds based on its now-unreviewable unilateral determination that COMMISA breached by abandoning the project—when PEP forcibly seized the oil platforms for its own benefit. The judgment thus upended COMMISA's settled and investment-backed expectations, stripped it of a favorable award for the benefit of the State, deprived it of an opportunity to be heard on the merits of its claims, and turned a US$300 million arbitral win into a massive windfall for PEP.

12. Unfortunately, the Annulment Decision's reversal of Mexico's legal framework coupled with Mexico's actions thereafter will have a rippling impact on other US companies who have

[1] *See* Section IV below explaining Mexico's agreement to toll the statute of limitation during the March 21, 2014 procedural call, and then attempting to limit its agreement by letter of March 24, 2014.

chosen to invest in Mexico in reliance on the liberalization of Mexico's procurement market under NAFTA. Because PEMEX and its subsidiaries impose Mexico as the venue of the arbitration, absent some policy change, Mexican courts will have the opportunity to review and reverse any arbitral awards against its State entities. NAFTA is an important forum in which to challenge this sort of behavior.

13. Mexico's arguments to the contrary are not persuasive. The case law on which it relies deals with very different facts and is not applicable to the instant case. Its premises are also flawed. For one, the possibility of duplicative relief is not a valid reason at this preliminary stage to preemptively circumvent an investor's right to access NAFTA. Regardless, Claimant seeks relief in this action that is different from the New York and Luxembourg proceedings, and is prepared to address any risk of duplicative damages through a stipulation or other means satisfactory to the Tribunal.

14. Finally, Mexico is also incorrect about the effects of an allegedly insufficient waiver, although this is an issue this Tribunal need not reach because the waiver is valid. Mexico argues that this Tribunal should refuse *jurisdiction* if it finds Claimant's waiver to be insufficient. But the issue of waiver is a curable issue of *admissibility*, not jurisdiction. Thus, if the Tribunal finds that Claimant's waiver is not sufficient, it should provide Claimant the opportunity to cure and remain before this Tribunal.

I. Background

A. The Arbitrability of Disputes Arising from PEP Contracts

15. In 1997, COMMISA entered into Contract No. PEP-0-129/97 (the "Contract") with Pemex Exploración y Producción ("PEP") to build two 13,000-ton offshore platforms for the treatment, processing, and reinjection of natural gas ("the Project").[2] PEP is a subsidiary of Petróleos Mexicanos ("PEMEX") and along with PEMEX and PEMEX's other subsidiaries forms Mexico's state oil and gas company.

[2] **Exhibit C-7**, Contract No. PEP 0-129/97, October 22, 1997; **Exhibit C-8**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX Exploración y Producción*, Preliminary Award, International Court of Arbitration of the International Chamber of Commerce, Case No. 13613/CCO/JRF (the "Preliminary ICC Award"), §II.1.1.

16. The Contract contained a broadly worded and mandatory promise to arbitrate *any* controversy, claim, difference, or dispute:[3]

> *Any controversy, claim, difference, or dispute that may arise from* [...] *the present Contract, shall be definitively settled through arbitration* […] in accordance with the Conciliation and Arbitration Rules of the International Chamber of Commerce [ICC] that are in effect at that time.

17. PEMEX's enabling statute expressly authorized PEP's agreements to arbitrate. Article 14 of the statute provides that "Petróleos Mexicanos or its Affiliates may […] execute arbitration agreements whenever deemed appropriate."[4] Mexico enacted this law on January 1, 1994 as part of its NAFTA implementing legislation. The expression of legislative intent (*Exposición de Motivos*) for the NAFTA implementing bill speaks for itself:

> The inclusion of arbitral clauses in contracts executed between private parties and governmental entities is a frequent practice, especially at an international level. In order to acknowledge this reality, and to ensure improved conditions concerning negotiations executed by Pemex [and] its subsidiary entities [. . .], it is deemed appropriate to amend Article[] 14 of the Organic Law of Petróleos Mexicanos and Subsidiary Entities [. . .] to clarify that such entities may enter into agreements on arbitral clauses. Such amendment, simultaneously, shall enable Mexico to comply with the commitments undertaken by it in matters of international arbitration.[5]

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[3] **Exhibit C-7**, Contract No. PEP 0-129/97, Clause 23.3, October 22, 1997, (emphasis added).

[4] **Exhibit C-9**, Article 14 of the Organic Law of Petróleos Mexicanos and Subsidiary Entities (stating in full "In the case of international legal acts, Petróleos Mexicanos or its Subsidiary Entities may agree to the application of foreign law, to the jurisdiction of foreign courts in commercial matters, and to the execution of arbitral agreements where it may be so required to achieve the purpose thereof."); *see also* **Exhibit C-10**, *Corporación Mexicana de Mantenimiento Integral S. de R.L. de C.V. v. Pemex Exploración y Producción*, Final Award, International Court of Arbitration of the International Chamber of Commerce, Case No. 13613/CCO/JRF (the "ICC Award"), p. 35; *see also* **Exhibit C-11**, *Arbitration Agreements and the New PEMEX Regulation*, International Disputes Quarterly (Summer 2009), *available at* http://www.whitecase.com/idq/summer_2009_3/#.U5ca6PldX3Q ("*Arbitration Agreements and the New PEMEX Regulation*") (stating "Article 14 of PEMEX's Organic Law Ley Orgánica de Petróleos Mexicanos y Organismos Subsidiarios (the 'Organic Law'), provided that PEMEX had the full capacity to enter into arbitration agreements or include arbitration clauses in any kind of agreements, whether domestic or international.").

[5] **Exhibit C-12**, Expression of Legislative Intent (*Exposición de Motivos*) for the Decree Amending, Supplementing and Derogating Diverse Laws Relating to the North American Free Trade Agreement (the "NAFTA Decree") (*Decreto que reforma, adiciona y deroga diversas leyes relacionadas con el Tratado de Libre Comercio de América del Norte*) published in the Official Gazette on December 22, 1993. This NAFTA

18. This amendment to the PEMEX Law was critical to the legal certainty of transactions made possible by NAFTA. PEMEX has since routinely stipulated arbitration in its international contracts and it has also participated in numerous international arbitrations, including in connection with administrative rescissions.[6] And these agreements together with Article 14 have been relied upon by numerous U.S. and Canadian investors, including KBR.

B. PEP and COMMISA's Arbitral Dispute

19. From 1997 to 2003, PEP committed numerous breaches that resulted in countless change orders, delays, and cost overruns.[7] To resolve these issues, the parties entered three supplemental contracts. Two were retrospective and established that PEP would pay COMMISA to resolve COMMISA's claims from 1999 through 2002 (*Convenios A and B*); one was a prospective change order covering COMMISA's remaining work through 2004 (*Convenio C*).[8] These May 2003 *Convenios* had a materially identical promise to arbitrate: "Any difference or dispute that may arise or that is related to, or associated with this Specific Agreement … or any instance of breach with this Agreement, shall be definitively settled through arbitration."[9]

20. COMMISA resumed work in spring 2003, and PEP resumed its chronic breaches.[10] Among other things, PEP refused to allow COMMISA workers unimpeded access to the platforms, failed to supply agreed-upon accommodations for COMMISA personnel, delayed necessary work permits, and supplied defective equipment—all of which greatly delayed the project and produced additional cost overruns.[11]

21. On March 17, 2004, after COMMISA had completed 94% of the final phase of the project, PEP forcibly seized the platforms, ejected COMMISA personnel from the site, barred

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Decree amends several NAFTA-related statutes, including the *Ley Orgánica de Petróleos Mexicanos y Organismos Subsidiarios* and the *Ley del Servicio Público de Energía Eléctrica*.

6 *See* **Exhibit C-13**, Nullity Petition filed by PEP (Supreme Court of Justice of the Republic of Mexico 2002) (the "Nullity Petition"); *see also Arbitration Agreements and the New PEMEX Regulation*.

7 **Exhibit C-10**, ICC Award, pp. 60–114, 166–80, 186–96, 729–35.

8 **Exhibit C-14**, Specific Agreement for the Completion of Additional Work Under Contract No. PEP-0-129/97, May 29, 2003, pp. 1, 6, 9, 17-18.

9 *Id.* at Art. 19.3.

10 **Exhibit C-10**, ICC Award, pp. 426–81.

11 *Id.*

their return, and put the platforms into production.[12] PEP notified COMMISA that it intended to rescind the contract on the supposed grounds that COMMISA had failed to meet contractual milestones and abandoned the project.[13]

22. COMMISA initiated an ICC arbitration on December 1, 2004,[14] alleging that PEP breached the contracts and thus owed it damages.[15] COMMISA did not seek to set aside the rescission or reinstate the contracts.

23. On December 16, 2004, PEP completed the rescission.[16] The rescission was entirely unilateral. No Mexican court or other authority reviewed PEP's assertion that rescission was justified under the contract.

24. PEP also issued a "*finiquito*," a final unilateral accounting and demand for damages in connection with its unilateral rescission.[17] At the time, PEP conceded that "COMMISA is entitled to challenge the *finiquito* […] through an Arbitration Proceeding, thus safeguarding its rights."[18]

25. Before an arbitral tribunal could be appointed, PEP filed a claim to collect $80 million in bonds that COMMISA had posted to secure performance.[19] As the ICC Tribunal later pointed out, "COMMISA had an urgency to act" to stop execution of the bonds.[20] To maintain the *status quo*, COMMISA filed an *amparo* action seeking interim relief from the Mexican courts.[21]

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12 *Id.* at 286–87, 309–15.

13 *Id.* at 15, 276.

14 *Id.* at 16.

15 *Id.* at 6.

16 *Id.* at 16.

17 *Id.* at 17, 46.

18 *Id.*

19 *Id.* at 16.

20 **Exhibit C-8**, Preliminary ICC Award, ¶ 151.

21 *Id.; see also* ICC Arbitration Rules, art. 28.2 (2012), http://bit.ly/1staN3O (permitting parties to seek "interim or conservatory measures" from local courts before a tribunal is appointed); *see also* **Exhibit C-10**, ICC Award, p. 59 (stating "[i]n the Preliminary Award, the following was set forth '(…) the Tribunal finds that COMMISA's presentation of the Request for Amparo is a procedural act that falls within the scope of article 23 of the ICC Rules and article 1425 of the [Mexican] Code of Commerce given that its purpose is to secure conservatory or provisional measures without interrupting the procedure set forth in the arbitral agreement").

26. The ICC Tribunal formed in May 2005.[22] PEP participated fully in the arbitration and filed counterclaims. PEP also signed the Terms of Reference, which specifically provided that the ICC Tribunal would decide all jurisdictional issues.[23]

C. The ICC Tribunal Upholds Its Jurisdiction; PEP Does Not Challenge The Preliminary Award on Jurisdiction

27. PEP challenged the ICC Tribunal's jurisdiction. On November 20, 2006, the ICC Tribunal issued a Preliminary Award holding that it had jurisdiction over the parties' claims.[24] The Preliminary Award also enjoined PEP "from filing any claim attempting to collect the bonds […] until the Tribunal issues its final award, and according to such award, PEP has any right to claim the payment of the bonds."[25] Thus, if the ICC Tribunal ultimately found that PEP breached, PEP could not collect on the bonds.[26]

28. Under Mexican law, PEP had 30 days to challenge the tribunal's decision on jurisdiction before Mexican courts.[27] PEP never challenged the Preliminary Award on jurisdiction.[28]

29. In October 2007, PEP yet again challenged the ICC Tribunal's jurisdiction, arguing for the first time that its rescission was an "act of authority" that was not subject to arbitration at

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22 **Exhibit C-10**, ICC Award, pp. 6-7.

23 **Exhibit C-8**, Preliminary ICC Award, §I f.; **Exhibit C-10**, ICC Award, pp. 7, 9, 28.

24 **Exhibit C-8**, Preliminary ICC Award, §VII.1.; **Exhibit C-10,** ICC Award, pp. 34-35.

25 **Exhibit C-8**, Preliminary ICC Award, pp. 62, 81–82.

26 *Id.*

27 **Exhibit C-15**, Mexican Code of Commerce, art. 1432 ("[i]f prior to the issuance of its final award the tribunal declares itself competent, either party may petition a judge to review the foregoing within thirty (30) days after receiving notice of the declaration, and his decision shall be non-appealable."); **Exhibit C-16**, *PEMEX Exploración y Producción v. Corporación Mexicana de Mantenimiento Integral*, Decision of the Fifth District Court, June 24, 2010, (the, "Decision of the Fifth District Court"), p. 16; **Exhibit C-17**, Francisco González de Cossío y Carlos Loperena Ruiz, El Procedimiento Arbitral, MANUAL DE ARBITRAJE COMCERCIAL (México 2004), p. 101; **Exhibit C-18**, Vicente Bañuelos Rizo, ARBITRAJE COMERCIAL INTERNACIONAL: COMENTARIOS A LA LEY MODELO DE LA COMISIÓN DE NACIONES UNIDAS SOBRE DERECHO COMERCIAL INTERNACIONAL (Limusa, México 2010), p. 230.

28 **Exhibit C-10**, ICC Award, p. 35; **Exhibit C-16**, Decision of the Fifth District Court, p. 16 (stating "[T]here is an express acceptance by the parties, because they did not contest the preliminary award of November 20, 2006, wherein the Arbitral Tribunal asserted its jurisdiction over the dispute arising in connection with Public Work Contract PEP-0-129/97."

all.[29] The ICC Tribunal rejected this novel and belated attack in a Procedural Order.[30] PEP did not challenge the Tribunal's determination.

D. A Fundamental Legal Change Occurs In Mexico Twelve Years After the Contract Between PEP and COMMISA

30. While the ICC Award was pending, Mexico changed its laws governing public contracts. Specifically, Mexico enacted Article 98 of the Law of Public Works and Related Services, which provided that, effective May 28, 2009, rescissions of government contracts "may not be subject to arbitration proceedings."[31] This was a radical change to the law,[32] which all parties agreed was not applicable to the ICC Award.[33]

E. The ICC Tribunal Issues its Final Award In Favor of COMMISA

31. On December 16, 2009, the ICC Arbitral Tribunal issued its Final Award (the ICC Award), holding that PEP repeatedly breached the contracts and awarding COMMISA approximately $300 million in damages. The ICC Award granted damages only for PEP's pre-rescission breaches.[34] Specifically, the ICC Arbitral Tribunal awarded COMMISA damages for the change orders, delays, and cost overruns from 1997 to 2003, and for breaches and work completed from 2003 until PEP seized the platforms on March 17, 2004.[35] The majority also held that Article 98 did not apply retroactively, and at the time of contracting, PEMEX's enabling statute "explicitly authorize[d] PEP to include arbitration clauses in the contracts it executes" with no "restriction whatsoever."[36]

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[29] **Exhibit C-19**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*, Case No. 13631/CCO, Procedural Order No. 11, November 12, 2007, (the "ICC Procedural Order No. 11").

[30] **Exhibit C-10**, ICC Award, 12; **Exhibit C-19**, ICC Procedural Order No. 11 , pp. 3-4.

[31] **Exhibit C-20**, *Amparo Proceedings under Review No. 358/2010*, Federal District (Mexico), August 25, 2011 (the "Annulment Decision"), p. 427-28.

[32] **Exhibit C-21**, Francisco González de Cossío, *Arbitraje y Contratación Gubernamental*, JURÍDICA: ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA, No 42 (2012), pp. 9-11.

[33] **Exhibit C-10**, ICC Award, pp. 35–36; **Exhibit C-20**, Annulment Decision, p. 432 (protesting that "[t]he foregoing does not entail the retroactive application of the law detrimental to the aggrieved third party given that the amendment is considered as a constructive and argumentative guiding principle for the current case.")

[34] **Exhibit C-10**, ICC Award, pp. 732–34.

[35] *Id.* at 732-33.

[36] *Id.* at 35.

32. No court or party has ever challenged the ICC Tribunal's factual findings. Those findings were the result of years of extensive briefing on the merits, an evidentiary hearing in December 2007, and the ICC's Arbitral Tribunal's careful consideration of the evidence in a lengthy award. In its NAFTA pleading, Mexico provides an inaccurate and misleading recitation of the arbitration. For example, Mexico states that "[i]n 2004, the dispute ended when COMMISA ceased to work on the project."[37] The ICC Tribunal held the exact opposite– *i.e.*, PEP forcibly evicted COMMISA from the platforms before they were completed, thereby creating a very dangerous situation. To the extent Mexico's pleading differs from the ICC Arbitral Tribunal's factual findings, Mexico's pleading is inaccurate.

F. COMMISA Moves To Have the ICC Award Confirmed in the U.S.

33. In January 2010, COMMISA filed a petition in the United States District Court for the Southern District of New York (SDNY) to confirm the ICC Award under the Panama Convention.[38]

34. Nearly identical to the New York Convention, the Panama Convention provides for a simple approval process by which a local court in any signatory country converts an arbitral award into an enforceable court order.[39] These confirmation actions are intended to be "summary proceeding[s]" that "do[] little more than give the award the force of a court order."[40]

35. PEP moved to dismiss COMMISA's confirmation action for, *inter alia*, improper venue and lack of personal jurisdiction due to insufficient service of process. The SDNY court rejected PEP's claims and confirmed the ICC Final Award on August 25, 2010.

G. PEP Sues in Mexican Courts to Nullify the ICC Award

36. Months after COMMISA sought confirmation in the U.S., PEP brought an annulment action in Mexican court.

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37 Respondent's Memorial on Jurisdiction, ¶11.

38 **Exhibit R-003**, Petition to Confirm Award (Jan. 11, 2010).

39 **CLA-1**, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"); **CLA-2**, Inter-American Convention on International Commercial Arbitration (Panama, 1975) (the "Panama Convention").

40 **Exhibit C-22**, *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007).

37. First, PEP sought to nullify the ICC Award in Mexico's Third District Court.[41] The court dismissed for lack of jurisdiction.[42]

38. Second, PEP sought to set aside the ICC Award in the Fifth District Court, which similarly refused. It held that PEP had waived its non-arbitrability argument by failing to timely object to the Preliminary Award.[43] And it held further that the contracts' arbitration clauses encompassed these disputes, PEMEX's enabling statute authorized arbitration, and PEP consented to the Tribunal's power to decide jurisdiction when it agreed to the Terms of Reference.[44]

39. Third, PEP brought an *amparo* challenge to that ruling in the Tenth District Court, which also dismissed, echoing the Fifth District Court's reasoning.[45]

40. After three unsuccessful attempts to set aside the ICC Award, PEP found a court willing to favor a State enterprise. On September 21, 2011, the Eleventh Collegiate Court delivered their Annulment Decision. On remand, the Fifth District Court nullified the Final Award and it is undisputed that the decision is final.[46]

H. The Annulment Decision

41. The Annulment Decision rendered by the Collegiate Court was designed to protect PEP by annulling a valid international arbitral award against PEP and in favor of a U.S. company.

42. In its decision, the Collegiate Court recognized that PEP had "agreed to submit to arbitration any dispute arising under [the contracts]" and that this encompassed disputes about the contractual basis for rescission.[47] The court nevertheless held that arbitration of a dispute involving a rescission would be contrary to Mexican public policy because rescissions are issued

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41 **Exhibit C-23**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX Exploración y Producción*, Case No. 10-CV-00206-AKH, Supplemental Declaration of Dennis H. Tracey, III in Support of Motion to Dismiss the Petition to Confirm Foreign Arbitral Award, April 12, 2010, ¶ 3.

42 *Id.* at 2.

43 **Exhibit C-16**, Decision of the Fifth District Court, p. 16.

44 *Id.* at 15-22.

45 **Exhibit C-24**, *Amparo* action 604/2010-IV, Decision of the Tenth District Court, October 27, 2010 (the "Decision of the Tenth District Court"), pp. 21-22.

46 **Exhibit R-008**, *Sentencia de Nulidad del Laudo* (IPC-01), Oct. 24, 2011.

47 **Exhibit C-20**, Annulment Decision, pp. 406-7, 435.

to safeguard financial resources of the State.[48] Arbitrations were designed to settle private disputes, the court reasoned, and it would be "absurd" if a "private party in its capacity as [a] subject [could] hear, try and rule [on] acts of authority," including administrative rescissions.[49] PEP thus became "superior" to COMMISA and the Tribunal once it unilaterally rescinded the contract.[50] In the court's view, this meant not only that the act of rescission itself could not be arbitrated, but also that any pre-rescission breaches could not be arbitrated.[51]

43. In so doing, the Collegiate Court warped Mexican law to permit PEP to: (i) lure international investors to participate in projects under contracts that promise neutral dispute resolution; and then (ii) unilaterally remove any dispute from arbitration by rescinding the contract even though there was no factual basis to support the rescission. Since the problem identified by the Collegiate Court is perceived interference with a sovereign rescission, the Collegiate Court creates an irreconcilable imbalance that favors State enterprises: the arbitral tribunal has jurisdiction *only until it allegedly disrupts the rescission by ruling against* PEP on the contract. Accordingly, a government entity can enter into an agreement to arbitrate stipulating Mexico as the venue of the arbitration, breach the contract, rescind the contract, participate in arbitration under the contract, run the statute of limitations, and then, if it loses the arbitration, demand annulment on grounds that the arbitrators violated PEP's sovereign authority by ruling that PEP breached the contract and wrongfully rescinded.

44. This heads-I-win-tails-you-lose proposition constitutes a breach of NAFTA standards of investment protection, including a denial of justice. It certainly does not bode well for US companies who have chosen to invest in Mexico in reliance on the liberalization of Mexico's procurement market under NAFTA[52], or which may be contemplating projects under Mexico's

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48 *Id.* at 413-414.

49 *Id.* at 421-424.

50 *Id.*

51 *Id.* at 414, 458-459.

52 NAFTA Chapter 10 provided large new markets to US energy equipment and contracting companies. Under NAFTA, US energy equipment and service suppliers gained immediate access to the Mexican government procurement market, including PEMEX and PEP. When NAFTA entered into force in January 1994, 50 percent of PEMEX purchases of goods and services that exceeded $250,000 and construction services over $8 million, were immediately opened to US firms. Nearly all purchases are open today and a significant number of US companies, like COMMISA, currently provide services to PEMEX and to its subsidiary PEP under contracts that provide for the settlement of disputes through arbitration. COMMISA's contract with PEP was among the first agreements to be entered into under this NAFTA regime

recent energy reform.[53] PEMEX and its subsidiaries require that Mexico be the legal venue of arbitration.[54] Thus, Mexican courts have the opportunity to review and reverse arbitral awards against its State entities. This directly undermines the NAFTA goal of liberalization of Mexico's procurement market.

45. The Collegiate Court brushed aside PEP's statutory authority to arbitrate.[55] It also ignored binding precedent establishing that the administrative rescission of a contract is not an act of authority:

> [In] the execution of a franchise or fuel supply agreement in which Pemex-Refinación and the private individual or company establish reciprocal obligations and rights, under conditions fixed by the former, the existing legal relationship between the parties does not correspond to that of an authority and a subject, but to a voluntary coordination between the interest of [Pemex-Refinación] and the private individual or company that operates the fuel station, and *although [Pemex-Refinación] is empowered to rescind the contract this determination has its source precisely in the breach of the corresponding contractual clauses, proving that we are not before an act of authority but before the consequences of a contractual breach*.[56]

46. This finding is from a 2009 Supreme Court decision, and it was binding on the court that rendered the 2011 Annulment Decision.

47. Unable to locate any precedent supporting its finding on administrative rescission, the Collegiate Court relied on Article 98, the new statute prohibiting arbitration of rescissions enacted in 2009—twelve years after PEP contractually agreed to arbitrate and five years after arbitration began.[57] Acknowledging that its application would be illegally retroactive,[58] the court

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53 The Mexican Congress is currently considering legislation implementing the constitutional reform of December 2013 to permit the participation of private investment in activities, including oil exploration and production, previously reserved to Pemex.

54 *See e.g.*, **Exhibit C-25**, PEMEX PowerPoint, *Fundamental Aspects, Policies, Bases and Guidelines for Matters Concerning Public Works and Related Services Provided by Mexican Petroleum Companies, Subsidiaries and Affiliates*, July 17, 2006, slide 18.

55 **Exhibit C-20**, Annulment Decision, pp. 434-36.

56 **Exhibit C-26**, Record No. 165726. PEMEX-REFINING. Novena Época/ Registro: 165726/ Instancia: Segunda Sala/ Jurisprudencia/ Fuente: Semanario Judicial de la Federación y su Gaceta/ XXX, Diciembre de 2009,/ Materia(s): Administrativa/ Tesis: 2a./J. 210/2009 ("2009 Precedent on Rescission"), p. 306.

57 **Exhibit C-20**, Annulment Decision, pp. 427-432.

explained that Article 98—a significant and controversial deviation from prior Mexican law and policy—evidenced "the current trend of the legislator regarding public works [...] to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to the State" and "[t]herefore, the State should be granted, once again, suitable mechanisms to fulfill those objectives."[59]

48. In fact, Article 98 was such a significant and maligned break with past law that the Executive Branch has proposed a law providing that it will not in the future apply to PEMEX or its subsidiaries.[60] This proposal confirms that Mexican law and public policy did not preclude arbitration of issues relating to the administrative rescission of the contracts in this case before the 2009 amendment to the Public Works Law: removing the provision would be irrelevant if—as the Collegiate Court found—it codified an insurmountable public policy.

49. The only other support the Collegiate Court was able to locate for its decision to deprive COMMISA of its arbitral award was a 1994 Mexican Supreme Court case that did not discuss arbitration but described rescissions as "acts of authority." Because "acts of authority" should not be arbitrated, the Collegiate Court reasoned, the Tribunal lacked jurisdiction to hear any challenge to the rescission itself—or even COMMISA's pre-rescission breach-of-contract claims.[61] But this 1994 decision did not address arbitration and predated the 1997 amendment to PEMEX's Organic Law, in particular Article 14, which specifically permitted arbitration of disputes. Regardless, the 2009 Supreme Court decision described above reversed the 1994 decision.[62] The Collegiate Court, however, conveniently chose to ignore the 2009 Supreme Court decision and cited only the 1994 decision.

50. After the annulment, PEP collected US$106 million on the performance bonds posted by COMMISA. Though the only fact finder in this case—the ICC Tribunal—had held that PEP breached the contracts and thus had no right to collect on the performance bond, after the Collegiate Court's nullification ruling, PEP obtained a court order entitling it to recover all $80

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58 *Id.* at 432 (aware that it had done just that, the court denied that its holding "entail[ed] the retroactive application of the law.")

59 *Id.* at 431.

60 **Exhibit C-27**, Draft Pemex Law, art. 74.

61 **Exhibit C-20**, Annulment Decision, pp. 436-37.

62 **Exhibit C-26**, 2009 Precedent on Rescission.

million in bonds plus $26 million in interest, based solely on PEP's unilateral determination that COMMISA had breached.[63]

I. The SDNY Court Reaffirms Its Decision to Confirm the ICC Award

51. PEP's initial appeal was pending before the U.S. Second Circuit when the Collegiate Court annulled the ICC Award.[64] The Second Circuit remanded for the U.S. District Court "to address in the first instance whether enforcement of the award should be denied because it 'has been set aside.'"[65]

52. On these instructions, the District Court considered the Annulment Decision exclusively to determine if such decision is so repugnant to fundamental notions of justice as to warrant no deference. To do so, the court conducted a three-day trial to better understand the basis for the Annulment Decision. This trial was limited to assessing the basis for the Annulment Decision and whether the decision left COMMISA without a remedy for PEP's breaches of contract. In so doing, the judge made clear that "I am neither deciding, nor reviewing, Mexican law."[66]

53. On August 27, 2013, the District Court confirmed the ICC Award, declining to give deference to the Annulment Decision because doing so would "violate[] any basic notions of justice to which [the United States] subscribe[s]" as it (1) deprived COMMISA of any remedy and (2) appeared to be a retroactive application of law—both of which contravene U.S. law and public policy.[67] In its binding decision, the SDNY court held that confirmation of an arbitral award must entail a judgment for the "full amount of the award," not "a diminished amount."[68]

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63 **Exhibit C-28**, Receipt of Payment of Full Bond Amount, September 30, 2013 (A-3934–35).

64 **Exhibit C-29**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX Exploración y Producción*, Case No. 10-CV-00206-AKH, Declaration of Roberto Hernández-García, August 27, 2012.

65 **Exhibit C-30**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*, Order of the United States Court of Appeals for the Second Circuit, dated Feb. 16, 2012, S.D.N.Y. –N.Y.C. 10-cv-206 (citing *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999)), p. 2.

66 **Exhibit R-001**, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, SDNY, Aug, 27, 2013, p. 31.

67 **Exhibit R-001**, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, SDNY, Aug, 27, 2013, p. 25 (quoting *Baker Marine (Nig.) Ltd. v. Chevron (Nig.)*, 191 F.3d 194, 197 (2d Cir. 199), and *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938–39 (D.C. Cir. 2007)).

68 **Exhibit C-31**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*, Case 1:10-cv-00206-AKH, Transcript of Sept. 12, 2013, filed 09/26/13, p. 7.

Accordingly, the SDNY court entered judgment for $465 million, representing the amount of the ICC Award plus interest, and the amount of COMMISA's loss on the performance bonds.

54. PEP is currently appealing the SDNY court's August 27, 2013 confirmation of the ICC Award to the Second Circuit.[69] While the outcome of its appeal remains unclear, COMMISA currently has a vested legal right to collect the amount of the ICC Award in the U.S., impeded only by PEP's decision to appeal and its deposit of more than $465,000,000 in cash in a New York bank account at Citibank to secure the judgment pending appeal.

J. The Luxembourg Proceedings

55. On March 6, 2013, COMMISA filed a motion to confirm the ICC Award in Luxembourg under the New York Convention. The SDNY had released the security bond PEP placed with the court, and COMMISA was concerned that PEP would remove its assets from the U.S., making it impossible for COMMISA to recover the ICC Award. COMMISA went to Luxembourg in the hopes of ensuring that it had some protection.

56. On March 22, 2013, Judge Hoscheit, Vice President of the District Court of Luxembourg, confirmed the ICC Award.[70] Luxembourg follows France in its approach to confirming arbitral awards under the New York Convention. Specifically, whether an arbitral award has been annulled is irrelevant under Luxembourg law for purposes of confirming an award under the New York Convention. Consistent with Luxembourg law on the New York Convention, the Annulment Decision is not relevant and Judge Hoscheit appropriately confirmed the Final Award without considering the decision.[71] Mexico currently is appealing this decision. In addition to the confirmation action, there are two ancillary attachment actions which Mexico sets forth at paragraphs 25-29 of its pleading. These proceedings are interim actions ancillary to the proceeding for confirmation of the ICC Award, and thus even further removed from the measures that KBR is challenging in this NAFTA arbitration.

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69 **Exhibit C-32**, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*, Case 1:10-cv-00206-AKH, Notice of Appeal October 15, 2013.

70 **Exhibit C-33,** Order Confirming the ICC Award, District Court Of and In Luxembourg, Office of the President Judicial Precinct L-2080 Luxembourg, No. 38/2013 (March 22, 2013) (the "Luxembourg Confirmation Order"); *see also* Respondent's Memorial on Jurisdiction, ¶ 30.

71 *See* Respondent's Memorial on Jurisdiction, ¶ 30.

K. The NAFTA Claim

57. On August 30, 2013, KBR on its own behalf and on behalf of COMMISA filed a NAFTA claim against Mexico seeking full compensation for all losses and other injuries suffered, including legal costs, as a result of Mexico's breaches of NAFTA.[72] Unlike the confirmation proceedings—which deal exclusively with the confirmation of a vested right in the form of an ICC Award, the NAFTA claim challenges Mexico's actions in annulling the ICC Award and enforcing the performance bonds after the arbitrators (the only finder-of-fact) held in a five-year arbitration that PEP was the breaching party.

II. KBR and COMMISA's Waiver Meets the NAFTA Article 1121 Requirements

58. As required by NAFTA Article 1121, KBR and COMMISA provided a consent and waiver, attached at Annex A to the Notice of Arbitration. The waiver—to which Mexico now objects—provides as follows:

> Pursuant to Articles 1121(1) and 1121(2) of the North American Free Trade Agreement (the "NAFTA"), KBR, Inc. and its wholly-owned subsidiary Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA") each consent to arbitration in accordance with the procedures set out in the NAFTA and "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party [to the NAFTA], or other dispute settlement procedures, any proceedings with respect to the measures of the Disputing Party that is alleged to be a breach referred to in Article 1116 [and 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 laws of the disputing Party."
>
> For absence of doubt, KBR and COMMISA do not waive:
>
> 1. their right to initiate proceedings under the New York or Panama Conventions to enforce the ICC Final Award in any State party to these conventions;

[72] Mexico suggests that KBR filed only on its own behalf. However, the Notice of Arbitration and Mexico's own letters responding to the Notice of Arbitration make clear that KBR filed on its own behalf and on behalf of COMMISA. *See e.g.*, *KBR, Inc. v. The United Mexican States*, Notice of Arbitration, August 30, 2013, Introduction, ¶¶ 6 & 16, Annex A; **Exhibit C-34**, Respondent's Letter of September 27, 2013, p. 1.

2. their right to continue existing proceedings under the Panama Convention to enforce the ICC Final Award in the Southern District of New York;

3. their rights under the Opinion and Order Granting Petitioner´s Motion to Confirm Arbitration Award and Denying Respondent´s Motion to Dismiss Petition issued by Judge Alvin K. Hellerstein of the United States District Court for the Southern District of New York on August 27, 2013; or

4. their right to continue existing proceedings under the New York Convention to enforce the ICC Final Award in Luxembourg.

59. Contrary to Mexico's assertions, KBR and COMMISA's waiver is valid under NAFTA Article 1121. First, the New York and Panama Convention proceedings are not proceedings with respect to "the measures of the disputing party that is alleged to be a breach," and therefore fall outside the scope of Article 1121 waiver. And the precedent and arguments on which Mexico relies are either inapplicable or support a finding that KBR and COMMISA's waiver is valid. Second, Mexico has explicitly acknowledged that the scope of Article 1121 is limited to waiving claims for damages, and the confirmation proceedings are not claims for damages. Third, KBR and COMMISA cannot, and therefore cannot be required to, waive PEP's appeals in Luxembourg and New York. Lastly, policy and equity support a finding that Claimant's waiver is proper because, *inter alia*, NAFTA is the only forum to challenge Mexico's actions, the facts underlying this case suggest repeat abuses to other US investors, and the waiver provision cannot be read to permit a State party to hold the investor hostage while the clock runs on the NAFTA statute of limitation.

A. KBR's New York and Panama Convention Confirmation Proceedings Are Not "Proceedings With Respect to the Measure of the Disputing Party that is Alleged to be a Breach"

60. NAFTA Article 1121 requires claimants to "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party [to the NAFTA], 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 [and Article 1117] […]" Accordingly, waiver is only required for "proceedings with respect to *the measure of the disputing party that is alleged to be a breach.*" The New York and Panama Convention proceedings are not such proceedings.

61. The *Waste Management I* tribunal—a case on which Mexico heavily relies—considered the relevant test to be whether "both legal actions have a legal basis derived from the same measures."[73] Specifically, it considered that the respondent had to offer "proof that the actions brought before domestic courts or tribunals directly affect the arbitration *in that their object* consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA."[74] KBR and COMMISA's waiver meets this requirement.

62. The New York and Luxembourg proceedings do not "have a legal basis derived from the same measures" as KBR and COMMISA's NAFTA claim, and their "object" does not relate to the measures alleged to be a breach of NAFTA. Actions filed pursuant to the New York and Panama Conventions derive exclusively from the ICC Award itself, and their object is simply to convert the ICC Award into an enforceable court order. Post-award attempts to nullify the ICC Award do not and cannot form the basis, or object, of actions under the Conventions.

63. Conversely, under NAFTA, US investors may submit to arbitration a claim for damages resulting from a breach by Mexico of an obligation under: Section A of Chapter 11 or Article 1503(2), or Article 1502(3)(a). The NAFTA claims derive exclusively from Mexico's breaches of NAFTA – *i.e.*, its illegal Annulment Decision and improper collection of the performance bonds.

64. KBR and COMMISA's New York and Panama Convention proceedings, on the one hand, and NAFTA claim, on the other hand, thus have a legal basis derived from different measures. The New York and Luxembourg proceedings derive exclusively from the ICC Award; the NAFTA breaches derive exclusively from the Annulment Decision and improper collection of the performance bonds that occurred long after the ICC Award was issued. Accordingly, Claimant's waiver is valid and there is no requirement that Claimant waive the New York or Luxembourg proceedings.

65. Closer scrutiny of the New York and Luxembourg proceedings further illustrates that the ICC Award itself—not post-award attempts to nullify it—forms the basis of those actions, and their object. Under New York law, confirmation proceedings are intended to be summary

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[73] **Exhibit RL-006**, *Waste Management I*, §27 (emphasis added).

[74] *Id.*

proceedings to convert an award into a judgment, and a court has discretion to do so even if the final award has been annulled. Under Luxembourg law, the fact that the ICC Award has been annulled is irrelevant to the decision as to whether to confirm the arbitral award.

1. U.S. Courts' Role In Confirmation Proceedings Is Limited To Giving the Award the Force of a Court Order

66. Under New York law, New York or Panama Convention confirmation actions are intended to be "summary proceeding[s]" that "do[] little more than give the award the force of a court order."[75] One potential ground under the Conventions to refuse confirmation is where the courts of the country where the arbitration occurred annul the final award. In such instance, under New York law the court still has discretion to confirm the final award. The court will review the annulment decision and determine if such decision is so repugnant to fundamental notions of justice as to warrant no deference. That is what occurred in the New York proceeding.

67. COMMISA certainly did not *initiate* any proceeding in New York "with respect" to the Annulment Decision. In fact, COMMISA filed confirmation proceedings in New York over a year before the Annulment Decision was rendered. It is therefore simply incorrect to assert that COMMISA initiated proceedings in New York with respect to a "measure" that did not exist at the time. Rather, COMMISA argued in response to PEP's attempt to export the Annulment Decision that the court should disregard the Annulment Decision in issuing its decision to confirm the ICC Award—which is precisely what occurred. After reviewing the Annulment Decision to evaluate whether to give it force in the United States, the SDNY court chose not to accord the Annulment Decision weight under US law,[76] and therefore confirmed the ICC

[75] **Exhibit C-22,** *Zeiler*, 500 F.3d at 169.

[76] A US court has discretion under the New York and Panama Conventions to confirm an arbitral award even where it has been set aside at the seat of the arbitration. The New York and Panama Conventions require that a Contracting State must confirm an award. Article V of the New York and Panama Conventions provides limited exceptions that relieve a state of that duty but does not purport to dictate whether or not the state should refuse confirmation. Specifically, "[r]ecognition and enforcement of the award may be refused…only if" one of five enumerated conditions is met, and "[r]ecognition and enforcement of an arbitral award may also be refused if" either of two additional conditions is met. There are no circumstances in which a Contracting State must not confirm an award.

Award.[77] In so doing, the SDNY court made clear that it was not deciding or reviewing Mexican law.[78]

68. The fact that the New York court considered the Annulment Decision before confirming the arbitration award does not mean that the New York proceeding "was derived from" or "based upon" or had as its "object" the Annulment Decision. To the contrary, it proves that the basis of the New York proceeding was the ICC Award itself. The New York court considered the Annulment Decision, but ultimately chose not to accord it any weight and confirmed the ICC Award. It is therefore impossible that the U.S. proceeding is a "proceeding[] with respect to the measure of the disputing Party that is alleged to be a breach" of NAFTA.

2. The Luxembourg Judge's Role In New York Convention Confirmation Proceedings Is Limited to Reviewing the ICC Award Under Luxembourg Laws

69. Nor do Claimant's confirmation actions in Luxembourg under the New York Convention involve the Annulment Decision or Mexico's related actions. These proceedings are therefore not subject to waiver under NAFTA Article 1121.

70. Following French practice, Luxembourg courts do not defer to annulment decisions in the *forum* State. Luxembourg courts do not perform any analysis under Article V of the New York Convention. Instead, they rely on Article VII of the Convention, which allows each country to adopt a more liberal regime in favor of enforcement of arbitral awards. Article VII stipulates that: "[t]he provisions of the present Convention shall not […] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

71. Courts following French practice thus consider the fact that a *forum*-state court has set aside an award to be, as a matter of law, irrelevant. Courts must confirm—and actually have

[77] **Exhibit R-001**, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, SDNY, Aug, 27, 2013, 2 ("I therefore decline to defer to the Eleventh Collegiate Court's ruling, and I again confirm the Award . . .").

[78] **Exhibit R-001**, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, SDNY, Aug, 27, 2013, 31 ("In declining to defer to the Eleventh Collegiate Court, I am neither deciding, nor reviewing, Mexican law").

confirmed—arbitral awards that would have been enforceable in France or Luxembourg, despite the fact that an award has been set aside in the *forum* state.[79]

72. As the ICC Award met the criteria of Luxembourg arbitration law, the judge simply confirmed it.[80] Under Article 1251 of the Civil Procedural Code, the judge was not required, nor indeed entitled, to give any weight whatsoever to what a foreign court may have done to an award, that would be a matter of purely local consequence in that country. This was made clear in the confirmation decision, which assessed only the ICC Award.[81]

73. In light of the above, it would be impossible for the Luxembourg confirmation proceeding to be considered a "proceeding[] with respect to the measure of the disputing Party that is alleged to be a breach" of NAFTA.

3. The Cases on Which Mexico Relies Support A Finding That Claimant's Waiver Is Valid

74. In its Brief on Jurisdiction, Mexico relies principally on *Waste Management I*, *Detroit International* and *Canfor* to support its argument that KBR and COMMISA's waiver is insufficient under Article 1121.[82] But *Waste Management* is factually distinct from the present case and the legal test it sets forth to determine whether a waiver is valid under Article 1121 supports Claimant's position. Further, Mexico cannot rely on Canada's pleading or Mexico's own statements from February 2014 in *Detroit International.* Regardless, *Detroit International* supports a finding that Claimant's waiver is sufficient under Article 1121. *Canfor*, in turn, is concerned with the risk of inconsistent decisions and double recovery, neither of which are implicated in this arbitration.

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[79] **Exhibit C-36,** Legal Opinion of Professor Jan Paulsson (May 22, 2013), *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX-Exploración y Producción*, Case No. 38/2013, District Court Of and In Luxembourg (2013) (citing, *inter alia*, *Société Int'l Bechtel Co*., (Paris Court of Appeal, 29 Sept. 2005), 2006 REV. ARB. 695 (enforcing an award set aside in the UAE and focusing on lack of extra-territorial effect of the UAE annulment decision)). *See also,* **Exhibit C-35**, *Hilmarton Ltd. v OTV* (Cour de cassation, 23 March 1994), XX Y.B. COM. ARB. 663 (1995).

[80] **Exhibit R-001**, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, SDNY, Aug, 27, 2013.

[81] **Exhibit C-33**, Luxembourg Confirmation Order. The attachment actions are ancillary to the confirmation proceeding. As a result, like the confirmation proceedings, these are not proceeding with respect to the "measures" challenged by KBR in this arbitration.

[82] Respondent's Memorial on Jurisdiction, ¶¶ 48-49, 59-60 (citing **Exhibit RL-006**, *Waste Management I*; **Exhibit RL-007**, *Canfor Corporation v. United State and Terminal Forests Products Ltd. v. United States*).

a. *Waste Management I* is Factually Distinct, and Claimant's Waiver Meets the Test It Provides

75. In *Waste Management I*, the claimant, a U.S.-based company, brought a NAFTA claim against Mexico based on the actions of Acapulco, a sub-division of the Mexican Government, and Banobras, a Mexican state-owned and state-run bank. Specifically, Waste Management and its subsidiary Acaverde argued that Acapulco's alleged refusal to pay certain invoices submitted under a Concession Agreement and Banobras' alleged refusal to pay those invoices as Acapulco's guarantor breached NAFTA Articles 1105 and 1110.

76. At the same time, Acaverde maintained two suits against Banobras in the Mexican courts and one arbitration against Acapulco under the auspices of the City of Mexico Chamber of Commerce Permanent Arbitration Committee. All three proceedings were based on Banobras' and Acapulco's failure to pay the invoices–precisely the same measures at issue in their NAFTA claim.

77. Mexico objected to the NAFTA tribunal's jurisdiction, arguing that Waste Management and Acaverde had supplied a formally and substantively deficient waiver. Waste Management and Acaverde argued that the domestic proceedings did not fall within the scope of the required waiver of Article 1121, because (i) Mexico was not the named defendant in the local proceedings, and (ii) those proceedings did not invoke as a legal basis violations of the NAFTA.

78. In addressing the issue, the *Waste Management I* tribunal considered the relevant test to be whether "both legal actions have a legal basis derived from the same measures."[83] Specifically, it considered that the respondent had to offer "proof that *the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA*."[84] Applying this test, the *Waste Management I* tribunal considered claimants' waiver substantively insufficient, given that the measures challenged in all proceedings were identical. That is not the case here. The measure underlying the New York and Panama Conventions confirmation proceedings (confirmation of the ICC Award) *is not* the measure at issue in the NAFTA arbitration (the Annulment Decision and bond proceedings). In fact, as shown above, KBR and

[83] **Exhibit RL-006**, *Waste Management I*, §27.

[84] *Id.*

COMMISA's waiver meets the *Waste Management I* tribunal's test, because the New York and Luxembourg proceedings do not "have a legal basis derived from the same measures" as this NAFTA claim.

b. The NAFTA Parties' 1128 Submissions in *Detroit International* Support Claimant's Position on the General Scope of Article 1121

79. Mexico suggests that the U.S. and Mexico's 1128 submissions in *Detroit International Bridge Company v. Canada* support its reading of NAFTA Article 1121 to require waiver of confirmation proceedings. They do not and cannot.

80. To the extent the Mexico wishes to rely on its own statements in its Article 1128 submission, they cannot be afforded any weight: Mexico's Article 1128 submission in *Detroit International* is dated February 14, 2014 – during the pendency of this dispute and long after Mexico's objection to KBR and COMMISA's waiver on September 27, 2013.[85] Statements made by a party during an arbitration under a treaty for the benefit of third parties are not statements of authentic interpretation.[86] There is further no binding interpretation by the NAFTA Free Trade Commission on this issue.

81. Regardless, the NAFTA Parties' shared understanding of the general scope of Article 1121 waiver supports Claimant's reading of Article 1121. The NAFTA Parties agree that tangentially or incidentally related measures are outside the waiver requirement under Article 1121.[87] The Annulment Decision was introduced by Mexico's state enterprise PEP, not by KBR or COMMISA, and played at most an "incidental or tangential role" in the New York confirmation proceedings and no role at all in Luxembourg. Likewise, collection of the bonds is relevant to the New York confirmation action only to prevent PEP's illicit attempt to reduce the amount of the ICC Award. Accordingly, all proceedings fall outside the scope of NAFTA Article 1121 as interpreted in *Detroit International*.

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85 **Exhibit C-34**, Respondent's Letter of September 27, 2013.

86 **CLA-3**, Mahnoush H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties*, 104 Am. J. Int'l L. 597 (2010).

87 **Exhibit RL-020**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States dated March 3, 2014.

82. When examined closely, Mexico's Article 1128 submission in *Detroit International* also supports Claimant's position that Convention confirmation proceedings fall outside the scope of Article 1121. In paragraph 4 of its 2014 *Detroit International* submission, Mexico confirmed a position previously expressed in 2001 in the *Loewen* matter: Article 1121 only covers proceedings *for damages* with respect to the measure alleged to be a breach of NAFTA.[88] New York and Panama Convention proceedings that give a vested right the status of a court order are clearly not claims for damages, and therefore fall outside Mexico's own definition of the scope of Article 1121.

83. Mexico's Memorial on Jurisdiction ignores its own statements about the general scope of Article 1121 and instead relies on the NAFTA State parties' reading of the limited carve-out for injunctive, declaratory or other extraordinary relief in administrative tribunals or courts under the law of a disputing Party. But that carve-out is irrelevant to this dispute. Claimant is not arguing that the Convention confirmation proceedings fall under the carve-out for injunctive relief proceedings before Mexican courts set forth in Article 1121. There is no need to do so. The carve-out only applies to proceedings that would otherwise be considered "proceedings with respect to the measure of the disputing party that is alleged to be a breach" of NAFTA. The confirmation proceedings are not such proceedings, and therefore it does not matter whether or not they fall under the carve-out for injunctive relief.

c. The Concerns Mexico Draws From *Canfor* and *Thunderbird Gaming* As Support for Its Argument Are Illusory

84. Mexico also relies on *Canfor* and *International Thunderbird Gaming Corporation* to argue that parallel proceedings should be avoided as they risk inconsistent outcomes and double recovery.[89] While these may generally be valid concerns, neither is at issue in this case.

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[88] *See* Section II B. for a full exploration of Mexico's position in *Loewen*. **CLA-4**, *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, First Article 1128 Submission of the United Mexican States (October 16, 2000), ¶¶ 5-6 (emphasis added); **Exhibit CLA-5,** *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of Mexico Pursuant to Article 1128 of NAFTA (February 14, 2014), ¶ 4 (providing that "Article 1121 precludes a claimant from simultaneously commencing or continuing proceedings for damages under Chapter Eleven and in any other fora, including U.S. domestic courts, based upon the measure that is alleged to be a breach of Chapter Eleven.").

[89] Respondent's Memorial on Jurisdiction, ¶¶ 77-81 (citing **Exhibit RL-007**, *Canfor Corporation v. United States and Terminal Forests Products Ltd. v. United States*, ¶¶ 237, 242; **Exhibit RL-009**, *International Thunderbird Gaming Corporation v. The United Mexican States*, ¶ 118).

85. NAFTA does not provide a blanket prohibition on any and all types of concurrent or parallel proceeding in local and international fora. In fact, NAFTA expressly allows for the concurrent consideration of the same measure in multiple fora in certain instances. As the tribunal in *Canfor* points out, "the subject matter of a claim in investor-State arbitration under Chapter Eleven can also be submitted to State-to-State arbitration under Chapter Twenty."[90] Only certain types of parallel proceedings are disfavored, and those are specifically called out. This is necessarily the case as parallel proceedings are quite common in investor-State disputes.[91]

86. Referring to selective quotes from *International Thunderbird Gaming Corporation* and *Canfor*, the Government of Mexico argues that parallel proceedings in the context of Article 1121 (*i.e.*, "with respect to the [same] measures") are disfavored because they "could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."[92] Even accepting Mexico's position, the risks underlying the Article 1121 policy against parallel proceedings are not implicated here.

87. First, there is no possibility for inconsistent outcomes. The role of the U.S. courts in reviewing arbitral awards under the New York and Panama Conventions is very limited.[93] COMMISA's success in its confirmation proceedings under the NY and Panama Conventions means that the ICC Award has the force of a court order. There is no risk of inconsistency between this outcome and this Tribunal's future findings on Claimant's claims that Mexico has breached NAFTA Articles 1102, 1103, 1105, 1110, or 1503(2).

88. There is also no risk of double recovery. PEP suggests that waiver is necessary because the damages awarded in the NAFTA proceedings may overlap with the amount confirmed in the New York and Luxembourg proceedings.[94] PEP is not correct.

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90 **Exhibit RL-007**, *Canfor Corporation v. United States and Terminal Forests Products Ltd. v. United States*, ¶ 240.

91 *See* ¶¶91-93 for a number of examples of parallel proceedings that do not raise concerns in investor-State disputes.

92 **Exhibit RL-007**, *Canfor Corporation v. United States and Terminal Forests Products Ltd. v. United States*, ¶237 (citing **Exhibit RL-009**, *International Thunderbird Gaming Corporation v. The United Mexican States*, ¶ 118).

93 **Exhibit C-22**, *Zeiler*, 500 F.3d at 169.

94 Respondent's Memorial on Jurisdiction, ¶ 80.

89. As a threshold matter, the premise, drawn from *dicta*, is inconsistent with arbitral jurisprudence on this issue. Most tribunals will not preemptively limit an investor's rights based on the illusory potential for double recovery--it is too uncertain and, regardless, can be easily addressed in the final award on damages or otherwise. As one recent tribunal noted, "the Claimants' recovery should not be reduced based on the uncertain possibility of a favorable outcome in the national court proceedings" and "in any case, international law and decisions as well as domestic court procedures offer numerous mechanisms for preventing the possibility of double recovery."[95]

90. In this vein, the *Suez v. Argentina* tribunal refused to preemptively limit its jurisdiction based on some indeterminate risk of double recovery, noting that any potential overlap could be resolved at the damages phase: "[w]hile the Respondent's concern about the danger of double recovery to the corporation and to the shareholders for the same injury is to be noted, the Tribunal's decision at this point relates only to jurisdiction. Moreover, the Tribunal believed that any eventual award in this case could be fashioned in such a way as to prevent double recovery."[96] The *Sempra* tribunal, in turn, considered that double recovery did not present a real risk because the government "will make sure that any recovery obtained from one source is not duplicated by means of a separate recovery from another source."[97]

91. The risk of double recovery is entirely illusory here, because KBR will not seek it. To the extent that COMMISA is successful in collecting all or part of the ICC Award in either New York or Luxembourg, KBR agrees to stipulate that it will deduct any such collection from any amount sought in this NAFTA arbitration. Further, Claimant also seeks relief that is different from relief sought in New York or Luxembourg, including recovery of its legal fees and costs incurred while attempting to preserve its rights in light of Mexico's actions.

92. Claimant's stipulation is consistent with investor-State dispute precedent. In *Gemplus v. Mexico*, for example, the tribunal dismissed Mexico's concerns about double recovery, noting

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95 **CLA-6**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Partial Award on the Merits, March 30, 2010, ¶ 557.

96 **CLA-7**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, August 3, 2006 , ¶ 51.

97 **CLA-8**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 395.

that there was limited risk, because the claimant had offered "to enter into a legally binding assignment to Mexico of any and all pecuniary benefits, up to the value of any award in damages made in this arbitration, which they may derive as shareholders […]".[98] There simply is no risk of double-recovery here.

93. In short, double recovery is not a concern in this arbitration, and should not be taken into consideration when determining whether Claimant's waiver is effective.

B. Mexico Has Explicitly Acknowledged that the Scope of the Article 1121 Waiver is Limited to Claims for "Damages Only"

94. KBR and COMMISA's waiver is valid under Mexico's own reading of NAFTA Article 1121, as the New York and Panama Convention confirmation proceedings are not intended for the adjudication of claims for "damages."

95. In 2001, the Government of Mexico provided a submission on the interpretation of NAFTA in *The Loewen Group, Inc and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, advising that "[t]he waiver contemplated in Article 1121 is for claims *for damages only* in 'any administrative tribunal or court under *the law of any Party, or other dispute settlement procedures.*'"[99] Numerous investors have relied on this understanding,[100] and Mexico confirmed it in 2014 with its Article 1128 Submission in *Detroit International*, describing the entire text of Article 1121 as follows: "Article 1121 precludes a claimant from simultaneously commencing or continuing *proceedings for damages* under Chapter Eleven and in any other fora […]"[101] These statements make clear that Mexico limits the overall scope of Article 1121 to claims for damages.

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98 **CLA-9**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, June 16, 2010 at ¶ 12-60.

99 **CLA-10,** *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Second Article 1128 Submission of the United Mexican States, November 9, 2001, 13 (emphasis in original).

100 *See e.g.,* **CLA-11**, *Cargill, Incorporated v. United Mexican States*, December 29, 2004, Notice of Arbitration, ¶ 19 ("pursuant to Article 1121 of NAFTA, hereby waives its right to initiate or continue proceedings that seek damages based on alleged breaches of Article 1116 or 1117 of NAFTA"); **CLA-12**, *Corn Products International, Inc. v. The United Mexican States*, Notice of Arbitration, October 21, 2003, ¶ 17 (Corn Products "waive their right to initiate or continue other dispute settlement procedures involving the payment of damages […]").

101 **CLA-5**, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of Mexico Pursuant to Article 1128 of NAFTA, February 14, 2014, ¶ 4.

96. As "Article 1121 is for claims *for damages only* in 'any administrative tribunal or court under the law of any Party, or other dispute settlement procedures,'" an Article 1121 waiver does not apply to New York and Panama Convention confirmation proceedings. Convention proceedings are, by definition, not for the adjudication of claims for damages—they are designed to confirm an existing arbitration award. Mexico cannot now reverse its reading of Article 1121 to deprive KBR and COMMISA of their NAFTA rights.

C. KBR and COMMISA Cannot Waive PEP's Appeals in Luxembourg and New York

97. KBR and COMMISA's waiver is also valid because they cannot waive the confirmation proceedings. Both Luxembourg and New York courts have issued binding decisions confirming the ICC Award, which PEP—Mexico's state-owned company—has appealed. In New York, the trial court already has entered judgment in COMMISA's favor and PEP deposited more than $465,000,000 in cash in a New York bank account at Citibank to secure that judgment pending appeal. Mexico and PEP are free to withdraw their appeal and terminate the proceedings in Luxembourg and New York. COMMISA cannot do it for them and nothing in NAFTA Article 1121 requires KBR or COMMISA to waive substantive rights acquired before KBR filed its Notice of Arbitration on August 30, 2014.

98. Specifically, COMMISA is under no obligation to "waive" the confirmation decisions themselves by asking that the courts reverse their legally binding decisions, thus eliminating anything for PEP to appeal. There is no NAFTA authority for the proposition that COMMISA must now ask the courts in New York and Luxembourg to eradicate binding orders issued prior to KBR's submission of its NAFTA claim to arbitration. This is an absurd demand that cannot be squared with the text of NAFTA Article 1121.

99. The heart of the matter is this: it would be entirely inequitable—and a violation of fundamental tenets of international law—to deprive KBR of NAFTA jurisdiction based on a proceeding they cannot waive.

D. Policy and Equity Favor A Finding That Claimant's Waiver is Valid

100. Policy and equity considerations also support Claimant's understanding of Article 1121. NAFTA is the only forum available to KBR and COMMISA to challenge Mexico's actions in annulling the ICC Award and calling a bond to which it did not have a legal right. The waiver

provision was surely not intended to deprive an investor of their only opportunity to obtain justice for Mexico's breaches.

101. Moreover, Mexico's NAFTA 1121 argument relies on its own actions as grounds to prevent KBR from bringing a NAFTA claim. PEP introduced the Annulment Decision into the confirmation proceedings and PEP is now appealing both the US and Luxembourg decisions confirming the ICC Award. COMMISA did not rely on the Annulment Decision and cannot waive PEP's appeals. And PEP's collection on the bonds in Mexico forced that issue to become part of the US proceeding. There is no way of knowing how and when the US and Luxembourg appeals will end.

102. Article 1121 cannot be read to permit a State party to hold the investor hostage while the clock runs on the NAFTA statute of limitations. Yet that is precisely what Mexico is doing. If Mexico succeeds, Mexico will escape without any liability for its actions and, depending on the outcome in the U.S. and Luxembourg, could obtain a half-billion dollar windfall—over $400 million that it does not have to pay because it improperly annulled the ICC Award plus US$106 million that it forced COMMISA to pay by improperly calling the performance bonds.

103. Nor are Mexico's transgressions likely to be limited to COMMISA and KBR. Mexico requires that all parties that contract with PEP and PEMEX accept Mexico as the forum for arbitration.[102] Mexico's policy of permitting its courts and State enterprises to eliminate arbitral awards against State enterprises is problematic for every US contractor that enters into a contract with PEMEX and other Mexican state entities, and who expected a fair and binding arbitration to settle disputes.

III. Waiver Is An Issue of Admissibility, Not Competence

104. Should the Tribunal find that the Luxembourg and New York proceedings are not "proceedings with respect to the measure of the disputing party that is alleged to be a breach" of the NAFTA, there is no need to decide whether Article 1121's waiver requirement raises an issue

[102] *See* **Exhibit C-25**, PEMEX PowerPoint, *Fundamental Aspects, Policies, Bases and Guidelines for Matters Concerning Public Works and Related Services Provided by Mexican Petroleum Companies, Subsidiaries and Affiliates*, July 17, 2006.

of admissibility or of jurisdiction. Should the Tribunal decide to reach this issue, however, it should find that waiver is a question of admissibility.

105. Jurisdiction and admissibility are two distinct yet often conflated concepts.[103] An objection to jurisdiction questions the existence of adjudicative power, whereas an objection to admissibility questions whether a tribunal can "exercise its adjudicative power in relation to the specific claims submitted to it."[104] Defects in the admissibility of a claim may be cured, while issues of jurisdiction typically are incurable.

106. As a threshold matter, the fact that waiver is curable means that it is a matter of admissibility and not jurisdiction. This should be sufficient to support Claimant's request that, should the Tribunal find the waiver defective, it grant KBR and COMMISA the opportunity to cure any defect.

107. The requirement of a valid waiver as a prerequisite to NAFTA arbitration determines *when* the option to arbitrate arises, not whether the forum is available at all and not whether it is the proper forum. Were the Tribunal to sustain Mexico's preliminary objection, it would still be appropriate for the tribunal to exercise its adjudicative power once KBR and COMMISA cured the defective waiver. This is evident, for example, from *Waste Management II*, in which the tribunal refused to accept Mexico's argument that the claim submitted in *Waste Management I* was barred from consideration in the NAFTA forum simply because the tribunal in *Waste Management I* found the original waiver submitted by the claimant defective. The true nature of the waiver question as one of admissibility is apparent from the tribunal's acceptance of Waste Management's claim after Waste Management cured the defect in the waiver. If this were an issue of jurisdiction, the defect would be incurable.[105] In other words, the question is *when* the option to arbitrate arises, not *if* it exists.

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[103] **CLA-13**, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Cambridge University Press (2009), ¶ 291 (noting that the terms "'jurisdiction', 'consent to arbitration', 'competence', 'admissibility' and 'arbitrability' are employed inconsistently and with a notable ambivalence to the rationale for having different terms in the first place.").

[104] *Id.* at ¶ 297

[105] Although *Waste Management I* and *II* both refer to the waiver question as one of jurisdiction, neither *Waste Management* nor Mexico argued that waiver was properly a question of admissibility as opposed to jurisdiction and hence neither the tribunal in *Waste Management I* or *II* was in a position to decide this question. The use of the term "jurisdiction" in both decisions is an instance of the conflated use of the terms jurisdiction and admissibility discussed above. However, the *Waste Management II* tribunal's acceptance of the claim can only

108. Understanding waiver as an admissibility issue also makes sense in light of other issues that are commonly considered admissibility questions. For example, questions regarding a party's alleged failure to exhaust local remedies or the alleged failure of new claims to remain within the scope of the initial notice of arbitration are both issues that are properly understood as ones of admissibility.[106] Waiver falls within the same category as a condition precedent to arbitrating this particular *claim*. The crux of the waiver issue is not about whether or not this is the correct forum; it is about whether the claim is currently admissible. Were KBR and COMMISA to substitute a valid waiver, the defect would be cured.

109. As the waiver implicates admissibility rather than jurisdiction, should the Tribunal find KBR and COMMISA's waiver defective, the Tribunal need only allow KBR and COMMISA the opportunity to cure the waiver promptly. It would make no sense to dismiss KBR and COMMISA's claim entirely and thereby preclude any recourse to NAFTA dispute resolution due to the running of the statute of limitations.

IV. PEP's Request That the Tribunal Refuse Jurisdiction Would Render Moot the Parties' Agreement to Toll the Statute of Limitations Based on Mexico's Request for a Lengthy Briefing Schedule

110. As Mexico is aware, if the Tribunal dismisses the case on jurisdiction, COMMISA and KBR lose all access to NAFTA. The statute of limitations to bring a NAFTA claim expires at the latest on October 24, 2014[107] and will have run by the time the Tribunal issues its decision on this preliminary question.

111. Mexico's stance on this issue sheds new light on Mexico's insistence on a lengthy procedural schedule for the waiver issue, as well as Mexico's sluggish responses in this arbitration.[108] After the parties agreed that the Tribunal should address the sufficiency of

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be reasonably explained by understanding that waiver was treated as, if not named, an issue of admissibility. If waiver were an issue of jurisdiction, it would simply not have been curable.

106 **CLA-14**, Jan Paulsson, *Jurisdiction and Admissibility*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, ICC Publishing (2005), p. 609.

107 *See* **Exhibit R-008**, *Sentencia de Nulidad del Laudo* (IPC-01), Oct. 24, 2011.

108 As one example, KBR filed its Notice of Arbitration on August 30, 2013. A month later, on September 27, 2013, Mexico notified KBR that it considered that the 1976 UNCITRAL Rules, and not the 2010 UNCITRAL Rules applied. KBR made the change immediately, on October 1, 2013. Though it was a minor correction, and

Claimant's waiver under Article 1121 of NAFTA as a preliminary question,[109] Mexico advocated for a lengthy procedural schedule. During the procedural call of March 21, 2014, KBR explained that it could not agree to a long procedural schedule absent some assurance that it would not lose the ability to bring a NAFTA claim.

112. To assuage KBR and the Tribunal's concerns on this issue, Mexico agreed that it would toll the statute of limitations. Mexico then suggested in a March 24, 2014 letter that it had intended to only toll the statute of limitations for purposes of this arbitration. This, as explained below, renders the entire tolling agreement moot under the current procedural schedule, if the Tribunal makes the decision on jurisdiction rather than admissibility. In this regard, Claimant responded on March 25, 2014:

> Respondent has unambiguously confirmed that Claimant's Notice of Arbitration, as filed, tolled the three-year NAFTA statute of limitations. There is no need to speculate about a second arbitration. If the Tribunal adopts the procedural schedule proposed by Claimant, it will be in a position to timely confirm the validity of the waiver. Conversely, if the Tribunal decides that the waiver is insufficient, it has the authority to order a short abeyance of the arbitration to permit Claimant to cure. Respondent cannot at the same time drag out adjudication of the admissibility of the waiver attached to Claimant's Notice of Arbitration and demand closure of these arbitration proceedings in the event of a decision adverse to Claimant.[110]

113. On April 1, 2014, the Tribunal issued Procedural Order 1, pursuant to which the parties had to submit their final submissions on the preliminary question of waiver by August 14, 2014.[111] The hearing is currently set for October 5, 2014,[112] as Mexico refused to consider any dates before October.[113] Under this schedule, the Tribunal's decision will be rendered after the

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although Mexico had been on notice of the arbitration since August 30, 2013, Mexico waited until December 9, 2013 to appoint its arbitrator.

109 *See* Procedural Order 1, art. 12.

110 G. Aguilar Alvarez email to ICSID, March 25, 2014.

111 Procedural Order 1, art. 12.2.4.

112 ICSID Letter of May 28, 2014.

113 *See e.g.*, Adriana Perez Gil Ochoa email to ICSID, April 15, 2014 ("Adicionalmente hacemos de conocimiento del Tribunal la disponibilidad de la Demandada también a partir de la semana del 29 de septiembre y la primer

statute of limitations to file a NAFTA claim has expired. As a result, if the Tribunal determines that it does not have jurisdiction because the waiver was insufficient, and therefore COMMISA and KBR must file a new Notice of Arbitration with another tribunal, they will be deprived of all access to NAFTA.

114. Accordingly, Mexico's request for an extended procedural schedule coupled with its current request that the Tribunal dismiss this case on jurisdiction (rather than a curable admissibility issue) can be reduced to a request that the Tribunal vindicate its bait and switch. This irremediable loss of access to seek NAFTA relief would be entirely inequitable given that (1) Mexico requested a timeline over KBR's objections that it would run the clock, (2) KBR agreed to the extended timeline in reliance on Mexico's agreement to toll the statute of limitations, which is irrelevant if the Tribunal dismisses the case on jurisdiction, and (3) Mexico has dragged its feet throughout this proceeding, likely to ensure that KBR is left without a remedy.

V. Request for Relief on Preliminary Question

115. In light of the above, Claimant requests that the Tribunal find that KBR and COMMISA's waiver is proper under NAFTA Article 1121. If the Tribunal finds that the waiver was not proper, Claimant requests that the Tribunal provide guidance as to what it would consider a proper waiver under the circumstances, and permit Claimant to cure its waiver and continue the proceedings before this Tribunal.

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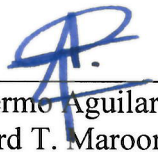
semana de octubre."); Adriana Perez Gil Ochoa email to ICSID, May 21, 2014; G. Aguilar Alvarez email to ICSID, 5/22/2014 (requesting an earlier date).

Very truly yours,



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