

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

KBR, INC.

Claimant/Investor,

-and-

THE UNITED MEXICAN STATES,

Respondent/Party.

(ICSID Case No. UNCT/14/1)

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

2. One of the preconditions to the NAFTA Parties’ consent to arbitrate claims under Chapter Eleven is the waiver required by Article 1121, which is entitled “Conditions Precedent to Submission of a Claim to Arbitration.” As a condition precedent to submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration.¹

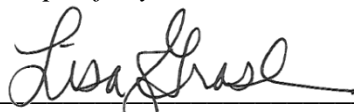
¹ See NAFTA art. 1121(3) (“A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.”); *id.* art. 1137(1) (“A claim is submitted to arbitration under this Section when: . . . (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.”); see also *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award § 24 (June 2, 2000) (“[T]he 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 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[.]”) (“*Waste Management Award*”).

Without an effective waiver, there is no consent of the NAFTA Party necessary for a tribunal to assume jurisdiction over the dispute.²

3. As the tribunal in *Railroad Development Corporation v. Republic of Guatemala* explained in relation to the similar waiver provision contained in the Dominican Republic-Central America-United States Free Trade Agreement, although a tribunal may determine whether a waiver complies with the requirements of Article 1121, a tribunal itself cannot remedy an ineffective waiver.³ Accordingly, a claim can be submitted, and the arbitration can properly commence, only as of the date that a claimant submits an effective waiver.

4. Further U.S. views on the interpretation of Article 1121 are reflected in paragraphs 4 to 7 of the attached non-disputing Party submission of February 14, 2014 in the NAFTA Chapter Eleven case *Detroit International Bridge Company v. Government of Canada*.

Respectfully submitted,



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July 30, 2014

² See NAFTA art. 1122(1) (“Each Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement.*”) (emphasis added); see also *Methanex Corp. v. United States*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002) (“In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied).”); *Waste Management Award*, pt. IV (“[T]his Arbitral Tribunal is compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA[.]”).

³ *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 ¶ 61 (Nov. 17, 2008) (“This being a matter pertaining to the consent of the Respondent to this arbitration, the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied, as the United States did in *Methanex.*”) (citation omitted).

ATTACHMENT

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

DETROIT INTERNATIONAL BRIDGE COMPANY,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

PCA Case No. 2012-25

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Articles 1116(1) and 1117(1) (Arbitrable Disputes)

2. In creating Chapter Eleven’s investor-State dispute settlement mechanism, the NAFTA Parties have specified the treaty obligations the breach of which may be submitted to arbitration. NAFTA Articles 1116(1) and 1117(1) provide a Party’s consent to arbitrate only claims based on a breach of either Section A of Chapter Eleven, Article 1503(2) or, under certain circumstances, Article 1502(3)(a). Articles 1116(1) and 1117(1) do not provide consent to arbitrate disputes based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations.¹

¹ See, e.g., *Grand River Enterprises v. United States*, NAFTA/UNCITRAL, Award ¶ 71 (Jan. 12, 2011) (“The Tribunal understands the obligation to ‘take into account’ other rules of international law to require it to respect the Vienna Convention’s rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an

Articles 1116(2) and 1117(2) (Limitations Period)

3. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2). Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2).²

Article 1121(1)(b) (Waiver Requirement)

4. One of the preconditions to the NAFTA Parties' consent to arbitrate claims under Chapter Eleven is the waiver required by Article 1121. That provision is entitled "Conditions Precedent to Submission of a Claim to Arbitration" and states in relevant part:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

...

(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.

The NAFTA Parties thus conditioned their consent to arbitration on a claimant's waiver (under Article 1121) of its right to avail itself of other forums with respect to a measure alleged to constitute a NAFTA breach. Without an effective waiver, therefore, there is no consent of the Party/Respondent necessary for a tribunal to assume jurisdiction over the dispute.

5. Compliance with Article 1121 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing

interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA."); *see also Methanex Corp. v. United States*, NAFTA/UNCITRAL, Award, Part II, Chapter B ¶ 5 (holding that NAFTA Chapter Eleven does not "creat[e] any jurisdiction to decide on alleged violations of the GATT"). The NAFTA Parties' view that breaches of other treaties are not arbitrable under NAFTA Articles 1116 and 1117 by virtue of asserting a claim under NAFTA Article 1105 was confirmed by the binding interpretation of the Free Trade Commission issued in 2001. *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ B(3) (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf> ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

² The United States' views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case *Merrill & Ring Forestry, L.P. v. Canada*.

proceedings with respect to the measure alleged to constitute a NAFTA breach in another forum. As the Tribunal in *Commerce Group v. El Salvador* explained in relation to the similar waiver provision contained in the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”), “[a] waiver must be more than just words; it must accomplish its intended effect.”³ Thus, if a claimant continues proceedings with respect to the same measure in another forum despite meeting the formal requirement of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.

6. Article 1121(1)(b) requires a waiver of a claimant’s “right to initiate or continue . . . any proceedings *with respect to* the measure of the disputing Party that is alleged to be a breach referred to in Article 1116[.]”⁴ As the United States has previously argued, the phrase “with respect to” in Article 1121(b) should be interpreted broadly.⁵ This construction of the phrase is consistent with the purpose of the waiver provision: to avoid the need for a Respondent 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).”⁶ 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.”⁷ 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 those domestic proceedings.

7. Article 1121(1)(b) includes an exception to the waiver requirement 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.”⁸ The United States agrees with Canada and Mexico that the NAFTA Parties intended this exception to be limited to proceedings before an administrative tribunal or court constituted under the law of the

³ *Commerce Group Corp. and San Sebastian Mines, Inc. v. El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶ 80 (Mar. 14, 2011); *see also id.* ¶¶ 81-84.

⁴ NAFTA Art. 1121(1)(b) (emphasis added).

⁵ *See, e.g., Consolidated Softwood Lumber Proceedings*, Reply Post-Hearing Submission of Respondent United States of America, at 2 n. 2 (Mar. 10, 2006); *Canfor v. United States*, Reply on Jurisdiction of Respondent United States of America, at 12 (Aug. 6, 2004) (citing North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 147 (1993)); *see also id.* (commenting on the “with respect to” construction in other NAFTA provisions); *accord Consolidated Softwood Lumber Proceedings*, NAFTA/UNCITRAL, Decision on Preliminary Question ¶ 201 (June 6, 2006) (“[T]he Tribunal is of the view that the words “with respect to” are to be interpreted broadly.”)

⁶ *International Thunderbird Gaming Corp. v. Mexico*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) (“In construing Article 1121 of the NAFTA, one 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.”).

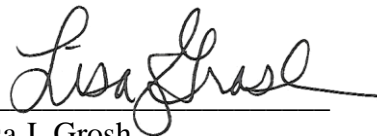
⁷ *Commerce Group* ¶ 111-12 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was “part and parcel” of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be “teased apart”).

⁸ NAFTA Art. 1121(1)(b).

disputing Party.⁹ This reading is consistent with the NAFTA's negotiating history.¹⁰ The purpose of this exception is to allow a claimant to initiate or continue certain proceedings to preserve its rights during the pendency of the arbitration, in a manner consistent with the broader purposes of the waiver requirement, set forth in paragraph 6 above. It would not be consistent with this purpose to allow a claimant in a NAFTA proceeding to bring a claim for extraordinary relief in one NAFTA Party "under the law of" a different NAFTA Party. The exception in Article 1121(1)(b) thus does not permit a claimant to initiate or continue "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages," with respect to the measure before an administrative tribunal or court constituted under the law of any other NAFTA Party, or of a non-Party.

Dated: February 14, 2014

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⁹ See *Detroit Bridge International Co. v. Canada*, PCA Case No. 2012-25, Respondent's Memorial on Jurisdiction and Admissibility ¶ 102 (June 15, 2013) (Under NAFTA Article 1121(1)(b), "[i]njunctive, declaratory or other extraordinary relief may thus only be sought before courts of the respondent State . . ."); *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, First Article 1128 Submission of the Government of Mexico ¶ 7 (Oct. 16, 2000) (Under NAFTA Article 1121(1)(b), "[a] would-be NAFTA claimant could initiate or continue before an administrative tribunal or court of the disputing Party only, proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages.").

¹⁰ A previous draft of the provision illustrates that the NAFTA Parties considered creating an exception to the waiver requirement for "proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party." See Draft Article 1121(b), INVEST1.904 (Sept. 4, 1992). The NAFTA Parties did not bracket the text "administrative tribunal or court" or "of the disputing Party," illustrating their intention to limit the waiver exception to administrative tribunals or courts *of the disputing Party*. The accompanying footnote suggests a choice between several drafting options to be made during legal "scrubbing." *Id.* The Tribunal should not presume that the NAFTA Parties intended to make important substantive changes during this "*toilette finale*."