IN THE MATTER OF AN ARBITRATION UNDER THE 1976 UNCITRAL ARBITRATION RULES

KBR, INC.,

Claimant

v.

THE UNITED MEXICAN STATES,

Respondent

Case No. UNCT/14/1

CLAIMANT'S FINAL SUBMISSION ON PRELIMINARY QUESTION OF WAIVER

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Introduction

1. KBR is in receipt of the submissions of both the United States and Canada pursuant to NAFTA Article 1128. Neither submission contests that KBR's and COMMISA's respective waivers under Article 1121(b) of the North American Free Trade Agreement ("NAFTA") are each valid and sufficient; rather, each submission merely asserts that the issue of the validity of a waiver is one that goes to the jurisdiction of a NAFTA tribunal.

2. The United States' and Canada's Article 1128 submissions are therefore only relevant to the extent this Tribunal finds that KBR's and COMMISA's Article 1121 waivers were deficient. However, the Tribunal need not reach the issue of the consequence of an insufficient waiver because KBR's and COMMISA's waivers are valid and sufficient. KBR's and COMMISA expressly waived their right to initiate or continue any and all proceedings with respect to the measures KBR contends are breaches of NAFTA, measures which do not make up the factual predicate for either of the award confirmation proceedings pending in New York and Luxembourg. Furthermore, neither of these proceedings is subject to the waiver requirements set forth in NAFTA Article 1121(b) because neither "involv[es] the payment of damages." Finally, neither KBR nor COMMISA is in a position to "waive" the New York or Luxembourg proceedings, as both such proceedings are currently on appeal by PEP and are within the exclusive control of PEP and/or Mexico.

3. Although the inapplicability of Article 1121's requirements to the New York and Luxembourg proceedings renders moot the issue opined upon by the United States and Canada, KBR reiterates its view that the validity of its waiver is an issue of admissibility, not jurisdiction. Therefore, should the Tribunal find a defect in KBR or COMMISA's waiver, KBR and COMMISA should be permitted to cure that defect. As set forth in KBR's Reply on Preliminary Question of Waiver ("KBR's First Waiver Submission"), the waiver requirement must be construed as an issue affecting *when* an arbitration may be commenced, not *whether* the parties

have agreed to arbitrate at all.[1] Importantly, at least one prior NAFTA tribunal's decision demonstrates that a failure to meet the requirements of Article 1121 may be cured.[2]

4. Moreover, although Canada's Article 1128 submission inaccurately characterizes Article 1121(b) waiver as a "jurisdictional" prerequisite, its submission accords with KBR's interpretation of the nature of the waiver requirement to the extent that it asserts that "[a] claimant cannot *ex post facto* cure Article 1121 jurisdictional defects absent the express consent of the responding NAFTA party."[3] Canada's position that waiver defects may be cured with the consent of the Respondent indicates that such defects go to admissibility rather than jurisdiction.

5. The Tribunal should permit KBR and COMMISA to cure any defect found in their respective waivers for an additional reason: Mexico expressly agreed to toll the statute of limitations governing KBR's NAFTA claims in exchange for a lengthy procedural schedule on the waiver issue, a schedule which Mexico received, and which would, in the absence of the express promise given, deprive KBR of its ability to re-file its case. Mexico later inequitably attempted to curb the scope of its promise by claiming that it meant to toll the statute of limitations only with respect to the pending proceeding – not any re-filed proceeding – a promise which would be self-evidently worthless should the Tribunal find that KBR's or COMMISA's waiver is defective. In order for Mexico's promise to have any meaningful operation, KBR and COMMISA must be permitted to cure any defect this Tribunal may find with respect to their express waivers.

6. In sum, KBR's and COMMISA's waivers satisfy the requirements of Article 1121, but to the extent that this Tribunal finds a defect in these waivers, it should reject Mexico's attempts to deprive KBR of its right to NAFTA protection and afford KBR and COMMISA the opportunity to cure any waiver defect.

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1 Claimant's Reply on Preliminary Question of Waiver, §III ¶¶ 104-109.

2 **CLA-15**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002 ("*Waste Management II*") (holding that Waste Management was entitled to refile its NAFTA claim after curing the defect in its waiver). The United States has also recognized that defective waivers may be cured. See **CLA-16**, *Methanex Corporation v. United States of America*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, November 13, 2000, p. 77 (noting that "if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers.")

3 *KBR, Inc. v. The United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the Government of Canada Pursuant to NAFTA Article 1128 (hereinafter "Canada's Article 1128 Submission"), July 20, 2014, ¶ 6.

I. KBR's and COMMISA's Waivers Meet the NAFTA Article 1121 Requirements as Interpreted by the United States and Canada in Their Respective Article 1128 Submissions

A. The "Measure" at Issue in the New York and Luxembourg Proceedings is "Separate and Distinct" From the "Measures" Alleged as Breaches of NAFTA

7. KBR and COMMISA each expressly waived its right to initiate or continue any proceedings with respect to the measures KBR alleges to be a breach of NAFTA. Mexico's claim that such waivers must be deemed ineffective in light of the ongoing proceedings pending in New York and Luxembourg is meritless, as those proceedings fall outside the scope of proceedings that both the United States and Canada agree are governed by Article 1121.

8. Canada's Article 1128 submission states that the phrase "with respect to" within the meaning of Article 1121(b), must be broadly interpreted to be consistent with "one of the goals of Article 1121," which is "to avoid conflicting outcomes or lead to double redress for the same conduct or measure." Canada also acknowledges, however, that measures that are "separate and distinct" from or "incidental or tangential" to the measures alleged to be NAFTA breaches do not fall within the scope of proceedings subject to waiver.[4]

9. The United States has agreed with this position in its Article 1128 submissions in both this case and the *Detroit International* case. The United States' Article 1128 submission in *Detroit International*, annexed to its submission in this case, states that "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."[5] The United States also explained in that submission that "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."[6]

10. The measures making up the basis of KBR's NAFTA claim are (1) the Mexican courts' decision to deprive COMMISA of its valid ICC award (the "Annulment Decision"), and (2)

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[4] Canada's Article 1128 Submission, ¶ 10.

[5] **RL-019**, *Article 1128 Submission of United States, Detroit International Bridge Company v. Canada*, ¶ 6.

[6] *Id*.

PEP's improper calling of the performance bonds posted by KBR. In contrast, the only measure at issue in the New York and Luxembourg proceedings is the ICC award favorable to COMMISA (the "ICC Award") itself, which is unquestionably "separate and distinct" from the measures comprising the "factual predicate"[7] of KBR's NAFTA claim.

11. The Annulment Decision can, at most, be considered an "incidental and tangential" measure in relation to the Award and the New York and Luxembourg proceedings to enforce the ICC Award. The Annulment Decision did not make up the factual predicate of COMMISA's claim in the New York proceeding under the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"). In fact, the Annulment Decision had not even been issued at the time that COMMISA commenced its enforcement action in New York. Although the Annulment Decision was eventually brought to the attention of the New York court, it was raised by PEP as an affirmative defense to enforcement, which the New York court ultimately rejected. Nor did COMMISA's claim in the Luxembourg proceeding involve the Annulment Decision, as Luxembourg law does not take into account annulment decisions when deciding whether to confirm an arbitral award pursuant to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[8]

12. Similarly, PEP's improper calling of the performance bonds does not comprise the factual predicate of COMMISA's claim for confirmation of the ICC Award in either the New York or Luxembourg proceedings. With respect to the New York proceeding, PEP had not liquidated the performance bonds at the time that COMMISA commenced its confirmation action in New York. Moreover, although the New York court eventually included the amount of the liquidated bonds in its judgment confirming the ICC Award, the calling of the bonds cannot be reasonably considered to have played more than an "incidental or tangential role" in the New York proceeding. The Luxembourg proceeding involved no consideration at all of the liquidated bonds.

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[7] **RL-006**, *Waste Management I*, §27 (discussing that the term "measure" in NAFTA Article 1121 means the factual basis for a claim rather than the legal nature of the claim).

[8] **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 extraterritorial effect of the UAE annulment decision)).

13. Accordingly, Article 1121 as construed by the United States and Canada, does not require KBR and COMMISA to waive the New York and Luxembourg proceedings, as neither of the measures underpinning KBR's NAFTA claim can be considered any more than "incidental or tangential" to the measure underpinning the New York and Luxembourg proceedings, which were commenced for the limited purpose of recognizing the ICC Award.

14. Finally, as Canada has submitted in accordance with a prior NAFTA decision[9] "one of the goals of Article 1128 is to avoid conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure." The outcome of the New York and Luxembourg proceedings would not in any way conflict with KBR's claim in this arbitration that Mexico has breached NAFTA.

B. Enforcement Proceedings Under the New York and Panama Conventions Do Not Involve Claims "For Damages"

15. KBR and COMMISA also were not required to waive the New York and Luxembourg proceedings because such proceedings do not involve claims for damages. As Mexico stated in its Article 1128 submission in *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, "[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.*"[10] Mexico affirmed this interpretation in its Article 1128 submission in *Detroit International*, asserting that "Article 1121 precludes a claimant from simultaneously commencing or continuing proceedings *for damages* under Chapter Eleven and in any other *fora* […]"[11]

16. In fact, all three NAFTA State Parties appear to agree that the waiver requirement set forth by Article 1121(b) applies only to actions seeking damages, not other kinds of relief.[12]

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[9] **RL-009**, *International Thunderbird Gaming Corporation v. The United Mexican States (*UNCITRAL*)* Award, January 26, 2006 ¶ 118.

[10] **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).

[11] **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 (emphasis added).

[12] See **RL-004**, United States Statement of Administrative Action, p. 596 ("Article 1121 requires the investor … to waive the right to initiate or continue any actions in local courts or other *fora* relating to the disputed measure, except for actions for injunctive or other extraordinary relief."); Canada's Article 1128 Submission, ¶11

17. The limited scope of the New York and Luxembourg proceedings further underscores the inapplicability of Article 1121's waiver requirement with respect to those proceedings. COMMISA commenced the New York proceeding pursuant to the Panama Convention, which permits courts in enforcement jurisdictions very limited authority to either recognize or refuse to recognize a foreign arbitral award.[13] The scope of this authority does not include the jurisdiction to adjudicate liabilities between the parties or assess damages.[14] The Luxembourg court's authority was similarly limited under the New York Convention, pursuant to which COMMISA brought its confirmation action.[15] As neither the New York nor Luxembourg proceedings involve claims for "damages only," they are not subject to the waiver requirement set forth in Article 1121(b).

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

18. Lastly, the waiver requirement cannot be interpreted to require KBR and COMMISA to "waive" the continuation of the New York and Luxembourg proceedings because the discontinuation of those proceedings is currently within the exclusive control of PEP and Mexico. The New York and Luxembourg courts each issued binding decisions confirming the ICC Award *before* KBR filed its NAFTA claim on August 30, 2013. PEP has appealed the rulings of both courts, and KBR and COMMISA have no power to terminate PEP's appeals.

19. No NAFTA State Party has asserted in this case that Article 1121(b) should be interpreted to bar an investor's right to NAFTA protection in circumstances where the proceedings alleged to fall within the scope of the article are not within the control of the investor to waive. Indeed, such an interpretation would place investors such as KBR and COMMISA in an impossible situation and would contravene the very purposes of NAFTA. And there is no suggestion by any NAFTA State Party that Article 1121(b) may be interpreted to

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("[P]roceedings with respect to a measure alleged to breach the NAFTA are permitted before the courts and tribunals of the respondent NAFTA Party as long as such proceedings do not involve the payment of damages.").

13 Claimant's Reply on Preliminary Question of Waiver, ¶¶ 66-73.

14 *Id.* ¶ 34 (citing **Exhibit C-22**, *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007)).

15 **Exhibit C-36**, Legal Opinion of Professor Jan Paulsson (May 22, 2013).

require COMMISA to seek *vacatur* of the valid and binding court judgments rendered in its favor prior to KBR's filing of its NAFTA claim.

20. Accordingly, KBR and COMMISA were not required under Article 1121(b) to "waive" or otherwise take any action with respect to the New York and Luxembourg proceedings, which had both resulted in valid and binding judgments in COMMISA's favor *before* KBR's NAFTA claim was filed, and which are currently subject to the exclusive control of PEP and Mexico.

II. Should the Tribunal Find that KBR's and COMMISA's Waivers Are Defective, KBR and COMMISA Should Be Permitted to Cure Any Such Defect

A. The Issue of the Validity of KBR's and COMMISA's Article 1121 Waivers Goes to Admissibility, Not Jurisdiction

21. 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 NAFTA. Therefore, this Tribunal need not decide whether Article 1121's waiver requirement raises an issue of admissibility or jurisdiction. However, should the Tribunal decide to reach this issue, it should find that waiver is an admissibility requirement that is curable.

22. As a general matter, alleged defects in admissibility (which involve questions concerning the tribunal's "adjudicative power in relation to the specific claims submitted to it"[16]) are treated differently than alleged defects in jurisdiction (which question whether the parties consented to arbitrate at all) in that only the former may be cured.[17] The existence of a valid waiver concerns *when* the opportunity to arbitrate arises, not whether an arbitral forum is available at all.

23. Prior NAFTA decisions affirm this point. In *Waste Management II*, Mexico argued that where an investor initially files a NAFTA claim with a defective waiver, the investor should be barred from re-filing the same claim even after curing the waiver defect. Specifically, Mexico asserted in *Waste Management II* that "the effect of the first unsuccessful proceedings [*Waste Management I*] is to debar the Claimant from bringing any further claim with respect to the

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[16] **CLA-13**, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, Cambridge University Press (2009), ¶ 297 (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.").

[17] *Id.*

measure that is alleged to be a breach of NAFTA."[18] The tribunal, however, rejected that argument, holding that "the Claimant is not prevented from bringing the present proceedings for the reasons presented by the Respondent."[19] By permitting the claimant to cure its initially defective waiver, the *Waste Management II* tribunal's decision unequivocally demonstrates that the question of the validity of an investor's waiver is, in essence, one of admissibility, not jurisdiction.

24. Canada's Article 1128 submission is consistent with this interpretation. Canada's statement that "[a] claimant cannot *ex post facto* cure Article 1121 jurisdictional defects absent the express consent of the responding NAFTA party" concedes that a defective waiver may be cured.[20] This further underscores that the waiver requirement goes to admissibility and not jurisdiction.

25. Similarly the United States has acknowledged that waiver defects may be cured by consent. In *Methanex*, the United States acknowledged that, if the tribunal should "dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers."[21] Indeed, in that case, the United States agreed:

> in the interest of efficiency [that] if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, the United States consent in advance to the reconstitution of this Tribunal to be composed of its current members — on the condition that this Tribunal issue an order determining the arbitration to be duly commenced as of the date that Methanex submits the effective waivers.[22]

26. Finally, Mexico, within the context of this proceeding, also contemplated the possibility of curing any waiver defect that this Tribunal might find. In email correspondence sent to the Tribunal on March 24, 2014, Mexico — in its attempt to narrow the scope of its promise to toll

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[18] **CLA-15**, *Waste Management II*, ¶ 3.

[19] *Id.* ¶ 53.

[20] Canada's Article 1128 Submission, ¶ 6.

[21] **CLA-16**, *Methanex*, p. 77.

[22] *Id*.

the statute of limitations governing KBR's NAFTA claim (which is further discussed in Section B, below) — made the following statement:

> If Claimant contemplates "curing" its waiver, it must do so immediately, waiving the judicial proceedings at issue.[23]

27. It is thus apparent that all three NAFTA Parties agree that waiver defects may be cured under certain circumstances.

28. As discussed in KBR's First Waiver Submission, waiver should be considered in the same category as other procedural conditions precedent that are typically treated as admissibility issues, such as whether a party has exhausted local remedies or the alleged failure of new claims to remain within the scope of the initial notice of arbitration.[24] These issues, like that of waiver, concern, at their core, whether a claim is presently ripe and admissible, not whether arbitration is the proper forum for the resolution of the dispute.[25] In sum, these principles, prior NAFTA decisions involving waiver defects, and Canada's and the United States' Article 1128 submissions in this case, support KBR's position that a defect in waiver must be viewed as a curable defect affecting the admissibility of the claim, not arbitral jurisdiction.

B. Mexico Consented to Permit KBR and COMMISA to Cure Any Waiver Defect the Tribunal Might Find

29. As the validity of KBR' and COMMISA's waivers implicates admissibility rather than jurisdiction, should the Tribunal find the waivers defective, it need only permit KBR and COMMISA an opportunity to cure the waivers promptly. However, even if this Tribunal finds that Article 1121(b) sets forth a jurisdictional prerequisite, the Tribunal should still permit KBR and COMMISA to cure any defect that this Tribunal might find because Mexico gave its "express consent"[26] to allow KBR and COMMISA to cure any such defect when it agreed to toll

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[23] **Exhibit C-38**, Respondent's Email Correspondence of March 24, 2014 ("Si la Demandante contempla "subsanar" su renuncia, debe de hacerlo de inmediato, renunciando a los procedimientos judiciales en cuestion".)

[24] Claimant's Reply on Preliminary Question of Waiver, ¶ 108 (citing **CLA-14**, Jan Paulsson, *Jurisdiction and Admissibility*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, ICC Publishing (2005), p. 609).

[25] *Id.*

[26] Canada's Article 1128 Submission, ¶ 6.

the statute of limitations governing KBR's NAFTA claims. Mexico agreed to toll the statute of limitations in exchange for an extended procedural schedule, which would, without such agreement, have precluded KBR from re-filing its claim within the governing statute of limitations with a cured waiver. Refusing to permit KBR the opportunity to cure any waiver defect (should one be found) would be highly inequitable and result in irreparable prejudice to KBR by depriving KBR of NAFTA protection.

30. As this Tribunal is aware, during the first procedural call between the parties, Mexico confirmed its request[27] for a lengthy briefing schedule on the waiver issue, virtually ensuring that the statute of limitations for KBR's NAFTA claim would run before this Tribunal would have an opportunity to issue its decision. KBR's counsel expressed, as it had on prior occasions, KBR's concern that the extended schedule proposed by Mexico would deprive KBR and COMMISA of the opportunity to cure any defect the Tribunal might find with respect to KBR's and COMMISA's waivers if the statute of limitations for bringing KBR's NAFTA claim was not tolled, but offered to consider Mexico's request if Mexico agreed that the limitations period would be considered tolled as of the date that KBR filed its notice of arbitration. Specifically, Mr. Aguilar-Alvarez stated:

> Mr. Chairman, again, as I said, this issue [of waiver] has been extensively discussed before, the legal nature of the issue has not changed, we still maintain the position that 20 days is more than generous to address the issue. We would be prepared to consider additional time, but again we are concerned with the statute of limitations, so if Mexico were to agree that the statute of limitations has been tolled by filing the notice of arbitration, we could have that discussion.[28]

31. In response to this concern, Mexico expressly agreed to toll the statute of limitations governing KBR's NAFTA claim in order to accommodate the briefing schedule it sought, stating specifically that "we concur that the filing of the notice of arbitration suspends the [limitations] term."[29] The Tribunal confirmed with Mexico's counsel that Mexico would not be prejudiced in

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[27] **Exhibit C-37**, Claimant's Email Correspondence of March 3, 2014 (detailing the schedules proposed by Mexico and Claimant respectively).

[28] Audio Recording of Procedural Call of March 20, 2014, at 7:48.

[29] Audio Recording of Procedural Call of March 20, 2014, at 09:14, 09:23 and 09:48 ([Mr. Lopez (México's counsel)]: "Si bueno, efectivamente, coincidimos que la presentación del aviso de arbitraje suspende el término

extending the term, and that the limitations term would not run pending the Tribunal's determination of the preliminary waiver issue.[30] Finally, KBR's counsel requested the Tribunal "to record the agreement of the parties that the statute of limitations has been suspended in determining what the briefing schedule is going to be,"[31] and Mexico did not contest that request. Thus, Mexico's agreement that any curative submission would not be barred by the statute of limitations was clear. The Tribunal subsequently adopted Mexico's proposed schedule in the First Procedural Order entered on April 1, 2014.

32. Mexico subsequently attempted to curb the scope of that agreement, claiming that it had intended to toll the statute of limitations for the instant proceeding only, not any subsequent claim that KBR might file.[32] This "revised" offer would of course have done nothing to address KBR's concern – expressed on more than one occasion – that dragging out the proceedings for adjudication of the preliminary waiver issue could ultimately leave KBR shut out of the arbitral forum forever.

33. Permitting KBR and COMMISA the opportunity to cure any waiver defect is the only way to give meaning to Mexico's agreement to toll the statute of limitations. Having obtained its preferred schedule, Mexico should not be permitted to "revise" its initial promise in a manner that results in the very prejudice to KBR that the initial promise was intended to avoid: the deprivation of KBR's right to NAFTA protection.

34. Accordingly, should this Tribunal find a defect in KBR's or COMMISA's waivers, it should, in the interests of fairness and efficiency, permit KBR and COMMISA to cure any such defect within the context of this proceeding.

35. Even if the Tribunal is inclined to find that any such waiver defect is jurisdictional in nature (which, KBR maintains, it is not), the Tribunal should find that Mexico has expressly consented to permit KBR and COMMISA to cure any such defect by agreeing to toll the statute

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y consideramos que no habría ningún problema para efectos de poder [inaudible] la prórroga, digo este plazo [inaudible]").

30 *Id*. 09:27 ([Chairman]: "Entonces si he comprendido bien, señor Lopez, no tendría inconveniente en prorrogar el plazo, osea, el que digamos que la notificación de arbitraje pues está dentro de los límites y no corre plazo entre tanto".); *Id.* 09:47 ([Mr. Lopez (México's counsel)]: "Si, es correcto.")

31 *Id*. 10:22.

32 **Exhibit C-38**, Respondent's Email Correspondence of March 24, 2014.

of limitations governing the present NAFTA claim, and should find that any second notice of arbitration filed by KBR on behalf of itself and COMMISA must be considered timely if filed on or before the date that the Tribunal deems to represent the end of the tolled period.

III. Request for Relief on Preliminary Question

36. In light of the above, KBR requests that the Tribunal find that the waivers proffered by itself and COMMISA are proper under NAFTA Article 1121. If the Tribunal finds that the waivers were not proper, KBR requests that the Tribunal provide guidance as to what it would consider a proper waiver under the circumstances, and permit KBR and COMMISA to cure any waiver defect and continue the proceedings before this Tribunal. In the alternative, if the Tribunal finds that the waivers were not proper, and that such waiver defect amounts to a defect in the Tribunal's jurisdiction, KBR requests that the Tribunal acknowledge Mexico's express agreement to toll the three-year statute of limitations provided under NAFTA Articles 1116(2) and 1117(2) pending the Tribunal's determination of the waiver issue by holding that any revised submission filed by KBR may be considered timely on or before the date that the Tribunal considers to represent the end of the tolled period.

Very truly yours,

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