

**IN THE MATTER OF AN 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

**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**

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I. INTRODUCTION

1. Canada submits this Reply to the submissions of the Governments of the United States of America and the United Mexican States filed on February 14, 2014 pursuant to NAFTA Article 1128 (“U.S. Article 1128 Submission” and “Mexico Article 1128 Submission,” respectively).¹

2. The submissions of the United States and Mexico confirm Canada's interpretation of the NAFTA provisions at issue with respect to this Tribunal's jurisdiction.

3. With respect to the interpretation of Article 1121, Canada, the United States and Mexico agree that:

- There is no consent to arbitration under Article 1122(1), and hence no jurisdiction for a NAFTA tribunal, unless a claimant acts consistently with the conditions precedent to the submission of a claim to arbitration. This includes a requirement for the claimant to file a valid waiver and act consistently with that waiver by abstaining from initiating or continuing domestic proceedings with respect to a measure alleged to breach the NAFTA;
- The phrase “any proceedings with respect to a measure” in Article 1121(1)(b) and 2(b) is to be interpreted broadly as per its ordinary meaning and to give effect to the object and purpose of the provision; therefore, compliance with Article 1121 involves considering whether a measure alleged to breach the NAFTA plays more than an incidental or tangential role in the domestic proceeding and whether a measure impugned in the domestic proceeding is separate and distinct from a measure alleged to breach the NAFTA; and
- The phrase “proceedings...before an administrative tribunal or court under the law of the disputing Party” in Article 1121(1)(b) and 2(b) means that injunctive, declaratory or other extraordinary relief may only be sought from courts or tribunals of the respondent NAFTA Party.

4. The submissions of the United States and Mexico also confirm Canada's interpretation of the three-year time limitations provisions in Articles 1116(2) and 1117(2).² The NAFTA Parties all agree that:

¹ To complete the evidentiary record, Canada has included the legal authorities cited in the U.S. and Mexico Article 1128 Submissions not already submitted by the disputing parties as **RLA-60** to **RLA-64**.

² DIBC has abandoned its argument regarding the existence of a special agreement under the *Boundary*

- Continuing acts or a continuing course of conduct does not extend the strict three-year time limitations period in Article 1116(2) and 1117(2) for filing a NAFTA claim. A claim must be filed within three years from the date upon which the claimant *first* acquired knowledge of the alleged breach and damage regardless of whether the measure complained of is continuing or complete.

5. The agreement of the NAFTA Parties on how these provisions are to be interpreted should be considered decisive and given considerable weight by the Tribunal.

II. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 1121

6. Both the United States and Mexico agree with Canada's interpretation of the ordinary meaning and object and purpose of Article 1121. The concordant views of the NAFTA Parties confirm that DIBC's position is untenable.

A. The NAFTA Parties Agree that the Claimant Must File a Valid Waiver and Act Consistently with that Waiver by Discontinuing Domestic Proceedings Involving Payment of Damages

7. DIBC has argued that it need not do anything other than submit a written document with its Notice of Arbitration in order to comply with Article 1121 and perfect Canada's consent to arbitrate in Article 1122(1).³

8. The United States and Mexico agree with Canada that DIBC's position is contrary to the ordinary meaning and object and purpose of Article 1121. The United States writes:

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 proceedings with respect to the measure alleged to constitute a NAFTA breach in another forum.⁴

Waters Treaty. See DIBC Rejoinder Memorial on Jurisdiction, ¶ 13. As such, there is no need for Canada to further address this issue. Nevertheless, it should be noted that the United States agreed with Canada with respect to the jurisdiction of a NAFTA Chapter Eleven tribunal to adjudicate on the existence and/or violation of other international treaties. See U.S. Article 1128 Submission, ¶ 2.

³ DIBC Rejoinder Memorial on Jurisdiction, ¶ 30.

⁴ U.S. Article 1128 Submission, ¶ 5.

9. Under the heading “Obligation to Terminate Domestic Proceedings,” Mexico writes:

[T]he waiver obligation must be given substantive meaning. If a claimant acts inconsistently with its written waiver by continuing domestic proceedings, the claimant's conduct would demonstrate that the waiver has not actually been provided, and therefore that the conditions precedent for the submission of a NAFTA claim have not been satisfied.⁵

10. These views reflect the long-standing and consistent interpretation that all three NAFTA Parties have previously given to Article 1121.⁶ The NAFTA Parties agree that there is no consent to arbitrate, and hence no jurisdiction of the tribunal, when the claimant fails to provide a valid and effective waiver and when it continues to pursue domestic proceedings with respect to measures alleged to breach the NAFTA contrary to Article 1121 after filing its notice of arbitration.

11. The U.S. and Mexico Article 1128 Submissions not only endorse Canada's interpretation of Article 1121, but they also reflect the conclusions of the *Waste Management I* and *Commerce Group* tribunals.

⁵ Mexico Article 1128 Submission, ¶ 18.

⁶ See Canada Memorial on Jurisdiction, ¶ 84 n. 126, citing *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, February 4, 2005 at 36, **RLA-8** (endorsing the position of Mexico in *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Counter Memorial Regarding the Competence of the Tribunal of the United Mexican States, November 5, 1999: “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 proceedings with respect to the same measures in another forum. All three NAFTA Parties have confirmed in submissions to NAFTA tribunals that a claimant's failure to terminate parallel claims invalidates any purported waiver under Article 1121.”); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Submission of the Government of Canada, December 17, 1999, ¶¶ 7-8, **RLA-9** (In reference to the claimant's argument that “the defendant [NAFTA Party] – not the plaintiff – has the burden of presenting the waiver to an appropriate court,” Canada wrote: “The text of the NAFTA does not support this interpretation. Furthermore, such an interpretation contradicts the clear purpose of the provision which is to avoid duplication of recourse and cost. The investor has an obligation to waive its right to initiate or continue domestic legal proceedings concerning the measure which is alleged to be a breach of Chapter 11. It follows from a good faith interpretation of this obligation that the investor is required to act in conformity with the waiver that it is required to produce. In other words, the waiver must be made effective by the investor. *Waste Management, Inc.*'s interpretation would amount to giving the NAFTA provision a technical reading not consistent with the purpose of the provision.”)

12. The *Waste Management I* tribunal rejected the same argument DIBC makes here by affirming that a NAFTA claimant is “obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.”⁷

13. The *Commerce Group* tribunal came to the same conclusion. As noted in the U.S. Article 1128 Submission, the tribunal in that case was interpreting NAFTA Article 1121's equivalent provision in the Dominican Republic-Central America-U.S. Free Trade Agreement (“CAFTA-DR”) in light of the claimant's failure to terminate parallel domestic litigation proceedings as of the day it filed its notice of arbitration. After taking note of the concurring views of other non-disputing CAFTA-DR Parties,⁸ the tribunal specifically endorsed the *Waste Management I* tribunal's conclusion that a claimant must not only file a valid written waiver but must also “materially ensure that no other legal proceedings are ‘initiated’ or ‘continued’.”⁹ Rejecting the same argument that is advocated by DIBC here, the *Commerce Group* tribunal emphasized that it was the claimant which was “*under an obligation to discontinue*” the parallel domestic proceedings “in order to give material effect to their formal waiver” and failure to do so deprived the tribunal of jurisdiction over the dispute.¹⁰ In other words, *Commerce Group*,

⁷ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000 (hereinafter “*Waste Management I*, Award”), ¶ 19, **RLA-4**. DIBC misinterprets the observations of the tribunal in *Waste Management II* on this issue. See DIBC Rejoinder Memorial on Jurisdiction, ¶ 57, citing *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal regarding Mexico's Preliminary Objection, June 26, 2002, (hereinafter “*Waste Management II*, Decision on Preliminary Question”), **CLA-16**. In noting that a NAFTA tribunal is not “entitled or required to ensure actual compliance with the waiver,” the *Waste Management I* tribunal was merely observing that it cannot compel the claimant to discontinue domestic proceedings. Rather, as both *Waste Management* tribunals recognized, a NAFTA tribunal can and must “determine *both* that the waiver conformed to NAFTA requirements *and* that it was a genuine waiver, expressing the true intent of the Claimant at the time it was lodged” (*Waste Management II*, Decision on Preliminary Question, ¶ 10, emphasis added). When a claimant fails to act in conformance with its waiver, the remedy is for the NAFTA tribunal to decline jurisdiction.

⁸ *Commerce Group Corp. et al. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011 (hereinafter “*Commerce Group*, Award”), ¶¶ 81-82, **RLA-6** (quoting Costa Rica and Nicaragua's Non-Disputing Party Submissions, both of which concurred with the position of El Salvador that failure to discontinue conflicting domestic proceedings deprived the tribunal of jurisdiction.).

⁹ *Commerce Group*, Award, ¶¶ 83-84, **RLA-6**, citing *Waste Management I*, Award, ¶ 20.

¹⁰ *Commerce Group*, Award, ¶ 102, **RLA-6** (“Claimants were accordingly under an obligation to

just like *Waste Management I*, put the onus on the claimant, not the respondent State, to ensure domestic proceedings were discontinued.

14. For the Tribunal to decline jurisdiction for failure to terminate parallel domestic proceedings is not “acting on behalf” of Canada in domestic proceedings, as DIBC suggests.¹¹ It simply flows from the Tribunal’s competence to decide on its jurisdiction by determining whether the condition precedent to Canada’s consent to arbitration has been met. As stated by the *Waste Management I* tribunal: “it thus falls to this Tribunal...when it comes to ascertaining the existence of a genuine show of intent in line with the terms required in the waiver, to evaluate the conduct of the waiving party vis-à-vis effective compliance therewith.”¹²

B. The NAFTA Parties Agree that “proceedings with respect to the measure” is to be Interpreted Broadly in Accordance with its Ordinary Meaning and the Object and Purpose of Article 1121

15. DIBC advocates the narrowest possible meaning of “proceedings with respect to the measure” as to require a waiver of claims only if the exact measure (as defined by DIBC) is specifically challenged and identified as the specific basis of its claim in domestic proceedings. DIBC argues that unless both the NAFTA and domestic proceedings are “challenging the same government action,” there is no conflict with Article 1121 and the proceedings can continue in parallel.¹³

discontinue those proceedings in order to give material effect to their formal waiver”), ¶ 107 (“the Tribunal concludes that Claimants were obliged to discontinue the proceedings before the El Salvador courts relating to the revocation of environmental permits, and by not doing so, Claimants did not act in accordance with the requirements of the Waiver Provision.”), ¶ 115 (“the waiver is invalid as it lacks effectiveness due to Claimant’s failure to discontinue the proceedings before El Salvador’s Court of Administrative Litigation of the Supreme Court.”).

¹¹ DIBC Rejoinder Memorial on Jurisdiction, ¶ 53.

¹² *Waste Management I*, Award, ¶ 14, **RLA-4**. See also *id.*, ¶ 20 (“[T]his Tribunal will therefore have to ascertain whether Waste Management did indeed submit the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.”) (emphasis added).

¹³ DIBC Counter-Memorial on Jurisdiction, ¶ 156.

16. The United States and Mexico agree with Canada that DIBC's interpretation is incorrect.

17. First, the NAFTA Parties agree that the phrase "with respect to" is to be interpreted broadly.¹⁴ As the United States and Mexico explain, "with respect to" in the context of Article 1121 is synonymous with "relating to," "concerning," and "as regards; with reference to."¹⁵ This is evident from the plain meaning of the phrase "with respect to" in all three official NAFTA languages.¹⁶ This is also evident from the United States NAFTA Statement of Implementation, which states "Article 1121 requires the investor...to consent in writing to arbitration, and to waive the right to initiate or continue any actions in local courts or other fora *relating to* the disputed measure...".¹⁷ Canada's NAFTA Statement of Implementation also supports a broad interpretation in its description that the investor and its enterprise must "waive their right to initiate or continue legal proceedings...*concerning* the measure in question."¹⁸ The phrase "with respect to" demands an expansive interpretation in accordance with its ordinary meaning.

¹⁴ Canada Memorial on Jurisdiction, ¶ 94; Canada Reply Memorial on Jurisdiction, ¶ 75; U.S. Article 1128 Submission, ¶ 6; Mexico Article 1128 Submission, ¶ 7. See also *Canfor Corporation v. United States of America*, Reply on Jurisdiction of Respondent United States of America, August 6, 2004 at 10-12, **RLA-61**, cited in Mexico Article 1128 Submission, ¶¶ 7-8 and cited in U.S. Article 1128 Submission, ¶ 6.

¹⁵ U.S. Article 1128 Submission, ¶ 6 (referring to its previous pleadings in *Consolidated Softwood Lumber Proceedings*, Reply Post-Hearing Submission of Respondent United States of America, March 10, 2006 at 2 n. 2, **RLA-60**; *Canfor Corporation v. United States of America*, Reply on Jurisdiction of Respondent United States of America, August 6, 2004 at 12, **RLA-61** ("Thus, in the context of Article 1121(1)(b), the United States considered "with respect to" to be synonymous with "relating to.""); Mexico Article 1128 Submission, ¶ 8. See also Canada Memorial on Jurisdiction, ¶ 94; Canada Reply Memorial on Jurisdiction, ¶ 76.

¹⁶ See Canada Reply Memorial on Jurisdiction, ¶ 75 n. 131. See also *Consolidated Softwood Lumber*, Decision on Preliminary Question, ¶ 201 n. 214 (citing use of "with respect to" in the French and Spanish versions of NAFTA), **RLA-12**.

¹⁷ The North American Free Trade Agreement Implementation Act, United States Statement of Administrative Action, November 1993 (hereinafter "U.S. Statement of Administrative Action") at 147, **RLA-65** (emphasis added).

¹⁸ The North American Free Trade Agreement, Canadian Statement of Implementation, January 1994 (hereinafter "Canada's Statement of Implementation") at 154, **RLA-66** (emphasis added).

18. The *Consolidated Softwood Lumber* tribunal also concluded that “with respect to” should be interpreted broadly.¹⁹

19. Second, all three NAFTA Parties agree that a broad construction of “with respect to” is consistent with the object and purpose of Article 1121. The U.S. and Mexico Article 1128 Submissions confirm that one of the goals of Article 1121 is to avoid “conflicting outcomes (and thus legal uncertainty).”²⁰ To achieve this purpose, the NAFTA Parties put in place a waiver requirement to ensure that they would not have to defend against claims relating to government measures in multiple proceedings at the same time and from having to continue to defend against such claims after the NAFTA arbitration is concluded.²¹

20. Finally, the U.S. and Mexico Article 1128 Submissions support Canada’s position on the scope of Article 1121. The United States submits that the measures at issue in the NAFTA arbitration cannot be more than “tangentially or incidentally related to” the measures at issue in the domestic proceedings and that Article 1121 requires the termination of domestic proceedings unless the measures at issue can be “teased apart” from the measures at issue in the NAFTA arbitration as “separate and distinct.”²² Mexico submits that Article 1121 applies where the application of the measure alleged to breach NAFTA Chapter Eleven, or its implications on a claimant’s rights, are put into question or are relevant to the determination of the domestic proceedings.²³ Thus, consistent with what Canada has already argued,²⁴ compliance with Article 1121 involves considering

¹⁹ *Consolidated Softwood Lumber*, Decision on Preliminary Question, ¶ 201, **RLA-12**.

²⁰ U.S. Article 1128 Submission, ¶ 6 and Mexico Article 1128 Submission, ¶ 12, *citing Thunderbird*, Award, ¶ 118, **RLA-5**. See Canada Memorial on Jurisdiction, ¶ 105; Canada Reply Memorial on Jurisdiction, ¶ 76.

²¹ U.S. Article 1128 Submission, ¶ 6; Mexico Article 1128 Submission, ¶¶ 10-14.

²² U.S. Article 1128 Submission, ¶ 6.

²³ Mexico Article 1128 Submission, ¶ 6.

²⁴ See e.g., Canada Memorial on Jurisdiction, ¶ 95 (“a domestic proceeding that requires for its disposition making determinations of facts or determinations of legal rights, or that might award compensation, “in regards to or with reference to” a measure that is alleged to breach the NAFTA”); Canada Reply Memorial on Jurisdiction, ¶ 78 (“[A] determination as to whether domestic proceedings are ‘with respect to’ a measure alleged to breach the NAFTA involves considering whether the measures in question play more than just an incidental or insignificant role in both proceedings. Any domestic proceeding in which the

whether a measure alleged to breach the NAFTA plays more than an incidental or tangential role in the domestic proceeding and whether a measure impugned in a domestic proceeding is separate and distinct from a measure alleged to breach the NAFTA.

C. The NAFTA Parties Agree that Injunctive, Declaratory or Other Extraordinary Relief May Only Be Sought From an Administrative Tribunal or Court of the Respondent NAFTA Party

21. DIBC has argued that Article 1121 allows it to seek injunctive, declaratory or other extraordinary relief against Canada in U.S. (or Mexican) courts with respect to measures alleged to breach NAFTA as long as the U.S. (or Mexican) court “applies” Canadian law.²⁵

22. The U.S. and Mexico Article 1128 Submissions confirm that DIBC’s position is contrary to the ordinary meaning and object and purpose of Article 1121. The NAFTA Parties agree that the exception in Article 1121(1)(b) and 2(b) (“proceedings for injunctive, declaratory or other extraordinary relief...before an administrative tribunal or court under the law of the disputing Party”) applies only to proceedings before courts and tribunals of the respondent NAFTA Party.²⁶

23. This is the only logical reading of the provision in its entirety: a claimant cannot pursue claims for damages “before any administrative tribunal or court under the law of any Party” (that is, Canada, the United States and Mexico). Thus, the only reason to refer later in the provision to “an administrative tribunal or court under the law of *the disputing Party*” when making an exception for injunctive and declaratory relief is to signify that

measure, its application, or its implications on a claimant’s rights are put into question or are relevant to the determination of the proceeding is ‘with respect to’ the measure under Article 1121”).

²⁵ DIBC Rejoinder Memorial on Jurisdiction, ¶¶ 79-85.

²⁶ U.S. Article 1128 Submission, ¶ 7, *citing* Canada Memorial on Jurisdiction, ¶ 102 and *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, First Article 1128 Submission of the Government of Mexico, October 16, 2000, ¶ 7, **RLA-13**; Mexico Article 1128 Submission, ¶¶ 15-16. Canada had also pointed to the statement in the Article 1128 submission by Mexico in the *Loewen* arbitration as evidence of Mexico’s understanding of Article 1121(1)(b) (See Canada Memorial on Jurisdiction, ¶ 101, quoting “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.”) (emphasis added).

the tribunal or court from which such relief is sought is within the respondent NAFTA Party.²⁷ Otherwise, there would be no need for a distinction between the two types of proceedings and Article 1121(1)(b) and 2(b) could have been terminated after the phrase “not involving the payment of damages.”

24. Furthermore, as the U.S. Article 1128 Submission explains, the purpose of the injunctive or declaratory relief exception is to allow the claimant to preserve its rights with respect to measures by the respondent Party during the NAFTA arbitration.²⁸ While it makes sense that the NAFTA Parties would agree to such remedies in their own courts with respect to their own measures, it would be a radical conclusion to find that the NAFTA Parties would consent in advance to be subject to injunctive or declaratory orders from a foreign court for breaches of their own domestic law.

25. Finally, DIBC's attempt to use preliminary NAFTA draft texts to show otherwise is, as the U.S. and Mexico Article 1128 Submissions point out, unavailing.²⁹ There is no interpretive need to refer to the NAFTA drafts at all given that the ordinary meaning of the text is clear.³⁰ Nevertheless, the U.S. Article 1128 Submission reiterates what Canada already noted with respect to the preliminary NAFTA drafts: they do not indicate that a choice was left to legal scrub whether to allow injunctive proceedings to occur in the

²⁷ U.S. Article 1128 Submission, ¶ 7; Mexico Article 1128 Submission, ¶¶ 15-16; Canada Reply Memorial on Jurisdiction, ¶ 90. This ordinary meaning interpretation was shared by Professor (now Judge of the International Court of Justice) Greenwood QC in his expert opinion filed in *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Opinion of Christopher Greenwood, Q.C., March 26, 2001, ¶ 44, **RLA-67** (“[NAFTA] Article 1121 provides that a claimant cannot, at one and the same time, carry on litigation in a national court in any of the NAFTA States and invoke Chapter 11 arbitration in respect of the same complaint, except that it may seek certain forms of non-monetary relief in the courts of the *respondent* State at the same time as invoking Chapter 11.”) (emphasis in original).

²⁸ U.S. Article 1128 Submission, ¶ 7. The Article 1128 submission by Mexico in *Loewen* made a similar observation: “the purpose of permitting injunctive relief to be pursued against the measure complained of is to permit the claimant to seek a particular form of domestic relief that, if granted, may obviate the international claim.” *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, First Article 1128 Submission of the Government of Mexico, October 16, 2000, ¶ 11, **RLA-13**.

²⁹ U.S. Article 1128 Submission, ¶ 7; Mexico Article 1128 Submission, ¶¶ 15-17.

³⁰ Article 32 of the *Vienna Convention on the Law of Treaties* (**RLA-10**) permits recourse to supplementary means of interpretation only where the application of Article 31 “leaves the meaning ambiguous or obscure,” “leads to a result which is manifestly absurd or unreasonable,” or “to confirm the meaning resulting from the application from the application of Article 31.”

courts of any NAFTA Party versus in the courts of the respondent Party.³¹ DIBC's isolation of the phrase "under the domestic law" from the remainder of the draft text which was not bracketed ascribes a speculative intention to the negotiators which is not supported by the draft or any other evidence.

III. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLES 1116(2) AND 1117(2)

26. DIBC has argued that Articles 1116(2) and 1117(2) do not prevent a claimant from filing a claim more than three years past the date on which it first acquired knowledge of the alleged NAFTA breach and loss if the measure complained of is a continuing course of conduct. DIBC argues that "one can 'first acquire' knowledge of a 'breach' arising from a continuing act multiple times."³²

27. Both the United States and Mexico agree with Canada that DIBC's interpretation of Article 1116(2) and 1117(2) is incorrect. The long-standing and concordant views of the NAFTA Parties rejecting the proposition that a continuing course of conduct renews the three-year limitations period should be considered decisive by the Tribunal.

28. The U.S. Article 1128 Submission states that "a continuing course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2)."³³ This is the same position expressed in previous non-disputing Party submissions in *Merrill & Ring* and *Bilcon*,³⁴ in NAFTA arbitrations like *Apotex*³⁵ and also reflects the U.S. NAFTA Statement of Administrative Action ("all claims must be brought within three years").³⁶ Similarly, Mexico's statement that "the three-year limitations period cannot be

³¹ U.S. Article 1128 Submission, ¶ 7 n. 10. See also Canada Reply Memorial on Jurisdiction, ¶ 93.

³² DIBC Rejoinder Memorial on Jurisdiction, ¶ 149.

³³ U.S. Article 1128 Submission, ¶ 3.

³⁴ *Merrill & Ring Forestry, L.P. v. Canada* (UNCITRAL) Article 1128 Submission of the United States, July 14, 2008, ¶¶ 2, 8, **RLA-17**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc. v. Government of Canada* (UNICTRAL), 1128 Submission of the United States of America, April 19, 2013, ¶ 12, **RLA-19**.

³⁵ *Apotex Inc. v. The United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, June 14, 2003 (hereinafter "*Apotex*, Award"), ¶¶ 325-331, **RLA-33**.

³⁶ U.S. Statement of Administrative Action at 146, **RLA-65**. This is consistent with Canada's Statement of Implementation, which repeated the language of 1116(2) and 1117(2). See Canada's Statement of

extended by an allegation that the alleged violation has continued” reflects its own long-standing position.³⁷ The NAFTA Parties agree, as the *Feldman*, *Grand River*, and *Apotex* tribunals all confirmed, that the three-year deadline for filing a claim is a “clear and rigid” limitations defence which is not subject to any “suspension,” “prolongation,” or “other qualification.”³⁸

29. In contrast, DIBC’s continuing breach theory relies almost exclusively on the *UPS* decision, which as Canada has previously noted, is viewed as incorrect by all three NAFTA Parties on this specific issue and has not been endorsed by other NAFTA tribunals.³⁹ As the United States points out, “under the *UPS* tribunal’s reading of Article 1116(2), for any continuing course of conduct the term “first acquired” would in effect mean “last acquired,” given that the limitations period would fail to renew only after an investor acquired knowledge of the state’s *final* transgression in a series of similar and related actions.”⁴⁰

30. DIBC’s attempt to find support in other cases also falls flat. For example, DIBC argues that *Feldman* supports the doctrine of continuing acts generally and DIBC’s case

Implementation at 153, **RLA-66**.

³⁷ Mexico Article 1128 Submission, ¶ 21. See also *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of Mexico, April 2, 2009, **RLA-18**; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Respondent’s Counter-Memorial on Preliminary Questions (Sept. 8, 2000), ¶¶ 189, 199, **CLA-34**.

³⁸ U.S. Article 1128 Submission, ¶ 3; *Merrill & Ring Forestry, L.P. v. Canada* (UNCITRAL) Article 1128 Submission of the United States, July 14, 2008, ¶ 6, **RLA-17**; *Merrill & Ring Forestry, L.P. v. Canada* (UNCITRAL) Article 1128 Submission of Mexico, April 2, 2009, **RLA-18**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF)99/1, Award, December 16, 2002 ¶ 63, **RLA-14**; *Grand River Enterprises Six Nations Ltd. v. United States* (UNCITRAL) Decision on Objections to Jurisdiction, July 20, 2006 (hereinafter “*Grand River, Jurisdiction Decision*”), ¶ 29, **RLA-15**; *Apotex*, Award, ¶ 304, **RLA-33**.

³⁹ Canada Memorial on Jurisdiction, ¶¶ 210-212; Canada Reply Memorial on Jurisdiction, ¶ 163.

⁴⁰ U.S. Article 1128 Submission, ¶ 3, citing *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, July 14, 2008, ¶ 10, **RLA-17**. See also *Merrill & Ring Forestry, L.P. v. Canada* (UNCITRAL) Article 1128 Submission of Mexico, April 2, 2009, **RLA-18**.

specifically.⁴¹ But Mexico points out that DIBC has misrepresented the facts of that case, which, as Canada has already argued, does not support DIBC's theory.⁴²

31. DIBC's attempt to explain away *Apotex* is also unavailing. DIBC says that the tribunal determined that a challenged decision by the U.S. Federal Drug Administration ("FDA") was "a one-time act, not that the continuing acts doctrine is inconsistent with the NAFTA's time limitation provisions."⁴³ This is incorrect. In dismissing *Apotex*'s claim challenging the decision of the FDA regarding one of its products (Pravastatin) as time-barred, the tribunal stated:

Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a "continuing breach" by the United States, or "part of the same single, continuous action," in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure. As the Respondent [United States] has forcefully argued, nothing in the text or jurisprudence of NAFTA Chapter Eleven suggest that a party can evade NAFTA's limitation period in this way.⁴⁴

32. The *Apotex* tribunal had the same view as that reflected in the U.S. and Mexico Article 1128 Submissions: the NAFTA three-year time bar applies regardless of whether the act is continuing or not.⁴⁵

⁴¹ DIBC Rejoinder Memorial on Jurisdiction, ¶ 158.

⁴² Mexico Article 1128 Submission, ¶¶ 19-20. See Canada Reply Memorial on Jurisdiction, ¶ 164. DIBC believes also *Grand River* "says nothing one way or the other regarding the doctrine of continuing acts." DIBC Rejoinder Memorial on Jurisdiction, ¶ 156. But the *Grand River* tribunal rejected the contention that claims based on similar and related actions could extend the three-year time limitations period. See *Grand River*, Jurisdiction Decision, ¶ 81, **RLA-15**. DIBC also misrepresents the findings in *Pac Rim* (DIBC Rejoinder Memorial on Jurisdiction, ¶ 160), which specifically found the time-bar question to be "irrelevant" because the date of the dispute was determined to be within the limitations period. See *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, June 1, 2012, ¶ 3.38, **CLA-30** ("the three-year time limit under CAFTA as invoked by the Respondent become irrelevant for the purpose of deciding the Ratione Temporis issue; and it is not necessary for the Tribunal to address their respective submissions any further here.")

⁴³ DIBC Rejoinder Memorial on Jurisdiction, ¶ 154.

⁴⁴ *Apotex*, Award, ¶¶ 325-326, **RLA-33**.

⁴⁵ DIBC's attempt in its Rejoinder Memorial to rely on United States court judgments interpreting certain domestic statutes for support of its interpretation of Articles 1116(2) and 1117(2) serves only to demonstrate the weakness of its position. DIBC Rejoinder Memorial on Jurisdiction, ¶ 150. The judgements cited by DIBC are irrelevant under the NAFTA and international law. NAFTA Article 1131 (Governing Law) states that a NAFTA Chapter Eleven tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

33. The NAFTA three-year time limitation provision exists to ensure claims are brought within a finite period of time from the moment an investor first acquired knowledge of the breach and loss. DIBC's attempt to argue that continuing acts creates an exception for this clear-cut rule finds no support in Articles 1116(2) and 1117(2).

IV. THE CONCORDANT VIEWS OF THE NAFTA PARTIES ON THE INTERPRETATION OF ARTICLES 1116(2), 1117(2) AND 1121 SHOULD BE GIVEN CONSIDERABLE WEIGHT BY THE TRIBUNAL

34. Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT") describes the general rules for the interpretation of treaties. Article 31(3)(a) and (b) provide:

(3) There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [...]

35. As Mexico notes in its Article 1128 Submission, where the Parties have the same interpretation of a provision of the NAFTA (including through Article 1128 non-disputing Party submissions), this constitutes a subsequent agreement and/or subsequent practice as understood by the *Vienna Convention on the Law of Treaties* which should be taken into account by a NAFTA tribunal.⁴⁶ This is consistent with the previously expressed views of the NAFTA Parties.⁴⁷

36. It should be uncontroversial that shared views of the NAFTA Parties on the interpretation of a provision of Chapter Eleven be accorded considerable weight. NAFTA tribunals like *Bayview* and *Cattlemen* have given due regard to the views of the non-disputing NAFTA Parties.⁴⁸ The *Commerce Group* tribunal did the same in the context of

⁴⁶ Mexico Article 1128 Submission, ¶ 22.

⁴⁷ See e.g., *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, February 4, 2005 at 36-37, **RLA-8** (common position of the three NAFTA Parties in different NAFTA Chapter Eleven arbitrations constitute a "subsequent agreement" within the meaning of Article 31(3)(a) of the VCLT); Canada Memorial on Jurisdiction on Jurisdiction, ¶ 199; Canada Reply Memorial on Jurisdiction, ¶¶ 160-161.

⁴⁸ *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1) Award, June

the CAFTA-DR.⁴⁹ Nevertheless, DIBC disputes both the status and the bona fides of such common interpretations by the NAFTA Parties.

37. First, DIBC suggests there needs to be a “jointly issued interpretation of the NAFTA” for there to be a “subsequent agreement” under the *Vienna Convention*.⁵⁰ But as Canada has already pointed out, under international law, the existence of a subsequent agreement turns not on its form but on whether the treaty parties intend their understanding to constitute an agreed interpretation of the provision in question.⁵¹ As the International Law Commission noted with respect to VCLT Article 31(3)(a), “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation.”⁵²

38. Furthermore, as the *Cattlemen* tribunal recognized, “concordant, common and consistent” actions of the Parties with respect to the interpretation of a treaty provision also establishes subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention*.⁵³ The International Law Commission noted that “the importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.”⁵⁴

19, 2007, ¶¶ 100, 106-107, **RLA-24** (referring to the submission of the United States pursuant to Article 1128 to confirm the interpretation of Article 1101); See also *Canadian Cattlemen for Fair Trade v. United States* (UNCITRAL) Award on Jurisdiction, January 28, 2008 (hereinafter “*Cattlemen*, Jurisdictional Award”), ¶ 188-189, **RLA-55** (concluding that the concordant views of the NAFTA Parties constituted “subsequent practice”).

⁴⁹ *Commerce Group*, Award, ¶¶ 81-82, **RLA-6**.

⁵⁰ DIBC Rejoinder Memorial on Jurisdiction, ¶ 163.

⁵¹ *Methanex Corporation v. United States of America* (UNCITRAL) Award, August 3, 2005, Part II, Chapter B, ¶ 20, **RLA-23** (concluding that “no particular formality is required for there to be an ‘agreement’ under Article 31(3)(a) of the Vienna Convention.”). See also Canada Reply Memorial on Jurisdiction, ¶ 161 n. 262 and authorities cited therein.

⁵² United Nations, *Yearbook of the International Law Commission 1966* (New York: 1976), (U.N. General Assembly Doc. A/CN.4/SEA/A/1966/Add.1), Vol. II (hereinafter “*ILC Yearbook*”) at 221, ¶ 14, **RLA-68**.

⁵³ See *Cattlemen*, Jurisdictional Award, ¶¶ 183, 188-189 and authorities cited therein, **RLA-55**.

⁵⁴ *ILC Yearbook* at 221, ¶ 15, **RLA-68**.

39. In this case, while the concurrence of the NAFTA Parties regarding the interpretation of Article 1121 and the three-year time bar in Articles 1116(2) and 1117(2) is sufficient to be a “subsequent agreement” as envisioned by VCLT Article 31(3)(a), the fact that these views are long-standing and consistent with the positions each has taken in previous disputes, including those in which they were not the respondent NAFTA Party, also establishes the “subsequent practice” as understood by Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*.

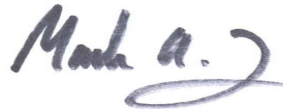
40. Second, DIBC dismisses the concordant interpretation of the NAFTA Parties as mere “pronouncements by attorneys for the NAFTA States” that are “not surprising,” “pro-respondent” and “self-interested.”⁵⁵ This accusation is unfounded. NAFTA Chapter Eleven is designed to balance the rights of investors from Canada, the United States and Mexico with the terms and conditions upon which the NAFTA governments agreed to establish the extraordinary remedy of advance consent to international arbitration. The fact that the NAFTA Parties are unanimously opposed to DIBC’s proffered interpretation of Articles 1116(2), 1117(2) and 1121 simply reflects the fatal defects inherent in DIBC’s arguments.

⁵⁵ DIBC Rejoinder Memorial on Jurisdiction, ¶¶ 163, 165.

V. CONCLUSION

41. Canada respectfully submits that the Tribunal should give considerable weight to the views of the United States and Mexico expressed in their NAFTA Article 1128 Submissions. Based thereon and the arguments Canada has submitted previously, DIBC's claim should be dismissed by the Tribunal for lack of jurisdiction.

Respectfully submitted on behalf of
the Government of Canada
this 3rd day of March, 2014



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