BEFORE THE HONORABLE TRIBUNAL
IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 1976 UNCITRAL ARBITRATION RULES

RESOLUTE FOREST PRODUCTS INC.
Claimant

and

GOVERNMENT OF CANADA
Respondent

SUBMISSION OF MEXICO PURSUANT NAFTA ARTICLE 1128

June 14, 2017

1. The Government of Mexico makes this submission pursuant to NAFTA Article 1128 with respect to certain questions of interpretation of the NAFTA. Mexico takes no position on the facts of this dispute. The fact that a question of interpretation arising in the proceeding is not addressed in this submission should not be taken to constitute Mexico's concurrence or disagreement with a position taken by either of the disputing parties.

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

Burden of proof

2. Mexico concurs with paragraphs 11, 13 – 17 of Canada's Reply Memorial.[1] When an investor brings a claim under NAFTA Chapter Eleven, it "bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute."[2]

3. As Canada has explained, in *Methanex v. United States* the tribunal recognized that consent to arbitration provided for in Article 1122 cannot be established unless claimant shows that "(i) that Chapter Eleven 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). Where these requirements are met by the claimant, Article 1122 is satisfied, and the NAFTA Party's consent to arbitration is established".[3] [Emphasis added]

4. The tribunal in *Apotex v. the United States* similarly stated that the claimant "bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction." The United States has also expressed support for this position. In *Spence International Investments v. Costa Rica* the United States, as a non-disputing Party, submitted that "the claimant bears the burden to establish jurisdiction under [the investment] Chapter…, including with respect to Article 10.18.1" and therefore "the claimant must prove the necessary and relevant facts (*i.e.*, the date when such knowledge of breach and loss was first acquired) to

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1 *Resolute Forest Products Inc. v. Government of Cana* (UNCITRAL), Canada's Reply Memorial on Jurisdiction, 29 March 2017 ("Reply Memorial").

2 Reply Memorial, para. 10.

3 Reply Memorial, para. 11. In *Merrill & Ring Forestry v. Canada*, the Tribunal agrees with the *Methanex* Tribunal adding: "The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence". *Merrill & Ring Forestry v. Canada* (UNCITRAL), Decision on a Motion to Add a New Party, 31 January 2008, para. 29. Also, in *Bilcon v. Governement of Canada* the Tribunal held the following in relation to the jurisdiction of a tribunal under NAFTA Chapter 11: "The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter eleven, to an overall enhancement of their exposure to remedial actions by investors." *Bilcon v. Governement of Canada* (UNCITRAL), Award on Jurisdiction and Liability, 17 March 2015, para.229.

establish that its claims fall within the three-year claims limitation period."[4] The jurisdiction of a NAFTA Chapter Eleven tribunal cannot be presumed, it has to be established and the claimant has the burden of proving the necessary facts.

5. In *Emmis International Holding v. Hungary*, the Tribunal held with respect to the burden of proof at the jurisdicitonal stage:

> 171. The Tribunal must decide [the question of whether the Claimant owned an investment capable of expropriation] finally at the jurisdictional stage on the balance of probabilities. The Claimants bear the burden of proof. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defences. As the tribunal held in *Saipem v Bangladesh:*
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> > In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the jurisdictional phase and make a *prima facie* showing of Treaty breaches.
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> 172. This passage touches upon two types of jurisdictional proof. The first relates to questions of fact that must be definitively determined at the jurisdictional stage. The second involves questions of fact that go to the merits, which the Tribunal must ordinarily not prejudge, unless they are plainly without foundation. This latter question necessarily involves assessing whether the alleged conduct of the Respondent is capable of constituting a breach of the substantive protections of the investment treaty so as to fall within the jurisdiction of the Tribunal *ratione materiae* but this has to be determined on a prima facie basis only.
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> 173. In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation. This task lies fully within the ambit of the jurisdictional phase. This burden is to be contrasted with the need to establish on a prima facie basis at the jurisdictional phase that the Respondent breached the treaty. This question is based on whether the alleged unlawful conduct giving rise to the treaty breach—if it can be established in the merits phase—is capable of falling within the treaty provisions invoked.[5]

Knowledge of loss and damage

6. Mexico concurs with Canada's analysis in paragraphs 37-42 of its Memorial on Jurisdiction. In particular, Mexico agrees that "the plain language of Articles 1116(2) and 1117(2) does not require a claimant to acquire knowledge of the full extent of the loss or damage resulting

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[4] *Spence International Investments v. Costa Rica (ICSID),* Submission of the United States as non-disputing party, 17 April 2015, para. 10

[5] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi ésSzolgáltató Kft. V. Hungary*, (ICSID), Award, 16 April 2014, para 171- 173.

from the alleged breaches in order to start the time limitation to submit a claim to arbitration".[6] As recognized by the tribunal in *Mondev v. United States*, "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[7] The United States has also expressed its support for this finding.[8]

Article 1101(1)

7. Article 1101(1) states:

> This Chapter applies to measures adopted or maintained by a Party relating to:
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> (a) investors of another Party;
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> (b) investments of investors of another Party in the territory of the Party; and
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> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

[Emphasis added].

8. Mexico concurs with Canada that : "[i]n order for a measure to be within the scope and coverage of NAFTA Chapter Eleven, Article 1101(1) requires that the impugned measure be both "adopted or maintained by a Party" and "relating to" an investor or its investments. The fact that a measure has some indirect economic effect on an investor is not a sufficient legal nexus to ground a claim under Chapter Eleven. More is needed. The Claimant must establish a legally significant connection between the impugned measure and it or its investment. It must also establish that the measures were adopted or maintained by a Party".[9] [Emphasis added]

9. The *Methanex* Tribunal had previously interpreted the phrase "relating to" in Article 1101(1). It rejected the claimant's interpretation of that phrase stating that "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex's interpretation derives from the fact that it imposes no practical limit". [10]

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[6] *Resolute Forest Products Inc. v. Government of Cana* (UNCITRAL), Canada's Memorial on Jurisdiction, 22 December 2016, para. 42.

[7] *Mondev International Ltd. v. United States of America* (ICSID), Award, 11 October 2002, para. 87.

[8] *Grand River Enterprises Six Nations, LTD., Jerry Montour, Kenneth Hill and Arthur Montour, Jr., v. United States of America* (UNCITRAL) Objections to Jurisdiction of Respondent United States of America, 5 December 2005, page 36 ("Articles 1116(2) and 1117(2) provide that the limitations period begins at the time claimants "*first* acquired, or should have *first* acquired" knowledge of any alleged breach and loss or damage. In construing these articles, the NAFTA Chapter Eleven tribunal in *Mondev Int'l Ltd. v. United States of America* properly concluded that "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear." Article 14 of the International Law Commission's Articles on State Responsibility is in accord. That Article provides that a breach such as that alleged by claimants occurs "at the moment when the act is performed, even if its effects continue.") [footnotes omitted]

[9] *Resolute Forest Products Inc. v. Government of Cana* (UNCITRAL), Canada's Statement of Defence, 1 September 2016, paragraph 73.

[10] *Methanex Corporation v. United States of America*, (UNCITRAL), Partial Award of the Tribunal, 7 August 2002, paragraph 137.

10. The *Methanex* tribunal agreed with the submission of the United States observing that "[t]he alternative interpretation advanced by the USA does impose a reasonable limitation: there must a legally significant connection between the measure and the investor or the investment".[11] México has shared this interpretation in previous cases[12], which is consistent with Canada's analysis in paragraphs 83-94 of its Memorial on Jurisdiction in the present case.

11. Mexico respectfully submits that the *Methanex* Tribunal correctly interpreted the phrase "relating to" as it appears in NAFTA Article 1101(1) and concurs with the submissions of Canada and the United States to that effect.

Article 1102(3)

12. Article 1102(3) provides that:

> 3. The treatment accorded by a Party under paragraphs 1 and 2 [of Article 1102] means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

13. The level of treatment required to a state or a province of a NAFTA Party under Article 1102(3) is the most favorable treatment accorded by that state or province to investors and to investments of investors of that NAFTA Party.[13] Mexico has previously expressed the view, and reiterates here, that "[t]he treatment accorded by one province is not the standard against which another province is to judge".[14] Canada expressed a similar position in its Reply Memorial: "… It is untenable to argue that the NAFTA Parties intended for the treatment by one state or province would become the national standard for the entire country."[15] Mexico concurs in that statement.

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[11] Id. at paragraph 139.

[12] *Methanex Corporation v. The United States of America*, Submission of the United Mexican States pursuant Article 1128, 15 May 2001, paras. 6 and 7 ("The United States contends that this language requires that there be a 'legally significant connection between the complained of measures and the specific investor … or its investments'… Mexico agrees with the position of the United States, and disagrees with Methanex's contention that measures that merely 'affect' investors or investments are covered by Chapter Eleven"); *Pope and Talbot Inc. v. The Government of Canada*, Submission of the United Mexican States pursuant Article 1128, 2 December 1999, para. 20 ("To read Article 1101 so broadly as to receive claims based on mere effect would negate the Parties' clear intention to confine the extraordinary right of direct action to measures relating to investors or investments that are alleged to contravene Section A of Chapter Eleven. The allegation that a Party has breached the investment protections of the NAFTA is an extremely serious one, not to be made lightly.").

[13] In a similar manner, the U.S. Statement of Administrative Action describes the content of Article 1102(3) as follows: "Article 1102 provides that the treatment provided by state and provincial governments to investors from other NAFTA countries and their investments must be no less favorable than the most favorable treatment they provide to domestic investors and their investments". Chapter Eleven: Investment, A. Summary of NAFTA provisions; b. Non-discrimination and Minimum Treatment Standards, pages, 140-141.

[14] *Pope and Talbot Inc. v. The Government of Canada*, Submission of the United Mexican States pursuant Article 1128, 3 April 2000, para. 65.

[15] Reply Memorial, para. 161.

Article 2103

14. Mexico agrees with Canada's interpretation of Article 2103 in relation to Article 1105 and 1110 of NAFTA: "*NAFTA Article 2103(1) makes clear that NAFTA shall not apply to taxation measures except as set out in that Article. Article 1105 claims against taxation measures are not permitted. Furthermore, Article 2103(6) stipulates that an investor may not bring an expropriation claim under Chapter Eleven with respect to a taxation measure if it has not sought a determination that the measure is an expropriation from the NAFTA Parties tax authorities at the time it filed its Notice of Intent to Submit a Claim to Arbitration*". [16]

Respectfully submitted,

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[16] Canada's Statement of Defense, para. 78.