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

RESOLUTE FOREST PRODUCTS INC.,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

(PCA Case No. 2016-13)

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

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

2. Without a NAFTA Party's consent to an investor-State arbitration brought pursuant to Chapter Eleven, a tribunal lacks jurisdiction over that investment dispute.[1] Under Article 1122, the scope of a NAFTA Party's consent to arbitrate an investment dispute is limited by the procedural conditions set out in Chapter Eleven. Those procedures include, *inter alia*, the requirements of Articles 1116 and 1117.[2] Thus, a tribunal must find that a claim satisfies the

[1] *Ethyl Corp. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction ¶ 59 (June 24, 1998) ("*Ethyl* Award on Jurisdiction") (holding that "[t]he sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration rules is the consent of the Parties").
[2] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002) ("*Methanex* First Partial Award") ("In order to establish the necessary consent to arbitration, it is sufficient to show

requirements of Articles 1116 and/or 1117 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) the claim.

3. Articles 1116(2) and 1117(2) prohibit an investor from making, and the Tribunal from hearing, "a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." These Articles thus impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.

4. The NAFTA Parties consistently raise, and tribunals generally address, the time bar defense as a jurisdictional objection.[3] For example, in *Glamis Gold*, the tribunal found that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976).[4] In *Apotex I & II*, the parties treated the United States' time-bar objection as a jurisdictional issue, and the tribunal expressly found that Article 1116(2) deprived it of "jurisdiction *ratione temporis*" with respect to one of the claimant's alleged breaches.[5] Interpreting an identical limitations period provision under the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA"), the *Spence* tribunal likewise addressed the time-bar defense as a jurisdictional issue.[6]

(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). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.").

[3] *See, e.g.*, *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 242 (Mar. 17, 2005) ("*Bilcon* Award"); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 3 (July 20, 2006) ("*Grand River* Decision on Objections to Jurisdiction"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 11 (Dec. 6, 2000); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶¶ 46-47 (Dec. 16, 2002) ("*Feldman* Award") (noting that the tribunal had identified five "preliminary jurisdictional questions" on which the parties were to submit written pleadings, including "[w]hether the Respondent was entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2)"). Although the tribunal in *Pope & Talbot* found Canada's time-bar objection in that case was "in the nature of an affirmative defence", it provided no reasoning for reaching this conclusion. *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record ¶ 11 (Feb. 24, 2000) ("*Pope & Talbot* Award in Relation to Preliminary Motion"). Moreover, no subsequent NAFTA Chapter Eleven tribunal has followed this holding.

[4] *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005).

[5] *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) ("*Apotex I & II* Award").

[6] *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award ¶¶ 235-236 (Oct. 25, 2016) ("*Spence* Interim Award"). It is not significant for purposes of determining the jurisdictional nature of the limitations period that the CAFTA places the limitations period provision under an Article (Article 10.18) with the heading "Conditions and Limitations on Consent of Each Party", while the NAFTA places the limitations period provisions under Articles that do not explicitly refer to the consent of the Treaty Parties. As noted above, Article 1122 incorporates by reference "the procedures set out" in the NAFTA, and the limitations period is jurisdictional as it places limitation on the authority of a tribunal to act on the merits.

5. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Eleven,[7] a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[8]

6. The limitations period set out in Articles 1116(2) and 1117(2) requires a claimant to submit a claim to arbitration within three years of the "date on which the" investor or enterprise "first acquired, or should have first acquired, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the investor or enterprise. This limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[9]

7. An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized,[10] a continuing course of conduct by the host State does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the NAFTA Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2).[11]

8. With regard to knowledge of "incurred loss or damage" under Articles 1116(2) and 1117(2), the term "incur" broadly means to "to become liable or subject to."[12] Therefore, an

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[7] *Apotex I & II* Award ¶ 150. *See Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . ."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) ("It is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."); *see also Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

[8] *Spence* Interim Award ¶¶ 163, 239, 245-246.

[9] *Grand River* Decision on Objections to Jurisdiction ¶ 29; *Feldman* Award ¶ 63; *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

[10] *See Grand River* Decision on Objections to Jurisdiction ¶ 81.

[11] Although a legally distinct injury can give rise to a separate limitations period under Articles 1116(2) and 1117(2), as the *Grand River* tribunal made clear, when a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression" in that series. *Id.*

[12] Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/incur. *See also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds").

investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the *Grand River* tribunal correctly reasoned:

> In many sources, the verb ["incur"] is regularly taken to mean "become liable to." Judicial dicta likewise suggest that one incurs a loss when liability accrues; a person may "incur" expenses before he or she actually dispenses any funds. In the Tribunal's view, this interpretation corresponds most closely to the ordinary meaning of the term. The verb "to incur" in ordinary usage is often used to describe situations where there is no immediate outlay of funds by the affected party. A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[13]

9. In *Pope & Talbot*, the tribunal interpreted Articles 1116(2) and 1117(2) as requiring that "the loss has occurred" rather than "could or would occur."[14] This interpretation is not incompatible with the holding in *Grand River*, as a loss occurs when it is incurred, rather than when the financial impact of the loss is realized. Moreover, an unduly restrictive reading of the *Pope & Talbot* tribunal's interpretation is unwarranted by its findings. The tribunal did not find that the claimant in that case must have actually purchased, or paid the higher prices for, the wood chips before it had incurred loss or damage. Rather, the tribunal's findings indicated that the date on which the "necessity to purchase" the more expensive wood chips arose determined when the loss or damage was incurred.[15]

10. With regard to knowledge of the "alleged breach" under Articles 1116(2) and 1117(2), a "breach" of an international obligation exists "when an act of th[e] State is not in conformity with what is required of it by that obligation."[16] In the context of Article 1110, a breach is manifest where a NAFTA Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 1110(1). In order to establish the first point, the claimant must demonstrate that the government measure(s) at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[17]

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[13] *Grand River* Decision on Objections to Jurisdiction ¶ 77 (citations omitted). *See also Spence* Interim Award ¶ 213 (finding "the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred").

[14] *Pope & Talbot* Award in Relation to Preliminary Motion ¶ 12.

[15] *Id.*

[16] Articles on Responsibility of States for Internationally Wrongful Acts, art. 12, U.N. Doc. A/RES/56/83 (2001).

[17] *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 100-102 (June 26, 2000). *See also Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 357 (June 8, 2009) ("[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: '[I]t must first be determined if the Claimant was radically deprived of the

11. Thus, with respect to an expropriation claim, a claimant has actual or constructive knowledge of the "alleged breach" once it has (or should have had) knowledge of all elements required to make a claim under Article 1110 – including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking.[18] That date, however, need not coincide with the last of the government measures that are alleged to have harmed the claimant's investment. For example, a claimant may have actual or constructive knowledge that previous measures in the series already expropriated its investment. Similarly, a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value.[19] Rather, as noted above and in paragraph 7, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under Article 1110.

Article 1101(1) ("Relating to" Requirement)

12. Article 1101(1) requires that the challenged measures adopted or maintained by a NAFTA Party "relate to" an investor of another NAFTA party, or to that investor's investments. The "relating to" requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a legally significant connection between the measure and the investor or its investment.[20] Otherwise, untold numbers

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economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.' The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures 'substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.'") (citations omitted); *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 149-154 (Jan. 12, 2011); *Feldman* Award ¶ 152; *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sept. 18, 2009) ("*Cargill* Award") (holding that expropriation under customary international law requires "a radical deprivation of a claimant's economic use and enjoyment of its investment").

[18] With the exception of Article 1110(1)(d), the other elements of an Article 1110 expropriation accrue, if at all, at the time of the taking. Even with respect to Article 1110(1)(d), where, at the time of the taking, a State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. *See Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶¶ 71-72 (Oct. 11, 2002). Thus, only when a State provides a process for fixing adequate compensation but ultimately fails to promptly determine and pay such compensation does a breach of the compensation obligation occur subsequent to the taking.

[19] *See Spence* Interim Award ¶¶ 264-265 (finding that claimants had at least constructive knowledge of the expropriation no later than the dates of the government's decrees of expropriation, and arguably on the dates of the government's declarations of public interest, in respect to each property, notwithstanding that claimants remained in possession of the properties); *id*. ¶ 298 (finding that "the relevant question is not whether the MINAET was the last line of measures affecting the Claimants' property rights but rather when did the Claimants first acquire knowledge of the breach"). *See also International Technical Products Corp. v. Islamic Republic of Iran*, Case No. 302, Award No. 196-302-3 (Oct. 24, 1985), 9 IRAN-U.S. CL. TRIB. REP. 206, 241 (1985) ("What is decisive is the time by which Claimants had irreversibly lost possession and control of the property.").

[20] *See Methanex* First Partial Award ¶ 147 (finding that "the phrase 'relating to'. . . signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them"). *See also Bayview Irrigation District, et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award ¶ 101 (June 9, 2007); *Bilcon* Award ¶ 240.

of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 1101(1) threshold.[21] As the *Methanex* tribunal aptly observed, "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[22]

13. Whether a challenged measure bears a "legally significant connection" to a foreign investor or investment depends on the facts of a given case. Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a "legally significant connection" requires a more direct connection between the challenged measure and the foreign investor or investment.

14. Thus, for example, the *S.D. Myers* tribunal found that "the requirement that the import ban be 'in relation' to SDMI and its investment in Canada is easily satisfied," given that the measure "was raised to address specifically the operations of SDMI and its investment."[23] In *Bilcon*, the tribunal found a legally significant connection where the challenged measure was the rejection by Nova Scotia and the Canadian federal government of a quarry project that was to be developed and operated pursuant to an agreement between the claimants and their Canadian joint-venture partner.[24] The *Cargill* tribunal found that the import permit requirement at issue "directly affected" and "constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico."[25] And while the *Methanex* tribunal held that the facts in that case did not meet the "legally significant connection" standard, it found that the claimant's allegation that the Governor of California *intended* to penalize foreign producers of methanol (such as the claimant) through measures directed at MTBE producers could, if proven, satisfy the legally significant connection standard.[26]

Article 1102(3) (National Treatment by States/Provinces)

15. As a general matter, the national treatment obligation under Article 1102 does not prohibit a NAFTA Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Rather, the obligation prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that

[21] NAFTA Chapter Eleven tribunals have consistently found that the mere effect of a challenged measure on a claimant, without more, does not satisfy the "relating to" requirement of Article 1101(1). *See*, *e.g.*, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award ¶ 6.13 (Aug. 25, 2014) (finding "something more than a mere 'effect' from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)" and that the *Cargill* tribunal was not seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the tribunals in *Methanex* and *Bayview*).

[22] *Methanex* First Partial Award ¶ 137.

[23] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Partial Award ¶ 234 (Nov. 13, 2000).

[24] *Bilcon* Award ¶¶ 5, 12, 237, 239, 241. During the licensing process, the claimants acquired the entire partnership. *Id*. ¶ 8.

[25] *Cargill* Award ¶¶ 173, 175.

[26] *Methanex* First Partial Award ¶¶ 151-159. While the *Cargill* tribunal did not explicitly conduct a "relating to" analysis with respect to the other government measure at issue – a tax on soft drinks and related products, but not directly on HFCS – the tribunal had found earlier in its Award that this measure "conditioned a tax advantage on the use of domestically produced cane sugar *for the very purpose* of affecting the sale of HFCS . . . ." *Cargill* Award ¶ 2 (emphasis added).

are "in like circumstances." Any suggestion to the contrary misconstrues the obligation as one to provide nationally uniform treatment. The Parties, all of whom are geographically, politically and economically diverse nations, did not intend such a result.[27]

16. Article 1102(3) pertains to state and provincial measures only, and thus serves to determine what "treatment" by a state or province is the relevant reference point. The provision recognizes that states and provinces may have different standards for in-state (or in-province) and domestic out-of-state (or out-of-province) investors or their investments. Where a state or province accords different treatment to in-state (or in-province) investors or their investments and domestic out-of-state (or out-of-province) investors or their investments, investors from another NAFTA Party in like circumstances, or their investments, are entitled to receive the better of the treatment accorded by the state or province.[28]

17. However, Article 1102(3) should not be construed as preventing a state or province from adopting or maintaining measures that apply only to investors or their investments operating (or seeking to operate) in that state or province. An investor cannot rest its claim under Article 1102(3) on the fact that a domestic enterprise operating in another state or province receives a different or greater benefit or is subject to a different or lesser burden unless it is "in like circumstances" with that enterprise. Whether such measures constitute less favorable "treatment" accorded to the foreign investor (or its investment) in "like circumstances" on the basis of nationality is a fact-specific inquiry at the merits phase.[29]

Article 2103 (Taxation Measures)

18. NAFTA Article 2103(1) generally excludes taxation measures from the NAFTA's provisions: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." Article 2103 includes, however, several exceptions to this general exclusion. For example, Article 2103(4)(b) specifically subjects certain taxation measures to the national

[27] *See, e.g., Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Submission Respecting Post-Hearing Article 1128 Submissions Filed by the United Mexican States and the United States of America ¶¶ 24, 27-28 (June 1, 2000) ("[A]s the NAFTA parties indicate, Article 1102 does not prevent the NAFTA Parties from implementing location-based measures to achieve regulatory objectives. Where location-based measures exist, NAFTA Article 1102 is not breached simply because an investment *within* the location is not accorded the same treatment accorded investors or investments *outside* the location.") (emphasis added); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Supplemental Submission of the United Mexican States, at 3, 6 (May 25, 2000) ("Mexico concurs in the view that Article 1102 does not prevent the NAFTA Parties from implementing location-based measures to achieve regulatory objectives."); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 5 (Apr. 7, 2000) ("The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Any suggestion to the contrary misconstrues the obligation to provide 'national treatment' – whose object and purpose are to prevent nationality-based discrimination – as an obligation to provide 'nationally uniform treatment.'").

[28] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1 (1993) at 140-141 ("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.").

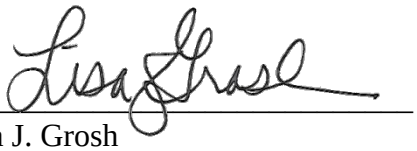
[29] *See United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Award ¶ 83 (May 24, 2007).

treatment and most-favored-nation treatment requirements of Articles 1102 and 1103, and Article 2103(6) specifically subjects, in certain circumstances, taxation measures to the provisions of Article 1110 relating to expropriation. By implication, taxation measures are not subject to any Chapter Eleven obligations, including those embodied in Article 1105, that are not expressly identified as exceptions to the Article 2103(1) general exclusion of taxation measures from the NAFTA.

19. Article 2103 applies to all "taxation measures." NAFTA Article 201 defines a "measure" as "any law, regulation, procedure, requirement or practice." A "practice" in this context includes the application of, or failure to apply (or the enforcement of or failure to enforce) a tax. Accordingly, with respect to a claim under Article 1110 alleging that an expropriation has occurred, Article 2103 does not create a distinction between a taxation measure imposed on a foreign investor or investment as a means of allegedly expropriating its investment, and a taxation measure that advantages a domestic investor or investment as a means of allegedly expropriating the foreign investor's investment.

20. Article 2103(6) states that Article 1110 "shall apply to taxation measures except no investor may invoke that Article as a basis for a claim" to arbitration where the appropriate competent taxation authorities have determined that the challenged taxation measure "is not an expropriation." In order to ensure that the appropriate taxation authorities can make this determination, the provision imposes a jurisdictional requirement that, before submitting a claim for expropriation challenging a taxation measure, a claimant must "refer the issue of whether the taxation measure is not an expropriation for determination to the competent authorities." Moreover, a claimant may only submit an Article 1110 claim involving this issue to arbitration under Article 1120 if, within the period of six months, "the competent authorities do not agree to consider the issue, or having considered it, fail to agree that the measure is not an expropriation."

Respectfully submitted,



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June 14, 2017