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

TENNANT ENERGY, LLC

Claimants

AND

GOVERNMENT OF CANADA

Respondent

(PCA Case No. 2018-54)

SECOND SUBMISSION OF THE UNITED MEXICAN STATES

COUNSEL FOR THE UNITED MEXICAN STATES:
Orlando Pérez Gárate

ASSISTED BY:

Secretaría de Economía
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1. Pursuant to Article 1128 of the North America Free Trade Agreement (NAFTA), Mexico makes this submission on questions of interpretation of the NAFTA. In this submission, Mexico does not take a position 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.

Compliance with NAFTA Article 1116 requirements is a matter of jurisdiction

2. The NAFTA Parties consented to arbitrate a claim under Chapter 11 provided that a claimant submits a claim "in accordance with the procedures set out in [the] Agreement" (Article 1122(1)). Failure to comply with Article 1122(1) results in the absence of a NAFTA Party's consent and thus, in the tribunal's lack of jurisdiction.

3. Article 1116 sets forth requirements that the claimant must meet to establish the NAFTA Party's consent contained in Article 1122(1). The tribunal in *Methanex v. the United States* underscored the importance of complying with Article 1116, among other provisions, to satisfy Article 1122(1) and accordingly to establish a tribunal's jurisdiction:

> In order to establish the necessary consent to arbitration [under Chapter 11], it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[1]

4. Mexico concurs with Canada that fulfillment of Article 1116's requirements is one of the conditions that must be met to establish a NAFTA Party's consent.[2] Therefore, compliance with Article 1116 is a matter of jurisdiction, not admissibility.[3]

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[1] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (7 August 2002).

[2] Canada's Memorial on Jurisdiction (21 September 2020), ¶¶ 55 – 56.

[3] The distinction between jurisdiction and admissibility in International Law is relevant and its legal effects are different, as Professor George Abi-Saab has made it clear:

"The consent of the parties cannot go beyond the objective limits of the general jurisdiction of the organ, but can restrict its jurisdiction further within these objective limits, by the parties subjecting their consent to additional limits, conditions or reservations.

The requirement to ascertain the existence and scope of consent, while strict and exacting in international law, does not mean the restrictive interpretation of the jurisdictional title […] But it does not mean either its extensive interpretation […] Interpretation is limited here to the establishment of the reality and extent of the consent of the party or parties, at the time it was given.

Generically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.

It is true that these conditions were adjusted to the specificities of international law, and some additional ones were developed, by way of custom. But none of these conditions has anything to do with the determination of the scope of consent whether to the general or the special jurisdiction of tribunals […]" [Emphasis added]

5. With respect to the burden of proof, when an investor brings a claim under NAFTA Chapter 11, it bears the burden of proving that a NAFTA Party has consented to arbitration and that the tribunal has jurisdiction over the dispute. The tribunal in *Apotex v. the United States* stated that a claimant "bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction."[4] The jurisdiction of a NAFTA Chapter 11 tribunal cannot be presumed, it has to be established and the claimant has the burden of proving the necessary facts and fulfillment of the specific legal requirements.

NAFTA Article 1116(1) requires the existence of an investor of a Party at the time of the alleged breach

6. Mexico agrees with Canada that Articles 1101(1) and 1116(1), set a temporal limitation on a NAFTA tribunal's jurisdiction, requiring a claimant to demonstrate that it was an investor of a Party[5] when the alleged breach occurred.[6]

7. Article 1101(1) has been correctly described as "the gateway leading to the dispute resolution provisions of Chapter 11".[7] Article 1101(1) informs the scope of Article 1116(1) by setting a threshold connection between a claimant bringing the claim and the challenged measure that must be met (i.e., the existence of an investor of a Party at the time of the alleged breach). Under Section A, there is no obligation owned to a claimant in the absence of the aforementioned connection. Thus, no claim can be submitted to arbitration under Articles 1116(1).[8]

NAFTA Article 1116(2) establishes a strict three-year limitation period triggered by a real or constructive knowledge of the alleged breach and loss or damage

8. The NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements established in NAFTA Chapter 11, including Article 1116(2). Under Chapter 11, a tribunal's jurisdiction *rationae temporis* is reliant on a claimant's compliance with

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Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting Opinion, Georges Abi-Saab, ¶¶ 13, 16, 18 and 19.

[4] *Apotex Inc. v. United States of America* (UNCITRAL), Award on Jurisdiction and Admissibility (14 June 2014) ¶ 150.

[5] Article 1139 defines an "investor of a Party" as a "Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".

[6] Canada's Memorial on Jurisdiction, ¶¶ 64 – 67.

[7] *Methanex Corporation v. United States of America* (UNCITRAL), First Partial Award, 7 August 2002, ¶ 106. Other NAFTA Tribunals have recognized the relevance of Article 1101(1): *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 136 ("Article 1101, by its terms, applies to the entirety of Chapter Eleven, including the procedural provisions of Section B. Article 1101 unambiguously refers to 'this Chapter,' which comprised both Section A, the substantive investment protections, and Section B, the investment dispute resolution mechanism"), and *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 252 ("Article 1101(1) establishes both the scope and coverage of the substantive protections accorded to investors and investments (Section A of Chapter 11) as well as the scope of the rights to submit disputes to arbitration under Chapter Eleven (Section B of Chapter 11)").

[8] In *Mesa*, the tribunal explained that "investment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted […] Accordingly, this Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an "investor" holding an "investment". *Mesa award,* ¶¶ 326 – 327.

the requirement to submit its claim to arbitration within three years of the date that it first acquired, or ought to have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

9. NAFTA Tribunals, such as *Grand River v. the United States* and *Feldman v. Mexico* have recognized that there is a "clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification" introduced by Article 1116(2).[9] In *Mobil v. Canada*, the tribunal recognized that three NAFTA Parties have consistently uphold this approach:

> By preventing claims being brought against a NAFTA Party after more than three years, it guarantees for all three States a degree of certainty and finality. Their submissions in several earlier NAFTA arbitrations make clear the importance which they attach to that guarantee while the awards themselves highlight that the limitation period is "clear and rigid".[10]

10. Despite attempts by many claimants to circumvent the three-year statute of limitations on the grounds of continued violation, NAFTA tribunals have consistently rejected this line of argumentation. For example, in *Mobil v. Canada* the tribunal stated:

> Finally, apart from UPS, Mobil's continuing breach argument has attracted comparatively little support in the jurisprudence of NAFTA arbitration tribunals. While Mobil rightly points out that none of the awards on this subject concerned facts directly comparable to those in the present case, it is now over ten years since the award in UPS and the absence of any subsequent endorsement of that tribunal's views on continuing breach means that, at the very least, they should be treated with caution.[11]

11. Article 1116(2) provides that the three-year limitation period is triggered (1) when an investor first acquired knowledge of the alleged breach and loss or damage, or (2) when an investor should have first acquired knowledge of the alleged breach and loss or damage. The knowledge required under Article 1116(2) is actual knowledge or constructive knowledge. The first concept refers to a situation in which the Claimant had actual knowledge, while the second refers to an obligation of "reasonable care or diligence" imposed to the investor. In *Grand River v. the United States*, the tribunal referred to the constructive knowledge in the following terms:

> "Constructive knowledge" of a fact is imputed to person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of "constructive notice." This entails notice that is imputed to a person, either from

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[9] *Grand River Enterprise Six Nations Ltd. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction (*Grand River*), 20 July 2006, at ¶ 29; and *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 63 ("[T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension […], prolongation or other qualification.").

[10] *Mobil Investments Canada Inc. v. Canada* (Mobil Investments), Decision on Jurisdiction and Admissibility (ICSID Case No. ARB/15/6) ¶ 146. 2 july 2018.

[11] Id., ¶ 161.

> knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge.[12]

12. With respect to the knowledge of damages or loss, it is not necessary that the claimant acquires knowledge of the full extent of losses or damage to trigger the three-year limitation period. The tribunal in *Mondev v. the United States* reasoned that "[a] claimant may know that it has suffered loss or damage even if the extent or quantification is still unclear, is sufficient to trigger the limitation period."[13]

13. As it is a matter of jurisdiction *ratione temporis*, it is up to the claimant to establish that its claim falls within the three-year limitation period. This view is shared by all three NAFTA Parties and has been confirmed by the NAFTA courts:

> The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their Article 1128 submissions, that the claimant has to establish its case on this and other points.[14]

14. Therefore, Article 1116(2) bars claimants from bringing claims based on alleged NAFTA violations that occurred more than three years prior to the submission of a request for arbitration.

Respectfully,

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General Director of the Legal Office of International Trade

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[12] *Grand River*, ¶ 59. The tribunal in *Grand River* aligned with other tribunals noting that "other NAFTA and ICSID arbitration tribunals … have emphasized that agreements intended to protect international investment are not substitutes for prudence and diligent inquiry in international investors' conduct of their affairs." ¶ 67.

[13] *Mondev International Ltd. v. the United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 87.

[14] *Resolute Forest Products Inc. v. Government of Canada* ("Resolute"), PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 85.