

IN THE ARBITRATION UNDER CHAPTER TEN OF
THE UNITED STATES-PERU TRADE PROMOTION AGREEMENT AND
THE UNCITRAL ARBITRATION RULES

BACILIO AMORRORTU (USA),

Claimant

-and-

THE REPUBLIC OF PERU,

Respondent

PCA CASE NO. 2020-11

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Peru Trade Promotion Agreement (“U.S.-Peru TPA” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a tribunal regarding the interpretation of the Agreement. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Expedited Review Mechanisms in U.S. International Investment Agreements

2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven concluded that it lacked authority to rule on the United States’ preliminary objection that, even accepting all of the claimant’s allegations of fact, the claims should be dismissed for “lack of legal merit.”¹ The tribunal ultimately dismissed all of claimant’s claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.²

3. In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary

¹ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Partial Award ¶¶ 109, 126 (Aug. 7, 2002) (“*Methanex Partial Award*”) (quoting U.S. submission).

² *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part VI (Aug. 3, 2005) (deciding that the tribunal lacked jurisdiction over any of the claims and, even if the tribunal had jurisdiction, the claims would have failed on the merits).

objections in a manner that allows for efficient resolution, including with respect to objections that a claim must fail “as a matter of law.”

Article 10.20.4 of the U.S.-Peru TPA

4. Article 10.20.4 provides that:

4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal’s competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

(Footnote omitted.)

5. Article 10.20.4 authorizes a respondent to make “any objection” that, “as a matter of law,” a claim submitted is not one for which the tribunal may issue an award in favor of the claimant. Paragraph 4 clarifies that its provisions operate “[w]ithout prejudice to a tribunal’s authority to address other objections as a preliminary question.” Paragraph 4 thus provides a further ground for dismissal, in addition to “other objections,” such as preliminary objections to the tribunal’s competence. Consistent with the “without prejudice” clause, a tribunal retains the

authority to hear preliminary objections to competence asserted under the applicable arbitration rules.

6. Subparagraph (a) requires that a respondent submit any such objection “as soon as possible after the tribunal is constituted,” and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 5 of Article 10.20, which authorize a respondent, “within 45 days after the tribunal is constituted,” to make an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence.

7. Subparagraph (b) states that a tribunal “shall suspend any proceedings on the merits, . . . and issue a decision or award on the objection[.]” This mandatory requirement with respect to objections that a claim fails as a matter of law complements the tribunal’s discretion, under the applicable arbitration rules,³ to address objections to competence as a preliminary matter.⁴

8. Subparagraph (c) states that, for any objection under paragraph 4, a tribunal “shall assume to be true” the factual allegations supporting a claimant’s claims. The tribunal “may also consider any relevant facts not in dispute.” The factual allegations must, nevertheless, be sufficient to show (assuming they are true) that a claim satisfies all legal requirements under the Agreement. This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.

9. Subparagraph (d) states that the respondent “does not waive any objection as to competence . . . merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.” Subparagraph (d) confirms that a respondent is not required to request a preliminary decision on an objection to competence when invoking the procedures under paragraph 4 (or paragraph 5). That is, the applicable arbitration rules permit, but do not require, a respondent to seek a preliminary decision on any objections to competence, and paragraph 4 does not alter those rules.

10. In sum, paragraph 4 was intended to supplement, not limit, the tribunal’s authority under the available arbitration rules to decide preliminary objections, such as competence objections, separately from the merits. Thus, if a respondent makes a preliminary objection under paragraph 4, the tribunal also retains the authority under the applicable arbitration rules to hear any preliminary objections to competence. Indeed, reasons of economy and efficiency will often weigh in favor of competence objections being decided preliminarily and at the same time as objections made under paragraph 4. This is consistent with the Agreement’s text, context, and object and purpose.

³ Art. 10.16.3 of the Agreement authorizes the claimant to designate the ICSID Arbitration Rules, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules agreed by the disputing parties.

⁴ Article 41 of the ICSID Arbitration Rules, Article 45 of the ICSID Additional Facility Rules, Article 21 of the 1976 UNCITRAL Arbitration Rules and Article 23 of the 2010 and 2013 UNCITRAL Arbitration Rules all authorize a tribunal constituted under them to decide objections to jurisdiction or competence as a preliminary question.

Article 10.17 (Consent to Arbitration)

11. A State's consent to arbitration is paramount.⁵ Indeed, given that consent is the “cornerstone” of jurisdiction in investor-State arbitration,⁶ it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.⁷

12. Article 10.17.1 of the U.S.-Peru TPA provides that “[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.” Thus, the Parties to this Agreement have only consented to arbitrate investor-State disputes where an investor submits a claim in accordance with this Agreement, including the requirements relevant to the arbitration of claims under Section B, such as those set out in Articles 10.16 and 10.18.⁸ An agreement to arbitrate is then formed upon the investor's corresponding consent to arbitrate “in accordance with the procedures set out in this Agreement” under Article 10.18.2(a).

13. In this connection, a State does not waive its right to raise jurisdictional or preliminary objections, including whether it has consented to arbitration, by participating in the proceeding or availing itself of the authority of the tribunal, provided such objections are raised within the timeframes established by the treaty, the applicable rules, the tribunal, or agreement of the parties.

⁵ See, e.g., ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 74 (1st ed. 2009) (“Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.”); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015) (“General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. 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.”).

⁶ As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre.” Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965)

⁷ *Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (“*Renco* Partial Award”) (“It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru.”). See also Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 831 (Peter Muchlinski et al., eds. 2008) (“Like any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction.”); CHRISTOPHER F. DUGAN ET AL., *INVESTOR STATE ARBITRATION* 219 (2008) (“The consent of the parties is the basis of the jurisdiction of all international arbitration tribunals.”).

⁸ Cf. *Methanex* Partial Award ¶ 120 (concluding, when interpreting a similar consent provision under NAFTA Article 1122, that the NAFTA Parties' consent to arbitrate requires a disputing investor to satisfy not only Articles 1101 (Scope and Coverage), 1116 (Claim by an Investor) and 1117 (Claim by an Investor on Behalf of an Enterprise), but also all pre-conditions and formalities required under Articles 1118 (Settlement of a Claim), 1119 (Notice of Intent), 1120 (Submission of a Claim), and 1121 (Conditions Precedent to Submission of a Claim)).

14. Article 10.16.5 of the U.S.-Peru TPA provides that “[t]he arbitration rules applicable under paragraph 3 [namely, ICSID, UNCITRAL, or other mutually agreed-upon rules] . . . shall govern the arbitration except to the extent modified by this Agreement.” As discussed in the previous section, Article 10.20, paragraphs 4-5 establish a mandatory mechanism for consideration of preliminary objections and specific timeframes for a respondent to submit such objections for a tribunal’s consideration. With respect to the arbitral rules, Article 23.2 of the (2013) UNCITRAL Rules, for example, provides that “[a] plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence[.]” Moreover, Article 17.2 of the (2013) UNCITRAL Rules provides that the tribunal shall establish the “provisional timetable of the arbitration” and may (consulting with the parties) “extend or abridge any period of time prescribed under these Rules or agreed by the parties.”

15. Accordingly, provided that a respondent raises jurisdictional or preliminary objections within the timeframes established by the treaty, the applicable rules, the tribunal, or otherwise by agreement of the parties, a respondent is not precluded or estopped from raising such objections solely by virtue of participating in the proceeding or availing itself of the authority of the tribunal.⁹

Article 10.18.2(b) (Waiver Requirement)

16. Article 10.18.2 of the U.S.-Peru TPA states in relevant part:

2. No claim may be submitted to arbitration under this Section unless:

...

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

17. The waiver requirements under Article 10.18.2(b) are among the requirements upon which the Parties have conditioned their consent. A valid and effective waiver is therefore a precondition to the Parties’ consent to arbitrate claims, and accordingly a tribunal’s jurisdiction,

⁹ See, e.g., *Frontier Petroleum Services Ltd. v. Czech Republic*, Canada-Czech Republic (BIT/UNCITRAL), Final Award ¶ 207 (Nov. 12, 2010) (rejecting claimant’s argument that respondent was estopped from objecting to the tribunal’s jurisdiction even though its acceptance of jurisdiction was recorded in the tribunal’s first procedural order.).

under Chapter Ten of the U.S.-Peru TPA.¹⁰ The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”¹¹

18. Similar to provisions found in many of the United States’ other international investment agreements,¹² Article 10.18.2(b) is a “no U-turn” waiver provision. As such, it permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the Agreement.¹³ However, Article 10.18.2(b) makes clear that as a condition precedent to the submission of a claim to arbitration under the Agreement, a claimant must submit an effective waiver together with its Notice of Arbitration. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Article 10.18.1, assuming all other relevant procedural requirements have been satisfied.

19. Compliance with Article 10.18.2(b) entails both formal and material requirements.¹⁴ Regarding the formal requirements, the waiver must be in writing and “clear, explicit and categorical.”¹⁵ As the *Renco* tribunal stated, because Article 10.18.2(b) is a “no U-turn” provision, Article 10.18.2(b) requires an investor to “definitively and irrevocably” waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement.¹⁶ This conclusion, as the *Renco* tribunal

¹⁰ *Renco Partial Award* ¶ 73 (“[C]ompliance with Article 10.18(2) is a condition and limitation upon Peru’s consent to arbitrate. Article 10.18(2) contains the terms upon which Peru’s non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal’s jurisdiction.”); see also *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award §§ 16, 31 (June 2, 2000) (“*Waste Management I Award*”); *Detroit International Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015) (“*Detroit Bridge Award*”); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (Mar. 14, 2011) (“*Commerce Group Award*”); *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, ¶ 56 (Nov. 17, 2008) (“*Railroad Development Decision on Jurisdiction*”).

¹¹ *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) (“*Thunderbird Award*”) (stating, in relation to a waiver provision similar to Article 10.18 of the U.S.-Peru TPA, that “[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”); see also *Waste Management I Award* § 27 (finding that, under NAFTA Article 1121, which is similar to Article 10.18 of the U.S.-Peru TPA, “when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the *double benefit* in its claim for damages”) (emphasis added).

¹² For example, waiver provisions similar to Article 10.18.2 of the U.S.-Peru TPA can be found in Article 1121 of NAFTA, Article 10.18.2 of the Dominican Republic-Central American Free Trade Agreement (“CAFTA-DR”), and Article 26 of the 2012 U.S. Model Bilateral Investment Treaty.

¹³ Any such subsequent arbitration claim would be subject to the three-year limitations period for claims under Article 10.18.1.

¹⁴ *Renco Partial Award* ¶ 73; see also *Waste Management I Award* § 20; *Commerce Group Award* ¶¶ 79-80.

¹⁵ *Renco Partial Award* ¶ 74; see also *Waste Management I Award* § 18.

¹⁶ *Renco Partial Award* ¶¶ 95-6.

rightly observed, results from the language requiring the investor to provide a written waiver of “any right to initiate or continue before any [forum] any proceeding with respect to any measure alleged to constitute a breach . . . ’ (emphasis added).”¹⁷ Article 10.18.2(b) is thus “intended to operate as a ‘once and for all’ renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits).”¹⁸ That is, the waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.¹⁹ Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective.

20. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings with respect to the measures alleged to constitute a Chapter Ten breach in another forum as of the date of the waiver and thereafter. In relation to a similar waiver provision in NAFTA Chapter Eleven, the *Waste Management I* tribunal held that

the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver[.]²⁰

21. As the tribunal in *Commerce Group* explained in relation to an identical waiver provision contained in CAFTA-DR Chapter Ten, “[a] waiver must be more than just words; it must accomplish its intended effect.”²¹ Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.²²

22. Article 10.18.2(b) requires a claimant’s waiver to encompass “any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16.” The phrase “with respect to” should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate

¹⁷ *Id.* ¶ 95.

¹⁸ *Id.* ¶ 99.

¹⁹ U.S.-Peru TPA, art. 10.18.2(b).

²⁰ *Waste Management I* Award § 24 (emphasis added).

²¹ *Commerce Group* Award ¶ 80.

²² *Id.* ¶ 115 (noting that the waiver was invalid and lacked “effectiveness” because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); see also *Detroit Bridge* Award ¶ 336.

concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”²³ As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are “separate and distinct” and the measures can be “teased apart.”²⁴

23. For a waiver to be and remain effective, any juridical person or persons that a claimant directly or indirectly owns or controls, or that directly or indirectly control the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a Chapter Ten breach. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 10.18.2(b) through affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of this waiver provision mentioned in the preceding paragraph of this submission.

24. If all formal and material requirements under Article 10.18.2(b) are not met, the waiver is ineffective and will not engage the respondent State’s consent to arbitration or the tribunal’s jurisdiction *ab initio* under the Agreement. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 10.18.2(b). However, the tribunal itself cannot remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State as a function of its general discretion to consent to arbitration.²⁵ Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration. However, where a claimant files an effective waiver subsequent to the constitution of the tribunal, the only available relief (unless the respondent State agrees otherwise) is the dismissal of the arbitration, as the tribunal would have been constituted before the proper submission of the claim to arbitration, and thus without the consent of the respondent State as contemplated in Article 10.17.1. Under such circumstances, the tribunal would lack jurisdiction *ab initio*.

²³ *Thunderbird Award* ¶ 118 (In construing the waiver provision under the NAFTA, the tribunal held, “[o]ne must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”).

²⁴ *Commerce Group Award* ¶ 111-112 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was “part and parcel” of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be “teased apart”). Article 10.18.2 does not require a waiver of domestic proceedings where the measure at issue in the U.S.-Peru TPA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

²⁵ *Renco Partial Award* ¶ 173; *see also Railroad Development Decision on Jurisdiction* ¶ 61 (finding that “the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver” and that “[i]t is for the Respondent and not the Tribunal to waive a deficiency under [CAFTA-DR] Article 10.18 or to allow a defective waiver to be remedied”); *Waste Management I Award* § 31 (holding that the waiver deposited with the first notice of arbitration did not satisfy NAFTA Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant).

25. In its submissions, Peru states that Article 10.18.2(b) requires a claimant to submit an unconditional waiver with its Notice of Arbitration and that an invalid waiver can be remedied only with the consent of the respondent State.²⁶ The United States agrees with this interpretation. Pursuant to customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, “[t]here shall be taken into account, together with context, (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; . . .”²⁷ In accordance with these principles, the tribunal must take into account the Parties’ common understanding, as evidenced by their submissions.²⁸

²⁶ See *Amorrortu v. Republic of Peru*, Respondent’s Submission on Preliminary Objections ¶¶ 82-87, 93-96 (Mar. 15, 2021) and Reply ¶¶ 78-79, 88-91 (May 24, 2021).

²⁷ Vienna Convention on the Law of Treaties, art. 31(3)(a)-(b), May 23, 1969, 1155 U.N.T.S. 331; see also International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 3, UN Doc. A/73/10 (2018) (“Subsequent agreements and subsequent practice under Article 31, paragraph 3(a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.”); *id.*, cmt. 3 (“By describing subsequent agreements and subsequent practice under article 31, paragraph 3(a) and (b), as ‘authentic’ means of interpretation, the Commission recognizes that the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty.”). Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the “authoritative guide to treaty law and practice.” See Letter from Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. at 1 (Oct. 18, 1971).

²⁸ See, e.g., *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award on Damages ¶ 379 (Jan. 10, 2019) (“[T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals . . . can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position on this issue[.]”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (explaining that the approach advocated by claimant had “clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA,” as evidenced by “their submissions to other NAFTA tribunals,” and that “[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.”); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) (explaining that “the available evidence cited by the Respondent,” including submissions by the NAFTA Parties in arbitration proceedings, “demonstrates to us that there is nevertheless a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]’”); International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 4, cmt. 18, UN Doc. A/73/10 (2018) (stating that subsequent practice under Article 31(3)(b) of the Vienna Convention “includes not only official acts at the international or at the internal level that serve to apply the treaty . . . but also, *inter alia*, . . . statements in the course of a legal dispute . . .”).

Respectfully submitted,



Lisa J. Grosh

Assistant Legal Adviser

John D. Daley

Deputy Assistant Legal Adviser

Nicole C. Thornton

Chief of Investment Arbitration

Anne K. Cusick

Attorney-Adviser

Office of International Claims and

Investment Disputes

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

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