

**IN THE MATTER OF AN ARBITRATION UNDER
THE 2010 UNCITRAL ARBITRATION RULES**

KBR, INC.,

Claimant

v.

THE UNITED MEXICAN STATES,

Respondent

CLAIMANT'S NOTICE OF ARBITRATION

Guillermo Aguilar Alvarez
Richard T. Marooney
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New York, New York 10036
United States

Counsel for Claimants

August 30, 2013

August 30, 2013

By FedEx

Dirección General de Inversión Extranjera
Secretaría de Economía
Avenida de los Insurgentes Sur 1940, piso 8
Colonia La Florida,
México D.F. 01030
México

Re: Submission of a Claim to Arbitration under NAFTA Chapter 11

Dear Sir or Madam:

We represent KBR, Inc. ("KBR") an "investor of a Party," in its claim against the Government of the United Mexican States ("Mexico") on its own behalf and on behalf of its wholly-owned subsidiary Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA") for breach by Mexico of its obligations under the North American Free Trade Agreement ("NAFTA") Chapter 11 and Article 1503(2).

Pursuant to Articles 1116 and 1120 of the NAFTA and Article 3 of the 2010 UNCITRAL Arbitration Rules, KBR hereby submits a claim to arbitration against Mexico under Chapter 11 of the NAFTA and the UNCITRAL Arbitration Rules. Please find below our submission in the form of a notice of arbitration, as provided in Article 3 of the UNCITRAL Arbitration Rules modified by Section B of Chapter 11 ("Notice of Submission to Arbitration").

I. SUBMISSION OF A CLAIM TO ARBITRATION

1. Pursuant to Article 1120(1)(c) of the North American Free Trade Agreement ("NAFTA"), KBR, Inc. ("KBR" or the "Investor") hereby submits its dispute with the United Mexican States ("Mexico") to arbitration under NAFTA and the 2010 UNCITRAL Arbitration Rules.
2. This claim is ripe for arbitration and is otherwise properly submitted. First, in accordance with NAFTA Article 1116(2), less than three years have elapsed from the date on which KBR first acquired or should first have acquired knowledge of the alleged breaches and the

knowledge that it suffered a loss as a result of those breaches. As explained below, the earliest breaching measure occurred on September 21, 2011 with the Mexican courts' annulment of an International Chamber of Commerce ("ICC") arbitral award.

3. In accordance with Article 1120(1) and as explored below, more than six months have elapsed between the measures giving rise to KBR's claims and the date of submission of this claim.
4. In accordance with NAFTA Article 1119, more than 90 days have passed since KBR properly served written notice of its intent to submit this claim on the Government of Mexico on February 19, 2013 (the "Notice of Intent").¹ Mexico received the Notice of Intent on February 20, 2013.² But Mexico has chosen not to respond, though it is clear from recent court proceedings in the United States that Mexico examined and understood the Notice of Intent.³ As an investor cannot negotiate with a State party that refuses to respond and a State cannot use its own refusal to respond to avoid arbitration, KBR has necessarily satisfied the requirement to negotiate in Article 1118.
5. KBR submits this claim pursuant to Section B of Chapter 11 of NAFTA. Article 1122 of NAFTA provides that each Party consent to the submission of a claim to arbitration in accordance with the procedures set out in NAFTA. Article 1122(2) provides that a Party's consent under Article 1122(1) and the submission by a disputing investor of a claim to arbitration shall constitute written consent of the parties to arbitration for the purposes of the UNCITRAL Arbitration Rules.
6. Article 1121 of NAFTA sets forth a consent and waiver as conditions precedent to submission of a claim to arbitration. As required by NAFTA Article 1121, KBR on behalf of itself and COMMISA hereby consents to arbitration in accordance with the procedures set

¹ **Exhibit C-1**, February 19, 2013 KBR Notice of Intent to File a Claim.

² **Exhibit C-2**, February 20, 2013 FedEx Delivery Receipt. Given Mexico's failure to respond, KBR also hand-delivered the Notice of Intent on Mexico with a reminder letter on July 31, 2013. See **Exhibit C-3**, Notice of Intent with Reminder Letter and Spanish Translation. The Government of Mexico, however, refused to accept delivery at the Dirección General de Inversión Extranjera, Secretaría de Economía, which is the office identified in the Diario Oficial de la Federación [Mexico's Official Federal Gazette]. Accordingly, on August 6, 2013, KBR followed up with a notary public, at which point the Dirección General de Inversión Extranjera, Secretaría de Economía accepted delivery. See **Exhibit C-4**, August 6, 2013 Notary Public Minutes.

³ **Exhibit C-5**, March 20, 2013 Letter from Hogan Lovells US LLP to Judge Alvin K. Hellerstein.

forth in NAFTA Chapter 11 and the UNCITRAL Arbitration Rules. KBR and COMMISA's consent and waiver, attached at **Annex A** to this Notice of Arbitration, provides as follows:

Pursuant to Articles 1121(1) and 1121(2) of the North American Free Trade Agreement (the "NAFTA"), KBR, Inc. and its wholly-owned subsidiary Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA") each consent to arbitration in accordance with the procedures set out in the NAFTA and "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party [to the NAFTA], or other dispute settlement procedures, any proceedings with respect to the measures of the Disputing Party that is alleged to be a breach referred to in Article 1116 [and Article 1117], except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of the disputing Party."

For absence of doubt, KBR and COMMISA do not waive:

1. their right to initiate proceedings under the New York or Panama Conventions to enforce the ICC Final Award in any State party to these conventions;
 2. their right to continue existing proceedings under the Panama Convention to enforce the ICC Final Award in the Southern District of New York;
 3. their rights under the Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition issued by Judge Alvin K. Hellerstein of the United States District Court for the Southern District of New York on August 27, 2013; or
 4. their right to continue existing proceedings under the New York Convention to enforce the ICC Final Award in Luxembourg.
7. On November 9, 2001, the Government of Mexico provided a submission on the interpretation of NAFTA in *The Loewen Group, Inc and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, advising that "[t]he waiver contemplated in Article 1121 is for claims *for damages only* in 'any administrative tribunal or court under the law of any Party, or other dispute settlement procedures.'" *Second Article 1128 Submission of The United Mexican States*, November 9, 2001, 13 (emphasis in original).

This understanding has been reflected in numerous filings. *See e.g., Cargill, Incorporated v. United Mexican States*, Notice of Arbitration, December 29, 2004, ¶ 19 (“Pursuant to Article 1121 of NAFTA, [Cargill] hereby waives its right to initiate or continue proceedings that seek damages based on alleged breaches of Article 1116 or 1117 of NAFTA”); *Corn Products International, Inc. v. The United Mexican States*, Notice of Arbitration, October 21, 2003, ¶ 17 (Corn Products “waive their right to initiate or continue other dispute settlement procedures involving the payment of damages...”).

8. As “Article 1121 is for claims *for damages only* in ‘any administrative tribunal or court under the law of any Party, or other dispute settlement procedures,’” Article 1121 waiver does not apply to the enforcement proceedings. The New York and Panama Conventions’ enforcement proceedings are, by definition, not for the adjudication of claims for damages—they are designed to enforce an existing arbitration award.
9. Moreover, the Article 1121 waiver does not and cannot extend to New York and Panama Convention enforcement proceedings, because such proceedings do not and cannot address the measures alleged to be a breach of NAFTA Articles 1116 and 1117. At issue in this NAFTA arbitration is the validity under customary international law and NAFTA of the Mexican court decisions and actions in annulling the arbitral award, as well as PEP’s decision to seek enforcement of the performance bonds posted by COMMISA after the only finder of fact (*i.e.*, the ICC Arbitral Tribunal) made clear that PEP could not do so.

II. NAMES AND ADDRESSES OF THE PARTIES

10. Investor Claimant:

KBR, INC.
601 Jefferson St., KT-3400
Houston, Texas 77002
Phone: 713-753-3867

Claimant’s Wholly-Owned Enterprise:

Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.
Av. Francisco I
Madero No. 1955 Opte.
Edificio Santos, 3er Piso

Col. Zona Centro
Monterrey, Nuevo Leon, Mexico C.P. 6400

Address for Service:

As established in the Power of Attorney attached to the Notice of Intent, KBR is represented in this matter by King & Spalding LLP. Please direct all correspondence to the following address:

Guillermo Aguilar Alvarez
Richard T. Marooney
Ana Vohryzek
King & Spalding LLP
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2145 - Direct Dial
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11. Respondent State:

THE UNITED MEXICAN STATES
Director General de Inversión Extranjera
Dirección General de Inversión Extranjera
Secretaría de Economía
Avenida Insurgentes 1940
Colonia La Florida
México, D.F. 01030

Mexico has designated this entity to receive service in NAFTA Annex 1137.2 and in accordance with Article 1 of the *Acuerdo por el que se faculta a la Dirección General de Inversión Extranjera para fungir como lugar de entrega de notificaciones y otros documentos, de conformidad con lo señalado en el artículo 1137.2 del Tratado de Libre Comercio de América del Norte*, published in the *Diario Oficial de la Federación* [Mexico's Official Federal Gazette] on June 12, 1996.

III. THE AGREEMENT TO ARBITRATE

12. The Claimant invokes Section B of Chapter 11 of the NAFTA as procedural authority for this arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions concerning the settlement of disputes between a Party and an investor of another Party.
13. Pursuant to NAFTA Article 1122(1), Mexico provided its general consent for the submission of a claim to arbitration under NAFTA Chapter 11. NAFTA Article 1120 further provides that the investor may elect to submit its claim to arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules, as modified by Section B of NAFTA Chapter 11. Pursuant to Article NAFTA 1120(1)(c), KBR accordingly submits its claim to arbitration under the UNCITRAL Arbitration Rules, as modified by Section B of NAFTA Chapter 11.
14. In accordance with NAFTA Article 1122(2), Mexico's consent under Article 1122(1) and the submission by KBR of its claim to arbitration "shall satisfy the requirement of [...] Article II of the New York Convention for an agreement in writing; and [...] Article I of the InterAmerican Convention for an agreement."

IV. LEGAL INSTRUMENT IN RELATION TO WHICH THE CLAIM ARISES

15. This dispute arises from Mexico's breach of its obligations under NAFTA Chapter 11 and Article 1503.

V. NAFTA PROVISIONS THAT HAVE BEEN BREACHED

16. Mexico has breached its obligations under NAFTA Articles 1102, 1103, 1105, 1110 and 1503(2). As a result of this breach, KBR and its fully-owned subsidiary COMMISA have suffered damages. The NAFTA provisions breached by Mexico provide in relevant part:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105: Minimum Standard of Treatment

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Article 1110: Expropriation and Compensation

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.

Article 1503(2): State Enterprises

Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

VI. FACTUAL BASIS FOR THE CLAIM AND JURISDICTION

A. Factual Background

17. In 1997, COMMISA entered into Contract No. PEP-0-129/97 with *Pemex Exploración y Producción* (“PEP”) to build two offshore platforms for the treatment, processing, and reinjection of natural gas (“the Project”). PEP is a subsidiary of *Petróleos Mexicanos* (“PEMEX”) and along with PEMEX and PEMEX’s other subsidiaries forms Mexico’s state oil and gas company.

18. Article 23.3 of Contract No. PEP-0-129/97 provided for arbitration in accordance with the ICC Rules of Arbitration:

Any controversy, claim, difference, or dispute that may arise from [...] the present Contract, shall be definitively settled through arbitration [...] in accordance with the Conciliation and Arbitration Rules of the International Chamber of Commerce [ICC] that are in effect at that time.”

19. Between 1997 and 2002, PEP breached the contract in many ways that resulted in extensive delays and cost overruns. From September 2002 to March 2003 the parties participated in a series of hearings before the auditing agency of the Mexican Government to determine how much money PEP owed to COMMISA for the various change orders and delays resulting from PEP’s breaches. The conciliation proceedings culminated in three “*convenios*”—A, B and C.

20. Convenio A provided a structure for PEP to pay COMMISA’s outstanding signed invoices. Convenio B addressed and resolved COMMISA’s pending technical claims and controversies. Thus, Convenios A and B provided a mechanism through which PEP was to pay COMMISA for work already performed by COMMISA as a result of PEP’s breaches.

21. Convenio C covered the remaining work to be performed from January 15, 2003-January 14, 2004. Like Article 23.3 of the EPC-1 Contract, Article 19.3 of Convenio C provided for arbitration in accordance with the ICC Rules of Arbitration.

22. In March 2004, when COMMISA had completed 94% of the work that remained under Convenio C, PEP wrongfully expelled COMMISA and took over the platforms. PEP also

gave notice of its intent to administratively rescind the contract. The parties attempted to resolve their disputes, but were unable to do so. On December 1, 2004, COMMISA initiated arbitration under the ICC Rules of Arbitration in accordance with the arbitration agreements. Two weeks later, on December 16, 2004, PEP unilaterally rescinded the contracts, citing administrative prerogative.

23. The parties' arbitration focused on the commercial performance under the contracts and on which party was at fault for the many delays and cost overruns. COMMISA asserted claims for the amounts PEP failed to pay it under Convenios A and B, and also asserted claims in connection with PEP's breaches of Convenio C that resulted in further delays and cost overruns.
24. PEP filed counterclaims in the arbitration, including claims that the administrative rescission was proper and resulted from COMMISA's breach. PEP also sought significant damages in the arbitration for COMMISA's alleged breaches of Convenio C, and penalties for those alleged breaches (which were secured by performance bonds).
25. In November 2006, the Arbitral Tribunal (the "ICC Tribunal") issued a preliminary award unanimously upholding jurisdiction (the "ICC Preliminary Award"). In this award, the ICC Tribunal considered that for purposes of apportioning liability and damages it had jurisdiction to consider all alleged contractual breaches, including those that allegedly motivated the rescission. PEP did not challenge this ruling.
26. The ICC Tribunal proceeded to adjudicate COMMISA's breach of contract claims relating to change orders, pay items, delivered systems, work days, financing costs, engineering man-hours, escalation and extraordinary work, as well as PEP's counterclaims. After hearing argument and weighing evidence from both parties in a proceeding that lasted five years, the ICC Tribunal on December 19, 2009 issued a final award in favor of COMMISA of approximately US\$300 million, plus interest and value added tax (the "ICC Final Award"). The ICC Tribunal found that PEP had breached numerous contractual obligations and that PEP was generally not entitled to penalties, including the \$80 million performance bond that COMMISA had posted.

27. In January 2010, COMMISA moved to enforce the ICC Final Award in the United States District Court for the Southern District of New York. The District Court entered judgment for COMMISA for \$355,864,541.75 plus Mexican value added tax and interest. PEP appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit denied PEP's request for a stay pending appeal. PEP was required to post security by depositing \$395,009,641.34 into the District Court's registry, which stayed the execution of its judgment.
28. Two months after COMMISA filed for enforcement, PEP sought to nullify the ICC Final Award in Monterrey, Mexico. The court in Monterrey promptly dismissed the complaint for lack of jurisdiction. PEP next filed a complaint with the Mexican Fifth District Court (*Juzgado Quinto de Distrito en Materia Civil del Distrito Federal* or "Fifth District Court"), which also rejected PEP's claim. PEP then filed an indirect amparo challenge to that ruling in the Tenth District Court on Civil Matters (*Juzgado Décimo de Distrito en Materia Civil del Distrito Federal*), which likewise ruled against PEP. PEP then appealed the Tenth District Court's ruling before the 11th Collegiate Court on Civil Matters (*Décimo Primer Tribunal Colegiado en Materia Civil del Primer Circuito*) ("11th Collegiate Court").
29. The 11th Collegiate Court held on September 21, 2011 that the ICC Final Award should be annulled and on October 25, 2011 the Fifth District Court on remand annulled it (jointly the "Annulment Decision"). In so doing, the 11th Collegiate Court considered that once PEP exercised its sovereign authority to rescind the Contract, COMMISA lost its right to arbitrate. The 11th Collegiate Court further concluded that the ICC Tribunal could not review the merits of COMMISA's breach of contract claims or award damages to COMMISA once PEP exercised its authority to rescind. As indicated above, following the 11th Collegiate Court's instructions, the Mexican Fifth District Court reversed its prior decision and annulled the ICC Final Award. It is undisputed that there is no further recourse available in Mexican courts to challenge the Annulment Decision.
30. Until the Annulment Decision, no Mexican court had held that when a State enterprise such as PEP administratively rescinds a contract with an arbitration provision, all disputes under that contract and within the scope of that provision can no longer be arbitrated. To the

contrary, throughout the parties' relationship and the arbitration, the law expressly authorized PEP and PEMEX to arbitrate their disputes. PEP and PEMEX, in fact, had arbitrated disputes with contractors after administratively rescinding the contract. There was also no question that the arbitration agreements in the contracts with COMMISA were valid and binding under Mexican law.

31. Simply put, the Collegiate Court decision was designed to protect PEP by annulling a valid international arbitral award that had ruled against PEP and in favor of a U.S. company. In so doing, the decision violated international law, NAFTA, the principles behind international arbitration and basic notions of fairness and equity.
32. First, the grounds for the Annulment Decision were arbitrary and unprecedented. It allowed PEP unilaterally to eviscerate the arbitration agreement simply by declaring that a rescission has occurred; no court had ever held this before.
33. The Annulment Decision also relied on an inapplicable 2009 amendment to Mexican arbitration law to reach its result. On May 28, 2009, Mexican law was amended to state that administrative rescissions could not be the subject of an arbitration. Prior to that time, there was no law or barrier of any kind precluding arbitrations that also involved an administrative rescission, and PEP and PEMEX had arbitrated such disputes. In fact, Mexico's NAFTA implementing legislation included statutory modifications that expressly provided that PEP and PEMEX could submit disputes to arbitration. This is consistent with Mexico's desire to conform with NAFTA Article 2022. There was consequently no "public policy" precluding the ICC arbitration between PEP and COMMISA.
34. As read by the 11th Collegiate Court, the 2009 amendment would itself disturb general principles of international law, especially where, as here, it is applied retroactively to deprive a winning party of its award. Specifically, the 11th Collegiate Court deprived COMMISA of its Final ICC Award because it considered that PEP's decision to administratively rescind the contract constituted a sovereign determination of COMMISA's liability. Put differently, the 11th Collegiate Court empowered PEP to be the judge of its own cause and to unilaterally invalidate an arbitral decision rendered after five years of litigation before the only tribunal that examined the parties' allegations in the light of the voluminous record.

35. According to the 11th Collegiate Court, the ICC Tribunal could not interfere with PEP's sovereign determination by deciding that it was PEP who breached the contract. The Collegiate Court's finding is arbitrary, fundamentally unfair, inconsistent with Mexico's international obligations and irreconcilable with any rule of law system. The 11th Collegiate Court tortured Mexican law in a way that allows PEP to: (i) lure international investors to participate in projects under contracts in which PEP itself includes ICC agreements to arbitrate; and at the same time (ii) unilaterally remove any dispute from arbitration simply by rescinding the contract. Under this precedent, Mexican courts can now choose to annul arbitral awards adverse to Mexican state enterprises.. Worse still, the 11th Collegiate Court decision creates an irreconcilable imbalance: the arbitral tribunal has jurisdiction *only until it rules against* PEP. Accordingly, a government entity can enter into an agreement to arbitrate stipulating Mexico as the venue of the arbitration, breach the contract, demand arbitration as required in the contract, while running the statute of limitations (45 days in some cases), and then, if it loses, demand annulment on grounds that the tribunal violated PEP's sovereign authority by ruling against the rescission.
36. COMMISA's situation proves the point: COMMISA and PEP spent five years arbitrating COMMISA's claims and PEP's counterclaims without any judicial challenge by PEP, until COMMISA won. Relying on the Annulment Decision, PEP has refused to pay the at least \$400 million owed under the ICC Final Award and has, moreover, obtained a judgment in Mexico from the Second Unitary Tribunal of the First Circuit (*Segundo Tribunal Unitario del Primer Circuito*) on October 24, 2011 ordering the payment of the performance bond posted by COMMISA. To this day no party has questioned the veracity of the ICC Tribunal's determination that PEP was the liable party and that PEP was not entitled to call the performance bonds posted by COMMISA. Yet COMMISA was forced to pay the bonds and interest to PEP for a total of over \$110 million. PEP has therefore now recovered \$110 million even though the only fact finder—the ICC tribunal—held that PEP breached the contract; that PEP was not entitled to penalties or to call the performance bonds; and that COMMISA was entitled to hundreds of millions of dollars in damages as a consequence of PEP's breaches. This is an absurd result that directly contradicts NAFTA and its underlying principles.

37. As mentioned above, the Mexican courts issued the Annulment Decision while PEP's appeal of the U.S. District Court's decision enforcing the ICC Final Award was pending in the Second Circuit. PEP asked the Second Circuit to remand the case to the District Court to consider whether the ICC Final Award was still enforceable in the United States in light of the Annulment Decision; the Second Circuit granted PEP's motion.
38. The District Court requested extensive briefing on whether the ICC Final Award could be enforced in the United States despite being annulled in Mexico. The District Court also directed COMMISA to consider whether it could now file the claims it brought before the ICC Tribunal with an administrative court in Mexico. Supported by expert testimony, COMMISA explained that any claims before an administrative court would be jurisdictionally barred given the text of the Annulment Decision and current Mexican law. PEP, however, asserted in the District Court—without support—that COMMISA should be able to bring all of its contract and damages claim before an administrative court in Mexico. Faced with PEP's assertion and in an attempt to defer to the Mexican courts, the U.S. District Court ordered COMMISA to initiate further proceedings in the Mexico before it ruled. Complying with the U.S. District Court's instruction, on November 6, 2012, COMMISA filed its claims with the Third Regional Chamber of the Northeast of the Federal Tax and Administrative Court in Mexico. As predicted, on November 21, 2012 the Federal Tax and Administrative Court rejected the claim on grounds that the statute of limitations had run.
39. For the avoidance of doubt, compliance by COMMISA with the U.S. District Court's instructions is without prejudice to (i) the final and binding nature of the ICC Final Award and (ii) KBR's rights under NAFTA Chapter 11.
40. On January 17, 2013, the U.S. District Court released the \$395,009,641.34 security that PEP had deposited as protection for KBR. KBR has now filed a claim to enforce the award in Luxembourg and to attach any of PEP or PEMEX assets in that country. These proceedings are ongoing.
41. On April 10-12, 2013, the parties attended a hearing before the U.S. District Court. On August 27, 2013, Judge Alvin K. Hellerstein of the United States District Court for the Southern District of New York issued an Opinion and Order Granting Petitioner's Motion to

Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition. Judge Hellerstein's Opinion and Order is attached as **Exhibit C-6**. As stated above, NAFTA does not require KBR or COMMISA to waive their rights under this Opinion and Order, and KBR and COMMISA do not waive any such rights.

42. In short, PEP and the Mexican courts have harmed KBR and COMMISA by respectively seeking and declaring the annulment of the ICC Final Award. The harm includes, among other things, forcing KBR and COMMISA to spend millions of dollars in attorneys' fees and costs and requiring COMMISA to pay an additional \$110 million to PEP in performance bonds based on COMMISA's alleged failure to perform, even though the only fact-finder—the ICC Tribunal—found that PEP had breached the contract, owed COMMISA damages and could not call the performance bonds.

B. Jurisdiction

43. An arbitral tribunal constituted under NAFTA Chapter 11 has jurisdiction over this dispute. KBR—a company incorporated in the United States—is an investor of a Party under Article 1139. COMMISA is an enterprise as defined in NAFTA Article 201, and an investment of an investor of a Party under Article 1139. Mexico has consented to submit this dispute to arbitration under Article 1122.
44. Likewise, KBR's investments in Mexico meet the definition of protected investment under NAFTA Article 1139. In relevant part, NAFTA Article 1139 defines "investment" as:
- (a) an enterprise; [...]
 - (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; [...]
 - (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
 - (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:

- (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
- (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise

45. KBR owns or controls, directly or indirectly, the rights under the contracts. Such rights and interests are “(h) interests arising from the commitment of capital or other resources in the territory of a Party to an economic activity in such territory, such as under contracts, [...] including construction contracts.” They also constitute “(g) [...] property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.” Moreover, COMMISA is an “enterprise” and as a result constitutes a protected investment, as does KBR’s “interest” in COMMISA.

46. The ICC Final Award is also a protected investment. As the tribunal in *Mondev* stated in finding jurisdiction over a disputed court decision, “NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139.” *Mondev International Ltd v United States, Award*, ICSID Case No ARB(AF)/99/2; IIC 173 (2002), ¶ 91. Moreover, the ICC Final Award arose from KBR’s “investment” in Mexico. As one recent tribunal noted:

[T]he rights embodied in the ICC Final Award were not created by the Award, but arise out of the Contract. The ICC Final Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.

Saipem SpA v Bangladesh, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No ARB/05/07; IIC 280 (2007), ¶ 127.

C. Basis for the Claim

47. By annulling the ICC Final Award, Mexican courts violated NAFTA Article 1105, which requires that Mexico and its organs treat investors fairly and equitably. The Annulment Decision perpetrated a denial of justice by wrongfully depriving KBR and COMMISA of the

damages KBR and COMMISA will ultimately suffer from the annulment remains unclear, the expropriation is final and significant.

51. Lastly, Mexico has breached NAFTA Article 1503(2) by allowing PEP to act in a manner inconsistent with Mexico's NAFTA obligations while exercising delegated regulatory, administrative or other governmental authority. Mexico is thus responsible for PEP's expropriation of KBR and COMMISA's investment, culminating in the annulment of the ICC Final Award and the calling of the performance bonds.

VII. RELIEF SOUGHT AND DAMAGES CLAIMED

52. KBR will seek full compensation for all losses and other injuries suffered as a result of Mexico's breaches, including but not limited to the legal costs incurred in seeking to enforce the improperly annulled Award in New York and Luxembourg and the approximately US \$110 million drawn by PEP from the contractual performance bonds and *fianzas* posted by COMMISA, as well as interest, costs, and such other relief as the arbitrators deem appropriate.

VIII. PROPOSAL OF AN ARBITRATOR

53. Article 1123 of the NAFTA provides that "the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."
54. In accordance with the NAFTA Article 1123 and Article 4 of the UNICTRAL Arbitration Rules, KBR designates as arbitrator:

Gabrielle Kaufmann-Kohler
3-5 Rue du Conseil Général
P.O. Box 552
CH 1211 Geneva
Tel. + (41-22) 809-6200
Fax + (41 22) 809-6201
gabrielle.kaufmann-kohler@lk-k.com

Attached as **Annex B** please find Ms. Kaufmann-Kohler's CV.

benefit of justice as administered by the ICC Tribunal in accordance with the agreement of PEP and COMMISA in the contracts. The 11th Collegiate Court decision gave the state party to the dispute—PEP—the power to revise the facts, the law, and the terms of the contract in its favor and to do so after an arbitration procedure, to which it had agreed and in which it participated, produced a final award adverse to it. This type of action is inconsistent with any rule of law system, and a classic denial of justice under customary international law, as incorporated by NAFTA Article 1105(1).

48. Mexico has also violated KBR and COMMISA's rights to transparency, due process and treatment that is not arbitrary, among other fundamental tenets of fair and equitable treatment under NAFTA Article 1105.
49. Moreover, Mexico has breached the obligation to afford U.S. investors and investments non-discriminatory treatment under NAFTA Articles 1102 and 1103. The annulment of the ICC Final Award was unprecedented, meaning that all past investors were better treated. It was also discriminatory: the Annulment Decision expressly gave a Mexican state entity the right to rescind the contract, and with it, make a unilateral determination of COMMISA's liability. Importantly, the annulment occurred only because the ICC Tribunal found that PEP—the Mexican state party—had breached the contract, and as a result, the ICC Final Award defied a sovereign determination. Leaving aside the fact that the ICC Final Award did not interfere with the rescission itself, under the 11th Collegiate Court's logic, if the ICC Tribunal had found the private party—COMMISA—liable, the ICC Final Award would not have been annulled and indeed, would not be annulable. In that case, the ICC Tribunal would not have contradicted a sovereign decision, and there would be no grounds for an annulment. This is plainly discriminatory.
50. In addition, Mexico violated NAFTA Article 1110 by expropriating KBR and COMMISA's right to the value of their investment as embodied in the ICC Final Award, in violation of principles of fair and equitable treatment under Article 1105(1) and without compensation. The ICC Final Award represented KBR and COMMISA's investment in Mexico and was the only remaining compensation after PEP unilaterally terminated the contracts and took over the two offshore platforms without payment. It has been annulled. Though the quantum of

IX. LANGUAGE OF ARBITRATION

55. Pursuant to Article 3 of the UNCITRAL Arbitration Rules, KBR proposes English as the language of arbitration.

X. PLACE OF ARBITRATION

56. Pursuant to NAFTA Article 1130:

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with: [...] (b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

57. Article 18 of the UNCITRAL Arbitration Rules further provides that:

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.
2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

58. In the event that the parties are unable to agree, KBR respectfully requests the Tribunal to fix the legal venue of the arbitration in Toronto, Canada.

XI. RESERVATION

59. KBR reserves the right to supplement or modify this Notice of Arbitration in response to any arguments or assertions made by Mexico.

XII. SERVICE

60. COMMISA has submitted this Notice of Arbitration to the authority designated by Mexico pursuant to NAFTA Article 1137 and Annex 1137.2.

61. COMMISA has submitted this Notice of Arbitration in English, with a courtesy Spanish translation.

Very truly yours,



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