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February 19, 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: Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11

Dear Sir or Madam:

Pursuant to Articles 1116, 1117, and 1119 of the North American Free Trade Agreement ("NAFTA"), KBR, Inc. ("KBR") hereby gives written notice of its intention to submit to arbitration a 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 NAFTA Chapter 11 and Article 1503(2).

	DIRECCIÓN GENERAL DE INVERSIÓN EXTRANJERA
06 AGO. 2013	
RECIBIDO	
HORA:	
RECIBIO:	



I. Name and Address of the Disputing Investor

1. KBR is a Delaware corporation with its principal place of business in Houston, Texas. Documentation of KBR's status as a US investor is attached at Ex. A, Certification of KBR, Inc. Incorporation in Delaware.

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

II. Name and Address of the Wholly-Owned Enterprise

2. Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. is a Mexican subsidiary of KBR:

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

3. Documentation of COMMISA's legal status and ownership structure is attached at Ex. B, Certification of Current Ownership of COMMISA.

III. Legal Representative and Service of Documents

4. As established in the attached Power of Attorney, Ex. C, KBR is represented in this matter by King & Spalding LLP:

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1185 Avenue of the Americas
New York, NY 10036
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Please direct correspondence related to this matter to Guillermo Aguilar Alvarez at the above address.

IV. NAFTA Provisions That Have Been Breached

5. Mexico has breached its obligations under NAFTA articles:
- a. 1102: National Treatment;
 - b. 1103: Most-Favored-Nation Treatment;
 - c. 1105: Minimum Standard of Treatment;
 - d. 1110: Expropriation and Compensation; and
 - e. 1503(2): State Enterprises

V. Issues and Factual Basis for the Claim

A. Factual Background

6. 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. PEP suspended the Project in March 2002. After "conciliation" proceedings, the parties amended their contract by executing Convenio C (together with Contract No. PEP-0-129/97, the "Contract").
7. Both Article 23.3 of Contract No. PEP-0-129/97 and Article 19.3 of Convenio C 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." PEP suggested including the arbitration clause; and KBR and COMMISA would not have agreed to undertake the project without an arbitration to arbitrate in the Contract.



8. In March 2004, when COMMISA had completed 94% of its work, PEP expelled COMMISA and took over the platforms. 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 Contract, citing administrative prerogative.
9. In November 2006, the ICC Tribunal issued a preliminary award unanimously upholding jurisdiction (the "ICC Preliminary Award"). PEP did not challenge this ruling. The ICC Tribunal adjudicated 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. PEP filed counterclaims. After hearing argument and weighing evidence from both parties in a proceeding that lasted 5 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 bonds COMMISA had posted.
10. 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.
11. 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 5th District Court (*Juzgado Quinto de Distrito en Materia Civil del Distrito Federal* or "5th 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").

12. The 11th Collegiate Court held on September 21, 2011 that the ICC Final Award should be annulled and on October 25, 2011 the 5th District Court on remand annulled it (jointly the "Annulment Decision"). In so doing, the 11th Collegiate Court held 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 5th District Court reversed its prior decision and annulled the ICC Final Award. There is no further recourse available in Mexican courts to challenge the Annulment Decision.
13. 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 \$80 million performance bond posted by COMMISA.
14. The Annulment Decision has also harmed COMMISA's right to enforce the ICC Final Award in the United States. 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.



15. The District Court is now considering whether the ICC Final Award can be enforced in the United States despite being annulled in Mexico. In so doing, the District Court has expressed considerable concern that the Annulment Decision effectively deprived COMMISA of its right to adjudicate its claims. At the same time, however, the District Court has indicated that it may rule that the Annulment Decision prevents the possibility of the ICC Final Award being enforced in the United States. Accordingly, the District Court 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, has 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 further proceedings in the U.S. before it rules and instructed COMMISA to file its claims with an administrative court in Mexico. 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 and on November 21, 2012 the Court rejected the claim on grounds that the statute of limitations had run.
16. 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.

B. Jurisdiction

17. An arbitration 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.



18. 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

19. KBR owns or controls; directly or indirectly, the rights under the Contract. 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.

20. 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

21. 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 benefit of justice as administered by the ICC Tribunal in accordance with the agreement of PEP and COMMISA in the Contract. The 11th Collegiate Court decision gave one 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. Aside from the fact that this is not Mexican law and cannot be found in any rule of law system, it is also a classic denial of justice under customary international law, as incorporated by NAFTA Article 1105(1).
22. Mexico 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.
23. Moreover, COMMISA will show that Mexico breached the obligation to afford US investors and investments non-discriminatory treatment under NAFTA Articles 1102 and 1103.
24. 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. Indeed, the annulment deprived KBR and COMMISA of any compensation; the ICC Final Award was KBR's and COMMISA's only remaining compensation after PEP unilaterally terminated the Contract and took over the two offshore platforms without payment.

25. The annulment of the ICC Final Award also constituted an expropriation of KBR and COMMISA's right to the value of the ICC Final Award itself, as expropriation includes the taking of "rights under judicial decisions" when those decisions themselves emanate from an investment. *Mondev*, ¶ 98; *Saipem* Jurisdiction, ¶¶ 130-132.
26. 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.

VI. Relief Sought and Damages Claimed

27. KBR will seek full compensation for the losses and other injuries suffered as a result of Mexico's breaches, and will claim at least US\$400 million in compensatory damages for the amount of the ICC Final Award plus any sums drawn by PEP from the contractual performance bonds and *fianzas*, as well as interest, costs, and such other relief as the arbitrators deem appropriate.

VII. Service

28. This Notice of Intent to Submit a Claim to Arbitration is submitted to you as the authority designated by Mexico pursuant to Annex 1137.2 of the NAFTA 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* on 12 June 1996.

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Very truly yours,

A handwritten signature in black ink, appearing to be "G. Alvarez", written over a horizontal line.

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