IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

FIREMAN'S FUND INSURANCE COMPANY,

Claimant/Investor,

-and-

THE UNITED MEXICAN STATES,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to NAFTA Article 1128, the United States of America makes this submission to address certain questions of interpretation of the NAFTA arising in the case brought by Fireman's Fund Insurance Company against the United Mexican States. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

2. This submission responds to the Tribunal's question, raised on the first day of the hearing on jurisdiction, on whether a bank holding company under United States law should be considered a "financial institution" within the meaning of Article 1416.

3. Under the Bank Holding Company Act of 1956, a company may not become a bank holding company except with the prior approval of the Federal Reserve Board. *See* 12 U.S.C. § 1842(a). In acting on an application to become a bank holding company, the Board must assess the financial and managerial resources and future prospects of the company. *See* 12 U.S.C. § 1842(c)(2). A bank holding company may not engage in any activity other than managing or controlling banks or activities authorized under section 4 of the Act. *See* 12 U.S.C. § 1843(a)(2). Activities authorized under section 4 are generally specified in the Federal Reserve Board's Regulation Y (*see* 12 C.F.R. § 225.28) and include lending, leasing, trust activities, financial and investment advisory activities, securities activities and insurance activities. A bank holding company may engage in

activities directly or indirectly through a subsidiary. A U.S. bank holding company is subject to regulation and supervision by the Board, including capital adequacy requirements, as soon as it acquires control of a bank. *See* 12 U.S.C. § 1844.

4. Article 1416 defines "financial institution" as "any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located." Under U.S. law, U.S. bank holding companies meet all aspects of the definition.

5. Because a U.S. bank holding company (which is regulated and supervised by the Federal Reserve Board) is permitted to provide financial services to the public, it is a "financial intermediary." This fact in itself establishes that U.S. bank holding companies are "financial institutions" under the definition in Article 1416.

6. In addition, U.S. bank holding companies also meet other aspects of the definition of "financial institution": They are "other enterprise[s] . . . authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located" – or regulated as a financial institution, for short.

7. Whether a particular enterprise is regulated as a financial institution must be determined on a case-by-case basis in light of all of the circumstances. However, a regulated enterprise is not a "financial institution" merely because it issues debt securities, engages in limited borrowing for the purpose of acquiring shares of banks or other financial institutions, or holds shares of a bank or other financial institution.[1]

8. As the definition in Article 1416 recognizes, whether an enterprise is regulated "as a financial institution" depends upon the content of the law of the Party and the nature of the enterprise and its activities. It is not necessary that municipal law use the words "financial institution" for an entity to fall within the definition set forth in Article 1416. (Under United States law, for example, there is no comprehensive, universally applicable definition of "financial institution.")[2]

9. The views and practices of the Party's financial authorities, as reflected in their regulatory and supervisory frameworks, should be taken into account in determining whether an enterprise is regulated as a "financial institution." The mere fact that the law or the Party declares that it is regulating an enterprise "as a financial institution" is not dispositive of the issue.

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[1] A U.S. bank holding company becomes subject to supervision and regulation by the Federal Reserve Board as soon as it acquires *control* of a bank through share acquisition (meaning 25% or more of any class of voting shares) or otherwise. *See* 12 U.S.C. § 1841.

[2] Statutes in the financial services area generally do not use the term "financial institution," although there are statutes that contain definitions for this term. *See, e.g.*, 7 U.S.C. § 1a(15); 11 U.S.C. § 101(22); 12 U.S.C. § 3401(1); 15 U.S.C. § 78c(a)(46); 18 U.S.C. § 20. The United States also notes that under U.S. law there is no comprehensive, universally applicable definition of "financial intermediary."

10. A non-exhaustive list of relevant factors, no one or set of which is necessarily dispositive, to consider in determining whether an enterprise is regulated as a financial institution includes the following:

a. whether and the extent to which the business or assets of the enterprise are devoted to financial services, whether intermediation services or others, such as investment and financial advisory activities or merger and acquisition advisory activities;

b. whether the enterprise is subject to capital requirements or regulation beyond those applicable to companies generally;

c. whether, and the extent to which, the enterprise is supervised or regulated by the financial authorities as opposed to other regulatory bodies;[3]

d. whether the purpose of the regulation or supervision is based on or consistent with the prudential reasons referenced in Article 1410(1).[4]

11. Each of the above factors establishes that U.S. bank holding companies are "authorized to do business and regulated or supervised as a financial institution under" U.S. law. Under the Bank Holding Company Act, a U.S. bank holding company is authorized to engage directly in financial service activities and is considered to be engaged indirectly in the activities of its subsidiaries. U.S. bank holding companies are subject to specific capital requirements. *See* 12 C.F.R. § 225, App. A. The Federal Reserve Board, an agency whose responsibilities deal with the financial sector, regulates and supervises activities of a U.S. bank holding company. And the purpose of the Board's supervision and regulation is firmly grounded in the prudential reasons identified in Article 1410(1). U.S. bank holding companies therefore are "financial institutions" within the meaning of Article 1416.

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[3] Financial authorities in the United States include, but are not limited to, the Commodity Futures Trading Commission; the Department of the Treasury; the Federal Reserve Board; the Federal Deposit Insurance Corporation; the National Credit Union Administration; the Office of the Comptroller of the Currency; the Office of Thrift Supervision; the Securities and Exchange Commission; state banking departments and superintendents; state insurance commissioners; and state boards of administration of pension funds.

[4] That Article provides in pertinent part as follows:

> 1. Nothing in this Part shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:
>
> (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service provider;
>
> (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions or cross-border financial service providers; and
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> (c) ensuring the integrity and stability of a Party's financial system.

NAFTA art. 1410.

12. Holding companies under the laws of other Parties may differ from bank holding companies under U.S. law, as may be the case with respect to the laws that apply to such companies.

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Respectfully submitted,

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