Before the Panel established in accordance with Annex 31-A (United States-Mexico Facility-Specific Rapid Response Labor Mechanism) of the Agreement between the United States of America, the United Mexican States and Canada (USMCA)

San Martín Mine

(MEX-USA-2023-31A-01)

Motion for Leave to File

Amicus Submission by the Chamber of Commerce of the United States of America

January 12, 2024

1. The Chamber of Commerce of the United States of America (Chamber), by and through its undersigned counsel, hereby files this Motion for Leave to file the attached Amicus Submission by the Chamber of Commerce of the United States of America to express its views to the members of the Rapid Response panel established under Annex 31-A of the United States Mexico Canada Agreement (USMCA) in connection with an alleged denial of rights involving the San Martín Mine, which is owned by Industria Minera México, S.A. de C.V. at the San Martín mine located in the Mexican state of Zacatecas.

2. The Chamber is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

3. A significant policy objective of the Chamber is to continue to grow exports of goods and services from the United States to other countries. In 2021 exports of manufactured goods surpassed $1.13 trillion (U.S.), a sum representing nearly half of the sector's total output. The Chamber advocates for international trade so U.S. companies can sharpen their global competitiveness and the economy can benefit from that trade. The Chamber is a strong proponent of free trade agreements and has encouraged the pursuit of additional free trade agreements.

4. The Chamber is deeply concerned about this case and the issues it presents, which are important to businesses on both sides of the border, and to the viability and credibility of the USMCA and the Rapid Response proceeding created therein.

5. The San Martín mine case is the first to go before a USMCA Rapid Response panel. The dispute thus represents a significant test for the USMCA Rapid Response mechanism. It would be especially damaging if this first case failed to represent a valid, viable and credible claim that a denial of rights is occurring at the facility in question. This is especially true given its status as the first case under the Rapid Response mechanism, which should be free from procedural defects, and should respect the principles of due process.

6. Given the novelty of this issue and the significance it has on the Rapid Response Petition process, the Chamber seeks leave to file the attached Amicus Submission by the Chamber of Commerce of the United States of America for consideration by the Rapid Response panel convened to resolve the above-captioned submission.

7. The Chamber originally submitted the attached Amicus as part of the filing by the San Martín Mine. The Chamber learned that the submission had been rejected, and that the San Martín Mine was asked to resubmit its filing without the Chamber's attachment. The basis upon which the filing was rejected was that Article 20 of the USMCA Chapter 31 Rules of Procedure, somehow prevented the Chamber from submitting its position to the Panel. This was done without notice or an opportunity for hearing or other consideration of the Chamber's views on the Rules of Procedure, or the policy considerations associated with the significance of this case.

8. The Chamber now files the instant Motion to express those views and seeks to have the USMCA Secretariat reconsider the submission accompanied by argument as to why acceptance of the submission is appropriate.

9. Section C of the Rules of Procedure expressly apply to Rapid Response Labor Panels. In particular, Article 26, not Article 20, defines the procedures governing Rapid Response proceedings under Chapter 31-A of the USMCA. Nowhere in Article 26 is there any limitation on the ability of a non-governmental organization, or any other interested party, to make an amicus submission to a Rapid Response Panel, or any authority of the Secretariat to reject such submissions. Rapid Response matters first and foremost are matters in the public interest, and any Rapid Response Panel should have the benefit of all available viewpoints when evaluating a case. Moreover, because the penalties assessed in the case of a denial of rights apply to goods and services from a private sector facility, or enterprise in the case of repeat denials of rights, ample opportunity should be made available to interested parties to express their viewpoints on cases.

10. As pointed out in the attached submission, certain basic tenets of due process have already been disregarded in connection with this case in two foundational ways.

    a. First, a copy of the complaint, even one redacted to protect the identity of the submitters, has not been shared with the government of Mexico or the San Martín Mine. Such an omission makes it virtually impossible for a party or an affected facility to meaningfully defend itself if it does not have a copy of the underlying submission that has given rise to the proceeding.

b. Second, as argued in the attached amicus submission, the entire proceeding before this Rapid Response Panel is premised upon facts that arose before the USMCA went into force, and before Mexico reformed its labor laws. The attached Amicus Submission fully elaborates on this issue, arguments that do not need to be restated here.

11. Continued refusal to accept the Chamber's amicus submission for consideration by the Panel in the instant case will present a third example of how the Rapid Response proceedings deny due process to interested parties in such cases.

12. For legal proceedings to be viewed as credible and meaningful, all persons, including the accused and those with the public interest in mind, should have the opportunity to present their viewpoints. Moreover, members of the Panel should have the benefit of such viewpoints, and they alone should determine whether to consider such viewpoints and what weight to afford them. To deny them the ability to even consider such viewpoints, runs contrary to the public interest and undermines the credibility of the process altogether.

13. Due process is not a mere inconvenience. Due process is what makes a legal system credible, viable and capable of withstanding the test of time. If the Rapid Response Petition mechanism is to have those attributes, it should embrace due process. One small step in that direction is to accept the attached Amicus Submission.

Respectfully submitted,

/s/

Stefan Marculewicz
Littler Mendelson, P.C.
815 Connecticut Ave., N.W., Suite 400
Washington, DC 20006

Counsel for the Chamber of Commerce of the United States of America

Before the Panel established in accordance with Annex 31-A (United States-Mexico Facility-Specific Rapid Response Labor Mechanism) of the Agreement between the United States of America, the United Mexican States and Canada (USMCA)

San Martín Mine

(MEX-USA-2023-31A-01)

Amicus Submission by the Chamber of Commerce of the United States of America

November 21, 2023

I. Introduction

1. The Chamber of Commerce of the United States of America (Chamber) appreciates the opportunity to express its views to the members of the Rapid Response panel established under Annex 31-A of the United States Mexico Canada Agreement (USMCA) in connection with an alleged denial of rights involving the San Martín Mine, which is owned by Industria Minera México, S.A. de C.V. and is located in the Mexican state of Zacatecas.

2. The Chamber is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

3. A significant policy objective of the Chamber is to continue to grow exports of goods and services from the United States to other countries. In 2021 exports of manufactured goods surpassed $1.13 trillion (U.S.), a sum representing nearly half of the sector's total output. The Chamber advocates for international trade so U.S. companies can sharpen their global competitiveness and the economy can benefit from that trade. The Chamber is a strong proponent of free trade agreements and has encouraged the pursuit of additional free trade agreements.

4. The Chamber is deeply concerned about this case and the issues it presents, which are important to businesses on both sides of the border. The San Martín mine case is the first to go before a USMCA Rapid Response panel, and the dispute thus represents a significant test case of the USMCA Rapid Response mechanism. It would be especially damaging if this test case failed to represent a valid, viable and credible claim that a denial of rights is occurring at the facility in question. And especially given its status as the first case under the Rapid Response mechanism, it should be free from procedural defects. That is not the case here.

5. The U.S. government's pursuit of this case violates a central principal upon which the U.S. legal system was built. The principle is that laws do not have retroactive effect unless the lawmakers expressly specify otherwise. The USMCA does not provide for retroactive effect, and nothing in its text permits the U.S. government to apply it that way. However, the facts upon which the U.S. government relies to support its case involving the San Martín mine occurred before the USMCA was negotiated, prior to the USMCA's passage by the U.S. Congress, and prior to its entry into force. Pursuit of this case disregards the

rule of law and the principles of fundamental fairness. For that reason, and the possibility that similar situations that predated the USMCA may give rise to additional Rapid Response proceedings, the Chamber is compelled to offer the perspective of the broader U.S. business community to the panel members who will evaluate the claims by the United States against Mexico in the Rapid Response petition involving the San Martín mine.

6. By agreeing to the facility-specific Rapid Response process in the USMCA, Mexico conferred upon the United States government a very powerful tool. It is a tool the United States should use sparingly and carefully, and in a manner that is consistent with the rule of law. It should also respect Mexico's sovereignty and Mexico's evaluation of compliance with its own laws. This panel has the opportunity to impose restraint on the U.S. government's exercise of that power, and the Chamber encourages it to do so.

7. The Chamber therefore asks that this panel consider the Chamber's views in connection with this submission as it evaluates the case. The Chamber believes that once the panel does so, it will conclude that no denial of rights, as that term is defined under the USMCA, has occurred because the facts upon which this case is based all occurred well before the USMCA went into force. The USMCA cannot apply retroactively, and therefore, does not apply here.

II. Statement of Facts[1]

8. ***Mexico's Labor Relations History and Reform.*** For many years, Mexico had a system that permitted the existence of "protection unions" and "inactive collective bargaining agreements." The system permitted unions to represent employees without employee knowledge or say in that representation. The system denied employees the fundamental right to be represented by a labor union of their own choosing, or not be represented. It denied employees the ability to engage in, or to refrain from, collective bargaining. In many cases, employees were unaware of the existence of collective bargaining agreements that covered them. The system was criticized at the international level, and after prior unsuccessful efforts to change the law, Mexico amended its Constitution on February 24, 2017 to prohibit activities that allowed the system to exist. Then,

[1] It should be noted that neither the government of Mexico nor the San Martín mine has had the opportunity to review the submission that is at issue in this proceeding. This has been raised by Mexico and is a focal point of its submission. While not the focus of this amicus filing, the lack of transparency and due process associated with this proceeding is problematic and calls into question the credibility of the process altogether.

in May of 2019 Mexico updated its labor laws to implement the constitutional changes.[2]

9. Given the massive paradigm shift initiated by this change in the law, Mexico set out an ambitious plan to implement the changes throughout the country over a period of three years. Under that plan, Mexico would implement the reforms in in the first group eight states by mid-November 2020. That first group included the state of Zacatecas, where the San Martín mine at issue in this proceeding is located. Mexico would then implement the reforms in an additional thirteen states by October 1, 2021, and the final eleven states by May 1, 2022.

10. Mexico is well on its way to reforming its labor laws and should be applauded for the progress it has achieved on such a massive undertaking in such a short period of time.

11. ***The USMCA and its Implementation.*** In 2017 the United States and Mexico commenced negotiations on an update to the North American Free Trade Agreement (NAFTA). One of the key elements of the renegotiation related to labor rights in Mexico. By the Fall of 2018, the three countries had reached an agreement on the terms of the USMCA, which was signed on November 30, 2018. It contained Annex 31-A, which is the facility-specific Rapid Response procedure at issue here.[3] This mechanism is a first-of-its-kind in the world of free trade agreements, and this is the first-of-its-kind panel assembled to resolve a petition.

12. Under the U.S. Constitution, treaties must be ratified by the United States Senate.[4] That occurred when the implementing legislation was passed by the U.S. House of Representatives on December 19, 2019 and the U.S. Senate on January 7, 2020. The legislation was signed by the President on January 29, 2020. The USMCA entered into force on July 1, 2020.[5]

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[2] For an ILO study on the history of Mexican labor laws and the subsequent changes, see The Transformation of the Mexican Labour Regulation Model and its link to North American Economic Integration (ilo.org) (https://www.ilo.org/static/english/intserv/working-papers/wp015/index.html). All online citations referenced in this submission were last accessed on November 20, 2023.

[3] IF10997 (congress.gov) (https://crsreports.congress.gov/product/pdf/IF/IF10997#:~:text=approved%20by%20the%20House%20of,a%20vote%20of%2089%2D10.&text=January%2029%2C%202020%3A%20USMCA%20signed,116%2D113).&text=July%201%2C%202020%3A%20USMCA%20entered%20into%20force).

[4] U.S. Constitution, Art. II, Sec. 2.

[5] IF10997 (congress.gov) (https://crsreports.congress.gov/product/pdf/IF/IF10997#:~:text=approved%20by%20the%20House%20of,a%20vote%20of%2089%2D10.&text=January%2029%2C%202020%3A%20USMCA%20signed,116%2D113).&text=July%201%2C%202020%3A%20USMCA%20entered%20into%20force).

13. ***San Martín Mine - Sequence of Events.*** On May 15, 2023, Los Mineros, their U.S. strategic partner the United Steelworkers of America,[6] and the U.S. labor federation the AFL-CIO filed the Rapid Response petition that is at issue before this panel.[7] No one – not the San Martín mine, or the Mexican Government – has seen the petition other than the unions who filed it and the U.S. Government. Under the facility-specific Rapid Response petition mechanism, once the United States believes that a denial of rights has occurred, it refers the matter to Mexico to evaluate the claims. Notwithstanding the fact that the U.S. Government chose not to share the petition, even a redacted one, with Mexico, the Mexican government undertook an investigation into what it reasonably believed was at issue.

14. That investigation, as well as a review of media accounts and a press release issued by the United States Trade Representative, revealed that a labor dispute began in 2007—almost 16 years ago—with a strike at the mine. Eventually, in August of 2018 the striking workers formed a coalition under the applicable section of the Mexican Federal Labor Law at the time, and a majority voted to end the strike. The National Mining and Metal Workers Union (Los Mineros) which initiated the strike, challenged the vote to end the strike. On August 22, 2018, the Federal Mediation and Arbitration Board authorized the start of operations at the San Martín mine. Los Mineros continued to challenge the authorization through legal proceedings. Ultimately, in June of 2023, the Mexican authorities concluded that Los Mineros owns the CBA and ordered backpay. The authorities also concluded that continued operations at the mine were lawful and as late as July of 2023 authorized the continuation of work at the mine pending any further appeals.[8] Although Los Mineros is the rightful owner of the CBA at the mine the union has not sought to engage in collective bargaining with the employer. Los Mineros continue to believe, contrary to the findings of the Mexican authorities, that the strike is ongoing and because of that, the operations at the mine should cease.

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[6] USW and Los Mineros Make Meaningful International Trade | United Steelworkers. (https://www.usw.org/news/media-center/articles/2018/usw-and-los-mineros-make-meaningful-international-trade).

[7] United States Requests First Ever USMCA Rapid Response Labor Mechanism Panel at Grupo Mexico Mine | United States Trade Representative (ustr.gov) (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/august/united-states-requests-first-ever-usmca-rapid-response-labor-mechanism-panel-grupo-mexico-mine).

[8] It should be noted that Mexican labor law proceedings are complex. Under Mexican labor law, ownership of a CBA and whether a strike is lawful or not are handled through separate proceedings.

15. The Mexican authorities have concluded under Mexican law that Los Mineros enjoy representational rights for the workers at the mine, and is the owner of the collective bargaining agreement there. Notwithstanding, Los Mineros continues to disagree with the authorities' decision to end the strike. On May 15, 2023 the unions filed the USMCA Rapid Response petition that is the subject of this proceeding. Following the procedural steps of Rapid Response mechanism, on August 22, 2023, the United States government announced that it had requested the first panel ever under the Rapid Response Labor Mechanism.

III. Argument

16. The Chamber's amicus filing focuses on a single issue: Whether the U.S. government has the legal authority under the USMCA to pursue a Rapid Response petition involving facts and laws that predated the USMCA and its entry into force. The answer is an unequivocal "no."

17. The U.S. government lacks legal authority to pursue this case. The events that gave rise to the petition predate the entry into force of the USMCA, and until that occurred, the U.S. government agreed that the labor provisions of NAFTA, known as the *North American Agreement on Labor Cooperation*, remained in force.

18. ***USMCA's Plain Language Precludes Retroactive Application.*** The plain language of the USMCA implementation documents makes it clear that the USMCA does not apply until its entry into force when the NAFTA labor provisions terminate. The USMCA Protocol,[9] which is the operative instrument that defines the framework within which the USMCA would replace NAFTA, provides the following: "Each Party shall notify the other Parties, in writing, once it has completed the internal procedures required for the entry into force of this Protocol. This Protocol and its Annex *shall enter into force on the first day of the third month following the last notification*."[10] The Protocol makes clear that the labor provisions of NAFTA were to remain in force until the USMCA came into force. The Protocol reads, "[u]pon entry into force of this Protocol, the *North American Agreement on Labor Cooperation*… shall be terminated."[11]

[9] USMCA_Protocol.pdf (ustr.gov) (https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf).
[10] *Id.* (emphasis added).
[11] *Id.*

19. In other words, the parties must resolve any labor related issue that arose before the entry of the USMCA into force under the NAFTA labor provisions, not those of the USMCA.

20. ***International Law Precludes Retroactive Application of Treaties***. Even absent the plain language of the USMCA protocol, a long-standing principle of international law is that a treaty does not apply to a member state until the state has ratified the treaty or the treaty comes into force. International treaties simply do not apply retroactively. "Unless a different intention appears, the provisions of an international agreement do not bind a party in relation to any act or fact that took place, or any situation that ceased to exist, before the date of the entry into force of the agreement with respect to that party." Restatement (Third) of Foreign Relations Law § 322(1) (1987).

21. The United Nations Vienna Convention on the Law of Treaties,[12] which was signed by the United States on April 24, 1970, by Mexico on May 23, 1969 and accessed to by Canada on October 14, 1970 sets forth the generally accepted rules for application of treaties.

22. Specifically, Article 28 of the Vienna Convention is titled "Non-retroactivity of Treaties." The Article provides as follows: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

23. Nowhere in the USMCA does there appear any intent to apply its provisions to events that predated its entry into force. In fact, the USMCA Protocol provides the opposite. It makes clear that the labor provisions of NAFTA remained in effect until the USMCA went into force.

24. Even the International Labor Organization (ILO), the agency of the United Nations that oversees labor standards globally, adheres to the principle that a treaty does not apply retroactively.

25. The ILO's primary instrument through which the agency sets labor standards globally is the Convention. Per the ILO Constitution, an ILO Convention does not become binding until a member state has ratified it. Article 19, Section 5(d) of the Constitution of the International Labor Organization provides that if a member state ratifies an ILO Convention, "it will communicate the formal

[12] Vienna Convention on the Law of Treaties (1969) (un.org) (https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention."[13] Enforcement of ILO Conventions against a member state is authorized under Article 26 of the ILO Constitution. It provides that "[a]ny of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified."[14]

26. The ILO was very active in connection with Mexico's labor law reforms, and as part of its labor reform process, Mexico ratified ILO Convention 98, the Right to Organize and Collective Bargaining Convention, on November 23, 2018. Before that date, Mexico had no obligations to conform its laws to Convention 98. The events that give rise to this Rapid Response proceeding, predated Mexico's ratification of ILO Convention 98.

27. As an analogy applicable to this situation, the Convention of the Organization for Economic Co-operation and Development (OECD), the foundational document for another international organization that touches on international labor standards through its Guidelines for Multinational Enterprises[15] also provides that member states are not bound by the obligations of the Convention until after they have ratified or accepted said instrument. Article 14 provides that the OECD Convention shall come into force for a member state until it has deposited its instrument of ratification or acceptance.[16]

28. Other international instruments follow the same structure. For example, Article 13 of the 2001 instrument on Responsibility of States for Internationally Wrongful Acts provides that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation at the time the act occurs."[17]

29. ***As a Matter of International Law, the United States Consistently Argues that Treaties Do Not Apply Retroactively.*** The instant Rapid Response petition involving the San Martín mine is not the first time the issue of retroactive application has been considered by the USTR. However, this appears to be the

[13] Key document - ILO Constitution (https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A19)
[14] *Id.*
[15] MNE Guidelines - Organisation for Economic Co-operation and Development (oecd.org) (https://mneguidelines.oecd.org/mneguidelines/).
[16] Convention on the OECD (https://www.oecd.org/about/document/oecd-convention.htm).
[17] Responsibility of States for Internationally Wrongful Acts (2001) (un.org) (https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

first time the United States has sought to apply a treaty retroactively when the plain text of that treaty fails to authorize such application.

30. For years, the United States has argued that treaties cannot be applied retroactively,[18] including NAFTA and the USMCA.[19] The U.S. government's position on retroactive application of this petition belies international law and the position the U.S. government has consistently taken in other trade disputes. It is unclear why this petition justifies a fundamental shift in trade policy, except that it advances the interests of U.S. organized labor and their allies in Mexico.[20] The Chamber does not believe the U.S. government can draw a meaningful distinction to justify this shift.

31. **<u>The U.S. Government's Position With Respect to Retroactivity is Inconsistent with the Rule of Law Generally and U.S. Law in Particular.</u>** The U.S. government's pursuit of this case violates the principles of due process, the rule of law, and fundamental fairness. The U.S. government's approach here, which is clearly designed to advance the interests of its labor union allies, is totally inconsistent with the broader policy doctrine of the United States. The United States Department of State has an entire Bureau dedicated to championing "universal values, including respect for the rule of law, democratic institutions, and human rights."[21] The rule of law is central to the U.S. system of government.

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[18] See The United States of America's Memorial on its Preliminary Objection, *TC Energy Corporation and TransCanada PipeLines Limited v. United States*, ICSID Case No. ARB/21/63, para. 11 (June 12, 2023) (arguing that the United States' alleged breach of the NAFTA occurred after NAFTA's termination and thus is outside the scope of the substantive provisions of the NAFTA, citing to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

[19] See, e.g., *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America, at 20 and n. 17 and 18 (June 1, 2001) (the United States citing to Article 13 and Article 28 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts in support of its proposition that under general principles of international law and absent a showing of contrary intent, NAFTA's obligations only apply to acts or facts that occurred after NAFTA's effective date); *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure* (USA-CDA- 2021-31-01), Rebuttal Written Submission of the United States of America, para 2 (the United States stating that the solar safeguard measure is not a "continuing breach" of the USMCA, because the United States applied the unlawful measure prior to entry into force of the USMCA).

[20] Biden Does Big Labor's Bidding in Mexico - WSJ (https://www.wsj.com/articles/biden-does-big-labors-bidding-in-mexico-usmca-ustr-unions-56b195d8).

[21] Bureau of Democracy, Human Rights, and Labor - United States Department of State (https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-democracy-human-rights-and-labor/).

32. The United States has a long-standing and deeply rooted presumption in its own laws against retroactive application of those laws. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)(citing, among other cases, *Dash v. Van Kleek,* 7 Johns. 477, 503 (NY 1811)("It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have retrospective effect.")). Indeed, certain provisions of the United States Constitution specifically reject the retroactive application of laws. *See e.g., U.S. Const.* Art. I, Sec. 9, cl. 3 (prohibiting retroactive application of penal legislation); Art I, Sec. 10, cl. 1 (prohibiting State passage of retroactive legislation impairing the obligation of contracts); Art I, Secs. 9-10 (prohibiting legislatures from singling out disfavored persons and meting out summary punishment for past conduct).

33. It is true that under some circumstances, legislation in the United States can apply retroactively, but only where the legislature has made clear its intent to do so. "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Landgraf*, 511 U.S. at 270. "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.*

34. Nowhere in the text of the USMCA, the USMCA Protocol, or the enabling legislation for the USMCA, is there any directive that the treaty applies to events that predate its entry into force. Without express permission to do so, the U.S. government lacks any legal authority to retroactively apply the USMCA to events that predate the treaty's effective date of July 1, 2020. It is simply not fair to apply a law, whether domestic or international, that did not exist at the time the events that gave rise to the claim occurred.

35. Making matters worse, the U.S. government's attempt to retroactively apply laws in this case occurs on two levels. First, as discussed above, it seeks to apply the USMCA to facts that predate the treaty's entry into force.

36. Second, and perhaps a greater disregard of the principles of law, it seeks to apply Mexico's labor law reforms retroactively to Mexican citizens. Mexico did not pass its labor law reforms until May 1, 2019. The vote to end the strike occurred almost a year before then, in August 2018, and the authorities have

continued to authorize full operation of the mine. The Mexican labor law reforms did not have retroactive effect, and, in fact, were phased in over the course of two years.

37. It is especially troublesome in this case that the U.S. government is seeking not just the retroactive application of a treaty, but the retroactive application of a foreign sovereign's law within that foreign sovereign's own borders. No doubt, it would be an affront to U.S. sovereignty if Mexico, or any other trading partner for that matter, attempted to do what the U.S. government has sought to do here.

38. From a pure policy perspective, the retroactive application of laws that did not exist at the time of an alleged infraction creates significant challenges for businesses. Many multinational enterprises have robust codes of conduct and compliance departments that exist for the sole purpose of ensuring that the enterprise follow applicable laws. Effective compliance with law requires knowledge of that law. Application of law to facts that predated that law, as is being done here, undermines that entire process and the broader culture of compliance.

39. Applying a law retroactively, particularly the law of another country, also undermines predictability and unsettles expectations of enterprises subject to that law. Laws exist to inform entities how to behave. If they conform behavior to the law, they should be able to reasonably predict their conduct will not have adverse consequences. However, if an enterprise cannot reasonably predict its behavior will be found lawful, then it is left with two options – (1) take its chances and run the risk of an adverse finding – which in this case could result in the elimination of tariff preferences; or (2) avoid the risk and cease doing business in the jurisdiction altogether. No doubt the risks of an adverse finding could cause many businesses to choose the second option. That does not facilitate free trade between the United States and Mexico.

40. The USMCA is a free trade agreement designed to *facilitate* trade between the United States and Mexico. Yet the way it is being applied in this case, and the policy message being sent by the U.S. government's approach to this case, would appear to support a restriction of trade with Mexico. That is not the purpose of the labor chapter of the USMCA.

41. This Panel has a duty to the principles of international and domestic rule of law, as well as basic common sense, to reject this petition.

42. Based upon the foregoing, this Panel should conclude that it lacks jurisdiction over this dispute because it occurred prior to the entry into force of the USMCA, and because of that, no denial of rights has occurred in connection with this petition.

Respectfully submitted,

/s/

Stefan Marculewicz
Littler Mendelson, P.C.
815 Connecticut Ave., N.W., Suite 400
Washington, DC 20006

Counsel for the Chamber of Commerce of the United States of America