IN THE ARBITRATION UNDER
ANNEX 14-C OF THE UNITED STATES-MEXICO-CANADA AGREEMENT,
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT,
AND THE 2013 UNCITRAL ARBITRATION RULES

WESTMORELAND COAL COMPANY

Claimant

-and-

GOVERNMENT OF CANADA

Respondent.

ICSID CASE NO. UNCT/23/2

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Annex 14-C of the United States-Mexico-Canada Agreement (USMCA), Article 1128 of the North American Free Trade Agreement (NAFTA), and Section 20 of Procedural Order No. 1, the United States of America makes this submission on questions of interpretation of the USMCA and the NAFTA. The United States does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[*]

[*] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

Limitations on Claims for Loss or Damage (NAFTA Articles 1116 & 1117)

Loss or damage incurred directly

2. To the extent applicable in this case, NAFTA Articles 1116 and 1117 set forth limitations on the types of claims for loss or damage that an investor may make.

3. Each claim by an investor must fall within either NAFTA Article 1116 or NAFTA Article 1117 and is limited to the type of loss or damage available under the Article invoked.[1] An investor that has not incurred loss or damage by reason of, or arising out of, a Party's alleged breach cannot submit a claim to arbitration under NAFTA Chapter Eleven.

4. NAFTA Article 1116(1) permits an investor to present a claim for loss or damage incurred by the investor itself:

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the *investor* has incurred loss or damage by reason of, or arising out of, that breach. (Emphasis added)

5. NAFTA Article 1117(1), in contrast, permits an investor to present a claim on behalf of an enterprise of another Party that it owns or controls for loss or damage incurred by that enterprise:

> An investor of a Party, *on behalf of an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation . . . and that the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach. (Emphasis added)

[1] An investor may bring separate claims under both Articles 1116 and 1117; however, the relief available for each claim is limited to the article under which that particular claim falls.

6. NAFTA Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury.[2] Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under NAFTA Article 1116. Where the investor seeks to recover loss or damage to an enterprise that the investor owns or controls, the investor's injury is only *indirect*. Such a derivative claim must be brought, if at all, under NAFTA Article 1117.[3] However, NAFTA Article 1117 is applicable only where the loss or damage has been incurred by "*an enterprise of another Party* that is a juridical person that the investor owns or controls directly or indirectly." (Emphasis added). NAFTA Article 1117 does not apply where the alleged loss or damage is to an enterprise of a non-Party or of the same Party as the investor.

7. The United States' position on the interpretation and functions of NAFTA Articles 1116(1) and 1117(1) is long-standing and consistent.[4] The United States therefore agrees with Canada[5] and Mexico[6] that investors must allege direct damage to recover under NAFTA Article

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[2] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. DOC. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 146 (1993) ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor.").

[3] *See*, *e.g.*, Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) ["Caplan & Sharpe"] (noting that Article 24(1)(a), nearly identically worded to NAFTA Article 1116(1), "entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor," while Article 24(1)(b), nearly identically worded to NAFTA Article 1117(1) "creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls").

[4] *See*, *e.g.*, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 6-10 (Sept. 18, 2001) ("Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment."); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2-10 (Nov. 6, 2001); *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 2-18 (June 30, 2003); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-9 (May 21, 2004); *Legacy Vulcan, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB/19/1, Submission of the United States of America ¶¶ 29-38 (June 7, 2021).

[5] *See*, *e.g.*, *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Government of Canada Counter-Memorial on Damages ¶ 28 (June 9, 2017); *id*. n.50 (authorities cited including Canada's prior statements on same); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Counter-Memorial (Damages Phase) ¶¶ 108-109 (June 7, 2001).

[6] *See*, *e.g.*, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United Mexican States (Damages Phase) ¶¶ 41-45 (Sept. 12, 2001) (explaining that Article 1116 allows an investor to bring a claim for loss or damage suffered by the investor and that Article 1117 allows an investor to bring a claim for loss or damage on behalf of an enterprise (that the investor owns or controls) for loss or damage suffered by the enterprise); *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Statement of Defense ¶¶ 167(e) and (h)

1116 and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed, if at all, under NAFTA Article 1117.[7]

8. The distinction between NAFTA Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders."[8] As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: "a wrong done to the company frequently causes prejudice to its shareholders." Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed."[9] Thus, only *direct* loss or damage suffered by shareholders is cognizable under international law.[10]

9. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is

(Nov. 24, 2003); *Alicia Grace v. United Mexican States*, NAFTA/ICSID Case No. UNCT/18/4, Statement of Defense ¶¶ 529-37 (June 1, 2020).

[7] Pursuant to Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(3) (a)-(b) ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"). Although NAFTA Article 1131(2) also provides a manner by which the NAFTA Parties may interpret the NAFTA, nothing in that article states that it is the exclusive means by which the Parties may interpret the Agreement.

[8] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 639, ¶¶ 155-156 (Judgment of Nov. 30) (noting also that "[t]his remains true even in the case of [a corporation] which may have become unipersonal").

[9] *Id.* ¶ 156 (*quoting Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 44 (Second Phase, Judgment of Feb. 5) ["*Barcelona Traction*"]). *See also Barcelona Traction* ¶ 46 ("[A]n act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.").

[10] *See Barcelona Traction* ¶ 47 ("Whenever one of his direct rights is infringed, the shareholder has an independent right of action."). The United States notes that some authors have asserted or proposed exceptions to this rule.

determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

10. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution.[11] Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests—whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.[12]

11. The second principle of customary international law against which NAFTA Articles 1116 and 1117 were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.[13]

12. Under these background principles, a common situation is left without a remedy under customary international law. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor/shareholders, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is only directly suffered by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility.[14]

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[11] *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder's State that has espoused the claim) may bring a claim under customary international law.

[12] Under NAFTA Article 1110, an expropriation may either be direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

[13] ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 512-513 (9th ed. 1992) ("[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.") (footnote omitted).

[14] Some investment treaties allow an investment to assume the nationality of the investor that owns or controls that investment pursuant to ICSID Article 25(2)(b), therefore permitting an enterprise to bring a claim on its own behalf

13. NAFTA Article 1117(1) addresses this issue by creating a right to present a claim not found in customary international law.[15] Where the investment is an enterprise of another Party,[16] an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise.

14. NAFTA Article 1116, in contrast, adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights.[17] Were shareholders to be permitted to claim under NAFTA Article 1116 for indirect injury, NAFTA Article 1117's limited carve out from customary international law would be superfluous. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of customary international law "in the absence of words making clear an

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even though it was constituted under the laws of the disputing Party. *See, e.g.,* U.S.-Argentina Bilateral Investment Treaty, S. TREATY DOC. NO. 103-2, 103d Cong., 1st Sess., art. VII(8) (1994) ("For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."); Energy Charter Treaty, art. 26(7), Apr. 16, 1998 (entry into force), 2080 U.N.T.S. 95; 34 I.L.M. 360 (1995).

[15] *See* Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, *in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 177 (Judith H. Bello et al. eds., 1994) ("Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.") (footnote omitted).

[16] *See* NAFTA Article 1139 ("enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there"); NAFTA Article 201 ("enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association").

[17] NAFTA Article 1116(1) derogates from customary international law only to the extent that it permits individual investors (including minority shareholders) to assert claims that could otherwise be asserted only by States. *See, e.g.*, *Nottebohm* (*Liechtenstein v. Guatemala*), 1955 I.C.J. 4, 24 (Judgment of Apr. 6) ("[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]") (internal quotation omitted); F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 86 (1974) ("[I]nternational responsibility had been viewed as a strictly 'interstate' legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 585 (5th ed. 1998) ("[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.").

intention to do so."[18] Nothing in the text of NAFTA Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.[19]

15. The above conclusions on the distinction between NAFTA Articles 1116(1) and 1117(1) are reinforced in several complementary NAFTA provisions, all of which serve to recognize relevant principles of domestic law[20] aimed at preserving the separate legal identity of a corporation,[21] promoting judicial economy,[22] and protecting the rights of creditors and other shareholders.[23]

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[18] *Elettronica Sicula S.p.A. (ELSI)* (*U.S. v. Italy*) 1989 I.C.J. 15, ¶ 50 (Judgment of July 1989) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003); *see also id.* at ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

[19] As noted earlier, the United States expressly drew a distinction between direct and indirect injury in its Statement of Administrative Action. *See supra*, note 2.

[20] *See, e.g., Barcelona Traction* at ¶ 50 ("If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has . . . not only to take cognizance of municipal law but also to refer to it.").

[21] *See, e.g., Bolivar v. Pocklington*, 975 F.2d 28, 33 (1st Cir. 1992) ("a sole shareholder cannot commandeer corporation assets by discarding the corporate veil at his convenience"). *See generally* David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law," OECD Working Papers on International Investment, 2014/02, at 13-25 (2014) ["Gaukrodger"] (discussing the impact that shareholder claims for indirect loss may have on corporate identity).

[22] *See, e.g., Johnson v. Gore Wood & Co.* [2002] 2 AC 1, 62 (House of Lords) ("If the shareholder is allowed to recover in respect of [indirect] loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. . . . Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."); *Gaubert v. United States*, 885 F.2d 1284, 1291 (5th Cir. 1989) ("One rationale behind this prohibition [on indirect loss] rests on principles of judicial economy."), *reversed on other grounds*, 499 U.S. 315 (1991).

[23] *See, e.g., Gaubert*, 885 F.2d at 1291 ("Another rationale for the prohibition [on shareholder claims for indirect loss] is fairness to creditors of the corporation. Common shareholders are usually at or near the bottom of the corporate financial pecking order. First come the secured then unsecured creditors, then the bondholders in order of preference, then the preferred shareholders, and lastly the common shareholders. Any recovery for injuries to the corporation is paid into the corporation, and the various creditors, bondholders, and equity-holders are 'paid' in that order. Were common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation."); Caplan & Sharpe, at 826 (noting that with respect to art. 24(1)(b) of the U.S. Model BIT, substantively identical to NAFTA Article 1117(1), the provision

16. For example, NAFTA Article 1117(3) provides that claims brought on behalf of an investor under NAFTA Article 1116(1) and an enterprise under NAFTA Article 1117(1) that arise from the same events should be heard together by the same arbitral tribunal.[24] This provision promotes judicial economy by providing for the consolidation of claims, thereby reducing the risk of double recovery and inconsistent awards when the claims are based on the same events. NAFTA Article 1117(3) also makes clear that an investor that owns or controls an enterprise, may, in an appropriate case, submit claims under both NAFTA Articles 1116 and 1117.[25] This allowance would be unnecessary if the controlling investor could claim for indirect loss under NAFTA Article 1116(1).

17. NAFTA Article 1117(4) is aimed at further reducing the possibility of multiple actions by preventing the investment, which includes an enterprise under NAFTA Article 1139, from bringing a claim on its own behalf.[26]

18. NAFTA Articles 1121(1)(b) and 1121(2)(b) also reinforce the distinction between NAFTA Articles 1116 and 1117, respectively, in order to reduce the likelihood of multiple

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maintains the "distinction between the rights of shareholders and the corporation [and] prevents investors from effectively stripping away a corporate asset . . . to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors") (internal citation omitted).

[24] NAFTA Article 1117(3) reads in full: "Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interest of a disputing party would be prejudiced thereby."

[25] For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay," the investor might be able to claim under Article 1116 damages stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 1117 damages relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations. A minority or non-controlling shareholder under such a scenario, however, could submit only a claim for direct damages – the loss of dividends – under Article 1116.

[26] *See* MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1117-4 (2008 Supp.) ("[Article 1117(4)] is likely . . . designed to forestall the possibility that the investment could make one claim while its controlling owner advanced a different claim. The rule of non-responsibility should prohibit that result, in any event, but given the different approach taken in the ICSID Convention [under Article 25(2)(b)], the provision provides extra guidance to tribunals as to the route an Article 1117 claim should take.").

actions and double recovery.[27] Regardless of whether an investor submits a claim for injury to its own interest under NAFTA Article 1116, or to the interest of an enterprise that the investor owns or controls under NAFTA Article 1117, the enterprise must "waive [its] right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach," with certain limited, specified exceptions. Otherwise, a NAFTA Party could be forced to defend against such claims in concurrent or consecutive proceedings, risking duplicative and potentially inconsistent decisions for the same loss or damage arising from the same breach.

19. Finally, under NAFTA Article 1135(2)(a) and (b), where a claim is made under NAFTA Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This requirement – which follows the practice of many domestic legal systems with respect to shareholder derivative actions[28] – is aimed at preventing the investor from effectively stripping away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.[29] Instead, any award in the claimant's favor will make the enterprise whole and the value of the shares and assets will be restored. This goal is reflected in NAFTA Article 1135(2)(c), which provides that where a claim is made under NAFTA Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief.

20. Allowing an investor to claim for any indirect loss under NAFTA Article 1116(1) would render the above framework ineffective.[30] For example, if an investor had the right to bring its

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[27] *See, e.g., GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Final Award ¶¶ 116-121 (Nov. 15, 2004) (finding that "[t]he overwhelming *implausibility* of a simultaneous resolution of the problem [of double recovery] by national and international jurisdictions impels consideration of the practically *certain* scenario of unsynchronized resolution") (emphasis in original).

[28] *See* Gaukrodger at 19-20.

[29] Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties. *See, e.g.*, Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT'L L.J. 71, 77, 78 (1965).

[30] It is well-established under customary international law that provisions of a treaty must be interpreted in such a manner that renders their terms effective. *See Territorial Dispute* (*Libya v. Chad*), 1994 I.C.J. 6, ¶ 51 (Judgment of Feb. 3) (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties,

own claim for loss or damage suffered by an enterprise, that investor might choose to make a claim under NAFTA Article 1116(1) rather than NAFTA Article 1117(1) in order to protect the award from creditors or other shareholders.[31] Under such circumstances, the provisions of NAFTA Article 1135 – designed to ensure any award based on injury to an enterprise is paid to the enterprise in order to protect the interests of creditors and other shareholders – would be rendered meaningless.[32]

Respectfully submitted,

[signed]

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consistently upheld by international jurisprudence, namely that of effectiveness") (collecting authorities); *accord Corfu Channel* (*United Kingdom v. Albania*), 1949 I.C.J. 4, 24 (Judgment of Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

[31] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 452 (1st ed. 2009) ("It is difficult to imagine why a shareholder would elect to bring a claim for the account of its company if it had the option of bypassing the company altogether. The company might be liable to pay creditors, local taxes and discharge other obligations before distributing the residual amount of any damages recovered to the shareholders.").

[32] *See, e.g., Marvin Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Correction and Interpretation of the Award ¶¶ 12-13 (June 13, 2003) (revising the award to comply with the requirement of Article 1135(2) that damages under Article 1117 be paid to the enterprise). Allowing an investor to bring a claim for indirect loss under Article 1116 would also permit a class of claims (by minority shareholders and creditors, which do not own or control the enterprise at issue) never envisioned by the NAFTA Parties. In such a case, Article 1121(1)(b) would not prevent the enterprise from also seeking available remedies under domestic law for the same injury. Nor would Article 1117(3) require the consolidation of these investors' claims. As a result, there would be an increased risk of forum shopping, multiple actions, double recovery and inconsistent awards.