IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT AND CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

- AND -

THE 2013 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

- BETWEEN –

WESTMORELAND COAL COMPANY,

Claimant,

AND

GOVERNMENT OF CANADA,

Respondent.

(ICSID Case No. UNCT/23/2)

CLAIMANT'S COMMENTS ON THE ARTICLE 1128 SUBMISSIONS

April 24, 2024

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1. Pursuant to Paragraph 20.2 of Procedural Order No. 1 ("**PO1**"), Claimant Westmoreland Coal Company ("**WCC**") hereby provides its comments on the submissions of the United States and Mexico made pursuant to Annex 14-C of the United-States-Mexico-Canada Agreement ("**USMCA**"), and Article 1128 of the North America Free Trade Agreement ("**NAFTA**").

2. On April 10, 2024, the United States submitted a narrow statement focused on "derivative claims" without addressing the other disputed issues in this arbitration. This is telling, since WCC cited extensively to U.S. government publications and agency announcements to explain that the object and purpose of the USMCA legacy provision is to continue NAFTA protection for a three-year period. The United States has not disputed WCC's interpretation of those publications. The United States' limited position on derivative claims, on the other hand, contradicts decades of jurisprudence. For that very reason, multiple tribunals have ignored similar Article 1128 submissions by the United States on this issue.

3. On April 10, 2024, Mexico submitted a broader statement, which provides valuable insight into the Contracting Parties' intent in negotiating the legacy investment provisions under the USMCA. Aside from its comments on the USMCA, however, Mexico primarily addresses issues that are irrelevant to the present dispute. Specifically, while Mexico comments on a broad range of issues, including the Article 1121 waiver requirement and the Article 1116/1117 statute of limitations, Mexico offers only high-level comments without addressing the specific interpretive issues currently before the Tribunal. Nevertheless, WCC provides comments on Mexico's submission to the extent relevant.

I. LEGACY PROTECTION UNDER ANNEX 14-C OF THE USMCA

4. In its non-disputing party submission, Mexico argues that the sole purpose of legacy protection is to "preserve" NAFTA claims arising out of acts and facts that pre-date the USMCA.[1] In fact, Mexico confirms that USMCA Article 14-C ***only*** applies to acts which pre-dated the USMCA and does not create an additional three-year period during which investors can assert NAFTA claims pertaining to legacy investments.[2] Meanwhile, the

[1] *See* Non-Disputing Party Submission of the United Mexican States ("Mexico's Submission"), ¶ 9 ("[T]he ordinary meaning of Annex 14-C preserves the ability of investors to submit claims to arbitration alleging NAFTA breaches in relation to acts or facts that took place before the termination of the NAFTA.").

[2] *Id.*

United States offers no comment on the legacy investment provision. Three core conclusions may be drawn from the non-disputing Parties' submissions on legacy protection.

5. ***First***, Mexico's position on legacy protection supports finding that WCC and its investment are protected under USMCA Annex 14-C since, according to Mexico, "the ordinary meaning of Annex 14-C ***preserves the ability of investors to submit claims to arbitration alleging NAFTA breaches in relation to acts or facts that took place before the termination of the NAFTA***."[3] There can be no doubt that WCC is an "investor … alleging NAFTA breaches in relation to acts or facts that took place before the termination of the NAFTA."[4] Thus, its right to submit its claims alleging NAFTA breaches to arbitration is preserved.

6. ***Second***, Mexico's submission contradicts Canada's position with respect to Annex 14-C. Canada's central argument is that an investment must be ***continuing*** in the country on July 1, 2020 in order to qualify for legacy investment protection.[5] That position only makes sense if there is some ***forward-looking purpose*** for the investment protection, *i.e.*, if the legacy protection is designed to ensure that investments ***continue to benefit*** from protection with respect to ***future measures.*** If the treaty does not provide for future protection, there would be no point in requiring a continuing investment. Mexico submits that there is no forward-looking purpose of the legacy provision, since, in its view, "NAFTA breaches could only have occurred before NAFTA was terminated."[6] It makes no sense to curtail such a limited window of protection (which applies only to acts between July 1, 2017, and July 1, 2020) by excluding victims of expropriation.

7. ***Third***, the United States' Article 1128 submission does not address legacy investment protection under Annex 14-C. It also does not address Claimant's extensive reliance on contemporaneous materials to prove the United States' understanding that the USMCA "continues" NAFTA protection for breaches that occurred prior to the NAFTA's

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3 *See* Mexico's Submission, ¶ 9 (emphasis added). The United States has expressed the same view in non-disputing party submissions submitted in other NAFTA legacy arbitrations. *See Legacy Vulcan LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Second Submission of the United States of America, July 21, 2023, ¶¶ 8–12, **CLA-078**.

4 *See* Mexico's Submission, ¶ 9.

5 *See, e.g.*, Canada's Reply on Jurisdiction, Dec. 13, 2023, ¶ 67 ("Reply").

6 Mexico's Submission, ¶ 9.

termination.[7] Thus, the tribunal should accept the United States' contemporaneous statements cited in WCC's briefs as evidence that the United States did not intend to abruptly terminate NAFTA protection for pre-existing NAFTA claims.

II. THE WAIVER REQUIREMENT UNDER NAFTA ARTICLE 1121

8. As WCC has explained in this arbitration, the NAFTA Article 1121 waiver requirement requires investors to waive their rights to use procedures that are *distinct* from the investment treaty arbitration mechanism selected by the investor.[8] Moreover, even if the Article 1121 waiver requirement requires a waiver of investment arbitration rights, it does not prevent an investor whose claims were dismissed on curable procedural or jurisdictional grounds from re-commencing arbitration a second time after curing the defect, as is the case here. Canada argues otherwise.[9]

9. In its Article 1128 submission, Mexico submits that Article 1121 requires a waiver of all claims, including investment arbitration claims, that seek anything other than injunctive, declaratory, or other extraordinary relief not involving the payment of damages.[10] Mexico's position not only makes no sense, but fails to address the precise issue in dispute in this arbitration—whether Article 1121 prevents the resubmission of the *same claim*

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[7] *See, e.g.*, Claimant's Rejoinder on Jurisdiction, ¶ 63 ("Rejoinder"). *See, also, e.g.*, Email from D. O'Brien to J. Melle and other USTR personnel, "RE: Call Tomorrow Morning, attaching Talking Points," Nov. 28, 2018, p. 3, **C-106**; Congressional Research Service, "USMCA: Implementation and Considerations for Congress," Legal Sidebar No. LSB10399, Jan. 30, 2020, p. 3 (emphasis added), **C-059**; U.S. Dep't of State, 2020 Investment Climate Statements: Mexico, available at: https://www.state.gov/reports/2020-investment-climate-statements/mexico/ (lasted accessed Aug. 14, 2023) (emphasis added), **C-061**; *see also* Talking Points on USTR Investment Chapter for OECD Investment Committee Meetings, pp. 2–3, **C-113** (explaining that explained that "the Investment Chapter departs significantly from the prior practices of the three parties" because "investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those 'legacy investments' for three years after the termination of the NAFTA.").

[8] Rejoinder, ¶ 172. The waiver requirement under NAFTA Article 1121(b) provides that an investor must "waive their 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 referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States ("NAFTA"), signed Dec. 17, 1992, entered into force Jan. 1, 1994, Article 1121(b), **C-107** (emphasis added).

[9] *See, e.g.*, Reply, ¶ 16.

[10] Mexico's Submission, ¶ 16.

under the *same dispute resolution mechanism* after correcting the procedural defect that led to the original dismissal.

10. ***First***, Mexico's reading of Article 1121 is unworkable. If an Article 1121 waiver were to waive investment treaty arbitration rights, the investor would be precluded from *ever* bringing a NAFTA claim in the first place, since Article 1121 provides no exception for a first claim.[11] That is precisely why Article 1121 only requires waiver of the right to pursue "***other*** dispute settlement procedures," *i.e.*, dispute settlement procedures *other than* the investment arbitration procedure selected by the investor. Once an investor has chosen investment treaty arbitration under specified arbitration rules, the investor's sole remaining recourse after submitting the waiver is investment arbitration under the chosen rules.

11. All of the authorities that Mexico cites on this point are irrelevant, as they involve situations where investors simultaneously pursued relief before national courts in violation of the waiver, submitted incomplete waivers, or engaged in other settlement discussions with the State.[12] These cases have nothing to do with the present case, in which WCC initiated a second arbitration *after* curing a jurisdictional defect, invoking the very same dispute resolution mechanism under the very same arbitration rules, without violating any commitments made in its waiver letters.

12. ***Second***, Mexico's submission fails to address the specific disputed waiver issue in this arbitration. Specifically, Mexico does not address whether an Article 1121 waiver prevents

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11 Rejoinder, ¶ 172.

12 In *First Majestic v. Mexico*, the tribunal held the claimant violated the waiver provision in initiating a second ICSID arbitration arising out of the same measures while the first arbitration was still pending. *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Decision on the Respondent's Preliminary Objection to Jurisdiction, 20 December 2023, ¶ 12. Similarly, in *DIBC v. Canada*, the claimant initiated a parallel litigation before U.S. courts after filing its notice of intent under the NAFTA. *Detroit International Bridge Company v. The Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, Apr. 2, 2015, ¶¶ 46, 48, 315, 320, **RLA-029**. The same is true of *Commerce Group v. El Salvador*. *See Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, Mar. 14, 2011, ¶¶ 100–107, **RLA-031** (claimants initiated arbitration while proceedings were ongoing in El Salvadorian courts regarding the same measures). Moreover, none of the cases that Mexico cites address the meaning of "other dispute settlement procedures". In *Air Canada v. Venezuel*a, the tribunal found the claimant met the waiver requirement even though it was involved in "at least" two third-party settlement procedures after the waiver was issued. *See Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, Sept. 13, 2021, ¶ 232. The *KBR* tribunal only held that the "with respect to the measure" language should be interpreted broadly, which is not at issue here. *KBR, Inc. c. Estados Unidos Mexicanos*, Caso CIADI No. UNCT/14/1, Laudo definitivo, 30 de abril de 2015, ¶ 113, **RLA-034**. Finally, in *Renco I*, the claimant included a reservation of rights which the tribunal held violated the treaty. *The Renco Group Inc. v. Republic of Peru*, Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, ¶ 119, **RLA-030**.

a claimant from resubmitting the same claim via the same arbitration rules ***after the claim is dismissed on curable procedural grounds***, which is the only waiver issue in dispute.

13. ***Third***, to the extent Mexico believes that an Article 1121 waiver limits an investor to one bite at the apple via investment arbitration (which is unclear from Mexico's submission), that result has been squarely rejected by every tribunal to have considered it. For example, the *Waste Management* tribunal confirmed that the waiver provision requires the investor to waive their recourse to domestic litigation does *not* apply to future investment arbitrations under the same arbitration rules.[13] Otherwise, an investor's claim could be defeated for purely technical and curable reasons, with no prospect of having its claim heard on the merits before *any* tribunal—national or international.[14] That is an outcome that should be avoided. Indeed, preventing an investor from re-submitting its claim to arbitration after its first attempt is dismissed on curable technical grounds would undermine one of the central goals of the NAFTA: to provide an effective dispute resolution mechanism.[15]

III. DERIVATIVE CLAIMS UNDER NAFTA ARTICLE 1116

14. As noted above, the only point that the United States addresses in its submission is whether an investor can assert a claim for indirect damages under Article 1116 or whether it must claim such damages on behalf of an enterprise under Article 1117. According to the United States, "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."[16] The United

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13 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 27, 35, 37, **RLA-036** ("In the Tribunal's view, neither the express terms of NAFTA nor the applicable rules of international law preclude a claimant who has failed to comply with the prerequisites for submission to arbitration under Article 1121(1) from commencing arbitration a second time in compliance with those prerequisites."). The *Murphy v. Ecuador II* tribunal reached a similar conclusion. *Murphy Exploration & Production Company International v. The Republic of Ecuador*, PCA Case No. 2012-16, Partial Award on Jurisdiction, 13 Nov. 2013 (*Murphy II*), ¶¶ 166–180, **RLA-087**.

14 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 27 ("The claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible.").

15 Canada does not dispute that effective dispute resolution is a goal of the NAFTA. *See* Rejoinder, ¶ 147; s*ee also* NAFTA, Article 102 (1), **C-107** ("The Objectives of this Agreement . . . are to . . . create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes.").

16 Non-Disputing Party Submission of the United States ("United States' Submission"), ¶ 7.

States' position is inconsistent both with the terms of the NAFTA and with *all* prior NAFTA decisions.

15. ***First***, the plain language of the NAFTA expressly recognizes that both voting and non-voting shares are protected investments under the NAFTA. NAFTA Article 1139 defines "investment" to include an "equity security of an enterprise," and "equity or debt securities" are defined to "include[] voting ***and non-voting shares,*** bonds, convertible debentures, stock options and warrants."[17] The NAFTA thereby expressly protects shareholders' (even non-voting shareholders') rights to bring a claim for damage to their shareholding.

16. ***Second***, the plain language of the NAFTA recognizes the rights of an investor to bring a claim for loss, *independent* from the rights of the enterprise. Article 1116 expressly permits "Claim[s] by an Investor of a Party on Its Own Behalf." Under Article 1139, an "investor of a Party" is defined to include, *inter alia*, "a national…that seeks to make, is making or ***has made an investment***," including an Article 1139 investment in "***voting and non-voting shares***." Thus, Article 1116 expressly permits a national that has made an investment in voting or non-voting shares to bring a claim on its own behalf. Article 1116 requires only that the investor have "incurred loss or damage," whether direct or indirect, as a result of the challenged measures.[18] It is indisputable that WCC is the only entity that would have incurred loss or damage as a result of the challenged measures, as confirmed in the *Westmoreland I* award, and thus is entitled to pursue a claim for those losses.[19]

17. Article 1117 ***expands*** the rights of shareholders by allowing majority or controlling shareholders to bring claims on behalf of the ***entire enterprise***.[20] However, Article 1117 does not replace the rights of shareholders to pursue claims on their own behalf. The clearest evidence that Article 1117 relief *supplements* Article 1116 relief (and does not replace it) is that Article 1117(3) requires consolidation of parallel claims asserted by the

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17 NAFTA, Article 1139, **C-107**.

18 NAFTA, Article 1116, **C-107**; *see Tennant Energy, LLC v. Government of Canada* ("Tennant"), PCA Case No. 2018-54, Final Award, 25 Oct. 2022, ¶ 358, **RLA-012** ("The Tribunal notes that Article 116 of the NAFTA does not expressly state that . . . the allegedly wrongful measures must have directly affected the claimant-investor.").

19 *See, e.g.*, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Award, Jan. 31, 2022, ¶¶ 233–237, **CLA-001** ("Westmoreland I Award").

20 NAFTA, Article 1117, **C-107**.

investor and by the enterprise.[21] If it were true that the NAFTA did not permit the investor to recoup their own losses due to damage caused to enterprises in which the investor has an interest, there would be no concern about possible double recovery. The only reason there is such a concern is because *both* the enterprise and the investor can assert claims for losses in share value.

18. ***Third***, the United States' position on derivative claims is contradicted by a long line of jurisprudence in which tribunals have permitted claims for indirect loss, including under the NAFTA.[22]

19. ***Finally***, in any event, even if there were such a limitation, *quod non*, WCC incurred direct damage, as WCC has pled in the arbitration.[23]

IV. THE LIMITATIONS PERIOD UNDER ARTICLES 1116 AND 1117

20. Mexico's submission on the limitations period mostly addresses points that are not at issue in this arbitration. Where relevant, Mexico's submission is unsupported and inconsistent with the plain text of the NAFTA as well as established principles of international law.

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[21] NAFTA, Article 1117(3), **C-107** ("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 116 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.").

[22] *Pope & Talbot v. Canada*, Award in Respect of Damages, May 31, 2002, ¶ 80, **CLA-042** ("It could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise…, it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116."); *S.D. Myers, Inc. v. Canada*, Second Partial Award (Damages), Oct. 21, 2002, ¶ 122, **CLA-043**; *GAMI Investments, Inc. v. United Mexican States*, Final Award, Nov. 15, 2004, ¶¶ 27–33, **CLA-044**; *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, ¶ 35, **CLA-045** ("We agree with UPS that the claims here are properly brought under Article 1116 and agree as well that the distinction between claiming under Article 1116 or Article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada."); *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 86, **CLA-005** ("But it is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative."); *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999, ¶ 89, **CLA-036**; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, ¶¶ 48, 55–56, 57–65, **CLA-037**; *Impregilo v. Argentina*, *Impregilo S.p.A v. Argentine Republic*, ICSID Case No ARB/07/17, Award, Jun. 21, 2011, ¶ 138, **CLA-038**; *F. Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, ¶¶ 377–380, **CLA-039**; *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, Dec. 13, 2017, ¶¶ 154–157, **CLA-040**; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Jan. 18, 2019, ¶¶ 208–213, **CLA-041**; *BG Group Plc v. The Republic of Argentina*, Final Award, Dec. 24, 2007, ¶¶ 189–205, **CLA-032**.

[23] Claimant's Response to Memorial on Jurisdiction, ¶ 144; Rejoinder, ¶ 193.

21. To start, Mexico argues that the statute of limitations is "strict."[24] However, the case law on which Mexico relies focuses on ***when*** the statute of limitations accrues, not whether tolling is a generally recognized principle of international law. In *Tennant Energy, LLC v. Canada*, the tribunal focused only on the date when the limitations period starts to run.[25] Similarly, the tribunal in *Resolute Forest Products Inc. v. Government of Canada* addressed whether the claimant's knowledge of facts suggesting it was likely to have suffered damages was sufficient to commence the three-year limitations period.[26] Since neither of these cases addressed tolling, they have nothing to do with the disputed limitations issues here.

22. Mexico argues that "there is no possibility for the three-year limitation period to be suspended,"[27] but only cites irrelevant sources. For example, Mexico cites its own defensive pleading in *Marvin Roy Feldman* to argue that a government cannot "be deemed to have implicitly and indirectly modified jurisdictional requirements ***for the waiving of its sovereign immunity***."[28] The issue of whether a state "waiv[ed] its sovereign immunity" has no bearing on this case. Likewise, Mexico refers to a quote by Professor Brownlie on estoppel to support this argument, without any indication as to the origin of this quote.[29] In

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24 *See* Mexico's Submission, ¶ 26 (noting the limitations period has been interpreted to be a "clear and rigid limitation defense.").

25 *Tennant*, Final Award, ¶¶ 271–346, **RLA-012**.

26 *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, Jan. 30, 2018, ¶¶ 154, 164–179, **RLA-021**. The paragraph to which Mexico cites addresses the burden of proof on time bar, not whether the limitations period may be tolled. *Id.*, ¶ 85.

27 Mexico's Submission, ¶ 30.

28 *See* Mexico's Submission, ¶ 30 n. 22.

29 *See id.*

any event, the principle of estoppel is well-embraced under international law,[30] and is not refuted even by Canada.[31]

23. More to the point, WCC has demonstrated that tolling—the core issue with respect to Canada's limitations defense—is a well-accepted principle of international law.[32] Mexico does not argue otherwise. Mexico also does not dispute that tolling is recognized under its own domestic law—much like all or almost all domestic laws around the world. In fact, Mexico's own civil code provides that a statute of limitations is interrupted by the filing of a lawsuit or other judicial action,[33] and benefits all plaintiffs that share the same cause of action.[34] Mexico does not dispute this.

24. Mexico also does not dispute that NAFTA Article 1131 requires the application of international law to resolve NAFTA disputes. Mexico does not explain why tolling—a well-accepted principle of customary international law—is not considered part of the "international law" that the Contracting Parties incorporated in the NAFTA in Article 1131.

25. In sum, Mexico's submission on the NAFTA statute of limitations is mostly irrelevant because it addresses points that are not disputed in this arbitration. However, it is nevertheless notable that Mexico does not contest WCC's position on the core limitations issue in dispute, namely, the tolling principle under customary international law and its application to the NAFTA.

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30 *See, e.g.*, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 142 et seq. (1987) (discussing arbitrations and cases in which the maxim *allegans contraria non est audiendus* has been applied), **CLA-026**; *Pan American Energy LLC v. Argentina*, ICSID Case Nos. ARB/03/13, ARB/04/8 Decision on Preliminary Objections, July 27, 2006, ¶ 159, **CLA-021**; *SPP (Middle East) Ltd. v. Egypt*, ICC Case No. YD/AS No. 3493, Award, Mar. 11, 1983, 3 ICSID Rep. 46, 66 (1995), **CLA-022** (concluding that "a party is barred from taking a contrary course of action (i.e., alleging or denying a certain act or state of facts) after inducing by its own conduct the other party to do something which the latter would not have done but for such conduct of the former party."); UNIDROIT Principles of International Commercial Contracts, Article 1 § 8 (2004) ("A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."), **CLA-023**; I.C. MacGibbon, *Estoppel in International Law*, 7 Int'l & Comp. L. Q. 468 (1958), **CLA-020**.

31 Rather, Canada disputes whether WCC correctly articulated the requirements to establish estoppel under international law, thereby implicitly acknowledging its validity. Reply, ¶ 108.

32 *See, e.g.*, Rejoinder, ¶¶ 128–142.

33 Civil Code of Mexico, Article 1168, **C-114**.

34 Civil Code of Mexico, Article 1169, **C-114**.

V. OWNERSHIP AND CONTROL UNDER ARTICLE 1117

26. Mexico argues that in order for an investor to submit a claim on behalf of an enterprise pursuant to Article 1117, ownership and control must be established both at the time of the challenged measures and when a claim is submitted to arbitration.[35] This position is at odds with the majority of arbitral precedent, as well as the object, purpose and negotiating history of the NAFTA.

27. ***First***, more than a dozen investment arbitration tribunals, including the *Westmoreland I* tribunal, have concluded that "the critical time" of ownership and control is on the date of the measures.[36] The *Westmoreland I* tribunal declined its jurisdiction to hear Westmoreland Mining Holdings (**WMH**)'s Article 1117 claim because WMH did not own the enterprise at "the critical time," *i.e.*, "at the time of the alleged breach."[37]

28. ***Second***, the plain language of the NAFTA does not require continuous ownership to assert an Article 1117 claim on behalf of an enterprise. In fact, Canada tried to insert a continuous ownership requirement into the NAFTA,[38] but the proposed language did not make it into the final version of the NAFTA. The fact that the NAFTA parties discussed a possible

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35 Mexico's Submission, ¶¶ 31–34.

36 *See, e.g., Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶¶ 6, 124, **CLA-012**; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, Sept. 4, 2020, ¶¶ 6, 173–75, **CLA-013**; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, April 30, 2010, ¶¶ 17–18, **CLA-014**; *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, Sept. 19, 2011, ¶¶ 8, 26, 36, 107, **CLA-015**; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, Aug. 24, 2015, ¶¶ 8, 39–59, **CLA-016**; *Petrobart Ltd v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, Mar. 29, 2005, p. 15, 21–22, 41, **CLA-017**; *WNC Factoring v. Czech Republic*, PCA Case No. 2014-34, Award, Feb. 22, 2017, ¶¶ 8, 63, 57, 65–68, 401–03, **CLA-009**; *Mondev v. U.S.* Award, ¶ 91, **CLA-005**; *EnCana v. Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, Feb. 3, 2006, ¶¶ 126–31, **CLA-006**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, ¶¶ 12, 355, 370, 390, Oct. 7, 2020, **CLA-008**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, ¶¶ 124–25, **CLA-010**; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, Aug. 22, 2012, ¶ 144–45, **CLA-011**; *Vito G. Gallo v. Canada*, PCA Case No. 2008-03, Award, Sept. 15, 2011, ¶ 325, **RLA-011** ("Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained."); *Westmoreland I* Award, ¶ 200, **CLA-001**.

37 *Westmoreland I* Award, ¶¶ 200–206, 212, 215, 237, **CLA-001**.

38 *See* INVEST.221, Dallas Composite, (Feb. 21, 1992) 32, **C-056**; INVEST.403, Washington Composite (Apr. 23, 1992) 32, **C-057**.

continuous ownership requirement, but declined to incorporate the required language, is compelling evidence that the NAFTA parties did not impose such a requirement.

29. ***Third***, it would undermine the NAFTA's protections to require an investor asserting an Article 1117 claim to maintain continuity of ownership and control in the face of state measures. This case is the perfect example for why imposing such a requirement is improper, since neither WCC nor WMH would be able to assert a claim on behalf of Prairie—all because WCC was forced into bankruptcy, in part due to Canada's measures.

30. In any event, even if WCC cannot pursue an Article 1117 claim on behalf of Prairie, it is uncontroverted that WCC can pursue an Article 1116 claim on its own behalf. In support of its position on ownership and control, Mexico cites just one case, *B-Mex v. United States*.[39] While that outlier case is inconsistent with prior jurisprudence and basic principles of justice, the tribunal acknowledged that its ruling would not impede an investor's ability to assert a claim on its own behalf.[40] In fact, even Canada admitted at the *Westmoreland I* hearing that, notwithstanding the purported transfer of the NAFTA Claim in the bankruptcy proceeding, WCC still could bring a claim on its own behalf under Article 1116.[41]

31. In sum, Mexico's submission does not support a continuous ownership requirement under the NAFTA, but even if there were such a requirement, this Tribunal nevertheless has jurisdiction to hear WCC's claims.

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39 *See* Mexico's Submission, ¶ 33.

40 *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, **RLA-046**, ¶¶ 148–152 ("The Tribunal observes that the fact that Article 1117 requires the investor to own or control the enterprise at the time it submits a claim on that enterprise's behalf does not deprive an investor of Treaty protection where a NAFTA Party expropriates, otherwise causes the loss of, or destroys the value of, its investment. [] In those circumstances, the investor's claims under Article 1116 will survive undiminished. Article 1116 does not require subsistence of the investment at the time a claim is submitted. Indeed, unlawful expropriation being the textbook example of wrongful conduct against which the Treaty seeks to protect, any other interpretation would eviscerate the protections of Chapter 11. However, where the investor no longer owns or controls the enterprise at the time of submission of the claim, it can no longer pursue an Article 1117 claim 'on behalf of' that enterprise").

41 *See* WMH – Hearing Transcript, Day 2, pp. 278:15-280:4, **C-046**. Mexico concludes by stating that for an investor to pursue a claim under USMCA Annex 14-C, it has to prove it owned or controlled the investment: (i) at the time the alleged measure was adopted, (ii) when submitting the claim to arbitration, and (iii) as of the date of entry into force of the USMCA. However, Mexico never explains the third requirement and does not seek to justify it based on plain meaning, prior jurisprudence, or any other source.

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Respectfully submitted,

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