**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 1976 UNCITRAL ARBITRATION RULES BETWEEN**

**WESTMORELAND AND MINING HOLDING LLC**
**Claimants**

**AND**

**GOVERNMENT OF CANADA**
**Respondent**

**(ICSID Case No. UNCT/20/3)**

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# SUBMISSION OF THE UNITED MEXICAN STATES

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**ASSISTED BY:**

***Secretaría de Economía***
Aristeo López Sánchez
Francisco Diego Pacheco Román

1. Pursuant to Article 1128 of the North America Free Trade Agreement (NAFTA), Mexico makes this submission on questions of interpretation of the NAFTA. In this submission, Mexico does not take a position 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.

**NAFTA Articles 1116(1) and 1117(1)**

2. Mexico agrees with Canada that Articles 1101(1), 1116(1), and 1117(1), read together, set a temporal limitation on a NAFTA tribunal's jurisdiction, requiring a claimant to demonstrate that it was an investor of a Party, as defined in Article 1139,[1] when the alleged breach occurred.[2]

3. Article 1101(1) has been correctly described as "the gateway leading to the dispute resolution provisions of Chapter 11".[3] Mexico agrees with Canada that Article 1101(1) informs the scope of Articles 1116(1) and 1117(1) by setting a threshold connection between a claimant bringing the claim and the challenged measure that must be met (i.e., the existence of an investor of a Party and its investment at the time of the alleged breach). There is no obligation under Section A owned to that claimant and its investment in the absence of that connection. Thus, no claim can be submitted to arbitration under Articles 1116(1) and 1117(1).[4] Accordingly, Mexico concurs with Canada's interpretation of Article 1101 outlined in ¶¶ 46-48 and 51-54 of its Reply Memorial on Jurisdiction.

4. According to Article 1116(1), an investor of a Party –other than the respondent NAFTA Party-, on its own behalf, may submit to arbitration a claim that another Party has breached a provision in Section A and specific provisions in Chapter 15, only if *that* investor has incurred loss

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[1] Article 1139 defines an "investor of a Party" as a "Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".

[2] Canada's Memorial on Jurisdiction (18 December 2020), ¶¶ 48 – 55.

[3] *Methanex Corporation v. United States of America* (UNCITRAL), First Partial Award, 7 August 2002, ¶ 106. Other NAFTA Tribunals have recognized the relevance of Article 1101(1): *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 136 ("Article 1101, by its terms, applies to the entirety of Chapter Eleven, including the procedural provisions of Section B. Article 1101 unambiguously refers to 'this Chapter,' which comprised both Section A, the substantive investment protections, and Section B, the investment dispute resolution mechanism"), and *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 252 ("Article 1101(1) establishes both the scope and coverage of the substantive protections accorded to investors and investments (Section A of Chapter 11) as well as the scope of the rights to submit disputes to arbitration under Chapter Eleven (Section B of Chapter 11)").

[4] Canada's Memorial on Jurisdiction, ¶¶ 50-51.

or damage "by reason of, or arising out of, that breach." Canada asserts that Article 1116(1) "restricts the availability of a claim for damages to circumstances where a disputing investor existed – and was therefore capable of incurring a loss- at a time of the alleged breach that caused the loss or damage".[5] Mexico agrees with Canada's interpretation of Article 1116(1), contained ¶¶ 60-64, of its Reply Memorial on Jurisdiction.

5. Similarly, under Article 1117(1), "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 a claim to arbitration for breaching an obligation under Section A, and specific provisions in Chapter 15. Mexico agrees with Canada that Article 1117(1) "only allows a disputing investor to submit a claim alleging a breach of Section A on behalf of an enterprise that it owns or controls at the time of the alleged breach",[6] and NAFTA tribunals have supported that conclusion.[7]

Respectfully,

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Director General de Consultoría Jurídica de
Comercio Internacional
June 11th, 2021

[5] Canada's Reply Memorial on Jurisdiction (9 April 2021), ¶ 61.

[6] Id. ¶¶ 66-67, 69, 71-72.

[7] *Vito G. Gallo v. Government of Canada* (PCA Case No. 55798), Award, 15 September 2011, ¶ 332 ("any claimant seeking to successfully file an arbitration on behalf of a domestic 'juridical person', must pass a first hurdle: the plaintiff must prove that at the time when the alleged treaty violations occurred he or she owned or controlled the 'juridical person' holding the investment" [Emphasis added]); and, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Partial Award, 19 July 2019, ¶ 145 ("The Parties agree that the Claimant must establish that they owned or controlled the Mexican Companies at the time of the treaty breaches. At least one other NAFTA tribunal to have confronted this issue has so held, and this Tribunal agrees." [Emphasis added])