

Public Document

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

BETWEEN:

WESTMORELAND MINING HOLDINGS LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/20/3)

GOVERNMENT OF CANADA

**REPLY OF THE GOVERNMENT OF CANADA TO THE NAFTA ARTICLE 1128
SUBMISSION OF THE GOVERNMENT OF THE UNITED MEXICAN STATES**

June 25, 2021

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I. INTRODUCTION

1. The NAFTA Article 1128 submission filed by the United Mexican States in this arbitration confirms Canada's interpretation of Articles 1101(1), 1116(1), and 1117(1) with respect to jurisdiction *ratione temporis*.¹ Previous NAFTA Chapter Eleven tribunals have accorded the views of the non-disputing NAFTA Parties considerable weight in the interpretation of the treaty obligations.² This Tribunal should do the same.

2. The views of the NAFTA Parties must be considered by this Tribunal in accordance with Article 31(3) of the *Vienna Convention on the Law of Treaties*.³ In doing so, the Tribunal should consider any previous statements by the NAFTA Parties on the interpretation of the relevant provisions, not only the Article 1128 submissions in this arbitration.⁴

II. ARTICLES 1101(1), 1116(1), AND 1117(1) MUST BE READ TOGETHER

3. All three NAFTA Parties agree that Articles 1101(1), 1116(1), and 1117(1) must be read together. Mexico "agrees with Canada that Article 1101(1) informs the scope of Articles 1116(1)

¹ *Westmoreland Mining Holdings LLC v. Government of Canada*, Submission of the United Mexican States, 11 June 2021 ("Article 1128 Submission of Mexico").

² See e.g., **RLA-029**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 100 and 106-107 (referring to the Article 1128 submission of the United States to confirm the interpretation of Article 1101, where Canada did not make an Article 1128 submission); **RLA-070**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Final Award, 8 June 2009, ¶¶ 601 and 618 (where no Article 1128 submissions were made, the tribunal referred to the submissions of the NAFTA Parties before other tribunals as support for its interpretation of Article 1105).

³ **CLA-013**, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). Article 31(3) provides that, as a general rule of interpretation, "[t]here 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; (c) [...]"

⁴ **RLA-028**, *Canadian Cattlemen for Fair Trade v. United States* (UNCITRAL) Award on Jurisdiction, 28 January 2008 ("*Canadian Cattlemen – Award on Jurisdiction*"), ¶¶ 181-189, where the tribunal relied on the Article 1128 submission of Mexico and statements of Canada before other tribunals to establish "subsequent practice" and confirm the interpretation of Article 1101(1)(a). No inferences should be drawn with respect to any NAFTA Party's position on a particular issue based on the absence of a NAFTA Article 1128 submission. For example, the *Canadian Cattlemen* tribunal found that the absence of an Article 1128 submission from Canada in that arbitration "cannot be seen as evidence of Canadian support for the Claimants' position on this issue". See **RLA-028**, *Canadian Cattlemen – Award on Jurisdiction*, ¶ 187. This finding was consistent with the view of the United States in that arbitration that, "[t]he fact that Canada did not make a submission pursuant to Article 1128 to this arbitration [...] cannot serve as any basis for concluding that it disagrees with the interpretation proposed by the [United States]". See **RLA-028**, *Canadian Cattlemen – Award on Jurisdiction*, ¶ 175.

and 1117(1)".⁵ Likewise, the United States has explained that, "Articles 1116 and 1117 must be read together with Article 1101(1)".⁶

4. The NAFTA Parties' interpretation is consistent with the ordinary meaning of Articles 1101(1), 1116(1), and 1117(1). First, Article 1101(1) circumscribes the application of the entirety of Chapter Eleven,⁷ including the procedural provisions of Section B that provide investors standing to bring a claim. Second, Articles 1116(1) and 1117(1) refer expressly to Section A – of which Article 1101(1) is the first provision – by requiring that a claimant allege that a Party "has breached an obligation under [...] Section A". Accordingly, a good faith interpretation of NAFTA Chapter Eleven requires that Articles 1101(1), 1116(1), and 1117(1) be read together.

5. As a result, the Claimant is mistaken when it argues that Articles 1116(1) and 1117(1) "can stand on their own" and do not need to be read together with Article 1101(1).⁸ Its view does not accord with the proper interpretation of NAFTA, upon which the NAFTA Parties are in agreement.

III. ARTICLE 1101(1) INFORMS THE SCOPE OF ARTICLES 1116(1) AND 1117(1) AND REQUIRES THAT THE CHALLENGED MEASURES RELATE TO THE INVESTOR OF A PARTY THAT FILES A CLAIM

6. Reading Articles 1101(1), 1116(1), and 1117(1) together, the challenged measures alleged to have "breached an obligation" under Section A must "relate to" the investor of a Party filing a claim under Section B – that is, the "disputing investor"⁹ or "claimant".¹⁰ As stated by Mexico:

⁵ Article 1128 Submission of Mexico, ¶ 2.

⁶ **RLA-071**, *Apotex Holdings Inc. and Apotex Inc., v. United States of America* (ICSID Case No. ARB(AF)/12/1) Counter-Memorial on the Merits and Objections to Jurisdiction of Respondent United States of America, 14 December 2012, ¶ 212.

⁷ Article 1101 is entitled "Scope and Coverage" and begins with: "This Chapter applies to measures adopted or maintained by a Party relating to: [...]" (emphasis added). See also **RLA-026**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex – Partial Award*"), ¶ 106(i); **RLA-020**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 252.

⁸ See *Westmoreland Mining Holdings LLC v. Government of Canada*, Claimant's Rejoinder Memorial on Jurisdiction, 21 May 2021 ("Claimant's Rejoinder Memorial on Jurisdiction"), ¶¶ 2, 14, and 15.

⁹ Article 1139 defines a "disputing investor" as "an investor that makes a claim under Section B".

¹⁰ See *Westmoreland Mining Holdings LLC v. Government of Canada*, Canada's Memorial on Jurisdiction, 18 December 2020 ("Canada's Memorial on Jurisdiction"), ¶¶ 50-51; *Westmoreland Mining Holdings LLC v.*

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).¹¹

7. The United States, too, has explained that “given the great number of measures of general applicability [...], the only reasonable interpretation of ‘relating to’ is that there must be a legally significant connection between the complained of measures and the specific investor who is the claimant, or its investments.”¹² Accordingly, the three NAFTA Parties view Article 1101(1) as requiring a link between the claimant and the measures that it challenges as a breach of Section A. It is not sufficient for the challenged measures to “relate to” a different investor of a Party – who is not the claimant – and that investor’s investments.¹³

8. The requirement that the challenged measures “relate to” the claimant under Article 1101(1) means that the challenged measure must “directly address, target, implicate, or affect the Claimant” or have a “direct and immediate” effect on the claimant.¹⁴ Mexico has previously agreed

Government of Canada, Canada’s Reply Memorial on Jurisdiction, 9 April 2021 (“Canada’s Reply Memorial on Jurisdiction”), ¶¶ 47-48.

¹¹ Article 1128 Submission of Mexico, ¶ 3.

¹² **RLA-072**, *Methanex Corporation v. United States of America* (UNCITRAL) Reply Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, 12 April 2001, p. 44; **RLA-026**, *Methanex – Partial Award*, ¶ 130 (“the USA contends that [...] there must be a legally significant connection between the measure and the claimant investor or its investment. It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments.”). The *Methanex* tribunal agreed with the submission of the United States observing that “[t]he alternative interpretation advanced by the USA does impose a reasonable limitation: there must be a legally significant connection between the measure and the investor or the investment”. See **RLA-026**, *Methanex – Partial Award*, ¶ 139. See also **RLA-073**, *Lone Pine Resources Inc. v. Government of Canada* (UNCITRAL) NAFTA Article 1128 Submission of the United States of America, 16 August 2017 (“*Lone Pine – US 1128 Submission*”), ¶ 7 (“Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard [of Article 1101(1)]”); **RLA-074**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 June 2017 (“*Resolute – US 1128 Submission*”), ¶ 13.

¹³ Canada’s Reply Memorial on Jurisdiction, ¶ 47.

¹⁴ Canada’s Memorial on Jurisdiction, ¶¶ 49-50; Canada’s Reply Memorial on Jurisdiction, ¶¶ 47-48, citing **RLA-046**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶ 6.22, and **RLA-033**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 244.

with Canada that, “[t]he fact that a measure has some indirect economic effect on an investor is not a sufficient legal nexus to ground a claim under Chapter Eleven. More is needed. The Claimant must establish a legally significant connection between the impugned measure and it or its investment.”¹⁵ Similarly, the United States has explained that Article 1101(1) “cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a legally significant connection between the measure and the investor or its investment. [...] Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard. Rather, a ‘legally significant connection’ requires a more direct connection between the challenged measure and the foreign investor or investment.”¹⁶

IV. ARTICLES 1101(1), 1116(1), AND 1117(1) REQUIRE A CLAIMANT TO HAVE BEEN AN INVESTOR OF A PARTY AT THE TIME OF THE ALLEGED BREACH

9. The requisite connection between a claimant under Section B of NAFTA Chapter Eleven and the alleged breach of an obligation under Section A cannot be met when the alleged breach occurred before the claimant qualified as an “investor of a Party”. Mexico confirms that Articles 1101(1), 1116(1), and 1117(1) set a temporal limitation on a NAFTA tribunal’s jurisdiction, requiring a claimant to demonstrate that it was an “investor of a Party” when the alleged breach occurred.¹⁷

10. Mexico also agrees with Canada 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 [the] time of the alleged breach that caused the loss or damage”.¹⁸ NAFTA Article 1116(1) does not permit a claimant to receive compensation for a loss incurred by another investor and that investor’s investments.

¹⁵ **RLA-075**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 14 June 2017, ¶ 8.

¹⁶ **RLA-073**, *Lone Pine – US 1128 Submission*, ¶¶ 6-7. See also **RLA-074**, *Resolute – US 1128 Submission*, ¶¶ 12-13.

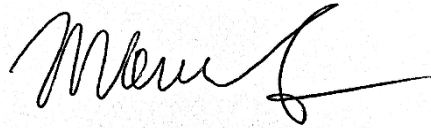
¹⁷ Article 1128 Submission of Mexico, ¶ 2-5; Canada’s Memorial on Jurisdiction, ¶¶ 48-55; Canada’s Reply Memorial on Jurisdiction, ¶¶ 43-73.

¹⁸ Article 1128 Submission of Mexico, ¶ 4.

11. Finally, Mexico agrees 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”.¹⁹ Mexico affirms that the two NAFTA decisions addressing the issue of when “ownership or control” must exist to establish jurisdiction for a claim filed under Article 1117(1) – *B-Mex* and *Gallo* – provide that a claimant must own or control the enterprise at the time of the alleged breach.²⁰ This position is consistent with the limited derogation from customary international law that Article 1117(1) creates to allow an investor to make a claim on behalf of its locally-organized enterprise. It does not derogate further from customary international law by allowing an investor to submit a claim for an alleged breach of an obligation owed to a different investor or its investment.²¹

June 25, 2021

Respectfully submitted on behalf of Canada,



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¹⁹ Article 1128 Submission of Mexico, ¶ 5.

²⁰ The Claimant continues to contend that the *B-Mex* tribunal “did not resolve any factual issues” on the timing of ownership or control. *See* Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 44, fn. 37. However, as Canada has explained, the *B-Mex* tribunal found that ownership or control must exist at the time of the alleged breach and proceeded to assess whether ownership or control existed at that time. *See* Canada’s Reply Memorial on Jurisdiction, ¶ 95. With respect to *Gallo*, the Claimant argues that the tribunal’s decision was made on the basis of the existence of a “sham transaction”, despite the fact that the tribunal did not find there was a sham transaction. *See* Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 53. The Claimant ignores that the Tribunal’s decision was based on the claimant’s lack of evidence that *it owned or controlled the relevant enterprise at the time of the alleged breach*. *See* Canada’s Reply Memorial on Jurisdiction, ¶ 93.

²¹ *See* Canada’s Reply Memorial on Jurisdiction, ¶ 71.