PUBLIC DOCUMENT

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

BETWEEN:

WESTMORELAND COAL COMPANY

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/23/2)

GOVERNMENT OF CANADA

COMMENTS OF THE GOVERNMENT OF CANADA ON THE SUBMISSIONS OF THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES PURSUANT TO CUSMA ANNEX 14-C AND NAFTA ARTICLE 1128

April 24, 2024

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I. INTRODUCTION

1. The submissions filed by Mexico and the United States under CUSMA Annex 14-C and NAFTA Article 1128 in this arbitration confirm Canada's interpretation of Paragraphs 1 and 6(a) of CUSMA Annex 14-C, and NAFTA Articles 1116, 1117, and 1121.[1] Prior tribunals have accorded the views of the non-disputing CUSMA and NAFTA Parties considerable weight in the interpretation of their treaty obligations.[2] This Tribunal should do the same.

2. The consistent views of Canada, the United States, and Mexico with respect to both CUSMA Annex 14-C and NAFTA Chapter Eleven must be considered by this Tribunal in accordance with Article 31(3) of the *Vienna Convention on the Law of Treaties* ("VCLT").[3] In doing so, the Tribunal should consider any previous statements by Canada, the United States, and Mexico on the interpretation of the jurisdictional requirements under both Agreements, and not only the submissions filed in this arbitration.[4] No inferences should be drawn with respect to any non-disputing Party's position on a particular issue based on the absence of a submission on that issue in this arbitration.[5]

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[1] Submission of the United States of America, 10 April 2024 ("Article 1128 Submission of the United States"); Submission of the United Mexican States, 10 April 2024 ("Article 1128 Submission of Mexico").

[2] *See e.g.* **RLA-001**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022 ("*Westmoreland* – Final Award"), ¶ 214 (accepting that "significant weight" should be placed on the submissions of non-disputing NAFTA Parties, and acknowledging that the NAFTA States "have a unique perspective on how the NAFTA should be interpreted and also in recognition of the systemic interest of States in ensuring consistency of interpretation.").

[3] **CLA-004**, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) ("VCLT"). 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) […]". *See also* **RLA-018**, *Canadian Cattlemen for Fair Trade v. United States* (UNCITRAL), Award on Jurisdiction, 28 January 2008 ("*Canadian Cattlemen* – Award on Jurisdiction"), ¶¶ 181-189; **RLA-009**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1), Award, 19 June 2007, ¶¶ 106-121.

[4] **RLA-018**, *Canadian Cattlemen* – Award on Jurisdiction, ¶¶ 181-189 (relying on the NAFTA 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)).

[5] *See* **RLA-018**, *Canadian Cattlemen* – Award on Jurisdiction, ¶ 187 (finding 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"). 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-018**, *Canadian Cattlemen* – Award on Jurisdiction, ¶ 175.

II. THE CLAIMANT HAS NOT ESTABLISHED THAT THE TRIBUNAL HAS JURISDICTION OVER ITS CLAIM UNDER CUSMA ANNEX 14-C

3. All three CUSMA Parties agree that their consent to arbitrate claims under CUSMA Annex 14-C is limited to the express terms of the Annex.[6] If a claim does not meet the terms of the Annex, there is no consent to arbitrate it. It is not open to either the Claimant or the Tribunal to modify the conditions of the CUSMA Parties' consent to arbitrate.

4. All three CUSMA Parties further agree that their consent to arbitrate claims under CUSMA Annex 14-C is limited to a "specific category of investments": legacy investments.[7] Paragraph 6(a) of Annex 14-C defines a legacy investment as an "investment of an investor of another Party" that, among other characteristics, was "in existence on the date of entry into force of" CUSMA.[8]

5. Canada has explained that this definition requires a claimant to have held the relevant investment with respect to which it brings a claim when CUSMA entered into force.[9] Mexico and the United States agree. In Mexico's view, "for an investor to validly pursue a claim under [CUSMA] Annex 14-C, it has to prove that it owned or controlled the enterprise […] as of the date of entry into force of the [CUSMA]."[10] In the United States' view, "Annex 14-C limits the submission of arbitration claims to those investors with ongoing investments in the host states after

[6] Canada's Memorial on Jurisdiction and Response to Notice of Arbitration, 28 June 2023 ("Canada's Memorial on Jurisdiction"), ¶¶ 81-82; Canada's Reply on Jurisdiction, 13 December 2023 ("Canada's Reply on Jurisdiction"), ¶ 71; Article 1128 Submission of Mexico, ¶ 4 ("…the State Parties' consent to arbitration must be established pursuant to the provisions of the USMCA. In this case, Annex 14-C establishes the terms of the Parties' consent to the arbitration of legacy investment claims and pending claims …"); **R-156**, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63), The United States of America's Reply on its Preliminary Objection, 27 December 2023 ("*TC Energy* – U.S. Reply"), ¶ 33 ("In the absence of a claim that 'coincide[s] with the terms of the offer' in Annex 14-C, 'there is no perfected consent.'") (original citation omitted).

[7] Article 1128 Submission of Mexico, ¶ 12. *See also* Canada's Memorial on Jurisdiction, ¶ 82; Canada's Reply on Jurisdiction, ¶ 71; **R-156**, *TC Energy* – U.S. Reply, ¶ 51 ("The consent to arbitration in Paragraph 1 of Annex 14-C is limited to 'legacy investments'.")

[8] CUSMA Annex 14-C, ¶ 6. A "legacy investment" must also meet the definition of "investment" in NAFTA Chapter Eleven. The Claimant here has alleged a number of investments, including under NAFTA Article 1139(h), the scope of which it misstates. *See* **RLA-094**, *Koch Industries, Inc. and Koch Supply & Trading, LP v. Government of Canada* (ICSID Case No. ARB/20/52), Award, 13 March 2024, ¶¶ 343-351; **RLA-095**, *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction, 30 July 2018, ¶¶ 205-207.

[9] Canada's Memorial on Jurisdiction, ¶¶ 81-90; Canada's Reply on Jurisdiction, ¶¶ 71-72.

[10] Article 1128 Submission of Mexico, ¶ 34.

the NAFTA's termination."[11] The Tribunal should attribute significant weight to this agreement of the CUSMA Parties.

6. In this case, the Claimant disposed of its investments in Canada prior to CUSMA's entry into force. [12] As a result, the Claimant did not hold a "legacy investment" and this Tribunal does not have jurisdiction over the claim it filed on October 14, 2022.

III. THE CLAIMANT HAS NOT ESTABLISHED THAT THE TRIBUNAL HAS JURISDICTION OVER ITS CLAIM UNDER NAFTA CHAPTER ELEVEN

A. The Limitation Period in NAFTA Articles 1116(2) and 1117(2) Cannot be Suspended or "Tolled" by a Tribunal

7. NAFTA Articles 1116(2) and 1117(2) set a three-year temporal limitation on the NAFTA Parties' consent to arbitrate under NAFTA Chapter Eleven. The three NAFTA Parties confirm that, as Mexico explains, the temporal limitation "is a condition to the consent of NAFTA Parties that a claimant shall meet in order to establish the jurisdiction of a tribunal."[13]

8. The three-year temporal limitation is not subject to suspension or variance by a NAFTA Chapter Eleven tribunal. As Mexico submits, "there is no possibility for the three-year limitation period to be suspended."[14] A tribunal cannot retrospectively create an arbitration agreement

[11] **R-156**, *TC Energy* – U.S. Reply, ¶ 52.

[12] *See* Canada's Reply on Jurisdiction, ¶¶ 13, 67, 86; Claimant's Response on Jurisdiction, ¶ 30, *citing* **C-035**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), (Docket No. 1621) Excerpt of Exhibit H-6 – Stalking Horse Purchase Agreement, 18 March 2019.

[13] Article 1128 Submission of Mexico, ¶ 26; **R-097**, *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2), Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶ 5 ("The NAFTA Parties made their consent to arbitration conditional upon compliance with the procedural requirements established in NAFTA Chapter Eleven, including Article 1116(2) and 1117(2)."); **R-098**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), Submission of the United States of America, 14 June 2017, ¶ 3 (NAFTA Articles 1116(2) and 1117(2) "impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute."); Canada's Reply on Jurisdiction, fn. 220.

[14] Article 1128 Submission of Mexico, ¶ 30; *see also* **R-095**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Counter-Memorial on Preliminary Questions, 8 September 2000, ¶ 199 ("There is nothing in the language of Article 1117(2), or elsewhere in Chapter Eleven, that authorizes flexibility in applying the time limitation […]."); **R-093**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 25 June 2021, ¶ 4 ("The limitations period is a 'clear and rigid' requirement that is not subject to any 'suspension,' 'prolongation,' or 'other qualification.'"); **RLA-021**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153 ("this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period".)

between a claimant and a respondent State if the conditions of State consent have not been satisfied.[15]

9. Contrary to the Claimant's position in this case,[16] the absence of a provision in NAFTA disclaiming suspension does not mean that suspension is available. As the United States observes, a general rule "would not override the specific requirements of Article 1116(2), which operates as a *lex specialis* and governs (together with Article 1117(2)) the operation of the limitations period for claims brought under NAFTA Chapter Eleven."[17]

10. Finally, Mexico's submission references a case that refutes the Claimant's statement that "other respondent States have not objected on prescription grounds in similar cases."[18] In addition to the United States' position in *Methanex*,[19] in *Bacilio Amorrortu v. Peru*, the claimant brought a second claim against the respondent after its first claim was dismissed for lack of jurisdiction.[20] The respondent in that case has submitted that the claimant's second claim falls outside the second

[15] *See, e.g.* **RLA-030**, *The Renco Group, Inc. v. The Republic of Peru* (ICSID Case No. UNCT/13/1), Partial Award on Jurisdiction, 15 July 2016, ¶ 158 ("Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru's consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leads to a clear timing issue: if no compliant waiver is served with the notice of arbitration, Peru's offer to arbitrate has not been accepted; there is no arbitration agreement; and the Tribunal is without any authority whatsoever. If the Tribunal applied the *Mavrommatis* doctrine, the Tribunal would be exercising powers it simply does not have (because there is no arbitration agreement, and so the Tribunal is not a tribunal). In effect, it would be creating, retrospectively, an arbitration agreement for the Parties when no agreement had ever come into existence. To put it colloquially, the Tribunal would be 'pulling itself up by its own bootstraps' in order to create jurisdiction when none existed. In the Tribunal's considered opinion, this would be entirely unprincipled and obviously impermissible.") (emphasis added).

[16] Claimant's Rejoinder on Jurisdiction, 13 March 2024, ¶ 129.

[17] **R-099**, *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Submission of the United States of America, 14 July 2008, ¶ 14, referencing to **RLA-096**, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Adopted by the Drafting Committee on Second Reading, Art. 55, International Law Commission, 53rd Sess. (2001) ("States routinely establish specific rules in international agreements that define governing rights and duties in lieu of general principles of international law, reflecting the maxim *lex specialis derogate legi generali*. The *lex specialis* provision of the International Law Commission's Articles on State Responsibility confirms this point. Under that provision, the Articles 'do not apply where and to the extent that' issues of state responsibility 'are governed by special rules of international law.'"). *See also* **RLA-030**, *The Renco Group, Inc. v. The Republic of Peru* (ICSID Case No. UNCT/13/1) Partial Award on Jurisdiction, 15 July 2016, ¶ 157 ("[T]he clear and express language of Article 10.18 of the Treaty, as well as its object and purpose, establishes a *lex specialis* which must prevail over, or in any event precludes, the *Mavrommatis* doctrine.")

[18] Claimant's Response on Jurisdiction, ¶ 173.

[19] *See* Canada's Reply on Jurisdiction, ¶ 136.

[20] **RLA-097**, *Bacilio Amorrortu (USA) v. The Republic of Peru* (UNCITRAL), Procedural Order No. 2, 18 March 2024 ("*Amorrortu* – Procedural Order No. 2"), ¶ 16.

tribunal's jurisdiction *ratione temporis* because the claim was submitted to arbitration via a Notice of Arbitration received more than three years after the claimant's knowledge of the alleged treaty breaches.[21] This is consistent with the view of the three NAFTA Parties that the failure of an earlier claim for lack of jurisdiction does not "toll" or provide an exception to NAFTA's strict and rigid limitation period for a subsequent claim.[22]

B. All Three NAFTA Parties Agree on the Interpretation of NAFTA Article 1121

1. A NAFTA Party's Consent to Arbitrate is Contingent on the Filing of a Valid and Effective Waiver

11. The submissions of the United States and Mexico in this proceeding, as well as in prior proceedings, confirm Canada's interpretation of the waiver requirements in NAFTA Article 1121. All three NAFTA Parties agree that compliance with Article 1121 entails both formal and material requirements. As Mexico states, "[a] claimant must comply with both aspects to ensure the validity of its waiver."[23] The United States similarly wrote in the *DIBC v. Canada* arbitration that:

> Compliance with Article 1121 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the measure alleged to constitute a NAFTA breach in another forum.[24]

[21] **RLA-097**, *Amorrortu* – Procedural Order No. 2, ¶ 22.

[22] Article 1128 Submission of Mexico, ¶ 22; **R-148**, *Methanex Corp. v. United States* (UNCITRAL), Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, 27 June 2001, pp. 52-53 ("As a result of deeming Methanex's claim to be submitted as of May 25, 2001, that portion of Methanex's original Statement of Claim that identified the Bill as a measure that violated NAFTA Chapter Eleven should be dismissed by this Tribunal since the Bill was passed more than three years before the submission of Methanex's claim to arbitration.")

[23] Article 1128 Submission of Mexico, ¶ 20.

[24] **R-103**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), Submission of the United States of America, 14 February 2014 ("*DIBC* – Article 1128 Submission of United States"), ¶ 5. *See also* **R-104**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), Submission of Mexico, 14 February 2014 ("*DIBC* – Article 1128 Submission of Mexico"), ¶ 18; **R-157**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the United States and Mexico, 3 March 2014, ¶¶ 8-10.

12. Both the United States and Mexico also agree with Canada that a tribunal cannot step into the shoes of the respondent State and cure a defective waiver.[25] As Mexico notes:

> This is the case since the requirements under NAFTA Article 1121 are a reflection of the sovereign agreement between the NAFTA Parties, which outline the conditions under which an investor-State tribunal may exercise jurisdiction over the NAFTA Parties.[26]

13. These views reflect the long-standing and consistent interpretation of all three NAFTA Parties with respect to Article 1121, which has also been adopted by numerous NAFTA tribunals.[27] The NAFTA Parties agree that there is no consent to arbitrate, and hence no jurisdiction of the tribunal, when the claimant fails to provide a valid and effective waiver. The Claimant has failed to provide such a valid and effective waiver here.

2. The Phrase "Other Dispute Settlement Procedures" in NAFTA Article 1121 Includes Other NAFTA Claims

14. All three NAFTA Parties agree that the exception to the waiver requirement found in Article 1121(1)(b) and Article 1121(2)(b) is "limited"[28] and "very specific".[29] This narrow exception allows a claimant to initiate or continue a claim "before an administrative tribunal or court under the law of the disputing Party" that does not involve the payment of damages. By implication, the initiation or continuation of all other proceedings involving the payment of damages are deemed inconsistent with Article 1121, including other NAFTA claims. This is also evident from the United States' NAFTA Statement of Implementation, which states that "Article 1121 requires the

[25] Article 1128 Submission of Mexico, ¶ 21. *See also* **RLA-038**, *Bacilio Amorrortu (USA) v. The Republic of Peru* (UNCITRAL), Partial Award on Jurisdiction, 5 August 2022, ¶ 237.

[26] Article 1128 Submission of Mexico, ¶ 22.

[27] **RLA-029**, *Detroit International Bridge Company v. The Government of Canada* (UNCITRAL), Award on Jurisdiction, 2 April 2015, ¶¶ 317 and 321; **RLA-028**, *Waste Management, Inc. v. United Mexican States (I)* (ICSID Case No. ARB(AF)/98/2), Arbitral Award, 2 June 2000, ¶ 32; **RLA-034**, *KBR Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Final Award, 30 April 2015, ¶ 148; **RLA-038**, *Bacilio Amorrortu v. Peru* (UNCITRAL), Partial Award on Jurisdiction, 5 August 2022, ¶ 237.

[28] **R-103**, *DIBC* – Article 1128 Submission of United States, ¶ 7.

[29] Article 1128 Submission of Mexico, ¶ 16; *see also* Canada's Memorial on Jurisdiction, ¶¶ 113-114; Canada's Reply on Jurisdiction, ¶¶ 189-191.

investor…to consent in writing to arbitration, and to waive the right to initiate or continue any actions in local courts or other *fora* relating to the disputed measure".[30]

15. The position taken by all three NAFTA Parties is also consistent with their shared understanding of the object and purpose of Article 1121,[31] which is to avoid the need for a respondent State to litigate concurrent and overlapping proceedings, to minimize the risk of double recovery, and to reduce the risk of conflicting outcomes on both the law and facts (and thus legal uncertainty).[32] Claims brought under NAFTA, where the only remedy available is the payment of damages,[33] cannot be read into the narrow and limited exception found in Article 1121 that prohibits a claimant from initiating or continuing "other dispute settlement proceedings" which involve the payment of damages.

C. NAFTA Article 1117(1) Does Not Permit Claims on Behalf of an Enterprise that the Claimant No Longer Owns or Controls When the Claim is Submitted to Arbitration

16. Article 1117(1) allows an investor to bring a claim on behalf of an enterprise that it "owns or controls" at the time the claim is submitted to arbitration.[34] All three NAFTA Parties agree that the investor must own or control the enterprise at the time it submits its claim to arbitration, in addition to owning or controlling the enterprise at the time of the impugned measures.[35] As Mexico

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[30] **RLA-098**, *The North American Free Trade Agreement Implementation Act*, United States Statement of Administrative Action, November 1993 at p. 147 (emphasis added).

[31] Canada's Reply on Jurisdiction, ¶ 193; **R-103**, *DIBC* – Article 1128 Submission of United States, ¶ 6 ("…the purpose of the waiver provision: to avoid the need for a Respondent to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of 'conflicting outcomes (and thus legal uncertainty.')"); **R-104**, *DIBC* – Article 1128 Submission of Mexico, ¶¶ 10-14.

[32] **RLA-036**, *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 ("*Waste Management II* – Decision"), ¶ 27; **RLA-037**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNICTRAL), Arbitral Award, 26 January 2006, ¶ 118; **RLA-034**, *KBR Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Final Award, 30 April 2015, ¶¶ 116, 124; **RLA-035**, *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶¶ 237, 242.

[33] NAFTA Article 1135.

[34] Canada's Memorial on Jurisdiction, ¶¶ 137-141; Canada's Reply on Jurisdiction, ¶¶ 203-212.

[35] **R-155**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Reply on Jurisdictional Objections, 1 December 2017, ¶ 284 ("The Respondent would add that any intended claimant [under Article 1117] would also need to prove ownership and control on the date of submission to arbitration…") (emphasis added); **R-117**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Second Submission of the

notes, this additional temporal requirement is evinced by the present tense formulation of the phrase "owns or controls" in the text of the provision.[36] The Claimant did not own or control the enterprise – Prairie – on whose behalf it brings an Article 1117(1) claim when it filed its claim on October 14, 2022. Consequently, the Tribunal has no jurisdiction to hear the Article 1117(1) claim on behalf of Prairie.

D. NAFTA Article 1116(1) Does Not Permit Claims For Reflective Loss

17. All three NAFTA Parties agree that Articles 1116(1) and 1117(1) constitute two strictly separate standing provisions that address discrete, non-overlapping types of injury.[37] As Mexico states, "[w]hile Article 1116 is the avenue that permits an investor to pursue a claim for loss or damages incurred by the investor directly, Article 1117 allows an investor to pursue a claim for loss[*sic*] or damages incurred indirectly, through an enterprise. This distinction is clear."[38]

18. All three NAFTA Parties further agree that reflective loss is not recoverable under NAFTA Article 1116.[39] Thus, indirect damage to a shareholder investor, based on harm to the enterprise's rights or assets that such investor owns or controls, can only be claimed under Article 1117 and not under Article 1116. As the United States points out:

> 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*,

United States of America, 17 August 2018, ¶¶ 3, 5, 6. (at ¶ 5: "an investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration.").

[36] Article 1128 Submission of Mexico, ¶¶ 32-34.

[37] Canada's Memorial on Jurisdiction, ¶ 132; Canada's Reply on Jurisdiction ¶ 218; Article 1128 Submission of United States, ¶¶ 6-7; Article 1128 Submission of Mexico, ¶¶ 23-24.

[38] Article 1128 Submission of Mexico, ¶ 24. *See also* Article 1128 Submission of the United States, ¶ 6; Canada's Memorial on Jurisdiction, ¶ 132; Canada's Reply on Jurisdiction, ¶ 218.

[39] Canada's Memorial on Jurisdiction, ¶ 134; Canada's Reply on Jurisdiction, ¶ 223; Article 1128 Submission of the United States, ¶¶ 7; **R-158**, *Alicia Grace v. United Mexican States* (ICSID Case No. UNCT/18/4), Mexico Statement of Defence, 1 June 2020 ("*Grace* – Statement of Defence"), ¶¶ 529-537; **R-113**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL), Statement of Defense, 24 November 2003, ¶¶ 167.

> "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders."[40]

19. Nothing in the text of Article 1116 indicates that the NAFTA Parties intended to derogate from the general principle of separate legal personality between investors and their enterprise. As the United States affirms, "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 intention to do so'."[41] The common understanding and interpretation of all three NAFTA Parties with respect to the type of loss or damage for which an investor may submit a claim to arbitration under NAFTA Article 1116 must be considered and given considerable weight by the Tribunal.

20. In this case, the Claimant's alleged losses appear, at most, to be an indirect result of the alleged harm to Prairie's rights and assets. The NAFTA Parties agree that this type of loss is not recoverable under Article 1116(1).

April 24, 2024

Respectfully submitted on behalf of Canada,

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[40] Article 1128 Submission of the United States, ¶ 8. See also, **R-158**, *Grace* – Statement of Defence, ¶ 532; Canada's Memorial on Jurisdiction, ¶ 134; Canada's Reply on Jurisdiction, ¶ 223.

[41] Article 1128 Submission of the United States, ¶ 14. *See also* Canada's Memorial on Jurisdiction, ¶ 134 and fn. 236.