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

WESTMORELAND MINING HOLDINGS LLC

Claimant,

v.

GOVERNMENT OF CANADA

Respondent,

ICSID Case No. UNCT/20/3

CLAIMANT WESTMORELAND MINING HOLDINGS LLC'S RESPONSE TO THE ARTICLE 1128 SUBMISSION OF THE UNITED MEXICAN STTES

June 25, 2021

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1. Article 1128 of the North American Free Trade Agreement ("NAFTA") permits the Governments of the United Mexican States ("Mexico") and the United States of America (the "United States") to submit comments on interpretations of NAFTA in any Chapter 11 dispute involving the Government of Canada ("Canada"). Consistent with Paragraph 16.2 of Procedural Order No. 1, Claimant Westmoreland Mining Holdings LLC's ("Westmoreland") comments here are limited to Mexico's submission.

2. The NAFTA Parties can be expected to express similar interpretations of NAFTA because all are cast as respondents in Chapter 11 proceedings. All would prefer to limit the occasions when they have to defend their respective governments against foreign investor claims.

3. Notwithstanding this expectation, the United States did not submit an Article 1128 submission here. Mexico's Article 1128 submission conforms to that expectation and does not make any attempt to interpret treaty terms in reference to the facts of this dispute.

4. Parroting Canada's position, Mexico's argument is that Articles 1101(1), 1116(1), and 1117(1) include a temporal limitation even though words for a temporal limitation are not to be found in NAFTA's text, nor in a statement from the Free Trade Commission, nor in any other official statement from any one of the NAFTA Parties.[1]

[1] *See* Submission of the United Mexican States ¶ 2 (June 10, 2021) ("Mexican Article 1128 Submission"); NAFTA Article 2001 (providing for Free Trade Commission which can resolve disputes regarding interpretations of NAFTA); CLA-061, Canada's Statement on the Implementation of NAFTA, Department of External Affairs, Canada Gazette (Jan. 1, 1994); CLA-062, U.S. Statement of Administrative Action for the Implementation of NAFTA (Sep. 13, 1993).

5. Mexico argues that Article 1101(1) requires "the existence of an investor of a Party and its investment at the time of the alleged breach."[2] Article 1101 provides that "[t]his chapter applies to measures adopted or maintained by a Party relating to" investors or investments of another Party. The text of Article 1101(1) contains no temporal limitation.

6. Mexico does not explain where the temporal limitation in Article 1101(1) can be found. Instead, Mexico cites only Canada's Reply Memorial on Jurisdiction.[3] Westmoreland has rebutted Canada's argument in its Rejoinder Memorial.[4]

7. Mexico next asserts that Articles 1116(1) and 1117(1) allow an investor (whether on its own behalf under Article 1116 or on behalf of an enterprise under Article 1117) to seek arbitration only "where a disputing investor existed…at [the] time of the alleged breach that caused the loss or damage."[5] These words are not to be found in Articles 1116(1) or Article 1117(1); for example, Article 1116(1) provides that "[a]n 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."

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[2] Mexican Article 1128 Submission ¶ 3.

[3] Mexican Article 1128 Submission ¶ 3.

[4] Westmoreland Rejoinder ¶¶ 20-26.

[5] *See* Mexican Article 1128 Submission ¶¶ 4-5 (quoting Canada Reply Memorial on Jurisdiction ¶ 61.

8. Mexico does not proffer its own analysis of Articles 1116(1) and 1117(1), relying, instead, on Canada's Reply Memorial and the same authorities cited by Canada.[6] Westmoreland rebutted Canada's argument in its Rejoinder Memorial. There is nothing new here to answer.[7]

Respectfully submitted,

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[6] *See* Mexican Article 1128 Submission ¶¶ 4-5.

[7] Westmoreland Rejoinder ¶¶ 14-19; *see also id.* ¶¶ 32, 44, 53, 54 (rebutting cases cited by Canada).