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

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA CASE No. 2016-13

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

JULY 12, 2017

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I. INTRODUCTION

1. The NAFTA Article 1128 submissions filed by the Governments of the United States of America and Mexico in this arbitration confirm the longstanding and consistent interpretation advanced by the NAFTA Parties with respect to the interpretation of Articles 1101(1), 1116(2), 1117(2) and 2103. The concordant 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* (“Vienna Convention”),¹ and should be given considerable weight.

2. In summary, and contrary to the positions advanced by the Claimant, the NAFTA Parties agree that:

- NAFTA Articles 1116(2) and 1117(2) impose a “clear and rigid” limitation that is not subject to any suspension, prolongation, or other qualification;
- the limitation period under Articles 1116(2) and 1117(2) starts running when the claimant first acquires (or should first acquire) knowledge of an alleged breach and loss;
- an investor may acquire knowledge that it has incurred a loss or damage even though it does not yet know, with certainty, the full extent of that loss;
- a claimant must comply with the time limitation in order to establish a respondent’s consent to arbitration and the jurisdiction of a tribunal under NAFTA Chapter Eleven;
- the Claimant has the burden to prove the Tribunal’s jurisdiction *ratione temporis* by proving that it has complied with the time limitation;
- Article 1101(1) requires that there be a legally significant connection between the challenged measure and the investor or its investment; and
- Article 2103 prevents a Claimant from invoking Article 1110 with respect to a taxation measure where it has not followed that Article’s procedural requirements.

¹ **RL-086**, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) (“*Vienna Convention on the Law of Treaties*”).

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3. In light of the evolution of the Claimant's argument with respect to Article 1102(3), specifically its confirmation that it is not complaining about the treatment provided by either the Canadian federal government or the Government of Québec, the submissions by the United States and Mexico with respect to Article 1102(3) are not directly relevant to the circumstances of this case. Nevertheless, they confirm that Resolute's Article 1102 claim is ripe for dismissal at this preliminary stage.

II. THE AGREEMENT OF THE NAFTA PARTIES ON THE INTERPRETATION OF THE NAFTA SHOULD BE GIVEN CONSIDERABLE WEIGHT

4. Article 31(3) of the Vienna Convention provides that in interpreting a treaty, "[t]here shall be taken into account, together with the context: (a) [a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;" and "(b) [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

5. The use of the word "shall" indicates that a tribunal must take into consideration the subsequent agreement of the NAFTA Parties regarding the interpretation of their obligations,² including where their agreement is established by subsequent practice.³

6. Article 31(3) of the Vienna Convention does not limit the form of agreement or practice that must be taken into account. In the NAFTA context, subsequent agreement and subsequent practice establishing agreement on interpretation may therefore be evidenced through the NAFTA Parties' submissions, including non-disputing Party submissions under Article 1128. Where the NAFTA Parties state their agreement and express concordant, common and consistent

² In contrast, Article 32 of the Vienna Convention provides that, in certain circumstances, "[r]ecourse *may* be had to supplementary means of interpretation" (emphasis added). As the International Law Commission emphasized in its commentary on Article 31, "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation. **RL-095**, "Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session" (U.N. Doc. A/6309/Rev.1) in *Yearbook of the International Law Commission 1996* (New York: U.N. 1967), vol. II, at 169 (U.N. Doc. A/CN.4/SER.A/1966/Add.1) ("Reports of the ILC Commission"), p. 221, ¶ 14.

³ The International Law Commission also emphasized that "[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." **RL-095**, Reports of the ILC Commission, p. 220, ¶ 15.

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views on how to interpret NAFTA, they create subsequent agreement and practice within the meaning of Article 31(3) of the Vienna Convention.⁴

7. In sum, as the United States has observed (and as Canada has concurred), “[t]he Parties’ common, concordant, and consistent position constitutes the authentic interpretation [of the NAFTA] and, under the Vienna Convention on the Law of Treaties, ‘shall be taken into account, together with the context.’”⁵

8. NAFTA Chapter Eleven tribunals have accorded the concordant views of the NAFTA Parties on the interpretation of the treaty obligations considerable weight.⁶ This Tribunal should do the same.

⁴ See **RL-020**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008 (“*Canadian Cattlemen – Award on Jurisdiction*”), ¶¶ 181-189. The *Canadian Cattlemen* tribunal recognized that “the formal process of interpretation under Article 1131(2) is not the only means available to the NAFTA Parties of reaching a ‘subsequent agreement.’” With respect to subsequent practice, the tribunal held that its value and significance depends on “the extent to which it is concordant, common, and consistent.” The tribunal found that while the evidence before it in that case did not rise to the level of a subsequent agreement, it did establish a concordant, common, and consistent practice within the meaning of Article 31(3).

⁵ **RL-096**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 12 June 2015, ¶ 3, citing **RL-086**, *Vienna Convention on the Law of Treaties*, Art. 31(3)(a), (b); **RL-095**, Reports of the ILC Commission, p. 220, ¶ 9 (observing that there is no hierarchy among the norms of interpretation listed in Article 31 and that those in Article 31(3) “by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them”); **RL-020**, *Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 188-189; **RL-097**, Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” (1958) 33 Brit. Y.B. Int’l L. 203 at 223 (observing that “a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted”) (emphasis omitted); **RL-098**, *Iran v. United States*, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT, 9 September 2004, ¶ 109 (“The importance of . . . subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[.]”) (citing International Law Commission). Concurred with by Canada at **RL-099**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Respondent’s Response to 1128 Submissions, 26 June 2015, fn. 4. See also **RL-100**, *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Respondent’s Reply to the 1128 Submissions of the United States and Mexico, 29 January 2016, ¶ 5.

⁶ See **RL-020**, *Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 189-189 (finding that the concordant, common, and consistent practice of the NAFTA Parties confirmed the tribunal’s interpretation of Article 1101); **RL-005**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 100,106-107 (referring to the Article 1128 submission of the United States to confirm the interpretation of Article 1101). Even when NAFTA tribunals have not explicitly acknowledged that there is an agreement for the purposes of Article 31(3)(a) of the Vienna Convention, they have consistently adopted the common positions of NAFTA Parties advanced in Article 1128 submissions. See, e.g. **RL-018**, *Methanex Corporation v. United States of America* (UNCITRAL) First Partial Award, 7 August 2002 (“*Methanex – Partial Award*”), ¶ 147 (accepting the United States’ position on the interpretation of Article 1101(1) based on Article 31(1) of the Vienna Convention, while finding it not necessary to rely on the United States’ submissions based on Article 31(3) of the Vienna Convention as supported by Canada and Mexico); **RL-057**, *The Loewen Group Inc. and Raymond Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 235 (deciding that the provisions of the ICSID

III. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLES 1116(2) AND 1117(2)

9. All three NAFTA Parties agree on several important points related to the time limitation set out in NAFTA Articles 1116(2) and 1117(2). The NAFTA Parties' agreement on all of these issues is longstanding.

10. First, the NAFTA Parties all agree that NAFTA Articles 1116(2) and 1117(2) impose a "clear and rigid" limitation that is not subject to any suspension, prolongation, or other qualification.⁷

Convention did not apply to the dispute, as the United States had argued, and as Canada and Mexico had agreed in their Article 1128 submissions); **RL-062**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶¶ 83-92 (referring to the submissions of Canada, Mexico and the United States in support for its holding that there is no rule of customary international law prohibiting or regulating anticompetitive behavior); **RL-101**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB (AF)/99/01) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 44-45 (referring to the Article 1128 submission of the United States in its determination that the limitation period under Article 1117 runs not from the time of delivery of the notice of intent to submit a claim to arbitration but from the "definitive activation of an arbitration procedure" (i.e. "the time at which the notice of arbitration has been received by the [ICSID] Secretary-General", where the dispute is submitted to arbitration under the ICSID Additional Facility Rules); **RL-102**, *Mobil Investments, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 291-295, 302-303, 346-350, 374 (noting that all three NAFTA Parties took the position that the reservation set out in Article 1108(1)(a) covers subordinate measures that existed when NAFTA entered into force as well as those that came into existence afterwards, and rejecting the claimant's position to the contrary; noting also the NAFTA Parties' agreement on the conditions that must be met for any "subordinate measure" to be covered by a reservation; noting the submissions of the NAFTA Parties with respect to the applicable law for the purposes of determining whether the subordinate measure fulfils these conditions; and noting the NAFTA Parties' agreement that a new subordinate measure could impose some additional or more onerous commitments than those imposed by the earlier measure).

⁷ See *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Respondent's Memorial on Jurisdiction, 22 December 2016 ("Respondent's Memorial on Jurisdiction"), ¶ 26 ("In *Feldman v. United States*, the tribunal stressed that 'NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defence which, as such, is not subject to any suspension [...], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years.'"); *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 June 2017 ("Article 1128 Submission of the United States"), ¶ 6 ("This limitations period [set out in Articles 1116(2) and 1117(2)] is a 'clear and rigid' requirement that is not subject to any 'suspension,' 'prolongation,' or 'other qualification.'"). See also **RL-103**, *Mobil Investments Canada, Inc. v. Government of Canada* (ICSID Case No. ARB/15/6) Respondent's Rejoinder, 16 December 2016, ¶ 86 (stating that Articles 1116(2) and 1117(2) establish "a 'clear and rigid' limitation period 'not subject to any suspension, prolongation or other qualification'"); **RL-104**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Respondent's Observations on Issues Raised in 1128 Submissions of the United States and Mexico, 22 April 2016 ("*Eli Lilly – Respondent's Observations on Article 1128 Submissions*"), ¶ 7 ("[T]he NAFTA Parties all agree that NAFTA Articles 1116(2) and 1117(2) impose a 'clear and rigid' limitation defense that is not subject to any suspension, prolongation, or other qualification."); **RL-043**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶ 6 ("NAFTA tribunals, such as *Grand River v. the United States* and *Feldman v. Mexico* have recognized that there is a 'clear and rigid limitation defense - not subject to any suspension, prolongation or other qualification' introduced by Articles 1116(2) and 1117(2)."); **RL-042**, *Eli Lilly and Company v. Government*

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11. Second, the NAFTA Parties all agree that the limitation period starts running when the claimant first acquires (or should first acquire) knowledge of an alleged breach and loss.⁸

12. Third, the NAFTA Parties all agree that an investor may acquire knowledge that it has incurred a loss or damage even though it does not yet know, with certainty, the full extent of that loss. As Canada explained in its Memorial on Jurisdiction, and as Mexico concurs, “the plain language of Articles 1116(2) and 1117(2) does not require a claimant to acquire knowledge of the full extent of the loss or damage resulting from the alleged breaches in order to start the time

of Canada (UNCITRAL) Submission of the United States of America, 18 March 2016, fn. 1 (“The claims limitation period has been described as ‘clear and rigid’ and not subject to any ‘suspension,’ ‘prolongation,’ or ‘other qualification.’”); **RL-037**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 3 March 2014 (“*DIBC – Reply of Canada to 1128 Submissions*”), ¶ 28 (“The NAFTA Parties agree, as the *Feldman, Grand River*, and *Apotex* tribunals all confirmed, that the three-year deadline for filing a claim is a ‘clear and rigid’ limitations defence which is not subject to any ‘suspension,’ ‘prolongation,’ or ‘other qualification.’”); **RL-036**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 February 2014 (“*DIBC – 1128 Submission of U.S.*”), fn. 2 (reaffirming that “[t]he United States’ views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case *Merrill & Ring Forestry, L.P. v. Canada*.”); **RL-033**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 July 2008 (“*Merrill & Ring – 1128 Submissions of the U.S.*”), ¶ 6 (“Both the *Grand River* and *Feldman* tribunals observed that Article 1116(2) introduces a ‘clear and rigid’ limitation defense, which is not subject to any ‘suspension,’ ‘prolongation,’ or ‘other qualification.’”); **RL-034**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of Mexico pursuant to Article 1128 of NAFTA, 2 April 2009 (“*Merrill & Ring – 1128 Submission of Mexico*”) (stating that “[t]he United Mexican States concurs with in its entirety the Submission of the United States of America dated July 14, 2008.”).

⁸ Respondent’s Memorial on Jurisdiction, ¶ 32 (“Articles 1116(2) and 1117(2) provide that the time limitation may commence from two possible points in time: (1) the moment when an investor or enterprise ‘first acquired’ knowledge of the alleged breach and loss, or (2) the moment when an investor or enterprise ‘should have first acquired’ knowledge of the alleged breach and loss.”); Article 1128 Submission of the United States, ¶ 6 (“The limitations period set out in Articles 1116(2) and 1117(2) requires a claimant to submit a claim to arbitration within three years of the ‘date on which the’ investor or enterprise ‘first acquired, or should have first acquired, knowledge’ of (i) the alleged breach, and (ii) loss or damage incurred by the investor or enterprise.”); **RL-105**, *Mobil Investments Canada, Inc. v. Government of Canada* (ICSID Case No. ARB/15/6) Respondent’s Counter-Memorial, 30 June 2016, ¶ 142 (“Accordingly, a claimant may not bring a claim if more than three years have elapsed since it first acquired knowledge, or should have first acquired knowledge, of the alleged breach and the alleged loss arising out of that breach.”); **RL-104**, *Eli Lilly – Respondent’s Observations on Article 1128 Submissions*, ¶ 8 (“[T]he NAFTA Parties all agree that the limitations period starts running when the claimant first acquires knowledge of a breach and loss.”); **RL-037**, *DIBC – Reply of Canada to 1128 Submissions*, ¶ 33 (“The NAFTA three-year time limitation provision exists to ensure claims are brought within a finite period of time from the moment an investor first acquired knowledge of the breach and loss”); **RL-036**, *DIBC – 1128 Submission of U.S.*, ¶ 3 (excerpted at note 7, *supra*); **RL-033**, *Merrill & Ring – 1128 Submissions of the U.S.*, ¶ 10 (“Article 1116(2) requires an investor to submit a claim to arbitration within three years of the date on which the investor *first* acquired knowledge (either actual or constructive) of: (i) the alleged breach, and (ii) loss or damage incurred by the investor”); **RL-034**, *Merrill & Ring – 1128 Submission of Mexico* (excerpted at note 7, *supra*).

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limitation to submit a claim to arbitration.”⁹ The United States also agrees, noting that “the investor may ‘incur’ loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.”¹⁰

13. The NAFTA Parties agree that this interpretation is supported by previous decisions. For example, Mexico agrees that the interpretation advanced by Canada is supported by the holding in *Mondev v. United States* that a “claimant may know that it has suffered loss or damage even if the extent of the quantification of the loss or damage is still unclear.”¹¹ Like Canada, the United States finds support for this interpretation in *Grand River Enterprises v. Mexico*¹² and *Spence v. Costa Rica*.¹³

14. The Claimant argues that the *Grand River* tribunal was wrong because “even certain future loss... is not loss actually incurred.”¹⁴ It refers to the tribunal’s holding in *Pope & Talbot v. Canada* that “[t]he critical requirement is that the loss has occurred and was known or should

⁹ Respondent’s Memorial on Jurisdiction, ¶ 42, concurred with by Mexico at *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to Article 1128, 14 June 2017 (“Article 1128 Submission of Mexico”), ¶ 6.

¹⁰ Article 1128 Submission of the United States, ¶ 8.

¹¹ **RL-029**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87, cited at Article 1128 Submission of Mexico, ¶ 6.

¹² **RL-022**, *Grand River Enterprises Six Nations et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 ¶ 77 (“In many sources, the verb is regularly taken to mean ‘become liable to.’ Judicial dicta likewise suggest that one incurs a loss when liability accrues; a person may ‘incur’ expenses before he or she actually dispenses any funds. In the Tribunal’s view, this interpretation corresponds most closely to the ordinary meaning of the term. The verb ‘to incur’ in ordinary usage is often used to describe situations where there is no immediate outlay of funds by the affected party. A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party’s interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.”) (“*Grand River – Decision on Jurisdiction*”), cited at Article 1128 Submission of the United States, ¶ 8.

¹³ **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016, ¶ 213 (“Indeed, in the Tribunal’s view, the Article 10.18.1 requirement, *inter alia*, to point to the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.”) (“*Spence – Interim Award*”), cited at Article 1128 Submission of the United States, fn. 13. Canada addresses the relevance of this case at paragraphs 20-21, *infra*.

¹⁴ *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Claimant’s Rejoinder Memorial on Jurisdiction, 3 May 2017 (“Claimant’s Rejoinder Memorial on Jurisdiction”), fn. 81.

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have been known by the investor, not that it was or should have been known that the loss could or would occur.”¹⁵ However, as stated by the United States, the holdings in *Pope & Talbot* and *Grand River* are not necessarily incompatible, “as a loss occurs when it is incurred, rather than when the financial impact of the loss is realized.”¹⁶ Canada also agrees with the United States that:

... an unduly restrictive reading of the *Pope & Talbot* tribunal’s interpretation is unwarranted by its findings. The tribunal did not find that the claimant in that case must have actually purchased, or paid the higher prices for, the wood chips before it had incurred loss or damage. Rather, the tribunal’s findings indicated that the date on which the “necessity to purchase” the more expensive wood chips arose determined when the loss or damage was incurred.¹⁷

15. Fourth, the NAFTA Parties all agree that a claimant must comply with the time limitation in order to establish a respondent’s consent to arbitration and the jurisdiction of a tribunal under NAFTA Chapter Eleven. Contrary to the position taken by the Claimant for the first time in its Rejoinder Memorial,¹⁸ Canada’s time-bar objection goes to the jurisdiction of the Tribunal and not to the admissibility of the claims.

16. The tribunal in *Pope & Talbot* remains the only NAFTA Chapter Eleven tribunal to have erroneously characterized an objection based on the time limitation as an “affirmative defence” for which the respondent bears the burden of proof.¹⁹ The United States agrees that the *Pope & Talbot* tribunal “provided no reasoning for reaching this conclusion” and that “no subsequent NAFTA Chapter Eleven tribunal has followed this holding.”²⁰ Indeed, as the United States observes,²¹ NAFTA tribunals consistently address the time bar defence as a jurisdictional objection.

¹⁵ **CL-011**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record, 24 February 2000, ¶ 12, cited at Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 91.

¹⁶ Article 1128 Submission of the United States, ¶ 9.

¹⁷ Article 1128 Submission of the United States, ¶ 9.

¹⁸ Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 14.

¹⁹ See Respondent’s Reply Memorial on Jurisdiction, ¶ 20.

²⁰ Article 1128 Submission of the United States, fn. 3.

²¹ Article 1128 Submission of the United States, ¶ 4.

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17. For example, the tribunal in *Methanex v. United States* understood that the requirement to file a claim within three years of first acquiring knowledge of the alleged breach and loss engaged the NAFTA Parties' consent to arbitrate and a tribunal's jurisdiction over the claim:

In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) *that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117* (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.²²

18. The tribunal in *Bilcon v. Canada* also treated Canada's objection under Article 1116(2) as a "jurisdictional objection."²³ The *Bilcon* tribunal underscored the importance of establishing a tribunal's jurisdiction with reference to the elements of a NAFTA Party's consent to arbitration:

General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. *The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors. The Parties to NAFTA chose to go as far, but only as far, as they stipulate in Chapter Eleven towards enhancing the international legal rights of investors.*²⁴

19. As the United States observed,²⁵ the tribunals in *Glamis Gold v. United States*, *Grand River*, *Feldman v. Mexico* and *Apotex v. United States* also addressed the time bar defence as a jurisdictional objection.²⁶ The holding in *Apotex* is particularly relevant. The Claimant asserts

²² **RL-018**, *Methanex – Partial Award*, ¶ 120 (emphasis added).

²³ **RL-025**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon – Award*"), ¶ 242.

²⁴ **RL-025**, *Bilcon – Award*, ¶ 229 (emphasis added).

²⁵ See Article 1128 Submission of the United States, ¶ 4 and fn. 3-5.

²⁶ **RL-017**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005, ¶ 18 (finding that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for the purposes of Article 21(4)" of the UNCITRAL Arbitration Rules); **RL-022**, *Grand River – Decision on Jurisdiction*, ¶ 3 (stating that the tribunal's "Decision on Objections to Jurisdiction addresses a single

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that, to fulfil the essential jurisdictional elements of NAFTA Chapter Eleven, it need only prove that it is an investor of another NAFTA Party with an investment in Canada.²⁷ However, as held by the *Apotex* tribunal, in addition to fulfilling these requirements, a claimant must also establish the timeliness of its claims as a matter of jurisdiction *ratione temporis*.²⁸

20. The NAFTA Parties also agree on the relevance of *Spence v. Costa Rica*²⁹ to interpreting the time limitation under NAFTA, particularly with regard to its jurisdictional nature.³⁰ As Canada stated in its earlier submissions, the time limitation applicable in *Spence* – Article 10.18.1 of the Dominican Republic-Central America-United States Free Trade Agreement of 2004 (CAFTA-DR) – is equivalent to the time limitation in NAFTA Articles 1116(2) and 1117(2).³¹ The United States agrees, describing the limitations periods under the respective treaties as “identical.”³² Contrary to the Claimant’s assertion,³³ it makes no difference that the

jurisdictional issue raised by Respondent and identified for separate treatment as a preliminary issue by the Tribunal: whether certain of the Claimants’ claims must be barred as not timely under NAFTA Articles 1116(2) and 1117(2).”); **RL-106**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶ 11 (stating that the tribunal would consider certain “jurisdictional issues” on a preliminary basis, including “[w]hether the Respondent is entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2).”); **RL-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶¶ 46-47 (recalling the tribunal’s earlier decision to hear arguments on “[w]hether the Respondent was entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2)” as one of the “preliminary jurisdictional questions” and referring to the time limitation again as one of the “jurisdictional issues.”); **RL-023**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, (“*Apotex – Award on Jurisdiction*”), ¶¶ 314 (noting that “there [was] an initial question as to the precise nature of [the respondent’s] objection [under Article 1116(2)], and whether it is properly characterised as one of “jurisdiction” or merits / substance. The objection was treated by both Parties as a ‘jurisdictional’ issue.”), 335 (holding that “even if Apotex qualified as an ‘investor’, who has made an ‘investment’ in the U.S. for the purposes of NAFTA Articles 1116 and 1139, the Tribunal would have no jurisdiction *ratione temporis* with respect to Apotex’s allegation in its Pravastatin Notice of Arbitration that the FDA’s letter decision of 11 April 2006 (determining that the 180-day exclusivity period had not been triggered) itself constituted a violation of NAFTA Articles 1102, 1105, and 1110. This particular claim would therefore fall to be dismissed on this basis in any event.”).

²⁷ See Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 13.

²⁸ **RL-023**, *Apotex – Award on Jurisdiction*, ¶ 335 (excerpted at note 26, *supra*).

²⁹ **RL-028**, *Spence – Interim Award*.

³⁰ Respondent’s Memorial on Jurisdiction, fns. 53, 56, 71, 145; Respondent’s Reply Memorial on Jurisdiction, ¶¶ 14-15, 24, 100; Article 1128 Submission of Mexico, ¶ 4; Article 1128 Submission of the United States, ¶ 4.

³¹ Respondent’s Memorial on Jurisdiction, fn. 71 (noting that the *Spence* tribunal was “applying Article 10.18.1 of the Dominican Republic-Central America-United States Free Trade Agreement of 2004, which imposes a three-year time bar similar to NAFTA Articles 1116(2) and 1117(2).”); Respondent’s Reply Memorial on Jurisdiction, ¶ 99 (noting that the time limitation under Article 10.18.1 of CAFTA-DR is equivalent to that set out in NAFTA Articles 1116(2) and 1117(2)).

³² Article 1128 Submission of the United States, ¶ 4.

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limitation period in CAFTA-DR appears under the heading “Conditions and Limitations on Consent of Each Party.” Canada agrees with the United States that this is a distinction without a difference for the purposes of the jurisdictional nature of the respective time limitations:

It is not significant for purposes of determining the jurisdictional nature of the limitations period that the CAFTA places the limitations period provision under an Article (Article 10.18) with the heading “Conditions and Limitations on Consent of Each Party”, while the NAFTA places the limitations period provisions under Articles that do not explicitly refer to the consent of the Treaty Parties. As noted above, Article 1122 incorporates by reference “the procedures set out” in the NAFTA, and the limitations period is jurisdictional as it places limitation on the authority of a tribunal to act on the merits.³⁴

21. In any event, Canada does not rely “above all” on *Spence* as having “precedential” value in this case, as the Claimant asserts.³⁵ Canada refers to *Spence* as a relevant and persuasive authority on the issues before the Tribunal in relation to the time limitation. NAFTA Article 1131 requires the Tribunal to “decide the issues in dispute in accordance with this Agreement [i.e. NAFTA] and applicable rules of international law.” In doing so, the Tribunal may refer to the decisions of other arbitral tribunals, to the extent that those tribunals were applying NAFTA or treaties containing equivalent provisions. In contrast, authorities interpreting completely different treaty provisions, such as *Tecmed v. Mexico*,³⁶ are not relevant and have no persuasive value in this arbitration. As such, the Claimant’s reliance on this case is misplaced.³⁷

³³ Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 29.

³⁴ Article 1128 Submission of the United States, fn. 6.

³⁵ Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 29.

³⁶ **CL-038**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003 (“*Tecmed – Award*”). The *Tecmed* arbitration was brought under the former bilateral investment treaty between Spain and Mexico. The limitations period of that treaty provided: “The investor may not submit a claim under this Agreement if more than three years have elapsed since the date on which the investor had or should have had notice of the alleged violation, as well as of the loss or damage sustained.” However, the treaty did not provide that compliance with the time limitation was a condition of consent to arbitration, as NAFTA Article 1122(1) does through its incorporation of Articles 1116(2) and 1117(2). See **CL-038**, *Tecmed – Award*, ¶ 72; **RL-107**, *Acuerdo para la Promoción y Protección Recíproca de Inversiones entre los Estados Unidos Mexicanos y el Reino de España*, 23 June 1995, 1965 U.N.T.S. 147 (entered into force 18 December 1996); **RL-108**, *Agreement for the Reciprocal Promotion and Protection of Investments Between the United States and the Kingdom of Spain* (Unofficial Translation of the Spanish Original obtained from Investor-State Law Guide).

³⁷ See Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 31.

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22. The Claimant’s reliance on an article written by Jan Paulsson is also inapposite, as the article says nothing about the NAFTA.³⁸ The text of the treaty, in particular Articles 1116(2), 1117(2) and 1122(1), is the source of the conditions under which a NAFTA Party consents to arbitrate.³⁹ Whatever academic debate exists on how to distinguish between jurisdiction and admissibility generally, and however the question of jurisdiction versus admissibility might be treated differently under different treaties, when it comes to the only question that matters for this Tribunal – do NAFTA Articles 1116(2) and 1117(2) engage consent to arbitrate under Article 1122(1) – theoretical distinctions are beside the point.

23. Consistent with the weight of authority, Canada objected to the Tribunal’s jurisdiction *ratione temporis* under Articles 1116(2) and 1117(2) in its Statement of Defence.⁴⁰ Throughout the bifurcation proceedings and this preliminary phase of the arbitration, the Claimant agreed that Canada’s time-bar arguments were in the nature of a “jurisdictional objection”⁴¹ or “jurisdictional defence.”⁴² Whatever the reason for the Claimant’s about-face, it does not relieve

³⁸ **CL-040**, Jan Paulsson, “Jurisdiction and Admissibility” in Gerald Aksen et al., eds., *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing, 2005) 601, cited at Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 22.

³⁹ In any event, Professor Paulsson’s article proves this point, stating that “[i]f the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.” That the NAFTA limitation period is *lex specialis* has been confirmed numerous times. See, e.g., **RL-025**, *Bilcon – Award*, ¶ 258. (“The Tribunal agrees that the general rules of international law on time-limits and their consequences are applicable to the question before it, but is also aware that specific terms of NAFTA might enjoy priority as *leges speciales*. Thus, case law must be viewed in the context of the particulars of the laws at play and the factual situations in each case.”).

⁴⁰ *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Respondent’s Statement of Defence, 1 September 2016, ¶¶ 8 (“[T]he Tribunal has no jurisdiction *ratione temporis*. As a condition of Canada’s consent to arbitrate under NAFTA Article 1122(1), Articles 1116(2) and 1117(2) set a strict three-year time limit within which an investor must file a claim once it has knowledge of the alleged NAFTA breach and that it has suffered some cognizable loss or damage.”), 76 (“Even if the Claimant can get through the Article 1101(1) gateway to NAFTA Chapter Eleven, this Tribunal would still have no jurisdiction *ratione temporis* because the Claimant waited too long to file its claim.”).

⁴¹ *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Claimant’s Opposition to Respondent’s Request for Bifurcation, 13 October 2016, fn. 35; *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Transcript of Bifurcation Hearing, 7 November 2016 at 50:4.

⁴² *Resolute Forest Products, Inc. v. Government of Canada* (UNCITRAL) Claimant’s Counter-Memorial on Jurisdiction, 22 February 2017, ¶ 82 and fn. 131.

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the Claimant of establishing the Tribunal's jurisdiction *ratione temporis* by proving its compliance with the time limitation.⁴³

24. The United States agrees that “[b]ecause the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Eleven, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.”⁴⁴ Mexico also agrees, endorsing the United States’ non-disputing Party submission in *Spence*: “the claimant bears the burden to establish jurisdiction under [the investment] Chapter..., including with respect to Article 10.18.1” and therefore “the claimant must prove the necessary and relevant facts (i.e., the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period.”

25. The NAFTA Parties’ agreement with respect to these interpretative issues only confirms that the claims at issue in this preliminary phase must be dismissed for lack of jurisdiction *ratione temporis*. The evidence presented by Canada in this arbitration establishes conclusively that the Claimant first appreciated the alleged loss or damage before the applicable cut-off date of December 30, 2012.

⁴³ Respondent’s Reply Memorial on Jurisdiction, ¶ 10. This was the conclusion of the *Spence* tribunal interpreting the equivalent time limitation under CAFTA-DR **RL-028**, *Spence – Interim Award*, ¶¶ 239 (stating that “the Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant’s case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal’s jurisdiction.”), 245 (finding that the claimants in that case failed to show that they first acquired, or must be deemed to have first acquired, knowledge of the breaches and losses only after the applicable cut-off date)

⁴⁴ Article 1128 Submission of the United States, ¶ 5. See also **RL-109**, *Spence International Investments v. Costa Rica* (UNCITRAL) Submission of the United States as non-disputing party, 17 April 2015, ¶ 10, cited at Article 1128 Submission of Mexico, ¶ 4.

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IV. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 1101

26. The NAFTA Parties agree that to satisfy the “relating to” requirement in Article 1101, a claimant must demonstrate that a “legally significant connection” exists between the challenged measures and the investor or its investment.⁴⁵

27. Accordingly, the NAFTA Parties unanimously disagree with the Claimant’s characterization of the jurisdictional threshold as a causal nexus that does not require a direct connection of legal significance.⁴⁶ As the United States explains, the “negative impact of a challenged measure on a claimant, without more, does not satisfy the standard”, since “a more direct connection” is required.⁴⁷

28. Absent a significant legal connection, the NAFTA Parties also agree that an “indeterminate class of investors” would improperly meet the threshold of Article 1101.⁴⁸ Indeed, this is exactly what would happen if the Tribunal accepted the Claimant’s threshold, and Canada agrees with the United States Article 1101 was not meant to allow “untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment” to meet the threshold.⁴⁹

V. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 2103

29. All three NAFTA Parties agree that, pursuant to Article 2103, taxation measures may not be contested as a breach of Article 1105.⁵⁰ Accordingly, the Claimant’s argument that the Property Tax Agreement between Pacific West Commercial Corporation and Richmond County breached Article 1105 must fail.

⁴⁵ Article 1128 Submission of the United States, ¶ 12; Article 1128 Submission of Mexico, ¶ 68; Respondent’s Reply Memorial on Jurisdiction, ¶ 207.

⁴⁶ Claimant’s Rejoinder Memorial on Jurisdiction, ¶ 107.

⁴⁷ Article 1128 Submission of the United States, ¶ 13.

⁴⁸ Article 1128 Submission of the United States, ¶ 12; Article 1128 Submission of Mexico, ¶. 9; Respondent’s Reply Memorial on Jurisdiction, ¶ 126.

⁴⁹ Article 1128 Submission of the United States, ¶ 12.

⁵⁰ Article 1128 Submission of the United States, ¶¶ 18, 20; Article 1128 Submission of Mexico, ¶ 14.

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30. The NAFTA Parties also agree that a taxation measure may only be contested as a breach of Article 1110 if the claimant has sought a determination from the NAFTA Parties that the measure is an expropriation.⁵¹ The United States further explains, and Canada agrees, that Article 2103 does not create a distinction between a taxation measure as a means of expropriating an investment, and a taxation measure that advantages a domestic investor by allegedly expropriating the foreign investment.⁵² Whatever the intention behind the measure, a claimant may only submit an Article 1110 claim involving a taxation measure after it has referred the issue to the competent authorities, and the authorities do not agree to consider it or fail to agree that the measure is not an expropriation.

31. In the circumstances, given that the Claimant has not followed procedural requirements of Article 2103, the Tribunal may not consider the taxation measure as part of the Claimant's Article 1110 claim.

VI. THE NAFTA PARTIES' SUBMISSIONS REGARDING ARTICLE 1102(3) CONFIRM THAT THE CLAIM IS RIPE FOR DISMISSAL AT THIS PRELIMINARY STAGE

32. As Canada noted in its Reply Memorial, the Claimant has clarified that it is not basing its Article 1102 claim on treatment afforded to it by the Canadian federal government or the Government of Québec, the province in which its actual investment are located.⁵³ Insofar as the views of the United States and Mexico regarding Article 1102(3) focus on the issue of treatment by different governments, they not directly relevant for the situation before this Tribunal, since Resolute complains about the "treatment" it received from Nova Scotia, a province in which none of its supercalendered paper investments were located.

33. While Canada does not disagree with the United States that an analysis of whether a foreign and domestic investor are "in like circumstances" is a question for the merits,⁵⁴ this necessarily presumes that there has been actual *treatment* accorded to the investor or its investment by the state or province in question in order for the claim to be admissible. Absent

⁵¹ Article 1128 Submission of the United States, ¶¶ 18, 20; Article 1128 Submission of Mexico, ¶ 14.

⁵² Article 1128 Submission of the United States, ¶ 19.

⁵³ Respondent's Reply Memorial on Jurisdiction, ¶¶ 145-146.

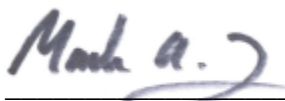
⁵⁴ Article 1128 Submission of the United States, ¶ 17. See Respondent's Reply Memorial on Jurisdiction, ¶ 162.

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any evidence of a link between Nova Scotia and the investor, the claim cannot even meet the *prima facie* basis of admissibility and can therefore be dismissed at this preliminary stage.

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Respectfully submitted
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