



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

**Lone Pine Resources Inc.**  
Claimant

and

**Government of Canada**  
Respondent

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**SUBMISSION OF MEXICO PURSUANT NAFTA ARTICLE 1128**

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**16 August 2017**

1. The Government of Mexico makes this submission pursuant to NAFTA Article 1128 with respect to certain questions of interpretation of the NAFTA. Mexico takes no position on the facts of this dispute. The fact that a question of interpretation arising in the proceeding is not addressed in this submission should not be taken to constitute Mexico's concurrence or disagreement with a position taken by either of the disputing parties.

### **Article 1101(1)**

2. Article 1101(1) states that Chapter 11 “applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party...”

3. Mexico concurs with Canada on the relevance of Article 1101(1) in determining the jurisdiction of tribunals to settle investment disputes under NAFTA, which has also been recognized by other tribunals.<sup>1</sup> In *Methanex*, Mexico stated that “[u]nder heading ‘Scope and Coverage’, the first article of Chapter Eleven establishes the breadth of measures that are covered by the chapter, and, by definition, the range of measures that are arbitrable under Section B”.<sup>2</sup>

4. As part of the context of this provision it is of paramount importance to take into account other related provisions like the definition of “investment” or “investor of a Party” in Article 1139, which also informs about the scope of Chapter Eleven.<sup>3</sup>

5. In its Counter-Memorial, Canada stated that “Article 1101 requires that a ‘legally significant connection’ be demonstrated between the measure and the investor or its investment”.<sup>4</sup> This interpretation of Article 1101(1) has been supported not only by Canada, but also Mexico and the United States in previous cases,<sup>5</sup> and has been applied by Chapter Eleven arbitral tribunals.<sup>6</sup>

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<sup>1</sup> *Lone Pine Resources Inc. v. Government of Canada* (UNCITRAL), Canada's Counter-Memorial, 24 July 2015, para. 267, 269 and FN 340 (Counter-Memorial).

<sup>2</sup> *Methanex Corporation v. United States* (UNCITRAL), Second Submission of Mexico pursuant to NAFTA Article 1128, 15 May 2001, para. 5.

<sup>3</sup> In *Apotex Holdings Inc. and Apotex Inc. v. United States*, the United States highlighted the relevance of the link between Article 1101(1) and the definition of “investment” in Article 1139, submitting that “[t]he interpretation of [Article 1139(h)] necessarily is informed by other provisions of Chapter Eleven, including its scope and coverage provision, Article 1101. Article 1101(1) states that Chapter Eleven applies only to measures adopted or maintained by a Party relating to: (1) “investors or another Party” (which is defined as a Party “that seeks to make, is making or has made an investment”); and (2) “investments of investors of another Party in the territory of the Party.” (*Apotex Holdings Inc. and Apotex Inc. v. the United States, United States* (ICSID, Case No. ARB(AF)/12/1), Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America, 14 December, 2012, para. 250)

<sup>4</sup> *See* Counter-Memorial, para. 293.

<sup>5</sup> *Id.* Para. 299. Also, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), Submission of the United States pursuant to Article 1128, 14 June 2017, paras. 12-14 (<http://www.pcacases.com/web/sendAttach/2192>); Submission of the United Mexican States pursuant to Article 1128, 14 June 2017, paras. 8-11 (<http://www.pcacases.com/web/sendAttach/2191>).

<sup>6</sup> *Id.* Paras. 302-307.

Mexico therefore concurs with Canada's interpretation with respect to the "relating to" requirement explained in paragraphs 293-301 of its Counter-Memorial.

### **Article 1105(1)**

6. As Canada explained in paragraphs 338-343 of its Counter-Memorial, the NAFTA Parties unanimously agree on the following points with respect to the scope and content of Article 1105(1):

- "The Note of Interpretation of 31 July 2001 confirms that the minimum standard of treatment prescribed by Article 1105 is based on an objective standard, the existence of specific rules regarding the protection of aliens, and not a subjective standard that would allow the Tribunal to assess the impugned measure against its own idea of what constitutes fair and equitable treatment."<sup>7</sup>
- "To prove the existence of such a customary rule, the investor must demonstrate the two prerequisites for the establishment of custom, i.e. the existence of the general practice of States and the subjective element, the *opinio juris*, indicating that this practice was adopted because it constitutes a rule of law."<sup>8</sup>
- "The burden of proof rests entirely on the claimant and cannot be shifted to the respondent or the Tribunal."<sup>9</sup>

### **Article 1110**

7. Mexico agrees with Canada that "[i]nternational law recognizes that States have the power to adopt measures for the protection of the public good without having to compensate for any property interference that may result, as long as the measures are non-discriminatory and were adopted in good faith."<sup>10</sup>

8. The police powers doctrine is directly applicable to Article 1110 because it has been recognized by the customary international law as Canada described in paragraphs 492- 498 of its Counter-Memorial. It is thus an applicable rule of international law both pursuant to Article 1131(1), which requires that tribunals "decide the issues in dispute in accordance with this Agreement and applicable rules of international law" [Emphasis added], and the general rule of interpretation set forth in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which

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<sup>7</sup> Para. 343.

<sup>8</sup> Para. 342.

<sup>9</sup> Para. 342.


<sup>10</sup> Id. Para. 492.

requires to take into account “together with the context:… any relevant rules of international law applicable in the relations between the parties”, when interpreting a treaty.<sup>11</sup>

9. Mexico also concurs in Canada’s submissions in paragraphs 501-508 of its Counter-Memorial. As Canada has demonstrated, the NAFTA Parties have expressly recognized their sovereign right to legislate in the public interest, including environmental protection, and that this has been recognized by Chapter Eleven arbitral tribunals as a settled point of international law.

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Respectfully submitted,



Hugo Romero Martínez

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<sup>11</sup> In *Philip Morris v. Uruguay*, the Tribunal stated the following when interpreting the provision on expropriation contained in the Switzerland-Uruguay BIT (i.e. Article 5(1)): “... Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of ‘[a]ny relevant rules of international law applicable to the relations between the parties,’ a reference ‘which includes ... customary international law.’ This directs the Tribunal to refer to the rules of customary international law as they have evolved.” *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID)*, Award, 8 July 2016, para. 290.

<sup>12</sup> Counter-Memorial, para. 501.