

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

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

(PCA CASE No. 2018-54)

**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**

JULY 26, 2021

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I. INTRODUCTION

1. Canada provides the following response to the non-disputing Party submissions filed by the Governments of the United States and Mexico in this arbitration under NAFTA Article 1128, each dated June 25, 2021.¹ The NAFTA Article 1128 submissions filed by the Governments of the United States and Mexico confirm Canada's interpretation of Article 1116 generally, and Articles 1116(1) and 1116(2) more specifically, with respect to jurisdiction *ratione temporis*.

2. 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* ("VCLT"),² and should be given considerable weight. In summary, the NAFTA Parties agree that:

- A claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Article 1116.
- The requirements of Article 1116 must be met to establish a NAFTA Party's consent to arbitration under Article 1122(1). If these requirements are not met, a tribunal's jurisdiction is not established.
- Under Article 1116(1), a claimant must prove it was an "investor of a Party" when the alleged breach occurred to establish jurisdiction *ratione temporis*.
- Article 1116(2) imposes a "clear and rigid" limitation period that is not subject to any suspension, prolongation, or other qualification.
- The limitation period under Article 1116(2) begins to run on the date when a claimant *first* acquires knowledge of the alleged breach and alleged loss. This first acquisition of knowledge can occur only once. Subsequent State conduct relating to the same alleged breach does not renew or reset the limitation period.

¹ *Tennant Energy, LLC v. Government of Canada*, Second Article 1128 Submission of the United States, 25 June 2021 ("Second Article 1128 Submission of the U.S."), ¶ 1; *Tennant Energy, LLC v. Government of Canada*, Article 1128 Submission of Mexico, 25 June 2021, ("Second Article 1128 Submission of Mexico") ¶ 1; *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M 289, 605 ("NAFTA").

² **RLA-031**, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (entered into force 27 January 1980) 23 May 1969 ("VCLT").

- The test for constructive knowledge (“should have first acquired”) is an objective one, assessed against the standard of what a reasonably prudent investor should have known.
- A claimant need not have full knowledge of the loss or damage incurred in order to start the limitation period under Article 1116(2).

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

3. Pursuant to Article 31.3 of the VCLT, any subsequent agreement or subsequent practice of the parties to a treaty must be taken into account, together with the context of the treaty term under interpretation. Article 31.3 states:

There 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;
[...]³

4. 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,⁴ including where their agreement is established by subsequent practice.⁵

³ **RLA-031**, VCLT, Article 31.3 (emphasis added).

⁴ In contrast, Article 32 of the VCLT 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.” See **RLA-098**, “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 (emphasis added).

⁵ 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.” See **RLA-098**, Reports of the ILC Commission, p. 221, ¶ 15 (emphasis added).

5. VCLT Article 31.3 does not limit the form that such an agreement or practice must take. In this regard, the International Law Commission includes “statements in the course of a legal dispute” as relevant subsequent practice of States for the purposes of treaty interpretation.⁶

6. In the NAFTA context, subsequent agreement and subsequent practice establishing agreement on interpretation may be evidenced by the NAFTA Parties’ arbitration submissions, including non-disputing Party submissions under Article 1128. Where the NAFTA Parties express concordant views on how to interpret the NAFTA, they create subsequent agreement and subsequent practice within the meaning of VCLT Article 31.3.⁷

7. As a result, tribunals have accorded considerable weight to the concordant views of the NAFTA Parties.⁸ For instance, the *Bilcon* tribunal found that the NAFTA Parties

⁶ **RLA-099**, Report of the International Law Commission, Seventieth session (30 April-1 June and 2 July-10 August 2018) (UN Doc. A/73/10) Chapter IV, p. 32, Conclusion 4, Commentary 18; *See also RLA-100, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Award on Damages, 10 January 2019 (“*Bilcon – Award on Damages*”), ¶ 378.

⁷ **RLA-063**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008 (“*Canadian Cattlemen – Award on Jurisdiction*”), ¶¶ 181-189. In determining whether the NAFTA Parties had a “subsequent agreement” or “subsequent practice” under VCLT Article 31.3, the *Canadian Cattlemen* tribunal considered that Mexico had filed an Article 1128 submission but Canada had not. This led the tribunal to decline to find a “subsequent agreement” of the NAFTA Parties. Nevertheless, the tribunal found that the evidence in front of it, including an Article 1128 submission from Mexico, established a “subsequent practice” within the meaning of Article 31.3. In contrast, in *Tennant*, both non-disputing Parties have submitted Article 1128 submissions. The *Canadian Cattlemen* tribunal also recognized that the power of the NAFTA Free Trade Commission established under Article 2001 to make authoritative interpretations of NAFTA “under Article 1131(2) is not the only means available to the NAFTA Parties of reaching a ‘subsequent agreement.’” *See RLA-063, Canadian Cattlemen – Award on Jurisdiction*, ¶ 185. The *Bilcon* tribunal concurred. *See RLA-100, Bilcon – Award on Damages*, ¶ 377.

⁸ *See RLA-063, Canadian Cattlemen – Award on Jurisdiction*, ¶¶ 181-189 (finding that the concordant, common, and consistent practice of the NAFTA Parties confirmed the tribunal’s interpretation of Article 1101); **RLA-065**, *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); **RLA-002**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 147 (accepting the United States’ position on the interpretation of Article 1101(1) based on Article 31.1 of the VCLT, while finding it not necessary to rely on the United States’ submissions based on Article 31.3 of the VCLT as supported by Canada and Mexico); **CLA-315**, *Glamis Gold, Ltd. v. 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); **RLA-124**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶¶ 83-92 (referring to the submissions of Canada, Mexico and the United States for its holding that no rule of customary international law prohibits or regulates anticompetitive behavior); **RLA-192**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB (AF)/99/01) Interim Decision on

demonstrated subsequent practice establishing the agreement of the Parties under VCLT Article 31.3(b) based on their submissions to investor-State tribunals, including the United States' Article 1128 submission. Accordingly, the tribunal stated, "the NAFTA Parties' subsequent practice militates in favour of adopting the Respondent's position".⁹

8. In this case, the NAFTA Parties' agreement on the proper interpretation of Article 1116 generally, and Articles 1116(1) and 1116(2) concerning jurisdiction *ratione temporis*, constitutes subsequent agreement and practice under VCLT Articles 31.3(a) and 31.3(b), respectively. The Tribunal must consider this unanimous interpretation of the NAFTA Parties pursuant to VCLT Article 31.3. Moreover, the Tribunal should give considerable weight to the NAFTA Parties' agreed interpretation of Articles 1116, 1116(1), and 1116(2).

III. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 1116 GENERALLY

9. The NAFTA Parties agree on two important issues related to the interpretation of Article 1116: the burden of proof and consent to arbitration.

10. First, as explained by the United States, a "claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction" under Article 1116.¹⁰

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(2) 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); **CLA-221**, *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 the 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).

⁹ **RLA-100**, *Bilcon – Award on Damages*, ¶¶ 376-379. The *Bilcon* tribunal also correctly noted that analyzing subsequent practice does not replace the primary rule of interpretation of VCLT Article 31.1. See **RLA-100**, *Bilcon – Award on Damages*, ¶ 379.

¹⁰ Second Article 1128 Submission of the U.S., ¶ 3.

Similarly, Mexico makes clear that, “[t]he jurisdiction of a NAFTA Chapter 11 tribunal cannot be presumed, it has to be established and the claimant has the burden of proving the necessary facts and fulfillment of the specific legal requirements.”¹¹ Canada agrees with this interpretation.¹² In NAFTA Chapter Eleven disputes, the NAFTA Parties have consistently advanced this position with respect to the burden of proof under Article 1116, which has been recognized and accepted by numerous NAFTA tribunals.¹³

11. Second, with respect to consent to arbitration, Mexico “concur[s] with Canada that fulfillment of Article 1116’s requirements is one of the conditions that must be met to establish a NAFTA Party’s consent” under Article 1122(1).¹⁴ As Canada explained in its Counter-Memorial on Jurisdiction, Article 1122(1) affirms that Canada has conditioned its consent on claims being submitted “in accordance with the procedures set out in this Agreement”.¹⁵ One of those procedures is the fulfillment of Article 1116’s requirements.

¹¹ Second Article 1128 Submission of Mexico, ¶ 5.

¹² See Canada’s Counter-Memorial on Jurisdiction, 21 September 2020 (“Canada’s Counter-Memorial on Jurisdiction”), ¶¶ 58-61; Canada’s Rejoinder Memorial on Jurisdiction, 26 May 2021 (“Canada’s Rejoinder Memorial on Jurisdiction”), ¶¶ 16-24.

¹³ See e.g., **RLA-193**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. UNCT/10/2) Memorial on Objections to Jurisdiction of Respondent United States of America, 16 May 2011, ¶ 28; **RLA-080**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. UNCT/10/2) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150; **RLA-160**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) United Mexican States Article 1128 Submission on Jurisdiction, 14 June 2017 (“*Resolute – Mexico 1128 Submission*”), ¶¶ 2-5; **RLA-169**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) United States of America Article 1128 Submission on Jurisdiction, 14 June 2017 (“*Resolute – U.S. 1128 Submission*”), ¶ 5; **RLA-079**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 (“*Resolute – Decision on Jurisdiction and Admissibility*”), ¶ 84; **C-177**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL), Canada’s Counter-Memorial (Public Version), 28 February 2014, ¶ 231; **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶ 236; **RLA-194**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Canada’s Submission on Jurisdiction 20 December 2010, ¶ 23; **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 (“*Gallo – Award*”), ¶ 328; **RLA-195**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Mexico’s Memorial on Jurisdictional Objections, 30 May 2017 (“*B-Mex – Mexico’s Memorial on Jurisdictional Objections*”), ¶¶ 108-114; **RLA-196**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Mexico’s Reply on Jurisdictional Objections, 1 December 2017 (“*B-Mex – Mexico’s Reply on Jurisdictional Objections*”), ¶¶ 287-301; **RLA-121**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019 (“*B-Mex – Partial Award*”), ¶ 145

¹⁴ Second Article 1128 Submission of Mexico, ¶ 4, citing to Canada’s Counter-Memorial on Jurisdiction, ¶¶ 55-56.

¹⁵ Canada’s Counter-Memorial on Jurisdiction, ¶ 55.

Thus, as Mexico affirms, “[f]ailure to comply with Article 1122(1) results in the absence of a NAFTA Party’s consent and thus, in the tribunal’s lack of jurisdiction.”¹⁶ Likewise, the United States agrees that “a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 1116 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an arbitration claim.”¹⁷ Thus, unless the requirements of Article 1116 are met, a NAFTA Party does not consent to arbitration and, in turn, a tribunal’s jurisdiction is not established. This is a longstanding interpretation of Article 1116 that has been consistently maintained by all three NAFTA Parties¹⁸ and this Tribunal should adopt the same approach.

IV. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 1116(1)

12. Canada, the United States, and Mexico agree that a claimant must prove it was an “investor of a Party” when the alleged breach occurred to establish jurisdiction under Article 1116(1).¹⁹ The NAFTA Parties’ view of Article 1116(1) is the proper interpretation in context.

¹⁶ Second Article 1128 Submission of Mexico, ¶ 2.

¹⁷ Second Article 1128 Submission of the U.S., ¶ 3.

¹⁸ See e.g., **RLA-160**, *Resolute – Mexico 1128 Submission*, ¶¶ 2-5; **RLA-169**, *Resolute – U.S. 1128 Submission*, ¶¶ 2-3; **RLA-197**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL Government of Canada Memorial on Jurisdiction, 22 December 2016 (“*Resolute – Canada’s Memorial on Jurisdiction*”), ¶¶ 3, 23-24; **RLA-195**, *B-Mex – Mexico’s Memorial on Jurisdictional Objections*, ¶¶ 55-62; **RLA-196**, *B-Mex – Mexico’s Reply on Jurisdictional Objections*, ¶ 33; **RLA-198**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Submission of the United States of America, 28 February 2018, ¶¶ 2-5; **RLA-199**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Canada’s Article 1128 Submission, 28 February 2018 ¶¶ 2-4; **RLA-200**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Mexico’s Counter-Memorial on Preliminary Questions, 8 September 2000, ¶¶ 126-127; **RLA-201**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) 1128 Submission of the Government of Canada, 6 October 2000, ¶¶ 2-3; 10-12.

¹⁹ See e.g., Second Article 1128 Submission of the U.S., ¶ 11: “claimant (i.e., the investor bringing the claim) must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach, and incurred loss or damage thereby.” (footnote omitted); and Second Article 1128 Submission of Mexico, ¶ 6: “Mexico agrees with Canada that Articles 1101(1) and 1116(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”. See also Canada’s Counter-Memorial on Jurisdiction, ¶¶ 64-74; Canada’s Rejoinder Memorial on Jurisdiction, ¶¶ 28-31.

13. The ordinary meaning of the language used in Article 1116(1) of a “claim by an investor of a Party on its own behalf” and “that another Party has breached an obligation” is that jurisdiction under Article 1116(1) is limited to a claim that another Party breached an obligation relating to the claimant under Section A of Chapter Eleven.²⁰ Mexico correctly notes that the requisite connection between a claimant and a challenged measure under Section A cannot be met until the claimant became a protected investor.²¹ Thus, an investor can establish jurisdiction for a claim under Article 1116(1) only if it was an investor of a Party when the alleged breach occurred.²² It is not adequate to show that a previous enterprise who held the investment was a protected investor at that time. As the United States observes, “[t]here is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor.”²³

14. In addition, Article 1116(1) only permits a disputing investor to file a claim that “the investor has incurred loss or damage by reason of, or arising out of, that breach.”²⁴ This requires a claimant to be the same investor who suffered the alleged loss or damage from the alleged breach.²⁵ The only way that a claimant could be “the investor” to have suffered such alleged loss or damage is if it was an investor of a Party when the alleged breach occurred. Thus, as the United States confirms, “Article 1116(1) does not authorize a different investor to bring a claim on behalf of the investor who suffered the loss or damage as a result of the alleged breach.”²⁶

²⁰ NAFTA Article 1116(1) (emphasis added).

²¹ Second Article 1128 Submission of Mexico, ¶ 6-7.

²² Second Article 1128 Submission of Mexico, ¶ 6-7.

²³ Second Article 1128 Submission of the U.S., ¶ 11.

²⁴ NAFTA Article 1116(1) (emphasis added).

²⁵ Second Article 1128 Submission of the U.S., ¶¶ 10-12.

²⁶ Second Article 1128 Submission of the U.S., ¶ 10.

15. The waiver provision in Article 1121(1)(b)²⁷ offers context for interpreting Article 1116(1). As the United States observes here²⁸ and Mexico has explained in other NAFTA proceedings,²⁹ the waiver provision ensures that a NAFTA respondent does not need to litigate concurrent and overlapping proceedings in multiple forums relating to the same alleged breach.³⁰ The United States appropriately warns that if Article 1116(1) were interpreted as allowing an investor to bring a claim who was a different investor from the investor who had made the investment at the time of the alleged breach, this interpretation could render the waiver provision meaningless.³¹ Respondents might face duplicative domestic and international proceedings over the same alleged breach, raising the risk of double recovery and legal uncertainty over conflicting outcomes.³² This interpretation could also incentivize claim shopping: if a claimant does not have to be a protected investor when the alleged breach occurred, nothing would prevent investors from making investments solely to file claims against the NAFTA Parties.³³ Nothing in the Agreement suggests the NAFTA Parties intended such an outcome.

²⁷ NAFTA Article 1121(1)(b) states: “[a] disputing investor may submit a claim under Article 1116 to arbitration only if: [...] (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.”

²⁸ Second Article 1128 Submission of the U.S., ¶ 14.

²⁹ **RLA-157**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014 (“*DIBC – Mexico 1128 Submission*”), ¶¶ 11 and 14, citing **RLA-202**, *Waste Management, Inc. v. United Mexican States I* (ICSID Case No. ARB(AF)/98/2) Award, 2 June 2000, ¶ 27 and **RLA-067**, *Canfor Corp. and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶¶ 237 and 242.

³⁰ **CLA-136**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award, 26 January 2006, ¶ 118: “In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”

³¹ Second Article 1128 Submission of the U.S., ¶ 15.

³² NAFTA’s object and purpose includes creating effective procedures for the resolution of disputes. See NAFTA Article 102(e).

³³ Moreover, if a claimant could advance a claim under Article 1116(1) concerning an alleged breach that occurred before it became an investor of a Party, then the investor that held the enterprise at the time of the

16. Consequently, NAFTA tribunals have consistently held that if a claimant cannot establish it was a protected investor with a protected investment when the alleged breach occurred, a tribunal lacks jurisdiction.³⁴ This Tribunal should uphold this principle, and attach considerable weight to the NAFTA Parties' agreement that Article 1116(1) requires a claimant to establish it was an investor of a Party when the alleged breach occurred. The Claimant appears to accept this rule, as it has not challenged Canada's interpretation of Article 1116(1) concerning jurisdiction *ratione temporis* in its Counter-Memorial on Jurisdiction or Reply on Jurisdiction.

V. THE NAFTA PARTIES AGREE ON THE INTERPRETATION OF ARTICLE 1116(2)

17. All three NAFTA Parties agree on several relevant points related to the limitation period set out in NAFTA Article 1116(2). The NAFTA Parties' agreement on these issues is both consistent and longstanding.

18. First, the three NAFTA Parties agree that Article 1116(2) imposes a "clear and rigid" limitation period that is not subject to any suspension, prolongation, or other qualification.³⁵ Past NAFTA tribunals have followed this strict interpretation of the

alleged breach could simply transfer the enterprise to an impecunious affiliate prior to the submission of a claim in an attempt to bring a NAFTA claim while avoiding the possibility of a negative costs award.

³⁴ **RLA-001**, *Mesa – Award*, ¶¶ 325-327; **RLA-004**, *Gallo – Award*, ¶¶ 284-297; **CLA-135**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 93; and **RLA-121**, *B-Mex – Partial Award*, ¶ 145.

³⁵ Second Article 1128 Submission of the U.S., ¶ 4; Second Article 1128 Submission of Mexico, ¶ 9. See also **RLA-169**, *Resolute – U.S. 1128 Submission*, ¶ 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.'"; **RLA-203**, *Eli Lilly and Company v. Government 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.'"; **RLA-156**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 July 2008 ("*Merrill & Ring – U.S. Article 1128 Submission*"), ¶ 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.'"; **RLA-189**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the Government of Mexico, 2 April 2009 ("*Merrill & Ring – 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."; Canada's Counter-Memorial on Jurisdiction, ¶ 99; Canada's Rejoinder Memorial on Jurisdiction, ¶ 79; **RLA-197**, *Resolute – Canada's Memorial on Jurisdiction* ¶¶ 25-26; **RLA-204**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL), Rejoinder Memorial of Canada, 8 December 2015, ¶ 77.

limitation period in Article 1116(2).³⁶ There is no reason for this Tribunal to depart from this well-established rule. Moreover, all three NAFTA Parties agree that a strict interpretation of Article 1116(2) is consistent with very purpose of limitation period provisions, which is to provide legal predictability and certainty by ensuring that States are not forced to defend stale claims for which evidence may no longer be readily available or which require witnesses to recollect events long past.³⁷

19. Second, all three NAFTA Parties agree that the limitation period under Article 1116(2) begins to run on the date when an investor *first* acquires knowledge of the alleged breach and alleged loss.³⁸ As noted by the United States, “[s]uch knowledge cannot *first* be acquired at multiple points in time or on a recurring basis”.³⁹ The longstanding view of the NAFTA Parties is that once a claimant knows or should have known of the alleged breach and loss or damage, subsequent alleged transgressions by a Party arising from a continuing course of conduct do not renew the limitations period.⁴⁰ This is in line

³⁶ **RLA-070**, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006 (“*Grand River – Decision on Objections to Jurisdiction*”), ¶ 29; **RLA-081**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 63; **RLA-080**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 327; **RLA-131**, *Mobil Investments Canada Inc. v. Government of Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 146, stating the three NAFTA Party’s “submissions in several earlier NAFTA arbitrations make clear the importance which they attach to that guarantee while the awards themselves highlight that the limitation period is ‘clear and rigid’”.

³⁷ See Canada’s Counter-Memorial on Jurisdiction, ¶ 99; Second Article 1128 Submission of the U.S., ¶ 5; Second Article 1128 Submission of Mexico, ¶ 9.

³⁸ Second Article 1128 Submission of the U.S., ¶ 4; Second Article 1128 Submission of Mexico, ¶ 8; Canada’s Counter-Memorial on Jurisdiction, ¶¶ 102, 116, 155; Canada’s Rejoinder Memorial on Jurisdiction, ¶ 106.

³⁹ Second Article 1128 Submission of the U.S., ¶ 4.

⁴⁰ Second Article 1128 Submission of the U.S., ¶ 4; Second Article 1128 Submission of Mexico, ¶ 10; Canada’s Rejoinder Memorial on Jurisdiction, ¶ 81; **RLA-157**, *DIBC – Mexico 1128 Submission*, ¶¶ 21-22; **RLA-191**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), United States Article 1128 Submission, 14 February 2014, ¶ 3; **RLA-158**, *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, ¶¶ 27-28; **RLA-156**, *Merrill & Ring – U.S. Article 1128 Submission*, ¶ 2; **RLA-189**, *Merrill & Ring – Submission of Mexico*, (concurring with the entirety of the 1128 Submission of the United States, 14 July 2008); **RLA-190**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL), 1128 Submission of the United States of America, 19 April 2013, ¶ 12.

with Canada's position in its Rejoinder Memorial on Jurisdiction that "[o]nce a claimant has acquired actual or constructive knowledge of the alleged breach, subsequent disclosure of related factual details does not change the date when the claimant *first* acquired or should have *first* acquired such knowledge."⁴¹ In other words, an investor cannot evade the limitation period by pointing to "the most recent transgression" in a series of similar and related actions by a respondent state.⁴² Though Canada has demonstrated how this is not a case of continuing breach,⁴³ as Mexico recognizes, NAFTA tribunals have "consistently rejected" claimants' attempts to "circumvent the three-year statute of limitations on the grounds of continued violation".⁴⁴ Allowing such claims would render the limitation period ineffective and would run contrary to a NAFTA Party's consent to arbitration.⁴⁵

20. Third, all three NAFTA Parties agree that the knowledge component of Article 1116(2) may be satisfied either by actual ("first acquired") or constructive ("should have first acquired") knowledge of the alleged breach and alleged loss.⁴⁶ As Canada's submissions in this arbitration, and the Article 1128 submissions of the United States and Mexico, note the test for constructive knowledge is an objective one⁴⁷ – that of a "reasonably prudent investor".⁴⁸ Further, all three NAFTA Parties endorse the finding of

⁴¹ Canada's Rejoinder Memorial on Jurisdiction, ¶ 79.

⁴² See for e.g., Second Article 1128 Submission of the U.S., ¶ 5 citing to **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 81; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 79-80; **RLA-156**, *Merrill & Ring – U.S. Article 1128 Submission*, ¶¶ 5-7; **RLA-189**, *Merrill & Ring – Submission of Mexico* (concurring with the entirety of the 1128 Submission of the United States, 14 July 2008). See also **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 158: "[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant."

⁴³ Canada's Rejoinder Memorial on Jurisdiction, ¶ 81.

⁴⁴ Second Article 1128 Submission of Mexico, ¶ 10.

⁴⁵ Second Article 1128 Submission of the U.S., ¶ 5.

⁴⁶ Canada's Counter-Memorial on Jurisdiction, ¶¶ 108, 113; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 6, 63-64, 73; Second Article 1128 Submission of the U.S., ¶¶ 4, 6; Second Article 1128 Submission of Mexico, ¶¶ 8, 11.

⁴⁷ Canada's Counter-Memorial on Jurisdiction, ¶¶ 108-111; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 6, 74-75; Second Article 1128 Submission of the U.S., ¶ 7; Second Article 1128 Submission of Mexico, ¶¶ 11-12.

⁴⁸ Second Article 1128 Submission of the U.S., ¶ 7; Second Article 1128 Submission of Mexico, ¶ 11; Canada's Counter-Memorial on Jurisdiction, ¶¶ 110-111, **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 66.

the *Grand River* tribunal that: “[c]onstructive knowledge’ of a fact is imputed to person [sic] if by exercise of reasonable care or diligence, the person would have known of that fact.”⁴⁹

21. Finally, the NAFTA Parties agree that a claimant need not have full knowledge of the allegedly “incurred loss or damage” in order to start the limitation period under Article 1116(2).⁵⁰ All three NAFTA Parties agree with the finding of the *Mondev* tribunal: “[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”⁵¹ In addition, as the United States correctly notes, an investor may “incur” loss or damage “even if the financial impact [...] of that loss or damage is not immediate”.⁵²

VI. CONCLUSION

22. The NAFTA Parties’ concordant views of Articles 1116, 1116(1), and 1116(2) constitute subsequent agreement and practice under the VCLT. The Tribunal should give them considerable weight in its interpretation of these provisions. The agreed interpretation of the NAFTA Parties on these issues of treaty interpretation support Canada’s position that the Claimant’s claim is ripe for dismissal at this jurisdictional stage of the arbitration.

⁴⁹ Second Article 1128 Submission of the U.S., ¶ 7; Second Article 1128 Submission of Mexico, ¶ 11; Canada’s Counter-Memorial on Jurisdiction, ¶¶ 110-111, citing **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 59.

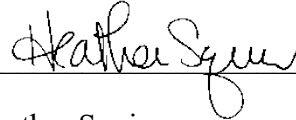
⁵⁰ Second Article 1128 Submission of the U.S., ¶ 6; Second Article 1128 Submission of Mexico, ¶ 12; and Canada’s Counter-Memorial on Jurisdiction, ¶¶ 112-113; Canada’s Rejoinder Memorial on Jurisdiction, ¶¶ 105-106.

⁵¹ Second Article 1128 Submission of the U.S., ¶ 6; Second Article 1128 Submission of Mexico, ¶ 12, and Canada’s Counter-Memorial on Jurisdiction, ¶ 113 all citing **RLA-083**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87. *See also* Canada’s Rejoinder Memorial on Jurisdiction, ¶ 106, fn. 262.

⁵² Second Article 1128 Submission of the U.S., ¶ 6. *See also* Canada’s Counter-Memorial on Jurisdiction, ¶¶ 112-114; Canada’s Rejoinder Memorial on Jurisdiction, ¶¶ 105-106.

July 26, 2021

Respectfully submitted on behalf of the
Government of Canada

A handwritten signature in cursive script, reading "Heather Squires", positioned above a horizontal line.

Heather Squires
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Mark Klaver
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