PUBLIC DOCUMENT

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

BETWEEN:

WESTMORELAND COAL COMPANY

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/23/2)

GOVERNMENT OF CANADA

MEMORIAL ON JURISDICTION AND RESPONSE TO NOTICE OF ARBITRATION

June 28, 2023

Trade Law Bureau
Government of Canada
Lester B. Pearson Building
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I. INTRODUCTION

1. The Tribunal does not have jurisdiction over the claim that Westmoreland Coal Company ("WCC" or the "Claimant") submitted to arbitration on October 14, 2022 ("2022 NOA"). The claim alleges that certain climate change measures taken by Alberta and Canada to reduce greenhouse gas emissions violate Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of the *North American Free Trade Agreement* ("NAFTA"). It echoes a separate claim that WCC, a Delaware corporation, previously submitted to arbitration in 2018 ("2018 NOA"), and freely withdrew in 2019. The Claimant's bid to pursue this new claim several years later suffers from serious flaws that mean that the Claimant cannot establish this Tribunal's jurisdiction under the *Canada–United States–Mexico Agreement* ("CUSMA") or NAFTA.

2. On July 1, 2020, CUSMA superseded NAFTA. As the only free trade agreement in place between the United States and Canada, CUSMA provides the exclusive, not the "alternative",[1] basis for Canada's consent to arbitrate investor-State claims with U.S. investors. However, that consent is limited to claims related to "legacy investments", as set out in CUSMA Annex 14-C. To hold a "legacy investment", a claimant must have owned or controlled the investment at issue when CUSMA entered into force on July 1, 2020. The Claimant fails to meet this requirement. On March 15, 2019, WCC sold all of its Canadian assets – including an enterprise named Prairie Mines & Royalty ULC ("Prairie") that owned and operated thermal coal mines in Alberta – in an arm's-length sale. WCC did not have any investments in Canada when CUSMA entered into force. Accordingly, the Claimant's entire claim fails for lack of jurisdiction, and the Tribunal need not proceed further.

3. However, even if the Tribunal determines that WCC held a "legacy investment" under CUSMA Annex 14-C, the Claimant must also establish that its claim meets each of the jurisdictional requirements of NAFTA Chapter Eleven. Once again, it has failed to do so.

4. First, the Claimant has failed to establish the Tribunal's jurisdiction *ratione temporis*. NAFTA Articles 1116(2) and 1117(2) set a strict three-year time limit on a claimant's ability to bring a claim. This time limitation cannot be tolled under NAFTA Chapter Eleven, and its requirements cannot be

[1] Claimant's Notice of Arbitration, 14 October 2022 ("Claimant's 2022 NOA"), ¶ 99.

met by any claim other than the one before the Tribunal. WCC brings a claim on its own behalf under Article 1116, and on behalf of Prairie under Article 1117. As the evidence demonstrates, both WCC and Prairie first acquired knowledge of the alleged breaches and loss more than three years prior to the date of the 2022 NOA. As a result, WCC's claim falls outside the three-year limitation period and must be dismissed.

5. Second, the Claimant has failed to establish the Tribunal's jurisdiction *ratione voluntatis*. NAFTA Article 1121 imposes formal waiver requirements on claimants and their local enterprises. Here, the Claimant relies on waivers for WCC and Prairie that are dated from 2018 and that accompanied the 2018 NOA, which was withdrawn by the Claimant in 2019. These waivers do not satisfy the formal requirements of Article 1121 for the purposes of this arbitration. WCC has also failed to confirm that the individuals who signed the 2018 waivers had the authority to waive the legal rights of WCC and Prairie at the time the 2022 NOA was filed. As a result, WCC has failed to file waivers that meet the formal requirements of Article 1121. Absent Canada's consent, which is not provided here, there is no legal basis on which these defective waivers can be cured following the constitution of the Tribunal. The claim must be dismissed.

6. Separately, the Claimant cannot assert the claim on behalf of Prairie because Prairie waived its right to bring claims related to the measures at issue here in a separate claim filed in 2019 ("WMH NOA") by its subsequent owner, Westmoreland Mining Holdings LLC ("WMH"). As the Claimant has conceded, the current claim before the Tribunal "relies on the same or related claims, facts, and harms" of which WMH complained.[2] The 2022 NOA thus falls within the scope of Prairie's waiver in the *Westmoreland Mining Holdings LLC v Canada* ("*WMH*") arbitration, and the Tribunal does not have jurisdiction to hear the NAFTA Article 1117 claim on behalf of Prairie.

7. Third, the Claimant has failed to establish the Tribunal's jurisdiction *ratione in personam* under both NAFTA Articles 1116(1) and 1117(1). Under Article 1116(1), an investor must submit a *prima facie* claim that the alleged breaches caused the investor to suffer loss. An investor is not entitled to reflective loss under the provision. The only damages WCC alleges are Prairie's alleged damages for which WCC is not entitled to submit a claim under Article 1116(1). As a result, WCC's

[2] Claimant's 2022 NOA, ¶ 13.

claim under NAFTA Article 1116(1) must be dismissed because it has failed to make a *prima facie* claim of damage.

8. Moreover, Article 1117(1) requires an investor to own or control the enterprise on whose behalf it brings a claim at the time the claim is submitted to arbitration. As noted above, WCC sold Prairie on March 15, 2019, long before it submitted this claim to arbitration on October 14, 2022. As a result, WCC's claim under NAFTA Article 1117(1) must be dismissed.

9. Finally, the Claimant has failed to establish the Tribunal's jurisdiction *ratione materiae* with respect to the impugned federal measure. NAFTA Article 1101, the gateway of NAFTA Chapter Eleven, establishes that only measures that "relate to" an investor of another Party or an investment of an investor of another Party fall within the scope of the chapter. The federal measure did not apply in Alberta until long after WCC sold Prairie. As a result, the federal measure does not "relate to" WCC or its investment, and any claim with respect to the federal measure must be dismissed.

10. The Claimant's attempts to sidestep these fundamental flaws in its claim cannot be sustained. For instance, it asks the Tribunal to find jurisdiction over this claim because WCC "already initiated this dispute" when it submitted its 2018 NOA, and that this claim can be "relate[d] back" to the 2018 NOA.[3] However, the Tribunal's jurisdiction under CUSMA Annex 14-C and NAFTA Chapter Eleven must be established with respect to the specific claim that the Tribunal has been constituted to adjudicate – here, in the 2022 NOA. But even if the Tribunal could entertain establishing its jurisdiction on the basis of a separate claim, WCC freely withdrew the 2018 NOA on July 23, 2019. There is thus no claim to which the 2022 NOA can "relate back".

11. The Claimant further muddies the waters by constructing what it calls the "First Arbitration" out of its withdrawn 2018 NOA and the claim brought in 2019 by WMH, the arm's-length purchaser of Prairie.[4] This "First Arbitration" does not exist. There has not been one single claim to arbitration that has been transferred back and forth between WCC and WMH. There have been three separate claims: (1) WCC filed one in 2018 and withdrew it in 2019; (2) WMH filed one in 2019 that was

[3] Claimant's 2022 NOA, ¶ 99.

[4] *See e.g.* Claimant's 2022 NOA, ¶¶ 63 and 115.

dismissed in 2022; and (3) WCC has now filed this claim in 2022. Each claim must independently meet the requirements of CUSMA and NAFTA, as applicable. WCC's 2018 NOA was withdrawn before a tribunal was constituted to determine whether it met the requirements of NAFTA Chapter Eleven. The *WMH* tribunal found that the WMH claim did not meet the requirements of NAFTA Chapter Eleven. This Tribunal must assess WCC's 2022 NOA and determine whether it meets the requirements of CUSMA Annex 14-C and, if so, whether it also meets the requirements of NAFTA Chapter Eleven. It does not.

12. The Claimant mischaracterizes the procedural history and minimizes the choices it has made. It asks this Tribunal to overlook the fact that those choices have consequences for its ability to meet the preconditions to Canada's consent to arbitrate investor-State claims. The Tribunal cannot do so. The terms of the treaties and the facts of this case lead to one conclusion: WCC's claim must be dismissed for lack of jurisdiction.

13. Canada's Memorial on Jurisdiction is organized in five sections. In **Section II**, Canada sets out the facts necessary for the Tribunal to determine whether it has jurisdiction over the 2022 NOA, including a high-level description of the challenged measures, the circumstances of WCC's purchase and sale of interests in Canada, and the procedural history leading to WCC's submission of this claim. It concludes with a table summarizing the key facts for the jurisdictional phase. In **Sections III** and **IV**, Canada sets out the reasons why the Tribunal does not have jurisdiction to hear this claim under CUSMA Annex 14-C and NAFTA Chapter Eleven, respectively. In **Section V**, Canada provides its brief response to the merits of the 2022 NOA, as the Tribunal directed in Procedural Order No. 1. In particular, Canada explains that there has been no violation of NAFTA Articles 1102, 1105, or 1110, and that the Claimant has failed to establish that it is entitled to any award of damages. **Section VI** contains Canada's request for relief.

II. FACTUAL BACKGROUND

A. The Global Context for the Challenged Measures and the Harms of Emissions from Coal-Fired Electricity Generation

14. Burning coal to generate electricity produces greenhouse gas ("GHG") emissions that contribute to climate change. Using coal to generate electricity releases more GHGs into the

atmosphere per unit of energy than the combustion of almost every other hydrocarbon fuel.[5] In fact, in 2010,[6] burning coal to generate electricity accounted for about 72 per cent of total GHG emissions from the energy sector worldwide, with the energy sector contributing approximately 40 per cent of overall GHG emissions.[7]

15. Coal-fired power plants also release air pollutants, such as nitrogen oxides, sulphur oxides, and particulate matter, as well as heavy metals such as cadmium, lead, and mercury.[8] The impacts of these emissions on air quality have been linked to a number of human health conditions, including chronic and acute respiratory diseases, heart disease, stroke, and diabetes.[9]

16. As a result of the negative environmental and human health impacts of coal combustion to produce electricity, governments around the world have increasingly committed to reducing emissions from coal-fired electricity generation.[10] Moreover, international institutions, such as the

[5] **R-001**, The World Bank, "Understanding CO_2 Emissions from the Global Energy Sector", 2014, p. 2.

[6] Unless otherwise specified, data referenced are from 2013, which is predominantly the year from which data would have been available to the Government of Alberta at the time that it announced its 2015 Climate Leadership Plan.

[7] **R-001**, The World Bank, "Understanding CO_2 Emissions from the Global Energy Sector", 2014, pp. 1-2.

[8] In Canada, coal-fired electricity generation is among the highest emitting sources of air pollutants. *See* **R-002**, Environment and Climate Change Canada, National Pollutant Release Inventory, "Sector Overview: Electricity" [Excerpt], p. 7.

[9] **R-003**, Juciano Gasparotto and Katia Da Boit Martinello, "Coal as an energy source and its impacts on human health", *Energy Geoscience 2 (2021) 113-120*, 16 July 2020, pp. 115-117.

[10] For example, over the last decade, governments have halted support for new coal plants, more tightly regulated pollution from existing plants, and shut down old plants. In 2015, the United Kingdom announced that it would be closing all of its coal-fired power stations by 2025. *See* **R-004**, The Guardian, "UK to close all power plants in switch to gas and nuclear", 18 November 2015. In addition, 48 national and 49 sub-national governments have joined the "Powering Past Coal Alliance", and have committed to phasing out coal-fired electricity generation by 2030 in OECD and EU member countries, and by 2040 globally. *See* **R-005**, Powering Past Coal Alliance, "Declaration", accessed on 7 June 2023. In 2023, the U.S. Environmental Protection Agency announced new GHG emissions limits on existing and future power plants. The proposed rules would require existing coal-fired power plants scheduled to run past 2040 to install carbon capture and storage technology starting in 2030, while those with earlier shutdown dates will be required to co-fire with 40 per cent natural gas by 2030. The new proposal is part of a suite of measures that the U.S. is adopting to achieve net zero emissions in the power sector by 2035. *See* **R-006**, United States Environmental Protection Agency, "Fact Sheet: Greenhouse Gas Standards and Guidelines for Fossil Fuel-Fired Power Plants Proposed Rule", 2023.

World Bank, European Investment Bank, and European Bank for Reconstruction and Development, have announced an end to the public financing of new coal plants.[11]

17. Canada is no exception. While the majority of the electricity in Canada is generated from non-GHG emitting sources, the supply mix varies considerably by province and territory depending on the availability of natural resources, transmission infrastructure, and market structure. What does not vary, however, is that coal-based electricity generation has been the largest contributor of GHG emissions in Canada's electricity sector. In 2013, for example, coal-based electricity, which represented 11 per cent of total electricity generation in Canada at the time, was responsible for 72 per cent of the electricity sector's total GHG emissions.[12]

18. The protection of the environment, including the regulation of GHG emissions and air pollutants, is regulated at both the federal and provincial levels in Canada.[13] Both levels of government have taken action in this area. For example, in 2012, the federal government adopted the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* (the "2012 Federal Emissions Regulations"). These regulations imposed a stringent performance standard on new coal-fired electricity generation units and on those that reach the end of their "useful life", generally defined as 50 years after the date of their commissioning.

19. In 2016, the federal government published a notice of intent to amend the 2012 Federal Emissions Regulations as part of a plan to accelerate the transition to cleaner electricity in Canada.[14]

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[11] **R-007**, The Washington Post, "The World Bank cuts off funding for coal. How big of an impact will it have?", 17 July 2013; **R-008**, BBC News, "European Investment Bank drops fossil fuel funding", 14 November 2019; **R-009**, Forbes, "Another Major Investor Joins World Bank in Dropping Support for Coal", 14 December 2018.

[12] **R-010**, Environment Canada, "National Inventory Report: 1990-2013 Greenhouse Gas Sources and Sinks in Canada", Part 3, Annex 11: "Electricity Generation in Canada: Summary and Intensity Tables" [Excerpt], p. 72.

[13] Federal environmental laws are based on federal legislative powers over matters that include trade and commerce, navigation and shipping, seacoasts and fisheries, criminal law, and matters of national concern. At the federal level, many climate change regulations are developed under the authorities of the *Canadian Environmental Protection Act, 1999,* S.C. 1999, c. 33. Provincial environmental laws are based on provincial legislative powers over matters that include municipalities, local works and undertakings, property and civil rights, provincially owned (public) lands, and natural resources. Territorial governments exercise delegated powers under the authority of the Parliament of Canada.

[14] **R-011**, Canada Gazette, Part I, Vol. 150, No. 51, *Canadian Environmental Protection Act, 1999, Notice of Intent to develop greenhouse gas regulations for electricity generation in Canada*, 17 December 2016 [Excerpt]. The proposed amendment related to Canada's commitments under the Paris Agreement. In December 2015, the State Parties to the United Nations Framework Convention on Climate Change recognized that climate change represents an urgent and potentially irreversible threat to human societies and the planet. They adopted the Paris Agreement, which committed to

The proposed amendment changed the definition of "useful life", ensuring that all existing coal-fired generating units reach the end of their useful life by December 31, 2029 at the latest. The change accelerated the time at which the regulations' stringent performance standard for GHG emissions must be met by all coal-fired generating units. The amended regulations came into force on November 30, 2018, and are expected to result in significant reductions in GHG emissions across Canada (the "2018 Federal Emissions Regulations").

20. Provincial governments have also taken measures to address GHG emissions caused by coal-fired electricity generation. For example, in 2008, British Columbia banned conventional coal-fired power and required all electricity generation to have net zero emissions starting in 2016.[15] In 2014, Ontario fully eliminated coal as a source of electricity generation, following a decision to this effect in 2003. At the time, this action was the single largest GHG-reduction initiative in North America, eliminating approximately 28 megatonnes of annual GHG emissions – equivalent to 14 per cent of Ontario's total 2005 GHG emissions, or over half of all vehicle emissions in the province.[16] In 2014, Saskatchewan introduced the world's first commercial-scale carbon capture and storage ("CCS") electricity project, which is able to capture 90 per cent of the GHG emissions from the host coal-fired electricity generation facility.[17]

holding global warming to "well below" 2 degrees Celsius above pre-industrial levels, and to make efforts to limit it to 1.5 degrees above pre-industrial levels. *See* **R-012**, United Nations Framework Convention on Climate Change, Paris Agreement, 12 December 2015. Canada joined the Paris Agreement in 2015 and committed to reduce Canada's GHG emissions to 30 per cent below 2005 levels by 2030.

[15] *See* **R-013**, *Greenhouse Gas Reduction (Emissions Standards) Statutes Amendment*, S.B.C. 2008, c. 20, 29 May 2008 [Excerpt].

[16] **R-014**, Government of Ontario, "The End of Coal", 15 December 2017; **R-015**, Government of Canada, "Pan-Canadian Framework on Clean Growth and Climate Change, Annex II: Provincial and territorial key actions and collaboration opportunities with the Government of Canada", 24 February 2018 [Excerpt], Ontario Key Actions, p. 18.

[17] **R-016**, SaskPower, "Boundary Dam Carbon Capture Project", accessed on 21 June 2023. Other examples include Québec, which announced a new Energy Policy in 2016 that included the elimination of burning coal to generate electricity. Similarly, in 2016, New Brunswick released a Climate Change Strategy, which included a decision to phase out coal-fired electricity.

B. Alberta Takes Action to Reduce Emissions from Coal-Fired Electricity Generation

1. Alberta's 2007 Emissions Reduction and Carbon Pricing Regulations

21. Alberta was one of the first jurisdictions in North America to impose GHG emissions performance standards and a carbon pricing system on large industrial facilities. Starting in 2007, GHG emissions from industrial activities were regulated and priced under Alberta's *Specified Gas Emitters Regulation* ("SGER"),[18] made under the *Climate Change and Emissions Management Act*.[19]

22. The SGER applied to large industrial facilities that emitted 100,000 tonnes or more of GHGs per year, including coal-fired electricity generating units.[20] The SGER required facilities to reduce their GHG emissions intensity by 12 per cent relative to that specific facility's historical emissions intensity performance. The price for excess GHG emissions was set at $15 per tonne for 2007-2015, $20 per tonne for 2016, and $30 per tonne for 2017.[21]

2. Alberta's 2015 Climate Leadership Plan

23. On November 22, 2015, the Government of Alberta announced the 2015 Climate Leadership Plan,[22] which was largely based on recommendations made by a Climate Change Advisory Panel (the "Advisory Panel").[23] The 2015 Climate Leadership Plan included actions with respect to carbon pricing, electricity and renewables, methane emissions, and emissions from oil and gas production.[24] The sub-sections that follow highlight relevant parts of the 2015 Climate Leadership Plan.

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[18] **R-017**, *Specified Gas Emitters Regulation*, Alberta Regulation 139/2007, 17 July 2007 ("*SGER*").

[19] **R-018**, *Climate Change and Emissions Management Act*, SA 2003, c. C-16.7 (version in force between 24 May 2006 and 19 April 2007), now known as the *Emissions Management and Climate Resilience Act* (**R-019**, *Emissions Management and Climate Resilience Act*, SA 2003, c. E-7.8).

[20] **R-017**, *SGER*, s. 3(1).

[21] **R-017**, *SGER*, s. 8(2); **R-020**, Alberta Minister of Environment, Ministerial Order 26/2011, 24 June 2011, Appendix; **R-021**, Alberta Minister of Environment and Parks, Ministerial Order 13/2015, 30 June 2015, Appendix.

[22] **R-022**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015.

[23] **R-023**, Climate Change Advisory Panel, Climate Leadership Report to Minister, 20 November 2015; **R-024**, Government of Alberta, Press Release, "Province takes meaningful steps toward climate change strategy", 25 June 2015.

[24] **R-022**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015.

(a) Updates to Existing Emissions Reduction and Carbon Pricing Regulations for Industrial Emitters

24. The 2015 Climate Leadership Plan envisaged new regulations to replace the SGER, focusing on an increase in the stringency of emissions standards for large industrial emitters. The new *Carbon Competitiveness Incentive Regulation* ("CCIR"), which came into force on January 1, 2018, increased the stringency of the GHG emissions performance standard applicable to all electricity generating units.[25] Coal-fired generating units would need to match the emissions performance recommended by the Advisory Panel: "good-as-best gas".[26] The price of excess emissions under the CCIR was set at $30 per tonne for 2018 and subsequent years.[27]

(b) New Carbon Levy on Consumer Fuels

25. Pursuant to the 2015 Climate Leadership Plan, Alberta also introduced a new carbon levy on transportation and heating fuels in order to price end-use emissions at the consumer level.[28] The levy, which was imposed under the *Climate Leadership Act* as of January 1, 2017, applied to purchases of fuels that produce GHG emissions when combusted, such as gasoline, diesel, natural gas, and propane. The carbon levy did not apply to electricity[29] or to fuels used in the operation of facilities that were regulated under the SGER or its replacement, the CCIR.[30]

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[25] **R-025**, *Carbon Competitiveness Incentive Regulation*, Alberta Regulation 255/2017, 1 January 2018. *See also* **R-023**, Climate Change Advisory Panel, Climate Leadership Report to Minister, 20 November 2015, p. 31. Facilities with less than 100,000 tonnes of annual GHG emissions, such as coal mines, could opt in to the regulation in certain circumstances.

[26] **R-026**, Alberta, *Carbon Competitiveness Incentive Regulation Fact Sheet,* April 2018, p. 1 ("Product-based benchmarks reflect the recommendations of the Climate Change Advisory Panel where possible. For example, the panel recommended stringency based on 'good-as-best gas' for electricity, and 'top-quartile performance or better' for oil sands in-situ and mining. In all other cases, benchmarks are set at 80 per cent of production-weighted average emissions intensity.") The "good-as-best gas" standard meant that under the CCIR, coal-fired generating units would need to match the emissions performance of the much lower emitting best-in-class natural gas combined cycle facility.

[27] **R-027**, Alberta Minister of Environment and Parks, Ministerial Order 58/2017, 21 December 2017.

[28] **R-028**, *Climate Leadership Act*, SA 2016, c. C-16.9 ("*Climate Leadership Act*"), s. 3(1) ("The purpose of this Act is to provide for a carbon levy on consumers of fuel to be effected through a series of payment and remittance obligations that apply to persons throughout the fuel supply chains.")

[29] *See* **R-028**, *Climate Leadership Act*, s. 1(1)(k) ("'fuel' means a substance set out in the Table in the Schedule") and Schedule (electricity not listed in the Table).

[30] For example, when an electricity generator purchased coal or natural gas for combustion to create electricity at a regulated facility, no levy was payable on the fuel purchase. Instead, the carbon pricing system applicable to large industrial facilities (*i.e.* the SGER/CCIR) regulated and priced the emissions resulting from the combustion of that fuel. *See* **R-028**, *Climate Leadership Act*, s. 15(1)(b) ("a consumer is exempt from paying a carbon levy on fuel if the fuel is

(c) Phase-Out of All Emissions from Coal-Fired Electricity Generation

26. The 2015 Climate Leadership Plan adopted the Advisory Panel's recommended suite of complementary policies with respect to the electricity sector.[31] These included a phase-out of all emissions – both GHGs and those affecting air quality – from coal-fired electricity generation, and a corollary transition to lower-emitting forms of electricity generation by 2030.[32]

27. Three interrelated principles would guide this transition: maintaining a reliable electricity system; ensuring reasonable electricity price stability for consumers; and not unnecessarily stranding capital in Alberta's competitive electricity market.[33]

28. The reduction of GHG emissions from coal mining in Alberta was not a focal point of the 2015 Climate Leadership Plan. As shown in Figure 1 below, Alberta's coal mines do not have a significant emissions profile, especially when compared to power plants that burn coal to generate electricity:

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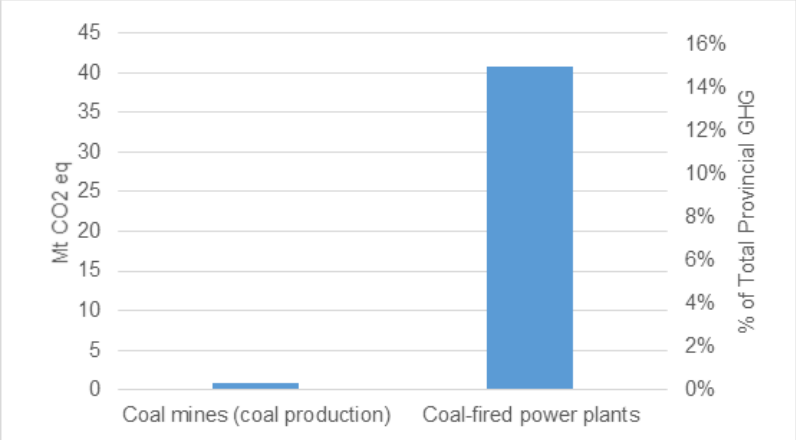
used by the consumer in the operation of a specified gas emitter as set out in the regulations."); **R-029**, *Climate Leadership Regulation*, Alberta Regulation 175/2016 (version in force between 15 November 2016 and 4 April 2017), s. 1(1)(gg) (defining "specified gas emitter" as a facility to which the SGER applies); **R-030**, *Climate Leadership Regulation*, Alberta Regulation 175/2016 (version in force between 9 January 2018 and 21 November 2018), s. 1(1)(gg) (defining "specified gas emitter" as a facility to which the CCIR applies). All of the generating units relevant to this arbitration were "specified gas emitters" to which the SGER/CCIR applied.

[31] The Advisory Panel recommended an "integrated electricity policy package" to address the sector as a whole. *See* **R-023**, Climate Change Advisory Panel, Climate Leadership Report to Minister, 20 November 2015, pp. 6 and 30.

[32] **R-022**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015.

[33] **R-022**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015. The structure of Alberta's electricity market is unique in Canada. While the transmission and distribution components of the system are fully regulated, the wholesale power supply (generation) component of Alberta's electricity system has been an openly competitive market between predominantly private companies since 1996. Market forces, rather than a centralized plan, dictate the timing of, and need for, new generation in Alberta. *See* **R-031**, *Westmoreland Mining Holdings, LLC v. Canada* (ICSID Case No. UNCT/20/3) Canada's Statement of Defence, 26 June 2020 ("*WMH – Statement of Defence*"), ¶¶ 26-27.

Figure 1: GHG Emissions from Coal Mines and Coal-Fired Power Plants (2013)[34]



29. As a result, the 2015 Climate Leadership Plan took no policy stance on the continued mining of coal – it did not address any mineral rights, leases, land tenures, permits, ownership, royalty interests, or coal supply agreements.

3. Alberta's 2016 Off-Coal Agreements with Power Companies

30. In 2015, there were 18 coal-fired electricity generating units in Alberta, operating at six power plants.[35] The 18 generating units were owned by four companies that supplied the Alberta market with coal-fired electricity: ATCO, Capital Power, Maxim, and TransAlta. Alberta was anticipating the retirement of at least 12 of the 18 generating units by 2030, representing approximately 25 per cent of the generating capacity in the province.[36]

[34] Data sourced from **R-032**, Environment and Climate Change Canada, "National Inventory Report: 1990-2018 Greenhouse Gas Sources and Sinks in Canada", Part 3, Annex 12: "Provincial/Territorial Greenhouse Gas Emission Tables by Canadian Economic Sector, 1990-2018", Annex 13: "Electricity in Canada: Summary and Intensity Tables" [Excerpts], pp. 52 and 69.

[35] Near the capital city, Edmonton: the Genesee power plant (three units); the Keephills power plant (three units); and the Sundance power plant (six units). Farther south, between Edmonton and Calgary: the Battle River power plant (three units) and the Sheerness power plant (two units). To the west, near the Rocky Mountains: the H.R. Milner power plant (one unit).

[36] **R-033**, Market Surveillance Administrator, "Market Share Offer Control 2015", 30 June 2015, pp. 11-16.

31. In light of these pending retirements, the coal-fired emissions aspect of the 2015 Climate Leadership Plan focused on the six coal-fired generating units that were expected to operate beyond 2030, which accounted for an additional 16 per cent of generation capacity in the province:[37]

Table 1: Coal-Fired Generating Units in Alberta Expected to Operate Beyond 2030

Generating Unit	Year Commissioned	Federal End of Useful Life (2015)[38]	Generating Unit Owner (2015)
Sheerness 1	1986	2036	ATCO (50%); TransAlta (50%)
Genesee 2	1989	2039	Capital Power
Sheerness 2	1990	2040	ATCO (50%); TransAlta (50%)
Genesee 1	1994	2044	Capital Power
Genesee 3	2005	2055	Capital Power (50%); TransAlta (50%)
Keephills 3	2011	2061	Capital Power (50%); TransAlta (50%)

32. Phasing out emissions from these generating units by 2030 would require transitioning the units to other fuel sources or technologies – such as renewable sources, natural gas, or carbon capture and storage technology – or replacing them altogether. It thus presented a complex policy challenge in the context of Alberta's unique electricity market, which relies on private capital to undertake the significant investment risk of building new generating assets.[39]

33. To help navigate this complexity in a transparent and objective manner, the Government of Alberta retained Mr. Terry Boston, an independent expert in electricity markets and systems, to advise it on the best options to achieve its policy goal of zero emissions from coal-fired generating units.[40] Consistent with the 2015 Climate Leadership Plan, the guiding principles for Mr. Boston's development and consideration of approaches to phasing out emissions from coal-fired generating

[37] **R-033**, Market Surveillance Administrator, "Market Share Offer Control 2015", 30 June 2015, pp. 11-16.

[38] As noted in Section II.A above, the 2012 Federal Emissions Regulations were later amended such that all existing coal-fired generating units would reach the end of their useful life by December 31, 2029 at the latest. *See* **C-003**, *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167, as amended 30 November 2018.

[39] *See* **R-031**, *WMH – Statement of Defence*, ¶¶ 26-27.

[40] **R-034**, Government of Alberta, Press Release, "Alberta takes next steps to phase-out coal pollution under Climate Leadership Plan", 16 March 2016.

units were to maintain: electric system reliability, reasonable stability and electricity prices for consumers and businesses, and investors' confidence in Alberta by not unnecessarily stranding capital. The guiding principles also included ensuring that workers, communities, and affected companies were treated fairly throughout the process. Maintaining electricity system reliability was the "paramount" consideration.[41]

34. On September 30, 2016, having concluded his consultations and review, Mr. Boston set out his recommendations to the Government of Alberta in an open letter to the Premier. Mr. Boston recommended that, in order to create a positive investor outlook for market-based generation and renewables, Alberta provide voluntary payments to the owners of the six coal-fired generating units that were otherwise expected to operate beyond 2030 ("Transition Payments").[42]

35. On November 24, 2016, Alberta announced that it had concluded agreements with ATCO, Capital Power, and TransAlta to this effect.[43] The agreements, named "Off-Coal Agreements", provided for Transition Payments in annual installments to each company between 2017 and 2030 in exchange for each company's commitment to cease coal-fired emissions at the relevant generating units on or before December 31, 2030.[44] The Transition Payments were based on the fully reviewable net book value of each generating unit.[45]

36. Consistent with the policy goals that Alberta sought to achieve with the Transition Payments, the Off-Coal Agreements also impose eligibility conditions that must be met before the annual

[41] **R-035**, Letter from Terry Boston to Premier Rachel Notley, 30 September 2016, p. 1.

[42] **R-035**, Letter from Terry Boston to Premier Rachel Notley, 30 September 2016, p. 2.

[43] **R-036**, Government of Alberta, Press Release, "Revised: Alberta announces coal transition action", 24 November 2016.

[44] *See e.g.* **R-037**, Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen in Right of Alberta (represented by Ministry of Energy), 24 November 2016. The Transition Payments are made pursuant to Alberta's *Energy Grants Regulation*, which gives Alberta's Minister of Energy the authority to "make grants to any person or organization in respect of any matter that is under the Minister's administration." **R-038**, *Energy Grants Regulation*, Alberta Regulation 103/2003, s. 2; **R-039**, Government of Alberta, Grant payments disclosure table, "CLP Coal Generation Transition", "Energy General Armed" [Excerpts], available at: https://www.alberta.ca/grant-payments-disclosure-table.aspx.

[45] *See* **R-031**, *WMH – Statement of Defence*, ¶ 47.

installments of the Transition Payments will be made.[46] In particular, the conditions for receipt of the Transition Payments include minimum annual investment spending requirements with respect to the company's electricity business, and a commitment to continue generating electricity or to otherwise participate in the electricity market in Alberta.[47] Companies have demonstrated their continued participation in the Alberta electricity market by, for example, investing in new renewable energy projects.[48]

37. No interest in coal mines, coal mining equipment, coal mineral rights, or coal supply contracts was included in the calculation of the Transition Payments, even though two of the power companies (Capital Power and TransAlta) also owned coal-related interests.[49] Capital Power and TransAlta received larger Transition Payments not because they owned coal mine interests, but rather because of their ownership interests in newer and larger generation facilities.[50] As Alberta's Minister of Economic Development and Trade explained in 2017, capital in associated coal mines, coal mining equipment, and coal mineral rights was not relevant to the objective of the Transition Payments, and was not included in any payment made by the Government of Alberta.[51]

[46] To recall, these policy objectives were maintaining system reliability, price stability, and investor confidence in Alberta. *See* **R-035**, Letter from Terry Boston to Premier Rachel Notley, 30 September 2016, p. 1; **R-036**, Government of Alberta, Press Release, "Revised: Alberta announces coal transition action", 24 November 2016, p. 2.

[47] *See* **R-037**, Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen In Right Of Alberta (represented by Ministry of Energy), 24 November 2016, s. 5; **R-040**, Appendix 1, Off-Coal Agreement between Canadian Utilities Ltd. et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy), 24 November 2016, s. 5; **R-041**, Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy), 24 November 2016, s. 5.

[48] **R-042**, Government of Alberta, "Renewable Electricity Program", pp. 2 and 3.

[49] TransAlta's coal mining interests were held by its subsidiary, Sunhills Mining LP. Capital Power held interests in the Genesee mine through a joint venture with Prairie.

[50] *See* Table 1 above.

[51] **R-043**, Letter from The Hon. Deron Bilous, Ministry of Economic Development and Trade, Government of Alberta to John A. Schadan, Westmoreland Coal Company, 6 June 2017, p. 1 ("[T]he payments under the Off-Coal Agreements were calculated based on the approximate capital invested in the coal-fired generation units that would not be recovered by the end of 2030, or recovered through repurposing equipment for another type of generation. It is important to note the calculations in the Off-Coal Agreements excluded capital in associated coal mines, coal mining equipment, and coal mineral rights. As you are aware, Alberta's Climate Leadership Plan only addresses emissions from coal-fired power generation, and does not contain any policy stance on coal mining within the province.")

4. Alberta's 2019 and 2020 Updates to its Emissions Reduction and Carbon Pricing Regulations

38. In 2019, Alberta replaced the emissions reduction and carbon pricing mechanism for large industrial emitters (the CCIR) with the *Technology Innovation and Emissions Reduction Regulation* ("TIER").[52] Under the TIER, facilities that emit in excess of their allowable emissions pay a set price for those emissions: $30 per tonne of carbon dioxide equivalent in 2020, $40 per tonne in 2021, and $50 per tonne in 2022, with $15 increases each year from 2023-2030.[53]

39. Alberta also repealed the *Climate Leadership Act* as of May 30, 2019, removing the carbon levy on consumer fuels.[54] As discussed in the following section, this resulted in Part I of the federal *Greenhouse Gas Pollution Pricing Act* applying in Alberta as of January 1, 2020.

C. Canada Takes Action to Reduce Greenhouse Gas Emissions

40. On June 21, 2018, the federal *Greenhouse Gas Pollution Pricing Act* ("GGPPA") entered into force.[55] The legislation was enacted as part of a broader strategy to meet the GHG emissions reductions that Canada committed to under the Paris Agreement in 2015. Its pricing components are contained in two parts. Part I of the GGPPA established a regulatory charge that applies to the producers, distributors, and importers of various types of carbon-based fuel ("Federal Fuel Charge"). Part II provides the legal framework to establish a regulatory trading system for large industrial emitters, known as the Output-Based Pricing System ("OBPS").[56]

41. The GGPPA operates as a "backstop" to provincial and territorial carbon pricing mechanisms, meaning that, in practice, a province or territory will only be subject to Part I and/or Part II of

[52] **R-044**, *Technology Innovation and Emissions Reduction Regulation*, Alberta Regulation 133/2019 (version in force between 5 November 2019 and 18 August 2020). The TIER applied starting January 1, 2020.

[53] **R-045**, Alberta Minister of Environment and Parks, Ministerial Order 36/2020, 3 November 2020, Appendix; **R-046**, Alberta Minister of Environment and Parks, Ministerial Order 87/2021, 1 December 2021, Appendix; **R-047**, Alberta Minister of Environment and Protected Areas, Ministerial Order 62/2022, 21 December 2022, Appendix.

[54] **R-048**, *An Act to Repeal the Carbon Tax*, SA 2019, c. 1, s. 1.

[55] **R-049**, *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.

[56] Details regarding the OBPS were further specified through the *Output-Based Pricing System Regulations*, adopted in 2019.

the GGPPA if it has an insufficiently stringent GHG pricing mechanism,[57] or if the province or territory voluntarily accepts the federal backstop. A key element in the design of the federal backstop is the integration between the fuel charge and either the federal OBPS or the equivalent provincial system for large industrial emitters meeting the benchmark requirements, such that the same source of GHG emissions are not priced twice. Given this integration, large industrial emitters like electricity generating facilities that are already covered by a carbon pricing mechanism (either under provincial regulations or the federal OBPS) can take steps to acquire relief from the Federal Fuel Charge.[58] This is because the GHG emissions associated with that fuel are already being priced when the fuel is burned in the facility covered by that other carbon pricing mechanism.

42. When the GGPPA entered into force in 2018, Alberta had a complete carbon pricing system that met the federal benchmark criteria. As a result, the federal system was not applied in the province, in whole or in part.[59] At the time, Alberta's system was comprised of the consumer carbon levy set out in the *Climate Leadership Act* (analogous to Part I of the GGPPA) and the CCIR, which applied to industrial emitters (analogous to the OBPS under Part II of the GGPPA).

43. The repeal of Alberta's consumer carbon levy on May 30, 2019 meant that Alberta then only partially met the federal benchmark criteria. Consequently, on June 13, 2019, Canada announced its intention to apply the Federal Fuel Charge under Part I of the GGPPA in Alberta.[60] On August 7, 2019, Canada enacted the necessary regulation, and the Federal Fuel Charge began applying in

[57] This is determined by comparing the provincial and territorial carbon pricing systems against minimum federal stringency criteria, known as the federal benchmark.

[58] **R-050**, *Fuel Charge Regulations*, 2018, c. 12, s. 187, Part 9 (made under Part I of the GGPPA). To effectuate the relief, an owner or operator of an industrial facility can apply to the federal Minister of the Environment for a statement that confirms that the facility is subject to a provincial output-based performance standard relating to a provincial carbon pricing mechanism for GHG emissions. This statement satisfies one of the conditions that is required for the owner or operator to apply to register with the Canada Revenue Agency as a "registered emitter". Registered emitters may complete and sign an "exemption certificate", and provide it to their fuel supplier. This allows the supplier to deliver fuel for use at the covered facility without the Federal Fuel Charge applying. See an example of an exemption certificate at **R-051**, Canada Revenue Agency form, Fuel Charge Exemption Certificate for Registered Emitters or Users of Fuel.

[59] *See* **R-052**, Canada Gazette, Part II, Vol. 152, No. 22, *Order Amending Part 2 of Schedule 1 to the Greenhouse Gas Pollution Pricing Act*, SOR/2018-212, 19 October 2018, Annex 2, Table 1 (setting out the Governor-in-Council's formal determination that Alberta had a carbon price or emissions cap that met the minimum benchmark stringency.)

[60] **R-053**, Government of Canada News Release, "Government of Canada Announces Intent to Apply Pollution Pricing in Alberta", 13 June 2019. *See also* **R-054**, Government of Canada, "Backgrounder: Proposed Application of the Federal Carbon Pollution Pricing System in Alberta", 13 June 2019.

Alberta as of January 1, 2020.[61] Part II of the GGPPA does not, and has never, applied in Alberta because the CCIR and its replacement, the TIER, have consistently met the federal benchmark criteria for industrial emitters. As set out above, the integration between the Federal Fuel Charge and Alberta's system for large industrial emitters meant that the owners and operators of the generating facilities at issue in this case were eligible to take steps to obtain relief from payment of the Federal Fuel Charge.

D. The Claimant and Its Purchase and Sale of Interests in Coal Mines in Canada

44. Understanding the measures of which WCC complains, Canada sets out in this section the facts related to WCC's 2014 acquisition and 2019 sale of interests in Canada.

1. WCC Purchases Canadian Enterprises with Interests in Coal Mining Operations in Alberta in 2014

45. WCC was incorporated under the laws of the State of Delaware on May 4, 1910.[62] It began mining coal in Westmoreland County, Pennsylvania, and then expanded its operations throughout the United States through the years.[63] On April 28, 2014, WCC purchased interests in certain Canadian enterprises with coal mining operations in Canada from Sherritt International ("Sherritt").[64] As part of this purchase, WCC acquired Prairie, an Alberta corporation.[65] Prairie owned and operated

[61] **R-055**, Canada Gazette, Part II, Vol. 153, No. 17, *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)*, SOR/2019-294, 8 August 2019, s. 8. The statutory instrument was enacted on August 7, 2019, and published on August 8, 2019.

[62] **R-056**, Westmoreland Coal Company, Quarterly Report for the Quarterly Period ended June 30, 2015 (Form 10-Q) [Excerpt], Exhibit 3.1.

[63] **R-057**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings (Court Docket, Doc. 54), 9 October 2018 [Excerpt] ("Stein First Day Declaration"), ¶ 8.

[64] The purchase consideration included a US$282.8 million initial cash payment made on April 28, 2014, a cash payment for a working capital adjustment of US$39.8 million made on June 25, 2014, and assumed liabilities of US$421.3 million. **R-058**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 7; **C-005**, Westmoreland Coal Company Presentation, "Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations", 24 December 2013, p. 3. The Claimant also refers to undertakings it made to acquire Sherritt's assets in 2014 during a review of the proposed investment by Canada under the *Investment Canada Act* and *Competition Act*. *See* Claimant's 2022 NOA, ¶¶ 31-33. These were voluntary undertakings the Claimant offered that Canada's Minister of Industry could take into account, among other factors, when deciding whether to approve the Claimant's investment as potentially being a "net benefit" to Canada.

[65] *See* **R-058**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], pp. 7, 15, 17-18. In total, the 2014 Canadian acquisition included six thermal coal mines (four in Alberta and two in Saskatchewan), a char production

three thermal coal mines in Alberta: the Genesee mine, the Sheerness mine, and the Paintearth mine.[66] All three mines were surface mines that supplied sub-bituminous coal to adjacent electricity generating units.[67] WCC's 2022 NOA focuses on these three mines.

46. WCC owned Prairie through a series of holding companies, including through Westmoreland Canada Holdings Inc. ("WCHI"), an Alberta entity,[68] as illustrated in Figure 2 below. Canada refers to Prairie and WCHI together as the "Canadian Enterprises".

Figure 2: WCC's Ownership of the Canadian Enterprises (2018)[69]

facility (which produced char using coal from the Estevan Mine in Saskatchewan), and a 50 per cent interest in an activated carbon plant (located at the Estevan Mine in Saskatchewan).

[66] **R-058**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], pp. 15 and 17. *See also* Claimant's 2022 NOA, ¶ 23.

[67] **R-058**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 17. See ¶ 31, Table 1 above that sets out the ownership of the generating units at the relevant mines at the time.

[68] **R-059**, Westmoreland Coal Company, Current Report (Form 8-K), 21 May 2018, Ex. 99.2.

[69] The information in this figure was drawn from **R-059**, Westmoreland Coal Company, Current Report (Form 8-K), 21 May 2018, Ex. 99.2. WCC directly owned Westmoreland Canada, LLC (Delaware). "LP" and "GP" refer to "limited partner" and "general partner", respectively. *See* **R-060**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3) Expert Report of Kathryn A. Coleman, 16 December 2020 ("*WMH – Coleman Report*"), fn. 119 for a description of the roles of limited and general partners.

47. WCC did not acquire the royalty assets – privately held mineral rights where the owner sets the royalty to be paid – associated with the Genesee, Sheerness, or Paintearth mines. These were sold to two Canadian companies.[70]

2. WCC Sells the Canadian Enterprises in an Arm's-Length Transaction in March 2019

48. WCC subsequently faced financial difficulties, with a series of additional acquisitions "nearly tripl[ing its] debt obligations".[71] In 2016, according to Mr. Jeffrey Stein, an officer and member of WCC's Board of Directors at the time, WCC began to evaluate options to reduce the debt in its capital structure.[72] These issues took on "heightened significance" in early 2018 as it appeared WCC would "exhaust all of its remaining liquidity".[73] This led WCC to consider several financing alternatives to "address its liquidity challenges" and, eventually, to file a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court") on October 9, 2018.[74]

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[70] Those companies were Altius Minerals Corporation and its subsidiary, Altius Prairie Royalties Corp. *See* **R-061**, Arrangement Agreement between Westmoreland Coal Company, Altius Minerals Corporation, Sherritt International Corporation, Prairie Mines & Royalty Ltd, Coal Valley Resources Inc., et al., 24 December 2013, p. 1; **R-062**, Altius, Annual Information Form, 2021, 24 March 2022, p. 3; **R-063**, Altius Minerals Corporation, Amended and Restated Preliminary Short Form Prospectus, 1 May 2014, pp. 16-17, 54. The royalty assets included the right to receive payments in a certain percentage interest in each tonne of coal mined.

[71] **R-057**, Stein First Day Declaration, ¶ 59-60.

[72] **R-057**, Stein First Day Declaration, ¶ 64.

[73] **R-057**, Stein First Day Declaration, ¶ 66. "Liquidity", in this context, appears to mean available cash. In its NOA, the Claimant states that "Canada's measures pushed Westmoreland to the brink of insolvency, forcing Westmoreland and some of its affiliates to file for bankruptcy in U.S. bankruptcy court…." Claimant's 2022 NOA, ¶ 64. As is evident from Mr. Stein's Declaration, however, a host of factors contributed to WCC's financial decline and eventual commencement of chapter 11 bankruptcy proceedings. *See also* **R-064**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3) Claimant's Counter-Memorial on Jurisdiction, 26 February 2021, ¶ 62 ("WCC's bankruptcy was not undertaken to obtain any legal advantage under the treaty. WCC had taken on too much debt and began negotiating with its Secured Creditors in 2018 to see whether it could restructure its debt to preserve liquidity…. The restructuring was undertaken for ordinary business purposes.")

[74] **R-057**, Stein First Day Declaration, ¶ 66. *See also* **R-065**, Westmoreland Coal Company, Voluntary Petition For Non-Individuals Filing For Bankruptcy (Court Docket, Doc. 1), 9 October 2018; **R-060**, *WMH – Coleman Report*, ¶¶ 15-48 (explaining the general features of a bankruptcy process under chapter 11 of the U.S. Bankruptcy Code); **R-060**, *WMH – Coleman Report*, fns. 53 and 67. Westmoreland Coal Company is sometimes referred to in the bankruptcy court filings as "WCC", and sometimes as "WLB". WCC and its relevant debtor affiliates are collectively referred to as the "WLB Debtors". WCC's bankruptcy case was jointly administered with its affiliated debtor companies.

49. That same day, WCC announced that following "months of good-faith, arm's-length discussions with [its] secured creditors",[75] it had entered into a Restructuring Support Agreement ("RSA") with the majority of its secured creditors, including with certain financial institutions that had provided debt financing to WCC (the "First Lien Lenders").[76] A debtor contemplating bankruptcy will often enter into an RSA with its creditors and other stakeholders to obtain the creditors' support for the debtor's bankruptcy "plan", which must be approved by a bankruptcy court.[77] WCC's RSA, and subsequently its Plan, contemplated the sale of WCC's assets, including the Canadian Enterprises, by public auction in order to secure the highest bid for the assets.[78]

50. On November 15, 2018, the Bankruptcy Court authorized (a) the First Lien Lenders to serve as the "stalking horse" bidder[79] (through an entity or entities yet to be formed on their behalf), and (b) WCC to enter into a purchase agreement with the entity or entities formed on behalf of the First Lien Lenders (the "Stalking Horse Purchase Agreement").[80] Essentially, if no one else bid for WCC's

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[75] **R-066**, *In re Westmoreland Coal Company et al.,* Case No. 18-35672 (DRJ), Motion of Westmoreland Coal Company (Court Docket, Doc. 208), 18 October 2018 ("Bidding Procedures Motion"), ¶ 1. *See also* **R-060**, *WMH – Coleman Report*, ¶ 52; **R-057**, Stein First Day Declaration, ¶¶ 67-79.

[76] **R-067**, Westmoreland Coal Company, News Release, "Westmoreland Enters into Restructuring Support Agreement with Members of Ad Hoc Lending Group; WMLP Simultaneously Files Chapter 11 to Sell Assets", 9 October 2018. *See also* **R-060**, *WMH – Coleman Report*, ¶ 9; **R-068**, *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ), Restructuring Support Agreement, Exhibit A to Stein First Day Declaration (Court Docket, Doc. 54), 9 October 2018 [Excerpt] ("WCC RSA").

[77] The plan is a key element of a chapter 11 bankruptcy that sets out the treatment that all classes of creditors will receive. In exchange for the debtor proposing a plan with terms acceptable to the creditors, the creditors commit to supporting the debtor's plan once it commences the bankruptcy proceeding. *See* **R-060**, *WMH – Coleman Report*, ¶ 37.

[78] **R-066**, Bidding Procedures Motion, ¶ 1; **R-068**, WCC RSA, Ex. B (Sale Transaction Term Sheet), p. 88 of 167, and Schedule 2 (Milestones), p. 68 of 167; **R-069**, *In re Westmoreland Coal Company, et al.,* Case No. 18-35672 (DRJ), Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of its Debtor Affiliates, 2 March 2019 (Court Docket, Doc. 1561), Exhibit A – Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of its Debtor Affiliates ("WCC Plan"), Article IV.C.1(a); and **R-057**, Stein First Day Declaration, ¶ 78. *See also* **R-060**, *WMH – Coleman Report*, ¶¶ 41 and 54.

[79] This means that the First Lien Lenders committed to bid for WCC's assets at a set price, irrespective of whether there were any other bidders in the auction. *See* **R-060**, *WMH – Coleman Report*, ¶¶ 55, 59; **R-068**, WCC RSA, Exhibit B (Sale Transaction Term Sheet), p. 88 of 167. A "stalking horse" bidder essentially sets the floor purchase price in an auction as a way of "protecting against 'lowball' bids [and therefore] attracts other prospective purchasers to bid on the assets." *See* **R-060**, *WMH – Coleman Report*, ¶ 42.

[80] *See* **R-070**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Perform Obligations Related to the Stalking Horse Bid, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof

assets, the First Lien Lenders would carry out the purchase of certain WCC assets, including the Canadian Enterprises, through one or more acquisition vehicles.[81]

51. While a marketing process was authorized, no bids were received. Accordingly, on January 21, 2019, the stalking horse bid became the successful bid for WCC assets, including the Canadian Enterprises,[82] and two new Delaware limited liability companies were subsequently formed on behalf of the First Lien Lenders as acquisition vehicles to take title to the assets.[83] The two acquisition vehicles were WMH, formed on January 31, 2019, and Westmoreland Mining LLC, formed on February 12, 2019 (together, the "Purchaser").[84]

52. On March 2, 2019, the Bankruptcy Court approved WCC's Plan (in the "Plan Confirmation Order"), which authorized WCC and the First Lien Lenders to execute the sale transaction contemplated by the Plan and the Stalking Horse Purchase Agreement.[85] The Plan Confirmation Order also made a number of findings pertaining to the Purchaser's purchase of certain WCC assets, including that:

(Court Docket, Doc. 519), 15 November 2018 ("Order Approving Bidding Procedures"), ¶¶ C-D, 5-6. *See also* **R-060**, *WMH – Coleman Report*, ¶¶ 59-60; **R-066**, Bidding Procedures Motion.

[81] **R-060**, *WMH – Coleman Report*, ¶¶ 42 and 69.

[82] **R-060**, *WMH – Coleman Report*, ¶ 69. The First Lien Lenders' stalking horse bid was a "credit bid". The U.S. Bankruptcy Code affords secured creditors the right to use their secured claim in a bankruptcy as "currency in a sale of the creditor's collateral. Referred to as 'credit bidding,' this practice allows a secured creditor to use the money owed to it by the debtor as consideration to purchase the debtor's assets, irrespective of the value of the creditor's collateral. This gives the secured creditor a significant advantage over other bidders: the secured creditor can set a floor price with its credit bid, wherein it can 'pay' for the assets by bidding its claim against the debtor, while any other bidder must pay the purchase price in cash. The secured creditor can thus set its bid at the lowest price at which it is willing to accept in cash satisfaction of its secured claim, rather than effecting repayment by taking possession of its collateral." *See* **R-060**, *WMH – Coleman Report*, ¶ 43.

[83] **R-060**, *WMH – Coleman Report*, ¶ 64.

[84] *See* **R-060**, *WMH – Coleman Report*, ¶¶ 70 and 73; **R-071**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining Holdings LLC, Entity No. 7262545, accessed on 6 June 2023; **R-072**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining LLC, Entity No. 7266728, accessed on 6 June 2023.

[85] *See* **R-060**, *WMH – Coleman Report*, ¶ 71; **R-073**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of its Debtor Affiliates, 2 March 2019 (Court Docket, Doc. 1561) [Excerpt] ("WCC Plan Confirmation Order"). Other aspects of the sale transaction that the Court approved included Westmoreland Mining LLC's purchase of other of WCC's assets. *See* **R-060**, *WMH – Coleman Report*, ¶¶ 75, 76, 79, and 80.

- the purchased assets were sold "free and clear of all Liens, Claims, encumbrances, and interests",[86] which in essence eliminated all liens and claims against the assets being sold that existed prior to the commencement of the bankruptcy case;[87]

- the sale was "negotiated, proposed and entered into by [WCC] and the Purchaser without collusion, in good faith and from arm's-length bargaining positions",[88] which in effect insulated the sale from a court applying a stricter standard of review for the transaction that would be applied if the Purchaser was determined to be an "insider" of WCC;[89] and

- the Purchaser would not be "liable for any claims against or in the assets purchased" in the sale, or have "successor, transferee, derivative, or vicarious liabilities of any kind or character" with respect to WCC or its affiliates, or any of their obligations prior to the sale's closing.[90]

53. WCC and the First Lien Lenders carried out the sale transaction on March 15, 2019.[91] The transaction resulted in each of WMH and Westmoreland Mining LLC taking title to certain of the purchased WCC assets.[92] In particular, WMH acquired the Canadian Enterprises (100% of the equity in WCHI, which directly owned Prairie) and a certain "Transferred Cause[] of Action" entitled the

[86] **R-073**, WCC Plan Confirmation Order, ¶ 45.

[87] **R-060**, *WMH – Coleman Report*, ¶ 72 (a).

[88] **R-073**, WCC Plan Confirmation Order, ¶ 47. The First Lien Lenders and the Purchaser shared counsel who represented them in the transaction, while WCC and its debtor subsidiaries had their own counsel. *See* **R-060**, *WMH – Coleman Report*, fn. 83.

[89] **R-060**, *WMH – Coleman Report*, ¶ 72 (b) and (c).

[90] **R-073**, WCC Plan Confirmation Order, ¶ 49. *See also* **R-060**, *WMH – Coleman Report*, ¶ 72 (d).

[91] *See* **R-060**, *WMH – Coleman Report*, ¶ 75. The "Plan Effective Date", which is the date on which the majority of the Plan's transaction steps were carried out, was March 15, 2019. **R-074**, *In re Westmoreland Coal Company, et al*., Case No. 18-35672 (DRJ), Notice of (I) Entry of Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates and (II) Occurrence of the Plan Effective Date, (Court Docket, Doc. 1608), 15 March 2019. *See also* **R-075**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621), 18 March 2019, [Excerpt of Exhibit G – Description of Transaction Steps], p. 2 of 661 ("Description of Transaction Steps"); Claimant's 2022 NOA, ¶ 66.

[92] **R-060**, *WMH – Coleman Report*, ¶¶ 74-80; **R-075**, Description of Transaction Steps, s. II, p. 12 of 661 and s. III, p. 13 of 661. WMH also acquired the insurance policies and debt instruments.

"NAFTA Claim",[93] which was specifically defined in the Stalking Horse Purchase Agreement as follows:

> that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by Westmoreland on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended).[94]

54. While the U.S. Bankruptcy Code facilitates the transfers of legal claims as a "means of transferring value to stakeholders", it defers to applicable non-bankruptcy law with respect to both the issue of transferability itself, and to the merits of a claim and who may assert it.[95]

55. The result of the arm's-length transaction on March 15, 2019 was that the First Lien Lenders held all of the equity interests in WMH, which in turn held all of the equity interests in the Canadian Enterprises as set forth in Figure 3 below.[96] Neither the First Lien Lenders nor their acquisition vehicles acquired any equity interests in WCC.[97]

[93] **R-060**, *WMH – Coleman Report*, ¶ 74.

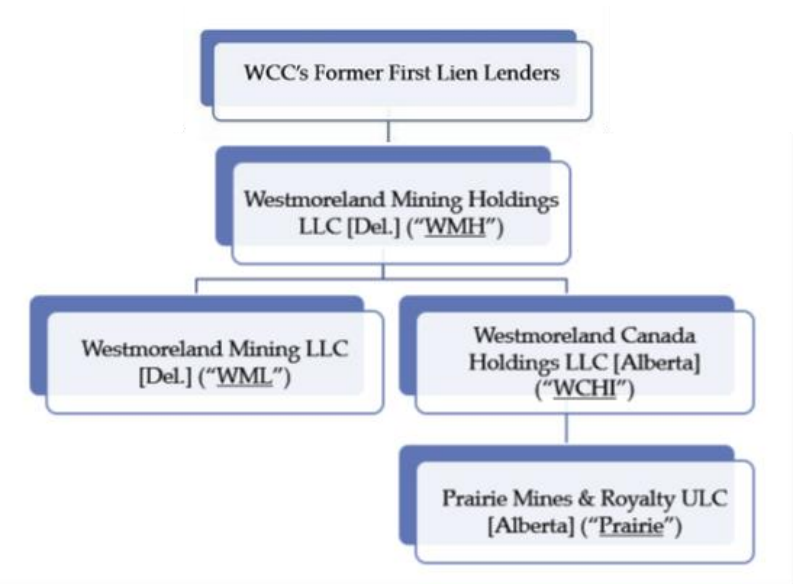
[94] **R-076**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621), 18 March 2019 [Excerpt of Exhibit H-6 - Stalking Horse Purchase Agreement] ("Stalking Horse Purchase Agreement"), s. 1.01, p. 139 of 661. The Stalking Horse Purchase Agreement defined the term "Westmoreland" as "Westmoreland Coal Company, a Delaware corporation". *See* **R-076**, Stalking Horse Purchase Agreement, p. 129 of 661.

[95] **R-060**, *WMH – Coleman Report*, ¶ 88. *See also* **RLA-001**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022 ("*WMH – Final Award*"), fn. 114, citing to **R-060**, *WMH – Coleman Report*.

[96] **R-060**, *WMH – Coleman Report*, ¶¶ 81-82 ("At the conclusion of the transaction, WCC no longer held any interest in WMH, WML, or the assets purchased pursuant to the Stalking Horse Purchase Agreement. Obligations arising from the operation of the businesses that arose after the closing of the transaction became the sole responsibility of WMH and WML."); **R-075**, Description of Transaction Steps, ss. II and III.

[97] **R-060**, *WMH – Coleman Report*, ¶ 66, fn. 89; **R-076**, Stalking Horse Purchase Agreement, s. 1. *See also* **R-075**, Description of Transaction Steps, s. III.f. Purchasing equity interests in WCC would not have allowed the First Lien Lenders' acquisition vehicles to take the purchased WCC assets "free and clear" of prior encumbrances, and without any potential successor liability. *See generally* **R-060**, *WMH – Coleman Report*, ¶ 44.

Figure 3: The First Lien Lenders' Post-Sale Corporate Holdings (March 15, 2019)



56. WCC has since wound down its affairs, and is no longer an operating company.[98] On December 29, 2022, the Bankruptcy Court issued a "Final Decree" closing the chapter 11 cases of WCC and its debtor affiliates.[99] As of that date, WCC and its debtor affiliates considered their bankruptcy case to be "fully administered", with one exception: that the "WCC Plan Administrator [would] continue to pursue the NAFTA Claim in cooperation with [Westmoreland Mining LLC]."[100] This exception is discussed in greater detail in section II.E.5 below.

E. The Procedural Background to the Claimant's Claim

1. WCC Files a NAFTA Claim in 2018 Against the Government of Canada

57. On November 19, 2018, one month after filing its Petition with the Bankruptcy Court, WCC filed a Notice of Arbitration and Statement of Claim against the Government of Canada under

[98] *See* Claimant's 2022 NOA, ¶ 14. This result was contemplated from the outset by WCC's Plan. *See* **R-060**, *WMH – Coleman Report*, ¶¶ 84 and 85; **R-069**, WCC Plan, Art. IV.N. and Art. VII.B.

[99] **R-077**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Final Decree Closing the Chapter 11 Cases of WLB Reorganized Debtors to Claims (Court Docket, Doc. 3356), 29 December 2022.

[100] **R-078**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), WLB Plan Administrator's Emergency Motion for Entry Of Final Decree Closing The Chapter 11 Case Of The WLB Reorganized Debtors (Court Docket, Doc. 3344), 21 December 2022, ¶¶ 10-11.

NAFTA Chapter Eleven.[101] WCC brought its claims under NAFTA Article 1116 on its own behalf and under Article 1117 on behalf of its enterprise, Prairie.[102] WCC alleged that two measures adopted by the Government of Alberta were inconsistent with Canada's NAFTA obligations. Specifically, WCC alleged that the Government of Alberta's decision, in its 2015 Climate Leadership Plan, to phase out emissions from coal-fired electricity generating units by 2030 viola-[ted] NAFTA Article 1105.[103] WCC also alleged that Alberta's 2016 decision to provide the Transition Payments was inconsistent with NAFTA Articles 1102 and 1105.[104] WCC alleged that these measures caused it "damages exceeding $470 million".[105]

2. WMH, the Arm's-Length Purchaser of the Canadian Enterprises, Attempts to Substitute Itself for WCC in WCC's 2018 Claim

58. On May 13, 2019, approximately two months after WMH purchased the Canadian Enterprises and the "NAFTA Claim" from WCC pursuant to the U.S. Bankruptcy Court approved Plan, WMH, WCHI and Prairie attempted to amend WCC's 2018 NOA (the "Attempted Amendment").[106] WMH asserted that the Attempted Amendment was made pursuant to Article 20 of the 1976 UNCITRAL Rules,[107] to "reflect" the changes to the ownership of Prairie and alleged interests in the "NAFTA Claim" effectuated through WCC's bankruptcy proceeding.[108] In the letter

[101] **R-079**, *Westmoreland Coal Company v. Canada*, Notice of Arbitration and Statement of Claim, 19 November 2018 ("*WCC – 2018 NOA*") and Exhibit 1. Westmoreland Coal Company had submitted its Notice of Intent to Submit a Claim to Arbitration on August 20, 2018.

[102] **R-079**, *WCC – 2018 NOA*, ¶ 19.

[103] **R-079**, *WCC – 2018 NOA*, ¶ 99.

[104] **R-079**, *WCC – 2018 NOA*, ¶¶ 87 and 98.

[105] **R-079**, *WCC – 2018 NOA*, ¶¶ 78-81, 105.

[106] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019.

[107] Article 20 of the 1976 UNCITRAL Rules provides: "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."

[108] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019. The letter indicates that "interests in the NAFTA Chapter 11 claim were included among the assets transferred to Westmoreland Mining Holdings LLC as provided in the plan of reorganization." The treatment of legal claims under U.S. bankruptcy law is noted above, and discussed in greater detail in **R-060**, *WMH – Coleman Report*, ¶¶ 86-88.

covering the Attempted Amendment, WMH had also altered the style of cause of the claim from "*Westmoreland Coal Company v. Government of Canada*" to "*Westmoreland Mining Holdings LLC v. Government of Canada*".[109]

59. On July 2, 2019, Canada rejected the Attempted Amendment given that it was not a permissible amendment under the 1976 UNCITRAL Rules.[110] In particular, Canada explained that "the substitution of a new claimant is an amendment that causes a claim to fall outside the tribunal's jurisdiction", and one that is "tantamount to the filing of a new claim".[111] As Canada explained, WMH could not become the disputing investor in a claim that WCC had submitted to arbitration. Canada also clarified that any claimant must satisfy the procedural requirements of NAFTA Chapter Eleven in order to bring a claim, including Article 1119, which requires a claimant to deliver a notice of its intention to submit a claim to arbitration at least 90 days before it submits its claim. Canada underlined that the treaty's pre-conditions to arbitration, which condition Canada's consent to arbitration with a particular claimant and include the requirements of Article 1119, were not requirements that Canada would agree to waive.[112]

[109] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019.

[110] **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 1.

[111] **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2 (emphasis removed), citing to **RLA-002**, *Refusal to Accept the Claim of Raymond Intl (UK) Ltd*, Refusal No. 21 (Decision No. DEC18-REF21-FT) Final Decision, 8 December 1982, reprinted in 1 Iran-US CTR 394, and **RLA-003**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision on a Motion to Add a New Party, 31 January 2008.

[112] **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2. The Claimant contested Canada's objections, arguing that the circumstances here are such that the "new claimants do not change the nationality of the parties nor the issues to be resolved in the arbitration." **R-082**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 1. Canada further clarified that its objection was grounded "in the fact that the WMH NOA proposed to substitute a new Claimant for the original Claimant in this proceeding. This amendment is prohibited by Article 20 of the UNCITRAL Arbitration Rules for the very reason that it would result in the claim falling outside the tribunal's jurisdiction. That the amendment may not change the nationality of the Claimant or the issues to be resolved in the proceeding has no bearing on the operation of Article 20 in this instance." **R-083**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019, p. 1.

3. WCC Withdraws its 2018 Claim and WMH Pursues its Own NAFTA Claim in 2019

60. With Canada's response in hand, including Canada's proposal to the Claimant on a path forward,[113] it was agreed that the May 13, 2019 submission from WMH would serve as WMH's NOI under Article 1119 for a new claim.[114] This agreement meant that WMH was in a position to file its NOA as of August 12, 2019, sparing it from having to file a new NOI after the July correspondence that would restart the 90-day period required under Article 1119.

61. Canada made clear that its agreement to this approach was "without prejudice to its ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim."[115] Further, as WMH's NOI was a new potential claim, separate and distinct from the claim filed by WCC in November 2018, Canada offered to engage in consultations with WMH pursuant to NAFTA Article 1118.[116] WMH did not accept Canada's offer.

62. At the same time, on July 23, 2019, while continuing to administer the remaining bankruptcy process, WCC decided to withdraw its 2018 NOA against Canada.[117] It did so to accelerate the

[113] **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2 ("Under the circumstances, and because the Amended NOA appears to meet the formal requirements of an NOI, Canada is prepared to accept the Amended NOA filed on May 13 as Westmoreland Mining Holdings LLC's NOI, on the condition that Westmoreland Coal Company withdraws the claim that it submitted against Canada on November 19, 2018. Westmoreland Mining Holdings LLC would then be free to submit its own claim to arbitration 90 days after the May 13 NOI date.")

[114] *See* **R-083**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019; **R-084**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", 23 July 2019.

[115] **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2.

[116] **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2.

[117] *See* **R-084**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", 23 July 2019, p. 1 ("On behalf of Westmoreland Coal Company and pursuant to the appended July 12, 2019 letter, we hereby withdraw Westmoreland Coal Company's November 19, 2018 Notice of Arbitration and Statement of Claim.")

submission of WMH's claim to arbitration.[118] No tribunal was constituted to hear WCC's claim from 2018.

63. On August 12, 2019, 90 days after the submission of its NOI, WMH initiated proceedings under NAFTA Chapter Eleven against Canada by submitting the WMH NOA.[119] WMH brought its claim under NAFTA Article 1116 on its own behalf, and under Article 1117 on behalf of WCHI and Prairie.[120] WMH claimed "damages exceeding $470 million".[121]

64. The WMH NOA alleged breaches of Article 1102 and Article 1105 on the basis that "Canada did not treat Westmoreland equally with the Albertan companies"[122] and that Alberta's decision not to provide "a dollar to Westmoreland is arbitrary, grossly unfair and, therefore, a violation of the minimum standard of treatment under customary international law in breach of Article 1105."[123] As discussed further below in Section IV.B.3, the allegations of breach and damage, and the description of the factual circumstances leading to them in the WMH NOA, were nearly identical to those alleged in WCC's 2018 NOA.

65. The *WMH* tribunal was constituted on February 24, 2020. The proceedings were administered by ICSID, who by letter of April 2, 2020, accepted its designation as the administering authority and registry for the dispute, which was subsequently assigned ICSID Case No. UNCT/20/3.[124]

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[118] **R-082**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 1 (explaining that WCC agreed to withdraw its claim "as a means to expedite the arbitration process"); **R-084**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", 23 July 2019, p. 1, referring to **R-083**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019.

[119] **R-085**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3) Notice of Arbitration and Statement of Claim, 12 August 2019 ("*WMH – 2019 NOA*").

[120] **R-085**, *WMH – 2019 NOA*, ¶¶ 1 and 25.

[121] **R-085**, *WMH – 2019 NOA*, ¶ 111.

[122] **R-085**, *WMH – 2019 NOA*, ¶ 93.

[123] **R-085**, *WMH – 2019 NOA*, ¶ 104.

[124] **RLA-004**, *Westmoreland Mining Holdings, LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Procedural Order No. 1, 22 April 2020, ¶ 4.1. *See also* **RLA-001**, *WMH – Final Award*, ¶ 18.

4. The *WMH* Tribunal Dismisses WHM's Claim in 2022

66. Canada objected to the jurisdiction of the *WMH* tribunal on several grounds, and requested bifurcation of the proceedings with respect to jurisdictional issues. On October 20, 2020, the *WMH* tribunal granted Canada's request for bifurcation, in part,[125] agreeing to address in a preliminary phase Canada's objections that the tribunal lacked jurisdiction because: (i) WMH was not an "investor of a Party" when the alleged breaches occurred in 2015 and 2016;[126] (ii) WMH had not established a *prima facie* damages claim;[127] and (iii) the challenged measures did not "relate to" the claimant or its investment.[128] A hearing on the merits of these three issues was held virtually on July 14-15, 2021.[129]

67. On January 31, 2022, the tribunal issued a final award dismissing WMH's claim in its entirety.[130] In rejecting WMH's claim, the tribunal found that:

> to have jurisdiction to bring a claim under Article 1116(1), the investor/claimant must comply with two requirements: firstly it must be claiming 'on its own behalf' such that it held the investment at the time of the alleged breach and is not bringing the claim on another's behalf; and secondly, that same investor (i.e. 'the' investor) must itself have suffered loss or damage arising out of that breach. Article 1117(1) contains the same requirements.[131]

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[125] **RLA-005**, *Westmoreland Mining Holdings, LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Procedural Order No. 3: Decision on Bifurcation, 20 October 2020 ("*WMH – PO 3*"), ¶ 60. Canada had also sought bifurcation on its objections that the Claimant had failed to establish that part of its claim was timely under NAFTA Articles 1116(2) and 1117(2), and on an admissibility issue related to NAFTA Article 1108(7)(b)'s exclusion of the application of Article 1102 to subsidies or grants provided by a Party.

[126] *See e.g.* **R-086**, *Westmoreland Mining Holdings, LLC v. Canada* (ICSID Case No. UNCT/20/3) Canada's Memorial on Jurisdiction, 18 December 2020 ("*WMH – Canada's Memorial*"), ¶¶ 47-68.

[127] *See e.g.* **R-086**, *WMH – Canada's Memorial*, ¶¶ 69-76.

[128] *See e.g.* **R-086**, *WMH – Canada's Memorial*, ¶¶ 69-76.

[129] **RLA-001**, *WMH – Final Award*, ¶ 67.

[130] **RLA-001**, *WMH – Final Award*, ¶ 252.

[131] **RLA-001**, *WMH – Final Award*, ¶¶ 200. While this decision was enough to deprive the tribunal of jurisdiction, the tribunal went on to consider whether WMH had shown, on a *prima facie* basis, that it had suffered loss as a result of the measures, and whether those measures "related to" WMH or its investment. It held that WMH had not established a *prima facie* claim to damages, and that it is "unarguable" that the impugned measures "could not, and did not, relate to either WMH or to its investment." **RLA-001**, *WMH – Final Award*, ¶¶ 232, 235-236.

68. As such, the tribunal held that, to establish jurisdiction *ratione temporis*, WMH was required to demonstrate "firstly that the Challenged Measures applied to it and secondly that it itself suffered loss as a result of those Challenged Measures."[132] In finding that WMH had not met its burden to establish jurisdiction, the tribunal found, as Canada has emphasized above, that WMH was "not the legal successor of WCC but is a separate company to which the NAFTA claim was purportedly transferred after the alleged Treaty breaches."[133] In arriving at that determination, the tribunal noted that WMH was created as a new company at arm's length from WCC and that the "specific process by which [WMH] came into being" was not a "corporate restructuring pursuant to which [WMH] emerged from WCC's ashes."[134] The *WMH* tribunal could not have been clearer: there is no single "Westmoreland" as WMH in that case, and WCC before this Tribunal, have asserted.

5. WCC and Westmoreland Mining LLC Purport to Re-Transfer the Withdrawn 2018 NOA Back to WCC in the U.S. Bankruptcy Proceeding

69. Following the *WMH* tribunal's award on June 17, 2022, WCC, with the consent of the First Lien Lenders' acquisition vehicle and WMH's subsidiary, Westmoreland Mining LLC, submitted a motion to the Bankruptcy Court for the entry of an order "authorizing WCC to prosecute the NAFTA Claim".[135] The motion stated:

> Consequently, to effect the intent of [WCC and its debtor affiliates] under the Plan to ensure that the NAFTA Claim, valued at approximately CAD 470 million (US$374 million), can be prosecuted, and the Plan can be consummated, WCC, with the agreement and consent of [Westmoreland Mining LLC], seeks an order […] recognizing that WCC retains the NAFTA Claim and authorizing WCC, at the

[132] **RLA-001**, *WMH – Final Award*, ¶ 215.

[133] **RLA-001**, *WMH – Final Award*, ¶ 230.

[134] **RLA-001**, *WMH – Final Award*, ¶ 230. These findings from the *WMH* tribunal may not be re-litigated by the Claimant in the current arbitration.

[135] **R-087**, *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim (Court Docket, Doc. 3313), 17 June 2022 ("Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim"). The Motion defined Westmoreland Mining LLC as "New Westmoreland". Although WMH was the entity that purportedly acquired the "NAFTA Claim" in the March 15, 2019 sale transaction, it was not a party to the motion before the Bankruptcy Court. "NAFTA Claim" had the same meaning as in the Stalking Horse Purchase Agreement. *See* **R-076**, Stalking Horse Purchase Agreement, s. 1.01, p. 139 of 661.

> expense of [Westmoreland Mining LLC], to prosecute the claim for the benefit of [Westmoreland Mining LLC].[136]

70. As explained above, the 2018 NOA was withdrawn on July 23, 2018, and WMH's claim was dismissed by the tribunal constituted to hear it on January 31, 2022.

71. Nonetheless, on June 23, 2022, the Bankruptcy Court approved WCC's requests in the motion and issued an order finding that:

> (a) the NAFTA Claim did not transfer to Westmoreland Mining LLC ("New Westmoreland") or any other party pursuant to the [Stalking Horse] Purchase Agreement, the Confirmation Order, the Plan, or any other Plan Documents or Sale Transaction Documentation; (b) pursuant to the Plan, on the Plan Effective Date, WCC's rights to the NAFTA Claim remained with WCC as reorganized, and (c) WCC retains title to the NAFTA Claim to the same extent it did prior to the Plan Effective Date.[137]

6. WCC Submits This New Claim to Arbitration in 2022

72. On June 30, 2022, WCC served Canada with a Notice of Intent to Submit a Claim to Arbitration (the "2022 NOI"). The 2022 NOI asserted that it "related to the same dispute that was the subject of the Notice of Intent that [WCC] sent to the Government of Canada on or around August 20, 2018" (the "2018 NOI") and the "Notice of Arbitration and Statement of Claim that [WCC] submitted on or around November 19, 2018".[138] It further alleged that the dispute described in the 2018 NOI and 2018 NOA was "subsequently the subject of the arbitration between WMH and Canada (ICSID Case No. UNCT/20/3)".[139] The Claimant requested that Canada waive the 90-day period in NAFTA Article 1119.[140]

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[136] **R-087**, Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim, ¶¶ 2, 23.

[137] **R-088**, *In re Westmoreland Coal Company et al*., Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), 27 June 2022 ("Order of U.S. Bankruptcy Court"), ¶ 1. The Plan Effective Date was March 15, 2019. The Bankruptcy Court also ruled that, pursuant to the Stalking Horse Purchase Agreement, Westmoreland Mining LLC would be entitled to the "economic benefit and proceeds of the NAFTA Claim." *See* **R-088**, Order of U.S. Bankruptcy Court, ¶ 3.

[138] Claimant's Notice of Intent, 30 June 2022 ("Claimant's NOI"), p. 2.

[139] Claimant's NOI, p. 2.

[140] Claimant's NOI, p. 3.

73. On July 27, 2022, Canada acknowledged receipt of the Claimant's 2022 NOI.[141] In doing so, Canada did not agree to waive the pre-condition to arbitration set out in NAFTA Article 1119 as this notice related to a new claim. Canada explained that "[t]he 90-day period provides an important opportunity for the disputing parties to engage in the consultations discussed above and to prepare for potential arbitration proceedings."[142]

74. On October 14, 2022, Canada received, through official service channels, the Claimant's 2022 NOA, thus formally commencing the current arbitration.[143] In addition to its 2022 NOA, the Claimant attached the waivers that had been filed by WCC and Prairie as part of the WCC 2018 NOA.[144] WCC did not file any waivers contemporaneous with the NOA, instead choosing to rely on the prior waivers for the purposes of this arbitration.[145]

75. In its 2022 NOA, the Claimant brings its claim under NAFTA Article 1116 on its own behalf, and NAFTA Article 1117 on behalf of an enterprise it owned until 2019, Prairie. The Claimant "alternatively" brings its claim under CUSMA Annex 14-C.[146] WCC alleges that:

- the Government of Alberta's decision, in its 2015 Climate Leadership Plan, to phase out emissions from coal-fired electricity generation units by 2030 violated NAFTA Article 1105;[147]

[141] **R-089**, Letter from Julie Boisvert, Government of Canada, to Javier H. Rubinstein, King & Spalding LLP, 27 July 2022.

[142] **R-089**, Letter from Julie Boisvert, Government of Canada, to Javier H. Rubinstein, King & Spalding LLP, 27 July 2022, p. 2.

[143] While the Claimant's Notice of Arbitration is dated October 11, 2022, it was not received by Canada through the official service channels provided for in NAFTA Article 1137(2) (Service of Documents), Annex 1137.2 (Service of Documents on a Party Under Section B), and **R-090**, Canada Gazette, Part I, Vol. 128, No. 25, 18 June 1994 [Excerpt], p. 3017 until October 14, 2022. As such, October 14, 2022 is the date that the present claim was submitted to arbitration. *See* NAFTA Article 1137(1)(c). Canada provided the Tribunal with the version of the Claimant's 2022 NOA confirming the date and time of its receipt by email dated March 14, 2023.

[144] **C-040**, Prairie Mines Waiver, 19 November 2018; **C-041**, WCC Waiver, 19 November 2018.

[145] **R-091**, E-mail from Heather Squires, Government of Canada, to Javier Rubinstein, King & Spalding LLP, 21 February 2023.

[146] Claimant's 2022 NOA, ¶ 99.

[147] Claimant's 2022 NOA, ¶¶ 86-88.

- Alberta's 2016 decision to provide the Transition Payments violated NAFTA Articles 1102 and 1105;[148] and

- these two measures, "combined with federal and provincial carbon taxes that hiked the price of coal", violated NAFTA Article 1110.[149]

76. WCC has not quantified its alleged damages.[150]

F. Summary of Key Events for the Jurisdictional Phase

77. The table below sets out a summary of the key events for the jurisdictional phase of this arbitration.

Table 2: Summary of Key Events

Date	Event	Memorial Reference
July 17, 2007	Alberta enacts the SGER, which imposes emissions standards on industrial emitters, including power plants, and sets a carbon price.	Section II.B.1
April 28, 2014	WCC purchases Prairie from Sherritt.	Section II.D.1
November 22, 2015	Alberta announces the 2015 Climate Leadership Plan, which includes plans to update the SGER, a phase-out of emissions from coal-fired electricity generation, and a new carbon levy on consumer fuels.	Section II.B.2
June 13, 2016	Alberta enacts the *Climate Leadership Act*, which imposes a carbon levy on consumer fuels as of January 1, 2017. Industrial emitters continue to be governed by the SGER.	Section II.B.2
November 24, 2016	Alberta announces that it has concluded Off-Coal Agreements with three power plant owners – TransAlta, Capital Power, and ATCO.	Section II.B.3

[148] Claimant's 2022 NOA, ¶¶ 76-80, 85.

[149] Claimant's 2022 NOA, ¶¶ 91-92.

[150] Claimant's 2022 NOA, ¶¶ 94-95.

Date	**Event**	**Memorial Reference**
November 24, 2016	WCC and Prairie first acquire knowledge of alleged breaches and loss.	Section IV.A
January 1, 2018	Alberta enacts the CCIR, which replaces the SGER and requires coal-fired power plants to match the emissions performance of best-in-class natural gas facilities.	Section II.B.2
June 21, 2018	Canada's GGPPA enters into force. It does not apply in Alberta.	Section II.C
August 20, 2018	WCC submits the WCC 2018 NOI.	Section II.E.1
October 9, 2018	WCC files for bankruptcy in the U.S. and announces the execution of an RSA with the First Lien Lenders.	Section II.D.2
November 19, 2018	WCC submits the 2018 NOA.	Section II.E.1
January 31, 2019	WMH is created on behalf of the First Lien Lenders to take title to certain WCC assets.	Section II.D.2
February 12, 2019	Westmoreland Mining LLC is created on behalf of the First Lien Lenders to take title to certain WCC assets.	Section II.D.2
March 15, 2019	WCC sells all of its interests in Canada.	Section II.D.2
	WMH acquires WCHI, Prairie, and, purportedly, the "NAFTA Claim".	Section II.D.2
May 13, 2019	Canada receives the Attempted Amendment from WMH, WCHI, and Prairie.	Section II.E.2
May 30, 2019	Alberta repeals the *Climate Leadership Act*'s carbon levy on consumer fuels. Industrial emitters continue to be governed by the CCIR.	Section II.B.4
July 23, 2019	WMH submits the WMH NOI, which is deemed to have been submitted on May 13, 2019.	Section II.E.3
	WCC withdraws its 2018 NOA.	Section II.E.3
August 7, 2019	Canada enacts *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)*, which effectuate the	Section II.C

Date	Event	Memorial Reference
	application of Part I of the GGPPA in Alberta as of January 1, 2020.	
August 12, 2019	WMH submits the WMH NOA.	Section II.E.3
October 14, 2019	**"Critical date" for the purposes of the limitation period for the 2022 NOA under Articles 1116(2) and 1117(2) (three years prior to its submission to arbitration).**	**Section IV.A**
January 1, 2020	Alberta's CCIR is replaced by the TIER.	Section II.B.4
	The Federal Fuel Charge begins to apply in Alberta.	Section II.C
July 1, 2020	CUSMA supersedes NAFTA.	Section III.B
January 31, 2022	The *WMH* tribunal dismisses WMH's claim for lack of jurisdiction.	Section II.E.4
June 30, 2022	WCC submits the 2022 NOI.	Section II.E.6
October 14, 2022	WCC submits the 2022 NOA.	Section II.E.6

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMANT'S CLAIM UNDER CUSMA ANNEX 14-C

A. The Claimant Bears the Burden to Establish That The Tribunal Has Jurisdiction

78. An investor bringing a claim under CUSMA Annex 14-C and NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions precedent to commence arbitration and that the tribunal has jurisdiction over the claim. NAFTA tribunals have consistently confirmed the fundamental principle that "[i]t is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures".[151] Most recently, the tribunals in

[151] **RLA-006**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 236. *See also* **RLA-007**, *Apotex Inc. v. The Government of the United States of America* (ICSID Case No. UNCT/10/2) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex I – Award on Jurisdiction*") , ¶ 150, citing **RLA-008**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 58-64 (summarizing previous decisions, and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional phase"); **RLA-009**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007 ("*Bayview – Award*"), ¶¶ 63, 122

WMH and *Tennant Energy v. Canada* held that the burden is squarely on the claimant at the jurisdictional phase of a dispute.[152] As the *Tennant* tribunal explained:

> The Tribunal agrees with the Respondent, and with the United States and Mexico in their Article 1128 submissions, that compliance with Article 1116(1) of the NAFTA constitutes a jurisdictional requirement in respect of which the Claimant bears the burden of proof.
>
> Article 1122(1) of the NAFTA states that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement". Unless a claim is submitted in accordance with the procedures under NAFTA, there is no consent. The Tribunal agrees with the Respondent that consent is a question of jurisdiction.[153]

79. The principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction has been consistently advanced by all three NAFTA parties,[154] and is well established in international investment jurisprudence more generally.[155] The tribunal in *Spence International Investments v. Costa Rica* observed:

(finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **RLA-010**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 ("*Grand River – Award*"), ¶ 122 ("Claimants must […] establish an investment that falls within one or more of the categories established by that Article [1139]."); **RLA-011**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶ 328 ("[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.")

[152] **RLA-001**, *WMH – Final Award*, ¶ 193 ("If the Claimant cannot establish, on the balance of probabilities, those facts which are critical to founding jurisdiction, there is no jurisdiction.")

[153] **RLA-012**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Final Award, 25 October 2022 ("*Tennant – Award*"), ¶¶ 349-350.

[154] *See e.g.* **R-092**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Government of the United States of America and the United Mexican States, 26 July 2021 ("*Tennant – Canada's Reply to 1128 Submissions*"), ¶ 10; **R-093**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 25 June 2021 ("*Tennant – Second U.S. 1128 Submission*"), ¶ 3; **R-094**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United Mexican States, 25 June 2021 ("*Tennant – Second Mexico 1128 Submission*"), ¶ 5.

[155] *See e.g.* **RLA-013**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48 ("As a party bears the burden of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof required at the jurisdictional phase."); **RLA-014**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 192 ("[Claimant] has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); **RLA-015**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280 ("[A] State's consent to arbitration shall not be

> 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.[156]

80. The Claimant has failed to meet its burden of proving that this Tribunal has jurisdiction.

B. The Claimant Has Failed to Establish That It Holds a Legacy Investment Under Paragraph 6(a) of CUSMA Annex 14-C

1. CUSMA Annex 14-C Requires a Claimant to Own or Control The Relevant Investment When CUSMA Entered into Force

81. On July 1, 2020, CUSMA superseded NAFTA as the free trade agreement in force between Canada, the United States, and Mexico. CUSMA Chapter 14 (Investment) does not contain a trilateral investor-State dispute settlement ("ISDS") mechanism. Instead, after July 1, 2020, with respect to Canada, "an investor may only submit a claim to arbitration under [Chapter 14] as provided under Annex 14-C (Legacy Investment Claims and Pending Claims)" and in accordance with NAFTA's ISDS mechanism.[157] WCC filed its NOA in this arbitration after July 1, 2020. Thus, WCC must prove it meets the jurisdictional requirements in <u>both</u> CUSMA Annex 14-C and NAFTA Chapter Eleven.

82. CUSMA Annex 14-C sets out the circumstances of Canada's limited consent to arbitrate claims for a transition period of three years following CUSMA's entry into force.[158] In particular, paragraph 1 establishes that Canada's consent to arbitrate is limited to "legacy investments":

> 1. Each Party consents, <u>with respect to a legacy investment</u>, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

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presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.")

[156] **RLA-016**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Corrected Interim Award, 30 May 2017 ("*Spence – Corrected Interim Award*"), ¶ 239.

[157] CUSMA Article 14.2(4) and CUSMA Annex 14-C, ¶ 1.

[158] CUSMA Annex 14-C, ¶ 3 ("[a] Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.")

> (a) Section A of Chapter 11 (Investment) of NAFTA 1994; […] (emphasis added.)

83. Paragraph 6(a) defines the term "legacy investment" as follows:

> 6. For the purposes of this Annex:
>
> (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement; (emphasis added.)

84. Paragraph 6(b) of CUSMA Annex 14-C provides further guidance on the meaning of "legacy investment". It specifies that, for the purposes of the Annex, the terms "investment" and "investor" have the meanings accorded in NAFTA Chapter Eleven.[159] NAFTA Article 1139 (Definitions) defines the term "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of such Party".

85. Thus, a "legacy investment" is an investment owned or controlled by an investor of another Party in the territory of the Party that was: (1) established or acquired while NAFTA was in force; and (2) "in existence on the date" of CUSMA's entry into force, July 1, 2020. As a consequence, a tribunal would have no jurisdiction under CUSMA over a claim brought by a claimant that disposed of the investment that is the subject of the claim before July 1, 2020.

86. This interpretation is confirmed by the relevant context. Paragraph 1 of CUSMA Annex 14-C offers the CUSMA Parties' consent to the submission of a claim regarding a legacy investment in accordance with Section B of NAFTA Chapter Eleven. NAFTA Articles 1116(1) and 1117(1) set out the circumstances under which an "investor of a Party" may bring a claim under Section B. Both Articles 1116(1) and 1117(1) require that a claim pertain to the alleged breach of an obligation under Section A of NAFTA Chapter Eleven.

[159] CUSMA Annex 14-C, ¶ 6(b) ("'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994".)

87. Section A opens with Article 1101(1), the "gateway" to NAFTA Chapter Eleven,[160] which sets out the scope and coverage of the Chapter. Article 1101(1) circumscribes the application of the obligations of Section A and of the dispute settlement mechanism in Section B.[161] In relevant part, Article 1101(1) reads:

> 1. This Chapter 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; […] (emphasis added.)

88. The obligations contained in Section A thus apply to measures that "relat[e] to" investors of another Party and investments held by investors of another Party. Read together with Articles 1116(1) and 1117(1), a measure alleged to breach an obligation under Section A must "relat[e] to" the "investor of a Party" bringing the claim, or to the investments held by that "investor of a Party". NAFTA tribunals have consistently applied Article 1101(1) to require a "legally significant connection" between the challenged measure and the claimant or its investment.[162] Thus, where a

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[160] **RLA-017**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex – Partial Award*"), ¶ 106(i). *See also* **RLA-010**, *Grand River – Award*, ¶¶ 76-80; **RLA-018**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 118-128 ("*Canadian Cattlemen – Award on Jurisdiction*"); **RLA-009**, *Bayview – Award*, ¶ 85.

[161] **RLA-018**, *Canadian Cattlemen – Award on Jurisdiction*, ¶ 127; **RLA-019**, *Apotex Holdings Inc. and Apotex Inc v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014 ("*Apotex II – Award*"), ¶ 6.26; **RLA-006**, *Mesa – Award*, ¶ 324; **RLA-020**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2006) [Excerpts] ("*Kinnear*"), p. 1101-28c.

[162] *See e.g.* **RLA-001**, *WMH – Final Award*, ¶ 199 ("it would seem implausible that the entity referred to as an 'investor[s] of another Party' in one limb of Article 1101(1) [subparagraph (a)] is a different entity to the 'investor[s] of another Party' referred to in the limb that immediately follows [subparagraph (b)]."). *See also* **RLA-019**, *Apotex II – Award*, ¶ 6.3 ("It is necessary to address [Article 1101(1)] within the context of NAFTA's Chapter Eleven and the Claimants' substantive claims in this arbitration. […] Accordingly, the [challenged measure] (as adopted and maintained by the Respondent) must relate to the Claimants as investors or to their investments in the territory of the USA within the meaning of NAFTA Article 1101(1)") and ¶¶ 6.22-6.24; **RLA-021**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute – Decision on Jurisdiction*"), ¶¶ 222 and 244 (stating that under Article 1101(1), a measure must "have some specific impact on the claimant" or "directly address, target, implicate, or affect the Claimant"); **RLA-022**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("*Cargill – Award*"), ¶ 175; **RLA-006**, *Mesa – Award*, ¶ 330 ("Put differently, the investor must establish that it was seeking to make the very investment in respect of which it makes its claims."); **RLA-011**, *Gallo – Award*, ¶¶ 325-326 (holding that the tribunal had no jurisdiction over the claim because the claimant did not own or control the investment when the challenged measure occurred).

claimant cannot establish that the challenged measure had an "immediate and direct effect" on itself or its investment, the claim must fail for lack of jurisdiction under Article 1101(1).[163]

89. The same reasoning applies to paragraph 6(a) of CUSMA Annex 14-C. Its language on "an investment of an investor of another Party […] in existence on the date of entry into force of this Agreement" requires the claimant to have held the investment at issue on July 1, 2020.

90. This interpretation is consistent with a core object and purpose of CUSMA: to supersede NAFTA.[164] In that context, the CUSMA Parties offered limited consent to use CUSMA Annex 14-C to submit ISDS claims in accordance with Section B of NAFTA Chapter Eleven. The CUSMA Parties did not intend for Annex 14-C to allow investors that had sold their investment before NAFTA was terminated to submit new claims in accordance with NAFTA Chapter Eleven following CUSMA's entry into force. Thus, jurisdiction cannot be established if the claimant did not hold the investment on that date.

2. WCC Did Not Own or Control Any Investment in Canada When CUSMA Entered into Force

91. WCC does not hold a "legacy investment" under CUSMA Annex 14-C. On March 15, 2019, WCC sold the Canadian enterprises, along with all of their assets, to WMH. Though WCC acquired its alleged investments in Canada while NAFTA was in force, it did not own or control them[165] when CUSMA entered into force on July 1, 2020. This is undisputed between the parties. As a result, the Tribunal lacks jurisdiction over the claim.

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[163] **RLA-001**, *WMH – Final Award*, ¶¶ 207, 212; **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 244; **RLA-022**, *Cargill – Award*, ¶ 175; **RLA-019**, *Apotex II – Award*, ¶¶ 6.22-6.24.

[164] *See e.g.* CUSMA Preamble, where the CUSMA Parties resolve to "REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement […]" (emphasis added); Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States ("1. Upon entry into force of this Protocol, the CUSMA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the CUSMA that refer to provisions of the NAFTA.") (emphasis added); Annex 14-C, ¶ 5 ("[…] the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994") (emphasis added).

[165] In addition to alleging an investment in Prairie as an enterprise under NAFTA Article 1139(a), WCC also alleges in its 2022 NOA that it held a number of other investments (see Section IV below). With the exception of the undefined allegation of an investment in "claims to money against Canada as a result of the Measures", the other allegations appear to be tied to Prairie and its assets.

IV. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMANT'S CLAIM UNDER NAFTA CHAPTER ELEVEN

92. Even if the Tribunal finds that it has jurisdiction under CUSMA Annex 14-C, the Claimant must also establish the Tribunal's jurisdiction under NAFTA Chapter Eleven. NAFTA Article 1122(1) provides that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." All three NAFTA Parties agree that their consent is conditioned upon the claim to arbitration being submitted in "compliance with all procedural requirements" contained in Chapter Eleven.[166] As explained by the tribunal in *Methanex v. United States*:

> 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.[167]

93. Therefore, a NAFTA Party's consent to arbitration under Article 1122(1) is conditioned on full compliance with the requirements set out in Chapter Eleven, including those in NAFTA Articles 1116 to 1121.[168] Failure to comply means that a tribunal does not have jurisdiction over a particular claim.[169] The following sections demonstrate that the Claimant has not complied with: (A) the limitation period in Articles 1116(2) and 1117(2); (B) the waiver requirements of Article 1121; (C) the standing requirements of Articles 1116(1) and 1117(1); and (D) the scope requirements of Article 1101(1). As a result, the Tribunal does not have jurisdiction over the entirety of the Claimant's claim.

94. The Claimant has also failed to establish that it held the investments it alleges. It merely asserts, without reference to evidence, a series of investments under NAFTA Article 1139. In addition

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[166] Article 1122(1). **R-095**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Counter-Memorial on Preliminary Questions, 8 September 2000, ¶ 127; **R-096**, *Methanex Corp. v. United States* (UNCITRAL) Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, p. 74.

[167] **RLA-017**, *Methanex – Partial Award*, ¶ 120.

[168] **RLA-017**, *Methanex – Partial Award*, ¶¶ 120, 121.

[169] **RLA-017**, *Methanex – Partial Award*, ¶¶ 120, 121.

to Prairie as an enterprise, and an interest in Prairie, these alleged investments include: (i) the "Prairie Mines", which WCC alleges qualify as "real estate or other property" under NAFTA Article 1139(g) but for which it has provided no evidence of who holds title to such property; (ii) "interests arising from the commitment of capital or other resources" under NAFTA Article 1139(h), which the 2022 NOA does not identify; and (iii) "claims to money" under no particular sub-paragraph of Article 1139, which are also entirely unspecified.[170] Precision with respect to the alleged investments that were subject to the alleged breaches is a central part of establishing the Tribunal's jurisdiction under Articles 1101(1), 1116(1), and 1117(1). To the extent the Claimant maintains allegations with respect to these three alleged investments, Canada reserves the right to raise additional jurisdictional objections.

A. The Claimant Has Failed to Establish that Its Claim is Timely under NAFTA Articles 1116(2) and 1117(2)

95. The Tribunal does not have jurisdiction *ratione temporis* to hear this claim because the claim was submitted to arbitration outside the strict three-year limitation period prescribed by NAFTA Articles 1116(2) and 1117(2). The Claimant's attempts to circumvent the limitation period by appealing to past claims have no basis in NAFTA or the factual record.

1. NAFTA Articles 1116(2) and 1117(2) Establish a Strict Limitation Period

96. NAFTA imposes a strict three-year limitation period on claims under Chapter Eleven. A claim that fails to meet the requirements of Articles 1116(2) and 1117(2) will fall outside the jurisdiction of a tribunal constituted under NAFTA Chapter Eleven.[171] Articles 1116(2) and 1117(2) provide:

[170] Claimant's 2022 NOA, ¶¶ 108-110.

[171] The three NAFTA Parties agree that compliance with the limitation period is a condition of their consent to arbitration. *See e.g.* **R-097**, *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶ 5; **R-098**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 June 2017 ("*Resolute – U.S. 1128 Submission*"), ¶ 2; **R-093**, *Tennant – Second U.S. 1128 Submission*, ¶ 3; **R-094**, *Tennant – Second Mexico 1128 Submission*, ¶¶ 2-4, 8; **R-092**, *Tennant – Canada's Reply to 1128 Submissions*, ¶ 11. *See also* **RLA-001**, *WMH – Final Award*, ¶ 214 (stating that "significant weight" should be placed on the submissions of non-disputing NAFTA Parties, and acknowledging that the NAFTA Parties "have a unique perspective on how the NAFTA should be interpreted and also in recognition of the systemic interest of States in ensuring consistency of interpretation.")

> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> […]
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
>
> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
>
> […]
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

97. For claims by an investor on its own behalf, the limitation period begins when the claimant first acquires, or should have first acquired, knowledge of both the alleged breach and the alleged resulting loss. For claims by an investor on behalf of its enterprise investment, the limitation period begins when the enterprise first acquires actual or constructive knowledge. In order to be timely, a claim must be submitted to arbitration within three years of first acquiring actual or constructive knowledge of the alleged breach and loss arising from that breach.

98. The limitation period in Articles 1116(2) and 1117(2) is not subject to any suspension, prolongation or other qualification by a NAFTA Chapter Eleven tribunal.[172] Rather, it is a "clear and rigid" constraint on a tribunal's jurisdiction to hear a claim.[173]

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[172] All three NAFTA Parties agree. *See e.g.* **R-099**, *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Submission of the United States of America, 14 July 2008, ¶ 6; **R-100**, *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009 (concurring with the entirety of the submission of the United States of America dated 14 July 2008); **R-098**, *Resolute – U.S. 1128 Submission*, ¶ 6; **R-093**, *Tennant – Second U.S. 1128 Submission*, ¶ 4, **R-094**, *Tennant – Second Submission of the United Mexican States*, ¶ 9, **R-092**, *Tennant – Canada's Reply to 1128 Submissions*, ¶ 18.

[173] **RLA-023**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman – Award*"), ¶ 63 ("the Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension […], prolongation or other qualification.") *See also* **RLA-024**, *Grand River Enterprises Six Nations, Ltd., et al v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29; **RLA-007**, *Apotex I – Award on Jurisdiction*, ¶¶ 304, 327; **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 153 ("this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period".)

99. While the Claimant purports to acknowledge the requirements of Articles 1116(2) and 1117(2) in its 2022 NOA, it in fact searches for principles that are nowhere to be found in the treaty. First, it argues that the submission of its 2022 NOA should be deemed to "relate back" to the submission of the 2018 NOA, and that this "relating back" means that its 2022 NOA should be deemed timely.[174] There is no provision in NAFTA Articles 1116(2) or 1117(2) that would allow the assessment of the timeliness of one claim to stand in for the assessment of the timeliness of a separate claim.[175] The Claimant points to no authority in support of its "relating back" argument, because none exists.

100. Second, WCC argues that the limitation period in NAFTA Articles 1116(2) and 1117(2) should be tolled as a result of the *WMH* arbitration,[176] invoking "the tolling of a prescription period" as "a general principle of law recognized under Article 38(1) of the [*Statute of the International Court of Justice*]".[177] However, the Claimant has neither established the content of such a "general principle" nor articulated how or why it would displace NAFTA Articles 1116(2) and 1117(2).[178]

101. The text of these provisions is explicit and clear: "an investor may not make a claim" if more than three years have elapsed from the date it first acquired knowledge of the alleged breaches and resulting losses. This treaty language offers no room for reading in the unproven concept of tolling that the Claimant relies upon to circumvent NAFTA's limitation period. The unambiguous language of Articles 1116(2) and 1117(2) provides certainty, stability, and finality to respondent States.[179] In

[174] Claimant's 2022 NOA, ¶¶ 112-113. The 2018 NOA was submitted on November 19, 2018. The 2022 NOA was submitted on October 14, 2022.

[175] Moreover, as a factual matter, there is no prior WCC claim to which this current claim could "relate back". WCC voluntarily withdrew the 2018 NOA on July 23, 2019, thereby terminating that claim. *See* Section II.E.3 above.

[176] Claimant's 2022 NOA, ¶¶ 114-115.

[177] Claimant's 2022 NOA, ¶ 114. The Claimant elsewhere refers to an "equitable tolling doctrine recognized under international law". *See* Claimant's 2022 NOA, ¶ 112.

[178] *See* **RLA-025**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, ¶ 85 ("Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.") *See also* **RLA-026**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the CAFTA-DR, 31 May 2016, ¶ 192 (citing **RLA-023**, *Feldman – Award* with approval in interpreting the equivalent three-year limitation period in the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR") and noting that "[t]he limitation period clause is written in plain terms and does not contemplate the suspension or 'tolling' of the three-year period.")

[179] *See* **RLA-027**, *Mobil Investments Canada v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 146 ("By preventing claims being brought against a NAFTA Party after more than three

contrast, the Claimant's tolling argument would deprive Articles 1116(2) and 1117(2) of any purpose or utility. Indeed, a claimant could submit, then withdraw, then resubmit a claim after the limitation period expired, requiring respondent States to defend stale claims for the indefinite future. This is not the result the NAFTA Parties contemplated.

102. Moreover, the Claimant's specific assertions with respect to its proposed "suspension" of the limitation period for this claim blur the clear lines between separate arbitrations and separate claimants in a manner that is not permitted by Articles 1116(2) and 1117(2). For example, the Claimant asserts that its proposed suspension "began on November 19, 2018, when [WCC] filed a Notice of Arbitration and Statement of Claim against Canada in the First Arbitration, and ended on January 31, 2022, when the tribunal in the First Arbitration [*WMH*] issued its Final Award declining jurisdiction over the case."[180] But, as discussed above, WCC submitted its 2018 NOA and withdrew it in 2019 prior to the constitution of a tribunal.[181] The *WMH* arbitration resolved a separate claim made by a different claimant, WMH, in 2019,[182] and concluded with a final award in 2022.[183] The Claimant cannot simply merge different claims brought by different claimants to suit its litigation

years, it guarantees for all three States a degree of certainty and finality.) *See also* **RLA-016**, *Spence – Corrected Interim Award*, ¶ 208 (noting, with respect to the CAFTA-DR's equivalent limitation period provision, that: "[limitation periods] are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.")

[180] Claimant's 2022 NOA, ¶ 115.

[181] *See* ¶¶ 60-63 above, which set the record straight on the circumstances of the Claimant's withdrawal of its 2018 NOA. The Claimant also misrepresents Canada's position with respect to WCC's ability to pursue a claim, arguing that Canada "accepted that [WCC] would be entitled to bring a claim". Claimant's 2022 NOA, ¶ 115. The Claimant relies on a conditional statement by counsel for Canada in the *WMH* arbitration hearing on jurisdiction in answer to a question ("So, WCC could still be in a position to bring a claim on its own behalf." (emphasis added.)) *See* Claimant's 2022 NOA, ¶ 72 and fn. 65. Counsel for Canada was answering a general question about standing as between NAFTA Articles 1116(1) and Article 1117(1) in circumstances where an alleged investor disposed of its investment prior to the submission of a claim. As set out below, to have standing under NAFTA Article 1117(1), a claimant must own or control the enterprise on whose behalf it brings a claim at the time that it submits its claim to arbitration. However, as Canada's counsel recognized with the conditional "could still be in a position", any claimant bringing a claim under NAFTA Articles 1116(1) or 1117(1) must still meet all of the preconditions to consent set out in NAFTA Chapter Eleven and, since July 1, 2020, CUSMA Annex 14-C. Whether that has occurred can only be determined in the circumstances of a particular claim once it has been submitted to arbitration. As set out throughout this Memorial, the Claimant here has failed to establish that it meets the preconditions to consent set out in both CUSMA Annex 14-C and NAFTA Chapter Eleven.

[182] **RLA-001**, *WMH – Final Award*, ¶ 230

[183] **RLA-001**, *WMH – Final Award*. Even in 2019, the claims made by WMH concerning Alberta's decision to phase out emissions from coal-fired generating units in its 2015 Climate Leadership Plan fell outside of NAFTA Chapter Eleven's three-year limitation period. *See* **R-031**, *WMH – Statement of Defence*, ¶¶ 69-71.

strategy. Each claim submitted to arbitration under NAFTA Articles 1116 and 1117 must individually be assessed for its compliance with the jurisdictional requirements of NAFTA Chapter Eleven.

103. NAFTA Articles 1116(2) and 1117(2) are clear: a tribunal has jurisdiction *ratione temporis* over a claim only if the claimant and its enterprise investment first acquired knowledge of the alleged breaches and loss within three years of the submission of the claim to arbitration.

2. The Claim Falls Outside the Strict Limitation Period

104. WCC submitted this claim to arbitration on October 14, 2022.[184] For the claim to be timely, WCC or its enterprise investment must have first acquired knowledge of the alleged breaches and loss within three years of October 14, 2022 – that is, on or after the "critical date" of October 14, 2019. None of the Claimant's claims meets this requirement.

105. First, the Claimant alleges a breach of NAFTA Article 1102 and related loss arising out of Alberta's decision to phase out emissions from coal-fired electricity generation and Alberta's allocation of Transition Payments.[185] Alberta publicly announced its decision to phase out these emissions on November 22, 2015,[186] and its entry into the Off-Coal Agreements, which operationalized the Transition Payments, on November 24, 2016.[187] Both events are years before the critical date.

106. Second, the Claimant alleges breaches of NAFTA Article 1105 and related loss arising out of the same measures.[188] They are similarly outside the limitation period.

107. Third, the Claimant alleges two breaches of NAFTA Article 1110 and related loss arising out of: (1) Alberta's decision to phase out emissions from coal-fired electricity generation, combined

[184] Pursuant to NAFTA Article 1137(1)(c), this is the date that Canada received the 2022 NOA. *See* ¶ 74 and fn. 143 above. The Claimant instead posits that the date of the 2022 NOA is October 11, 2022. While the Claimant is incorrect, even using the Claimant's date, the claim falls outside the limitation period.

[185] Claimant's 2022 NOA, ¶¶ 76-80.

[186] **R-022**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015.

[187] **R-036**, Government of Alberta, Press Release, "Revised: Alberta announces coal transition action", 24 November 2016.

[188] Claimant's 2022 NOA, ¶¶ 81-88.

with Alberta's "punishing levies on coal"[189]; and (2) Alberta's allocation of Transition Payments, combined with "federal and provincial carbon taxes".[190] Alberta enacted the *Climate Leadership Act*, which introduced its levy on consumer fuels, on June 13, 2016.[191] Alberta's repeal of that legislation, which triggered the eventual application of Part I of the federal GGPPA in Alberta, occurred on May 30, 2019.[192] Canada enacted the *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)* on August 7, 2019, formally notifying the public on August 8, 2019 that Part I of the GGPPA would apply in Alberta.[193] In each case, knowledge of the alleged breach and loss occurred, or should have occurred, prior to the critical date of October 14, 2019.

108. The fact that all of the Claimant's claims are outside the limitation period is confirmed both by the Claimant's submission of the 2018 NOA, and its arguments in the claim before this Tribunal that its knowledge of the alleged breaches and losses should be related back to that claim. As noted above, there is no basis in NAFTA Articles 1116(2) and 1117(2) to allow the alleged timeliness of one claim (the 2018 NOA) to stand in for the alleged timeliness of another (the 2022 NOA). Moreover, as a matter of fact, the Claimant has demonstrated that it had the requisite knowledge at least by the time it submitted its 2018 NOA to arbitration on November 19, 2018, itself almost one year before the critical date for this claim.[194]

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[189] Claimant's 2022 NOA, ¶ 91.

[190] Claimant's 2022 NOA, ¶ 92.

[191] **R-028**, *Climate Leadership Act*. This carbon levy became effective on January 1, 2017. Canada notes that WCC's allegations with respect to the "carbon levies" appear to be based on the mistaken belief that consumer carbon levies (as opposed to carbon pricing under Alberta's SGER/CCIR) applied to coal mining and/or electricity generation. To the extent that WCC is alleging a violation of NAFTA on the basis of the adoption of the CCIR, the regulatory changes were announced as part of the Climate Leadership Plan on November 20, 2015 and the regulation came into force on January 1, 2018.

[192] **R-048**, *An Act to Repeal the Carbon Tax*, SA 2019, c. 1. Alberta's repeal of the *Climate Leadership Act*, and all subsequent acts related to the application of Part I of the federal GGPPA in Alberta took place after the Claimant disposed of its investments in Canada, on March 15, 2019. As a result, they cannot form part of any alleged breach of NAFTA obligations because the Claimant was not a protected investor to whom obligations were owed when they took place. *See* Section IV.D. Canada presents the dates here to illustrate that, even if they could constitute an alleged breach, knowledge of the alleged breach and loss would still have been first acquired more than three years prior to the submission of the 2022 NOA.

[193] **R-055**, Canada Gazette, Part II, Vol. 153, No. 17, *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)*, SOR/2019-294, 8 August 2019.

[194] This is further confirmed by the Claimant's insistence that in its 2022 NOA, it has "asserted the same claims against the Government of Canada" as in its withdrawn 2018 NOA (Claimant's 2022 NOA, fn. 72). In its bid to apply law that does not exist, the Claimant has also admitted that "only two years and eight months have elapsed since November 24, 2016, when Westmoreland and Prairie first acquired knowledge of Canada's breaches and of their resulting damages."

109. The record is clear: WCC and its investment had actual or constructive knowledge of all of the alleged breaches and losses prior to the critical date of October 14, 2019. As a result, the Tribunal lacks jurisdiction *ratione temporis* under NAFTA Articles 1116(2) and 1117(2).

B. The Claimant Has Failed to Meet the Conditions Precedent for Submission of a Claim to Arbitration under NAFTA Article 1121

110. The Tribunal also lacks jurisdiction *ratione voluntatis* over the claim because the Claimant has not complied with the formal waiver requirements of NAFTA Article 1121. Nor can WCC bring its claim on behalf of Prairie because Prairie waived its right to such a claim in the *WMH* arbitration. As a result, the Claimant has failed to establish that it meets the preconditions to Canada's consent to arbitrate. Its claim must be dismissed.

1. NAFTA Article 1121 Requires a Claimant and Its Enterprise to Waive Their Rights to Initiate or Continue Proceedings with Respect to the Measures Alleged to Violate NAFTA Chapter Eleven

111. Submitting and complying with an effective waiver under Article 1121 is among the pre-requisites to establish the consent of a NAFTA Party to arbitrate. As numerous tribunals have held, a claimant's failure to comply with the waiver requirement means a tribunal lacks jurisdiction.[195]

112. Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration", states:

> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(Claimant's 2022 NOA, ¶ 116 (emphasis added.)) Again, the Claimant has failed to establish the legal basis for its arguments. And, as a matter of fact, the Claimant has demonstrated that it had the requisite knowledge as of November 24, 2016, almost three years before the critical date for this claim.

[195] **RLA-028**, *Waste Management, Inc. v. United Mexican* States (ICSID Case No. ARB (AF)/98/2) Arbitral Award, 2 June 2000 ("*Waste Management I – Award*"), p. 239; **RLA-029**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 2 April 2015 ("*DIBC – Award*"), ¶¶ 291, 320, 336-337; **RLA-030**, *The Renco Group, Inc. v. The Republic of Peru* (UNCITRAL) Partial Award on Jurisdiction, 15 July 2016 ("*Renco – Partial Award*"), ¶ 73; **RLA-031**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) Award, 14 March 2011 ("*Commerce Group – Award*"), ¶¶ 79-80; **RLA-032**, *Railroad Development Corp. v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, 17 November 2008 ("*Railroad Development – Decision on Jurisdiction*"), ¶ 56.

> (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.[196]

113. Under Article 1121, NAFTA claimants must waive the right to initiate or continue "any proceedings" for payment of damages with respect to the respondent's measures that allegedly breach Chapter Eleven. Such a waiver continues to be in force following the end of the arbitral proceedings.[197]

114. The fora contemplated by Article 1121 are both: (1) administrative tribunals or courts under the law of any Party; and (2) other dispute settlement procedures. The only exceptions to the waiver requirement are those expressly set out in Article 1121 – 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.[198]

115. Compliance with Article 1121 entails both formal and material requirements.[199] On the formal requirements, the waiver "must be clear, explicit and categorical".[200] Under Article 1121(3), the waiver must be in writing, delivered to the disputing Party, and included in the submission of a claim to arbitration. For cases submitted under the UNCITRAL Rules, a claim is "submitted to arbitration"

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[196] Article 1121(2) contains the same condition precedent for a disputing investor filing a claim under Article 1117.

[197] *See e.g.* **RLA-030**, *Renco – Partial Award*, ¶ 78-83; **RLA-033**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Partial Award on Jurisdiction, 27 February 2004, ¶ 17; **R-101**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Reply Memorial On Jurisdiction and Admissibility, 6 December 2013, ¶ 70 ("The waiver required by Article 1121 must be legally enforceable now and in perpetuity so that a claimant cannot later pursue domestic proceedings for damages with respect to measures alleged to breach NAFTA even after the NAFTA arbitration is over. This is consistent with the ordinary meaning of the provision, which requires that a claimant make a clear choice between pursuing its claims under NAFTA or in domestic court – it cannot do both".)

[198] **RLA-029**, *DIBC – Award*, ¶ 293.

[199] **RLA-030**, *Renco – Partial Award*, ¶ 73. *See also* **RLA-028**, *Waste Management I – Award*, ¶ 20; **RLA-031**, *Commerce Group – Award*, ¶¶ 79-84.

[200] **RLA-028**, *Waste Management I – Award*, ¶ 18.

when the notice of arbitration is received by the disputing Party.[201] Hence, for a waiver to satisfy the requirements of Article 1121, it must be filed contemporaneously with the notice of arbitration and reflect the waiver of rights as of that date. As the United States noted in *Gramercy Funds v. Peru*, "[a]s the written waiver is to 'accompany' the Notice of Arbitration, it must be submitted at the same time as the Notice of Arbitration."[202]

116. On the material requirements, a claimant must act consistently and concurrently with the waiver by not initiating or continuing domestic or other dispute settlement proceedings for the payment of damages "with respect to the measure" alleged to breach NAFTA.[203] There is no end date to the commitment not to initiate such proceedings. If a claimant or its enterprise initiates or continues litigation "with respect to the measure" for payment of damages in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement.[204] As the *Waste Management I* tribunal stated:

> [T]he act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. […] [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver [...].[205]

[201] NAFTA, Article 1137(1)(c) ("A claim is submitted to arbitration under this Section when: […] (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.")

[202] **R-102**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2) Submission of the United States, 21 June 2019 ("*Gramercy Funds – U.S. Submission*"), ¶ 12. *See also* **RLA-029**, *DIBC – Award*, ¶ 295; **RLA-028**, *Waste Management I – Award*, ¶¶ 19, 24.

[203] **RLA-028**, *Waste Management I – Award*, ¶¶ 14, 20, 24; **RLA-031**, *Commerce Group – Award*, ¶¶ 79-80, 84, 102, 107.

[204] **RLA-031**, *Commerce Group – Award*, ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction.) *See also* **RLA-029**, *DIBC – Award*, ¶ 336.

[205] **RLA-028**, *Waste Management I – Award*, ¶ 24 (emphasis added).

117. Moreover, the three NAFTA Parties agree that the phrase "with respect to" in Article 1121 should be interpreted broadly.[206] NAFTA tribunals concur,[207] finding that the subject matter of overlapping proceedings need not be identical.[208] A broad construction of the phrase "with respect to" is also consistent with the purpose of Article 1121.[209] NAFTA and other tribunals confirm that Article 1121 aims: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple fora; to minimize the risk of double recovery; and to reduce the risk of conflicting outcomes (and thus legal uncertainty).[210] As such, tribunals should interpret Article 1121

[206] **RLA-034**, *KBR Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Final Award, 30 April 2015 [("*KBR – Award*"), ¶ 113 ("The Tribunal further observes that Respondent and the non-disputing NAFTA Parties concur in that the expression '*with respect to the measure*' should be broadly interpreted. Claimant has not disputed this view of the three NAFTA Parties. The Tribunal accepts that the formula 'with respect to' is wide. Its plain meaning is equivalent to 'relating to' or 'concerning,' terms used respectively in the United States' Statement of Administrative Action and Canada's Statement of Implementation."); **RLA-035**, *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 201. *See also* **R-103**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 February 2014, ¶ 6: ("As the United States has previously argued, the phrase 'with respect to' in Article 1121(b) should be interpreted broadly."); **R-104**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico, 14 February 2014, ¶ 8 ("Mexico agrees that all three Parties 'used the phrase 'with respect to' interchangeably with 'concerning'', which suggests a 'broad and general relationship.' Mexico also agrees with Canada's views expressed in this proceeding, that '[t]he ordinary meaning of the words 'with respect to' is 'as regards; with reference to,' not 'identical' or 'same as.'"); **R-105**, *KBR Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Submission of the Government of Canada, 30 July 2014, ¶¶ 7-11.

[207] **RLA-028**, *Waste Management I – Award*, ¶ 27. *See also* **RLA-034**, *KBR – Award*, ¶ 112 ("The *Waste Management I* tribunal points to the requirement that the *object* or better the subject matter of the parallel proceedings *'consist[] of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA*.' In other words, the measure that is alleged to be a breach in the NAFTA arbitration must fall within the subject matter of the parallel domestic or international proceedings. This interpretation comports with the natural and plain meaning of Article 1121 of NAFTA.")

[208] **RLA-034**, *KBR – Award*, ¶ 124 ("While the subject matters of the two proceedings […] are thus not identical, the Tribunal considers, as it has already clarified, that it should not adopt an excessively formalistic approach to the interpretation of Article 1121. Indeed, it should be guided by the purpose of that provision, which is to avoid conflicting outcomes, a waste of resources, and double recovery.")

[209] **RLA-028**, *Waste Management I – Award*, ¶ 27.

[210] **RLA-036**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 27; **RLA-037**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNICTRAL) Arbitral Award, 26 January 2006, ¶ 118; **RLA-034**, *KBR – Award*, ¶¶ 116, 124. The tribunal in *Commerce Group* observed that the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart." **RLA-031**, *Commerce Group – Award*, ¶¶ 111-112.

broadly by considering whether a parallel proceeding "fall(s) within the subject-matter of the NAFTA proceedings."[211]

118. Where a claimant fails to meet the formal and material requirements under Article 1121, the claimant cannot retroactively cure its non-compliance.[212] Nor can a tribunal remedy a defective waiver. Instead, only the respondent State holds the discretion to decide whether to permit a claimant to either proceed under, or remedy, an ineffective waiver.[213] This has been the longstanding position of the NAFTA Parties,[214] and affirmed by many tribunals.[215] Accordingly, without a respondent's

[211] **RLA-034**, *KBR – Award*, ¶ 116 ("The terms of Article 1121 do not suggest that a waiver be given only with respect to proceedings whose subject matter is 'identical' to the measures at issue in the NAFTA context. Rather, the measure(s) at issue in the parallel proceedings must fall within the subject-matter of the NAFTA proceedings. A narrow approach based on a formal identity of the measures would not comport with the object and purpose of this specific provision.")

[212] **RLA-034**, *KBR – Award*, ¶ 148 ("The practice of previous NAFTA tribunals adduced by the Parties in this case shows that the waiver may not be corrected in the course of the arbitration concerned unless the NAFTA Party consents to such correction."); **RLA-038**, *Bacilio Amorrortu v. Republic of Peru* (UNCITRAL) Partial Award on Jurisdiction, 5 August 2022 ("*Amorrortu – Partial Award on Jurisdiction*"), ¶ 237 ("granting leave to cure a defective waiver, over the objection of the Respondent, would be tantamount to the Tribunal creating consent to arbitration where no such consent existed when the Tribunal was constituted. The Tribunal simply fails to see how, despite having been constituted on the basis of an invalid arbitration agreement, and hence not having jurisdiction over the Parties from the beginning of these proceedings, it could purport to exercise a power to cure the Claimant's defective waiver over the objection of the Respondent, and thereby endow itself with jurisdiction.")

[213] **RLA-030**, *Renco – Partial Award*, ¶ 173; **RLA-032**, *Railroad Development – Decision on Jurisdiction*, ¶ 61; **RLA-028**, *Waste Management I – Award*, ¶ 31.

[214] *See e.g.* **R-106**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Counter-Memorial Regarding the Competence of the Tribunal, 5 November 1999, ¶¶ 25-30, 93-98; **R-107**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Submission of the Government of Canada, 17 December 1999, ¶¶ 8 and 11; **R-108**, *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America* (UNCITRAL) Statement of Defense on Jurisdiction of Respondent United States of America, 15 December 2004, ¶¶ 8-10; **R-109**, *KBR, Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Submission of the United States of America, 30 July 2014, ¶¶ 2-4. *See also* **R-102**, *Gramercy Funds – U.S. Submission*, ¶ 17 ("A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 10.18.2(b). However, the tribunal itself cannot remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State as a function of its general discretion to consent to arbitration. Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration. However, where a claimant files an effective waiver subsequent to the constitution of the tribunal, the only available relief (unless the respondent State agrees otherwise) is the dismissal of the arbitration, as the tribunal would have been constituted before the proper submission of the claim to arbitration, and thus without the consent of the respondent State as contemplated in Article 10.17.1 the tribunal would lack jurisdiction *ab initio*.") The text of Article 10.18.2(b) mirrors that of NAFTA Article 1121.

[215] *See e.g.* **RLA-029**, *DIBC – Award*, ¶ 321; **RLA-032**, *Railroad Development - Decision on Jurisdiction*, ¶ 61; **RLA-034**, *KBR – Award*, ¶ 148; **RLA-038**, *Amorrortu – Partial Award on Jurisdiction*, ¶¶ 237, 265.

consent, a claimant cannot cure a defective waiver. The tribunal must dismiss the claim for lack of jurisdiction.

2. The Claimant Has Not Met the Formal Requirements of Article 1121

119. The Claimant has not met the formal requirements of NAFTA Article 1121. On October 14, 2022, when WCC filed its NOA in this arbitration, it failed to provide contemporaneous waivers for both the Claimant and the enterprise (Prairie) as required by Articles 1121(1) and (2). Instead, WCC relies on waivers for itself and Prairie dated from 2018, which were filed with the 2018 NOA (the "2018 waivers").[216] WCC's reliance on waivers filed in a separate arbitration cannot establish Canada's consent to arbitrate this claim. Moreover, the Claimant failed to provide any evidence that the individuals who signed the 2018 waivers have the legal capacity to bind WCC and Prairie as of the date of the 2022 NOA, despite requests from Canada in this regard.[217]

120. On February 3, 2023, Canada wrote to the Claimant advising it that the 2018 waivers did not satisfy the requirements of Article 1121 as they were not filed contemporaneously with the 2022 NOA. Canada similarly asked for confirmation that the individuals who signed the 2018 waivers continued to have the capacity to sign waivers on behalf of both the Claimant and Prairie as of the 2022 NOA.[218] In response, the Claimant stated its belief that it does not need to file any waivers with the 2022 NOA as, in its view, the 2018 waivers are "still applicable and in effect"; since WCC and Prairie have already waived their rights, the Claimant maintained, they "do not need to do so again."[219] The Claimant is incorrect.

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[216] **C-040**, Prairie Mines Waiver, 19 November 2018; **C-041**, WCC Waiver, 19 November 2018. *See also* **R-091**, E-mail from Heather Squires, Government of Canada, to Javier Rubinstein, King & Spalding LLP, 21 February 2023.

[217] In fact, there is evidence that none of the individuals who signed the 2018 waivers retained the capacity to bind WCC or waive its legal rights as of the date of the 2022 NOA. *See e.g.* **R-069**, WCC Plan, Article IV.I.1, p. 79 of 165 (confirming that at the time the 2022 NOA was filed, the Plan Administrator "shall be the sole representative of, and shall act for, the Remaining WLB Debtors"). Mr. Jeffrey Stein, who did not sign either 2018 waiver, is the Plan Administrator. *See* **R-077**, *In re Westmoreland Coal Company, et al.,* Case No. 18-35672 (DRJ), Final Decree Closing the Chapter 11 Cases of WLB Reorganized Debtors to Claims (Court Docket, Doc. 3356), 29 December 2022, p. 1 of 3.

[218] **R-091**, E-mail from Heather Squires, Government of Canada, to Javier Rubinstein, King & Spalding LLP, 21 February 2023, p. 3 (E-mail from K. Zeman).

[219] **R-091**, E-mail from Heather Squires, Government of Canada, to Javier Rubinstein, King & Spalding LLP, 21 February 2023, p. 2 (E-mail from J. Rubinstein).

121. Waivers filed with a notice of arbitration for a separate claim to be brought to a different tribunal do not satisfy the requirements under Article 1121 for this claim. Accordingly, the Claimant's failure to file waivers that are contemporaneous with the 2022 NOA deprives this Tribunal of jurisdiction.

122. Further, the Claimant's attempt to overcome this result by arguing that the 2018 waivers can be relied upon for the purposes of meeting the requirements of Article 1121 in this arbitration is illogical. Indeed, if the 2018 waivers continued to be effective, they would operate to prohibit the Claimant's pursuit of this claim, the same way that Prairie's *WMH* waiver bars the claim brought on its behalf under Article 1117 in this arbitration (discussed further below in the next section). The 2018 waivers, if effective, would bar the Claimant's right to initiate or continue this claim, which is "with respect to the measures" alleged to breach the NAFTA in the 2018 NOA. The Claimant has not reconciled its arguments in this regard.

123. Neither the Claimant nor the Tribunal can retroactively perfect Canada's consent to jurisdiction due to the Claimant's failure to satisfy the requirements of Article 1121. At this point in the arbitration, Canada's consent is required to allow the Claimant to proceed under or rectify the waivers. Canada does not consent. As such, the only remedy available to this Tribunal is the complete dismissal of the Claimant's claim under both Articles 1116 and 1117 for want of jurisdiction.

3. The Claimant Cannot Bring Its Article 1117 Claim Because Prairie Waived Its Rights To Such a Claim in a Prior Arbitration

124. Separate and distinct from the issue above, the Tribunal also lacks jurisdiction over WCC's Article 1117 claim on behalf of Prairie because Prairie is bound by the waiver it signed in the *WMH* arbitration. In *WMH*, Prairie submitted the following waiver:

> Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, Prairie Mines & Royalty ULC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to the measures of the Government of Canada (and its Province, Alberta) that are alleged to be a breach referred to in Articles 1116 and 1117, 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 Canada.[220]

125. As explained above, a claimant and its enterprise must meet the material requirements of Article 1121 by acting consistently and concurrently with any waiver. This includes refraining from initiating or continuing any proceedings for the payment of damages "with respect to the measure" alleged to breach NAFTA.[221] In this case, Prairie's *WMH* waiver bars WCC from bringing a claim on behalf of Prairie under Article 1117.

126. First, Prairie's *WMH* waiver continues to be in force. There is no basis in the text of Article 1121 to qualify the temporal scope of a waiver provided under Article 1121. An effective waiver thus bars, for example, future proceedings which may be "initiated" by an investor if a tribunal were to decide that it lacked jurisdiction or that a claimant's claim was inadmissible.[222]

127. Second, the term "or other dispute settlement procedures" in Article 1121 necessarily includes other investment arbitrations, including other disputes brought under NAFTA Chapter Eleven. Thus, Prairie's *WMH* waiver extends to the claim before the Tribunal.

128. Third, Prairie's *WMH* waiver is "with respect to the measures" alleged to breach NAFTA Chapter Eleven in the 2022 NOA. In fact, the allegations with respect to Alberta's 2015 Climate Leadership Plan in the 2022 NOA and those found in the *WMH* proceeding are identical.[223] Indeed, the Claimant confirms in its 2022 NOA that "the present arbitration is within the terms of the waivers previously executed by Westmoreland and Prairie".[224] The Claimant also notes that in the current claim, it "has made no change to either the claims asserted with respect to the measures that are

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[220] **R-085**, *WMH – 2019 NOA,* Exhibit C-001, Prairie Mines Waiver, 12 November 2018, p. 42 of 45.

[221] **RLA-028**, *Waste Management I – Award*, ¶¶ 14, 20, 24; **RLA-031**, *Commerce Group – Award*, ¶¶ 79-80, 84, 102, 107.

[222] **RLA-030**, *Renco – Partial Award*, ¶ 83.

[223] Compare Claimant's 2022 NOA, ¶¶ 78-88 with **R-085**, *WMH – 2019 NOA*, ¶¶ 91-110.

[224] *See* Claimant's 2022 NOA, fn. 72. The Claimant misleadingly uses "Westmoreland" in the 2022 NOA without distinguishing between Westmoreland Coal Company and Westmoreland Mining Holdings LLC. It similarly does not draw a distinction between the first claim by WCC which was withdrawn in 2019, and the claim filed by WMH, instead referring to them both as the "First Arbitration". Canada clarifies these facts for the Tribunal by referring to the factually correct claim, as well as the correct legal entity that brought each claim. Only the WMH claim proceeded to arbitration. The first WCC claim was withdrawn by the Claimant prior to the constitution of a tribunal.

alleged to be breaches of NAFTA Articles 1116 and 1117 or the dispute settlement procedures identified by Westmoreland in the First Notice of Arbitration (i.e. the UNCITRAL Rules)."[225] On the Claimant's own admissions, both the WMH NOA and the claim before this Tribunal relate to the same "claims, facts and harms".[226]

129. As such, the Claimant's Article 1117 claim on behalf of Prairie is barred due to the waiver that Prairie signed in the *WMH* arbitration and must be dismissed in its entirety.

C. The Claimant Has Failed to Establish That It Is Entitled to Bring Its Claim Under NAFTA Articles 1116(1) and 1117(1)

130. Even if the Tribunal finds that the claim can proceed despite the Claimant's failure to comply with Articles 1116(2), 1117(2), and 1121, WCC lacks standing to bring the claim under both Articles 1116(1) and 1117(1). As such, the Tribunal does not have jurisdiction *ratione personam* and the claim must be dismissed.

1. WCC Has Failed to Plead a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

131. NAFTA Article 1116(1) permits an investor to file a claim "on its own behalf" alleging that a Party has breached an obligation under Section A of Chapter Eleven and "that the investor has incurred loss or damage" (emphasis added). To establish standing under Article 1116(1), WCC must establish on a *prima facie* basis that it has itself incurred loss or damage from the alleged breaches of NAFTA. It has failed to do so.[227]

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[225] Claimant's 2022 NOA, fn. 72.

[226] Claimant's 2022 NOA, ¶ 13 ("The facts of this case are not new to Canada. They are related to an earlier arbitration in which Canada successfully argued that WMH – which attempted to purchase Westmoreland's NAFTA claim in U.S. bankruptcy proceedings – had no standing. This Notice of Arbitration relies on the same or related claims, facts, and harms of which Westmoreland and its purported successor-in-interest, Westmoreland Mining Holdings LLC ("WMH"), put Canada on notice no later than 2018 in ICSID Case No. UNCT/20/3.") The Claimant's 2022 NOA further alleges that "the imposition of carbon charges" by Alberta and Canada violates NAFTA Article 1110 as the charges "rendered thermal coal economically unviable well before 2030". Claimant's 2022 NOA, ¶ 11. The Claimant's Article 1110 allegations inextricably link these measures to Alberta's 2015 Climate Leadership Plan and 2016 allocation of Transition Payments. *See* Claimant's 2022 NOA, ¶¶ 90-91 (arguing that these measures "combined" breach Article 1110, and referring to them all as a single "regulatory scheme to phase out coal by 2030.") These measures cannot be separated out for the purposes of evading the requirements of Article 1121.

[227] **RLA-001**, *WMH – Final Award*, ¶ 231; **RLA-012**, *Tennant – Award*, ¶ 433 ("even if it were *not* necessary for the purposes of Article 1116(1) for the Claimant to hold a qualifying interest at the time of the breach, the Claimant has not

132. Articles 1116(1) and 1117(1) constitute two strictly separate standing provisions that address discrete, non-overlapping types of injury. The ordinary meaning of Article 1116(1) is that a claimant may bring a claim under Article 1116(1) where it seeks to recover damages for alleged losses that it incurred directly from the challenged measure, including as a shareholder. Direct losses to a shareholder may arise where the challenged measure interfered with the shareholder's rights to dividends or to participate in shareholder votes.[228] By contrast, where the claimant seeks to recover damages for alleged losses that it incurred indirectly through an enterprise investment, it must bring a claim under Article 1117(1), with any monetary damages paid to the enterprise.[229] Indirect losses may arise where the claimant alleges that interference with the enterprise's rights or assets led to economic effects, such as a diminution in share value. Article 1116(1) does not grant a shareholder claimant standing to allege a breach of obligations owed to the enterprise or to claim reflective losses – that is, harm to the enterprise's rights or assets that led indirectly to economic effects for the investor.[230]

133. Permitting claims of reflective loss under Article 1116(1) would render Article 1117(1) ineffective by eliminating its strict distinction from Article 1116(1).[231] It would also undermine NAFTA's objectives to ensure a predictable commercial framework and investor protection.[232] Advanced domestic legal systems prohibit claims of reflective loss to maintain the corporation's separate legal personality.[233] Allowing shareholders to personally recover damages under NAFTA

proved, on a *prima facie* basis, that it had itself incurred any incidence of loss or damage by reason of or arising from the Respondent's alleged breach, which occurred prior to the Claimant becoming an investor and acquiring an investment. This means that a condition under Article 1116(1) of the NAFTA is not satisfied, and consequently, that the Tribunal lacks jurisdiction to hear the claim.") (emphasis in original.)

[228] **RLA-039**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970 ("*Barcelona Traction*"), ¶ 47.

[229] Article 1135(2)(b).

[230] **RLA-040**, *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*"), ¶ 389 ("Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116.")

[231] **RLA-040**, *Bilcon – Award on Damages*, ¶ 372.

[232] NAFTA Preamble. *See also* NAFTA Article 102 (Objectives).

[233] **RLA-041**, David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, No. 2013/03, OECD Investment Division, pp. 8, 15-17.

for the enterprise's losses would create a contradictory commercial framework, and undercut investor protection by reducing assets available to creditors and other shareholders.[234]

134. Customary international law upholds the corporation's separate legal personality and with it, the general rule against reflective loss.[235] Nothing in the text of Article 1116(1) indicates that the NAFTA Parties intended to derogate from customary international law.[236] Instead, the long-standing and consistent understanding of the Parties that Article 1116(1) does not offer standing to claim reflective loss establishes subsequent agreement and practice to properly interpret the provision.[237]

135. The Claimant's damages claim is brief and under-developed.[238] WCC purportedly seeks "[c]ompensation for the damages caused to Westmoreland and Prairie by Canada's actions that are in breach of its obligations".[239] WCC advances three overarching alleged losses. First, "Alberta's decision to phase out coal by 2030, and its subsequent decision to implement a carbon charge (later supplemented by the federal government's minimum carbon charges), led Canadian coal-fired generation utilities to accelerate the closure of coal-fired generation units and/or convert them to

[234] **RLA-042**, David Gaukrodger, Chapter 8, The impact of investment treaties on companies, shareholders and creditors, OECD Business and Finance Outlook 2016, p. 235.

[235] **RLA-039**, *Barcelona Traction*, ¶ 38; **RLA-043**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (I.C.J. Reports 2010) Judgment, 30 November 2010, ¶¶ 103-105; **RLA-044**, Zachary Douglas, *The International Laws of Investment Claims* (Cambridge University Press, 2009) [Excerpt], ¶¶ 786, 791-798; **RLA-040**, *Bilcon – Award on Damages*, ¶ 373.

[236] **RLA-045**, *Loewen Group Inc. v. United States* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 ("*Loewen – Award*"), ¶ 160.

[237] **R-110**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 18 September 2001, ¶¶ 6-10; **R-111**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Seventh Submission of the United States of America, 6 November 2001, ¶¶ 2-10; **R-112**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Submission of the United States of America, 30 June 2003, ¶¶ 2-18; **R-113**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Statement of Defense, 24 November 2003, p. 59, fn. 158; **R-114**, *International Thunderbird Gaming Corp. v. United Mexican States* (UNCITRAL) Submission of the United States of America, 21 May 2004, ¶¶ 4-9; **R-115**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 29 December 2017, ¶¶ 4-22; **R-116**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Third U.S. 1128 Submission, 21 December 2018, ¶ 7. Under Article 31(3)(a) and (b) of the *Vienna Convention on the Law of Treaties* ("VCLT"), the Tribunal must take into account the NAFTA Parties' common understanding, and should give it considerable weight. **RLA-040**, *Bilcon – Award on Damages*, ¶ 379.

[238] The Claimant's 2022 NOA contains two short paragraphs on damages. In its "relief sought", WCC says it will quantify its alleged damages later in the proceedings. Claimant's 2022 NOA, ¶¶ 94, 95, 123(i).

[239] Claimant's 2022 NOA, ¶ 123.

natural gas sooner than 2030".[240] Second, provincial and federal governments allegedly eliminated the market for thermal coal, reducing revenues post-2030. Third, the challenged measures allegedly accelerated mine reclamation costs. WCC says these measures "essentially left Westmoreland with worthless interests" in the mines.[241]

136. Yet each of these alleged losses appears, at most, to be an indirect result of the alleged breaches on Prairie's rights and assets. WCC has not advanced a *prima facie* claim that the alleged breaches led to direct loss to WCC – instead of economic effects incidental to the alleged losses of Prairie. Since reflective loss to an investor's interests in an enterprise investment is not cognizable under Article 1116(1), WCC has not plead a *prima facie* claim of damage. As a result, the Tribunal does not have jurisdiction over WCC's Article 1116(1) claim.

2. WCC Did Not Own or Control Prairie When WCC Submitted Its NAFTA Article 1117(1) Claim to Arbitration

137. WCC also cannot establish the Tribunal's jurisdiction over its Article 1117(1) claim because it did not own or control the enterprise investment when it filed its 2022 NOA. Article 1117(1) states:

> An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. (emphasis added.)

138. The proper interpretation of Article 1117(1) is that a claimant has no standing to bring a claim on behalf of an enterprise that the claimant does not "own or control" at the time it submits the claim to arbitration.[242] The ordinary meaning of Article 1117(1) is unambiguous: an investor of a Party

[240] Claimant's 2022 NOA, ¶ 94.

[241] Claimant's 2022 NOA, ¶ 94.

[242] *See* VCLT, Article 31.

"may submit to arbitration" a claim on behalf of an enterprise only if the investor "owns or controls" the enterprise. The use of the present tense ("owns" or "controls")[243] rather than the past tense ("owned" or "controlled") leaves no room to interpret the provision as allowing claims on behalf of an enterprise the claimant no longer owns or controls when it submits the claim.[244]

139. The NAFTA Parties were live to temporal tenses in the drafting of NAFTA Chapter Eleven. For example, Article 1139 defines the term "investor" to capture three temporal tenses: an investment that the investor (a) seeks to make; (b) makes; or (c) has made.[245] This demonstrates the NAFTA Parties' cognizance of temporal considerations when defining the relationship between an investor and its investment. In Article 1117(1), the NAFTA Parties deliberately used the present tense – "that the investor owns or controls" – and in so doing excluded investments that the investor previously but no longer owns or controls.

140. WCC did not own or control the enterprise on whose behalf it brings an Article 1117 claim when WCC filed its NOA on October 14, 2022. WCC owned Prairie until March 15, 2019, when it

[243] The French and Spanish versions of Article 1117(1) also use the present tense in requiring that the investor "owns or controls" the investment. The French version uses "[u]n investisseur d'une Partie, agissant au nom d'une entreprise d'une autre Partie qui est une personne morale que l'investisseur possède ou contrôle directement ou indirectement" (emphasis added). The Spanish version uses "en representación de una empresa de otra Parte que sea una persona moral propiedad del inversionista o que esté bajo su control directo o indirecto" (emphasis added).

[244] *See* **RLA-046**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019, ¶¶ 148-152 (stating that Article 1117(1) "uses the present tense: an investor may make a claim 'on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly'. Thus, the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf. The drafters of the Treaty could have said an enterprise 'that the investor owned or controlled at the time of the alleged breach'. They chose not to. Similarly, Article 1121(1)(b) requires that an investor submitting a claim to arbitration '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 proceedings before any domestic forums. Again, the Treaty clearly envisages that the investor own or control the enterprise at the time arbitration is commenced. The drafters of the Treaty could have used the past tense; they chose not to. These textual points alone are, in the Tribunal's mind, dispositive: disregarding that unequivocal direction in the text of the Treaty would offend the principles of interpretation of the VCLT that the Tribunal must apply. […] [W]here the investor no longer owns or controls the enterprise at the time of submission of the claim, it can no longer pursue an Article 1117 claim 'on behalf of' that enterprise.") (emphasis in original.) *See also* **R-117**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Second Submission of the United States of America, 17 August 2018, ¶¶ 3, 5, 6. ¶ 5 ("an investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration.") (emphasis in original.) Moreover, the tribunal in *Loewen v. United States of America* held that it lacked jurisdiction over Raymond Loewen's Article 1117 claim because he could not show the requisite ownership or control at the time the claim was submitted to arbitration. **RLA-045**, *Loewen – Award*, pp. 69-70.

[245] NAFTA Article 1139 ("**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".)

sold Prairie to WMH. This fact is undisputed. Consequently, the Tribunal has no jurisdiction to hear the Article 1117(1) claim on behalf of Prairie.

141. In combination with WCC's failure to establish standing under Article 1116(1), the Tribunal does not have jurisdiction over any of WCC's claims for a violation of NAFTA Chapter Eleven.

D. The Claimant Has Failed to Establish the Requirements of NAFTA Article 1101(1) with Respect to the Federal Fuel Charge

142. Even if the Tribunal finds that the claim can proceed despite the Claimant's failure to comply with Articles 1116, 1117, and 1121, the Tribunal also lacks jurisdiction *ratione materiae* over the aspects of the claim pertaining to the Federal Fuel Charge.[246] The Federal Fuel Charge does not "relate to" WCC or its alleged investments – as Article 1101(1) requires – because the measure did not begin to apply in Alberta until after WCC had already disposed of those investments. By that point, WCC no longer qualified as a protected "investor" with an "investment" in Canada.

1. Article 1101(1) Requires a Legally Significant Connection between the Measure Alleged to Constitute a Violation and a Claimant or Its Investment

143. As noted above, Article 1101 (Scope and Coverage) is the gateway to NAFTA Chapter Eleven.[247] To establish a tribunal's subject matter jurisdiction under Chapter Eleven, a claimant must show that a Party adopted or maintained a measure and that the measure "relates to" an investor or its investment.[248] All three NAFTA Parties agree that the relationship or connection required by the term "relates to" must be "legally significant" – a mere effect on a claimant or its investment is insufficient.[249] NAFTA tribunals have also required a "legally significant connection" between the

[246] *See e.g.* Claimant's 2022 NOA, ¶ 92 (alleging that "Alberta, through its payments to coal-fired electricity units, combined with federal and provincial carbon taxes that hiked the price of coal" violated NAFTA Article 1110).

[247] *See e.g.* **RLA-010**, *Grand River – Award*, ¶ 76 ("As other NAFTA tribunals have noted, NAFTA's Article 1101 defines the field of application of NAFTA's Chapter 11, and operates as 'gateway' to NAFTA arbitration.")

[248] Article 1101(1) (Scope and Coverage) ("This Chapter 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; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.") *See also* **RLA-020**, *Kinnear*, p. 1101-2C. The Claimant must also establish that it held an "investment" as that term is defined in NAFTA Article 1139. *See* ¶ 94 of Section IV above.

[249] *See* **R-118**, *Methanex Corporation v. United States of America* (UNCITRAL) Second Submission of Mexico Pursuant to NAFTA Article 1128, 15 May 2001, ¶¶ 4, 6-7 ("The United States contends that this language requires that there be a

impugned measure and the particular claimant or its investment to determine whether a given measure "relates to" an investor or its investment as required by Article 1101(1).[250]

144. In assessing the requirements of Article 1101(1), tribunals should ask "whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment".[251] This requires the impugned measure to have had an "immediate and direct effect" on the claimant or its investment.[252] While a measure need not have targeted the specific claimant or its investment, nor imposed legal penalties or prohibitions on the investor or investment itself, a measure that merely affects an investor or its investment in a tangential or consequential manner does not suffice.[253]

145. If a claimant does not qualify as a protected "investor" with a protected "investment" when the respondent adopted the challenged measure, the claimant cannot establish the requisite "immediate and direct effect" of the challenged measure on the claimant or its investment. In fact, the claimant cannot meet the express terms of Article 1101, because the challenged measure would not "relate to" the "investor" that filed the claim or its investment.

'legally significant connection between the complained of measures and the specific investor […] or its investments' […] Mexico agrees with the position of the United States, and disagrees with Methanex's contention that measures that merely 'affect' investors or investments are covered by Chapter Eleven"); **R-119**, *Methanex Corporation v. United States of America* (UNCITRAL) Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, pp. 48-49 ("Measures of general applicability – especially ones such as those at issue here that are aimed at the protection of human health and the environment – are, by their nature, likely to affect a vast range of actors and economic interests. Given the potential of such measures to affect enormous numbers of investors and investments, with respect to any such specific measure, there must be a legally significant connection between the measure and a claimant investor or its investment"); **R-120**, *Methanex Corporation v. United States of America* (UNCITRAL) Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, ¶ 23 ("Canada agrees with the United States that the term 'relating to' requires a 'significant connection between the measure at issue and the essential nature of the investment.'")

[250] **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 242, citing **RLA-017**, *Methanex – Partial Award*, whose approach was adopted in **RLA-009**, *Bayview – Award*, ¶ 101; **RLA-022**, *Cargill – Award*, ¶ 174; **RLA-019**, *Apotex II – Award*, ¶ 6.13; **RLA-047**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶ 240; and **RLA-006**, *Mesa – Award*, ¶ 259.

[251] **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 242.

[252] **RLA-001** *WMH – Final Award*, ¶¶ 207, 212; **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 244; **RLA-022**, *Cargill – Award*, ¶ 175; **RLA-019**, *Apotex II – Award*, ¶¶ 6.22-6.24.

[253] **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 242. *See also* **RLA-017**, *Methanex – Partial Award*, ¶¶ 142, 147.

2. There Is No Legally Significant Connection Between the Federal Fuel Charge and WCC or Its Alleged Investments

146. The Claimant alleges that the federal "carbon charge"[254] played a role in "depriv[ing] Westmoreland of the value of its investments in the Mines."[255] However, Canada enacted the regulations to apply the Federal Fuel Charge under Part I of the GGPPA in Alberta on August 7, 2019, and they came into force on January 1, 2020.[256] By the time of their enactment and entry into force, the Claimant had already disposed of its investments in Canada. As set out above, WCC sold all of its Canadian assets to WMH on March 15, 2019.[257] Accordingly, there is no connection – much less the legally significant one required by Article 1101(1) – between the Federal Fuel Charge under Part I of the GGPPA and the Claimant or its alleged investments. Consequently, the Tribunal does not have jurisdiction to consider any of the Claimant's allegations of a NAFTA violation that involve the Federal Fuel Charge.

V. CANADA'S RESPONSE TO THE CLAIMANT'S NOTICE OF ARBITRATION

147. In its 2022 NOA, WCC alleges that Canada violated NAFTA Articles 1102, 1105, and 1110, and that it or an enterprise it once owned suffered certain unspecified damages as a result. Canada has not violated NAFTA Chapter Eleven, and maintains that the Claimant's damages claim is flawed. In accordance with Procedural Order No. 1, Canada provides in this section a brief response to WCC's merits allegations. Canada will address WCC's case on liability and damages in full at a later phase of the proceedings, if necessary. For the avoidance of doubt, none of the issues covered in this Section V should be addressed in the jurisdictional phase of the arbitration.

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[254] The Claimant variously refers to the provincial and federal fuel charges in its 2022 NOA as "carbon pricing regulations", "carbon charges", "levies on carbon emissions", and "carbon taxes". *See e.g.* Claimant's 2022 NOA, ¶¶ 9, 58, 61, 90-92. In addition, the Claimant has characterized the GGPPA in its 2022 NOA as imposing a "carbon charge" or "minimum federal charges," without distinguishing between the Federal Fuel Charge under Part I and the OBPS under Part II of the GGPPA. This distinction is discussed in Section II.C above.

[255] Claimant's 2022 NOA, ¶ 92.

[256] Section II.C above; **R-055**, Canada Gazette, Part II, Vol. 153, No. 17, *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)*, SOR/2019-294, 8 August 2019. The Claimant does not dispute the fact that the Federal Fuel Charge under Part I of the GGPPA began to apply in Alberta on January 1, 2020. *See* Claimant's 2022 NOA, ¶ 57.

[257] Section II.D.2 above.

A. Canada Has Not Violated NAFTA Article 1102

148. The Claimant alleges that Canada violated NAFTA Article 1102 because Alberta provided Transition Payments to owners of coal-fired electricity generating units, but did not provide the Claimant or its investment at the time with a payment.[258] However, NAFTA Article 1108(7)(b) excludes "subsidies or grants provided by a Party" from the application of Article 1102.[259] The voluntary Transition Payments are "subsidies or grants provided by a Party".[260] Therefore, Article 1102 does not apply to them. WCC's Article 1102 claim fails on this basis alone.

149. Even if Article 1102 did apply, Canada's actions are fully consistent with the national treatment obligation. The Claimant has failed to meet its burden under Article 1102 to prove that: (1) Alberta accorded "treatment" to the Claimant or its former investment by making the Transition Payments; (2) Alberta accorded the alleged treatment "in like circumstances" to appropriate domestic comparator investors or investments; and (3) the treatment accorded to the Claimant or its former investment was "less favourable" than the treatment accorded to appropriate domestic comparators.

150. To illustrate, neither the Claimant nor its former investment were accorded treatment "in like circumstances" to ATCO, Capital Power, and TransAlta. These three enterprises are owners of electricity generating units that are fundamentally unlike coal mines. ATCO, Capital Power, and TransAlta received Transition Payments as electricity market participants to facilitate Alberta's transition to lower emitting forms of electricity generation while maintaining the reliability of the electricity system. Providing payments to owners of interests in coal mines (such as WCC, Altius, Sunhills Mining LP, and Capital Power) would not have advanced that legitimate public policy objective.[261] Nor were the Claimant or its former investment accorded less favourable treatment than Canadian investors and their investments. No individual or company – Canadian (including Capital

[258] Claimant's 2022 NOA, ¶¶ 78-79.

[259] NAFTA Article 1108(7)(b) ("Articles 1102, 1103 and 1107 do not apply to: […] (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.")

[260] For example, the payments were made pursuant to the **R-038**, *Energy Grants Regulation*, Alberta Regulation 103/2003, s. 2. *See also* **R-039**, Government of Alberta, Grant payments disclosure table, "CLP Coal Generation Transition", "Energy General Armed" [Excerpts], available at: https://www.alberta.ca/grant-payments-disclosure-table.aspx (listing the payments under the Government of Alberta's "grant payments disclosure table".)

[261] *See* Section II.B.3 above.

Power and TransAlta) or American – received any payment relating to any coal mine interest or asset under Alberta's 2015 Climate Leadership Plan or any of the other impugned measures.[262]

B. Canada Has Not Violated NAFTA Article 1105

151. The Claimant also alleges that Alberta's 2016 allocation of Transition Payments was "arbitrary and grossly unfair" in violation of NAFTA Article 1105.[263] The Claimant has not met the high threshold required to demonstrate a breach of Article 1105. Alberta's decision to grant Transition Payments to the owners of generating units was neither arbitrary nor grossly unfair – it was tied to the rational policy objective of ensuring that Albertans would have access to reliable and affordable electricity as Alberta's electricity sector transitioned to cleaner energy. Nor was the Claimant or its former investment "arbitrarily or uniquely excluded"[264] from receiving payment. As stated above, no individual or company, Canadian or American, received a Transition Payment in relation to any coal mine interest or asset.

152. The Claimant's allegation that Alberta's 2015 decision to phase out emissions from coal-fired electricity generation breached Article 1105 because it was contrary to the Claimant's "reasonable expectations regarding its investments in Canada"[265] must also be rejected. NAFTA tribunals have consistently confirmed that the customary international law minimum standard of treatment does not require a State to fulfill an investor's alleged "expectations".[266] NAFTA Article 1105 is not a guarantee of future investment returns, nor does it impose an obligation on the State to maintain an existing regulatory framework.[267] In any event, the Claimant could not have reasonably expected,

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[262] *See e.g.* **R-043**, Letter from The Hon. Deron Bilous, Ministry of Economic Development and Trade, Government of Alberta to John Schadan, Westmoreland Coal Company, 6 June 2017, p. 1.

[263] Claimant's 2022 NOA, ¶¶ 83-85.

[264] Claimant's 2022 NOA, ¶ 83.

[265] Claimant's 2022 NOA, ¶¶ 86-87.

[266] *See e.g.* **RLA-048**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012 ("*Mobil I – Decision*"), ¶ 153; **RLA-049**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 620. All three NAFTA Parties agree on this point. *See e.g,* **R-121**, *Windstream Energy, LLC v. Canada* (UNCITRAL) Submission of the United States of America, 12 January 2016, ¶¶ 16-17; **R-122**, *Windstream Energy, LLC v. Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 12 January 2016, ¶¶ 6-7; **R-123**, *Windstream Energy, LLC v. Canada* (UNCITRAL) Canada's Reply to the 1128 Submissions of the United States and Mexico, 29 January 2016, ¶¶ 32-36.

[267] **RLA-048**, *Mobil I – Decision*, ¶ 153.

and did not in fact expect,[268] that the 2012 Federal Emissions Regulations would provide a guarantee for a return on its investment in coal mines in Canada. Any informed investor would also have known that provinces have the authority to regulate emissions within their borders and that Alberta was contemplating stricter emissions regulations.[269]

C. Canada Has Not Violated NAFTA Article 1110

153. The Claimant further alleges two violations of NAFTA Article 1110. First, WCC alleges that Alberta's decision to allocate Transition Payments, combined with what WCC defines as "federal and provincial carbon taxes" deprived it of the "value of its investments in the Mines between 2017 and 2030."[270] Second, WCC alleges that Alberta's 2015 Climate Leadership Plan decision to phase out emissions from coal-fired electricity generation, combined with Alberta's "levies" on coal, deprived it of "the value of its investments".[271] Both allegations must be rejected.

154. The Claimant has failed to identify the specific investment alleged to have been expropriated, as required under NAFTA Article 1110.[272] Moreover, it has failed to establish that the measures of which it complains constitute an indirect expropriation.[273] Determining whether an indirect expropriation has occurred requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, though the fact of adverse effect on the economic value of an investment alone does not establish an indirect expropriation has occurred; (ii)

[268] *See e.g.* **R-124**, Westmoreland Coal Company, 2013 Annual Report, 28 February 2014 [Excerpt], p. 29 ("As it is unclear at this time what shape additional regulation in Canada will ultimately take, it is not yet possible to estimate the extent to which such regulations will impact the Sherritt Assets to be acquired by us. However, those assets involve large facilities, so the setting of emissions targets […] may well affect them and may have a material adverse effect on our business, results of operations and financial performance. […] For example, laws or regulations regarding GHGs could result in fuel switching from coal to other fuel sources by electricity generators, or require us, or our customers, to employ expensive technology to capture and sequester carbon dioxide."); **R-058**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 31.

[269] *See e.g.* the discussion of the SGER in **R-124**, Westmoreland Coal Company, 2013 Annual Report, 28 February 2014 [Excerpt], p. 29.

[270] Claimant's 2022 NOA, ¶ 92.

[271] Claimant's 2022 NOA, ¶ 91.

[272] Canada notes that Prairie continued operations after WCC sold it to WMH.

[273] The Claimant does not allege a direct expropriation.

the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.[274]

155. The Claimant incorrectly focuses exclusively on the alleged economic impact of the impugned measures. Even then, it does not establish that the entire value of its investment at the time was destroyed (it was not). Moreover, the Claimant has not pointed to any distinct, reasonable investment-backed expectations with which any of the measures could have interfered in the highly regulated area of electricity generation and emissions reduction. WCC's own public statements in 2014 and 2015 to its investors explained the uncertainty surrounding the future of GHG regulations with respect to its interests in Alberta.[275] Finally, all of the impugned measures, individually and collectively, were non-discriminatory regulatory measures designed and applied to protect legitimate public welfare objectives: protection of the environment and of human health. For example, all emissions from coal-fired electricity in Alberta will be phased out, and no investors with interests in coal mine assets received Transition Payments. The measures' character was not expropriatory. As such, the impugned measures did not, individually or collectively, constitute an indirect expropriation.

D. The Claimant Is Not Entitled to Damages

156. The Claimant alleges that "Canada's actions at the provincial and federal levels eliminated the market for thermal coal, and essentially left [WCC] with worthless interests in the Genesee, Sheerness, and Paintearth mines, while saddling [WCC] with significant reclamation costs."[276] It has not yet quantified those damages.[277] The Claimant's damages claim is without merit.

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[274] NAFTA Article 1110 reflects customary international law, which in turn recognizes that a host State is not required to compensate an investor for any loss sustained by the imposition of a non-discriminatory regulatory measure designed and applied to protect legitimate public welfare objectives. *See e.g.* **RLA-050**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, ¶ 7; **RLA-051**, *S.D. Myers v. Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶¶ 281-282. The NAFTA Parties' shared understanding that such measures do not constitute indirect expropriations, except in rare circumstances which are not present here, is reflected in CUSMA Annex 14-B (Expropriation), ¶ 3.

[275] *See* **R-124**, Westmoreland Coal Company, 2013 Annual Report, 28 February 2014 [Excerpt], p. 29; **R-058**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 31.

[276] Claimant's 2022 NOA, ¶ 94.

[277] Claimant's 2022 NOA, ¶ 95.

157. The Claimant has not met its burden to establish a causal link between each of the alleged breaches of NAFTA Chapter Eleven and the damages it claims. In fact, the Claimant acknowledges that it was the choice of its customers – coal-fired electricity generators – to "accelerate" their closure or conversion to natural gas that allegedly caused them damage.[278] Moreover, the Claimant fails to acknowledge that the 2012 Federal Emissions Regulations, on which WCC allegedly grounded its investment expectations, were amended in 2018 and required all coal-fired generating units to meet their stringent emissions standard by December 31, 2029, at the latest. The Claimant has not alleged any breach of NAFTA Chapter Eleven with respect to this measure. As a result, the Claimant has not established the requisite causation.

158. The Claimant's preliminary allegation of damages suffers from a number of additional flaws. For example, it appears to allege loss or damage that extends in time beyond its sale of the Canadian Enterprises in March 2019,[279] which it is not entitled to recover. The Claimant also fails to identify the specific purchase price for those enterprises, through which it may have already recovered the loss it allegedly suffered.[280] Moreover, both the Paintearth and Sheerness mines for which the Claimant claims damages have reserves that WCC projected, in 2013, would be exhausted in 2022 and 2024, respectively.[281] This is well in advance of 2030 when emissions from coal-fired generating units must be reduced to zero under Alberta's 2015 Climate Leadership Plan. The third mine with respect to which the Claimant claims damages, the Genesee mine, Prairie owned jointly with Capital Power. On March 28, 2017, Prairie concluded a $70 million agreement with respect to its joint

[278] Claimant's 2022 NOA, ¶ 94.

[279] *See e.g.* Claimant's 2022 NOA, ¶ 92.

[280] The Claimant provides the overall value of the credit bid its First Lien Lenders made for all of the assets it sold, but does not provide any specificity on the valuation of the Canadian Enterprises. *See* Claimant's 2022 NOA, ¶ 65.

[281] **C-005**, Presentation, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations 9, Dec. 24, 2013, p. 10.

ownership.[282] While WCC mentions this agreement in its 2022 NOA,[283] it omits the fact that the company "fully recovered its capital investments at the mine"[284] through this arrangement.

159. As a result of the serious flaws in its claim previewed in this section, the Claimant's allegations of breach and damage must be rejected.

VI. REQUEST FOR RELIEF

160. For the foregoing reasons, Canada respectfully requests that this Tribunal:

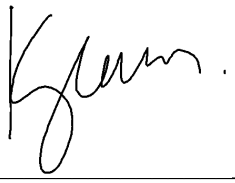
(a) dismiss the Claimant's claim in its entirety for lack of jurisdiction;

(b) require the Claimant to bear all costs of the arbitration, including Canada's costs of legal assistance and representation, pursuant to NAFTA Article 1135(1) and Article 42 of the 2013 UNCITRAL Rules; and

(c) grant any other relief that it deems appropriate.

June 28, 2023

Respectfully submitted on behalf of Canada,



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[282] **R-125**, Capital Power, Press Release, "Capital Power enters into cost savings agreement related to the Genesee Mine", 28 March 2017.

[283] Claimant's 2022 NOA, ¶ 59.

[284] **R-126**, Westmoreland Coal Company, News Release, "Westmoreland Receives $52 Million Early Repayment of Genesee Mine Receivable", 28 March 2017.