- Public Version -

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE RULES OF ARBITRATION
OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

WESTMORELAND COAL COMPANY,

Claimant,

vs.

GOVERNMENT OF CANADA,

Respondent.

CLAIMANT'S RESPONSE TO MEMORIAL ON JURISDICTION

Javier H. Rubinstein
Lauren F. Friedman
Kevin D. Mohr
Cedric Soule
Rikki Stern
Emma Iannini
Tamsin Parzen
KING & SPALDING LLP
110 N Wacker Drive
Suite 3800
Chicago, IL 60606

Counsel for Claimant

September 20, 2023

TABLE OF CONTENTS

I. INTRODUCTION **1**

II. FACTUAL AND PROCEDURAL BACKGROUND **5**

A. WCC Files Its Claim for Arbitration in November 2018 ..... **7**

B. WCC Amends Its November 2018 Notice of Arbitration in May 2019 ..... **9**

C. Canada Rejects WCC's Amended Notice of Arbitration and Insists that WCC Withdraw Its Claim against Canada, with WMH as Sole Claimant **12**

D. Canada Objects to the Tribunal's Jurisdiction over WMH, and Prevails **15**

E. WCC Acts Promptly to Re-Assert Its NAFTA Claims **18**

III. CLAIMANT HAS A LEGACY INVESTMENT UNDER THE USMCA **20**

A. WCC Acquired Its Investments Between January 1, 1994 and July 1, 2020 ..... **21**

B. WCC's Investments Existed on July 1, 2020 ..... **21**

1. The Relevant Time for Determining Whether the Investor Owns or Controls the Investment Is the Time of the Measures 22

2. Even if the USMCA Requires the Investor to Own or Control the Investment on July 1, 2020, WCC at a Minimum Held Interests Arising from a Commitment of Capital, Including its Claim to Money 31

3. Canada Should Be Estopped from Disputing WCC's Ability to Lodge Its Claim Based on Its Representations in the *Westmoreland I* Arbitration 37

4. The Legally Significant Connection Test Is Not a Separate Requirement of the USMCA and in Any Event, WCC Meets That Standard 43

IV. THE TRIBUNAL HAS JURISDICTION UNDER THE NAFTA **45**

A. Claimant Is Entitled to Bring Its Claim Under NAFTA Articles 1116(1) and 1117(1) **45**

1. WCC Has Provided Sufficient Evidence of Its Investment 45

2. WCC Has the Requisite Ownership and Control Over Prairie 50

B. WCC Has Pled a *Prima Facie* Damages Claim **53**

C. Claimant's NAFTA Claim Is Timely **57**

1. WCC Submitted Its Claims Within Three Years of Learning of the NAFTA Breach 57

2. Canada Should Be Estopped From Asserting Its Limitations Defense 73

3. Canada Also Should Be Barred From Asserting Its Limitation Defense Because It Constitutes an Abuse of Rights Under International Law........ 76

D. Claimant Submitted Valid Waivers Pursuant to NAFTA Article 1121 80

1. WCC Filed Valid Waivers With Its Notice of Arbitration in the Present Proceedings 80

2. Tribunals No Longer Impose a "Restrictive" Rule of Treaty Interpretation and Demonstrate Flexibility in the Timing of Waivers 82

3. Fundamental Principles of International Law Support Having WCC's NAFTA Claims Heard on the Merits........ 86

V. REQUEST FOR RELIEF 90

I. INTRODUCTION

1. This arbitration raises fundamental questions about the obligations of States to implement their energy transition agenda in accordance with their investment treaty obligations to foreign investors. Specifically, this case raises crucial questions as to, *first*, whether Alberta's implementation of the energy transition needed to accord with Canada's investment treaty obligations under international law; and *second*, whether Canada fulfilled its treaty obligations when Alberta decided to ease the impact of the energy transition on domestic coal companies but not to provide any such relief to similarly situated foreign investors. Those questions, however, have been reserved by the parties and the Tribunal for the merits phase of the arbitration and will not be addressed here.

2. In the meantime, Canada's Memorial on Jurisdiction represents the latest step in its longstanding effort to ensure that these questions are never addressed, and that Westmoreland Coal Company's ("**WCC**") NAFTA Claim is never heard on the merits. Canada disputes jurisdiction on every conceivable ground—even arguing points that blatantly contradict positions that it took in *Westmoreland v. Canada (I),* ICSID Case No. UNCT/20/3 ("***Westmoreland I***"). After successfully arguing that Westmoreland Mining Holdings ("**WMH**") could not step into WCC's shoes in order to pursue the NAFTA Claim, while acknowledging that WCC still could pursue that claim, Canada now argues that WCC is not a protected investor either. According to Canada, there is no protected investor.

3. In *Westmoreland I*, Canada proposed and insisted that WCC withdraw its claims and that WMH replace WCC in the arbitration as the sole claimant, knowing full well that Canada's very next step would be to argue that WMH had no standing to pursue those claims. Never once did Canada notify WCC that it planned to challenge WMH's standing, instead, it strongly implied that it would not. In doing so, Canada precipitated a substantial delay in the prosecution of the NAFTA Claim—a delay that easily could have been avoided.

4. Under well-recognized principles of international law, Canada should be estopped from challenging WCC's standing to reassert its NAFTA Claim in this arbitration. While Canada may have executed its plan to perfection, taking such inconsistent positions in an effort to make sure that WCC never has its day in court, is not an outcome that can or should be tolerated under the NAFTA or international law.

5. As the tribunal suggested in *Westmoreland I*, WCC is the rightful party to pursue the NAFTA Claim, which WCC originally filed in 2018 due to its ownership and control of the relevant investments at the time of the measures. The *Westmoreland I* Award declined to recognize jurisdiction over WMH's claim precisely because it found that WMH could not stand in for WCC as the rightful investor and claimant. *Westmoreland I* thus confirmed that only WCC could pursue its NAFTA Claim against Canada. The findings of the *Westmoreland I* Award, issued by preeminent arbitrators in the field, are sound and binding on Canada.

6. After insisting that WCC withdraw from the arbitration and telling the *Westmoreland I* tribunal that WCC still could pursue its NAFTA Claim, Canada now turns around and argues that the NAFTA Claim is time-barred because the USMCA has replaced the NAFTA and the statute of limitations has run. These arguments flatly contradict the positions that Canada adopted in *Westmoreland I*, where Canada acknowledged that WCC still could bring a claim—even though the USMCA already had replaced the NAFTA, and even though more than three years had passed by the time that Canada made that concession. Canada should be estopped from taking advantage of the delay that it substantially precipitated, and from contradicting the positions it successfully presented to the tribunal in *Westmoreland I*.

7. WCC's claims satisfy the three-year limitations requirement in NAFTA Articles 1116(2) and 1117(2). WCC submitted its claims to arbitration on November 19, 2018, less than two years after first becoming aware of Canada's breaches of the NAFTA. WCC's timely submission of its NAFTA Claim suspended the three-year limitations period during the pendency of the *Westmoreland I* arbitration. The principle that a limitations period is suspended when a timely claim is commenced—thereby giving the Respondent notice of the claim and the opportunity to prepare its defense—is consistent with the text and purpose of the NAFTA, principles of customary international law and the stated positions of the NAFTA Parties.

8. The limitations period here resumed when the *Westmoreland I* tribunal issued its Final Award on January 31, 2022, and it continued to run until nine months later when WCC resubmitted its Notice of Arbitration on October 11, 2022. In short, WCC's NAFTA Claim is timely, as it was resubmitted within three combined years after the NAFTA limitations

began to run, excluding the period of suspension. Canada's limitations period thus should be rejected.

9. Even if the NAFTA limitations period was not tolled during the pendency of the earlier arbitral proceedings, Canada should be estopped from asserting the limitations defense for two reasons.

10. *First*, Canada's contention that the NAFTA Claim is time-barred squarely contradicts the positions that Canada took with the *Westmoreland I* tribunal to support its position that only WCC had standing to prosecute the NAFTA Claim. At the jurisdiction hearing on July 15, 2021, Arbitrator Hosking asked Canada, whether WCC "ha[s] any residual rights to bring a treaty claim,"[1] and Canada responded that "[WCC] could still be in a position to bring a claim on its own behalf."[2] Earlier in the arbitration, Canada similarly acknowledged that WCC "continues to exist, and it was open to WCC to continue with its NAFTA claim."[3] Notably, Canada made these representations to the tribunal in 2021, after the three-year limitations period would have expired if it were not suspended. Canada should be estopped from now claiming that WCC's NAFTA Claim is time barred when it said exactly the opposite to the *Westmoreland I* in arguing that only WCC had standing to pursue the NAFTA Claim.

11. *Second*, the delay in WCC's prosecution of the arbitration is due to WCC's withdrawal of the NAFTA Claim in order to substitute WMH—which Canada itself proposed as a "solution" to move the arbitration forward without any hint that it intended to rely on that very withdrawal to challenge the tribunal's jurisdiction; to the contrary, Canada's

[1] *Westmoreland Mining Holdings LLC v. Canada*, Jurisdictional Hearing transcript, Day 2, 278:9–280:9, Jul. 15, 2021 ("**Jurisdictional Hearing transcript**"), **C-046**.

[2] Jurisdictional Hearing transcript, Day 2, 278:9–280:9, **C-046** ("I think if they no longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf. So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf.").

[3] *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Reply Memorial on Jurisdiction, Apr. 9, 2021, ¶ 112 ("**Canada's Reply Memorial on Jurisdiction**"), **C-047**.

reservation of rights suggested exactly the opposite. Had Canada notified WCC that it planned to object to WMH's standing to pursue WCC's originally filed claims, WCC would not have agreed to withdraw and also would have taken additional steps to ensure that WCC's original claims were heard on the merits, including having WCC and WMH both included as disputing investors, just as WCC originally proposed.

12. Canada's limitations defense also should be barred as an abuse of right under international law. The abuse of right principle requires the State to act in a manner that "is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect),"[4] and not in a manner that "is calculated to prejudice the rights and legitimate interests of the other party under the Treaty."[5] In this case, Canada's limitations defense represents a plain abuse of rights. Canada's legitimate right under the NAFTA limitations requirement is to receive timely notice of WCC's NAFTA Claim so that it has the opportunity to prepare its defense. That right was satisfied through WCC's timely assertion of its claim in 2018. Canada's limitations defense is not meant to vindicate any legitimate right, but rather only to prejudice WCC by ensuring that its NAFTA Claim is never heard on the merits, through a series of procedural maneuvers that in no way fairly balance the rights and interests of the parties. This conduct not only deprives WCC's opportunity for a decision on the merits and undermines the core purpose of the NAFTA to provide an effective dispute resolution system.

13. Canada's objection that WCC has not complied with the NAFTA's waiver requirement also is meritless. WCC complied with the waiver requirement by submitting enforceable waiver letters with its Notice of Arbitration. Canada concedes that such waiver letters should have taken immediate effect and should continue in effect in perpetuity. Yet, despite its recognition that WCC's earlier waiver should remain valid, Canada argues that WCC should have executed new waiver letters, based only on the requirement that the Notice of Arbitration be "accompanied . . . by" the waiver letters. Canada's position makes no sense, since WCC had nothing left to waive after it filed the waiver letters in the *Westmoreland I*

[4] See *infra* ¶ 200.

[5] See *infra* ¶ 201.

arbitration, and since WCC's Notice of Arbitration *was* "accompanied … by" its waiver letters, which were attached as Exhibit 1.

14. Finally, Canada argues that WCC has not made a *prima facie* damages claim, but merely a claim for "reflective loss." Claims for reflective loss arise where shareholders sue for the *diminution of the value* of their shares caused by acts of the host State taken against the company in which they own shares. That is not at issue here, as WCC is challenging Canada's conduct that resulted in the *total destruction* of WCC's investment. This is not a case of reflective loss.

15. In short, Canada's jurisdictional objections are meritless and should be rejected. This Response to Memorial on Jurisdiction is organized as follows: In **Section II**, Claimant sets out the facts relevant to jurisdiction. In **Section III**, Claimant demonstrates that it holds a legacy investment in Canada under the USMCA. In Section **IV**, Claimant establishes that the Tribunal has jurisdiction under NAFTA and the USMCA to hear Claimant's claims. Finally, in **Section V**, Claimant sets out its Request for Relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

16. As explained in WCC's Notice of Arbitration, this dispute arises out of a series of regulatory measures imposed by Respondent in its accelerated transition from coal. Prior to making its investment, in April 2014, the Office of Industry of Canada sent a letter to WCC, confirming it was "satisfied that [WCC's] investment is likely to be of net benefit to Canada," and providing "approval of [the] investment pursuant to the Investment Canada Act."[6] During the course of its investment, WCC consistently fulfilled the investment obligations imposed by Canada, including obligations related to jobs, revenues and taxes.

17. Despite this, on November 20, 2015, shortly after WCC completed its investment in Canada, a new Alberta provincial government announced a "Climate Leadership Plan." The Climate Leadership Plan planned to eliminate all power generated from coal in Alberta by 2030, hastening the expiration of the time in which coal-generated electricity would be allowed in Alberta.[7] When it implemented the Climate Leadership Plan, Alberta promised

[6] Final Letters from Investment Canada, **C-048.**

[7] *See* Second Notice of Arbitration, ¶ 35.

to assist companies that would be impacted negatively by the new initiative.[8] Alberta charged Terry Boston, an industry executive, with developing a methodology to compensate fairly the affected companies for their stranded assets.[9]

18. In its Notice of Arbitration, Claimant explained how Respondent's regulatory regime favored Canadian companies over foreign companies like the American company owned by Claimant. On September 30, 2016, Mr. Boston wrote to the Premier of Alberta, recommending that Alberta compensate affected *Canadian* companies through voluntary net book value payments for their coal-burning units and related capital with useful lives that extended beyond 2030.[10] On November 24, 2016, Alberta implemented Mr. Boston's recommendations.[11] On that date, Alberta entered into Off-Coal Agreements with each of TransAlta, Capital Power, and ATCO, *Canadian* companies affected by Alberta's Climate Leadership Plan.[12] Under the Agreements, the companies agreed to cease coal-fired emissions on or before December 31, 2020, in return for compensation from Alberta.[13] In total, Alberta agreed to pay CA$ 1.36 billion to TransAlta, Capital Power, and ATCO for phasing out coal.[14] By contrast, WCC, an *American* company, received no compensation from Alberta for the loss is caused by the Climate Leadership Plan.[15]

19. The Notice of Arbitration also explains how Respondent's regulatory measures contradicted the investment terms offered to Claimant when it entered Canada, namely, the expectation of a fifty-year transition away from coal, which was cut short soon after Claimant made its investment. Just three years after Respondent approved Claimant's investment on the basis that it was "satisfied that [the] investment is likely to be of net benefit to Canada," Respondent imposed regulatory measures that destroyed the sole

[8] *See id.* ¶ 38.

[9] *See id.* ¶ 38.

[10] *See id.* ¶ 43.

[11] *See id.* ¶ 44.

[12] *See id.* ¶ 45.

[13] *See id.* ¶ 45.

[14] *See id.* ¶ 49.

[15] *See id.* ¶ 52.

purpose of the business. Respondent should be held responsible for such a drastic *volte face* in position, thereby violating Claimant's legitimate expectations.

20. In its Memorial on Jurisdiction, Respondent dedicates almost half of its submission to addressing the facts at issue in this dispute. In that recitation, Respondent fails to justify the measures, including its apparent decision to deprive Claimant of the value of its investment without any compensation whatsoever.

21. Nevertheless, recognizing that the Parties agreed to bifurcate the analysis of jurisdiction to promote the efficient resolution of this dispute, and given the number of jurisdictional objections lodged by Respondent (at least six), Claimant will limit its recitation of the facts to those related to the jurisdiction of this Tribunal, reserving its right to address the merits at a later stage. The remainder of this section summarizes the procedural history of the *Westmoreland I* arbitration, which has important implications for the Tribunal's jurisdiction.

A. WCC Files Its Claim for Arbitration in November 2018

22. On August 20, 2018, after the Government of Alberta destroyed the value of WCC's investments and denied WCC compensation, WCC filed a Notice of Intent to Submit a Claim to Arbitration against Canada under NAFTA Chapter 11 ("**2018 Notice of Intent**").[16] Although the parties conferred, they were unable to resolve their dispute amicably.

23. On November 19, 2018, WCC filed a Notice of Arbitration and Statement of Claim against the Government of Canada ("**2018 Notice of Arbitration**"), raising claims under NAFTA Chapter 11 on its own behalf and on behalf of Prairie Mines & Royalty ULC ("**Prairie**").[17] In accordance with NAFTA Article 1120, WCC attached to the 2018 Notice of Arbitration as Exhibit 1 waivers that both it and Prairie had executed (the "**Original Waivers**").[18] The arbitration was governed by the 1976 UNCITRAL Arbitration Rules ("**1976 UNCITRAL Rules**").[19]

[16] Notice of Intent to Submit a Claim to Arbitration, Aug. 20, 2018, **C-030**.

[17] Notice of Arbitration, Nov. 19, 2018, ¶ 1, **R-079**.

[18] Notice of Arbitration, Nov. 19, 2018, Exhibit 1, **R-079**.

[19] Notice of Arbitration, Nov. 19, 2018, Cover Letter, p. 1, **R-079**.

24. It bears emphasis that WCC owned Prairie at the time of all challenged measures (except the federal fuel charges as WCC sold Prairie before Canada implemented that measure).[20] WCC's ownership and control of the investment is confirmed by numerous contemporaneous records, including (*i*) Westmoreland Coal Company Form 8-Ks, including the filing announcing the "acquisition of Sheritt"; (*ii*) the Westmoreland 2014 Annual Report; and (*iii*) other Westmoreland Annual Reports.[21] WCC agrees to withdraw its claim related to the federal fuel charge measure from the arbitration.[22]

25. In its 2018 Notice of Arbitration, WCC asserted that the Government of Alberta's treatment of WCC's investments violated Canada's obligations under NAFTA Articles 1102 and 1105.[23] Specifically, WCC argued that by providing compensation to Albertan coal companies of nearly $1.4 billion as part of Alberta's coal phase out program, but refusing to compensate WCC, Canada failed to afford WCC's investments national treatment under NAFTA Article 1102 and the minimum standard of treatment under NAFTA Article 1105.[24] WCC further argued that Alberta's coal phase-out program breached NAFTA Article 1105 by denying WCC's legitimate expectations regarding its investments.[25]

26. On March 26, 2019, WCC appointed Mr. James Hosking as its party-appointed arbitrator.[26] Then, on May 1, 2019, Canada appointed Professor Zachary Douglas as its party-appointed arbitrator.[27] The parties subsequently exchanged various communications concerning the

[20] *See, e.g.*, Westmoreland Coal Company Form 8-K, dated Apr. 28, 2014, p. 1 (noting that WCC "consummated its previously announced acquisition of Sherritt" on April 28, 2014), **C-049**; *see also* Westmoreland Coal Company, 2014 Annual Report, Mar. 6, 2015 [Excerpt], p. 7, **R-058**. *See, e.g.*, Westmoreland Coal Co., Form 8K, Ex. 99.3: Historical Financial Information of PMRL and CVRI, Jul. 1, 2014, p. 4, **C-050**; Westmoreland Coal Company, 2014 Annual Report, Mar. 6, 2015 [Excerpt], p. 17, **R-058**; Westmoreland Coal Co., 2017 Form 10K, Apr. 2, 2018, p. 10, (listing Sheerness, Genesee, and Paintearth Mines under "Properties"), **C-051**.

[21] *Id.*

[22] Given Claimant's withdrawal of the federal fuel charge claim, there is no need to respond to ¶¶ 142–46 of Canada's Memorial on Jurisdiction and Response to Notice of Arbitration dated June 28, 2023 ("**Canada's Memorial on Jurisdiction**").

[23] Notice of Arbitration, Nov. 19, 2018, ¶¶ 85–104, **R-079**.

[24] Notice of Arbitration, Nov. 19, 2018, ¶¶ 85–89, 92–98, **R-079**.

[25] Notice of Arbitration, Nov. 19, 2018, ¶ 99–104, **R-079**.

[26] Letter from Elliot J. Feldman to Scott Little, Mar. 26, 2019, **C-052**.

[27] Letter from Scott Little to Elliot J. Feldman, May 1, 2019, **C-053**.

appointment of the chair of the tribunal, before interrupting them for a short period of time to address WCC's request to amend its Notice of Arbitration. We set out below the relevant facts pertaining to WCC's request.

B. WCC Amends Its November 2018 Notice of Arbitration in May 2019

27. On October 9, 2018, after the filing of its 2018 Notice of Intent, but before filing its 2018 Notice of Arbitration, WCC and some of its affiliates were forced to file for bankruptcy, partly as a result of Canada's measures.[28] As Jeffrey Stein, WCC's Plan Administrator and former Chief Restructuring Officer and Board member, explains, WCC arranged to sell substantially all of its assets through the bankruptcy process to maximize recovery for WCC's creditors, as WCC had become a shell and lacked the infrastructure necessary to extract value from its remaining assets, including its legal claims.[29] As the *Westmoreland I* tribunal confirmed, the bankruptcy restructuring was carried out for legitimate reasons, and not to manufacture a NAFTA claim. In the tribunal's words, "[i]t is clear that at all times WCC and Westmoreland and the first-tier lien holders acted in good faith," in the restructuring.[30] Moreover, WCC handled its NAFTA Claim with comprehensive deliberation involving input from outside consultants, external bankruptcy counsel, external NAFTA counsel, and WCC's Board of Directors.

28. On October 18, 2018, WCC and its affiliates filed a motion with the U.S. bankruptcy court in the Southern District of Texas, Houston Division ("**Bankruptcy Court**") seeking authorization to, among other things, (i) conduct a marketing process for the sale of its assets; and (ii) enter into a stalking horse purchase agreement (the "**Stalking Horse Purchase Agreement**") with an acquisition entity formed by lenders (*i.e.*, Westmoreland Mining LLC or "**New Westmoreland**").[31] The intention was to sell substantially all of

[28] *See* Second Notice of Arbitration, Oct. 11, 2022, ¶ 64; *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 54, Oct. 9, 2018, **C-031**.

[29] Witness Statement of Jeffrey S. Stein, Sept. 20, 2023 ("**Stein WS**"), ¶¶ 1–2, 7–8, **CWS-1**.

[30] *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, Jan. 31, 2022, ¶ 192 ("***Westmoreland* Award**"), **CLA-001**.

[31] The First Lien Lenders also formed a second acquisition entity to effectuate the Sale Transaction, Westmoreland Mining Holdings LLC ("**WMH**"), which wholly owns New Westmoreland. *See Notice of Sixth Amendment to the Plan Supplement* §§ II, III, Case No. 18-35672 (DRJ) (Bankr. S.D. Tex. 2018), ECF No. 1621, Exh. G, **R-075**.

WCC's assets through public auction,[32] but the Stalking Horse Purchase Agreement allowed some of WCC's creditors and direct subsidiaries to purchase WCC's assets through an acquisition vehicle if there were no other bidders.[33] The acquisition vehicle, WMH, was incorporated on January 31, 2019.[34]

29. The Stalking Horse Purchase Agreement identified the NAFTA Claim as a Transferred Cause of Action that WCC would "sell, convey, transfer, assign and deliver" to New Westmoreland.[35] The Purchase Agreement contained a representation and warranty that (a) "[t]he Sellers have good and marketable title in and to . . . all Purchased US Assets . . . , free and clear of Encumbrances other than Permitted Encumbrances"[36] and that "***[s]ubject to the terms of . . . Applicable Law,*** upon consummation of the Transaction . . . Buyer and/or the relevant Designated Buyers will have acquired good and marketable title in and to each of the Purchased US Assets, free and clear of Encumbrances other than Permitted Encumbrances."[37] The Purchase Agreement in turn defines "Applicable Law" to include, *inter alia*, "international laws."[38]

30. Ultimately, no buyer for WCC's assets emerged during the sale process. Thus, on March 15, 2019, the Stalking Horse Purchase Agreement went into effect, and WMH acquired most of WCC's U.S. assets and equity interests, including Prairie and Westmoreland

[32] *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Amended Ch. 11 Plan, Docket No. 1532, ¶ 241, **C-033**.

[33] *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 789 (the "Disclosure Statement"), Article I.C, p. 4, **C-034**; *id.*, Exhibit B of **C-034**; Plan, Article IV.C.1(a), Docket No. 1532, **C-033**.

[34] *Westmoreland* Award, ¶ 88, **CLA-001**.

[35] *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), (Docket No. 1621) Excerpt of Exhibit H-6 – Stalking Horse Purchase Agreement, § 2.01(l) ("**Stalking Horse Purchase Agreement**"), **C-035**; *see also* § 2.14, **C-035**.

[36] Stalking Horse Purchase Agreement § 3.10(a), **C-035**.

[37] Stalking Horse Purchase Agreement § 3.10(a) (emphasis added), **C-035**.

[38] Stalking Horse Purchase Agreement § 1.01 ("'Applicable Law' means, with respect to any Person, any transnational, domestic or ***foreign*** federal, state, provincial, territorial or local law (statutory, common or otherwise), constitution, ***treaty, convention,*** ordinance, code, rule, ***regulation, order,*** injunction, ***judgment, decree, ruling,*** reporting or licensing requirement ***or other similar requirement enacted, adopted, promulgated or applied by a Governmental Authority*** that is in effect on or prior to the Closing Date (or during the Interim Period, if applicable) and binding upon or applicable to such Person or any of its assets, Liabilities or business, in each case, as amended, unless expressly specified otherwise.") (emphasis added), **C-035**.

Canada Holdings Inc. ("**WCHI**"), the Canadian entity through which WCC owned Prairie.[39] Per the terms of the Stalking Horse Purchase Agreement, WMH also attempted to acquire WCC's NAFTA claim, subject to the Applicable Law.[40]

31. On May 13, 2019, WCC submitted an Amended Notice of Arbitration and Statement of Claim to the Government of Canada ("**2019 Amended Notice of Arbitration**"), pursuant to Article 20 of the 1976 UNCITRAL Rules, to reflect the expected change in ownership interest.[41] The 2019 Amended Notice of Arbitration, which was "submitted on behalf of [WCC], [WMH], [WCHI], and [Prairie],"[42] sought to insert WMH as a claimant in the arbitration, with WCC and WMH listed as the "initial disputing investor" and the "disputing investor," respectively.[43] Exhibit 1 to the 2019 Amended Notice of Arbitration attached the Original Waivers for WCC, WMH, WCHI, and Prairie.[44] The waiver letter for Prairie was the same waiver letter that WCC had submitted with the 2018 Notice of Arbitration.[45]

32. The cover letter accompanying the 2019 Amended Notice of Arbitration explained that WCC had "undertaken a corporate reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code" under which WCC "transferred substantially all of its assets to [WMH]" including "Prairie Mines & Royalty ULC and the interests in the NAFTA Chapter 11 claim."[46] The cover letter confirmed that while the 2019 Amended Notice of Arbitration "reflect[ed] these changes," "[t]here [were] no changes to the substance of the claim."[47]

39 Stalking Horse Purchase Agreement, **C-035**.

40 *Id*., **C-035**.

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

42 Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, ¶ 1, **C-055**.

43 Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, ¶¶ 15, 21, **C-055**.

44 Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, Exhibit 1, **C-055**.

45 *Compare* Notice of Arbitration, Nov. 19, 2018, Exhibit 1, PDF p. 40, **R-079** (waiver letter from Prairie Mines & Royalty ULC dated Nov. 12, 2018) *with* Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, Exhibit 1, PDF p. 39, **C-055** (waiver letter from Prairie Mines & Royalty ULC dated Nov. 12, 2018).

46 Letter from Elliot Feldman to Scott Little, May 13, 2019, **R-080**.

47 *Id*., **R-080**.

33. Article 20 of the 1976 UNCITRAL Rules provides that "During the course of the arbitral proceedings either party may amend or supplement his claim or defense 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."[48] The 2019 Amended Notice of Arbitration was timely, as it was submitted less than six months after the 2018 Notice of Arbitration, and Canada suffered no prejudice, since it had yet to file its Statement of Defense.[49] The Amended Notice also did not fall "outside the scope of the arbitration clause," *i.e.*, NAFTA's dispute resolution provisions.

C. Canada Rejects WCC's Amended Notice of Arbitration and Insists that WCC Withdraw Its Claim against Canada, with WMH as Sole Claimant

34. Canada claims in its Memorial on Jurisdiction that WCC "decided to withdraw" the 2018 Notice of Arbitration against Canada.[50] But this statement ignores Canada's role in the agreement that led to WCC's withdrawal.

35. Canada responded to the 2019 Amended Notice of Arbitration in a letter dated July 2, 2019. It alleged that the 2019 Amended Notice of Arbitration was "not a permissible amendment of Westmoreland Coal Company's Notice of Arbitration under Article 20 of the 1976 UNCITRAL Rules,"[51] suggesting that Canada sought to preserve—not destroy—the jurisdiction of the tribunal. Invoking two inapposite decisions, Canada claimed that "[t]he substitution of a new claimant is an amendment that causes a claim to fall outside of the tribunal's jurisdiction."[52] The two decisions on which Canada purported to rely were a Decision on a Motion to Add a New Party in *Merrill & Ring Forestry L.P.*, a case with

[48] 1976 UNCITRAL Arbitration Rules, Article 20 (emphasis added), **CLA-003**.

[49] Letter from Elliot Feldman to Scott Little, May 13, 2019, **R-080**.

[50] Canada's Memorial on Jurisdiction, ¶ 62.

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

[52] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, p. 2, **R-081**.

very different facts, and an Iran-US Claims Tribunal decision in which the original claimant did not have the requisite nationality.[53]

36. On the basis of its misconstrued reading of Article 20 of the 1976 UNCITRAL Rules, Canada proposed a "solution" to WCC and WMH: so long as WCC withdrew its claim against Canada, Canada would accept the 2019 Amended Notice of Arbitration as WMH's Notice of Intent, and WMH would be free to submit a Notice of Arbitration 90 days after May 13, 2019 (the date of submission of the 2019 Amended Notice of Arbitration).[54] In addition, Canada suggested that the "disputing parties would re-appoint their party appointed arbitrators once a claim is submitted and would then continue the process, in which they are currently engaged, of appointing a tribunal chairperson."[55]

37. Canada concluded its July 2, 2019 letter by noting that its proposed solution was "without prejudice to its ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim."[56] Jeffrey Stein, WCC's Plan Administrator, explains that WCC and WMH understood that Canada reserved its right to raise objections arising from the 2018 Notice of Arbitration ("**the original NOA**") or "any new claim," *i.e.*, a claim WMH might raise in its Notice of Arbitration that WCC had not already raised in its 2018 Notice of Arbitration.[57] Because Canada did not reserve its right to challenge the tribunal's jurisdiction over WMH, which is not covered by either the "original NOA" or the "any new claim" categories, WCC and WMH reasonably understood that Canada, acting in good faith, would not raise a jurisdictional objection regarding WMH.[58] If Canada had indicated that it might do so, WCC and WMH would not have accepted Canada's proposal.[59] As

[53] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, pp. 1–2, **R-081**; *see also infra* ¶ 181 n. 280.

[54] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, p. 2, **R-081**.

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

[56] Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada," Jul. 2, 2019, p. 2, **R-081** (emphasis added).

[57] Stein WS, ¶ 13, **CWS-1**.

[58] Stein WS, ¶¶ 14–15, **CWS-1**.

[59] Stein WS, ¶ 15, **CWS-1**.

explained by Jeffrey Stein, WCC and WMH would have taken the necessary steps to ensure that the NAFTA claims were prosecuted on the merits, whether by WCC or WMH.[60]

38. On July 3, 2019, WCC and WMH responded to Canada's July 2, 2019 letter, making clear that they disagreed with Canada's interpretation of Article 20 of the 1976 UNCITRAL Rules: "We disagree with Canada's analysis of Article 20 and the applicability of the cited authorities. We see those authorities as distinguishable because, among other reasons, the new claimants do not change the nationality of the parties nor the issues to be resolved in the arbitration."[61] However, WCC and WMH agreed to Canada's proposal "as a means to expedite the arbitration process and avoid unnecessary conflict."[62] They concluded their July 3, 2019 letter by thanking Canada "for proposing a fair compromise that enables us to proceed with the arbitration without unnecessary procedural delay,"[63] confirming their understanding that the parties intended to continue the arbitration that WCC already commenced. The July 3, 2019 letter corroborates Mr. Stein's testimony that WCC and WMH reasonably believed that Canada had made its proposal in good faith and that it would not challenge the tribunal's jurisdiction over WMH.

39. On July 12, 2019, Canada responded to WCC's and WMH's July 3, 2019 letter, writing "We understand that your clients agree with Canada's proposal of July 2, 2019 as a way forward."[64] Canada again did not mention any possible jurisdictional objection regarding WMH and, thus, did not disabuse WCC and WMH of their understanding that Canada had proposed "a fair compromise" that would permit the arbitration to move forward expeditiously. Instead, Canada proposed three steps to facilitate "an orderly transition," namely for WCC to withdraw its claim against Canada, for WMH to submit a Notice of Arbitration and Statement of Claim on August 12, 2019, and for the parties then to resume

[60] Stein WS, ¶ 15, **CWS-1**.

[61] Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada," Jul. 3, 2019, p. 1, **R-082**.

[62] Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada," Jul. 3, 2019, p. 1, **R-082**.

[63] Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada," Jul. 3, 2019, p. 2, **R-082**.

[64] Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada," Jul. 12, 2019, p. 1, **R-083**.

the process of constituting a tribunal.[65] Canada also committed to respond to a tribunal president proposal that WCC and WMH had made on June 21, *i.e.*, after WCC attempted to amend its 2018 Notice of Arbitration to add WMH as a claimant.[66]

40. WCC and WMH accepted Canada's demands as a means to expedite the process. On July 23, 2019, WCC withdrew its claim against Canada and WMH simultaneously submitted its Notice of Intent to Submit a Claim to Arbitration, backdated to May 13, 2019, the date of the 2019 Amended Notice of Arbitration.[67] Following Canada's demands, the Notice no longer included WCC's waiver letter, but rather included WMH's and WCHI's May 2019 waivers, as well as Prairie's original November 2018 waiver. On August 12, 2019, WMH submitted its Notice of Arbitration and Statement of Claim. Canada concedes that "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."[68]

41. While Canada had suggested that the parties re-appoint the same tribunal, the parties ultimately did not exchange new appointment letters for the co-arbitrators. Instead, the parties picked up the appointment process where WCC and Canada had left off, proceeding with the selection process for chair that WCC and Canada had been discussing up until June 2019. Specifically, Canada wrote to WMH's counsel on August 9, 2019 (*i.e.*, before WMH submitted its Notice of Arbitration on August 12, 2019) and proposed that the Secretary General of ICSID serve as appointing authority for the chair of the tribunal.[69] The tribunal was constituted on February 24, 2020.

D. Canada Objects to the Tribunal's Jurisdiction over WMH, and Prevails

42. With the tribunal constituted, and having just procured the agreement to have WCC's claims withdrawn, Canada immediately proceeded to assert several jurisdictional

[65] Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada," Jul. 12, 2019, pp. 1–2, **R-083**.

[66] *Id*., p. 2, **R-083**.

[67] 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," Jul. 23, 2019, p. 1, **R-084**.

[68] Canada's Memorial on Jurisdiction, ¶ 64.

[69] Letter from Scott Little to Elliot J. Feldman, August 9, 2019, **C-054**.

objections, including that the tribunal did not have jurisdiction over WMH,[70] despite not informing WCC and WMH that it intended to object to WMH's jurisdiction, and in fact implying that it would not. Notably, Canada did not object to the fact that WMH had not provided "contemporaneous waivers" on its and Prairie's behalf, and did not argue that WCC already irrevocably waived the right to pursue a claim on behalf of Prairie. On October 20, 2020, the tribunal partially granted Canada's request for bifurcation.[71]

43. In its submissions on jurisdiction, Canada argued that the tribunal did not have jurisdiction over WMH's claims because the NAFTA breaches that WMH was claiming occurred before its incorporation and concerned a different investor, WCC.[72] Canada asserted that NAFTA and international jurisprudence confirmed that the claimant had to be a protected investor at the time of the alleged breach, and that WMH "should not be able to claim damages allegedly suffered by WCC and its investment."[73] Moreover, even though WMH now owned Prairie, Canada contended that "the right to advance the claim remained with the investor that owned or controlled the investment at the time of the alleged breach" *i.e.*, WCC.[74] Canada also represented to the tribunal that WCC "continues to exist, and it was open to WCC to continue with its NAFTA claim."[75]

44. In response to WMH's argument that WCC sold its NAFTA claim to WMH in the bankruptcy restructuring, Canada asserted that the alleged transfer was irrelevant because WCC's claim "[was] not the claim that is before this Tribunal"[76] and had been withdrawn (at Canada's urging).[77] According to Canada, there was "no mechanism under Chapter Eleven that allows a disputing investor to sell a claim to another investor of a Party and

[70] *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Canada's Statement of Defense, Jun. 26, 2020, ¶¶ 63–68, **R-031**.

[71] *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Procedural Order No. 3, Decision on Bifurcation, Oct. 20, 2020, ¶ 60(a), **RLA-005**.

[72] *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Memorial on Jurisdiction, Dec. 18, 2020, ¶¶ 65–68, **R-086**.

[73] Canada's Reply Memorial on Jurisdiction, ¶ 99, **C-047**.

[74] *Id*. ¶ 108, **C-047**.

[75] *Id*. ¶ 112, **C-047**.

[76] *Id*. ¶ 127, **C-047**.

[77] *Id*. ¶ 128, **C-047**.

maintain the Party's consent to arbitration."[78] It was "not possible that these claims [could] be sold to [WMH] because those claims are specific to WCC."[79]

45. At the hearing on jurisdiction, Canada conceded to the tribunal that WCC, as the original investor, could still bring a claim on its own behalf:

> Arbitrator Hosking: "We understand that WCC still exists; does it have any residual rights to bring a treaty claim? And the question really arises out of Canada's position that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law. That is Canada's submission. And then the related issue was: What is the consequence of the change in ownership of the Canadian assets as a consequence of the bankruptcy reorganization? So, what is WCC's position today?"[80]
>
> [. . .]
>
> Counsel for Canada: " . . . What would be WCC's position today? **<u>And I think if they no longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf</u>**. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf. So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf."[81]

46. On January 31, 2022, the tribunal issued its Final Award, concluding that it did not have jurisdiction over WMH.[82] The tribunal summarized the issues to be decided as follows:

> <u>A fundamental question raised by the temporal challenges is whether, to bring a claim under NAFTA Chapter Eleven, [WMH] must have owned or controlled the investment at the time of the alleged Treaty breach.</u> If the answer to this question is 'yes', given it is common ground that [WMH] was not in existence at the time of the enactment of the Challenged Measures, it will be necessary to determine whether [WMH] is the same

[78] *Id.* ¶¶ 130–135, **C-047**.

[79] *Id.* ¶ 131, **C-047**.

[80] Jurisdictional Hearing Transcript, Day 2, 278:15–279:2 (emphasis added) **C-046**.

[81] Jurisdictional Hearing Transcript, Day 2, 279:12–280:4, (emphasis added), **C-046**.

[82] *Westmoreland* Award, ¶ 252(1), **CLA-001**.

> entity as WCC, albeit in a new corporate form, failing which [WMH]'s claim must fail for lack of jurisdiction *ratione temporis*.[83]

47. The tribunal answered 'yes' to the first question, finding that "[f]or [WMH] to be able to bring its claim it must therefore show firstly that the Challenged Measures applied to it and secondly that it itself suffered loss as a result of those Challenged Measures."[84] The tribunal then held that "[WMH] is not the legal successor of WCC but is a separate company to which the NAFTA claim was purportedly transferred after the alleged Treaty breaches."[85] That is, the tribunal held that WMH could not step into the shoes of the rightful claimant, which was WCC. As such, the tribunal determined that it did not have jurisdiction over WMH's claims.[86]

48. Thus, while the Stalking Horse Purchase Agreement represented and warranted that WCC had good and marketable title in and to the NAFTA Claim at the time of execution of such agreement,[87] the award rendered pursuant to Applicable Law established that WMH could not pursue WCC's claims.

E. WCC Acts Promptly to Re-Assert Its NAFTA Claims

49. Following the *Westmoreland I* award, and to further confirm that WCC retained title to the NAFTA Claim pursuant to U.S. law, on June 17, 2022 (a few months after receiving the arbitration award), WCC filed a motion before the Bankruptcy Court seeking to confirm that the NAFTA claim had not transferred to WMH and requesting an order "authorizing WCC to prosecute the NAFTA Claim."[88]

50. On June 23, 2022, the Bankruptcy Court issued an order finding that WCC had "retain[ed] title to the NAFTA claim" and that "the NAFTA Claim did not transfer to Westmoreland Mining LLC [New Westmoreland] or any other party."[89] It further found that "WCC [is]

[83] *Westmoreland* Award, ¶ 194, **CLA-001**.

[84] *Id.* ¶ 215, **CLA-001**.

[85] *Id.* ¶ 230, **CLA-001**.

[86] *Id.* ¶ 231, **CLA-001**.

[87] Stalking Horse Purchase Agreement § 3.10, **C-035**.

[88] *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), Jun. 17, 2022, **R-087**.

[89] *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), Jun. 23, 2022, ¶ 1, **C-038**.

authorized to pursue the NAFTA Claim in accordance with the Bankruptcy Code, the Plan, and this Order."[90]

51. Hon. Shelly Chapman, a former U.S. bankruptcy judge who has overseen some of the most important bankruptcy proceedings in U.S. history (including Lehman Brothers), has reviewed the record and confirms that from a U.S. law perspective, WCC has continually owned and retained its NAFTA claim. As she explains, since the *Westmoreland I* tribunal held that international law (the Applicable Law) would not allow WMH to prosecute WCC's claim, the purported transfer was void and the NAFTA claim has remained with WCC at all times:

> The arbitral tribunal first ruled that, under Chapter Eleven of NAFTA, WMH did not qualify as an "investor" under NAFTA and, thus, did not have standing to pursue the NAFTA Claim as a matter of international law. Therefore, as a matter of U.S. bankruptcy law, notwithstanding the parties' intent to transfer such claim as a component of the Sales Transaction, such claim was never transferred pursuant to the Plan Confirmation Order. At all times, the NAFTA Claim remained with WCC as a Retained Cause of Action.[91]
>
> . . .
>
> As such, notwithstanding (a) the parties' intent to transfer the NAFTA Claim in the Sale Transaction and (b) the provisions of the Plan and the Plan Confirmation Order purporting to transfer the NAFTA Claim as a Transferred Cause of Action, the NAFTA Claim was not validly transferred under the Bankruptcy Code because the purpose of the purported transfer, i.e., for WMH to pursue the NAFTA Claim, could not be realized.[92]

52. Judge Chapman also confirms that the transaction was void *ab initio*, *i.e.*, it was never consummated to begin with. As she explains, "[t]he [Stalking Horse] Purchase Agreement established only two possible avenues for the Debtors' assets in the Sale Transaction: Purchased US Assets would transfer to the Purchaser, and Excluded Assets would remain with the Debtors."[93] And, "such provision or act is treated as having had no legal existence

[90] *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), Jun. 23, 2022, ¶ 2, **C-038**.

[91] Hon. Shelley Chapman Expert Report, ¶ 39 ("**Expert Report**"), **CER-1**.

[92] *Id*. ¶ 43, **CER-1**.

[93] *Id*. ¶ 46, **CER-1**.

and is considered a nullity or void from the start," since the applicable law frustrates transacting parties' intent to effectuate certain terms of a contract of sale.[94] Thus, she concludes, "because the transfer of the NAFTA Claim from WCC to WMH was *void ab initio*, the claim, as a matter of law and fact, remained with WCC as a Retained Cause of Action and it remains there still, regardless of the parties' original intent to transfer it."[95]

53. In sum, pursuant to applicable U.S. bankruptcy law, the NAFTA Claim never transferred to WMH and has remained with WCC since it crystallized following Canada's measures in 2016.

54. WCC has initiated this arbitration to re-assert and finally prosecute its NAFTA Claim against Respondent on the merits. While WCC relied in good faith on Canada's offer to compromise in order to enable the NAFTA Claim to move forward expeditiously, WCC in fact has lost valuable time and resources in pursuit of its claims. WCC has at all times acted expeditiously and diligently to pursue the NAFTA Claim, which it still holds today.

55. This Response now addresses Canada's objections to the Tribunal's jurisdiction to hear the NAFTA claims. As we will demonstrate, Canada's objections are meritless, since this Tribunal has the requisite jurisdiction to consider the NAFTA Claim.

III. CLAIMANT HAS A LEGACY INVESTMENT UNDER THE USMCA

56. WCC is entitled to pursue this arbitration pursuant to the NAFTA by virtue of Annex 14-C of USMCA, which provides that arbitration pursuant to Chapter 11 of the NAFTA remains available to investors where they have "legacy investments," provided they commence the arbitration proceeding within three years of the NAFTA termination (*i.e.*, by July 1, 2023). Because WCC, a qualified investor, is pursuing claims related to legacy investments, and initiated its claim before July 1, 2023, it is entitled to NAFTA protection under the USMCA.

57. The term "legacy investment" under the USMCA 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." Thus, there are two requirements to qualify as a "legacy investment":

[94] *Id*. ¶ 45, **CER-1**.

[95] *Id*. ¶ 47, **CER-1**.

(***i***) the investment was acquired between January 1, 1994 and July 1, 2020; and (***ii***) the investment existed on July 1, 2020. As explained below, WCC's investments meet both requirements.

A. WCC Acquired Its Investments Between January 1, 1994 and July 1, 2020

58. As explained in the Notice of Arbitration, Claimant acquired its investments at issue in April 2014. The investments thus meet the first requirement of a legacy investment since they were acquired in April 2014, after the NAFTA went into force—and long before it terminated on July 1, 2020.

59. This should be uncontroversial because the *Westmoreland I* Award concluded that WCC had acquired the coal assets at issue in this dispute in April 2014:

> Westmoreland Coal Company ("WCC") is incorporated in Delaware, United States of America. In April 2014, WCC acquired the coal assets of Sherritt International ("Sherritt"), a Canadian company, paying in excess of US$ 320 million and assuming liabilities in excess of US$ 420 million. Sherritt's assets included Prairie which owned a number of mine-mouth coal mines, including three in Alberta: the Genesee, Sheerness and Paintearth Mines (the "Mines").[96]

60. Other than disputing the sufficiency of documentation offered regarding those investments (addressed in Section IV.A.1 below), Canada does not appear to dispute that Claimant meets this first requirement to constitute a legacy investment, since WCC acquired the investment after NAFTA went into effect but before it terminated.

B. WCC's Investments Existed on July 1, 2020

61. The second requirement under the USMCA is that the investment existed on July 1, 2020. As is clear from the "legacy" nature of this provision, this requirement exists to provide protection to existing investments, in other words, investments made before July 1, 2020 (investments made after that date would be covered by the USMCA).

62. As Claimant explained in the Notice of Arbitration, this dispute concerns several "investments" as defined under Article 1139 of the NAFTA, all of which existed as of July 1, 2020, including: (***i***) an interest and participation in an enterprise (Prairie) (items a and e), (***ii***) the real estate associated with Prairie (item g), (***iii***) interests arising from the

[96] *Westmoreland* Award, ¶ 75 (emphasis added), **CLA-001**.

commitment of capital or other resources in Prairie (item h); and (***iv***) a qualifying claim to money (item h).

63. Canada seeks to introduce new requirements to the USMCA, including its argument that WCC also needs to show that it owned or controlled the investment as of July 1, 2020 .[97] Canada's argument is baseless for at least three reasons.

64. *First*, the relevant time to determine whether the investor owned or controlled the relevant investment is at the time of the challenged measures. *Second*, even if WCC must prove that it owned or controlled the investment on July 1, 2020 to qualify for protection, WCC held on that date, at a minimum, interests arising from the commitment of capital, including a claim to money. *Third*, Canada should be stopped from making this argument because it squarely contradicts the position that Canada adopted in the *Westmoreland I* arbitration. WCC addresses these three arguments in turn.

1. The Relevant Time for Determining Whether the Investor Owns or Controls the Investment Is the Time of the Measures

65. Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**") provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[98] As demonstrated below, investment tribunals repeatedly have held, based on the ordinary meaning, object and purpose of the NAFTA, that the relevant time for determining whether the investor owns or controls the investment is the date of the measures. While this issue has not been addressed by a tribunal constituted pursuant to the USMCA, the same principle to the USMCA. We address these two points in turn.

a. Under the NAFTA, the Relevant Time for Determining Whether the Investor Owns or Controls the Investment Is the Date of the Measures

66. The starting point to determine whether a claim qualifies as a legacy investment is the NAFTA. That is because the USMCA specifies that the NAFTA continues to apply for a three-year period and that the terms "investment" and "investor" have the meanings

[97] Canada's Memorial on Jurisdiction, ¶¶ 85, 88.

[98] Vienna Convention on the Law of Treaties, Article 31(1) ("**VCLT**"), **CLA-004**.

accorded in NAFTA Chapter Eleven.[99] Annex 14-C Article 1 of the USMCA provides, in relevant part:

> Each Party consents, with respect to a legacy investment, 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: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; [. . .]

67. Annex 14-C Article 6 of the USMCA defines the "legacy investments," *i.e.*, which investment claims under the NAFTA can be asserted until July 1, 2023 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 . . .
>
> (b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994.

Thus, it is appropriate to look to the NAFTA definitions of "investment" and "investor" to define which "investment of an investor" is protected under the USMCA's three-year transitional period.

68. The relevant articles for defining what constitutes an "investor" and "investment" under the NAFTA are Articles 1101(1), 1139, 1116(1), and 1117(1). As explained below, tribunals always have interpreted these articles to look to the time of the measures to determine the rightful investor.

69. Article 1101, entitled "Scope and Coverage," is widely considered to be the "gateway" to Chapter Eleven of the NAFTA.[100] Article 1101(1) states that Chapter Eleven applies to, *inter alia*, "investors of another party" and "investments of investors of another Party," the term of art employed in the USMCA.

[99] Canada's Memorial on Jurisdiction, ¶ 84.

[100] *Methanex v. United States of America*, First Partial Award, Aug. 7, 2002, ¶ 106, **RLA-017**; *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, Jan. 28, 2008, ¶ 118, **RLA-018**; *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award Jun. 19, 2007, ¶ 71, **RLA-009** (citing the position taken by the United States in its Article 1128 submission on this issue); *Apotex v. United States of America*, Award on Jurisdiction and Admissibility, Jun. 14, 2013, ¶ 137, n. 22, **RLA-007**; *Grand River v. United States of America*, Award, Jan. 12, 2011, ¶ 76, **RLA-010**.

70. Article 1139 further defines these terms of art, establishing that an 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." This definition clearly does not require continuous ownership, since its tense ("has made") describes an action that occurred in the past.

71. NAFTA Article 1139 likewise defines what an "investment" is and does not require that the investment be held by an investor on the date of entry into force of the treaty or the notice of arbitration. Rather, Article 1139 provides a relatively broad list of investments, including, *inter alia*, interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory.[101] Such interests can subsist even if the investor no longer owns or controls the investment.

72. Article 1139 defines an "investment of an investor of a Party" (the term of art used in the USMCA definition of legacy investment) to mean "an investment owned or controlled directly or indirectly by the investor of such Party," which also describes an action that has occurred in the past.

73. The question of whether to limit protection to those investors who continue to control the investment arose during the NAFTA negotiations. In those negotiations, Canada repeatedly proposed that the term "investment" be defined in Article 1139 to require that the investment interest "continues to be controlled by [the] investor," first suggesting that protection be offered "provided that such business enterprise continues to be controlled by such investor" and later suggesting that "provided that such business enterprise continues to be controlled by such investor or the investor continues to own a significant minority interest in such business enterprise."[102] However, despite Canada's proposals, neither limitation made it into the final version of Article 1139. The fact that this issue was debated

[101] NAFTA Article 1139(h).

[102] INVEST.221, Dallas Composite, Feb. 21, 1992, 32. (The text of February 21, 1992, contained three proposals for the definition of "investment." Canada had suggested the following: [investment means: "the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor"), **C-056**. On April 3, Canada sought to amend the definition to read "the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor or the investor continues to own a significant minority interest in such business enterprise." INVEST.403, Washington Composite, Apr. 3, 1992, 32, **C-057**.

by the Contracting Parties means the Contracting Parties knowingly rejected the requirement of continuous ownership.

74. Article 1116, the standing provision, defines the claims that an investor can submit on its own behalf, and also refers to events that occurred in the past. Specifically, Article 1116 provides that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." Article 1116 is framed in the past tense; it is satisfied as long as the investor "has incurred" loss or damage in the past. Nothing in the text of Article 1116 requires the investor to show it continued to hold the investment after the measures. In fact, prior tribunals (and Canada itself) repeatedly have acknowledged that an investor can bring a claim on its own behalf even if the investor no longer owns the claim.[103] In interpreting Article 1116, the *Westmoreland I* tribunal held:

> [T]o 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.[104]

75. Article 1117 deals with claims by investors on behalf of an enterprise, and provides that "[a]n 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

[103] *See e.g., Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶¶ 76–83, **CLA-005** (allowing NAFTA claim to proceed even though *Mondev* had lost control of it's the project due to foreclosure as well as its rights to contractual claims in the United States before it filed the notice of arbitration); *EnCana v. Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, Feb. 3, 2006 ¶¶ 126–31 ("***EnCana* Award**"), **CLA-006** (finding jurisdiction over claimant's claims against Ecuador even though prior to filing its RFA, EnCana had sold its Ecuadorian investments to a third-party); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, Jun. 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, Oct. 7, 2020 ¶¶ 12, 355, 370, 390, **CLA-008**; *WNC Factoring v. Czech Republic*, PCA Case No. 2014-34, Award, Feb. 22, 2017, ¶¶ 8, 57, 63, 65–68, 401–03, **CLA-009**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, ¶¶ 124–25 ("***GEA v. Ukraine* Award**"); **CLA-010**; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, Aug. 22, 2012, ¶ 144–45 ("***Daimler v. Argentine Republic* Award**"), **CLA-011**.

[104] *Westmoreland* Award, ¶ 200, **CLA-001**.

this Section a claim that the other Party has breached an obligation under [the NAFTA]." While Canada emphasizes the use of the present tense in Article 1117,[105] this language does not foreclose all claims on behalf of the enterprise because the investor can, pursuant to Article 1139, continue to hold all legal claims belonging to the enterprise at the time of the measures. Moreover, prior tribunals repeatedly have failed to place any meaning on the use of the present tense in Article 1117. For example, the *Westmoreland I* tribunal interpreted Article 1117, finding that it required examination of whether the investor held the investment at the time of the breach, placing no importance whatsoever on whether the investor held the investment at any time thereafter:

> The tribunal in *Gallo* "without hesitation", [held] that, for there to be jurisdiction *ratione temporis* "[. . .] the Claimant must have owned or controlled the Enterprise at the time the [challenged measure] was enacted." In further support of the Tribunal's construction, the *Gallo* tribunal specifically referred to 'the' investor, not 'an' investor as follows: "Investment 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." The *Gallo* tribunal further noted that "[i]n a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time." (The critical time is again the date on which the treaty was allegedly breached.).[106]

By referencing "the" critical time, the *Gallo* and *Westmoreland I* tribunals made clear that there is one relevant time for evaluating who owns the investment, *i.e.*, the time of the measures.

76. As the *Westmoreland I* tribunal confirmed, this is the view of the overwhelming majority of investment tribunals, both under the NAFTA and other investment treaties.[107] For

[105] Canada's Memorial on Jurisdiction, ¶ 138.

[106] *Westmoreland* Award, ¶ 202, **CLA-001** (emphasis added); *see also id.* ¶ 209 ("[G]iven the Tribunal's construction of Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction *ratione temporis* to bring a claim").

[107] *See e.g.*, *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, Oct. 7, 2020 ("***IC Power* Award**"), ¶¶ 385–86, **CLA-008**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, ¶¶ 124–125, **CLA-010**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, Jun. 16, 2006, ¶ 135, **CLA-007**; *Daimler v. Argentine Republic* Award, ¶ 144–45, **CLA-011**; *EnCana* Award, ¶ 131, **CLA-006**.

example, the *IC Power v. Guatemala* tribunal dismissed the objection that the claimant had disposed of the investment before filing the arbitration.[108] The tribunal explained:

> Insofar as the alleged Treaty breaches were committed in respect of an investment held by the Claimant at the time, the Tribunal considers that the later transfer of ownership in the investment cannot extinguish the Claimant's right to bring a Treaty claim in respect of those breaches.
>
> Additionally, the Tribunal finds that, as a matter of principle, the ability of investors to mitigate the damage arising from a treaty breach would be significantly curtailed if investors were precluded from disposing of distressed assets before seeking redress from an investment tribunal.[109]

77. The *GEA Group v. Ukraine* tribunal similarly rejected Ukraine's objection that the claimant had assigned its investments to a third party years before it commenced arbitration, finding that the critical date for judging whether an investor owns or owned a "covered investment" is the time when the State adopted the disputed measures.[110] Any other rule "would exclude a significant range of cases where claims are made in respect of the divestment or expropriation of an investment."[111] The tribunal thus confirmed its jurisdiction to hear all claims that occurred before the date on which the claimant had assigned its investments to a third party.[112]

78. Many other investment tribunals have reached the same conclusion. For example, in *EnCana v. Republic of Ecuador*, Ecuador argued that the claimant was not a qualified investor since it had sold its Ecuadorian investments to third-parties.[113] The *EnCana* tribunal rejected Ecuador's argument as "misconceiv[ed]" since "the sale of [EnCana's investments in Ecuador] did not affect th[e] claim as to loss or damage which had accrued up until the time of the sale."[114] As the tribunal explained: "[p]rovided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point;

[108] *IC Power* Award, ¶¶ 12, 355, 370, 390, **CLA-008**.

[109] *Id.* ¶¶ 385–86, **CLA-008** (emphasis added).

[110] *GEA v. Ukraine* Award, ¶¶ 124–25, **CLA-010**.

[111] *Id.* ¶ 124, **CLA-010**.

[112] *Id.* ¶ 125, **CLA-010**.

[113] *EnCana* Award, ¶¶ 123–24, **CLA-006**.

[114] *Id.* ¶¶ 126–27, **CLA-006**.

retention of the subsidiary (assuming it is within the investor's power to retain it) serves no purpose as a jurisdictional requirement[.]"[115]

79. Likewise, the *Daimler v. Argentine Republic* tribunal found that there were "good reasons not to impose a continuous ownership requirement."[116] In its words:

> [T]o impose a continuous ownership requirement may defeat the ends of justice in cases where the sale of the investment was forced - e.g. under domestic bankruptcy laws, where the bankruptcy itself may have been caused by some act of the respondent state in violation of the BIT.[117]

80. The fact that an investor can pursue relief after divestment is so universally recognized that it usually is uncontroversial. In many other cases, the respondent State has not even tried to challenge a claimant's standing to bring its claims even though the claimant no longer had ownership or control of the investment at the time it filed its claim.[118] This reflects the general understanding that loss of ownership and control after the measures does not deprive the investor of its ability to assert claims for earlier measures.

81. In sum, NAFTA Articles 1101, 1116, 1117, and 1139 govern which investors and investments are protected under the three-year USMCA transitional period given the

[115] *Id.* ¶ 131, **CLA-006**.

[116] *Daimler v. Argentine Republic* Award, ¶ 142, **CLA-011**.

[117] *Id.* ¶ 142 (emphasis added), **CLA-011**.

[118] *See e.g., Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶¶ 6, 124, **CLA-012** (claimants filed their RFA on Feb. 4, 2014 even though their investment had entered bankruptcy and the claimants decided to abandon the project years earlier); *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, Sept. 4, 2020 ("***Eskosol* Award**"), ¶¶ 6, 173–75 **CLA-013** (claimant filed its request for arbitration years after an Italian receiver took control of the relevant investment); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, Apr. 30, 2010, ¶¶ 17–18, **CLA-014 (**claimants' investment was put into bankruptcy and auctioned to other owners before they filed the arbitration); *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, Sept. 19, 2011, ¶¶ 8, 26, 36, 107, **CLA-015** (demonstrating that claimant's investment in the Czech Republic was declared bankrupt in October 2001 and that the bankruptcy proceedings terminated on August 10, 2006 with the distribution of the proceeds of sale but that the claimant only began arbitration against respondent in October 2009); *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, Aug. 24, 2015, ¶¶ 8, 39–59, **CLA-016**; *Petrobart Ltd v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, Mar. 29, 2005, pp. 15, 21–22, 41, **CLA-017**; *WNC Factoring* Award, ¶¶ 8, 63, 57, 65–68, 401–03, **CLA-009**. The Czech Republic only challenged the tribunal's jurisdiction on the basis that the arbitration claim was disallowed under EU law on the basis of its *intra*-EU nature; or, alternatively, on the basis that the limited dispute resolution clause of the UK-Czech Republic BIT only allowed the tribunal to decide claimant's expropriation claim under Article 5 of the BIT.

definition of "legacy investments" in the USMCA, and none require continuous ownership (despite Canada's attempts to incorporate such language into the USMCA). WCC held all interests related to Prairie when all of the measures occurred; it therefore qualifies for NAFTA protection pursuant to the three-year transitional period under the USMCA.

b. The Same Principles Apply to the USMCA

82. There is nothing in the text of the USMCA, or in its object or purpose, which justifies departure from the well-settled principle that the relevant time for evaluating the ownership and control of the investment is at the time of the measures.

83. As explained above, USMCA Annex 14-C Article 6 confirms that the terms "investment" and "investor" have the meanings accorded in NAFTA Chapter Eleven. That is, to ensure that investors received the same NAFTA protection, the Contracting Parties applied the same definition of investor and investment as applied when the NAFTA was in force. Thus, there is no textual basis in the NAFTA to depart from the well-established principle discussed in the Section III.B.1.a above.

84. It also makes sense to apply the same definitions of investor and investment under the NAFTA given that the purpose of the USMCA three-year transitional period was to provide a bridge from the NAFTA to the USMCA. American, Canadian, and Mexican government officials and government publications confirm that the State Parties understood that legacy investments would continue to receive the same protection under the USMCA during the three-year traditional period. The following official statements provide guidance on the Contracting Parties' intent:

(a) "[t]he investment protections in Chapter 11 [of the NAFTA] are going to <u>continue to be available</u>"[119] after USMCA enters into force;

(b) Annex C "<u>permits the relevant NAFTA provisions to apply for three years after NAFTA is terminated</u>";[120]

[119] "Quoted: Senior Administration Officials on the USMCA," *World Trade Online*, Oct. 1, 2018 (emphasis added), https://insidetrade.com/trade/quoted-senior-administration-officials-usmca, **C-058**.

[120] Congressional Research Service, "USMCA: Implementation and Considerations for Congress," Legal Sidebar No. LSB10399, Jan. 30, 2020, p. 3 (emphasis added), **C-059**.

(c) "ISDS cases can still be brought forward under NAFTA for investments made prior to the entry into force of USMCA";[121]

(d) "When the USMCA enters into force many of these provisions will remain, and legacy investments will have three years for consideration under NAFTA arbitration;"[122] and

(e) "[i]n the [USMCA], Canada has agreed to an additional 3-year period after the entry into force, in which an investor with a 'legacy investment' may bring a claim for breach of the investment obligations under the NAFTA . . . "[123]

85. Since the purpose of the USMCA was to continue to provide NAFTA protection to existing investments, the determination of whether the investor still should benefit from investment protection should consider whether, immediately prior to July 1, 2020, the investor would have been able to bring its own NAFTA claim under the NAFTA.

86. This is supported by Implementation Article 34.1(1) of the USMCA, which provides that "[t]he Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement."[124] Abruptly terminating the ability of holders of legacy investments to assert claims under Section A of Chapter 11 of NAFTA 1994 would not promote a smooth transition, predictability, transparency, good governance, and the rule of law. To the contrary, such a departure from prior practice would create confusion by abruptly terminating existing rights without notice. The purpose of the USMCA and the NAFTA is

[121] Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment," Feb. 26, 2020, p. 32 (emphasis added), **C-060**.

[122] U.S. Dep't of State, *2020 Investment Climate Statements: Mexico*, available at: https://www.state.gov/reports/2020-investment-climate-statements/mexico/ (lasted accessed Aug. 14, 2023) (emphasis added), **C-061**.

[123] *See also* Government of Canada, "Explore key changes from NAFTA to CUSMA for importers and exporters," https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/nafta-cusma_aceum-alena.aspx?lang=eng, **C-062** (emphasis added) ("The Parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry of force of CUSMA"); Government of Canada, "Bill C-4", Canada-United States-Mexico Agreement Implementation Act, Section C.21, PDF p. 86, https://www.canada.ca/en/privy-council/corporate/transparency/briefing-documents/parliamentary-committees/standing-committee-internal-trade/bill-c-4-canada-united-states-mexico-agreement-implementation-act-february-18-2020.html, **C-063** ("The Parties also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of the CUSMA . . . ").

[124] USMCA, Article 34.1 (emphasis added).

to provide investment protection in order to stimulate foreign investment, and such confusion undermines that purpose.[125]

87. In sum, the text of the USMCA supports applying the same approach that applies to the NAFTA. The object and purpose of the three-year transition period is to ensure a "smooth transition" by ensuring that NAFTA protection would "continue to be available" for three years after the NAFTA's termination, which requires applying the same approach to defining "investor" and "investment" as applied under the NAFTA. That inquiry indisputably should focus on whether the investor held the investment at the time of the breach, which WCC did.

2. Even if the USMCA Requires the Investor to Own or Control the Investment on July 1, 2020, WCC at a Minimum Held Interests Arising from a Commitment of Capital, Including its Claim to Money

88. Even if WCC had to hold the investment at the time the USMCA went into effect, WCC held the right to bring a claim as of July 1, 2020. The NAFTA Article 1139 definition of "investment" extends to "interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such area," including "claims to money," except for claims to money that do not "involve" the kinds of investments that are recognized in Article 1139. WCC's rights to the NAFTA claim, which crystallized when Canada imposed its measures, comprise a claim to money for its protected investment, including, *inter alia*, its enterprise and real estate.

89. Article 1139 provides, in relevant part (emphasis added):

> Article 1139 . . .
>
> investment means:
>
> . . .
>
> (a) an enterprise;

[125] NAFTA, Preamble (resolving to "CONTRIBUTE to the harmonious development and expansion of world trade . . . " and to "ENSURE a predictable commercial framework for business planning and investment . . . "); USMCA, Preamble (resolving to "STRENGTHEN ANEW the longstanding friendship between them and their peoples, and the strong economic cooperation that has developed through trade and investment" and to "ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment").

> . . .
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> . . .
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
>> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
>>
>> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
>
> <u>but investment does not mean,</u>
>
> <u>(i) claims to money that arise solely from</u>
>
>> <u>(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or</u>
>>
>> <u>(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d);</u> **<u>or</u>**
>
> **<u>(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)</u>** . . .

90. By specifically exempting claims to money *other than* those involving the kinds of interests described in Article 1139 subparagraphs (a) through (h), the NAFTA recognizes that claims to money comprise investments *as long as they relate to the categories of investments recognized under subparagraphs (a) through (h)*, such as enterprises (item a), real estate (item g) and interests arising from the commitment of capital (item h). As such, even though WCC no longer owned Prairie as of July 1, 2020, it did hold interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, in particular, the claim to money regarding the enterprise.

91. Multiple investment tribunals, including tribunals organized under the NAFTA and other investment treaties, have held that lawsuits concerning the liquidation and settlement of

claims relating to an investment form part of the investment.[126] Claimant's right to the NAFTA claim is a "claim to money" that is related to an investment because it flows from, and crystallizes, a range of earlier investments.

92. In *Mondev v. United States*, the investor brought a claim on its own behalf for loss and damage caused to its investments in the United States, including loss and damage to its interests in a Massachusetts limited partnership it controlled. By the time of entry into force of the NAFTA, "all Mondev had were claims to money associated with an investment which had already failed," and had entered foreclosure.[127] The United States argued that there was no subsisting investment in the project at the time the NAFTA entered into force, since the project had entered foreclosure, and thus Mondev could not be considered an "investor" at that time.[128] The tribunal rejected that argument, finding that Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory," which also "were not caught by the exclusionary language in paragraph (j) of the definition of 'investment', since they involved 'the kinds of interests set out in subparagraphs (a) through (h).'"[129] The tribunal considered that it would merely be providing protection to the subsisting interests that Mondev continued to hold in the original investment. In the *Mondev* tribunal's words:

> [O]nce an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. This is obvious with respect to the protection offered by Article 1110: as the United States accepted in argument, a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an "investor" as someone who "seeks to make, is making

[126] *See, e.g.*, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Interim Award, Dec. 1, 2008, ¶ 180, **CLA-018** (holding that lawsuits concerning the liquidation and settlement of claims relating to the investment form part of the investment); *see also Etrak Insaat Taahut ve Ticaret Anonim Sirketi v. State of Libya*, ICC Case No. 22236/ZF/AYZ, Final Award, Jul. 22, 2019, ¶ 156, **CLA-019** ("finding that a settlement agreement is a qualifying investment because it constitutes "claims to money […] related to an investment").

[127] *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 77, **CLA-005**.

[128] *Id.* ¶ 77, **CLA-005**.

[129] *Id.* ¶ 80, **CLA-005**.

> or has made an investment". Even if an investment is expropriated, it remains true that the investor "has made" the investment.[130]
>
> Issues of orderly liquidation and the settlement of claims may still arise and require 'fair and equitable treatment', 'full protection and security' and the avoidance of invidious discrimination. A provision that in a receivership local shareholders were to be given preference to shareholders from other NAFTA States would be a plain violation of Article 1102(2). The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and the intent of NAFTA is evidently to provide protection of investments throughout their life-span, i.e., 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.' [131]

93. The *Mondev* tribunal relied on the text of the NAFTA in reaching that conclusion, as well as the object and purpose of the NAFTA. As the tribunal explained,

> [T]o require the claimant to maintain a continuing status as an investor under the law of the host state at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11 . . . Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment.[132]

94. Here, WCC was forced into bankruptcy following Canada's measures, at which point WCC transferred Prairie to WMH to maximize recovery for creditors that otherwise lost everything.[133] These are precisely the types of "classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment" that the *Mondev* tribunal warned should not destroy the jurisdiction[134] Thus, the transfer of Prairie and other related interests to WMH does not deprive WCC of its right to bring the present claim against Canada.

[130] *Id.* ¶ 80, **CLA-005**.

[131] *Id.* ¶ 81, **CLA-005** (emphasis added).

[132] *Id.* ¶ 91 (emphasis added), **CLA-005**.

[133] Stein WS, ¶¶ 6–8, **CWS-1**.

[134] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, Oct. 11, 2002, ¶ 91, **CLA-005**.

95. The *Jan de Nul v. Egypt* tribunal reached the same conclusion, holding that the right to file a claim remained with the investor that held the investment at the time the dispute arose.[135] Likewise, in *Daimler v. Argentine Republic*¸ Argentina argued that the tribunal lacked jurisdiction over the claimant's claims because the claimant had sold its investment before filing its request for arbitration.[136] The tribunal rejected that argument, finding that although the injured investor had transferred "any other rights pertaining to the Sold Shares" to a third party, the investment treaty claim remained with the injured investor pursuant to the law governing the contract of sale.[137] In the tribunal's view, "[t]he better view would seem to be that ICSID claims are at least in principle separable from their underlying investments," such that a claim can remain with the injured investor notwithstanding a subsequent transfer of the related investment.[138]

96. Thus, it is indisputable that a NAFTA claim is a protected investment that can remain with the investor despite a subsequent transfer of the relevant investment. This is clear from the text of the NAFTA, which expressly recognizes "claims to money" as a protected form of investment (as long as the claim relates to the types of investments otherwise protected by the NAFTA), a principle that has been confirmed by multiple investment tribunals.

97. Thus, even assuming *arguendo* that WCC had to own an investment as of July 1, 2020, WCC still has a qualifying investment because it continued to own the NAFTA Claim on that date. That WCC continues to hold the NAFTA Claim has been confirmed by Canada, the *Westmoreland I* tribunal, the U.S. bankruptcy court, and former U.S. bankruptcy judge Hon. Shelley Chapman.

98. To start, in *Westmoreland I*, Canada argued that the right to bring the claim "remain[ed] with the investor who owned or controlled the investment at the time of the alleged breach," *i.e.*, WCC.[139] The *Westmoreland I* tribunal agreed, finding that the claim "remains with the

[135] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, Jun. 16, 2006, ¶ 135, **CLA-007**.

[136] *Daimler v. Argentine Republic* Award, ¶ 105, **CLA-011**.

[137] *Id.* ¶¶ 143–54, **CLA-011**.

[138] *Id.* ¶ 145, **CLA-011**.

[139] *See, e.g.*, Canada's Reply Memorial on Jurisdiction, ¶ 112, **C-047**.

party which owned or controlled it at the time of the alleged breach," *i.e.*, with WCC.[140] Specifically, the *Westmoreland I* tribunal weighed two options, either: (*a*) the NAFTA claim could be transferred with an underlying investment, or (*b*) it remained with the party who owned or controlled it at the time of the treaty breach. The tribunal held that the claim remained with the aggrieved party, *i.e.*, with WCC:

> The question here is whether under NAFTA Chapter Eleven, a NAFTA claim can be transferred together with the underlying investment when the investment is transferred or whether it remains with the party which owned or controlled it at the time of the alleged treaty breach. The short answer to Westmoreland's argument is that given the Tribunal's construction of Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction ratione temporis to bring a claim.[141]

99. Judge David R. Jones also held on June 27, 2022, that the NAFTA claim "remains" with WCC.[142] And, former U.S. bankruptcy judge, Hon. Shelley Chapman, also opines that WCC has at all relevant times retained title to the NAFTA Claim. In her words:

> [I]t bears emphasis that the Bankruptcy Court has issued a binding factual determination that the NAFTA Claim did not transfer pursuant to the Plan or Sale Transaction documents and that "pursuant to the Plan, on the Effective Date, WCC's rights to the NAFTA Claim remained with WCC as reorganized" and "WCC retains title to the NAFTA Claim to the same extent it did prior to the Effective Date."[143]

100. That is, the NAFTA Claim remains with WCC to this day, since WMH could not assert the NAFTA Claim pursuant to the applicable non-bankruptcy law (*i.e.*, the NAFTA). Thus, as of July 1, 2020, WCC indisputably held interests arising out of its commitment of capital, including the right to the claim to money at issue in this arbitration.

[140] *Westmoreland* Award, ¶ 209 ("Here the tribunal considered the corollary situation, holding that a claimant investor which owned or controlled an investment at the time of an alleged treaty breach was not required to maintain a continuing status as an investor at the time the arbitration was commenced."), **CLA-001**.

[141] *Id.* ¶ 209 (emphasis added), **CLA-001**.

[142] *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), Jun. 23, 2022, ¶¶ 1–2, **C-038**.

[143] Expert Report, ¶ 48, **CER-1**.

3. Canada Should Be Estopped from Disputing WCC's Ability to Lodge Its Claim Based on Its Representations in the *Westmoreland I* Arbitration

101. Although WCC has established the requisite ownership and control, as explained above, Canada also should be estopped from arguing otherwise since Canada acknowledged in the *Westmoreland I* arbitration that WCC satisfied the ownership and control requirements under the NAFTA. As explained below, Canada should be estopped from making its arguments on ownership and control because, *first*, those arguments contradict its prior position on ownership and control, and *second*, such arguments only exist because Canada induced and agreed on WCC's withdrawal from its first arbitration, without disclosing Canada's position that WMH would not have standing to pursue the asserted claims.

102. Estoppel is one of the "general principles of law recognized by civilized nations."[144] Its aim is to preclude a party from benefiting from its own inconsistency to the detriment of another party who has in good faith relied upon one of its representations.[145] International law has long recognized such a requirement on the basis that "a State ought to be consistent in its attitude to a given factual or legal situation."[146]

103. In the 1893 Behring Sea arbitration between the United States and Great Britain, the arbitrators rejected the contention that Great Britain had conceded the Russian claim to exercise exclusive jurisdiction over the fur seals fisheries, since Great Britain had protested against the Russian claim of sovereignty in 1821. The proceedings, as Lord McNair stated, "demonstrated that some advantage is to be gained by one State, party to a dispute, by convincing the other State of inconsistency with an attitude previously adopted."[147] "This is not estoppel *eo nomine*," Lord McNair commented, "but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*."[148]

[144] I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L. Q. 468 (1958), **CLA-020**.

[145] *Id*. at 469, **CLA-020** (internal citations omitted).

[146] *Id*. at 468, **CLA-020**.

[147] *Id*. at 469, **CLA-020**.

[148] *Id*. at 469, **CLA-020**.

104. In addition to the notion that a party should not be permitted to "blow both hot and cold," a State's inconsistent positions also can violate the more traditional notion of estoppel involving detrimental effect to the other party. Investment tribunals have defined estoppel as "detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party."[149] In *SPP (Middle East) Ltd. v. Egypt*, for example, the tribunal concluded that "a party is barred from taking a contrary course of action (*i.e.*, alleging or denying a certain act or state of facts) after inducing by its own conduct the other party to do something which the latter would not have done but for such conduct of the former party."[150]

105. Here, Canada has adopted inconsistent positions that have caused serious injustice to WCC, with Canada's insistence that WCC withdraw from the original arbitration (an arbitration that WCC initiated before the NAFTA terminated and before WCC sold its interests in Prairie to WMH).[151] After Canada insisted on WCC's withdrawal from the arbitration, with a carefully worded reservation of rights that made no mention of any potential objection to WMH's standing, Canada immediately turned around and argued that WMH could not step into the shoes of WCC, which, it insisted, was the only investor entitled to bring a claim arising out of the dispute.[152] But for Canada's conduct, WCC and WMH would have been able to take steps to ensure that the NAFTA Claim could be pursued on the merits, including the assertion of the NAFTA Claim by WCC and WMH jointly (as WCC proposed), thereby enabling the tribunal to decide which of those entities was the right beneficiary.

106. Estoppel is closely linked to the international law principle of preclusion, reflected by the maxim *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") and *allegans contraria non audiendus est* ("one making contradictory

[149] *Pan American Energy LLC v. Argentina*, ICSID Case Nos. ARB/03/l3, ARB/04/8 Decision on Preliminary Objections, Jul. 27, 2006, **CLA-021**, ¶ 159.

[150] *SPP (Middle East) Ltd. v. Egypt*, ICC Case No. YD/AS No. 3493, Award, Mar. 11, 1983, 3 ICSID Rep. 46, 66 (1995), **CLA-022**; *see also* UNIDROIT Principles of International Commercial Contracts, Article 1 § 8 (2004) ("A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."), **CLA-023**.

[151] *See supra* Sections II.B–C.

[152] *See id*.

statements is not to be heard"). The underlying basis of the preclusion doctrine "is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation."[153] While the terms estoppel and preclusion often have been employed interchangeably,[154] a number of tribunals and courts have found that the principle of preclusion is broader than the concept of estoppel *stricto sensu*. In particular, detrimental reliance is not a required element of preclusion; rather, a party is precluded from taking inconsistent positions by virtue of the principle of good faith, regardless of reliance. This broader notion of preclusion has been invoked either expressly or implicitly in a number of arbitrations, decisions and separate opinions.[155]

107. The tribunal in the *Argentine-Chile Frontier* Case described the preclusion principle as barring "inconsistency between claims or allegations put forward by a state, and its previous conduct in connection therewith . . . "[156]

108. The decision of the International Court of Justice ("**ICJ**") in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits,[157] and especially the Separate Opinion of Vice-President Alfaro in that case, also reaffirm the international law principle that "a State party to an international litigation is bound by its previous acts or attitude

[153] Article 129 of the Organic Code of the Judiciary of the Republic of Ecuador, **C-064**, which provides: In addition to the duties of any judicial officer, the judges, have the following generic powers and duties: "[. . .] 9. At any stage of the proceedings, the judges that become aware that they have no competence to hear the case on account of personal, territory or grade venue reasons, should refrain from hearing it, without declaring invalid the process they will pass it to the competent court or judge that should, from the point at which inhibition occurred, continue hearing the case. If the incompetence is due to the subject matter, he will declare it null and void and will send the process to the competent court or judge for that would initiate the proceeding, but the time between the filing of the lawsuit and the declaration of nullity will not be computed in terms of the statute of limitations of the right or action."

[154] *Argentine-Chile Frontier* Award, Dec. 9, 1966, 16 R.I.A.A. 109, 164 (1969), **CLA-024**. *See also Case concerning the Territorial Dispute* (*Libyan Arab Jamahiriya v. Chad*), Judgment, Feb. 3, 1994 I.C.J. Rep. 6, 77 ¶ 96 (Separate Opinion of Judge Ajibola) (noting that "in international arbitral or judicial tribunals estoppel and preclusion have tended to be referred to interchangeably or indiscriminately."), **CLA-025**.

[155] *See* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 142 *et seq*. (1987) (discussing arbitrations and cases in which the maxim *allegans contraria non est audiendus* has been applied), **CLA-026**.

[156] *Argentine-Chile Frontier* Award, Dec. 9, 1966, 16 R.I.A.A. 109, 164 (1969), **CLA-024**.

[157] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, (I.C.J. Reports 1962), p. 6, **CLA-027**.

when they are in contradiction with its claims in the litigation."[158] To quote from the same Opinion of Vice-President Alfaro:

> Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). That this principle can operate with decisive effect in international litigation . . . is clear from the *Temple* case itself.[159]

109. The sole arbitrator in *The Lisman* likewise found that the claimant was precluded from adopting an inconsistent factual position:

> By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful . . . claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.[160]

110. The preclusion principle also was adopted in the Iran-US Claims Tribunal case of *Oil Fields of Texas*.[161] Richard Mosk, in his concurring Opinion, explained that Iran and National Iranian Oil Company ("**NIOC**") were precluded from disavowing their

[158] *See* Separate Opinion of Vice-President Alfaro in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, p. 39, **CLA-027**.

[159] *Id.* (emphasis added), **CLA-027**. While some debate remains as to whether the principle of preclusion is a general principle of law recognized by civilized nations or has attained the status of custom, there is no debate that the principle exists. *See also* I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L. Q. 468, 468–70 (1958) (emphasis added), **CLA-020**.

[160] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, 142 (1987) (emphasis in original) (citing *The S.S. Lisman (U.S. v. U.K.)*, Award, Oct. 5, 1937), 3 R.I.A.A. 1767, 1790 (1950)), **CLA-026**.

[161] In 1954, the Iranian State-owned company NIOC entered into an agreement with a US-European consortium of eight major oil companies. Under the agreement, Iran granted the consortium exploration, drilling, refining, and transportation rights with respect to oil in a specified sector of Iran. In 1973, the parties replaced the 1954 agreement with a new agreement whereby NIOC assumed control of all exploration, extraction and refining activities in Iran, but which required the consortium members to form a "service company," OSCO, which then entered into the service contract with NIOC. Following a series of mergers, NIOC eventually expressed its willingness to take over all contracts entered into by OSCO and explicitly represented itself to many third party companies as the party to their contracts executed by OSCO.

previously-made representations concerning NIOC's status, and explicitly rejected any detrimental reliance requirement:

> NIOC has, in order to derive certain benefits, represented itself as the party to contracts executed by OSCO. Iranian Government entities have even represented to this Tribunal that NIOC is OSCO's successor . . . there is authority for the proposition that Iran and NIOC should not now be able to disavow these representations. . . . This principle has long been accepted as a rule of international law . . . [and] [t]here are suggestions that in international law, 'estoppel', or its equivalent, may be utilized, even in the absence of technical municipal law requirements, such as reliance. Underlying the use of estoppel or analogous doctrines in international law "is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation . . . Thus, for all of the foregoing reasons, if, as the majority concludes, NIOC was not OSCO's principal, NIOC is the successor to the liability of OSCO to Oil Field and should be liable to Oil Field to the same extent as would be NIOC's predecessor, OSCO."[162]

111. The International Court of Justice and its predecessor, the Permanent Court of International Justice, also have broadly recognized the concept of preclusion. For example, in the case of the *Legal Status of Eastern Greenland*, the Court stated that because "Norway reaffirmed that she recognized the whole of Greenland as Danish", Norway "has debarred herself from contesting Danish sovereignty over the whole of Greenland."[163] The Court did not consider whether a party had detrimentally relied on Norway's statements; it was sufficient that the statement had been made, intending to produce legal effects.[164] Thus, a party is precluded from taking an inconsistent position by virtue of the principle of good faith, irrespective of whether it induces reliance.

112. Here, Canada is precluded from disputing WCC's ability to bring its claim on ownership/control grounds since Canada itself acknowledged in *Westmoreland I* that WCC still could bring a claim on its own behalf despite having transferred Prairie to WMH. As

[162] Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, *National Iranian Oil Company, Oil Service Company of Iran*, No. ITL 10-43-FT, 1982 WL 229382, at 23–24 (emphasis added) (internal citations omitted), **CLA-028**.

[163] *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, Apr. 5, 1933, P.C.I.J., Ser. A/B, No. 53 at 68–69, **CLA-029**.

[164] *Id.* at 68–69, **CLA-029**.

explained above,[165] at the final hearing on July 15, 2021, Arbitrator Hosking asked Canada, in light of "Canada's position that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law," "what the position of WCC is now in Canada's submission," in particular, "does it have any residual rights to bring a treaty claim?"[166] As Canada confirmed, as of the date of the final hearing, WCC could still have a claim under NAFTA Article 1116 on its own behalf:

> I think if they no longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf. So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf.[167]

113. In other words, Canada represented to the *Westmoreland I* tribunal that WCC still could bring a claim on its own behalf (under Article 1116) as of July 15, 2021, which is *after* the USMCA went into force (and after WCC transferred its investments to WMH). Since WCC still could bring an Article 1116 claim as of July 15, 2021, WCC *also* can bring the present claim, since there is no factual difference in WCC's right to assert a claim on July 15, 2021 and the submission of the Notice of Arbitration in this arbitration.

114. Canada acknowledges that its above-quoted statement accurately reflects its views as to whether an investor can bring a claim after disposing of its investment.[168] While Canada argues its explanation was "conditional" and depends on the "circumstances of a particular claim," Canada does not identify any circumstances involving the present claim that justify departing from the position it took before the tribunal at the final hearing in *Westmoreland I*. Canada's position that WCC still could bring a claim on its own behalf under Article 1116 as of July 15, 2021 is sound. Canada is bound by that position, which should be adopted by this Tribunal.

[165] *See supra* ¶ 10.

[166] Jurisdictional Hearing transcript, Day 2, 278:9–280:9, **C-046**.

[167] Jurisdictional Hearing transcript, Day 2, 278: 9–280:9 (emphasis added), **C-046**.

[168] Canada's Memorial on Jurisdiction, ¶ 102 n. 181.

115. In sum, WCC is covered by the USMCA, which looks to the NAFTA to define the investors and investments that are covered during the three-year transition period. The NAFTA requires that the investor own or control the investment as of the date of the measures, and WCC meets this standard. Even if the NAFTA or USMCA required the investor to also hold the investment as of July 1, 2020, WCC still complies because of its ongoing interest arising from its commitment of capital, which gave rise to a claim to money in the form of a NAFTA claim. In any event, Canada should be estopped from arguing that WCC cannot bring a claim on behalf of Prairie, as this contradicts the position it adopted during the *Westmoreland I* arbitration. While WCC does not have to prove that it detrimentally relied on Canada's representations to preclude Canada from now taking the contradictory position that WCC cannot assert its claim, WCC *has* relied to its detriment on the representations made by Canada by withdrawing its claims.

4. The Legally Significant Connection Test Is Not a Separate Requirement of the USMCA and in Any Event, WCC Meets That Standard

116. Canada argues that the legacy investment claim fails under NAFTA Article 1101(1) because WCC has not shown that the challenged measure had a "legally significant connection" and "immediate and direct effect" on itself or its investment as of July 1, 2020.[169] While WCC easily meets this standard since it owned the investment at the time of the measures, Canada attempts to contort this requirement as somehow related to the "legacy investment" definition in the USMCA. Canada's suggestion that the measures had to have an "immediate and direct effect" on the investment on July 1, 2020 is senseless.

117. As a preliminary matter, it is unsettled whether the NAFTA imposes a "legally significant connection" requirement. For example, the tribunal in *Cargill v. Mexico* refused to adopt the view that Article 1101 contained a "legally significant" requirement.[170] Additionally, the *Apotex II* tribunal thought it "inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven's substantive provisions for the

[169] Canada's Memorial on Jurisdiction, ¶¶ 88–90.

[170] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 175, **RLA-022** (the tribunal held in dicta that the facts giving rise to the claimant's claims against Mexico would have "satisfied" that test anyway).

merits of the Claimants' claims."[171] The *Canadian Cattlemen* tribunal also found that the "legally significant connection" requirement did not "provide guidance" in the "present case," especially in light of the tribunal's duty under Article 31 of the VCLT to interpret Article 1101 according to its "ordinary meaning" in good faith and in light of the NAFTA's object and context and purpose.[172]

118. Even those tribunals that have applied a "legally significant connection" standard uniformly have focused on establishing such a connection at the time of the measures (*e.g.*, not at the time the treaty came into effect nor when the claim is filed). As the *Westmoreland I* tribunal explained in its award:

> This [immediate and direct effect] would not be possible were the claimant not to have owned or controlled the investment in question at the time the challenged measure was adopted or maintained. This requirement that the claimant owned or controlled the investment at the time of the alleged treaty breach can also be seen from the case of *Resolute Forest Products* where the test adopted by the tribunal was whether the measure in question "[. . .] directly address[ed], target[ed], implicate[d] or affect[ed] the Claimant.[173]

119. Other tribunals imposing the "immediate and direct effect" requirement, including *Methanex*,[174] *Cargill*,[175] *Resolute Forest*,[176] and *Bayview*,[177] similarly have reasoned that this requirement only means that the measure must have an immediate and direct effect on the investment. WCC plainly meets that standard, since, as the *Westmoreland I* tribunal

[171] *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, Aug. 25, 2014, ¶ 6.20, **RLA-019**.

[172] *The Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, Jan. 28, 2008, ¶¶ 209, 219, **RLA-018**.

[173] *Westmoreland* Award, ¶ 207 (emphasis added), **CLA-001**.

[174] *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and the Merits, Aug. 3, 2005, Part IV, ¶¶ 18–22, **RLA-050**.

[175] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶¶ 174–75, **RLA-022**.

[176] *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, Jan. 30, 2018, ¶ 248, **RLA-021** ("It holds that the sale measures were sufficiently proximate to the Claimant and its investment to satisfy the 'relating to' requirement of Article 1101").

[177] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award Jun. 19, 2007, ¶ 101, **RLA-009**.

confirmed, the measures "directly address[ed], target[ed], implicat[ed] or affect[ed] [WCC]."[178]

120. Thus, Canada's objection that WCC's legacy investment claim fails under NAFTA Article 1101(1) should be rejected.

IV. THE TRIBUNAL HAS JURISDICTION UNDER THE NAFTA

121. Because the USMCA protects legacy investments in accordance with the terms of the NAFTA, WCC agrees it must establish that the Tribunal has jurisdiction pursuant to the NAFTA. Contrary to Canada's claims, WCC fulfills each of the requirements of the NAFTA, as set out below.

A. Claimant Is Entitled to Bring Its Claim Under NAFTA Articles 1116(1) and 1117(1)

1. WCC Has Provided Sufficient Evidence of Its Investment

122. In its Memorial, Canada claims that WCC has "failed to establish that it held the investments it alleges."[179] Canada's one-paragraph argument is difficult to follow, but Canada appears to make two claims: *first*, that WCC failed to provide evidence of its investments, including its ownership of the Prairie Mines,[180] and *second*, that WCC allegedly failed to describe its "interests arising from the commitment of capital or other resources" under NAFA Article 1139(h) and its "claims to money" with sufficient "precision."[181] Canada also implies that WCC's "claims to money" are not a covered investment under NAFTA Article 1139.[182] Canada's arguments are meritless for the following reasons.

123. *First*, although Canada does not describe any missing documentation, WCC has provided sufficient evidence of its investments. As explained in its Notice of Arbitration, WCC has two main investments protected by the NAFTA and the USMCA: (i) its interest in Prairie

[178] *Westmoreland* Award, ¶ 207, **CLA-001**.

[179] Canada's Memorial on Jurisdiction, ¶ 94.

[180] *Id*. ¶ 94.

[181] *Id*. ¶ 94.

[182] *Id*. ¶ 94 (noting that WCC did not point to a "particular sub-paragraph of Article 1139.").

through March 15, 2019,[183] and (ii) its "claims to money" against Canada, as preserved by the bankruptcy court.[184]

124. WCC acquired Prairie (and the related Prairie mines) on April 28, 2014.[185] There is abundant evidence of this investment, including (*i*) Westmoreland Coal Company Form 8-Ks, including the filing announcing the "acquisition of Sheritt," *i.e.*, Prairie's owner at the time of the acquisition; (*ii*) the Westmoreland 2014 Annual Report; and (*iii*) other Westmoreland Annual Reports.[186] In addition, WCC attaches an April 2014 letter from the Office of Industry of Canada, confirming it was "satisfied that [WCC's] investment is likely to be of net benefit to Canada," and providing "approval of [the] investment pursuant to the Investment Canada Act."[187]

[183] *See In re Westmoreland Coal Company, et al*., Case No. 18-35672 (DRJ), Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621) [Excerpt of Exhibit G – Description of Transaction Steps], Mar. 18, 2019, p. 2, **R-075** (identifying Plan Effective Date as Mar. 15, 2019).

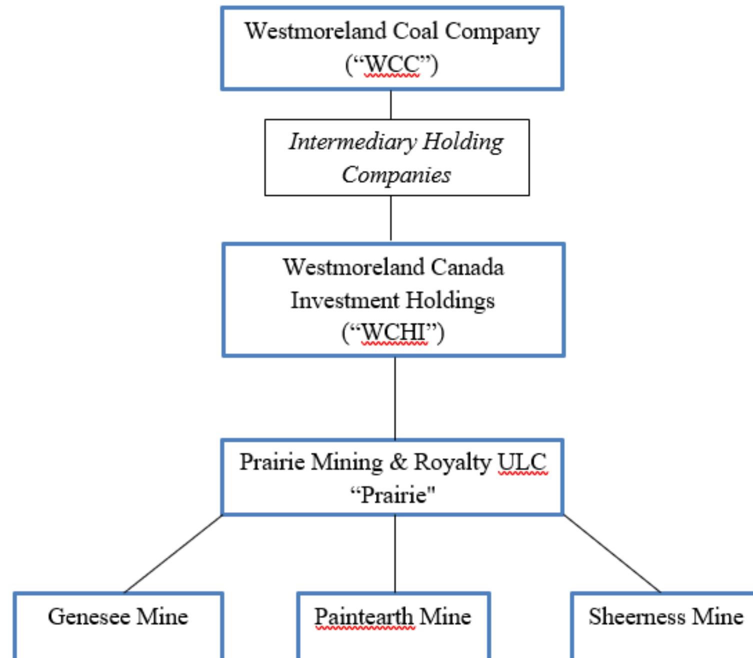
[184] Second Notice of Arbitration, ¶¶ 108–110.

[185] *See* Second Notice of Arbitration, ¶ 34; Westmoreland Coal Company Form 8-K, dated Apr. 28, 2014, p. 1 (noting that WCC "consummated its previously announced acquisition of Sherritt" on April 28, 2014), **C-049**; *see also* Westmoreland Coal Company, 2014 Annual Report, Mar. 6, 2015 [Excerpt], p. 7, **R-058**. *See, e.g.*, Westmoreland Coal Co., Form 8K, Ex. 99.3: Historical Financial Information of PMRL and CVRI, Jul. 1, 2014, p. 4, **C-050**; Westmoreland Coal Company, 2014 Annual Report, Mar. 6, 2015 [Excerpt], p. 17, **R-058**; Westmoreland Coal Co., 2017 Form 10K, Apr. 2, 2018, p. 10, **C-051** (listing Sheerness, Genesee, and Paintearth Mines under "Properties").

[186] *Id.*

[187] Final Letters from Investment Canada, **C-048**.

125. WCC's ownership structure was as follows until its reorganization in bankruptcy in 2019:[188]



126. Through its ownership of Prairie, WCC held "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purpose," as defined under NAFTA Article 1139(g). Prairie "own[ed] and operat[ed] the Paintearth, Sheerness, [and] Genesse" mines, which "suppli[ed] domestic utilities with thermal coal for electricity generation."[189] WCC acquired the assets in the expectation of using the mines for economic benefit, since it owned and operated the relevant mines. In addition, WCC held interests from the commitment of capital and other resources in the continued operation of Prairie and the Prairie mines, including contracts

[188] *See* Westmoreland Coal Company, Current Report (Form 8-K), May 21, 2018, Ex. 99.2, p. 6, **R-059**; Presentation, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations 9, Dec. 24, 2013, slide 5, **C-005** (setting out map of Prairie mines); Westmoreland Coal Company, 2014 Annual Report, Mar. 6, 2015 [Excerpt], p. 7, **R-058**; *see also Westmoreland* Award, ¶ 75, **CLA-001**.

[189] Westmoreland Coal Co., Form 8K, Ex. 99.3: Historical Financial Information of PMRL and CVRI, Jul. 1, 2014, p. 4, **C-050**.

where the remuneration depended on production of the mines, as defined under Article 1139(h).[190]

127. None of this is new to Canada given the findings made by the *Westmoreland I* tribunal. For example, the tribunal found that WCC owned Prairie at the time of the measures, as follows:

> Westmoreland Coal Company ("WCC") is incorporated in Delaware, United States of America. In April 2014, WCC acquired the coal assets of Sherritt International ("Sherritt"), a Canadian company, paying in excess of US$ 320 million and assuming liabilities in excess of US$ 420 million. Sherritt's assets included Prairie which owned a number of mine-mouth coal mines, including three in Alberta: the Genesee, Sheerness and Paintearth Mines. . . After the acquisition, Prairie was directly owned by WCHI, an Albertan entity, owned by WCC. Prairie and WCHI are together called the Canadian Enterprises. This acquisition more than doubled WCC's business and Prairie's mine-mouth coalmines formed its core.[191]

128. The *Westmoreland I* tribunal also described the bankruptcy proceedings and transfer of most of WCC's assets, including Prairie, to WMH in 2019.[192] It described Canada's arguments as follows: "WCC's investment in Canada commenced in 2014 when it acquired the Canadian Enterprises . . . Only WCC can have a claim against Canada for damage allegedly suffered by the Challenged Measures."[193] On the basis of the parties' arguments, the tribunal held that WMH would have to show that it was "the legal successor of WCC pursuant to WCC's restructuring" in order to pursue the claim,[194] thereby recognizing that WCC remained the rightful owner of its claim.

129. Canada recognizes WCC's ownership of Prairie and Prairie's ownership of the Prairie Mines in its Memorial on Jurisdiction, where it acknowledges the 2014 acquisition, citing to many of the same documents WCC previously provided to Canada.[195] It is puzzling that

[190] *See, e.g.*, Contract Extension Agreement Between Prairie Mines & Royalty Ltd. and Alberta Power (2000) Ltd. dated April 29, 2011, **C-065**.

[191] *Westmoreland* Award, ¶¶ 75–76, **CLA-001**.

[192] *Id.* ¶ 89, **CLA-001**.

[193] *Id.* ¶ 107, **CLA-001**.

[194] *Id.* ¶ 218, **CLA-001**.

[195] Canada's Memorial on Jurisdiction, ¶¶ 45–46.

Canada then argues just paragraphs later that WCC has failed to provide sufficient proof of ownership of the Prairie mines.[196]

130. With respect to WCC's claims to money, WCC explained that it holds claims to money against Canada as a result of the Measures, which related to losses to its enterprise, and losses related to its commitment of capital and other resources in Canada.[197] WCC presented evidence that it owns that claim by attaching the bankruptcy court decision confirming its continuing ownership of the NAFTA Claim to its Notice of Arbitration.[198] WCC also explained at length above in Section III.B.2 why its "claim to money" qualifies as an investment under Article 1139 in its Notice of Arbitration.[199]

131. Here, because WCC has a "claim to money" against Canada, which arises out of multiple types of protected investments under NAFTA Article 1139, including, *inter alia*, the protected enterprise, WCC has a protected investment under NAFTA Article 1139(h).

132. As explained in detail in Section III.B.2, numerous tribunals have recognized that claims to money, including claims against the respondent State, qualify as an investment as long as those claims arise out of prior investments. Canada's argument that WCC's "claim to money" is "under no particular sub-paragraph of Article 1139, which are also entirely unspecified"[200] is baseless.

---

196 *Id*. ¶ 94.

197 Second Notice of Arbitration, ¶ 110.

198 *See In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), Jun. 23, 2022, **C-038**.

199 *See also* Second Notice of Arbitration, ¶¶ 108–110. Specifically, WCC explained that "NAFTA Chapter 11 carves out claims to money only where such claims to money arise solely from specific contexts," and thus protect "claims to money" as long as they arise from the other investments protected under Article 1139. As WCC explained:

> Where a claim to money arises from an the above-described categories, including "enterprise" (item a), interest in an enterprise (item e), or interests arising from the commitment of capital (item h), it is considered an "investment" under NAFTA Chapter 11. Therefore, Westmoreland also had claims to money against Canada as a result of the Measures, which related to losses to its enterprise as well as losses related to its commitment of capital and other resources in Canada to economic activity it carried out in Canada.

200 Canada's Memorial on Jurisdiction, ¶ 94 (citing the Second Notice of Arbitration, ¶¶ 108–110).

2. WCC Has the Requisite Ownership and Control Over Prairie

133. Next, Canada argues that WCC cannot bring a claim on behalf of Prairie because WCC did not own or control Prairie at the time WCC submitted its NAFTA Article 1117(1) claim.[201] Canada only asserts this argument with respect to WCC's Article 1117 claim—not its Article 1116 claim. In any event, this argument fails for many of the same reasons as Canada's arguments on WCC's ownership and control of its legacy investment, which Claimant already addressed extensively in Section III.B.1 above.

134. Canada's arguments on ownership and control fail for at least two reasons. *First*, WCC owned and controlled all relevant investments when the measures occurred, which is the relevant time for purposes of determining jurisdiction. *Second*, Canada should be estopped from adopting its new position that WCC did not own or control the investment after the transfer to Prairie, as it contradicts the position that Canada asserted in *Westmoreland I*.[202]

135. As explained above in Section III.B.1, it is well-established that the investor eligible to challenge a State's measures is the entity that owned or controlled the investment at the time the challenged measure was enacted. That is confirmed by:

(a) *First*, the language, context and purpose of Articles 1101, 1116, 1117 and 1139 of the NAFTA, and that language applies to the definition of "legacy" claims under the USMCA (*see supra* ¶¶ 68-75);

(b) *Second*, the consistent interpretation of tribunals constituted under the NAFTA and other treaties, including *Westmoreland I* and *Gallo v. Canada* (*see supra* ¶¶ 75–76); and

(c) *Third*, the object and purpose of the NAFTA and the USMCA to protect foreign investment to stimulate cross-border investment, as well as the Contracting Parties' positions that the USMCA would provide a "smooth transition" for the three-year legacy period (*see supra* ¶¶ 84-87).

136. Thus, there should be no debate that the relevant time for assessing ownership and control is the date of the measures, not the date on which the investor filed its NAFTA claim. And,

[201] Canada's Memorial on Jurisdiction, ¶¶ 137–141.

[202] *Id*. ¶¶ 137–141.

here, it is uncontroverted that WCC held Prairie and all related interests at the time of the measures.[203]

137. In its Memorial, Canada cites irrelevant cases to argue that, in addition to the requirement that WCC owned the investment at the time of the measures (and on the date the USMCA went into effect), WCC *also* must own the investment at the time of the Notice of Arbitration. Canada bases this argument on two cases, *Loewen v. United States* and *B-Mex, LLC and others v. United Mexican States*, neither of which supports its position.[204]

138. *First*, *Loewen v. United States* is heavily criticized and, in any event, entirely inapposite since that tribunal found there was no *continuous nationality* because an American investor was pursuing the claim against the United States. The question of continuous *nationality* has nothing to do with the issue of continuous *identity*. In fact, the *Loewen* tribunal expressly distinguished *Mondev* because *Mondev* dealt with the question of continuous *identity*—not continuous *nationality*.[205]

139. In *Loewen,* the investor accepted that "the present real party in interest" was an American citizen.[206] The tribunal rejected jurisdiction on that basis, holding that the NAFTA "was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors."[207] The tribunal held that there "must be continuous national identity from the date of the events giving rise to the claim . . . through the date of the resolution of the claim."[208] Here, unlike in *Loewen*, at no point from the time of the measures to the present date can it be said that Canadian investors

[203] Indeed, Canada consistently argued that WCC held Prairie on the date of the measures in the *Westmoreland I* arbitration, and the *Westmoreland I* tribunal confirmed the same. *See, e.g.*, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Memorial on Jurisdiction, Dec. 18, 2020, ¶¶ 65–68, 74–76, **R-086**; Canada's Reply Memorial on Jurisdiction, ¶¶ 108–112, **C-047**; *Westmoreland* Award, ¶¶ 218, 230, **CLA-001**. WCC held Prairie from April 28, 2014 to March 15, 2019. Meanwhile, Canada's measures at issue in this arbitration, took place from November 2015 to June 2016. The only measure for which WCC did not hold Prairie at the relevant time is the federal fuel charge, which WCC has agreed to drop in this arbitration. *See supra* ¶ 24.

[204] Canada's Memorial on Jurisdiction, ¶ 138, n. 244.

[205] *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003, ¶¶ 226–27, **RLA-045**.

[206] *Id.* ¶ 225, **RLA-045**.

[207] *Id.* ¶ 223, **RLA-045**.

[208] *Id.* ¶ 225, **RLA-045**.

are seeking to enforce a claim against the Government of Canada. WCC is, and always has been, a U.S. investor pursuing its rights under the NAFTA.

140. Canada also relies on *B-Mex, LLC and others v. United Mexican States* to argue that the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf.[209] *B-Mex* is an isolated case that does not follow the accepted jurisprudence that an investor need only own or control the investment at the time of the challenged measures, a position confirmed by dozens of treaty arbitrations, including *Westmoreland I*, *Mondev, IC Power v. Guatemala*, *Gallo v. Canada*, *GEA Group v. Ukraine*, *WNC Factoring v. Czech Republic*, *Blusun v. Italy*, *Peter Franz Vöcklinghaus v. Czech Republic*, *Petrobart v. Kyrgyz Republic*, *Oostergetel v. Slovakia*, *Dan Cake v. Hungary*, *EnCana v. Ecuador*, *Jan de Nul v. Egypt*, and *Daimler v. Argentine Republic*.[210]

141. Even if the Tribunal adopts the approach of this outlier decision, the *B-Mex* tribunal made clear that while, in its view, the investor must own the enterprise at the time of submission of the claim in order to bring a claim under Article 1117 (*e.g.*, to bring a claim on behalf of the enterprise), the investor still can pursue a claim on its own right pursuant to Article 1116. As that tribunal held, "Article 1116 does not require subsistence of the investment

[209] Canada's Memorial on Jurisdiction, ¶ 138, n. 244.

[210] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶¶ 6, 124, **CLA-012**; *Eskosol* Award, ¶¶ 6, 173–75, **CLA-013**; *Oostergetel v. Slovakia*, Decision on Jurisdiction, Apr. 30, 2010, ¶¶ 17–18, **CLA-014**; *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, Sept. 19, 2011, ¶¶ 8, 26, 36, 107, **CLA-015**; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, Aug 24, 2015, ¶¶ 8, 39–59, **CLA-016**; *Petrobart Ltd v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, Mar. 29, 2005, pp. 15, 21–22, 41, **CLA-017**; *WNC Factoring* Award, ¶¶ 8, 63, 57, 65–68, 401–03, **CLA-009**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, Oct. 11, 2002, ¶ 91, **CLA-005**; *EnCana v. Ecuador*, Award, ¶¶ 126–31, **CLA-006**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, Jun. 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, ¶¶ 12, 355, 370, 390, Oct. 7, 2020, **CLA-008**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, ¶¶ 124–25, **CLA-010**; *Daimler v. Argentine Republic* Award, ¶ 144–45, **CLA-011**; *Vito G. Gallo v. Canada*, PCA Case No. 2008-03, Award, Sept. 15, 2011, ¶ 325, **RLA-011** ("Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained.").

at the time a claim is submitted."[211] Thus, while the position adopted in *B-Mex* is incorrect and should be rejected, even if it were adopted, WCC still should be permitted to proceed with its claim on its own behalf.[212]

142. In sum, there is no requirement that WCC own or control the underlying investments at the start of this arbitration to pursue a claim under Article 1116 or 1117. However, to the extent there is such a requirement, it would only bar WCC from bringing a claim on behalf of the enterprise Prairie. That does not affect the scope of the claim before the Tribunal, however, since Prairie's entire claim crystallized while WCC owned the investment between 2014 and 2019.[213] Thus, the Tribunal should confirm its jurisdiction.

B. WCC Has Pled a *Prima Facie* Damages Claim

143. Respondent argues that Claimant fails to establish jurisdiction *ratione materiae* because Article 1116(1) does not grant a shareholder claimant such as WCC 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.[214]

144. Respondent misconstrues the meaning of reflective loss. Claims for reflective loss arise where shareholders sue for the *diminution of the value* of their shares caused by acts of the host State taken against the company in which they own shares.[215] That is not at issue here, as WCC is challenging Canada's conduct that resulted in the *total destruction* of WCC's investment. This is not a case of reflective loss.

[211] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, Jul. 19, 2019, ¶¶ 148–152 ("***B-Mex* Partial Award**"), **RLA-046**.

[212] Likewise, while Canada cites a submission of the United States in the *B-Mex* case in support of its argument, that submission dealt solely with NAFTA Article 1117, *e.g.*, whether a company must own the enterprise at the time of the submission of the claim to arbitration in order to bring a claim on behalf of the entire enterprise. Much like with the holding in *B-Mex*, such an opinion does not affect WCC's right to bring a claim on its own behalf. *See B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Second Submission of the United States of America, Aug. 17, 2018, ¶¶ 3, 5, 6, **R-117**.

[213] The only claim that did not crystallize during this period related to the federal fuel charge, which, as explained *supra* at ¶ 24, Claimant has dropped from this arbitration.

[214] Canada's Memorial on Jurisdiction, ¶¶ 131 *et seq*.

[215] Zachary Douglas, The International Law of Investment Claims, Cambridge University Press, 2009, p. 402, ¶ 759, **CLA-030**.

145. Moreover, even if WCC were claiming reflective loss under the NAFTA, this claim still would be permissible. The ICJ's rulings in *Barcelona Traction* and *Diallo*, the cases Respondent relies on,[216] are irrelevant because both were concerned with diplomatic protection for shareholders under customary international law.[217] As multiple tribunals have affirmed, as well as the ICJ in *Barcelona Traction* and *Diallo*, customary international law on this point is only relevant if there is no applicable treaty, *i.e.*, where the protection arises only under customary international law.[218]

146. By contrast, in the treaty context, there is no reason to exclude claims seeking to recover for reflective loss. Consider the analysis of the *ad hoc* Committee in *Azurix v. Argentina*:

> [T]he Committee considers that, even where a foreign investor is not the actual legal owner of the assets constituting an investment, or not an actual party to the contract giving rise to the contractual rights constituting an investment, that foreign investor may nonetheless have a financial or other commercial *interest* in that investment. This is so, irrespective of whether the actual legal owner of the assets or contractual rights constituting the investment is a wholly or partly owned subsidiary of the investor, or whether the actual legal owner is an unrelated third party. The Committee

[216] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, International Court of Justice, Judgment, Feb. 5, 1970, ICJ Reports 3 (1970), ¶ 38 ("***Barcelona Traction***"), **RLA-039**; *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (I.C.J. Reports 2010) Judgment, Nov. 30, 2010 ("***Diallo* Judgment**"), ¶¶ 103–105, **RLA-043**. The only case that Respondent cites to that does not apply customary international law is *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Damages, Jan. 10, 2019, ¶ 373. But *Bilcon* does not assist Canada because the holding in *Bilcon*—that Articles 1116 and 1117 NAFTA are "to be interpreted to prevent claims for reflective loss from being brought under Article 1116"—is inapposite in this case. *Id*. ¶ 389, **RLA-040**. Claimant is not claiming reflective loss as it is not claiming for reduction in the value of its shares as a result of the disputed measures.

[217] *Barcelona Traction*, ¶ 86–92, **RLA-039**; *Diallo* Judgment, ¶ 155–156, **RLA-043**. Further, only *Barcelona Traction* addressed reflective loss. In *Diallo*, the ICJ was concerned with Mr. Diallo's direct rights as a shareholder, such as the receipt of dividends or monies payable on the winding-up of companies. *See Diallo* Judgment, ¶ 114–115, 157.

[218] *Barcelona Traction*, ¶ 90, **RLA-039**; *Ahmadou Sadio Diallo (Guinea v Congo)*, International Court of Justice, Decision on Preliminary Objections, May 24, 2007, I.C.J. REPORTS 582 (2007) ¶ 88, **CLA-031**; *BG Group Plc v. The Republic of Argentina*, Final Award, Dec. 24, 2007 ("***BG Group***"), ¶ 202 (c) (noting that even if *Barcelona Traction* were relevant, the Argentina-UK BIT would override that decision), **CLA-032**; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004, ¶ 141, **CLA-033**. *See also Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, International Court of Justice, Decision of Jul. 20, 1989, 15 International Court of Justice Reports (1989), ¶¶ 69–70, **CLA-034**.

> sees no reason in principle why an investment protection treaty cannot protect such an interest of a foreign investor, and enable the foreign investor to bring arbitration proceedings in respect of alleged violations of the treaty with respect to that interest.[219]

147. Respondent's position on reflective loss, if true, would overturn the decades of awards predicated on indirect shareholding. Investor-State tribunals routinely have accepted derivative actions in the decades since *Barcelona Traction*, including *Goetz v. Burundi*,[220] *BG Group v. Argentina*,[221] *CMS v. Argentina*,[222] *Impregilo v. Argentina*,[223] *Arif v. Moldova*,[224] *Deutsche Telekom v. India*,[225] and *Anglo-American v. Venezuela*,[226] as well as NAFTA cases *Pope &*

[219] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, Sep. 1, 2009, ¶ 108 (emphasis added), **CLA-035**.

[220] *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999, ¶ 89, **CLA-036** (citing *AGIP v. Republic of Congo*, *AAPL v. Sri Lanka*, *AMT v. Zaire* and determining that a derivative claim was permissible) ("*la jurisprudence antérieure du CIRDI ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l'étend aux actionnaires de ces personnes, qui sont les véritables investisseurs*.").

[221] *BG Group* ¶¶ 189–205, **CLA-032**.

[222] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, Jul. 17, 2003, ¶¶ 48, 55–56, 57–65, **CLA-037**.

[223] *Impregilo v. Argentina, Impregilo S.p.A v. Argentine Republic*, ICSID Case No ARB/07/17, Award, Jun. 21, 2011, ¶ 138, **CLA-038** ("It follows from Article 1(1)(b) of the Argentina-Italy BIT that Impregilo's shares in AGBA were protected under the BIT. If AGBA was subjected to expropriation or unfair treatment with respect to its concession – an issue to be determined on the merits of the case – such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT.").

[224] *F. Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, ¶¶ 377–380, **CLA-039** (holding that shareholder protection is not restricted to ownership in its shares but extends to the assets of the company).

[225] *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, Dec. 13, 2017, ¶¶ 154–157, **CLA-040** (finding that the claimant shareholder is entitled to recover the reflective losses it suffered from violations of the treaty standards with respect to its indirect investments in its subsidiaries).

[226] *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Jan. 18, 2019, ¶¶ 208–213, **CLA-041**.

Talbot v Canada,[227] *S.D. Myers v. Canada,*[228] *GAMI v. Mexico*,[229] *UPS v. Canada*[230] and *Mondev v. United States*.[231]

148. Finally, in the NAFTA context, as leading scholars confirm, Articles 1116 and 1117 "avoid any potential *Barcelona Traction* problem" because Article 1117 "permits a controlling shareholder that is a national of a NAFTA Party to bring a claim on behalf of an enterprise in another NAFTA Party, even if the shareholder owns the controlling interest through intermediaries."[232] Moreover, an investor of a Party may submit an Article 1117 claim in connection with an investment that is "owned or controlled directly or indirectly by an investor of a Party,"[233] which expressly allows the investor to bring the claim on behalf of the investment for losses suffered by the investment. Thus, unlike some laws that place great weight on the distinction between shareholders and the corporation (the origin of the

[227] *Pope & Talbot v. Canada*, Award in Respect of Damages, May 31, 2002, ¶ 80, **CLA-042** ("It could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise…, it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116."). In this case, Pope & Talbot, Inc., a U.S. company, claimed for losses incurred by its Canadian subsidiary due to Canada's export control regime for softwood lumber under Article 1116 and the tribunal rejected Canada's argument that Pope & Talbot could not recover for its subsidiary's losses under Article 1116. *Id*.

[228] *S.D. Myers*, *Inc. v. Canada*, Second Partial Award (Damages), Oct. 21, 2002, **CLA-043** (allowing U.S. investor S.D. Myers Inc. to bring claim under Article 1116 for losses resulting from Canada's interim prohibition on S.D. Myers' Canadian subsidiary's ability to export Polychlorinated biphenyl waste from Canada to the U.S. for treatment).

[229] *GAMI Investments, Inc. v. United Mexican States*, Final Award, Nov. 15, 2004, ¶¶ 27–33, **CLA-044**.

[230] *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, ¶ 35, **CLA-045** ("We agree with UPS that the claims here are properly brought under Article 1116 and agree as well that the distinction between claiming under Article 1116 or Article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada.").

[231] *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 84, **CLA-005** (acknowledging that Mondev International Ltd. could claim for losses caused by the City of Boston to its subsidiary under Article 1116).

[232] 'Article 1116 – Claim by an Investor of a Party on its Own behalf,' *in* MEG KINNEAR, ANDREA BJORKLUND, ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CH. 11, VOL. 1. (Kluwer Law Int'l 2007), pp. 1116–6, **CLA-046**.

[233] *Id*. at 1116–7, **CLA-046**.

reflective loss restriction), the NAFTA recognizes the rights of controlling shareholders to pursue claims on behalf of the corporation.

C. Claimant's NAFTA Claim Is Timely

149. Under NAFTA Articles 1116(2) and 1117(2), a claimant may submit a claim within three years after the claimant first becomes aware of a breach of the NAFTA and that the breach caused it harm. As explained below, WCC's claims are timely under NAFTA Articles 1116(2) and 1117(2) for three independent reasons. *First*, less than three combined years have elapsed since WCC became aware of its claim, as the limitations period was suspended during the pendency of the earlier *Westmoreland I* arbitral proceedings. *Second*, Canada should be estopped from making its Articles 1116(2) and 1117(2) objections, both in light of its prior inconsistent statements to the *Westmoreland I* tribunal and its active participation in procuring WCC's agreement to withdraw its claim and have WMH proceed as the sole claimant, the very agreement that Canada now relies upon to argue that WCC's claims are time-barred. And *third*, Canada also should be barred from asserting a limitations defense under Articles 1116(2) and 1117(2) to object to this Tribunal's jurisdiction over WCC's claims, on the ground that the assertion of that defense constitutes an abuse of rights under international law.

1. WCC Submitted Its Claims Within Three Years of Learning of the NAFTA Breach

150. As explained below, less than three combined years have elapsed since WCC became aware of its NAFTA claims, since (i) WCC first submitted its claims to arbitration less than two years after learning of the NAFTA Claim, (ii) the limitations period was suspended during the pendency of the earlier *Westmoreland I* arbitral proceedings, and (iii) WCC promptly resubmitted its NAFTA Claim to arbitration less than one year after the issuance of the *Westmoreland* award that established that WCC is the proper NAFTA claimant. As such, in accordance with NAFTA Articles 1116(2) and 1117(2), less than three combined years have elapsed between the time that WCC became aware of Canada's NAFTA breaches and the submission of the claim to this arbitration.

a. WCC Timely Asserted its NAFTA Claim against Respondent

151. WCC first submitted its dispute to arbitration less than two years after first becoming aware of Canada's breaches of NAFTA. As explained above in Section II, WCC first became aware of Canada's breaches of the NAFTA and that those breaches caused it harm on November 24, 2016,[234] when Alberta signed Off-Coal Agreements with Canadian companies that were affected by Alberta's Climate Leadership Plan, but not with WCC, which was equally impacted.[235] WCC initiated an arbitration against Canada on November 19, 2018, less than two years later.

152. At that point, as explained in below, the limitation period was suspended from November 19, 2018 until January 31, 2022, when the *Westmoreland I* tribunal rendered its award finding that WMH did not have standing to assert the NAFTA Claim.

153. On October 11, 2022, less than nine months after the issuance of the *Westmoreland I* award, WCC re-submitted its NAFTA Claim to arbitration, challenging the exact same measures that it previously challenged.

154. In total, therefore, with the suspension of the limitations period during the pendency of the arbitral proceedings that culminated with the award on January 31, 2022, less than three combined years have passed between the date when WCC first became aware of Canada's NAFTA breaches and the ensuing harm, and the date when WCC filed this arbitration, in compliance with Articles 1116(2) and 1117(2).

b. WCC's Timely Submission of its Claims Suspended the Three-Year Limitations Period Until the Award of January 31, 2022

155. Article 31(1) of the VCLT states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[236] Article 31(2) also provides that "the context for the purpose of the interpretation of a treaty shall comprise … the text, including its preamble and annexes."[237] Also, according to Article 31(3)(c), when interpreting a treaty,

[234] *See supra* ¶ 18; and Notice of Arbitration dated Nov. 19, 2018, ¶¶ 66–67, **R-079**.

[235] *See supra* ¶ 18; and Notice of Arbitration dated Nov. 19, 2018, ¶¶ 67–76, **R-079**.

[236] VCLT, Article 31(1), **CLA-004**.

[237] *Id*., Article 31(2), **CLA-004**.

"[a]ny relevant rules of international law applicable in the relations between the parties" shall be taken into account, together with "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[238]

156. Thus, under the VCLT, a good faith reading of NAFTA Articles 1116(2) and 1117(2) must look to the ordinary meaning of those provisions, accord with their object and purpose, and take into account the rules of international law and any subsequent party agreement. A good faith reading of Articles 1116(2) and 1117(2) pursuant to the VCLT, supports finding that the limitations period is suspended once the Contracting Party is notified of a dispute for the duration of the pending arbitration. This interpretation is supported by, *first*, the text of the provisions, *second*, the object and purpose of the NAFTA, *third*, the subsequent statements of the NAFTA Contracting Parties, and *fourth*, general principles of international law. Thus, the limitations period here was suspended during the pendency of the earlier arbitral proceedings, *i.e.*, from November 19, 2018 to January 31, 2022.

i. The Text of NAFTA Articles 1116(2) and 1117(2)

157. Much like other investment treaties,[239] NAFTA Articles 1116(2) and 1117(2) are silent as to whether the initiation and pendency of a timely claim suspends the running of the limitations period. The text of Article 1116(2), which is virtually identical to Article 1117(2), provides:

> An investor of a Party <u>may submit to arbitration</u> under this Section <u>a claim</u> that another 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 investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim <u>if more than three years have elapsed</u> from the date on which the investor first acquired, or should have first

[238] *Id.*, Article 31(3)(c), **CLA-004**.

[239] *See, e.g.*, Peru-US FTA Article 10.18.1, **C-066**; Canada-Moldova BIT (2018), Articles 21(2)(3)(i), and (f)(i), **C-067**; Canada-Guinea BIT (2015), Articles 22 (5)(1) and (6)(1), **C-068**.

> acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.[240]

158. While Articles 1116(2) and 1117(2) do not speak to the suspension of a limitations period, they do provide that an investor "<u>may submit to arbitration</u>" a claim, as long as it files that claim within three years. Thus, the textual question is what constitutes "submit[ting] a claim" for purposes of the three-year limitations period, such that the investor complies with the limitations period. Article 1137 of the NAFTA answers that question by providing that "[a] claim is <u>submitted to arbitration</u> under this Section when…(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party." In this case, WCC "submitted to arbitration" its NAFTA claim in 2018, when Canada received WCC's notice of arbitration under the UNCITRAL Arbitration Rules.

159. In the highly analogous case of *Renco v. Peru (II)*, the tribunal presided by Bruno Simma interpreted the similarly structured U.S.-Peru FTA, finding that, as long as the investor submitted an earlier claim by a timely notice of arbitration, the claim was "submitted" by the limitations period, which suspended the limitations period during the pendency of the arbitration. The *Renco II* tribunal found that, because the notice of arbitration and statement of claim was "submitted" in compliance with the applicable UNCITRAL Rules, the investor's re-submitted claim following a dismissal due to a procedural defect was not time-barred by the Peru-U.S. FTA. In the words of the tribunal:

> [T]he Tribunal finds that the Claimant's notice of arbitration and statement of claim *in Renco I* suspended the prescription period of Article 10.18.1 – notwithstanding the fact that the Claimant was found, almost five years later, to have submitted a defective waiver. In this vein, what matters is that the notice of arbitration and statement of claim in *Renco I* met the requirements of Articles 3 and 20 of the UNCITRAL Rules and, therefore, amounted to a submission to arbitration within the (identical) meaning of both Articles 10.16.4 and Article 10.18.1 . . . Consequently, the Tribunal finds that the Claimant's claims are not time-barred pursuant to Article 10.18.1.[241]

[240] NAFTA, Article 1116(2) (emphasis added)

[241] *The Renco Group, Inc. v. The Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, Jun. 30, 2020, ¶¶ 249, 251 ("***Renco II***"), **CLA-002** (internal citations omitted).

160. Likewise here, WCC "submitted" its notice of arbitration in compliance with the requirements of Articles 1116(2) and 1117(2), and said notice of arbitration complied with the applicable 1976 UNCITRAL Rules, since it included (*a*) a demand that the dispute be referred to arbitration;[242] (*b*) the names and addresses of the parties;[243] (*c*) a reference to the arbitration clause that is invoked;[244] (*d*) a reference to the contract out of or in relation to which the dispute arises;[245] (*e*) the general nature of the claim and an indication of the amount involved;[246] and (*f*) the relief sought.[247] Much like in *Renco II*, WCC was required to re-submit its claims to cure the procedural defect found by the *Westmoreland I* tribunal. Thus, the limitations period was suspended during the proceedings first initiated by WCC.

ii. The Object and Purpose of the NAFTA

161. The object and purpose of the NAFTA is to promote cross-border investments by allowing foreign investors whose investments are harmed by a foreign government to pursue their claims in a neutral forum. Specifically, "[C]hapter 11 of the NAFTA seeks to protect non-State actors by granting them substantive and procedural rights, including the right to [pursue their claims via] arbitration."[248] NAFTA Article 102(e) provides that the NAFTA's objectives include the creation of "effective procedures … for the resolution of disputes." Likewise, NAFTA Chapter Eleven, Section B defines its "Purpose" in Article 1115 as follows:

> [T]his Section [Settlement of Disputes between a Party and an Investor of Another Party] establishes a mechanism for the settlement of investment

[242] 1976 UNCITRAL Arbitration Rules, Article 3(a), **CLA-003**; First Notice of Arbitration, ¶¶ 2, 19, **C-043**.

[243] 1976 UNCITRAL Arbitration Rules, Article 3(b), **CLA-003**; First Notice of Arbitration, ¶¶ 15–16, **C-043**.

[244] 1976 UNCITRAL Arbitration Rules, Article 3(c), **CLA-003**; First Notice of Arbitration, ¶ 19, **C-043**.

[245] 1976 UNCITRAL Arbitration Rules, Article 3(d), **CLA-003**; First Notice of Arbitration, ¶ 19, **C-043**.

[246] 1976 UNCITRAL Arbitration Rules, Article 3(e), **CLA-003**; First Notice of Arbitration, ¶¶ 78–104, **C-043**.

[247] 1976 UNCITRAL Arbitration Rules, Article 3(f), **CLA-003**; First Notice of Arbitration, ¶ 105, **C-043**. It was not necessary for the Notice of Arbitration to contain a proposal as to the number of arbitrators under Article 3(g) of the 1976 UNCITRAL Rules since, under NAFTA Article 1123, there were to be three arbitrators.

[248] Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" Fifteen Years of NAFTA Chapter 11 Arbitration. (2011) JurisNet., 193–194, **CLA-047**.

> disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal. (emphasis added)

162. Thus, it is indisputable that the purpose of Chapter Eleven is to provide for an effective procedure to resolve disputes. Barring the resubmission of claims previously dismissed due to (correctable) procedural defects simply because the statute of limitations has run in the meantime would run counter to the objective of creating an effective framework for the resolution of disputes.

163. The object and purpose of the specific provisions at issue, Articles 1116(2) and 1117(2), also are consistent with the principle that the limitations period is suspended when a claim has been timely asserted. All three Contracting Parties have taken the position that the purpose of the limitations period in NAFTA Articles 1116(2) and 1117(2) is to provide predictability and to ensure the availability and sufficiency of reliable evidence.[249] Here, the object and purpose of Articles 1116(2) and 1117(2) were satisfied when WCC timely submitted its Notice of Arbitration on November 19, 2018, less than two years after the limitations period started to run. At that point, Canada was put on notice of the need to secure reliable evidence and prepare to defend itself against the NAFTA claims, and the limitations period was suspended until the issuance of the *Westmoreland I* award.

[249] *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, Jul. 26, 2021, ¶ 18, **R-092** (stating that the purpose is "to provide legal predictability and certainty by ensuring that States are not forced to defend stale claims for which evidence may no longer be readily available or which require witnesses to recollect events long past."); *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Second Submission of the United States of America, Jun. 25, 2021, ¶ 5, **R-093**; and *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Submission of the United States of America, Jul. 14, 2008, ¶ 16, **R-099**. *See also Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, Mar. 11, 2016, ¶ 5, **CLA-048**; and *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, Apr. 17, 2015, ¶ 7, **CLA-049**. In those submissions, the United States referred to Article 10.18.1 of the Dominican Republic-Central America-United States Free Trade Agreement, which is nearly identical to NAFTA Articles 1116(2) and 1117(2), and wrote that the object and purpose of that provision is to "promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties." *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, Apr. 2, 2009, **R-100** (Mexico agreed with the United States regarding the object and purpose of Articles 1116(2) and 1117(2)).

164. Commenting on a substantively identical provision in the Canada-Venezuela BIT,[250] the *Vannessa Ventures v. Venezuela* tribunal acknowledged that "the purpose of such a statute of limitation provision is to require diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions,"[251] and on that basis, rejected Venezuela's time bar defense since Vanessa Ventures had discussed the relevant investment in its request for arbitration.[252] That is, where there has been ongoing, diligent prosecution of the claim, the State has the opportunity to preserve relevant evidence, thereby achieving the goals of the prescription period and justifying its suspension during the pendency of the asserted claim.[253] WCC's commencement and WMH's prosecution of the first arbitration achieved these goals.

165. Canada alleges that WCC's position would "deprive Articles 1116(2) and 1117(2) of any purpose or utility" because "a claimant could submit, then withdraw, then resubmit a claim after the limitation period, requiring respondent States to defend stale claims for the indefinite future."[254] That is nonsense. WCC obviously is not suggesting that claimants should be able to abuse the limitations period by arbitrarily pausing and restarting the arbitration at whim. WCC's position is that the limitations period is suspended during the diligent prosecution of a claim in arbitration, as such conduct keeps the State on notice of the claim and allows it to prepare its defense. This enables the investor to re-submit its

250 Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Jul. 1, 1996, Article XII.3(d) ("An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if not 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."), **C-069**.

251 *Vannessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, Aug. 22, 2008, ¶ 3.5.4, **CLA-050**.

252 *Id.* ¶¶ 3.5.2, 3.5.4, **CLA-050**.

253 Bin Cheng notes that "[a] review of the various international decisions dealing with the subject will show that the raison d'être of prescription may be found in the concurrence of two circumstances:— 1. Delay in the presentation of a claim; 2. Imputability of the delay to the negligence of the claimant." Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), 378–379, **CLA-026**.

254 Canada's Memorial on Jurisdiction, ¶ 101.

claim if it is dismissed due to a procedural defect, so long as the claim is submitted within the limitations period, excluding the period of suspension.

166. Thus, the object and purpose of NAFTA Chapter Eleven, including the two specific limitations provisions, support the conclusion that the timely submission of a claim to arbitration effectively suspends the three-year limitations period.

iii. General Principles of International Law

167. In addition to Article 31(3)(c) of the VCLT, which looks to "any relevant rules of international law," NAFTA Article 1131 provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." As explained by the Mixed Claims Commission (France-Mexico) in the *Georges Pinson Case*, every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not expressly resolve in a different way.[255] Thus, to the extent that the express terms of Articles 1116(2) and 1117(2) are ambiguous, the tribunal should look to international law to resolve any remaining ambiguity.

168. Many international tribunals and jurisdictions around the world have established the general principle that the timely presentation of a claim to the competent authority suspends the limitations period during the pendency of the claim. This suspension principle is a relevant rule of international law that the Tribunal must consider in interpreting Articles 1116(2) and 1117(2).[256]

169. International tribunals long have recognized the suspension of a limitations period once a State is notified of the claim. More than one hundred years ago, Commissioner Little in

[255] *Georges Pinson Case (France v. Mexico)*, Award, Oct. 19, 1928, V UNRIAA 327, p. 422 ("*Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente*."), **CLA-051**.

[256] *See supra* ¶ 155. As the tribunal in *Eskosol S.p.A. in liquidazione v. Italian Republic* explained, "the ICJ's point was that just as customary international law principles can be created by the universal behavior of States considered to have ripened into law, such principles also may emanate from the convergence in their national laws of generally accepted principles." *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, May 7, 2019, ¶ 119, **CLA-052**.

Williams v. Venezuela held that a limitations period is suspended when the debtor government is duly notified of the claimant's claim.[257] Commissioner Little reasoned that such notification "puts that government on notice, and enables it to collect and preserve its evidence and prepare its defense."[258]

170. Following *Williams v. Venezuela*, this suspension principle gained ground with other international tribunals. A few years later, in 1903, Umpire Ralston held in the *Gentini Case* that "the presentation of a claim to competent authority within proper time will interrupt the running of prescription."[259] Likewise, in the 1903 *Giacopini Case*, Umpire Ralston rejected Venezuela's limitations argument, even though the Giacopinis had suffered harm 32 years prior, since Venezuela had been put on notice of the incidents involving the Giacopinis. Umpire Ralston concluded that "full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails."[260]

171. Umpire Ralston came to the same conclusion based on similar facts in the *Tagliaferro Case*. Although 31 years had elapsed between the incidents complained of and the presentation of the claim to the Mixed Claims Commission (Italy-Venezuela), Umpire Ralston found that the responsible authorities had known of the wrongdoing "at all times." As a result, he concluded that "[w]hen the reason for the rule of prescription ceases, the rule ceases, and such is the case now."[261]

172. In the last century, the question of whether a limitations period is suspended during the pendency of the claim has arisen in only one publicly-available investment treaty case—*Renco v. Peru (II)*.[262] In addition to its textual reading of the limitations period (discussed above), the *Renco II* tribunal held that the suspension of limitations periods during the pendency of a timely-asserted claim is a general principle of law recognized by civilized

[257] *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, at 279–293, **CLA-053**.

[258] *Id.,* **CLA-053**.

[259] *Gentini Case*, Reports of International Arbitral Awards, Vol. X, pp. 551–561, at 561, **CLA-054**.

[260] *Giacopini Case*, Reports of International Arbitral Awards, Vol. X, pp. 594–596, at 595, **CLA-055**.

[261] *Tagliaferro Case*, Reports of International Arbitral Awards, Vol. X, pp. 592–594, at 593, **CLA-056**.

[262] *Renco II*, ¶ 248, **CLA-002**.

nations.[263] The *Renco II* tribunal based that finding on the fact that suspension has long been recognized by international tribunals, is well-accepted in common laws and civil laws around the world, and is recognized in multilateral treaties. Based on a thorough review of these sources of law, the *Renco II* tribunal held that the suspension of prescription periods during the pendency of the asserted claim rises to the level of a "general principle of law," as follows:

> In order for a principle to rise to the level of a "general principle of law" under Article 38(1)(c) of the ICJ Statute, it must be "generally accepted" across national legal systems. The exact degree of acceptance required remains a subject of debate. However, no such difficulty arises in this case. The Claimant has pointed to the laws of Peru, Argentina, France, Germany, Portugal, Spain, the United Kingdom, and the United States. The Claimant also cites early arbitral decisions from which the rules of prescription in international law originated as a general principle adopted by analogy from national legal systems and Roman law, including most notably the *Gentini Case*, which held that "the presentation of a claim to competent authority within proper time will interrupt the running of prescription."[264]

173. Perhaps for this reason, other respondent States have not objected on prescription grounds in similar cases involving resubmission of claims to arbitration. For example, in *Waste Management II*, after the *Waste Management I* tribunal dismissed the original claim due to an incomplete waiver, the claimant resubmitted its claim. By the time the claimant filed the second request for arbitration in June 2000, more than three years had lapsed since many of the measures, which dated back to 1995.[265] Despite this, neither Mexico nor the tribunal questioned the limitations period.

174. In sum, the suspension principle, which has been adopted by civilized nations and international tribunals alike, forms a general principle of international law to which the VCLT and NAFTA Article 1131 refer. Applying that principle, the Tribunal should find that the limitations period in the NAFTA is suspended during the pendency of a timely-

[263] *Renco II*, ¶ 212, **CLA-002**.

[264] *Id.* ¶ 214 (internal citations omitted), **CLA-002**.

[265] Some of the measures at issue in the arbitration took place as early as October 1995, including a newspaper advertisement taken out by the mayor, demanding adjustments to the service. Despite this, Claimant did not initiate the second arbitration until 2000. *See generally*, *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, Jun. 26, 2002 ("***Waste Management II* Decision**"), ¶ 35, **RLA-036**.

asserted claim. Here, there can be no dispute that Canada was put on notice of WCC's claims in 2018 when WCC timely commenced arbitration. Thus, the limitations period was suspended during the pendency of the arbitration initially commenced by WCC, and then prosecuted by WMH, until the tribunal issued its award on January 31, 2022.

iv. The Positions of the NAFTA Parties

175. Article 31(3)(a) of the VCLT provides that the interpretation of a treaty should take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[266] Canada alleges that the Contracting Parties have agreed that Articles 1116(2) and 1117(2) impose a "clear and rigid" prescription period that is "not subject to any suspension, prolongation or other qualification."[267] On the contrary, if anything, the Contracting Parties have agreed that suspension of the limitations period would be appropriate in the present circumstances.

176. To begin with, Canada has not established the existence of any agreement between the three NAFTA Parties regarding Articles 1116(2) and 1117(2). Canada also has not pointed to any submission on Articles 1116(2) and 1117(2) that it made as a non-disputing party pursuant to NAFTA Article 1128. Canada apparently only relies on its submissions in this case and in the *Tennant* case.[268] Arguments that a State party makes in the context of defending an arbitration cannot be considered evidence of any party agreement regarding the interpretation of a treaty.[269] Because States may, as the parties to the treaty, assert a concordant interpretation that benefits them as litigants against investments, adopting such interpretations would "appear[] to be contrary to due process, specifically contrary to the

[266] VCLT, Article 31(3)(a), **CLA-004**.

[267] Canada's Memorial on Jurisdiction, ¶ 98.

[268] *Id*. ¶ 98, n. 172.

[269] *See*, *e.g.*, *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, Jun. 17, 2005, ¶ 47, n. 12 ("We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties."), **CLA-057**.

principle of independence and impartiality of justice, which includes the principle that no one can be the judge of its own cause."[270]

177. To support its allegation that the three NAFTA parties agree on the interpretation of Articles 1116(2) and 1117(2), Canada relies on the United States' and Mexico's Article 1128 submissions in the *Merrill & Ring Forestry* and *Tennant* cases.[271] Notably, *Merrill & Ring Forestry* and *Tennant* dealt with the date on which the limitations period started to run, *not* whether the limitations period is suspended during the pendency of the arbitration. Moreover, those submissions all cite to the *Feldman v. Mexico* award for the proposition that the limitations period in Article 1116(2) is "clear and rigid" and not subject to any "'suspension,' 'prolongation,' or 'other qualification.'"[272] Yet, the *Feldman* award (upon which Canada also relies[273]) includes an exception to the "clear and rigid" limitations period, specifically where, *as here*, the State is aware of and acknowledges the claim.

178. Specifically, while the *Feldman* tribunal found that Articles 1116(2) and 1117(2) "introduce a clear and rigid limitation defense which, as such, is not subject to any

[270] Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free trade *Commission* and the Rule of Law" Fifteen Years of NAFTA Chapter 11 Arbitration. (2011) JurisNet., 192, **CLA-047**.

[271] Canada's Memorial on Jurisdiction ¶ 98, n. 172.

[272] *See Merrill & Ring Forestry v. Canada*, ICSID Case No. UNCT/07/1, Submission of the United States of America, Jul. 14, 2008, ¶ 6, **R-099**; *Merrill & Ring Forestry v. Canada*, ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, Apr. 2, 2009, **R-100**; *Tennant Energy v. Canada*, PCA Case No. 2018-54, Second Submission of the United States of America, Jun. 25, 2021, ¶ 4, **R-093**; and *Tennant Energy v. Canada*, PCA Case No. 2018-54, Second Submission of the United Mexican States, Jun. 25, 2021, ¶ 9, **R-094**.

[273] Canada's Memorial on Jurisdiction, ¶ 98, n. 173. In that same footnote, Canada cites cases that are inapposite because the claimants in those cases failed to begin any arbitration proceeding within the three-year window, which is not WCC's case. For example, in *Grand River v. United States of America*, the claimants submitted their notice of arbitration on March 12, 2004. The tribunal held that the claimants should have known about some of the respondent's alleged treaty breaches and of the resulting loss or damage that the claimants had incurred prior to March 12, 2001, the date of the three-year cutoff for purposes of the limitations provision under NAFTA Articles 1116(2) and 1117(2). The Grand River tribunal concluded that those claims were time-barred (*see Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, Jul. 20, 2006, ¶ 83, **RLA-024**). WCC's circumstances are materially different. WCC initiated an arbitration within three years of becoming aware of Canada's NAFTA breaches, in compliance with Articles 1116(2) and 1117(2). Therefore, this Tribunal should not place any weight on the manner in which other tribunals, faced with very different facts, characterized the language of those two provisions.

suspension, prolongation or other qualification,"[274] it also held, in the same paragraph of its Award, that "an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation."[275] The *Feldman* tribunal also noted that a prolonged recognition of the claim by the State would constitute an "exceptional circumstance" that likely would interrupt the running of the limitations period. In its words:

> [A]ny other state behavior short of such formal and authorized recognition would only under exceptional circumstances be able to either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense. Such exceptional circumstances include a long, uniform, consistent and effective behavior of the competent State organs which would recognize the existence, and possibly also the amount, of the claim.[276]

179. In other words, the *Feldman* award, on which *all three* NAFTA parties rely in construing Articles 1116(2) and 1117(2), confirmed that the limitations period in those provisions could be interrupted (*i.e.*, suspended) by the assertion and acknowledgement of the claim. Notably, in its *Merrill & Ring Forestry* Article 1128 submission, Mexico "expressly endorse[d] the observations of the United States of America in connection with the findings of the arbitral tribunal in *Feldman v. United Mexican States*."[277] Thus, to the extent the Tribunal adopts the non-disputing parties' prior views on this issue (issued in a different context), those views acknowledge an exception to the rigid rule that otherwise applies to Articles 1116(2) and 1117(2), where the State is timely made aware of the claim, as Canada has been since 2018.

v. The Suspension Principle Applies to the NAFTA Claim Resubmitted by WCC

180. Canada attempts to avoid the application of the well-established suspension principle by arguing that the arbitration initiated by WCC and then pursued by WMH involved

[274] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002, ¶ 63 (internal citations omitted), **RLA-023**.

[275] *Id.* ¶ 63 (emphasis added), **RLA-023**.

[276] *Id.* ¶ 63 (emphasis added), **RLA-023**.

[277] *Merrill & Ring Forestry v. Canada*, ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, Apr. 2, 2009, **R-100**.

"different claims brought by different claimants," and that WCC "cannot simply merge different claims brought by different claimants to suit its litigation strategy."[278] Canada's position is wrong both on the facts and the law. However, even assuming, *arguendo,* that the claims asserted by WCC and WMH were different, that would have no impact on the applicability of the suspension principle, which nevertheless comports with the text, object, and purpose of Articles 1116(2) and 1117(2).

181. Contrary to Canada's assertion, the claims asserted by WCC in 2018 and WMH in 2019 were *the same*, both factually and legally. In fact, Canada concedes in its Memorial on Jurisdiction that the claims involved nearly identical facts and claims: "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 the WCC's 2018 NOA."[279] Thus, Canada's argument that WCC and WMH submitted "different claims" is both disingenuous and wrong.[280]

182. This is not a case involving unrelated entities that may have different claims against the State or differing interests; on the contrary, WCC and WMH's claims involve the exact same investments and the exact same measures. WMH and WCC did not proceed as co-claimants originally because WMH did not exist when WCC initially filed its arbitration. WMH only entered into the picture as a result of a purported assignment of the NAFTA Claim by WCC to WMH during the course of the WCC bankruptcy. While it turns out that the assignment was void, it was nevertheless apparent to Canada at all times that WMH was seeking to assert the exact same claims that WCC originally filed.

278 Canada's Memorial on Jurisdiction, ¶ 102.

279 *Id*. ¶ 64.

280 In its correspondence on this issue in the first arbitration, Canada relies on two cases to suggest the case would be "new," but neither case supports its position. In *Merrill & Ring Forestry L.P.*, the claimant sought to add a new party that was entirely unconnected to Merrill & Ring, Georgia Basin L.P. Georgia Basin owned timberland in British Columbia. The tribunal held that Georgia Basin would have to submit a new claim because the two parties asserted very different claims. *See Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Decision on a Motion to Add a New Party, Jan. 31, 2008, ¶¶ 2, 20–21 ("we [] see as many differences as we see similarities"), **RLA-003**. By contrast, even Canada recognizes that WMH and WCC asserted the same claim. In *Refusal to Accept the Claim of Raymond Intl (UK) Ltd*, Judge Holtzmann dissented, citing to an especially apt aphorism by the distinguished Justice Manfred Lachs of the International Court of Justice: "exaggerated formalism . . . may in some circumstances deny the administration of justice." *Refusal to Accept the Claim of Raymond Intl (UK) Ltd,* Refusal No. 21 (Decision No. DEC18-REF21-FT) Final Decision, Dec. 8, 1982, reprinted in 1 Iran-US CTR 394, **RLA-002**.

183. Canada's position that the arbitration initiated by WCC and pursued by WMH are "different claims" also is belied by party conduct. All parties treated the *Westmoreland I* arbitration as a continuation of the claim previously asserted by WCC. In fact, Canada itself characterized its "solution" of removing WCC from the arbitration as a continuation of the proceeding that WCC had already begun. Canada thus agreed to "accept the Amended NOA filed on May 13 as [WMH's] NOI . . . "[281] WCC and WMH also understood that Canada's solution was a continuation of the arbitration process. As noted above, WCC and WMH agreed to Canada's proposal "as a means to <u>expedite</u> the arbitration process and avoid unnecessary conflict" and thanked Canada "for proposing a fair compromise that enables us to <u>proceed</u> with the arbitration without unnecessary procedural delay."[282] Moreover, while Canada proposed to re-appoint the arbitrators appointed prior to the amendment of the claim, the parties simply proceeded to treat their previously appointed arbitrators as having been duly appointed without exchanging any new appointment documentation.[283] Thus, contrary to Canada's claims, the fact that WCC withdrew and that WMH was substituted as the claimant does not change the fact that both entities were asserting the exact same claim to challenge exact same measures before the same arbitrators they had previously appointed before the substitution of claimants.

184. Even assuming, *arguendo,* that the claims asserted by WCC and WMH were different, that would have no impact on the applicability of the suspension principle because WCC's submission of its 2018 Notice of Arbitration, and WMH's continuation of that claim, comports with the text, object, and purpose of Articles 1116(2) and 1117(2).

185. It is undeniable that WCC initiated the first arbitration in 2018, and in doing so, complied with the Article 1116(2) and 1117(2) by "submitting" its claim to arbitration within the three-year limitations period, even though WMH continued the claim to conclusion. There is nothing in the text of Articles 1116(2) or 1117(2) that supports limiting the application of the suspension principle to cases in which the claimant is substituted during the course of the arbitration.

[281] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, p. 2, **R-081**.

[282] Letter from Elliot Feldman to Scott Little, Jul. 3, 2019, p. 2, **R-082**.

[283] *See supra* ¶ 36.

186. Moreover, all of the objectives of the NAFTA limitations period are met here. Specifically, WCC's original timely submission of its claim in 2018 confirms that WCC did not delay its prosecution of the case, one of two core goals of the prescription period.[284] Moreover, since the claims involved identical facts and alleged NAFTA breaches, Canada was fully on notice of the NAFTA Claim in 2018 and had every opportunity to preserve its evidence and develop its defense of the NAFTA Claim, thereby satisfying the other core goal of the limitations period, *i.e.*, to ensure that the State is put on notice to prepare its defense.[285] Thus, while WCC and WMH are separate legal entities, that does not change the fact that the claims asserted by each of them were exactly the same, such that WMH's substitution as the claimant had no relevance from a limitations perspective. In short, all of the objectives of the NAFTA limitations period were satisfied here.

187. Refusal to recognize the suspension principle in these circumstances would run contrary to the purpose of the NAFTA, especially because WCC submitted its own waiver in that arbitration. As a result, if its claim were now time-barred, WCC would be left without any opportunity to have its day in court, all because of a procedural (and correctable) technicality.[286] Under similar facts, the *Renco II* tribunal held that such a conclusion would be inconsistent with the purpose of the treaty:

> While, contrary to NAFTA, the Treaty does not explicitly mention as one of its objections the creation of effective dispute resolution procedures, there can be no doubt that the Contracting Parties, acting in good faith, must have intended for the Treaty's dispute resolution mechanism to be effective. Applying the above reasoning of the Tribunal in *Waste Management*, it would seem to run counter to the effectiveness of the system if the Claimant in the present case, after having eventually submitted a valid waiver (without any relevant time having passed for prescription purposes after the conclusion of *Renco I*), is still denied in its request to have its Treaty claim heard on the merits. In the words of the Tribunal in that case, such a situation should be avoided if possible.[287]

188. Suspension is just as warranted here as it was in *Renco II*, since WCC has not had its NAFTA claim heard on the merits before *any* tribunal, national or international. Thus,

[284] *See supra* Section II.B.

[285] *See supra* ¶ 163.

[286] *Waste Management II* Decision, ¶ 35, **RLA-036**.

[287] *Renco II*, ¶ 246 (emphasis added), **CLA-002**.

failure to suspend the prescription period once WCC initiated the arbitration (that WMH continued) would undermine the central purpose of the NAFTA to create an effective dispute resolution framework.

189. In sum, a good faith interpretation of Articles 1116(2) and 1117(2), in accordance with the VCLT, the object and purpose of the NAFTA, general principles of international law, and the subsequent submissions of the non-disputing parties, all support a finding that WCC's submission of its notice of arbitration in 2018 suspended the three-year statute of limitations, which continued to be suspended until the arbitral tribunal rendered its award on January 31, 2022. As such, WCC's claims in this arbitration were timely filed, as they were asserted within three combined years after WCC learned of Canada's NAFTA breaches and the resulting damages caused.

2. Canada Should Be Estopped From Asserting Its Limitations Defense

190. Even if the NAFTA limitations period was not suspended during the pendency of the earlier arbitral proceedings, Canada nonetheless should be estopped from asserting the limitations defense since it is inconsistent with the positions that Canada took both in procuring the withdrawal of WCC's NAFTA Claim and its defense in the *Westmoreland I* arbitration.

191. As explained above,[288] the related principles of estoppel and preclusion are among the "general principles of law recognized by civilized nations."[289] Those same principles preclude Canada from arguing that WCC's claims are time-barred for at least two reasons. *First*, Canada's limitations defense hinges upon WCC's withdrawal of its 2018 NAFTA Claim in connection with WMH's substitution—a withdrawal that Canada insisted upon and presented as a solution to enable the parties to "continue the process, in which they are currently engaged, of appointing a tribunal chairperson,"[290] without any disclosure that Canada intended to utilize WCC's withdrawal to seek dismissal of the NAFTA Claim on jurisdictional grounds. And *second*, Canada should be precluded from asserting its

[288] *See supra* Section III.B.3.

[289] *See, e.g.*, I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L. Q. 468 (1958), **CLA-020**; Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, National Iranian Oil Company, Oil Service Company of Iran, No. ITL 10-43-FT, 1982 WL 229382, at 23–24 (internal citations omitted), **CLA-028** (recognizing preclusion as a principle of international law).

[290] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, p. 2, **R-081**.

limitations defense because it is wholly inconsistent with Canada's position before the *Westmoreland I* tribunal in 2021 that WCC still could pursue the NAFTA Claim.

192. As explained in Section III.B.3, the aim of estoppel is to preclude a party from benefiting from its own inconsistency to the detriment of another party, particularly where the other party has in good faith relied upon one of its representations to its detriment.[291]

193. Here, as explained above,[292] WCC initiated arbitration against Canada in November 2018, raising claims involving the exact same measures at issue in the present arbitration. In May 2019, after WCC's reorganization in bankruptcy transferred ownership of Prairie to WMH, WCC submitted an Amended Notice of Arbitration.[293] The 2019 Amended Notice of Arbitration, which was "submitted on behalf of [WCC], [WMH], [WCHI], and [Prairie],"[294] sought to insert WMH as a claimant in the arbitration, describing WCC and WMH as the "initial disputing investor" and the "disputing investor," respectively,[295] and its Exhibit 1 included waivers for WCC, WMH, WCHI, and Prairie.[296] Canada refused to accept the Amended Notice, but said it would accept it as WMH's Notice of Intent so long as WCC withdrew its claim completely.[297] Canada did not disclose that it intended to object to the tribunal's jurisdiction over WMH. To the contrary, Canada implied the exact opposite by reserving its right to challenge jurisdiction only with respect to the "original NOA" submitted by WCC and any "new claims", without any mention of challenging WMH's standing to pursue the NAFTA Claim.

194. Believing Canada to be acting in good faith, WCC and WMH agreed to Canada's plan.[298] Had Canada notified WCC that it planned to object to WMH's standing to pursue WCC's originally filed claims, WCC would not have agreed to withdraw and also would have been able to take additional steps at the time to ensure that WCC's original claims were heard

[291] I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L. Q. 468 (1958), 469, **CLA-020**.

[292] *See supra* Section II.B.

[293] Letter from Elliot Feldman to Scott Little, May 13, 2019, **R-080**.

[294] Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, ¶ 1, **C-055**.

[295] *Id*. ¶¶ 15, 21, **C-055**.

[296] *Id*., Exhibit 1, **C-055**.

[297] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, p. 2, **R-081**.

[298] *See supra* Section II.C.

on the merits, such as, for example, having WCC and WMH prosecute the claims as co-claimants. As Jeffrey Stein explains in his witness statement, had WCC known that Canada planned to challenge WMH's standing to pursue the NAFTA Claim, WCC would have taken whatever steps were necessary to make sure that the NAFTA Claim was heard on the merits, whether through WCC or WMH.[299]

195. Canada also should be estopped from asserting its limitations defense because it squarely contradicts the position that Canada took before the *Westmoreland I* tribunal in 2021. As noted above, the sole arbitrator in *Lisman* held that, where a party deliberately adopted one position in an arbitration, that party "prevent[s] himself" from adopting the opposite position in a subsequent litigation.[300] The principle that a party cannot "blow hot and cold" is a principle of both estoppel and preclusion that is recognized as a rule of international law.[301]

196. Here, as explained above,[302] Canada acknowledged in the *Westmoreland* arbitration that WCC still could bring its NAFTA Claim, thus reinforcing Canada's position before the tribunal that only WCC has standing to pursue the claim. Specifically, at the jurisdiction hearing on July 15, 2021, when Arbitrator Hosking asked Canada, whether WCC "ha[s] any residual rights to bring a treaty claim,"[303] Canada responded that "[WCC] could still be in a position to bring a claim on its own behalf."[304] Notably, Canada made that representation on July 15, 2021, long after the three-year limitations period would have

[299] Stein WS, ¶ 15.

[300] *See supra* ¶ 109.

[301] *See, e,g.*, Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, National Iranian Oil Company, Oil Service Company of Iran, No. ITL 10-43-FT, 1982 WL 229382 at 23–24 (internal citations omitted), **CLA-028**.

[302] *See supra* ¶¶ 10, 112–14.

[303] Jurisdictional Hearing transcript, Day 2, 278:9–280:9, **C-046**.

[304] Jurisdictional Hearing transcript, Day 2, 278:9–280:9, **C-046** ("I think if they no longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf. So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf.").

expired if it were not suspended. Earlier in the arbitration, Canada similarly acknowledged that WCC "continues to exist, and it was open to WCC to continue with its NAFTA claim."[305]

197. Canada ultimately convinced the *Westmoreland I* tribunal to decline jurisdiction over WMH's case based on the finding that WCC alone qualified as the covered investor to assert the NAFTA Claim. Canada should not be permitted to represent to the *Westmoreland I* tribunal that WCC could still bring a claim—and then change its position after the Tribunal found that WCC was the only "investor" who could assert the NAFTA Claim in order to prevent WCC from reasserting that claim. Canada should be estopped from changing its position now in order to prevent WCC from bringing the claim that Canada previously said "it was open to WCC to continue with."

3. Canada Also Should Be Barred From Asserting Its Limitation Defense Because It Constitutes an Abuse of Rights Under International Law

198. An abuse of rights occurs when a party exercises its rights unreasonably without due regard for the interests of others, which is precisely what Canada did when it insisted on WCC's withdrawal from the arbitration, and then relied on that same withdrawal to argue that WCC's claims are time barred, thereby preventing those claims from ever being heard on the merits.

199. Investment treaty tribunals have embraced abuse of rights as a principle of international law. For example, the tribunal in *Abaclat v. Argentina* found that this theory was "an expression of the more general principle of good faith," which itself is "a fundamental principle of international law, as well as investment law."[306] The ICJ has recognized the principle of good faith as "one of the basic principles governing the creation and performance of legal obligations."[307] Article 26 of the VCLT also provides that "[e]very

[305] Canada's Reply Memorial on Jurisdiction, ¶ 112, **C-047**.

[306] *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Aug. 4, 2011, ¶ 646, **CLA-061**.

[307] *See Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, 253, 268 (¶ 46), **CLA-059**.

treaty in force is binding upon the parties to it and must be performed by them in good faith."[308]

200. The abuse of right principle requires the State to act in a manner that "is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect)."[309] In addition, the State must conduct itself fairly and equitably, and not exercise its right in a way that "is calculated to procure . . . an unfair advantage…"[310] In other words, "the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation . . . "[311]

201. To decide whether or not a State exercised a right in good faith, "an international tribunal must examine whether the exercise of the right was in pursuit of the legitimate interests protected by it and whether, in the light of the obligations assumed by the State, the exercise of the right was calculated to prejudice the rights and legitimate interests of the other party under the Treaty."[312] There must be a "fair balance" between "the legitimate interests of the owner of the right" and "the legitimate interests of the other [] party."[313]

202. At least one international tribunal has found that the State could not invoke a limitations defense where it was partially responsible for the claimant's delay in bringing the claim.

308 VCLT, Article 26, **CLA-004**. Sir Hersch Lauterpacht wrote that "there is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused." Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge Grotius Publications Limited, 1982), 164, **CLA-058**.

309 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), 125, **CLA-026**. The Appellate Body of the World Trade Organization echoed Bin Cheng's position by confirming that international law prohibits the abusive exercise by a State of its rights: "This principle [the principle of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights . . . " WTO Appellate Body, Decision WT/DS58/AB/R, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, ¶ 158, **CLA-060**.

310 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), 125, **CLA-026**.

311 *Id.*, **CLA-026**.

312 *Id.* at 128–129, **CLA-026**.

313 *Id.* at 129, **CLA-026**.

In the 1903 *Stevenson Case*, Umpire Plumley dismissed Venezuela's limitations arguments because Venezuela had learned of the case in a timely fashion but refused to entertain the claim.[314] Umpire Plumley concluded that "it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government."[315]

203. Canada's course of conduct here, *i.e.*, (1) insisting that WCC withdraw its claim as a condition of WMH's substitution under the pretense that Canada was seeking to avoid a jurisdictional problem, (2) then arguing that the *Westmoreland I* tribunal had no jurisdiction to consider WMH's claims because only WCC could pursue those claims, and (3) now seeking to prevent WCC from reasserting those same claims, based on the very withdrawal that Canada insisted upon, obviously was calculated to make sure that the NAFTA Claim was not heard on merits, with no regard whatsoever for the prejudice that would result to WCC.

204. As the procedural history recounted above in Section II makes clear, Canada's mission all along apparently has been to make sure that WCC's NAFTA Claim is never heard on the merits, even though WCC timely asserted that claim back in 2018, giving Canada every opportunity to prepare its defense. Canada's conduct does not advance any legitimate right or interest that Canada might have since Canada had timely notice of the NAFTA Claim.

205. Canada's attempt to have WCC's NAFTA Claim dismissed as time barred does not achieve a "fair balance" between "the legitimate interests of the owner of the right" and "the legitimate interests of the other [] party."[316] If Canada prevails in short-circuiting WCC's

[314] *Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 385–387, at 385, **CLA-062**. ("It appears from the facts gathered . . . that the Venezuelan Government was in 1869, if not before, fully advised of the existence of this claim and of the details of which it was composed . . . and [the Venezuelan Government] had announced to the representative of the British Government that, owing to civil warfare, they could not attend to the arrangements or payment of it . . . some time subsequent . . . this case had been brought up before the Venezuelan Government, and it was found placed among their list of 'unrecognized claims.'").

[315] *Id.* at 387, **CLA-062**. *See also Irene Roberts Case*, Reports of International Arbitral Award, Vol. IX, pp. 204–208, at 207 ("The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose."), **CLA-063**.

[316] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge Grotius Publications Limited, 1987), p. 129, **CLA-026**.

ability to reassert its claim, Canada will have escaped the NAFTA Claim through clever procedural maneuvers, not by advancing any legitimate interest or right connected with the NAFTA's limitations period.

206. WCC, on the other hand, has obviously legitimate interests in having its day in court by having its NAFTA Claim heard on the merits—a claim that the United States Bankruptcy Court specifically has preserved in order to effectuate the terms of WCC's reorganization plan. WCC restructured solely for legitimate business purposes; as the *Westmoreland I* tribunal recognized, the purported transfer of the NAFTA Claim was unrelated to any attempt to create jurisdiction to assert a claim.[317] The restructuring also did not create new beneficiaries. WCC has acted in good faith in restructuring for business purposes and pursuing its claim on behalf of the appropriate beneficiaries; it deserves its day in court.

207. Meanwhile, Canada has manipulated the proceedings to ensure that WCC does not receive its day in court. Canada cannot, on the one hand, recognize WCC's right to pursue the NAFTA Claim in order to defeat WMH's standing to pursue that claim, and then turn around and oppose WCC's reassertion of that very claim. Much like in the *Stevenson Case*, Canada (like Venezuela) has responsibility for delaying WCC's ability to have its claims heard on the merits; as such, "it would be evident injustice to refuse [WCC] a hearing when the delay was apparently occasioned by the respondent Government."[318]

208. Canada will suffer no discernible prejudice from having to defend WCC's claims on the merits now. As explained above, Canada has been on notice of this dispute since WCC first filed its Notice of Dispute in 2018. Canada has acknowledged the assertion of this claim and has been able to prepare its defense of the case while WCC and WMH prosecuted the arbitral proceedings. Less than six months elapsed between the issuance of the *Westmoreland I* award and WCC's Notice of Intent in the present arbitration. To the extent that Canada suffers any prejudice from having to defend itself now on the merits, that harm is brought about by its own insistence on WCC's withdrawal of its claims, knowing full well that it planned to challenge WMH's standing to pursue WCC's claims.

[317] *Westmoreland* Award, ¶¶ 192, 218, **CLA-001**.

[318] *Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 385–387, at 387, **CLA-062**. *See also Irene Roberts Case*, Reports of International Arbitral Award, Vol. IX, pp. 204–208, at 207, **CLA-063**.

209. In sum, by procuring WCC's agreement to withdraw its claim against Canada as a condition of WMH's substitution, then challenging WMH's standing to pursue WCC's original claims while acknowledging to the tribunal that WCC still could bring those claims, and finally to argue that WCC's claims are time barred when those claims were reasserted, it is obvious that Canada's goal all along was to make sure WCC's claims were never heard on the merits, rather than to protect its own rights. Thus, even if Canada's limitations defense had any merit (which it does not for the reasons discussed above), that defense should be rejected as an abuse of rights.

D. Claimant Submitted Valid Waivers Pursuant to NAFTA Article 1121

210. The Parties mostly agree about the requirements of the NAFTA Article 1121 waiver provision.[319] Specifically, the Parties agree that a waiver letter: (*i*) takes immediate effect; and (*ii*) continues in perpetuity. Logically, that means the NAFTA waivers that WCC submitted in its first arbitration took immediate effect and continue to be in force to this day. Despite recognizing that such waiver letters ought to remain valid today, however, Respondent argues that WCC was required to prepare new waiver letters with its Notice of Arbitration in this proceeding. Respondent's argument should be rejected for three reasons. *First*, the waivers that WCC submitted on its own behalf and on behalf of Prairie remain valid and binding to this day, and WCC filed those effective waivers simultaneously with the Notice of Arbitration in the present arbitration. *Second*, in any event, tribunals no longer impose a restrictive rule of treaty interpretation and demonstrate flexibility in the timing of submission of waivers. *Third*, fundamental principles of international law support WCC's position, since Canada previously accepted waiver letters when WMH joined the first arbitration and WCC still has not yet had its day in court.

1. WCC Filed Valid Waivers With Its Notice of Arbitration in the Present Proceedings

211. Canada has never challenged the substance of WCC's waiver letters, even though WCC first submitted them with its original notice of arbitration, and WMH thereafter relied on one of them (WCC's original waiver letter for Prairie) in the *Westmoreland I* arbitration. Canada has no basis to object to the substance of the waivers, which employed the same

[319] Canada's Memorial on Jurisdiction, ¶¶ 111–113.

language utilized in NAFTA Article 1121 and were signed by the then-Chief Executive Officer of WCC, Michael Hutchinson. Thus, Canada cannot (and does not) argue that the substance of the waiver letters is inconsistent with NAFTA Article 1121.

212. Canada also cannot fairly argue that the waiver that WCC submitted with its Notice of Arbitration is no longer valid today. In its Memorial on Jurisdiction in this arbitration, Canada asserts that by signing a waiver, a claimant commits not to "initiat[e] or continu[e] domestic or other dispute settlement proceedings for the payment of damages 'with respect to the measure' alleged to breach NAFTA."[320] In Canada's view, "[t]here is no end date to the commitment not to initiate such proceedings."[321] Thus, Canada must acknowledge that the waiver letters that WCC submitted in the first arbitration on its own behalf and on behalf of its enterprise, Prairie, remain valid and continue to be in force today.

213. Because WCC's waiver letters are substantively sufficient and remain valid, WCC did not need to prepare a new waiver letter. In fact, a second waiver letter would serve no legal purpose since there was nothing left for WCC to waive when it filed its Notice of Arbitration in the present case. WCC executives cannot sign away rights that already were waived and no longer exist.

214. Moreover, contrary to Respondent's arguments,[322] WCC filed its waivers "contemporaneously" with, *i.e.*, attached to, its Notice of Arbitration in the present arbitration.[323] Thus, WCC complied with NAFTA Article 14.D.5, which requires that the notice of arbitration be "accompanied . . . by" the claimant's and the enterprise's written waivers.[324] There is no obligation under the NAFTA that the waiver be executed simultaneously with the Notice of Arbitration—only that the waiver accompany the notice of arbitration.

[320] Canada's Memorial on Jurisdiction, ¶ 116.

[321] *Id*. ¶ 116.

[322] *Id*. ¶¶ 113–115.

[323] *See* Prairie Mines Waiver, **C-40**; WCC Waiver, **C-41**.

[324] NAFTA Article 14.D.5 provides that, "[n]o claim shall be submitted to arbitration under this Annex unless . . . the notice of arbitration is accompanied: (i) for claims submitted to arbitration under Article 14.D.3.1(a) (Submission of a Claim to Arbitration), by the claimant's written waiver, and (ii) for claims submitted to arbitration under Article 14.D.3.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers."

215. In sum, Canada has never disputed—and still does not dispute—the substance of WCC's waiver letters. Those letters remain valid and binding on WCC and Prairie to this day. Since WCC had nothing more to waive, it correctly attached the same waiver letters to its Notice of Arbitration in this case, thereby complying with the requirement that the notice of arbitration be "accompan[ied]" by the relevant waivers.[325] That should suffice for the Tribunal to reject Canada's waiver objections.

2. Tribunals No Longer Impose a "Restrictive" Rule of Treaty Interpretation and Demonstrate Flexibility in the Timing of Waivers

216. Canada's formalistic arguments with respect to the waiver letters undermine the purpose of the NAFTA. In reliance on Article 31 of the VCLT,[326] multiple tribunals have held that a waiver letter need not be submitted simultaneously with the notice of arbitration.[327] Thus, while WCC did submit the waiver letters simultaneously with the Notice of Arbitration, such a formalistic complaint is insufficient to deprive the Tribunal of jurisdiction to hear the present case, as confirmed by the following precedent.

217. In *International Thunderbird Gaming v. Mexico*, Mexico objected to jurisdiction because some of the relevant enterprises had not timely filed waivers along with the notice of arbitration.[328] The tribunal rejected this objection, finding that the "requirement to include

[325] Canada's Memorial on Jurisdiction, ¶ 115.

[326] *Ethyl Corp. v. Canada*, Award on Jurisdiction, Jun. 24, 1998, ¶ 55, **CLA-064**. The *Ethyl* tribunal began its discussion by declaring irrelevant the "restrictive" rule of treaty interpretation, which traditionally had provided that any waiver of sovereign prerogative should be construed strictly. It noted that the doctrine of restrictive interpretation had been replaced by the Vienna Convention on the Law of Treaties, to which Canada was a Party and which the United States had acknowledged as setting forth customary international law with respect to treaty interpretation. The tribunal thus announced it was applying Vienna Convention principles in its analysis, which required the tribunal to look at the "ordinary meaning to be given to the terms [of the treaty] in their context and in the light of [its] object and purpose." *See also Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Award, Sept. 25, 1983, 1 ICSID Reports 377, 394–97 (1983), **CLA-065** (rejecting the notion that treaties are to be interpreted in deference to the sovereignty of States); *Mondev v. United States of America*, Award, Oct. 11, 2002, ¶ 43, n. 4, **CLA-005** ("Neither the International Court of Justice nor other tribunals in the modern period apply any principle of restrictive interpretative to issues of jurisdiction.").

[327] *See e.g., Ethyl Corporation v. Canada*, Award on Jurisdiction, Jun. 24, 1998, **CLA-064**; *B-Mex* Partial Award, ¶¶ 46–139, **RLA-046**.

[328] *International Thunderbird Gaming Corp. v. United Mexican States*, Arbitral Award, Jan. 26, 2006, ¶¶ 114–16, **RLA-037**.

waivers in the submission of the claim is purely formal" and "a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings."[329] In rejecting Mexico's objection, the *Thunderbird* tribunal observed that it "joins the view of other NAFTA Tribunals that have found Chapter Eleven provisions should not be construed in an excessively technical manner."[330] In the words of the *Thunderbird* tribunal, to grant Canada's Article 1121 objection would warp the object and purpose of the NAFTA's waiver requirement by engaging in an "overl[y]formalistic" approach to treaty interpretation.[331]

218. Likewise, in *B-Mex et al. v. Mexico*, Mexico claimed that the claimant's failure to list every single aggrieved investor in its original waiver letter meant that the tribunal should decline jurisdiction.[332] The *B-Mex* tribunal rejected Mexico's arguments. The tribunal noted that the "purpose" of Chapter 11 of the NAFTA was to "provide investors access to a dispute resolution mechanism that is successful in producing the intended result of <u>resolving investment disputes</u>."[333] As the tribunal held, it would cut against the object and purpose of the treaty to not allow the additional claimants to cure a trivial procedural defect by submitting waiver letters and consenting to jurisdiction after the request for arbitration had been submitted,[334] particularly because Mexico had not been prejudiced by receiving the waiver letters from the additional claimants later than the notice of arbitration.[335]

219. Similarly, in *Ethyl v. Canada*, Canada argued that the tribunal lacked jurisdiction because the claimant had failed to include an Article 1121 waiver with its request for arbitration.[336]

[329] *Id.* ¶ 117, **RLA-037**.

[330] *Id.* ¶ 117, **RLA-037** (referring to *Waste Management v. Mexico (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, Jun. 2, 2000, **RLA-028** and *Mondev International Ltd v. United States of America*, Award, Oct. 11, 2002, ¶ 44, **CLA-005** ("Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope")).

[331] *Thunderbird v. Mexico* Award, ¶ 117, **RLA-037**; *see also KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Final Award, Apr. 30, 2015, ¶ 24, **RLA-034**.

[332] *B-Mex v. Mexico* Partial Award, ¶ 46, **RLA-046**.

[333] *Id.* ¶ 116 (emphasis added), **RLA-046**.

[334] *Id.* ¶¶ 7–11, 71, 257, **RLA-046**.

[335] *Id.* ¶¶ 128–29, 132–39, **RLA-046**.

[336] *Ethyl Corp. v. Canada*, Award on Jurisdiction, ¶ 89, **CLA-064**.

The tribunal denied Canada's argument that submitting Article 1121 waiver letters simultaneously with a request for arbitration is a "precondition to jurisdiction," as such a finding would have a "[d]rastically preclusive effect."[337]

220. Finally, the *Pope & Talbot v. Canada* tribunal also held that: "strict adherence to the letter of [] NAFTA article[] [1121] is not necessarily a precondition to arbitrability, but must be analyzed within the context of the objective of NAFTA in establishing investment dispute arbitration in the first place."[338] The tribunal explained:

> The investor's failure to execute an Article 1121(1)(b) waiver could not prejudice the disputing Party; that failure could only work to the investor's disadvantage. Viewed in this light, the Tribunal believes that there would be no good reason to make the execution of the investor's waiver a precondition of a valid claim for arbitration.[339]

221. Moreover, the tribunal concluded: "[l]ading [the arbitration] process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat th[e] object [of the NAFTA's establishment of investment arbitration]."[340]

222. While some tribunals have adopted a stricter approach to the NAFTA waiver requirement, Claimant is not aware of any cases in which a tribunal held that a waiver was submitted too early, as here, where WCC relies on pre-existing waiver letters that remain in effect today. Indeed, such a rule would make little sense, since the receipt of a waiver *earlier* in time means the State is protected from double jeopardy for *additional* time, *i.e.*, even before the claimant initiates its investment arbitration. Here, WCC submitted its waiver letters in November 2018 and has been barred from pursuing any domestic remedies since that time. As Canada acknowledges, the aims of Article 1121 are to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple fora, minimize the risk of double recovery, and reduce the risk of conflicting outcomes.[341] Those risks are not

[337] *Id.* ¶ 91, **CLA-064**.

[338] *Pope & Talbot v. Canada*, Award concerning the Motion by Government of Canada respecting the Claim Based Upon Imposition of the 'Super Fee,' Aug. 7, 2000, ¶ 26, **CLA-066**.

[339] *Id.* n. 3, **CLA-066**.

[340] *Id.* ¶ 26, **CLA-066**.

[341] Canada's Memorial on Jurisdiction, ¶ 117.

present here, where WCC has not yet had its day in court, has not obtained any recovery in respect of Canada's measures, and no tribunal has decided this case on the merits.

223. Because the relevant jurisprudence goes against it, Canada relies on cases that are entirely irrelevant to the present case. In *Gramercy v. Peru (I)* ("***Gramercy I***"), the tribunal considered that a first waiver letter submitted by the claimant, which included a reservation of rights empowering Gramercy to bring its claims in another forum, was invalid.[342] That meant the precondition of a "clear, explicit and categorical" waiver under the U.S.-Peru FTA had not been met.[343] *Gramercy I* does not assist Canada's case, however, since Canada does not challenge the terms of the waiver letters here.[344] In fact, *Gramercy I* supports WCC's position because the tribunal allowed Gramercy to amend its waiver letter *after* it filed its notice of arbitration, and held that the revised waiver was valid even though Gramercy had not dismissed related domestic court proceedings against the government until after it provided the waiver.[345] Thus, the *Gramercy I* tribunal did not require Gramercy to submit a waiver letter "simultaneously" with the notice of arbitration. Peru also did not dispute the fact that Gramercy was allowed to submit a second waiver letter amending the first letter that the Tribunal had deemed invalid under the U.S.-Peru FTA.[346]

224. Likewise, Canada relies on *KBR v. Mexico* for the suggestion that the expression "with respect to the measure" in Article 1121 should be "interpreted broadly."[347] However, *KBR*

[342] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, Dec. 6, 2022 ("***Gramercy v. Peru* Final Award**"), ¶ 472, **CLA-067**.

[343] *Id.* ¶¶ 483–84, **CLA-067**.

[344] Canada's Memorial on Jurisdiction, ¶ 119 (citing **C-040**, Prairie Mines Waiver, Nov. 19, 2018 and **C-041**, WCC Waiver, 19 Nov. 2018). *See also* Canada's Memorial on Jurisdiction, ¶ 115, n. 202 (referencing *the United States*' non-disputing party submission in *Gramercy v. Peru* under Article 10.20.2 of the United States-Peru FTA, **R-202**). Tellingly, Canada declines to discuss what the *Gramercy tribunal* itself decided on the waiver issue.

[345] *Gramercy v. Peru* Final Award, Dec. 6, 2022, ¶¶ 486–89, **CLA-067** (holding that Gramercy's second waiver letter was valid as of the day it was submitted, July 18, 2016, even though Gramercy did not withdraw from the local Peruvian proceedings until August, 5 2016).

[346] *Id.* ¶ 486, **CLA-067**.

[347] Canada's Memorial on Jurisdiction, ¶ 117. In paragraphs 116–117, n. 204 and 210 of its Memorial on Jurisdiction, Canada also relies on the tribunal's award in *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, Mar. 14, 2011, **RLA-031** in support of its argument that the Tribunal should find WCC's waivers invalid under Article 1121 of the NAFTA. For similar reasons to *KBR*, the *Commerce Group* award does

bears no resemblance to the present case. In *KBR*, Mexico argued that the waivers were insufficient because they expressly carved out the related domestic proceedings that the claimant pursued in tandem with the arbitration.[348] The *KBR* tribunal accepted Mexico's argument that the waivers failed to comply with Article 1121, explaining that the pursuit of relief in two for a posed a "concrete risk" of "double (or triple) reparation" in KBR's favor.[349] Here, unlike in *KBR*, there is no risk of parallel proceedings or double recovery since WCC effectively waived its right to pursue domestic litigation.

225. In sum, most tribunals have adopted a flexible approach on timing of waiver letters and the few investment treaty cases Canada cites are factually distinguishable. Most critically, here, there is no timing issue with WCC's waiver letters, since WCC submitted still-valid waiver letters together with the notice of arbitration.

3. Fundamental Principles of International Law Support Having WCC's NAFTA Claims Heard on the Merits

226. Canada argues that WCC's claims cannot proceed because WCC and Prairie already waived their rights to pursue the present claims in the prior arbitration. However, it is a fundamental principle of international law that a claimant is not barred from bringing a claim until its claim is litigated on the merits. Canada's arguments to the contrary contradict the position it adopted in the *Westmoreland I* arbitration.

227. To start, it is a fundamental principle of international law that a claimant is not barred from bringing a claim until its claim is litigated on the merits.[350] Thus, Canada's arguments that WCC and/or Prairie waived their rights to pursue their treaty claims are misplaced, since neither entity has pursued its claim on the merits to final judgment. The situation is analogous to *Waste Management II*, in which Waste Management filed a second claim

not assist Canada. As Canada itself admits, in *Commerce Group*, the tribunal found claimants' waiver invalid and lacked "effectiveness" since the claimants "failed to discontinue domestic proceedings in El Salvador." Canada's Memorial on Jurisdiction, ¶ 116, n. 204 (citing **RLA-031** at ¶ 115). There are no such parallel or concurrent proceedings that raise the specter of double recovery or any other issue that would render WCC's waivers non-compliant with NAFTA Article 1121.

[348] *KBR* Award, ¶¶ 75–85, 121–122, 139–141, **RLA-034**.

[349] *Id.* ¶ 139, **RLA-034** (unofficial translation from the original Spanish provided by counsel).

[350] *Waste Management II* Decision, ¶ 36 (citing *Barcelona Traction*), **RLA-036**.

against Mexico after its first claim was dismissed due to an incomplete waiver. The *Waste Management II* tribunal accepted jurisdiction, holding that:

> No doubt the concern of the NAFTA parties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings. But where the first proceeding produces no decision on the merits because of a jurisdictional barrier, there is nothing in Chapter 11 which expressly or impliedly prohibits a second proceeding brought after the jurisdictional barrier has been removed.[351]
>
> [. . .]
>
> [Under] international [law], the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State recommencing its action. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies. As the International Court said in the *Barcelona Traction* case:
>
>> It has been argued that the first set of proceedings 'exhausted' the Treaty processes in regard to the particular matters of complaint, the subject of those proceedings, and that the jurisdiction of the Court having once been invoked, and the Court having been duly seised in respect of them, the Treaty cannot be invoked a second time in order to seise the Court of the same complaints. As against this, it can be said that the Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted to judgment, or discontinued in circumstances involving its final renunciation – neither of which constitutes the position here.[352]

228. That is, contrary to Canada's claim, a prior waiver does not "operate to prohibit the Claimant's pursuit of this claim,"[353] since a claimant is entitled to exhaust its treaty process. WCC has not exhausted its treaty process, as it neither received a decision on the merits

[351] *Waste Management II* Decision, ¶ 27, **RLA-036**.

[352] *Id.* ¶ 36 (emphasis added), **RLA-036**.

[353] Canada's Memorial on Jurisdiction, ¶ 122.

nor did it renounce its investment claims.[354] To the contrary, WCC at all times sought to preserve its fundamental right to pursue relief in investment arbitration.

229. Canada argues that the waiver letters "necessarily include[] other investment arbitrations, including other disputes brought under NAFTA Chapter Eleven" without any support.[355] That proposition is incorrect, since multiple prior tribunals, including in *Waste Management II*, have held that the first waiver would not prevent the claimant from initiating a second claim. Since the NAFTA requires a claimant to irrevocably waive its right to recourse in domestic courts, it would be fundamentally unfair to require a claimant to waive all other forms of recourse but then deny any access to a final judgment, especially when it is based solely on a technicality. As the *Waste Management II* tribunal held:

> [a]n investor in the position of the Claimant, who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the Respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible.[356]

230. Since WCC irrevocably renounced all other avenues for relief, denying its right to assert its claim in arbitration because of an earlier waiver would mean that WCC could not bring its claim before any tribunal, whether domestic or international. To do so would defeat "the underlying purpose of the arbitration provisions in Chapter 11," which is to "create effective procedures [] for the resolution of disputes."[357]

231. Canada also should not be permitted to argue that the waiver letters are invalid or somehow finally renounced WCC's rights, since that would squarely contradict the position Canada

[354] As the *Cyprus Bank v. Hellenic Republic* tribunal held: "[W]aiver of a fundamental right, like access to investment arbitration, should be unequivocal — the investor must have made a clear declaration of intent renouncing its right to protection via investment arbitration. And if there is serious inequality of bargaining power between the parties, scholars have cautioned that waivers should be reviewed with special care." *Cyprus Bank v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction, Jan. 8, 2019, ¶ 1003, **CLA-068** (citing S.I. Strong, *Contractual Waivers of Investment Arbitration: Waive of the Future*, 29 ICSID REV. 690, 699–700 (2014)).

[355] Canada's Memorial on Jurisdiction, ¶ 127.

[356] *Waste Management II* Decision, ¶ 35, **RLA-036**.

[357] NAFTA Article 102(1)(e); *cf.* Article 1115, referring to "due process before an impartial tribunal."

adopted in the *Westmoreland I* arbitration. As explained above, WCC has done exactly what WMH did in relying on the waiver letters, as WMH also re-used the prior waiver letter that WCC had submitted for Prairie.[358] Since Canada did not object to WMH's approach in the first arbitration, it should not be permitted now to object to WCC's identical approach in this arbitration. Canada cannot blow hot then cold by accepting a procedural approach in one arbitration—only to argue in the next arbitration that the very same procedure is defective. Canada's new position is not only untenable, but it is also transparently opportunistic.

232. In sum, the waivers that WCC submitted on its own behalf and on behalf of Prairie remain valid and binding to this day, and WCC filed those effective waivers simultaneously with the Notice of Arbitration in the present arbitration. In any event, tribunals no longer impose a restrictive rule of treaty interpretation and demonstrate flexibility in the timing of waivers. The Tribunal should allow WCC to have its day in court by hearing the NAFTA Claim on the merits, and should disregard Canada's arguments, which contradict its position in the *Westmoreland I* arbitration. For all of these reasons, the Tribunal should reject Canada's Article 1121 waiver objection.

* * *

233. In conclusion, Canada's jurisdictional objections each should be rejected as meritless. Claimant has shown that WCC holds legacy investments in Canada under the USMCA. WCC is entitled to bring its claims under NAFTA Articles 1116(1) and 1117(1) and it has set forth a *prima facie* damages claim. WCC's claims are also timely under NAFTA Articles 1116(2) and 1117(2) and it has submitted the appropriate waivers under NAFTA Article 1121. The Tribunal should therefore affirm its jurisdiction to hear WCC's NAFTA Claim on the merits.

[358] *See supra* ¶ 211.

V. REQUEST FOR RELIEF

234. For the forgoing reasons, Claimant respectfully requests that the Tribunal issue an award:

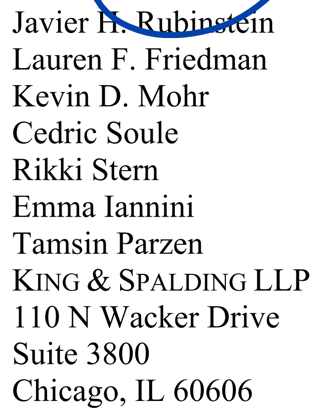
(a) Rejecting Canada's jurisdictional objections in full and finding that it has jurisdiction to hear all of Claimant's claims;

(b) Ordering Canada to bear all the costs of this proceeding, including (but not limited to) Claimant's attorneys' fees and expenses; and

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

September 20, 2023

Respectfully submitted,



By:______________________________

Javier H. Rubinstein
Lauren F. Friedman
Kevin D. Mohr
Cedric Soule
Rikki Stern
Emma Iannini
Tamsin Parzen
KING & SPALDING LLP
110 N Wacker Drive
Suite 3800
Chicago, IL 60606

Counsel for Claimant