

**PUBLIC DOCUMENT**

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

**BETWEEN:**

**WESTMORELAND MINING HOLDINGS LLC**

**Claimant**

**AND**

**GOVERNMENT OF CANADA**

**Respondent**

**(ICSID Case No. UNCT/20/3)**

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**GOVERNMENT OF CANADA**

**MEMORIAL ON JURISDICTION**

**December 18, 2020**

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## I. INTRODUCTION

1. The substantive obligations under Section A of NAFTA Chapter Eleven are not engaged with respect to a claimant until it becomes an “investor of a Party”. A NAFTA tribunal’s jurisdiction *ratione temporis* over a claim is thus limited to an alleged breach, and resulting loss or damage, that occurred after a claimant becomes an investor of a Party.

2. The Claimant in this case, Westmoreland Mining Holdings LLC (the “Claimant” or “WMH”), was constituted under the laws of Delaware on January 31, 2019. This is the earliest possible date on which it could have become an investor of a Party. Nonetheless, in its Notice of Arbitration and Statement of Claim filed against Canada on August 12, 2019 (the “Claimant’s NOA”),<sup>1</sup> the Claimant alleges breaches of NAFTA Chapter Eleven and resulting damages that pre-date its existence as an investor of a Party. First, the Claimant alleges that Alberta’s decision in its 2015 Climate Leadership Plan to phase out emissions from coal-fired electricity generation by the year 2030 breached NAFTA Article 1105. Second, the Claimant alleges that Alberta’s decision in 2016 to make voluntary payments to the owners of the six coal-fired generating units in the province that were expected to operate – and produce emissions – beyond 2030 (the “Transition Payments”) breached NAFTA Articles 1102 and 1105. The Claimant alleges \$470 million<sup>2</sup> in damages by reason of, or arising out of, these alleged breaches. However, NAFTA Chapter Eleven does not allow claims for alleged breaches and damages that pre-date the existence of a claimant as a protected investor. The Tribunal thus does not have jurisdiction *ratione temporis* over the claim.

3. The Claimant does not contest the fundamental principle that an investor of a Party under NAFTA Chapter Eleven only has standing to bring a claim alleging breaches and damages that occurred after it became an investor of a Party. Instead, it argues that the Tribunal has jurisdiction *ratione temporis* because it is “substantially the same”<sup>3</sup> as Westmoreland Coal Company (“WCC”), an investor of a Party at the time of the alleged breaches and damages. WCC filed for

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<sup>1</sup> *Westmoreland Mining Holdings LLC v. Government of Canada*, Notice of Arbitration, 12 August 2019.

<sup>2</sup> Unless otherwise specified, all references to dollar amounts in this Memorial are in Canadian dollars.

<sup>3</sup> *Westmoreland Mining Holdings LLC v. Government of Canada*, Hearing on Bifurcation, Transcript, 24 September 2020 (“Bifurcation Hearing Transcript”), p. 93:15-17.

bankruptcy in the United States (“U.S.”) on October 9, 2018, and the Claimant contends that, because it is substantially the same as WCC, it merely “continued with its pre-existing investment through a bankruptcy restructuring.”<sup>4</sup>

4. The Claimant is not the same as WCC, and NAFTA Chapter Eleven does not allow two enterprises to be the same “investor of a Party”. The Claimant was constituted in 2019. WCC was constituted more than one hundred years earlier, in 1910. The Claimant is a limited liability company. WCC is a corporation. WCC and the Claimant currently co-exist as distinctly constituted entities. While WCC is winding down its affairs and will eventually dissolve, the Claimant continues to operate. The two entities cannot be the same enterprise.

5. The Claimant’s position in WCC’s bankruptcy process further confirms that the two enterprises are distinct. WCC entered bankruptcy so that it could sell substantially all of its assets, provide an efficient distribution to its creditors, and wind down its businesses and affairs upon distribution of the sale proceeds. It auctioned off its assets, including its interests in Westmoreland Canada Holdings Inc. (“WCHI”) and Prairie Mines & Royalty ULC (“Prairie”) (together, the “Canadian Enterprises”), to the highest bidder. The highest bidder was the Claimant, an entity formed on behalf of certain secured creditors of WCC (the “First Lien Lenders”) to purchase assets from WCC. The relationship between the Claimant and WCC during WCC’s bankruptcy process was that of a buyer and seller. The Claimant and WCC were legally adverse in interest and were represented by separate counsel. The U.S. bankruptcy court that managed the process made a specific finding that the Claimant and WCC were transacting at arm’s length.

6. Indeed, by purchasing certain WCC assets and excluding certain WCC liabilities, the Claimant was able to acquire value for the First Lien Lenders without taking on all of the significant liabilities tied to WCC’s corporate identity. The bankruptcy court confirmed that the

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<sup>4</sup> Claimant’s Response to Canada’s Request for Bifurcation, ¶ 13.

Claimant has no “successor liability” to WCC and that it purchased assets “free and clear” of prior encumbrances.<sup>5</sup>

7. The Claimant is trying to have it two ways. During WCC's bankruptcy process, the Claimant was constituted as a distinct entity to purchase WCC assets on behalf of the First Lien Lenders without inheriting all of WCC's significant liabilities. However, in advancing this NAFTA claim, the Claimant alleges that it is “substantially the same” investor of a Party as WCC. These two positions are inherently contradictory and cannot co-exist. The Claimant cannot have it both ways.

8. Canada's Memorial on Jurisdiction is organized as follows. Part II provides a general overview of the facts relevant for the preliminary phase of this arbitration. Part III explains that the Claimant's claim must fail for lack of jurisdiction *ratione temporis* under NAFTA Articles 1101(1), 1116(1), and 1117(1) because the Claimant was not an “investor of a Party” to whom the substantive obligations in Chapter Eleven applied when the alleged breaches occurred. The Claimant also fails to make a *prima facie* damages claim because neither it nor its enterprise could have incurred any “loss or damage by reason of, or arising out of” alleged breaches that pre-date its existence as an investor of a Party. These objections independently establish that the Tribunal has no jurisdiction *ratione temporis*. Finally, Part IV contains Canada's conclusion and request for relief.

9. Canada files with this Memorial on Jurisdiction the Expert Report of Kathryn A. Coleman.<sup>6</sup> Ms. Coleman is a partner at Hughes Hubbard & Reed LLP, and has practiced bankruptcy law in the U.S. for over 35 years. In her Expert Report, Ms. Coleman explains the developments of the WCC chapter 11 bankruptcy process, including the sale transaction in which WCC sold its interests in the Canadian Enterprises to the Claimant.

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<sup>5</sup> **R-063**, United States Bankruptcy Court, *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 1561], 2 March 2019 [Excerpt] (“WCC Plan Confirmation Order”), ¶¶ 49 and 45.

<sup>6</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**.

## II. FACTUAL BACKGROUND

### A. The Claimant's Corporate Formation and Purchase of Canadian Enterprises

10. The Claimant was constituted as a Delaware limited liability company named "Westmoreland Mining Holdings LLC" on January 31, 2019.<sup>7</sup> It was formed on behalf of the First Lien Lenders as a vehicle for taking title to certain assets that the First Lien Lenders purchased from WCC in partial satisfaction of debts owed to them by WCC.<sup>8</sup>

11. One of these assets was WCC's equity interests in a Canadian enterprise named WCHI,<sup>9</sup> which owns Prairie.<sup>10</sup> Prairie was formed in Alberta,<sup>11</sup> and operates four Alberta coal mines.<sup>12</sup> The Claimant purchased WCHI from WCC on behalf of the First Lien Lenders in March 2019.<sup>13</sup> This

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<sup>7</sup> **R-062**, Westmoreland Coal Company, et al., *Notice of Seventh Amendment to the Plan Supplement* [Court Docket, Doc. 1849], 17 May 2019 ("WMH Formation Documents"), Article II, ¶¶ 2.1 and 2.2; **R-067**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining Holdings LLC, Entity No. 7262545, accessed on 13 December 2020. A limited liability company ("LLC") is a form of business entity created by state law in the United States. An LLC "permits the pass-through federal tax treatment of a partnership and the liability protections of a corporation." **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, fn. 95.

<sup>8</sup> See **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶¶ 64 and 70.

<sup>9</sup> WCHI was incorporated in Alberta on 18 December 2013. See **C-001**, Westmoreland Mining Holdings, LLC NAFTA Consent and Waiver, 10 May 2019, Government of Alberta, Registrar of Corporations, Certificate of Status for Westmoreland Canada Holdings Inc.

<sup>10</sup> Claimant's NOA, ¶ 18.

<sup>11</sup> Prairie is a corporation "formed by amalgamation in Alberta" on 1 August 2017. See **C-001**, Westmoreland Mining Holdings, LLC NAFTA Consent and Waiver, 10 May 2019, Government of Alberta, Registrar of Corporations, Certificate of Status for Prairie Mines & Royalty ULC.

<sup>12</sup> See e.g., Canada's Statement of Defence, 26 June 2020 ("Statement of Defence"), ¶ 59.

<sup>13</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶¶ 75, 77-80; **R-053**, Westmoreland Coal Company, et al., Stalking Horse Purchase Agreement, Exhibit H-6 to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 15 March 2019 ("Stalking Horse Purchase Agreement"), s. 2.02 (a); **R-043**, Westmoreland Coal Company, et al., Description of Transaction Steps, Exhibit G to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 15 March 2019 ("Description of Transaction Steps"), ss. III.c and III.f. The First Lien Lenders opted to have the Claimant purchase equity interests in WCHI, rather than in other WCC affiliates that indirectly owned Prairie. See **R-051**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof* [Court Docket, Doc. 208], 18 October 2018 ("Bidding Procedures Motion"), p. 6 of 34.

transaction was approved by the U.S. bankruptcy court overseeing WCC's U.S. bankruptcy case, discussed in greater detail below.

12. As of March 2019, the First Lien Lenders' ownership of WCHI and Prairie through the Claimant can be illustrated as follows:

*Figure 1: Ownership of the Canadian Enterprises (March 2019)*



### **B. The Prior Owner of the Canadian Enterprises and Its Financial Difficulties**

13. WCC was incorporated under Delaware law on May 4, 1910.<sup>14</sup> WCC began mining coal in Westmoreland County, Pennsylvania, and, through the years, expanded its coal mining operations throughout the United States and into Canada.<sup>15</sup>

14. Between 2006 and 2016, WCC and its subsidiaries made several acquisitions.<sup>16</sup> Among them was WCC's 2014 purchase of interests in certain Canadian enterprises with coal operations in Canada from a company named Sherritt International ("Sherritt").<sup>17</sup> WCC's purchase from Sherritt

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<sup>14</sup> **R-071**, Westmoreland Coal Company, Quarterly Report for the Quarterly Period ended June 30, 2015 (Form 10-Q) [Excerpt], Exhibit 3.1.

<sup>15</sup> **R-049**, Westmoreland Coal Company, et al., *Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings* [Court Docket, Doc. 54], 9 October 2018 [Excerpt of Declaration] ("Stein First Day Declaration"), ¶ 8.

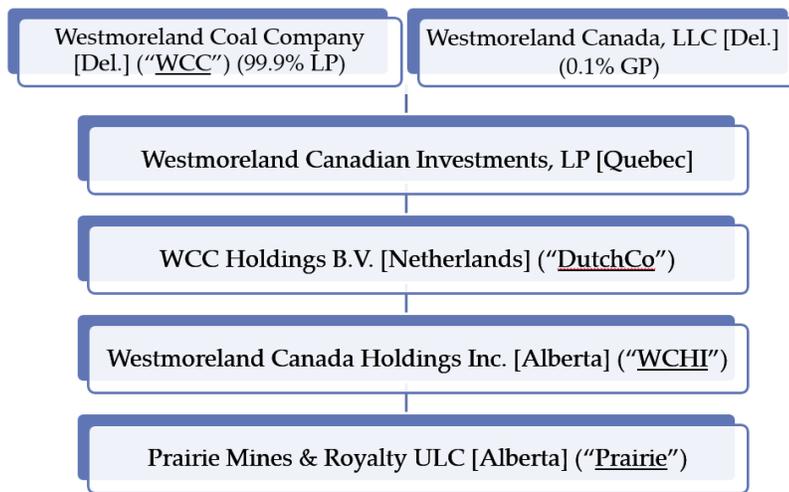
<sup>16</sup> **R-049**, Stein First Day Declaration, ¶ 59.

<sup>17</sup> **R-049**, Stein First Day Declaration, ¶ 59.

included Prairie.<sup>18</sup> WCHI was incorporated on December 18, 2013, and when the transaction closed, directly owned Prairie.<sup>19</sup>

15. WCC, a publicly traded corporation, held its interests in the Canadian Enterprises in the following manner:

*Figure 2: WCC’s Ownership of the Canadian Enterprises (2018)*<sup>20</sup>



16. WCC’s series of acquisitions in this ten-year period contributed to a decline in its financial condition. According to Mr. Jeffrey Stein, an officer and member of WCC’s Board of Directors at the time, the “series of acquisitions within a relatively short timeframe nearly tripled” WCC’s debt obligations,<sup>21</sup> and WCC faced challenges integrating them into its business.<sup>22</sup> Moreover, “coal sales and revenue did not rise proportionately”, leaving WCC “significantly overleveraged.”<sup>23</sup> A

<sup>18</sup> See **R-040**, Westmoreland Coal Company, 2014 Annual Report [Excerpt], p. 7.

<sup>19</sup> **C-001**, Westmoreland Mining Holdings, LLC NAFTA Consent and Waiver, 10 May 2019, Government of Alberta, Registrar of Corporations, Certificate of Status for Westmoreland Canada Holdings Inc.; **R-040**, Westmoreland Coal Company, 2014 Annual Report [Excerpt], p. 6.

<sup>20</sup> **R-072**, Westmoreland Coal Company, 2017 Annual Report, (Form 10-K) [Excerpt], Exhibit 21.1. “LP” and “GP” refer to “Limited Partner” and “General Partner”, respectively. See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, fn. 119.

<sup>21</sup> **R-049**, Stein First Day Declaration, ¶ 60.

<sup>22</sup> **R-049**, Stein First Day Declaration, ¶ 60.

<sup>23</sup> **R-049**, Stein First Day Declaration, ¶ 60.

“continued decline in the coal sector” exacerbated its concerns about its ability to pay its debts.<sup>24</sup> In 2016, WCC began to evaluate options to reduce the debt in its capital structure.<sup>25</sup> The issues took on “heightened significance” in 2018 because WCC would “exhaust all of its remaining liquidity by May 31, 2018”.<sup>26</sup>

17. In the spring and summer of 2018, after defaulting on certain loan facilities, WCC began negotiations with its key creditors, including the First Lien Lenders, which culminated in a Restructuring Support Agreement (“RSA”).<sup>27</sup> A debtor contemplating bankruptcy under chapter 11 of the U.S. Bankruptcy Code may enter an RSA with its creditors and other stakeholders to address the key terms of a bankruptcy “plan” – a key element of a chapter 11 bankruptcy that sets out the treatment that all classes of creditors will receive – before commencing the bankruptcy proceeding.<sup>28</sup> In exchange for the debtor proposing a plan with terms acceptable to the creditors, the creditors commit to supporting the debtor’s plan<sup>29</sup> once it commences the bankruptcy proceeding.<sup>30</sup>

18. On October 9, 2018, following “months of good-faith, arm’s-length discussions with [its] secured creditors”,<sup>31</sup> WCC announced that it had entered an RSA with certain creditors.<sup>32</sup> On the

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<sup>24</sup> **R-049**, Stein First Day Declaration, ¶ 60.

<sup>25</sup> **R-049**, Stein First Day Declaration, ¶ 64.

<sup>26</sup> **R-049**, Stein First Day Declaration, ¶ 66. “Liquidity”, in this context, appears to mean available cash.

<sup>27</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 52; **R-049**, Stein First Day Declaration, ¶¶ 67-78.

<sup>28</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 37. A chapter 11 plan must be approved by a bankruptcy court. See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 20-21.

<sup>29</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 37. As Ms. Coleman explains, a chapter 11 case ideally involves the “negotiation of a plan that maximizes distributions to creditors”. See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 35.

<sup>30</sup> This type of arrangement has become “commonplace for large companies contemplating a chapter 11 process.” See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 37.

<sup>31</sup> **R-051**, Bidding Procedures Motion, ¶ 1.

<sup>32</sup> **R-073**, Westmoreland Coal Company, News Release, “Westmoreland Enters into Restructuring Support Agreement with Members of Ad Hoc Lending Group; WMLP Simultaneously Files Chapter 11 to Sell Assets”, 9 October 2018. See also **R-050**, Westmoreland Coal Company, et al., Restructuring Support Agreement, Exhibit A to *Declaration of Jeffrey S. Stein in Support of Chapter 11 Petitions and First Day Pleadings* [Court Docket, Doc. 54], 9 October 2018 [Excerpt] (“WCC RSA”). The group of secured creditors that were signatories to the RSA included the First Lien Lenders.

same day, WCC filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code (the "Petition")<sup>33</sup> in the U.S. Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court").<sup>34</sup>

19. WCC explained to the Bankruptcy Court that the goal of its plan (the "Plan")<sup>35</sup> was to "drive a value-maximizing Sale Transaction that will provide enhanced stakeholder recoveries."<sup>36</sup> WCC further confirmed its intention under the Plan for: "(a) the sale and transfer of substantially all of [its] assets and equity interests, (b) efficient distributions to [its] creditors, and (c) a subsequent wind-down of [its] businesses and affairs upon distribution of the sale proceeds pursuant to the Plan."<sup>37</sup>

20. WCC received authorization from the Bankruptcy Court to conduct a marketing process for the sale of certain of its assets, including its interests in the Canadian Enterprises.<sup>38</sup> Among the

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<sup>33</sup> **R-052**, Westmoreland Coal Company, Voluntary Petition For Non-Individuals Filing For Bankruptcy [Court Docket, Doc. 1], 9 October 2018. *See also* **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶¶ 15-48 for an explanation of the general features of a bankruptcy process under chapter 11 of the U.S. Bankruptcy Code.

<sup>34</sup> Thirty-six of WCC's affiliates that were also debtors also filed voluntary petitions for bankruptcy on the same day. The Canadian Enterprises did not file petitions for bankruptcy relief. *See* **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, fns. 53 and 67. Westmoreland Coal Company is sometimes referred to in the bankruptcy court filings as "WCC", and sometimes as "WLB". WCC and its relevant debtor affiliates are collectively referred to as the "WLB Debtors".

<sup>35</sup> **R-042**, Westmoreland Coal Company, et al., *Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates*, Exhibit A to United States Bankruptcy Court, *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 1561], 1 March 2019 [Excerpt] ("WCC Plan").

<sup>36</sup> **R-057**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Court Docket, Doc. 354], 2 November 2018 [Excerpt] ("Motion to Approve the DS"), p. 7 of 148; **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶ 62. WCC's bankruptcy case was jointly administered with its affiliated debtor companies. **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, fn. 53.

<sup>37</sup> **R-057**, Motion to Approve the DS, p. 7 of 148; **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶ 62.

<sup>38</sup> *See* **R-054**, United States Bankruptcy Court, *Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof* [Court Docket, Doc. 519], 15 November 2018 ("Order Approving Bidding Procedures"). WCC's interests in the Canadian Enterprises were among the "Core Assets" referenced in the Court's order. *See also* **R-051**, Bidding Procedures Motion, p. 6 of 34. As Ms. Coleman explains, "WCC had pledged its equity in its Canadian affiliates [...] to secure

other assets that would be offered for sale under the Plan were certain “Transferred Causes of Action”.<sup>39</sup> These were specifically defined to include a cause of action entitled “the NAFTA Claim”,<sup>40</sup> which was also a defined term.<sup>41</sup> As Ms. Coleman explains in her Expert Report, the U.S. Bankruptcy Code treats legal claims as “property of the estate” of the debtor – a broadly defined term under U.S. bankruptcy law.<sup>42</sup> While a debtor may seek bankruptcy court authority to transfer legal claims, “the Bankruptcy Code defers to applicable non-bankruptcy law – whether it be state, federal, or international law” – with respect to the transferability and the merits of a particular claim.<sup>43</sup>

21. As is often the case when a debtor elects to pursue a sale transaction in a bankruptcy proceeding, WCC proposed to conduct the sale by public auction in order to secure the highest bid for the assets.<sup>44</sup> Under the RSA, the First Lien Lenders agreed to act as a “stalking horse” in the auction, committing to bid for WCC’s assets at a set price, irrespective of whether there were any

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certain prepetition debt obligations of the WLB Debtors.” Those equity interests became part of WCC’s bankruptcy “estate” when it commenced the bankruptcy process, and “[t]he value of that estate, including the equity in the Canadian Entities, would be available to be distributed to the WLB Debtors’ creditors through the WCC Bankruptcy Proceeding.” See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 57.

<sup>39</sup> **R-064**, Westmoreland Coal Company, et al., Disclosure Statement, Schedule 1 to United States Bankruptcy Court, *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Court Docket, Doc. 841], 18 December 2018 [Excerpt] (“Disclosure Statement”), p. 25 of 469 (explaining that the WLB Debtors shall “transfer [...] all Transferred Causes of Action held by the WLB Debtors to the Purchaser free and clear of all Liens, Claims, Interests, charges, and other encumbrances (other than the Assumed Liabilities and Permitted Encumbrances)”).

<sup>40</sup> The term “Transferred Causes of Action” was defined in the Stalking Horse Purchase Agreement discussed below in ¶¶ 22 and 24, as certain transferred actions “against third Persons available to any of the Sellers or their estates (collectively, the “**Transferred Causes of Action**”), including the NAFTA Claim [...]”. See **R-053**, Stalking Horse Purchase Agreement, s. 2.01(l).

<sup>41</sup> The “NAFTA Claim” was defined in the Stalking Horse Purchase Agreement as “that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by [Westmoreland Coal Company] on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended).” See **R-053**, Stalking Horse Purchase Agreement, s. 1.01, p. 139. The term “Westmoreland” was used in the definition of the “NAFTA Claim”, which was in turned defined for the purposes of the agreement as “Westmoreland Coal Company, a Delaware corporation”. See **R-053**, Stalking Horse Purchase Agreement, Recitals.

<sup>42</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 86 and fn. 12.

<sup>43</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 88.

<sup>44</sup> See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 54 and 41.

other bidders in the auction.<sup>45</sup> As Ms. Coleman explains in her Expert Report, the “stalking horse sets the floor purchase price in the upcoming auction—protecting against ‘lowball’ bids—and attracts other prospective purchasers to bid on the assets.”<sup>46</sup>

22. The First Lien Lenders’ stalking horse bid was subject to the terms of a purchase agreement that they negotiated with WCC (the “Stalking Horse Purchase Agreement”), and which they submitted to the Bankruptcy Court for approval.<sup>47</sup> If no one else bid for WCC’s assets, the First Lien Lenders would carry out the purchase of certain WCC assets under the Stalking Horse Purchase Agreement and in accordance with the Plan.<sup>48</sup>

23. The Plan contemplated that the First Lien Lenders would not purchase the assets directly, but would establish one or more acquisition vehicles to purchase the assets from WCC on their behalf.<sup>49</sup> The equity of the acquisition vehicles would then be distributed to the First Lien Lenders in partial satisfaction of WCC’s debts to them.<sup>50</sup>

24. The Stalking Horse Purchase Agreement confirmed that the First Lien Lenders, through their acquisition vehicles, would not acquire all of WCC’s assets or assume all of its liabilities.<sup>51</sup>

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<sup>45</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 54, 55, 59, and 60; **R-050**, WCC RSA, Exhibit B (Sale Transaction Term Sheet), p. 88 of 167. The First Lien Lenders’ stalking horse bid was a “credit bid”. The U.S. Bankruptcy Code affords secured creditors the right to use their secured claim in a bankruptcy as “currency in a sale of the creditor’s collateral. Referred to as ‘credit bidding,’ this practice allows a secured creditor to use the money owed to it by the debtor as consideration to purchase the debtor’s assets, irrespective of the value of the creditor’s collateral. This gives the secured creditor a significant advantage over other bidders: the secured creditor can set a floor price with its credit bid, wherein it can ‘pay’ for the assets by bidding its claim against the debtor, while any other bidder must pay the purchase price in cash. The secured creditor can thus set its bid at the lowest price at which it is willing to accept in cash satisfaction of its secured claim, rather than effecting repayment by taking possession of its collateral.” See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 43.

<sup>46</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 42.

<sup>47</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 59-60. See also **R-051**, Bidding Procedures Motion.

<sup>48</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 42 and 69.

<sup>49</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 64.

<sup>50</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, fn. 72 and ¶¶ 64, 75, and 80. Certain newly created debt instruments and cash comprised the remainder of the repayment of WCC’s debts. See also **R-042**, WCC Plan, Art. III.B.3(c)(i).

<sup>51</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 65. For example, while workers’ compensation liabilities for occupational injuries to transferred employees arising after the transactions’ closing were assumed, certain statutory liabilities for workers that arose prior to the closing were excluded. **R-053**, Stalking Horse Purchase Agreement, ss. 2.04(h) and 2.05(c).

Specific assets and liabilities were excluded.<sup>52</sup> The Stalking Horse Purchase Agreement also confirmed that neither the First Lien Lenders nor their acquisition vehicles would purchase any equity interests in WCC.<sup>53</sup> Purchasing equity interests in WCC would not have allowed the First Lien Lenders' acquisition vehicles to take the purchased WCC assets "free and clear" of prior encumbrances, and without any potential successor liability.<sup>54</sup>

25. In its Court-approved notice of sale to prospective bidders, WCC confirmed that protections against potential successor liability were important to the First Lien Lenders and their acquisition vehicles. In particular, WCC explained that the "Stalking Horse Bidder would not have entered into the Stalking Horse Purchase Agreement but for [...] protections against potential claims based upon 'successor liabilities' theories",<sup>55</sup> including that, if the stalking horse bid were the successful bid, the stalking horse bidder "shall not be deemed" to:

- (a) "be a legal successor, or otherwise be deemed a successor to [WCC and its debtor subsidiaries]";
- (b) "have, de facto or otherwise, merged with or into [WCC and its debtor subsidiaries]"; or
- (c) "be an alter ego or mere continuation or substantial continuation of [WCC and its debtor subsidiaries]".<sup>56</sup>

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<sup>52</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 65; **R-053**, Stalking Horse Purchase Agreement, ss. 2.03 and 2.05. For example, "excluded assets" include "all director and officer insurance policies of the Sellers" (s. 2.03(c)), and "excluded liabilities" include "all liabilities (i) for Taxes of any Non-Acquired Entity or any of their equity holders for any Tax period (including any Liability of a Non-Acquired Entity for the Taxes of any other Person under Treasury Regulations section 1.1502-6 [...] as a transferee or successor, by contract or otherwise)" (s. 2.05 (a)).

<sup>53</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 66, fn. 89 ("In order to come to this conclusion, we connected a series of defined terms in the Stalking Horse Purchase Agreement—specifically, "'**Transferred Assets**' means, collectively, the Purchased US Assets and the Purchased Equity Interests"; "Purchased US Assets" includes a series of assets, none of which include equity in WCC, "'Purchased Canadian Equity Interests' means all of the shares of issued and outstanding capital stock of the Canadian Target"; "'Canadian Target' means WCHI"; and "'WCHI' means Westmoreland Canada Holdings Inc., an Alberta corporation." Therefore, the term "Transferred Assets" does not include equity in WCC."). **R-053**, Stalking Horse Purchase Agreement, s. 1. *See also* **R-043**, Description of Transaction Steps, s. III.f.

<sup>54</sup> *See, generally*, **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 44.

<sup>55</sup> **R-054**, Order Approving Bidding Procedures, Exhibit 3 (Sale Notice), pp. 34-35 of 42.

<sup>56</sup> **R-054**, Order Approving Bidding Procedures, Exhibit 3 (Sale Notice), p. 34 of 42.

26. WCC confirmed in its notice of sale that it intended for this protection against successor liability to apply equally to other potential buyers.<sup>57</sup>

27. The Bankruptcy Court approved the bidding procedures for the sale on November 15, 2018, setting the bid deadline for January 15, 2019.<sup>58</sup> However, WCC did not receive any bids from any other prospective buyers; and, on January 21, 2019, the stalking horse bid became the successful bid for certain WCC assets.<sup>59</sup> Accordingly, two new Delaware limited liability companies were formed on behalf of the First Lien Lenders as acquisition vehicles to take title to the purchased assets (the "Purchaser").<sup>60</sup> One of the acquisition vehicles was the Claimant, formed on January 31, 2019.<sup>61</sup> The First Lien Lenders and the Purchaser (including the Claimant) shared counsel who represented them in the transaction, while WCC and its debtor subsidiaries had their own.<sup>62</sup>

28. On March 2, 2019, the Bankruptcy Court approved the Plan (in the "Plan Confirmation Order"), which authorized WCC and the First Lien Lenders to execute the sale of certain of WCC's assets to the Claimant, and the subsequent distribution of the equity in the Claimant to the First Lien Lenders in partial satisfaction of their secured claims.<sup>63</sup> The Plan Confirmation Order also made a number of findings with respect to the transaction that pertain to the Claimant's purchase of certain of WCC's assets, including that:

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<sup>57</sup> **R-054**, Order Approving Bidding Procedures, Exhibit 3 (Sale Notice), pp. 34-35 of 42.

<sup>58</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 60; **R-054**, Order Approving Bidding Procedures, ¶ 3 (c).

<sup>59</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 69.

<sup>60</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 64, 70, 73, and 74.

<sup>61</sup> The second new Delaware limited liability company was Westmoreland Mining LLC, formed on February 12, 2019. Westmoreland Mining LLC is a wholly owned subsidiary of the Claimant, and owns the U.S. component of the Claimant's business. See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 70, 73, 74, 76, and 79; **R-068**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining LLC, Entity No. 7266728, accessed on 13 December 2020; **R-070**, Westmoreland Coal Company, News Release, "Westmoreland Emerges from Chapter 11", 15 March 2019.

<sup>62</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, fn. 83.

<sup>63</sup> See **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 71; **R-063**, WCC Plan Confirmation Order. Other aspects of the sale transaction that the Court approved include Westmoreland Mining LLC's purchase of others of WCC's assets.

- the purchased assets were sold “free and clear of all Liens, Claims, encumbrances, and interests”,<sup>64</sup> which in essence eliminated all liens and claims against the assets being sold that existed prior to the commencement of the bankruptcy case;<sup>65</sup>
- the sale was “negotiated, proposed and entered into by [WCC] and the Purchaser without collusion, in good faith and from arm’s-length bargaining positions”,<sup>66</sup> which in effect insulates the sale from a court applying a stricter analysis that would be applied if the Claimant was determined to be an insider of WCC;<sup>67</sup> and
- the Claimant shall not be “liable for any claims against or in the assets purchased” in the sale, or have “successor, transferee, derivative, or vicarious liabilities of any kind or character” with respect to WCC or its affiliates, or any of their obligations prior to the sale’s closing.<sup>68</sup>

29. Following the Bankruptcy Court’s approval of WCC’s Plan, WCC and the First Lien Lenders executed the sale transaction on or around March 15, 2019.<sup>69</sup> The sale transaction included the Claimant’s purchase of the Canadian Enterprises and the “NAFTA Claim”.<sup>70</sup>

30. Consistent with the Plan, after the sale of substantially all of its assets, WCC began the process of winding down and dissolving.<sup>71</sup>

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<sup>64</sup> **R-063**, WCC Plan Confirmation Order, ¶ 45.

<sup>65</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 72 (a).

<sup>66</sup> **R-063**, WCC Plan Confirmation Order, ¶ 47.

<sup>67</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 72 (b) and (c).

<sup>68</sup> **R-063**, WCC Plan Confirmation Order, ¶ 49. *See also* **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 72 (d).

<sup>69</sup> *See* **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 75. The “Plan Effective Date”, which is the date on which the majority of the Plan’s transaction steps were carried out, was March 15, 2019. **R-080** *Westmoreland Coal Company, et al., Notice of (I) Entry of Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates and (II) Occurrence of the Plan Effective Date* [Court Docket, Doc. 1608], 15 March 2019. *See also* **R-043**, Description of Transaction Steps, p. 2 of 661.

<sup>70</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 74, 76, 79, and 80.

<sup>71</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 84 and 85. *See also* **R-042**, WCC Plan, Art. IV.N.

**C. The Procedural Background to the Claimant's NAFTA Claim**

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

31. On November 19, 2018, one month after filing its Petition with the Bankruptcy Court, WCC filed a Notice of Arbitration and Statement of Claim against the Government of Canada under NAFTA Chapter Eleven ("WCC's NOA").<sup>72</sup>

32. WCC brought its claims under NAFTA Article 1116 on its own behalf and under Article 1117 on behalf of its enterprise, Prairie.<sup>73</sup> WCC alleged that two measures adopted by the Government of Alberta were inconsistent with Canada's NAFTA obligations. Specifically, WCC alleged that the Government of Alberta's decision, in its 2015 Climate Leadership Plan, to phase out emissions from coal-fired electricity generation units by 2030 violated NAFTA Article 1105.<sup>74</sup> WCC also alleged that Alberta's 2016 decision to provide the Transition Payments was inconsistent with NAFTA Articles 1102 and 1105.<sup>75</sup> WCC alleged that these measures caused it "damages exceeding \$470 million".<sup>76</sup>

**2. The Claimant Attempts to Substitute Itself for WCC in WCC's NAFTA Claim**

33. On May 13, 2019, approximately two months after the Claimant purchased the Canadian Enterprises and the "NAFTA Claim" from WCC pursuant to the court-approved Plan, Canada received an attempt to amend WCC's Notice of Arbitration (the "Attempted Amendment"), which was submitted on behalf of WMH, WCHI, and Prairie.<sup>77</sup> WMH submitted that the Attempted Amendment was made pursuant to Article 20 of the 1976 UNCITRAL Rules,<sup>78</sup> and to "reflect"

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<sup>72</sup> **R-074**, Westmoreland Coal Company, Notice of Arbitration and Statement of Claim, 19 November 2018 and Exhibit 1. Westmoreland Coal Company had submitted its Notice of Intent to Submit a Claim to Arbitration on August 20, 2018.

<sup>73</sup> **R-074**, WCC's NOA, ¶ 19.

<sup>74</sup> **R-074**, WCC's NOA, ¶ 99.

<sup>75</sup> **R-074**, WCC's NOA, ¶¶ 87 and 98.

<sup>76</sup> **R-074**, WCC's NOA, ¶ 105.

<sup>77</sup> **R-075**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019.

<sup>78</sup> Article 20 of the 1976 UNCITRAL Rules provides: "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such

the changes to the ownership of Prairie and alleged interests in the NAFTA Chapter Eleven claim effectuated through WCC's bankruptcy proceeding.<sup>79</sup> In the letter covering the Attempted Amendment, WMH had also altered the style of cause of the claim from "*Westmoreland Coal Company v. Government of Canada*" to "*Westmoreland Mining Holdings LLC v. Government of Canada*".<sup>80</sup>

34. On July 2, 2019, Canada objected to WMH's attempt to amend WCC's NOA on the basis that it was not a permissible amendment under the 1976 UNCITRAL Rules.<sup>81</sup> In particular, Canada explained that "the substitution of a new claimant is an amendment that causes a claim to fall outside the tribunal's jurisdiction," and one that is "tantamount to the filing of a new claim".<sup>82</sup> Accordingly, Canada explained that WMH could not become the disputing investor in a claim that WCC submitted to arbitration. Canada also clarified that any claimant must satisfy the procedural requirements of NAFTA Chapter Eleven in order to bring a claim, including the Article 1119 requirement that it deliver a notice of its intention to submit a claim to arbitration ("NOI") at least 90 days before it submits its claim. Canada underlined that the treaty's pre-conditions to arbitration, which condition Canada's consent to arbitration with a particular claimant and include the requirements of Article 1119, are "not requirements that Canada can agree to waive."<sup>83</sup>

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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."

<sup>79</sup> **R-075**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019. The letter indicates that "interests in the NAFTA Chapter 11 claim were included among the assets transferred to Westmoreland Mining Holdings LLC as provided in the plan of reorganization." The treatment of legal claims under U.S. bankruptcy law is noted above, and discussed in greater detail in **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 86-88.

<sup>80</sup> **R-075**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019.

<sup>81</sup> **R-076**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 1.

<sup>82</sup> **R-076**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2, citing to **RLA-043**, *Refusal to Accept the Claim of Raymond Intl (UK) Ltd*, Refusal No. 21 (Decision No. DEC18-REF21-FT) Final Decision, 8 December 1982, reprinted in 1 Iran-US CTR 394, and **RLA-044**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision on a Motion to Add a New Party, 31 January 2008.

<sup>83</sup> **R-076**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2. The Claimant contested Canada's objections, arguing that the circumstances here are such that the "new claimants do not change the nationality of the parties nor the issues to be resolved in the arbitration." **R-077**,

35. Canada and WMH agreed that the May 13, 2019, submission would serve as WMH's NOI under Article 1119.<sup>84</sup> Canada offered to engage in consultations with WMH with respect to its NOI pursuant to NAFTA Article 1118;<sup>85</sup> however, WMH did not accept Canada's offer.<sup>86</sup>

36. For its part, on July 23, 2019, while continuing to administer the remaining bankruptcy proceedings, WCC withdrew its NAFTA claim against Canada.<sup>87</sup>

### **3. The Claimant Files a NAFTA Claim Against the Government of Canada**

37. On August 12, 2019, ninety days after the submission of its NOI, the Claimant initiated these proceedings by submitting its Notice of Arbitration against the Government of Canada. The Claimant has brought its claim under NAFTA Article 1116 on its own behalf, and under Article

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Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 1. Canada further clarified that its objection was grounded "in the fact that the WMH NOA proposed to substitute a new Claimant for the original Claimant in this proceeding. This amendment is prohibited by Article 20 of the UNCITRAL Arbitration Rules for the very reason that it would result in the claim falling outside the tribunal's jurisdiction. That the amendment may not change the nationality of the Claimant or the issues to be resolved in the proceeding has no bearing on the operation of Article 20 in this instance." **R-078**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019, p. 1.

<sup>84</sup> See **R-078**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019; **R-079**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", 23 July 2019.

<sup>85</sup> **R-076**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2.

<sup>86</sup> The Claimant suggested at the hearing on bifurcation that the absence of consultations with respect to the new claim indicated that Canada "recognized ... the continuity of the initial Westmoreland and the Westmoreland that emerged from bankruptcy". See Bifurcation Hearing Transcript, pp. 92:18-93:4. However, the Claimant's decision not to consult with Canada is not evidence of any recognition on Canada's part. See **R-078**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019, p. 1; **R-076**, Letter from Mr. Scott Little to Mr. Elliot Feldman "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2.

<sup>87</sup> See **R-079**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", 23 July 2019, p. 1 ("On behalf of Westmoreland Coal Company and pursuant to the appended July 12, 2019 letter, we hereby withdraw Westmoreland Coal Company's November 19, 2018 Notice of Arbitration and Statement of Claim.") See also **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 84 (explaining that, while WCC will ultimately dissolve, it "has remained in existence to administer the remaining bankruptcy process.").

1117 on behalf of WCHI and Prairie.<sup>88</sup> The Claimant provided the waivers and consents that NAFTA Articles 1121 and 1122 require from disputing investors and their enterprises.<sup>89</sup>

38. The allegations of breach and damage, and the description of the factual circumstances leading to them, in the Claimant's NOA are nearly identical to WCC's NOA. In describing them, the Claimant's NOA explains that "the term 'Westmoreland' is used generically throughout this Notice of Arbitration and Statement of Claim", and that, only "[w]hen deemed appropriate, specific references have been made to Westmoreland Mining Holdings or Westmoreland Coal Company."<sup>90</sup> The Claimant claims "damages exceeding \$470 million".<sup>91</sup>

39. The Claimant describes its Article 1102 and Article 1105 claims with respect to the Transition Payments in the following manner:

- Under the heading "Breach of Article 1102 – National Treatment": "Canada did not treat Westmoreland equally with the Albertan companies. Alberta implemented a regulatory scheme to phase out the use of coal in the province by 2030. Alberta compensated the Canadian companies with nearly \$1.4 billion in payments. Westmoreland, a U.S. investor, did not receive any compensation",<sup>92</sup> and "Westmoreland has been damaged by Alberta's inequitable measures."<sup>93</sup>
- Under the heading "Breach of Article 1105 – Minimum Standard of Treatment": "The Government of Alberta's decision to pay out nearly \$1.4 billion in compensation to those three companies (and predominantly to TransAlta and Capital Power) and not a dollar to Westmoreland is arbitrary, grossly unfair and, therefore, a violation of the minimum standard of treatment under customary international law."<sup>94</sup>

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<sup>88</sup> Claimant's NOA, ¶¶ 1 and 25.

<sup>89</sup> **C-001**, Westmoreland Mining Holdings, LLC NAFTA Consent and Waiver, 10 May 2019.

<sup>90</sup> Claimant's NOA, fn. 1 ("As set forth in more detail below, Westmoreland Coal Company transferred most of its assets, including the assets at issue here, to Westmoreland Mining Holdings. This transfer was accomplished pursuant to a Plan of Reorganization approved by a U.S. federal bankruptcy court on March 15, 2019. The term 'Westmoreland' is used generically throughout this Notice of Arbitration and Statement of Claim to describe the facts and circumstances of the dispute. When deemed appropriate, specific references have been made to Westmoreland Mining Holdings or Westmoreland Coal Company.").

<sup>91</sup> Claimant's NOA, ¶ 111.

<sup>92</sup> Claimant's NOA, ¶ 93.

<sup>93</sup> Claimant's NOA, ¶ 95.

<sup>94</sup> Claimant's NOA, ¶ 104.

40. The Claimant's NOA identifies the date associated with this measure as occurring late in 2016. For example, the NOA explains that Alberta "implemented Mr. Boston's recommendations" and "announced for the electric utilities nearly \$1.4 billion in compensation" in November 2016.<sup>95</sup>

41. The Claimant describes its Article 1105 claim with respect to the "coal phase-out program" in the following terms:

- Under the heading "Breach of Article 1105 – Minimum Standard of Treatment": "The coal phase-out program also denies Westmoreland of the reasonable expectations of its investments in Canada in breach of Article 1105"<sup>96</sup> and "has curtailed the time horizon for Westmoreland's investments in the Mines, reducing their value and accelerating the time in which Westmoreland would have to complete its reclamation of the Mines at a cost that is no longer justified by the investments."<sup>97</sup>

42. The Claimant explains that "the coal phase-out program" was "adopted in 2015".<sup>98</sup>

43. Notwithstanding its prior submissions on these issues, at the hearing on bifurcation held on September 24, 2020, the Claimant asserted its view that the alleged breaches did not occur until 2017.<sup>99</sup> Canada has explained that Alberta's decision to allocate Transition Payments and its decision to phase out emissions from coal-fired electricity generation occurred in 2016 and 2015, respectively.<sup>100</sup> Canada maintains its prior description of the measures and their dates, and will refer to them accordingly in this submission. However, the Tribunal need not decide the dispute between the disputing parties over the date of the challenged measures for the purposes of this

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<sup>95</sup> See e.g., Claimant's NOA, ¶ 72.

<sup>96</sup> Claimant's NOA, ¶ 105.

<sup>97</sup> Claimant's NOA, ¶ 109.

<sup>98</sup> Claimant's NOA, ¶ 109. See also, ¶ 30.

<sup>99</sup> Bifurcation Hearing Transcript, p. 109:2-6 ("That earliest possible date [for when an actionable claim arose for the purposes of the Limitation Period of the Treaty] would be when the payouts began. So, July of 2017, because that's when we first know that the payments that were discussed and for which Terry Boston was hired would take place, that payments were being made.") See also Procedural Order No. 3, ¶ 50 ("The Claimant clarified its position during the oral hearing, explaining that the measure out of which its claims arise is the payment of the Transition Payments which commenced in July 2017.")

<sup>100</sup> Statement of Defence, ¶¶ 4, 6, 30-49, 64, and 71; Canada's Request for Bifurcation, ¶¶ 9, 12-13, 17, 23, and fn. 36; Canada's Reply to the Claimant's Response to Canada's Request for Bifurcation, ¶¶ 26-31.

jurisdictional phase. Even under the Claimant's most recently asserted date, the alleged breaches occurred before it became an investor of a Party under NAFTA Chapter Eleven.

### **III. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMANT'S NAFTA CLAIM**

44. The substantive obligations under Section A of NAFTA Chapter Eleven do not apply to a claimant until it becomes an "investor of a Party". A NAFTA tribunal's jurisdiction under Articles 1101(1), 1116(1), and 1117(1) is therefore limited to alleged breaches of those obligations, and resulting loss or damage, that occurred after a claimant becomes an investor of a Party. The Claimant here became an investor of a Party, at the earliest, when it was constituted on January 31, 2019. It was not a protected investor when the alleged breaches, and resulting damage, occurred. Consequently, the Tribunal lacks jurisdiction over the claim.<sup>101</sup>

#### **A. The Claimant Bears the Burden of Proving That It Has Satisfied the Jurisdictional Requirements of NAFTA Chapter Eleven**

45. A claimant under NAFTA Chapter Eleven bears the burden of proving that the tribunal has jurisdiction over the dispute. NAFTA tribunals have repeatedly confirmed this principle.<sup>102</sup> For example, the *Mesa v. Canada* tribunal found that, "[i]t is for the Claimant to establish the factual

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<sup>101</sup> The Claimant acknowledges that the success of Canada's objection will mean that the Tribunal lacks jurisdiction over the entire claim. See Claimant's Response to Canada's Request for Bifurcation, ¶ 30 ("Claimant agrees that resolution of these issues would, if decided entirely in favor of Canada, likely dispose of the entirety of the claim.").

<sup>102</sup> **RLA-034**, *Apotex Inc. v. The Government of the United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150, citing **RLA-045**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 58-64 (summarizing previous decisions and concluding "if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional phase."). See also **RLA-029**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award on Jurisdiction, 19 June 2007 ("*Bayview – Award on Jurisdiction*"), ¶¶ 63, 122 (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **RLA-027**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 ("*Grand River – Award*"), ¶ 122 (holding that "Claimants must [...] establish an investment that falls within one or more of the categories established by that Article [1139]"); **RLA-021**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶ 328 (stating that "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.").

elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."<sup>103</sup> The *Resolute v. Canada* tribunal came to the same conclusion:

Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party 'the burden of proving the facts relied on to support [its] claim or defence'. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.<sup>104</sup>

46. In this case, the Claimant bears the burden of proving that it has brought its NAFTA claim in accordance with Articles 1101, 1116, and 1117.

**B. The Claimant Was Not an Investor of a Party When the Alleged Breaches Occurred and the Tribunal Does Not Have Jurisdiction *Ratione Temporis***

47. The Claimant's claim must fail for lack of jurisdiction *ratione temporis* under NAFTA Articles 1101(1), 1116(1), and 1117(1) because the Claimant was not an "investor of a Party" when the alleged breaches occurred in 2015 and 2016. Subsection (1) below explains that, under NAFTA Chapter Eleven, a claimant must be an investor of a Party when an alleged breach occurred. Subsection (2) explains that the Claimant does not meet this requirement.

**1. A Claimant Must Be an Investor of a Party When the Alleged Breach Occurred**

**(a) Articles 1101(1), 1116(1), and 1117(1) Require a Claimant to Be an Investor of a Party When the Alleged Breach Occurred**

48. Articles 1116(1) and 1117(1) set out the circumstances under which an "investor of a Party" may bring a claim under Section B of NAFTA Chapter Eleven. Under Article 1116(1), an investor of a Party may, on its own behalf, bring a claim "that another Party has breached an obligation under: (a) Section A".<sup>105</sup> Under Article 1117(1), an investor of a Party may, "on behalf of an

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<sup>103</sup> **RLA-020**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 236.

<sup>104</sup> **RLA-033**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute – Decision on Jurisdiction*"), ¶ 84.

<sup>105</sup> Article 1116(1) provides in full: "An investor of a Party may submit to arbitration under this Section a claim 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

enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly”, bring a claim “that the other Party has breached an obligation under: (a) Section A”.<sup>106</sup> Accordingly, both Articles 1116(1) and 1117(1) require that a claim pertain to the alleged breach of an obligation under Section A.

49. Section A opens with Article 1101(1), the “gateway” to NAFTA Chapter Eleven,<sup>107</sup> which sets out the scope and coverage of the Chapter. Article 1101(1) circumscribes the application of the obligations of Section A and of the dispute settlement mechanism in Section B. In relevant part, it reads:

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; [...]

50. The obligations contained in Section A thus apply to measures that “relat[e] to” investors of another Party and investments held by investors of another Party. Read together with Articles 1116(1) and 1117(1), a measure alleged to breach an obligation under Section A must “relat[e] to” the “investor of a Party” bringing the claim, or to the investments held by that “investor of a Party”. NAFTA tribunals have consistently required this connection between the claimant, its investments, and Article 1101(1).<sup>108</sup>

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obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”

<sup>106</sup> Article 1117(1) provides in full: “An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.”

<sup>107</sup> **RLA-026**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 106(i). See also **RLA-027**, *Grand River – Award*, ¶¶ 76-80; **RLA-028**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 118-128; **RLA-029**, *Bayview – Award on Jurisdiction*, ¶ 85.

<sup>108</sup> See e.g., **RLA-046**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶ 6.3 (“It is necessary to address [Article 1101(1)] within the context of NAFTA’s Chapter Eleven and the Claimants’ substantive claims in this arbitration. [...] Accordingly, the [challenged measure] (as adopted and maintained by the Respondent) must relate to the Claimants as investors or to their

51. Accordingly, for a claim to meet the requirements of Articles 1101(1), 1116(1), and 1117(1), it must allege a breach of an obligation that applies to the “investor of a Party” bringing the claim or to the investments of that investor of a Party. If the investor of a Party did not exist or did not have an investment at the time of the challenged measure, then the threshold connection between the challenged measure and the claimant under Article 1101(1) cannot be met, and there are no substantive obligations in Section A that apply with respect to that claimant and its investments.

52. NAFTA Chapter Eleven provides further guidance with respect to when a person or entity becomes an “investor of a Party”, and when an “investment of an investor of a Party” is established, such that they might fall within the scope of the Chapter. NAFTA Article 1139 defines these terms, in relevant part, as follows:

**investor of a Party** means [...] an enterprise of such Party, that seeks to make, is making or has made an investment;

**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

53. NAFTA Article 1139 also defines “enterprise of a Party” by reference to the term “enterprise” defined in NAFTA Article 201, which means “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association”.<sup>109</sup>

54. A corporate entity thus becomes an “investor of a Party” under NAFTA Chapter Eleven when it is both: (a) constituted or organized under the applicable law; and (b) seeks to make, is making, or has made an investment. Similarly, an “investment of an investor of a Party” is established when the relevant “investor of a Party”: (a) qualifies as such under NAFTA; and (b)

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investments in the territory of the USA within the meaning of NAFTA Article 1101(1)”) and ¶¶ 6.22-6.24; **RLA-033, Resolute – Jurisdictional Decision**, ¶¶ 222 and 244 (under Article 1101(1) a measure must “have some specific impact on the claimant” or “directly address, target, implicate, or affect the Claimant”). *See also RLA-047, Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 175.

<sup>109</sup> Under Article 1139, “**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there”, and “**enterprise** means an ‘enterprise’ as defined in Article 201 (Definitions of General Application), and a branch of an enterprise”.

acquires ownership or control of the enterprise or other interest forming the basis of its “investment”. Before these requirements are met, NAFTA Chapter Eleven does not apply with respect to the corporate entity.

55. Articles 1101(1), 1116(1), and 1117(1) therefore set a temporal limitation on a tribunal's jurisdiction, and a claimant must demonstrate that it was an investor of a Party when the alleged breach occurred.

**(b) NAFTA and Other International Investment Jurisprudence  
Confirm that a Claimant Must Be a Protected Investor When  
the Alleged Breach Occurred**

56. NAFTA tribunals have consistently confirmed the temporal limitation imposed by Articles 1101(1), 1116(1), and 1117(1) and have found that they lacked jurisdiction *ratione temporis* where a claimant sought to make a claim concerning alleged breaches that pre-date its existence as a protected “investor of a Party.”

57. For example, the *Mesa v. Canada* tribunal found that it lacked jurisdiction under NAFTA Articles 1101(1) and 1116(1) over claims challenging certain measures that occurred before the claimant in that case became an investor of a Party.<sup>110</sup> The tribunal found that “the investor must establish that it was seeking to make the very investment in respect of which it makes its claims” before the alleged breaches,<sup>111</sup> explaining that its “jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an ‘investor’ holding an ‘investment’.”<sup>112</sup> The tribunal further explained that investment arbitration tribunals have “repeatedly found that they do

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<sup>110</sup> **RLA-020**, *Mesa – Award*, ¶ 333 (“TTD and Arran were incorporated on 17 November 2009. North Bruce and Summerhill were incorporated on 6 April 2010. Hence, for the reasons set forth above, the Tribunal concludes that its jurisdiction is limited to claims based on measures which occurred after 17 November 2009 for TTD and Arran and after 6 April 2010 for North Bruce and Summerhill.” (footnotes omitted)).

<sup>111</sup> **RLA-020**, *Mesa – Award*, ¶ 330 (“It is obviously implied in the definition [of “investor of a Party” and “investment of an investor of a Party] quoted above that there must be a link between the investor that seeks to make an investment, and the investment that the investor seeks to make”).

<sup>112</sup> **RLA-020**, *Mesa – Award*, ¶ 327.

not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted.”<sup>113</sup>

58. Similarly, in *Gallo v. Canada*, the tribunal found that it lacked jurisdiction under Articles 1101(1) and 1117(1) over the claim because the claimant, an American investor, did not own or control the enterprise on whose behalf he was bringing a claim at the time of the alleged breaches. The tribunal stated 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,” with the “critical time” being the date of the alleged breach.<sup>114</sup> Similar to the tribunal in *Mesa*, the *Gallo* tribunal held that “[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.”<sup>115</sup>

59. The tribunal in *B-Mex v. Mexico* also found that an “investor of a Party” must demonstrate its ownership or control of the enterprise (i.e. its investment) at the time of the alleged breaches in order for the tribunal to have jurisdiction under Article 1117(1). The tribunal confirmed that “the Claimants must establish that they owned or controlled the Mexican Companies [the relevant enterprises] at the time of the treaty breaches”.<sup>116</sup>

60. In line with NAFTA tribunals, other international investment tribunals have consistently found that their jurisdiction does not extend to claims alleging breaches that pre-date the claimant's protection under the relevant treaty. For example, in *Renée Rose Levy v. Peru*, decided under the France-Peru BIT, the Tribunal explained that a claimant must have an investment at the time of the alleged breach for the tribunal to have jurisdiction:

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<sup>113</sup> **RLA-020**, *Mesa – Award*, ¶ 326.

<sup>114</sup> **RLA-021**, *Gallo – Award*, ¶ 325 (“[...] ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained.”).

<sup>115</sup> **RLA-021**, *Gallo – Award*, ¶ 328.

<sup>116</sup> **RLA-022**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019, ¶ 145. The disputing parties also agreed that the claimants needed to establish ownership or control of the relevant enterprises at the time of the alleged breaches. Mexico further argued that ownership or control must also be shown at the time of the submission of the claim to arbitration, in addition to at the time of the alleged treaty breach. The tribunal agreed. **RLA-022**, *B-Mex – Partial Award*, ¶ 147.

[...] [I]t is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.<sup>117</sup>

61. The tribunal proceeded to explain that, because the BIT is “at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.”<sup>118</sup>

62. Similarly, in *GEA Group v. Ukraine*, a case decided under the Germany-Ukraine BIT, the German claimant acquired its investment by acquiring the shares of an enterprise (KCH) from another potentially protected investor (SF Beteiligungs-GmbH).<sup>119</sup> Ukraine argued that, to the extent any alleged breaches occurred before the acquisition of KCH, the tribunal lacked jurisdiction.<sup>120</sup> The tribunal affirmed that it had no jurisdiction over alleged breaches that occurred before the claimant became an investor: “for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed.”<sup>121</sup> Like the tribunals in *Mesa* and *Gallo*, the tribunal observed that investment arbitration tribunals have “consistently applied” this principle.<sup>122</sup>

63. The principle that a claimant must have been a protected investor at the time of the alleged breaches is such a widely-accepted principle that it is frequently common ground between the

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<sup>117</sup> **RLA-048**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/7) Award, 9 January 2015 (“*Renée Rose Levy – Award*”), ¶ 146 (emphasis added).

<sup>118</sup> **RLA-048**, *Renée Rose Levy – Award*, ¶ 147.

<sup>119</sup> **RLA-023**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011 (“*GEA Group – Award*”), ¶¶ 33-40, 150, 172.

<sup>120</sup> **RLA-023**, *GEA Group – Award*, ¶ 166.

<sup>121</sup> **RLA-023**, *GEA Group – Award*, ¶ 170. In applying the governing principle quoted, the *GEA Group* tribunal found that it had jurisdiction over certain alleged breaches because they occurred after the claimant had made its investment in Ukraine. *See e.g.*, ¶¶ 192-193, and 198.

<sup>122</sup> **RLA-023**, *GEA Group – Award*, ¶ 170.

parties. For example, in *Cementownia v. Turkey*, the tribunal explained that “[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred.”<sup>123</sup> Similarly, it was “common ground” between the parties in *Libananco v. Turkey* that the tribunal’s jurisdiction depended on whether the claimant had acquired its investment before the alleged breaches.<sup>124</sup>

64. Consequently, NAFTA and other international investment law jurisprudence confirms that a claimant must have been a protected investor at the time of the alleged breach in order to establish a tribunal’s jurisdiction *ratione temporis*.

## 2. The Claimant Was Not an Investor of a Party When the Alleged Breaches Occurred

65. The Claimant was constituted under the laws of Delaware on January 31, 2019.<sup>125</sup> This is the earliest possible date on which the Claimant could have become an “investor of a Party” under NAFTA Chapter Eleven – that is, an entity (a) constituted or organized under applicable law, and (b) seeking to make, making, or having made an investment. The Claimant does not allege that a breach of the obligations under Section A of Chapter Eleven occurred after this date.

66. Instead, the Claimant only alleges breaches of Section A that occurred years before its existence as a protected investor, and that concern an entirely different investor – WCC. As noted above,<sup>126</sup> the Claimant uses the non-specific term “Westmoreland” to describe its claims, obscuring the fact that it is a different investor than WCC.<sup>127</sup> For example, the Claimant’s

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<sup>123</sup> **RLA-049**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 112.

<sup>124</sup> **RLA-050**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011, ¶ 127 (“It is common ground between the Parties that the Tribunal’s jurisdiction over the merits depends on whether Libananco owned ÇEAŞ and Kepez shares at the time of the alleged expropriation (*i.e.* 12 June 2003).”).

<sup>125</sup> **R-062**, WMH Formation Documents, Article II, ¶ 2.1; **R-067**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining Holdings LLC, Entity No. 7262545, accessed on 13 December 2020.

<sup>126</sup> *See above*, Section II.C.3.

<sup>127</sup> Claimant’s NOA, fn. 1.

Article 1102 claim with respect to Alberta's 2016 decision to provide Transition Payments states: "Westmoreland, a U.S. Investor, did not receive the same 'made in Alberta' treatment [...]. Its investor confidence was not maintained, and its capital was stranded as a result of Alberta's actions."<sup>128</sup> The Claimant is referring to WCC because the Claimant could not have had any stranded capital prior to its formation in 2019. Nor could the Claimant have had "investor confidence" prior to acquiring its investment in Canada in 2019, at which point it would have already been aware of "Alberta's actions".<sup>129</sup>

67. Similarly, the Claimant alleges that the "coal phase-out program, adopted in 2015" violated Article 1105,<sup>130</sup> in part because "Westmoreland" made undertakings under the *Investment Canada Act*, and that "[t]hese undertakings were made in 2014 with the reasonable expectation, in accordance with Canadian Federal Regulations, that Westmoreland's investments in the Mines would provide a reasonable return on investment beyond 2030."<sup>131</sup> Again, the Claimant is referring to WCC. The Claimant did not exist, let alone have any alleged expectations, in 2014 or 2015.

68. The Claimant alleges breaches of Section A of NAFTA Chapter Eleven that occurred years before it existed as an investor of a Party. The Claimant was thus not a protected investor when the alleged breaches occurred and the Tribunal lacks jurisdiction *ratione temporis* over the claim under Articles 1101(1), 1116(1), and 1117(1).

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<sup>128</sup> Claimant's NOA, ¶ 94.

<sup>129</sup> See e.g., **R-033**, Government of Alberta, Press Release, "Revised: Alberta announces coal transition action", 24 November 2016.

<sup>130</sup> Claimant's NOA, ¶¶ 109-110.

<sup>131</sup> Claimant's NOA, ¶ 108. WCC's acquisition of assets from Sherritt met the threshold for a "net benefit" review under the *Investment Canada Act*. This "net benefit" review considers a number of factors, including the effects of the investment on the level of economic activity in Canada, productivity, and competition, as well as the compatibility of the investment with national industrial, economic, and cultural policies. In this context, WCC made voluntary undertakings, including maintaining certain levels of capital investment in Canada, which expired in 2017. See Claimant's NOA, ¶ 107 (referring to undertakings that WCC made for a period of three years), and ¶ 108 (specifying that WCC's undertakings were made in 2014). The Claimant's acquisition of WCHI did not meet the threshold.

**C. The Claimant Cannot Establish a *Prima Facie* Damages Claim and the Tribunal Does Not Have Jurisdiction**

69. The Claimant cannot establish a *prima facie* damages claim because neither it nor its enterprises could have incurred any “loss or damage by reason of, or arising out of,” the alleged breaches, which pre-date the Claimant’s existence as an “investor of a Party”. The Tribunal does not have jurisdiction *ratione temporis* over the claim. Subsection (1) below explains that, under NAFTA Chapter Eleven, a claimant must establish *prima facie* that it, or an enterprise that it owned or controlled, incurred damage by reason of, or arising out of, the alleged breach. Subsection (2) explains that the Claimant cannot meet this requirement.

**1. A Claimant Must Establish *Prima Facie* Loss or Damage “By Reason Of, or Arising Out Of,” an Alleged Breach**

70. A claimant is required to set out a *prima facie* case for damages in order to establish a tribunal’s jurisdiction over the claim.<sup>132</sup> Under NAFTA Article 1116(1), an investor of a Party must claim on its own behalf “loss or damage by reason of, or arising out of,” an alleged breach of an obligation under Section A of NAFTA Chapter Eleven. Similarly, under Article 1117(1), an investor of a Party must claim that its enterprise – a juridical person that the investor owns or controls at the time of the alleged breach – incurred “loss or damage by reason of, or arising out of,” the alleged breach.<sup>133</sup> Where an investor of a Party or its enterprise could not have incurred damages “by reason of, or arising out of,” the alleged breach of an obligation under Section A, a claimant cannot make out a *prima facie* case for damages, and the tribunal does not have jurisdiction over the claim.

71. As explained above,<sup>134</sup> a claimant is protected under NAFTA Chapter Eleven when it becomes an “investor of a Party” to whom obligations are owed. It is not possible for a claimant

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<sup>132</sup> For example, the tribunal in *UPS v. Canada* held that a claimant is required to “state a *prima facie* case of damage” at the jurisdictional stage. See **RLA-025**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 37. The *UPS* tribunal found that the claimant had stated a *prima facie* case of damage in that dispute.

<sup>133</sup> The alleged damage must flow from the alleged breach. As stated by the tribunal in *Methanex v. United States*: “The Tribunal construes Articles 1116 and 1117 as requiring a claim of loss or damage that originates in the measure adopted or maintained by the NAFTA Party”. **RLA-051**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and the Merits, 3 August 2005, Part II, Ch. F, ¶ 26.

<sup>134</sup> See *above*, Section III.B.1.

or its enterprise to incur loss or damage by reason of, or arising out of, an alleged breach that pre-dates the claimant's existence as an investor of a Party. Thus, a claimant cannot establish *prima facie* that it or its enterprise incurred damage by reason of, or arising out of, an alleged breach that occurred prior to the claimant becoming a protected investor.

72. Tribunals have confirmed this principle. For example, the tribunal in *Saluka v. Czech Republic* found that it lacked jurisdiction in respect of claims for damage incurred prior to the claimant's acquisition of the underlying investment:

[T]he Tribunal wishes to emphasise that, in accordance with the Treaty, its jurisdiction is limited to claims brought by the Claimant, Saluka, in respect of damage suffered by itself in respect of the investment represented by its holding of IPB shares. It follows, therefore, that the Tribunal does not have jurisdiction in respect of any claims of Nomura, or any claims in respect of damage suffered by Nomura and not by Saluka, or any claims in respect of damage suffered in respect of the IPB shares before October 1998 when the bulk of those shares became vested in the Claimant.<sup>135</sup>

73. Accordingly, NAFTA tribunals do not have jurisdiction *ratione temporis* over claims for damage arising out of an alleged breach that occurred prior to a claimant becoming a protected investor of a Party.

## 2. The Claimant Cannot Establish *Prima Facie* Loss or Damage “By Reason Of, or Arising Out Of,” the Alleged Breaches

74. As explained above,<sup>136</sup> the earliest date on which the Claimant could have become an investor of a Party is January 31, 2019, the date it was constituted. However, the Claimant does not allege loss or damage arising out of a breach of Section A of NAFTA Chapter Eleven that occurred after it became an investor of a Party. Instead, the loss or damage alleged to have been incurred concerns WCC, a different investor. For example, the Claimant states: “Westmoreland, by contrast to the three Canadian companies, has been denied compensation for the loss of its investment in the Mines in Alberta, caused by the Government's Climate Leadership Plan [...]”<sup>137</sup>

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<sup>135</sup> **RLA-024**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244.

<sup>136</sup> *See above*, Section III.B.2.

<sup>137</sup> Claimant's NOA, ¶ 82.

The Claimant is referring to WCC and its investment because the Claimant had no investment in Canada at the time of the alleged breaches and could not have incurred the alleged loss or damages.

75. Similarly, the Claimant alleges that “Westmoreland has received no compensation from Alberta even as Alberta has decided to terminate the value of Westmoreland’s assets.”<sup>138</sup> Again, the Claimant is referring to WCC because the Claimant had no assets at the time Alberta allegedly “decided to terminate” their value.

76. Neither the Claimant nor its enterprises could have incurred loss or damage by reason of, or arising out of, any alleged breach in its claim. The alleged breaches and damages pre-date its existence as a protected investor of a Party. The Claimant thus cannot establish *prima facie* any loss or damage and the Tribunal does not have jurisdiction over the claim.

**D. None of the Arguments Advanced by the Claimant Establish the Tribunal’s Jurisdiction *Ratione Temporis***

77. The Claimant does not contest the fundamental principle that an investor of a Party under NAFTA Chapter Eleven has standing only to bring a claim alleging breaches and damages that occurred after it became an investor of a Party. Instead, it argues that the Tribunal has jurisdiction *ratione temporis* for three reasons: (1) the Claimant is “substantially the same” investor of a Party as WCC;<sup>139</sup> (2) the Claimant “continued with its pre-existing investment through a bankruptcy restructuring”;<sup>140</sup> and (3) WCC’s NAFTA claim was “transferred” to the Claimant.<sup>141</sup> None of the Claimant’s arguments have merit.

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<sup>138</sup> Claimant’s NOA, ¶ 95.

<sup>139</sup> Bifurcation Hearing Transcript, p. 93:15-20.

<sup>140</sup> Claimant’s Response to Canada’s Request for Bifurcation, ¶ 13.

<sup>141</sup> Claimant’s NOA, ¶ 18.

**1. The Claimant Is Not the Same “Investor of a Party” as WCC**

78. During the proceedings on bifurcation, the Claimant argued that the Tribunal has jurisdiction *ratione temporis* over its claim because it is “substantially the same” investor of a Party as WCC.<sup>142</sup> The Claimant is not the same investor of a Party as WCC.

79. First, NAFTA Chapter Eleven does not allow two distinct enterprises to be the same “investor of a Party”. Under NAFTA, an enterprise is an “entity constituted or organized under applicable law.” The Claimant was constituted under Delaware law as a limited liability company in 2019.<sup>143</sup> WCC was constituted under Delaware law as a corporation in 1910.<sup>144</sup> WCC and the Claimant currently co-exist. While WCC is winding down its affairs and will eventually dissolve,<sup>145</sup> the Claimant continues to operate. The two entities thus cannot be the same “enterprise” under NAFTA, and cannot be the same “investor of a Party”.

80. Second, the Claimant and WCC are separate disputing investors under NAFTA Chapter Eleven. WCC filed one NAFTA claim, along with the waiver and consent required to perfect Canada's consent to arbitrate its claim under Articles 1121 and 1122, on November 19, 2018.<sup>146</sup> WCC withdrew this claim on July 23, 2019.<sup>147</sup> The Claimant filed its separate NAFTA claim, along with its distinct waiver and consent, on August 12, 2019.<sup>148</sup> If the Claimant and WCC were

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<sup>142</sup> Bifurcation Hearing Transcript, p. 93:15-20 (“The Westmoreland that emerged from bankruptcy was substantially the same as the Westmoreland that entered, and Westmoreland's Prairie Mines were entirely in Canada and were owned by the American company Westmoreland going in and coming out of corporate reorganization.”).

<sup>143</sup> **R-062**, WMH Formation Documents, Article II, ¶ 2.1; **R-067**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining Holdings LLC, Entity No. 7262545, accessed on 13 December 2020.

<sup>144</sup> **R-071**, Westmoreland Coal Company, Quarterly Report for the Quarterly Period ended June 30, 2015 (Form 10-Q) [Excerpt], Exhibit 3.1.

<sup>145</sup> **R-042**, WCC Plan, Article IV.N.

<sup>146</sup> **R-074**, WCC's NOA, Exhibit 1.

<sup>147</sup> **R-079**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, “Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC And Prairie Mines & Royalty ULC”, 23 July 2019, p. 1.

<sup>148</sup> **C-001**, Westmoreland Mining Holdings, LLC NAFTA Consent and Waiver, 10 May 2019.

the same investor of a Party, WCC would not have needed to withdraw its claim and the Claimant would not have filed its own.

81. Third, the Claimant has already confirmed several times that it is a “new investor”,<sup>149</sup> a new “disputing investor”,<sup>150</sup> a new “holding entity”,<sup>151</sup> and a different “Delaware company” than WCC.<sup>152</sup> It cannot also argue that it is “substantially the same” investor of a Party as WCC.

82. Finally, the Claimant's status as a participant in the WCC bankruptcy process confirms that the Claimant and WCC are not the same enterprise. In the bankruptcy process, WCC was a debtor. The Claimant was created as an acquisition vehicle of the First Lien Lenders, whose interests were adverse to WCC's.<sup>153</sup> Indeed, WCC owed the First Lien Lenders hundreds of millions of dollars.<sup>154</sup> Through extensive arm's-length negotiations, WCC and the First Lien Lenders agreed that WCC and certain of its affiliates would sell substantially all of their assets for the benefit of the First Lien Lenders.<sup>155</sup> As Ms. Coleman explains in her Expert Report, “they accomplished what they set out to do”,<sup>156</sup> and executed the negotiated sale transaction.

83. In that transaction, the Claimant was buyer, and WCC was seller.<sup>157</sup> WCC and the Claimant were legally adverse in interest and were represented by separate counsel.<sup>158</sup> In fact, the Bankruptcy Court made a specific finding that the Claimant and WCC “negotiated, proposed and

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<sup>149</sup> Bifurcation Hearing Transcript, p. 94:3-7 (“[t]here is no question of whether Canada was on notice that it owed NAFTA Chapter Eleven obligations in Prairie Mines and its *new investor parent*, unlike in the cases cited by Canada.”) (emphasis added).

<sup>150</sup> Claimant's NOA, ¶ 20.

<sup>151</sup> Claimant's Response to Canada's Request for Bifurcation, ¶ 15 (“Here, in contrast, an American investment in Alberta indisputably existed when the alleged breaches occurred. It was the direct holding entity, not the investment and not the nationality of the investor, that changed.”).

<sup>152</sup> Claimant's Rejoinder to Canada's Reply in Support of its Request for Bifurcation, ¶ 3.

<sup>153</sup> See **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶ 90.

<sup>154</sup> See **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶ 59 (explaining that the First Lien Lenders had a secured claim of US\$669 million in the bankruptcy process). See also **R-042**, WCC Plan, Art. VIII.A.2.

<sup>155</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶¶ 9, 12-13, and 52-55.

<sup>156</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶ 89.

<sup>157</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, ¶¶ 12 and 90.

<sup>158</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction, fn. 83 and ¶¶ 12 and 90.

entered into” the Stalking Horse Purchase Agreement “without collusion, in good faith and from arm’s-length bargaining positions.”<sup>159</sup>

84. Moreover, in purchasing WCC’s assets, rather than equity in WCC, the Claimant was protecting itself from certain liabilities that attached to WCC. For example, the Claimant assumed only the liabilities listed in the Stalking Horse Purchase Agreement, and excluded all others.<sup>160</sup> In addition, protections against potential claims based on “successor liability” theories were expected throughout the bankruptcy process,<sup>161</sup> and the Bankruptcy Court ordered that the Claimant “shall have no successor [...] liabilities” with respect to WCC.<sup>162</sup> As Ms. Coleman explains, “the WCC Bankruptcy Court’s order confirming the WCC Plan, which is now final and non-appealable, insulates WMH from the assertion of claims based on theories of ‘successor liability’.”<sup>163</sup>

85. The Claimant cannot have it both ways. It went to great lengths during the bankruptcy proceedings to establish that it is not “substantially the same” as WCC. It cannot now argue that it is the same for the purposes of pursuing this claim under NAFTA Chapter Eleven.

## 2. The Claimant’s Investment in Canada Began in 2019

86. Next, the Claimant argues that the Tribunal has jurisdiction *ratione temporis* because “the Claimant continued with its pre-existing investment through a bankruptcy restructuring.”<sup>164</sup> Again, the Claimant is mistaken.

87. As explained above, the Claimant could not have “continued with its pre-existing investment through a bankruptcy restructuring” because the Claimant was constituted *during* WCC’s bankruptcy proceedings as a vehicle to purchase WCC assets in satisfaction of the debt owed by

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<sup>159</sup> **R-063**, WCC Plan Confirmation Order, ¶ 47. *See also*, **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 72 (b) and (c). For a discussion of the Stalking Horse Purchase Agreement, see ¶¶ 22-24 above; **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶¶ 65 and 66.

<sup>160</sup> **R-053**, Stalking Horse Purchase Agreement, s. 2.05; **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 65.

<sup>161</sup> **R-054**, Order Approving Bidding Procedures, Exhibit 3 (Sale Notice), pp. 34-35 of 42.

<sup>162</sup> **R-063**, WCC Plan Confirmation Order, ¶ 49.

<sup>163</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 13.

<sup>164</sup> Claimant’s Response to Canada’s Request for Bifurcation, ¶ 13.

WCC to the First Lien Lenders. The Claimant's investment in Canada cannot "pre-exist" the very existence of the Claimant.

88. Moreover, the bankruptcy documents confirm that the Claimant purchased its interest in the Canadian Enterprises in March 2019. Specifically, WCC auctioned its equity interests in the Canadian Enterprises to the highest bidder in an effort to "drive a value-maximizing Sale Transaction".<sup>165</sup> The highest (and only) bidder in that auction was the Claimant, who purchased its equity interest in the Canadian Enterprises "free and clear" in an arm's length transaction.<sup>166</sup> The Claimant had no investments in Canada prior to that date.

89. For these reasons, it is not possible that the Claimant "continued with its pre-existing investment through a bankruptcy restructuring." Neither the Claimant nor its investment existed before 2019.

### **3. The Alleged "Transfer" of WCC's NAFTA Claim to the Claimant Cannot Establish the Tribunal's Jurisdiction *Ratione Temporis***

90. Finally, the Claimant argues that the Tribunal has jurisdiction *ratione temporis* because WCC "transferred" its NAFTA claim to the Claimant during WCC's bankruptcy proceedings.<sup>167</sup> At the hearing on bifurcation, counsel for the Claimant elaborated further, explaining that WCC's claim was not "sold off" to a new or different owner during WCC's bankruptcy proceedings, but "traveled as an asset [...] with the Company."<sup>168</sup> The alleged "transfer" of WCC's NAFTA Claim to the Claimant during WCC's bankruptcy proceedings cannot establish the Tribunal's jurisdiction

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<sup>165</sup> **R-057**, Motion to Approve the DS, ¶ 6; **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 62.

<sup>166</sup> **R-063**, WCC Plan Confirmation Order, ¶¶ 45 and 47; **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 72 (a) and (c).

<sup>167</sup> Claimant's NOA, ¶ 18 ("Pursuant to a Plan of Reorganization approved by the bankruptcy court on or around March 15, 2019, Westmoreland Coal Company transferred most of its assets, including Westmoreland Canada Holdings Inc. and its ownership of Prairie, other Canadian assets, and the instant NAFTA claim, to Westmoreland Mining Holdings LLC, a U.S. entity formed and registered in Delaware, United States of America.").

<sup>168</sup> Bifurcation Hearing Transcript, p. 117:9-15 ("I think it's been a principle in NAFTA that you shouldn't just be selling a claim. So, and I think your hypothetical would lead there, which is not what is happening here. The Claim traveled as an asset, but it traveled with the Company. So, it wasn't being sold off and it wasn't to an entirely new or different owner.").

*ratione temporis* and the statements made by the Claimant at the hearing on bifurcation are, in any event, not accurate.

91. First, neither the “NAFTA claim” nor any other asset of WCC “traveled as an asset [...] with the Company.” WCC sold substantially all of its assets in the bankruptcy process, including what it called the “NAFTA claim”.<sup>169</sup> The Claimant in turn purchased WCC’s “NAFTA claim”, along with other assets, in partial satisfaction of the First Lien Lenders’ claims.<sup>170</sup> WCC itself remains in chapter 11 in the United States. The Claimant’s statement at the hearing on bifurcation that WCC’s NAFTA claim was not sold is thus inaccurate.

92. Second, the fact that the “NAFTA Claim” was sold to the Claimant in the context of WCC’s bankruptcy has no effect on whether the “NAFTA Claim” is legally transferrable. U.S. bankruptcy law is silent on the validity of the transfer of a legal claim. It defers instead to applicable non-bankruptcy law as to the legal viability of a transferred claim, including a transferee’s ability to pursue it.<sup>171</sup> Under NAFTA Chapter Eleven, the governing law is NAFTA and applicable rules of international law.<sup>172</sup> Notwithstanding how a legal claim might have been treated under U.S. law in the context of a bankruptcy process, there is no mechanism in NAFTA to allow one “disputing investor” to transfer or sell its claim to another investor of a Party.<sup>173</sup> Canada’s consent to arbitrate a claim under NAFTA Chapter Eleven is specific to the “investor of a Party” who brings the claim. To establish jurisdiction under Articles 1101(1), 1116(1), and 1117(1), a NAFTA claim must be brought by the “investor of a Party” to whom the measure relates, who was the subject of the alleged breaches of obligations contained within Section A as a protected investor of a Party, and who incurred resulting damages.

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<sup>169</sup> **R-053**, Stalking Horse Purchase Agreement, s. 2.01(l) and s. 1.01 (Definitions).

<sup>170</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, Section V.G.

<sup>171</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction**, ¶ 88.

<sup>172</sup> NAFTA Article 1131(1): “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

<sup>173</sup> Article 1139 defines “disputing investor” as “an investor that makes a claim under Section B”, and uses it in conjunction with the relevant “investor of a Party” in Articles 1116(1) and 1117(1) in such provisions as Article 1119 (Notice of Intent to Submit a Claim to Arbitration), 1120 (Submission of a Claim to Arbitration), and 1121 (Conditions Precedent to Submission of a Claim to Arbitration).

93. Regardless, the claim that was sold in the context of WCC's bankruptcy process has now been withdrawn. The "NAFTA Claim" was defined in the bankruptcy proceedings as follows:

"NAFTA Claim" means that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by [Westmoreland Coal Company] on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended).<sup>174</sup>

94. WCC withdrew this defined "NAFTA claim" and its request for relief against the Government of Canada on July 23, 2019.<sup>175</sup> The claim in this arbitration is the one that was filed under NAFTA Chapter Eleven on August 12, 2019. Thus, the "NAFTA claim" no longer exists.

95. For these reasons, the Claimant's contention that WCC's NAFTA claim could be "transferred" and "traveled as an asset [...] with the Company" during WCC's bankruptcy proceedings is incorrect and, in any event, cannot establish the Tribunal's jurisdiction *ratione temporis*.

#### **IV. REQUEST FOR RELIEF**

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

- (a) dismiss the Claimant's claim in its entirety and with prejudice on the grounds of lack of jurisdiction;
- (b) order the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- (c) grant any further relief it deems just and appropriate under the circumstances.

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<sup>174</sup> **R-053**, Stalking Horse Purchase Agreement, s. 1.01. "Westmoreland" was defined in the same Purchase Agreement as "Westmoreland Coal Company, a Delaware corporation". **R-053**, Stalking Horse Purchase Agreement, Recitals.

<sup>175</sup> **R-079**, Letter from Elliot Feldman to Scott Little, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC And Prairie Mines & Royalty ULC", 23 July 2019, p. 1.

December 18, 2020

Respectfully submitted on behalf of Canada,



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