

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

WESTMORELAND MINING HOLDINGS LLC

Claimant,

v.

GOVERNMENT OF CANADA

Respondent,

ICSID Case No. UNCT/20/3

**CLAIMANT WESTMORELAND MINING HOLDINGS LLC'S
REJOINDER ON JURISDICTION**

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Alexander K. Obrecht
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, CO 80202
Telephone: (303) 861-0600

Andrew V. Layden
BAKER & HOSTETLER LLP
200 South Orange Avenue, Suite 2300
Orlando, FL 32801
(407) 649-4000

Elliot J. Feldman
Michael S. Snarr
Paul M. Levine
Analia Gonzalez
James J. East
John R. Lehrer
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Eleventh Floor
Washington D.C. 20036
Tel: 202-861-1500
Fax: 202-861-1783
Email: westmoreland@bakerlaw.com

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I. INTRODUCTION

1. There is no provision in NAFTA for the *ratione temporis* principle as Canada has defined it. The text of NAFTA does not say what Canada wants, and it also says what Canada does not want it to say. Canada has used the phrase “at the time of the alleged breach” more than fifty times in its two Memorials, but the phrase does not appear in NAFTA’s Chapter 11 even once. And where Article 1117 says that an investor may bring a claim on behalf of an enterprise for breach of an obligation, Canada says the text does not mean what it says.

2. Canada promotes an interpretation of Article 1101 in order to interpret Articles 1116 and 1117 when those Articles can stand on their own. Canada then denies the plain language of the treaty and asks the Tribunal to accept that its strained interpretation is “straightforward.” It is not straightforward and is not corroborated anywhere in the text of Chapter 11; nor in statements of interpretation by the Free Trade Commission; nor in the contemporaneous statements delivered by the legislatures of Canada and the United States regarding the import and purpose of the passages that Canada reinterprets here.

3. NAFTA, like other bilateral investment treaties, requires that an investor at all times, from the time of a breach forward, be an “investor of a Party,” but says nothing about whether the investor must be the same investor from the time of the breach through the filing of a claim. The text of NAFTA, the compulsory starting point under the Vienna Convention, is not a source of legal authority for the rule that Canada invokes as its objection to jurisdiction.

4. The cases Canada proposes for authority do not say what Canada contends, and some support Westmoreland's position.¹ Canada fails to distinguish the cases that recognize jurisdiction for claims brought by a formally different entity or person having a continuity of interests with the original investor.

5. Cases frequently allow for the assignment or transfer of claims, particularly where there has been a continuity of interests between the transferor and transferee. Canada has little to say in rebuttal to those cases where jurisdiction was found for claims and investments that were transferred.

6. The Westmoreland bankruptcy process, a "Type G reorganization," expressly and deliberately assured a continuity of interests. Canada acknowledges that Westmoreland Coal Company ("WCC") entered bankruptcy and transferred its interests in Prairie Mines and Royalty ("Prairie") to Westmoreland Mining Holdings LLC ("WMH"). Canada acknowledges that it owed NAFTA obligations to WCC and Prairie before bankruptcy and to WMH and Prairie after, but denies that the obligations it owed to Prairie before bankruptcy are cognizable after. Canada even acknowledges that WMH was a wholly-owned subsidiary of WCC at the time the ownership of Prairie was transferred but dismisses that fact as a formality so that it can maintain—as a formality—that WCC and WMH are different entities with different claims and different investments. Canada acknowledges the bankruptcy but denies its expressly intended effect.

¹ For the avoidance of doubt, any reference to "Westmoreland" is a reference to Claimant, Westmoreland Mining Holdings.

7. Canada does not claim, nor would it suffer, any prejudice from the Tribunal's recognition of jurisdiction of the WMH claim. Canada, therefore, tries to bolster its case for denial of jurisdiction by conjuring speculative "specters" of difficulties that jurisdiction might portend for some future case. Canada's concerns about future cases are ephemeral and, more importantly for this case, have no basis here.

8. This case is not one where jurisdiction is being manipulated for the sake of a claim. The foreign investment is real, unchanged from the moment of the breach, and has yet to be made whole. Canada hopes that WCC's misfortune through bankruptcy will be Canada's good fortune to escape WMH's claim and a fair determination with respect to alleged violations of its obligations under Chapter 11.

II. THE TEXT OF ARTICLES 1116 AND 1117 IS "STRAIGHTFORWARD" BUT CANADA'S INTERPRETATION IS NOT

9. Canada claims that its interpretation of Articles 1116 and 1117 is "straightforward" and prohibits WMH's claim.² Canada's position appears to be simple but the words that would convey the meaning that Canada ascribes to Articles 1116 and 1117 are not to be found in the text.

10. The NAFTA draftsmen knew how to condition an investor's right to arbitration on certain requirements. They frequently did. Article 1113 contains express conditions upon which the benefits of Chapter 11 may be denied to an investor of another Party. Articles 1116 and 1117 have three-year limitation requirements. Article 1120 requires six months to elapse before a claim may be filed. Article 1121 states that a claim may be submitted "only if" the investor provides consents and waivers.

² Canada Reply ¶ 8.

11. The NAFTA draftsmen were comfortable using the phrase “existing at the time” when they wanted. Article 1108(4) states: “No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment *existing at the time the measure becomes effective*.” (emphasis added). Yet, for the fifty-plus times Canada’s Memorials say, “at the time of the alleged breach,” there is not a single reference to those words anywhere in the NAFTA text.

12. Canada’s “straightforward” interpretation of Articles 1116 and 1117 in Section B of Chapter 11 requires that those articles be interpreted through the lens of Article 1101 in Section A, and that Article 1101 itself be “properly interpreted.”³ Canada asks the Tribunal to infer an intent of the NAFTA Parties beyond the ordinary meaning of the terms of Article 1101 to inform Canada’s interpretation of Articles 1116 and 1117. Considering the importance that Canada assigns to the interpretation of the interpretation, it is curious that there is no statement by the Free Trade Commission, nothing in Canada’s NAFTA Statement of Implementation, and nothing in the United States’ Statement of Administrative Action for the Implementation of NAFTA that might confirm Canada’s view.⁴

³ Canada Reply ¶ 43.

⁴ See Canada’s Statement on the Implementation of NAFTA, Department of External Affairs, Canada Gazette (1 Jan. 1994) [Excerpt]; CLA-062, U.S. Statement of Administrative Action for the Implementation of NAFTA (13 Sept. 1993) [Excerpt].

13. The language of Articles 1116 and 1117 is not ambiguous. It requires no resort to supplementary or alternative sources to construe its ordinary meaning. The incongruities in Canada's interpretation of Articles 1116 and 1117 demonstrate that those Articles are not and cannot be a source of the jurisdictional rule that Canada seeks to have applied here.

A. The Ordinary Meaning Of Articles 1116 And 1117 Requires No Interpretation

14. Canada's objection that WMH is not a proper claimant for this arbitration should direct attention to Articles 1116 and 1117, the clauses specifically addressing who may submit a claim to arbitration and the conditions for doing so. Under Article 31 of the Vienna Convention on the Law of Treaties, the terms of the treaty are to be given their ordinary meaning, in their context, in light of the object and purpose of the treaty, and in accordance with the principle of good faith.⁵ Canada's Reply Memorial, however, begins instead with an interpretation of the terms of Article 1101, a general provision for the scope of NAFTA Chapter 11, instead of Articles 1116 and 1117. "First, the Claimant inappropriately interprets the term 'relating to' in Article 1101(1) in a manner that is devoid of the context of Articles 1116 and 1117."⁶ Canada then continues by proffering its interpretation of how the phrase "relate to" in Article 1101 should be interpreted.⁷

⁵ CLA-013, Vienna Convention on the Law of Treaties (1969), Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.")

⁶ Canada Reply ¶ 47.

⁷ See Canada Reply ¶¶ 47-54.

15. Canada's analytical approach is backwards. The Tribunal should begin with the ordinary meaning of the terms of Articles 1116 and 1117, the context of which may be informed by Article 1101 and other treaty terms. The elements of who may submit a claim for arbitration under Articles 1116 and 1117 are, to use Canada's term, "straightforward" and unambiguous. For Article 1116, they require:

- an "investor of a Party," defined by Article 1139 as "a national or an enterprise of such Party, that seeks to make, is making or has made an investment" as "investment" may be defined under Article 1139;
- "a claim that another Party has breached an obligation" under Section A;
- "a claim ... that the investor has incurred loss or damage by reason of, or arising out of, that breach"; and
- "[not] more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

16. For Article 1117, the same elements are required with the difference that:

- the "investor of a Party" makes the claim "on behalf of an enterprise of another Party that is a juridical person," where an "enterprise" is defined by Article 201 as "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";
- the investor "owns or controls directly, or indirectly" that enterprise on whose behalf the claim is made;
- the three-year limitations period runs "from the date on which the enterprise first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage," and
- it is the "investor" and not the "investment" that makes the claim.

17. Neither Canada's Memorial nor its Reply Memorial disputes that WMH is a national or an enterprise of the United States that has made an investment by virtue of its acquisition of Prairie in Canada. There is no dispute that Prairie is a juridical person that is an enterprise of Canada or that WMH owns or controls Prairie. There is no dispute that WMH's claim was filed within three years of the execution of the Off-Coal Agreements, therefore within three years of the knowledge of WMH and Prairie of the alleged breach of Section A of NAFTA. Whether the alleged breach and damages can be proven are issues for the merits, but WMH's claim satisfies the elements of Articles 1116 and 1117 in accordance with the ordinary meaning of the terms of those provisions.

18. Canada points to the title of Section B, "Settlement of Disputes between a Party and an Investor of Another Party," to say that "the procedures in Section B do not pertain to *any* investor of a Party, or *any* investment. They pertain to the investor with a dispute concerning the substantive obligations under Section A that were owed to that investor."⁸ As Professor Paulsson points out, however, "[t]he text of the treaty could have been perfectly clear in the formalistic sense which Canada seeks to promote...But where there is no such clear stipulation, one should not be quick to infer it."⁹ Canada projects its own interpretation onto the ordinary meaning of the words of the title. WMH is an investor of another Party (the United States), it has a dispute with Canada under NAFTA Chapter 11 that it wishes to be settled and, thus, meets completely the terms of the title of Section B.

⁸ Canada Reply ¶ 56 (emphasis in Reply).

⁹ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 6.

19. WMH is aggrieved by Canada's breach of its obligations to Prairie because the Off-Coal Agreements, unfairly and in discriminatory fashion, are cutting short the income stream for Prairie's mines by paying Albertan utilities (who also own coal mines) to change their energy supply source to natural gas. These measures began while Prairie was owned by WCC and they continue to the present day while Prairie is owned by WMH. As the parent of the damaged investment, or as the investor claimant bringing a claim on behalf of the investment for the damage to it, WMH is an investor of another Party that meets the requirements of Articles 1116 and 1117 to submit a claim to arbitration by the ordinary meaning of the terms of those provisions.

B. Canada's View Requires An Interpretation Of Article 1101 Beyond Its Ordinary Meaning And Contrary To The Principle Of Good Faith

20. Canada refers to the phrase "a claim that another Party has breached an obligation under Section A" in Articles 1116 and 1117 to argue that Article 1101 of Section A limits the scope of the ordinary terms of Articles 1116 and 1117.¹⁰ The obligations of Section A are those listed in Articles 1102 through 1110.

21. Article 1101 makes the general statement that Chapter 11 applies to "measures adopted or maintained by a Party relating to ... investors of another Party; investments of investors of another Party in the territory of the Party; and, with respect to Articles 1106 and 1114, all investments in the territory of the Party."¹¹ Thus, the

¹⁰ Canada Reply ¶ 48.

¹¹ Article 1106 instructs that a government may not impose performance requirements with respect to all investments, including investments of investors of a non-Party. See, e.g., Article 1106(1) ("of an investment of an investor of a Party or of a non-Party in its territory.") Article 1114 refers to environmental measures applied to "an investment of an investor" without reference to an "investor of a Party."

sentence in Article 1101 stands for the basic proposition that measures relating to investors of another Party and to investments of investors of another Party are subject to the obligations of Chapter 11. Article 1101 makes no reference to time.

22. Canada cites the partial award in *Methanex v. United States*¹² to contend that NAFTA Article 1101(1) creates a jurisdictional “gateway” that is linked to Articles 1116 and 1117. Nothing in the text indicates Article 1101(1) has this type of jurisdictional force or effect. As the Tribunal in *BG Group v. Argentina* explained, Article 1101(1) is an introductory provision that “sets out the scope of obligations under Chapter 11.” Numerous other NAFTA provisions would be rendered “pointless” under Canada’s much broader interpretation.¹³

23. Canada’s argument that Article 1101 places a temporal restriction on claims submitted under Articles 1116 and 1117 has no textual basis.¹⁴ Were Canada’s interpretation of Article 1101 correct, that “relating to” means that claims are static and apply only to an investor in its particular form at a particular point in time, the logic of

¹² RLA-026, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (7 Aug. 2002). Even the *Methanex* tribunal backtracked on its own “legally significant connection” test for jurisdictional purposes in the Final Award, where the tribunal considered the merits of each issue after the parties had the chance to develop the record on these points. See generally CLA-033, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005).

¹³ CLA-034, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award ¶¶ 227-231 (Dec. 24, 2007)

¹⁴ Canada translates the English text of Article 1101(1) into the French text and back in order to insert definite articles in English where they do not exist. Canada Reply n. 105. Canada exaggerates the definitiveness of the definite articles in French and Spanish; nevertheless, the English text is official as it is written.

that argument would have to apply to investments as well.¹⁵ Canada's argument would produce absurd results beyond those that it would produce for this case.

24. Were an investor a sole proprietorship that converted into a partnership, a partnership that converted into a corporation, or a corporation that converted into a limited liability company, it would be a different entity and a different investor. And were the investor to take such an action in response to measures that breached obligations under Section A, or for normal business reasons completely unrelated to the offending measures, Canada's theory would prohibit the investor from submitting or pursuing a claim because it would not be the same investor that existed at the time of a breach. Were the investor an individual and she were to die, leaving the ownership rights of her investment to her heirs intestate, those heirs (even assuming they were nationals of the same Party) would not be able to submit or pursue a claim for arbitration; by Canada's reasoning, the heirs would not be the same investor who existed at the time of the breach. Canada's theory suggests that a respondent government in that circumstance would have won an investor-state lottery ticket, escaping liability even upon the unfortunate demise of a company or a human investor.

25. Canada's line of thinking also would suggest that "relating to" in Article 1101 requires the investment to be the same entity in the same form as it existed at the time of the breach. Thus, were an investment-enterprise a corporation that converted into a limited liability company, or a joint venture that became a corporation, it would be

¹⁵ See also CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 7 ("All I believe I need to point out is (1) that Canada's position is a matter of inference rather than plain meaning, and (2) that the relevant Ecuador/France treaty in the *Perenco* case did not disqualify indirect control of the investment, and this is also the case under NAFTA.").

a different entity, a different enterprise, a different investment, and the investor no longer would be able to submit or pursue a claim because the measures would not “relate to” the same investment. Were the investment a debt security converted into an equity security, or real estate or other property exchanged for equity in an enterprise, the investment would have changed and no longer “relate to” the measures being challenged.

26. Nothing in the text of NAFTA supports these results, nor would anything relating to the object and purpose of NAFTA support them. Canada has cited nothing in Canada's NAFTA Statement of Implementation, nor in the United States' NAFTA Statement of Administrative Action, that would support such a result.

C. Canada's Interpretation Of Articles 1116 And 1117 Requires Words To Be Inserted That Are Not There

27. For the ordinary meaning of the terms of Articles 1116(1) and (2) and 1117(1) and (2) to meet Canada's interpretation, the text would have to be amended to state that the investor had to exist as the same corporate entity as existed at the time of the breach and that the enterprise had to exist in the same form as it existed at the time of the breach. And those amendments would not be enough; it would be necessary to add that both the investor and the enterprise investment had to exist in the same form at the time that each had knowledge of the breach or the resulting damages, starting the clock on the limitations period in Articles 1116 and 1117.

28. To express Canada's interpretation of Article 1101, its interpretation of how Article 1101 impacts Articles 1116 and 1117, and the requirements that necessarily follow from that interpretation, Articles 1116 and 1117 would have to be amended to read as follows:

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. 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 obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach provided that the investor is the same national or enterprise (i.e., 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 [NAFTA Article 201]) as it existed at the time of the breach and also at the time the national or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the same investor has incurred loss or damage.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage, nor if the investor is not the same national or enterprise (i.e., 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 [NAFTA Article 201]) as it existed at the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the same investor has incurred loss or damage.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. 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, provided that the investor is the same national or enterprise (i.e., 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 [NAFTA Article 201]) as it existed at the time of the breach, and provided that the investment is the same investment in the same form as it existed at the time of the breach, and also at the time the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the same investor has incurred loss or damage.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage, nor if the investor is not the same national or enterprise (i.e., 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 [NAFTA Article 201]) as it existed at the date on which the enterprise, also in its same form, first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the same enterprise has incurred loss or damage.

29. The phrase "relating to" in Article 1101 is not strong enough to support the weighty reinterpretations of Articles 1116 and 1117 that Canada demands.

D. None Of Canada's Parade Of "Difficulties" Follows From The Ordinary Meaning Of Articles 1116 And 1117, Nor Is Presented By This Case

1. NAFTA Already Prevents A "Multiplicity Of Proceedings, Divergent Outcomes And Overlapping Damages"

30. Canada has conjured up a "specter of a multiplicity of proceedings, divergent outcomes, and overlapping claims for damages" were the Tribunal to apply the ordinary meaning of Articles 1116 and 1117.¹⁶ There is no need for such worry. Claims submitted by two different investors having "a question of law or fact in common" may be consolidated under one tribunal under Article 1126.¹⁷ Article 1117(3) expressly provides for consolidation under Article 1126 where there are multiple claims arising from the same set of events. Any tribunal, consolidated or otherwise, ought to recognize the fundamental principle of international law that a double-recovery of damages is prohibited.¹⁸

2. The Ordinary Meaning Of Articles 1116 And 1117 Does Not "Incentivize Claim Shopping"

31. Canada incorrectly argues that Claimant "would permit an investor to acquire an investment for the purpose of pursuing a NAFTA claim," and that "there is nothing to prevent claimants from making investments solely to file claims against the

¹⁶ Canada Reply ¶ 6.

¹⁷ See, e.g., CLA-035, *Canfor Corp. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal (7 Sept. 2005).

¹⁸ E.g., RLA-054, *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No ARB/05/1, Award ¶ 155 (22 Aug. 2012) ("[I]n the event that some future tribunal should find itself faced with a parallel claim by DCAG, that tribunal would have ample legal tools at its disposal to prevent any double recovery against the Respondent arising out of the same facts and circumstances as the present claim.").

NAFTA Parties.”¹⁹ Neither Westmoreland nor its expert witness, Professor Paulsson, has suggested anything of the sort.²⁰

32. A respondent does not have obligations under Chapter 11 in the absence of an investor of another Party having an investment in the territory of the respondent Party. Articles 1101, 1116 and 1117 all evidence the foreign nationality requirement must exist for a foreign investment, which gives rise to the treaty obligations.²¹ *Loewen v. United States*²² confirms that there must be a continuity in the diversity of nationality between investor and investment in order for a claim to be preserved.²³ *Mesa Power* shows that foreign investment protections apply only where a foreign investment exists. *Gallo* stands for the proposition that when an investment is owned by a domestic investor and then transferred to a foreign investor, the treaty obligations do not apply retroactively because there was no treaty obligation to a domestic investor and its domestic investment.²⁴ Claimant and Professor Paulsson have briefed already, extensively, the principle that investor-claimants may not acquire investments in sham transactions purely for the chance of pursuing and winning an investor-state treaty claim.²⁵

¹⁹ Canada Reply ¶ 7.

²⁰ In this case, anyone acquiring the investment would be acquiring the onerous reclamation obligations. No one sensibly would acquire such a burden deliberately. See, e.g., Counter Memorial ¶ 40.

²¹ See Counter Memorial ¶¶ 25-32.

²² CLA-036, *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003).

²³ See *infra* ¶¶ 118-119.

²⁴ See *infra* ¶¶ 44, 53.

²⁵ See Counter Memorial ¶¶ 46-58; CER-Paulsson-International Law-Counter Memorial on Jurisdiction-First Report ¶¶ 14, 66, 68, 71.

33. Investor-state treaty protection is the *quid pro quo* for a *bona fide* foreign investment.²⁶ The cases on this issue demonstrate that ambulance-chasing investors looking for litigation opportunities are not difficult to distinguish from *bona fide* investors who, for business reasons rather than reasons of cheating the bilateral investment treaty system, have undertaken a change in corporate form.

34. Canada's forum-shopping concerns have nothing to do with this case where the claim at issue was presented originally under NAFTA by WCC, and then was transferred to WMH through the bankruptcy process. WCC and WMH have pursued the same right, based on the same obligations, in the same forum.

3. The Ordinary Meaning Of Articles 1116 And 1117 Does Not Risk Indefinite Tolling Of The Statute Of Limitations By New Investors Nor Infinite Conflicts Between Domestic And International Fora

35. Canada argues that, were the Tribunal to find jurisdiction over WMH's claim, the "statute of limitations" in Articles 1116 and 1117 would no longer have meaning because investor companies could simply form new companies *ad infinitum* having no temporal limitation on their knowledge of the breach or resulting damages.²⁷ Claimant-Investors also, Canada speculates, would "pursue domestic legal proceedings while the Claimant pursues a NAFTA Chapter Eleven claim, with respect to the *same* loss or damage incurred by [the related company] by reason of the challenged measures."²⁸

²⁶ See, e.g., *infra* ¶ 42.

²⁷ Canada Reply ¶ 62.

²⁸ Canada Reply ¶ 63 (emphasis in Reply).

36. Westmoreland believes that international arbitrators are not so easily fooled. One can imagine many ways in which investment agreements might be abused. International arbitrators have not been shy to call out such abuses as violations of the fundamental principle of good faith, which is an essential requirement of any dispute settlement proceeding.²⁹

37. This case presents no issue of conflicting waivers, nor statute of limitations manipulation. Canada surely would have raised those objections if it thought they existed here. And to the extent the statute of limitations might be relevant in a future case brought by an Article 1117 claimant on behalf of an enterprise,³⁰ the Tribunal may note that Article 1117(2) ties the knowledge of the breach and damages to the knowledge of the enterprise and not to the knowledge of the investor.

²⁹ See, e.g., *infra* ¶¶ 51 & Canada Reply ¶ 87 (discussing dismissal of claim for abuse of process grounds even though jurisdiction *ratione temporis* existed) (citing RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/7, Award (9 Jan. 2015); Canada Reply ¶¶ 85-86 (same proposition) (citing CLA-018, *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility (17 Dec. 2015)).

³⁰ The window of time for claims against Canada under NAFTA Chapter 11 is nearly closed anyway. The Canada-US-Mexico Agreement makes no provision for investor-state arbitration with Canada. Canada's concerns about frivolous objections in future cases are a distraction from the merits of this case and the simple proposition that the entity emerging from bankruptcy as the owner of the debtor-company's investment should be allowed to pursue a NAFTA Chapter 11 claim for harm to the investment.

4. The Ordinary Meaning Of Articles 1116 And 1117 Does Not
"Fundamentally Alter The Basis On Which The NAFTA Parties
Consent To Arbitrate Under NAFTA Chapter Eleven"

38. Investment-enterprises may not submit their own claims for a breach of Chapter 11.³¹ But investors expressly may submit claims to arbitration on behalf of an investment-enterprise when there has been a breach of obligations under Chapter 11.³² And Respondents owe obligations to foreign investment enterprises under Articles 1102(2) and 1105. These principles are fundamental, expressly articulated in the NAFTA text, in contrast to the "principles" that Canada asserts form the basis of consent to arbitration.

39. Nothing in the text of NAFTA prohibits an investor from restructuring in order to maintain its claim for damages as an investor or damages to its investment. Canada's argument to the contrary is that the NAFTA Parties viewed investments as static, even inert, immobilized from changes in capital or form, prohibited from changing investors lest the investments forfeit NAFTA's protections.

40. Canada's "principles" dictating a static market with static investments are inconsistent with the principles of the Agreement expressed by the NAFTA Parties in the Preamble and in the Article 102 objectives of the Agreement:

CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; CREATE an expanded and secure market for the goods and services produced in their territories; ... ESTABLISH clear and mutually advantageous rules governing their trade; ENSURE a predictable commercial framework for business planning and investment; ... ENHANCE the competitiveness of their firms in global markets.

³¹ NAFTA Article 1117(4).

³² NAFTA Article 1117(1).

a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; b) promote conditions of fair competition in the free trade area; c) increase substantially investment opportunities in the territories of the Parties; ... e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes

41. Canada argues that “the most significant objective is Article 102(1)(e) which is to ‘create effective procedures...for the resolution of disputes.’”³³ But investment dispute resolution serves no purpose without commitment to protect investments on a non-discriminatory basis and in accordance with principles of fair and equitable treatment. Neither of those objectives is served by the application of a rule saying that, despite meaningful, *bona fide* commitments of capital in a foreign investment, and notwithstanding the absence of any requirements in the text of the Agreement, a foreign investor would lose protections were an individual investor to pass away or the investor-enterprise were to restructure for good faith business reasons that imposed no prejudice upon the respondent Party.

III. CANADA HAS INTERPRETED *RATIONE TEMPORIS* TOO BROADLY FROM INTERNATIONAL ARBITRATION CASES

42. The *ratione temporis* objection advocated by Canada seeks to ensure that a state does not face investment claims without receiving its *quid pro quo* of an investment from a protected foreigner.³⁴ It would be unfair for the state to face a claim when nothing is at risk in the host state prior to the date of the breach. But the hypotheses underlying Canada’s argument do not pertain to the facts in this case.

³³ Canada Reply ¶ 75.

³⁴ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 146 (15 Sept. 2011).

43. Canada reads arbitral cases in search of a rule without a reasoned explanation. Canada accords little consideration to the investor-state treaty policies that shape its *ratione temporis* principle, and even less to whether its objection sustains or undermines those policies when applied to this case. Canada appears to cite a long list of cases hoping to mask that the facts in those cases are not analogous to the facts of this dispute.

44. None of the NAFTA cases cited by Canada addresses the effect of the transfer of a *bona fide* investment between foreign investors having a continuity of interests between them. *Mesa Power Group v. Canada* concerned whether there was a timely new investment prior to measures adopted by Canada, not whether the transfer of the investment to a related entity was actionable.³⁵ The critical issue in *B-Mex v. Mexico*³⁶ concerned who owned the investment at the time the claim was submitted for purposes of Article 1117(1),³⁷ not whether the claimants had an investment prior to the date of the breach.³⁸

³⁵ RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award ¶¶ 329-332 (24 March 2016); see also Counter-Memorial ¶¶ 80-81 (describing facts of *Mesa*).

³⁶ RLA-022, *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 Partial Award (19 July 2019).

³⁷ See RLA-022, *B-Mex v. Mexico* ¶¶ 145-153. The parties in *B-Mex* agreed that the Claimants must own or control the Mexican entities at the time of the breaches. The tribunal agreed with that proposition by saying “ [a]t least one other NAFTA tribunal to have confronted this issue has so held,” and then cited only *Gallo v. Canada*, a sham transaction where there was no American investor or investment at the time of the breach. See *infra* ¶ 53. The tribunal did not resolve any factual issues related to that stipulated position. See *id.* ¶ 145.

³⁸ Compare RLA-022, *B-Mex v. Mexico* ¶¶ 38-39 (identifying breaching measures in 2013-14), with *id.* ¶ 154 (setting forth issues to resolve regarding ownership).

45. Canada cited *Libananco Holdings v. Turkey*³⁹ without ever explaining how the facts there would apply to the case before this Tribunal.⁴⁰ The decision in *Saluka v. Czech Republic* is also of limited value because Nomura (the prior owner of the investment) was a Japanese entity that never could access the Dutch-Czech Republic BIT.⁴¹

46. Canada calls *GEA Group v. Ukraine*⁴² “directly comparable to this case” because it involved the sale of an investment between two different German companies.⁴³ However, there was no evidence of any bankruptcy restructuring or a relationship showing a continuity of interests between the claimant and the seller of the investment.⁴⁴ More significantly, perhaps, the tribunal found that all of the breaching measures postdated the claimant’s acquisition of the investment, making any analysis into the effect of the transfer a moot point.⁴⁵

³⁹ RLA-050, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011). The question there was whether the foreign investor could prove it bought the investment from a domestic (Turkish) person prior to the breaching measures. See *id.* ¶¶ 88, 98, 99, 570.1. Unlike here, the Tribunal found that there was no foreign investor of any type prior to the date of the breaching measures.

⁴⁰ See Canada Reply ¶ 88; see also Canada Memorial n.124.

⁴¹ See RLA-024, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Partial Award ¶¶ 1-2 (17 Mar. 2006).

⁴² RLA-023, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 Mar. 2011).

⁴³ See RLA-023, *GEA Group v. Ukraine* ¶¶ 33-38; Canada Reply ¶ 96; CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 12 (discussing *GEA*).

⁴⁴ See RLA-023, *GEA Group v. Ukraine* ¶¶ 33-38; Canada Reply ¶ 96; CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 12 (discussing *GEA*).

⁴⁵ See RLA-023, *GEA Group v. Ukraine* ¶¶ 183, 193, 198, 202, 203.

47. Another instance where Canada cites a case without relating the facts to this dispute is *STEAG v. Spain*.⁴⁶ The claimant in *STEAG*, a German company, acquired, in 2012, 26.01 percent of the shares in a Spanish investment, Arenales Solar, through an insolvency reorganization.⁴⁷ *STEAG* injected additional capital into Arenales Solar during 2013-14.⁴⁸ Spain challenged jurisdiction on *ratione temporis* grounds, contending (in part) that the additional capital was not actionable.⁴⁹ The tribunal rejected Spain's objection, finding that the capital injections were part of the original investment: "The economic structure of a transaction may cause several capital injections to be made over a long period of time, without this necessarily implying that there are multiple independent investments."⁵⁰ The change in form in expected ways over time did not deprive the tribunal of jurisdiction.⁵¹

⁴⁶ See Canada Reply ¶ 97; RLA-056, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability, and Principles of Quantum (8 Oct. 2020). ("STEAG"). Claimant is providing a translation of the relevant paragraphs of this decision as CLA-037.

⁴⁷ CLA-037, *STEAG* ¶¶ 144, 151.

⁴⁸ See CLA-037, *STEAG* ¶¶ 361, 371.

⁴⁹ See CLA-037, *STEAG* ¶ 346. Spain also contended that *STEAG*'s purchase in Arenales Solar post-dated the measures, but the Tribunal rejected that assertion. See *id.* ¶¶ 381-382 (finding that enacted measure, and not announcement of potential measure, is actionable).

⁵⁰ CLA-037, *STEAG* ¶¶ 373-374.

⁵¹ See CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶¶ 9-11 ("Steag argued that its injection of funds into the venture subsequent to the acquisition of its shareholding from Solar Millennium were a part of the project finance undertakings that accompanied the acquisition, and thus it could not be said that its investment was '*reestructurada tras el nacimiento de la controversia con miras a asegurar la aplicabilidad del tratado*' (restructured following the onset of the dispute to secure applicability of the treaty, para. 350). The Tribunal agreed."); see also Counter Memorial ¶¶ 58-59 (discussing *Mobil* (CLA-017) and *S.D. Myers* (CLA-019)).

48. Canada's position makes no sense in light of *CME v. Czech Republic*.⁵²

There, the respondent contended that jurisdiction was lacking because the claimant did not acquire the investment until 1997, when it obtained the shares from a related company after the date of the breach.⁵³ The tribunal rejected this argument, finding that "any claims deriving from the Claimant's predecessor's investment (also covered by the Treaty) follow the assigned shares" because the Treaty "must continuously protect" an investment "assigned" between corporate affiliates."⁵⁴ Canada has no answer for how its jurisdictional argument can be reconciled with *CME*.

49. Canada complains that Claimant conflates jurisdiction and abuse of process.⁵⁵ There are differences in the principles, but the principles overlap. *Ratione temporis* would not allow claims for a breach where there had been no foreign investor and investment and no treaty obligation in force.⁵⁶ Some of the *ratione temporis* cases, such as *Gallo*, involve claims by investors with respect to investments that were owned by domestic investors at the time of the alleged breach. Other *ratione temporis* cases, like *Mesa Power*, involve claims brought by foreign investors when no investment

⁵² CLA-021, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 Sept. 2001).

⁵³ See CLA-021, *CME v. Czech Republic* ¶ 421.

⁵⁴ CLA-021, *CME v. Czech Republic* ¶ 424.

⁵⁵ See Canada Reply ¶ 84.

⁵⁶ The state parties to a treaty could, however, draft the treaty in such a manner that such claims could be allowed. The express terms of the treaty would take precedence over a body of decisions from which a customary international law principle may emerge. See CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award ¶ 80 (30 April 2004) ("Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties, they could have done so.").

existed at the time of the breach. Both sets of cases may be described as “abuse of process” cases because they involve investors attempting to obtain jurisdiction where the conditions essential for operation of the investment treaty were not in effect.

50. Some cases, such as *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*⁵⁷, involve foreign investors who made investments prior to the breach (hence, *ratione temporis* technically was satisfied), but the circumstances of the investment were a sham lacking the *quid pro quo* of investment required for access to international arbitration rights under the treaty.

51. Westmoreland has demonstrated that several cases upon which Canada relies for precedent as to *ratione temporis* were decided on abuse of process.⁵⁸ For example, Canada initially raised *Levy v. Peru* in its Memorial on Jurisdiction.⁵⁹ That case did discuss the general proposition for jurisdiction *ratione temporis*, but Canada now concedes the tribunal dismissed the case on abuse of process, not for lack of jurisdiction *ratione temporis*.⁶⁰

52. The same is true for *Phoenix Action v. Czech Republic*.⁶¹ There, the tribunal discussed jurisdiction *ratione temporis* but Canada never addressed in its initial Memorial how the doctrine in that case relates to this dispute.⁶² The tribunal's ultimate

⁵⁷ RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/7, Award (9 Jan. 2015).

⁵⁸ See Counter-Memorial ¶¶ 46-58.

⁵⁹ Canada Memorial ¶ 60.

⁶⁰ See Canada Reply ¶ 87.

⁶¹ RLA-045, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009).

⁶² Canada Memorial n.102.

decision in *Phoenix Action* held that, “[t]he conclusion of the Tribunal is therefore that the Claimant’s initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration.”⁶³ *Phoenix Action* later noted that assignments under the ICSID convention could be permissible in some circumstances provided that it was not done “for the *sole purpose* of gaining access to ICSID jurisdiction, after damages have occurred.”⁶⁴

53. The issue in the remaining NAFTA case cited by Canada, *Gallo v. Canada*, was whether the young American there had purchased the Canadian investment prior to the measure or whether the investment was owned by a wealthy Canadian businessman, despite an alleged oral agreement whereby the Canadian acted on behalf of the American.⁶⁵ The claimant presented the Shareholders’ Register of the Enterprise that demonstrated Mr. Gallo became the owner of the investment prior to the date of the measure.⁶⁶ The Tribunal disregarded this “*prima facie*” evidence, however, because the relationship obviously constituted a sham transaction, so much so that the Tribunal questioned whether an investment ever occurred (even if Canada did not consider the claimant to have acted fraudulently).⁶⁷ And like the other NAFTA cases cited by Canada for this proposition, there was no issue in *Gallo* as to whether

⁶³ RLA-045, *Phoenix Action* ¶¶ 67, 144.

⁶⁴ RLA-045, *Phoenix Action* ¶ 92 (emphasis added).

⁶⁵ RLA-021, *Gallo* ¶¶ 298-312; Counter-Memorial ¶¶ 52-55.

⁶⁶ See RLA-021, *Gallo* ¶ 282 (“*Prima facie* it would thus seem that Mr. Gallo has proven that as of that date he became the owner and controller of the Enterprise.”).

⁶⁷ Counter-Memorial ¶ 55; see also RLA-021, *Gallo* ¶ 281 (identifying numerous irregularities with Mr. Gallo’s claims to ownership of the investment); ¶¶ 285-289 (contending that Mr. Gallo lacked evidence that transaction occurred); ¶¶ 291-297 (questioning the lack of contemporaneous corporate filings and tax filings to support Claimant’s ownership arguments).

the investment could be sold under NAFTA between foreign investors having a continuity of interests; instead, the issue was whether the American had made a new investment as of the date of the breaching measures.

54. These cases upon which Canada relies address sham transactions. As Professor Paulsson puts it:

For Canada not to see *Libananco* and *Gallo* as instances of abusive claims suggests an unwillingness to do so. I expect that the Arbitral Tribunal will not have that impediment. *Libananco* and *Gallo* were relied upon by Canada in its Memorial as support for its jurisdiction *ratione temporis* arguments. In light of *Phoenix Action*, those two cases as well as *Renée Rose Levy* and *Cementownia* were fundamentally cases of abuse of process (fabricating treaty protection that otherwise would not have existed) which I do not consider to be apposite to the present case.⁶⁸

55. Canada is not asserting here that WMH sought to manufacture jurisdiction through the transfer of the assets from WCC to WMH (which, at that point, was WCC's wholly owned subsidiary). Nor could Canada, as that transaction was conducted to ensure a continuity of interests under U.S. law regarding reorganizations.⁶⁹

IV. CLAIMS MAY BE ASSIGNED WHERE, AS HERE, THERE IS A CONTINUITY OF INTERESTS

56. International investment law provides that investments and their related claims may be assigned after the breach, without harm to the investment rights or claims, in circumstances where companies are affiliated or otherwise have a close continuity of interests.⁷⁰ The facts prove that such a transfer happened here. WCC

⁶⁸ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 24.

⁶⁹ See *infra* ¶¶ 61-74; CLA-021, *CME v. Czech Republic* ¶ 424.

⁷⁰ See *infra* ¶¶ 61-74.

transferred its assets through the bankruptcy to WMH and maintained a continuity of interests between the two entities after the breach.

57. Canada disagrees with the legal principle, but also contests that the facts of the transfer between WCC and WMH show a close continuity of interests between the two companies.

58. Canada abandons its formalistic view of the corporate entities of WCC and WMH, as well as its formalistic view of the bankruptcy process, when it discusses the actual transfer of WCC's assets to WMH. The transfer was arranged so that (1) WCC owned WMH as a wholly-owned subsidiary; (2) WCC transferred its assets (including Prairie) to WMH; (3) WMH's shares subsequently were distributed to the Secured Creditors on a *pro rata* basis in exchange for a portion of the debt owed to them by WCC and secured for them by Prairie and WCC's other assets. The Bankruptcy Court found these steps to be "integral" to the bankruptcy process because the method of reorganization was taken pursuant to U.S. federal law that expressly recognizes a continuity of interests between the old and new entities.⁷¹

59. The Bankruptcy Court found that the reorganization was designed to qualify as a "Type G" reorganization under U.S. federal law.⁷² To qualify for this Type G treatment, the regulations require explicitly a "continuity of interests" between the old company (WCC) and the new company (WMH) in the reorganization. Therefore, the U.S. government views WCC and WMH as having a continuity of interests.

⁷¹ See *infra* ¶¶ 75-79.

⁷² See CLA-038, 26 U.S.C. § 368(a)(1)(G).

60. Canada and its bankruptcy attorney, Ms. Coleman, ignore the form of the transfer. Ms. Coleman's expert reports summarize what is in the extensive public record about the bankruptcy; add a general description of the U.S. Chapter 11 bankruptcy process; and offer her gloss on what happened during the WCC bankruptcy, arguing that there is a break, without continuity, in the interests of the stakeholders in WCC and WMH. But that gloss, relied upon by Canada, is often contradictory to statements Ms. Coleman has made elsewhere about the absolute control secured creditors have over a bankruptcy process that preserves the continuity of their interests.

A. Canada Has Not Rebutted The Law On Assignment Of Claims

61. Canada disputes that an investment claim can be assigned⁷³ but investment decisions demonstrate that assignment is permissible when there is an affiliation or continuity of interests between the transferor and transferee. Canada reduces its analysis of three such cases to a single paragraph of its Reply Memorial:⁷⁴ *Autopista v. Venezuela*;⁷⁵ *Koch Minerals Sarl and Koch Nitrogen International Sarl v. The Bolivarian Republic of Venezuela*;⁷⁶ and *CME v. Czech Republic*.⁷⁷ Forced to concede that assignments are legally permissible without disrupting jurisdiction of the claim, Canada argues that those cases are distinguishable from this one because "the

⁷³ Canada Reply ¶ 130.

⁷⁴ Canada Reply ¶ 107.

⁷⁵ CLA-020, *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 Sept. 2001).

⁷⁶ CLA-022, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19 (30 Oct. 2017) ("*Koch*").

⁷⁷ CLA-021, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 Sept. 2001).

claimant acquired the shares constituting the investment from its parent company.”⁷⁸

The cases, however, make clear that jurisdiction is not defeated by shuffling investments between corporate affiliates, not only a parent to a subsidiary.

62. In *Autopista*, the transfer of the foreign investment was not made from parent to subsidiary but, rather, occurred between affiliated “sibling” companies that were both owned by a common holding company.⁷⁹ The holding company was Mexican and, therefore, was not even able to access the ICSID Convention used to obtain jurisdiction.⁸⁰ However, as Professor Paulsson points out, “[t]he core similarity [to the case here] relevant for jurisdictional purposes is that, like Venezuela, Canada knew that Prairie was a US investment vehicle.”⁸¹

63. A similar result was reached in *Koch*. Koch Minerals Sàrl and Koch Nitrogen International Sàrl were “associated companies within the same Koch group of companies” and there was no evidence in the award that Koch Minerals owned Koch Nitrogen International.⁸² The assignment of the investment from Koch Minerals to Koch Nitrogen was not even a direct assignment because Koch Minerals (known in the award as “KOSMA”) first transferred its rights to Koch Oil Marketing S.A., who later transferred

⁷⁸ Canada Reply ¶ 107; see also *id.* (stating that “the claimant, KNI, likewise acquired its investment—an interest in an Offtake Agreement—by assignment from its parent.”).

⁷⁹ CLA-020, *Autopista v. Venezuela* ¶ 17. The transfer in this case moved the investment from a Mexican entity to a U.S. entity, which was needed to obtain ICSID jurisdiction. See Counter-Memorial ¶ 60; CLA-020, *Autopista v. Venezuela* ¶¶ 125-128.

⁸⁰ CLA-020, *Autopista* ¶¶ 54, 141.

⁸¹ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 17 (discussion of *Autopista*).

⁸² CLA-022, *Koch* ¶ 6.70; see also *id.* ¶¶ 1.2-1.3, 5.12.

those rights to Koch Nitrogen International (known in the award as “KNI”).⁸³ These transfers were permissible because there was “an internal reorganization between associated companies within the same Koch group of companies,” without regard to whether the controlling entity itself had jurisdiction under the BIT or the ICSID Convention.

64. Canada contends, in a footnote, that *Autopista* and *Koch* are also distinguishable because the affiliated-company assignments occurred prior to the actionable measures.⁸⁴ According to Canada's contention, an investor would be prohibited from making a legitimate, good-faith transfer of an investment to an affiliated entity after enactment of a breaching measure if it still wanted to pursue its investment treaty claim. Canada cites no additional authority in support of its position, which is contradicted by *CME v. Czech Republic*, a case Canada omitted from its footnote.

65. *CME v. Czech Republic* involved measures starting in 1996, whereas the operable share transfer occurred in May 1997.⁸⁵ The tribunal found that “any claims deriving from the Claimant's predecessor's investment (also covered by the Treaty) follow the assigned shares,” stating that the Treaty “must continuously protect” an investment “assigned” between corporate affiliates because of the “broad interpretation of the investment” that protects “indirect investments.”⁸⁶ NAFTA provides a similarly

⁸³ CLA-022, *Koch* ¶ 5.12. The country of incorporation for Koch Oil Marketing S.A. is unknown from the Award.

⁸⁴ Canada Reply n. 209.

⁸⁵ Compare CLA-021, *CME v. Czech Republic* ¶¶ 107-113, 423 (detailing 1996 measures), with *id.* ¶ 377 (stating share transfer between companies occurred in May 1997).

⁸⁶ CLA-021, *CME v. Czech Republic* ¶ 424; see also CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 17 (discussion of *CME*).

broad interpretation, defining “investment of an investor of a Party” as “an investment owned or controlled directly or *indirectly* by an investor of such a Party.”⁸⁷

66. Canada cites *Mihaly v. Sri Lanka* for the proposition that investment claims may not be assigned, but that case is inapplicable to the facts and law here. *Mihaly* involved an objection to the ICSID tribunal's jurisdiction *ratione personae*, with Sri Lanka arguing that the case involved a claim asserted by a Canadian company that was allegedly assigned to a U.S. claimant.⁸⁸ It was apparently undisputed that the Canadian company made the investment, but the U.S. claimant contended that it was the assignee of the claims of its Canadian partner.⁸⁹ Canada was not a signatory to the ICSID convention and the relevant BIT was the U.S.-Sri Lankan treaty,⁹⁰ so allowing the assignment from the Canadian company to the U.S. claimant was inappropriate: “To allow such an assignment to operate in favour of *Mihaly* (Canada) would defeat the object and purpose of the ICSID Convention and the sanctity of the privity of international agreements not intended to create rights and obligations for non-parties.”⁹¹ The claim before this Tribunal concerns NAFTA, not the ICSID Convention nor the U.S.-Sri Lankan BIT, and the transfer of *Prairie* from one U.S. parent company (WCC) to its U.S. subsidiary (WMH) did not “create rights and obligations for non-parties.” The *Mihaly* Tribunal's analysis of the applicability of the ICSID Convention and the U.S.-Sri

⁸⁷ NAFTA Article 1139 (Definitions) (emphasis added); see also CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 7 (explaining that NAFTA protects indirect investments, like the BIT at issue in *Perenco*).

⁸⁸ RLA-067, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award ¶¶ 11-12 (15 March 2002).

⁸⁹ RLA-067, *Mihaly v. Sri Lanka* ¶¶ 11, 13-15.

⁹⁰ RLA-067, *Mihaly v. Sri Lanka* ¶¶ 1, 12, 23.

⁹¹ RLA-067, *Mihaly v. Sri Lanka* ¶ 24.

Lankan BIT to a Canadian investor that assigns its claim to obtain otherwise non-existent jurisdiction is not probative of any of the issues in this arbitration.⁹²

67. Canada criticizes Professor Paulsson's analysis of *African Holdings v. Democratic Republic of the Congo*⁹³ where the *ratione temporis* objection was upheld when the breach occurred before the U.S. claimants had any investment.⁹⁴ *African Holding* stands for the proposition that an assignment of claims cannot convey rights that the transferor does not have.⁹⁵ The tribunal recognized, however, that if the original investor and transferor had rights to an investor-state claim, those rights could have and would have been transferred by the otherwise valid assignment. Canada acknowledges that African Holdings, who held the "claims to money," was properly assigned all the rights held by the former owners:⁹⁶ "The assignee therefore has exactly the same interest as the original investor...."⁹⁷ Canada seeks to distinguish this principle of assignment because it involved "two affiliated companies owned virtually entirely by the

⁹² See CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 20 ("The tribunal's obiter dictum which Canada cites at paragraph 132 of the Reply to the effect that claims in ICSID are not 'a readily assignable chose in action' is the reddest of herrings; the statement is correct as a general observation but of no relevance here; the absence of a requisite protected nationality simply cannot be overcome by assignment.").

⁹³ CLA-031, *African Holding Company of America et al. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award (29 July 2008).

⁹⁴ See CLA-031, *African Holding Company v. Congo* ¶ 87 (explaining Belgian entity owned investment prior to 2000); see *id.* ¶ 121.

⁹⁵ See CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 21 (discussing *African Holding*) ("[T]he question is the survival of a protected investment by assignment – not its absence *ab initio*").

⁹⁶ See Canada Reply n. 262, n. 263 (stating that "the tribunal suggested in *obiter dicta* that the assignee of the debts held the same interests as the original investor").

⁹⁷ CLA-031, *African Holding Company v. Congo* ¶ 78, translated in CER-Paulsson-International Law-Counter Memorial on Jurisdiction-First Report ¶ 60.

same family,”⁹⁸ but the tribunal went further and stated that a wider range of claims could be assigned provided there was “a continuum concerning rights and obligations under the contracts and the investment, in particular in that their nature and character are kept unchanged.”⁹⁹

68. Canada goes so far as to misrepresent Judge Crawford’s book in stating that “investment claims cannot be transferred between investors.”¹⁰⁰ But Canada omits the key sentence on this subject in Judge Crawford’s book: “[I]t is said that assignment does not affect the claim if the principle of continuity is observed” provided it is done so with “great care.”¹⁰¹ It was with “great care” that the principle of continuity was respected here.

B. Canada’s Attempts To Separate The Continuity Of Interests Between WCC And WMH Are Supported Neither By The Law Nor The Facts

69. The Bankruptcy Court found that the transfer of assets from WCC to WMH, while WMH was WCC’s wholly owned subsidiary, was an “integral” part of the transaction. Transferring the assets in this way preserved continuity to comply with U.S. federal law regarding reorganizations. However, Canada’s bankruptcy attorney twists the bankruptcy process to avoid finding that WMH (and its shareholders, the Secured Creditors) had a continuous interest in WCC.

⁹⁸ Canada Reply n. 263.

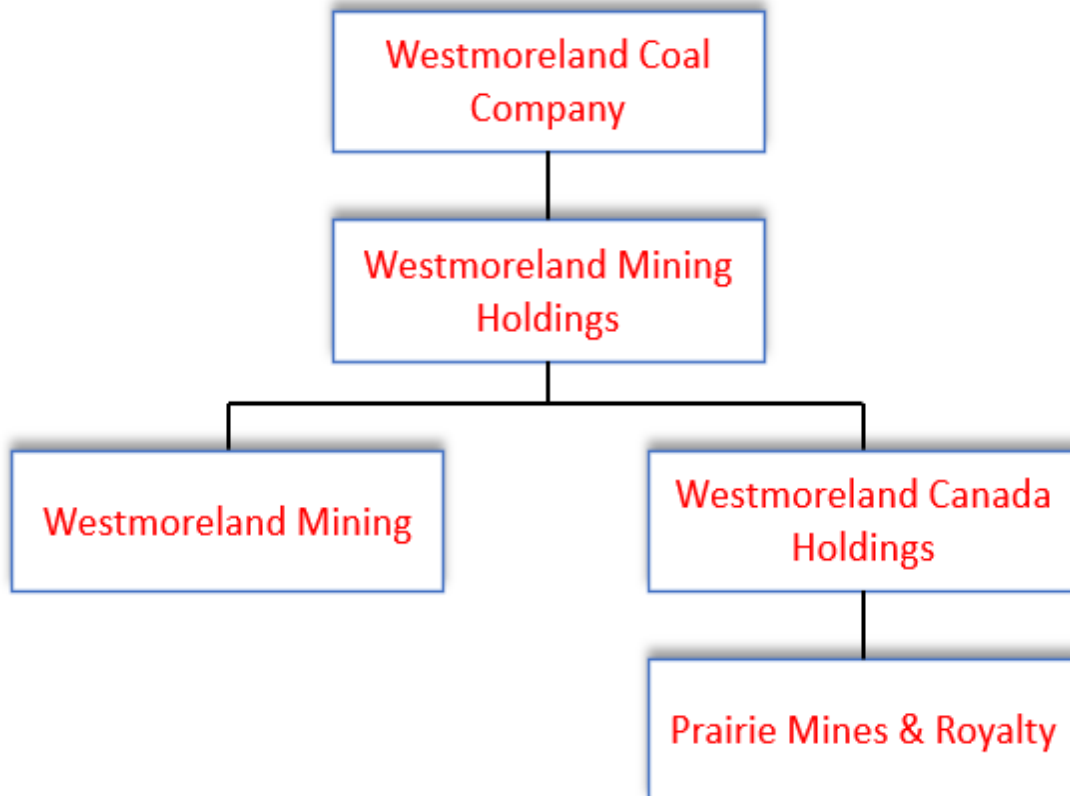
⁹⁹ CLA-031, *African Holding Company v. Congo* ¶ 84, *translated in* CER-Paulsson-International Law-Counter Memorial on Jurisdiction-First Report ¶ 60.

¹⁰⁰ Canada Reply n. 259 (*citing* RLA-068, J Crawford, Brownlie’s Principles of Public International Law (8th ed., OUP 2012) [Excerpt], pp. lxxx and 704 (pp. 8 and 9 of 9)).

¹⁰¹ RLA-068, J Crawford, Brownlie’s Principles of Public International Law (8th ed., OUP 2012) [Excerpt], p. 704 (p. 9 of 9)).

1. The Transaction Steps Demonstrate That WMH Was The Wholly Owned Subsidiary Of WCC When The Assets Were Transferred

70. As detailed in Claimant's Counter-Memorial, it is undisputed that (1) WCC transferred its assets to WMH and (2) WMH was the wholly-owned subsidiary of WCC at the time of the transfer:¹⁰²



¹⁰² See Appendix A ¶¶ 31-41. Canada complains that WMH was not created by WCC but, rather, by an attorney representing the Secured Creditors. See Canada Reply Memorial ¶¶ 19-21. The Description of Transaction Steps provided that WMH “will be formed as an entity with the sole members acting as nominees of the [Secured Creditors] in connection with effecting these Transaction Steps and the Sale Transaction.” C-043, Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621) at 13 (18 March 2019). Then, WCC would take ownership of WMH and sole member nominated by the Secured Creditors would withdraw from WMH. *Id.* Critically, however, Canada does not dispute that WMH was owned by WCC at the time of the transfers or explain why the fact WMH was created by an attorney for the Secured Creditors should matter.

WCC's ownership and transfer of assets to WMH was accomplished through a detailed "Description of Transaction Steps" disclosed in the bankruptcy process.¹⁰³ Ms. Coleman's first report details the same transaction steps, explaining that "WCC thus received 100% of the membership interests in WMH as consideration...."¹⁰⁴ Only after this deliberate step did the Secured Creditors take ownership of the equity interests in WMH,¹⁰⁵ with WCC then being wound down and dissolved.¹⁰⁶

71. Canada argues that the Bankruptcy Court found WMH was not an "insider" or "affiliate" of WCC,¹⁰⁷ but the Bankruptcy Court's statement had nothing to do with the Transaction Steps, as Canada's bankruptcy attorney admits: the "[i]ntermediary steps taken to effectuate the transaction do not affect the bankruptcy court's finding in this regard."¹⁰⁸ The formal transfer outlined in the Description of Transaction Steps is between WCC, a parent company, and WMH, its wholly-owned subsidiary, making them corporate affiliates at the time of the transfer.

¹⁰³ C-043, Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621) at 13-14 (18 March 2019); *see also* C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 58 (2 March 2019) (detailing which documents constituted part of the Plan Supplement).

¹⁰⁴ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶¶ 76-80; *see also* RER-Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 7.

¹⁰⁵ C-043, Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621) at 13-14 (18 March 2019).

¹⁰⁶ C-043, Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621) at 14-15 (18 March 2019); *see also* C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 64, 78, 81, 95-96 (2 March 2019) (detailing wind down and dissolution of WCC); RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶¶ 62, 84.

¹⁰⁷ Canada Reply ¶ 26.

¹⁰⁸ RER-Coleman-Bankruptcy-Memorial on Jurisdiction n. 104.

72. Another Canadian effort to diminish the transaction between WCC and WMH is to argue that the steps occurred “virtually simultaneously,”¹⁰⁹ but Canada has not explained why this fact matters. Canada does not contend that the transaction was a sham to obtain NAFTA jurisdiction; instead, Canada has argued that abuse of process is not at issue.¹¹⁰ Nor does Canada contend that the jurisdictional question here turns on a stopwatch reading of the duration of time that WMH was WCC’s wholly-owned subsidiary. It is the fact of WCC’s ownership of WMH, not the duration, that is relevant.

73. The Bankruptcy Court did not consider the duration of WCC’s ownership of WMH material. Instead, the Bankruptcy Court found that the transaction steps were “integral” to the court’s Confirmation of the Bankruptcy Plan (and Plan Supplement).¹¹¹ The Transaction Steps themselves were referenced repeatedly in the Plan approved by the Bankruptcy Court.¹¹² Canada has not explained why an integral part of the transaction should be read out of the transfer so that this Tribunal might ignore that WMH was WCC’s wholly-owned subsidiary.

74. Even the Purchase and Sale Agreement, which Canada has characterized as an asset sale, was conditioned explicitly on the transaction being consummated according to the Description of Transaction Steps. The agreement provides that the “Parties intend to effectuate the transactions contemplated by this Agreement,” and that

¹⁰⁹ Canada Reply ¶ 26.

¹¹⁰ See Canada Reply ¶¶ 84-89.

¹¹¹ See Counter Memorial, Appendix A ¶ 32 (citing C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 2-3 (2 March 2019)).

¹¹² See, e.g., C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 59, 72, 75-77, 81, 83 (2 March 2019).

the sale of the assets was subject to the terms and conditions of the agreement.¹¹³ The Agreement provides specifically that, “Notwithstanding anything contained herein to the contrary, the Closing and the other transactions contemplated to occur at Closing pursuant to this Article II shall be effected in accordance with the Description of Transaction Steps.”¹¹⁴ Canada is not free to read these provisions out of the agreement to recharacterize the transaction.¹¹⁵

2. U.S. Law Expressly Finds There Is A Continuity Of Interests
Between WCC And WMH

75. The Disclosure Statement¹¹⁶ repeatedly provides that the Description of Transaction Steps will govern the transfer of assets from WCC to WMH.¹¹⁷ By structuring the transaction as a Type G reorganization, WCC would not be required to pay taxes (as they would on a direct sale of assets), thus preserving more money for the Secured Creditors.¹¹⁸ WMH also would be able to use certain tax benefits, such as

¹¹³ R-053, Stalking Horse Purchase Agreement at 1 & §§ 2.01, 2.02 (15 Mar. 2019).

¹¹⁴ R-053, Stalking Horse Purchase Agreement § 2.09 (15 Mar. 2019); *see also id.* § 8.01(e) (explaining that transaction could be structured as a Type G reorganization and would be consummated in accordance with the Description of Transaction Steps).

¹¹⁵ The Purchase and Sale Agreement is governed by Delaware law, *id.* § 12.06, which provides that contracts are to be interpreted so as not to render provisions as “mere surplusage” and “will not read a contract to render a provision or term meaningless or illusory.” *E.g.*, CLA-039, *Sunline Commercial Carriers Inc. v. CITGO Petro. Corp.*, 206 A.3d 836, 846 (Del. 2019); CLA-040, *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019). These cases were decided by the Delaware Supreme Court, the highest authority on the interpretation of Delaware law.

¹¹⁶ As described by Ms. Coleman, the Disclosure Statement sets out information to interested parties so that they can decide whether to accept or reject the Plan. See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 38 & n.32.

¹¹⁷ C-044, Order Approving Disclosures and Notices of Chapter 11 Plan (Court Docket, Doc. 841) at 24, 55, 57, 84 (19 Dec. 2018).

¹¹⁸ See C-044, Order Approving Disclosures and Notices of Chapter 11 Plan at 85; *see also* C-045, Contribution and Distribution Agreement (15 Mar. 2019) (effectuating transaction steps and providing transaction qualifies as a Type G Reorganization).

losses, accrued previously by WCC.¹¹⁹ The Secured Creditors further would be able to exchange their debt for stock in a tax-efficient manner.¹²⁰ The Disclosure Statement makes clear that these tax benefits can occur only when the Secured Creditors are the successful bidders for WCC.¹²¹

76. This transaction was structured to qualify as a Type G reorganization under the Plan.¹²² Canada's bankruptcy attorney opines this type of reorganization "is a distinct inquiry from a determination of whether WMH was an unrelated, third-party purchaser of WCC's assets."¹²³ That is not so.

77. A Type G reorganization is so named because it arises from 26 U.S.C. § 368(a)(1)(G), which provides for reorganizations through "a transfer by a corporation of all or part of its assets to another corporation in a [Chapter 11 bankruptcy] or similar case."¹²⁴ In contrast to an asset sale, where tax is recognized immediately, § 368 reorganizations are designed to be tax-free at the time of the completion of the transaction.¹²⁵ As explained in the Treasury Regulations:

¹¹⁹ See C-044, Order Approving Disclosures and Notices of Chapter 11 Plan at 85-87.

¹²⁰ See C-044, Order Approving Disclosures and Notices of Chapter 11 Plan at 89-90.

¹²¹ See C-044, Order Approving Disclosures and Notices of Chapter 11 Plan at 89 n.18.

¹²² See Appendix A ¶ 41; C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 75 (2 March 2019); R-053, Stalking Horse Purchase Agreement § 8.01(e) (15 Mar. 2019).

¹²³ RER-Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 33.

¹²⁴ See CLA-038, 26 U.S.C. § 368(a)(1)(G).

¹²⁵ See CLA-041, 11 Mertens Law of Fed. Income Tax'n § 43:1 (Apr. 2021); see also *id.* § 43:14 ("The regulations discuss one of the fundamental rules of tax law that unrealized appreciation or depreciation in property is realized when such property is sold or otherwise disposed of.").

Under the general rule, upon the exchange of property, gain or loss must be accounted for if the new property differs in a material particular, either in kind or in extent, from the old property. The purpose of the reorganization provisions of the Code is to except from the general rule certain specifically described exchanges incident to such readjustments of corporate structures made in one of the particular ways specified in the Code, as are required by business exigencies *and which effect only a readjustment of continuing interest in property under modified corporate forms.*¹²⁶

78. The regulation makes clear that one of the requirements for a reorganization under § 368 is a continuity of interests. The Treasury Regulations again address this issue: “The purpose of the continuity of interest requirement is to prevent transactions that resemble sales from qualifying for nonrecognition of gain or loss available to corporate reorganization. Continuity of interest requires that in substance a substantial part of the value of the proprietary interests in the target corporation be preserved in the reorganization.”¹²⁷

79. Paragraph (e)(6) of the applicable Treasury Regulation deals specifically with claims by creditors for purposes of continuity of interests.¹²⁸ “*Creditors’ claims as proprietary interests....* A creditor’s claim against a target [*i.e.*, debtor] corporation may be a proprietary interest in the target corporation if the target corporation is in a [Chapter 11 of the Bankruptcy Code] case....In such cases, if any creditor receives a proprietary interest in the issuing corporation in exchange for its claim, every claim of that class of

¹²⁶ See CLA-042, 26 C.F.R. § 1.368-1(b) (emphasis added); see also CLA-043, Alan S. Gutterman, Business Transactions Solutions § 295:38 (May 2021) (“An acquisition will be nontaxable to the extent that a transferor retains interest in the transferred business.”).

¹²⁷ CLA-042, 26 C.F.R. § 1.368-1(e)(1).

¹²⁸ CLA-042, 26 C.F.R. § 1.368-1(e)(1) (“See paragraph (e)(6) of this section for rules related to when a creditor’s claim against a target corporation is a proprietary interest in the corporation.”).

creditors...is a proprietary interest in the target corporation immediately prior to the potential reorganization....”¹²⁹

80. The explanatory note from the U.S. Treasury Department for these Treasury Regulations advised that “[t]he final regulations provide that, in certain circumstances, stock received by creditors may count for continuity of interest purposes both inside and outside of bankruptcy proceedings.... *The final regulations treat such senior claims as representing proprietary interests in the target corporation.*”¹³⁰

81. Therefore, the deliberate structure of the reorganization of WCC to WMH as a Type G reorganization ensured there would be a “continuity of interests” through the exchange of the Secured Creditors’ debt in WCC to equity in WMH—making them associated companies.

3. The Secured Creditors Used Their Control Of The Bankruptcy Process To Effectuate Value Through A “So-Called” Sale

82. Canada uses Ms. Coleman’s report to repeat the public record of the bankruptcy in an attempt to create a purported distinction between WCC and WMH. That distinction is a hyper-technical, form-over-substance argument. Canada has not explained how it was deprived of its *quid pro quo* when Secured Creditors with significant rights in WCC—what Ms. Coleman calls a “stakeholder”—used the bankruptcy process to protect its rights and reorganize the company as WMH.

¹²⁹ CLA-042, 26 C.F.R. § 1.368-1(e)(6) (italics in original).

¹³⁰ CLA-044, Treasury Decision 9434 (12 Dec. 2008) (emphasis added).

83. Once WCC defaulted on its debt obligations, the Secured Creditors, who became the shareholders in WMH, had the highest priority interest in WCC. They had total authority to determine how they (through WMH) would take over WCC because WCC signed contracts ceding control of the process to the Secured Creditors.

84. Ms. Coleman's statements in this proceeding that the Secured Creditors had no control over WCC are inconsistent with statements she has made outside this proceeding, acknowledging that undersecured creditors (such as the Secured Creditors here) obtain a "shift in control" and a "shift in power" to direct a bankruptcy and the future of a debtor company.¹³¹

85. Ms. Coleman's prior writings indicate that the process used here, a "so-called § 363 sales" process, is the preferred method of Secured Creditors in bankruptcy to recover value for the debt that is owed to them.¹³² The Secured Creditors, entitled to all assets of the company through their Security Interests¹³³ in the case here, chose this method to take over WCC and shed themselves of existing liabilities. That the Secured Creditors chose to obtain repayment on their debt interests through a new corporate vehicle (WMH) instead of taking the equity of the prior corporation (WCC) is not a reasonable basis for this Tribunal to deny jurisdiction.

¹³¹ See *infra* ¶ 91.

¹³² See *infra* n. 160.

¹³³ See *infra* ¶ 86.

a. The Secured Creditors Had Control Over WCC And The Bankruptcy

86. WCC was almost out of money and defaulted on its obligations to the Secured Creditors in early 2018.¹³⁴ The Secured Creditors could have sought to execute on their collateral at that point, taking ownership of all the assets they were owed under the various debt instruments.¹³⁵ At the time of the default, the debt was secured by “substantially all” of WCC’s U.S. assets and 65% of the equity interests in Westmoreland Canadian Investments, LP, a Québec Limited Partnership that served as the holding company for Prairie and WCC’s other Canadian assets (the “Security Interests”).¹³⁶

87. Instead of taking the collateral at that point, the Secured Creditors agreed to forbear execution on their collateral in exchange for control of the bankruptcy process and the financial affairs of WCC.¹³⁷ The Secured Creditors entered into a Bridge Loan

¹³⁴ See R-049, Stein First Day Declaration ¶ 66 (9 Oct. 2018); see also C-039, Westmoreland Coal Company Form 8-K at 2 (21 May 2018).

¹³⁵ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction n. 44 (“For example, a secured lender who is owed \$100 and has a lien against a piece of the debtor’s equipment (meaning that it has a legal right to take possession of the equipment should the debtor default on its obligations to the lender....”); see also RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 27 and Reply Memorial ¶ 30 (“A creditor holding a secured claim has the legal right to satisfy its claim from the property securing the obligation,” affording the Secured Creditors “direct access” to the property in the event of a default).

¹³⁶ See C-036, Guaranty and Collateral Agreement between WCC and Bank of Montreal, § 3, Schedule 3.03 (16 Dec. 2014); C-037, Collateral Agreement between WCC and U.S. Bank Nat’l Assn., § 3, Schedule 3.03 (16 Dec. 2014); Appendix A ¶ 4; RER-Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 21. Canada denies that the Secured Creditors held an investment under NAFTA. Canada Reply n. 219. But these security interests constitute an investment under NAFTA Article 1139(g). For example, the tribunal in *Lion v. Mexico* ruled that a mortgage used to secure commercial loans constituted an investment under this provision. See generally CLA-045, *Lion Mexico Consolidated LP v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction ¶¶ 229-243 (30 July 2018); see also CLA-046, *Manchester Securities Corp. v. Republic of Poland*, PCA Case No. 2015-18, Award ¶ 376 (7 Dec. 2018) (finding mortgages constituted an investment).

¹³⁷ See generally C-039, Westmoreland Coal Company Form 8-K (21 May 2018).

with WCC that effectively ceded control of WCC's finances to the Secured Creditors through "Approved Budgets" of monthly expenditures.¹³⁸ The agreement established numerous financial metrics for WCC, including limitations on operating disbursements, minimum requirements on how much cash to bring in, and liquidity requirements.¹³⁹ There were also weekly reporting requirements and other limitations on expending the funds.¹⁴⁰ And, the Secured Creditors limited WCC from expending the Bridge Loan funds except in certain ways enumerated by the Creditors.¹⁴¹ The remaining 35% of WCC's equity interests in Prairie (and WCC's other Canadian assets) were added to the security for the Bridge Loan.¹⁴² The Bridge Loan also required WCC to execute the Restructuring Support Agreement.¹⁴³

88. As Ms. Coleman opined in an attempt to show the Secured Creditors did not control the bankruptcy process, a debtor (here, WCC) ordinarily controls a Chapter 11 bankruptcy process. However, a debtor can contractually turn that control over to its Secured Creditors in a restructuring support agreement.¹⁴⁴ Restructuring Support

¹³⁸ See C-039, Westmoreland Coal Company Form 8-K §§ 1.01 (definition of "Approved Budget") and 9.01(j) (requiring Secured Creditor approval of budget).

¹³⁹ See C-039, Westmoreland Coal Company Form 8-K §§ 1.01, 9.15 and 10.13.

¹⁴⁰ See C-039, Westmoreland Coal Company Form 8-K § 9.16; see *generally* Appendix A ¶ 11.

¹⁴¹ See *generally* Appendix A ¶ 11.

¹⁴² See RER-Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 21.

¹⁴³ See C-039, Westmoreland Coal Company Form 8-K § 9.14.

¹⁴⁴ See RER-Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 27 ("Parties to a[n] RSA (other than the debtor) do not 'control' the bankruptcy process. Indeed, the practice of entering into RSAs has developed precisely because the debtor-in-possession has exclusive control over the bankruptcy process. As stated in the First Expert Report, an RSA is a contractual arrangement among the debtor and key creditors whereby the debtor agrees to use its control over the process in a specified way.").

Agreements are, Ms. Coleman concedes, “commonplace” for large companies in U.S. Chapter 11 proceedings.¹⁴⁵

89. That is what WCC did here. The Secured Creditors already had rights to all of WCC’s property. WCC turned over control of the bankruptcy process to the Secured Creditors so they could determine how best to use the bankruptcy.

90. The Restructuring Support Agreement gave the Secured Creditors approval rights over every document that was in any way material to the bankruptcy, including all the documentation essential to the bankruptcy process.¹⁴⁶ The Secured Creditors further mandated that WCC complete the bankruptcy according to certain pre-set milestones.¹⁴⁷ The Restructuring Support Agreement gave the Secured Creditors approval rights over other material aspects of WCC’s business, including limitations on any “revenue-generating” contracts with more than a six-month term.¹⁴⁸

b. Canada’s Bankruptcy Attorney Previously Has
Acknowledged That Secured Creditors Control The
Bankruptcy Process

91. Ms. Coleman claims that the Secured Creditors did not control WCC, but her prior statements outside of this proceeding reveal otherwise. At a 2016 summit on distressed investing hosted by *The M&A Advisor*, Ms. Coleman explained that the process used by the Secured Creditors here involved a “real shift of power and a real

¹⁴⁵ See RER-Coleman-Bankruptcy- Memorial on Jurisdiction ¶ 37.

¹⁴⁶ See R-050, WCC RSA §§ 3.01-3.02; see generally RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶¶ 31-48.

¹⁴⁷ See R-050, WCC RSA § 7.01(c) and Schedule 2.

¹⁴⁸ See R-050, WCC RSA § 7.01(f). To rebut these points, Canada and Ms. Coleman raise *non-sequiturs*. For example, they argue that these agreements were done at “arms-length.” See, e.g., Canada Reply ¶ 22. Of course, a company can cede control of the bankruptcy process through an arms-length contract, particularly when the other option is execution on all the assets by the Secured Creditors.

shift of control of the case” from the debtors (here, WCC) to the creditors (here, the Secured Creditors):

Speaker 1: With Chapter 11 [bankruptcy] filings going down, you know, over the past few years. When is Chapter 11 really the right thing to do for companies?

Coleman: Well sometimes, it's when old equity does want to stay in. But being at the bottom of the stack on an absolute priority basis. They've got to find a way to give themselves some leverage against the creditors. And the only way to do that is to put the company in and provide the financing in bankruptcy. One of the worst things that old equity can do, but it happens all the time is put in new money and it really looks like good money going after bad. Because if you put in new money, either as an equity basis or on a subordinated credit basis. Then the company, you haven't really done anything other than really provide more money that eventually could go to the other creditors. The only way to come in ahead of other creditors, is to do it as a debtor in possession financing in bankruptcy. And that is, it's a very smart play but, boy, it's a tough choice to make, but that is where, I think, bankruptcy really does offer the second chance that it's supposed to.

If you don't have that and you have existing creditors being the ones providing that debt financing, then you see a real shift of power and a real shift of control of the case. Companies are supposed to, the way the Code is supposed to work is companies file Chapter 11, formulate a plan of reorganization that comports with the absolute priority rule, and then execute and they come out. And, old equity still retains, I mean, they may have to pay new money for it, but they would still retain control. The way the Code has been used very cleverly by creditors for the past 10 years, has been to really mark everything to market, force a sale, and then the creditors are the ones who are providing the financing, and saying what the plan can say in advance, really from the outside of the case, and that's not the way it's supposed to work but that's what's been happening.

Speaker 1: Shift of power.

Coleman: Exactly.¹⁴⁹

¹⁴⁹ Ms. Coleman's comments can be found at: https://www.youtube.com/watch?v=luR9kh_n8as. Claimant is providing a transcript of the interview as: C-046, MandA.TV Interview Transcript of Kathryn A. Coleman (29 Mar. 2016).

92. In another prior written statement that she provided to the American Bankruptcy Institute, Ms. Coleman again conceded the control existing creditors (the Secured Creditors here) obtain by providing financing to the debtor:

Without first getting DIP lender consent, the debtor cannot do anything outside the ordinary course of business. For example, the debtor is no longer free to seek to assume or reject contracts. It cannot propose an incentive plan to retain critical management players. It cannot sell or decline to sell its assets. But most important, it cannot propose its own plan without lender approval, and it cannot obtain approval of the plan over the opposition of the DIP lender -- or that of any other creditor to whom the DIP lender extends its protection....

Now, however, lenders are more aware of the many benefits of being the DIP lender and therefore are unwilling to allow the use of cash collateral alone. Even if the debt is still held by a traditional lender who actually advanced 100 cents on the dollar, the lender is likely to insist on making funds available as postpetition financing, and to go as far as possible to ensure control of the case as a secured creditor.¹⁵⁰

93. In an oral presentation to the American Bankruptcy Institute Commission to Study the Reform of Chapter 11, Ms. Coleman repeated many of her same views about the control creditors have been able to exert over a debtor corporation. She conceded that the creditors have taken control of bankruptcy to the point of inducing her to rewrite her own filings; they exert near-total control over the debtor:

By the time you get to having to file bankruptcy, particularly if you're not one of these huge companies, and most of my clients are not, you've already been through a number of iterations with your existing lenders, in the hopes of staving off a Chapter 11 filing. You get there, and by the time you have done that, you've given all your collateral. You guys are exactly right. There's no unsecured debt out there and by the same token, there's no unencumbered cash out there....

¹⁵⁰ C-047, Statement of Kathryn A. Coleman, *ABI Commission to Study the Reform of Chapter 11*, Public Field Meeting (3 Nov. 2012), available at: http://commission.abi.org/sites/default/files/statements/03nov2012/Coleman_Commission_State%20ment.pdf.

I know that secured lender interests or debt holder interests urge the commission to say, "Well, it's the reality. We are the new owners of the business, and therefore, you ought to change the Code to accept that reality and allow the debt holders to have corporate governance control even during the case. You ought to let us say who the debtor's board members are. You ought to give us a lot of access to corporate governance and to the decisions over what's going to happen in case."

Now, since the Code doesn't provide that access, at least not yet, knock on wood it won't, what they've been doing instead is putting all of that into the DIP financing document.

You look at these credit agreements and what can the debtor do when not... There are usually no covenants. Lenders always say, "I'm not going to put any financial covenants in there, you're in Chapter 11." The covenants are kind of meaningless. What they do put in there is you can't do anything out of the ordinary course of business without getting lender approval. "You can't file a pleading in the case without giving us 3 days to look at it and comment on it." I've had secured lender lawyers redrafting my pleadings as the debtor's counsel. I think I've drafted them all right in the first place. "You certainly can't file a plan without me signing off on it." Most treacherous of all, quite often they'll say, "You have to sell your assets." You have to do a 363 sale within a very short period of time, 60 days. Otherwise you're going to be in default. What happens when you're in default? Your DIP goes away.¹⁵¹

94. As Ms. Coleman has told it, the practical reality of the bankruptcy process is that Secured Creditors often do have and exercise significant control. In this case, consistent with Ms. Coleman's observations about bankruptcy trends generally, the Secured Creditors controlled WCC throughout the bankruptcy process and were empowered to decide how the company would emerge from bankruptcy.

¹⁵¹ C-048, Transcript of Proceedings for the ABI Commission to Study the Reform of Chapter 11, Field Hearing (3 Nov. 2012), *available at*: http://commission.abi.org/sites/default/files/statements/03nov2012/11_03_2012_transcript.doc.

c. The Secured Creditors Used The Bankruptcy Code's "So-
Called" Sales Process To Obtain WCC In Exchange For
Extinguishing Debt

95. The Secured Creditors had over \$700 million in outstanding debt owed to them by WCC,¹⁵² which constituted a substantial interest and investment in the future of WCC. WCC took that money with the expectation it could repay it, which is why it offered the Security Interests as collateral. The Secured Creditors expected to be repaid from the proceeds of WCC's business, including Prairie, or to recover their funds from the Security Interests.¹⁵³ As Ms. Coleman explained, the Secured Creditors were "stakeholders" in WCC, like shareholders or any others having an interest in the debtor's business.¹⁵⁴

96. Once the bankruptcy started, the Secured Creditors' rights became paramount because their debt had to be paid in full before there could be equity distributions.¹⁵⁵ The Secured Creditors were the "First Lien Lenders," meaning they had highest priority of any interest (except those payments that were incurred after the start of the bankruptcy, which here were largely funded by the Secured Creditors through the DIP Financing Agreement).¹⁵⁶

¹⁵² See Appendix A ¶¶ 2-3; RER-Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 23.

¹⁵³ See RER-Coleman-Bankruptcy-Reply on Jurisdiction ¶ 3.

¹⁵⁴ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction n.11 (explaining that bankruptcy process addresses only creditor recoveries).

¹⁵⁵ RER Coleman-Bankruptcy-Reply Memorial on Jurisdiction ¶ 17 (stating that the bankruptcy process is designed to "maximize the value of [] assets and deliver their value to the debtor's creditors").

¹⁵⁶ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 27; RER Coleman-Bankruptcy-Reply Memorial on Jurisdiction n. 2; C-040, Final Order (Court Docket, Doc. 520), Exhibit 1, DIP Credit Agreement at 71 (15 Nov. 2018).

97. The Secured Creditors could recover value for their debt through a “debt for equity swap,”¹⁵⁷ whereby the Secured Creditors would have exchanged their debt for the equity of WCC.¹⁵⁸ Under this mechanism, the Secured Creditors would then own the equity of WCC, which would remain the same company. They also could recover value through a court-approved sale of assets under 11 U.S.C. § 363 of the Bankruptcy Code,¹⁵⁹ which here was the functional equivalent of a debt for equity swap and was the process that was chosen with respect to WCC.

98. By this process, Secured Creditors “paid” for their assets in WMH using their outstanding debt interests in WCC.¹⁶⁰ The Restructuring Support Agreement included a Term Sheet for the Proposed Plan of Reorganization, which envisioned the Secured Creditors receiving either (i) “the equity interests of the Purchaser [*i.e.*, WMH]” and other consideration or (ii) the full value in cash of the outstanding debt (or some

¹⁵⁷ See, e.g., CLA-047, 11 U.S.C. § 1123(a)(5)(J) (stating that a bankruptcy plan can include the issuance of debtor’s securities in exchange for debt).

¹⁵⁸ See CLA-048, 11 U.S.C. § 363(k). Only secured creditors have the right to bid their credit in this fashion; other potential purchasers have to pay cash. See *id.*; see also RER-Coleman-Bankruptcy Memorial on Jurisdiction ¶ 43; R-051, Bidding Procedures Motion at 53-57 (of 74). See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶¶ 43, 59, 69; R-051, Bidding Procedures Motion at 60 (of 74). The Secured Creditors set the initial floor for any competing bids—there were none—and were able to use the entirety of their outstanding debt to bid for the company, if necessary.

¹⁵⁹ See also RER-Coleman-Bankruptcy Memorial on Jurisdiction ¶ 40.

¹⁶⁰ Ms. Coleman has explained in her prior writings that these “so-called § 363 sales” are how bankruptcies get done for undersecured creditors: “Chapter 11 has morphed via so-called § 363 sales into an efficient, numbers-driven means of transferring value from existing owners to creditors. This process “is now the tool of choice to put a quick close to a bankruptcy case,” “avoid[ing] time, expenses, and, some would say, the Bankruptcy Code’s unbending rules.” C-049, Kathryn A. Coleman and Jonathan M. Landers, *Rounding the Square Peg: Clarifying the Jurisprudence of the Sale Model of Chapter 11*, The American Bankruptcy Institute Journal, available at:

<https://www.hugheshubbard.com/index.php?p=actions/vmqHhrUtils/download/asset&id=13767>.

As its name suggests, an “undersecured creditor” is a creditor whose security interests do not cover the value of the existing debt.

other agreed upon amount).¹⁶¹ That treatment was carried over through later bankruptcy filings.¹⁶² The Secured Creditors thus were going to receive maximum value for their debt.

99. Canada construed this transaction as an open market sale with the Secured Creditors not being the “purchasers of last resort.”¹⁶³ But the Secured Creditors had control of the bankruptcy and designed a process that would ensure a continuity of their interests pursuant to the Type G reorganization regulations.¹⁶⁴ As Ms. Coleman explained in her prior writings, “[a] typical § 363 sale involves participating by existing lenders who are undersecured and often have ‘everything,’ a debtor in possession by or with the consent of the existing lenders, and the debtor’s management. These parties have substantial control over the terms of the price and sale especially...where...the obtainable price is well below the amount of the secured debt.”¹⁶⁵

¹⁶¹ R-050, WCC RSA, Ex. A at p.77 of 167 (p. 39 of the PDF). A proposed sale transaction term sheet was also attached to the Restructuring Support Agreement. *Id.* Ex. B at p. 89 (p. 51 of the PDF).

¹⁶² See C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 71 (2 March 2019) (explaining payments to Secured Creditors).

¹⁶³ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 9.

¹⁶⁴ See R-050, WCC RSA § 3.01 (providing approval rights to Secured Creditors over Bidding Procedures).

¹⁶⁵ C-049, Kathryn A. Coleman and Jonathan M. Landers, *Rounding the Square Peg: Clarifying the Jurisprudence of the Sale Model of Chapter 11*, *The American Bankruptcy Institute Journal*, available at

<https://www.hugheshubbard.com/index.php?p=actions/vmgHhrUtils/download/asset&id=13767>.

100. The Secured Creditors (through WMH) obtained substantially all WCC's business, including its U.S. properties, mining leases, equipment and fixed assets, accounts receivable, coal inventories, contracts, cash, permits, books and records, causes of action, headquarters, intercompany receivables, tax assets, collateral securing any bonds, and the equity in its Canadian business. The Secured Creditors even obtained WCC's intellectual property, including its trade dress, trademarks, and any goodwill associated with those marks, and WCC's goodwill.¹⁶⁶

101. The Secured Creditors took control of WCC without any of WCC's other encumbrances, leaving liabilities behind.¹⁶⁷ WMH was the vehicle to take WCC's assets, a "practical solution" to obtain certain tax benefits.¹⁶⁸ At the center of the transaction was a transfer of assets from WCC, as a parent company, to its wholly-owned subsidiary, WMH.

102. Authorities make clear that WCC's change in form to WMH does not defeat jurisdiction. *STEAG v. Spain*, for example, explained that restructuring the investment with additional capital did not defeat jurisdiction.¹⁶⁹ As Professor Paulsson observes ironically, "Canada thus not only fails to show this case is similar to *STEAG*, but in the process of attempting to do so scores an own goal in calling attention to the fact that restructuring that does not seek to create jurisdiction where there is none is not *per se* objectionable."¹⁷⁰

¹⁶⁶ R-053, Stalking Horse Purchase Agreement § 2.02 (15 Mar. 2019).

¹⁶⁷ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 44.

¹⁶⁸ See RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 45; see also *supra* ¶¶ 56-81.

¹⁶⁹ RLA-056, *STEAG* ¶¶ 373-374.

¹⁷⁰ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 11; see also CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 17 (discussion of

103. The tribunal in *Abaclat v. Argentina*¹⁷¹ reached a similar result. There, Argentina complained that only certain payments were made in its territory and subsequent payments for security entitlements were not made in Argentina. Therefore, according to Argentina, the payments made outside Argentina were not part of the investment. The tribunal rejected Argentina's argument, explaining that "the bonds and security entitlements are part of one and the same economic operation and they make only sense together...."¹⁷²

104. The tribunal in *Manchester Securities Corp. v. Poland* similarly found that mortgages and bonds "should be considered to be part of the investment....The investment has to be considered in its totality."¹⁷³ These same principles were applied in *CSOB v. Slovakia*, where the tribunal explained that:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.¹⁷⁴

S.D. Myers v. Canada); Counter Memorial ¶¶ 64-69 (discussing *Perenco* (CLA-023) and *Waste Management II* decisions (CLA-014)).

¹⁷¹ CLA-049, *Abaclat and others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011).

¹⁷² CLA-049, *Abaclat* ¶¶ 359, 374, 376.

¹⁷³ CLA-046, *Manchester* ¶ 376.

¹⁷⁴ CLA-050, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction ¶ 72 (24 May 1999).

105. WCC entered Chapter 11 bankruptcy with a combination of debt and equity interests, with the equity interests having little worth.¹⁷⁵ Canada seeks to ignore the importance of the debt that financed the company and wants to make WCC and WMH into wholly separate entities. But the bankruptcy process sought to preserve the continuity of the interests of the most important stakeholders in WCC, including their interests in WCC's investment in Prairie.

C. Canada Has The Burden Of Proof On Its Jurisdictional Objection

106. Canada has not met its burden that NAFTA specifically, nor international law generally, holds that the transfer of Prairie from WCC to WMH destroys the NAFTA claim *per se*, nor that such an outcome would be required under the particular facts of this case. Canada's assertion that "it is Claimant's burden to establish that this Tribunal has jurisdiction over its claim" is a mischaracterization of the applicable standard.¹⁷⁶ Claimant does not dispute that it carries the burden of establishing a proper basis for jurisdiction and, once in the merits phase, proving its claims. But Canada's rendition of the standard of proof "would impermissibly reverse" the applicable standard that would have the effect of "denying the investor access to justice" and "create a windfall for the host state[.]"¹⁷⁷

¹⁷⁵ See R-049, Stein First Day Declaration ¶ 32 (9 Oct. 2018). Even at the highest price listed in there of 41 cents per share, the combined value of the common stock was approximately \$7.7 million dollars—about 1 percent of the total outstanding debt owed to the Secured Creditors.

¹⁷⁶ Counter-Memorial n. 101.

¹⁷⁷ CLA-051, Frédéric G. Sourgens, Kabir Duggal, et al., *Evidence in International Investment Arbitration* (Oxford, 2018), pp. 43-44; see also *id.* at 45 ("Burden of proof in the jurisdictional setting must, as a functional matter, be in equipoise due to the competing interests of sovereign limitation of external judicial or arbitral review on the one hand, and access to justice on the other.").

107. Article 24 of the UNCITRAL Rules provides that “[e]very party shall have the burden of proving the facts relied on to support his claim or defence.”¹⁷⁸ Investor-State tribunals have recognized that a party advancing a proposition, whether of fact or law, has the burden of proving its own allegations. The *Soufraki v. United Arab Emirates* tribunal explained that, “[i]n accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts.”¹⁷⁹ With respect to defenses asserted by a respondent-State, the *Chevron v. Ecuador* tribunal stated:

As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.¹⁸⁰

Several other tribunals have followed the general principle that the respondent bears the burden of proving its defenses.¹⁸¹

¹⁷⁸ UNCITRAL Arbitration Rules (1976), Article 24. Pursuant to Procedural Order No. 1, “the procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules[.]” Procedural Order No. 1 ¶ 6.2 (22 April 2020).

¹⁷⁹ CLA-052, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No ARB/02/7, Award ¶ 58 (7 July 2004).

¹⁸⁰ CLA-053, *Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador I*, UNCITRAL, PCA Case No. 34877, Interim Award ¶ 139 (1 Dec. 2008).

¹⁸¹ See, e.g., RLA-021, *Gallo* ¶ 277 (“[T]he principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove its case, and without evidence it will fail; but if the Respondent raises defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent”); CLA-054, *George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award ¶ 315 (1 June 2009) (“As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences”); CLA-055, *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award ¶ 113 (30 June 2009) (“It is a well-

108. This principle assigning the burden of proof to a respondent for its own defenses extends to jurisdictional objections advanced by a respondent-State.

According to the *Fraport v. Philippines II* tribunal:

Regarding burden of proof, in accordance with the well-established rule of *onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections. The Tribunal accepts that if Respondent adduces evidence sufficient to present a *prima facie* case, Claimant must produce rebuttal evidence, although Respondent retains the ultimate burden to prove its jurisdictional objections.¹⁸²

Similarly, the respondent in *Laos Holdings v. Laos I* accepted, and the tribunal endorsed, that the State carries the burden of “proving that a ‘legal dispute’ arose before the critical date” when the respondent invokes a jurisdiction *ratione temporis* objection.¹⁸³

109. Commentators also explain that the general principle of international law concerning the burden of proof specifically extends to jurisdictional objections in order to preserve a claimant's procedural rights:

established rule in international adjudication that the burden of proof lies with the party alleging a fact, whether it is the claimant or the respondent”).

¹⁸² CLA-056, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award ¶ 299 (10 Dec. 2014); see also CLA-057, *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award ¶ 174 (28 July 2015) (“There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections.”).

¹⁸³ CLA-058, *Lao Holdings N.V. v. Lao People's Democratic Republic I*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction ¶ 66 (21 Feb. 2014).

The respondent bears the burden of proof with regard to any assertions that alter the record [of] the claimant's jurisdictional case. Specifically, respondent cannot introduce new materials into the tribunal's jurisdictional analysis and yet continue to insist that it remains claimant's burden to overcome respondent's objections....The respondent's burden of proof applies fully to all new materials and requires that the respondent carry proof to the same standard as the claimant. The respondent is thus not privileged solely because of its arbitration posture as responding to an invocation of jurisdiction.....If the respondent makes submissions that are plausible on their face but not sufficiently well supported to meet the standard of proof the sheer creation of doubt in the tribunal's mind should not lead to a rejection of jurisdiction. Such a conclusion would impermissibly reverse applicable burdens of proof. As discussed below, such conduct could, in the right circumstances, entail annulable error.¹⁸⁴

V. CANADA DOES NOT DENY IT HAD NAFTA CHAPTER 11 OBLIGATIONS TO WCC AND PRAIRIE AT THE TIME OF THE BREACH; IT SEEKS ONLY TO ESCAPE THEM

110. Canada claims that, “Before a disputing investor exists and makes its investment, neither it nor its investment could have been owed a substantive obligation under Section A, and neither of them could have suffered loss or damage arising out of the alleged breach of an obligation.”¹⁸⁵ Yet, Canada acknowledges that “Canada may have owed WCC obligations with respect to itself and its investment in the Canadian Enterprises from 2014 until WCC disposed of its investment in 2019,” and that Canada would owe obligations to WMH “and its investment in the Canadian Enterprises as of 2019.”¹⁸⁶

¹⁸⁴ CLA-051, Frédéric G. Sourgens, Kabir Duggal, et al., *Evidence in International Investment Arbitration* (Oxford, 2018), pp. 43.

¹⁸⁵ Canada Reply ¶ 67.

¹⁸⁶ Canada Reply ¶ 68.

111. Although Canada recognizes it owed obligations to Prairie (one of the “Canadian Enterprises”), it pretends that Prairie when owned by WCC is not the same as Prairie when owned by WMH: “Further, as explained above, the Claimant’s argument depends on the incorrect presumption that its investment in the Canadian Enterprises is the same as WCC’s investment in the Canadian Enterprises. The fact that an enterprise forming the basis of separate investors’ investments may be the same does not mean that the investment made (once) by each investor is the same.”¹⁸⁷

112. Prairie is the same enterprise under WMH that it was under WCC. It has the same company corporation number and same date of incorporation.¹⁸⁸ The mines it owns are the same, it is the same entity that had been supplying coal to the Albertan utilities, and the same entity that will be obliged to reclaim the mines but without the benefit of the planned revenue stream because the revenues have been curtailed by the Off-Coal Agreements and Alberta’s continuing payments to the utilities.

113. Canada argues that WCC is the only entity that could have brought the instant claim, stating, as an unqualified proposition, that “tribunals have determined the right to advance the claim remained with the investor that owned or controlled the investment at the time of the alleged breach” in cases where a claimant sold its investment after the breach.¹⁸⁹ According to the cases Canada cites, however, this conclusion is not quite so.

¹⁸⁷ Canada Reply ¶ 68, n. 134.

¹⁸⁸ See C-050, Certificate of Status for Prairie Mines & Royalty ULC (15 Aug. 2018). WCC and WMH submitted this same Certificate of Status for Prairie as an exhibit to the August 2019 NOI and August 2019 NOA, respectively.

¹⁸⁹ Canada Reply ¶ 108.

114. The tribunal in *Daimler Financial Services AG v. The Argentine Republic* stated that “ICSID claims are at least in principle separable from their underlying investment....provided that the investor did not otherwise relinquish its right to bring an ICSID claim.”¹⁹⁰ The issue in *Daimler* was whether the claimant transferred the right to assert the claim to its parent company; because the claimant had standing at the time of the breach and had not transferred its rights over the claim under domestic law, it still had standing to proceed with the arbitration.¹⁹¹ The Tribunal later explained that the claimant’s parent, who had an “indirect” investment at the time of the allegedly offending government measures, may “also enjoy an independent right to bring its own claim for the same damages.”¹⁹² The *Daimler* tribunal allowed for more than one claimant.

115. Canada also contends that *Gemplus S.A. v. Mexico* holds that a right to assert a treaty claim does not travel with an investment.¹⁹³ There, the investment was transferred from Gemplus to SLP (an affiliated company of Gemplus), both of which were French entities that could have potentially asserted rights under the French-Mexican BIT.¹⁹⁴ Contrary to Canada’s assertion, Gemplus’s retention of its treaty claim occurred through contractual operation and was not based upon any legal principle

¹⁹⁰ RLA-054, *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No ARB/05/1, Award ¶ 145 (22 Aug. 2012).

¹⁹¹ RLA-054, *Daimler Financial Services v. Argentina* ¶¶ 145-146, see also generally *id.* ¶¶ 146-154 (addressing claimant’s standing under German law); CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 17 (discussing *Daimler*).

¹⁹² RLA-054, *Daimler Financial Services v. Argentina* ¶ 155. The issues of whether an indirect interest could be asserted under the German-Argentine BIT and double recovery of damages were not before the tribunal. See *id.*

¹⁹³ Canada Reply ¶ 112; CLA-029, *Gemplus S.A. et al. v. Mexico*, ICSID Case No. ARB (AF)/04/3, Award (18 June 2010).

¹⁹⁴ See CLA-029, *Gemplus S.A. v. Mexico* ¶ 5-14 (“SLP...was selected [as transferee of the Mexican investment] because of its French nationality.”).

preserving the claim with the original investor. Canada hints at the contractual arrangement when stating that, “ [t]he *Gemplus* tribunal observed that a memorandum of understanding ensured the claimant *Gemplus S.A.*, which held the investment when the alleged breach occurred, retained all rights to maintain its claim against the respondent.”¹⁹⁵ The tribunal determined that the transfer between *Gempus* to *SLP* preserved a continuous chain of French ownership which would have permitted assertion of the claim but for a contractual stipulation that *Gemplus* retained the treaty claim.¹⁹⁶

116. The decision in *EnCana Corp. v. Ecuador* is even more attenuated from Canada's argument. During the arbitration proceeding under the Canadian-Ecuadorian BIT, the Canadian claimant sold part of its interest in the investment to a U.S. entity and then announced an intention to sell the remaining part to a Chinese consortium.¹⁹⁷ The tribunal held that the claimant retained standing to assert the claim regardless of whether it owned the local investment.¹⁹⁸ However, the tribunal did not address whether any other parties could assert a claim, nor could it insofar as the new owners of the investment were not even eligible under the BIT.

¹⁹⁵ Canada Reply n. 237.

¹⁹⁶ See CLA-029, *Gemplus S.A. v. Mexico* ¶¶ 5-28, 5-29.

¹⁹⁷ RLA-053, *EnCana Corp. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481, Award ¶¶ 1, 22, 123 (3 Feb. 2006).

¹⁹⁸ RLA-053, *EnCana Corp. v. Ecuador* ¶ 131; CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 17 (discussing *EnCana*).

117. These cases stand broadly for the proposition that a claimant's jurisdiction is judged at the time of filing. But, as *Daimler* demonstrates, there is no reason why multiple claimants could not bring claims if both were to have standing. Professor Paulsson explains: "Canada cannot have it both ways. Either the present case is one of first impression, in which case the distinctions it seeks to make in this respect confirm that conclusion; or else the *ratione temporis* debate should be perceived as encompassing a broad range of circumstances in which formal distinctions of ownership structures give way to the reality of the proper understanding of who has standing (without subterfuge) to seek redress for the harm done to the at-risk investments."¹⁹⁹

118. Moreover, *Loewen v. United States* demonstrates that the proposition is not absolute. The Tribunal in *Loewen* required that NAFTA jurisdictional requirements be met through the entirety of the case, not just at the time of filing. There, the Canadian claimant suing the United States went through a U.S. Chapter 11 bankruptcy reorganization during the pendency of the arbitration proceedings. The restructuring resulted in the claimant-investor becoming a U.S. corporation, thus breaking the diversity of nationality required by NAFTA between the investor and the investment. The tribunal found that the change in the nationality of the company owning the investment deprived the tribunal of its jurisdiction over the claim, notwithstanding that jurisdiction had existed at the time the claim was filed and even through a hearing on the merits.²⁰⁰

¹⁹⁹ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 17.

²⁰⁰ See CLA-036, *Loewen* ¶¶ 25, 29, 230.

119. In anticipation of the nationality concern, the claimant also had created a Canadian shell company called “Nafcanco,” to whom the NAFTA Chapter 11 claim was assigned as the company’s only asset.²⁰¹ The *Loewen* tribunal found that it was inappropriate for the claimant to reorganize its business in the United States but keep the NAFTA claim with the Canadian shell company:

By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding. Claimants also urge that TLGI remains in existence, since its charter remains in existence. The Tribunal is being asked to look at form rather than substance to resolve a complicated claim under an international treaty.²⁰²

120. WCC is a shell company. The investment and assets associated with it are owned by WMH. The benefits of an award in this case for harm to the investment should inure to the company that is the owner of the investment.

121. Canada says that, “WCC continues to exist and it was open to WCC to continue with its NAFTA claim”²⁰³ but, (as recognized by Canada’s bankruptcy attorney²⁰⁴) WCC is required to be wound down and dissolved.²⁰⁵

122. Canada does not propose that its formal objection to the form of the Claimant could be resolved by joining WCC or amending the claim, and Canada’s

²⁰¹ See CLA-036, *Loewen* ¶¶ 1, 9, 220.

²⁰² CLA-036, *Loewen* ¶ 237.

²⁰³ Canada Reply ¶ 112.

²⁰⁴ RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶¶ 62, 84.

²⁰⁵ *Supra* ¶ 70; see also C-042, Order Confirming Amended Joint Chapter 11 Plan of WCC and Certain Debtor Affiliates (Court Docket, Doc. 1561) at 64, 78, 81, 95-96 (2 March 2019) (detailing wind down and dissolution of WCC).

statement is disingenuous because it refused substitution for WCC by WMH and insisted on withdrawal of WCC's claim in order to proceed with recognizing WMH as a claimant:

Under the circumstances, and because the Amended NOA appears to meet the formal requirements of an NOI, Canada is prepared to accept the Amended NOA filed on May 13 as Westmoreland Mining Holdings LLC's NOI, on the condition that Westmoreland Coal Company withdraws the claim that it submitted against Canada on November 19, 2018. Westmoreland Mining Holdings LLC would then be free to submit its own claim to arbitration 90 days after the May 13 NOI date. The disputing parties would re-appoint their party appointed arbitrators once a claim is submitted and would then continue the process, in which they are currently engaged, of appointing a tribunal chairperson.²⁰⁶

123. Canada's acknowledgement that it owed obligations to WCC and Prairie; its suggestion that WCC should be the proper claimant; its refusal to amend the WCC claim to include WMH as claimant and insistence that WCC's claim be withdrawn pending recognition of the WMH Notice of Intent; all evoke the principles of good faith and the principle against self-contradiction. The tribunal in *Chevron v. Ecuador* explained, "[t]hat duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold,' to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."²⁰⁷

²⁰⁶ R-076, Letter from Mr. Scott Little to Mr. Elliot Feldman Re: Westmoreland Coal Company v. Government of Canada, 2 July 2019, at 2.

²⁰⁷ CLA-060, *Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.106 (30 Aug. 2018).

124. In his concurring opinion in the case of *Temple of Preah Vihear (Cambodia v. Thailand)*, Judge Alfaro explained that, “[t]he primary foundation of this principle is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith.” This principle “is not to be regarded as a mere rule of evidence or procedure” but, rather, is a substantive rule.²⁰⁸

125. Were Canada’s position on jurisdiction adopted and, presuming there were breaches of obligations to WCC and Prairie, Canada would receive a windfall as a result of the bankruptcy restructuring.²⁰⁹ Canada disingenuously says there would be no windfall because “[i]t was WCC that underwent bankruptcy, not the Claimant.”²¹⁰ As Professor Paulsson reflected, “[w]hat matters is the ultimate economic reality; does the recovery pursued ultimately and legitimately seek *reparation of the harm done to protected investors who put their capital at risk?*”²¹¹ WMH and its ownership of Prairie is the outcome of the WCC bankruptcy, and the continuity of interests between WMH and WCC—the Secured Creditors preserving their security interest in Prairie and their right to recover money from the debt contracted by WCC—is evident.

²⁰⁸ CLA-059, Case Concerning the Temple of Preah Vihear (*Cambodia v. Thailand*), Separate Opinion of Vice-President Alfaro at 42 (15 June 1962).

²⁰⁹ See CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 15 (“It should surprise no one that investments that lead to treaty-based arbitrations against States tend to be troubled businesses that often require restructuring as a way of mitigating the adverse consequences of the difficulties encountered. Given the goal of promoting the inflow of investments, it should be obvious that restructuring ought to minimize the prejudice suffered, rather than to provide an excuse for denying treaty protection.”).

²¹⁰ Canada Reply ¶ 113.

²¹¹ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 18.

126. Canada's Memorial on Jurisdiction offered no explanation of how Canada would be prejudiced by the Tribunal finding it has jurisdiction to hear WMH's claim, a fact Westmoreland highlighted in its Counter-Memorial: "Canada does not claim that it would suffer any harm, prejudice or unfairness resulting from the Tribunal finding jurisdiction to hear WMH's claim. Canada makes no argument about the equities of its position."²¹² Now, after two Memorials and over 100 pages of argument, Canada, in its Reply Memorial on Jurisdiction, still has not offered even a token explanation of how it would be prejudiced were the Tribunal to find it has jurisdiction to hear WMH's claim. For all of Canada's protestations of the parade of difficulties that would arise from WMH's claim, it is Canada who seeks to manipulate the text of NAFTA and the system of investor-state dispute settlement to reap an inequitable windfall by an objection to jurisdiction occasioned by the additional misfortune of a bankruptcy restructuring.

²¹² Counter-Memorial ¶ 3; see also CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 18 ("Canada does not address the rationale for this proposition, but simply repeats that a claimant who was not an investor when the dispute arose has no standing.").

VI. THE ASSIGNED CLAIMS APPROPRIATELY REST WITH WMH WHO, AS THE NEW PARENT COMPANY OF PRAIRIE, WILL SUFFER THE PENDING DAMAGES

127. Prairie's mine-mouth operations were purchased in 2013-14 by WCC on the expectation that they would have a 50-year lifespan under the federal regulatory scheme. The mines could service only the adjacent, associated power plants of the Albertan utilities who, subsequently, received Off-Coal payouts from the government.

128. Canada affirms that the Off-Coal Agreements "provided for distribution of the Transition Payments in fourteen annual installments between 2017 and 2030." The payments are continuing in order to keep the utilities "off coal," as in off Prairie's coal.

129. The Off-Coal Agreements ensure that Prairie's mines will close no later than 2030 and perhaps earlier. Some of the coal mines will close sooner because the Albertan companies have either accelerated the closure of coal-fired units or are converting those units to gas sooner than 2030. The closure of coal-fired units will lead to the closures of Prairie's mines, causing increased revenue loss and increased reclamation costs, and will strand WMH's capital even as Alberta paid utilities expressly to compensate for their stranded capital.

130. WMH is losing, and will continue to lose, revenue as a result of the early mine closures, even assuming that some of the mines hold on until 2030.

131. WMH has explained that the accelerated closure of the mines due to the Off-Coal Agreements leads to an acceleration of mine reclamation costs. Prairie's mines are designed to be reclaimed over their original lifespans, so that WMH essentially pays down the total reclamation costs of the mines on an annual basis.

132. WMH estimated that the early closures of the mines as of 2030 would require WMH to incur nearly \$42 million in uncompensated expenses for reclamation alone, which would not be offset in any other way.²¹³

133. WMH is the owner of Prairie now and for the foreseeable future to 2030 and, therefore, WMH, not WCC, is the investor that is incurring losses now and will continue to incur losses through 2030 provided that either Alberta, or Canada, continues not to compensate Prairie the way that the utilities were compensated for their “off-coal” transition.

134. Contrary to Canada’s insistence that measures cannot relate to an investor and investment under Article 1101 when they are not “direct and immediate,”²¹⁴ the Off-Coal Agreements, the Transition Payments that pay the utilities to stop buying Prairie’s coal, and Alberta’s decision not to compensate Prairie for stranded capital from the transition in the same manner in which the Albertan utilities were compensated, “relate to” Prairie and to its investor, WMH, and the losses they are suffering.

²¹³ WMH Statement of Claim ¶ 87.

²¹⁴ Canada Reply ¶ 47.

VII. CONCLUSION

135. Professor Paulsson observed for this Tribunal, “Canada sees this replacement of one investment vehicle with another as a formal silver bullet: a mistake which unfortunately for the investors enables Canada to elude the consequences of breaching the Treaty. The fact that the restructuring caused no illicit gain to the investors does not in its view matter. Nor does it make a difference that the investors could have conceived a number of alternative restructurings which would have saved the day – and thus disabled this jurisdictional objection. This is Canada’s position in sum: a singular example of form over substance, difficult to posit as consonant with the aim of the NAFTA drafters to stimulate investments by protecting them from governmental visitations in the host country.”²¹⁵ But Canada additionally denies the form of the transaction itself that ensured a continuity of interests between WCC and WMH.

²¹⁵ CER-Paulsson-International Law-Rejoinder on Jurisdiction-Second Report ¶ 4.

136. For the foregoing reasons, Westmoreland requests that the Tribunal deny Canada's objections to jurisdiction and issue an award of costs and fees in Claimant's favor.

Respectfully submitted,



Alexander K. Obrecht
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, CO 80202
Telephone: (303) 861-0600

Andrew V. Layden
BAKER & HOSTETLER LLP
200 South Orange Avenue, Suite
2300
Orlando, FL 32801
(407) 649-4000

Elliot J. Feldman
Michael S. Snarr
Paul M. Levine
Analia Gonzalez
James J. East
John R. Lehrer
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Eleventh Floor
Washington D.C. 20036
Tel: 202-861-1500
Fax: 202-861-1783
Email: westmoreland@bakerlaw.com

Counsel for Claimant Westmoreland Mining
Holdings LLC