PUBLIC DOCUMENT

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

BETWEEN:

WESTMORELAND COAL COMPANY

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/23/2)

GOVERNMENT OF CANADA

REPLY ON JURISDICTION

December 13, 2023

Trade Law Bureau
Government of Canada
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I. INTRODUCTION

1. Since 2018, Westmoreland Coal Company ("WCC" or "the Claimant") has made a series of choices. These choices have unfolded in the context of litigation that WCC initiated under an extraordinary dispute settlement process that is rooted in the specific conditions of the treaty Parties' consent to arbitrate. By submitting two claims to arbitration, first under NAFTA Chapter Eleven and then under CUSMA Annex 14-C, the Claimant twice accepted that it would need to operate within these conditions.

2. Now, dissatisfied with the results of its choices, the Claimant comes to this Tribunal, blaming Canada, and asks that the Tribunal sit as both a court of inherent jurisdiction and a court of equity to create jurisdiction where it does not exist in the treaties in order to ensure that WCC "has its day in court".[1] However, tribunals constituted under CUSMA Annex 14-C and NAFTA Chapter Eleven are not vested with residual jurisdiction to ensure that every claimant "has its day in court". Nor do they sit as courts of equity.

3. Instead, this Tribunal can only find jurisdiction if the Claimant establishes that the claim it submitted to arbitration on October 14, 2022 ("2022 NOA" or "2022 Claim") meets the specific jurisdictional requirements of the treaties the Claimant has invoked. Canada demonstrated in its Memorial on Jurisdiction ("Memorial") that the Claimant has not done so. In its Response to Canada's Memorial on Jurisdiction ("Response"), the Claimant again fails to meet its burden.

4. On the facts, the Claimant writes out the central role that its own decisions played in the procedural history, beginning with its submission of a claim to arbitration against Canada under NAFTA Chapter Eleven on November 19, 2018 ("2018 NOA" or "2018 Claim"). The Claimant then sold the 2018 NOA to Westmoreland Mining Holdings LLC ("WMH") in the context of its U.S. bankruptcy case, without regard for the impact of such sale under international law. Canada was not a party to WCC's bankruptcy proceeding and was not aware of WCC's choice to sell the 2018 NOA

[1] The Claimant repeats this phrase "day in court" eight times in its Response. Claimant's Response to Memorial on Jurisdiction, 20 September 2023 ("Claimant's Response on Jurisdiction"), ¶¶ 4, 187, 206, 207, 210, 222, 232.

at that time. Nor did Canada cause WCC to file for bankruptcy protection in the U.S.[2] This, too, was a choice of the Claimant's, informed by years of its own business decisions in a sector undergoing major transition across jurisdictions due to a variety of factors, including new technologies, evolving commercial considerations, and regulatory changes.

5. The Claimant and WMH next put WMH forward as the claimant that would pursue a NAFTA claim. This was not Canada's idea. WMH had purportedly purchased a claim that it thought it could pursue, based on advice it received, and WCC was going to wind down its affairs. The Claimant and WMH notified Canada of their chosen approach through an amended Notice of Arbitration and Statement of Claim that revised the style of cause from *Westmoreland Coal Company v. Canada* to *Westmoreland Mining Holdings v. Canada* (the "Attempted Amendment").

6. While Canada objected to the Attempted Amendment as an impermissible amendment to a notice of arbitration, WMH and WCC had expressed a clear desire for WMH to pursue a claim instead of WCC. In this light, Canada made a proposal for a procedurally efficient way forward: WMH could use the Attempted Amendment as its notice of intent to submit a claim to arbitration, then file its own notice of arbitration, and WCC would withdraw its 2018 Claim. Canada expressly and broadly reserved its right to raise jurisdictional objections with respect to the 2018 Claim, and any future claim, including a potential WMH claim.

7. WCC and WMH were under no obligation to accept Canada's proposal. Indeed, they disagreed with Canada's view of the scope of acceptable amendments. They could have rejected Canada's proposal or made a counter-proposal. That is not what they chose to do. Instead, WCC withdrew its claim, and WMH submitted its own claim to arbitration. The result of these choices was the final award issued in *Westmoreland Mining Holdings LLC v. Canada* ("*WMH*"): NAFTA Chapter Eleven did not permit WMH to pursue its claim.

[2] **RLA-001**, *Westmoreland Mining Holdings v. Government of Canada* (ICSID Case No. UNCT/20/3), Final Award, 31 January 2022 ("*WMH – Final Award*"), ¶ 167 (describing the claimant's position in that case that "Canada did not push WCC into bankruptcy"). *See also* **R-064**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3) Claimant's Counter-Memorial on Jurisdiction, 26 February 2021 ("*WMH – Claimant's Counter-Memorial*"), ¶ 62; **R-057**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings (Court Docket, Doc. 54), 9 October 2018 [Excerpt] ("Stein First Day Declaration"), ¶¶ 53-63.

8. Dissatisfied with this result, the Claimant rewrites the procedural history by arguing in its Response that Canada "demanded" or "insisted" that WCC withdraw the 2018 Claim,[3] and that Canada waived its right to raise jurisdictional objections with respect to WMH's 2019 Claim.[4] Canada did not demand that WCC withdraw its 2018 NOA and did not waive its right to raise jurisdictional objections.

9. Nor has it ever been for Canada to advise the Claimant on the consequences of the choices it made or was considering making. Disputing parties in litigation are responsible for defending their own interests, and must live with the consequences of their choices – as well- or ill-advised as they may be. The Claimant is a sophisticated business entity which, by its own account, "handled its NAFTA Claim with comprehensive deliberations involving input from outside consultants, external bankruptcy counsel, external NAFTA counsel, and WCC's Board of Directors."[5] Canada's position has consistently been that none of WCC's 2018 Claim, WMH's 2019 Claim, or the 2022 Claim has any merit, and that the conditions of Canada's consent to arbitrate must be met for any claim to proceed. The Claimant's attempts to cast Canada's behaviour as inconsistent, at best, must be rejected. Canada corrects the Claimant's account of the procedural history more completely in **Section II**.

10. On the law, the Claimant reads out treaty requirements it finds inconvenient, reads in principles not found in the treaty terms, and prioritizes un-established principles of equity over the specific conditions of Canada's consent to arbitrate investor-State disputes expressed in the text of CUSMA Annex 14-C and NAFTA Chapter Eleven. The Tribunal must be satisfied that the treaty requirements have been met. If they are not, it cannot pivot and find jurisdiction anyway on principles of equity. The Claimant has not established that its 2022 Claim meets the requirements of CUSMA Annex 14-C and NAFTA Articles 1116(2) and 1117(2), 1121, 1117(1), and 1116(1).

11. In **Section III**, Canada explains that, as a threshold matter, the Claimant's continued attempts to blur the lines between three distinct claims to establish the Tribunal's jurisdiction must be rejected.

[3] Claimant's Response on Jurisdiction, ¶¶ 3, 40, 105, 191, 198, 203.

[4] Claimant's Response on Jurisdiction, ¶¶ 37, 105.

[5] Claimant's Response on Jurisdiction, ¶ 27.

The Claimant refers to the Claim before this Tribunal as interchangeable with both the Claimant's withdrawn 2018 Claim and WMH's dismissed 2019 Claim, going so far as to revise the *Westmoreland Mining Holdings LLC v. Canada* style of cause to "*Westmoreland v. Canada (I)*".[6] Unlike in every other instance in international investment arbitration where subsequent cases are numbered, the claimants in the *WMH* claim and the Claim before this Tribunal are not the same. The *WMH* tribunal is not the "*Westmoreland I*" tribunal, and this case is not "*Westmoreland II*". The 2022 NOA is separate and distinct from both WCC's 2018 NOA and WMH's 2019 NOA. Tellingly, the 2022 NOA includes allegations with respect to new measures and a violation of NAFTA Article 1110 that WCC did not raise in its 2018 NOA and that WMH did not raise in its 2019 NOA.

12. In **Section IV,** Canada explains that the Claimant did not hold a "legacy investment" as required by Paragraph 1 and defined in Paragraph 6(a) of CUSMA Annex 14-C. In its Response, the Claimant asks the Tribunal to read this express and additional jurisdictional requirement out of CUSMA Annex 14-C by arguing that it need only establish that it owned and controlled Prairie Mines & Royalty ULC ("Prairie") at the time of the alleged breaches. The Tribunal cannot rewrite Canada's offer to arbitrate.

13. The Claimant does not dispute that it sold Prairie before CUSMA entered into force. Instead, the Claimant alleges for the first time that it held a "NAFTA claim" that separately qualifies as a protected investment under NAFTA Article 1139. There is no support for the Claimant's circular argument. Neither the terms of CUSMA Annex 14-C and NAFTA Chapter Eleven nor the jurisprudence support the notion that an unproven claim under an investment treaty qualifies for investment protection under that same treaty. Nor has the Claimant established in law or in fact that Canada should be estopped or precluded from raising the express and additional jurisdictional requirement to hold a "legacy investment" in CUSMA Annex 14-C. As a result, the Claimant's 2022 Claim must be dismissed. The Tribunal need not proceed further.

14. In **Section V.A**, Canada explains that the Claimant has further failed to establish that its claim is timely under NAFTA Articles 1116(2) and 1117(2). The Claimant admits that it first acquired the requisite knowledge of breach and loss on November 24, 2016, almost six years before it submitted

[6] Claimant's Response on Jurisdiction, ¶ 2.

its 2022 Claim to arbitration.[7] On its face, the Claimant's claim is time-barred. To avoid this result, the Claimant asks the Tribunal to read into these articles a principle of suspension that does not exist and to accept that any claim submitted to arbitration by any company with "Westmoreland" in its name is one and the same. The Claimant's requests must be rejected. The Claimant cannot rely on a withdrawn claim and a claim brought by an arm's-length claimant to establish that its 2022 Claim is timely.

15. In **Section V.B**, Canada explains that the Claimant has failed to submit waivers contemporaneous with its 2022 NOA, as NAFTA Article 1121 requires. In its Response, the Claimant argues that it did not need to file new waivers in 2022 because the waivers that WCC filed with its 2018 NOA "remain valid and binding to this day".[8] The Claimant is incorrect. The waivers that WCC filed with its 2018 NOA were withdrawn with that NOA in July 2019, and cannot serve as valid waivers for its 2022 NOA. Moreover, the Claimant continues to refuse to confirm whether the individuals who signed the waivers it filed on October 14, 2022 had the power to bind WCC and Prairie on that date. The waivers thus do not meet the specific requirements of NAFTA Article 1121.

16. The Claimant has provided no meaningful response to Canada's second objection under NAFTA Article 1121, which is that the waiver that Prairie filed in *WMH* precludes WCC from bringing a NAFTA Article 1117(1) claim on its behalf here. Canada accepted that waiver as valid for the purposes of the 2019 WMH Claim, it was not withdrawn, and it functions to prohibit the Tribunal from finding jurisdiction over the claim that WCC brings on Prairie's behalf pursuant to NAFTA Article 1117(1).

17. In **Section V.C**, Canada explains that the Claimant has not established that it owned or controlled Prairie when it submitted its claim to arbitration, as NAFTA Article 1117(1) requires. Its position that the only time that a claimant needs to "own or control" the enterprise on whose behalf it brings a claim is at the time of the alleged breach again asks the Tribunal to read out the express terms of Article 1117(1). The treaty is clear: an investor may bring a claim on behalf of an enterprise that it "owns or controls", in the present tense. A claimant must own or control the enterprise at the

[7] Claimant's Response on Jurisdiction, ¶ 151.

[8] Claimant's Response on Jurisdiction, ¶ 232.

time the claim on its behalf is submitted to arbitration. This Claimant did not, and it cannot bring an Article 1117(1) claim on behalf of Prairie.

18. In **Section V.D**, Canada explains that the Claimant has still not articulated a *prima facie* damages claim under NAFTA Article 1116(1). It has only alleged loss that is Prairie's. That is reflective loss that WCC cannot recover under Article 1116. By arguing that Article 1116 permits reflective loss, the Claimant asks the Tribunal to ignore the existence of Article 1117, and entirely disregard the differences between the two types of claims that the NAFTA Parties expressly provided for in those provisions. The Claimant further fails to specify how the challenged measures allegedly resulted in the "total destruction" of its investment. Because the Claimant has failed to articulate a *prima facie* claim of recoverable damages, the Tribunal does not have jurisdiction over its Article 1116(1) claim.

19. Finally, Canada explained in its Memorial that the Tribunal did not have jurisdiction under NAFTA Article 1101(1) over the aspects of the 2022 NOA that related to the Federal Fuel Charge because those measures came into effect only after WCC sold Prairie.[9] In its Response, the Claimant "agrees to withdraw its claim related to the federal fuel charge measure from the arbitration."[10] Canada acknowledges and accepts this withdrawal. Canada further understands that the Claimant has withdrawn at least one of its allegations of violation of NAFTA Article 1110.[11]

20. The consequence of the Claimant's failure to establish that its 2022 Claim meets the requirements of CUSMA Annex 14-C and NAFTA Chapter Eleven is dismissal of the Claim. Canada reiterates its request for relief in **Section VI**.

[9] Canada's Memorial on Jurisdiction and Response to Notice of Arbitration, 28 June 2023 ("Canada's Memorial on Jurisdiction"), ¶¶ 40-43, 142-146.

[10] Claimant's Response on Jurisdiction, ¶ 24.

[11] In its 2022 NOA, the Claimant alleged violations of NAFTA Article 1110 on the basis of: (1) Alberta's "payments to coal-fired electricity units, combined with federal and provincial carbon taxes"; and (2) Alberta's "introduc[tion of] a regulatory scheme to phase out coal by 2030, along with its punishing levies on coal." Claimant's Notice of Arbitration, 14 October 2022 ("Claimant's 2022 NOA"), ¶¶ 91-92. This is the only alleged violation that involved the Federal Fuel Charge.

II. CORRECTIONS TO THE CLAIMANT'S ACCOUNT OF THE PROCEDURAL BACKGROUND

21. Canada set out the procedural background to the Claimant's 2022 Claim in its Memorial, with reference to an evidentiary record.[12] In its Response, the Claimant confirmed its agreement that WCC submitted its 2018 Claim to arbitration under NAFTA Chapter Eleven on November 19, 2018.[13] The 2018 Claim was brought on behalf of WCC and Prairie,[14] and included two waivers (the 2018 waivers), one on behalf of WCC and one on behalf of Prairie.[15] The Claimant further confirmed its agreement that on March 26, 2019, the Claimant appointed Mr. James Hosking, and on May 1, 2019, Canada appointed Professor Zachary Douglas,[16] as the party-appointed arbitrators for WCC's 2018 Claim.

22. However, the Claimant paints a picture of the events that transpired in the following months that leaves the impression that Canada's actions were conducted in bad faith. The Claimant's narrative cannot be reconciled with the record. The Claimant's complete avoidance of responsibility for its own decisions and actions in what eventually led to its voluntary withdrawal of the 2018 Claim cannot be ignored. In what follows, Canada provides further factual context for the Tribunal, so that the record regarding WCC's 2018 Claim and WMH's 2019 Claim is complete and accurate.[17]

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[12] Canada's Memorial on Jurisdiction, ¶¶ 57-76.

[13] Canada's Memorial on Jurisdiction, ¶ 57; Claimant's Response on Jurisdiction, ¶ 23; **R-079**, *Westmoreland Coal Company v. Canada*, Notice of Arbitration and Statement of Claim, 19 November 2018 ("*WCC – 2018 NOA*") and Exhibit 1. The Claimant refers to this NOA in its Response as the "2018 Notice of Arbitration". WCC had submitted its Notice of Intent to Submit a Claim to Arbitration on August 20, 2018.

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

[15] The Claimant refers to these waivers as the "Original Waivers". Claimant's Response on Jurisdiction, ¶ 23.

[16] Claimant's Response on Jurisdiction, ¶ 26. *See also* **C-052**, Letter from Elliot J. Feldman to Scott Little, 26 March 2019; **C-053**, Letter from Scott Little to Elliot J. Feldman, 1 May 2019.

[17] In accordance with Procedural Order No. 1, Canada's Memorial on Jurisdiction also provided a response to the Claimant's Notice of Arbitration. As such, it provided Canada's high-level view of facts relevant to both merits and jurisdictional issues, with a focus on the facts necessary to decide the jurisdictional issues. In light of the bifurcation of the proceedings, and in accordance with Paragraph 14.4 of Procedural Order No. 1, Canada limits its Reply to address only the factual and legal issues pertaining to jurisdictional questions. Canada reserves the right to correct any inaccuracies in the Claimant's account of the facts and law pertaining to liability and damages at a later phase of the proceedings, as necessary.

A. The Claimant Voluntarily Withdrew its 2018 Claim

23. Canada explained in its Memorial that the Claimant withdrew its 2018 Claim on July 23, 2019.[18] In its Response, the Claimant repeats several inaccuracies with respect to the circumstances surrounding the withdrawal of its 2018 Claim, including that the Attempted Amendment constituted a request for "joinder", and that Canada "demanded" or "insisted" that WCC withdraw its 2018 Claim. Neither proposition stands on the facts.

1. The Attempted Amendment Requested a Substitution, Not a Joinder

24. On May 13, 2019, Canada received the Attempted Amendment.[19] The Claimant, its witness, and its expert all allege that the Attempted Amendment requested that WCC's 2018 Claim be asserted by "WCC and WMH jointly".[20] The Attempted Amendment itself establishes that this is incorrect.

25. The covering letter attaching the Attempted Amendment was entitled "*Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim*."[21] Westmoreland Mining Holdings LLC was not added to Westmoreland Coal Company in the name of the case presented by the requestors; it replaced it. Further, the Attempted Amendment was submitted by Elliot J. Feldman of Baker Hostetler "on behalf of Westmoreland Mining Holdings LLC, Westmoreland Canada Holdings Inc., and Prairie Mines & Royalty ULC."[22] The cover page of the Amended Notice of Arbitration and Statement of Claim that accompanied the letter asserted WMH

[18] Canada's Memorial on Jurisdiction, ¶¶ 60-63.

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

[20] Claimant's Response on Jurisdiction, ¶¶ 105, 210; **CWS-1**, Witness Statement of Jeffrey S. Stein, 20 September 2023 ("Stein Witness Statement"), ¶ 10 ("WCC explained that WMH would join WCC as the claimant in the arbitration"); **CER-1**, Expert Report of the Honorable Shelley C. Chapman, 20 September 2023 ("Chapman Report"), ¶ 30 ("On May 13, 2019, WCC requested Canada's consent to add WMH as a claimant in the arbitration that WCC had initiated.").

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

[22] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019, p. 1. The Claimant states in its Response, ¶ 31 that the Attempted Amendment was submitted on behalf of WCC as well. While the Amended NOA does reference WCC, the covering letter states otherwise.

as the Claimant/Investor in the claim, with no reference to WCC.[23] The words "join", "joinder", "add" or "co-claimants" do not appear anywhere in these documents.

26. The covering letter further explained the requestors' reason for making their request: WCC had transferred "substantially all" of its assets to WMH, including "[b]oth Prairie Mines & Royalty ULC and the interests in the NAFTA Chapter 11 claim".[24] According to the covering letter, the Amended Notice of Arbitration and Statement of Claim "reflect[ed] these changes", and expressed the requestors' apparent view at the time that they wanted WMH to pursue a NAFTA claim.[25] That they ended up being unsuccessful does not retroactively change the nature of their request from substitution to joinder.

27. The subsequent correspondence on this issue confirms that both Canada and the parties submitting the Attempted Amendment contemporaneously agreed that the request was for substitution. On July 2, 2019, Canada responded to the Attempted Amendment. In doing so, Canada specifically noted "[t]hat the substitution of a new claimant is an amendment that causes a claim to fall outside the tribunal's jurisdiction".[26] In its response to Canada's letter, the requestors also referred to the "substitution of a new claimant".[27]

28. The Claimant itself has subsequently referred to the Attempted Amendment as a substitution on several occasions, including in materials submitted to the U.S. Bankruptcy Court,[28] and, most

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

[24] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019, p. 1. *See also* Claimant's Response on Jurisdiction, ¶ 33.

[25] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019, p. 1.

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

[27] **R-082**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 1 (also referring to "new claimants").

[28] **R-087**, *In re Westmoreland Coal Company et al.,* Case No. 18-35672 (DRJ) Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim (Court Docket, Doc. 3313), 17 June 2022, ¶ 17 ("Following the attempted transfer of WCC's NAFTA Claim to New Westmoreland pursuant to WCC's reorganization, WCC requested Canada's agreement that New Westmoreland be substituted for WCC in the existing NAFTA arbitration. Canada refused to agree.") (emphasis added). The *WMH* tribunal also understood the Attempted Amendment as a request for substitution. **RLA-001**, *WMH – Award*, ¶ 91 ("On 13 May 2019, Westmoreland, WCHI and Prairie filed a written notification with Canada seeking

recently, in its Response.[29] There should be no doubt that the Attempted Amendment requested a substitution, not a joinder.

2. WCC and WMH Made Choices with Respect to the Treatment of WCC's 2018 Claim

29. The Claimant next attempts to create a narrative that Canada "demanded" or "insisted" that WCC withdraw its 2018 NOA, and that WCC had no or limited agency in that decision.[30] In particular, the Claimant argues that Canada's response to the Attempted Amendment was a demand, and that "WCC [agreed] to withdraw its claim against Canada as a condition of WMH's substitution".[31] The Claimant is mistaken. At no point did Canada "demand" or "insist" that WCC or WMH act in any way. As the correspondence at the time indicates, it was WMH and WCC who made a request for substitution, which Canada opposed. In the circumstances, Canada offered a proposal on a path forward for WMH that would allow WMH to save time by having the Attempted Amendment stand in for its Notice of Intent. There was no substitution.

30. As noted above, the Attempted Amendment reflected the requestors' proposal for effectuating the outcome of WCC's U.S. bankruptcy process with respect to WCC's 2018 NOA – that WMH had purchased substantially all of WCC's assets.[32] WCC's asset sale and subsequent wind-down and dissolution were contemplated even before it filed its 2018 NOA.[33] WCC had agreed to these

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Canada's agreement that WCC's Notice of Arbitration be amended by the substitution of Westmoreland as Claimant.") (emphasis added).

[29] Claimant's Response on Jurisdiction, ¶ 183.

[30] *See* Claimant's Response on Jurisdiction, ¶¶ 34-41.

[31] Claimant's Response on Jurisdiction, ¶ 209.

[32] **R-080**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019, p. 1. The Claimant has confirmed that it "handled its NAFTA Claim with comprehensive deliberation involving input from outside consultants, external bankruptcy counsel, external NAFTA counsel, and WCC's Board of Directors." Claimant's Response on Jurisdiction, ¶ 27.

[33] Moreover, contrary to the Claimant's allegations in its Response, Canada did not cause WCC to file for bankruptcy protection in the United States. As Mr. Jeffrey Stein acknowledged in a contemporaneous declaration submitted to the U.S. Bankruptcy Court, a host of factors contributed to the Claimant's financial decline, including adverse market conditions for the coal sector, increased regulation in the United States and Canada, significant acquisition and expansion efforts by WCC between 2006 and 2016, and coal industry liabilities in the United States. **R-057**, Stein First Day Declaration, ¶¶ 53-63. *See also* **R-064**, *WMH – Claimant's Counter-Memorial*, ¶ 62 ("WCC's bankruptcy was not undertaken to obtain any legal advantage under the treaty. WCC had taken on too much debt and began negotiating with its Secured Creditors in 2018 to see whether it could restructure its debt to preserve liquidity. […] The restructuring was

outcomes with its key creditors[34] and had explained them to the U.S. Bankruptcy Court prior to November 19, 2018.[35] The proposal subsequently made to Canada was clear: the requestors wanted to remove WCC from what they viewed as "the claim" and replace it with WMH, the subsequent owner of Prairie and its assets. WCC was going to wind down. As Mr. Stein explains to this Tribunal, from his perspective, the Attempted Amendment was "consistent with the intended transfer of the NAFTA claim" in WCC's bankruptcy process.[36]

31. As explained in its Memorial, Canada opposed the requested substitution on the grounds that it was an impermissible amendment to a claim under Article 20 of the 1976 UNCITRAL Rules.[37]

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undertaken for ordinary business purposes."); **RLA-001**, *WMH – Award*, ¶ 167 (describing the claimant's position in that case that "Canada did not push WCC into bankruptcy".).

[34] Specifically, WCC had concluded a Restructuring Support Agreement with its key creditors on October 9, 2018, the same date it filed its petition for bankruptcy. *See* **R-068**, *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ), Restructuring Support Agreement, Exhibit A to Stein First Day Declaration (Court Docket, Doc. 54), 9 October 2018 [Excerpt], pp. 74-75. *See also* **R-057**, Stein First Day Declaration, ¶ 78.

[35] **R-057**, Stein First Day Declaration, ¶ 78; **C-070**, *In re Westmoreland Coal Company et al.* Case No. 18-35672 (DRJ), Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto (Court Docket, Doc. 354), 2 November 2018, p. 7 of 148 ("The Plan and Disclosure Statement contemplate (a) the sale and transfer of substantially all of the WLB Debtors' assets and equity interests, (b) efficient distributions to their creditors, and (c) a subsequent wind-down of the WLB Debtors' businesses and affairs upon distribution of the sale proceeds pursuant to the Plan."). Canada was not a party to WCC's bankruptcy proceedings.

[36] **CWS-1**, Stein Witness Statement, ¶ 10. Mr. Stein appears to further confirm that WCC's contemplated wind-down was part of its calculus at the time. **CWS-1**, Stein Witness Statement, ¶ 7 ("WCC would become a shell of its former self [and] would lack the infrastructure necessary to extract value from its remaining assets, including its legal claims"). The Claimant's actions in this arbitration belie that assertion. If WCC has sufficient "infrastructure" to submit a claim to arbitration in 2022, it surely could have had the same ability in 2018.

[37] Canada's Memorial on Jurisdiction, ¶ 59. The Claimant's attempt to re-litigate the merits of Canada's position before this Tribunal must be rejected. *See* Claimant's Response on Jurisdiction, ¶¶ 33, 35, 36, fn. 280. Not only is the question moot because WCC withdrew its 2018 Claim and WMH submitted its 2019 Claim to arbitration, but the Claimant has neither supported its allegation that Canada has a "misconstrued reading" of Article 20 nor established any infirmity in the authorities Canada relied on. While the Claimant attempts to dismiss *Merrill & Ring* as irrelevant based on a different fact pattern, its argument does not displace the applicability of the decision's legal conclusions with respect to the scope of Article 20. As that tribunal held, Article 20 "contains an overall and absolute prohibition against introducing amendments which go beyond the scope of the arbitration clause". **RLA-003**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Decision on a Motion to Add a New Party, 31 January 2008, ¶ 18. The tribunal then went on to decide whether, on the facts of that case, the amendment was compatible with the scope of the arbitration clause found in Section B of NAFTA Chapter Eleven (*see* ¶ 19). Substituting WMH had for WCC was an amendment that would have gone beyond the scope of the arbitration agreement. Finally, the Claimant's argument that the *Raymond International* decision should not be relied on merely because there was a dissenting opinion must be dismissed. This does nothing to address the majority position, upon which Canada relies. Moreover, if the Claimant's view that the existence of a dissenting opinion entirely discredits the decision of the majority, then it cannot rely on *Renco II*.

Instead, as Canada explained in its July 2, 2019 letter, such an "amendment" was not an amendment at all but "a new claim."[38] Thus, in Canada's view, there were potentially two claims it may need to defend against: one submitted by WCC on November 19, 2018, and another claim by the new owner of Prairie, WMH, which would still need to meet all the requirements of NAFTA Chapter Eleven, including the submission of a notice of intent to submit a claim to arbitration.

32. In this light, and in view of the Attempted Amendment's clearly stated preference for WMH to pursue a NAFTA claim instead of WCC, Canada wrote to the Claimant and proposed the following:

> 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.[39]

33. Canada then offered to engage in consultations with WMH.[40] Far from constituting a "demand" for withdrawal, this proposal was consistent with what WMH and WCC communicated to Canada that they wanted. Canada could have insisted that WMH file a notice of intent following this correspondence and wait an additional 90 days to submit its claim to arbitration. Instead, Canada provided an option that would accelerate the date on which WMH could submit its new claim to arbitration, on the condition that WCC withdraw its own claim. Canada had no preferences with respect to which corporate entity it would be litigating against.

34. WCC and WMH were free to reject Canada's proposal. They were also free to make a counter-proposal if they did not believe that accepting the proposal outright would be in their interest. Given their disagreement with Canada's interpretation of Article 20 of the 1976 UNCITRAL Rules,[41]

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

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

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

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

Canada was under no illusion that WCC and WMH would accept the proposal outright. That understanding is apparent in Canada's comprehensive reservation of "its ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim,"[42] which covered any number of circumstances. Those circumstances included WCC and WMH rejecting Canada's proposal, WCC continuing its claim, and WMH submitting its own parallel claim. Indeed, WMH could have simply filed its own notice of intent without the benefit of the time savings offered by Canada, waited the required 90 days to file its notice of arbitration, and both WCC and WMH could have attempted to pursue claims. Alternatively, they could have insisted that a tribunal decide the issue of whether the substitution of a claimant is a permissible amendment under Article 20 of the 1976 UNCITRAL Rules.

35. However, WCC and WMH did not choose either course of action. They did not attempt to negotiate at all. Consistent with their initial request, counsel for WMH responded to Canada's proposal on July 3, 2019, accepting it and noting that Canada's proposal was "a fair compromise that enabled [them] to proceed with the arbitration without unnecessary procedural delay."[43]

B. The Claimant Misconstrues Certain Facts Relating to the 2019 WMH Claim

36. The Claimant next asserts in its Response that Canada's failure to disclose all possible jurisdictional objections it might raise with respect to a new WMH claim induced WCC to act.[44] In addition, it relies on two aspects of the *WMH* arbitration to argue that the 2019 WMH Claim and the 2018 WCC Claim are the same,[45] and that Canada has conceded that WCC may pursue the 2022 Claim.[46] The Claimant alleges, first that the constitution of the *WMH* tribunal was merely a continuation of WCC's 2018 NOA; and, second, that Canada agreed to allow WCC to bring this

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

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

[44] Claimant's Response on Jurisdiction, ¶ 37.

[45] Claimant's Response on Jurisdiction, ¶¶ 41, 183.

[46] Claimant's Response on Jurisdiction, ¶¶ 10, 46-47, 112-114, 196.

Claim during an exchange between counsel for Canada and the *WMH* tribunal in the jurisdiction hearing in that case. Canada addresses each of these points in turn.

1. Canada Did Not Waive, and Was Not Obligated to Preemptively Raise, Potential Jurisdictional Arguments with Respect to the WMH Claim

37. The Claimant takes issue with the fact that Canada raised jurisdictional objections in the *WMH* arbitration with respect to WMH's standing.[47] It alleges that Canada did not preserve its right to do so, and did not inform WCC or WMH of potential jurisdictional objections that Canada might raise when it made its July 2, 2019 proposal. The Claimant's witness Mr. Stein further states that if he had "known that Canada would argue that WMH did not have standing", he "would have never authorized WCC to withdraw its claim."[48] The Claimant's position is unfounded.

38. First, the Claimant's new position that "Canada did not reserve its right to challenge the tribunal's jurisdiction over WMH"[49] is contradicted by the contemporaneous record. Canada did not waive its ability to raise jurisdictional objections. To the contrary, Canada was clear in its correspondence that it "preserved its ability to raise any jurisdictional objections with respect to the original NOA or any new claim."[50] On its face, the language of the preservation, including the phrase "any new claim", is broad. A plain reading of the phrase leads to the conclusion that it captures any claim other than the original NOA (*i.e.* other than the 2018 Claim), and, specifically, the "new claim" that was in discussion between the parties at the time.

39. The Claimant offers a strained reading of this broad and comprehensive reservation of rights, alleging that it extended only to jurisdictional objections based on WCC's 2018 NOA and "'any new claim' [that] WMH might raise in its Notice of Arbitration that WCC had not already raised in its 2018 NOA".[51] Its reading must be rejected. Canada consistently conveyed that it considered a

[47] **CWS-1**, Stein Witness Statement, ¶ 13; Claimant's Response on Jurisdiction, ¶ 37.

[48] **CWS-1**, Stein Witness Statement, ¶ 15; Claimant's Response on Jurisdiction, ¶ 37.

[49] Claimant's Response on Jurisdiction, ¶ 37.

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

[51] **CWS-1**, Stein Witness Statement, ¶ 13. *See also* Claimant's Response on Jurisdiction, ¶ 37 (alleging that WMH was "not covered by either the 'original NOA' or the 'any new claim' categories"). At no point did WCC or WMH ask Canada

potential WMH claim to be a new claim.[52] Moreover, WCC and WMH themselves responded with similar language at the time. In their July 3, 2019 letter, counsel to WMH asked for confirmation about the modalities for service of "the new Notice of Arbitration and Statement of Claim", and confirmed that they would "proceed with a new Notice of Arbitration and Statement of Claim".[53] It is unreasonable to read "any new claim" as excluding the potential new claim by WMH under discussion in the correspondence.

40. Second, Canada is not required to disclose potential jurisdictional arguments at the time a claimant is attempting to amend a claim, or when it submits a new claim. Indeed, the 1976 UNCITRAL Rules, which governed both the 2018 WCC Claim and the 2019 WMH Claim, only state that pleas going to a tribunal's jurisdiction must be raised no later than the statement of defence.[54] There is no obligation in NAFTA or otherwise that required Canada to disclose potential jurisdictional arguments prior to filing a statement of defence.[55]

41. Third, the Claimant's argument that Canada somehow "sought to preserve – not destroy – the jurisdiction of the tribunal"[56] based on its reliance on Article 20 of the 1976 UNCITRAL Rules is illogical. Canada had no obligation to "preserve the jurisdiction" of a tribunal that had not yet been constituted and whose jurisdiction the Claimant had not yet established.[57] Canada properly relied on

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for clarification with respect to the meaning of Canada's reservation of rights. The fact that WCC and/or WMH made an incorrect assumption based on their own legal advice cannot be faulted against Canada.

[52] *See e.g.*, **R-081**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, pp. 1-2 (objecting to the Attempted Amendment on the basis that it was "a new claim" and "tantamount to the filing of a new claim"; and referring to WMH as "the new claimant in follow-up to its NOI"); **R-083**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019, p. 1 (suggesting next procedural steps "in order to allow for an orderly transition over to the new claim.") (emphasis added).

[53] **R-082**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 2 (emphasis added). Mr. Stein admitted in his witness statement that he "did not participate directly in all of the internal discussions at the time." **CWS-1**, Stein Witness Statement, ¶ 12.

[54] **CLA-003**, 1976 UNCITRAL Rules, Article 21(3).

[55] In fact, this is precisely where Canada raised its jurisdictional objections. *See* **R-031**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Canada's Statement of Defence, 26 June 2020, Section III.

[56] Claimant's Response on Jurisdiction, ¶ 35.

[57] As Canada demonstrated in its Memorial, the burden of establishing jurisdiction is squarely on the Claimant. It is not Canada's burden to "preserve" the jurisdiction of a tribunal as the Claimant alleges. *See* Canada's Memorial on Jurisdiction, ¶¶ 78-80.

Article 20 in response to the inappropriate amendment that WMH and other entities were seeking to make to the 2018 NOA to demonstrate that that particular amendment was outside the jurisdiction of a tribunal that might be constituted to hear the claim as submitted in the 2018 NOA. Such an argument cannot be construed as an implicit agreement by Canada that any future claim submitted by WMH would meet the jurisdictional requirements of NAFTA Chapter Eleven. To the contrary, if anything, Canada's actions should have put WCC and WMH on notice that Canada takes the conditions of its consent to arbitration seriously, and would be looking closely at the jurisdiction of any tribunal ultimately constituted to hear a claim.

42. Fourth, Canada was under no obligation to step into the shoes of the Claimant's or WMH's counsel and warn them of all possible consequences of the withdrawal of the 2018 NOA and the filing of a new claim by WMH. The Claimant and WMH are sophisticated business enterprises with experienced counsel. As the Claimant notes in its Response, "WCC handled its NAFTA Claim with comprehensive deliberations involving input from outside consultants, external bankruptcy counsel, external NAFTA counsel, and WCC's Board of Directors."[58] It was not for Canada to bring to the Claimant's attention all possible defences that Canada may raise so that WCC and WMH could decide how to proceed. These were factors for the Claimant and WMH to analyze and the consequences of those choices are for the Claimant and WMH to bear.

43. Finally, the Claimant's allegation that it would not have withdrawn its 2018 NOA if it had known that Canada was going to raise jurisdictional objections to WMH's 2019 NOA is moot. Even if Canada had agreed to accept the Claimant's own proposal to replace WMH as the claimant in WCC's 2018 NOA (subject to the same reservation of Canada's right to raise any jurisdictional objection), the same jurisdictional issues the *WMH* tribunal decided would have been at issue, and the claim would have been dismissed.

2. Canada and WMH Constituted a Separate Tribunal to Hear the 2019 WMH Claim After WCC Withdrew its 2018 Claim

44. The Claimant further suggests that WMH and Canada did not reappoint the party-appointed arbitrators that WCC and Canada had appointed to hear WCC's claim, but rather that WMH and

[58] Claimant's Response on Jurisdiction, ¶ 27.

Canada merely "picked up" where WCC and Canada had left off in the 2018 WCC Claim.[59] These allegations are incorrect and incomplete, respectively. The factual record is clear that, despite the appointment of the same party-appointed arbitrators in the 2018 WCC Claim to the *WMH* tribunal, these arbitrator appointments were new and the tribunal ultimately constituted to hear WMH's 2019 Claim was separate from the tribunal that was not constituted following WCC's 2018 Claim.

45. On July 2, 2019, when Canada responded to the Claimant's Attempted Amendment and proposed a path forward, Canada proposed that:

> The disputing parties would re-appoint their party appointed arbitrators once a claim is submitted and would then continue the process, in which they are currently engaged, of appointing a tribunal chairperson.[60]

46. WMH confirmed in its response of July 3, 2019 that it intended to provide "confirmation of Mr. James Hosking as [its] party-appointed arbitrator, on August 12, 2019", along with the submission of its new NOA.[61] It did so on August 12, 2019.

47. Canada sought and received from Professor Zachary Douglas a new letter of appointment and statement of independence and impartiality for the newly submitted WMH Claim on August 21, 2019.[62]

48. In the interest of procedural efficiency, Canada and WMH agreed to adopt and continue the procedural discussions with respect to the selection of a tribunal chairperson that Canada and WCC

[59] Claimant's Response on Jurisdiction, ¶ 41.

[60] **R-081,** Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019, p. 2 (emphasis added). *See also* **R-083**, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 12 July 2019, p. 2.

[61] **R-082**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 2. As noted above, WCC had appointed Mr. Hosking as its party-appointed arbitrator for its 2018 Claim on March 26, 2019. *See also* **R-127**, *Westmoreland Coal Company v. Government of Canada*, James Hosking Declaration of Acceptance and Statement of Impartiality and Independence, 25 March 2019.

[62] **R-128**, Letter from Professor Zachary Douglas QC to Trade Law Bureau, "Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC v. Government of Canada (UNCITRAL/NAFTA Chapter 11)", 21 August 2019. Canada had separately appointed Professor Douglas to hear the WCC Claim on May 1, 2019, and obtained a separate letter of appointment and statement of independence and impartiality. **R-129**, Letter from Professor Zachary Douglas QC to Trade Law Bureau, "Westmoreland Coal Company v. Government of Canada (UNCITRAL/NAFTA Chapter 11)", 1 May 2019.

had begun. Indeed, in its July 3, 2019 letter,[63] WMH appeared to reassert WCC's proposal of June 21, 2019 for each side to select one or two candidates from the other party's list of six candidates (previously exchanged and rejected), for the parties to jointly interview them, and if the parties could not agree, to put two names to the party-appointed arbitrators to make the selection.[64] Canada rejected this proposal on August 9, 2019, preferring to "ask the Secretary General of ICSID to serve as appointing authority for the case, pursuant to NAFTA Article 1124."[65]

49. Accordingly, as of August 12, 2019, when WMH submitted its claim to arbitration, WMH had reappointed Mr. Hosking,[66] Canada had not yet reappointed Professor Douglas, and there was no agreed process between Canada and WMH for the selection of a presiding arbitrator. Canada made a detailed proposal with respect to a process for selecting a presiding arbitrator to WMH on August 20, 2019.[67]

50. Canada and WMH ultimately agreed that the Secretary General of ICSID would act as appointing authority for the WMH Claim and would facilitate a strike-and-rank process for the selection of the presiding arbitrator.[68] As a result of that process, Ms. Juliet Blanch was selected as presiding arbitrator on February 24, 2020.[69]

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[63] **R-082**, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 2 ("In the same spirit, we hope Canada will be amenable to our June 21, 2019 proposal for a process to appoint a Tribunal President.")

[64] *See* **R-130**, E-mail from Elliot Feldman to Krista Zeman, "RE: Westmoreland v. Canada – Proposed Candidates for Presiding Arbitrator", 21 June 2019, p. 1.

[65] **C-054**, Letter from Scott Little to Elliot J. Feldman, 9 August 2019. It is evident from this exchange that Mr. Stein's recollection of the proposal WCC made is incorrect. *See* **CWS-1**, Stein Witness Statement, ¶ 14 ("The parties proceeded to reappoint their party appointed arbitrators, who would then appoint a chairperson, all according to Canada's proposal.")

[66] This was later confirmed in the discussions surrounding Procedural Order No. 1 in *WMH*. *See* **R-131**, E-mail from Paul Levine to Krista Zeman, "RE: Westmoreland Mining Holdings LLC v. Government of Canada (ICSID Case No. UNCT/20/3) – Draft P.O. 1/Post Award Redactions", 16 April 2020, p. 1.

[67] **R-132,** E-mail from Benjamin Tait to Elliot Feldman, "RE: Westmoreland Mining Holdings LLC", 20 August 2019, *attaching* **R-133**, Letter from Scott Little to Elliot Feldman, "RE: Westmoreland Mining Holdings LLC v. Government of Canada", 20 August 2019.

[68] **R-134**, Letter from Elliot Feldman to Meg. Kinnear, "Re: Westmoreland Mining Holdings LLC v. Government of Canada", 19 November 2019; **R-135**, Letter from Trade Law Bureau to ICSID, "Re: Westmoreland Mining Holdings LLC v. Government of Canada", 18 December 2019.

[69] **R-136**, Letter from ICSID to parties, "Re: Westmoreland Mining Holdings LLC v. Government of Canada – Request for Appointment (R20190062)", 24 February 2020.

51. Following the constitution of the *WMH* tribunal, Canada and WMH worked to reach agreement on the tribunal's proposed first procedural order and a confidentiality order. In the context of these discussions, Canada and WMH exchanged new statements of independence and impartiality from their party-appointed arbitrators.[70] The *WMH* tribunal issued its Procedural Order No. 1 on April 22, 2020, confirming that Mr. Hosking had been appointed on August 12, 2019, Professor Douglas had been appointed on August 21, 2019, and that Ms. Blanch had been appointed, and, thus the tribunal constituted, on February 24, 2020.[71]

3. Canada Did Not Tell the *WMH* Tribunal That WCC Could Bring the Claim Before This Tribunal

52. The Claimant relies heavily in its Response on a statement made by counsel for Canada at the *WMH* hearing to argue that Canada has conceded that the Claimant can properly bring this claim.[72] This statement must be understood in the context of the particular question that was being addressed, which related to the ability of a claimant to bring a claim under NAFTA Article 1116 if it no longer owns or controls the investment in question.[73]

53. In a bid to probe Canada's position "that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law", Arbitrator Hosking asked Canada whether WCC had any "residual rights to bring a treaty claim?" given the outcomes of WCC's bankruptcy proceedings.[74] In response, counsel for Canada stated:

> So, I think, if I understand your question--and you can let me know if I haven't--it is: What would be WCC's position today? And I think if they no

[70] **R-137**, Email from Krista Zeman to Paul Levine, "RE: Westmoreland Mining Holdings LLC v. Government of Canada", 1 April 2020, *attaching* **R-128**, Letter from Professor Zachary Douglas QC to Trade Law Bureau, 21 August 2019; **R-138**, Zachary-Douglas-QC-CV-5. *See also* **R-131**, Email from Paul Levine to Krista Zeman, "RE: Westmoreland Mining Holdings LLC v. Government of Canada (ICSID Case No. UNCT/20/3) – Draft P.O. 1/Post Award Redactions", 16 April 2020, p. 1; **R-139**, *Westmoreland Mining Holdings, LLC v. Government of Canada*, James Hosking Declaration of Acceptance and Statement of Impartiality and Independence, 16 April 2020.

[71] **RLA-004**, *Westmoreland Mining Holdings, LLC v. Government of Canada* (ICSID Case No. UNCT/20/3), Procedural Order No. 1, 22 April 2020 ("*WMH – PO 1*"), ¶ 3.

[72] Claimant's Response on Jurisdiction, ¶¶ 10, 46-47, 112-114, 196.

[73] **C-046**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3), Jurisdictional Hearing Transcript ("*WMH* – Jurisdictional Hearing Transcript"), Day 2, pp. 278:9-280: 9.

[74] **C-046**, *WMH* – Jurisdictional Hearing Transcript, Day 2, p. 278:15-20.

> longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf.
>
> So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf. As we've mentioned, it is still an entity constituted under the laws of Delaware.[75]

54. In asking the question, the tribunal was under the impression that, while WCC still existed, it was soon to be dissolved.[76] Based on this, the tribunal was not suggesting that WCC should submit a new claim or that Canada was agreeing to such a notion. Instead, it was a theoretical question based on the ability of an entity that no longer owns or controls an investment to commence a claim under NAFTA. The answer reflects the question, which was not inquiring about every other possible jurisdictional requirement a new WCC claim would need to meet. As Canada explained in its Memorial, assessing whether a particular claim meets all necessary jurisdictional requirements can only be determined in the circumstances of a particular claim once it has been submitted to arbitration.[77]

III. THE TRIBUNAL MUST DETERMINE WHETHER IT HAS JURISDICTION OVER THE CLAIM BEFORE IT

55. As Canada explained in its Memorial, the Claimant bears the burden of establishing this Tribunal's jurisdiction to hear the claim before it.[78] To establish the Tribunal's jurisdiction, the Claimant must demonstrate that its 2022 NOA meets the jurisdictional requirements of CUSMA Annex 14-C and NAFTA Chapter Eleven. Prior claims cannot establish this Tribunal's jurisdiction.

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[75] **C-046**, *WMH* – Jurisdictional Hearing Transcript, Day 2, pp. 279:10-280:5.

[76] **C-046**, *WMH* – Jurisdictional Hearing Transcript, Day 2, p. 278:15; **RLA-001**, *WMH – Final Award*, ¶ 93 ("WCC is in the process of being dissolved but at the time of the Hearing on Jurisdiction was still in existence.").

[77] Canada's Memorial on Jurisdiction, fn. 181.

[78] Canada's Memorial on Jurisdiction, ¶¶ 78-79.

56. In its Response, the Claimant continues to blur the lines between three separate claims and the treatment of those claims under international and U.S. law, adopting shifting and self-serving approaches to the terms "NAFTA claim" (no capital "c"), "NAFTA Claim" (with a capital "C"), and "claim" in an attempt to create jurisdiction where none exists. It has used "NAFTA claim" to mean a purported asset,[79] "NAFTA Claim" as a defined term in WCC's bankruptcy proceedings,[80] "NAFTA Claim" as an undefined term in its Response,[81] and "claim" as equivalent to "breach" or "dispute".[82] The Claimant also selectively uses the plural of these terms when it wishes to obscure the clear lines between its withdrawn 2018 Claim, WMH's failed 2019 Claim, and the 2022 Claim.[83] The Claimant's approach cannot be reconciled with the treaty provisions or the facts, and cannot establish this Tribunal's jurisdiction to hear WCC's 2022 Claim.

A. A Claim That is Submitted to Arbitration under CUSMA Annex 14-C and NAFTA Chapter Eleven is a Term of Art

57. Establishing the Tribunal's jurisdiction is a question of international law, to be decided in accordance with the terms of the treaties invoked.[84] In both CUSMA and NAFTA, the terms "claim"

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[79] "NAFTA claim" as an asset: Claimant's 2022 NOA, ¶ 13 ("The facts of this case […] are related to an earlier arbitration in which Canada successfully argued that WMH—which attempted to purchase Westmoreland's NAFTA claim in U.S. bankruptcy proceedings—had no standing."); Claimant's Response on Jurisdiction, ¶ 30 ("Per the terms of the Stalking Horse Purchase Agreement, WMH also attempted to acquire WCC's NAFTA claim, subject to the Applicable Law."); Claimant's Response on Jurisdiction, ¶ 91 ("Claimant's right to the NAFTA claim is a 'claim to money'.").

[80] "NAFTA Claim" as WCC's 2018 NOA defined in the Stalking Horse Purchase Agreement: Claimant's Response on Jurisdiction, ¶ 29 ("The Stalking Horse Purchase Agreement identified the NAFTA Claim […]"); Claimant's NOA, ¶ 66. *See* **R-076**, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672 (DRJ), Notice of Sixth Amendment to the Plan Supplement (Court Docket, Doc. 1621), 18 March 2019 [Excerpt of Exhibit H-6 - Stalking Horse Purchase Agreement] ("Stalking Horse Purchase Agreement"), s. 1.01 (defining the "NAFTA Claim" as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by WCC on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)").

[81] NAFTA Claim, not defined: Claimant's Response on Jurisdiction, ¶ 2 ("Westmoreland Coal Company's ("WCC") NAFTA Claim"); Claimant's Response on Jurisdiction, ¶ 54 ("WCC has initiated this arbitration to re-assert and finally prosecute its NAFTA Claim against Respondent on the merits"). *See also* ¶¶ 105, 150.

[82] Claimant's 2022 NOA, ¶ 13 ("This Notice of Arbitration relies on the same or related claims, facts, and harms […]."); Claimant's Response on Jurisdiction, ¶ 181 ("Contrary to Canada's assertion, the claims asserted by WCC in 2018 and WMH in 2019 were the same, both factually and legally.") (emphasis omitted).

[83] Claimant's Response on Jurisdiction, ¶ 37 ("WCC and WMH would have taken the necessary steps to ensure that the NAFTA claims were prosecuted on the merits, whether by WCC or WMH"); Claimant's Response on Jurisdiction, ¶ 150 ("[L]ess than three combined years have elapsed since WCC became aware of its NAFTA claims", referring to WCC's 2018 NOA, the *WMH* arbitration, and WCC's 2022 NOA).

[84] *See e.g.,* NAFTA Article 1131(1).

and "claim to arbitration" are used with precision and serve to delineate a State's consent to arbitrate. A treaty Party's consent is only provided with respect to "the submission of a claim to arbitration" in carefully outlined circumstances.[85]

58. Under CUSMA, an "investor may only submit a claim to arbitration […] as provided under Annex 14-C".[86] Similarly, under NAFTA, an investor may "submit to arbitration […] a claim" with respect to certain obligations,[87] provided, *inter alia*, that six months have elapsed between "the events giving rise to a claim" and the submission of the "claim to arbitration",[88] and that all conditions precedent to the submission of "a claim" to arbitration have been met.[89] Absent satisfaction of the treaty's conditions – for that claim, by that claimant, at that time – the State has not consented to arbitration.[90]

59. The Claimant makes several assertions about the nature of a "claim" under CUSMA Annex 14-C and NAFTA Chapter Eleven that are unsupported by the text of those treaties. First, the Claimant appears to assume, without any basis, that "claims involving the exact same measures" equate to the

[85] NAFTA Article 1122.

[86] CUSMA Article 14.2(4) ("For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims) […]".) The Annex sets out specific requirements with respect to the submission of certain types of claim to arbitration. Annex 14-C, ¶¶ 1-2 ("1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994 […] 2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; (b) Article II of the New York Convention for an "agreement in writing"; and (c) Article I of the Inter-American Convention for an "agreement".) (emphases added).

[87] NAFTA Articles 1116(1) and 1117(1). As discussed in Section V.A.1 below, such "a claim" "may not" be made outside the three-year limitation period prescribed in Articles 1116(2) and 1117(2).

[88] NAFTA Article 1120.

[89] NAFTA Article 1121. In addition, Article 1137(1) defines the date on which a claim is "submitted to arbitration" under Section B of NAFTA Chapter Eleven, as the Claimant recognizes. *See* Claimant's Response on Jurisdiction, ¶ 158.

[90] At times, the Claimant also adopts this approach to "NAFTA claim". *See* Claimant's 2022 NOA, ¶ 67 ("Accordingly, on July 23, 2019, Westmoreland duly withdrew its NAFTA claim"). *See also* **RLA-019**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶¶ 6.3, 6.22-6.24; **RLA-021**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2016-13) Decision on Jurisdiction and Admissibility, 30 January 2018 (*Resolute – Decision on Jurisdiction*), ¶¶ 242, 244; **RLA-022**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 174-175.

same "claim" for the purposes of a State's consent under CUSMA and NAFTA.[91] However, similarity in allegations of breach and damage in two claims submitted to arbitration by different investors of a Party do not make those claims the same. In fact, NAFTA specifically contemplates that multiple claims by different investors may be submitted to arbitration based on the same underlying measure.[92] For example, Article 1117(3) foresees the possibility of two or more claims "arising out of the same events" – such as when an investor submits a claim on behalf of an enterprise under Article 1117 while another investor or non-controlling investor submits a claim under Article 1116.[93] If the NAFTA Parties had meant "claim" to mean any dispute "arising out of the same events" they would have said so explicitly. That is not what the NAFTA Parties contemplated.

60. Second, the Claimant suggests that one claimant may "prosecute" the claim of another claimant when it alleges that WCC "commenced" and WMH "prosecuted" a single arbitration.[94] Neither CUSMA nor NAFTA contemplate this. To the contrary, Canada's offer to arbitrate is premised on the submission of a particular claim to arbitration by a particular claimant, and is only accepted when

[91] Claimant's Response on Jurisdiction, ¶ 193 ("Here, […] WCC initiated arbitration against Canada in November 2018, raising claims involving the exact same measures at issue in the present arbitration."); Claimant's Response on Jurisdiction, ¶ 181 ("Contrary to Canada's assertion, the claims asserted by WCC in 2018 and WMH in 2019 were the same, both factually and legally.") (emphasis omitted).

[92] *See e.g.*, NAFTA Article 1126 (Consolidation) which contemplates separate claims by different investors that have questions of fact or law in common – such as, for example, where the claims arise out of the same underlying measures. *See also*, **RLA-052**, *Canfor Corporation and others v. United States of America* (UNCITRAL), Order of the Consolidation Tribunal, 7 September 2005 ("*Canfor – Order of the Consolidation Tribunal*"), ¶¶ 18, 21, 24 (describing that the same measures were at issue in all three claims); **RLA-053**, *Corn Products International v. United Mexican States and Archer Daniel Midlands Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)04/1 and ICSID Case No. ARB(AF)/04/5), Order of the Consolidation Tribunal, 20 May 2005, ¶ 1 (describing that the same tax measure was at issue in both claims).

[93] NAFTA Article 1117(3) ("Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.") *See also* **CLA-066**, *Pope & Talbot v. Canada* (UNCITRAL), Award concerning the Motion by Government of Canada respecting the Claim Based Upon Imposition of the "Super Fee", 7 August 2000 ("*Pope & Talbot – Award on Motion*"), fn. 2: ("[C]onsolidation under that NAFTA provision appears to be directed to consolidation of cases involving different investors making similar claims, rather than a single investor making different claims."); **RLA-054**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006) [Excerpts] ("*Kinnear*"), p. 1126-11.

[94] Claimant's Response on Jurisdiction, ¶ 174 ("Thus, the limitations period was suspended during the pendency of the arbitration initially commenced by WCC, and then prosecuted by WMH, until the tribunal issued its award on January 31, 2022.") Despite this characterization, the Claimant also appears to recognize that the *WMH* tribunal "held that WMH could not step into the shoes of the rightful claimant, which was WCC." Claimant's Response on Jurisdiction, ¶ 47.

all of the treaty's requirements have been met with respect to that claimant and that claim. Here, while the Claimant invokes three separate claims that were submitted to arbitration since 2018, only one is before this Tribunal.

61. Third, the Claimant appears to suggest that U.S. law may empower the Tribunal to find jurisdiction with respect to a claim even if the treaties it has invoked do not. For example, it submits that it filed a motion with the U.S. Bankruptcy Court "requesting an order 'authorizing WCC to prosecute the NAFTA Claim'",[95] notwithstanding that the "NAFTA Claim", as defined in the U.S. transaction at issue, was withdrawn under international law.[96] A U.S. court is not empowered to "authorize" a claimant to pursue a claim submitted to arbitration against Canada under CUSMA Annex 14-C or NAFTA Chapter Eleven.[97] It is for a tribunal constituted under those treaties to determine whether the claim before it meets the conditions of Canada's consent to arbitrate, as a matter of international law. Consequently, it is not relevant to this Tribunal's task that a U.S. Bankruptcy Court "specifically has preserved [a claim] in order to effectuate the terms of WCC's

[95] Claimant's Response on Jurisdiction, ¶ 49. The Claimant's expert appears to suggest that Canada somehow accepted the outcome of this motion because it did not object before the U.S. Bankruptcy Court. **CER-1**, Chapman Report, ¶ 35. This suggestion must be rejected. Notwithstanding the irrelevance of the Bankruptcy Court's judgment to this Tribunal's task, even if Canada had wanted to object to the motion, it had no opportunity to do so because the timelines were too short. The motion was filed and served on most parties on June 17, 2022. On June 23, 2022, the order approving the motion was signed by the motion's judge. The motion was only sent to Canada by First Class US mail on this same day. The order was formally entered on June 27, 2022. Thus, assuming that the motion was properly sent (which Canada has reason to doubt, having found no internal record of receipt), there was no opportunity for Canada to object. *See* **R-140**, *In re Westmoreland Coal Company, et al.,* Case No. 18-35672 (DRJ), Affidavit of Service (Court Docket, Doc. 3314), 22 June 2022; **C-094**, *In re Westmoreland Coal Company, et al.,* Case No. 18-35672 (DRJ), Supplemental Affidavit of Service (Court Docket, Doc. 3316), 27 June 2022; **R-088**, *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ), Order (Court Docket, Doc. 3315), 27 June 2022.

[96] The Claimant inconsistently refers to an undefined "NAFTA claim" and the "NAFTA Claim", which was specifically defined in the Stalking Horse Purchase Agreement to mean WCC's 2018 NOA, and which was withdrawn. *See* **R-076**, Stalking Horse Purchase Agreement, s. 1.01, p. 139 of 661 (defining "NAFTA Claim" as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by [Westmoreland Coal Company] on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)."). The Stalking Horse Purchase Agreement defined the term "Westmoreland" as "Westmoreland Coal Company, a Delaware corporation". *See* **R-076**, Stalking Horse Purchase Agreement, p. 129 of 661.

[97] The Claimant and its expert appear to recognize this. *See e.g.*, Claimant's Response on Jurisdiction, ¶ 100 ("That is, the NAFTA Claim remains with WCC to this day, since WMH could not assert the NAFTA Claim pursuant to the applicable non-bankruptcy law (*i.e.*, the NAFTA)."); **CER-1**, Chapman Report, ¶ 43 ("U.S. bankruptcy law does not alter the limitations imposed by applicable non-bankruptcy law as to whether the NAFTA Claim could be asserted by WMH".)

reorganization plan",[98] or found that the imprecisely defined "NAFTA Claim never transferred to WMH".[99] If the 2022 Claim does not meet the jurisdictional requirements of CUSMA and NAFTA as a matter of international law, U.S. law does not operate to create jurisdiction otherwise.

B. There Is Only One Claim Before This Tribunal

62. The Claimant has submitted its 2022 Claim to arbitration under CUSMA Annex 14-C and NAFTA Chapter Eleven. As Canada demonstrated in its Memorial,[100] the Claimant's attempts to blur the lines between three separate claims in its bid to establish jurisdiction must fail.

63. WCC submitted the first claim to arbitration against Canada on November 19, 2018.[101] On July 23, 2019, WCC decided to withdraw that claim.[102] At the time, only party-appointed arbitrators had been appointed, and no agreement had been reached on either a presiding arbitrator or a method for selection of the presiding arbitrator.[103] Because the claim was withdrawn, no tribunal was constituted, no case number was assigned to the file, no administering authority was chosen, no tribunal deposit was made, and no procedural orders or awards were issued. Accordingly, contrary to the Claimant's argument now, WCC did not "diligently […] pursue" the 2018 Claim.[104] It withdrew the 2018 Claim on July 23, 2019.

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[98] Claimant's Response on Jurisdiction, ¶ 206. Nor is it this Tribunal's task to ensure that the bargain that the Claimant and its creditors struck in WCC's bankruptcy process is upheld. While that may be a concern of a U.S. bankruptcy court, which is a court of equity, that is not this Tribunal's charge. *See e.g.*, **R-141**, *In re M & M Transp. Co.*, 13 B.R. 861 (1981) (United States Bankruptcy Court, S.D. New York), 2 September 1981, p. 867; **R-142**, *In re Maxko Petroleum, LLC*, 425 B.R. 852 (2010) (United States Bankruptcy Court, S.D. Florida, Fort Lauderdale Division), 12 March 2010, p. 876 (both explaining that U.S. bankruptcy courts sit as courts of equity).The Claimant's expert's opinion that "[e]quity dictates that the NAFTA Claim should be heard on the merits" is similarly inapposite. **CER-1**, Chapman Report, ¶¶ 49-51.

[99] Claimant's Response on Jurisdiction, ¶ 53.

[100] Canada's Memorial on Jurisdiction, ¶¶ 57-76.

[101] Canada's Memorial on Jurisdiction, ¶ 57; **R-079**, *WCC – 2018 NOA*, and Exhibit 1. WCC had submitted its Notice of Intent to Submit a Claim to Arbitration on August 20, 2018.

[102] Canada's Memorial on Jurisdiction, ¶ 62; **R-084**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", 23 July 2019, p. 1 ("On behalf of Westmoreland Coal Company and pursuant to the appended July 12, 2019 letter, we hereby withdraw Westmoreland Coal Company's November 19, 2018 Notice of Arbitration and Statement of Claim.")

[103] *See* Section II.B.2, above.

[104] Claimant's Response on Jurisdiction, ¶ 54.

64. WMH separately submitted the second claim to arbitration twenty days later, on August 12, 2019.[105] A tribunal was constituted to hear that claim on February 24, 2020, the parties agreed to have ICSID administer the arbitration, and it was assigned a case number (ICSID Case No. UNCT/20/3). The tribunal issued procedural orders,[106] and ultimately issued a Final Award dismissing WMH's claim in its entirety for lack of jurisdiction.[107]

65. The Claimant's attempts to combine its 2018 Claim with WMH's 2019 Claim must be rejected.[108] WCC and WMH each submitted a separate claim to arbitration. The fact that Canada and WMH appointed the same part appointed arbitrators for the WMH 2019 Claim as Canada and WCC had appointed for the 2018 Claim does not mean the claims are the same.[109] Nor can WMH have asserted "the exact same claims that WCC originally filed".[110] Similarity in the allegations of breach and damage between WCC's 2018 NOA and WMH's 2019 NOA does not make them the same claim that was submitted to arbitration.

66. WCC submitted a separate Notice of Arbitration on October 14, 2022.[111] There can be no question that the current Claim is separate and distinct from both the withdrawn 2018 WCC Claim and the dismissed 2019 WMH Claim. This Claim was submitted by a new Notice of Arbitration,[112] has a separate tribunal, is under the 2013 UNCITRAL Rules (as opposed to the 1976 UNCITRAL

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

[106] *See e.g.*, **RLA-004**, *WMH – PO 1*; **RLA-055**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3), Confidentiality Order, 22 April 2020; **RLA-056**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3), Procedural Order No. 2 (Hearing Protocol), 21 September 2020; **RLA-005**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3), Procedural Order No. 3 (Decision on Bifurcation), 20 October 2020.

[107] **RLA-001**, *WMH – Final Award*.

[108] For example, the Claimant offers a short form for the *WMH* award that erases the distinct claimants: "*Westmoreland I*". Claimant's Response on Jurisdiction, ¶ 2.

[109] As Canada established above, WMH appointed Mr. Hosking as the arbitrator to hear its claim on August 12, 2019, and Canada appointed Professor Douglas to the tribunal on August 21, 2019. These were separate appointments from WCC's March 26, 2019 appointment of Mr. Hosking and Canada's May 1, 2019 appointment of Professor Douglas to hear the WCC 2018 Claim. *See* Section II.B.2, above.

[110] Claimant's Response on Jurisdiction, ¶ 182.

[111] As discussed in Section V.B.1, below, because the 2022 NOA was not accompanied by valid waivers, the claim has not yet been properly submitted to arbitration.

[112] Claimant's 2022 NOA.

Rules for the two other Claims),[113] has its own ICSID case number (UNCT/23/2), and its own procedural orders.[114] It also challenges new measures, and alleges a new violation of NAFTA Article 1110, which neither of the 2018 WCC or 2019 WMH Claims alleged.[115] The Claimant has no grounds to argue otherwise. This is the only Claim upon which this Tribunal's jurisdiction can be found. As Canada established in its Memorial, and elaborates in the sections that follow, the Claimant has failed to meet its burden to establish this Tribunal's jurisdiction. Its Claim must be dismissed.

IV. THE CLAIMANT HAS NOT ESTABLISHED THAT THE TRIBUNAL HAS JURISDICTION OVER ITS CLAIM UNDER CUSMA ANNEX 14-C

67. As Canada explained in its Memorial, the Claimant must establish jurisdiction under both CUSMA Annex 14-C and NAFTA Chapter Eleven. CUSMA Annex 14-C permits a claimant from the U.S. or Mexico to submit a claim to arbitration against Canada only "with respect to a legacy investment".[116] A tribunal has no jurisdiction under CUSMA over a claim brought by a claimant that did not hold its investment on July 1, 2020, when CUSMA entered into force.[117] It is undisputed between the parties that WCC sold its interests in Prairie in 2019. The Claimant did not own or control this enterprise or any other investment it allegedly held indirectly through Prairie on July 1, 2020. Thus, WCC did not hold a "legacy investment" and cannot establish the Tribunal's jurisdiction under CUSMA Annex 14-C.

68. In its Response, the Claimant advances three arguments in its attempt to establish the Tribunal's jurisdiction under CUSMA Annex 14-C: first, CUSMA Annex 14-C does not require a claimant to hold the investment at issue at the time CUSMA entered into force; second, even if it does, WCC meets this requirement as it held the so-called "NAFTA Claim" as an independent investment on

[113] Procedural Order No. 1, 5 May 2023, s. 9.1(b).

[114] Procedural Order No. 1, 5 May 2023; Procedural Order No. 2, 5 May 2023.

[115] While WCC's 2018 notice of intent alleged a violation of Article 1110, this allegation was not asserted in the NOA it submitted to arbitration on November 19, 2018.

[116] Canada's Memorial on Jurisdiction, ¶¶ 86-90.

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

July 1, 2020; and third, Canada should be estopped or precluded from advancing its jurisdictional objection under CUSMA Annex 14-C.[118] None of these arguments withstands scrutiny.

A. The Claimant's Legal Analysis of CUSMA Annex 14-C is Flawed

69. While the Claimant appears to recognize that the investment in question must have existed on July 1, 2020 to qualify as a "legacy investment" under CUSMA,[119] it also claims that "Canada seeks to introduce new requirements" into CUSMA by arguing that "WCC also needs to show that it owned or controlled the investment as of July 1, 2020."[120] Disregarding the plain text of CUSMA Annex 14-C, the Claimant prioritizes NAFTA as "[t]he starting point" for its analysis,[121] and claims that there is "one relevant time for evaluating who owns the investment, *i.e.* the time of the measures."[122]

70. The Claimant's interpretation of the term "legacy investment" is incorrect. It asks the Tribunal to read out the express textual requirement in CUSMA Annex 14-C for a claimant to hold the investment when CUSMA entered into force. While holding the investment at the time of the alleged breach is necessary to meet one pre-condition under NAFTA Chapter Eleven, it is insufficient to establish jurisdiction under CUSMA Annex 14-C. The Claimant's invocation of NAFTA Articles 1101(1) and 1139, and CUSMA's object and purpose, do not support its attempt to read out the express text of CUSMA Annex 14-C.

1. The Claimant Asks the Tribunal to Read Out the Express Text of CUSMA Annex 14-C

71. NAFTA has been terminated. The only consent that can ground the Tribunal's jurisdiction is found in Paragraph 1 of CUSMA Annex 14-C. It states that "[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with [NAFTA Chapter Eleven] and this Annex".[123] Paragraph 6(a) of CUSMA Annex 14-C defines the key term "legacy

[118] Claimant's Response on Jurisdiction, ¶¶ 63-64.

[119] Claimant's Response on Jurisdiction, ¶¶ 57, 61.

[120] Claimant's Response on Jurisdiction, ¶ 63.

[121] Claimant's Response on Jurisdiction, ¶ 66.

[122] Claimant's Response on Jurisdiction, ¶ 75. *See also* ¶¶ 64-87.

[123] CUSMA Annex 14-C, ¶ 1 (emphasis added).

investment". Thus, the starting point to determine if Canada has consented to arbitrate this Claim is CUSMA Annex 14-C, not NAFTA Chapter Eleven. While WCC must establish that its claim meets the pre-conditions of NAFTA Chapter Eleven, it cannot proceed directly to that analysis without first establishing that it held a "legacy investment" under CUSMA Annex 14-C.

72. Annex 14-C includes preconditions to jurisdiction that are additional to those found in NAFTA Chapter Eleven.[124] In particular, it defines a "legacy investment" as "an investment of an investor of another Party" that, among other things, was "in existence on the date of entry into force of this Agreement". As Canada explained in its Memorial, to establish a tribunal's jurisdiction, Paragraphs 1 and 6 of CUSMA Annex 14-C require a claimant to have held the investment when CUSMA entered into force, on July 1, 2020.[125] Finding otherwise would ignore the text of CUSMA Annex 14-C, and instead focus exclusively on whether WCC was a qualifying "investor" with a qualifying "investment" under NAFTA Chapter Eleven.[126] The Tribunal has no scope to re-write Canada's offer to arbitrate or to deem Canada to have "accepted" an offer it has not made.[127]

2. It is Necessary but Not Sufficient for the Claimant to Have Held the Investment at the Time of the Alleged Breach

73. The Claimant mischaracterizes investment jurisprudence as suggesting the only temporal condition on a claimant's ownership or control of an investment is the requirement to prove the claimant held the investment at the time of the alleged breach.[128] This is incorrect. The Claimant must

[124] Canada's Memorial on Jurisdiction, ¶ 81.

[125] Canada's Memorial on Jurisdiction, ¶¶ 82-90.

[126] The disputing parties agree that to establish the Tribunal's jurisdiction, the Claimant must prove it held the investment when the alleged breaches occurred, under NAFTA Articles 1116(1) and 1117(1). *See e.g.*, Claimant's Response on Jurisdiction, ¶¶ 74-75. The Claimant mischaracterizes Canada's position in previous cases by stating Canada acknowledged that "an investor can bring a claim on its own behalf even if the investor no longer owns the claim." (emphasis added). Instead, Canada's position, such as in *WMH*, has concerned ownership or control over the investment. *See e.g.*, **R-086**, *Westmoreland Mining Holdings, LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Canada's Memorial on Jurisdiction, 18 December 2020, ¶¶ 48-55; **R-143**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3), Canada's Reply on Jurisdiction, 9 April 2021, ¶ 69.

[127] **RLA-057**, *Giovanni Alemanni and others v The Argentine Republic* (ICSID Case No ARB/07/8), Decision on Jurisdiction and Admissibility, 17 November 2014 ("*Alemanni – Decision on Jurisdiction*"), ¶ 305.

[128] The Claimant contends that "the view of the overwhelming majority of investment tribunals, both under NAFTA and other investment treaties" is that a claimant needs to hold the investment only at the time of the alleged breach. Claimant's Response on Jurisdiction, ¶ 76. It further contends that "there is no textual basis in the NAFTA to depart from the well-established principle" that a claimant must hold the investment at the time of the alleged breach. Claimant's Response on Jurisdiction, ¶ 83. This is a straw man argument. Canada does not seek to depart from the principle. Instead, WCC must

meet the jurisdictional conditions in both CUSMA Annex 14-C and NAFTA Chapter Eleven for its claim to proceed. As such, satisfying NAFTA's jurisdictional requirements is necessary but not sufficient to establish this Tribunal's jurisdiction. [129]

74. The Claimant has not cited to any jurisprudence interpreting and applying the term "legacy investment" in CUSMA Annex 14-C. The Claimant cites only to decisions addressing NAFTA Chapter Eleven alone, or other investment treaties that were not seized with interpreting and applying CUSMA's express jurisdictional requirement to have a "legacy investment".[130] Such decisions do not offer instructive guidance to resolve the question of whether an investor must have held the investment on July 1, 2020 to establish jurisdiction under CUSMA Annex 14-C.

75. Nor do the authorities the Claimant cites preclude the possibility that a different investment treaty or investment chapter – such as CUSMA – may impose an additional jurisdictional requirement on when a claimant must own or control the investment.[131] While the decisions cited by the Claimant found that holding the investment at the time of the alleged breach is necessary to establish jurisdiction under one specific treaty, they did not hold that this was the only temporal requirement

satisfy the jurisdictional conditions in both treaties. This includes holding a "legacy investment" under CUSMA Annex 14-C.

[129] Moreover, as discussed in Section V.C, below, NAFTA Article 1117(1) also requires a claimant to own or control an enterprise on whose behalf it brings a claim at the time it submits the claim to arbitration.

[130] Claimant's Response on Jurisdiction, ¶¶ 76-79.

[131] *See e.g.*, Claimant's Response on Jurisdiction, ¶ 74, *citing* **CLA-011**, *Daimler v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012 ("*Daimler – Award*"). The treaty at issue in that case does not contain provisions analogous to CUSMA Annex 14-C. **RLA-058**, Treaty Between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments, signed 9 April 1991. None of the following cases addressed treaties containing an analogous requirement to that in CUSMA Annex 14-C to hold the investment when the treaty entered into force either: **CLA-010**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award, 31 March 2011 ("*GEA Group – Award*"); **CLA-009**, *WNC Factoring v. Czech Republic* (PCA Case No. 2014-34), Award, 22 February 2017 ("*WNC – Award*"); **CLA-012**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Award, 27 December 2016 ("*Blusun – Award*"); **CLA-015**, *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, 19 September 2011 ("*Vöcklinghaus – Award*"); **CLA-017**, *Petrobart Ltd v. The Kyrgyz Republic (II)* (SCC Case No. 126/2003), Award, 29 March 2005 ("*Petrobart II – Award*"); **CLA-014**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL), Decision on Jurisdiction,30 April 2010 ("*Oostergetel – Decision on Jurisdiction*"); **CLA-016**, *Dan Cake S.A. v. Hungary* (ICSID Case No. ARB/12/9), Decision on Jurisdiction and Liability, 24 August 2015 ("*Dan Cake – Decision on Jurisdiction and Liability*"); **CLA-006**, *EnCana v. Ecuador* (LCIA Case No. UN3481, UNCITRAL), Award, 3 February 2006 ("*EnCana – Award*"); **CLA-007**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006 ("*Jan de Nul – Decision on Jurisdiction*").

to establish a tribunal's jurisdiction when more than one investment treaty is at issue. The Claimant's attempts to misconstrue the tribunals' findings in this way must be rejected.[132]

3. NAFTA Articles 1101(1) and 1139, and CUSMA's Object and Purpose, Do Not Support the Claimant's Attempt to Ignore the Requirement to Hold a "Legacy Investment"

76. The Claimant further advances misguided arguments on NAFTA Articles 1101(1) and 1139, and on CUSMA's object and purpose. None of them support its attempt to read out the express and additional requirement in CUSMA Annex 14-C that a claimant hold the investment at the time CUSMA entered into force.

77. On NAFTA Article 1101(1), the Claimant asserts that Canada "suggests" a challenged measure must have had a legally a significant connection with a claimant on July 1, 2020.[133] The Claimant misunderstands Canada's legal argument, which noted that CUSMA Annex 14-C Paragraph 6(a) and NAFTA Article 1101(1)(b) both use the term "investment of an investor of another Party".[134] As such, jurisprudence with respect to NAFTA Article 1101(1)(b) offers instructive guidance for the Tribunal's interpretation of the same term contained in CUSMA Annex 14-C Paragraph 6(a).

78. NAFTA tribunals have applied the "legally significant connection" test in Article 1101(1)(b) to require a connection between a challenged measure and the investment <u>of the claimant</u> – not merely

[132] *See e.g.*, Claimant's Response on Jurisdiction, ¶ 75 ("By referencing 'the' critical time, the *Gallo* and [*WMH*] tribunals made clear that there is one relevant time for evaluating who owns the investment, i.e., the time of the measures."). The *WMH* tribunal did not make this statement, expressly or implicitly. The tribunal did not foreclose the possibility that a claimant filing a claim under CUSMA Annex 14-C must establish it owned or controlled the investment when the treaty entered into force, as the issue was never put to that tribunal. The *WMH* tribunal instead explained, "the issue in dispute in this case [is] whether the investor at the time the challenged measures are adopted or maintained must be the same entity as the investor at the time the arbitration is commenced." **RLA-001**, *WMH – Final Award*, ¶ 195. The same holds true for the *Gallo* tribunal's analysis, which focused only on whether a claimant must hold the investment at the time of the alleged breach. **RLA-011**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶¶ 325-327.

[133] Claimant's Response on Jurisdiction, ¶ 116.

[134] CUSMA Annex 14-C, ¶ 6(a) states: "For the purposes of this Annex: (a) "legacy investment" means an <u>investment of an investor of another Party</u> in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement; […]". (emphasis added). NAFTA Article 1101(1)(b) uses the term in the plural, stating: "[t]his Chapter applies to measures adopted or maintained by a Party relating to: […] (b) <u>investments of investors of another Party</u> in the territory of the Party; […]" (emphasis added).

the investment of any investor.[135] When this same reasoning is applied in the CUSMA Annex 14-C context, the "investment of an investor of another Party" in Paragraph 6(a) must have been the Claimant's "investment" on July 1, 2020 in order for the Claimant to establish that it holds a "legacy investment".[136] The Claimant offers no response to this conclusion.

79. On NAFTA Article 1139, the Claimant invokes the definitions of "investor of a Party" and "investment" in an attempt to read out the additional, express requirement in CUSMA Annex 14-C.[137] It notes that the definition of the term "investor of a Party" includes a reference to the past tense – "has made an investment" – and that the term "investment" does not require that the investment be held by an investor on the date of entry into force of the treaty or the notice of arbitration.[138] Yet the fact that the definitions of "investor of a Party" or "investment" in NAFTA do not contain the temporal condition in CUSMA Annex 14-C Paragraph 6(a) does not authorize the Tribunal to read out the latter.

80. Neither definition in NAFTA Article 1139 contains an exhaustive set of pre-conditions to Canada's consent to arbitrate under CUSMA Annex 14-C (or under NAFTA itself). While the definitions address certain conditions on personal jurisdiction and subject-matter jurisdiction, they do not address all the express conditions on temporal jurisdiction contained in other provisions or applicable treaties. Thus, qualifying as a protected "investor" holding an "investment" at one time does not mean the Claimant meets all other jurisdictional requirements of CUSMA Annex 14-C or NAFTA Chapter Eleven.

[135] *See* Canada's Memorial on Jurisdiction, fn. 162.

[136] Canada's Memorial on Jurisdiction, ¶¶ 88-89.

[137] Claimant's Response on Jurisdiction, ¶¶ 70-72.

[138] Claimant's Response on Jurisdiction, ¶¶ 70-72. The Claimant's argument relies on certain Canadian proposals to define the term "investment" in NAFTA Article 1139 during NAFTA negotiations in the early 1990s. Claimant's Response on Jurisdiction, ¶ 73. For the reasons addressed in this section, these arguments are irrelevant to the Tribunal's task.

81. On CUSMA's object and purpose, the Claimant raises many arguments to support its flawed interpretation on Annex 14-C.[139] None of them supplants the clear text requiring that a claimant hold the "legacy investment" when CUSMA entered into force.

82. First, the Claimant contends, with no evidentiary support, that the purpose of CUSMA "was to continue to provide NAFTA protection to existing investments",[140] and "to ensure that investors received the same NAFTA protection".[141] As such, the Claimant alleges that the Tribunal should apply the same approach to defining "investor" and "investment" under CUSMA as applied under NAFTA, and, specifically, to focus exclusively on whether the investor held the investment at the time of the alleged breach.[142] Yet the question here concerns the text of CUSMA Annex 14-C, not the definition of "investors" and "investments" in NAFTA.

83. Second, the Claimant contends that the purpose of CUSMA's three-year transitional period was to provide "a bridge" from NAFTA to CUSMA,[143] such that the applicable test under CUSMA is to consider whether "immediately prior to July 1, 2020", a claimant could have filed a NAFTA claim.[144] This argument is baseless. The jurisdictional question under CUSMA before this Tribunal relates to the ownership or control of the investment on July 1, 2020, not immediately prior or any time before.

84. The Claimant further resorts to allegations that Canada's interpretation of the clear terms of CUSMA Annex 14-C would result in "abrupt" termination[145] and "confusion".[146] Both arguments are misguided. The CUSMA Parties did not "abruptly terminate" investor-State dispute settlement under NAFTA: they offered limited consent to arbitrate disputes arising under NAFTA Chapter Eleven with certain protected investors who held protected investments when CUSMA entered into

[139] Claimant's Response on Jurisdiction, ¶¶ 82-87.

[140] Claimant's Response on Jurisdiction, ¶ 85.

[141] Claimant's Response on Jurisdiction, ¶ 83.

[142] Claimant's Response on Jurisdiction, ¶ 87.

[143] Claimant's Response on Jurisdiction, ¶ 84.

[144] Claimant's Response on Jurisdiction, ¶ 85.

[145] Claimant's Response on Jurisdiction, ¶ 86 (alleging that Canada's interpretation would entail "[a]bruptly terminating the ability of holders of legacy investments to assert claims under Section A of Chapter 11 of NAFTA 1994").

[146] Claimant's Response on Jurisdiction, ¶ 86.

force. Moreover, the CUSMA Parties publicly disclosed CUSMA's text far in advance of the treaty's entry into force.[147] Investors had significant time to review the jurisdictional requirements to determine whether a tribunal would have jurisdiction over their alleged claim if it was submitted to arbitration after CUSMA's entry into force. Rather than creating confusion, CUSMA's express requirement adds clarity and removes doubt over when a claimant must have held the investment to have a qualifying "legacy investment" that may benefit from the limited extension of the CUSMA Parties' offer to arbitrate.

85. Finally, the Claimant unconvincingly invokes the investment promotion objectives of CUSMA's investment chapter to overcome the express hurdles to establishing Canada's consent to arbitration under CUSMA Annex 14-C.[148] The extraordinary nature of the investor-State dispute settlement mechanism makes it imperative for a claimant to establish that it meets each condition of the respondent's offer to arbitrate. A respondent State's consent to jurisdiction is prescribed, and it has only consented to arbitrate when each pre-condition is met. As explained in Canada's Memorial, a core objective of CUSMA is to offer the Parties' limited consent to arbitrate investment claims under Section B of NAFTA Chapter Eleven and CUSMA Annex 14-C.[149] The CUSMA Parties did not intend for Annex 14-C to allow investors that sold their investment before NAFTA was terminated to submit claims in accordance with NAFTA Chapter Eleven following CUSMA's entry into force. The text of CUSMA Annex 14-C Paragraph 6(a) confirms this intention. It plainly requires the Claimant to establish its ownership or control of the investment when CUSMA entered into force. The Claimant cannot invoke one element of the treaty's purpose to read out its express text.

[147] The draft text of CUSMA was first published on October 1, 2018. *See* **R-144**, Web Archive, Office of the United States Trade Representative, "United States-Mexico-Canada Agreement Text", 1 October 2018, available at: https://web.archive.org/web/20181001081423/https:/ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico. *See also* **R-145**, Web Archive, Government of Canada, "A new United States-Mexico-Canada Agreement", 6 October 2018, available at: https://web.archive.org/web/20181006125151/https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng.

[148] Claimant's Response on Jurisdiction, ¶ 85.

[149] *See e.g.*, Canada's Memorial on Jurisdiction, ¶ 90.

86. None of the Claimant's arguments support its interpretation of CUSMA Annex 14-C. The Claimant agrees that on March 15, 2019, it sold Prairie and all of Prairie's assets to WMH.[150] On July 1, 2020, WCC did not own or control the investment with respect to which it brings its Claim. Thus, the Claimant has failed to establish Canada's consent to arbitration under CUSMA Annex 14-C. This Tribunal is without jurisdiction over WCC's 2022 Claim.

B. The Claimant Has Not Established That It Held a "Legacy Investment"

87. For the first time, the Claimant argues in its Response that even if CUSMA Annex 14-C requires it to have held the investment when CUSMA entered into force, WCC meets this condition because its so-called "NAFTA Claim" constitutes a protected "investment" under NAFTA Article 1139, as an interest arising from the commitment of capital and a "claim to money".[151] WCC also alleges it held the "NAFTA Claim" on July 1, 2020.

88. The Claimant's arguments must fail. Its circular definition of "investment" would allow any entity to merely assert a NAFTA claim to create an investment. This is not what the applicable treaties contemplate: an investment must arise out of something other than purported and unproven CUSMA/NAFTA claims. In any event, even if the Tribunal were to accept the Claimant's misguided view of "investment", its 2022 Claim cannot proceed. The Claimant did not hold the "NAFTA Claim" at the time of the alleged breaches. Moreover, WCC has failed to allege any breach or damage with respect to this alleged "investment".

1. An Unproven NAFTA Claim Does Not Qualify as a Protected Investment Under CUSMA Annex 14-C or NAFTA Article 1139

89. The Claimant asserts that the "NAFTA Claim" qualifies as an "investment" under NAFTA Article 1139 in two ways: as an unproven "claim to money",[152] and as a "commitment of capital"

[150] Claimant's Response on Jurisdiction, ¶ 30, *citing* **C-035**, Stalking Horse Purchase Agreement.

[151] Claimant's Response on Jurisdiction, ¶ 88 ("WCC's rights to the NAFTA claim […] comprise a claim to money for its protected investment, including, *inter alia*, its enterprise and real estate").

[152] Claimant's Response on Jurisdiction, ¶¶ 123-132.

under NAFTA Article 1139(h). Both assertions are unworkable. An unproven NAFTA claim does not qualify as a protected investment under CUSMA Annex 14-C or NAFTA Article 1139.[153]

90. First, the Claimant's inconsistent and imprecise use of the term "NAFTA Claim", discussed above, leaves its case here ambiguous. It is unclear if the Claimant argues that an investor has a qualifying "investment" by holding (a) an unproven cause of action under NAFTA Chapter Eleven that might form the basis of a potential claim that has not yet been submitted to arbitration, or (b) a formal claim that has been submitted to arbitration under NAFTA Chapter Eleven. The Claimant suggests an unproven cause of action under NAFTA Chapter Eleven alone constitutes a protected "investment" by contending "the NAFTA Claim […] crystalized following Canada's measures in 2016".[154] Yet in other instances, the Claimant frames the "NAFTA Claim" as the formal claim to arbitration that WCC commenced in 2018.[155] The Claimant's failure to articulate the basic parameters of its alleged investment evidences its inability to establish the Tribunal's jurisdiction at the outset.

91. Second, there is no support in the text of NAFTA Article 1139 for finding that an unproven NAFTA claim independently qualifies as a protected "investment".[156] Article 1139 defines the term "investment" through the exhaustive list set out in subparagraphs (a) through (h).[157] An alleged

[153] For determining whether the Claimant's alleged "claim to money" constitutes a "legacy investment" under Paragraphs 1 and 6(a) of CUSMA Annex 14-C, Paragraph 6(a) instructs the Tribunal to look at the definition of "investment" in NAFTA Article 1139. This is a question of subject matter jurisdiction, which is a separate requirement from the temporal requirement imposed by the last clause of the definition of "legacy investment".

[154] Claimant's Response on Jurisdiction, ¶ 53 (emphasis added). *See also* ¶ 150 ("WCC first submitted its claims to arbitration less than two years after learning of the NAFTA Claim") (emphasis added). The Stalking Horse Purchase Agreement defined the "NAFTA Claim" as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19,2018 by WCC on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)." **C-034**, *In re: Westmoreland Coal Company, et al*., Case No. 18-35672, Docket No. 789, Exhibit B, s. 1.01. *See also* **R-076**, Stalking Horse Purchase Agreement, s. 2.01(l). *See also* Claimant's 2022 NOA, fn. 51.

[155] *See e.g.*, Claimant's Response on Jurisdiction, ¶ 150 ("WCC promptly resubmitted its NAFTA Claim to arbitration less than one year after the issuance of the Westmoreland award that established that WCC is the proper NAFTA claimant" (emphasis added)).

[156] Canada addresses both an unproven cause of action and a formal claim that has been submitted to arbitration together with the phrase "unproven NAFTA claim", unless otherwise stated.

[157] The definition states "investment means" before introducing the list, without the kind of terminology that would indicate the list is non-exhaustive, such as "includes". *See* **RLA-054**, *Kinnear*, pp. 1139-7 to 1139-38.

investment must fall into one of those categories and be established with evidence. Neither an unproven NAFTA claim nor an unproven "claim to money" is included in that list.

92. Following the list, the definition states: "but investment does not mean […] any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)".[158] This text does not state expressly or implicitly that an unproven NAFTA claim or an unproven "claim to money" constitutes a protected investment under Article 1139.[159] Instead, it expressly states that a claim to money that does not involve the kinds of interests set out in subparagraphs (a) through (h) – none of which include an unproven NAFTA claim – cannot qualify as an "investment". WCC cannot rely on exclusions from the definition of "investment" in subparagraph (j) to somehow establish that its unproven "NAFTA Claim" is an investment.[160]

93. Nor is the alleged "NAFTA Claim" a "commitment of capital" under subparagraph (h). Neither an investor's belief that a State violated an investment treaty and owes it damages, nor the submission of a claim to arbitration based on this belief, constitutes a commitment of capital within the territory of the host State.[161] Further, subparagraphs (h)(i) and (ii) of Article 1139 clarify that "interests arising from the commitment of capital or other resources" capture such interests as "contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions" or "contracts where remuneration depends substantially on the production,

[158] NAFTA Article 1139 (emphasis added).

[159] **RLA-059**, Zachary Douglas, *The International Laws of Investment Claims* (Cambridge University Press, 2009) [Excerpt] ("*Douglas*"), ¶ 386 ("clause (i) of the definition in Chapter 11 of NAFTA expressly carves out certain types of 'claims to money' arising out of sale of goods contracts and credit contracts and any other claim to money which does not memorialize a right *in rem* mentioned in the proceeding clauses (a) to (h) of the NAFTA definition".) (emphasis added).

[160] Claimant's Response on Jurisdiction, ¶ 90 ("NAFTA recognizes that claims to money comprise investments as long as they relate to the categories of investments recognized under subparagraphs (a) through (h)").

[161] *See e.g.*, **CLA-008**, *IC Power Asia Development v. Republic of Guatemala* (UNCITRAL, PCA Case No. 2019-43), Final Award, 07 October 2020 ("*IC Power – Award*"), ¶ 374. In determining whether a claimant held a protected "investment", tribunals have looked for characteristics such as the commitment of capital or other resources in the territory of the host State, a certain duration, sharing of operational risks, and the expectation of gain or profit. Tribunals recognize these elements may be closely interrelated, should be examined in their totality, and will normally depend on the circumstances of each case. **CLA-007**, *Jan de Nul – Decision on Jurisdiction*, ¶ 91. An unproven NAFTA claim does not share these characteristics.

revenues or profits of an enterprise".[162] An unproven NAFTA claim does not resemble these contractual examples, which reflect distinct legal rights within the territory of the host State.[163]

94. The Claimant has not cited a single investment decision that supports its position. While it relies on decisions that held that an investor can dispose of its investment and yet still advance a claim,[164] these are holdings on standing.[165] They do not address the distinct question here on subject-matter jurisdiction.[166] Instead, the tribunals that have considered arguments that a treaty claim constituted a distinct investment under that treaty have categorically rejected the argument.

95. In *ACP Axos Capital v. Kosovo*,[167] the tribunal rejected the claimant's argument that it possessed a treaty "claim to money", which it alleged constituted a protected "investment":

> The Tribunal does not need to engage in an extensive discussion as to what type of claims would be protected under the language of the Treaty, but one

[162] NAFTA Article 1139 (emphasis added).

[163] While the Claimant alleges it has a "right to the NAFTA claim" – thereby assuming it satisfies the conditions to establishing the Tribunal's jurisdiction – an unproven NAFTA claim does not itself constitute a "right" to alleged damages. *See* Claimant's Response on Jurisdiction, ¶ 91. Just as a lottery ticket does not constitute a cognizable "claim to money" with respect to the desired funds (until the ticketholder wins), an unproven NAFTA claim does not constitute a right to the desired damages. *See* **RLA-060**, *Saipem SpA v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 113; **RLA-059**, *Douglas*, ¶ 387.

[164] Claimant's Response on Jurisdiction, ¶¶ 91-96.

[165] *See e.g.*, **CLA-010**, *GEA Group – Award*, ¶¶ 124–125 ("The Respondent, in effect has attempted to create a standing requirement (i.e., a requirement of ownership or control of the investment at the time of registration of the Request) that does not otherwise exist under the BIT, ICSID Convention or ICSID Rules"); **CLA-011**, *Daimler – Award*, ¶ 145 ("the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damage as a result of the allegedly offending government measures at the time that those measures were taken") (emphasis added); **CLA-006**, *EnCana – Award*, ¶¶ 22, 124 (where the claimant sold its interest in the enterprise it formerly owned and controlled *during* the arbitral proceedings, but not before they were initiated).

[166] The Claimant's reliance on **CLA-005**, *Mondev International Ltd v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002 ("*Mondev – Award*"), is similarly misplaced. *See* Claimant's Response on Jurisdiction, ¶¶ 92-93. Contrary to the Claimant's suggestion, the claimant in that case did not allege that its domestic legal claims constituted an investment, and the tribunal did not make a finding in that regard. Indeed, none of the *Mondev*, *Jan de Nul*, *Daimler*, and *Chevron* tribunals were seized with the question of whether an investment claim qualifies as a protected "investment". Nor did they state expressly or implicitly that an investment claim qualifies as a protected "investment". These decisions do not support the Claimant's proposition. (**CLA-007**, *Jan de Nul – Decision on Jurisdiction*; **CLA-011**, *Daimler – Award*; **CLA-018**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I* (PCA Case No. 2007-02/AA277), Interim Award, 1 December 2008 ("*Chevron – Interim Award*")).

[167] **RLA-061**, *ACP Axos Capital GmbH v. Republic of Kosovo* (ICSID Case No. ARB/15/22), Award, 3 May 2018 ("*ACP – Award*"), ¶¶ 246-256.

> thing is clear: it cannot be a claim under the Treaty itself. Otherwise, the definition would be circular and would result in the paradoxical situation that it would suffice for a claimant to advance any claim under a bilateral investment treaty containing this language to subsequently claim that it has a protected investment.
>
> The "[c]laims to money" phrasing referred to in Article 1(1)(c) of the Treaty must therefore have a basis other than the Treaty itself. This basis may be contractual, tortious, statutory, regulatory or otherwise, but it cannot be only the Treaty itself.[168]

96. In *IC Power v. Guatemala,*[169] the tribunal rejected the claimant's argument that its reservation of rights in a sale agreement to bring an investment claim sufficed to establish an investment. Even if the claim directly related to a claimant's other type of investment, the tribunal held, a public international law claim could not constitute an asset located in the host State.[170] Agreeing with the tribunal's reasoning in *Axos Capital,* the *IC Power* tribunal stated that "a contrary interpretation would produce paradoxical results: any investor would create a qualifying investment through the mere fact of advancing a claim under the treaty."[171]

97. The findings of these tribunals are logical, given the problems that accepting arguments to the contrary would create for a tribunal assessing jurisdiction, liability, and damages issues. Under WCC's legal theory, the challenged measure may be the event that creates an "investment". Claimants might allege that they held this "investment" at the time of the alleged breach, because the alleged breach was the very event that created the alleged investment.[172] The CUSMA/NAFTA Parties did not intend this result. It would eviscerate various jurisdictional requirements adopted by the treaty Parties,[173] including for "legacy investments" in CUSMA Annex 14-C.

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[168] **RLA-061**, *ACP – Award*, ¶¶ 248-250 (emphasis added).

[169] **CLA-008**, *IC Power – Award.*

[170] **CLA-008**, *IC Power – Award*, ¶ 374.

[171] **CLA-008**, *IC Power – Award*, ¶ 374.

[172] Moreover, if a cause of action under an investment treaty crystallizes following the host State's adoption of the measures, as the Claimant alleges, then a claimant would not hold the cause of action at the time of the alleged breaches. Thus, it would fail to meet the jurisdictional condition to hold the investment at the time of the alleged breach. *See* Claimant's Response on Jurisdiction, ¶ 53.

[173] The Claimant's legal theory would also create confusion over the application of NAFTA Article 1101(1). The Claimant does not explain how a challenged measure described within an investment claim to arbitration could itself "relate to"

98. Further, the Claimant fails to explain how a host State owes the investment protections in Section A of NAFTA Chapter Eleven with respect to an unproven NAFTA claim that did not exist at the time of adopting the challenged measures. Nor does the Claimant explain how the host State could breach such obligations.[174] As Professor Douglas states, "[a] host state cannot, for instance, expropriate something that the claimant does not have."[175] WCC's legal theory would cause confusion for individual claims, for States, and the investment treaty system more broadly.

99. Finally, the Claimant relies on the U.S. Bankruptcy Court's finding that WCC continuously held the "NAFTA Claim" under U.S. law.[176] That issue is irrelevant to the question here of whether the an unproven NAFTA claim can constitute a protected "investment" under the applicable law in this arbitration: CUSMA, NAFTA, and international law.[177] Neither the Claimant's expert nor the U.S. Bankruptcy Court can determine which potential assets qualify as a protected "investment" under NAFTA Chapter Eleven. The Bankruptcy Court did not attempt to do so. Thus, the Claimant has failed to establish that the "NAFTA Claim" qualifies as a protected investment under CUSMA and NAFTA.

2. Even if the "NAFTA Claim" Could Qualify as an Investment, the Claimant's Claim Fails

100. Even if the Tribunal finds on the law that the Claimant's unproven NAFTA claim can qualify as a protected "investment" under Article 1139 (which it should not do), the Claimant still cannot

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that claim if it is the protected "investment". Under the Claimant's theory, the alleged breaches would both create the "investment" – the claim – and somehow "relate to" this investment, which did not exist until after the challenged measures occurred. The Claimant's legal theory would also render the limitation periods in NAFTA Articles 1116(2) and 1117(2) ineffective. If a claim to arbitration under NAFTA Chapter Eleven is a protected "investment", then a claimant may allege it could only first acquire knowledge of the alleged breach and loss regarding that investment after it submitted the claim to arbitration. This is illogical.

[174] *See e.g.*, **CLA-005**, *Mondev – Award*, ¶ 61 ("All that was left thereafter were LPA's *in personam* claims against Boston and BRA for breaches of contract or torts arising out of a failed project. Those claims arose under Massachusetts law, and the failure (if failure there was) of the United States Courts to decide those cases in accordance with existing Massachusetts law, or to act in accordance with Article 1105, could not have involved an expropriation of those rights.").

[175] *See also* **RLA-059**, *Douglas*, ¶ 342.

[176] *See e.g.*, Claimant's Response on Jurisdiction, ¶¶ 97, 99.

[177] NAFTA Article 1131(1) (Governing Law) ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law".).

establish that the Tribunal has jurisdiction over its 2022 NOA as a matter of fact. Indeed, the facts highlight the problems with its legal arguments.

101. First, if the alleged "NAFTA Claim" is the 2018 Claim, it does not constitute a "legacy investment" under CUSMA Annex 14-C because it no longer existed on July 1, 2020. The Claimant withdrew the 2018 Claim on July 23, 2019, almost a year before CUSMA entered into force.[178]

102. Second, the Claimant has not established that its unproven NAFTA claim – whether the 2018 NOA or a cause of action that had yet to be submitted to arbitration – meets the temporal requirement of NAFTA Articles 1116(1) and 1117(1) to hold the alleged "investment" at the time of the alleged breach in 2016. The "NAFTA Claim" did not exist, and the Claimant neither owned nor controlled it, at the time of the alleged breaches. To the contrary, the Claimant states "the NAFTA Claim […] crystalized <u>following Canada's measures</u> in 2016".[179]

103. Third, even if the Tribunal finds on the facts that the "NAFTA Claim" qualifies as a protected "investment" (which it also should not do), the Claimant has not alleged that the challenged measures violated any obligations in NAFTA Chapter Eleven purportedly owed to the "NAFTA Claim" as WCC's "investment". Instead, the Claimant's allegations all concern treatment of a different investment – Prairie – and Prairie's alleged losses.[180] A claimant cannot rely on one "investment" for the purposes of establishing jurisdiction while advancing liability and damages claims about a different "investment" over which a tribunal lacks jurisdiction.[181] Thus, the Tribunal would have no jurisdiction over any of WCC's Claim as alleged. The entire Claim must fail.

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[178] In addition, the Claimant fails to specify the capital that WCC allegedly committed to Prairie as part of its allegation that WCC had a qualifying "investment" under subparagraph (h) (a "commitment of capital"), separate from WCC's original purchase of Prairie. Prairie's mine production contracts do not qualify as WCC's capital commitments: WCC was not privy to those contracts. The sole exhibit that WCC cites regarding its alleged "commitment of capital" is Prairie's Extension Agreement, which dates to 2011 – <u>before</u> WCC invested in Prairie. Claimant's Response on Jurisdiction, fn. 190, *citing* **C-065**, Contract Extension Agreement Between Prairie Mines & Royalty Ltd. and Alberta Power (2000) Ltd., 29 April 2011.

[179] Claimant's Response on Jurisdiction, ¶ 53 (emphasis added).

[180] Claimant's 2022 NOA, ¶¶ 94, 95, 123(i).

[181] The substantive protections in Section A of NAFTA Chapter Eleven cannot apply to an "investment" that falls outside the respondent's consent to arbitration. As Professor Douglas notes, "[t]he tribunal's examination of the question of the host state's liability is intertwined with an assessment of whether the prejudice alleged by the claimant can be properly linked to the rights that comprise the investment". **RLA-059**, *Douglas*, ¶ 345.

C. The Claimant's Attempt to Create Jurisdiction Based on the Doctrine of Estoppel and the Concept of Preclusion Must Fail

104. The Claimant's final attempt to establish jurisdiction under CUSMA Annex 14-C is to argue that Canada should be estopped or "precluded" from making the objection. Yet the Tribunal cannot use the doctrine of estoppel to find jurisdiction where it does not otherwise exist. In addition, the Claimant has failed to make its case for either estoppel or preclusion.

1. The Tribunal Cannot Find Jurisdiction Based on Estoppel

105. A tribunal derives its power from the consent of the disputing parties.[182] The sole basis to establish the legal relationship between the disputing parties from which the Tribunal can find jurisdiction is the Claimant's acceptance of Canada's offer to arbitrate, if established based on the conditions specified in CUSMA Annex 14-C and NAFTA Chapter Eleven.[183] The Tribunal must be satisfied that the Claimant meets each of these conditions. Where one (or more) is not met, a tribunal may not create jurisdiction based on the doctrine of estoppel. As the *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I* tribunal confirmed:

> As a preliminary matter, the Tribunal must satisfy itself of the existence and extent of its jurisdiction. It considers that its jurisdiction is fixed by laws (as explained further below), and that such jurisdiction cannot here be created, continued or extended by arguments based on the possible operation of doctrines of acquiescence, waiver or estoppel in respect of acts or omissions of Respondent (or Claimant).[184]

106. The *Oded Besserglik v. Republic of Mozambique* tribunal similarly affirmed:

> [T]he jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel.[185]

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[182] **RLA-062**, *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I* (UNCITRAL, PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 ("*Achmea – Award on Jurisdiction*"), ¶ 220.

[183] **RLA-057**, *Alemanni – Decision on Jurisdiction*, ¶ 305.

[184] **RLA-062**, *Achmea – Award on Jurisdiction*, ¶ 219 (emphasis added). The tribunal further explained, "[i]n any event, the Tribunal has not found it necessary to rest any part of its decision upon the ostensible attitude of either Party to these arbitration proceedings – still less upon that of the Government of the Netherlands or of the European Commission – to the question of the status of the BIT or the existence, continuation or extent of the jurisdiction of the Tribunal".

[185] **RLA-063**, *Oded Besserglik v. Republic of Mozambique* (ICSID Case No. ARB(AF)/14/2), Award, 28 October 2019 ("*Besserglik – Award*"), ¶ 422 (emphasis added). *See also* **RLA-023**, *Marvin Roy Feldman Karpa v. United Mexican*

107. The Tribunal should stop here and reject the Claimant's invocation of estoppel in an attempt to overcome its failure to establish jurisdiction under the terms of CUSMA Annex 14-C.

2. The Claimant Cannot Meet the Elements of Estoppel

108. Even if estoppel could give rise to jurisdiction (which it cannot), the Claimant has not met its requirements. Estoppel is a general principle in international law that rests on the principles of good faith and consistency.[186] The elements of estoppel in international law are:

(i) an unambiguous statement of fact;

(ii) which is voluntary, unconditional, and authorized; and

(iii) which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement.[187]

109. The Permanent Court of International Justice has confirmed that the alleged representation must be "clear and unequivocal".[188] Moreover, Sir Ian Brownlie regarded the "essence of estoppel" as "the

States (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002 ("*Feldman – Award*"), ¶ 63 (holding that the respondent State was not estopped from invoking the three-year limitation period under NAFTA Articles 1116(2) and 1117(2)); Section V.A.6, below.

[186] **RLA-063**, *Besserglik – Award*, ¶ 423.

[187] **RLA-063**, *Besserglik – Award*, ¶ 423; **RLA-064**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL), Interim Award, 26 June 2000, ¶ 111.

[188] *See e.g.*, **CLA-027**, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, (I.C.J. Reports 1962) with Separate Opinion of Vice-President Alfaro, p. 31 (discussing the Serbian Loans case). *See also* **RLA-065**, *North Sea Continental Shelf Cases (Germany v. Denmark / Germany v. Netherlands)*, ICJ Reports 1969, p. 3, Judgment of 20 February 1969, p. 26, ¶ 30 ("[I]t appears to the court that only the existence of a situation of estoppel could suffice to lend substance to [the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf] […], – that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evidence acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice".) (emphasis added); **RLA-066**, J.P. Müller & T. Cottier, *Estoppel*, in II Encyclopedia of Public International Law, 116 (R. Bernhardt ed., 1992); **RLA-067**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Award, 18 August 2008, ¶ 249 ("Following this line of reasoning, for the conduct or representation of a State entity to be invoked as grounds for estoppel, it must be unequivocal, that is to say, it must be the result of an action or conduct that, *in accordance with normal practice and good faith*, is perceived by third parties as an expression of the State's position, and as being incompatible with the possibility of being contradicted in the future".) (emphasis in original); **RLA-068**, *Aguas del Tunari, S.A., v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction, 21 October 2005, fn. 161; **RLA-069**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I* (UNCITRAL, PCA Case No. 2007-02/AA277), Partial Award on the Merits, 30 March 2010, ¶ 351; **RLA-070**, *Pac Rim Cayman LLC. v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Award, 14 October 2016, ¶ 8.47.

element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice."[189] Without prejudice or detriment, there is no trigger of the protections that estoppel provides.[190] An assertion of estoppel is subject to a high threshold of proof.[191]

110. On the facts, the Claimant cannot establish the elements of estoppel. As explained in Section II.B above, the Claimant alleges that Canada's jurisdictional objection under CUSMA Annex 14-C contradicts the position it adopted in the *WMH* arbitration for two reasons: (a) Canada allegedly committed not to raise jurisdictional objections against an investment claim brought by WMH or WCC over the alleged NAFTA breaches; and (b) Canada allegedly represented to the *WMH* tribunal that WCC would have standing to bring a NAFTA claim against Canada.[192] The Claimant is factually incorrect on both matters.

111. Canada's July 2019 correspondence made no representation – let alone a "clear and unequivocal" or "unconditional" one – that Canada would refrain from advancing any jurisdictional objections to any investment claims filed by WCC or WMH, including under CUSMA Annex 14-C. The July 2, 2019 letter, and Canada's subsequent correspondence, did not expressly or implicitly state that Canada would renounce its right to advance jurisdictional objections to an investment claim filed by WCC or WMH. Rather, in the July 2, 2019 letter, Canada expressly and comprehensively reserved its rights to make any jurisdictional objections to any investment claim advanced by WCC or WMH by citing its right to object on jurisdiction to the "original NOA" or "any new claim".[193] The reference to "any new claim" encompasses any claim that might be submitted to arbitration by WCC or WMH under NAFTA (or CUSMA) other than WCC's 2018 Claim. Canada put WCC and WMH on notice that it had not tied its hands or committed not to make jurisdictional objections.

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[189] **RLA-071**, J. Crawford, *Brownlie's Principles of Public International Law* (9th Ed., 2019), p. 407; **RLA-072**, *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 47.

[190] **RLA-052**, *Canfor – Order of the Consolidation Tribunal*, ¶ 168.

[191] **CLA-018**, *Chevron – Interim Award*, ¶ 143.

[192] Claimant's Response on Jurisdiction, ¶ 64.

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

112. WCC mischaracterizes Canada's July 2, 2019 letter by stating that Canada reserved "its right to challenge jurisdiction only with respect to"[194] certain claims. As explained above,[195] this is not a reasonable reading. Canada did not use the term "only" in the relevant statement nor place any limits on its rights to advance jurisdictional objections. Canada never represented that it was narrowing the scope of jurisdictional objections it might bring. Reading the letter in full makes it clear that Canada considered a future claim to be filed by WMH or WCC to be a "new claim".

113. The fact that Canada expressed concerns over the jurisdictional issues created by WCC's attempt to amend the 2018 NOA by inserting WMH as the claimant demonstrated that Canada takes its consent to investment arbitration seriously. Nothing in Canada's correspondence indicated a willingness to change that position. Canada would not have precluded its own right to advance jurisdictional objections in a potential investment claim alleging $500 million in damages, particularly where a case might raise a wide range of jurisdictional issues.

114. The Claimant's suggestion that Canada "insisted" on WCC's withdrawal "to avoid a jurisdictional problem" must also be rejected.[196] Canada did not insist that WCC withdraw its claim, and Canada's proposal does not preclude it from advancing any jurisdictional objections. Thus, the Claimant cannot establish that Canada's 2019 correspondence meets the first element of the estoppel test – offering a "clear and unequivocal" representation that Canada would not advance a jurisdictional objection to a claim by WCC under CUSMA Annex 14-C.

115. The Claimant likewise cannot establish the second element of estoppel, by showing that Canada made an "unconditional" representation to refrain from advancing jurisdictional objections to any future WCC claim that might be submitted to arbitration. The reverse is true: in its July 2019 correspondence, Canada unconditionally reserved its rights to object to jurisdiction to a future claim.

116. Since Canada did not make a clear, unequivocal, and unconditional representation to WCC that it would refrain from advancing jurisdictional objections in a NAFTA claim, there is no basis to

[194] Claimant's Response on Jurisdiction, ¶ 193 (emphasis added).

[195] *See* Section II.B.1, above.

[196] Claimant's Response on Jurisdiction, ¶ 203.

consider WCC's assertions that it detrimentally relied on the 2019 correspondence. Any decision that WCC might have made to its detriment cannot have been made based upon a non-existent representation by Canada to WCC.

117. Nevertheless, the Claimant has also failed to establish detrimental reliance on Canada's 2019 correspondence. WCC advanced no contemporaneous evidence indicating that at the time of the correspondence with Canada in July 2019, WCC understood that Canada was renouncing its ability to bring jurisdictional objections to any investment claim, including from WMH or WCC.[197] Moreover, if WCC (or WMH) had relied on this alleged belief, it is peculiar that they did not seek assurance in writing from Canada, given that Canada's correspondence neither expressly nor implicitly represented that Canada would withhold jurisdictional objections.

118. WCC chose to withdraw its 2018 Claim. Canada did not induce or force that outcome. WCC is a sophisticated investor that made an informed choice with the advice of counsel. It must accept the legal consequences of its business decisions. The Claimant cannot establish that Canada's 2019 correspondence meets the third element of the estoppel test: WCC did not detrimentally rely on any unambiguous representation by Canada prior to withdrawing its 2018 Claim.

119. WCC's attempt to seize on counsel for Canada's oral answer at the *WMH* hearing also fails to establish grounds for estoppel. Here too, Canada made no representation that it would refrain from making a jurisdictional objection to a potential claim that WCC might file under CUSMA or NAFTA. Nor did Canada represent that WCC could establish jurisdiction for a claim under either treaty.

[197] Mr. Stein's witness statement in this arbitration – made five years after the events in question – does not constitute contemporaneous evidence of WCC's alleged "understanding". Moreover, many of Mr. Stein's recollections are contradicted by contemporaneous evidence and are thus unreliable. For example, Mr. Stein's statement that "Canada never suggested that it […] intended to challenge WMH's standing to pursue the NAFTA claims against Canada following WCC's withdrawal" (**CWS-1**, Stein Witness Statement, ¶ 13) is belied by the fact that Canada expressly reserved its rights to advance jurisdictional objections in its July 2, 2019 letter. In addition, his recollection that in attempting to amend the 2018 NOA, "WCC explained that WMH would join WCC as the claimant in the arbitration" (**CWS-1**, Stein Witness Statement, ¶ 10, emphasis added) is contradicted by the Attempted Amendment. *See* Section II.A.1, above; **R-080,** Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim", 13 May 2019. His account of the method that Canada and WMH agreed to for selecting a tribunal chairperson (*i.e.*, that the party appointed arbitrators "would then appoint a chairperson, all according to Canada's proposal") (**CWS-1**, Stein Witness Statement, ¶ 14) is also incorrect. *See* Section II.B.2, above. Mr. Stein further admits that he "did not participate in all of the internal discussions at the time" (**CWS-1**, Stein Witness Statement, ¶ 12). As a result, the Tribunal should not accept his testimony as reliable.

Canada's oral answer in the *WMH* hearing solely concerned how Canada's jurisdictional objection in that case might apply to a hypothetical claim filed by WCC.[198] The answer focused on NAFTA Article 1116(1) only. It was not intended to suggest that Canada would not foresee any other potential jurisdictional objections to a claim by WCC, including under CUSMA Annex 14-C.

120. Nor did Canada expressly or implicitly state that WCC would automatically be capable of meeting the conditions to establishing Canada's consent to arbitrate under: NAFTA Articles 1116(1) or 1117(1), on standing; Articles 1116(2) and 1117(2), on the limitation period; Article 1121, on waiver; or Article 1101(1), on the requisite relationship between a challenged measure and claimant or its investment.[199] Thus, the Claimant cannot establish that Canada's oral answer to the *WMH* tribunal meets the first element of the estoppel test.

121. Moreover, Canada did not make its oral answer at the *WMH* hearing to WCC.[200] WCC was not a party to that arbitration. Canada's oral answer cannot constitute a promise made to WCC on which WCC could rely. The Claimant offers no evidence of, and cannot establish, detrimental reliance on Canada's oral answers at the *WMH* hearing. It cannot establish that Canada's oral answer to the *WMH* tribunal meets the third element of the estoppel test.

122. Thus, even if the Tribunal could override the pre-conditions to Canada's consent based on estoppel (which it cannot do), WCC has not met the evidentiary burden to meet the doctrine's elements. Instead, Canada reserved the right it now invokes to argue this Tribunal lacks jurisdiction.

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[198] Since The *WMH* tribunal understood that WCC was "in the process of being dissolved" (**RLA-001**, *WMH – Final Award*, ¶ 93), its question was not focused on the actual possibility of WCC bringing a future claim.

[199] Canada's statement that WCC "could be in a position" to file a claim on its own behalf – that is, under Article 1116(1) – merely recognized the possibility that WCC might be in a position to make a claim under that provision. However, the conditional "could" signalled that such a potential claim would still need to meet all other applicable jurisdictional requirements.

[200] **RLA-073**, *Nova Scotia Power Incorporated (NSPI) v. Bolivarian Republic of Venezuela I* (UNCITRAL, PCA Case No. 2009-14), Award on Jurisdiction, 22 April 2010, ¶ 143 ("it is not sufficient that one party has engaged in inconsistent conduct. It is also necessary to establish that the counterparty was aware of that conduct, relied on it, and acted on the assumption that the first party would not deviate from that original position. In the present case, the Claimant cannot credibly assert that it relied on the Respondent's legal argument made in another case involving another party, and which was unambiguously rejected by the Secretary-General of ICSID".) (emphasis added).

3. The Claimant's Preclusion Argument Fails on the Law and the Facts

123. The Claimant's argument that the Tribunal should "preclude" Canada from advancing its jurisdictional objections under CUSMA Annex 14-C is also flawed.[201] The Claimant asserts that "a party is precluded from taking inconsistent positions by virtue of the principle of good faith, regardless of reliance."[202] Yet the Claimant fails to establish a concept of "preclusion" in international law separate from the doctrine of estoppel. The authorities it cites treat a concept of "preclusion" as related to estoppel – which requires proof of reliance.[203] WCC also fails to cite a single investment treaty case applying its concept of "preclusion". It even concedes the uncertain status of "preclusion" at international law and merely announces, "the principle exists".[204] The Claimant's reasoning is inadequate to meet its burden to prove that the Tribunal should drop one of the key requirements to apply the doctrine of estoppel – detrimental reliance. As with estoppel, the Tribunal cannot find jurisdiction based on "preclusion", as the Claimant has failed to meet the express conditions to jurisdiction in the applicable treaties.[205]

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[201] Claimant's Response on Jurisdiction, ¶ 115. The Claimant proposes that "WCC does not have to prove that it detrimentally relied on Canada's representations to preclude Canada" from objecting to the Tribunal's jurisdiction.

[202] Claimant's Response on Jurisdiction, ¶ 106.

[203] For example, the *Argentine-Chile Frontier* case did not cite a separate concept of "preclusion", but discussed inconsistency between State claims and actions within the context of estoppel. *See* **CLA-024**, *Argentine-Chile Frontier Case* (16 R.I.A.A. 109 (1969)), Award, 9 December 1966, p. 164 (discussing these points under the heading "Estoppel" and referencing "this doctrine of estoppel"). Similarly, the Separate Opinion of Vice-President Alfaro in the *Temple of Preah Vihear* case expressly abstained from using the term "preclusion". *See* **CLA-027**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, Separate Opinion of Vice President Alfaro, p. 27 ("The principle, not infrequently called a doctrine, has been referred to by the terms of 'estoppel', 'preclusion', 'forclusion', 'acquiescence'. I abstain from adopting any of these particular designations, as I do not believe that any of them fits exactly to the principle or doctrine as applied in international cases"). The Claimant mischaracterizes Richard Mosk's concurring Opinion in the Iran-US Claims Tribunal case of *Oil Fields of Texas* by arguing that he "explicitly rejected any detrimental reliance requirement". Claimant's Response on Jurisdiction, ¶ 110. In fact, the arbitrator's comments were less definitive: "[t]here are suggestions that in international law, 'estoppel', or its equivalent, may be utilized, even in the absence of technical municipal law requirements, such as reliance". **CLA-028**, *Oil Field of Texas v. The Government of the Islamic Republic of Iran et al.* (1 Iran-U.S.C.T.R. 347), Concurring Opinion of Richard M. Mosk with Respect to Interlocutory Award, 9 December 1982, p. 24 (emphasis added). Investment tribunals have treated reliance as a core requirement to apply the doctrine of estoppel, without citing it as a "technical municipal law" concept and in **CLA-029**, *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, April 5, 1933, P.C.I.J., Ser. A/B, No. 53, ¶¶ 68–69, the Court did not renounce a concept of reliance.

[204] Claimant's Response on Jurisdiction, fn. 159.

[205] **RLA-062**, *Achmea – Award on Jurisdiction*, ¶ 219; **RLA-063**, *Besserglik – Award*, ¶ 422; **RLA-023**, *Feldman – Award*, ¶ 63.

124. Furthermore, even if the Tribunal applied the Claimant's novel concept of "preclusion", the Claimant fails to prove the alleged inconsistency between Canada's words and conduct. As noted above, Canada made no representation that it would refrain from advancing jurisdictional objections under CUSMA Annex 14-C or NAFTA Chapter Eleven to a claim filed by WCC or WMH. In fact, Canada expressly reserved its rights to advance such objections. Thus, the Tribunal should reject the Claimant's request to find jurisdiction via a concept of "preclusion" despite the fact that WCC had no "legacy investment" under CUSMA Annex 14-C. The Tribunal has no jurisdiction under CUSMA and must decline to hear this Claim.

V. THE CLAIMANT HAS NOT ESTABLISHED THAT THE TRIBUNAL HAS JURISDICTION OVER ITS CLAIM UNDER NAFTA CHAPTER ELEVEN

125. Even if the Tribunal finds that the Claimant has established jurisdiction under CUSMA Annex 14-C, the Claimant must also establish that it meets all the jurisdictional requirements of NAFTA Chapter Eleven. As Canada explained in its Memorial, the Claimant has failed to establish the Tribunal's jurisdiction under NAFTA because: its 2022 Claim was not submitted within the three-year limitation period in NAFTA Articles 1116(2) and 1117(2); it has not complied with the waiver requirements of NAFTA Article 1121; it did not own Prairie, the enterprise on whose behalf it brings a claim under NAFTA Article 1117, at the time that it submitted its Claim to arbitration; and it has failed to articulate a *prima facie* claim of damages under NAFTA Article 1116(1).

126. In its Response, the Claimant incorrectly asserts that its Claim is timely based on an unsupported principle of suspension, that it did not need to file waivers contemporaneous with its 2022 NOA to meet the requirements of Article 1121, that the only relevant time for assessing ownership or control under NAFTA Article 1117 is the time of the alleged breach, and that NAFTA Article 1116 permits reflective loss. The Claimant's arguments must all be rejected. Canada addresses them in turn.

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

127. In its Memorial, Canada demonstrated that the Tribunal lacks jurisdiction *ratione temporis* because the Claimant failed to comply with the strict three-year limitation period in NAFTA Articles

1116(2) and 1117(2).[206] In its Response, the Claimant admits that the limitation period began to run on November 24, 2016,[207] almost six years before it submitted this Claim to arbitration. It argues that the clear text of NAFTA should be rewritten to include a principle of "suspension" of the limitation period to accommodate its circumstances.

128. As Canada explains below, the Claimant's view cannot be reconciled with the text of NAFTA Articles 1116(2) and 1117(2), the object and purpose of the treaty and its explicit limitation period, or general principles of international law. Regardless, the Claimant's "suspension" theory must be rejected where, as here, a claimant withdraws a claim and a different claimant submits a claim to arbitration based on the same underlying measures.[208] Far from being "estopped" from raising the limitation period or precluded by an alleged "abuse of rights", Canada is ensuring that the temporal conditions to its consent to arbitrate under NAFTA are respected.

1. The Claimant Cannot Avoid the Clear and Unambiguous Treaty Text

129. Articles 1116(2) and 1117(2) impose a three-year limitation period on a claim that may be submitted to arbitration by an investor under Chapter Eleven:

> 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.
>
> […]
>
> 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.

[206] Canada's Memorial on Jurisdiction, ¶¶ 95-109.

[207] Claimant's Response on Jurisdiction, ¶ 151 ("WCC first became aware of Canada's breaches of the NAFTA and that those breaches caused it harm on November 24, 2016".) (emphasis omitted).

[208] Claimant's Response on Jurisdiction, ¶ 156 ("[T]he limitations period here was suspended […] from November 19, 2018 to January 31, 2022."), ¶ 160 ("[T]he limitations period was suspended during the proceedings first initiated by WCC.") This is incorrect. On November 19, 2018, WCC submitted its 2018 Claim to arbitration. That Claim was withdrawn on July 23, 2019. On August 12, 2019, WMH submitted its 2019 Claim to arbitration. The *WMH v. Canada* tribunal rendered its award on January 31, 2022.

130. The treaty is clear. An investor is barred from proceeding with a claim, either on its own behalf or on behalf of an enterprise that it owns or controls, if more than three years have elapsed since the date of first knowledge of the alleged breach and loss. Here, the Claimant agrees that it had knowledge of the alleged breach and loss on November 24, 2016.[209] The Claimant's 2022 NOA was submitted on October 14, 2022, more than three years later.[210] The ordinary meaning of the treaty terms permits no other outcome than dismissal for lack of jurisdiction *ratione temporis*.

131. The Claimant states that the treaty provisions "do not speak to the suspension of a limitations period",[211] but asserts that the Tribunal should nevertheless read suspension into Articles 1116(2) and 1117(2). Tellingly, the Claimant does not point to any treaty language that supports its view. Instead, it makes the misleading statement that Articles 1116(2) and 1117(2) "provide that an investor '<u>may submit to arbitration</u>' a claim, as long as it files that claim within three years".[212] The Claimant has taken language from provisions that do not concern the limitation period – Articles 1116(1) and 1117(1) ("may submit") – and substituted it for the language of the operative provisions: "An investor <u>may not</u> make a claim if more than three years have elapsed […]."[213] The NAFTA Parties did not mean "may" when they wrote "may not".

132. The Claimant next states that the "textual question" is "what constitutes" submitting a claim to arbitration for the purposes of the limitation period.[214] Canada agrees with the Claimant that a claim submitted under the UNCITRAL Arbitration Rules is submitted to arbitration when "the notice of arbitration" is received by the respondent State,[215] provided that all of the conditions of the State's

[209] Claimant's Response on Jurisdiction, ¶ 151.

[210] Claimant's 2022 NOA; Claimant's Response on Jurisdiction, ¶¶ 8, 153. As Canada explained in its Memorial at ¶ 104, October 14, 2022 (and not October 11, 2022) is the correct date because that is when Canada received the 2022 NOA. However, as discussed in Section V.B.1, below, the limitation period continues to run because the Claimant has not submitted valid waivers.

[211] Claimant's Response on Jurisdiction, ¶ 158.

[212] Claimant's Response on Jurisdiction, ¶ 158 (emphasis in original).

[213] NAFTA Articles 1116(1) and 1117(1) (emphasis added).

[214] Claimant's Response on Jurisdiction, ¶ 158.

[215] Article 1137(1) ("A claim is submitted to arbitration under this Section when: […] (c) <u>the</u> notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.") (emphasis added). WCC submitted its 2022 Claim to arbitration under Article 1137(1) on October 14, 2022.

consent are met (which, as discussed below, is not the case here).[216] Canada received the 2022 NOA on October 14, 2022, almost six years after the limitation period began to run. The Claimant simply asserts – with no basis – that its 2018 NOA, which was separately submitted to arbitration on November 19, 2018 and withdrawn on July 23, 2019, satisfies the time requirements for its 2022 Claim.[217] There is nothing in the treaty that would allow a prior notice of arbitration to stand in for "the" notice of arbitration that submits a particular claim to arbitration under NAFTA, much less one that has been withdrawn.[218]

133. The text of Articles 1116(2) and 1117(2) is clear, unambiguous, and dispositive: this claim is untimely and must be dismissed.

2. The NAFTA Parties and NAFTA Tribunals Confirm That the Limitation Period in Articles 1116(2) and 1117(2) is Strict

134. In its Memorial, Canada explained that the NAFTA Parties and prior NAFTA tribunals share the understanding that Articles 1116(2) and 1117(2) impose a clear and rigid limitation on the Parties' consent to arbitration.[219] In its Response, the Claimant fails to establish otherwise.

135. All three NAFTA Parties agree that Articles 1116(2) and 1117(2) introduce a clear and rigid limitation period that conditions their consent to arbitration.[220] In the face of this agreement, the

[216] This includes the provision of valid waivers at the time of the submission of the claim to arbitration. As discussed in Section V.B.1, below, the 2022 NOA was not accompanied by valid waivers and has thus not been properly submitted to arbitration. *See* **R-102**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v The Republic of Peru* (ICSID Case No. UNCT/18/2), Submission of the United States, 21 June 2019, ¶ 11 (in the context of the U.S.-Peru Trade Promotion Agreement, explaining that for limitation period purposes, the "date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration […] assuming all other relevant procedural requirements have been satisfied".); **CLA-048**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3), Submission of the United States of America, 11 March 2016, ¶ 9 (in the context of CAFTA-DR, explaining that "a Notice of Arbitration that is unaccompanied by a valid waiver does not constitute a claim that is capable of being submitted for purposes of any provision of Chapter Ten, including, and in particular, Article[…] 10.18.1" (the limitation period)).

[217] Claimant's Response on Jurisdiction, ¶ 158 ("In this case, WCC 'submitted to arbitration' its NAFTA claim in 2018, when Canada received WCC's [2018] notice of arbitration under the UNCITRAL Arbitration Rules.") WCC submitted its 2018 Claim to arbitration under Article 1137(1) on November 19, 2018, and withdrew it on July 23, 2019. Here, as elsewhere, the Claimant avoids entirely the fact that WCC withdrew its 2018 Claim.

[218] *See* Section III.A, above.

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

[220] Canada's Memorial on Jurisdiction, ¶ 98, fn. 172. **RLA-074**, *Windstream Energy LLC v. Canada (II)* (UNCITRAL, PCA Case No. 2021-26), Submission of Mexico pursuant to Article 1128 of NAFTA, 29 November 2023, ¶¶ 4-5. The Claimant seeks to dismiss the NAFTA Parties' non-disputing Party submissions in *Merrill & Ring* and *Tennant* on the

Claimant makes the misleading submission that "other respondent States have not objected on prescription grounds in similar cases",[221] citing only *Waste Management II*.[222] However, the limitation period was not at issue in that case because the claimant challenged a series of acts that culminated with the alleged expropriation of the investment on November 3, 1997 – less than three years prior to the request for arbitration of June 19, 2000.[223] Indeed, the claimant explicitly did "not allege" a breach prior to the start of the limitation period on November 3, 1997.[224] As such, there was no limitation period objection to be raised.

136. Furthermore, the Claimant omits *Methanex*, in which the United States' consent to accept a late waiver was "conditioned on" the commencement date of the arbitration to be that of the properly submitted waiver.[225] As a result of that condition on its consent, certain claims fell outside the tribunal's temporal jurisdiction. As the United States noted in a subsequent pleading: "As a result of deeming Methanex's claim to be submitted as of [the date of proper waivers], that portion of

basis that those cases did not concern "whether the limitations period is suspended." Claimant's Response on Jurisdiction, ¶ 177. The NAFTA Parties have unequivocally endorsed the *Grand River* and *Feldman* tribunals' observation that the limitation period is "clear and rigid" and "not subject to any suspension, prolongation, or other qualification." (citations omitted). **R-099**, *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1), Submission of the United States, 14 July 2008, ¶ 6; **R-100**, *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009. Canada shares this interpretation, as expressed in non-disputing Party submissions and responses to such submissions. *See* Canada's Memorial on Jurisdiction, ¶ 98, fn. 172; **R-146**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Submission of the Government of Canada, 6 October 2000, ¶ 10 (agreeing with Mexico's interpretation of Article 1117(2), found at **R-095**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Counter-Memorial on Preliminary Questions, ¶ 199 ("There is nothing in the language of Article 1117(2), or elsewhere in Chapter Eleven, that authorizes flexibility in applying the time limitation […].")

[221] Claimant's Response on Jurisdiction, ¶ 173. The Claimant also contradicts this assertion by stating that there is only one similar case: "In the last century, the question of whether a limitations period is suspended during the pendency of the claim [sic] has arisen in only one publicly-available investment treaty case." Claimant's Response on Jurisdiction, ¶ 172.

[222] Claimant's Response on Jurisdiction, ¶ 173.

[223] **R-147**, *Waste Management v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Request for Arbitration, 19 June 2000 ("*Waste Management – Request for Arbitration*"), p. 4.

[224] **R-147**, *Waste Management – Request for Arbitration*, p. 4, fn. 1.

[225] **R-096**, *Methanex Corp. v. United States* (UNCITRAL) Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, p. 77 ("Recognizing this, in the interests of efficiency, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members – on the condition that this Tribunal issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers.")

Methanex's original Statement of Claim that identified the Bill as a measure that violated NAFTA Chapter Eleven should be dismissed by this Tribunal since the Bill was passed more than three years before the submission of Methanex's claim to arbitration."[226] The issue was not put to the tribunal because, "apparently anticipat[ing] this result", Methanex did not challenge the Bill as a measure that violated NAFTA Chapter Eleven.[227]

137. NAFTA tribunals interpreting Articles 1116(2) and 1117(2), such as *Grand River*, *Feldman*, *Resolute*, and others, have further confirmed that the limitation period is strict.[228] In its Response, the Claimant does not address the *Resolute* tribunal's finding that: "There is no provision for the Tribunal to extend the limitation period."[229] Instead, the Claimant dismisses the authorities cited to by Canada as "inapposite" because they did not concern a claimant submitting a late claim when it had previously submitted and withdrawn a similar claim.[230] While the Claimant goes on to rely on comments made by the tribunal in *Feldman v. Mexico*, one of the cases it has put in the "inapposite" category,[231] it misrepresents the tribunal's findings. Importantly, the *Feldman* tribunal did not find, as the Claimant asserts, "an exception to the rigid rule that otherwise applies to Articles 1116(2) and 1117(2), where the State is timely made aware of the claim".[232] The Claimant finds no support in NAFTA tribunals' decisions for its expansive approach to Articles 1116(2) and 1117(2).

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[226] **R-148**, *Methanex Corp. v. United States* (UNCITRAL) Rejoinder Memorial of Respondent United States of America on Jurisdiction, Admissibility and the Proposed Amendment, 27 June 2001 ("*Methanex – Rejoinder on Jurisdiction*"), p. 52.

[227] **R-148**, *Methanex – Rejoinder on Jurisdiction*, p. 53 ("Methanex apparently anticipated this result, as its Draft Amended Claim does not rely on the Bill as a measure under the NAFTA in any event.")

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

[229] **RLA-021**, *Resolute – Decision on Jurisdiction*, ¶ 153; Canada's Memorial on Jurisdiction, fn. 173

[230] Claimant's Response on Jurisdiction, fn. 273 (concluding that "this Tribunal should not place any weight on the manner in which other tribunals, faced with very different facts, characterized the language of those two provisions [NAFTA Articles 1116(2) and 1117(2)]").

[231] Claimant's Response on Jurisdiction, fn. 273, referring to Canada's Memorial, fn. 173 (citing to **RLA-023**, *Feldman – Award*).

[232] Claimant's Response on Jurisdiction, ¶ 179. **RLA-023**, *Feldman – Award*, ¶ 63. In *Feldman*, the claimant asserted that tax officials of the respondent State "discouraged" it from filing a claim, which it argued was akin to an agreement by the State not to raise the limitation period. **RLA-023**, *Feldman – Award*, ¶ 55. The tribunal rejected that argument, stating that: "NAFTA Article 1117(2) does not provide for any suspension of the three-year period of limitation period." ¶ 59. *See also* ¶ 58 ("However, 'discouraging' a lawsuit does not amount to preventing it. The decision whether, and when, to bring a lawsuit lies with the prospective plaintiff, who also bears the respective benefits and risks.") and ¶ 63 (in which the tribunal "stresses […] that NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation

138. Finally, the Claimant places much weight on the majority decision in *The Renco Group, Inc. v. The Republic of Peru* ("*Renco II*"),[233] a case brought under the United States–Peru Trade Promotion Agreement, which it posits is "highly analogous" to the case before this Tribunal.[234] Not only were the authorities the majority relied on to reach its conclusion inapt and incomplete, but the facts before this Tribunal bear little resemblance to those of *Renco II*.

139. First, the *Renco II* decision arose after a prior claim by the same claimant had been dismissed because the notice of arbitration was accompanied by a defective waiver.[235] The tribunal considered whether, despite the defective waiver, the first claim had nonetheless been "submitted to arbitration" for the purposes of the limitation period in the claim before it.[236] The respondent in that case agreed that if the first claim had been "submitted to arbitration", the limitation period would have been suspended.[237] In direct contrast, Canada does not agree that the submission of WCC's 2018 Claim to arbitration is relevant to the timeliness of its 2022 Claim. Each claim must be evaluated for compliance with the State's consent to arbitrate.

140. Second, in *Renco II*, the claimant relied on a procedurally defective <u>but not withdrawn</u> claim to "suspend" the limitation period. Here, even if the 2018 NOA were relevant to the timeliness of the

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defense.") The claimant had also argued that the respondent was estopped from raising the limitation period because of discussions with tax officials. In considering (and dismissing) that argument, the *Feldman* tribunal remarked that the limitation period "would probably" be interrupted in the event of formal acknowledgment of the claim by the competent State organ. ¶ 60. The tribunal did not consider, much less find, that NAFTA permits a tribunal to read in an "exception" to the treaty's strict limitation period.

[233] *See also* **RLA-075**, *Renco Group, Inc. v. Republic of Peru* (PCA Case No. 2019-46), Decision on Expedited Preliminary Objections, Dissenting Opinion of J.C. Thomas QC, 30 June 2020.

[234] Claimant's Response on Jurisdiction, ¶ 172.

[235] *See* **RLA-030**, *The Renco Group, Inc. v. The Republic of Peru* (ICSID Case No. UNCT/13/1) Partial Award on Jurisdiction, 15 July 2016 ("*Renco I – Award on Jurisdiction*").

[236] A majority of the tribunal found that the notice of arbitration had been "submitted to arbitration" even in the absence of a defective waiver. Other tribunals considering the same treaty have come to the opposite conclusion and have delimited jurisdiction *ratione temporis* from the date of filing of a proper waiver. *See* Section V.B.1, below; **CLA-067**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru* (ICSID Case No. UNCT/18/2), Final Award, 6 December 2022 ("*Gramercy Funds – Award*"), ¶¶ 488, 495.

[237] **CLA-002**, *The Renco Group, Inc. v. Republic of Peru* (PCA Case No. 2019-46), Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 231. In addition, the respondent agreed that "the Parties agreed to suspend the prescription period during their consultations in 2016-2018", ¶ 171.

2022 Claim, the Claimant withdrew its 2018 NOA, and had no active claim against Canada until October 14, 2022 at the earliest.[238]

141. Third, the identity of the claimant in both *The Renco Group, Inc. v. The Republic of Peru* ("*Renco I*") and *Renco II* was the same. Here, the Claimant is attempting to "suspend" the limitation period because of a claim brought by a different claimant, WMH.

142. Fourth, as explained in detail in Section V.A.4 below, the authorities on which the *Renco II* majority relied concerned whether international law provides for the prescription (time limitation) of claims – not whether prescription could be suspended. The authorities were also decided under instruments that – unlike NAFTA – did not contain express and strict limitation periods conditioning State consent to arbitration.[239]

143. Much as the Claimant would like this case to be similar to *Renco II*, that decision offers no interpretive guidance to the Tribunal on the application of Articles 1116(2) and 1117(2) in this case.

3. The Object and Purpose of NAFTA Undermines the Claimant's Position

144. In the face of unequivocal treaty text barring its Claim, the Claimant adopts a highly selective view of the "object and purpose" of NAFTA and its three-year limitation period.[240] The object and purpose of NAFTA does not help the Claimant rewrite Articles 1116(2) and 1117(2).

145. The Claimant's main argument is that the existence of "a mechanism for the settlement of investment disputes" under Chapter Eleven should override the explicit jurisdictional requirements

[238] *See* Section III.B, above.

[239] The difference is meaningful. As Commissioner Little put it in the late 19th century: "While statutes of limitation are doubtless in good part aimed to be, as they are often alluded to as, expressions of prescription, they are, nevertheless, inaccurate expressions, because, for one thing, of their rigidity and want of adaptation to varying conditions and circumstances." **CLA-053**, *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, Decision of the Commissioner, Mr. Little, 5 December 1885, p. 287. In addition, the record on which the *Renco II* tribunal made its decision was incomplete. That tribunal had been provided with excerpts of civil codes said to support the claimant's view of "suspension". But under those very same domestic rules, suspension of the limitation period is terminated if the proceedings end or when the complainant withdraws its claim. *See e.g.*, **R-149**, Civil Code of France [Excerpt], Articles 2242, 2243; **R-150**, Civil Code of Germany, s. 204(2); **R-151**, Civil Code of Portugal, Article 327(2); **R-152**, Civil Code of Peru, Article 1997.

[240] Claimant's Response on Jurisdiction, ¶¶ 161-163.

of the treaty.[241] In particular, the Claimant posits that claims that have been "previously dismissed due to (correctable) procedural defects" should be allowed to proceed – regardless of whether the treaty's limitation period has run.[242] Nothing in the text or purpose of NAFTA Chapter Eleven supports that assertion. To the contrary, investor-State dispute resolution is an extraordinary mechanism subject to carefully conditioned and limited State consent.[243]

146. The Claimant's discussion of the "object and purpose" of limitation periods is also incomplete. In addition to predictability and the availability of reliable evidence,[244] NAFTA's strict limitation period provides certainty, stability, and finality for respondent States. In interpreting Articles 1116(2) and 1117(2), the tribunal in *Mobil v. Canada* underlined that the limitation period "plays [an] important role within the scheme of Chapter Eleven."[245] The tribunal referred specifically to the "guarantee" afforded by Articles 1116(2) and 1117(2): the limitation period "guarantees for all three States a degree of certainty and finality."[246] Similarly, in interpreting the limitation period provisions

[241] Claimant's Response on Jurisdiction, ¶ 161, *citing* NAFTA Article 1115. The Claimant also omits the full breadth of NAFTA's objectives, incorrectly stating that "[t]he object and purpose of the NAFTA is to promote cross-border investments". Claimant's Response on Jurisdiction, ¶ 161 (emphasis added). NAFTA Article 102 provides that the "objectives of this Agreement" are to: 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; d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

[242] Claimant's Response on Jurisdiction, ¶ 162.

[243] *See generally* **RLA-076**, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia* (PCA Case No. 2011-17), Award, 31 January 2014, ¶ 392 ("All clauses of the BIT must be given equal effect and, if the Contracting Parties gave their consent subject to those conditions, Rurelec could only accept the offer of arbitration as it was presented and not as it would have liked to receive it."); **RLA-015**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL, PCA Case No. 2010-9) Award on Jurisdiction, 10 February 2012, ¶ 272 ("At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed.")

[244] Claimant's Response on Jurisdiction, ¶ 163.

[245] **RLA-027**, *Mobil Investments Canada v. Canada* (ICSID Case No. ARB/15/6), Decision on Jurisdiction and Admissibility, 13 July 2018 ("*Mobil – Decision on Jurisdiction*"), ¶ 146.

[246] **RLA-027**, *Mobil – Decision on Jurisdiction*, ¶ 146. *See also* **R-099**, *Merrill & Ring Forestry L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1), Submission of the United States, 14 July 2008, ¶ 16 ("An ineffective Article 1116(2), in turn, would fail to promote the goals served by time-limit restrictions generally, which include ensuring the

of the CAFTA-DR, the tribunal in *Spence* noted that they "are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring."[247]

147. In the Claimant's view, a State's ability to preserve evidence "justif[ies]" the suspension of the limitation period.[248] However, giving "notice" to a State of a potential claim does not amend the express conditions of Articles 1116(2) and 1117(2). The treaty text does not permit a potential claimant to avoid the three-year limitation period by notifying the respondent State of a potential claim. Moreover, a claimant that withdraws a notice of arbitration cannot credibly contend that the respondent was therefore on notice to preserve potentially relevant evidence into the future. Fundamentally, Canada's ability (or not) to preserve evidence cannot override the temporal limitation on Canada's consent to arbitration that an investor "may not" submit a claim more than three years after first knowledge of breach and loss.[249]

4. The Claimant Has Failed To Establish The Existence of a General Principle of International Law on "Suspension" of Limitation Periods

148. In its Response, the Claimant states that general principles of international law are relevant to the Tribunal's task only "to the extent that the express terms of Articles 1116(2) and 1117(2) are ambiguous".[250] Canada agrees. As set out above, the text of Articles 1116(2) and 1117(2) is

availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential defendants and third parties.") (emphasis added).

[247] **RLA-016**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2), Corrected Interim Award, 30 May 2017, ¶ 208.

[248] Claimant's Response on Jurisdiction, ¶ 164.

[249] Contrary to the Claimant's assertion, the finding in *Vannessa Ventures* was not "on th[e] basis" of the purpose of the limitation period in the operative treaty (Claimant's Response on Jurisdiction, ¶ 164). In that case, the tribunal found that a claim related to copper mining was not time barred because the relevant measure occurred less than three years before the notice of arbitration, which "included the alleged violations […] relating to the Copper Concessions". **CLA-050**, *Vannessa Ventures v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Decision on Jurisdiction, 22 August 2008, ¶ 3.5.4 ("On 8 March 2002, the Ministry of Energy and Mines issued Resolution 3630 declaring MINCA's concession to the Las Cristinas Copper Concessions expired. For the Arbitral Tribunal, only this date is relevant regarding the commencement of the statute of limitation period. The Presidential Decree of President Chavez of 10 September 2002 published on 12 March 2003 reserving the Copper Concessions for direct exploitation by the Government of Venezuela is of no relevance in this context as already the previous Resolution of 8 March 2002 of the Ministry of Energy and Resources had deprived MINCA of any right to exploit the Copper Concessions which CVG had transferred to it on 28 January 1999.")

[250] Claimant's Response on Jurisdiction, ¶ 167.

unambiguous, rendering recourse to international law rules unnecessary. However, even if they are considered, the Claimant has failed to establish that there is an applicable rule of international law pertaining to suspension of limitation periods.

149. The Claimant appeals to early decisions of the Mixed Claims Commissions in the early 20th century to support its assertion that a "suspension" principle exists at international law.[251] However, these decisions were primarily concerned with whether prescription – not suspension of prescription – was a principle of international law. This inquiry was necessary because the governing instruments did not contain express limitation periods, and it was permissible because the adjudicators were empowered to decide "according to justice"[252] or "based upon absolute equity".[253]

150. Applying legal instruments that were silent on prescription, the Mixed Claims Commissions considered whether the adjudicator could nonetheless reject stale claims based on an international law concept of prescription.[254] In each case, the adjudicator found that even in the absence of a treaty-based limitation period, international law provided for the prescription of claims that were too old or

[251] Claimant's Response on Jurisdiction, ¶¶ 167-171.

[252] The *Williams v. Venezuela* case was adjudicated by a Claims Commission established under the Convention concluded between the United States of America and Venezuela of December 5, 1885. Under that instrument, "Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direction of international law on the subject." **CLA-053**, *Case of John H. Williams v. Venezuela,* Reports of International Arbitral Awards, Vol. XXIX, Decision of the Commissioner, Mr. Little, 5 December 1885, p. 280.

[253] The *Gentini Case* was adjudicated by the Italy-Venezuela Mixed Claims Commission, as were the *Giacopini Case* and the *Tagliferro Case*. The Protocol governing the proceedings of that Mixed Claims Commission specified that: "The decisions of the Commission shall be based upon absolute equity, without regard to objections of a technical nature or of the provisions of local legislation." **R-153**, Reports of International Arbitral Awards, Mixed Claims Commission (Italy–Venezuela), Volume X, 13 February and 7 May 1903, Article II, p. 482 (emphasis added). *See also* **CLA-026**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius Publications Limited, 1987), p. 378 ("In the opinion of the Umpire in the *Gentini Case*, prescription is a principle founded on equity and aimed at the attainment of justice. It has grown out of the necessities of mankind and has been sanctioned by the general juridical feeling of all nations since the earliest times. […] Before amplifying what the Umpire in the *Gentini Case* held to be the *ratio* of prescription, it may be pointed out that the application of the principle in international law may be excluded by express treaty provisions […]. But in the absence of such positive rules the [prescription] principle is applicable whenever those circumstances calling for its application, exist.") (emphasis added).

[254] **RLA-077**, P. J. Martinez-Fraga and C. Ryan Reetz, *The Status of the Limitations Period Doctrine in Public International Law: Devising a Functional Analytical Framework for Investors and Host-States*, McGill Journal of Dispute Resolution, Vol. 4 (2017-2018) ("*Martinez-Fraga & Reetz*"), p. 112 ("*Gentini* and *Williams* can be construed as standing for the proposition that international law, without specifying a particular field of international law, recognizes and encourages the application of the [limitation period doctrine] even where the treaty at issue does not prescribe a limitations period.")

stale. In so doing, they recognized prescription – not the suspension of prescription – as a principle of international law.[255] Thus, these cases do not establish the existence of a general principle of international law concerning suspension of limitation periods.

151. The NAFTA Parties included a clear and unqualified treaty-based limitation period of three years on claims under NAFTA Chapter Eleven. The Claimant has failed to establish any applicable rule of international law of "suspension" that could inform the interpretation of the clear treaty terms.

5. The Claimant's Theory of Suspension Cannot be Sustained

152. As explained above, NAFTA's limitation period is strict and the claim before this Tribunal is untimely. However, even if some form of suspension of the limitation period were permitted (*quod non*), the Claimant's theory of "suspension" has no merit.[256]

153. First, the Claimant improperly assumes that a claim, once made, suspends the limitation period – even if the claim is later withdrawn. In 2019, the Claimant withdrew its previous claim from submission to arbitration and discontinued the process of appointing a tribunal for that arbitration.[257] The Claimant has not explained how a withdrawn, inoperative claim could suspend the limitation

[255] The view that prescription is a principle of international law is not universally held. **RLA-077**, *Martinez-Fraga & Reetz*, p. 116 ("One line of authority, the Claims Tribunal cases together with *some* publicists, holds that customary international law recognizes and applies the [limitation period doctrine] in disputes based on a treaty where the treaty is silent as to a limitations period. A second line of equally normative authority holds that customary international law does not recognize the [limitation period doctrine] in disputes based on a treaty where the treaty is silent as to a limitations period.") (emphasis in original; internal citations omitted). The issue of prescription has arisen in investor-State dispute resolution when the underlying treaty does not contain an express limitation period. *See e.g.*, **RLA-078**, *Gavazzi v. Romania* (ICSID Case No. ARB/12/25), Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 147 ("Neither the ICSID Convention, nor the BIT, nor international law in general contain any statute of limitations in relation to treaty claims. Without such clear legal provisions, no time-bar can operate to bar an ICSID arbitration.") For a general discussion of limitation periods in investment treaties, *see* **R-154**, Pohl, J., K. Mashigo and K. Gordon, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Investment Division (2012), OECD Publishing, Paris, pp. 16-17.

[256] The Claimant appears to have moved away from its "relating back" and "tolling" theories. *See* Claimant's 2022 NOA, ¶¶ 112-114; Canada's Memorial on Jurisdiction, ¶¶ 99-100. "Relating back" does not appear in the Claimant's Response on Jurisdiction, and the concept of "tolling" is mentioned once, in the introduction. Claimant's Response on Jurisdiction, ¶ 9.

[257] Claimant's Response on Jurisdiction, ¶ 40. *See also* Section II.A, above. WCC's 2018 Claim was not "previously dismissed", as the Claimant states. Claimant's Response on Jurisdiction, ¶ 162.

period for its 2022 Claim. Articles 1116(2) and 1117(2) expressly do not allow for the submission of claims when "the statute of limitations has run in the meantime."[258]

154. Second, the Claimant incorrectly asserts that the submission to arbitration of a claim by one investor can suspend the limitation period for a claim by another investor. It has not pointed to any authority in support of this novel assertion. To the contrary, claims that are submitted to arbitration, and the investors that submit those claims, are not interchangeable.[259] The limitation period in NAFTA is specific to "the" investor that submits "the" notice of arbitration[260] and otherwise complies with the requirements of the treaty.

155. Third, the Claimant asserts that the claims advanced by WCC and WMH are "the same" because they do not involve "unrelated entities" or "differing interests".[261] However, the two WCC Claims and the WMH Claim are not "the same".[262] Canada's consent to arbitrate under NAFTA Chapter Eleven is not determined by whether an investor is a "related entity" to another investor, or how two entities' interests may or may not align. As the *WMH* tribunal noted, "Canada's consent to arbitrate under NAFTA Chapter Eleven is limited" by the definition of "investor" in NAFTA.[263] Here, the facts are incontrovertible: WCC and WMH are not the same.[264]

[258] Claimant's Response on Jurisdiction, ¶ 162.

[259] *See* Section III.A, above.

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

[261] Claimant's Response on Jurisdiction, ¶ 182.

[262] Claimant's Response on Jurisdiction, ¶ 181. *See also* Claimant's Response on Jurisdiction, ¶ 180 ("even assuming, *arguendo*, that the claims asserted by WCC and WMH were different, that would have no impact on the applicability of the suspension principle".)

[263] **RLA-001**, *WMH – Final Award*, ¶ 116.

[264] Claimant's Response on Jurisdiction, ¶ 182. As the *WMH* tribunal found, WMH "is not the same entity as WCC". **RLA-001**, *WMH – Final Award*, ¶ 117. The two entities also had adverse interests. **RLA-001**, *WMH – Final Award*, ¶ 117 (stating that WMH's "formation document evidences that it was created by WCC's first-tier lien holders and not by WCC. It was constituted as a new entity on behalf of the first-tier lien holders to purchase certain assets from WCC in an arms-length transaction to satisfy partially the first-tier lien holders' claims against WCC. The first-tier lien holders, as WCC's creditors, were adverse to WCC so Westmoreland must equally have been adverse to WCC.") (internal citations omitted). "Westmoreland" was defined as Westmoreland Mining Holdings LLC (WMH). *See* ¶ 1.

156. Fourth, the Claimant argues that the Tribunal may disregard the limitation period because "WCC and WMH's claims involve the exact same investments and the exact same measures."[265] This too is incorrect. An "investment" of one investor is distinct from the "investment" of another investor.[266] Even if the three claims challenged "the exact same measures" (which is not the case here[267]), that does not render the claims or the claimants "the same". Indeed, NAFTA contemplates separate claims by separate claimants based on the same underlying measure.[268] As noted above, it was open to WMH to proceed with its own claim alongside WCC's. These highly sophisticated and well-advised entities made decisions regarding how to proceed, and they cannot now undo those choices because they did not obtain their desired result.[269]

157. Finally, the Claimant asserts that the Tribunal should ignore the limitation period on the basis of "party conduct" and makes the misleading statement that Canada "recognize[d] that WMH and WCC asserted the same claim".[270] As set out in detail above, Canada has consistently recognized the existence of WCC's and WMH's separate claims, and has at all times acted in good faith and in accordance with the terms of NAFTA Chapter Eleven.[271]

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[265] Claimant's Response on Jurisdiction, ¶ 182.

[266] *See* **RLA-001**, *WMH – Award*, ¶ 200; **C-047,** *Westmoreland Mining Holdings, LLC v. Canada* (ICSID Case No. UNCT/20/3), Canada's Reply Memorial on Jurisdiction, 9 April 2014, ¶¶ 51-52.

[267] WCC's 2018 Claim challenged two Alberta measures, the Climate Leadership Plan (2015) and the Off-Coal Agreements (2016), alleged violations of NAFTA Articles 1102 and 1105, and sought damages "exceeding" USD 470 million. **R-079**, *WCC – 2018 NOA*, ¶¶ 24, 28, 82-104. WMH's 2019 Claim initially challenged the same two Alberta measures and sought USD 470 million in damages. **R-085**, *Westmoreland Mining Holdings LLC v. Canada* (ICSID Case No. UNCT/20/3), Notice of Arbitration and Statement of Claim, 12 August 2019, ¶¶ 93, 104, 105, 111. WCC's 2022 Claim challenged the Climate Leadership Plan, the Off-Coal Agreements, a new provincial measure (the fuel charge) and a new federal measure (the Federal Fuel Charge), alleged violations of Articles 1102, 1105, and 1110, and sought damages of an undisclosed amount. In its Response, WCC has dropped its challenge to the Federal Fuel Charge (*see* ¶ 24); the status of the provincial fuel charge is unclear, as is whether the Claimant maintains its allegation that Canada violated NAFTA Article 1110.

[268] *See* NAFTA Article 1117(3), Article 1126. *See also* Section III.A, above.

[269] Claimant's Response on Jurisdiction, ¶ 27.

[270] Claimant's Response on Jurisdiction, fn. 280; *see also* ¶ 183.

[271] *See* Sections II, III, above.

6. The Claimant's Attempt to Create Jurisdiction Based on Estoppel or "Abuse of Rights" Must Fail

158. The Claimant next argues that Canada should be "estopped from asserting the limitations defense" and that Canada's limitation period objection constitutes an "abuse of rights under international law".[272] Neither the law nor the facts support the Claimant's invocation of estoppel and abuse of rights to avoid NAFTA's limitation period. With respect to estoppel, Canada refers to its submissions above to correct the Claimant's erroneous contention that Canada should be estopped from asserting the limitations defense.[273]

159. The Claimant's allegation of abuse of rights must similarly be rejected. As with estoppel, the Tribunal cannot, as a matter of law, exercise jurisdiction where it does not otherwise exist based on an alleged abuse of right.[274] The Claimant has not cited a single authority in which a tribunal chose to exercise jurisdiction as a result of a respondent State's alleged abuse of rights, despite the claimant having failed to comply with the treaty's limitation period. Nor has it pointed to any authority where a tribunal has found that a respondent State's objection with respect to the limitation period constitutes an abuse of rights.

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[272] Claimant's Response ¶¶ 190-197 (on estoppel) and ¶¶ 198-209 (on abuse of rights).

[273] The Claimant raises two points in support of its estoppel argument: that Canada "insisted" on WCC's withdrawal of its 2018 Claim while failing to disclose future jurisdictional arguments; and that Canada's statements at the *WMH* hearing bar it from contesting jurisdiction here. Claimant's Response on Jurisdiction, ¶ 191. Both must be rejected. *See* Section IV.C, above (showing that as a matter of law, a tribunal cannot find jurisdiction based on the doctrine of estoppel, and that as a matter of fact, the Claimant has not established estoppel based on the procedural history of the WCC 2018 Claim and the 2019 WMH Claim or on statements at the *WMH* hearing).

[274] Investment tribunals have found that an abuse of rights may limit jurisdiction once otherwise established, but that it cannot itself create jurisdiction where it would otherwise not exist. *See e.g.*, **RLA-079**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17), Award, 9 January 2015 ("*Renée Rose Levy - Award*"), ¶ 182 (considering "that an abuse of process objection must be distinguished from a *ratione temporis* objection. If a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process. Here, the Tribunal has established that Ms. Levy acquired her investment prior to the challenged measure, even if it was just slightly before. In such a situation, a tribunal has jurisdiction *ratione temporis* but may be precluded from exercising its jurisdiction if the acquisition is abusive.") (emphasis added); **RLA-080**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12), Award on Jurisdiction and Admissibility, 17 December 2015 ("*Philip Morris – Award on Jurisdiction*"), ¶¶ 527, 534, 588 (finding that the requirements for the tribunal's jurisdiction *ratione temporis* were met but the tribunal was precluded from exercising jurisdiction over the dispute because the initiation of the arbitration constituted an abuse of rights); and **RLA-081**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012 ("*Pac Rim – Decision on Jurisdiction*"), ¶¶ 2.10, 2.107, 2.110 (noting that an abuse of process may preclude a tribunal from exercising jurisdiction, assuming jurisdiction exists, but finding that based on the facts, there was no abuse of process by the claimant).

160. The Claimant cites only two authorities, each more than a century old and between States, for support of its proposition that a State "could not invoke a limitations defense where it was partially responsible for the claimant's delay in bringing the claim".[275] Neither case even mentions abuse of rights.[276]

161. The only international investment case the Claimant cites with respect to abuse of rights, *Abaclat v. Argentina*, does not support its argument either.[277] This case did not involve a respondent State's conduct. Rather, it dealt with Argentina's objection to the tribunal's jurisdiction on the grounds that the initiation of the proceeding by the claimants' representative constituted an abuse of rights, an objection the tribunal dismissed.[278]

162. In fact, the Claimant fails to cite the only authority of which Canada is aware where an investment tribunal addressed a claimant's allegation that a State's jurisdictional objection amounted to an abuse of rights – *Renco I*. In that case, Peru objected to the claimant's waiver. Notably, the tribunal held that Peru's conduct regarding the late raising of its waiver objection did not rise to the level of an abuse of rights. The tribunal emphasized that, in raising its late waiver objection, Peru had "sought to vindicate its right to receive a waiver which complies with the formal requirement of" the

[275] Claimant's Response on Jurisdiction, ¶ 202, *citing* **CLA-062**, *Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 385–387; **CLA-063**, *Irene Roberts Case*, Reports of International Arbitral Award, Vol. IX, pp. 204-208.

[276] Moreover, both cases can be easily distinguished. As an initial matter, the instruments under which they were decided did not contain express limitation periods limiting the State's consent. Moreover, Venezuela had been aware of the claims at issue in both cases for over thirty years, had refused to respond to and adjudicate them, and then argued that the claims were barred by general prescription principles. In these circumstances, Umpire Plumley rejected Venezuela's prescription argument in the *Stevenson Case* and Commissioner Bainbridge rejected the argument in the *Irene Roberts Case*. *See* **CLA-062**, *Stevenson Case*, Reports of International Arbitral Awards, Vol. IX, pp. 386–387; **CLA-063**, *Irene Roberts Case*, Reports of International Arbitral Award, Vol. IX, p. 207. These are not the circumstances present before this Tribunal. NAFTA Articles 1116(2) and 1117(2) impose an express and strict limitation period. In raising a limitation period objection here, Canada seeks to ensure that the express conditions of its consent to arbitrate have been met.

[277] *See* Claimant's Response on Jurisdiction, ¶ 199.

[278] **CLA-061**, *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5) (formerly *Giovanna a Beccara and Others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility, 4 August 2011, ¶¶ 644, 657-659.

treaty,[279] and that Peru had "no duty to arbitrate Renco's claims under the Treaty unless Renco submits a waiver which complies with Article 10.18(2)(b)."[280]

163. The *Renco I* tribunal recognized what investment tribunals have consistently ruled: that the threshold to prove an abuse of rights is high. As the tribunal in *Chevron v. Ecuador* remarked:

> [I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process.[281]

164. In her separate opinion in the *Oil Platforms* case, Judge Higgins similarly explained that "the graver the charge the more confidence must be in the evidence relied on".[282]

165. The Claimant has failed to establish that such "very exceptional circumstances" exist here.[283] The Claimant has not adduced any evidence that would suggest Canada's conduct in raising a limitation period objection was "tainted by an ulterior motive",[284] or, as put by the Claimant, that Canada "manipulated the proceedings to ensure that WCC does not receive its day in court".[285] To

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[279] **RLA-030**, *Renco I – Award on Jurisdiction,* ¶ 186.

[280] **RLA-030**, *Renco I – Award on Jurisdiction,* ¶ 186.

[281] **CLA-018**, *Chevron – Interim Award*, ¶ 143; **RLA-030**, *Renco I – Award on Jurisdiction*, ¶ 177; **RLA-082**, *Rand Investments Ltd. and others v. Republic of Serbia* (ICSID Case No. ARB/18/8), Award, 29 June 2023, ¶ 464; **RLA-079**, *Renée Rose Levy – Award*, ¶ 186; **RLA-080**, *Philip Morris – Award on Jurisdiction*, ¶ 539; **RLA-083**, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Spain* (ICSID Case No. ARB/13/31), Award, 15 June 2018, ¶ 317.

[282] **RLA-030**, *Renco I – Award on Jurisdiction*, ¶ 177, *citing* **CLA-018**, *Chevron – Interim Award*, ¶ 143; **RLA-084**, *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, I.C.J. Reports 2003, p. 225, Separate Opinion of Judge Higgins, ¶ 33. Academic writings confirm the high threshold for a finding of abuse of rights and its "exceptional nature". **RLA-085**, Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (Oxford University Press 2020) [Excerpt], ¶ 4.255; **CLA-058**, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge Grotius Publications Limited, 1982), p. 164.

[283] As the tribunal in *Pac Rim Cayman LLC v. Republic of El Salvador* stated: "the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal." **RLA-081**, *Pac Rim – Decision on Jurisdiction*, ¶ 2.11. The tribunal in *Pac Rim v. El Salvador* discussed the burden of proof in the context of the respondent's allegation that there had been an abuse of process committed by the claimant in bringing its claim.

[284] **RLA-030**, *Renco I – Award on Jurisdiction,* ¶ 186.

[285] Claimant's Response on Jurisdiction, ¶ 207.

the contrary, as discussed above, Canada's conduct with respect to the 2019 correspondence and its defence in the *WMH* arbitration was taken in good faith and was in no way abusive.[286] Canada did not waive its right to raise jurisdictional objections with respect to "any new claim" that may be submitted to arbitration as the Claimant alleges; it expressly reserved the right to do so.[287]

166. In raising a limitation period objection here, Canada seeks to uphold its offer to arbitrate only claims that have been timely submitted according to the procedures set out in CUSMA Annex 14-C and NAFTA Chapter Eleven. If a claimant has not submitted its claim within the three-year limitation period set out in Articles 1116(2) and 1117(2), Canada has not consented to arbitration and a tribunal will not have jurisdiction. The Claim before this Tribunal is untimely and jurisdiction cannot be otherwise assumed.

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

167. In its Memorial, Canada demonstrated that the Claimant failed to establish the Tribunal's jurisdiction *ratione voluntatis* in two ways.[288] First, the Claimant's reliance on waivers for WCC and Prairie that are dated from 2018 and that accompanied the 2018 NOA, which was in turn withdrawn by the Claimant in 2019, cannot meet the formal requirements of NAFTA Article 1121(3) for this Claim.[289] Second, the Claimant cannot assert a claim on behalf of Prairie under NAFTA Article 1117(1) as Prairie waived such rights in the waiver it submitted in the *WMH* arbitration.[290]

168. In its Response, the Claimant argues that the requirements of Article 1121 have been met because the 2018 waivers "continue in effect in perpetuity,"[291] and were filed "contemporaneously" with its Notice of Arbitration in the present arbitration.[292] Relying on sparse authority, it further

[286] *See above* ¶¶ 23-50 and ¶¶ 110-122.

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

[288] Canada's Memorial on Jurisdiction, ¶¶ 110-129.

[289] Canada's Memorial on Jurisdiction, ¶¶ 111-123.

[290] Canada's Memorial on Jurisdiction, ¶¶ 124-129.

[291] Claimant's Response on Jurisdiction, ¶¶ 13, 210.

[292] Claimant's Response on Jurisdiction, ¶ 214.

argues that it may bring its Article 1117 claim on behalf of Prairie because it has an alleged right to have its claim heard on the merits.[293] The Claimant's arguments must fail.

1. The Claimant Did Not Submit Valid Waivers With its 2022 NOA as NAFTA Article 1121(3) Requires

169. In its Memorial, Canada demonstrated that the Claimant and Prairie have failed to provide waivers contemporaneous with the 2022 NOA, as required by Article 1121(3), and that this Claim must be dismissed.[294] This is especially true given the Claimant's failure to confirm that the individuals who signed the 2018 waivers had the legal authority to waive the rights of WCC and Prairie at the time the 2022 NOA was filed.[295] The Claimant's argument that it has met the requirements of Article 1121(3) because the 2018 waivers "remain valid and continue to be in force today"[296] must be rejected.

170. There is no dispute that the Claimant and Prairie submitted valid waivers in accordance with Article 1121 when WCC's 2018 Claim was submitted to arbitration.[297] However, the 2018 waivers cannot be used to satisfy the requirements of Article 1121 for this Claim, nor do such waivers remain effective given the Claimant's withdrawal of the 2018 NOA. The question for this Tribunal is not "whether the Claimant filed valid waivers with its 2018 Claim". Rather, the Tribunal must assess whether the Claimant has filed valid and effective waivers for the purposes of this Claim. It has not, and the Claimant's Claim must be dismissed.

[293] Claimant's Response on Jurisdiction, ¶¶ 226-232.

[294] Canada's Memorial on Jurisdiction, ¶¶ 111-123.

[295] Canada's Memorial on Jurisdiction, ¶ 119.

[296] Claimant's Response on Jurisdiction, ¶ 212.

[297] Claimant's Response on Jurisdiction, ¶¶ 210, 212.

(a) The Claimant Cannot Rely on the 2018 Waivers in the Current Arbitration

171. NAFTA Article 1121(3) requires a waiver to be in writing, delivered to the disputing Party, and included in the submission of a claim to arbitration.[298] The Claimant has not met these requirements.[299]

172. In its Response, the Claimant wrongly argues that "Canada's formalistic arguments with respect to the waiver letters undermine the purpose of the NAFTA",[300] that "multiple tribunals have held that a waiver letter need not be submitted simultaneously with the notice of arbitration",[301] and that failing to do so "is insufficient to deprive the Tribunal of jurisdiction."[302] The Claimant relies on the decisions in *International Thunderbird Gaming v. Mexico*,[303] *B-Mex v. Mexico*,[304] *Ethyl v. Canada*,[305] and *Pope & Talbot v. Canada*.[306] However, these authorities do not disrupt the conclusion that the Tribunal lacks jurisdiction because the Claimant has not submitted valid waivers for this Claim.

173. First, the 2018 waivers were withdrawn with the 2018 NOA. As of the date of the withdrawal, those waivers were no longer valid and binding. The Claimant has not pointed to any authority that would support its view that if a claim is withdrawn prior to the constitution of a tribunal, the waivers filed with that claim continue to be effective.

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

[299] Canada's Memorial on Jurisdiction, ¶¶ 119-123.

[300] Claimant's Response on Jurisdiction, ¶ 216.

[301] Claimant's Response on Jurisdiction, ¶ 216.

[302] Claimant's Response on Jurisdiction, ¶ 216.

[303] **RLA-037**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Arbitral Award, 26 January 2006 ("*Thunderbird – Award*").

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

[305] **CLA-064**, *Ethyl Corporation v. Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998 ("*Ethyl – Award on Jurisdiction*").

[306] **CLA-066**, *Pope & Talbot – Award on Motion*.

174. The Claimant incorrectly alleges that Canada recognized that "such waiver letters ought to remain valid today."[307] Canada has taken no such position. To the contrary, in its Memorial, Canada noted a hypothetical of what would happen "if the 2018 waivers continued to be effective".[308] Indeed, if the 2018 waivers remained effective, they would bar the Claimant's right to initiate or continue this Claim, as this Claim is "with respect to the measures" alleged to breach NAFTA Chapter Eleven in the 2018 NOA. This is consistent with the arguments that Canada has made below regarding the Prairie *WMH* waiver, which Canada agrees "continues to be in force."[309]

175. Second, the Claimant cannot rely on the withdrawn 2018 waivers, submitted with its 2018 NOA, to establish that the requirements of Article 1121 are met for a different claim. In this regard, Canada maintains the position it has taken in other proceedings that a waiver must be filed simultaneously with a request for arbitration to meet the preconditions to arbitration, and for a claim to be validly submitted to arbitration.[310] The Claimant's attempt to discredit this requirement by referring to cases in which a valid waiver was simply filed late are unavailing. This is not a case in which effective and valid waivers were filed late.[311] In fact, the *Thunderbird* tribunal specifically noted that "[t]he issue at hand is therefore not an actual failure to file waivers for [certain entities], but rather the (un-)timeliness of the filings in question."[312] The Claimant ignores the fact that the waivers the Claimant attempts to rely on in this Claim were filed in a separate and distinct claim,[313] and that the 2018 waivers were withdrawn along with the 2018 NOA. Those facts mean that it has not filed the waivers required by Article 1121 for the 2022 NOA.

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[307] Claimant's Response on Jurisdiction, ¶ 210.

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

[309] Canada's Memorial on Jurisdiction, ¶ 126.

[310] *See e.g.*, **CLA-064**, *Ethyl – Award on Jurisdiction*, ¶ 89.

[311] In this regard, the Claimant's argument that its waivers here were submitted early (in 2018) must also fail. First, as noted above, those waivers are no longer effective because WCC withdrew them along with the 2018 NOA that they accompanied. Second, waivers filed four years before a notice of arbitration cannot satisfy the requirements of Article 1121 unless there is clear evidence that the individuals signing the waiver had legal authority to waive the rights of the claimant and enterprise(s) (in the case of a claim under Article 1117) as of the time the claim was submitted to arbitration, or at the latest, prior to the constitution of the tribunal.

[312] **RLA-037**, *Thunderbird – Award*, ¶ 116.

[313] *See* Section III, above.

176. Third, Canada does not agree with the Claimant's argument that the "substance of the waiver letters" is consistent with NAFTA Article 1121.[314] The Claimant has refused to confirm whether the individuals who signed the waivers had the power to waive the legal rights of WCC and Prairie on October 14, 2022, when the NOA was submitted. While Canada asked the Claimant for such confirmation prior to the constitution of the Tribunal, none was provided.[315]

177. Nor has the Claimant attempted to correct the fact that it failed, even after submitting its NOA, to file waivers in accordance with Article 1121 as was done in the authorities the Claimant relies on.[316] Indeed, Canada gave the Claimant an opportunity to do so prior to the constitution of this Tribunal and the Claimant refused without further explanation as to why.[317] While Canada was under no obligation to raise this issue with the Claimant prior to its first written submission, Canada did so in any event to afford the Claimant an opportunity to cure the defect while it could still be cured. The only explanation the Claimant presents is a reference in its Response that "a second waiver would serve no legal purpose since there was nothing left for WCC to waive when it filed its [NOA]."[318] This argument collapses completely given the 2018 waivers were no longer effective as of the date the 2018 WCC Claim was withdrawn.

178. The Claimant has thus failed to establish that it submitted valid and effective waivers in accordance with Article 1121(3) with the 2022 NOA.

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[314] Claimant's Response on Jurisdiction, ¶ 211.

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

[316] Whether this Tribunal considers Article 1121(3) to be a question of jurisdiction or admissibility, the consequence for the Claimant is the same. The authorities put forward by the Claimant only support the notion that compliance with Article 1121(3) is a question of admissibility, not Article 1121(1) or (2), which are squarely jurisdictional requirements. For example, in holding that a defect under Article 1121 could be cured, the tribunal in *B-Mex* was discussing the requirements of Article 1121(3) with respect to the form and timing of a waiver, noting that, in its view, this was a question of a "claim's admissibility and can be cured". **RLA-046**, *B-Mex – Partial Award*, ¶¶ 60, 257. In doing so, it specifically held that it agreed that the "conditions precedent of Article 1121(1) which were required to show consent of the disputing parties had a "bearing on jurisdiction". **RLA-046**, *B-Mex – Partial Award*, fn. 73. The same is true of the *Ethyl* tribunal's determination. **CLA-064**, *Ethyl – Award on Jurisdiction*, ¶ 91 (referring specifically to the text of Article 1121(3)).

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

[318] Claimant's Response on Jurisdiction, ¶ 213.

(b) The Failure to Provide a Waiver in Accordance with Article 1121(3) Is Fatal to the Claimant's Claim

179. Canada explained in its Memorial that, in the absence of the respondent's consent, the only remedy for a claimant's failure to file valid and effective waivers after the tribunal is constituted is dismissal of the claim.[319] The Claimant has not demonstrated why this result is incorrect on the record before this Tribunal. The authorities the Claimant relies on do not support a finding that the Claimant's failure to file a proper waiver with this claim can be corrected.

180. First, the Claimant relies on *Thunderbird* to argue that failing to allow the claimant in that case to remedy its waivers by filing them 15 days after the request for arbitration would have resulted in an "overly formalistic reading of Article 1121".[320] However, the Claimant fails to distinguish, or even mention, the numerous authorities that have held that failure to comply with the provisions of Article 1121 deprive a tribunal of jurisdiction.[321]

181. Nor has the Claimant articulated why the decision of the *Thunderbird* tribunal (which, on this issue, is two paragraphs long), or the three other authorities it cites, should prevail over the consistent views of the three NAFTA Parties.[322] It also fails to note the decision in *Pope & Talbot*, which held that, at the latest, a waiver must come prior to the tribunal's constitution:

> [T]he requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a

[319] Canada's Memorial on Jurisdiction, ¶ 118.

[320] Claimant's Response on Jurisdiction, ¶ 217; **RLA-037**, *Thunderbird – Award*, ¶ 117.

[321] **RLA-029**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), Award on Jurisdiction, 2 April 2015 ("*DIBC – Award on Jurisdiction*"); **RLA-028**, *Waste Management, Inc. v. United Mexican* States (ICSID Case No. ARB (AF)/98/2), Arbitral Award, 2 June 2000 ("*Waste Management – Award*"); **RLA-030**, *Renco I – Award on Jurisdiction*; **CLA-067**, *Gramercy Funds – Award*, ¶ 146; **RLA-046**, *B-Mex – Partial Award*.

[322] *See e.g.*, **R-106**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Counter-Memorial Regarding the Competence of the Tribunal, 5 November 1999, ¶¶ 25-30, 93-98; **R-107**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Submission of the Government of Canada, 17 December 1999, ¶¶ 8, 11; **R-108**, *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America* (UNCITRAL), Statement of Defense on Jurisdiction of Respondent United States of America, 15 December 2004, ¶¶ 8-10; **R-109**, *KBR, Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1), Submission of the United States of America, 30 July 2014, ¶¶ 2-4.

> claim can competently be made. Rather, it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected.[323]

182. In both *B-Mex* and *Gramercy Funds*, the same held true. The defective waiver in each case was cured prior to the constitution of the Tribunal.[324] Further, as the Claimant notes, in *Gramercy Funds*, the respondent State, Peru, did not object to the claimant remedying its defective waiver.[325]

183. Thus, even if the Claimant is correct that a defective waiver can be cured after a notice of arbitration is filed without a respondent State's consent, it must be done prior to the constitution of the tribunal at the latest. Once a tribunal is constituted, a defective waiver cannot be remedied by a claimant or by the tribunal as the tribunal would have been constituted before the proper submission of the claim to arbitration and without the consent of the respondent State as contemplated in Article 1121.[326] In this regard, Canada agrees with the submission of the U.S.[327] and the decision of the tribunal in *Gramercy Funds* that:

> Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration.[328]

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[323] **RLA-086**, *Pope & Talbot v. Canada* (UNCITRAL), Award in Relation to the Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of The Statement of Claim from the Record (The "Harmac Motion"), 24 February 2000, ¶ 18 (emphasis added).

[324] **RLA-046**, *B-Mex – Partial Award*, ¶¶ 10, 11, 18; **CLA-067**, *Gramercy Funds – Award*, ¶¶ 25, 146.

[325] **CLA-067**, *Gramercy Funds – Award*, ¶ 486. The only issue in dispute with respect to the claimant's corrected waiver in that case was the date upon which the waiver would be deemed effective, and as such, the claim validly submitted to arbitration. In the end, the tribunal held that the effective date of the waiver was the date it was submitted with the claimant's amended Notice of Arbitration (*see* ¶ 488). This date was then carried forward to analyze the claimant's argument with respect to the limitation period.

[326] **RLA-029**, *DIBC – Award on Jurisdiction*, ¶ 321. *See* **RLA-032**, *Railroad Development Corporation v. Guatemala* (ICSID Case No. ARB/07/23), Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 61; **RLA-034**, *KBR Inc. v. United Mexican States* (ICSID Case No. UNCT/14/1) Final Award, 30 April 2015 [Spanish and English Translation] ("*KBR – Award*"), ¶ 148; **RLA-038**, *Bacilio Amorrortu v. Peru* (PCA Case No. 2020-11), Partial Award on Jurisdiction, 5 August 2022, ¶¶ 237, 265; **RLA-030**, *Renco I – Award on Jurisdiction*, ¶ 173; **RLA-028**, *Waste Management – Award*, ¶ 31.

[327] **R-102**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v The Republic of Peru* (ICSID Case No. UNCT/18/2) Submission of the United States, 21 June 2019, ¶ 17.

[328] **CLA-067**, *Gramercy Funds – Award*, ¶ 495.

184. Accordingly, waivers that are submitted after a notice of arbitration, but before the constitution of a tribunal, also impact the date on which a claim is submitted to arbitration. Thus, even if the Tribunal accepts the Claimant's argument that waivers need not be contemporaneous with a notice of arbitration, the failure to file both at the same time means that such a claim will only qualify as submitted to arbitration on the date the effective waivers are filed.[329]

185. Further, in accepting the claimant's tardy waiver in *B-Mex,* of key importance to the tribunal was evidence that the claimant did not have *de facto* control over the enterprise at the time the claim was submitted to arbitration, and thus could not obtain the proper waiver.[330] When a proper waiver was eventually provided, it was clear that it was signed by an individual that had "the power to 'submit [the company] to arbitration'".[331] This is certainly not the case here. Canada has not been presented with any evidence that the individuals who signed the 2018 waivers continue to have any legal authority on behalf of the Claimant or Prairie as of the date the 2022 NOA was submitted to arbitration.

186. It is striking that the Claimant preferred to litigate this issue before the Tribunal instead of filing new waivers out of an abundance of caution. Instead, the Claimant's failure to file valid waivers from WCC and Prairie with its 2022 Claim means it has not met the conditions to Canada's consent to arbitration under NAFTA Article 1121. As this Tribunal has already been constituted, the Claimant's failure to comply with Article 1121(3) cannot be cured and this Claim must be dismissed.

2. Prairie Has Waived Its Right to Have This Claim Submitted to Arbitration under NAFTA Article 1117(1)

187. In its Memorial, Canada demonstrated that the Claimant cannot bring an Article 1117(1) claim on behalf of Prairie as Prairie waived its right to such a claim in the *WMH* arbitration.[332] The Article 1117(1) claim advanced in this arbitration on behalf of Prairie, which is with respect to the measures

[329] This conclusion has direct consequences for other aspects of the Claimant's Claim, too. Specifically, the limitation period continues to run because WCC's 2022 NOA was accompanied by a defective waiver. Thus, even on the Claimant's case on timeliness (which cannot be accepted for the reasons outlined in Section V.A, above), its Claim is untimely.

[330] **RLA-046**, *B-Mex – Partial Award*, ¶ 254.

[331] **RLA-046**, *B-Mex – Partial Award*, ¶¶ 252-253.

[332] Canada's Memorial on Jurisdiction, ¶¶ 124-129.

that were at issue in the *WMH* arbitration,[333] is barred by the ongoing application of the waiver filed by Prairie in that proceeding. There is no interpretation of Article 1121 which allows Prairie to have a new claim advanced on its behalf, including a new arbitration under NAFTA Chapter Eleven. This is true notwithstanding the dismissal of the 2019 WMH Claim at the jurisdictional stage.

188. In its Response, the Claimant argues that "it is a fundamental principle of international law that a claimant is not barred from bringing a claim until its claim is litigated on the merits."[334] In this regard, it argues that its claim must be permitted to proceed, in effect arguing that the waiver filed by Prairie with the WMH Claim is no longer effective simply because the claim was dismissed at the jurisdictional stage. The Claimant's argument is baseless. As Canada demonstrates below, on August 12, 2019, when the WMH Claim was submitted to arbitration, Prairie expressly waived its right to have other NAFTA Article 1117(1) claims initiated on its behalf. As such, WCC is barred from bringing this claim under Article 1117(1) on Prairie's behalf.

(a) The Text of Article 1121 Does Not Allow an Enterprise to Have Multiple Claims Filed on Its Behalf

189. Waivers filed pursuant to NAFTA Articles 1121(1)(b) and (2)(b) require a claimant and its enterprise to waive their right to initiate or continue "any proceedings" for the payment of damages with respect to the respondent's measures that allegedly breach NAFTA Chapter Eleven.[335] Failure to act consistently with an effective waiver from the moment the waiver is submitted will result in a claimant's failure to establish a future tribunal's jurisdiction.[336]

190. The Claimant's argument that a claim can be re-filed following a loss at the jurisdictional stage when an effective waiver is in place is contrary to the ordinary meaning of Articles 1121(1)(b) and

[333] The Claimant confirmed in its 2022 NOA that "the present arbitration is within the terms of the waivers previously executed by Westmoreland and Prairie." Claimant's 2022 NOA, fn. 72. Indeed, on the Claimant's own admissions, both the WMH NOA and the Claim before this Tribunal relate to the same "claims, facts and harms". Claimant's 2022 NOA, ¶ 13. *See also* Canada's Memorial on Jurisdiction, ¶ 128.

[334] Claimant's Response on Jurisdiction, ¶¶ 226, 227.

[335] *See* Canada's Memorial on Jurisdiction, ¶¶ 111-118.

[336] **RLA-028**, *Waste Management – Award*, ¶ 24; **CLA-067**, *Gramercy Funds – Award*, ¶¶ 499-500; **RLA-031**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17) Award, 14 March 2011, ¶¶ 79-80, 84, 102, 107, 115; **RLA-029**, *DIBC – Award on Jurisdiction*, ¶ 336.

(2)(b). Examined through the lens of Article 31 of the *Vienna Convention on the Law of Treaties*, NAFTA Article 1121(2)(b) does not support the Claimant's position. It states:

> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[337]

191. The text of Article 1121 is clear and unambiguous: a claimant must waive its right to initiate or continue proceedings before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, with respect to the respondent's measures that allegedly breach NAFTA Chapter Eleven. The only permissible exceptions to this are expressly laid out: proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada.[338] There is no caveat in Article 1121 that allows an enterprise to have a second claim submitted on its behalf under Article 1117 if its first claim was dismissed for want of jurisdiction.[339]

192. Further, as Canada noted in its Memorial, valid waivers filed under Article 1121 extend to other investment arbitrations, including other disputes brought under NAFTA Chapter Eleven.[340] The ordinary meaning of "other dispute settlement procedures" does not include a qualifier which limits such proceedings to the domestic context, nor does it limit such proceedings to those submitted pursuant to other treaties. A finding otherwise would read out the express and unambiguous terms of

[337] NAFTA Article 1121(2)(b) (emphasis added).

[338] **RLA-029**, *DIBC – Award on Jurisdiction*, ¶ 293.

[339] **RLA-030**, *Renco I – Award on Jurisdiction*, ¶ 119; **CLA-067**, *Gramercy Funds – Award*, ¶ 482-483, **RLA-029**, *DIBC – Award on Jurisdiction*, ¶¶ 334, 336.

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

the provision. This interpretation is further supported by the clear exceptions to the waiver of an enterprise's rights: only proceedings for relief that does not involve the payment of damages. Another investment arbitration, and specifically another NAFTA claim, does not fit within this exception considering that an explicit claim for damages would be advanced.

193. This interpretation is also consistent with the intention of Article 1121 to avoid the need for a respondent State to litigate concurrent and overlapping proceedings, to minimize the risk of double recovery, and to reduce the risk of conflicting outcomes on both the law and facts (and thus legal uncertainty).[341]

194. Interpreting Article 1121 otherwise would mean that an enterprise could have multiple arbitration claims, including NAFTA claims, brought on its behalf. For example, an investor that is found to control the enterprise under Article 1117(1), and an investor that is found to own the enterprise under Article 1117(1), could bring separate claims on behalf of the enterprise. So could two separate investors that both "own" an enterprise (one directly and one indirectly). Two separate investors could also potentially bring claims with respect to the same enterprise under two different international treaties to which Canada is a Party if, for example, the enterprise has direct and indirect owners of differing nationality. These are not the results the NAFTA Parties contemplated.

195. Accordingly, when an Article 1117(1) claim is advanced under NAFTA, it is imperative to treat the enterprise investment's waiver as categorical. This is the only way to ensure that States do not face duplicative claims filed by multiple investors in distinct claims to arbitration, leading to possible double recovery on behalf of a claimant or its enterprise. The tribunal in *Waste Management II* agreed, holding that "[n]o doubt the concern of the NAFTA [P]arties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings."[342]

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[341] **RLA-036**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) ("*Waste Management II*"), Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002 ("*Waste Management II – Decision*"), ¶ 27; **RLA-037**, *Thunderbird – Award*, ¶ 118; **RLA-034**, *KBR – Award*, ¶¶ 116, 124.

[342] **RLA-036**, *Waste Management II – Decision*, ¶ 27. The *Waste Management II* tribunal further held that a tribunal should avoid a situation whereby a claimant has not had its claim "heard on the merits before any tribunal". However, the tribunal also noted that this should be the case only if it "is possible." *See* ¶ 35.

196. The authorities advanced by the Claimant do not support an alternative interpretation. For example, the Claimant draws an analogy with *Waste Management II*, arguing that, as the claimant in that case was permitted to file a new claim after its first was dismissed at the jurisdictional phase, so too should the Claimant's claim be permitted to proceed.[343] This is not a case like *Waste Management I* and *II*, where the first claim involved a defective (invalid) waiver.[344] Prairie submitted an effective waiver in *WMH*, and it remains effective today. All of the other authorities the Claimant relies on whereby a tribunal indicated that a claim could be re-filed following its dismissal at the jurisdictional phase[345] were decided under treaties that do not contain a waiver provision similar to NAFTA, and as such, are irrelevant.[346]

197. The Claimant also relies on *Cyprus Bank v. Hellenic Republic* to argue that "waiver of a fundamental right, like access to investment arbitration, should be unequivocal",[347] and that WCC has not "renounce[d] its investment claims."[348] Yet Prairie's *WMH* waiver is unequivocal. Indeed, it reflects the language of Article 1121(2)(b) almost *verbatim*, which as the *Waste Management I* tribunal noted, is "clear and should not lead to any confusion or deviation."[349]

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[343] The Claimant similarly relies on the *Waste Management II* tribunal's use of the *Barcelona Traction* decision of the International Court of Justice ("ICJ") to support its case. However, the *Barcelona Traction* decision does not support the Claimant's argument. Indeed, the Claimant has not provided any authority to support a reading that the ICJ's holding that a treaty process has not been exhausted until a case has been "prosecuted to judgment" means "prosecuted to judgment on the merits".

[344] **RLA-036**, *Waste Management II – Decision*, ¶ 2.

[345] **CLA-011**, *Daimler – Award*, ¶ 281; **RLA-087**, *Murphy Exploration & Production Company International v. The Republic of Ecuador* (PCA Case No. 2012-16), Partial Award on Jurisdiction, 13 November 2013, ¶ 195; **RLA-088**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Decision on Jurisdiction, 19 December 2012, ¶ 118; **RLA-089**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICISD Case No. ARB(AF)/06/2), Award, 17 September 2009, ¶ 109.

[346] *See* **RLA-058**, Treaty Between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments, signed 9 April 1991; **RLA-090**, Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed 27 August 1993; **RLA-091**, Agreement Between the Argentine Republic and the Kingdom of Spain on the reciprocal Promotion and Protection of Investments, signed 3 October 1991; **RLA-092**, Energy Charter Treaty, opened for signature 17 December 1994. None of these treaties contain a waiver provision similar to that found in NAFTA.

[347] Claimant's Response on Jurisdiction, fn. 354.

[348] Claimant's Response on Jurisdiction, ¶ 228.

[349] **RLA-028**, *Waste Management – Award*, ¶ 26.

198. Thus, the waiver required under Article 1121(2)(b) prohibits an enterprise from having additional claims brought on its behalf under Article 1117(1) regardless of whether the first claim was dismissed on jurisdictional grounds (unless such a dismissal was due to a defective waiver). Contrary to the Claimant's suggestion, the question before this Tribunal is not whether WCC has "exhausted its treaty process",[350] but whether the waiver Prairie filed in the *WMH* arbitration bars WCC from bringing this claim on behalf of Prairie under Article 1117(1). As Canada explains below, the answer to this question is yes, and this Tribunal is without jurisdiction.

(b) Prairie Waived its Right to Have This Claim Brought on Its Behalf under Article 1117(1) as a Result of its *WMH* Waiver

199. The Claimant has not responded to Canada's argument that the waiver filed on behalf of Prairie in the *WMH* arbitration bars the current claim.[351] Instead, the Claimant's entire argument with respect to its ability to bring an Article 1117(1) claim on Prairie's behalf hinges on its argument that the "NAFTA waivers that WCC submitted in its first arbitration took immediate effect and continue to be in force to this day."[352] This misunderstands Canada's point. Canada's argument with respect to the Claimant's Article 1117 claim arises out of the ongoing effects of the waiver filed by Prairie in the *WMH* arbitration, not the withdrawn 2018 waivers.

200. As established above, the waiver Prairie filed in the *WMH* arbitration extends to other NAFTA proceedings, such as the Claimant's claim under Article 1117(1) here. There can also be no argument between the disputing parties that this dispute is "with respect to the measures" in the *WMH* arbitration. Canada demonstrated this was the case in its Memorial,[353] and the Claimant has not provided any argument in response. The 2022 NOA also makes a claim for damages.[354]

201. Canada's argument stands despite the the fact that Canada did not object to the use of the 2018 waiver filed on behalf of Prairie in the *WMH* arbitration. The decision to accept a defective waiver

[350] Claimant's Response on Jurisdiction, ¶ 228.

[351] Canada's Memorial on Jurisdiction, ¶¶ 124-129.

[352] Claimant's Response on Jurisdiction, ¶ 210.

[353] Canada's Memorial on Jurisdiction, ¶ 128.

[354] Claimant's 2022 NOA, ¶ 123(i).

lies with the respondent State only. Thus, while the Claimant argues that "Canada cannot blow hot then cold by accepting a procedural approach in one arbitration" and not in another,[355] it is precisely Canada's prerogative to do so.

202. As Prairie is legally bound by the waiver it made in the *WMH* arbitration, and the Claimant's Article 1117(1) on behalf of Prairie is inconsistent with that waiver, the Claimant's Article 1117(1) claim must be dismissed.

C. The Claimant Has Failed to Establish That It Can Bring its Claim Under NAFTA Article 1117(1)

203. In addition to failing to satisfy the temporal requirements of NAFTA Articles 1116(2) and 1117(2), and the waiver requirements of NAFTA Article 1121, the Claimant has also failed to establish the Tribunal's jurisdiction under NAFTA Article 1117(1). As Canada explained in its Memorial, Article 1117(1) allows an investor to bring a claim on behalf of an enterprise that it "owns or controls" at the time the claim is submitted to arbitration. WCC cannot establish the Tribunal's jurisdiction over its Article 1117(1) claim because it did not own or control the enterprise investment – Prairie – when it filed its 2022 NOA.[356]

204. The Claimant's position is that the only time the claimant needs to "own or control" the enterprise on whose behalf it brings a claim is at the time of the alleged breaches.[357] This ignores the express terms of Article 1117(1), the clear understanding of all three NAFTA Parties on its meaning, and relevant jurisprudence that confirms that understanding.

1. It is Not Sufficient for a Claimant to Own or Control the Enterprise Only at the Time of the Alleged Breach

205. Canada agrees that a relevant time for assessing ownership or control of an investment under NAFTA Chapter Eleven is the date of the challenged measures. However, it is not the only relevant time. NAFTA Article 1117(1) contains an additional temporal requirement that the claimant "own or control" the enterprise on whose behalf an investor brings a claim at the time it submits that claim to

[355] Claimant's Response on Jurisdiction, ¶ 231.

[356] Canada's Memorial on Jurisdiction, ¶¶ 137-138.

[357] Claimant's Response on Jurisdiction, ¶ 136.

arbitration. As Canada explained in its Memorial, this is evinced by the present tense formulation of the phrase "owns or controls" in the text of Article 1117(1).[358] The fact that Prairie was sold three years prior to the submission of the 2022 NOA is uncontested between the disputing parties.[359] Consequently, WCC cannot establish the Tribunal's jurisdiction over its Article 1117(1) claim because it did not own or control Prairie when it filed its 2022 NOA on October 14, 2022.

206. In its Response, the Claimant again asks this Tribunal to read out the plain text of the treaty – and the clear position taken by the NAFTA Parties on its meaning[360] – by finding that the only temporal condition on a claimant's ownership or control of an enterprise investment under Article 1117(1) is proving the claimant held the investment at the time of the alleged breach.[361] The Claimant does not consider the language of NAFTA Article 1117(1) to substantiate its interpretation. Instead, it points to primarily non-NAFTA jurisprudence and argues that Canada should again be estopped from seeking to enforce this condition of its consent to arbitrate. Both arguments must be rejected.

207. First, the Claimant incorrectly asserts that its approach to Article 1117(1) is consistent with the interpretation of investment tribunals constituted under NAFTA as well as other treaties.[362] Of the fifteen cases the Claimant cites in support of its interpretation of NAFTA Article 1117(1), only three are NAFTA cases, and none decided that a claimant does not need to establish ownership or control of an enterprise under Article 1117(1) at the time it submits its claim to arbitration.[363]

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[358] Canada's Memorial on Jurisdiction, ¶¶ 138-139.

[359] Claimant's Response on Jurisdiction, ¶ 30. WCC sold Prairie to WMH on March 15, 2019.

[360] Canada's Memorial on Jurisdiction, ¶¶ 137-139; **R-155**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Reply on Jurisdictional Objections, 1 December 2017, ¶ 284 ("The Respondent would add that any intended claimant [under Article 1117] would also need to prove ownership and control on the date of submission to arbitration…") (emphasis added); **R-117**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Second Submission of the United States of America, 17 August 2018, ¶¶ 3, 5, 6. ¶ 5 ("an investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration.").

[361] *See e.g.*, Claimant's Response on Jurisdiction, ¶ 136.

[362] Claimant's Response on Jurisdiction, ¶¶ 135-136.

[363] **RLA-011**, *Gallo – Award*, ¶¶ 134, 321, 34. In *Gallo*, the Tribunal found that the Claimant had failed to prove its ownership or control of the investment enterprise at the time the impugned measures were adopted. In *Mondev*, the Claimant did not even bring a claim under Article 1117 and much of the Tribunal's analysis was devoted to the important distinctions between claims brought under NAFTA Articles 1116 and 1117. *See* **CLA-005**, *Mondev – Award*, ¶¶ 83-86. Finally, in *WMH* the tribunal was not seized with this issue, as WMH owned Prairie at the time it filed its 2019 NOA.

208. For instance, the Claimant argues that the *WMH* tribunal, relying on the *Gallo* tribunal's findings, placed "no importance whatsoever on whether the investor held the investment at any time thereafter".[364] However, neither the *WMH* nor the *Gallo* tribunal was seized with the question of whether a claimant seeking to establish jurisdiction under Article 1117(1) must also own or control the investment when it files its claim to arbitration under NAFTA Chapter Eleven. In both *WMH* and *Gallo*, the claimants held the relevant enterprises when they submitted their claims to arbitration.[365] Thus, the question of contemporaneous ownership and control at the time the claim was submitted to arbitration was not at issue. These cases do not support the Claimant's position.

209. Nor do the non-NAFTA cases the Claimant invokes support its interpretation of NAFTA Article 1117(1). For example, the Claimant relies on *Oostergetel v. Slovakia*, a case under the Netherlands-Slovakia BIT. That treaty did not contain an analogous provision to NAFTA Article 1117(1), including its temporal ownership requirements.[366] Moreover, ownership of the "investment" at the time of the submission of the claim to arbitration was not at issue.[367] All of the other cases cited by the Claimant suffer from similar flaws.[368]

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[364] Claimant's Response on Jurisdiction, ¶ 75.

[365] **RLA-001**, *WMH – Award*, ¶¶ 89, 194; **RLA-011**, *Gallo – Award*, ¶¶ 213-215 (explaining there was "no doubt" that the claimant owned the enterprise at the time the claim was submitted to arbitration).

[366] **RLA-093**, Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29 April 1991.

[367] **CLA-014**, *Oostergetel – Decision on Jurisdiction*, ¶¶ 63-64.

[368] The Claimant cites the following non-NAFTA cases: **CLA-008**, *IC Power – Award* (where the relevant BIT lacked an analogous provision to NAFTA Article 1117(1), including its temporal ownership requirements); **CLA-010**, *GEA Group – Award* (where the tribunal acknowledged that a requirement of ownership or control of the investment at the time of registration of the Request does not exist under the Germany-Ukraine BIT, ICSID Convention or ICSID Rules, none of which are relevant in interpreting the express temporal ownership requirements of NAFTA Article 1117(1)), ¶ 124); **CLA-009**, *WNC – Award* (where the issue of contemporaneous ownership or control of an enterprise was neither raised or addressed); **CLA-012**, *Blusun – Award* (where the jurisdictional claims concerned whether the "investment" at issue could properly be characterized as "pre-investment expenditures" for the purposes of the Energy Charter Treaty, ¶¶ 125, 134-136); **CLA-015**, *Vöcklinghaus – Award* (where the tribunal found that the claimant had no legal claim to the "investment" at issue at the time of the alleged treaty breaches, ¶ 165); **CLA-017**, *Petrobart II – Award* (where the issue of whether there was a qualifying investment under the Energy Charter Treaty turned on the characterization of a sales contract, ¶¶ 396-399); **CLA-014**, *Oostergetel – Decision on Jurisdiction* (where the issue of the investor's bankruptcy and ownership or control of the "investment" at the time of submitting the claim to arbitration were neither raised by the respondent, nor addressed by the tribunal); **CLA-016**, *Dan Cake – Decision on Jurisdiction and Liability* (where the jurisdiction of the tribunal was not challenged, and where the relevant BIT lacked a provision equivalent to NAFTA Article 1117(1)); **CLA-006**, *EnCana – Award* (where the claimant owned and controlled the enterprise at the time it submitted its claim to arbitration, ¶¶ 123-127); **CLA-007**, *Jan de Nul – Decision on Jurisdiction* (where the tribunal assessed whether there was a dispute relating to an "investment" within the terms of the ICSID Convention and BIT,

210. The only cases in which a tribunal was directly seized with the issue of ownership or control of an enterprise investment of the time of submitting a claim to arbitration are *B-Mex* and *Loewen*. In *B-Mex*, the tribunal looked at the ordinary meaning of the terms of NAFTA Article 1117(1) and found that, because the treaty "uses the present tense", "the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf."[369] The Claimant offers no meaningful response to the *B-Mex* tribunal's directly relevant findings.

211. In *Loewen*, the tribunal declined jurisdiction to hear the claims under NAFTA Article 1117(1) on the similar ground that the claimant did not own or control the relevant enterprise "when the claims were submitted to arbitration".[370] The Claimant does not offer a response to the tribunal's conclusion in this regard, preferring instead to discuss the tribunal's findings on the distinct legal question of continuous nationality to dismiss the case as "inapposite".[371] The tribunal's findings on the jurisdictional consequences of the claimant's failure to show he owned or controlled the enterprise when his claim was submitted to arbitration are clear: dismissal of the Article 1117(1) claim in its entirety.

212. It is uncontested that WCC sold Prairie three years prior to the submission of its 2022 Claim to arbitration.[372] Consequently, the Claimant cannot establish the Tribunal's jurisdiction over its Article 1117(1) claim because it did not own or control Prairie when it submitted its 2022 Claim to arbitration on October 14, 2022.

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which lacked an analogous provision to NAFTA Article 1117(1)); **CLA-011**, *Daimler – Award* (where the tribunal concluded that the transfer of shares via a Share Purchase Agreement did not deprive it of jurisdiction under the ICSID Convention and the Germany-Argentina BIT, neither of which contains a provision analogous to NAFTA Article 1117(1)).

[369] **RLA-046**, *B-Mex – Partial Award*, ¶¶ 148-152 (stating that Article 1117(1) "uses the present tense: an investor may make a claim 'on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly'. Thus, the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf. The drafters of the Treaty could have said an enterprise 'that the investor owned or controlled at the time of the alleged breach'. They chose not to.").

[370] **RLA-045**, *Loewen Group Inc. v. United States* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003, pp. 69-70.

[371] Claimant's Response on Jurisdiction, ¶¶ 137-139.

[372] Claimant's Response on Jurisdiction, ¶ 30. WCC sold Prairie to WMH on March 15, 2019.

2. The Claimant's Attempt to Create Jurisdiction Based on Estoppel Must Fail

213. The Claimant asserts in a single line in its Response that Canada should be estopped from adopting its "new" position that WCC did not own or control the investment after the transfer of Prairie, "as it contradicts the position that Canada took in [*WMH*]."[373] As discussed above, the Tribunal cannot find jurisdiction where it does not otherwise exist on the basis of estoppel.[374] The Tribunal should dismiss this argument outright.

214. In any event, Canada's position in this case is neither "new", nor inconsistent with, the positions it took in the *WMH* arbitration.[375] In that case, as in this one, Canada was clear that a claimant must establish ownership or control of the enterprise on whose behalf it brings a claim under NAFTA Article 1117(1) at the time of both the alleged breach and the submission of the claim to arbitration.[376] Absent such a showing, its claim on behalf of an enterprise must be dismissed for want of jurisdiction. Since the Claimant has failed to establish that it owned or controlled Prairie when it submitted this Claim to arbitration, its Article 1117(1) claim must be dismissed.

D. The Claimant Has Failed to Establish That It Can Bring Its Claim Under NAFTA Article 1116(1)

215. Finally, the Claimant contends that even if it cannot advance a claim under Article 1117(1) because it did not hold Prairie when it submitted this Claim to arbitration, it should be permitted to advance a claim on its own behalf under Article 1116(1).[377] The Tribunal should reject this request. Canada demonstrated in its Memorial that Article 1116(1) does not permit claims of reflective loss.[378]

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[373] Claimant's Response on Jurisdiction, ¶ 134.

[374] *See* Section IV.C.1, above.

[375] Canada has already explained that it did not waive all potential future jurisdictional objections with respect to a potential future WCC claim at the *WMH* hearing. *See* Section IV.C.2, above. Nor did Canada state that WCC would have standing to bring a future claim on behalf of Prairie under Article 1117(1); it could not because WCC had already sold the enterprise.

[376] **C-046**, *WMH* - Jurisdictional Hearing Transcript, Day 2, 279:16-19.

[377] Claimant's Response on Jurisdiction, ¶ 140.

[378] Canada's Memorial on Jurisdiction, ¶¶ 131-136.

Yet the Claimant solely claims such loss, as it claims damages for alleged harm to Prairie that had only indirect economic effects for the Claimant.[379]

216. In its Response, the Claimant argues that Article 1116(1) permits claims for reflective loss,[380] and that its claim is not, in fact, for reflective loss.[381] In doing so, the Claimant asks the Tribunal to read Article 1117(1) out of the treaty and ignore the fact that it has only asserted loss allegedly incurred by Prairie. Since the Claimant has failed to advance a *prima facie* claim that the alleged breaches caused direct loss to itself, it has no standing under Article 1116(1).

1. NAFTA Article 1116(1) Does Not Permit Claims for Reflective Loss

217. The Claimant's position that Article 1116(1) permits claims for reflective loss is incorrect and devoid of rigorous analysis. The express text of Article 1116(1) provides that an investor has a right to bring a claim "on its own behalf" alleging that "the investor has incurred loss or damage". [382] The plain meaning of this text is that a claimant has no standing under Article 1116(1) to allege losses of an enterprise that the claimant owned or controlled.

218. Offering no textual analysis of either Article 1116(1) or Article 1117(1), the Claimant argues that "unlike some laws that place great weight on the distinction between shareholders and the corporation […], the NAFTA recognizes the rights of controlling shareholders to pursue claims on behalf of the corporation [under Article 1117]."[383] The Claimant is mistaken. NAFTA upholds the bedrock principle of separate corporate personality. Articles 1116(1) and 1117(1) constitute strictly separate standing provisions that address discrete, non-overlapping types of injury.[384] Article 1116(1) permits claims for direct loss to the shareholder, such as interference with the right to dividends.

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[379] Canada's Memorial on Jurisdiction, ¶¶ 135-136.

[380] Claimant's Response on Jurisdiction, ¶ 145.

[381] Claimant's Response on Jurisdiction, ¶ 144.

[382] **RLA-001**, *WMH – Final Award*, ¶ 200 ("[T]o have jurisdiction to bring a claim under Article 1116(1), the investor/claimant must comply with two requirements: firstly it must be claiming 'on its own behalf' such that it held the investment at the time of the alleged breach and is not bringing the claim on another's behalf; and secondly, that same investor (i.e. 'the' investor) must itself have suffered loss or damage arising out of that breach.") (emphasis added).

[383] Claimant's Response on Jurisdiction, ¶ 148.

[384] Canada's Memorial on Jurisdiction, ¶ 132.

Article 1117(1) permits claims for harm to the enterprise's rights or assets that led indirectly to economic effects for the shareholder.[385]

219. The *Bilcon* tribunal rejected an interpretation whereby shareholders could personally recover damages for the enterprise's losses under Article 1116(1):

> [T]o permit reflective loss to be recovered under Article 1116 would raise questions about the relationship between the two provisions perhaps rendering Article 1117 inutile.[386]

220. WCC does not address Canada's explanations that permitting claims for reflective loss would: render Article 1117(1) ineffective;[387] undermine NAFTA's objectives to ensure a predictable commercial framework and investor protection;[388] and ignore the consistent understanding of all three NAFTA Parties that Article 1116(1) does not offer standing to claim reflective loss.[389]

221. The Claimant's reading of the jurisprudence is also irrelevant or misguided. Decisions under treaties that do not contain a strict separation between standing provisions, as found in NAFTA Articles 1116 and 1117, do not offer instructive guidance to this Tribunal.[390] Instead, the *Bilcon* Award on Damages offers the most recent and thorough analysis of the issue under NAFTA. After carefully reviewing the disputing parties' arguments on the text, context, object and purpose, as well as the NAFTA Parties' positions and relevant jurisprudence, the *Bilcon* tribunal held that "Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116".[391]

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[385] NAFTA Article 1135(2)(b).

[386] **RLA-040**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v. Government of Canada* (UNCITRAL) Award on Damages, 10 January 2019 ("*Bilcon – Award on Damages*"), ¶ 372.

[387] Canada's Memorial on Jurisdiction, ¶ 133.

[388] Canada's Memorial on Jurisdiction, ¶ 133, *citing* NAFTA Preamble, NAFTA Article 102 (Objectives).

[389] Canada's Memorial on Jurisdiction, ¶ 134.

[390] Claimant's Response on Jurisdiction, ¶ 147.

[391] **RLA-040**, *Bilcon – Award on Damages*, ¶ 389.

222. The Claimant offers no rebuttal to the *Bilcon* tribunal's analysis and instead simply argues it is not claiming reflective loss[392] – a flawed argument that Canada addresses below. Instead, the Claimant says NAFTA tribunals "have accepted derivative actions".[393] This argument ignores how the *GAMI* tribunal identified difficulties attributable to the derivative nature of shareholder claims. The tribunal expressed concern about the allocation of compensation between a shareholder and its subsidiary, especially where "unsynchronised resolution" of the same dispute was a "practically certain scenario".[394] Moreover, the *Mondev* tribunal stated:

> [A] NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor.[395]

223. Furthermore, the Claimant's attempt to dismiss the International Court of Justice's rulings in *Barcelona Traction* and *Diallo* as irrelevant because they concerned diplomatic protection for shareholders under customary international law is unavailing.[396] These decisions affirm the separate legal personality of the corporation under customary international law and from it, the rule that a shareholder investor cannot recover damages arising from the enterprise's losses.[397] NAFTA Chapter Eleven does not displace this rule. As Canada explained in its Memorial, nothing in the text of Article 1116(1) indicates the NAFTA Parties intended to derogate from customary international law.[398] Thus, Article 1116(1) does not grant standing for WCC to claim reflective loss.

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[392] Claimant's Response on Jurisdiction, fn. 216.

[393] Claimant's Response on Jurisdiction, ¶ 147.

[394] **CLA-044**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL), Final Award, 15 November, 2004, ¶ 119 (emphasis omitted). *See also* **RLA-040**, *Bilcon – Award on Damages*, ¶ 385. Ultimately, the *GAMI* tribunal did not have to decide these issues, as it held that the claimant had failed to prove that Mexico breached its NAFTA obligations. Nonetheless, permitting claims for reflective loss under Article 1116(1) may create a risk of multiple overlapping claims and double recovery in some cases. For example, one claimant might personally recover damages under Article 1116(1) arising from the enterprise's loss, while a different claimant might recover damages on behalf of the enterprise under Article 1117(1) for the same alleged loss.

[395] **CLA-005**, *Mondev – Award*, ¶ 86.

[396] Claimant's Response on Jurisdiction, ¶ 145.

[397] **RLA-039**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970, ¶ 38; **RLA-043**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (I.C.J. Reports 2010) Judgment, 30 November 2010, ¶¶ 103-105; **RLA-044**, *Douglas*, ¶¶ 786, 791-798; **RLA-040**, *Bilcon – Award on Damages*, ¶ 373.

[398] Canada's Memorial on Jurisdiction, ¶ 134.

2. The Claimant Only Claims Reflective Loss

224. The Claimant asserts in its Response that it does not claim reflective loss because Canada's conduct allegedly resulted in the "total destruction of WCC's investment."[399] Yet the Claimant fails to specify how the challenged measures "destroyed" its shareholding in Prairie. Indeed, the Claimant offers no details, information, or reasons to support this assertion. The Claimant does not allege that the challenged measures annulled, voided, cancelled, or eliminated WCC's shares in Prairie.[400] In fact, WCC continued to own those shares for multiple years after Alberta adopted the challenged measures. It eventually sold its Prairie shares to WMH in the context of its U.S. bankruptcy proceedings. Prairie also continued to operate after the challenged measures. Thus, WCC did not suffer a "total destruction" of its Prairie shareholding.

225. WCC also refers to alleged "loss […] caused by [Alberta's] Climate Leadership Plan" without any details.[401] It cites alleged "losses to its enterprise",[402] which WCC cannot claim under Article 1116(1). It references alleged "losses to its commitment of capital and other resources in Canada".[403] Yet the Claimant fails to identify a commitment of capital in Canada beyond any money that WCC paid to acquire Prairie shares indirectly. Otherwise, to define its alleged losses, WCC merely cites its 2022 NOA.[404]

226. As Canada explained in its Memorial, the alleged losses in the 2022 NOA all concern alleged lost revenues from, and higher reclamation costs for, Prairie's mining operations.[405] Prairie owned the Paintearth, Sheerness, and Genesse mines,[406] such that any alleged losses could only be incurred

[399] Claimant's Response on Jurisdiction, ¶¶ 14, 144 (emphasis omitted).

[400] The Claimant does not allege the value of Prairie shares dropped to zero. Such an assertion would be a quintessential claim of reflective loss. Even a total diminution in the value of shares is distinct from share destruction. Shares with no worth can rise in value. Destroyed shares are nullified.

[401] Claimant's Response on Jurisdiction, ¶ 19.

[402] Claimant's Response on Jurisdiction, ¶ 130.

[403] Claimant's Response on Jurisdiction, ¶ 130.

[404] *See e.g.*, Claimant's Response on Jurisdiction, ¶ 130.

[405] Canada's Memorial on Jurisdiction, ¶¶ 135-136.

[406] **C-050**, Westmoreland Coal Co., Form 8K, Ex. 99.3: Historical Financial Information of PMRL and CVRI, 1 July 2014 (showing Prairie Mines & Royalty Ltd. "owns and operates the Paintearth, Sheerness, Genesee (50% interest)"); **C-051**, Westmoreland Coal Co., 2017 Form 10K, 2 April 2018, p. 10 (showing the mines as "owned by" Prairie).

by Prairie. WCC was a shareholder in Prairie.[407] WCC could not directly suffer any of the alleged losses, which could only flow indirectly to WCC as a shareholder in Prairie.[408] The Claimant's failure to allege any direct loss that it suffered by reason or arising out of the alleged breaches means that it has failed to advance a *prima facie* case of damages under Article 1116(1). It has no standing under Article 1116(1) to advance its Claim, and it must be rejected.

VI. REQUEST FOR RELIEF

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

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

(b) require the Claimant to bear all costs of the arbitration, including Canada's costs of legal assistance and representation, pursuant to NAFTA Article 1135(1) and Articles 40 and 42 of the 2013 UNCITRAL Rules; and

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

December 13, 2023

Respectfully submitted on behalf of Canada,

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[407] Claimant's Response on Jurisdiction, ¶ 125; **R-058**, Westmoreland Coal Company, 2014 Annual Report [Excerpt], 6 March 2015, p. 6.

[408] Canada's Memorial on Jurisdiction, ¶¶ 135-136.