

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

**BETWEEN:**

**WESTMORELAND MINING HOLDINGS LLC**

**Claimant**

**AND**

**GOVERNMENT OF CANADA**

**Respondent**

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

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**GOVERNMENT OF CANADA**

**REPLY MEMORIAL ON JURISDICTION**

**April 9, 2021**

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Trade Law Bureau  
Government of Canada  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario  
K1A 0G2  
CANADA

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## **I. INTRODUCTION**

1. The substantive obligations of NAFTA Chapter Eleven are not owed to a prospective claimant until it becomes an “investor of a Party”. The jurisdiction of a NAFTA tribunal is therefore limited to alleged breaches of those substantive obligations, and resulting loss or damage, that occurred after a claimant became an investor of a Party.

2. The claimant in this case, Westmoreland Mining Holdings LLC (the “Claimant” or “WMH”), does not contest that it was constituted under the laws of Delaware on January 31, 2019, and was not an “investor of a Party” prior to that date. Nor does it contest that it first invested in Canada on March 15, 2019, when it acquired Westmoreland Canada Holdings Inc. (“WCHI”) and Prairie Mines & Royalty ULC (“Prairie”) (together, the “Canadian Enterprises”). Yet, the Claimant maintains that this Tribunal has jurisdiction under NAFTA Chapter Eleven to adjudicate an alleged breach of obligations under Section A, and resulting loss or damage arising out of those alleged breaches, that pre-date the Claimant’s existence as a protected investor.

3. The Claimant suggests that the “heart of the issue” in this jurisdictional dispute is “whether the investment existed as a foreign-owned investment when the host government allegedly breached its obligations to the investment and its foreign investor.”<sup>1</sup> It argues that, so long as *an* investor of a Party held an investment at the time of an alleged breach under Section A, then any subsequent investor of a Party that acquires the investment has standing to bring a claim for that alleged breach, even if that investor did not own or control the investment at the requisite time. In the Claimant’s view, the existence of a foreign-owned investment is determinative: so long as the “chains of nationality” are not broken,<sup>2</sup> a tribunal has jurisdiction to hear the claim.

4. The Claimant’s position is inconsistent with NAFTA Chapter Eleven, which requires a claimant to be an investor of a Party when the alleged breach occurred to establish jurisdiction *ratione temporis*. Under Section A of Chapter Eleven, a NAFTA Party owes substantive obligations to “investors of another Party”, and to “investments of investors of another Party”.<sup>3</sup>

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<sup>1</sup> See e.g., Claimant’s Counter-Memorial on Jurisdiction, ¶ 22.

<sup>2</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 14.

<sup>3</sup> NAFTA Articles 1101(1)(a) and (b).

The obligations are not owed to “investments” in isolation.<sup>4</sup> The existence of an “investor of another Party” determines both the existence of the treaty-protected investment, and the obligations that are owed. Independent of the protected investor that owns it, an investment is not owed obligations. This is consistent with the investor-State dispute settlement mechanism of Section B, which is entitled “Settlement of Disputes between a Party and an Investor of Another Party”. The NAFTA Parties do not engage in dispute settlement under Chapter Eleven with investments; they engage in dispute settlement with investors. Section B is explicit that investments have no standing to file an investment claim.<sup>5</sup> As a result, it is insufficient to ask under NAFTA Chapter Eleven whether an investment was foreign-owned by another investor at the time of the alleged breach. The Tribunal must also ask whether the investor filing the claim owned and controlled the investment at the time of the alleged breach.

5. For this reason, the Claimant’s argument that the Canadian Enterprises will be “punished”<sup>6</sup> if the Tribunal does not accept jurisdiction is misguided. The Canadian Enterprises are not afforded protection under Section A independent of their investor. The Claimant did not own or control the Canadian Enterprises at the time of the alleged breach. The Claimant invested in Canada when it purchased the Canadian Enterprises from Westmoreland Coal Company (“WCC”) in 2019. This was a different “investment of an investor of a Party” from the investment made by WCC in 2014. The Claimant cannot conflate the two in order to bring a NAFTA claim. It is not possible for the Claimant’s investment to be “punished” because the protections under Section A were not afforded to the Claimant and its investments until 2019, well after the date of the alleged breach and loss.

6. The Claimant’s argument that Section B permits an investor of a Party to advance a claim even though it was not a protected investor at the time of the alleged breach would lead to absurd results. For example, its approach would allow investors to file claims under Section B for alleged breaches owed to other investors and their investments under Section A, without

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<sup>4</sup> There are two notable exceptions, Articles 1106 and 1114, neither of which is at issue in this case. *See also*, Article 1101(1)(c).

<sup>5</sup> Article 1117(4) states: “An investment may not make a claim under this Section.”

<sup>6</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 37 and 40.

limitation on those other investors' ability to also bring claims, either under NAFTA Chapter Eleven or in domestic proceedings. This raises the specter of a multiplicity of proceedings, divergent outcomes, and overlapping claims for damages, all of which would create significant unpredictability and undermine NAFTA's objective of creating effective dispute settlement procedures.

7. The Claimant's interpretation would also incentivize claim shopping. Under the Claimant's theory, NAFTA Chapter Eleven would permit an investor to acquire an investment for the purpose of pursuing a NAFTA claim. If the Claimant is correct that a claimant does not have to be a protected investor or own or control an investment at the time of the alleged breach, then there is nothing to prevent claimants from making investments solely to file claims against the NAFTA Parties. Nothing in the Agreement suggests that the NAFTA Parties intended such an outcome.

8. Canada's interpretation avoids these difficulties and is much more straightforward – the obligations under Section A of NAFTA Chapter Eleven are owed to investors and, if breached, those investors have standing to bring a claim under Section B. No tribunal, under NAFTA or otherwise, has accepted a request to allow one investor to bring a claim on behalf of another investor and its investments. Canada has cited numerous awards confirming that an investor must be protected as such at the time of the alleged breach to establish jurisdiction *ratione temporis*. None of the cases the Claimant cites support its view that a claimant need not be a protected investor at the time of the alleged breach in order to submit a claim.

9. As an apparent alternative to its interpretation of NAFTA Chapter Eleven, the Claimant argues that the specific circumstances of this case allow the Tribunal to ignore the treaty text in order to accept jurisdiction over its claim. The Claimant offers four arguments. None has merit.

10. First, the Claimant casts Canada's reliance on the text of NAFTA Chapter Eleven as "elevat[ing] form over substance" and advocating for a strict rule of jurisdiction *ratione temporis* that "cuts off any and all claims where there has been a change in the corporate form of the

investor [...] even where the change is the result of bankruptcy proceedings.”<sup>7</sup> The Claimant argues that “[t]here is a legitimate public policy, consistent with the purposes of NAFTA, to allow lawful bankruptcy restructurings”,<sup>8</sup> and, therefore, “[e]ven were the Tribunal to acknowledge the broad, formalistic rule Canada advocates, it should recognize a narrow exception here.”<sup>9</sup>

11. The Claimant's argument overlooks the facts. In this case, the bankruptcy process was not the Claimant's, but that of an unrelated party, WCC. The Claimant's purchase of assets from WCC was a purchase transaction like any other. Its fundamental characteristics “are not materially disputed”,<sup>10</sup> and include the facts that: WCC auctioned off its assets to the public; the Claimant was formed to purchase them; WCC and the Claimant executed a sale from arm's-length bargaining positions; and WCC and the Claimant were legally adverse in interest. The fact that the sale occurred in the context of WCC's bankruptcy process does not alter these characteristics and the Claimant's plea for an “exception” for a “bankruptcy restructuring” is unavailing.

12. Contrary to the Claimant's suggestion, this does not result in Canada trying to “capitalize on the misfortune of WCC's bankruptcy”<sup>11</sup> or seeking to “violate its investment treaty obligations with impunity.”<sup>12</sup> WCC is not a claimant in this arbitration and Canada takes no position here on WCC's ability to exercise its rights under NAFTA as an investor holding an investment at the time of the alleged breaches. It was open to WCC to continue its claim; the company still exists as an enterprise constituted under the laws of Delaware.<sup>13</sup> Moreover, as the Claimant acknowledges, Canada did not cause WCC to enter bankruptcy.<sup>14</sup> Nor did Canada force WCC to choose the Bankruptcy Plan that it did, or to settle the debts that it owed to the First

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<sup>7</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 4.

<sup>8</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 15.

<sup>9</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 15.

<sup>10</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 11.

<sup>11</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 16.

<sup>12</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 4.

<sup>13</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 6.

<sup>14</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 57.

Lien Lenders in the form of an arm's-length asset sale to the Claimant. As Ms. Coleman explained in her First Expert Report, "Chapter 11 [of the Bankruptcy Code] allows debtors a great deal of latitude to develop a plan of reorganization through which the debtor's obligations and liabilities are settled."<sup>15</sup> WCC made its choices, and so did the Claimant. The Claimant cannot now ask the Tribunal to overlook the requirements of NAFTA Chapter Eleven so that it can escape the consequences of those choices. Applying the terms of Chapter Eleven is not a windfall to Canada. To the contrary, not doing so would produce a windfall to the Claimant, a third party to WCC, which was not the subject of the alleged breaches, and could not have suffered any of the alleged loss or damage.

13. The second argument advanced by the Claimant is that a "continuity" of "beneficial interest" between separate investors of a Party can establish the Tribunal's jurisdiction *ratione temporis*. Here, the Claimant appears to assert that the Tribunal has jurisdiction over this NAFTA claim because the First Lien Lenders had beneficial ownership and control over WCC at the time of the alleged breach and during WCC's bankruptcy proceeding, as well as over the Claimant at the time that it filed the NAFTA claim. The Claimant's argument is misguided in law and fact. International law and domestic legal systems widely recognize that an enterprise has separate legal personality from its owners. NAFTA Chapter Eleven does not allow a tribunal to "pierce the corporate veil" of a disputing investor to establish jurisdiction. Regardless, as creditors, the First Lien Lenders could neither beneficially own nor control WCC or the Canadian Enterprises.

14. Third, the Claimant argues that the Tribunal has jurisdiction *ratione temporis* over its claim because the Claimant purchased WCC's NAFTA claim as an asset during the arm's-length sale between WCC and the Claimant. The Claimant offers no further explanation in support of this argument, which has no merit. A NAFTA claim filed by one investor cannot establish the jurisdiction of a tribunal in a separate claim filed by another investor. WCC withdrew its NAFTA claim and request for relief on July 23, 2019, after which the Claimant filed its own NAFTA claim and request for relief on August 12, 2019. WCC's NAFTA claim cannot establish the Tribunal's jurisdiction in this case.

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<sup>15</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶ 33.



15. Finally, in what appears to be an afterthought, the Claimant argues that “Canada’s breach continues and its damages remain pending for Prairie and WMH”.<sup>16</sup> The Claimant provides no further explanation as to how its argument establishes the Tribunal’s jurisdiction *ratione temporis*. However, even if the Claimant were seriously pursuing this argument, it is without merit. There is no continuing breach or loss because both occurred just once.<sup>17</sup>

16. In sum, the Claimant maintains that it has standing under Section B to file a claim and be compensated hundreds of millions of dollars in damages on behalf of another investor and that investor’s investment. If accepted, the Claimant’s theory would fundamentally alter the basis on which the NAFTA Parties consent to arbitrate under NAFTA Chapter Eleven. No tribunal has ever accepted that an investor can make a claim alleging breach and loss prior to the date on which it became a protected investor. Neither should this Tribunal.

17. Canada’s Reply Memorial on Jurisdiction is organized as follows. Part II provides clarifications of certain facts relevant for the preliminary phase of this arbitration. Part III explains that the Claimant’s claim must fail for lack of jurisdiction *ratione temporis* under NAFTA Articles 1101(1), 1116(1), and 1117(1). Part IV explains that the Claimant’s alternative theories do not establish the Tribunal’s jurisdiction. Finally, Part V sets out Canada’s conclusion and request for relief.

18. Canada also files with this Reply Memorial on Jurisdiction the Second Expert Report of Kathryn A. Coleman. In her Second Expert Report, Ms. Coleman addresses certain factual assertions made by the Claimant in its Counter-Memorial on Jurisdiction, including with respect to the sale transaction between WCC and the Claimant, and the nature of the relationship between the First Lien Lenders and WCC under U.S. law.

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<sup>16</sup> Claimant’s Counter-Memorial on Jurisdiction, heading at ¶ 100.

<sup>17</sup> The Claimant appears to have abandoned its claim that the Government of Alberta’s 2015 Climate Leadership Plan constituted a breach of Section A of NAFTA Chapter Eleven. *See e.g.*, Claimant’s Counter-Memorial on Jurisdiction, ¶ 102; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 22. As Canada explained in its Statement of Defence, the Climate Leadership Plan was Alberta’s decision to phase out greenhouse gas emissions and air pollutants produced by coal-fired electricity generation by the year 2030. *See e.g.*, Canada’s Statement of Defence, ¶ 4. The only remaining challenged measure in this arbitration is Alberta’s decision in 2016 to make voluntary payments to the owners of the six coal-fired generating units in the province that were expected to operate – and produce emissions – beyond 2030.

## II. FACTUAL BACKGROUND

### A. Clarifications on the Claimant's Corporate Formation and Purchase of Canadian Enterprises

#### 1. The Claimant Was Formed as a New Entity on Behalf of the First Lien Lenders, Not as a Wholly-Owned Subsidiary of WCC

19. In its Counter-Memorial on Jurisdiction, the Claimant asserts, without reference to any documents, that WCC “creat[ed] WMH as a wholly-owned subsidiary”.<sup>18</sup> This statement is not accurate. As Canada explained in its Memorial on Jurisdiction, the Claimant was a new entity formed on behalf of certain financial institutions that provided debt financing to WCC (the “First Lien Lenders”) for the purpose of taking title to certain purchased assets in partial satisfaction of the First Lien Lenders’ secured claims.<sup>19</sup> It was not created by WCC.

20. The Claimant’s founding document, the “Limited Liability Company Agreement of Westmoreland Mining Holdings LLC” (“WMH LLC Agreement”),<sup>20</sup> confirms that the Claimant was not formed by WCC. Instead, it was formed on behalf of the First Lien Lenders. In particular, the WMH LLC Agreement identifies Thomas Moers Mayer as the sole and original Member<sup>21</sup> who “hereby forms a limited liability company”.<sup>22</sup> Mr. Mayer was a partner at Kramer

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<sup>18</sup> See e.g., Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 2, 11, 74, and Claimant’s Counter-Memorial on Jurisdiction, Appendix A, ¶ 1.

<sup>19</sup> See Canada’s Memorial on Jurisdiction, ¶ 10; **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶¶ 64 and 70. Canada pointed to documents that WCC filed with the Bankruptcy Court that evidenced these facts, including prior versions of the Description of Transaction Steps that indicated that the First Lien Lenders had initially contemplated two options for the Claimant’s creation to effectuate the purchase of WCC’s assets: (1) instructing WCC to create a new subsidiary; or (2) forming a new Delaware limited liability company that they would own. The following blacklines, contained in the penultimate version of the Description of Transaction Steps, confirm that the First Lien Lenders elected the second option: “Westmoreland Mining Holdings LLC (‘HoldCo’) will either be formed (i) by WCC, as a direct wholly-owned subsidiary of WCC; or (ii) as an entity with an initial sole member acting as a nominee of the Ad Hoc Group of First Lien Lenders”; and “~~In the event HoldCo is not initially formed by WCC, this~~ This contribution shall cause [...]”. See **R-060**, Westmoreland Coal Company, et al., Redline of Description of Transaction Steps, Exhibit G-1 to *Notice of Fourth Amendment to the Plan Supplement* [Court Docket, Doc. 1538], 28 February 2019, pp. 140 and 141 of 151. The final version of the steps reflected this blackline. See **R-043**, Westmoreland Coal Company, et al., Description of Transaction Steps, Exhibit G to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 15 March 2019 (“Description of Transaction Steps”), p. 13 of 661. See also **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶ 64, fn. 82.

<sup>20</sup> **R-081**, Westmoreland Mining Holdings, “Limited Liability Company Agreement of Westmoreland Mining Holdings LLC”, 31 January 2009 (“WMH LLC Agreement”).

<sup>21</sup> **R-081**, (“WMH LLC Agreement”), s. 6(a) (explaining: “The Company initially shall be wholly owned by the Member”, defined as Mr. Mayer on p. WMH000006). As Ms. Coleman explained in her first report, “[t]he equity

Levin Naftalis & Frankel LLP, the law firm that represented the First Lien Lenders in WCC's bankruptcy process.<sup>23</sup> Ms. Coleman confirms that under U.S. law, WCC did not create the Claimant as a wholly-owned subsidiary.<sup>24</sup>

21. The evidence thus establishes that the Claimant was not created by WCC or as a wholly-owned subsidiary of WCC.

## 2. The Claimant and WCC Were in an Arm's-Length Relationship

22. The Claimant also asserts that WCC's "transfer of Prairie and the associated NAFTA claim to WMH" was between "associated companies".<sup>25</sup> The Claimant does not specify what it means by "associated", or offer any evidence to establish that WCC and WMH were "associated". In fact, the evidence establishes that the Claimant and WCC were transacting at arm's length, and that the Claimant was not an "insider" to WCC.

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interests in an LLC are referred to as 'membership interests,' and their holders are 'members.'" **RER-Coleman-Bankruptcy-Memorial on Jurisdiction** [First Report], fn. 108.

<sup>22</sup> **R-081**, ("WMH LLC Agreement"), 31 January 2009, p. WMH000006.

<sup>23</sup> See e.g., **R-061**, Kramer Levin Naftalis & Frankel LLP & Porter Hedges LLP, *Verified Statement of Kramer Levin Naftalis & Frankel LLP and Porter Hedges LLP Pursuant to Federal Rule of Bankruptcy Procedure 2019* [Court Docket, Doc. 496], 14 November 2018 (including Thomas Moers Mayer on the signature block of the firm representing the First Lien Lenders); **R-062**, Westmoreland Coal Company, et al., *Notice of Seventh Amendment to the Plan Supplement* [Court Docket, Doc. 1849], 17 May 2019 ("WMH Formation Documents"), § 15.3 (directing attention to Thomas Moers Mayer as a notice party on behalf of WMH). The Claimant's Certificate of Formation was filed with the State of Delaware by an associate at the same firm. See **R-082**, Westmoreland Mining Holdings LLC, Certificate of Formation, 31 January 2009 (identifying Ilya Kontorovich as the "Authorized Person" to file the Certificate of Formation). See also **R-083**, Kramer Levin, "Kramer Levin Represents Secured Lenders in Acquisition of Westmoreland Coal's Assets Under Chapter 11 Plan", 15 March 2019, <<https://www.kramerlevin.com/en/perspectives-search/kramer-levin-represents-secured-lenders-in-acquisition-of-westmoreland-coals-assets-under-chapter-11-plan.html>> (accessed on 25 March 2021), p. 2 of 5 (identifying Ilya Kontorovich as an associate).

<sup>24</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 5. The Claimant also recognizes in its Counter-Memorial on Jurisdiction that its "initial sole member" was "a member of the Secured Creditors group": Claimant's Counter-Memorial on Jurisdiction, Appendix A, ¶ 36. As Ms. Coleman explains: "In its Counter-Memorial, WMH uses the term 'Secured Creditors' to refer to the lenders under the Senior Secured Note and Term Loan Facility [...] In my First Expert Report and in this report, I use the term 'First Lien Lenders' to refer to the same population. I use the term 'First Lien Lenders' to distinguish between the lenders under the instruments secured by a first-lien security interest on substantially all of the WLB Debtors' U.S. assets (including the equity of Westmoreland Canadian Investments, LP) and other creditors whose debt might be secured by a different lien. See **R-049**, Westmoreland Coal Company, et al., *Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings* [Court Docket, Doc. 54], 9 October 2018 [Excerpt of Declaration] ("Stein First Day Declaration") ¶¶ 29-31." See **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], fn. 2. Canada adopts this distinction in its Reply Memorial on Jurisdiction.

<sup>25</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 63.

23. First, as Canada explained in its Memorial on Jurisdiction,<sup>26</sup> the U.S. bankruptcy court overseeing WCC's bankruptcy ("Bankruptcy Court") held that the sale of the relevant assets, including the Canadian Enterprises and WCC's "NAFTA Claim" (as defined in the Stalking Horse Purchase Agreement<sup>27</sup>), was "negotiated, proposed and entered into by [WCC] and the Purchaser without collusion, in good faith and from arm's-length bargaining positions".<sup>28</sup> As Ms. Coleman explained in her First Expert Report, an arm's-length finding "insulates the sale from a court applying a stricter analysis that would be applied if the purchaser was determined to be an insider of, or closely related party to, the debtor."<sup>29</sup> The Claimant does not contest the Bankruptcy Court's finding, appearing to overlook it in order to make its unsupported assertion that WCC and WMH were "associated companies". The term "arm's-length" does not appear in the Claimant's Counter-Memorial.<sup>30</sup>

24. Second, the Bankruptcy Court specifically concluded that the Claimant "was not an 'insider' of [WCC], as that term is defined in section 101(31) of the Bankruptcy Code."<sup>31</sup> Ms.

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<sup>26</sup> Canada's Memorial on Jurisdiction, ¶ 28; **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶¶ 71 and 72.

<sup>27</sup> The "NAFTA Claim" was defined in the Stalking Horse Purchase Agreement as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by [Westmoreland Coal Company] on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)." See **R-053**, Westmoreland Coal Company, et al., Stalking Horse Purchase Agreement, Exhibit H-6 to *Notice of Sixth Amendment to the Plan Supplement* [Court Docket, Doc. 1621], 15 March 2019 ("Stalking Horse Purchase Agreement"), s. 1.01, p. 139. The term "Westmoreland" was used in the definition of the "NAFTA Claim", which was in turn defined for the purposes of the agreement as "Westmoreland Coal Company, a Delaware corporation". See **R-053**, Stalking Horse Purchase Agreement, Recitals.

<sup>28</sup> **R-063**, United States Bankruptcy Court, *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 1561], 2 March 2019 [Excerpt] ("WCC Plan Confirmation Order"), ¶ 47 (emphasis added).

<sup>29</sup> **RER**-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶ 72(c).

<sup>30</sup> The concept of "arm's length" does appear once in Professor Paulsson's report. There, while discussing the case of "arms'-length transactions in which a new investor acquires the investment", Professor Paulsson notes the following: "If that investment has already suffered the effects of the alleged treaty breach, that is a matter which is known to the new investor – or should have been known, unless the matter was concealed in which case the new investor has a complaint against the old one." **CER**-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 69. The evidence demonstrates that this is precisely the Claimant's situation: it was a new investor that acquired the investment in an arm's-length transaction.

<sup>31</sup> **R-063**, WCC Plan Confirmation Order, ¶ 47. The Bankruptcy Court used the term "WLB Debtors", which referred to WCC and certain of its affiliates. See **R-063**, WCC Plan Confirmation Order, fn. 2 ("Capitalized terms not defined herein shall have the meanings ascribed to them in the Plan."), and **R-042**, Westmoreland Coal Company, et al., *Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor*

Coleman explained in her First Expert Report that the U.S. Bankruptcy Code defines “insider” to include an “affiliate” of the debtor, which is further defined as “an entity owning or controlling the debtor, that is owned by the debtor, or that is owned by an entity owning or controlling the debtor.”<sup>32</sup> The Bankruptcy Court was thus satisfied that the Claimant did not own or control WCC, was not owned or controlled by WCC, and was not owned or controlled by another entity that owned or controlled WCC.<sup>33</sup> The Claimant does not address the Bankruptcy Court’s finding that it was not an “insider” to WCC, and similarly provides no explanation for how it could consider itself a company “associated” with WCC in light of the finding.

25. Third, as Ms. Coleman explained in her First Expert Report, WCC and the Claimant were “legally adverse to each other” in the negotiated sale of WCC’s assets, as the seller and buyer.<sup>34</sup> Separate legal counsel represented them.<sup>35</sup> Significantly, WCC had the same legal counsel in the bankruptcy process as its subsidiaries,<sup>36</sup> whereas the Claimant had the same legal counsel as the

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*Affiliates, Exhibit A to United States Bankruptcy Court, Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 1561], 1 March 2019 [Excerpt] (“WCC Plan”), Art. I.A(241) (Definition of “WLB Debtors”), p. 64 of 165.

<sup>32</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction** [First Report], fn. 103. *See also*, **R-045**, 11 U.S.C. § 101(31)(E) (defining “insider”); and § 101(2)(A)-(B) (defining “affiliate”). In these circumstances, Ms. Coleman explained that the concepts of “ownership and control” are “determined by ownership of, control of, or the power to vote 20% or more of the debtor’s outstanding voting securities”, and exclude entities holding securities “solely to secure debt.”

<sup>33</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], fn. 19.

<sup>34</sup> *See* **RER-Coleman-Bankruptcy-Memorial on Jurisdiction** [First Report], ¶¶ 12, 90, and fn. 83.

<sup>35</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction** [First Report], fn. 83 (“Pursuant to their adverse positions, the First Lien Lenders, WMH, and WML, on the one hand, and the WLB Debtors, on the other, had separate counsel. The WLB Debtors were represented primarily by Kirkland & Ellis LLP, while the First Lien Lenders, WMH, and WML were represented by Kramer Levin Naftalis & Frankel LLP.”); **R-061**, Kramer Levin Naftalis & Frankel LLP & Porter Hedges LLP, *Verified Statement of Kramer Levin Naftalis & Frankel LLP and Porter Hedges LLP Pursuant to Federal Rule of Bankruptcy Procedure 2019* [Court Docket, Doc. 496], 14 November 2018 (providing notice that Kramer Levin was representing the First Lien Lenders); **R-053**, Stalking Horse Purchase Agreement § 12.01 (listing Kramer Levin as a notice party on behalf of WML as “Buyer”); **R-062**, WMH Formation Documents § 15.3 (listing Kramer Levin as a notice party on behalf of WMH).

<sup>36</sup> **RER-Coleman-Bankruptcy-Memorial on Jurisdiction** [First Report], fn. 83. *See e.g.*, **R-051**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof* [Court Docket, Doc. 208], 18 October 2018 (“Bidding Procedures Motion”), p. 33 of 34; **R-057**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Approving the Adequacy of the Disclosure*

First Lien Lenders.<sup>37</sup> WCC and the First Lien Lenders were adverse in interest prior to and during the bankruptcy proceeding as debtor and creditors, as discussed further below.

26. Despite these uncontested facts, the Claimant asserts that WCC “transferred” its interests in Prairie and in its “NAFTA Claim” to WMH as a “wholly-owned subsidiary”.<sup>38</sup> In making this statement, the Claimant appears to focus on just one step in a multi-step transaction that was contemplated by WCC’s Bankruptcy Plan for the execution of the sale in which the First Lien Lenders received their collateral in partial satisfaction of WCC’s outstanding obligations to them. However, as Ms. Coleman explains, to say that WCC was the parent of the Claimant on this basis “entirely disregards the WCC Bankruptcy Court’s finding that the sale transaction between WCC and WMH was conducted at arm’s-length and was not subject to the higher scrutiny applied to insider transactions.”<sup>39</sup> The sale transaction steps “occurred virtually simultaneously”,<sup>40</sup> both began and ended with the First Lien Lenders (or their nominee) owning WMH,<sup>41</sup> and “[a]t no point did WCC have a meaningful role or relationship with respect to the management or operations of WMH that would lead to a different conclusion than the one at which the WCC Bankruptcy Court arrived.”<sup>42</sup> The Bankruptcy Court made its findings with full

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*Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Court Docket, Doc. 354], 2 November 2018 [Excerpt] (“Motion to Approve the DS”), p. 29 of 148; **R-060**, Westmoreland Coal Company, et al., Redline of Description of Transaction Steps, Exhibit G-1 to *Notice of Fourth Amendment to the Plan Supplement* [Court Docket, Doc. 1538], 28 February 2019, p. 3 of 151; **R-043**, Description of Transaction Steps, p. 3 of 661 (showing signatures of Kirkland & Ellis LLP and Jackson Walker LLP on behalf of “the Debtors and Debtors in Possession”).

<sup>37</sup> **R-061**, Kramer Levin Naftalis & Frankel LLP & Porter Hedges LLP, *Verified Statement of Kramer Levin Naftalis & Frankel LLP and Porter Hedges LLP Pursuant to Federal Rule of Bankruptcy Procedure 2019* [Court Docket, Doc. 496], 14 November 2018 (providing notice that Kramer Levin was representing the First Lien Lenders); **R-053**, Stalking Horse Purchase Agreement § 12.01 (listing Kramer Levin as a notice party on behalf of WML as “Buyer”); **R-062**, WMH Formation Documents § 15.3 (listing Kramer Levin as a notice party on behalf of WMH). *See also*, **R-083**, Kramer Levin, “Kramer Levin Represents Secured Lenders in Acquisition of Westmoreland Coal’s Assets Under Chapter 11 Plan”, 15 March 2019, <<https://www.kramerlevin.com/en/perspectives-search/kramer-levin-represents-secured-lenders-in-acquisition-of-westmoreland-coals-assets-under-chapter-11-plan.html>> (accessed on 25 March 2021).

<sup>38</sup> *See e.g.*, Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 17, 74.

<sup>39</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 7.

<sup>40</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 7.

<sup>41</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 7.

<sup>42</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 7.

knowledge of the entire transaction.<sup>43</sup> The Claimant does not contest these findings, and cannot reconcile its characterization of WCC as its parent with them.

**B. Clarifications on the Creditor-Debtor Relationship Between the First Lien Lenders and WCC**

27. The relationship between the First Lien Lenders and WCC was one of secured creditors and debtor, a legally adverse relationship under U.S. law.<sup>44</sup> This relationship was established through various debt instruments negotiated between the First Lien Lenders and WCC between 2014 and 2018 (“the Debt Instruments”).<sup>45</sup> In its Counter-Memorial on Jurisdiction, the Claimant makes a number of assertions that confuse the nature of this relationship. For example, the Claimant asserts that: the “debt-investors of WCC became the equity-investors of WMH”;<sup>46</sup> the First Lien Lenders “exercised *de facto*, if not formal, control over WCC’s assets”<sup>47</sup> through the Debt Instruments;<sup>48</sup> and the First Lien Lenders had an “effective right to control” WCC’s bankruptcy process.<sup>49</sup> These characterizations are either imprecise or inaccurate, and conflate distinct legal concepts under U.S. law.

28. Canada clarifies in the following sections: (1) the distinction in U.S. law between an equity interest in a company and a creditor’s security interest in the assets of a company as collateral for an outstanding debt; (2) the distinction in U.S. law between principles of corporate control and contractual arrangements governing the terms of financing arrangements between debtors and lenders; and (3) the role of secured creditors and debtors in a chapter 11 bankruptcy process.

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<sup>43</sup> See **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 7.

<sup>44</sup> As Ms. Coleman explains, the Claimant uses the term “Secured Creditors” to refer to the same population as the First Lien Lenders to which Canada refers. See **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], fn. 2.

<sup>45</sup> These instruments include the 2014 Senior Secured Notes, the 2014 Term Loan Facility, the 2018 Bridge Loan, and the 2018 Debtor-in-Possession (“DIP”) Financing Facility. See **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 21. The Claimant discusses these arrangements in the Claimant’s Counter-Memorial on Jurisdiction, Appendix A, ¶¶ 2-4, 11, and 21-25. Canada notes that only two of these financing arrangements predate the alleged breaches: the 2014 Senior Secured Notes and the 2014 Term Loan Facility.

<sup>46</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 11.

<sup>47</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 71.

<sup>48</sup> See Claimant’s Counter-Memorial on Jurisdiction, Appendix A, ¶¶ 2-4, 11, and 21-25.

<sup>49</sup> Claimant’s Counter-Memorial on Jurisdiction, Appendix A, ¶¶ 15 and 31.

**1. The First Lien Lenders Did Not at Any Time Hold Equity Interests in WCC or the Canadian Enterprises Pursuant to the Debt Instruments**

29. The Claimant's statement that the "debt-investors of WCC became the equity-investors of WMH"<sup>50</sup> incorrectly suggests that "debt-investors" and "equity-investors" are similarly placed. As Ms. Coleman explains, "[d]ebt instruments and equity interests have radically different characteristics, notwithstanding that extending secured credit to a borrower and buying an equity stake in a company may both sometimes colloquially be referred to as making an 'investment' in that company."<sup>51</sup>

30. U.S. law provides companies with two principal options for raising money in capital markets: offering equity or incurring debt.<sup>52</sup> A company offering equity is offering a "stake in the future financial success of the company", and granting to the equity holder rights to dividends and to participate in controlling the company's actions by electing the board of directors.<sup>53</sup> By contrast, a company incurring debt is "receiving immediate access to funds in exchange for a promise to repay the money to the lender at some future point (and almost invariably with interest, to compensate the lender for use of its funds)."<sup>54</sup> While the borrowing company may grant a lien or security interest in its assets ("collateral"), which afford the lender direct access to those assets in the event of nonpayment, lenders do not have ownership rights in the borrower or its assets.<sup>55</sup>

31. The concept of a lender's security interest in the borrower's assets is also distinct from the concept of "beneficial ownership" under U.S. securities law.<sup>56</sup> As Ms. Coleman explains, under U.S. securities law, the beneficial owner of an equity security is the one "who holds the true economic interest [...], regardless of the name in which the interest is held."<sup>57</sup> The "beneficial

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<sup>50</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 11.

<sup>51</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 3.

<sup>52</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 10.

<sup>53</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 10.

<sup>54</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 11.

<sup>55</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶¶ 11, 17.

<sup>56</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶¶ 16-17.

<sup>57</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 16.



owner” has voting power over the security and/or decision-making power regarding the disposition of the security.<sup>58</sup> By contrast, a lender with a security interest in the borrower's assets does not have beneficial ownership of those assets.<sup>59</sup> As Ms. Coleman explains, until a secured lender exercises its rights vis-à-vis the collateral, “the collateral remains under the ownership and control of the titleholder – the borrower.”<sup>60</sup>

32. There is no dispute that the First Lien Lenders did not hold any equity interests in WCC at any time. Nor did they hold equity interests in the Canadian Enterprises under the Debt Instruments. Instead, under these arrangements, the First Lien Lenders loaned funds to WCC, the repayment of which was secured by substantially all of WCC's assets, including WCC's equity interests in the Canadian Enterprises.<sup>61</sup> The First Lien Lenders' interest in the Canadian Enterprises under the Debt Instruments thus did not constitute beneficial ownership under U.S. law. Rather, their interest was limited to the conditional ability to foreclose on WCC's equity interests in the Canadian Enterprises – “a right that is only exercisable in the event of an uncured breach of the obligations under the financing documents.”<sup>62</sup> As Ms. Coleman explains, the First Lien Lenders' status as lenders, and not owners, of WCC's assets is “underscored by the provisions of the [Restructuring Support Agreement (“RSA”)] setting up a sale of the collateral [...]. Had the First Lien Lenders had ownership rights already as a result of their security interests, the sale process would have been unnecessary.”<sup>63</sup>

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<sup>58</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 16. *See also* **R-085**, Title 17 of the U.S. Code of Federal Regulations –Chapter II, Securities & Exchange Commission [Excerpt] (“17 C.F.R.”) § 240.13d-3(d)(3).

<sup>59</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 17.

<sup>60</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 17.

<sup>61</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶¶ 21-23.

<sup>62</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 30.

<sup>63</sup> **RER**-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 30.

**2. The First Lien Lenders Did Not at Any Time Control WCC or the Canadian Enterprises by Virtue of the Debt Instruments**

33. The Claimant's assertion that the First Lien Lenders "exercised *de facto*, if not formal, control over WCC's assets"<sup>64</sup> through the Debt Instruments is both imprecise and inaccurate. Under U.S. law, the term "control" is used in different legal contexts with different consequences depending on the situation.<sup>65</sup> The Claimant does not specify what kind of "control" it means, but refers to certain terms of the Debt Instruments to suggest that they evidence corporate control.<sup>66</sup>

34. However, principles of corporate control, on the one hand, and loan covenants, on the other, are distinct concepts under U.S. law. As Ms. Coleman explains, corporate control derives from ownership of equity interests or serving as an officer or director of a company. Corporate control does not derive from the extension of debt financing.<sup>67</sup> By contrast, loan covenants, "by which the borrower agrees to take or refrain from taking specified action",<sup>68</sup> are "contractual undertakings which the borrower has both the right and the power to disregard".<sup>69</sup> Loan covenants are "designed to maximize the probability that the lenders will be paid in full, to assure that collateral value is maintained, and to provide lenders with sufficient information to monitor the borrower's compliance with loan obligations."<sup>70</sup> They do not confer on the lender a right of control over the company or its assets.<sup>71</sup>

35. Ms. Coleman has reviewed the Debt Instruments and concluded that their covenants and restrictions "are standard in transactions of the sort between sophisticated, third-party lenders and their commercial clients",<sup>72</sup> and "did not confer upon the First Lien Lenders the ability to

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<sup>64</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 71.

<sup>65</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 13.

<sup>66</sup> See generally Claimant's Counter-Memorial on Jurisdiction, Appendix A.

<sup>67</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶¶ 12-13.

<sup>68</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 13.

<sup>69</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 13.

<sup>70</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 13.

<sup>71</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶¶ 13-14.

<sup>72</sup> RER-Coleman-Bankruptcy-Reply on Jurisdiction [Second Report], ¶ 23.

manage, or 'control', the operations of WCC and its affiliates or their assets.”<sup>73</sup> Her conclusion is further supported by the express terms of the Debtor-in-Possession (“DIP”) Financing Facility, which was approved by the Bankruptcy Court.<sup>74</sup> In particular, the DIP Financing Facility stated that none of the First Lien Lenders “controlled” WCC, any of its affiliates, or any of their properties or operations, by virtue of any of the Debt Instruments:

*No Control.* None of the DIP Facility Agent, the DIP Lenders, or the Prepetition Secured Parties controls the Debtors or their properties or operations, has authority to determine the manner in which any of the Debtors’ operations are conducted or is a control person or insider of the Debtors or any of their affiliates by virtue of the actions taken with respect to, in connection with, related to, or arising from the Interim Order or this Final Order, the DIP Facility, the DIP Loan Documents, the Prepetition Facilities, and/or the Prepetition Financing Documents.<sup>75</sup>

36. The “Prepetition Facilities” included both of the financing arrangements signed on December 16, 2014, as well as the May 21, 2018 Bridge Loan.<sup>76</sup> The Claimant’s suggestion that the First Lien Lenders “exercised *de facto*, if not formal, control over WCC’s assets”<sup>77</sup> through the Debt Instruments is thus completely without basis. It has offered no other evidence to support its assertion that the First Lien Lenders exercised “control” over WCC or its assets.

### 3. The First Lien Lenders Did Not Control WCC’s Bankruptcy Process

37. As Ms. Coleman explains, the “debtor has exclusive control over the bankruptcy process”, and retains ultimate decision-making authority over its bankruptcy process, subject to bankruptcy court approval.<sup>78</sup> While the Claimant asserts that the WCC RSA granted the First Lien Lenders

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<sup>73</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 23.

<sup>74</sup> *See* **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 25.

<sup>75</sup> **C-040**, Final Order (Court Docket, Doc. 520), Exhibit 1, DIP Credit Agreement (15 November 2018), s. E(viii) p. 12.

<sup>76</sup> **C-040**, Final Order (Court Docket, Doc. 520), Exhibit 1, DIP Credit Agreement (15 November 2018), pp. 9 (defining “Prepetition Facilities” to include the “Bridge Loan Agreement”, “together with the Prepetition Term Loan and Prepetition First Lien Notes Indenture”, and defining “Bridge Loan Agreement” as “that certain Bridge Loan Agreement, dated as of May 21, 2018”), 6 (defining “Prepetition Term Loan” as “that certain Amended and Restated Credit Agreement, dated as of December 16, 2014”), and 7 (defining “Prepetition First Lien Notes Indenture” as “that certain Indenture, dated as of December 16, 2014, with respect to WLB’s 8.75% Senior Secured Notes due January 1, 2022”). *See also* **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 25.

<sup>77</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 71.

<sup>78</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

“effective control” over the process,<sup>79</sup> Ms. Coleman explains that the practice of entering into RSAs has developed *precisely because* the debtor has exclusive control over the bankruptcy process.<sup>80</sup> In particular, an RSA is a contractual arrangement in which the debtor agrees to use its control over the process in a specified way.<sup>81</sup>

38. The debtor's ultimate control over the process is underscored by its fiduciary duty to maximize the value of its estate for the benefit of *all* of its stakeholders – creditors of all priorities and equity holders.<sup>82</sup> As Ms. Coleman explains, “[i]f someone offers the debtor a more advantageous path forward than the path agreed upon under the RSA, the debtor has a fiduciary duty to pursue the better deal.”<sup>83</sup> Accordingly, “virtually all RSAs”, including WCC's, contain a “fiduciary out” provision.<sup>84</sup> Under the terms of its RSA, WCC could terminate the agreement if it was determined: “(i) that proceeding with any of the Restructuring Transactions would constitute a breach of its fiduciary duties under applicable Law, or (ii) in the exercise of its fiduciary duties, to pursue an Alternative Restructuring Proposal”.<sup>85</sup> For these reasons, the First Lien Lenders did not control WCC's bankruptcy process.

### **C. Clarifications on the Procedural Background to the Claimant's NAFTA Claim**

39. The Claimant and Professor Paulsson make assertions with respect to the procedural background to the Claimant's NAFTA claim that require clarification.<sup>86</sup>

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<sup>79</sup> Claimant's Counter-Memorial on Jurisdiction, Appendix A, ¶ 15.

<sup>80</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

<sup>81</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

<sup>82</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

<sup>83</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

<sup>84</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

<sup>85</sup> **R-050**, Westmoreland Coal Company, et al., Restructuring Support Agreement, Exhibit A to *Declaration of Jeffrey S. Stein in Support of Chapter 11 Petitions and First Day Pleadings* [Court Docket, Doc. 54], 9 October 2018 [Excerpt] (“WCC RSA”), s. 13.02(b) (p. 58 of 167). Under s. 8.01 of the WCC RSA, WCC was not required to take any action that would be inconsistent with its fiduciary obligations. See **R-050**, WCC RSA, p. 53 of 167.

<sup>86</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 99; **CER-Paulsson-International Law-Counter-Memorial on Jurisdiction**, ¶ 40. Canada set out the procedural background to the Claimant's NAFTA Claim in detail in its Memorial on Jurisdiction, ¶¶ 31-43.

40. First, Professor Paulsson asserts that, “a new Notice of Intent was not required”.<sup>87</sup> However, Canada explained in its Memorial on Jurisdiction, and in its contemporaneous correspondence with the Claimant on this issue, that Canada could not waive the requirement in NAFTA Article 1119 that a claimant deliver a notice of its intention to submit a claim to arbitration (“NOI”) at least 90 days before it submits its claim.<sup>88</sup> Canada was “prepared to accept the Amended NOA filed on May 13 as Westmoreland Mining Holding LLC’s NOI”,<sup>89</sup> *i.e.*, as the “new” NOI. This proposal was consistent with the requirement that a “new” NOI be filed, and was made “without prejudice to [Canada’s] ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim” that might eventually be filed by the Claimant following the submission of its “new” NOI.<sup>90</sup>

41. Second, the Claimant suggests that, “the Parties agreed there was no need to repeat Article 1118 consultations.”<sup>91</sup> However, as Canada explained in its Memorial on Jurisdiction,<sup>92</sup> Canada offered to hold consultations with the Claimant in accordance with Article 1118.<sup>93</sup> The Claimant chose not to accept Canada’s offer.

42. Finally, the Claimant and Professor Paulsson aver that the “selection of arbitrators continued seamlessly from the original claim”,<sup>94</sup> and that “the arbitrators first named by WCC remain as members of the present Tribunal.”<sup>95</sup> This is also inaccurate. There was no tribunal “remaining” from the WCC claim, which was withdrawn on July 23, 2019.<sup>96</sup> Instead, the

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<sup>87</sup> CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 40.

<sup>88</sup> Canada’s Memorial on Jurisdiction, ¶ 34; **R-076**, Letter from Mr. Scott Little to Mr. Elliot Feldman, “*Re: Westmoreland Coal Company v. Government of Canada*”, 2 July 2019 (“Letter of 2 July 2019”).

<sup>89</sup> **R-076**, (“Letter of 2 July 2019”), p. 2.

<sup>90</sup> **R-076**, (“Letter of 2 July 2019”), p. 2.

<sup>91</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 99.

<sup>92</sup> Canada’s Memorial on Jurisdiction, ¶ 35.

<sup>93</sup> **R-076**, (“Letter of 2 July 2019”), p. 2 (“In accordance with NAFTA Article 1118, Canada would of course be willing to engage in consultations with Westmoreland Mining Holdings LLC as the new claimant in follow-up to its NOI, should it so desire.”) *See also* Canada’s Memorial on Jurisdiction, ¶ 35.

<sup>94</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 99.

<sup>95</sup> CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 40.

<sup>96</sup> *See* Canada’s Memorial on Jurisdiction, ¶ 36; **R-079**, Letter from Mr. 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*

disputing parties separately appointed this Tribunal for the purposes of hearing the Claimant's claim. As Procedural Order No. 1 sets out, the Claimant (not WCC) appointed Mr. Hosking on August 12, 2019; Canada appointed Professor Douglas on August 21, 2019; and the Secretary-General of ICSID appointed Ms. Blanch as President of the Tribunal on February 24, 2020.<sup>97</sup>

### **III. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE TEMPORIS* BECAUSE THE CLAIMANT WAS NOT AN INVESTOR OF A PARTY AT THE TIME OF THE ALLEGED BREACH**

43. In its Memorial on Jurisdiction, Canada explained that NAFTA Articles 1101(1), 1116(1), and 1117(1), properly interpreted, require a claimant to be an investor of a Party at the time of an alleged breach in order to establish jurisdiction *ratione temporis*.<sup>98</sup> The Claimant does not contest that it was not an investor of a Party at the time of the alleged breach and resulting loss or damage. This fact is determinative: the Tribunal does not have jurisdiction *ratione temporis* over the Claimant's NAFTA claim.

44. Nonetheless, in its Counter-Memorial on Jurisdiction, the Claimant undertakes its own interpretation of these provisions, and argues, along with Professor Paulsson,<sup>99</sup> that the treaty's terms do not require the Claimant to have been a protected investor at the time of the alleged breach and resulting loss for the Tribunal to have jurisdiction over the claim. Instead, the Claimant contends that the existence of a foreign-owned investment is what matters: so long as the "chains of nationality" are not broken,<sup>100</sup> a tribunal should have jurisdiction to hear the claim.

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*North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC*, 23 July 2019, p. 1.

<sup>97</sup> *Westmoreland Mining Holdings LLC v. Government of Canada* (UNICTRAL) Procedural Order No. 3, Decision on Bifurcation, 20 October 2020, ¶¶ 3.1, 3.2, and 3.3.

<sup>98</sup> Canada's Memorial on Jurisdiction, ¶¶ 47-55. Canada and the Claimant agree that the terms of NAFTA should be interpreted using a *Vienna Convention on the Law of Treaties* ("VCLT") analysis. However, the Claimant's theory is unsupported by the ordinary meaning of NAFTA Articles 1101(1), 1116(1), and 1117(1), in their context, and in light of the treaty's object and purpose.

<sup>99</sup> That the Claimant decided to jettison the principle of *jura novit curia* and hire an outside expert on the application of NAFTA Articles 1101, 1116, and 1117 to the undisputed facts of this case speaks to the frailty of the Claimant's legal position. This Tribunal has been charged with the responsibility to construe and apply the terms of NAFTA in accordance with international principles of treaty interpretation and international law, a task for which it is well-qualified. Any legal opinion that purports to provide the Tribunal with the answer to the decision its members have been appointed to make is unnecessary.

<sup>100</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 14.

The Claimant's interpretation of NAFTA Articles 1101(1), 1116(1), and 1117(1) is incorrect, and its application to the facts of this case unavailing.<sup>101</sup>

45. Section (A) below explains that under Section A of NAFTA Chapter Eleven, a claimant is owed treaty protection only after it becomes an investor of a Party. Section (B) explains that if an obligation owed to an investor is breached, only that investor has standing to bring a claim under Section B of Chapter Eleven. Section (C) shows that the Claimant's purported analysis of the "object and purpose" of NAFTA would require the Tribunal to supplement the ordinary meaning of the treaty's words with the Claimant's policy preferences. Finally, Section (D) demonstrates that the Claimant has failed to cite any investment law jurisprudence supporting its position.

**A. Section A of NAFTA Chapter Eleven Requires a Claimant to Be an Investor of a Party When the Alleged Breach Occurred**

46. Canada explained in its Memorial on Jurisdiction that, if a disputing investor was not protected and had made no investments at the time of the alleged breach, then "the threshold connection between the challenged measure and the claimant under Article 1101(1) cannot be met, and there are no substantive obligations in Section A that apply with respect to that claimant and its investments."<sup>102</sup> The Claimant disagrees, arguing that Article 1101(1) merely "reinforces" the nationality requirements of Articles 1116 and 1117, and "does not contain the temporal limitation Canada asserts."<sup>103</sup> The Claimant argues that Article 1101(1) is satisfied in this case because "WCC was, and WMH remains, investors of the United States" and "Prairie is an investment of investors of the United States in the territory of Canada."<sup>104</sup> The Claimant's

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<sup>101</sup> As Canada explained in its Memorial on Jurisdiction, the Claimant bears the burden of proving that the Tribunal has jurisdiction over its claim. *See* Canada's Memorial on Jurisdiction, ¶¶ 45-46. In its Counter-Memorial on Jurisdiction, the Claimant does not contest that it bears this burden. However, the Claimant nonetheless utilizes language to suggest a "presumption" in favour of jurisdiction. For example, the Claimant argues that WCC's bankruptcy proceedings should not "destroy", "undo", or "divest" this Tribunal of jurisdiction. *See* Claimant's Counter-Memorial on Jurisdiction, ¶¶ 2 and 13, and p. 26. The Claimant's language is inaccurate. There was no jurisdiction that can now be "undone" or "lost"; it is the Claimant's burden to establish that this Tribunal has jurisdiction over its claim.

<sup>102</sup> Canada's Memorial on Jurisdiction, ¶ 51.

<sup>103</sup> Claimant's Counter-Memorial on Jurisdiction, ¶¶ 30 and 31. CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 39.

<sup>104</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 32.

interpretation is inconsistent with the ordinary meaning of Article 1101(1), properly considered in its context, and is incorrect for several reasons.

47. First, the Claimant inappropriately interprets the term “relating to” in Article 1101(1) in a manner that is devoid of the context of Articles 1116 and 1117. In a dispute under Section B, the limitations imposed by Article 1101(1) must be interpreted in the context of those articles, and the specific claim being advanced. In these circumstances, the measures alleged to be a breach of Section A must “relate to” the Claimant or investments it has made.<sup>105</sup> NAFTA Chapter Eleven tribunals analyzing the text of Article 1101(1) have consistently required that a measure challenged as a breach of Section A “relate to” the investor bringing the claim or its investments. A claimant cannot pass through the “gateway” of this provision by challenging a measure as a breach of Section A that relates to some other investor or that investor’s investment.<sup>106</sup> For example, the tribunal in *Apotex* stated that the measure alleged to be a breach of Section A must have a “direct and immediate effect” on the claimant.<sup>107</sup> Similarly, the *Resolute* tribunal found

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<sup>105</sup> The reasoning of the tribunal in *Apotex* confirms: “It is necessary to address [Article 1101(1)] within the context of NAFTA’s Chapter Eleven and the Claimants’ substantive claims in this arbitration. As recorded elsewhere, the only measure impugned by the Claimants in this arbitration is the Import Alert of 28 August 2009. Accordingly, the Import Alert (as adopted and maintained by the Respondent) must relate to the Claimants as investors or to their investments in the territory of the USA within the meaning of NAFTA Article 1101(1).” See **RLA-046**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014 (“*Apotex – Award*”), ¶ 6.3. The term “investments of investors of another Party” within Article 1101(1)(b) is referred to as “les investissements effectués par les investisseurs d’une autre Partie” in the French text. Article 1101(1)(b) uses the past participle of the verb “effectuer” (to make) – “effectué” – confirming that the challenged measures must “relate to” investments that *have been made* by the claimant. The use of the past tense supports that the claimant’s investment must have already been made at the time of the challenged measures, and therefore that the claimant’s investment must already have been in existence at the time of the challenged measures.

<sup>106</sup> **RLA-026**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, (“*Methanex – Partial Award*”) ¶ 106(i). See also **RLA-027**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 (“*Grand River – Award*”), ¶¶ 76-80; **RLA-028**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008 (“*Cattleman – Award on Jurisdiction*”), ¶¶ 118-128; **RLA-029**, *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award on Jurisdiction, 19 June 2007 (“*Bayview – Award on Jurisdiction*”), ¶ 85.

<sup>107</sup> **RLA-046**, *Apotex – Award*, ¶ 6.22. The Claimant notes that the *Apotex* tribunal found that Article 1101(1) should not be interpreted as “an unduly narrow gateway to arbitral justice”. See Claimant’s Counter-Memorial on Jurisdiction, ¶ 31, ignoring that the tribunal only made this statement in rejecting a legal test of causation under Article 1101(1) (**RLA-046**, *Apotex – Award*, ¶¶ 6.26-6.28). The tribunal was clear that the requirement that the challenged measures have an “direct and immediate effect” on the claimant was not unduly narrow. See **RLA-046**, *Apotex – Award*, ¶¶ 6.4 and 6.22-6.24. The Claimant also notes that the tribunal found that Apotex Holdings Inc. was to be considered a “‘privy’ with Apotex-US, albeit not a named party in the [previous] Apotex I & II arbitration.” See Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 92-93 and **RLA-046**, *Apotex – Award*, ¶¶ 7.37-7.40. It is unclear why the Claimant points this out, as the tribunal made this statement in the context of determining



that a measure that “did not directly address, target, implicate, or affect the Claimant” did not pass the Article 1101(1) threshold.<sup>108</sup> The tribunal in *Methanex* found that a measure challenged as a breach of Section A must have more than a mere “economic impact” on a claimant in order to satisfy Article 1101(1).<sup>109</sup> No NAFTA tribunal has applied a less stringent requirement. As explained further below,<sup>110</sup> when a claimant is not a protected investor at the time of the alleged breach, NAFTA tribunals have held that the terms of Article 1101(1) are not met.

48. Accordingly, in order for the Tribunal to have jurisdiction, the challenged measure must “relate to” the Claimant and investments made by the Claimant. It is insufficient for the measure to relate simply to the Canadian Enterprises, before they were acquired by the Claimant. The Claimant came into existence on January 31, 2019, and made its investment in Canada on March 15, 2019. The measure constituting the alleged breach occurred in 2016. That measure could have had no direct and immediate effect on the Claimant or *its* investment in the Canadian Enterprises. It did not directly address, target, implicate, or affect the Claimant.

49. The Claimant nonetheless argues as a matter of application that the measure challenged as a breach of Section A “now relate[s] to WMH, Prairie’s current parent, because the life, value and return on investment in Prairie was curtailed without compensation”.<sup>111</sup> The Claimant is mistaken. The measure challenged as a breach of Section A in this case cannot relate to the Claimant.

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whether *res judicata* applied. Moreover, as already explained, WCC and the Claimant are not affiliated companies. *See above*, Section II.A.2.

<sup>108</sup> **RLA-033**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018, (“*Resolute – Jurisdictional Decision*”), ¶ 244.

<sup>109</sup> **RLA-026**, *Methanex – Partial Award*, ¶¶ 137 (“If the threshold provided by Article 1101(1) were merely one of “affecting”, as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex’s alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to a NAFTA arbitration.”) and 147; **RLA-051**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and the Merits, 3 August 2005, Part IV, Chapter E, ¶ 22. *See also*, **RLA-047**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 175 and 180.

<sup>110</sup> *See* Section III.D. *See also*, **RLA-021**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 (“*Gallo – Award*”), ¶ 235; **RLA-020**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶¶ 324-325.

<sup>111</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 21.

50. Indeed, the Claimant does not explain how the challenged measure could have had an “immediate” and “direct” effect on the Claimant several years before it came into existence and made its investment.<sup>112</sup> Nor could it. The Claimant made its investment in March 2019 with full knowledge of the fact that the Government of Alberta decided to make voluntary payments to the owners of the six coal-fired electricity generating units in the province that were expected to produce emissions beyond 2030 (the “Transition Payments”), and not to owners of coal mines, including WCC. In the arm’s-length purchase transaction in which it acquired the Canadian Enterprises, the Claimant would have taken into account the Canadian Enterprises’ “life” and “value” as of 2019 in negotiating the terms of the sale. It was only through this sale that the Claimant became an “investor of a Party” and made its investment in Canada. The Claimant cannot now claim that a measure allegedly affecting the “life” and “value” of Prairie in 2016 somehow have had an immediate and direct effect on it and its investment.

51. The second flaw in the Claimant’s interpretation is that it presumes that investments are owed substantive obligations under Section A independent of the protection afforded to the particular investor that owns them. The substantive obligations of Section A only apply to an investment that is protected as an “investment of an investor of a Party” (Article 1101(1)(b)).<sup>113</sup> That protection is founded on the existence of an “investor of a Party”<sup>114</sup>, and is owed only when the qualifying investor of a Party acquires ownership or control of its investment. Prior to this point in time, an investor is not entitled to any protection under Article 1101(1)(b). The conclusion that an “investment of an investor of a Party” cannot be dissociated from the “investor of a Party” is confirmed by the fact that, where the NAFTA Parties sought to provide protection to investments independent of a particular investor, they did so explicitly. For example, Article 1101(1)(c) provides for coverage of “investments” under Articles 1106 and

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<sup>112</sup> See also Section IV.D.

<sup>113</sup> Article 1139 defines an “investment of an investor of a Party” as an “investment owned or controlled directly or indirectly by an investor of such Party”.

<sup>114</sup> Article 1139 defines an “investor of a Party” as an “enterprise of such Party, that seeks to make, is making or has made an investment”.

1114, independent of any particular “investor”. Such coverage does not exist elsewhere under Section A.<sup>115</sup>

52. Finally, the Claimant's argument wrongly presumes that “investments” of different investors of a Party are interchangeable. In particular, it suggests that WCC's investment is the same as the Claimant's investment. In its Memorial on Jurisdiction, Canada explained this is incorrect: neither the Claimant nor its investment existed before 2019.<sup>116</sup> The protection afforded to a particular investor's investment begins when that investor has something at stake – or as Professor Paulsson puts it, “at-risk”<sup>117</sup> – which is protected under the Chapter. The French text of NAFTA Article 1101(1)(b) confirms that the protection afforded to an investor under Section A with respect to its investment only begins when *that* investor makes *its* investment.<sup>118</sup> In French, the text of Article 1101(1)(b) refers to “les investissements effectués par les investisseurs d’une autre Partie”. The verb “effectuer” translates to “to make”, and “effectués par” means “made by”.<sup>119</sup> An investment can only be “made” once, by one investor.<sup>120</sup> As a result, even if the enterprise (or other interest) forming the basis of the investment is the same, the “investment made by” each investor is unique.

53. Thus, whether or not the Canadian Enterprises were continuously owned by U.S. nationals is irrelevant under Article 1101(1)(b) because the Canadian Enterprises were not independently owed obligations under Section A. The Claimant acquired its interest in the Canadian Enterprises

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<sup>115</sup> For example, the obligation owed under NAFTA Article 1102 is to “investors of another Party” and “investments of investors of another Party.” The obligation owed under Article 1105 is to “investments of investors of another Party.”

<sup>116</sup> Canada's Memorial on Jurisdiction, ¶¶ 86-89.

<sup>117</sup> See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 61 (“The passages quoted from these cases show that arbitrators applying international law are disinclined to put form over substance when they ascertain whether claims are timely [...] and arise from genuine investments of at-risk capital [...].”)

<sup>118</sup> Pursuant to NAFTA Article 2206, “[t]he English, French and Spanish texts of this Agreement are equally authentic.”

<sup>119</sup> See R-090, *Larousse French-English Dictionary*, Definition of “effectuer”, <https://www.larousse.fr/dictionnaires/francais-anglais/effectuer/27764>, (accessed on 9 April 2021).

<sup>120</sup> The Spanish text refers to “investments of investors of another Party in the territory of the Party” as “las inversiones de inversionistas de otra Parte realizadas en territorio de la Parte”. The verb “realizar” in Spanish translates in English to “to make”. See R-091, *Larousse Spanish-English Dictionary*, Definition of “realizar” <https://www.larousse.fr/dictionnaires/espanol-anglais/realizar/32516>, (accessed on 9 April 2021).

on March 15, 2019, and the protection to be afforded to the Claimant's investment under NAFTA Chapter Eleven only began on that date.

54. For these reasons, the Claimant is mistaken. Article 1101(1) concerns more than a disputing investor's nationality. If a disputing investor was not protected and had made no investments at the time of the alleged breach, then the threshold connection between the challenged measure and the disputing investor under Article 1101(1) cannot be met.

**B. Section B of NAFTA Chapter Eleven Requires a Claimant to Be an Investor of a Party When the Alleged Breach Occurred**

55. Canada explained in its Memorial on Jurisdiction that NAFTA Articles 1116(1) and 1117(1) require that a claim submitted by an investor of a Party allege a breach of an obligation under Section A, which are owed only to an investor once it becomes protected, either by seeking to make, making, or having made an investment.<sup>121</sup> The Claimant disagrees, alleging that Articles 1116 and 1117 simply "impose nationality requirements on investors", and neither "specify that the 'investor of a Party' submitting the claim must be the same investor that existed at the time of the breach" nor contain a temporal requirement.<sup>122</sup> The Claimant is mistaken.

56. Section B of NAFTA Chapter Eleven provides for procedures to settle disputes between a Party and an investor of another Party. However, the procedures in Section B do not pertain to *any* investor of a Party, or *any* investment. They pertain to the investor with a dispute concerning the substantive obligations under Section A that were owed to that investor. This is clear from the title of Section B: "Settlement of Disputes between a Party and an Investor of Another Party" and the text of Articles 1116 and 1117. Only investors are owed substantive obligations under Section A with respect to themselves and their investments,<sup>123</sup> and only investors can settle disputes concerning those obligations under Section B. If an investor was not owed obligations under Section A, then it cannot have a "dispute" under Section B.

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<sup>121</sup> Canada's Memorial on Jurisdiction, ¶¶ 48-51.

<sup>122</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 27.

<sup>123</sup> As explained above, Article 1101(c) provides that "investments", independent of their investors, fall within the scope and coverage of NAFTA Chapter Eleven only with respect to Articles 1106 and 1114.

57. Whether a claim is filed under Article 1116(1), Article 1117(1), or both, a claimant must establish that it was a protected investor at the time of the alleged breach.<sup>124</sup> The Claimant has no dispute with Canada with respect to the alleged breaches, as the obligations at issue were owed to a different investor of a Party and that investor's investments. Neither Article 1116(1) nor Article 1117(1) allows the Claimant to assert a claim on behalf of another investor of a Party or that investor's investment.

**1. Article 1116(1) Does Not Allow an Investor of a Party to Submit a Claim on Behalf of Another Investor of a Party**

58. NAFTA Article 1116 provides for the submission of a claim to arbitration by a disputing investor on its own behalf:

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

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

59. The Claimant does not contest that it was not a protected investor at the time of the alleged breach and resulting loss. However, by arguing that the investor filing a claim need not be the same investor that existed at the time of the breach,<sup>125</sup> the Claimant argues in effect that Article 1116(1) allows it to bring a claim on behalf of another investor of a Party; i.e. the investor that was protected at the time of the alleged breach.<sup>126</sup> The Claimant's interpretation is

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<sup>124</sup> This requirement is distinct from the requirement that the Claimant make a *prima facie* case of damages under Articles 1116(1) and 1117(1). While Canada addressed these two issues separately in its Memorial on Jurisdiction, for the purposes of responding to the Claimant's arguments, Canada has addressed it in conjunction with its argument concerning jurisdiction *ratione temporis*.

<sup>125</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 27.

<sup>126</sup> For example, the Claimant argues that Canada "owed NAFTA Chapter 11 obligations to the investment and to its parent U.S. investor [WCC]" prior to the alleged breach. See Claimant's Counter-Memorial on Jurisdiction, ¶ 17.

inconsistent with the ordinary meaning of the terms of Article 1116(1), properly considered in their context, and is incorrect for several reasons.

60. First, as explained with respect to Article 1101(1),<sup>127</sup> unless a disputing investor was protected as such at the time of the alleged breach, then no substantive obligations in Section A apply with respect to that investor. Article 1116(1) only concerns an allegation of breach by the disputing investor bringing the claim. This is confirmed by the title of Article 1116(1): “Claim by an Investor of a Party on Its Own Behalf”. Article 1116(1) does not grant standing to one investor to bring a claim on behalf of another investor of a Party. The investor of a Party bringing the claim under Article 1116(1) must be the investor who was allegedly deprived of protection.

61. Second, under Article 1116(1), the disputing investor must claim that *it* “has incurred loss or damage by reason of, or arising out of, that breach.” This restricts the availability of a claim for damages to circumstances where a disputing investor existed – and was therefore capable of incurring a loss – at the time of the alleged breach that caused the loss or damage. A claimant cannot allege to have itself incurred loss or damage from an alleged breach that pre-dates its existence because no obligations were owed to it when the challenged measures occurred.<sup>128</sup>

62. Third, the Claimant's interpretation would render Article 1116(2) *inutile*. Article 1116(2) establishes that a claimant may not bring 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 cannot acquire “knowledge” of breach or loss before it comes into existence. If an investor could file a claim under Article 1116(1) alleging breach and loss that occurred prior to its existence, the limitation period could be tolled indefinitely by new investors coming into existence and acquiring

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*See also* ¶ 23 (“Canada tries to obscure these facts by focusing entirely on the January 13, 2019 formation of WMH, Prairie's parent and WCC's former subsidiary, in relation to the November 2016 Off-Coal Agreements. But Prairie was a Canadian enterprise, owned by WMH's former parent, WCC, prior to November 2016; thus, Canada's argument is irrelevant because the existence of the investment and the diversity of nationality that NAFTA requires are satisfied.”).

<sup>127</sup> *See above*, Section III.A.

<sup>128</sup> Canada's Memorial on Jurisdiction, ¶ 70.

“knowledge” of an alleged breach only at that moment. This would render the limitation period under Article 1116(2) meaningless.

63. Fourth, the Claimant's interpretation of Article 1116(1) would also render Article 1121(1) meaningless. In the context of a claim under Article 1116(1), Article 1121(1) requires the disputing investor to waive its right to initiate or continue any international or domestic proceeding for damages with respect to the measure alleged to breach Section A in the Article 1116(1) claim. According to Kinnear, *et al*, the purpose of Article 1121(1) is “to prevent a multiplicity of actions and duplication of remedies”.<sup>129</sup> If Article 1116(1) allowed a disputing investor to file a claim alleging breach and loss on behalf of another investor, as the Claimant contends, nothing would prevent the investor that *was* protected at the time of the alleged breach from also pursuing a proceeding for damages with respect to the measure alleged to breach Section A. For example, under the Claimant's interpretation, WCC could pursue domestic legal proceedings while the Claimant pursues a NAFTA Chapter Eleven claim, with respect to the *same* loss or damage incurred by WCC by reason of the challenged measures. Similarly, WCC might have continued its own NAFTA claim under Article 1116(1). This raises the untenable prospect of a multiplicity of proceedings and overlapping claims for damages.

64. In sum, the Claimant's argument that it did not have to be a protected investor at the time of the alleged breach in order to file a claim under Article 1116(1) is incorrect. The Claimant can only bring a claim on its own behalf concerning alleged breaches, and resulting losses, that occurred after it became an investor of a Party.

**2. Article 1117(1) Does Not Allow an Investor of a Party to Submit a Claim on Behalf of an Investment of Another Investor of a Party**

65. Similarly, NAFTA Article 1117(1) does not permit an investor of a Party to bring a claim on behalf of another investor's investment. It provides as follows:

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<sup>129</sup> **RLA-052**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2006) [Excerpts] (“Kinnear”), p. 1121-11.

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

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

66. Canada explained in its Memorial on Jurisdiction that Article 1117(1) only allows a disputing investor to submit a claim alleging a breach of Section A on behalf of an enterprise that it owns or controls at the time of the alleged breach.<sup>130</sup> The Claimant does not contest that it did not own or control the Canadian Enterprises at the time of the alleged breach. However, the Claimant argues that it can file a claim under Article 1117(1) because, under that provision, “the investor brings the claim on behalf of the foreign investment to whom the measure relates, in this case, Prairie.”<sup>131</sup> The Claimant’s interpretation is inconsistent with the ordinary meaning of Article 1117(1), properly considered in its context, and is incorrect for several reasons.

67. First, as Canada has already explained,<sup>132</sup> “foreign investments”, including enterprises, are not owed substantive obligations under Section A independent of the particular investor that owns them. Before a disputing investor exists and makes its investment, neither it nor its investment could have been owed a substantive obligation under Section A, and neither of them could have suffered loss or damage arising out of the alleged breach of an obligation. Read in the context of Article 1101(1), the “enterprise” referred to in Article 1117(1) is the investment of the investor of a Party bringing the claim. This interpretation is confirmed by the title of Section B, which makes clear that Section B concerns the settlement of disputes with investors, not

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<sup>130</sup> Canada’s Memorial on Jurisdiction, ¶¶ 48-55.

<sup>131</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 96.

<sup>132</sup> See above Section III.A.



investments.<sup>133</sup> There can be no “dispute” with an investment or with an investor that was not protected at the time of the alleged breach.

68. The Claimant’s argument that it can allege a breach under Article 1117(1) that predates its ownership of the Canadian Enterprises is thus incorrect. The Canadian Enterprises were not owed any substantive obligations under Section A independent of their particular U.S. investor. While Canada may have owed WCC obligations with respect to itself and its investment in the Canadian Enterprises from 2014 until WCC disposed of its investment in 2019, Canada could only owe obligations to the Claimant and its investment in the Canadian Enterprises as of 2019.<sup>134</sup> Any dispute arising out of alleged breaches of obligations owed to WCC and its investments belongs to WCC. Article 1117(1) does not accord the Claimant standing to enforce obligations that may have been owed to another investor. No NAFTA tribunal has ever agreed with the Claimant’s interpretation.<sup>135</sup>

69. Second, the Claimant’s argument that it acquired the “right to assert” a claim under Article 1117(1) when it purchased the Canadian Enterprises from WCC in March 2019 is also incorrect. As explained, the Canadian Enterprises are not independently owed substantive obligations under Section A and therefore a “right to assert” a claim cannot inherently travel with an investment. Moreover, investment law cases have rejected the argument that the right to assert a claim travels with an investment. In cases where an investment is transferred after the alleged breach, tribunals have determined that the right to advance the claim remained with the investor that owned or controlled the investment at the time of the alleged breach.<sup>136</sup>

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<sup>133</sup> NAFTA Article 1117(4).

<sup>134</sup> Further, as explained above, the Claimant’s argument depends on the incorrect presumption that its investment in the Canadian Enterprises is the same as WCC’s investment in the Canadian Enterprises. The fact that an enterprise forming the basis of separate investors’ investments may be the same does not mean that the investment made (once) by each investor is the same. *See above*, Section III.A.

<sup>135</sup> *See below*, Section III.D.

<sup>136</sup> *See e.g.*, **RLA-053**, *EnCana v. Republic of Ecuador* (UNICTRAL) Award, 3 February 2006 (“*EnCana – Award*”), ¶ 131 (concluding that the right to file a claim remained with the investor that held the investment at the time the “dispute” arose, which it defined as “the taking of measures in breach of the Treaty which cause loss and damage to an investor”); **RLA-054**, *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) Award, 22 August 2012 (“*Daimler Financial – Award*”), ¶ 145 (concluding the tribunal “should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly

70. For this reason, the Claimant's interpretation of Article 1117(1) would open the door to a multiplicity of proceedings under Section B with respect to the same enterprise and arising out of the same measures giving rise to an alleged breach of obligations in Section A. For example, in this case, the Claimant's theory could have allowed WCC, which still exists as an entity, to continue its claim under Article 1116(1) alleging a breach of Section A and resulting loss or damage because *it* was the protected investor at the time of the alleged breach.<sup>137</sup> This raises the possibility of overlapping claims and divergent outcomes.

71. Third, the Claimant's interpretation ignores that Article 1117(1) is not intended to allow a disputing investor to file a claim on behalf of another investor's enterprise. Under customary international law, an international claim may not be advanced against a State on behalf of the State's own nationals.<sup>138</sup> Article 1117(1) creates a limited derogation from customary international law to allow investors to make claims on behalf of their enterprises. However, contrary to what the Claimant insists, Article 1117(1) does not derogate further from customary international law by allowing an investor to submit a claim for an alleged breach of an obligation owed to a different investor and its investment.

72. Fourth, the Claimant's interpretation would create other potential outcomes that could not have been intended by the NAFTA Parties. For example, the Claimant's interpretation would incentivize claim shopping because it would allow an investor to acquire an investment for the purpose of pursuing a NAFTA claim. If the Claimant is correct that a claimant does not have to be a protected investor at the time of the alleged breach, then there would be nothing to prevent claimants from seeking out investments in enterprises in order to file claims on their behalf. These claimants could be in search of a windfall, rather than a genuine investment, as they would know of the alleged breaches at the time of their investment and could make an informed choice

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offending governmental measures at the time that those measures were taken" (emphasis in original)). Canada discusses these, and other cases, in greater detail in Section IV.A below.

<sup>137</sup> While it is possible the claims could be consolidated, Article 1117(3) simply offers a presumption of consolidation in circumstances where an investor makes a claim under Article 1117, and the investor or a non-controlling investor in the enterprise also makes a claim under Article 1116 arising out of the same events that gave rise to the claims. The particular circumstances of each case would need to be examined, and there is no guarantee that these claims would be consolidated. Contrary to Professor Paulsson's suggestion, that is not what occurred in this case. See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 40.

<sup>138</sup> RLA-052, Kinnear, p. 1116-6.

about the amount of “at-risk capital” to expend. No language in NAFTA indicates that the NAFTA Parties intended such a consequence.<sup>139</sup>

73. For these reasons, the Claimant cannot bring a claim under Article 1117(1) on behalf of the Canadian Enterprises for alleged breaches that occurred when they were owned and controlled by WCC. This Tribunal's jurisdiction *ratione temporis* is limited to alleged breaches, and resulting losses, that occurred after the Claimant acquired the Canadian Enterprises in 2019.

**C. The Object and Purpose of NAFTA Does Not Support the Claimant's Interpretation**

74. In accordance with the VCLT, a treaty's terms are further to be interpreted in light of the treaty's object and purpose. NAFTA Article 102 is instructive in this regard:

**Article 102: Objectives**

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, 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.

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<sup>139</sup> Another example concerns the issue of costs. If an investor could file a claim on behalf of an enterprise that it did not own or control at the time of the alleged breach, then the investor that held the enterprise at the time of the alleged breach could simply transfer the enterprise to an impecunious affiliate prior to the submission of a claim in an attempt to bring a NAFTA claim while avoiding the possibility of a negative costs award.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

75. Canada's interpretation of Articles 1101(1), 1116(1), and 1117(1) is consistent with the objectives stated in Article 102. In particular, when interpreting provisions that concern the resolution of investment disputes, the most significant objective is Article 102(1)(e), which is to "create effective procedures [...] for the resolution of disputes." Canada's interpretation of these Articles is consistent with this objective because it is straightforward – the obligations under Section A of NAFTA Chapter Eleven are owed to investors and, if breached, those investors have standing to bring a claim under Section B.

76. In contrast, the Claimant's interpretation of Articles 1101(1), 1116(1), and 1117(1) would undermine the effectiveness of the dispute settlement procedures. For example, as Canada has already explained, the Claimant's interpretation would, among other things: (a) render Article 1116(2) without effect; (b) allow investors to circumvent Article 1121; (c) permit a multiplicity of claims and duplication of remedies; and (d) incentivize would-be investors to purchase investments for the sole purpose of filing an investment claim. NAFTA Article 102(1)(e) thus does not support the Claimant's interpretation of the dispute resolution provisions in the Agreement.

77. The Claimant argues that the object and purpose of NAFTA does not support Canada's interpretation of Articles 1101(1), 1116(1), and 1117(1) because Canada's interpretation would not "increase substantially investment opportunities in the territories of the Parties" (Article 102(1)(c)).<sup>140</sup> Specifically, the Claimant asserts that Canada's interpretation "prohibits the transfer of an investment between U.S. investors that could mean forfeiture of the investment protection rights applicable to the investment" and, as such, would not "increase investment opportunities" contrary to Article 102(1)(c).<sup>141</sup>

78. The Claimant's argument is factually incorrect. Canada does not argue that the transfer of an investment between U.S. investors would lead to the "forfeiture of the investment protection

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<sup>140</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 33.

<sup>141</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 35.

rights applicable to the investment.” Rather, the investment protections rights remain with the investor that owned and controlled the investment at the time of the alleged breach. The right to file a claim under Section B is not “forfeited”: the obligations under Section A and standing rights under Section B concern the investor that was protected as such at the requisite time.

79. Moreover, the Claimant's argument tries to supersede the ordinary meaning of Articles 1101(1), 1116(1), and 1117(1) in reliance on the stated objectives under Article 102. This is impermissible and contrary to the useful guidance provided by the NAFTA tribunal in *ADF Group v. United States*. In that case, the tribunal explained that Article 102 is “necessarily cast in terms of a high level of generality and abstraction”, while interpretive issues commonly arise in respect of “detailed provisions embedded in the extraordinarily complex architecture of the treaty”.<sup>142</sup> The tribunal explained that the object and purpose of the parties to the treaty in agreeing to any particular provision is to be found, first, in the words used by the parties in that provision.<sup>143</sup> The tribunal stated:

We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis*. The former may frequently cast light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter.<sup>144</sup>

80. The Claimant is mistaken to rely on the *lex generalis* of Article 102 as a means to override the *lex specialis* of Articles 1101(1), 1116(1), and 1117(1).

81. The Claimant also errs by reading specific substantive provisions of NAFTA Chapter Eleven, Articles 1105 and 1109, as *lex generalis*.<sup>145</sup> It cannot be said that specific disciplines that the Parties agreed to in one aspect of NAFTA's overall coverage establish the object and purpose

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<sup>142</sup> **RLA-055**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 (“*ADF Group Inc. – Award*”), ¶ 147.

<sup>143</sup> **RLA-055**, *ADF Group Inc. – Award*, ¶ 147. The Tribunal explained that “[t]his is in line with Article 102(1) which states that *NAFTA's objectives are 'elaborated more specifically through its principles and rules'* such as ‘national treatment, most-favored nation treatment and transparency’” (emphasis in original).

<sup>144</sup> **RLA-055**, *ADF Group Inc. – Award*, ¶ 147

<sup>145</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 34.

of the Agreement as a whole.<sup>146</sup> These specific substantive obligations do not purport to reflect the object and purpose of the treaty.

82. In conclusion, the object and purpose of NAFTA does not support the Claimant's view an investor of a Party can allege breach and resulting loss that occurred prior to its existence as a protected investor.

**D. International Investment Law Jurisprudence Confirms that a Claimant Must be a Protected Investor When the Alleged Breach Occurred**

83. In its Memorial on Jurisdiction, Canada explained that numerous tribunals have confirmed that a tribunal lacks jurisdiction *ratione temporis* where the alleged breaches pre-date the claimant's existence as a protected "investor of a Party".<sup>147</sup> None of the cases the Claimant cites support its view that a claimant does not have to be a protected investor at the time of the alleged breach.<sup>148</sup> Instead, the Claimant spends considerable effort arguing that none of the decisions cited by Canada are relevant to its circumstances, which it alleges presents "a case of first impression".<sup>149</sup> The Claimant's case is not unique, and its efforts to distinguish the numerous decisions of other tribunals has no merit.

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<sup>146</sup> In any case, the Claimant's arguments based on the text of these provisions are in error. The Claimant did not explain why it relies on Article 1105 as evidence of the treaty's object and purpose, and simply states that Article 1105 applies to "investments of investors of another Party". In doing so, the Claimant quotes *Jan de Nul v. Egypt*. The quotation it relies upon is evaluating the claimant's substantive claim concerning the obligations of "fair and equitable treatment" and "continuous protection and security for investments". It does not address the object and purpose of the relevant treaty. See **CLA-015**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Decision on Jurisdiction, ¶¶ 34 (description of the claims) and 135 (16 June 2006). Likewise, Article 1109 does not concern access to the NAFTA dispute settlement for matters that arose before an investor's investment even begins. Instead, the transfers described in Article 1109 are all pecuniary transfers relating to an investor's existing investment. The Claimant has not raised a violation of Article 1109 in this arbitration. See Claimant's Counter-Memorial on Jurisdiction, ¶ 34.

<sup>147</sup> Canada's Memorial on Jurisdiction, ¶¶ 56-64.

<sup>148</sup> It is telling that the Claimant invites the Tribunal not to consider these cases at all because "[n]o supplementary means of interpreting the treaty text on this question should be necessary." (Claimant's Counter-Memorial on Jurisdiction, ¶ 8).

<sup>149</sup> **CER-Paulsson-International Law-Counter-Memorial on Jurisdiction**, ¶ 41; see also, ¶ 6 (stating that the question "may be one of first impression under NAFTA").

**1. The Claimant Conflates Jurisdiction *Ratione Temporis* and Abuse of Process**

84. The Claimant asserts that the doctrine of jurisdiction *ratione temporis* only “denies jurisdiction” where the transaction through which the claimant acquired its investment “might be a sham, an abuse of investment treaty rights to obtain jurisdiction that otherwise would not be available”.<sup>150</sup> The Claimant is mistaken and confuses the distinct questions of: (a) whether a tribunal has jurisdiction *ratione temporis* over the claim; and (b) whether the claim is inadmissible by virtue of an abuse of process.<sup>151</sup> The cases cited by the Claimant prove that its argument is misguided.

85. For example, the Claimant cites *Philip Morris* as an example of a case that involved an abuse of process.<sup>152</sup> However, the *Philip Morris* tribunal was also tasked with assessing jurisdiction *ratione temporis*. It found that its “starting point” was “to distinguish between the *ratione temporis* objection and the abuse of rights objection”.<sup>153</sup> It first analyzed the *ratione temporis* objection, finding:

The Tribunal [...] considers that, whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred. Investor-State jurisprudence is in accord with this approach.<sup>154</sup>

86. Applying this test, the tribunal found that the claimant had made its investment before the alleged breach occurred and that it had jurisdiction *ratione temporis*.<sup>155</sup> If it had come to the opposite conclusion, the tribunal’s analysis would have stopped there. It was *only* because the claimant’s investment occurred before the alleged breach that the tribunal proceeded to evaluate

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<sup>150</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 9 (“The doctrine [of jurisdiction *ratione temporis*] appropriately denies jurisdiction where the restructuring might be a sham, an abuse of investment treaty rights to obtain jurisdiction that otherwise would not be available”). See also, ¶ 46.

<sup>151</sup> Canada understands any references to “a sham” to refer to an abuse of process.

<sup>152</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 49; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 14

<sup>153</sup> **CLA-018**, *Philip Morris Asia Ltd. v. The Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015 (“*Philip Morris – Award*”), ¶ 527 (emphasis added).

<sup>154</sup> **CLA-018**, *Philip Morris – Award*, ¶ 529.

<sup>155</sup> **CLA-018**, *Philip Morris – Award*, ¶¶ 533-534.

the abuse of process objection, ultimately finding the claim to be inadmissible because the claimant acquired its investment for the principal purpose of gaining treaty protection.<sup>156</sup>

87. Similarly, the Claimant argues that the tribunal's decision in *Renée Rose Levy* concerned an abuse of process and not jurisdiction *ratione temporis*.<sup>157</sup> However, that is incorrect because the tribunal stated that "[i]f 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."<sup>158</sup> The tribunal found that it had jurisdiction *ratione temporis* because the claimant *had* made her investment prior to the alleged breaches.<sup>159</sup> It then proceeded to evaluate the respondent's abuse of process objection separately.<sup>160</sup>

88. Likewise, the tribunal in *Libananco* evaluated jurisdiction *ratione temporis* as a separate issue from abuse of process. While Professor Paulsson states that the operative issue in that case was whether there was a sham transaction,<sup>161</sup> it is difficult to understand the basis of this statement. The *Libananco* tribunal does not appear to have evaluated the respondent's abuse of process objection at all.<sup>162</sup> Instead, the tribunal evaluated the evidence of whether the claimant

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<sup>156</sup> **CLA-018**, *Philip Morris – Award*, ¶¶ 535 and 588.

<sup>157</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 88.

<sup>158</sup> **RLA-048**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/7) Award, 9 January 2015 ("*Renée Rose Levy – Award*"), ¶ 182.

<sup>159</sup> **RLA-048**, *Renée Rose Levy – Award*, ¶ 161. The tribunal's analysis of the jurisdiction *ratione temporis* objection found that "a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached." **RLA-048**, *Renée Rose Levy – Award*, ¶ 146; see also ¶ 147.

<sup>160</sup> **RLA-048**, *Renée Rose Levy – Award*, ¶¶ 174-195. The Claimant appears to acknowledge that the *Renée Rose Levy* decision addressed the *ratione temporis* objection and abuse of process objection separately. Claimant's Counter-Memorial on Jurisdiction, ¶ 88 ("Thus, the tribunal dismissed the claim expressly on grounds of abuse of process, not *ratione temporis*.").

<sup>161</sup> **CER-Paulsson-International Law-Counter-Memorial on Jurisdiction**, ¶ 68. The Claimant argues this case turned on an "abuse of process". See Claimant's Counter-Memorial on Jurisdiction, ¶¶ 86-87.

<sup>162</sup> **RLA-050**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011 ("*Libananco – Award*"), ¶ 104(g)(iv) (listing the respondent's abuse of process objection); ¶ 105 (not listing the abuse of process objection as "appropriate for preliminary determination"); ¶ 570.1 (showing that the tribunal's only decision in the "operative section" was on the timing of the claimant's acquisition of the relevant investment).



owned its investment in Turkey on the date of the alleged breach (June 12, 2003), ultimately finding that it did not have jurisdiction because the claimant had not proved this fact.<sup>163</sup>

89. The Claimant's attempt to blur the distinction between whether a tribunal has jurisdiction *ratione temporis* and whether a claim is inadmissible because of an abuse of process should therefore be rejected. None of the cases cited by the Claimant support its extraordinary theory that, absent an abuse of process, a tribunal will have jurisdiction to hear claims challenging alleged breaches that occurred before a claimant became a protected investor.<sup>164</sup>

## 2. The Claimant's Attempt to Distinguish Other Tribunal Decisions is Unavailing

90. The Claimant also argues that the "heart of the issue" in tribunal decisions cited by Canada was "whether the investment existed as a foreign-owned investment when the host government

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<sup>163</sup> **RLA-050**, *Libananco – Award*, ¶¶ 127-536. The tribunal concluded, at ¶ 570.1, that: "[T]he Tribunal has no jurisdiction over the present case as Libananco has not proved that it owned shares in ÇEAŞ and Kepez [the relevant investment] before 12 June 2003." Canada's Memorial also raised *Cementownia*, a case based on a very similar fact pattern to *Libananco*. See Canada's Memorial on Jurisdiction, ¶ 63. The *Cementownia* tribunal also found that it lacked jurisdiction because the claimant did not prove that it owned the "investment" at the relevant time or that it was an "investor". See **RLA-049**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009 ("*Cementownia – Award*"), ¶¶ 149 and 179(1)(a). The tribunal also found, separately, that the claim was an abuse of process and fraudulent. See **RLA-049**, *Cementownia – Award*, ¶¶ 159 and 179(1)(b).

<sup>164</sup> The Claimant cites a number of other cases that are not relevant to its position. See Claimant's Counter-Memorial on Jurisdiction, ¶¶ 47-48, 51-55. *Mobil v. Venezuela* did not address jurisdiction *ratione temporis* because the claimant only invoked jurisdiction for disputes arising out of actions that Venezuela took after the claimant's acquisition of its investment was completed. Moreover, the relevant "restructuring" was the Claimants' creation of a Netherlands holding company, which was "inserted into the corporate chain" holding the relevant investments. This is not comparable to the arm's-length purchase of the Canadian enterprises at issue in this case. See **CLA-017**, *Mobil (a.k.a. Venezuela Holdings) v. Venezuela* (ICSID Case No. ARB/07/27) Decision on Jurisdiction, 10 June 2010, ¶¶ 187, 204-205, and 209(a)(ii). With respect to *Phoenix Action*, the Claimant and Professor Paulsson confusingly present an uncited quotation, which is in fact excerpts from two separate paragraphs in the award. See Claimant's Counter-Memorial on Jurisdiction, ¶ 47 and CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 12 (referring but not citing to **RLA-045**, *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009 ("*Phoenix Action – Award*"), ¶ 136 and ¶ 138. The passages on which the Claimant relies relate to the question of whether or not the claimant had made an "investment" (*i.e.* whether the tribunal had *ratione materiae*). See **RLA-045**, *Phoenix Action – Award*, ¶¶ 145-146. On the separate issue of *ratione temporis*, while it was unclear whether the claimant was challenging measures that pre-dated its alleged investment in the Czech Republic, the tribunal indicated that it had "no jurisdiction *ratione temporis* to consider Phoenix's claims arising prior to December 26, 2002, the date of Phoenix's alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix 'invested' in the Czech Republic." See **RLA-045**, *Phoenix Action – Award*. Finally, as described below, the Claimant's characterization of *Gallo* as involving an abuse of process claim is inaccurate. There were no findings concerning an abuse of process in that case.

allegedly breached its obligations to the investment and its foreign investor.”<sup>165</sup> The Claimant is mistaken. The decisions focus on the status of the claimant as a protected investor at the time of the alleged breach.

91. For example, the *Mesa v. Canada* tribunal was focused on when the claimant became an “investor of a Party”, not on the existence of a foreign-owned investment.<sup>166</sup> It did not analyze the “existence” of a foreign-owned investment in isolation from its investor, as the Claimant suggests.<sup>167</sup> The tribunal explained that its “jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an ‘investor’ holding an ‘investment.’”<sup>168</sup> In fact, in analyzing the definitions of “investor of a Party” and “investment of investor of a Party”, the tribunal observed:

It is obviously implied in the definition quoted above that there must be a link between the investor that seeks to make an investment, and the investment that the investor seeks to make. Put differently, the investor must establish that it was seeking to make the very investment in respect of which it makes its claims.<sup>169</sup>

92. *Mesa* therefore confirms that there must be a link between the claimant and its investment at the time of the challenged measures: the claimant must have been seeking to make, or have already made, the investment in respect of which it brings its claims at the time of the challenged measures.

93. Similarly, the *Gallo v. Canada* tribunal was focused on whether the claimant owned or controlled its enterprise at the time of the alleged breach. The Claimant and Professor Paulsson

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<sup>165</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 22.

<sup>166</sup> The *Mesa* tribunal analyzed whether Mesa was an enterprise that “seeks to make, is making or has made an investment” at the time of the challenged measures, such that it could qualify as a protected “investor of a Party”, as defined under NAFTA Chapter Eleven, with respect to its investments. The tribunal ultimately relied on the timing of the incorporation of the claimant's investments in Canada as evidence of when the claimant made its investment. See **RLA-020, Mesa – Award**, ¶¶ 328-338.

<sup>167</sup> The Claimant argues that the relevant issue in that case “was that there were no existing foreign investments in Canada to have been affected by certain renewable energy measures adopted in or before September 2009.” Claimant's Counter-Memorial on Jurisdiction, ¶ 80.

<sup>168</sup> **RLA-020, Mesa – Award**, ¶ 327.

<sup>169</sup> **RLA-020, Mesa – Award**, ¶ 330.

characterize *Gallo v. Canada* as concerning a “sham transaction by which a US party is used as a front by a Canadian party to sue his own State under NAFTA”.<sup>170</sup> Contrary to the Claimant's argument, the *Gallo* tribunal made no findings concerning an abuse of process.<sup>171</sup> Instead, it found that the text of Article 1117(1) requires that a claimant “own or control” the enterprise on whose behalf it brings a claim at the time of the alleged breach of an obligation under Section A:

[...] Art. 1117 of the NAFTA [...] requires that any claimant seeking to successfully file an arbitration on behalf of a domestic ‘juridical person’, must pass a first hurdle: the plaintiff must prove that at the time when the alleged treaty violations occurred he or she owned or controlled the ‘juridical person’ holding the investment.<sup>172</sup>

94. While it is true that the Canadian enterprise in *Gallo* was previously owned by Canadian interests, the tribunal made no finding that Mr. Gallo could have succeeded in bringing his claim, if only the Canadian enterprise was previously owned by another investor of a Party. Instead, the tribunal found that Mr. Gallo had not satisfied the “*quid pro quo*” necessary to access NAFTA dispute settlement, which requires the claimant seeking protection to show it is a “protected foreign investor, who at the relevant time owns or controls an investment in the host country.”<sup>173</sup>

95. The *B-Mex* tribunal also evaluated whether the claimants “owned or controlled” the enterprises on whose behalf they brought a claim under Article 1117(1). It found that this ownership or control must be demonstrated at the relevant times, which it interpreted to include “at the time of the treaty breaches”.<sup>174</sup> The Claimant and Professor Paulsson wrongly argue that

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<sup>170</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 55; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 66.

<sup>171</sup> The argument that the claim was an “abuse of right” was raised by Canada “subsidiarily”; the tribunal repeated several times that Canada was not alleging fraud. See **RLA-021**, *Gallo – Award*, ¶¶ 146, 278-279, and 282.

<sup>172</sup> **RLA-021**, *Gallo – Award*, ¶ 332. Professor Paulsson and the Claimant do not address the *Gallo* tribunal's analysis of the text of Article 1117, which Canada relies on in this arbitration, instead repeating certain aspects of the “factual section of the award”. See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 71(xv) and ¶¶ 17-18; Claimant's Counter-Memorial on Jurisdiction, ¶¶ 52-55 and 82.

<sup>173</sup> **RLA-021**, *Gallo – Award*, ¶ 336, cited approvingly in CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 17.

<sup>174</sup> That tribunal found that the claimants “must establish that they owned or controlled the Mexican Companies [the relevant enterprises] at the time of the treaty breaches” and “at the time of the submission of the claim.” **RLA-022**, *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*”), ¶¶ 145-147 (emphasis omitted).

there was no holding on this issue.<sup>175</sup> The tribunal evaluated whether the requirements of Article 1117(1) were satisfied for three enterprises on whose behalf claims were brought.<sup>176</sup> While the Claimant points out that the tribunal found that the claimant never owned one of the three enterprises,<sup>177</sup> the Claimant does not address the fact that the tribunal evaluated whether the claimant owned or controlled the other two enterprises at the “relevant times”.<sup>178</sup>

96. *GEA Group* is directly comparable to this case and contradicts the Claimant's theory that a tribunal need only evaluate whether there existed a “foreign-owned investment” at the time of the alleged breach.<sup>179</sup> Like in the present case, *GEA Group* concerned the transfer of an enterprise between two separate investors of the same nationality.<sup>180</sup> Despite the fact that the enterprise was continuously owned and controlled by German investors, the tribunal found that “the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed.”<sup>181</sup> In its Counter-Memorial on Jurisdiction, the Claimant struggles to distinguish this case, advancing only the perplexing argument that the legal standard applied

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<sup>175</sup> CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 71(iii) (“B-Mex contains no *ratio decidendi* (i.e., holding) that supports Canada's contention that an investor must own or control the domestic entity at the time of breach and at the time of submission of the claim, because the sole claim that was dismissed was one brought on behalf of an entity by the name of Operadora Pesa, S. de R.L. de C.V., in which the claimants had never made an investment.”) (emphasis omitted); Claimant's Counter-Memorial on Jurisdiction, ¶ 83.

<sup>176</sup> The three enterprises were: (i) the Juegos Companies, (ii) E-Games, and (iii) Operadora Pesa.

<sup>177</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 83.

<sup>178</sup> See e.g., **RLA-022**, *B-Mex – Partial Award*, ¶ 207 (“Based on the foregoing, the Tribunal finds that the Claimants did not ‘own’ the Juegos Companies or E-Games at the relevant times for purposes of Article 1117. As they never owned any shares in Operadora Pesa, they naturally did not ‘own’ that company either.”); ¶ 232 (“Having found that the Claimants at all relevant times owned at least 50% of the Series B shares in each of JVE Sureste, JVE Centro, JyV Mexico and JVE DF, the Tribunal concludes that they had at all relevant times the legal capacity to control those companies. Further, having found that the Claimants at all relevant times owned at least 50% of each of the Series A and Series B shares, and at least 50% of the combined Series B and C shares, of JVE Mexico, the Tribunal also concludes that they had at all relevant times the legal capacity to control JVE Mexico. The Tribunal therefore concludes, on that basis, that the Claimants at all relevant times “controlled” the Juegos Companies for purposes of Article 1117”); ¶ 241 (“Based on the foregoing, the Tribunal is satisfied, on the preponderance of the evidence, that the Claimants *de facto* controlled E-Games at all relevant times”) (emphasis added throughout).

<sup>179</sup> The Claimant alleges that “[n]one of the cases relied upon by Canada presents a factual scenario directly comparable to this case.” Claimant's Counter-Memorial on Jurisdiction, ¶ 44.

<sup>180</sup> Canada's Memorial on Jurisdiction, ¶ 62; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 69.

<sup>181</sup> **RLA-023**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶ 170.

by the *GEA Group* tribunal is irrelevant because the claimant ultimately satisfied that standard.<sup>182</sup> In Canada's view, the legal standard is relevant regardless of the outcome of its application to the facts.

97. A recent decision, *STEAG v. Spain*, also contradicts the Claimant's position that "[n]one of the cases relied upon by Canada presents a factual scenario directly comparable to this case."<sup>183</sup> In *STEAG*, the claimant, a German company, had acquired its investment in an enterprise (Arenales Solar) from another German company.<sup>184</sup> The tribunal found that it only had jurisdiction over matters that occurred after the claimant acquired its investment (in Canada's translation):

Based on the foregoing, in accordance with Article 26 of the Treaty, the Tribunal has jurisdiction to resolve the dispute between the Parties only if said dispute arises from a claim for violation of the Treaty that is related to the Claimant's investment in Spain. Any dispute arising from alleged Treaty breaches in relation to STEAG's investment, but which arose before the Claimant acquired Arenales Solar, would not be within the jurisdiction *ratione temporis* of the Tribunal.<sup>185</sup>

98. Like *GEA Group*, the *STEAG* tribunal's analysis confirms that a tribunal's jurisdiction over a claim relating to an investment begins when the claimant acquires the investment, *even if* that investment was previously owned by an investor of the requisite nationality.

99. Finally, the Claimant does not meaningfully address *Saluka v. Czech Republic*. The *Saluka* tribunal found that it lacked jurisdiction in respect of claims for damage incurred prior to the claimant's (Saluka's) acquisition of the underlying investment from another company

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<sup>182</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 89.

<sup>183</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 44.

<sup>184</sup> **RLA-056**, *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4) Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020 ("*STEAG – Decision*"), ¶¶ 145-151 (describing STEAG's acquisition of SMAG's interests in Arenales Solar); and ¶ 766 (describing SMAG's bankruptcy process in Germany) (in Spanish).

<sup>185</sup> **RLA-056**, *STEAG – Decision*, ¶ 380 ("Partiendo de lo anterior, de conformidad con el artículo 26 del Tratado, el Tribunal tiene jurisdicción para resolver la disputa entre las Partes sólo si dicha disputa surge de una reclamación por violación del Tratado que esté relacionada con la inversión de la Demandante en España. Cualquier disputa derivada de presuntos incumplimientos del Tratado en relación con la inversión de Steag, pero que haya surgido antes de que la Demandante adquiriera Arenales Solar, no estaría dentro de la jurisdicción *ratione temporis* del Tribunal.")

(Nomura).<sup>186</sup> Professor Paulsson states that it is “hardly surprising” that Saluka could not recover damages on behalf of Nomura, “as Nomura could not and did not seek to be a party”.<sup>187</sup> However, the same situation exists in the present case – WCC is not a party to this arbitration and the Claimant should not be able to claim damages allegedly suffered by WCC and its investment.

100. In conclusion, NAFTA and international investment cases confirm that a claimant must be a protected investor at the time of the alleged breach and resulting damages. The Claimant has failed to provide any support for its proposition that a claimant can access NAFTA dispute settlement to seek damages for alleged breaches that occurred before a claimant made its investment.

#### **IV. THE CLAIMANT’S ALTERNATIVE ARGUMENTS DO NOT ESTABLISH THE TRIBUNAL’S JURISDICTION *RATIONE TEMPORIS***

101. Despite the *ratione temporis* requirements set out above, the Claimant argues the Tribunal may ignore the text of NAFTA, and overlook its legal personality, in order to accept jurisdiction over its claim. In particular, the Claimant argues that a “tribunal has jurisdiction when corporate change occurs for a legitimate business purpose; there is continuity in the beneficial interest in the investment; and the right to assert the claim is connected to the claimant’s *bona fide* investment in harmony with the purposes of the treaty.”<sup>188</sup> The Claimant further alleges that NAFTA does not prohibit the transfer of claims,<sup>189</sup> and that “Canada’s breach continues and its damages remain pending for Prairie and WMH”.<sup>190</sup> The Claimant’s legal arguments are unfounded, and its attempt to apply them to this case relies on fundamental factual mischaracterizations. Canada addresses each of the Claimant’s arguments in turn.

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<sup>186</sup> **RLA-024**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244.

<sup>187</sup> **CER**-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 71 (xiii).

<sup>188</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 9. *See also* ¶¶ 59-78.

<sup>189</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 94-99.

<sup>190</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 100-103.

**A. The Mere Existence of a “Restructuring” or a Bankruptcy Process Does Not Establish the Tribunal’s Jurisdiction *Ratione Temporis***

102. In its Memorial on Jurisdiction, Canada explained that the Claimant’s participation in WCC’s bankruptcy process confirmed both its adverse relationship to WCC and its purchase of the Canadian Enterprises in an arm’s-length sale.<sup>191</sup> In particular, Canada has established that:

- the Claimant was created as a new company in 2019 on behalf of the First Lien Lenders, who were legally adverse-in-interest to WCC;
- the Claimant acquired the Canadian Enterprises in an arm’s-length sale from WCC;
- the Claimant is unaffiliated with WCC;
- the Claimant bears no successor liability to WCC; and
- WCC continues to exist as an entity unrelated to the Claimant.

103. These facts are “not materially disputed”.<sup>192</sup> Nonetheless, in its Counter-Memorial on Jurisdiction, the Claimant overlooks them in favour of an argument that tribunals considering *ratione temporis* objections have determined “that a corporate restructuring of the investor is not, in and of itself, a basis for denying jurisdiction”.<sup>193</sup> It does not specify what it means by “restructuring”, but suggests that “restructurings” undertaken in the context of a bankruptcy process may have special status.<sup>194</sup> It attempts to draw parallels to four cases involving transfers of investments between affiliated companies,<sup>195</sup> alleging that WCC’s investment and its NAFTA

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<sup>191</sup> See e.g., Canada’s Memorial on Jurisdiction, ¶¶ 5-6, 24-28, 82-85; **RER-Coleman-Bankruptcy-Memorial** on Jurisdiction [First Report], ¶¶ 72(c), 90, and fn. 83.

<sup>192</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 11. In light of the Claimant’s argument that it was created “as a wholly-owned subsidiary of WCC”, it is unclear whether the Claimant agrees that it was created “on behalf of the First Lien Lenders.” However, for the reasons explained in Section II.A.1 at ¶¶ 19-21, this cannot be contested.

<sup>193</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 45; **CER-Paulsson-International Law-Counter-Memorial** on Jurisdiction, ¶ 6.

<sup>194</sup> See e.g., Claimant’s Counter-Memorial on Jurisdiction, ¶ 13 (“No tribunal has held that a bankruptcy restructuring for legitimate business purposes and that respects the diversity of nationality requirements of Articles 1116 and 1117 undoes jurisdiction over an investment claim.”)

<sup>195</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 59-63 (citing **CLA-019**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 Nov. 2000 (“*S.D. Myers – Partial Award*”); **CLA-020**, *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction 27 September 2001 (“*Autopista – Decision on Jurisdiction*”); **CLA-021**, *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL) Partial Award 13 September 2001 (“*CME – Partial Award*”); and **CLA-022**, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) Award, 30

claim were transferred through bankruptcy “from a parent company to another wholly-owned subsidiary”.<sup>196</sup> The Claimant's arguments must be rejected for several reasons.

104. First, the Claimant's focus on the existence of a “restructuring” or a bankruptcy process, rather than on the particular characteristics of the sale transaction in any given case, is misguided. No two “restructurings” or bankruptcy processes are the same. Each debtor faces a different set of facts and circumstances, and has “a great deal of latitude” to determine how it will settle its obligations and liabilities.<sup>197</sup> While in some cases a debtor may “reorganize” in a manner where its corporate form does not change and it retains ownership of its assets,<sup>198</sup> in other cases – like this one – a debtor chooses to settle its debts by selling its assets to a new entity.<sup>199</sup> Canada's arguments in this case have never been about bankruptcies, generally; they have been about the facts of the Claimant's acquisition of its investment in Canada, specifically. Nothing about the bankruptcy context of the Claimant's acquisition detracts from the transaction's fundamental characteristics, set out above.<sup>200</sup>

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October 2017 (“*Koch – Award*”). Professor Paulsson further describes a series of allegedly related cases pertaining to “the interposition of controlled holding companies” and a “restructuring *per se*”. See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶¶ 7-14. It is not clear how all of these cases pertain to the Claimant's arguments on “restructurings”, and it is notable that Professor Paulsson identifies the “irrelevance of the aforementioned line of cases to the present case” (¶ 19). He mentions only *Autopista* as supporting the proposition that “provided that the true investor's qualifying nationality is preserved, restructuring with an ordinary business purpose[...] should not divest a tribunal of jurisdiction over a claim”. See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, Executive Summary, (b), p. 2.

<sup>196</sup> See e.g., Claimant's Counter-Memorial on Jurisdiction, ¶ 17; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶¶ 23-24.

<sup>197</sup> RER-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶¶ 24 and 33.

<sup>198</sup> RER-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶ 31. Canada notes that another claimant under NAFTA Chapter Eleven, Lone Pine Resources Inc., underwent a bankruptcy process after it had filed its NAFTA Chapter Eleven claim, and retained its corporate form. Canada did not raise a jurisdictional objection on the basis that there had been a “bankruptcy proceeding” or a “restructuring”. See R-092, *Lone Pine Resources Inc. c. Gouvernement du Canada* (Dossier du CIRDI, UNCT/15/2) Contre-mémoire du Canada, 24 juillet 2015, ¶¶ 258, 262, and 266; R-093, *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2) Excerpt of Unofficial Translation of R-092, ¶¶ 258, 262, and 266 (explaining that the claimant entered bankruptcy, cancelled its shares and reissued them to its creditors, and emerged from bankruptcy as the same corporation, without the liquidation of its assets).

<sup>199</sup> RER-Coleman-Bankruptcy-Memorial on Jurisdiction [First Report], ¶ 32.

<sup>200</sup> In fact, Ms. Coleman explains that the fact that the transaction took place in the context of WCC's bankruptcy process “only inured to the benefit of WMH (and by extension the First Lien Lenders) because WMH was able to obtain the protections offered by the WCC Bankruptcy Court's findings that the sale was free and clear, made in



105. Second, the fundamental characteristics of the transaction confirm that this is not a case involving an internal reorganization or a transfer of an investment between affiliated companies.<sup>201</sup> WCC did not create the Claimant. Nor did it own the Claimant at any relevant time.<sup>202</sup> As Ms. Coleman explains:

[T]he equity in the Canadian Entities was not transferred as a mere reshuffling of equity interests among members of a corporate family. Instead, and as I discussed in my First Expert Report, WCC transferred its assets, including its ownership interest in the Canadian Entities, to an unaffiliated third party, [the Claimant], in satisfaction of debt.<sup>203</sup>

106. The Claimant's characterization of the transaction as one involving a "parent" and a "wholly-owned subsidiary" appears to rely on the fact that WCC notionally owned the equity interests in the Claimant for one intermediate step in the sale transaction. However, to say that WCC was the parent of the Claimant on account of that moment "entirely disregards" the Bankruptcy Court's finding that the Claimant was not an affiliate of WCC – a finding that it made with full knowledge of the intermediate step.<sup>204</sup> At no point did WCC "have a meaningful role or relationship with respect to the management or operations of [the Claimant] that would lead to a different conclusion".<sup>205</sup> There is thus no question that WCC and the Claimant are not affiliated entities.

107. Third, because this is not a case involving affiliated entities, none of the cases the Claimant cites in support of its argument that corporate restructuring "does not interfere with an investor's claim" is apposite. In *S.D. Myers*, the transfer of shares, which was not squarely at issue before

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good faith, conducted at arm's-length, and that WMH would not face any successor liability." **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 8.

<sup>201</sup> Ms. Coleman explains that "affiliated" companies are "members of a corporate family, and companies with some level of common ownership". **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 6.

<sup>202</sup> Including, (i) at the time of the alleged breaches; (ii) at the time the transaction was agreed upon or concluded; or (iii) at the time of the submission of the claim to arbitration.

<sup>203</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 8 (footnotes omitted).

<sup>204</sup> See **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ fn. 19 (explaining that "the WCC Bankruptcy Court effectively determined that WMH was not an 'affiliate' of WCC [...] (which is to say, that WMH did not own or control WCC, that WCC did not own or control WMH, and that WMH was not owned or controlled by an entity that also owned or controlled WCC).")

<sup>205</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 7.

the tribunal, was between a father and his sons.<sup>206</sup> Similarly, in both *CME v. Czech Republic* and *Autopista v. Venezuela*, the claimant acquired the shares constituting the investment in question from its parent company.<sup>207</sup> In *Koch Minerals Sarl and Koch Nitrogen International Sarl. v. The Bolivarian Republic of Venezuela*, the claimant, KNI, likewise acquired its investment – an interest in an Offtake Agreement – by assignment from its parent.<sup>208</sup> By contrast, this case is about the consequences for a potential NAFTA claim when one investor disposes of its investment in an arm's-length sale to an unrelated investor. None of the cases the Claimant cites address this scenario.<sup>209</sup>

108. Fourth, international investment law cases confirm that when an investor disposes of its investment after an alleged treaty breach arises, the transfer does not imbue the subsequent owner with a right to advance the treaty claim. To the contrary, in cases where a claimant sold its investment after the alleged breach, tribunals have determined that the right to advance the claim remained with the investor that owned or controlled the investment at the time of the alleged breach.

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<sup>206</sup> **CLA-019**, *S.D. Myers – Partial Award*, ¶ 230. The Tribunal was confronted with the question of whether the claimant, S.D. Myers, Inc., held an investment in Canada, and found that it had on the basis of its owners' interests in the relevant Canadian enterprise. Whether the owner was the father, or the son, was not directly at issue in assessing this question. Canada disagrees with the tribunal's suspension of S.D. Myers, Inc.'s corporate personality to find jurisdiction in that case. *See below*, fn. 233.

<sup>207</sup> **CLA-021**, *CME – Partial Award*, ¶¶ 5 and 377 (indicating that the "restructuring" involved the transfer of 93.2% of the shares in the investment to the claimant from its parent company); **CLA-020**, *Autopista – Decision on Jurisdiction*, ¶¶ 9, 17 -18, and 25-26 (indicating that the "restructuring" involved an intracompany transfer shares in the Claimant (Aucoven) from ICA to Icatech. Both ICA and Icatech were wholly-owned subsidiaries of ICA Holdings).

<sup>208</sup> **CLA-022**, *Koch – Award*, ¶ 5.12 (establishing that the relevant interest in the Offtake Agreement was originally held by KNI's parent, KOMSA, and vested in KNI on April 3, 2003). The tribunal did not take issue with the transfer in this case because it "was an internal reorganization between associated companies within the same Koch group of companies. It did not introduce an unrelated third party or materially change the transaction." However, the tribunal indicated that, but for this factor, the transfer "could have raised difficulties" (¶ 6.70). Those difficulties arise on the facts of the present case.

<sup>209</sup> A number of the Claimant's cited cases are further distinguishable because the tribunals accepted jurisdiction with respect to alleged breaches that took place subsequent to the transfer of the interests in question. *See e.g.*, **CLA-020**, *Autopista – Decision on Jurisdiction*, ¶¶ 25 and 33 (where the dispute did not arise after the August 1998 intracompany transfer of shares in the claimant from ICA to Icatech); **CLA-022**, *Koch – Award*, ¶¶ 2.16-2.36 and 5.12 (where the acts giving rise to the alleged breaches occurred between 2005 and 2010, and the claimant acquired its interest on April 3, 2003); **CLA-019**, *S.D. Myers – Partial Award*, ¶ 89; **R-094**, *S.D. Myers Inc. v. Canada*, Investor's Supplemental Memorial, 15 December 1999, ¶ 23 (where the transfer of ownership interests from father to sons also occurred prior to the alleged breaches, notwithstanding that the "restructuring" was not at issue before the tribunal).

109. For example, in *EnCana v. Ecuador*, the tribunal rejected the respondent's argument that the claimant no longer had standing to bring a claim under the Canada-Ecuador investment treaty because the claimant had sold its investment to a third party after both the alleged breach and its submission of the claim. The tribunal concluded that the right to advance a claim remained with the investor that held the investment at the time the "dispute" arose, which it defined as "the taking of measures in breach of the Treaty which cause loss and damage to an investor".<sup>210</sup>

110. The tribunal in *Daimler v. Argentina* similarly rejected the respondent's argument that the right to file a claim transferred with the investment in question, concluding that it "should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken".<sup>211</sup> The claimant had transferred its investment after the date of the alleged breach, and subsequently filed a claim relating to that investment.<sup>212</sup>

111. While the Claimant cites *Gemplus S.A. et al v Mexico* in support of its argument that the rights to advance a claim accompany an investment,<sup>213</sup> the tribunal's decision in that case further

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<sup>210</sup> **RLA-053**, *EnCana – Award*, ¶ 131. The NAFTA tribunal in *Mondev v. United States* considered a similar issue. In that case, the question was whether Mondev had lost standing to bring a claim under Chapter Eleven because it had lost its investment and was no longer an "investor of a Party". The tribunal found that Mondev's loss of its investment did not also mean that it lost its right to pursue a NAFTA claim, noting that the loss of an investment is often the basis for such disputes and that the purpose of the NAFTA would be frustrated if such a loss extinguished a claim: "To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of [the relevant investment protection provisions], which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment." See **RLA-035**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 91.

<sup>211</sup> **RLA-054**, *Daimler Financial – Award*, ¶ 145 (emphasis in original). The tribunal reached this conclusion despite the fact that the "transfer" of shares in question was between the claimant and its parent.

<sup>212</sup> **RLA-054**, *Daimler Financial – Award*, ¶¶ 40 and 44 (where the measures forming the basis for the alleged breach arose in 2001 and 2002, the claimant transferred its shares in the Argentinian enterprise to its German parent effective April 1, 2002, and the claimant's Request for Arbitration was filed in August 2004).

<sup>213</sup> See e.g., **CER-Paulsson-International Law-Counter-Memorial on Jurisdiction**, ¶¶ 52-59 (citing **CLA-029**, *Gemplus S.A. et al. v. Mexico* (ICSID Case No. ARB (AF)/04/3) Award, 18 June 2010, ("*Gemplus – Award*"); **CLA-030**, *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3) Award (9 March 1998) ("*Fedax – Award*"); and **CLA-031**, *African Holding Company of America et al. v. Democratic Republic of the Congo* (ICSID Case No. ARB/05/21) Award, 29 July 2008 ("*African Holding – Award*"). The *Fedax* case involved six promissory notes, held by the claimant and which had become due. However, the tribunal's key concern was jurisdiction *ratione materiae*, and whether a promissory note qualified as an "investment" under the ICSID Convention. This fact, and the particular characteristics of the investment in question (*i.e.* a promise to pay the specific holder of the debt instrument), render it an inapt comparison to this case. Canada addresses *African Holding* in Section IV.C below.

supports the opposite principle – that the right to assert a treaty claim does not travel with an investment. In that case, the tribunal found that the investor (Gemplus S.A.) that owned and controlled the investment at the time of the alleged breach retained the rights to bring a claim, despite the fact that it had transferred the shares constituting the investment after the alleged breach.<sup>214</sup>

112. In this case, the alleged breaches arose when WCC owned the Canadian Enterprises. WCC subsequently entered bankruptcy and sold its interests in the Canadian Enterprises to the Claimant. Like in *Encana*, *Daimler*, and *Gemplus*, the investor that owned or controlled the Canadian Enterprises at the time of the alleged breaches, WCC, continues to exist, and it was open to WCC to continue with its NAFTA claim. Contrary to the Claimant's suggestion,<sup>215</sup> Canada does not contest that an investor can sell an investment to another investor. This occurs routinely in the ordinary course of business. However, these cases confirm that the "rights to advance" remain with the investor who owned or controlled the investment at the time of the alleged breach.

113. For all of these reasons, the Claimant is mistaken when it alleges that Canada's position on jurisdiction *ratione temporis* would "punish WMH and Prairie for a restructuring and assignment of claim in the ordinary course of a bankruptcy, while providing Canada a windfall".<sup>216</sup> It was WCC that underwent bankruptcy, not the Claimant. While the Claimant asks the Tribunal to ignore the fundamental characteristics of its purchase from WCC in the generic name of "restructuring" and "bankruptcy", Canada asks the Tribunal to apply the relevant treaty provisions to the facts of the Claimant's case. The Tribunal should reject the Claimant's request to look beyond the text of NAFTA Chapter Eleven to find jurisdiction where it does not exist.

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<sup>214</sup> **CLA-029**, *Gemplus – Award*, ¶¶ 1-10, 1-15, 5.10-5.11, and 5-33 (where the alleged breaches occurred between 2000 and 2002, the claimant disposed of its investment on April 27, 2004, and filed its claim on August 10, 2004). The transfer of shares in this case from Gemplus S.A. also took place between affiliates.

<sup>215</sup> See e.g., Claimant's Counter-Memorial on Jurisdiction, ¶ 98 (referring to Canada's position as an "[u]nwritten prohibition[] on the transfer of rights attendant with an investment").

<sup>216</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 37.

**B. The Claimant's Alleged "Continuity" of Beneficial Ownership and Control Does Not Establish the Tribunal's Jurisdiction *Ratione Temporis***

114. The Claimant argues that the First Lien Lenders provide a "continuity" of "beneficial interest" in WCC and the Claimant that establishes the Tribunal's jurisdiction *ratione temporis*.<sup>217</sup> However, it fails to specify several key details of its theory, including the nature of the relevant interest,<sup>218</sup> the identity of the relevant entity over which the continuity of beneficial interest must be established,<sup>219</sup> and the date on which the alleged continuity of beneficial interest must be established.<sup>220</sup> Consequently, the Claimant's argument is incoherent, and the Tribunal should reject it on this basis alone.

115. Nonetheless, to refute it, Canada understands the Claimant as arguing that the First Lien Lenders offer a continuity of beneficial ownership and control between WCC and the Claimant that can establish jurisdiction *ratione temporis* because they beneficially owned and controlled: (1) the Claimant and the Canadian Enterprises when this NAFTA claim was filed, on the basis of their equity interests; and (2) WCC and the Canadian Enterprises prior to the Claimant's existence – including when the alleged breaches occurred – on the basis of the Debt Instruments

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<sup>217</sup> See e.g., Claimant's Counter-Memorial on Jurisdiction, ¶ 69 ("[c]ontinuity of the identity of the parties having a beneficial interest in the investor and investment is not required for the Tribunal to find jurisdiction over WMH's claim. Nevertheless, such continuity exists here").

<sup>218</sup> The Claimant does not define the term "beneficial interest", but appears to use it interchangeably with "beneficial ownership" or "control". See e.g., Claimant's Counter-Memorial on Jurisdiction, heading II.C.3, ¶¶ 9, 14, 64, 66, 70, 71, and fn. 15; Appendix A, ¶¶ 11, 15 and 22; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 5(c), "continuity in the beneficial ownership"

<sup>219</sup> The Claimant refers at different points to a continuity of beneficial interest over the "investment", the "investor", or both the "investor and investment", but often does not specify which "investor or what "investment" it is referring to. See e.g., Claimant's Counter-Memorial on Jurisdiction, heading II.C.3, ¶¶ 9, 14, 64, 69, 70, and fn. 15; CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 5(c). In one instance, the Claimant even argues the First Lien Lenders held an "investment" under NAFTA Article 1139 through their debt financing. Claimant's Counter-Memorial on Jurisdiction, Appendix A, ¶ 1. This does not make sense for three reasons. First, the First Lien Lenders are not the disputing investor in this case; thus, the question of whether they held a protected "investment" under NAFTA – which Canada does not accept – is irrelevant to establishing the Tribunal's jurisdiction. Second, the First Lien Lenders' debt-financing to WCC was not an investment "in the territory" of Canada. Third, although Prairie became a borrower under the Bridge Loan Facility pursuant to a credit agreement, dated as of May 21, 2018, this happened well after the date of the alleged breach. See **R-049**, Stein First Day Declaration, ¶ 29.

<sup>220</sup> The Claimant says Appendix A, "provides a detailed recitation of facts regarding the WCC bankruptcy, which shows a continuity of beneficial interests from WCC to WMH." See Claimant's Counter-Memorial on Jurisdiction, fn. 15. Yet most events in Appendix A occurred in the bankruptcy process. Only four paragraphs in Appendix A may concern events when the alleged breaches occurred.

and the WCC RSA. In short, the Claimant asks the Tribunal to look through its ownership structure and find jurisdiction based on the identity and lending activities of its owners prior to its existence. This is impermissible for several reasons.

116. First, international law and domestic legal regimes widely recognize as a fundamental principle of law that the corporation has separate legal personality from its owners.<sup>221</sup> NAFTA broadly upholds this principle and does not allow a tribunal to pierce the corporate veil of a disputing investor to find jurisdiction. The NAFTA Parties offer their consent to arbitrate with the disputing investor that files a claim under Section B – not with other parties who might have an interest in the disputing investor, such as its owners, or with previous investors or other parties that might have had an interest in a previous investor.<sup>222</sup>

117. Indeed, where the NAFTA Parties intended to permit a tribunal to disregard or look through the ownership structure of particular enterprises, they made express provision.<sup>223</sup> For example, under Article 1139, the definition of an “investment of an investor of a Party” means “an investment owned or controlled directly or indirectly by an investor of such Party.”<sup>224</sup> The term “indirectly” means a NAFTA tribunal can look *down* the corporate chain, to determine if *the claimant* owned or controlled the investment through intermediaries. However, this does not empower a NAFTA tribunal to pierce the corporate veil of the claimant by looking *up* the corporate chain, to determine if *the claimant's owners* owned or controlled the investment at the

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<sup>221</sup> In *Barcelona Traction*, the International Court of Justice (“ICJ”) acknowledged the corporation’s separate legal personality as established by municipal law. See **RLA-057**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970 (“*Barcelona Traction 1970*”), ¶ 38. See also **RLA-058**, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 639, Judgment, 30 November 2010 ¶¶ 155-156 (“international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders.”); **R-095**, *Salomon v. Salomon & Co.* [1897] A.C. 22 (H.L.).

<sup>222</sup> Article 1139 defines a “disputing investor” as “an investor that makes a claim under Section B”.

<sup>223</sup> Article 1113 (Denial of Benefits), which is not applicable here, is the only provision in NAFTA Chapter Eleven that allows a tribunal to look through a disputing investor, where a Party seeks to deny the benefits of Chapter Eleven in specific circumstances. Those specific circumstances are where an investor of a non-Party owns or controls an investor of another Party that is an enterprise of that Party, and the denying Party either does not maintain diplomatic relations with the non-Party, or adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be circumvented or violated if the benefits of the Chapter were accorded to the enterprise or its investments.

<sup>224</sup> Emphasis added. Article 1117(1) also refers to “an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly”.

requisite times. The NAFTA Parties did not choose to derogate from customary international law<sup>225</sup> by adopting language that would authorize tribunals to find jurisdiction by looking through a claimant to its owners.

118. Here, the First Lien Lenders are not the disputing investor: they did not bring the present claim. The disputing investor is the Claimant, who has separate legal personality from the First Lien Lenders under international law and domestic law. Accordingly, NAFTA does not allow this Tribunal to pierce its corporate veil, and look *up* to the First Lien Lenders to assess their activities in order to find jurisdiction. The Claimant's argument that tribunals can do so would fundamentally alter the basis on which the NAFTA Parties consent to arbitration.

119. Second, if accepted, the Claimant's bid to pierce the corporate veil would create unprecedented jurisdictional problems. Without textual authorization in NAFTA to look 'up' one level above the Claimant to find jurisdiction, there may be no constraint on piercing the veil of entities further in the chain.<sup>226</sup> The Claimant has not exhaustively identified the First Lien Lenders: it merely says they "included" certain companies.<sup>227</sup> The Claimant also offers no evidence that these First Lien Lenders had U.S. nationality.<sup>228</sup> The Tribunal might need to pierce the veil of the First Lien Lenders to ensure *their* beneficial owners had the requisite nationality,

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<sup>225</sup> It is well-recognized that "[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so." See **RLA-059**, *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* 1989 I.C.J. 15, Judgment, 20 July 1989, ¶ 50.

<sup>226</sup> In addressing the "flexible approach" proposed by Professor Weil in his Dissenting Opinion in *Tokios*, Professor Campbell McLachlan states: "the flexible approach could well have led to the need for tribunals to make difficult assessments regarding the nationality status of the claimant corporation. For example, the shareholders could, by nationality, be widely dispersed, or the shares could be held by legal entities incorporated in turn in one or more third States with the majority of shares being held by nationals of the respondent State. Alternatively, the shareholders of the respondent State could exert certain aspects of control over the claimant corporation even though they are not majority owners. In short, there are multiple reasons why the Dissenting Opinion's perspective has very much remained a minority position." See **RLA-060**, Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2<sup>nd</sup> Edition, Oxford University Press 2017) [Excerpt] ("McLachlan et al"), ¶ 5.125.

<sup>227</sup> Claimant Counter-Memorial on Jurisdiction, Appendix A, ¶ 12.

<sup>228</sup> Claimant Counter-Memorial on Jurisdiction, Appendix A, ¶ 12.

and then perhaps even pierce the veil of those beneficial owners as well. This would lead to absurd results, and would undermine legal stability and predictability for respondents.<sup>229</sup>

120. Third, investment treaty jurisprudence confirms that a tribunal should not suspend the separate personality of a claimant to find jurisdiction absent specific language in a treaty.<sup>230</sup> For instance, the *Tokios* tribunal declined to pierce the corporate veil of the claimant even though it was owned by shareholders in the host State.<sup>231</sup> Likewise, the *KT Asia* tribunal declined to pierce the corporate veil of the claimant stating, “a legal person constituted under the law of a Contracting Party is a national of that State”.<sup>232</sup> A long line of investment cases similarly upholds the corporate form.<sup>233</sup>

121. The two cases the Claimant cites to support its “continuity” argument do not assist its case.<sup>234</sup> While the Claimant states that *Waste Management II* offers an “example of a continuing

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<sup>229</sup> As Professor Campbell McLachlan states, “[b]right-line tests such as that applied by the *Tokios* majority provide predictability and therefore stability.” **RLA-060**, McLachlan et al, ¶ 5.125. Moreover, Ms. Coleman explains that the theory that there is an “association” or “affiliation” between WCC and WMH because the First Lien Lenders, who own the equity in WMH, previously lent money to WCC is “contrary to U.S. law. Under that theory, every bank and hedge fund would be ‘associated’ with every company to which it loaned money, dissolving any distinction between virtually every sophisticated company on the planet.” See **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 6.

<sup>230</sup> **RLA-061**, Fouret, J. et. al, *The ICSID Convention, Regulations and Rules – A Practical Commentary*, Edward Elgar Publishing, 2019 [Excerpt] (“Fouret et al”), ¶ 0.87 (“arbitral tribunals have shown to be reluctant to pierce the corporate veil”). For an example of *lex specialis* in this regard, see the discussion below on *Perenco*.

<sup>231</sup> **CLA-027**, *Tokios Tokekés v Ukraine* (ICSID Case No. ARB/02/18) Decision on Jurisdiction (Dissenting Opinion attached to the Decision on Jurisdiction), 29 April 2004; **RLA-060**, McLachlan et. al ¶ 5.118;.. **RLA-061**, Fouret et al, ¶ 0.87 (“arbitral tribunals have shown to be reluctant to pierce the corporate veil”).

<sup>232</sup> **RLA-062**, *KT Asia Investment Group BV v Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, ¶ 116.

<sup>233</sup> See **RLA-063**, *Burimi SRL v Albania* (ICSID Case No ARB/11/18) Award, 29 May 2013, ¶ 132. Article 8(2)(c) of the Italy-Albania BIT expressly authorized the tribunal to pierce the veil of a corporate national of the host State (in this case, Albania) to determine if its owners were nationals of the home State (Italy). However, since the claimant was incorporated in the home State (Italy), the tribunal found no need to pierce its corporate veil. See also, **RLA-060**, McLachlan et al, ¶ 5.118 (“The *Tokios* majority, despite the vigorous dissent of Weil, appears to be firmly within the majority of international tribunals and scholars that have addressed the corporate nationality issue.”). On this point, Canada maintains that the tribunal’s decision in *S.D. Myers* was misguided. The tribunal appealed to policy reasons to find indirect control over the investment based on the Myers family’s ownership and control of the claimant and investment. However, neither the strength of a claim on its merits, nor the owners of a claimant, can establish a NAFTA Party’s consent to arbitration. See **CLA-019**, *S.D. Myers – Partial Award*, ¶ 229. See also, **R-096**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368.

<sup>234</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 64-69 (citing **CLA-014**, *Waste Management II v. United Mexican States* (ICSID Case No. ARB/(AF)/00/3) Award, 30 April 2004 (“*Waste Management II – Award*”) and



beneficial interest being elevated above formalistic objections”,<sup>235</sup> the tribunal did not pierce the corporate veil of the claimant to find jurisdiction. Instead, the tribunal found jurisdiction because it looked *down* the corporate chain *from the claimant*, through intermediary companies, to the investment, which the claimant indirectly owned when the alleged breach occurred. As the tribunal recognized, NAFTA’s text permits this.<sup>236</sup> The tribunal’s reasoning in *Waste Management II* was therefore grounded in NAFTA’s text, not an ambiguous notion of “substance over form”.<sup>237</sup>

122. The Claimant’s reliance on *Perenco* similarly fails to advance its bid to pierce the corporate veil under NAFTA. In Professor Paulsson’s words, *Perenco* “precisely illustrates the rejection of a formalistic objection in favor of a purpose-oriented decision to accept jurisdiction”.<sup>238</sup> Yet the France-Ecuador treaty that the tribunal in *Perenco* was evaluating expressly authorized it to find jurisdiction over a claimant of a non-party if French shareholders controlled it.<sup>239</sup> That is – unlike NAFTA – the text of the applicable treaty empowered the

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**CLA-023**, *Perenco Ecuador Ltd. v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Remaining Issues of Jurisdiction and Admissibility (“*Perenco – Decision*”).

<sup>235</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶ 66.

<sup>236</sup> **CLA-014**, *Waste Management II – Award*, ¶¶ 80-85. ¶ 84: “Article 1117 deals with the special situation of claims brought by investors on behalf of enterprises established in the host State. But it still allows such claims where the enterprise is owned or controlled “directly or indirectly”, i.e., through an intermediate holding company”.

<sup>237</sup> Professor Paulsson also cites *Gemplus* for his appeal to a general notion that “continuity in the beneficial ownership or controlling interest in the investment prevails over formalism”. See **CER**-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 5(c). However, like the *Waste Management II* tribunal, the *Gemplus* tribunal also did not suspend the claimant’s separate legal personality to find jurisdiction. Rather, the *Gemplus* tribunal observed that a memorandum of understanding ensured the claimant Gemplus S.A., which held the investment when the alleged breach occurred, retained all rights to maintain its claim against the respondent. **CLA-029**, *Gemplus – Award*, ¶ 5-33. Thus *Gemplus* is not relevant here.

<sup>238</sup> **CER**-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶¶ 43-48. See also, Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 64, 65, and 69.

<sup>239</sup> **RLA-065**, Ecuador-France BIT (1994), 7 September 1994 [Unofficial English Translation], Article 1.3: “The term ‘companies’ shall apply to: [...] (ii) Any body corporate controlled by nationals of one Contracting Party or by bodies corporate having their registered office in the territory of one of the Contracting Parties and constituted in accordance with that Party’s legislation.” (emphasis added). See also, **RLA-064**, Ecuador-France BIT (1994), 7 September 1994. See also, **CLA-023**, *Perenco – Decision*, ¶ 216.

tribunal to find jurisdiction based on control of the claimant.<sup>240</sup> *Perenco* does not support the Claimant's argument.

123. Fourth, even if the Tribunal were to suspend the Claimant's corporate personality and assess the identity and activities of its owners with respect to WCC, it would find that the First Lien Lenders do not provide the "continuity of beneficial interest" the Claimant alleges. The First Lien Lenders were secured lenders to WCC; they never held equity interests in WCC. As Ms. Coleman explains, a lender taking a security interest in collateral does not have beneficial ownership over either the debtor or its assets.<sup>241</sup> The First Lien Lenders' security interest in WCC's assets granted through the financing arrangements – including the equity interest in the Canadian Enterprises – thus did not constitute "beneficial ownership" of either WCC or its assets.<sup>242</sup>

124. Nor did the First Lien Lenders control WCC or the Canadian Enterprises by virtue of the Debt Instruments.<sup>243</sup> Ms. Coleman explains that, "[u]nder U.S. law, a business entity, whether it be a corporation, an LLC, or a partnership, is controlled by its owners (and the management they appoint), not by its creditors."<sup>244</sup> The Claimant suggests that the covenants and restrictions contained in the Debt Instruments substantiate its assertions of control over WCC.<sup>245</sup> Yet Ms. Coleman's expert assessment and the terms of the Debt Instruments themselves establish the contrary. In particular, Ms. Coleman concludes that, under U.S. law, the Debt Instruments "did not confer upon the First Lien Lenders the ability to manage, or 'control', the operations of WCC

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<sup>240</sup> *Perenco* is further distinguishable because the heirs to Mr. Perrodo beneficially owned the shares under French law before certain measures underlying the alleged breaches occurred; and one heir was a shareholder in Perenco International Limited before any of the alleged breaches occurred. In contrast, the First Lien Lenders held no ownership interests in WCC or the Canadian Enterprises when the alleged breaches occurred. See **CLA-023**, *Perenco – Decision*, ¶¶ 49, 93, 109, 111, 238, and 256.

<sup>241</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶¶ 15-17.

<sup>242</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶¶ 28-30.

<sup>243</sup> See Claimant Counter-Memorial on Jurisdiction, Appendix A, ¶¶ 1-5. The Claimant has further failed to establish that the First Lien Lenders controlled WCC during the bankruptcy process or that process itself by virtue of the WCC RSA. See Section II.B.3 and **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 27.

<sup>244</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 3.

<sup>245</sup> Claimant Counter-Memorial on Jurisdiction, Appendix A, ¶¶ 1-5.

and its affiliates or their assets.”<sup>246</sup> Moreover, the court-approved DIP Financing Facility expressly stated that none of the First Lien Lenders “controlled” WCC, its affiliates, or any of their properties or operations, by virtue of the Debt Instruments.<sup>247</sup> Accordingly, the Claimant’s “continuity” argument must also fail because it has no basis in fact.

125. For these reasons, the Claimant’s argument that a continuity of beneficial ownership and control between WCC and the Claimant has no merit and should be rejected.

**C. The Sale of WCC’s NAFTA Claim to the Claimant Does Not Establish the Tribunal’s Jurisdiction *Ratione Temporis***

126. Canada explained in its Memorial on Jurisdiction that the sale of WCC’s NAFTA claim to the Claimant cannot establish the Tribunal’s jurisdiction *ratione temporis*.<sup>248</sup> In its Counter-Memorial on Jurisdiction, the Claimant maintains that the Tribunal has jurisdiction *ratione temporis* over the present claim because WCC sold<sup>249</sup> its NAFTA claim to the Claimant.<sup>250</sup> The Claimant is mistaken.

127. First, WCC’s claim cannot be relevant because it is not the claim that is before this Tribunal. Section B of Chapter Eleven establishes the procedures that must be followed when

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<sup>246</sup> **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶ 23. *See also*, Section II.B.2, ¶ 35. Furthermore, with no equity interests in WCC or the Canadian Enterprises when the alleged breaches occurred, the First Lien Lenders had no voting power to direct the enterprises’ corporate governance issues; determine shareholder resolutions; or appoint a majority of the boards. These are indicia of corporate control under U.S. law that do not exist here.

<sup>247</sup> *See* Section II.B.2, ¶¶ 35-36; **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶¶ 24-25. **C-040**, Final Order (Court Docket, Doc. 520), Exhibit 1, DIP Credit Agreement (15 Nov. 2018). The Claimant even appears to accept that the First Lien Lenders did not control WCC, by stating: “[t]he Secured Creditors, instead of enforcing their liens and immediately taking control of WCC and its assets, protected their investment interest in WCC through additional financing in advance of a bankruptcy restructuring.” (emphasis added). *See* Claimant Counter-Memorial on Jurisdiction, Appendix A, ¶ 8.

<sup>248</sup> Canada’s Memorial on Jurisdiction, ¶¶ 90-95.

<sup>249</sup> The Claimant does not contest that it bought WCC’s NAFTA claim as an asset during WCC’s bankruptcy proceedings. *See* Claimant’s Counter-Memorial on Jurisdiction, Appendix A, ¶ 28. Nonetheless, the Claimant refers to the sale as an “assignment” or “transfer” from a “parent company” to a “subsidiary in the corporate chain”. *See e.g.*, Claimant’s Counter-Memorial on Jurisdiction, ¶ 94. The Claimant’s characterization cannot disguise the market-based nature of the transaction. *See e.g.*, **RER-Coleman-Bankruptcy-Memorial on Jurisdiction** [First Report], ¶¶ 12 and 90; **RER-Coleman-Bankruptcy-Reply on Jurisdiction** [Second Report], ¶¶ 4-8.

<sup>250</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 94-99.

filing a NAFTA claim,<sup>251</sup> and defines when a claim is submitted to arbitration. For example, NAFTA Article 1137(1) states in relevant part that “[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.”

128. As Canada explained in its Memorial on Jurisdiction,<sup>252</sup> WCC filed a claim under Section B of NAFTA Chapter Eleven on November 19, 2018. WCC subsequently sold its NAFTA claim to the Claimant in March 2019. WCC then withdrew its NAFTA claim and request for relief against Canada on July 23, 2019, after which the Claimant filed its own NAFTA claim and request for relief on August 12, 2019. In its Counter-Memorial on Jurisdiction, the Claimant does not dispute these facts, but nonetheless argues that WCC's NAFTA claim is relevant to this Tribunal's jurisdiction. The Claimant does not explain how. WCC's NAFTA claim cannot be relevant to the Tribunal's jurisdiction; that claim has been withdrawn.<sup>253</sup>

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<sup>251</sup> For example, NAFTA Article 1122(1) states: “Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement”. See also, **RLA-026**, *Methanex – Partial Award*, ¶ 120 (“In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.”). A “claim” under Section B of Chapter Eleven is different than a “dispute”, as that term is used in the title of Section B: “Settlement of Disputes between a Party and an Investor of Another Party.” A dispute occurs when the factual circumstances and applicable law crystallize together into a cause of action. A claim under Section B occurs when it is filed by a Claimant in accordance with the procedures set out in the Agreement.

<sup>252</sup> Canada's Memorial on Jurisdiction, ¶¶ 20, 29, 31-37, and 93-94.

<sup>253</sup> The Claimant argues that, despite its withdrawal, WCC's NAFTA claim remains relevant because the withdrawal was made in the “context” of Canada's refusal to allow the Claimant to substitute itself for WCC in WCC's NAFTA claim. See Claimant's Counter-Memorial on Jurisdiction, ¶ 99. However, as Canada explained to the Claimant at the time, NAFTA Chapter Eleven and the 1976 UNCITRAL Arbitration Rules do not permit an investor of a Party to “substitute” itself for a disputing investor. See **R-076**, Letter from Scott Little to Elliot Feldman, “Re: Westmoreland Coal Company v. Government of Canada”, 2 July 2019. If an investor of a Party could merely “substitute” itself for a disputing investor, the investor of a Party would avoid having to comply with the terms of the Agreement that must be satisfied in order to perfect the consent to arbitrate. Such terms include whether the alleged breaches “relate to” the new claimant under Article 1101, and whether there are credible allegations under Section B that the new claimant has incurred damages by reason of the alleged breaches under Section A. See **RLA-044**, *Merrill & Ring Forestry L.P. v. Government of Canada*, (UNCITRAL), Decision on a Motion to Add a New Party, 31 January 2008, ¶ 19 (“The Tribunal must accordingly begin by examining whether the amendment requested by the Claimant's Motion to add a new party is compatible with the scope of the arbitration clause, i.e., do the impugned measures relate to Georgia Basin (Article 1101), and are there credible allegations that it has been damaged by reason of alleged breaches of Section A (Article 1116).”).

129. Second, the Claimant's argument that WCC's claim can establish this Tribunal's jurisdiction suggests that this Tribunal should exercise competence over WCC's claim. For example, throughout its Counter-Memorial on Jurisdiction, the Claimant asks the Tribunal to make determinations concerning the jurisdictional merits of WCC's claim.<sup>254</sup> This is impermissible. A NAFTA tribunal only has the competence to decide the claim before it, and WCC's claim is not before this Tribunal.

130. Third, in any event, there is no mechanism under Chapter Eleven to allow a disputing investor to sell its claim to another investor of a Party such that a NAFTA tribunal could then have jurisdiction over the claim. A Party's consent to arbitrate a claim under Section B is specific to the "disputing investor" that brings the claim. Had the NAFTA Parties intended to establish a mechanism to allow the transfer of claims, they would have done so expressly, such as in the case of subrogation, which provides an exception to the general rule that a claim cannot be assigned.<sup>255</sup> The Claimant's argument that Chapter Eleven does not "prohibit", and therefore permits, the transfer of a claim to arbitration is a misreading of the Agreement.<sup>256</sup> There is no mechanism under Chapter Eleven that allows a disputing investor to sell a claim to another investor of a Party and maintain the Party's consent to arbitration.

131. Fourth, the claims advanced by WCC cannot be sold to the Claimant because they are specific to WCC. As Canada explained in its Memorial on Jurisdiction, WCC's claim under Article 1102 concerned its "stranded capital",<sup>257</sup> and its claim under Article 1105 concerned its

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<sup>254</sup> The Claimant argues in its Counter-Memorial on Jurisdiction that WCC "was entitled" to protection under NAFTA Chapter Eleven (¶ 39), that the challenged measures in this arbitration "related to" WCC under NAFTA Article 1101 (¶¶ 21, 97), and that WCC first acquired knowledge of breach and loss under Articles 1116(2) and 1117(2) in November 2016 (¶ 102). The question of whether or not a NAFTA tribunal would have had jurisdiction over WCC's NAFTA claim is not a question that is within the competence of this Tribunal to decide.

<sup>255</sup> Subrogation is a special case of assignment and succession that arises where the investor has received an indemnity under an insurance claim. Under its terms, the insured investor's claim against the host State is assigned to the insurer upon payment of the claim arising from the insurance. The insurer succeeds to all the rights of the beneficiary who has received compensation under the insurance contract. In the context of investment law, the host State agrees to the subrogation, typically through an investment treaty between the host State and the investor's State of nationality. Many investment treaties contain subrogation clauses of this kind. See e.g., **RLA-066**, *Canada-United States-Mexico Free Trade Agreement*, Chapter 14 – Investment, Article 14.15.

<sup>256</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 94.

<sup>257</sup> Canada's Memorial on Jurisdiction, ¶ 66.

“legitimate expectations”.<sup>258</sup> It is not possible that these claims can be sold to the Claimant because those claims are specific to WCC.

132. For similar reasons, investment tribunals have opined that investment claims cannot be legitimately bought and sold between investors. For example, in *Mihaly v. Sri Lanka*, the tribunal cautioned that a treaty claim is a unique entitlement which cannot be assigned:

A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit.<sup>259</sup>

133. The Claimant cites no authorities in its Counter-Memorial to support its view that investment claims can legitimately be bought and sold between investors.<sup>260</sup> Professor Paulsson cites three authorities, but none of them involves the transfer of claims between investors.<sup>261</sup> For example, in *African Holding v. Democratic Republic of the Congo*, the tribunal assessed whether debts owed by the respondent under a construction contract had been assigned from one claimant (SAFRICAS) to another (African Holding), and whether the debts qualified as an “investment” respect to which a treaty claim might be made.<sup>262</sup> Importantly, while the tribunal held that only the assignee of the debts, African Holding, held an “investment” with respect to which a claim

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<sup>258</sup> Canada's Memorial on Jurisdiction, ¶ 67.

<sup>259</sup> **RLA-067**, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) Award, 15 March 2002, ¶ 24. That investment claims cannot be transferred between investors also finds support in international investment law commentary. For example, Professor Crawford, whom the Claimant cites in several places of its Counter-Memorial on Jurisdiction (*see e.g.*, Claimant's Counter-Memorial on Jurisdiction, ¶¶ 28, 67, and 96), states that “BIT claims are essentially claims *intuitu personae* under international law, and this imposes limits on their assignability.” The term “*intuitu personae*” means “by virtue of the person concerned.” *See RLA-068*, J Crawford, Brownlie's Principles of Public International Law (8<sup>th</sup> ed., OUP 2012) [Excerpt], pp. lxxx and 704 (pp. 8 and 9 of 9).

<sup>260</sup> *See* Claimant's Counter-Memorial on Jurisdiction, ¶¶ 94-99. While the Claimant cites to three U.S. law cases in fn. 110, Ms. Coleman explains that none is apposite. **RER-Coleman-Bankruptcy-Reply** on Jurisdiction [Second Report], ¶¶ 31-32.

<sup>261</sup> Professor Paulsson discusses **CLA-029**, *Gemplus – Award* and **CLA-030**, *Fedax – Award*. *See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction*, ¶¶ 51-59. Neither case involved the transfer of an investment claim between investors. Canada discusses these cases above at ¶¶ 111-112, and fn. 213.

<sup>262</sup> *See e.g.*, **CLA-031**, *African Holding – Award*, ¶¶ 57-59, and 74 (setting out the positions of the parties regarding whether the assignment of debts owing under a construction contract constituted an “investment” under the ICSID Convention before proceeding to decide the question). While Professor Paulsson translates the tribunal's use of the term “*créances*” to mean “claims”, in Canada's view, a better translation is “claims to money” or “debts”. *See e.g.*, **CLA-031**, *African Holding – Award*, ¶ 60.

might be made,<sup>263</sup> it ultimately declined jurisdiction *ratione temporis* over the claim because neither claimant was protected under the treaty at the time the dispute arose.<sup>264</sup> The tribunal's decision thus supports the view that this Tribunal does not have jurisdiction *ratione temporis* because the Claimant was not a protected investor under NAFTA at the time of the alleged breaches.

134. Finally, in its Counter-Memorial on Jurisdiction, the Claimant offers a series of bare assertions to explain why NAFTA Chapter Eleven should not prohibit the sale of claims between investors. For example, the Claimant argues that a prohibition on the sale of claims would not provide "fair and equitable treatment" to investors.<sup>265</sup> Presumably, the Claimant is referring here to NAFTA Article 1105, although it does not specify. In any event, the Claimant's suggestion that the absence of a right under NAFTA to which the Claimant believes it is entitled could violate the NAFTA itself does not make sense. None of the other arguments advanced by the Claimant have merit.<sup>266</sup>

135. For these reasons, the only claim relevant to these proceedings is the one filed by the Claimant on August 12, 2019. WCC's NAFTA claim has no bearing on this Tribunal's jurisdiction *ratione temporis*.

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<sup>263</sup> See e.g., **CLA-031**, *African Holding – Award*, ¶ 84. While the tribunal suggested in *obiter dicta* that the assignee of the debts held the same interests as the original investor, including with respect to an investment claim, the assignment was between two affiliated companies owned virtually entirely by the same family, a fact the tribunal pointed to in its commentary. See **CLA-031**, *African Holding - Award*, ¶ 79. Professor Paulsson confirms that the tribunal addressed the "assignment of claims" in "*obiter dicta*". See **CER-Paulsson-International Law-Counter-Memorial on Jurisdiction**, ¶ 60.

<sup>264</sup> **CLA-031**, *African Holding – Award*, ¶¶ 121-122.

<sup>265</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 98.

<sup>266</sup> The Claimant argues that NAFTA Article 102, which provides that an object and purpose of NAFTA is to "increase substantially investment opportunities in the territories of the Parties", establishes a right for NAFTA claims to be sold between investors. See Claimant's Counter-Memorial on Jurisdiction, ¶ 98. However, as explained above in ¶ 81, Article 102 cannot be used to create rights that do not exist in the Agreement. Moreover, allowing NAFTA claims to be bought and sold between investors would not "increase substantially investment opportunities", it would only encourage the commoditization of claims and their pursuit from investors who may not be genuinely concerned about investing in the host Party. The Claimant also argues that NAFTA Article 1109(1) permits the transfer of a claim under Chapter Eleven because that provision "promotes" transfers relating to investments. However, Article 1109 addresses the transfer of funds from an investment to an investor of a Party that owns or controls the investment. Nothing in the provision addresses the transfer of a claim under NAFTA Chapter Eleven.

**D. There is No Continuing Breach or Loss**

136. The Claimant states that, “Canada’s breach continues and its damages remain pending for Prairie and WMH”.<sup>267</sup> The Claimant cites no authorities in support of this assertion, and its arguments have no merit.

137. First, the Claimant’s argument that “Canada’s breach continues” is incorrect. The alleged breach occurred when the Government of Alberta decided to make the voluntary Transition Payments.<sup>268</sup> In particular, the Claimant points to the November 2016 “Off-Coal Agreements” that Alberta entered into with ATCO, Capital Power, and TransAlta that memorialized Alberta’s decision.<sup>269</sup> The Off-Coal Agreements detailed the specific amounts that had been allocated to each company, and provided for distribution of the Transition Payments in fourteen annual installments between 2017 and 2030.<sup>270</sup> The breach alleged by the Claimant cannot be characterized as “continuing” because the decision to allocate Transition Payments was made once, by November 2016 at the latest.<sup>271</sup>

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<sup>267</sup> Claimant’s Counter-Memorial on Jurisdiction, heading. *See also* CER-Paulsson-International Law-Counter-Memorial on Jurisdiction, ¶ 39 (“The breaches, still assumed *pro tem* to be valid, are continuing; the amputated lifecycle of the coal producing mines and the acceleration of the recovery of the mines have made a return on the investment impossible.”).

<sup>268</sup> *See* Canada’s Statement of Defence, ¶¶ 43-45.

<sup>269</sup> Claimant’s Counter-Memorial on Jurisdiction, ¶¶ 101 (“The Off-Coal Agreements damage Prairie, and its American investor, by removing Prairie’s customers prematurely, shortening the time horizon for Prairie’s coal mines by 6 to 25 years, and increasing the costs of reclaiming those mines.”) and ¶ 102 (“WCC and WMH had to file claims within three years of the November 2016 Off-Coal Agreements in order to comply with the statute of limitations contained in NAFTA Articles 1116(2) and 1117(2), which they both did.”).

<sup>270</sup> *See e.g.*, C-019, Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen In Right Of Alberta (represented by Ministry of Energy), 24 November 2016, s. 3(a); C-023, Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy), 24 November 2016, s. 3(a). *See also* Canada’s Reply to the Claimant’s Response on Bifurcation, ¶ 36 and fn. 65.

<sup>271</sup> Any suggestion that the breaches are continuing because the Transition Payments are paid in installments may be quickly dispatched. Even assuming that the Transition Payments have a continuing effect on the Claimant (which is disputed), international law distinguishes between continuing breaches, on the one hand, and perfected breaches with continuing effects, on the other. The Draft Articles on Responsibility of States for Internationally Wrongful Acts provide that: “[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.” *See* RLA-069, Yearbook of the International Law Commission, 2001, Volume II, Part Two, *Report of the Commission to the General Assembly on the work of its fifty-third session*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) [Excerpt] (“Draft Articles on Responsibility”) p. 59, Article 14(1). *See also* RLA-033, *Resolute – Jurisdictional Decision*, ¶ 157 (“The core point is that in the present case, the Nova Scotia measures were taken within a short space of time and were effectively complete when taken. It is true that they eventually had a



138. Second, the Claimant's argument that "damages remain pending for Prairie and WMH" is baseless. The Claimant itself states that, "[p]ayments pursuant to the Off-Coal Agreements [...] established that Prairie and its investors would be harmed"<sup>272</sup> and acknowledges that the alleged losses were "certain".<sup>273</sup> In fact, the Claimant alleges the exact same claim for damages (\$470 million) as did WCC in its Notice of Arbitration, before the Claimant came into existence as either an entity or an investor of a Party.<sup>274</sup> Moreover, the Claimant would have known of Alberta's decision to allocate Transition Payments when it invested in Canada in March 2019. The Claimant's argument that it should be compensated hundreds of millions of dollars in damages for alleged breaches of Section A of Chapter Eleven when it was aware of those alleged breaches and damages at the time it chose to invest must be rejected.

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continuing effect on the Claimant (from what date is disputed), but that does not suffice to qualify them as continuing wrongful acts. There is a distinction between a continuing breach of an obligation and a perfected breach which continues to have injurious effects.").

<sup>272</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 102.

<sup>273</sup> Claimant's Counter-Memorial on Jurisdiction, ¶ 39. The exact quantification of an alleged "certain" loss at a later stage does not transform the alleged underlying breach into a continuing one. See **RLA-035**, *Mondev – Award*, ¶ 87; **RLA-030**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 77.

<sup>274</sup> Compare **R-074**, Westmoreland Coal Company, *Notice of Arbitration and Statement of Claim Under Chapter Eleven of the North American Free Trade Agreement on Behalf of Westmoreland Coal Company and Prairie Mines & Royalty ULC*, 19 November 2018, ¶ 105, with Westmoreland Mining Holdings LLC, *Notice of Arbitration*, 12 August 2019, ¶ 111.

**V. REQUEST FOR RELIEF**

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

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

April 9, 2021

Respectfully submitted on behalf of Canada,



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Adam Douglas  
Krista Zeman  
Megan Van den Hof  
E. Alexandra Dosman  
Mark Klaver