IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT AND CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

- AND -

THE 2013 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

- BETWEEN –

WESTMORELAND COAL COMPANY,

Claimant,

AND

GOVERNMENT OF CANADA,

Respondent.

(ICSID Case No. UNCT/23/2)

REJOINDER ON JURISDICTION

March 13, 2024

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I. INTRODUCTION

1. In its Response to Canada's Memorial on Jurisdiction, WCC established through the testimony of Mr. Jeffrey Stein, the Expert Report of Judge Shelley Chapman and contemporaneous documentary evidence, that: (1) WCC sought to continue its participation in the *Westmoreland I* arbitration, alongside WMH, and only agreed to withdraw from the arbitration (and to have WMH substituted as the claimant) at Canada's insistence, based on the expressed understanding that the withdrawal would facilitate the hearing of WCC's original claims on the merits; (2) WCC would not have agreed to withdraw from the arbitration if it had known that Canada planned to challenge WMH's standing to pursue WCC's original claims, contrary to Canada's limited reservation of rights; (3) WCC is presenting the "same claims" that it originally filed in 2018, and that WMH unsuccessfully sought to pursue in *Westmoreland v. Canada (I)*; and (4) pursuant to U.S. bankruptcy law, WCC has continually held the NAFTA Claims[1] since the date of the measures.

2. In its Reply, Canada has presented no witness testimony or documentary evidence to counter any of these facts, which establish the Tribunal's jurisdiction to hear WCC's claims and to have WCC's claims adjudicated on the merits—at last.

3. Even in the face of this uncontroverted factual record, Canada continues to argue that the Tribunal lacks jurisdiction under the USMCA and the NAFTA, and that WCC's claims are time-barred. As we explain below, Canada's jurisdictional objections are factually and legally untenable, entirely ignoring the role that Canada itself played in creating the circumstances it now seeks to invoke in order to ensure that WCC's claims are never heard on the merits. Canada's arguments also misconstrue the plain language of both the USMCA and the NAFTA.

4. Canada would have the Tribunal believe that WCC's withdrawal from the *Westmoreland I* arbitration was entirely WCC's idea, and was done voluntarily by WCC with no involvement or pressure from Canada. The written record speaks for itself, and tells a very different story. The 2019 Amended Notice of Arbitration expressly included WCC as a

[1] Defined terms have the same meaning that WCC assigned to terms in its Response to Memorial on Jurisdiction, Sept. 20, 2023 ("Response").

Co-Claimant, alongside WMH, and attached WCC's original waiver letter, making clear that WCC sought to continue on as a Claimant. It was only after Canada insisted upon WCC's withdrawal, and proposed it as a "solution" to enable the arbitration "to move forward," starting with the continuing formation of the arbitral tribunal, that WCC agreed to the substitution based on the expressed understanding that it was a "fair compromise that enables us to proceed with the arbitration without unnecessary procedural delay," all without any hint that Canada planned to challenge WMH's standing to pursue any of WCC's original claims, thereby ensuring the "unnecessary procedural delay" that WCC sought to avoid—a delay that easily could have been avoided with WCC's continued participation in the arbitration.

5. In the *Westmoreland I* arbitration, WMH complained to the tribunal of Canada's bait-and-switch tactics, citing "principles of good faith and the principle against self-contradiction." In response to the tribunal's questions regarding the apparent unfairness that would arise if WCC's claims could never be heard on the merits, Canada reassured the tribunal that WCC still could pursue its NAFTA claims on its own. Now, in this arbitration, Canada once again has changed its tune, arguing that the claims are time-barred. Canada's gamesmanship should not be tolerated, nor should its continuing strategy of doing whatever it takes to make sure that WCC is never given its day in court.

6. Canada wrongly contends that the Tribunal lacks jurisdiction under Annex 14-C of the USMCA because that provision allegedly does not provide protection for claims that materialized before July 1, 2020. Canada's position contradicts both the plain language of the USMCA's legacy investment provisions and official documents surrounding the negotiation of the USMCA, both of which confirm that the legacy provision was intended to provide protection for events that transpired before the USMCA went into effect. This interpretation also is consistent with the NAFTA, which always has defined investment in a way that allows investors to lodge claims as long as they owned the investment on the date of the challenged measures. Canada's argument also squarely contradicts the position that it adopted in *Westmoreland I*, which Canada cannot now disavow under the principles of estoppel and preclusion recognized under international law.

7. Canada's limitations defense also should be rejected, both because it reflects a misreading of the NAFTA and because it flies in the face of a century of decisions such as *Renco I* and

Renco II, which establish that under customary international law, limitations periods are tolled during the period in which the claims at issue are being prosecuted, thereby putting the respondent state on notice of the need to preserve its evidence and prepare its defense. Canada admits that, if the international tolling principle applies, the claims in this arbitration were re-submitted by WCC within three cumulative years from the date on which WCC learned of the challenged measures. The only question, then, is whether the tolling principle applies here. As WCC established in its Response, it most certainly does given the unchallenged factual record in this case.

8. Canada wrongly argues that the tolling principle cannot be applied because the NAFTA makes no reference to the tolling principle. In fact, there was no need for an express reference. NAFTA Article 1131 incorporates the tolling principle by reference through its clear command that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." As the tribunal in *Renco II* held, applying the US-Peru FTA that similarly does not refer to the tolling principle, the fact that the limitations period in the treaty only requires that the claim be "submitted to arbitration" before the three-year limitations period expires, enables the application of the tolling principle, "which has been adopted by civilized nations and international tribunals alike, [which] forms a general principle of international law."

9. Canada tries to distinguish *Renco I* and *Renco II* based on WCC's withdrawal from the *Westmoreland I* arbitration, and the fact that WMH was a separate legal entity. However, the record is clear that WCC's "withdrawal" was actually a substitution of WMH as Claimant so that WMH could continue to prosecute the very same claims that WCC originally filed. As Canada itself pointed out, in *Westmoreland I*, WMH "only alleges breaches . . . that occurred years before its existence as a protected investor, and that concern an entirely different investor – WCC."[2] Canada cannot credibly contend that it believed WCC was abandoning its claims, or that Canada was not on continuing notice of the need to continue preserving evidence or to prepare its defense. To the contrary, the central tenet of Canada's defense in *Westmoreland I*, and the tribunal's award, was that

[2] *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Canada's Memorial on Jurisdiction, ¶ 66, **R-086**.

WMH did not have standing to pursue the NAFTA Claims because those claims could only be asserted by WCC!

10. Just like *Renco I* and *Renco II*, this case involves claims that were originally brought by the Claimant at hand, and were later dismissed on procedural grounds that WCC now has cured through the re-submission of those claims in this arbitration. Tolling also is just as warranted here because WCC has never had its NAFTA Claims heard on the merits by any tribunal, international or domestic.

11. If Canada's position were accepted and the tolling principle were not applied, WCC would be put in the position of having waived its right to pursue domestic relief, only to have lost its ability to seek relief from an international tribunal, all because of circumstances that Canada itself precipitated through its insistence on WCC's withdrawal—all without any plausible showing of prejudice to Canada whatsoever. Under such circumstances, the NAFTA Contracting Parties have endorsed the holding in *Feldman v. United Mexican States*, which confirmed that limitations period may be interrupted where the State is put on notice of the asserted claims.

12. In addition to the tolling principle, Canada should be estopped from asserting its limitations defense in any event, both because of Canada's pivotal role in securing the WCC withdrawal that it now seeks to use as a sword, and because of the representations that Canada made to the *Westmoreland I* tribunal in 2021 that WCC still could pursue its claims in order to allay the fairness concerns that would arise if WCC forever lost its ability to have its day in court. As the tribunals in *Renco I* and *Renco II* both recognized, a state's attempt invoke a limitations defense following a dismissal on curable procedural grounds constitutes an abuse of rights under international law. The same holds true here.

13. Finally, Canada challenges the Tribunal's jurisdiction under the NAFTA, despite the uncontradicted evidence of WCC's qualifying investment in Prairie. As dozens of tribunals have held, WCC is able to pursue a claim on behalf of Prairie because WCC owned Prairie on the date of the challenged measures, despite WCC's later sale of Prairie to WMH as part of the bankruptcy proceeding. As we explain below, Canada's position reflects a clear misreading of the NAFTA and investment arbitration jurisprudence.

14. Canada also argues that WCC cannot pursue a claim on behalf of Prairie under NAFTA Article 1117 because WMH waived those rights, and that WCC's 2018 waiver is no longer

valid. Canada's objections based on the prior waiver ignore the clear precedent established by many tribunals that have flatly rejected this objection in re-submitted cases. In any event, even if WMH did forever waive Prairie's international law rights, that would not prevent WCC from asserting a claim on its own behalf. Canada's argument that WCC did not adequately waive its claims in this arbitration because it only submitted its 2018 waiver in this arbitration, instead of a new waiver, is equally misconceived, both because the text of the waivers that WCC submitted in this arbitration perfectly matches the text of the NAFTA waiver provision (which Canada does not deny), and because WCC's waiver continues to be effective, as Canada conceded in *Westmoreland I*. Canada's arguments are meritless under international law, all in an ill-conceived effort to ensure that WCC's claims are never heard on the merits.

15. In sum, the factual and legal record before the Tribunal unequivocally establishes that the Tribunal has jurisdiction to hear WCC's claims, and to adjudicate those claims on the merits once and for all.

II. FACTS

16. There are four key factual issues relevant to Canada's jurisdictional objections. In each instance, Canada has presented no evidence to counter the testimony and documentary evidence presented by WCC in its Response. Specifically: (1) WCC sought to continue its participation in the *Westmoreland I* arbitration, alongside WMH, and only agreed to withdraw from the arbitration at Canada's insistence, based on the understanding that the withdrawal would expedite the hearing of WCC's original claims on the merits; (2) WCC would not have agreed to withdraw from the arbitration if it had known that Canada planned to challenge WMH's standing to pursue WCC's original claims; (3) WCC is presenting the "same claims" that it originally filed in 2018, and that WMH sought to pursue in *Westmoreland v. Canada (I)*; and (4) pursuant to U.S. bankruptcy law, WCC has continually held the NAFTA Claims since the date of the measures. WCC addresses these points in turn.

A. Canada Induced WCC to Withdraw From the Arbitration

17. As WCC explained in its Response, the only reason that WCC withdrew from the *Westmoreland I* arbitration was in response to a demand imposed by Canada as a condition of its agreement to accept the continuation of the arbitration following the bankruptcy proceeding. Meanwhile, Canada disingenuously argues that it never imposed such a condition, but rather, that WCC "voluntarily" withdrew from its first arbitration because WCC "wanted" to do so.[3] This factual issue is relevant to jurisdiction, since Canada should be estopped from asserting certain defenses in this arbitration because it created the circumstances underlying those defenses.

18. It is undisputed that WCC owned Prairie at the time of all challenged measures.[4] It also is undisputed that, at the time that WCC filed its arbitration against Canada to challenge those measures, WCC still held all components of the investment, including the enterprise at issue, Prairie. However, shortly after notifying Canada of the dispute, WCC and some of its affiliates were forced to file for bankruptcy, partly as a result of Canada's measures.[5] In March 2019, after WCC filed its notice of arbitration and statement of claim (the "2018 Notice of Arbitration"), WMH acquired in a bona fide bankruptcy transaction most of WCC's U.S. assets and equity interests, including Prairie and WCHI, the Canadian entity through which WCC owned Prairie.[6] Canada does not argue otherwise.

19. Following the restructuring, WCC submitted an amended notice of arbitration and statement of claim pursuant to the 1976 UNCITRAL Rules, which was "submitted on behalf of [WCC], [WMH], [WCHI], and [Prairie]" (the "2019 Amended Notice of Arbitration").[7] The introduction to the 2019 Amended Notice of Arbitration stated:

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3 Canada's Reply on Jurisdiction, Dec. 13, 2023, Section II.A, ¶ 33 ("Reply").

4 The only measures that took place after WCC sold Prairie to WCHI related to the federal fuel charges. However, WCC already agreed to withdraw this claim from this arbitration in its Response if the Tribunal deems necessary in order to retain jurisdiction over this arbitration. *See* Response, ¶ 24.

5 Response, ¶ 27.

6 As the *Westmoreland I* tribunal confirmed, the bankruptcy restructuring was carried out for legitimate reasons; in its words, "[i]t is clear that at all times WCC and Westmoreland and the first-tier lien holders acted in good faith" in the restructuring. *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, Jan. 31, 2022, ¶ 192 ("*Westmoreland* Award"), **CLA-001**.

7 Amended Notice of Arbitration and Statement of Claim ("2019 Amended Notice of Arbitration"), May 13, 2019, ¶¶ 15, 21, **C-055**.

> This Amended Notice of Arbitration and Statement of Claim **are submitted on behalf of Westmoreland Coal Company**, Westmoreland Mining Holdings LLC, a U.S. limited liability company ("Westmoreland"), Westmoreland Canada Holdings Inc. and Prairie Mines & Royalty ULC ("Prairie"), as to the following legal dispute with the Government of Canada ("Canada," "GOC" or "Canada") in accordance with Chapter Eleven of the North American Free Trade Agreement ("NAFTA").[8]

20. In addition, Exhibit 1 to the 2019 Amended Notice of Arbitration attached the Original Waivers for WCC, WMH, WCHI, and Prairie,[9] further confirming that WCC intended to participate as a claimant following the proposed amendment. And pursuant to Article 20 of the 1976 UNCITRAL Rules, WCC was entitled to amend its claim to include WMH.[10] The only reason that WCC did not continue to participate in the *Westmoreland I* arbitration was Canada's insistence that WCC drop its claims as a prerequisite to continuing with the arbitration and the constitution of the arbitral tribunal.

21. Canada insists that it had no role in the withdrawal of WCC from the arbitration, dedicating an entire section of its brief to arguing that "The Claimant Voluntarily Withdrew its 2018 Claim."[11] Yet, Canada's very first response to the 2019 Amended Notice of Arbitration belies that argument, as Canada insisted that the proposed addition of WMH was "not a permissible amendment of Westmoreland Coal Company's Notice of Arbitration under Article 20 of the 1976 UNCITRAL Arbitration Rules."[12] On the basis of its misconstrued reading of Article 20 of the 1976 UNCITRAL Rules, Canada proposed a solution on July 2, 2019. As Canada explained, it would "accept the Amended NOA filed on May 13 as Westmoreland Mining Holdings LLC's NOI, *on the condition that Westmoreland Coal Company withdraws the claim that it submitted against Canada* on November 19, 2018,"[13]

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8 *Id.* at ¶ 1 (emphasis added).

9 2019 Amended Notice of Arbitration, Exhibit 1, **C-055**.

10 Article 20 of the 1976 UNCITRAL Rules provides that "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances."

11 Reply, Section II.A.

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

13 Letter from Scott Little to Elliot Feldman, p. 2 (emphasis added), **R-081**.

and WMH would be free to submit a notice of arbitration 90 days after May 13, 2019 (the date of submission of the 2019 Amended Notice of Arbitration).[14]

22. On July 3, 2019, WCC and WMH responded to Canada's July 2, 2019 letter, making clear that they disagreed with Canada's interpretation of Article 20 of the 1976 UNCITRAL Rules, since "the new claimants [would] not change the nationality of the parties nor the issues to be resolved in the arbitration."[15] However, WCC and WMH agreed to Canada's proposal "as a means to expedite the arbitration process and avoid unnecessary conflict."[16] WCC and WMH concluded their July 3, 2019 letter by thanking Canada "for proposing a fair compromise that enables us to *proceed with the arbitration* without unnecessary procedural delay,"[17] confirming their understanding that the parties intended to continue the arbitration that WCC already commenced. As Mr. Jeffrey Stein, the Plan Administrator for WCC, attests in his witness statement, he "understood at the time that WCC believed that Canada was working in good faith to allow the claim to proceed without unnecessary conflict," and WCC "accepted Canada's offer" based on that good faith compromise.[18]

23. In addition to its representations of a fair and expeditious compromise, Canada failed to communicate that it reserved its right to object to the new claimant's standing to pursue the claims that WCC originally filed. Instead, Canada solely reserved its right to "raise any jurisdictional []objections *with respect to the original NOA or any* ***new claim***,"[19] which signaled to WCC and WMH that Canada would treat the two NOAs the same, save for any "new claim[s]" (*i.e.*, not new claimants) that could be introduced in the Second Amended Notice of Arbitration.[20]

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14 Letter from Scott Little to Elliot Feldman, p. 2, **R-081**.

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

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

17 Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada," July 3, 2019, p. 2 (emphasis added), **R-082**.

18 Witness Statement of Jeffrey Stein ("Stein WS"), ¶ 12, **CWS-1**.

19 Letter from Scott Little to Elliot Feldman, p. 2, **R-081**.

20 Canada asserts that Claimant's reading of the reservation of rights is "strained" because parties were discussing WMH's "new claim" at the time and Canada had "consistently conveyed that it considered a potential WMH claim to be a new claim." Reply, ¶¶ 38–39. But WMH and WCC were clear that WMH was not submitting its own claim, but rather they were adding WMH as a claimant. The new Notice of Arbitration was submitted to ensure that WMH could participate in the proceedings following the bankruptcy restructuring, as is clear from

24. Shockingly, Canada now argues that the "proposal subsequently made to Canada was clear: *the requestors* wanted to remove WCC from what they viewed as 'the claim' and replace it with WMH."[21] It should be indisputable that that is not what happened since the 2019 Amended Notice of Arbitration included *both* WCC and WMH. Canada acknowledges as much in a footnote, arguing that "[w]hile the Amended NOA does reference WCC, the covering letter states otherwise,"[22] although it does not explain why a covering letter should carry more weight than the 2019 Amended Notice of Arbitration itself.

25. Canada tries to divert attention from the 2019 Amended Notice of Arbitration and its accompanying waiver letters, by pointing to its case caption, which was "*Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim.*"[23] However, the case caption also did not mention *Prairie*, which Canada acknowledges was and remained a claimant. The fact that the 2019 Amended Notice of Arbitration *still* named WCC as a disputing investor cannot be overridden by the case caption—and much less by reference to an accompanying cover letter. In any event, the contemporaneous record clearly proves that WCC intended to participate in the *Westmoreland I* arbitration, alongside WMH.

26. Immediately following Canada's insistence that WCC withdraw the claim that it submitted against Canada,[24] WCC did so when it submitted its further amended notice of arbitration and statement of claim on August 12, 2019 (the "Second Amended Notice of Arbitration"). The Second Amended Notice of Arbitration submitted after the Parties' correspondence *removed* WCC as a disputing party. The removal of WCC is clear from the following redline, which reflects the changes between the 2019 Amended Notice of Arbitration and the Second Amended Notice of Arbitration:[25]

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the language that Canada cites in its Reply. Reply, ¶ 39 (citing WMH's July 3, 2019 letter regarding service of new Notice of Arbitration and Statement of Claim, Letter from Elliot Feldman to Scott Little, p. 2 **R-082**).

21 Reply, ¶ 30 (emphasis added).

22 Reply, ¶ 25 n.22.

23 Reply, ¶ 25.

24 Letter from Scott Little to Elliot Feldman, p. 2, **R-081**.

25 *Compare* 2019 Amended Notice of Arbitration, **C-055**, ¶ 1 *with Westmoreland Coal Company v.* Canada, Notice of Arbitration and Statement of Claim, May 13 2019, **R-079**, ¶ 1.

> **I. INTRODUCTION**
>
> 1. This ~~Amended~~ Notice of ~~Arbitration and Statement of Claim are~~**Intent to Submit a Claim to Arbitration is** submitted on behalf of Westmoreland ~~Coal Company, Westmoreland~~ Mining Holdings LLC **("Westmoreland Mining Holdings")**, a U.S. limited liability company ~~("Westmoreland")~~, Westmoreland Canada Holdings Inc. and Prairie Mines & Royalty ULC ("Prairie"), as to the following legal dispute with the Government of Canada ("Canada," "GOC" or "Respondent") in accordance with Chapter Eleven of the North American Free Trade Agreement ("NAFTA").

27. Following Canada's demands, the Second Amended Notice of Arbitration no longer attached WCC's waiver letter, but rather included only WMH's and WCHI's May 2019 waivers, as well as Prairie's original November 2018 waiver.[26] The contemporaneous record makes clear that the *only reason* that WCC withdrew from the arbitration was at Canada's insistence.

28. After securing WCC's agreement to withdraw from the arbitral proceedings, Canada proceeded to assert several jurisdictional objections, including that the tribunal did not have jurisdiction over WMH, despite not informing WCC and WMH that it intended to object to WMH's jurisdiction, and actually implying that it would not.[27] As Canada argued, 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,"[28] and it was "not possible that these claims [could] be sold to [WMH] because those claims are specific to WCC."[29] Canada does not deny that it planned to assert this defense when it elicited WCC's withdrawal from the arbitration—and has not argued otherwise.

29. WMH immediately called out the unfair nature of Canada's tactics, explaining to the *Westmoreland I* tribunal that, Canada had "insiste[d] that WCC's claim be withdrawn

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[26] Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement on Behalf of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC," July 23, 2019, **R-084**.

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

[28] *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Reply Memorial on Jurisdiction ¶¶ 130–135, **C-047**.

[29] *Id.* ¶ 131, **C-047**.

pending recognition of the WMH Notice of Intent,"[30] and that Canada's insistence upon WCC's withdrawal from the arbitration under the guise of accepting WMH's Notice of Intent—only to later dispute WMH's claim because WCC was no longer present—violated the principles of "good faith and the principle against self-contradiction."[31] In its words:

> [Canada's] refusal to amend the WCC claim to include WMH as claimant and insistence that WCC's claim be withdrawn pending recognition of the WMH Notice of Intent; all evoke the principles of good faith and the principle against self-contradiction. The tribunal in *Chevron v. Ecuador* explained, "[t]hat duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold,' to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."[32]

30. Conveniently, by the time Canada raised its objection to WMH's standing to pursue WCC's claim, more than three years had elapsed from the date that WCC learned of the challenged measures.[33]

31. Seeking to blunt the apparent injustice of the situation it had created, Canada acknowledged at the final hearing in *Westmoreland I* that WCC still could pursue a claim against Canada.[34] In response, WMH again noted the contradiction, since "Canada had insisted that withdrawal of the Westmoreland Coal Company claim was a condition for recognition of the Notice of Arbitration for Westmoreland Mining Holdings."[35]

32. WCC has put forward Mr. Jeffrey Stein as a fact witness to explain the circumstances surrounding WCC's withdrawal. Canada, on the other hand, has not put forward a single witness to counter Mr. Stein's testimony or to explain its version of events, which in any event, is contradicted by documentary evidence.

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30 *Westmoreland Mining Holdings v. Government of Canada*, ICSID Case No. UNCT/20/3, Claimant WMH's Rejoinder on Jurisdiction, May 21, 2021, ¶ 123, **CLA-069**.

31 *Id.*, ¶ 123.

32 *Id*.

33 Canada first raised its objections in its Statement of Defense, which it filed on June 26, 2020. The challenged measures took place in 2015 (Alberta's adoption of the Plan) and 2016 (transition payments).

34 Jurisdictional Hearing Transcript, Day 2, 279:12–280:4, **C-046**.

35 Jurisdictional Hearing Transcript, Day 2, 281:10–13, **C-046**.

33. Canada's version of events is difficult to follow and internally inconsistent. On the one hand, as explained above, Canada argues that WCC proposed—on its own initiative—that "The Claimant Voluntarily Withd[raw] its 2018 Claim."[36] Yet, in the next breath, Canada admits that "in Canada's view, there were potentially two claims it may need to defend against…In this light…Canada wrote to the Claimant and proposed the following . . . that Westmoreland Coal Company withdraws the claim."[37]

34. As Canada admits in its Reply, when WCC submitted the 2019 Amended Notice of Arbitration, "there were potentially two claims [Canada] may need to defend against: ***one submitted by WCC*** on November 19, 2018, ***and another claim by the new owner of Prairie***."[38] Canada acknowledges that it asked WCC to withdraw its claim precisely to protect against this circumstance.[39] The "circumstance" that Canada points to at the time of the 2019 Amended Notice of Arbitration included, "***WCC continuing its claim***, and ***WMH submitting its own parallel claim***."[40]

35. Why would Canada have believed there were two possible claims if it truly believed that WCC already had "voluntarily" withdrawn its claim? Even on Canada's version of the facts, absent the withdrawal, WCC could simply have picked up where it left off and resumed the original proceeding which it submitted to arbitration within the three-year statute of limitations.

36. Canada next argues that, even if Canada were the genesis of the withdrawal, "WCC and WMH were free to reject Canada's proposal" and that "Canada was under no illusion that WCC and WMH would accept the proposal outright."[41] However, the reason why WCC did not object to Canada's proposal was because Canada led it to believe that it was "proposing a fair compromise that enable[d] [the Parties] to proceed with the arbitration without unnecessary procedural delay."[42] Canada's point appears to be that WCC should

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36 Reply, Section II.A.

37 Reply, ¶¶ 31–32.

38 Reply, ¶ 31

39 Reply, ¶¶ 31–32 ("Thus, in Canada's view, there were potentially two claims it may need to defend against . . . In this light . . . Canada wrote to the Claimant and proposed the following.").

40 Reply, ¶ 34 (emphasis added).

41 Reply, ¶¶ 34–35.

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

have read through the lines and understood this was not a "fair compromise" or a "solution" that would "enable [the Parties] to proceed without unnecessary procedural delay"—despite Canada's suggestions to the contrary. WCC accepts that it was tricked into dropping from the arbitration, but does not accept that it should be blamed for failing to see through Canada's misrepresentations, or that it is fair to allow Canada to benefit from its trickery by ensuring that WCC's original claims are never heard on the merits.

37. Canada next argues that it had no obligation to forewarn WMH and WCC of its intention to challenge WMH's ability to bring the claim. WCC does not contend that Canada had a duty to forewarn WCC of its legal defense—it argues merely that it is improper for Canada to *take advantage of the withdrawal that it elicited to argue that WCC's NAFTA Claims are now barred and should never be heard on the merits*. Had Canada *not* insisted on WCC's withdrawal from the *Westmoreland I* arbitration, and proceeded instead with the Amended Notice of Arbitration submitted by both WCC and WMH, it is undeniable that WCC already would have had its claims heard on the merits.

38. On January 31, 2022, the *Westmoreland I* tribunal issued its Final Award, accepting Canada's arguments that it did not have jurisdiction over WMH.[43] The tribunal reached that conclusion because it found that, "[f]or [WMH] to be able to bring its claim it must therefore show firstly that the Challenged Measures applied to it and secondly that it itself suffered loss as a result of those Challenged Measures."[44] The tribunal held that "[WMH] is not the legal successor of WCC but is a separate company to which the NAFTA claim was purportedly transferred after the alleged Treaty breaches."[45] That is, the tribunal held that WMH could not step into the shoes of the rightful claimant, *i.e.*, WCC. Implicitly, this ruling confirms that the tribunal *would have had jurisdiction* to decide claims asserted by WCC—but could not do so based on the substitution that Canada elicited.

39. In sum, the factual record is clear that: (1) WCC sought to continue its participation in the *Westmoreland I* arbitration alongside WMH, (2) it was *Canada* that proposed and insisted upon WCC's withdrawal as a "solution" to enable the expeditious continuation of the arbitration, and (3) WCC accepted Canada's proposal as "a fair compromise that enables

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43 *Westmoreland* Award, ¶ 252(1), **CLA-001**.

44 *Id.* ¶ 215.

45 *Id.* ¶ 230.

us to proceed with the arbitration without unnecessary procedural delay,"[46] only to discover that Canada had succeeded in precipitating a huge procedural delay to prevent WCC's claims from being heard on the merits.

B. WCC Pursues the Same Claim That WCC and WMH Previously Pursued

40. Canada seeks to avoid application of the well-established tolling principle by arguing that the arbitration initiated by WCC and then pursued by WMH involved "different claims brought by different claimants."[47] Contrary to Canada's assertion, the claims asserted by WCC in 2018, by WMH in 2019, and by WCC in this arbitration *are the very same*.

41. As WCC established in its Response, WCC and WMH asserted the exact same claim challenging the exact same measures.[48] Moreover, in transmitting the amended Notice of Arbitration to Canada, WCC confirmed that, aside from reflecting WCC's transfer of assets to WMH, "***[t]here [were] no changes to the substance of the claim***."[49] In fact, a redline between WCC's first claim and WMH's amended claim reveals almost no differences between them.[50] Canada concedes that the claims involve nearly identical facts; in its words: "the allegations of breach and damage, and the description of the factual circumstances leading to them in the WMH NOA, were nearly identical to those alleged in the WCC's 2018 NOA."[51]

42. Canada and WMH also treated the *Westmoreland I* arbitration as a continuation of the claim previously asserted by WCC. In Canada's words, WMH "***substituted***" WCC,[52] a procedural posture that would not be possible if WMH had a different claim than WCC. In fact, Canada itself characterized its solution of removing WCC from the arbitration as a continuation of the proceeding that WCC had already begun. Canada thus agreed to

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

47 Canada's Memorial on Jurisdiction, ¶ 102.

48 Response, ¶ 183.

49 Letter from Elliot Feldman to Scott Little, May 13, 2019, p. 1 (emphasis added), **R-080**.

50 Redline-WCC Notice of Arbitration (Nov. 19, 2018) and WMH Notice of Arbitration (Aug. 12, 2019), **C-095**.

51 Response, ¶ 181; Canada's Memorial on Jurisdiction, ¶ 64. While WCC's Notice of Arbitration asserted some additional claims based on later acts, if those later acts somehow distinguish the claims, then WCC is prepared to withdraw them.

52 Letter from Scott Little to Elliot Feldman, p. 2 ("[t]he substitution of a new claimant is an amendment . . . "), **R-081**; *see also* Reply, ¶ 27.

"accept the Amended NOA filed on May 13 as [WMH's] NOI . . . ".[53] WCC and WMH likewise understood that Canada's solution was a continuation of the arbitration process, agreed to Canada's proposal "as a means to expedite the arbitration process and avoid unnecessary conflict," and thanked Canada "for proposing a fair compromise that enables us to *proceed with **the** arbitration* without unnecessary procedural delay."[54]

43. The Parties agreed to continue with the same appointed tribunal members for the continuation of the proceedings. On August 16, 2019, WMH notified its party-appointed arbitrator, Mr. Hosking that the substitution was solely a result of the bankruptcy proceeding, which "*otherwise has no material effect on the arbitration*":

> Dear Mr. Hosking: Please find attached a new Notice of Arbitration and Statement of Claim served this week on behalf of Westmoreland Mining Holdings LLC. Since your appointment to arbitrate the NAFTA Chapter 11 dispute between Westmoreland and the Government of Canada, Westmoreland Coal Company emerged from bankruptcy as Westmoreland Mining Holdings LLC and the new entity, still an American corporation, assumed ownership of the claim. By agreement with Canada, we replaced the Notice of Arbitration and Statement of Claim to substitute the new Claimant, which delayed the proceeding several weeks **but otherwise has no material effect on the arbitration**. We are proceeding now with Canada in search of a President for the Tribunal. We apologize for any disruption in your own calendar that this delay in the proceedings may cause. **You continue to be our selection as an arbitrator in this dispute**.[55]

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53 Letter from Scott Little to Elliot Feldman, p. 2, **R-081**.

54 Letter from Elliot Feldman to Scott Little, p. 1–2 (emphasis added), **R-082**. In its Reply, Canada asserts that although the party-appointed arbitrators in *Westmoreland I* were the same as those appointed in 2018, the arbitrator appointments in *Westmoreland I* were new, with WMH appointing Mr. Hosking on Aug. 12, 2019. Reply, ¶ 44–46. Canada does not mention, however, that when Mr. Hosking was appointed in *Westmoreland I*, he re-submitted the acceptance of appointment and declaration of independence he submitted in the first arbitration. WMH did not ask Mr. Hosking to submit a new statement of acceptance and independence because they believed this was the same claim. Mr. Hosking only submitted a new statement of independence because Canada objected and asked Mr. Hosking to submit a new statement of acceptance and independence. *See* Email from E. Feldman to J. Hosking re: Notice of Acceptance and Impartiality, April 15, 2020, **C-096** ("We had agreed previously with [Canada] that the arbitrators named for the prior iteration of Westmoreland's claim would be retained to work on this arbitration. Canada, however, has now requested a fresh statement of acceptance and independence. Therefore, we would be grateful if you might execute the attached statement and return it to us with a current version of your biography . . . ").

55 Email from J. Hosking to E. Feldman Re: Westmoreland (Acknowledgement), Aug. 16, 2019 (emphasis added), **C-097**.

44. Thereafter, ICSID appointed Ms. Juliet Blanch as the Chair and ICSID was designated as the administrative authority.[56] On April 14, 2020, ICSID circulated the statements of independence from the tribunal members, including the original statement of independence for Mr. Hosking.[57] In response, Canada asked for a fresh statement of independence from Mr. Hosking, without indicating that such a statement would in some way mark the beginning of a new arbitration or constitute a new tribunal.[58] Counsel to WMH and WCC responded that "Although we think it not necessary, we have asked Mr. Hosking for a fresh Statement of Independence. We will provide it to you and ICSID upon receipt."[59] Counsel thereafter approached Mr. Hosking and explained that he would continue his prior retention, but that Canada requested a fresh statement of independence:

> **We had agreed previously with Respondent that the arbitrators named for the prior iteration of Westmoreland's claim would be retained to work on this arbitration. Canada, however, has now requested a fresh statement of acceptance and independence**. Therefore, we would be grateful if you might execute the attached statement and return it to us with a current version of your biography so that we can provide it to Canada and to ICSID. We apologize for the inconvenience.[60]

45. As is clear from this correspondence, WMH and WCC understood that the Parties were continuing the existing arbitration process that WCC had initiated. The only reason that WMH and WCC obtained a new statement from Mr. Hosking was in response to Canada's request, and solely for the purpose of confirming his independence vis-à-vis the new claimant, WMH. In fact, in describing its constitution, the *Westmoreland I* tribunal only acknowledged the original appointments made by WMH and Canada—and likewise did not understand that either co-arbitrator had been "re-appointed" [61] as Canada claims.[62]

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56 *Westmoreland* Award, ¶ 15, **CLA-001**.

57 Email from V. Lavista (Legal Counsel, World Bank) to all parties Re Statements of Independence, April 14, 2020, **C-098**.

58 Email from K. Zeman to P. Levine & A. Douglas et al., re Draft P.O./Post Award Redactions, April 14, 2020, ("We noticed in the email that Ms. Lavista circulated earlier today that Mr. Hosking's acceptance of appointment and declaration of independence pertains to the Westmoreland Coal Company v. Canada arbitration, rather than to the Westmoreland Mining Holdings LLC v. Canada arbitration. Grateful if you could share his acceptance of appointment and declaration of independence for Westmoreland Mining Holdings' claim."), **C-099**.

59 Email from P. Levine to Krista Zeman et al., re Draft P.O. 1/Post Award Redactions, April 16, 2020, **C-100**.

60 Email from E. Feldman to J. Hosking re: Notice of Acceptance and Impartiality (emphasis added), **C-096**.

61 *Westmoreland* Award, ¶ 9, **CLA-001**.

62 Reply, ¶¶ 44-51.

46. Canada repeatedly acknowledged in *Westmoreland I* that WMH was seeking to bring a claim *on behalf of WCC*—and in fact, challenged WMH's claim on that very basis.[63] For example, Canada argued that "The Claimant [] seeks millions of dollars in damages for the alleged economic disruption ***caused to WCC*** and its investments in coal mines by the Government of Alberta's decision."[64] Canada also objected to WMH's claim because, *inter alia*, WMH "could neither beneficially own nor control WCC or the Canadian Enterprises."[65] Canada plainly argued that WMH could not assert a claim on behalf of WCC, because "WCC is not a claimant in this arbitration," suggesting that "[i]t was open to WCC to continue its claim; the company still exists as an enterprise constituted under the laws of Delaware."[66]

47. The most significant proof that WCC and WMH pursued the same claim was that the *Westmoreland I* tribunal declined jurisdiction because "[WMH] is not the legal successor of WCC but is a separate company to which the NAFTA claim was purportedly transferred after the alleged Treaty breaches."[67] That is, the tribunal held that WMH could not step into the shoes of the rightful claimant, which was WCC. WMH never purported to pursue any claim other than the one it attempted to purchase from WCC. Thus, while Canada seeks to liken this situation to one in which multiple shareholders pursue different claims against Canada based on the same underlying measure, that is not the issue here.[68] WMH and WCC have sought to submit claims on behalf of the exact same enterprise, Prairie. If WCC recovers, then WMH cannot assert a claim, and vice versa.

48. Canada nevertheless insists that WCC and WMH cannot be the same because the two had adverse interests in the bankruptcy.[69] To support its argument, Canada points to the *Westmoreland I* tribunal's purported "finding" that WMH was not a legal successor

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63 *See, e.g.*, *Westmoreland I* Award, ¶ 109, **CLA-001** ("There is no provision in the NAFTA entitling one investor to file a claim on behalf of a second investor and its investments, or to assign or otherwise transfer such a claim."); *see also id.* at ¶ 106.

64 Canada's Statement of Defense dated June 26, 2020, ¶ 66, **R-031**.

65 Canada's Reply Memorial on Jurisdiction, April 9, 2021, ¶ 13, **C-047**.

66 Canada's Reply Memorial on Jurisdiction, April 9, 2021, ¶ 12, **C-047**.

67 *Westmoreland* Award, ¶ 230, **CLA-001**.

68 Reply, ¶ 59.

69 *See* Reply, ¶ 155 n. 264.

of WCC.[70] In doing so, Canada mischaracterizes the *Westmoreland I* tribunal's summary of Canada's position as a "finding" made by the Tribunal— a finding which it did not make.[71]

49. In fact, Canada's assertion that WCC and WMH were, for relevant purposes, adverse parties is completely at odds with the fundamental principles and purposes of the United States Bankruptcy Code (the "**Bankruptcy Code**"). The Bankruptcy Code is clear that debtors (such as WCC) and creditors (including the first lien lenders through WMH) share the same interest of maximizing total creditor return on debts in an orderly and efficient fashion.[72] As stated by the Bankruptcy Court in *In re Innkeepers USA Trust*, "it is 'Bankruptcy 101' that a debtor and its board of directors owe fiduciary duties to the debtors' creditors to maximize the value of the estate."[73] WCC's "fiduciary obligation to obtain the best available price for its assets" is owed to, and inures to the benefit of, its creditors. Thus, a debtor's duty to maximize its estate for the benefit of its stakeholders *aligns* the interests of a debtor and its creditors (*i.e.*, the interests of WMH and WCC).[74] This is precisely the conclusion reached by the Bankruptcy Court in WCC's bankruptcy case in authorizing WCC to pursue the NAFTA Claim: "this Court having found that the relief requested in the Motion is in the best interests of the WLB Debtors' estates, their creditors, the WLB Plan Administrator and other parties in interests…."[75] As Judge

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70 *Id.* (citing *Westmoreland* Award, ¶ 117, **CLA-001**).

71 Canada's characterization of this point does not accurately reflect the *Westmoreland I* tribunal's position. The quotation Canada cites, *see*, Reply, ¶ 155, n. 264, is not from the *Westmoreland I* tribunal's analysis, but rather comes from the portion of the award summarizing Canada's position.

72 Congressional Research Service. *Bankruptcy Basics: A Primer* (R45137), Prepared by Michael D. Contino. Washington: Library of Congress, Oct. 12, 2022 (emphasis added) **C-101**; *see also Hoseman v. Weinschneider*, 322 F.3d 468, 475 (7th Cir. 2003) **C-102**; *Schaffer v. CC Invs., LDC*, 286 F. Supp. 2d 279, 281 (S.D.N.Y. 2003) **C-103**.

73 *In re Innkeepers USA Trust*, 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010), **C-104**; *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3rd Cir. 1998) ("[C]urrent management is generally best suited to orchestrate the process of rehabilitation for the benefit of creditors and other interests of the estate."), **C-105**.

74 The *Westmoreland I* tribunal reached the wrong conclusion on this issue since it did not benefit from expert testimony, which it noted was a limitation in rendering its decision. *Westmoreland* Award, ¶ 132, **CLA-001**.

75 *See e.g.*, *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim (Court Docket, Doc. 3313), June 17, 2022, **R-087**; and *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), June 23, 2022, **C-038**.

Chapman explains in her Expert Report, it is in the interest of *all* stakeholders in the bankruptcy for the NAFTA Claim to be prosecuted on the merits.[76]

50. In sum, it is clear that WMH and WCC have submitted the same claims since they involve the same facts, the same challenged measures, and the same requested relief, which is precisely why the *Westmoreland I* tribunal declined jurisdiction on the basis that WMH was seeking to bring a claim that only WCC could pursue. The parties' conduct confirms that the claims are the same, since the parties agreed to "substitute" WCC for WMH, in order to "proceed" with "the arbitration."

C. Canada Does Not Dispute That WCC Still Owns the NAFTA Claim as a Matter of U.S. Bankruptcy Law

51. As WCC explained in its Response, under U.S. bankruptcy law, the NAFTA Claim[77] was never transferred to WMH and has remained with WCC since the claim crystallized.[78] Canada does not dispute this. As explained below, this uncontested conclusion is relevant to whether WCC continually has owned the NAFTA Claim.

52. As a preliminary matter, Canada mischaracterizes why WCC went to Bankruptcy Court following the issuance of the *Westmoreland I* award.[79] WCC went to Bankruptcy Court not to obtain authorization for this Tribunal to accept jurisdiction, but rather to confirm that WCC retained its ownership of the NAFTA Claims at all times notwithstanding the Plan of Reorganization. WCC went to the U.S. Bankruptcy Court rather than the Tribunal on this point because WCC's property interest in the NAFTA Claims is undeniably a matter of U.S. bankruptcy law. As the tribunal explained in *Casinos Austria v. Argentina*, "whether an investor has title to a certain asset" following a bankruptcy process should be determined in accordance with the relevant bankruptcy law.[80]

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76 Hon. Shelley Chapman Expert Report ("Expert Report"), ¶ 50, **CER-001**.

77 Canada seeks to confuse the tribunal by arguing that WCC intentionally referenced the NAFTA Claim in capitalized terms (*e.g.*, NAFTA Claim v. NAFTA claim). Reply, ¶ 56. There is no sleight of hand here. WCC intended to identify its "claim to money" as the "NAFTA Claim" but may not have capitalized the "C" in every instance in the brief.

78 Response, ¶ 53.

79 Reply, ¶ 61.

80 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, Nov. 5, 2021, ¶ 316, **CLA-070**. ("That a treaty claim remains governed by treaty law does not mean, however, that domestic law is wholly irrelevant for the determination of compliance with, or liability under, a BIT, including the BIT governing the present dispute. Domestic law will remain relevant in

53. Here, the U.S. Bankruptcy Court specifically preserved and recognized WCC's ongoing title to the NAFTA Claim.[81] Moreover, as Judge Chapman, a former U.S. bankruptcy judge, explained in her Expert Report, because the NAFTA Claims could not be transferred to WMH as a matter of international law, the purported transfer of the claim from WCC to WMH did not occur as a matter of U.S. law—because the intention of the bankruptcy plan to have the claims prosecuted on the merits could not be realized.[82] Since Canada does not challenge the order of the U.S. bankruptcy court or the opinion of Judge Chapman on the efficacy of the transfer of the NAFTA Claim, the following salient points should be adopted by the Tribunal:

- As a matter of U.S. Bankruptcy Law, the NAFTA Claim was never transferred from WCC to WMH;[83] that transfer was *void ab initio*.[84]
- The NAFTA Claim remained with WCC at all times.[85]

54. Based on the conclusions of the Bankruptcy Court and Judge Chapman, it is indisputable that WCC owned and controlled the investment (the NAFTA Claim) when the USMCA went into effect, and when WCC submitted the present claim to arbitration.

55. Canada implicitly recognized these facts at the hearing on jurisdiction in *Westmoreland I*, when it conceded to the tribunal that WCC, as the original investor, could still bring a claim on its own behalf:

> Arbitrator Hosking: "We understand that WCC still exists; does it have any residual rights to bring a treaty claim? And the question really arises out of **Canada's position that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law**. That is Canada's submission. And then the related issue was: What is the consequence of the change in ownership of the Canadian assets as a consequence of the bankruptcy reorganization? So, what is WCC's position today?"

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governing a variety of incidental questions, or preliminary matters, including . . . for example because certain elements of a treaty can only be determined by recourse to domestic law (such as whether an investor has title to a certain asset . . . ")).

81 Reply, ¶ 61.

82 Response, ¶ 51; Expert Report, ¶ 39, **CER-001**.

83 *Id*.

84 *Id*. at ¶ 45.

85 *Id*. at ¶ 47.

> [. . .]
>
> Counsel for Canada: " . . . What would be WCC's position today? And I think if they no longer own or control the investment, that is true, the enterprise, **but that still would not preclude a claim under 1116 on their own behalf**. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf. So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf."[86]

56. Canada argues that this statement "must be understood in the context of the particular question that was being addressed, which related to the ability of a claimant to bring a claim under NAFTA Article 1116 if it no longer owns or controls the investment in question."[87] Yet, it is obvious from Canada's response at the hearing that it never understood or contended that WCC lost its right to bring a claim against Canada. WCC always held its claim, both as a matter of international law and U.S. domestic law.

57. Rather than engage with WCC on these important conclusions, Canada argues that these conclusions are irrelevant.[88] In fact, they are highly relevant to Canada's arguments that WCC did not hold an investment when the USMCA went into effect and when WCC submitted the present arbitration—which Canada (incorrectly) argues is required in order for this Tribunal to have jurisdiction. Thus, while WCC's position is that it need not prove that it held an investment on these dates (*see* Section III.B. and Section IV.A.), to the extent that these are jurisdictional requirements, they are satisfied here.

58. In sum, as the U.S. Bankruptcy Court found and Judge Chapman has confirmed, pursuant to the applicable U.S. law, WCC has owned and controlled the NAFTA Claim since the date of the measures.

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86 CMH – Hearing Transcript, Day 2, p. 278:15–280:4, **C-046**.

87 Reply, ¶ 52.

88 Reply, ¶ 61.

III. WCC HAS A LEGACY INVESTMENT UNDER THE USMCA

59. The Parties agree that under Annex 14-C of the USMCA, investors with "legacy investments" may pursue arbitration under NAFTA Chapter 11 as long as those investors commence arbitration within three years of the NAFTA's termination.[89] The Parties disagree, however, as to whether that legacy investment protection extends to claims that materialized prior to the implementation of the USMCA.[90]

60. WCC is entitled to pursue NAFTA arbitration under Annex 14-C of the USMCA because the USMCA expressly protects claims that materialized before July 1, 2020, and official documents surrounding the negotiation of the USMCA confirm that the legacy provision was intended to provide protection for events that transpired before the USMCA went into effect. This interpretation is consistent with the NAFTA, which always has defined investment in a way that allows investors to lodge claims as long as they owned the investment on the date of the challenged measures. In any event, Canada should be precluded from arguing the contrary because it contradicts the position it adopted in *Westmoreland I*.[91] WCC addresses each of these points in turn.

A. The USMCA Expressly Covers Claims That Materialized Before July 1, 2020

61. The Parties agree that investors are entitled to lodge investment claims pursuant to the NAFTA for a three-year period after the USMCA went into effect (*i.e.*, until July 1, 2023). The Parties also agree that Annex 14-C, Chapter 14 of the USMCA defines the "legacy investments" to which this transitional protection applies. Canada's argument that Annex 14-C does not extend to claims that materialized before July 1, 2020 is expressly contradicted by the text of the USMCA as well as contemporaneous evidence of the NAFTA Contracting Parties' understanding of the legacy investment protections.

62. Specifically, USMCA Article 14.2(3) clarifies that Annex 14-C applies to all disputes in existence in the transition period, including disputes arising out of facts that pre-dated the entry into force of the USMCA. Article 14.2(3) provides that, "[f]or greater certainty, ***this Chapter, except as provided for in Annex 14-C*** (Legacy Investment Claims and Pending

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89 Response, ¶ 56; Reply, ¶ 67.

90 Canada's Memorial on Jurisdiction, ¶¶ 85–88; Reply, ¶ 67.

91 *See* Response, ¶ 64.

Claims) *does not bind a Party in relation to an act or fact that took place or* ***a situation that ceased to exist before the date of entry into force of this Agreement***."[92] The legacy investment protection is the *only* protection under the USMCA that applies to prior events. While Canada relies upon the Annex 14-C requirement that the investment be in "existence on the date of entry into force of this Agreement" to argue that an already-expropriated investment does not benefit from legacy protection,[93] the USMCA makes clear that the language that Canada relies upon does not foreclose the pursuit of claims arising out of events that pre-dated the USMCA's entry into force.

63. This exception apparently was added during the "legal scrub" after the agreement had been negotiated but before it was signed. According to United States Trade Representative ("USTR") talking points dated November 28, 2018, the Contacting Parties added Article 14.2(3) to allow ISDS claims with respect to legacy investments "where the alleged breach took place before entry into force of the USMCA":

> "Article 14.2(3) (Scope): The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to the entry into force of the USMCA, consistent with the default Vienna Convention rules. **In the scrub, we clarified that there is one exception: Annex 14-C (the grandfather provision) allows investors to bring ISDS claims with respect to legacy investments where the alleged breach took place before entry into force of the USMCA**."[94]

64. The USTR note and Article 14.2(3) are consistent with the purpose of the legacy provision, which was designed to extend NAFTA protection as long as the investments were made before the USMCA came into force.[95]

65. Canada claims that WCC had "no evidentiary support" to prove that the purpose of the legacy provision was to protect investments from measures that pre-dated the USMCA.[96]

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92 USMCA Article 14.2(3) (emphasis added), **C-044**.

93 *See, e.g.*, Reply, ¶ 72.

94 Email from D. O'Brien to J. Melle and other USTR personnel, "RE: Call Tomorrow Morning, attaching Talking Points," Nov. 28, 2018, p. 3 (emphasis added), **C-106**.

95 Response, ¶¶ 83, 85.

96 Reply, ¶ 82.

That is not correct. WCC has provided as evidence numerous official publications by the Contracting Parties confirming that:[97]

i. "the investment protections of Chapter 11 of the NAFTA *are going to continue to be available* after USMCA enters into force";

ii. "Annex C permits *the relevant NAFTA provisions to apply for three years* after NAFTA is terminated"; and

iii. "*ISDS cases can still be brought forward* under NAFTA for investments made prior to the entry into force of USMCA."

66. Canada does not refute any of this evidence in its Reply—nor does it point to any contrary negotiating history or other evidence to support its argument that the USMCA does not apply to investments impacted by government measures that occurred prior to the entry into force of the USMCA.

67. Finally, Canada's argument that the USMCA abruptly terminated existing investment protection also is inconsistent with the purpose of investment protection and may even yield absurd results. For instance, the United States and Mexico have argued in another pending legacy investment dispute that Annex 14-C of the USMCA does not protect legacy investments against facts that arose after NAFTA's termination.[98] If the legacy investment protection does not apply to measures that arose before the USMCA went into effect—or to measures that arose after the USMCA went into effect—there would be no protection whatsoever.

68. In sum, the plain language of the USMCA itself confirms that the purpose of the legacy investment chapter was to extend NAFTA protection disputes for three years, including for disputes that arose before the USMCA went into force. The USMCA accomplishes this by confirming that the legacy investment protection extends to situations that "ceased to exist" before the USMCA went into force. This interpretation of legacy investment protection is confirmed by the contemporaneous official positions of the Contracting Parties following the negotiation of the USMCA. Canada provides *no evidence* to the contrary.

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97 *See* Response, ¶ 84.

98 *See TC Energy and Trans Canada Pipelines v. USA*, ICSID Case No. ARB/21/63, Procedural Order No. 2, April 13, 2023, ¶ 4(a), **CLA-071**; *TC Energy and Trans Canada Pipelines v. USA*, ICSID Case No. ARB/21/63, Mexico's Submission Pursuant to Article 1128 of NAFTA, Sept. 11, 2023, ¶ 5, **CLA-072**.

B. The Relevant Time to Determine When the Investor Owned or Controlled the Investment Is at the Time of the Measures

69. The above interpretation of Article 14.2(3) is consistent with the remainder of the USMCA legacy investment provisions. The USMCA defines a "legacy investment" as one "in existence on the date of entry into force of this Agreement," and relies on the NAFTA to define what constitutes such an investment, which in turn looks to the date of the measures to define a qualifying investment. Thus, Canada's argument that WCC must establish ownership or control on the date the USMCA entered into force is inconsistent with the long-standing practice under the NAFTA, which is incorporated into the USMCA.

70. *First*, as WCC explained in its Response, in providing ongoing protection for "legacy investment[s]" for a three-year period, the USMCA defines the terms "investment" and "investor" to have the same meanings as in NAFTA Chapter Eleven.[99] Specifically, Annex 14-C, Chapter 14 of the USMCA defines "legacy investments," *i.e.*, investments for which NAFTA claims can be asserted until July 1, 2023, as follows:

> For the purposes of this Annex: (a) "**legacy investment**" means an **investment of an investor of another Party** in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement . . .(b) "**investment**", "**investor**", and "Tribunal" **have the meanings accorded in Chapter 11** (Investment) of NAFTA 1994.

71. Thus, while the USMCA requires tribunals to consider whether an investment existed on the date the USMCA went into force, under the incorporated NAFTA definitions, the only relevant question is whether the investor held the investment on the date of the measures.[100] The NAFTA defines "investment" in the past tense precisely to protect investments that ceased to exist due to government interference. As WCC explained at length in its Response, the relevant NAFTA Articles – Articles 1101(1), 1139, 1116(1) and 1117(1) – all refer to investments in the past tense,[101] and thus are agnostic as to whether the claimant

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99 Response, ¶ 66.

100 Based on the plain language of Annex 14-C, WCC suggested that the "starting point" for this analysis is the NAFTA, since whether a "legacy investment" qualifies for investment protection must be determined in accordance with the terms of the NAFTA. Canada argues that WCC "disregard[s] the plaint text of CUSMA Annex 14-C" by "prioritiz[ing]" the NAFTA definition of "investment." Reply, ¶ 69. WCC "prioritizes" the NAFTA definition of "investment" precisely because that is what the USMCA calls for.

101 *See, e.g.*, Response, ¶¶ 70–72, 74.

continued to hold the investment after the disputed measures. For example, Article 1139 defines an investor as a party "that seeks to make, is making or *has made* an investment."[102] Notably, as WCC explained, during the NAFTA negotiations, Canada repeatedly tried to limit NAFTA protection to investors that "continu[e] to" control the investment,[103] but the Contracting Parties rejected Canada's proposal and none of the relevant provisions contain a continuing investment requirement.

72. For this reason, multiple NAFTA tribunals have looked to the date of the measures to determine the existence of an "investment of an investor," including the *Westmoreland I* tribunal.[104] As many tribunals have reasoned both with respect to the NAFTA and other treaties, imposing a continuous ownership requirement on investors is contrary to fundamental principles of international law that protect investors against the wrongful deprivation of their investments. If Canada's continuous ownership requirement were accepted, such basic treaty protections would be rendered useless. In this case, for instance, WCC transferred its assets to WMH as part of a forced bankruptcy that was precipitated, at least in part, by Canada's challenged measures.[105]

73. Canada argues that none of these cases apply, including cases decided under the NAFTA.[106] Yet, even Canada relies on NAFTA jurisprudence to provide guidance for

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102 *See* North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed Dec. 17, 1992, entered into force Jan. 1, 1994 ("NAFTA"), Art. 1139 (emphasis added), **C-107**.

103 Response, ¶ 73, citing INVEST.221, Dallas Composite, Feb. 21, 1992, 32, **C-056**.

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

105 *See, e.g.*, *Daimler v. Argentine Republic*, ¶ 142, **CLA-011**; *see also Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶¶ 76–83, **CLA-005** (allowing NAFTA claim to proceed even though Mondev had lost control of it's the project due to foreclosure as well as its rights to contractual claims in the United States before it filed the notice of arbitration*); EnCana v. Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, Feb. 3, 2006 ¶¶ 126–31, **CLA-006** (finding jurisdiction over claimant's claims against Ecuador even though prior to filing its RFA, EnCana had sold its Ecuadorian investments to a third-party); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, Oct. 7, 2020 ¶¶ 12, 355, 370, 390, **CLA-008**; *WNC Factoring v. Czech Republic*, PCA Case No. 2014-34, Award, Feb. 22, 2017, ¶¶ 8, 57, 63, 65–68, 401–03, **CLA-009**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, ¶¶ 124–25, **CLA-010**.

106 Reply, ¶ 75.

interpreting the USMCA—just not to define what constitutes an "investment" for purposes of Annex 14-C (despite its express reference to the NAFTA).[107]

74. Canada contends that the NAFTA definition of "investment" does not apply here because the NAFTA has terminated.[108] However, the NAFTA continued to apply for a three-year period after the USMCA went into effect, specifically to provide ongoing protection for "legacy investments." Therefore, the NAFTA remains fully relevant to the present analysis.

75. *Second*, the USMCA also applies to acts that pre-dated the USMCA since the NAFTA protects claims to money arising out of prior government conduct.[109] The NAFTA Article 1139 definition of "investment" includes, *inter alia*, "interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such area," including "claims to money," except for claims to money that do not "involve" the kinds of investments that are recognized in Article 1139.[110] Canada's argument that

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[107] Specifically, Canada acknowledges that because USMCA Annex 14-C and NAFTA Chapter 11 both use the term "investment of an investor of another party," the NAFTA offers "instructive guidance" for the Tribunal's interpretation of Annex 14-C, Paragraph 6(a). Reply, ¶ 77. Per Canada, this means that tribunals assessing the meaning of "an investment of an investor of another Party" under Paragraph 6(a) should consider jurisprudence on NAFTA Article 1101 requiring a "legally significant connection" between the challenged measure and the claimant's investment. Reply, ¶ 78. Canada cannot argue that the Tribunal cannot consider NAFTA jurisprudence for purposes of defining a "legacy investment" (as required by the USMCA), but should consider NAFTA jurisprudence for purposes of inventing new requirements not expressly incorporated into the USMCA. In any event, Canada's argument on the "legally significant connection" issue is difficult to follow, but Canada appears to claim that because tribunals interpret "investments of investors of another party" under NAFTA Article 1101(1)(b) as requiring the claimant to have held the investment at the time the challenged measures occurred, that the language "in existence on the date of entry into force of this Agreement" in Paragraph 6(a) means the claimant bringing the dispute must own or control the "investment of an investor of another Party" at issue on July 1, 2020. *Id*. This is contrary to the plain language of the treaty, in particular, USMCA Article 14.2(3). In any event, assuming *arguendo* that this is a separate requirement under the USMCA, WCC meets this requirement for the reasons set out in its Response. *See* Response, ¶¶ 88–100.

[108] Reply, ¶ 71.

[109] Canada argues that WCC asserted its argument that it held a claim to money "for the first time" in the Response (Reply, ¶ 87), but WCC raised that argument in its very first submission in this arbitration (Notice of Arbitration, ¶¶ 109–110).

[110] In relevant part, Article 1139 provides that "investment means: . . . (a) an enterprise; . . . (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; . . . (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; *but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a*

this provision does not provide any investment protection cannot be squared with the text of the NAFTA itself. Indeed, there would be no need to exclude "claims to money that do not involve the kinds of interest set out in paras (a) through (h)," unless other claims to money *were* covered by the NAFTA.

76. WCC's rights to the NAFTA Claim comprise a claim to money for its protected investment, including, *inter alia*, its claims arising out of (*i*) its ownership of Prairie, an enterprise (subsection a), (*ii*) its interest in Prairie entitling it to a share of the profits from the enterprise (subsection e), (*iii*) the property owned by Prairie (subsection g), and (*iv*) interests arising from a commitment of capital or other resources in Canada, including contracts for which remuneration depended substantially on the production, revenues, or profits of Prairie (subsection h). While WCC lost its enterprise and associated investments in the bankruptcy following Canada's measures, it retained its right to assert a claim against the government for its losses, a claim it had lodged prior to the bankruptcy and continued to own at all relevant times.

77. In fact, the *Westmoreland I* tribunal implicitly recognized that the claim to money remained with WCC despite the purported transfer of Prairie and other related assets to WMH:

> The question here is **whether under NAFTA Chapter Eleven, a NAFTA claim can be transferred** together with the underlying investment when the investment is transferred or **whether it remains with the party which owned or controlled it at the time of the alleged treaty breach**. The short answer to Westmoreland's argument is that given the Tribunal's construction of Articles 1101(1), 1116(1) and 1117(1), **only the party which owned the investment at the time of the alleged treaty breach has jurisdiction *ratione temporis* to bring a claim**.[111]

78. The *Westmoreland I* tribunal pointed out that the bankruptcy did not effectuate a complete transfer of ownership from WCC to WMH, such that WHM was not the "legal successor" to WCC.[112] However, as Judge Chapman explains, WCC nevertheless retained its ownership of the NAFTA Claim following the bankruptcy.[113] Finding that the NAFTA

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loan covered by subparagraph (d); or (j) ***any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)*** *. . .* "

111 *Westmoreland* Award, ¶ 209 (emphasis added), **CLA-001**.

112 *Westmoreland* Award, ¶ 119, **CLA-001**.

113 *See supra* ¶ 53.

Claim is an unprotected investment would mean that investment claims can simply disappear via bankruptcy, even when the claims have not been adjudicated on the merits, and the prosecution of the claims is essential to achieve the objectives of the Bankruptcy Court's Plan of Reorganization.

79. Canada argues that WCC's definition of investment would allow any entity to merely assert a NAFTA Claim to create an investment.[114] That is not true. In order for a "claim to money" to constitute an investment under Article 1139, it must involve "the kinds of interests set out in subparagraphs (a) through (h)," such as a qualifying enterprise (subparagraph a), an interest in an enterprise (subparagraph b), or interests arising from the commitment of capital in the territory of a Party to the economic activity in such territory, such as concessions (subparagraph h). Moreover, the "claim to money" must represent a claim *against the State* arising out of those defined sorts of investments. Finally, the claimant must own the investment on the date of the measures—it cannot acquire the investment thereafter. While these requirements severely limit the pool of investors qualified to hold a "claim to money," WCC satisfies all three requirements, since (*i*) it owned the type of investments articulated by Article 1139; (*ii*) it has a claim to money against Canada due to measures affecting those investments; and (*iii*) it owned the investment on the date of the measures, and thus owned the corresponding claim arising out of those measures. Contrary to Canada's position,[115] this NAFTA Claim existed on July 1, 2020, since (*i*) WCC identified it as an asset and sought to transfer it in the bankruptcy proceeding; and (*ii*) this NAFTA Claim remained pending on July 1, 2020.

80. Canada argues that the NAFTA Claim "does not resemble the[] contractual examples" listed in Article 1139, such as a concession contract.[116] Canada's argument misses the point, since WCC's position is that its NAFTA claim is a claim to money that *arose out of a qualified investment* under Article 1139, *i.e.*, its acquisition of the Alberta mines at issue. Likewise, Canada's argument that an investment "must arise out of something other than purported and *unproven* [USMCA]/NAFTA claims"[117] makes no sense, since the question

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114 Reply, ¶ 88.

115 *See* Reply, ¶ 101.

116 Reply, ¶ 93.

117 Reply, ¶ 88 (emphasis added).

of whether a claim is proven and meritorious is judged in the merits phase of the case, not as a jurisdictional matter. Canada's arguments should be rejected, as they would effectively nullify the NAFTA protections provided for "claims to money."

81. Canada claims that WCC does not cite a single investment decision that supports its argument.[118] Not so. WCC cited three decisions in support of its argument–*Mondev*, *Jan de Nul*, and *Daimler*. While Canada seeks to distinguish those cases,[119] it cannot deny that those cases are highly analogous to the present case, since each award affirmatively found that the investor retains the right to bring a claim for measures that occurred while it owned the investment, even if the investment is subsequently transferred or sold.

82. Similar to Canada in this case, the United States argued in *Mondev* that the investor had "no subsisting investment in the project" on the date that NAFTA entered into force because the project had definitively failed by that date and "all that was left were *certain claims for damages*."[120] The *Mondev* tribunal accepted that, even though investor's project failed before the NAFTA went into force, the investor's legal claims relating to its failed investment still were protected by NAFTA:[121]

> Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" [a specific definition of the term "investment" in NAFTA] as at [the entrance date], and they were not caught by the exclusionary language in paragraph (j) of the definition of "investment," since they involved "the kinds of interests set out in subparagraphs (a) through (h)." They were to that extent "investments existing on the date of entry into force of this Agreement," within the meaning of Note 39 of NAFTA. In the Tribunal's view, once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. . . .
>
> Similar considerations apply to [national treatment, fair and equitable treatment, and full protection and security]. Issues of orderly liquidation and the settlement of claims may still arise and require "fair and equitable treatment," "full protection and security" and the avoidance of invidious discrimination. . . The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and

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118 Reply, ¶ 94.

119 Reply, ¶ 94.

120 *Mondev v. U.S.* Award, ¶ 77 (emphasis added), **CLA-005**.

121 *Id*.

> the intent of NAFTA is evidently to provide protection of investments throughout their life-span, i.e., 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.'[122]

83. That is, *Mondev* stands for the clear principle that previously-existing claims based on an investment must be protected—even if the events at issue arose before the relevant treaty went into force. Here, there is even greater reason to reach that conclusion, since the relevant investment was protected by the NAFTA and the USMCA at all relevant times. There is no moment in time when WCC did not enjoy investment protection.

84. The awards in *Jan de Nul* and *Daimler* likewise show that an investment treaty claim remains with the investor that held the investment at the time the dispute arose, regardless of any subsequent transfer of the investment. The *Daimler* tribunal held 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 <u>at the time</u> that those measures were taken."[123] As noted by the *Jan de Nul* tribunal, this must be the case or "the entire logic of investment protection treaties would be defeated."[124]

85. Canada cites to two cases to support its position – *ACP Axos Capital v. Kosovo* and *IC Power v. Guatemala* – yet neither applies here. In *ACP*, the claimant asserted that it held two protected investments under the relevant BIT: a contract with Kosovo and a "claim to money" arising from the money spent to prepare the contract tender and to transfer know-how to Kosovo.[125] Under the BIT, an "investment" included "claims to money which has been used to create an economic value or claims to services or benefits in kind which have an economic value and *are connected with an investment*."[126] The claimant's "claim to money", however, was not connected to any investment because it never held a valid contract with Kosovo.[127] ACP's only alleged investment, therefore, was the treaty claim

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122 *Id.* ¶¶ 80–81 (emphasis added).

123 *Daimler v. Argentine Republic*, ¶ 145 (emphasis in original), **CLA-011**.

124 *Jan de Nul v. Egypt*, ¶ 135, **CLA-007**.

125 *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award, May 3, 2018, ¶ 136–137, **RLA-061**.

126 *Id*. at ¶ 134(c) (emphasis added).

127 *Id*. at ¶¶ 152, 244.

itself, which was untethered to any investment as defined under the BIT.[128] That is not the case here, since WCC's claim for money is expressly based on the impact of government measures on its qualifying investment in Canada.

86. *IC Power v. Guatemala* also does not support Canada's position, since that tribunal held that it had jurisdiction over the claim—despite the fact that the claimant had sold the investment prior to initiating the arbitration.[129] This conclusion is even more warranted here, since the USMCA expressly provides that investment protection applies to situations that "ceased to exist" before the trade agreement went into effect.

87. In sum, the plain language of the USMCA confirms that the purpose of the legacy investment chapter was to extend NAFTA protection disputes for three years, including for disputes that arose before the USMCA went into force. The USMCA accomplishes this by defining the term "investment" for purposes of Annex 14-C by reference to the NAFTA, which defines "investment" based on the date of the measures, while also expressly protecting claims to money stemming from protected foreign investments.

C. Canada Should Be Estopped From Disputing Ownership Control As of July 1, 2020 As It Contradicts the Position It Adopted in *Westmoreland I*

88. Even if the Tribunal concludes that WCC had to own or control the investment on July 1, 2020 to qualify for legacy investment protection, and that the NAFTA Claim does not qualify as such an investment, Canada nevertheless should be estopped from arguing that WCC did not have a requisite investment on July 1, 2020. The estoppel arises because the limitations defense that Canada asserts is premised on circumstances that Canada itself wrongfully precipitated through multiple acts of gamesmanship to prevent WCC's claims from being heard on the merits, including: (1) its insistence on WCC's withdrawal from the *Westmoreland I* arbitration as a condition of WMH's participation in the arbitration; (2) its representation to WCC that the withdrawal was a "solution" to enable the arbitration to "move forward" without procedural delay, when in fact Canada had every intention of delaying consideration of the NAFTA Claim on the merits by challenging WMH's standing to pursue any of the NAFTA Claims; and (3) its representations to the *Westmoreland I*

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128 *Id.*

129 *IC Power v. Guatemala*, ¶ 389, **CLA-008**.

tribunal that there was no unfairness to WCC because WCC still could pursue its claims, while now taking the exact opposite position in this arbitration.[130]

89. Canada does not dispute that estoppel is a general principle of law recognized by civilized nations,[131] but instead seeks to minimize the reach of that principle to avoid the consequences of its gamesmanship. Estoppel aims to preclude a party from benefiting from its own inconsistency to the detriment of another party who has in good faith relied upon one of its representations.[132] Investment tribunals have defined estoppel as "detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party."[133]

90. Canada argues that WCC failed to establish the elements of estoppel, namely: (*i*) an unambiguous statement of fact; (*ii*) which is voluntary, unconditional, and authorized, and (*iii*) which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement.[134] As explained below, WCC has established all three elements of estoppel.

91. *First*, Canada cannot fairly argue that it did not make an "unambiguous statement of fact." As explained above, Canada refused to accept the 2019 Amended Notice of Arbitration unless "***Westmoreland Coal Company withdr[ew] the claim that it submitted against Canada on November 19, 2018***."[135] There is nothing ambiguous about Canada's statement. In fact, Canada admits that it insisted on WCC's withdrawal in order to ensure that it would not be exposed to the risk of facing a separate claim by WCC.[136]

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130 Response, ¶ 101.

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

132 *Id.* at 469 (internal citations omitted), **CLA-020**.

133 *Pan American Energy LLC v. Argentina*, ICSID Case Nos. ARB/03/13, ARB/04/8 Decision on Preliminary Objections, July 27, 2006, **CLA-021**, ¶ 159; *SPP (Middle East) Ltd. V. Egypt*, ICC Case No. YD/AS No. 3493, Award, March 11, 1983, 3 ICSID Rep. 46, 66 (1995), **CLA-022** (concluding that "a party is barred from taking a contrary course of action (i.e., alleging or denying a certain act or state of facts) after inducing by its own conduct the other party to do something which the latter would not have done but for such conduct of the former party."); *see also* UNIDROIT Principles of International Commercial Contracts, Article 1 § 8 (2004) ("A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."), **CLA-023**.

134 Reply, ¶ 108.

135 Letter from Scott Little to Elliot Feldman, p. 2 (emphasis added), **R-081**.

136 Reply, ¶ 31.

92. *Second*, the statement was "voluntary, unconditional and authorized," since it was made on official government letterhead and was not accompanied by any stated conditions.[137] Canada does not dispute that this statement was voluntary, unconditional, or authorized, but instead confuses the issue by suggesting that Canada's *reservation of rights* was not unconditional.[138] WCC did not solely rely on Canada's reservation of rights in withdrawing its claim; its decision to withdraw was principally driven by Canada's offer which it felt "propos[ed] a fair compromise that enable[d] [the Parties] to proceed [] without unnecessary procedural delay."[139] Canada reinforced this misimpression by describing its "proposal of July 2, 2019 as a way forward,"[140] when in fact Canada's strategy all along was to produce an indefinite procedural delay of the arbitration by challenging WMH's standing, so that the NAFTA Claims were not heard on the merits. Canada's reservation of rights further misled WCC by providing assurance to WCC that Canada only reserved its right to object to old "claims" and new "claims"—not to object to a new "claimant."

93. *Third*, the contemporaneous evidence is clear that WCC only withdrew from the arbitration because WCC accepted Canada's proposal that would purportedly allow the parties to move forward with the arbitration. Indeed, in communicating WCC's withdrawal from the arbitration, counsel to WCC communicated that "[o]n behalf of Westmoreland Coal Company and ***pursuant to the appended July 12, 2019 letter*** [from Canada], we hereby withdraw Westmoreland Coal Company's November 19, 2018 Notice of Arbitration and Statement of Claim."[141] That is, WCC stated when it withdrew its claim that it did so "pursuant to" Canada's proposal.

94. Moreover, as explained above, WCC clearly intended to continue to participate as a claimant in the arbitration despite the bankruptcy proceeding since the 2019 Amended Notice of Arbitration named WCC as a claimant and included the original waiver letter for

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137 Letter from Scott Little to Elliot Feldman, **R-081**.

138 Reply, ¶ 116.

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

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

141 Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement on Behalf of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC," July 23, 2019, p. 1 (emphasis added), **R-084**.

WCC. Moreover, WCC has presented unrebutted evidence from witness Jeffrey Stein that WCC only withdrew from the arbitration because WCC understood that Canada would not object to WMH as a new claimant, and, had WCC known that Canada planned to challenge WMH's standing to pursue any claims, then WCC would have insisted on remaining part of the arbitration.[142] It should be uncontroversial that WCC relied upon Canada's representations in agreeing to withdraw its claim—to its detriment.[143] Regardless of the mechanics of WCC's withdrawal, that withdrawal foreclosed WCC's ability to continue to pursue its claim without the additional obstacles that Canada now is asserting, including, *inter alia*, objections to the limitations period and objections based on the USMCA, none of which WCC would have had to deal with if the parties had proceeded with the WCC/WMH Amended Notice of Arbitration.

95. Canada argues that WCC should present evidence that WCC understood that Canada was renouncing its ability to bring jurisdictional objections to any investment claims.[144] There is no need for such evidence, but in any event, WCC has presented the unchallenged testimony of Mr. Stein, who testified that WCC did not expect Canada to use its proposal to deny WCC any opportunity to lodge its claim—in the *Westmoreland I* arbitration or any future arbitration. Contrary to Canada's position, there is no need for WCC to show that Canada "force[d]" this outcome[145]—it is sufficient for estoppel purposes that Canada made an offer, and WCC relied on that offer in good faith to its detriment. Canada presents no case law to support its proposed standard—a standard that is entirely unworkable since it would be impossible to satisfy.

96. Finally, neither nor *Achmea* nor *Oded Bessesrglik* support Canada's argument that estoppel cannot be used to "create" jurisdiction. The circumstances in those two cases are entirely different than the present case, since they both involved a situation in which the claimant was seeking to establish the existence of an investment treaty claim based on estoppel—

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142 Stein WS, ¶ 15, **CWS-001** ("I was shocked when, after our agreement was implemented, Canada immediately challenged WMH's standing to pursue the NAFTA claims against Canada. Had I known that Canada would argue that WMH did not have standing (an argument we did not agree with), I would have never authorized WCC to withdraw its claim. Instead, I would have insisted that all steps be taken to ensure that that the NAFTA claim was pursued, whether through WCC, WMH or otherwise, thereby ensuring that the claims would be able to proceed regardless of which of them was found to have standing to pursue the claims.")

143 Reply, ¶ 117.

144 Reply, ¶ 117.

145 Reply, ¶ 118.

which is not the case here.[146] Moreover, the *Achmea* tribunal did not address whether the attitude of a Party would be relevant to the status of the BIT or the tribunal's jurisdiction.[147] Even if the *Achmea* decision considered this issue (it did not), the tribunal concluded that "[t]his award is thus necessarily confined to the specific circumstances of the present case; and *the Tribunal does not here intend to decide any general principles for other cases*, however ostensibly analogous to this case they might be."[148]

97. There is no question that Canada induced WCC to withdraw its claim in the first arbitration, and that, but for Canada's objection, WCC and WMH would have proceeded as co-claimants in *Westmoreland I* based on the First Amended Notice of Arbitration. There also is no question that WCC relied on Canada's offer in good faith and to its detriment. Finally, it is also clear that Canada procured the dismissal of the *Westmoreland I* arbitration by representing to the tribunal that even though WMH had no standing to assert the NAFTA Claims, those claims still could be pursued by WCC.

98. In sum, all of the elements of estoppel—a recognized principle of international law—are fully met in this case. Canada therefore should be estopped from challenging the tribunal's jurisdiction to hear WCC's claims.

D. Canada Should Be Precluded From Asserting Inconsistent Positions

99. As WCC explained in the Response, in addition to the more traditional concept of estoppel, international law long has recognized the principle of preclusion, which prevents a State party from adopting inconsistent positions. While the terms estoppel and preclusion often have been employed interchangeably,[149] a number of tribunals and courts have found that

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146 In *Oded Besserglick*, the tribunal held that estoppel could not effectively create a BIT where none existed, as is clear from a review of the full paragraph from which Canada cherry-picks: "The jurisdiction of the Tribunal and the BIT being in force is a matter of law. Just as the jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel, neither can a treaty which is not in force be given effect by an argument based on estoppel." **RLA-063**, ¶ 422. In *Achmea*, the claimant argued that EU law displaced certain provisions of the BIT, rendering them inapplicable. *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I (UNCITRAL, PCA Case No. 2008-13)*, Award on Jurisdiction, Arbitrability and Suspension, Oct. 26, 2010 ("*Achmea* Award on Jurisdiction"), ¶ 227, **RLA-062**.

147 *Id*. at ¶ 219 ("[i]n any event, the Tribunal has not found it necessary to rest any part of its decision upon the ostensible attitude of either Party to these arbitration proceedings – still less upon that of the Government of the Netherlands or of the European Commission – to the question of the status of the BIT or the existence, continuation or extent of the jurisdiction of the Tribunal").

148 *Id*. at ¶ 218 (emphasis added).

149 *Argentine-Chile Frontier* Award, Dec. 9, 1966, 16 R.I.A.A. 109, 164 (1969), **CLA-024**. *See also Case concerning the Territorial Dispute* (*Libyan Arab Jamahiriya v. Chad*), Judgment, Feb. 3, 1994, I.C.J. Rep. 6, 77

the principle of preclusion is broader than the concept of estoppel *stricto sensu*. In particular, detrimental reliance is not a required element of preclusion; rather, a party is precluded from taking inconsistent positions by virtue of the principle of good faith, regardless of reliance. Thus, the principle establishes that "a State ought to be consistent in its attitude to a given factual or legal situation."[150] "International jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*."[151] This broader notion of preclusion has been invoked either expressly or implicitly in a number of investment arbitrations and decisions.[152]

100. Canada disputes the existence of a "preclusion" concept separate from "estoppel" in international law, arguing that the authorities cited treat preclusion in the same way as estoppel, thereby requiring proof of reliance.[153] But as Richard Mosk explained in his concurring Opinion in the Iran-US Claims Tribunal *Oil Fields of Texas* case, the principles of preclusion and estoppel under international law "may be utilized, even in the absence of technical municipal law requirements, such as reliance."[154] That is because the principles of estoppel and preclusion under international law must be understood as distinct from the concept of estoppel in domestic legal systems.[155]

101. For these reasons, international tribunals have applied the principle of preclusion without requiring proof of reliance. For example, in *Lisman*, the sole arbitrator held that, where a

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¶ 96 (Separate Opinion of Judge Ajibola) (noting that "in international arbitral or judicial tribunals estoppel and preclusion have tended to be referred to interchangeably or indiscriminately."), **CLA-025**.

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

151 *Id.* at 469, **CLA-020**.

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

153 Reply, ¶ 123.

154 *Oil Field of Texas v. The Government of the Islamic Republic of Iran et al.* (1 Iran-U.S.C.T.R. 347), Concurring Opinion of Richard M. Mosk with Respect to Interlocutory Award, Dec. 9, 1982, p. 24, **CLA-028**.

155 *See, e.g.*, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, Aug. 30, 2018, ¶¶ 7.105, 7.107, **CLA-073**. ("The Tribunal does not seek here to apply the doctrine of 'judicial estoppel' as recognised by the laws of the USA. International law, not the laws of the USA, is the applicable law in this arbitration. However, it is clear that the mischief which this US doctrine seeks to remedy, by its own nomenclature, is the same as the mischief to be remedied under international law; namely: a deliberate want of good faith by a party's inconsistent statements calculated to thwart the integrity of the judicial process for its own benefit and to the other party's prejudice…The Tribunal here bases its decision on the general principle of good faith under international law applied to the Parties' obligations under their Arbitration Agreement, rather than upon any specific doctrine derived from the Anglo-Saxon concept of equitable estoppel by conduct or representation.").

party deliberately adopted one position in an arbitration, that party "prevent[s] himself" from adopting the opposite position in a subsequent litigation.[156] The sole arbitrator did *not* require a showing of reliance to find preclusion. Similarly, in *Chevron v. Ecuador*, the tribunal did not require a showing of reliance in holding that "no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."[157]

102. In *Caratube v. Kazahkhstan (II)*, the Ad Hoc Committee found, again without requiring a showing of reliance, that the claimant was precluded from "argu[ing] in favor of a legal standard that is in direct contradiction with the legal standard that it itself relied on and from which it benefited when it requested the continuation of the stay of enforcement of an ICSID award."[158]

103. Here, Canada should be precluded from arguing that WCC cannot bring a claim because it did not have an investment in place on July 1, 2020, since that argument is inconsistent with its acknowledgement in the *Westmoreland I* arbitration that WCC still could bring a claim despite having sold its interests to WMH in 2018.[159] Specifically, Canada acknowledged at the final hearing that WCC still would be entitled to bring a claim on its own behalf under Article 1116, citing *Daimler* and *EnCana* as supportive jurisprudence.[160] Canada adopted that position even though the USMCA already had replaced the NAFTA, and more than three years had passed since the date of the measures. Canada now argues the exact opposite, seeking to take advantage of the delay that it substantially precipitated by insisting that WCC withdraw from the arbitration and then assuring the *Westmoreland*

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156 *Reports of International Arbitral Awards, S.S. Lisman*, p. 1789–1790, **CLA-074**. The United States "insist[ed] that [the claimant was] precluded from denying now what he admitted then, that the goods were rightfully seized." *Id.* at 1789. The claimant "vigorously deni[ed] . . . that the concessions he made in the Prize Court as to the rightfulness of the seizure and detention bar him . . . from asserting the contrary." *Id.* The sole arbitrator agreed with the United States, finding that "[b]y the position he deliberately took in the British Prize Court . . . claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on." *Id.* at 1790.

157 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, Aug. 30, 2018, ¶¶ 7.106–7.107, **CLA-073**.

158 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on Stay of Enforcement of the Award, Dec. 12, 2019, ¶ 62, **CLA-075**.

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

160 *Id.* at 278:20–280:5.

I tribunal that dismissal of WMH would not be unfair because WCC still could pursue the NAFTA Claims itself. Canada cannot have it both ways.

104. In its Reply, Canada argues that, at the final hearing, it "made no representation that it would refrain from making a jurisdictional objection to a potential claim that WCC might file."[161] There was no need for Canada to make such a statement, since Canada represented to the tribunal that WCC still could bring a claim, *i.e.*, that a tribunal still would have jurisdiction to hear WCC's claim. Canada's inconsistent positions—arguing in one arbitration that WCC still has a viable claim and the next that it does not—violates the principle that "a party cannot 'blow hot and cold,' [which] is a principle of both estoppel and preclusion that is recognized as a rule of international law."[162] Because Canada expressly recognized that WCC still would be entitled to bring a claim in its own right under Article 1116—notwithstanding the transfer to WMH—Canada should be bound by that position in this arbitration, even if the USMCA requires that the claimant own the investment on July 1, 2020, even if more than three years have passed, and even if the NAFTA Claim is not considered a qualifying investment.

IV. THE TRIBUNAL HAS JURISDICTION UNDER THE NAFTA

105. While Canada no longer refutes the sufficiency of the evidence of WCC's investment,[163] Canada continues to contest jurisdiction pursuant to the NAFTA based on the statute of limitations, the adequacy of WCC's waiver, WCC's ability to pursue a claim on behalf of Prairie under NAFTA Article 1117, and the purported claim for "reflective loss."[164] As set forth below, Canada's arguments are meritless and should be rejected.

A. WCC Has the Requisite Ownership and Control Over Prairie

106. Canada wrongly contends that WCC cannot bring a claim on behalf of Prairie because WCC did not own or control Prairie when WCC filed its 2022 Notice of Arbitration.[165] WCC is entitled to bring a claim on behalf of Prairie because it owned that enterprise at

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161 Reply, ¶ 119.

162 Response, ¶ 195.

163 *See* Canada's Memorial on Jurisdiction, ¶ 94; Response, Section IV(A)(1).

164 Reply, ¶ 125–126.

165 Reply, ¶ 203.

the time of the challenged measures, which is the controlling paradigm, as explained in detail in Section III.B. above.

107. Canada argues nevertheless that WCC needs to establish ownership or control over Prairie at the time it filed this arbitration—an argument that rests entirely on the present tense use of the word "owns or controls" in Art. 1117(1).[166] However, other tribunals that have evaluated this language routinely place no meaning on the use of the present tense in Article 1117(1)[167]because, among other things, the NAFTA defines the term "investor" using the past tense[168] and because the investor can, pursuant to Article 1139, continue to hold all legal claims belonging to the enterprise at the time of the measures.[169]

108. In its Response, WCC cited over a dozen decisions in which the tribunals held that the relevant time for determining the existence of an investment was the date of the measures—and that later divestment of the relevant investment does not preclude investors from asserting their treaty claims.[170] Canada seeks to dismiss all of those decisions on the basis that only *Mondev v. United States*, *Gallo v. Canada*, and *Westmoreland v. Canada (I)* were NAFTA arbitrations.

109. Even if the tribunal were guided only by the NAFTA arbitrations, Canada fails to explain why the Tribunal should disregard the majority of *NAFTA jurisprudence* on this issue. In

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166 Reply, ¶ 203–205.

167 Response, ¶ 76.

168 NAFTA Article 1139 ("investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making or **has made** an investment;") (emphasis added).

169 *See supra* Section III.B.

170 Response, ¶ 140 (citing *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶¶ 6, 124, **CLA-012**; *Eskosol* Award, ¶¶ 6, 173–75, **CLA-013**; *Oostergetel v. Slovakia*, Decision on Jurisdiction, April. 30, 2010, ¶¶ 17–18, **CLA-014**; *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, Sept. 19, 2011, ¶¶ 8, 26, 36, 107, **CLA-015**; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, Aug 24, 2015, ¶¶ 8, 39–59, **CLA-016**; *Petrobart Ltd v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, March 29, 2005, p. 15, 21–22, 41, **CLA-017**; *WNC Factoring* Award, ¶¶ 8, 63, 57, 65–68, 401–03, **CLA-009**; *Mondev v. U.S.,* Award, ¶ 91, **CLA-005**; *EnCana v. Ecuador*, Award, ¶¶ 126–31, **CLA-006**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, ¶¶ 12, 355, 370, 390, Oct. 7, 2020, **CLA-008**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, ¶¶ 124–25, **CLA-010**; *Daimler v. Argentine Republic* Award, ¶ 144–45, **CLA-011**; *Vito G. Gallo v. Canada*, PCA Case No. 2008-03, Award, Sept. 15, 2011, ¶ 325, **RLA-011** ("Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained.").)

Mondev, the tribunal held that, once an investment exists, it remains protected by NAFTA even after the enterprise has failed:

> In the present case, in the Tribunal's view, Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" as at 1 January 1994, and they were not caught by the exclusionary language in paragraph (j) of the definition of "investment", since they involved "the kinds of interests set out in subparagraphs (a) through (h)". They were to that extent "investments existing on the date of entry into force of this Agreement", within the meaning of Note 39 of NAFTA. **In the Tribunal's view, once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed.** This is obvious with respect to the protection offered by Article 1110: as the United States accepted in argument, a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an "investor" as someone who "seeks to make, is making or has made an investment". Even if an investment is expropriated, it remains true that the investor "has made" the investment.[171]

110. Canada's only rebuttal is that "[i]n *Mondev*, the claimant did not even bring a claim under Article 1117."[172] That is beside the point, as Canada does not dispute that Mondev was permitted to bring a claim in its own right—despite having since divested of the investment. Likewise here, WCC is entitled to bring its own claim despite the transfer of ownership of Prairie to WMH as part of the bankruptcy, since WCC was the sole shareholder of Prairie at the time of the measures. WCC thus is entitled to claim all of Prairie's damages in its own name.

111. The *Gallo* tribunal likewise held that "for Chapter 11 of the NAFTA to apply to a measure relating to an investment, *that investment must be owned or controlled by an investor of another party, and* ***ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained***. In a claim under Art. 1117 the investor must prove that *he owned or controlled directly or indirectly the 'juridical person'*

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171 *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶ 80, **CLA-005**.

172 Reply, n.363.

holding the investment, at ***the critical time***."[173] While the *Gallo* tribunal did note that "[t]here is no doubt that Mr. Gallo is now [*i.e.*, at the time of the arbitration] the shareholder of record", it was very clear that "this is not the issue relevant for establishing his standing in this arbitration."[174] The relevant question was whether he owned or controlled the investment at the time of the violative measures.[175]

112. Canada's only rebuttal to *Gallo* is that the tribunal "found that the [c]laimant had failed to prove its ownership or control of the investment enterprise at the time the impugned measures were adopted" and so does not address whether Article 1117 requires ownership at the time the claim is submitted to arbitration.[176] But the *Gallo* tribunal was clear that the *only* relevant question under Article 1117 was whether the claimant owned the enterprise at the time of the measures.

113. Likewise, the *Westmoreland I* tribunal found that there were *two* requirements to bring a claim under NAFTA Article 1116(1) and Article 1117(1): the investor must (*i*) have held the investment *at the time of the alleged breach* and (*ii*) it must itself have suffered loss or damage.[177] It did not hold that the investor must also prove that it held the investment at the time it filed its arbitration, as Canada now advocates.

114. After ignoring the most relevant precedent, Canada claims that the "only cases" in which a NAFTA tribunal evaluated the issue of ownership or control of an enterprise at the time of submitting a claim to arbitration are *B-Mex v. United Mexican States* and *Loewen v. Canada*.[178] To start, Canada's assertion that these are the "only cases" to evaluate this question is incorrect, since *Mondev*, *Gallo*, and *Westmoreland I* all evaluated this issue—and in fact, Canada was a party to *Westmoreland I*, and thus is bound by the award under the doctrine of res judicata. Moreover, *Loewen* and *B-Mex* are isolated decisions that

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173 *Gallo*, ¶ 325, **RLA-011**.

174 *Id.* at ¶ 213.

175 *Id*. at ¶ 325.

176 Reply, ¶ 207 n. 363.

177 *Westmoreland* Award, ¶ 200, **CLA-001**.

178 Reply, ¶ 210.

conflict with dozens of tribunals that have held otherwise,[179] including at least three in the NAFTA context (namely, *Mondev*, *Gallo*, and *Westmoreland I*).

115. *Loewen* does not support Canada's position. As WCC explained in its Response, the *Loewen* tribunal dismissed Loewen's claim because the tribunal found that a domestic investor owned the investment at the time it submitted the notice of arbitration, and that a U.S. company cannot bring a claim against the U.S. government.[180] Moreover, the tribunal dismissed Raymond L. Loewen's claims under NAFTA based on its finding that Mr. Loewen had not established any ownership or control when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.[181] Specifically, the *Loewen* tribunal held that "No evidence was adduced to establish [Mr. Loewen's] interest and he certainly was not a party in interest at the time of the reorganization of TLGI."[182] That is quite different than the present proceedings, in which WCC has established through the U.S. court system and the expert testimony of Judge Chapman that it has remained a party in interest at all times since the bankruptcy proceeding.[183] Thus, the circumstances are highly distinguishable—and in any event, the *Loewen* decision is an outlier that attracted significant criticism throughout the investment arbitration community.[184]

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179 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶¶ 6, 124, **CLA-012**; *Eskosol* Award, ¶¶ 6, 173–75, **CLA-013**; *Oostergetel v. Slovakia*, Decision on Jurisdiction, April 30, 2010, ¶¶ 17–18, **CLA-014**; *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, Sept. 19, 2011, ¶¶ 8, 26, 36, 107, **CLA-015**; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, Aug 24, 2015, ¶¶ 8, 39–59, **CLA-016**; *Petrobart Ltd v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, March 29, 2005, p. 15, 21–22, 41, **CLA-017**; *WNC Factoring* Award, ¶¶ 8, 63, 57, 65–68, 401–03, **CLA-009**; *Mondev v. U.S.*, Award, ¶ 91, **CLA-005**; *EnCana v. Ecuador*, Award, ¶¶ 126–31, **CLA-006**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, ¶¶ 12, 355, 370, 390, Oct. 7, 2020, **CLA-008**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, ¶¶ 124–25, **CLA-010**; *Daimler v. Argentine Republic* Award, ¶ 144–45, **CLA-011**; *Vito G. Gallo v. Canada*, PCA Case No. 2008-03, Award, Sept. 15, 2011, ¶ 325, **RLA-011**.

180 *See* Response, ¶¶ 137–139.

181 *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, p. 69–70, **RLA-045**.

182 *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, p. 69, **RLA-045**.

183 *See supra* ¶ 53.

184 *See, e.g.*, N Rubins, *Loewen* v. *United States:* The Burial of an Investor-State Arbitration Claim, 21 Arbitration International 1 (March 1, 2005), pp. 1–2, **CLA-076** ("In light of growing dissatisfaction in some quarters about the reasoning and consistency of international arbitral awards, the *Loewen* decision added a new note of cynicism

116. *B-Mex v. United Mexican States* is another isolated case that does not follow the accepted jurisprudence that an investor need only control the investment at the time of the challenged measures, a position confirmed by dozens of arbitral tribunals.[185] Even if the Tribunal adopts such an outlier position, the *B-Mex* tribunal made clear that the investor could still bring a claim in its own right pursuant to Article 1116.[186] In the words of the tribunal, Article 1116 "***does not require subsistence of the investment at the time a claim is submitted***."[187] Canada offers no meaningful response to the *B-Mex* tribunal's finding on this point.[188]

117. In sum, there is no requirement that WCC own or control the underlying investments at the start of the arbitration to pursue a claim under Articles 1116 or 1117. However, in the event there is such a requirement, it would only bar WCC from bringing a claim on behalf of Prairie. That does not affect the scope of the claim before the Tribunal, however, since Prairie's claim is identical to WCC's claim—a point that Canada does not dispute.

B. WCC's NAFTA Claim Is Timely

118. WCC's claims are timely under Articles 1116(2) and 1117(2) since, *first*, less than three years have passed for limitations purposes since that period tolled during the pendency of the arbitration that WCC originally commenced and then was pursued by WMH in *Westmoreland I*, and, *second*, Canada should be barred from asserting its limitations defense on grounds of estoppel and abuse of right since it precipitated the circumstances that it now invokes to support its limitations defense. WCC addresses each point in turn.

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

119. Less than three cumulative years have elapsed between the time that WCC became aware of its NAFTA claims and this arbitration was commenced, excluding the period after WCC originally notified its claims and while the *Westmoreland 1* arbitration was pending.

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into the debate . . . a wide range of practitioners and commentators have expressed misgivings about the Loewen award.")

185 Response, ¶ 140.

186 Response, ¶ 141.

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

188 Reply, ¶ 210.

Specifically: (*i*) WCC first submitted its claims to arbitration less than two years after the disputed measures; (*ii*) the limitations period was tolled during the pendency of the prior arbitral proceedings; and (*iii*) WCC promptly resubmitted its NAFTA Claim to arbitration less than one year after the issuance of the *Westmoreland I* award.[189] Canada does not dispute that WCC's original submission of its claim in 2018 was timely, that WCC did not delay prosecution of the case following the issuance of the Award in *Westmoreland I*, or that less than three years lapsed during those two periods. Thus, if the tolling principle applies, it is undisputed that less than three years have elapsed since WCC first had knowledge of the measures it challenges in this arbitration.

120. The Parties disagree, however, as to whether tolling applies to NAFTA cases, and if it does, whether tolling is appropriate given WCC's earlier prosecution of its case, which was continued by WMH. As explained below, all tools of interpretation favor the application of the tolling principle in the NAFTA context, such that WCC now is entitled to finally have its day in court.

121. Under the Vienna Convention of the Law of Treaties ("VCLT"), the relevant provisions – NAFTA Articles 1116(2) and 1117(2) – should be interpreted in light of: (*i*) the ordinary meaning of the treaty; (*ii*) the general object and purpose of the treaty; (*iii*) the rules of international law; and (*iv*) subsequent party agreement. As WCC established in the Response, each of these tools support finding that the NAFTA permits tolling of the statute of limitations. WCC briefly responds to each of Canada's retorts to these arguments below.

a. The Ordinary Meaning of the NAFTA Supports Application of the Tolling Principle to This Case

122. While the NAFTA does not expressly mention the suspension principle, NAFTA Article 1131 provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and *applicable rules of international law*."[190] Therefore, the NAFTA expressly incorporates the rules of international law, which, as explained below, recognize the tolling principle.

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189 Response, ¶ 150.

190 NAFTA, Article 1131(1), **C-107**.

123. Canada argues that WCC did not point to any specific treaty language in the NAFTA to support the tolling principle,[191] but Canada does not deny the express incorporation of international law in NAFTA Article 1131. WCC also is not aware of *any* investment treaty that expressly incorporates the tolling principle; thus, disregarding the tolling principle as a matter of international law would foreclose the availability of such relief in re-submitted cases under all investment treaties worldwide.

124. The fact that the NAFTA (and other investment treaties) do not mention the word "tolling" does not mean their text does not incorporate the tolling principle. For instance, the *Renco II* tribunal evaluated the limitations provision and concluded that its language opens the door to the tolling principle by only requiring that the claim be "submitted to arbitration" before the three-year period elapsed, which made it possible for an investor to satisfy the limitations period as long as it submitted the claim to arbitration in accordance with the applicable rules within a three-year period.[192] As illustrated below, the relevant language under the NAFTA is similar to the limitations provision in the U.S.-Peru FTA:

NAFTA Article 1116(2)	**US-Peru FTA, Article 10.18**
An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.	Conditions and Limitations on Consent of Each Party 1. ***No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired***, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

191 Reply, ¶ 131.

192 *Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, June 30, 2020, ¶¶ 249, 251 ("*Renco II*"), **CLA-002**. Specifically, the *Renco* tribunal held that Renco's first notice of arbitration and statement of claim "amounted to a submission to arbitration within the (identical) meaning of both Articles 10.16.4 and Article 10.18.1."

125. Much like in *Renco I*,[193] WCC's 2018 Notice of Arbitration amounted to a submission to arbitration within the meaning of Articles 1116 and 1117 of the NAFTA, since it complied with the procedural requirements of the applicable 1976 UNCITRAL Arbitration Rules. Specifically, the notice of arbitration and statement of claim complied with the requirements to name the parties, describe the general nature of the claim, and describe the relief sought.[194] Thus, WCC "submitted to arbitration" its claim, in compliance with the relevant arbitration rules (the UNCITRAL Rules), in compliance with the requirement to file the claim within three years of the dispute.

126. Canada does not dispute that WCC's first notice of arbitration and statement of claim complied with the 1976 UNCITRAL Arbitration Rules.[195] Instead, Canada argues that there are other "conditions" to arbitration that must be met in order to comply with the NAFTA limitations period.[196] Yet, Canada does not identify a single NAFTA or USMCA requirement with which WCC *did not comply* when it "submit[ted] to arbitration" its dispute. The only additional requirement that Canada identifies is the six month cooling-off period,[197] which WCC complied with after it submitted a trigger letter to Canada and before submitting its notice of arbitration in the prior arbitration as well as the present arbitration.[198]

127. In sum, since WCC submitted its notice of arbitration and statement of claim in 2018, it complied with the NAFTA requirement that it submit its claim to arbitration within the three-year limitations period. While NAFTA does not contain an express provision on the

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193 *Renco II*, ¶¶ 249–251, **CLA-002** ("[T]he Tribunal finds that the Claimant's notice of arbitration and statement of claim in *Renco I* suspended the prescription period of Article 10.18.1 – notwithstanding the fact that the Claimant was found, almost five years later, to have submitted a defective waiver. In this vein, what matters is that the notice of arbitration and statement of claim in *Renco I* met the requirements of Articles 3 and 20 of the UNCITRAL Rules and, therefore, amounted to a submission to arbitration within the (identical) meaning of both Articles 10.16.4 and Article 10.18.1 . . . Consequently, the Tribunal finds that the Claimant's claims are not time-barred pursuant to Article 10.18.1.").

194 Response, ¶ 160.

195 Reply, ¶ 132.

196 Canada's Reply, ¶ 58.

197 Reply, ¶ 58.

198 Canada's position that it "does not agree" that WCC's submission of its claim to arbitration has any relevance also has no impact on the clear conclusion that WCC already submitted its claim to arbitration for purposes of Article 1116 and 1117. *See* Reply, ¶ 139.

tolling of statute of limitations, it has done so by express incorporation of international law since, as explained below, the tolling principle is embedded in customary international law.

b. Tolling Is a General Principle of International Law That Applies Under the Circumstances of This Case

128. Pursuant to the VCLT, the tolling principle applies to this case under international law for at least two reasons. *First*, as explained above, the NAFTA itself provides that "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[199] *Second*, under Article 31(3)(c) of the VCLT, the interpretation of a treaty should take into account "any relevant rules of international law." in other words, principles of international law are critically relevant to determining the applicability of the suspension principle to the present case.

129. Canada tries to avoid application of international law to this dispute by arguing that it would be "unnecessary" to look to international law since, it contends, the NAFTA unambiguously forecloses the possibility of suspension.[200] However, as explained above, the NAFTA is *silent* on the suspension issue, while it *expressly* calls for incorporation of international law. If anything, the NAFTA leaves open the possibility of incorporating the tolling principle, since Articles 1116(2) and 1117(2) only require that a claim *first* be submitted to arbitration within the three-year statute of limitations.[201]

130. WCC previously cited a series of international decisions dating back more than 100 years, which recognized and applied the tolling principle. Canada glibly dismisses these cases as "primarily concerned" with prescription,[202] yet notably does not cite to any of the cases in making this assertion. A review of the cases confirms that that they were concerned *both* with prescription and suspension – the two concepts are necessarily intertwined.

131. For example, in assessing a limitations defense in *Williams v. Venezuela*, Commissioner Little noted that while "statutes of limitations can be pleaded against the state," they only continue to operate until "time ceases to run against the claim."[203] As to when "time ceases

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199 *See supra* ¶ 122.

200 Reply, ¶ 148.

201 NAFTA Arts. 1116(2) and 1117(2), **C-107**.

202 Reply, ¶ 149.

203 *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, Dec. 5, 1885, p. 291, **CLA-053**.

to run", Commissioner Little found that it was the date of notification to the government of the claim because "[t]his puts that government on notice, and enables it to collect and preserve its evidence and prepare its defense."[204] That tolling principle, if applied here, would suspend the statute of limitations since Canada was notified of the claim. Similarly, in the *Gentini* case, Umpire Ralston considered whether the claimant had ever presented the claim to the competent authority, which would have "*interrupt[ed]* the running of the prescription."[205] Similar considerations were at play in the *Giacopini Case* and the *Tagliaferro Case*.[206] Contrary to Canada's claims, these cases directly addressed—and recognized—the existence of the tolling principle.

132. The *Renco II* tribunal did not share Canada's concerns about the applicability of this century of jurisprudence. To the contrary, the *Renco II* tribunal relied on these decisions, *inter alia*, in concluding that suspension is a general principle of international law.[207] Based on a review of civil codes and international jurisprudence, the *Renco II* tribunal held that the suspension of prescription periods during the pendency of the asserted claim rises to the level of a "general principle of law," as follows:

> In order for a principle to rise to the level of a "general principle of law" under Article 38(1)(c) of the ICJ Statute, it must be "generally accepted" across national legal systems. The exact degree of acceptance required remains a subject of debate. However, no such difficulty arises in this case. The Claimant has pointed to the laws of Peru, Argentina, France, Germany, Portugal, Spain, the United Kingdom, and the United States. The Claimant also cites early arbitral decisions from which the rules of prescription in international law originated as a general principle adopted by analogy from national legal systems and Roman law, including most notably the Gentini Case, which held that "the presentation of a claim to competent authority within proper time will interrupt the running of prescription."[208]

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204 *Id*. at p. 291.

205 *Gentini Case*, Reports of International Arbitral Awards, Vol. X, p. 551–561, at 561 (emphasis added) **CLA-054**.

206 *See Giacopini Case*, Reports of International Arbitral Awards, Vol. X, p. 594–596, at 595, **CLA-055**; *Tagliaferro Case*, Reports of International Arbitral Awards, Vol. X, p. 592–594, at 593, **CLA-056**.

207 *Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, June 30, 2020, ¶ 214, **CLA-002**.

208 *Id*. at ¶ 214, **CLA-002**.

133. In sum, the suspension principle, which has been adopted by civilized nations and international tribunals alike, forms a general principle of international law.

134. The plain text of the NAFTA opens the door to applying that international law principle by merely requiring that a claim be submitted to arbitration within a three-year period, which WCC did. Moreover, NAFTA Article 1131 expressly incorporates the international tolling principle by expressly referencing international law.

135. Canada reluctantly accepts that there may be an international tolling principle, but argues that it does not apply because WMH and WCC are separate legal entities and WCC withdrew its claim.[209] The international tolling principle extends to these circumstances.

136. While a true withdrawal could lead a respondent State to believe that it no longer needed to preserve its evidence, there was no such withdrawal here. Canada was fully aware that WCC withdrew its claims as part of an agreement with Canada to enable WMH to expeditiously pursue the claims originally asserted by WCC. There was no indication whatsoever that WCC intended for its claims not to be fully prosecuted, and nothing that would have led Canada reasonably to believe that the claims were permanently withdrawn such that it would no longer need to preserve evidence or prepare its defense of those claims. While WMH pursued those claims to award, they were rejected based on a curable procedural defect, just like in *Renco I*.

137. Canada replies that "a claimant that withdraws a notice of arbitration cannot credibly contend that the respondent was therefore on notice to preserve potentially relevant evidence into the future."[210] However, because Canada's demand was the only reason that WCC withdrew from the arbitration, Canada cannot rely on the withdrawal as a basis to defeat jurisdiction.[211] Moreover, Canada does not deny that it had every incentive to preserve potentially relevant evidence in light of the *Westmoreland I* arbitration—and has not identified *any* evidence that it failed to preserve. On the contrary, Canada argues that "Canada's ability (or not) to preserve evidence cannot override the temporal limitation on

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209 *See, e.g.*, Reply, ¶ 156.

210 Reply, ¶ 147.

211 *See supra* ¶¶ 17-39.

Canada's consent to arbitration,"[212] which incorrectly suggests that its preservation of evidence was somehow irrelevant.

138. *Second*, the international tolling principle should apply even though WMH and WCC are separate legal entities, since both related entities pursued the *same claims* against the same respondent—specifically, the NAFTA Claims that WCC originally asserted and purported to transfer WMH in the bankruptcy proceedings.[213] Since the arbitrations involved the pursuit of the same claims, Canada was continually on notice of WCC's claims and had every opportunity to preserve its evidence and develop its defense, thereby satisfying the core goal of the limitations period.[214] The fact that WMH and WCC are different corporate entities therefore has no bearing on the applicability of tolling to this case.

139. Contrary to Canada's suggestion, national courts and laws around the world do toll the statute of limitations even where the second action is commenced by a different plaintiff, as long as that plaintiff is adequately related to the original plaintiff. For example, in *Affiliated Bank of Middleton v. Am. Ins. Co.*, 77 Mich. App. 376, 258 N.W.2d 232, 234 (Mich. Ct. App. 1977), a Michigan court permitted an action to recover under a labor and material payment bond to proceed after the first action was dismissed, citing to cases from other jurisdictions allowing "after failure of the original action commenced within the limitations period, a renewed action by a different plaintiff when he represents the same interest as the original plaintiff."[215] In *Federal Kemper Ins. Co. v. Isaacson*, 377 N.W.2d 379 (Mich. Ct. App. 1985), the court confirmed that "[w]here a prior action has ended without an adjudication on the merits, the tolling statute is applicable to a renewed action by a different plaintiff who represents the same interest as the original plaintiff."[216] This principle is reflected in civil codes in jurisdictions all over the world, including *all* of the civil codes cited by Canada. Specifically:

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212 Reply, ¶ 147.

213 *See supra* ¶¶ 40–50.

214 *See, e.g.*, Response, ¶ 163; *see also, e.g.*, *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, at 279–293, **CLA-053**; Giacopini Case, Reports of International Arbitral Awards, Vol. X, p. 594–596, at 595, **CLA-055;** Tagliaferro Case, Reports of International Arbitral Awards, Vol. X, p. 592–594, at 593, **CLA-056**.

215 *Affiliated Bank of Middleton v. Am. Ins. Co.,* 77 Mich. App. 376, 258 N.W.2d 232, 234 (Mich. Ct. App. 1977), **C-108**.

216 *Federal Kemper Ins. Co. v. Isaacson*, 377 N.W.2d 379, 382 (Mich. Ct. App. 1985), **C-109**.

a. The Civil Code of Quebec recognizes the tolling principle[217] and provides that suspension "has effect with regard to all the parties with respect to any right arising from the same source."[218]

b. The Civil Code of Peru recognizes that a claim is tolled when an action is submitted to a judge or competent authority[219] and provides that tolling may be asserted by anyone with a "legitimate interest."[220]

c. The Civil Code of Spain provides that a claim is tolled when an action is submitted to tribunals or courts,[221] and with respect to joint claims, tolling benefits all creditors and debtors equally.[222]

d. The Civil Code of Portugal provides that a claim is tolled following notice of the claim,[223] and that the "interruption of prescription, in favor of any of the joint creditors, can be availed by all."[224]

e. The Civil Code of France likewise acknowledges the tolling principle[225] and that an event that "suspends the running of time for the purposes of prescription with regard to one of the joint and several creditors operates for the benefit of the other creditors."[226]

f. The Civil Code of Germany recognizes the tolling principle[227] and provides that "The suspension, suspension of expiry of the limitation period and

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217 Civil Code of Quebec, Article 2883, **C-110**.

218 *Id.,* Article 2892 (emphasis added).

219 Civil Code of Peru, Article 1996, **R-152** ("Citación con la demanda o por otro acto con el que se notifique al deudor, aun cuando se haya acudido a un juez o autoridad incompetente.").

220 Civil Code of Peru, Article 1999, **R-152** ("La suspensión y la interrupción pueden ser alegadas por cualquiera que tenga un legítimo interés").

221 Civil Code of Spain, Article 1974 (emphasis added), **C-111** ("La prescripción de las acciones se interrumpe por su ejercicio ante los Tribunales, por reclamación extrajudicial del acreedor y por cualquier acto de reconocimiento de la deuda por el deudor.").

222 Civil Code of Spain, Article 1974 (emphasis added), **C-111** ("La interrupción de la prescripción de acciones en las obligaciones solidarias aprovecha o perjudica por igual a todos los acreedores y deudores. Esta disposición rige igualmente respecto a los herederos del deudor en toda clase de obligaciones. En las obligaciones mancomunadas, cuando el acreedor no reclame de uno de los deudores más que la parte que le corresponda, no se interrumpe por ello la prescripción respecto a los otros codeudores.")

223 Civil Code of Portugal, Article 552, **R-151**.

224 Civil Code of Portugal, Article 558, **R-151** ("Interruption in favour of joint creditor – The interruption of prescription, in favour of any of the joint creditors, can be availed by all").

225 Civil Code of France, Article 2241 (emphasis added), **R-149 (**"La demande en justice, même en référé, interrompt le délai de prescription ainsi que le délai de forclusion.").

226 Civil Code of France, Article 1312 (emphasis added), **R-149 (**Free translation, the original provides: "Tout acte qui interrompt ou suspend la prescription à l'égard de l'un des créanciers solidaires, profite aux autres créanciers.").

227 Civil Code of Germany, Article 204 (emphasis added), **R-150** ("bringing of an action for performance or for establishment of the existence of a claim" or the "service of a third-party notice can also suspend the limitations period").

recommencement of the limitation period also apply to claims which are available, for the same reason, either in addition to the claim or instead of the claim."[228]

g. The Civil Code of Argentina recognizes the tolling principle,[229] and provides that the tolling principle applies to "indivisible" interests.[230]

140. Canada cherry-picks from the same civil codes,[231] but ignores that this principle—found in all of the civil codes addressed by the *Renco II* tribunal—benefit WCC as a creditor with the same interest as WMH in pursuing the NAFTA Claims against Canada.

141. In sum, WCC has established that the tolling principle is a general principle of international law. Canada has provided no basis for the Tribunal to disregard a century of case law, as recognized and confirmed by the *Renco II* tribunal. Canada's attempt to avoid application of this general principle also is improper given that the NAFTA expressly incorporates international law.

142. Canada's attempts to displace the tolling principal based on the "withdrawal" of WCC also is improper, both because Canada induced the withdrawal and because WCC's claims were not truly withdrawn in the first place, since the claims were purportedly assigned to WMH and were pursued by WMH on behalf of WCC in *Westmoreland I*, giving Canada every incentive to preserve evidence relevant to its defense. As explained above, the fact that WMH and WCC are different legal entities also has no bearing on the application of the tolling principle, since courts and civil codes around the world recognize that the tolling principle applies to plaintiffs who represent the same interest as the original plaintiff and seek to assert the same claims. In short, the international tolling principle, which is incorporated into the NAFTA, is applicable to WCC's claims in this arbitration.

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228 Civil Code of Germany, Article 213 (emphasis added), **R-150**.

229 Civil Code of Argentina, Article 2548 **C-112** ("Interruption by request for arbitration. The course of prescription is interrupted by the request for arbitration. The effects of this cause are governed by the provisions for the interruption of prescription by court request, to the extent applicable.") (Free translation, in its original Spanish, it reads: "Interrupción por solicitud de arbitraje. El curso de la prescripción se interrumpe por la solicitud de arbitraje. Los efectos de esta causal se rigen por lo dispuesto para la interrupción de la prescripción por petición judicial, en cuanto sea aplicable.").

230 Civil Code of Argentina, Article 2549 (emphasis added), **C-112** ("The interruption of prescription does not extend in favor or against the interested parties, except in cases of solidary (joint and several) or indivisible obligations." Free translation from its original Spanish, which provides: "Alcance subjetivo. La interrupción de la prescripción no se extiende a favor ni en contra de los interesados, excepto que se trate de obligaciones solidarias o indivisibles.")

231 Reply, ¶ 142 n. 239.

c. The Object and Purpose of the Treaty Supports Adopting the Tolling Principle

143. The VCLT also calls for review of the object and purpose of the relevant instrument. Here, the tolling principle is consistent with the general object and purpose of the NAFTA, including NAFTA Articles 1116 and 1117, in several respects.

144. *First*, the NAFTA provides that its purpose is the creation of "effective procedures for the resolution of disputes."[232] The refusal to recognize the tolling principle in these circumstances would undermine the promise of effective procedures for dispute resolution, since it would deprive investors of any opportunity to meaningfully challenge State measures when their claims are dismissed based on curable procedural technicalities.

145. Recognizing the tolling principle is even more critical in the context of a NAFTA arbitration since the NAFTA requires the investor to waive its claims in domestic courts and other dispute resolution mechanisms. Failure to toll the limitations period when the claim is asserted would all but deprive an investor of the opportunity to seek relief when the claims are dismissed because of a procedural (and correctable) technicality. Under similar facts, the *Renco II* tribunal held that failure to afford the claimant a day in court after correcting a procedural defect would be inconsistent with the purpose of the treaty.[233]

146. Tolling is just as warranted here as it was in *Renco II*, since WCC has not had its NAFTA Claim heard on the merits before *any* tribunal, national or international, and, in fact, WCC continues to hold valid legal claims against Alberta, which it has not asserted as a result of its waiver.[234] If tolling is not applied, WCC would be put in a position where it waived its right to pursue domestic relief—only to lose any ability to request such relief from an international tribunal. In the words of the *Waste Management II* tribunal, that is a result

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232 NAFTA, Art. 102(e).

233 *Renco II*, ¶ 246, **CLA-002** (emphasis added), ("While, contrary to NAFTA, the Treaty does not explicitly mention as one of its objections the creation of effective dispute resolution procedures, there can be no doubt that the Contracting Parties, acting in good faith, must have intended for the Treaty's dispute resolution mechanism to be effective. Applying the above reasoning of the Tribunal in Waste Management, it would seem to run counter to the effectiveness of the system if the Claimant in the present case, after having eventually submitted a valid waiver (without any relevant time having passed for prescription purposes after the conclusion of *Renco I*), is still denied in its request to have its Treaty claim heard on the merits. In the words of the Tribunal in that case, such a situation should be avoided if possible.").

234 If the Tribunal decides to dismiss the present claims despite the earnest attempt to pursue them, WCC then requests an order from this Tribunal confirming that WCC has not effectively waived its right to pursue relief in other venues.

that "should be avoided" as it does not support the broader object and purpose of the treaty.[235]

147. Canada does not dispute that the creation of effective dispute resolution procedures is a central object and purpose of the NAFTA. Canada points out that the NAFTA has other goals too, including, *inter alia*, the elimination of trade barriers, promotion of fair competition, and increasing investment opportunities in the territories of the Parties.[236] None of the additional goals that Canada points to conflict with NAFTA Chapter Eleven's core goal of creating an effective dispute resolution procedure.

148. *Second*, the tolling principle aligns with the specific object and purpose of NAFTA Articles 1116 and 1117. As Canada agrees,[237] the purpose of these limitations provisions is to provide predictability and ensure the availability of reliable evidence. That goal is satisfied when an investor puts a State on notice of a dispute and that dispute is continually prosecuted against the State. In this case, Canada has been aware of WCC's claims since 2018 and is suffering no limitations prejudice as a result of WCC's resubmission of its claims in this arbitration.

149. The tribunal in *Vannessa Ventures v. Venezuela* likewise recognized that the goal of the prescription period is satisfied as long as the State receives notice that it will face international claims involving the investment during the specified limitations period.[238] In that case, the claimant previewed that it had certain investment claims in its request for arbitration, but later submitted new claims after the statute of limitations period. Relying on a provision of the Canada-Venezuela BIT that is substantively identical to NAFTA Articles 1116 and 1117, the tribunal admitted the later claim, on the grounds that the State already had notice of the dispute.[239] Canada does not rebut this precedent.

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235 *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002 (Waste Management II Decision), ¶ 35, **RLA-036**.

236 Reply, n.241.

237 Reply, ¶ 146.

238 Response, ¶ 164 (citing *Vannessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, Aug. 22, 2008, ¶ 3.5.4, **CLA-050**).

239 Response, ¶ 164; *Vannessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, Aug. 22, 2008, ¶ 3.5.4, **CLA-050**.

150. In sum,applying the tolling principle to this case is consistent with the object and purpose of the NAFTA, which is to provide effective dispute resolution mechanism for foreign investors aggrieved by government conduct. Application of the tolling principle also is consistent with the NAFTA limitations period since WCC has diligently prosecuted its claims (whether directly or through WMH) at every stage, while Canada also has been on notice to preserve relevant evidence.

d. The Positions of the NAFTA Parties Also Support the Suspension Principle

151. Article 31(3)(a) of the VCLT requires that the interpretation of a treaty must take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[240] Here, the NAFTA Contracting Parties have endorsed the holding in *Feldman v. United Mexican States*, which confirmed that the statute of limitations may be tolled where a State is put on notice of a dispute. While WCC and Canada agree that the NAFTA Parties support the holding in *Feldman v. United Mexican States*,[241] they disagree on what the tribunal there actually held.

152. In *Feldman*, the tribunal conceded that, while Articles 1116 and 1117 introduce a "clear and rigid limitations period," "an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation."[242] The *Feldman* tribunal went on to acknowledge that a prolonged recognition of the claim by a state constitutes an "exceptional circumstance" that likely would interrupt the running of the limitations period. In its words:

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

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240 VCLT, Article 31(3)(a), **CLA-004**.

241 Canada's Memorial on Jurisdiction, ¶ 98, n. 173.

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

> **which would recognize the existence, and possibly also the amount, of the claim**.[243]

153. The *Feldman* award, on which all three NAFTA Contracting Parties rely in construing Articles 1116(2) and 1117(2), thus confirmed that the limitations period could be suspended by the assertion and acknowledgement of a claim.[244]

154. The Parties disagree about the relevance of the United States' and Mexico's Article 1128 submissions in the *Merrill & Ring Forestry* and *Tennant* cases.[245] Notably, *Merrill & Ring Forestry* and *Tennant* dealt with the date on which the limitations period started to run—not whether the limitations period is suspended during the pendency of an arbitration.[246]

155. The *Renco II* tribunal reviewed a similar non-disputing party submission that Peru submitted for the proposition that the limitations period in the U.S.-Peru FTA was "clear and rigid," but concluded that the relevant limitations provision (which it considered "analogous" to NAFTA Articles 1116(2) and 1117(2)),[247] "does allow for the prescription period to be suspended for the pendency of an arbitration" since any other interpretation would deny due process and undermine the purpose of the treaty.[248] As the *Renco II* tribunal explained:

> To hold otherwise would not only create perverse incentives for a respondent State to elicit grounds for setting aside, it would frustrate a claimant's due process rights: a successful vindication of those rights would be rewarded with a prescribed claim. Such a manifestly unreasonable result—which flies in the face of the object and purpose of the Treaty under Article 31(1) of the VCLT—also

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243 *Id.* ¶ 63 (emphasis added), **RLA-023**.

244 *Merrill & Ring Forestry v. Canada*, ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, April 2, 2009, **R-100** (in which Mexico "expressly endorse[d] the observations of the United States of America in connection with the findings of the arbitral tribunal in Feldman v. United Mexican States.").

245 Canada's Memorial on Jurisdiction ¶ 98, n. 172.

246 *See Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award, Oct. 25, 2022, ¶¶ 271–346 (summarizing the parties', the United States, and Mexico's submissions on the critical date for determining compliance with the three-year statute of limitations), **RLA-012**; *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Investor's Reply Memorial, Dec. 15, 2008, ¶¶ 64–127, **CLA-077**.

247 *Renco II*, ¶ 230, **CLA-002**.

248 *Renco II*, ¶ 233, **CLA-002**.

> confirms the Tribunal's interpretation under Article 32(b) of the VCLT.[249]

156. Canada also cites to NAFTA jurisprudence as supposed authority in its favor, but the cited case law "confirming" that the limitations period is "strict" does not address the issue here–whether the limitations period (even if strict) may be suspended where a claim is timely asserted and then resubmitted to arbitration following dismissal for a curable procedural defect. In *Resolute Forest Products Inc. v. Canada*, the tribunal considered whether the claimant's knowledge of facts suggesting that it was likely to have suffered damages was sufficient to trigger the three-year limitations period.[250] Similarly, in *Grand River v. United States* and *Apotex v. United States*, the tribunals considered the date on which the claimant had actual or constructive knowledge of the breach.[251] *Methanex* is likewise inapposite, since it did not deal with the limitations period at all.[252]

157. As to *Feldman v. United Mexican States*, discussed above, the tribunal specifically recognized an exception to the "strict" limitations period in Article 116(2) where the state is aware of and acknowledges the claim. All three NAFTA Contracting Parties have agreed

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249 *Renco II*, ¶ 233, **CLA-002**.

250 *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, Jan. 30, 2018, ¶¶ 154, 164–179, **RLA-021**.

251 *See, e.g.*, *Apotex Inc. v. The Government of the United States of America,* ICSID Case No. UNCT/10/2), Award on Jurisdiction and Admissibility, June 14, 2013, **RLA-007**, ¶¶ 304–335; **RLA-024**, *Grand River Enterprises Six Nations, Ltd., et al v. United States of America,* UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, ¶ 83. Canada also cites this case in its Memorial on Jurisdiction at ¶ 98, n. 173, along with other cases that are inapposite because the claimants in those cases failed to begin any arbitration proceeding within the three-year window, which makes the circumstances entirely different. For example, in *Grand River v. United States of America*, the claimants submitted their notice of arbitration on March 12, 2004. The tribunal held that the claimant should have known about some of the respondent's alleged treaty breaches and of the resulting loss or damage that the claimant had incurred prior to March 12, 2001, the date of the three-year cutoff for purposes of the limitations provision under NAFTA Articles 1116(2) and 1117(2). The *Grand River* tribunal concluded that those claims were time-barred. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, ¶ 83, **RLA-024**. WCC's circumstances are materially different. WCC and WMH initiated an arbitration within three years of becoming aware of Canada's NAFTA breaches, in compliance with Articles 1116(2) and 1117(2). Therefore, this Tribunal should not place any weight on the manner in which other tribunals, faced with very different facts, characterized the language of those two provisions.

252 Reply, ¶ 136; **R-096**, *Methanex Corp. v. United States* (UNCITRAL) Memorial on Jurisdiction and Admissibility of Respondent United States of America, Nov. 13, 2000, p. 77. As Canada acknowledges in its Reply, in that case, the tribunal did not address the limitations period. There was only one measure that fell outside the limitations period, and the claimant did not bring a claim based on that measure. Reply, ¶ 136; **R-148**, p. 53. So, while the United States argued in its Rejoinder on Jurisdiction and Admissibility that any claims based on that measure should be dismissed, its argument was moot. **R-148**, p. 53. In any event, the United States did not discuss prescription in its Rejoinder, nor was that issue put before the tribunal. *See* **R-148**, p. 52–53.

with the conclusion in *Feldman v. United Mexican States*—a conclusion that also is consistent with *Renco II* and *Vannessa Ventures*.

e. Canada Should Be Estopped From Asserting its Limitations Defense

158. Canada should, in any event, be estopped from asserting its limitations defense, since that defense hinges upon WCC's withdrawal of its 2018 NAFTA Claim in connection with WMH's substitution as claimant to pursue the claims that WCC originally asserted—a withdrawal that Canada insisted upon and presented as a solution to enable the parties to "continue the process, in which they are currently engaged, of appointing a tribunal chairperson."[253]

159. Canada denies that estoppel would prevent it from asserting its limitations defense for the same reasons addressed in Section III.C. above. Most surprisingly, Canada argues that it did not insist on WCC's withdrawal.[254] However, Canada's letter at the time confirms otherwise, as it imposed "*the condition* that Westmoreland Coal Company withdraws the claim that it submitted against Canada." In its words:

> Under the circumstances, and because the Amended NOA appears to meet the formal requirements of an NOI, Canada is prepared to accept the Amended NOA filed on May 13 as Westmoreland Mining Holdings LLC's NOI, **on the condition that Westmoreland Coal Company withdraws the claim that it submitted against Canada on November 19, 2018**. Westmoreland Mining Holdings LLC would then be free to submit its own claim to arbitration 90 days after the May 13 NOI date.[255]

160. Canada made an unambiguous statement that induced WCC to withdraw from the arbitration, upon which WCC relied to its detriment. Canada then made representations to the *Westmoreland I* tribunal that WCC still could pursue its claims, apparently seeking to blunt the apparent unfairness that would result if WCC's claims could never be heard on the merits. Canada thus should be estopped from asserting the limitations defense.

161. Separate and apart from estoppel, Canada also should be precluded from asserting its limitations defense. As explained above, the preclusion doctrine does not require

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253 Letter from Scott Little to Elliot Feldman, July 2, 2019, p. 2, **R-081**.

254 Reply, ¶¶ 23, 29-35.

255 Letter from Scott Little to Elliot Feldman, July 2, 2019, p. 2 (emphasis added), **R-081**.

detrimental reliance—it bars the exact sorts of inconsistent statements as those made by Canada. Canada ultimately convinced the *Westmoreland I* tribunal to decline jurisdiction over WMH's case based on the finding that WCC alone qualified as the covered investor to assert the NAFTA Claim. Canada should not be permitted to represent to the *Westmoreland I* tribunal that "it was open to WCC to continue" its claim,[256] only to change its position after that tribunal found that WCC was the only "investor" who could assert the NAFTA Claim in order to prevent WCC from having its day in court. Notably, civil codes around the world recognize that the tolling principle *also* applies where the defendant acknowledges the existence of a claim pending against it.[257]

162. Canada misconstrues *Renco II* as discarding the equitable principles of estoppel and preclusion.[258] In fact, the *Renco I* and *Renco II* tribunals both acknowledged that a respondent state may be precluded from disputing arbitration if it engaged in bad faith conduct.

163. *First*, the *Renco I* tribunal expressly noted the "*possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred under Article 10.18(1)*" since "Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco's claims were now time-barred under Article 10.18(1)."[259] The *Renco I* tribunal went on to admonish Peru that, if it raised the limitations defense in the subsequent arbitration, then its otherwise legitimate concerns about the waiver letter would become an abuse of rights. In its words:

> While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco's submission that Peru's conduct with respect to its late raising of the waiver objection constitutes an abuse of rights. **In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article**

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256 Canada's Reply Memorial on Jurisdiction, ¶ 112; *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Reply Memorial on Jurisdiction, April 9, 2021, ¶ 12, **C-047**.

257 *See, e.g.*, Civil Code of Spain, Article 1973, **C-111** ("La prescripción de las acciones se interrumpe por su ejercicio ante los Tribunales, por reclamación extrajudicial del acreedor y por cualquier acto de reconocimiento de la deuda por el deudor."); Civil Code of Peru, Article 1996, **R-152** (Se interrumpe la prescripción por: (1) "Reconocimiento de la obligación.").

258 Reply, ¶¶ 139–142.

259 *See Renco I*, Partial Award on Jurisdiction, ¶ 184–188, **RLA-030**.

10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.[260]

164. The only reason the *Renco I* tribunal did not find that Peru had violated these equitable principles was because it found on the facts that Peru acted in good faith in objecting to the defective waiver. In its words, Peru was not "seeking to evade its duty to arbitrate Renco's claims under the Treaty," but rather was seeking to "ensure that its waiver rights are respected or that the waiver provision's objectives are served."[261] However, the *Renco I* tribunal clearly warned that, were Peru to raise its limitations defense when Renco re-filed its claim, that conduct would constitute an abuse of rights that would justify tolling of the statute of limitations.

165. The *Renco II* tribunal, for its part, held that, since international law provided for the tolling principle, "the Tribunal *d[id] not need* to pronounce itself on whether, based on the Respondent's behavior in *Renco I*, the Respondent would have been precluded from objecting to the Claimant's claims being prescribed."[262]

166. Applying the principle announced in *Renco I* here, Canada's challenge to the timeliness of WCC's claim constitutes an abuse of rights, as Canada is undoubtedly "seeking to evade its duty to arbitrate [WCC]'s claims under the Treaty."[263] While Canada argues that WCC has not "pointed to any authority where a tribunal has found that a respondent State's objection with respect to the limitation period constitutes an abuse of rights,"[264] the *Renco I* tribunal clearly contemplated this result, and it was simply unnecessary for the *Renco II* tribunal to consider that point since it found that the FTA and international law supported application of the tolling principle. Thus, while it may not be necessary for this Tribunal to find that Canada engaged in an abuse of rights, the abuse of rights principle provides an independent basis upon which to find that WCC's claims are timely and should be heard on the merits.

167. Finally, Canada's argument that "the Tribunal cannot, as a matter of law, exercise jurisdiction where it does not otherwise exist based on an alleged abuse of right" should be

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260 *Renco I* Partial Award, ¶ 188 (emphasis added), **RLA-030**.

261 *Renco I* Partial Award, ¶¶ 184–188, **RLA-030**.

262 *Renco II* Award, ¶ 251, **CLA-002**.

263 *Renco I* Award, ¶¶ 184–188, **RLA-030**.

264 Reply, ¶ 159.

dismissed as inconsistent with international precedent.[265] In support of this assertion, Canada cites three cases: *Renee Rose Levy v. Peru*, *Philip Morris v. Australia*, and *Pac Rim Cayman v. El Salvador*. None of those tribunals addressed the question of whether a respondent state's abuse of rights is relevant to jurisdiction.[266]

168. In sum, the Tribunal should find that WCC's claim is timely because the statute of limitations tolled during the pendency of the *Westmoreland I* arbitration, meaning that less than three years elapsed between the date of the measures and the commencement of this arbitration. The tolling principle is supported by the plain language of the NAFTA, which incorporates international law, which calls for tolling where a respondent State has been put on notice of a claim. Tolling the statute of limitations is further supported by the NAFTA's object and purpose of promoting effective dispute resolution. And in any event, Canada must be estopped or precluded from asserting its limitations defense because it induced WCC to withdraw from the first arbitration only to later acknowledge that WCC was the proper party to bring the claim. It also is an abuse of rights for Canada to prevent WCC from bringing this claim now, after causing it to withdraw from the first arbitration.

C. Canada's Waiver Objections Are Meritless and Should Be Rejected.

169. Canada continues wrongly to insist that WCC has not met the waiver requirement in NAFTA Article 1121. *First*, Canada argues that WCC is barred from pursuing its NAFTA Claim because those claims were waived by WMH in *Westmoreland I*. That argument ignores the clear precedent established by many tribunals evaluating re-submitted cases, and in any event, would not prevent WCC from asserting a claim on its own behalf. *Second*, Canada argues that, even if the claims were not waived by WMH, then WCC did not adequately waive its claims in this arbitration. However, the waivers that WCC

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265 Reply, ¶ 159.

266 In *Rene Rose Levy*, the tribunal considered the distinction between an abuse of rights objection and a ratione temporis objection where there was a disputed corporate restructuring that would have impacted jurisdiction. *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, Jan. 9 2015, **RLA-079**, ¶¶ 182–183. In *Philip Morris Asia Limited v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, Dec. 17, 2015, the tribunal likewise considered whether a corporate restructuring constituted an abuse of rights such that the tribunal lacked jurisdiction to hear the dispute. **RLA-080**, ¶ 538–554 ("Although it is sometimes said that an abuse of right might also exist in the case of restructuring in respect of an existing dispute, if the dispute already exists, then a tribunal would normally lack jurisdiction *ratione temporis*."). In *Pac Rim Cayman LlC. v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, June 1, 2012, the tribunal considered the question of jurisdiction ratione temporis and abuse of rights to be intertwined. **RLA-081**, ¶ 2.107.

submitted in this arbitration are effective because their text perfectly matches the text of the NAFTA waiver provision, and accompanied the notice of arbitration. Pure to form, Canada invents technicalities that contradict modern jurisprudence, seeking to avoid facing any review of its conduct. All of Canada's waiver objections should be rejected.

1. WMH's Waiver Does Not Prevent WCC From Pursuing this Arbitration

170. Canada argues that WCC is not entitled to bring a claim on behalf of Prairie because, Canada contends, WMH supposedly waived all rights to bring a claim on behalf of Prairie in the *Westmoreland I* arbitration.[267] Canada's argument is baseless for the following three reasons.

171. *First*, the plain language of Article 1121 only requires the investor to waive their rights with respect to proceedings before national administrative tribunals, national courts, and dispute resolution procedures other than the procedure selected by the investor. The provision provides, in relevant part, that the investor must:

> "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, **or other dispute settlement procedures**, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

172. The waiver of rights to "*other* dispute settlement procedures" means the investor must waive their rights to use procedures that are *distinct* from the investment arbitration procedures selected. Otherwise, the waiver would immediately prevent the investor from pursuing relief under the NAFTA (which makes no sense). WMH's waiver letters therefore did not waive WCC's right to pursue relief under the 1976 UNCITRAL Rules, the procedure selected by both WMH and WCC.

173. Canada retorts that the text of Article 1121 carves out certain exceptions, such as for proceedings for "injunctive, declaratory or other extraordinary relief, not involving the payment of damages,"[268] but does not carve out an exception for claims dismissed for want

[267] Reply, ¶ 187.

[268] Reply, ¶ 191.

of jurisdiction. However, the plain language of Article 1121 does carve out proceedings initiated under the same institutional rules, as such proceedings do not constitute relief under "other dispute settlement procedures." Canada points to nothing in the NAFTA that bars pursuit of claims resubmitted under the same institutional rules.

174. *Second*, Canada's waiver objection contradicts the precedent on re-submitted claims, and, if accepted, would effectively bar *all resubmitted claims* under investment agreements containing a waiver requirement.[269] If Canada's position were right, then Waste Management and Renco would not have been permitted to submit their claims to arbitration a second time, since both the applicable trade agreements contained waiver provisions. In fact, all prior tribunals that have evaluated this question *have* allowed investors to resubmit their claims following dismissal of the first claim on jurisdictional grounds. In *Waste Management II*, the NAFTA tribunal considered whether Article 1121 allowed only a single claim for arbitration ("one bite at the apple"), holding that:

> An investor in the position of the claimant, who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. **The claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible**.
>
> […] In the Tribunal's view, neither the express terms of NAFTA nor the applicable rules of international law preclude a claimant who has failed to comply with the prerequisites for submission to arbitration under Article 1121(1) from commencing arbitration a second time in compliance with those prerequisites.[270]

175. Canada tries to sidestep *Waste Management II* on the basis that the first claim was dismissed due to a defective waiver letter.[271] The basis for dismissal, however, has nothing to do with the general principle that an investor should have "its NAFTA claim heard on

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269 WCC accepts that this issue has not been decided on many occasions, but, contrary to Canada's arguments, that is irrelevant to the outcome. As the *Murphy* tribunal noted, this was a "case of first impression with an unprecedented factual matrix." *Murphy Exploration & Production Company International v. The Republic of Ecuador,* PCA Case No. 2012-16, Partial Award on Jurisdiction, Nov. 13, 2013, ¶ 166, **RLA-087**.

270 *Waste Management II* Decision, ¶ 27, 35, 37 (emphasis added)**RLA-036**.

271 Reply, ¶ 196, 198.

the merits".[272] The *Waste Management II* tribunal expressly extended this principle to any "jurisdictional flaw [that] can be corrected," which "***applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies***".[273] Here, Prairie's claims were dismissed on curable grounds, which were remedied when WCC filed the present arbitration. In these circumstances, the Tribunal should not dismiss the claim due to a purported earlier waiver of Prairie's claim, since Prairie's claim has not yet been litigated on the merits or forfeited.

176. Canada also misconstrues *Waste Management II* as standing for the principle that "the concern of the NAFTA [P]arties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings."[274] In doing so, Canada takes this quote out of context by omitting the *very next clarifying sentence which plainly supports WCC's position*. The *Waste Management II* tribunal held as follows:

> No doubt the concern of the NAFTA parties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings. **But where the first proceeding produces no decision on the merits because of a jurisdictional barrier, there is nothing in Chapter 11 which expressly or impliedly prohibits a second proceeding brought after the jurisdictional barrier has been removed**.[275]

177. Other tribunals have recognized that a waiver does not bar resubmission of an investment arbitration where investors have corrected other types of procedural defects. For example, the *Murphy II v. Ecuador* tribunal evaluated the impact of a fork-in-the-road provision on a resubmitted a claim and recognized the importance of allowing the investor to pursue its investment claims, particularly given the waiver of domestic relief.[276] There, the tribunal in the first arbitration (constituted pursuant to the ICSID Rules) found it lacked jurisdiction because Murphy had failed to comply with the cooling-off period. When Murphy resubmitted its claim to arbitration under the UNCITRAL Rules (after Ecuador denounced

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272 *See Waste Management II* Decision, ¶ 27, 35, 37, **RLA-036**.

273 *Id.* ¶ 36 (emphasis added), **RLA-036**.

274 Reply, ¶ 195; **RLA-036**, *Waste Management II* – Decision, ¶ 27.

275 *Waste Management II,* ¶ 27 (emphasis added), **RLA-036**.

276 *See generally*, *Murphy Exploration & Production Company International v. The Republic of Ecuador,* PCA Case No. 2012-16, Partial Award on Jurisdiction, Nov. 13, 2013 (*Murphy II*), ¶¶ 166–180, **RLA-087**.

the ICSID Convention), Ecuador argued that the claim was barred based on the fork-in-the-road provision in the U.S.-Ecuador BIT.

178. In dismissing this objection, the *Murphy II* tribunal explained that, in accepting the State's offer to arbitrate investment disputes, the investor effectively foreclosed its opportunity to obtain relief in other fora such as the domestic courts.[277] The *Murphy II* tribunal permitted the investor to re-submit its claim to arbitration (under different arbitration rules) because it found that the investor already perfected the consent to arbitrate.[278] Moreover, the tribunal noted that this conclusion found support in the object and purpose of the treaty, one of which was "to give the investor access to a meaningful arbitration."[279] Here, too, WCC is entitled to submit Prairie's claim to arbitration despite WMH's earlier waiver, particularly because the NAFTA required WCC to waive its rights in other fora, including the domestic courts.

179. Canada does not cite *any* jurisprudence to support its position that a NAFTA waiver forecloses the resubmission of a claim, which not only contradicts the plain language of the NAFTA, but also basic principles of fairness under international law.[280] Instead, Canada invokes the unfairness that would result if a state had to face the same dispute twice.[281] Yet, Canada proceeds from a false premise, since it has not yet had to face WCC's

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277 *Murphy II*, Partial Award on Jurisdiction, ¶¶ 161-163, **RLA-087**.

278 The tribunal did so because it held that the treaty did not contain any express limitation on the ability of the claimant to pursue arbitration in the available fora, namely, UNCITRAL, ICSID arbitration, ICSID Additional Facility, or other arbitration procedures. *See* generally, Decision on Jurisdiction, ¶¶ 166–180. *See id.*, ¶ 178 ("The Tribunal considers that the presence of the phrase "under one of the following alternatives" in Article VI(2) and its corresponding absence in Article VI(3)(a) are meaningful. The inclusion of this language in Article VI(2) puts its operation as a fork-in-the-road provision beyond doubt. The fact that this language is absent from Article VI(3)(a) satisfies the Tribunal that this provision does not operate as a fork-in-the-road.").

279 *Murphy II*, Partial Award on Jurisdiction, ¶ 188, **RLA-087**.

280 Canada cites to *Renco I*, *Grammercy v. Peru*, and *DIBC – Award on Jurisdiction* to support its position that "there is no caveat in Article 1121 that allows an enterprise to have a second claim submitted on its behalf under Article 1117 if its first claim was dismissed for want of jurisdiction." Reply, ¶ 191. None of those decisions address whether a claim may be resubmitted in arbitration once a jurisdictional defect is cured. In *Renco I*, the tribunal did not address this point -- Renco and Peru "both agree[d] that the Tribunal should refrain from making a determination as to whether Renco's waiver would in fact prevent Renco from initiating a claim in a subsequent court or tribunal" and the Tribunal agreed. **RLA-030**, ¶ 118. In *Gramercy*, the tribunal concluded only that "once the investor has taken the decision to submit to international arbitration, the rule prevents *a return to domestic court*," and said nothing about resubmitting an investment arbitration. **CLA-067**, ¶ 482 (emphasis added). Likewise, in *DIBC*, the tribunal considered whether resubmitted waivers were effective since they continued to carve out a domestic litigation that had previously been found to contradict the waiver requirement—not whether a claim can be resubmitted. **RLA-029**, ¶ 334.

281 Reply, ¶ 194.

claims on the merits even once. Fairness dictates that an investor be allowed to reassert its claims when they have been dismissed based on curable procedural technicalities. Investment disputes otherwise could be won on sheer gamesmanship rather than on the merits.

180. *Third*, even assuming *arguendo* that a waiver letter can bar resubmission of a claim, WMH was not capable of waiving Prairie's claims in this arbitration, since WMH did not have the requisite ownership or control when the measures were imposed by the host state. WMH only could waive Prairie's claims *for the period during which it owned Prairie*, *i.e.*, after the acquisition in bankruptcy on March 15, 2019.[282] Canada argues that it was entitled to "accept" such a defective waiver letter, thereby rendering it effective,[283] but points to nothing in support of this novel argument.

181. In sum, WMH's waiver of rights on behalf of Prairie in the first arbitration does not preclude WCC from bringing a claim on Prairie's behalf in this arbitration. The NAFTA only requires the investor to waive its rights to pursue *other* dispute resolution mechanisms. Investment treaty jurisprudence also confirms that investors may resubmit their claims where the first arbitration is dismissed on jurisdictional grounds. And in any event, WMH's waiver could not deprive this Tribunal of jurisdiction to hear this claim, since WCC can still pursue a claim on its own behalf under NAFTA Article 1116.

2. WCC Submitted Valid Waivers With Its Notice of Arbitration in the Present Proceedings

182. Canada continues to advance its baseless argument that WCC failed to file valid waiver letters in the present arbitration. As explained in its Response, WCC complied with the NAFTA waiver requirements because its Notice of Arbitration was "accompanied by" valid waiver letters that fully and unconditionally waive its rights to pursue relief in other fora, in accordance with NAFTA Article 1121 and USMCA Section 14.D.5.[284]

183. Canada does not dispute the breadth of the waiver letters submitted by WCC in this arbitration—*i.e.*, that the waiver letters carved out any individual claims or was incomplete

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

283 Reply, ¶ 201.

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

in some respect. Rather, Canada's objection is that the waiver letters were previously "filed in a separate and distinct claim."[285] That does not matter, however, since WCC definitively waived all of its rights in the waiver letters, which it attached to the Notice of Arbitration *in this arbitration*. Canada does not explain how the prior submission of these waiver letters would render those letters ineffective.

184. It was entirely proper for WCC to rely on its earlier waiver letters, since there was nothing further for WCC to waive after it provided the 2018 waiver letters, since the earlier waiver letters had immediate effect and continued in perpetuity. Canada cannot dispute this point, since it previously argued that (*i*) the waiver takes effect on the date it is submitted, and (*ii*) "[t]here is no end date to the commitment not to initiate such proceedings," since the "waiver continues to be in force following the end of the arbitral proceedings,"[286] which is consistent with the jurisprudence on this issue.[287] WCC does not understand Canada's position, since Canada clearly knows that the waiver letters remained effective since WCC submitted them in the prior arbitration. Canada does not allege any plausible threat of double jeopardy, which is what a waiver letter is designed to prevent.

185. Canada's complaints about re-using the earlier waiver letter also are disingenuous because they contradict the position Canada adopted in the *Westmoreland I* arbitration. In submitting the 2019 Amended Notice of Arbitration and the Second Amended Notice of Arbitration, the claimants submitted the *same* letters that WCC previously submitted, which Canada accepted without objection.[288] Canada cannot accept such practice in one arbitration, only to argue that such practice is unacceptable where convenient to its defense. Once again, such contradictory conduct amounts to blowing hot and cold—which is

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arbitration under Article 14.D.3.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers." *See* **C-044**.

285 Reply, ¶ 175.

286 Canada's Memorial on Jurisdiction, ¶ 113, 116.

287 *See* Canada's Memorial on Jurisdiction, ¶ 113 n. 197 (citing *Renco – Partial Award*, ¶¶ 78-83, **RLA-030**; *EnCana Corporation v. Republic of Ecuador (UNCITRAL) Partial Award on Jurisdiction*, Feb. 27, 2004, ¶ 17, **RLA-033**; *Detroit International Bridge Company v. Government of Canada (UNCITRAL) Reply Memorial On Jurisdiction and Admissibility*, Dec. 6, 2013, ¶ 70, **R-101**).

288 *See* Response, ¶ 211; Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, Exhibit 1 at p. 35, **C-055**; Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement on Behalf of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC," July 23, 2019, p. 43, **R-084** (submitting 2018 Prairie waiver letter).

precluded by international law. Canada's response, that it is "precisely Canada's prerogative" to "'blow hot and cold'", betrays its lack of good faith in advancing this position.[289]

186. Canada next argues that the individuals who signed the waiver letters no longer have authority to waive company rights. Whether those individuals have such authority today is beside the point. All that matters is that the two individuals who signed the waiver letters had authority to do so when they signed those waivers.[290] Moreover, their authority to sign the waiver letters is irrelevant since there is no express requirement under the NAFTA that the waiver letters be contained in a separate, signed letter. Thus, to the extent it is relevant that one of the individuals signing the waiver letter left the company prior to submission to arbitration is inconsequential for purposes of Article 1121.

187. In addition to the side letter that WCC provided in this arbitration, WCC provided a *second* waiver in the present arbitration when it repeated the same waiver language within its Notice of Arbitration *in this arbitration*:

> Specifically, Westmoreland Coal Company and Prairie have waived their rights to initiate or continue before any administrative tribunal or court under the laws of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of Canada (and its Province, Alberta), that are alleged to be a breach referred to in Articles 1116 and 1117, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada. Westmoreland also has executed a power of attorney authorizing King & Spalding LLP to act on its behalf in this arbitration.

Thus, Canada benefitted from two waivers when it received the Notice of Arbitration in this arbitration—*first*, the waiver letter reflecting the language in Article 1121, and *second*, the waiver language contained in the Notice of Arbitration.

188. Canada faults WCC for failing to accept its offer to allow WCC to "cure the defect" in its waiver letter.[291] WCC did not accept that offer because its previous waiver letter complies

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289 Reply, ¶ 201.

290 Joe Micheletti, who signed the waiver letter on behalf of Prairie retired from Prairie on May 15, 2023, and so still had the authority to waive Prairie's legal rights on Oct. 14, 2022 when WCC filed its Notice of Arbitration. Michael Hutchinson signed the waiver letter on behalf of WCC when WCC emerged from bankruptcy.

291 Reply, ¶ 177.

with Article 1121 and because WCC suspected that Canada, consistent with its prior conduct, would wrongly construe WCC's acceptance as an admission that its previous waiver letter was no longer effective. In any event, Clamant stands by its position that it need not file new waiver letters. However, WCC is prepared to do so today if Canada drops its objection, in the interest of averting pointless procedural disputes.

189. Canada's remaining formalistic arguments likewise are insufficient to deprive the Tribunal of jurisdiction to hear the present case, as confirmed by a long line of precedent, including *International Thunderbird Gaming v. Mexico*,[292] *B-Mex v. Mexico*,[293] *Ethyl v. Canada*,[294] and *Pope & Talbot v. Canada*.[295] Canada seeks to distinguish these cases on the basis that each of them dealt with a claimant that filed a belated waiver letter. Canada does not explain why this should lead to a different result. In fact, the filing of a *late* waiver letter is far more prejudicial to a state since it creates the risk of double jeopardy until the waiver letter is filed. Meanwhile, WCC always was bound by the terms of its waiver letters, which it re-submitted in this arbitration, thereby avoiding any risk of double jeopardy to Canada. Much like in *Thunderbird*, "[t]he issue at hand is therefore not an actual failure to file waivers for [certain entities]."[296]

190. Canada replies that the Tribunal should ignore the clear holding in *Thunderbird* and instead rely on the "views of the three NAFTA Parties," including the defensive positions adopted by NAFTA Parties in which they appeared as the respondent State.[297] In *Waste Management*, Canada argued that the waiver requirement must be strictly enforced, since "real prejudice" could result from failure to provide a proper waiver.[298] However, this does

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292 *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Arbitral Award, Jan. 26, 2006, **RLA-037**.

293 *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, July 19, 2019, ¶ 60, **RLA-046** ("the requirements of Article 1121(3) as to the manner in which [claimant's consent] is to be conveyed to the respondent do not bear on the Tribunal's jurisdiction. Rather, failure to meet those requirements may affect the claim's admissibility and be cured.").

294 *Ethyl Corporation v. Canada*, Award on Jurisdiction, June 24, 1998, **CLA-064**.

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

296 *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Arbitral Award, Jan. 26, 2006, ¶ 116, **RLA-037**; Reply, ¶ 175.

297 Reply, n. 322 (citing, *inter alia*, **R-106** and **R-108**).

298 *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Submission of the Government of Canada, p. 2, **R-107**.

not address the issue at hand since here there was no failure to file waiver letters—or even complete waiver letters—for WCC or its enterprise. WCC and Prairie have fully waived their rights to pursue relief under all other dispute resolution mechanisms. Thus, the concerns expressed by Canada in *Waste Management* are irrelevant. The same is true of the United States' position in *KBR v. United Mexican States*, as that waiver letter was defective on its face.[299] In any event, the positions adopted by State parties in the context of defending an arbitration cannot be considered evidence of any party agreement regarding the interpretation of a treaty,[300] since States may, as the parties to the treaty, assert a concordant interpretation that benefits them as litigants against investors, and it would "appear[] to be contrary to due process, specifically contrary to the principle of independence and impartiality of justice, which includes the principle that no one can be the judge of its own cause."[301]

191. In sum, WCC and Prairie submitted valid waivers in the present proceedings which clearly conveyed WCC's consent to arbitrate and agreement to waive its right to recourse in all other fora, as required by Article 1121(1). Canada does not dispute that waiver letters met the requirements of Article 1121(1), and its only arguments as to the deficiency of these waivers are contradicted by a long line of arbitral precedent. As such, Canada's formalistic objections to sufficiency of the waiver letters should be rejected.

D. WCC Has Pled a Prima Facie Damages Claim

192. Canada argues—without any basis—that the present claim is one for reflective loss, *i.e.*, involves a claim for harm to the enterprise's rights or assets that led indirectly to economic losses for the investor.[302] Canada is incorrect for at least three reasons.

193. *First*, WCC's claims do not involve reflective loss because the challenged measures culminated in the total destruction of WCC's investment. Canada argues that WCC "fails

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299 *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the United States of America, **R-109**.

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

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

302 Response, Section IV.B.

to specify how the challenged measures 'destroyed' its shareholding in Prairie" since it continued to hold shares in Prairie after the measures.[303] However, despite holding shares in Prairie following the measures, WCC had significant write-offs on its own books after emerging from the bankruptcy.

194. *Second*, Canada argues that Articles 1116(1) and 1117(1) "constitute strictly separate standing provisions that address discrete, non-overlapping types of injury,"[304] and "permitting claims for reflective loss would render Article 1117(1) ineffective."[305] Canada seriously misconstrues the mechanics of Articles 1116(1) and 1117(1).

195. As the plain text of the NAFTA makes clear, Article 1116 permits "claim[s] by an investor of a party ***on its own behalf***," while Article 1117 permits "claim[s] by an investor of a party ***on behalf of an enterprise***." Thus, unlike most bilateral investment treaties, the NAFTA allows a controlling investor to claim for the *entire* enterprise's losses—even if the shareholders are not all present in that arbitration. However, permitting an investor to *also* bring Article 1116 claims for damage *it* incurs as a result of its ownership in an affected enterprise does not render "Article 1117(1) ineffective." Rather, it ensures that a shareholder or other investor is able to assert its claims, even if it is not qualified to bring a claim on behalf of the entire enterprise. While the existence of Article 1116 and 1117 can create a risk of double-recovery, Article 1117 addresses that by requiring that any Article 1116 and 1117 claims arising out of the same events be consolidated before the same tribunal.[306] Thus, the NAFTA Parties clearly contemplated that investors could pursue relief on behalf of a shareholder and the enterprise for the very same measures.

196. *Third*, even if WCC were claiming reflective loss under the NAFTA, the claim still would be permissible. The ICJ's rulings in *Barcelona Traction* and *Diallo* are irrelevant because they concerned diplomatic protection for shareholders under customary international law. As WCC explained, multiple tribunals (including the ICJ in *Barcelona Traction* and *Diallo*) have held that customary international law on this point is only relevant if there is

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303 Reply, ¶ 244.

304 Reply, ¶ 218.

305 Reply, ¶ 220.

306 NAFTA Article 1117(1), **C-107**. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, **C-107**.

no applicable treaty. Decades of NAFTA tribunals thus have dismissed the reflective loss defense, including, *inter alia*, the tribunals in *Pope & Talbot v Canada*,[307] *S.D. Myers v. Canada,*[308] *GAMI v. Mexico*,[309] *UPS v. Canada*.[310] Rather than engage with these cases, Canada argues, without support, that "NAFTA Chapter Eleven does not displace" the reflective loss principles announced in the ICJ decisions.[311]

197. Canada cites one NAFTA decision that it claims dismissed the reflective loss defense, *Mondev v. United States*,[312] but it misrepresents that tribunal's finding. Specifically, Canada misconstrues the tribunal's conclusion that, "[h]aving regard to the distinctions drawn between claims brought under Articles 1116 and 1117, *a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor*" as somehow suggesting that claims for reflective loss are impermissible.[313] The *Mondev* Award means exactly what it says, which is that damages for claims brought pursuant to Article 1117 should be paid to the *enterprise* rather than the shareholder. That is quite different than finding that a shareholder cannot recover any of its *own* damages simply because it invested in an enterprise. That would render NAFTA Article 1116 meaningless. In fact, Canada's interpretation would deprive minority

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

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

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

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

311 Reply, ¶ 223.

312 *Mondev v. U.S.* Award, ¶ 84, **CLA-005** (acknowledging that Mondev International Ltd. could claim for losses caused by the City of Boston to its subsidiary under Article 1116).

313 Reply, ¶ 222 (citing *Mondev* Award, ¶ 86, **CLA-005**).

shareholders from obtaining any relief pursuant to NAFTA unless they could convince the majority shareholder to lodge a claim on behalf of the enterprise. Clearly this is not what the Contracting Parties intended in providing for relief under both Articles 1116 and 1117.

198. In the passage of *Mondev* that Canada cites, the tribunal did *not* suggest that reflective loss principles would prevent the claimant from recovering. On the contrary, the tribunal emphasized that, in the future, claimants should consider submitting claims under *both* Articles 1116 and 1117 in order to ensure recovery on behalf of the investor as well as the enterprise:

> Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the respondent State or third parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved . . . Thus the Tribunal would have been prepared, if necessary, to treat Mondev's claim as brought in the alternative under Article 1117. In the event, the matter does not have to be decided, since the case can be resolved on the basis of Claimant's standing under Article 1116. **But it is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative**.[314]

199. The *Mondev* tribunal also suggested that, even though Mondev failed to assert an Article 1117 claim for damages on behalf of the entire enterprise, it would be prepared to allow Mondev to recover all of those damages "most simply by treating such a claim as in truth brought under Article 1117."[315] That is, the *Mondev* tribunal expressed the need to fashion relief in a manner that would provide complete recovery to the affected claimant—not to limit recovery based on artificial constraints.

200. Canada has unsuccessfully asserted the reflective loss defense in other arbitrations and thus should know that it is unmeritorious. For example, in *UPS v. Canada*, Canada argued that

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314 *Mondev v. U.S.* Award, ¶ 86 (emphasis added), **CLA-005**.

315 *Id.*

the tribunal lacked jurisdiction because "any harm flowing from the conduct complained of primarily affects UPS Canada rather than UPS," *i.e.*, the losses were reflective in nature.[316] The *UPS* tribunal rejected Canada's objections, finding that the distinction between claiming under article 1116 and 1117 was "an almost entirely formal one, without any significant implication for the substance or the rights of the parties" since UPS is the sole owner of UPS Canada.[317] As such, the tribunal held that UPS "is entitled to file a claim for its losses, including losses incurred by UPS Canada."[318] Here, too, WCC is entitled to file a claim for losses incurred by Prairie, as at the time of the measures, WCC was the sole owner of Prairie.

201. Finally, Canada relies heavily on the damages award in *Bilcon v. Canada* to support its reflective loss argument. However, the *Bilcon* tribunal (which did not dismiss the claim for want of jurisdiction) held that affected the investors were entitled to bring their own claim for damages suffered, even though the investment was directed through an enterprise. Specifically, the *Bilcon* tribunal held that the investors (who committed their own capital to the project) lost the opportunity to invest in the mines and had engaged directly with Canada in the permitting process.[319] The same principles apply here, since WCC engaged directly with Canada regarding the mining process, with the goal of WCC expanding its operations into Canada in order to build synergies with its existing operations in the United States. Thus, WCC itself lost significant opportunities, in addition to losses sustained due to its investment in Prairie.

202. In sum, Canada's reflective loss arguments are meritless and should be rejected. As both the text of the treaty and investment treaty jurisprudence confirms, the NAFTA expressly contemplates claims for reflective loss. Even if it did not, WCC is not bringing a claim for reflective loss but rather for the damage it suffered from the destruction of its shareholding investments in Prairie.

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316 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, ¶ 32, **CLA-045**.

317 *Id.* at ¶ 35.

318 *Id.* at ¶ 35.

319 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v. Government of Canada* (UNCITRAL) Award on Damages, Jan. 10, 2019, ¶¶ 392–96, **RLA-040**.

V. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW SUPPORT HAVING PRAIRIE'S CLAIM HEARD ON THE MERITS

203. Finally, while WCC has asserted a recognizable claim that complies with the USMCA legacy provision and the NAFTA, fundamental principles of international law additionally support having WCC's and Prairie's claims heard on the merits.

204. Under fundamental principles of international law, WCC should not be barred from bringing a claim until its claim have been heard on the merits. Multiple tribunals have recognized this principle, including *Waste Management II*, which held:

> **Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the Claimant [] recommencing its action. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies**. As the International Court said in the Barcelona Traction case: It has been argued that the first set of proceedings 'exhausted' the Treaty processes in regard to the particular matters of complaint, the subject of those proceedings, and that the jurisdiction of the Court having once been invoked, and the Court having been duly seised in respect of them, the Treaty cannot be invoked a second time in order to seise the Court of the same complaints. **As against this, it can be said that the Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted to judgment, or discontinued in circumstances involving its final renunciation** – neither of which constitutes the position here.[320]

205. WCC has not yet been accorded its treaty rights under the NAFTA, as it has not received a decision on the merits of its claims. Moreover, since WCC irrevocably renounced all other avenues for relief in submitting its waiver, denying its right to assert its claim in this arbitration would mean that WCC cannot bring its claim before any tribunal, whether domestic or international. To do so would defeat "the underlying purpose of the arbitration provisions in Chapter 11," which is to "create effective procedures [] for the resolution of disputes."[321]

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[320] *Waste Management II* Decision, ¶ 36 (emphasis added), **RLA-036**.

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

206. For all of the above reasons, and those set out in WCC's Responses, Canada's jurisdictional objections are meritless and should be rejected. WCC has shown that it holds legacy investments under the NAFTA, having owned its investments at the relevant date, *i.e.*, at the time of the measures. Canada also is estopped from arguing otherwise given its conduct in the *Westmoreland I* arbitration. Moreover, the Tribunal has jurisdiction under NAFTA Articles 1116 and 1117, since WCC had the requisite ownership and control over Prairie at the time of the challenged measures and because application of the tolling principle under international law establishes the timeliness of WCC's claims. Finally, WCC submitted valid waivers in this arbitration, and set forth a *prima facie* damages claim. There is thus no barrier to jurisdiction in this case. The Tribunal should hear WCC's claim on the merits.

VI. REQUEST FOR RELIEF

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

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

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

iii. Granting any other relief that it deems appropriate.

March 13, 2024

Respectfully submitted,

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