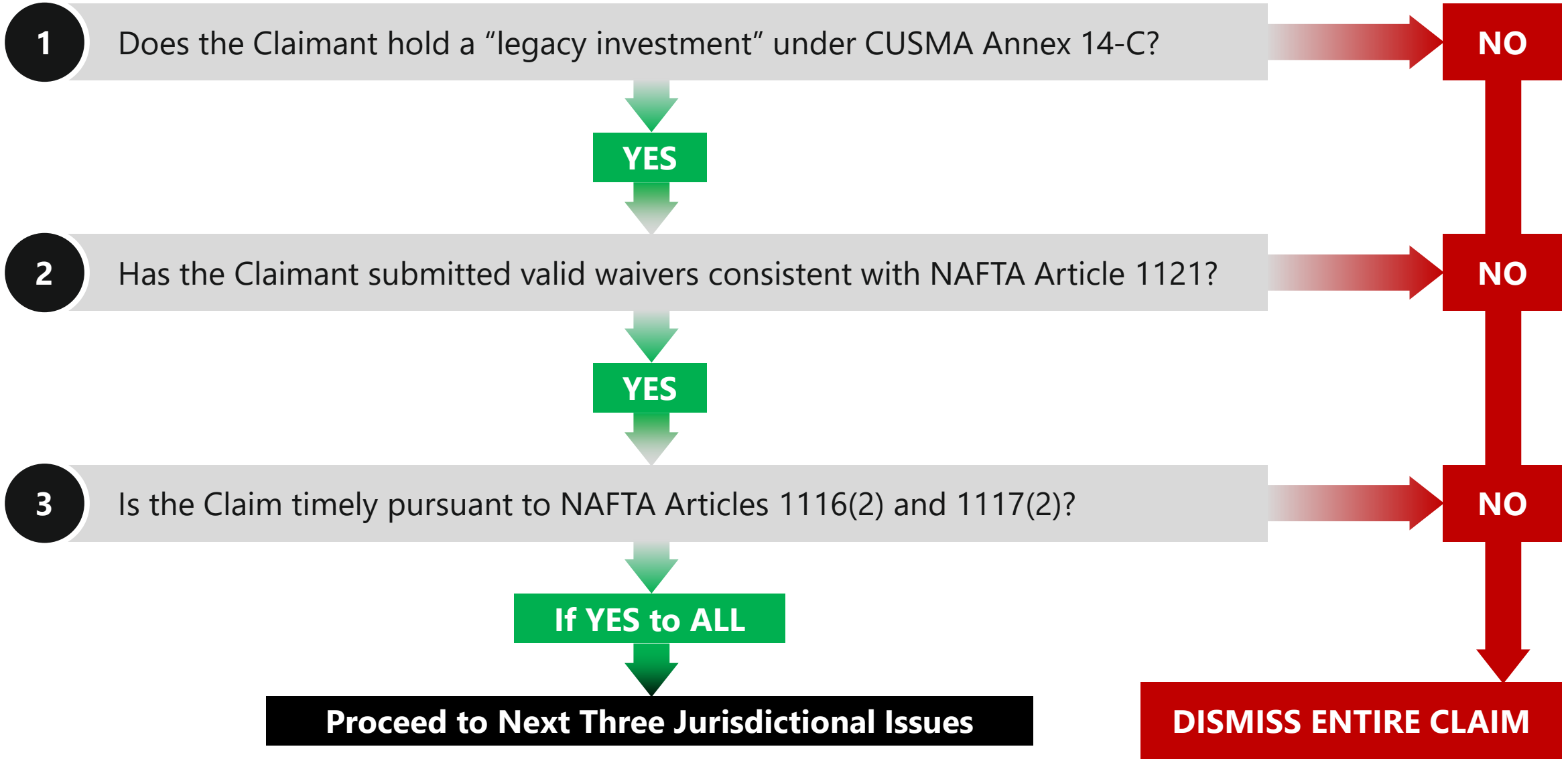
Westmoreland Coal Company v. Government of Canada

ICSID Case No. UNCT/23/2

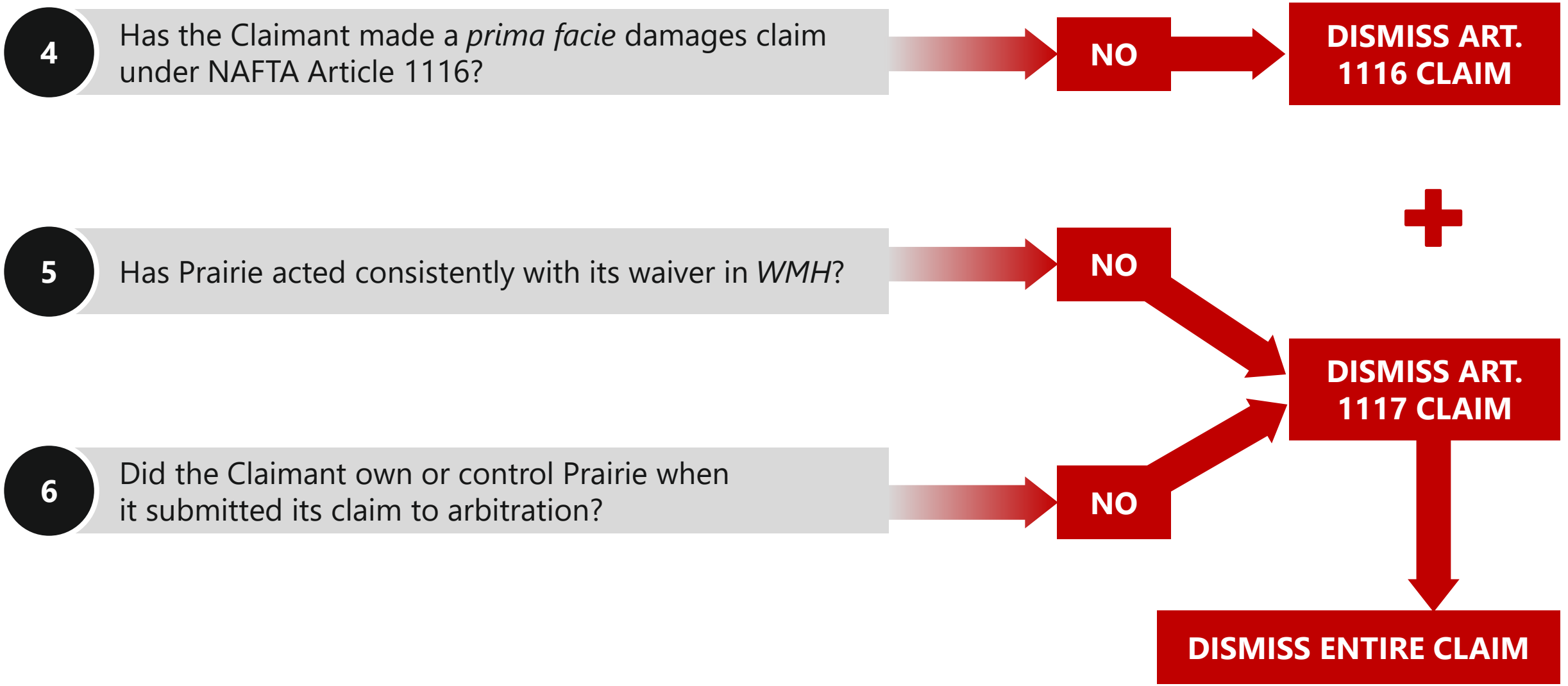
Canada's Opening Statement

May 2, 2024

The Claimant Has Not Established The Tribunal's Jurisdiction



The Claimant Has Not Established The Tribunal's Jurisdiction



Overview of Canada's Opening Statement

I. Factual Background

II. The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

III. The Claimant Has Not Submitted Valid Waivers Under NAFTA Article 1121

IV. The Claimant's Claim Is Not Timely Under NAFTA Articles 1116(2) and 1117(2)

V. The Claimant Has Not Made a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

VI. Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII. The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

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VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

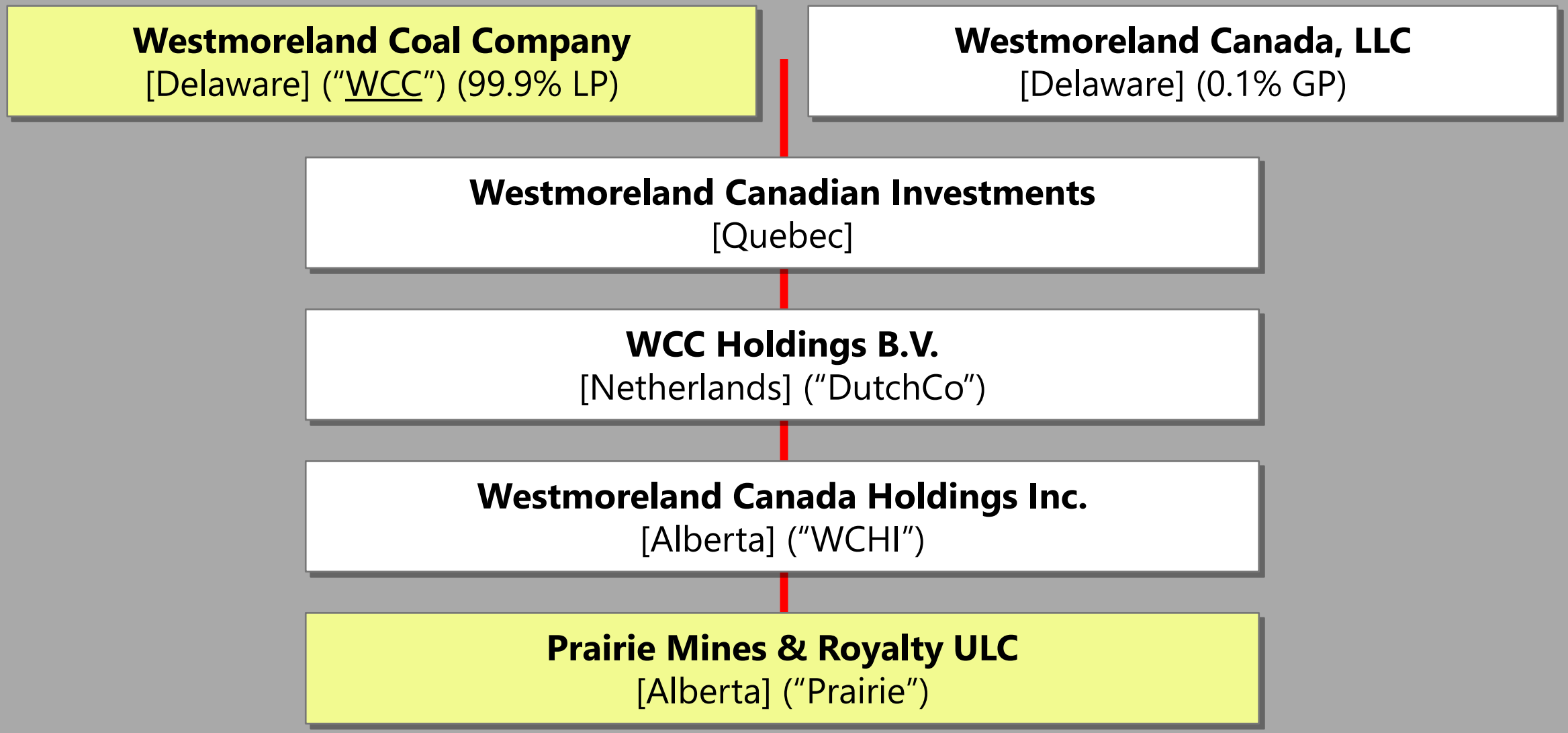
Chapter 1: The Claimant Purchases and Sells Interests in Canada

2014
WCC Purchases Interests in Prairie

2014	2015	2016	2017	2018	2019	2020

See Canada's Memorial on Jurisdiction, ¶¶ 45-47

Chapter 1: The Claimant Indirectly Held Its Interests in Prairie



Canada's Memorial on Jurisdiction, ¶ 46; R-060, *WMH – Coleman Report*, ¶ 77 (RER.031); R-059, Westmoreland Coal Company, Current Report (Form 8-K)

Chapter 1: The Claimant Purchases and Sells Interests in Canada

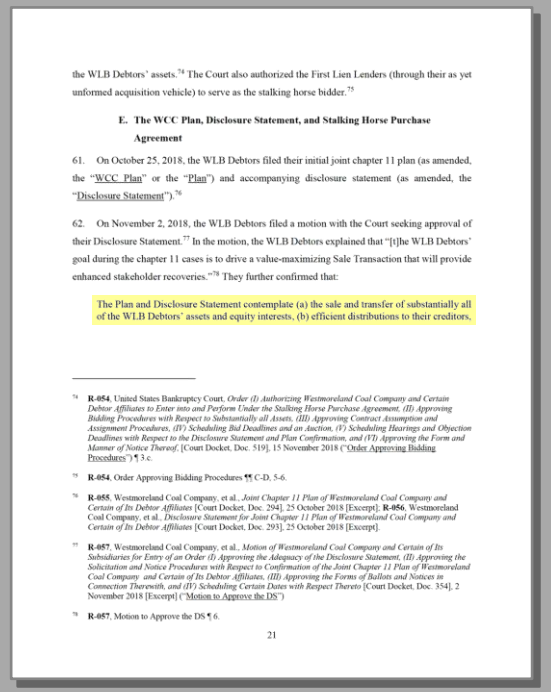
2014
WCC Purchases Interests in Prairie

OCT 2018
WCC Files for Bankruptcy in U.S.

2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020

See Canada's Memorial on Jurisdiction, ¶ 48

Chapter 1: The Claimant Planned to Sell Substantially All of its Assets and Wind Down



the WLB Debtors' assets.[74] The Court also authorized the First Lien Lenders (through their as yet unformed acquisition vehicle) to serve as the stalking horse bidder.[75]

E. The WCC Plan, Disclosure Statement, and Stalking Horse Purchase Agreement

61. On October 25, 2018, the WLB Debtors filed their initial joint chapter 11 plan (as amended, the "WCC Plan" or the "Plan") and accompanying disclosure statement (as amended, the "Disclosure Statement").[76]

62. On November 2, 2018, the WLB Debtors filed a motion with the Court seeking approval of their Disclosure Statement.[77] In the motion, the WLB Debtors explained that "[t]he WLB Debtors' goal during the chapter 11 cases is to drive a value-maximizing Sale Transaction that will provide enhanced stakeholder recoveries."[78] They further confirmed that:

> The Plan and Disclosure Statement contemplate (a) the sale and transfer of substantially all of the WLB Debtors' assets and equity interests, (b) efficient distributions to their creditors,

[74] **R-054**, United States Bankruptcy Court, *Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially all Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof*, [Court Docket, Doc. 519], 15 November 2018 ("Order Approving Bidding Procedures") ¶ 3.c.

[75] **R-054**, Order Approving Bidding Procedures ¶¶ C-D, 5-6.

[76] **R-055**, Westmoreland Coal Company, et al., *Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 294], 25 October 2018 [Excerpt]; **R-056**, Westmoreland Coal Company, et al., *Disclosure Statement for Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Court Docket, Doc. 293], 25 October 2018 [Excerpt].

[77] **R-057**, Westmoreland Coal Company, et al., *Motion of Westmoreland Coal Company and Certain of Its Subsidiaries for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Court Docket, Doc. 354], 2 November 2018 [Excerpt] ("Motion to Approve the DS")

[78] **R-057**, Motion to Approve the DS ¶ 6.

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WCC Motion to Approve the Disclosure Statement

The Plan and Disclosure Statement contemplate (a) the sale and transfer of substantially all of the WLB Debtors' assets and equity interests, (b) efficient distributions to their creditors, and (c) a subsequent wind-down of the WLB Debtors' businesses and affairs upon distribution of the sale proceeds pursuant to the Plan.

Chapter 1: The Claimant Purchases and Sells Interests in Canada

2014
WCC Purchases Interests in Prairie

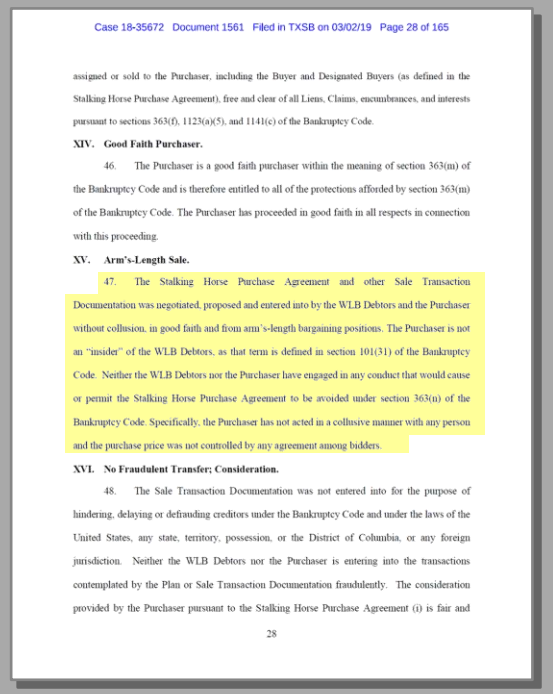
MAR 15, 2019
WCC Sells Interests in Prairie

OCT 2018
WCC Files for Bankruptcy in U.S.

2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020

See Canada's Memorial on Jurisdiction, ¶¶ 48-55

Chapter 1: WCC Sold Its Canadian Interests in an Arm's-Length Sale



Case 18-35672 Document 1561 Filed in TXSB on 03/02/19 Page 28 of 165

assigned or sold to the Purchaser, including the Buyer and Designated Buyers (as defined in the Stalking Horse Purchase Agreement), free and clear of all Liens, Claims, encumbrances, and interests pursuant to sections 363(f), 1123(a)(5), and 1141(c) of the Bankruptcy Code.

XIV. Good Faith Purchaser.

46. The Purchaser is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and is therefore entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code. The Purchaser has proceeded in good faith in all respects in connection with this proceeding.

XV. Arm's-Length Sale.

47. The Stalking Horse Purchase Agreement and other Sale Transaction Documentation was negotiated, proposed and entered into by the WLB Debtors and the Purchaser without collusion, in good faith and from arm's-length bargaining positions. The Purchaser is not an "insider" of the WLB Debtors, as that term is defined in section 101(31) of the Bankruptcy Code. Neither the WLB Debtors nor the Purchaser have engaged in any conduct that would cause or permit the Stalking Horse Purchase Agreement to be avoided under section 363(n) of the Bankruptcy Code. Specifically, the Purchaser has not acted in a collusive manner with any person and the purchase price was not controlled by any agreement among bidders.

XVI. No Fraudulent Transfer; Consideration.

48. The Sale Transaction Documentation was not entered into for the purpose of hindering, delaying or defrauding creditors under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia, or any foreign jurisdiction. Neither the WLB Debtors nor the Purchaser is entering into the transactions contemplated by the Plan or Sale Transaction Documentation fraudulently. The consideration provided by the Purchaser pursuant to the Stalking Horse Purchase Agreement (i) is fair and

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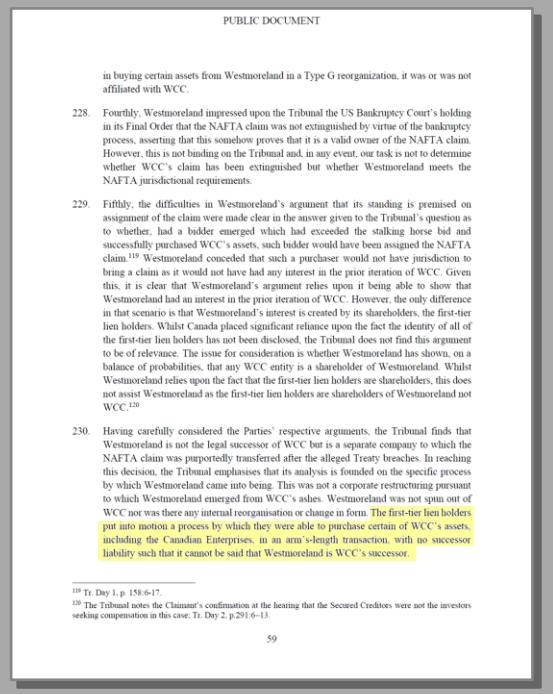
U.S. Bankruptcy Court, Confirmation Order

47. The Stalking Horse Purchase Agreement and other Sale Transaction Documentation was **negotiated, proposed and entered into** by the WLB Debtors and the Purchaser without collusion, in good faith and **from arm's-length bargaining positions**.

R-073, WCC Plan Confirmation Order, ¶ 47

Chapter 1: WCC Sold Its Canadian Interests in an Arm's-Length Sale



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in buying certain assets from Westmoreland in a Type G reorganization, it was or was not affiliated with WCC.

228. Fourthly, Westmoreland impressed upon the Tribunal the US Bankruptcy Court's holding in its Final Order that the NAFTA claim was not extinguished by virtue of the bankruptcy process, asserting that this somehow proves that it is a valid owner of the NAFTA claim. However, this is not binding on the Tribunal and, in any event, our task is not to determine whether WCC's claim has been extinguished but whether Westmoreland meets the NAFTA jurisdictional requirements.

229. Fifthly, the difficulties in Westmoreland's argument that its standing is premised on assignment of the claim were made clear in the answer given to the Tribunal's question as to whether, had a bidder emerged which had exceeded the stalking horse bid and successfully purchased WCC's assets, such bidder would have been assigned the NAFTA claim.[119] Westmoreland conceded that such a purchaser would not have jurisdiction to bring a claim as it would not have had any interest in the prior iteration of WCC. Given this, it is clear that Westmoreland's argument relies upon it being able to show that Westmoreland had an interest in the prior iteration of WCC. However, the only difference in that scenario is that Westmoreland's interest is created by its shareholders, the first-tier lien holders. Whilst Canada placed significant reliance upon the fact the identity of all of the first-tier lien holders has not been disclosed, the Tribunal does not find this argument to be of relevance. The issue for consideration is whether Westmoreland has shown, on a balance of probabilities, that any WCC entity is a shareholder of Westmoreland. Whilst Westmoreland relies upon the fact that the first-tier lien holders are shareholders, this does not assist Westmoreland as the first-tier lien holders are shareholders of Westmoreland not WCC.[120]

230. Having carefully considered the Parties' respective arguments, the Tribunal finds that Westmoreland 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. In reaching this decision, the Tribunal emphasises that its analysis is founded on the specific process by which Westmoreland came into being. This was not a corporate restructuring pursuant to which Westmoreland emerged from WCC's ashes. Westmoreland was not spun out of WCC nor was there any internal reorganisation or change in form. The first-tier lien holders put into motion a process by which they were able to purchase certain of WCC's assets, including the Canadian Enterprises, in an arm's-length transaction, with no successor liability such that it cannot be said that Westmoreland is WCC's successor.

[119] Tr. Day 1, p. 158:6-17.

[120] The Tribunal notes the Claimant's confirmation at the hearing that the Secured Creditors were not the investors seeking compensation in this case; Tr. Day 2, p.291:6–13.

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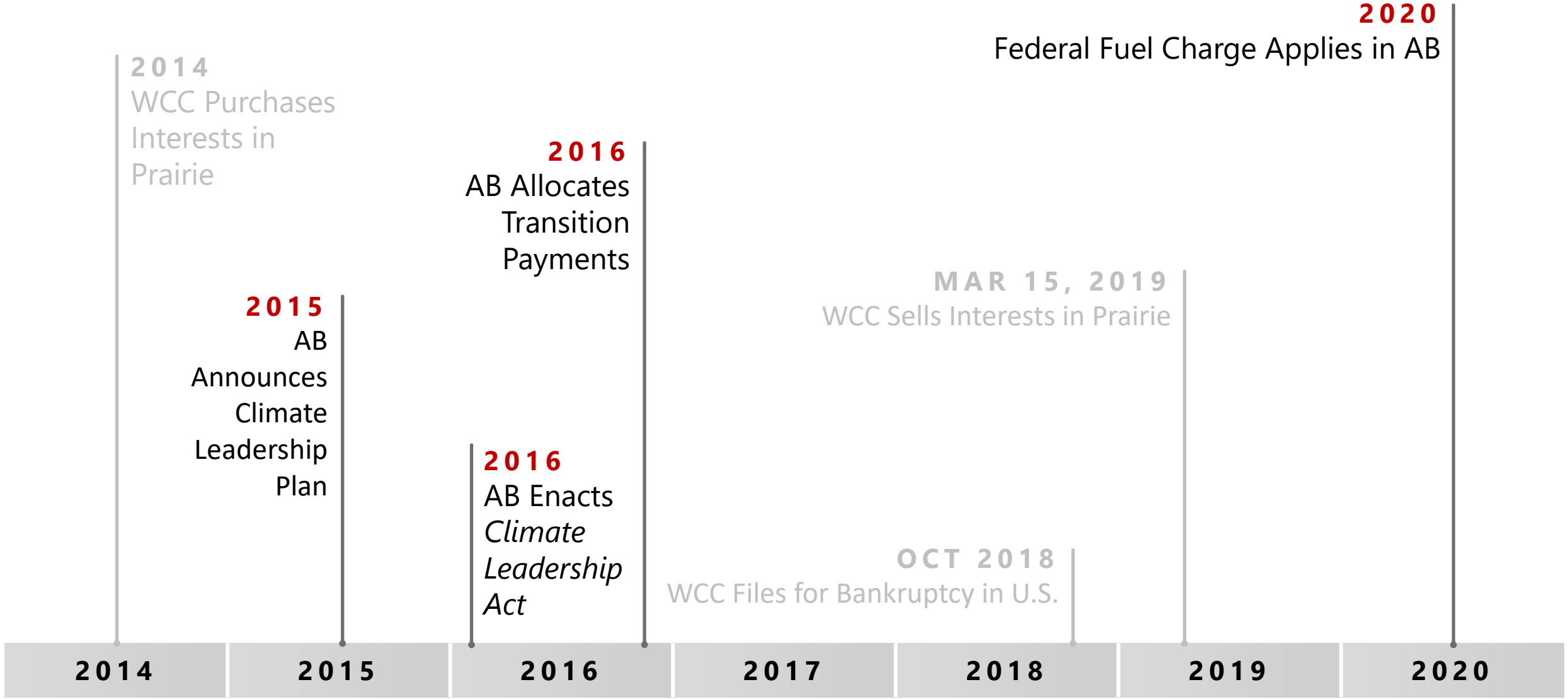
Westmoreland Mining Holdings v. Canada

The first-tier lien holders put into motion a process by which they were able to purchase certain of WCC's assets, including the Canadian Enterprises, **in an arm's-length transaction** …

This was not a corporate restructuring pursuant to which [WMH] emerged from WCC's ashes.

RLA-001, *Westmoreland Mining Holdings LLC v. Canada* – Award, ¶ 230

Chapter 2: Measures the Claimant Challenges In This Claim



See Canada's Memorial on Jurisdiction, ¶¶ 21-35

Chapter 2: The Claim Before This Tribunal

	2022 NOA
Measures Challenged	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments • 2016 Imposition of Consumer Fuel Levy • *Federal Fuel Charge (withdrawn)*
Alleged Breaches	• NAFTA Article 1102 • NAFTA Article 1105 • NAFTA Article 1110
Alleged Investments	• Prairie, interests in Prairie • Certain of Prairie's assets • "NAFTA claim" as a "claim to money"
Alleged Damages (Heads)	• Lost revenues from Prairie's coal sales • Prairie's accelerated reclamation costs
Alleged Damages (Quantum)	• Damages not yet quantified

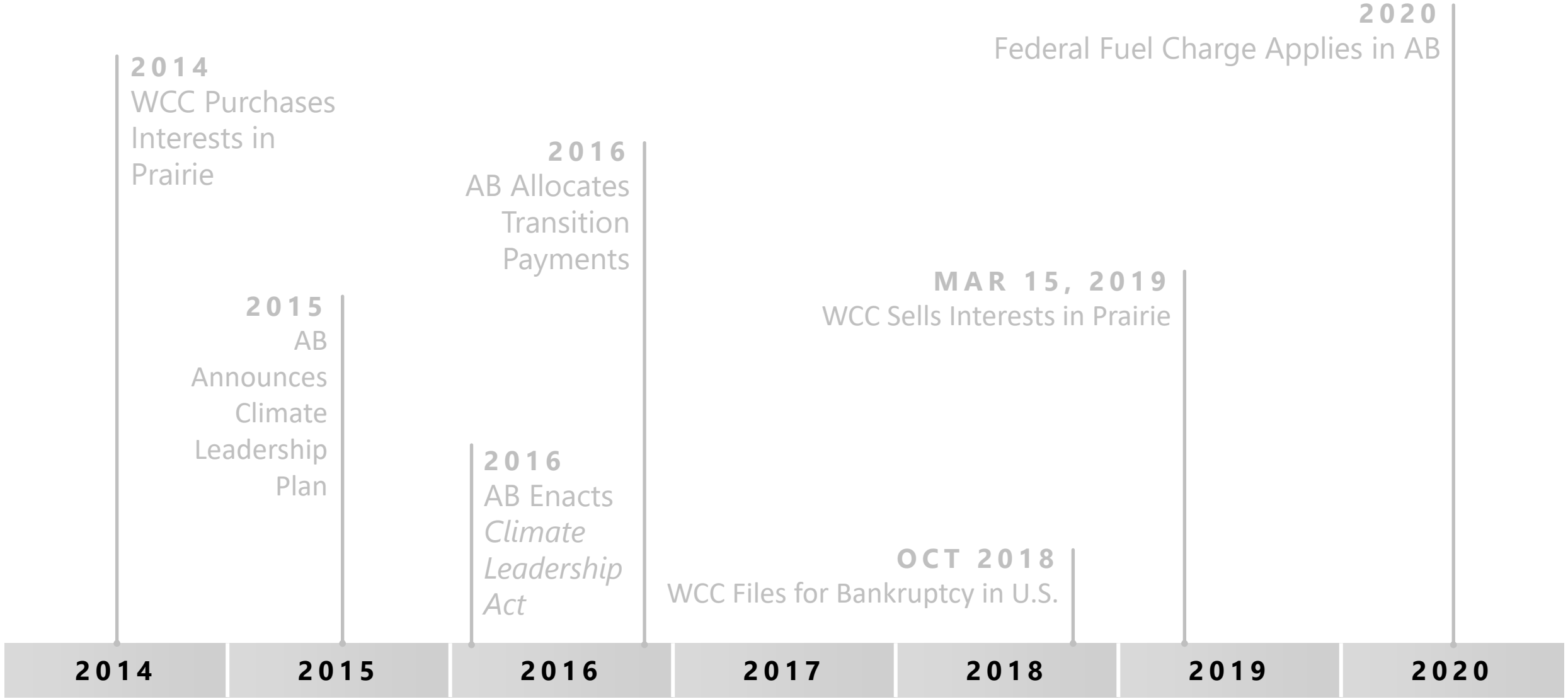
Tribunal Question 3

Please specify the scope and impact of the Claimant's withdrawal of the federal fuel charge claim, in particular in respect of the expropriation claim under NAFTA Article 1110.

Tribunal Question 4

If there is a residual expropriation claim, for instance in relation to measures adopted in 2015 and 2016, what are the Parties' positions in relation to that claim in terms of limitation periods and the scope of WCC's waivers?

Chapter 3: History of Prior Claims



***See* Canada's Memorial on Jurisdiction, ¶ 57**

Tribunal Question 2

Please elaborate on the identity of the claims advanced in 2018, 2019 and 2022, respectively. In particular, are the claims identical, as the Claimant argues, or are they separate and distinct, as the Respondent contends, and what is the effect of such a determination?

Canada Consents to Arbitrate Certain Claims Submitted to Arbitration

CUSMA Annex 14-C, Paragraph 1	NAFTA Article 1122(1)
1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex …	1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

The Investor Perfects Consent By Submitting a Claim to Arbitration in Accordance with the Treaty Conditions

CUSMA Annex 14-C, Paragraph 2

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an "agreement in writing"; and

(c) Article I of the Inter-American Convention for an "agreement".

NAFTA Article 1122(2)

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and

(c) Article I of the InterAmerican Convention for an agreement.

A Claim Is Submitted to Arbitration through a Notice of Arbitration

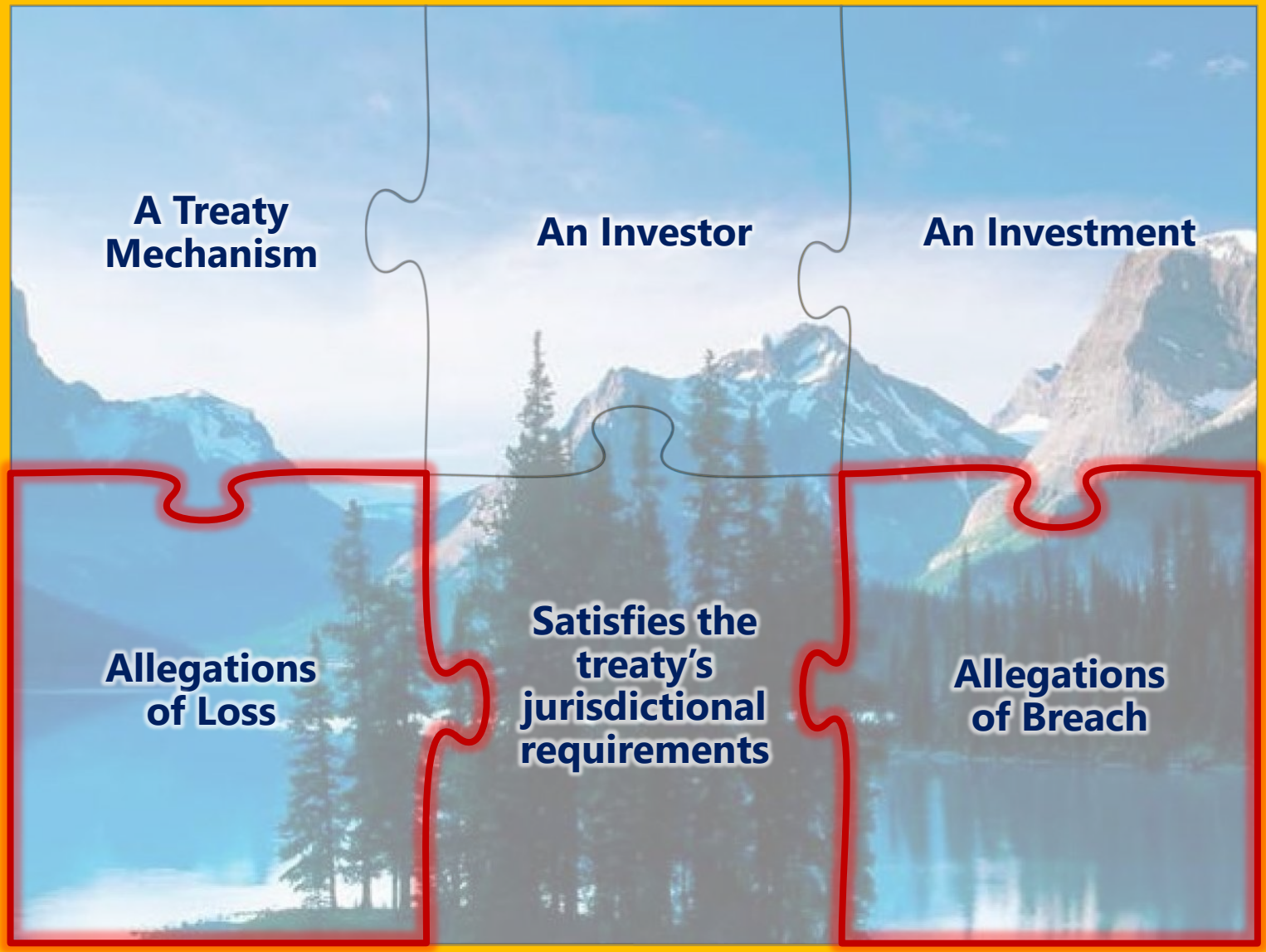
NAFTA Article 1137(1)

1. A claim is submitted to arbitration under this Section when:

...

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

The Framework for an Agreement to Arbitrate



IN THE MATTER OF AN ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

WESTMORELAND COAL COMPANY,

Claimant,

vs.

GOVERNMENT OF CANADA,

Respondent.

CLAIMANT'S NOTICE OF ARBITRATION

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Lauren F. Friedman
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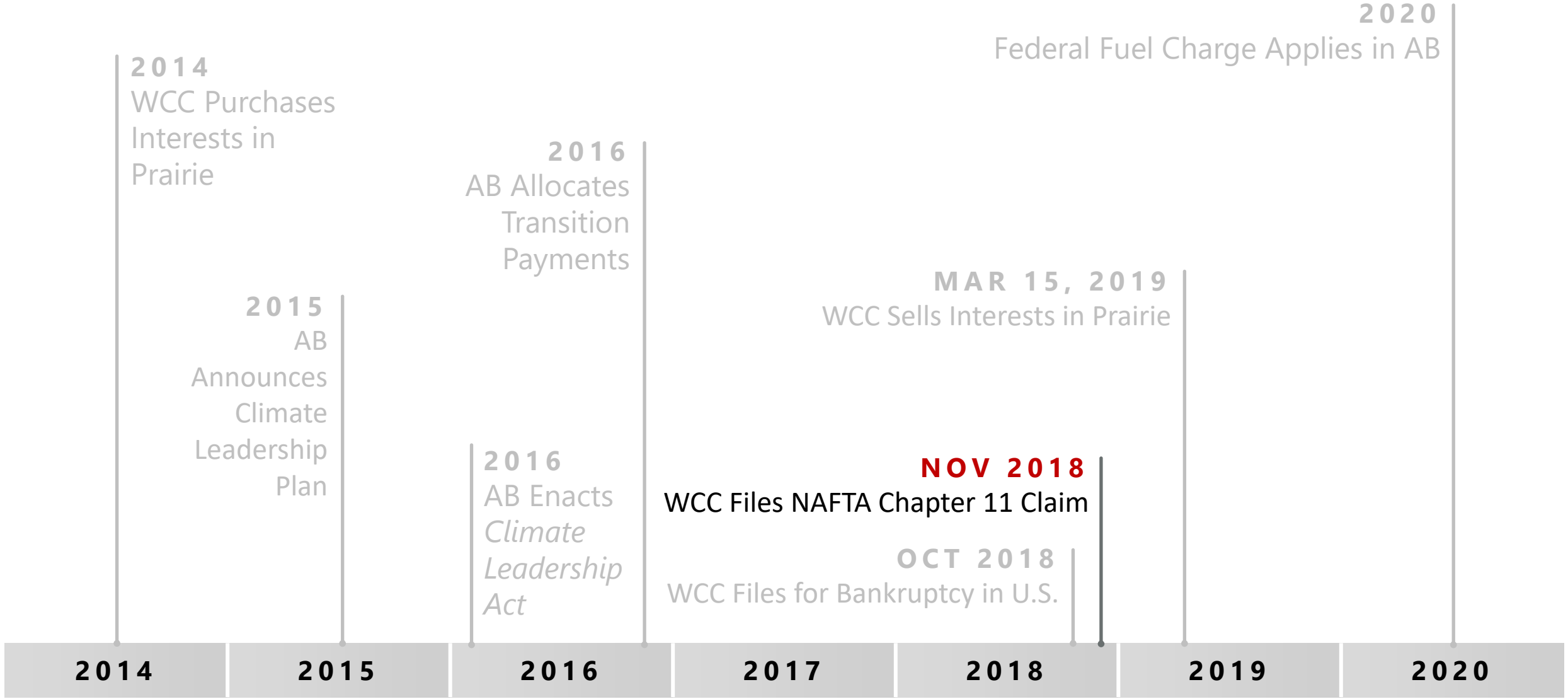
October 11, 2022

Chapter 3: History of Prior Claims

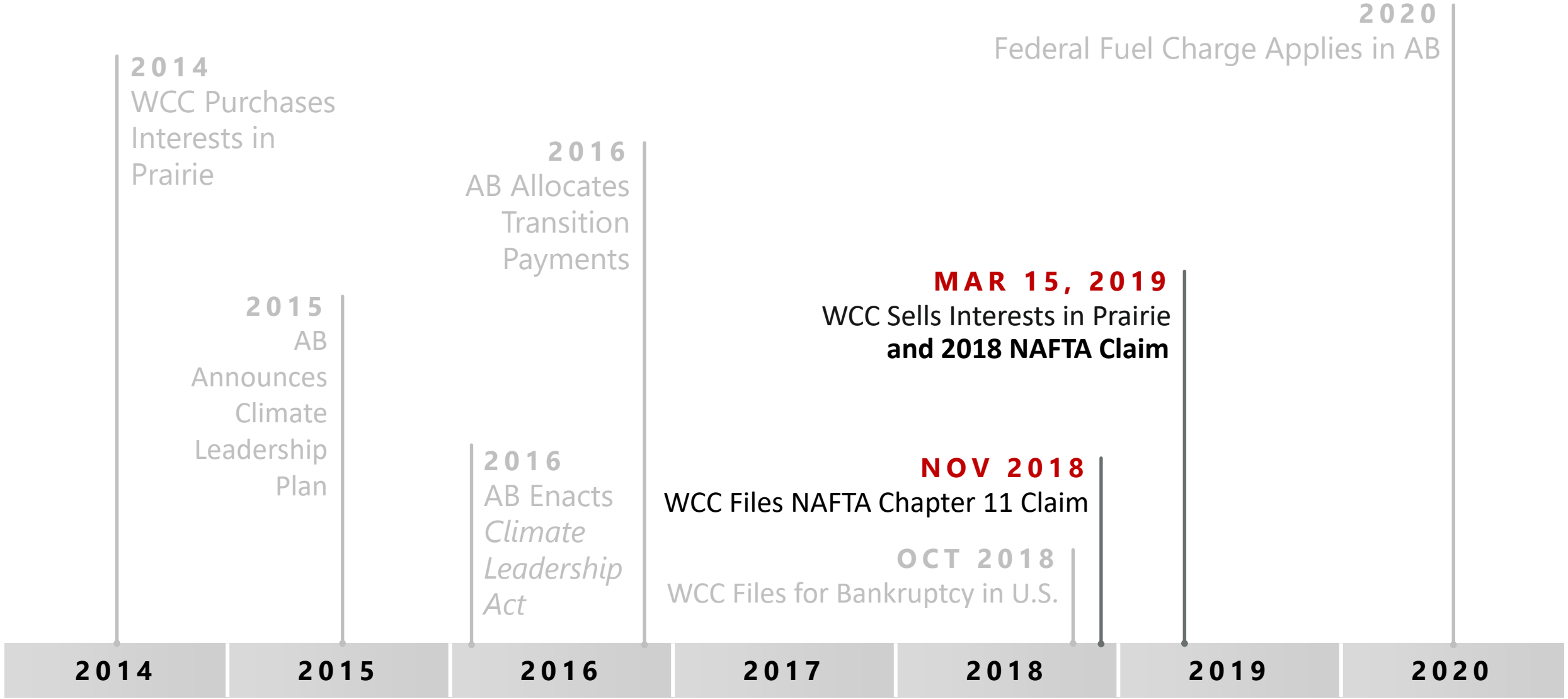


***See* Canada's Memorial on Jurisdiction, ¶ 57**

Chapter 3: WCC's 2018 NOA

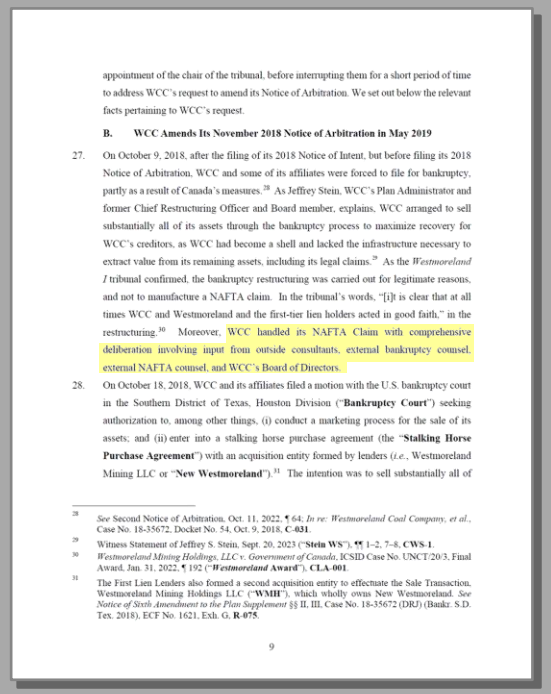
	2018 NOA	2022 NOA
Measures Challenged	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments • **2016 Imposition of Consumer Fuel Levy** • ***Federal Fuel Charge (withdrawn)***
Alleged Breaches	• NAFTA Article 1102 • NAFTA Article 1105	• NAFTA Article 1102 • NAFTA Article 1105 • **NAFTA Article 1110**
Alleged Investments	• Prairie, interests in Prairie • Certain of Prairie's assets	• Prairie, interests in Prairie • Certain of Prairie's assets • **"NAFTA claim" as a "claim to money"**
Alleged Damages (Heads)	• Lost revenues from Prairie's coal sales • Prairie's accelerated reclamation costs	• Lost revenues from Prairie's coal sales • Prairie's accelerated reclamation costs
Alleged Damages (Quantum)	• "Damages exceeding $470 million"	• **Damages not yet quantified**

Chapter 3: History of Prior Claims



***See* Canada's Memorial on Jurisdiction, ¶ ¶53-55**

Chapter 3: WCC Chose to Sell the 2018 NOA



appointment of the chair of the tribunal, before interrupting them for a short period of time to address WCC's request to amend its Notice of Arbitration. We set out below the relevant facts pertaining to WCC's request.

B. WCC Amends Its November 2018 Notice of Arbitration in May 2019

27. On October 9, 2018, after the filing of its 2018 Notice of Intent, but before filing its 2018 Notice of Arbitration, WCC and some of its affiliates were forced to file for bankruptcy, partly as a result of Canada's measures.[28] As Jeffrey Stein, WCC's Plan Administrator and former Chief Restructuring Officer and Board member, explains, WCC arranged to sell substantially all of its assets through the bankruptcy process to maximize recovery for WCC's creditors, as WCC had become a shell and lacked the infrastructure necessary to extract value from its remaining assets, including its legal claims.[29] As the *Westmoreland I* tribunal confirmed, the bankruptcy restructuring was carried out for legitimate reasons, and not to manufacture a NAFTA claim. In the tribunal's 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.[30] Moreover, WCC handled its NAFTA Claim with comprehensive deliberation involving input from outside consultants, external bankruptcy counsel, external NAFTA counsel, and WCC's Board of Directors.

28. On October 18, 2018, WCC and its affiliates filed a motion with the U.S. bankruptcy court in the Southern District of Texas, Houston Division ("**Bankruptcy Court**") seeking authorization to, among other things, (i) conduct a marketing process for the sale of its assets; and (ii) enter into a stalking horse purchase agreement (the "**Stalking Horse Purchase Agreement**") with an acquisition entity formed by lenders (*i.e.*, Westmoreland Mining LLC or "**New Westmoreland**").[31] The intention was to sell substantially all of

[28] *See* Second Notice of Arbitration, Oct. 11, 2022, ¶ 64; *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 54, Oct. 9, 2018, **C-031**.

[29] Witness Statement of Jeffrey S. Stein, Sept. 20, 2023 ("**Stein WS**"), ¶¶ 1–2, 7–8, **CWS-1**.

[30] *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, Jan. 31, 2022, ¶ 192 ("***Westmoreland* Award**"), **CLA-001**.

[31] The First Lien Lenders also formed a second acquisition entity to effectuate the Sale Transaction, Westmoreland Mining Holdings LLC ("**WMH**"), which wholly owns New Westmoreland. *See Notice of Sixth Amendment to the Plan Supplement* §§ II, III, Case No. 18-35672 (DRJ) (Bankr. S.D. Tex. 2018), ECF No. 1621, Exh. G, **R-075**.

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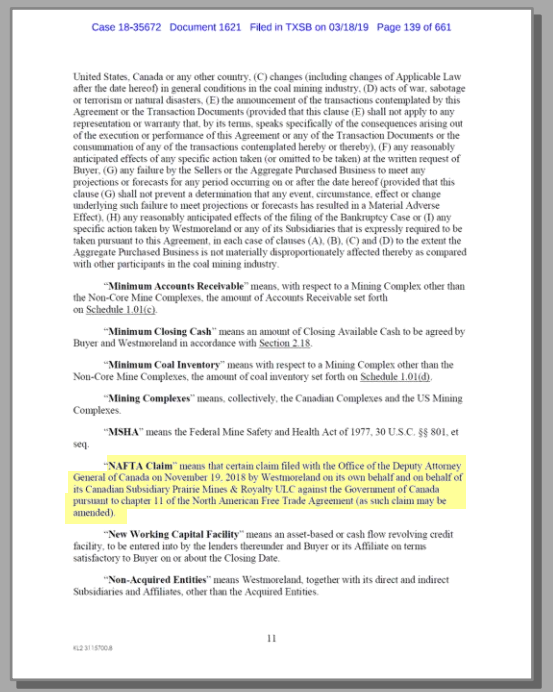
Claimant's Response on Jurisdiction

WCC handled its NAFTA Claim with comprehensive deliberation involving input from outside consultants, external bankruptcy counsel, external NAFTA counsel, and WCC's Board of Directors.

Claimant's Response on Jurisdiction, ¶ 27

The Sold "NAFTA Claim" Referred Expressly to the 2018 NOA



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United States, Canada or any other country, (C) changes (including changes of Applicable Law after the date hereof) in general conditions in the coal mining industry, (D) acts of war, sabotage or terrorism or natural disasters, (E) the announcement of the transactions contemplated by this Agreement or the Transaction Documents (provided that this clause (E) shall not apply to any representation or warranty that, by its terms, speaks specifically of the consequences arising out of the execution or performance of this Agreement or any of the Transaction Documents or the consummation of any of the transactions contemplated hereby or thereby), (F) any reasonably anticipated effects of any specific action taken (or omitted to be taken) at the written request of Buyer, (G) any failure by the Sellers or the Aggregate Purchased Business to meet any projections or forecasts for any period occurring on or after the date hereof (provided that this clause (G) shall not prevent a determination that any event, circumstance, effect or change underlying such failure to meet projections or forecasts has resulted in a Material Adverse Effect), (H) any reasonably anticipated effects of the filing of the Bankruptcy Case or (I) any specific action taken by Westmoreland or any of its Subsidiaries that is expressly required to be taken pursuant to this Agreement, in each case of clauses (A), (B), (C) and (D) to the extent the Aggregate Purchased Business is not materially disproportionately affected thereby as compared with other participants in the coal mining industry.

"**Minimum Accounts Receivable**" means, with respect to a Mining Complex other than the Non-Core Mine Complexes, the amount of Accounts Receivable set forth on Schedule 1.01(c).

"**Minimum Closing Cash**" means an amount of Closing Available Cash to be agreed by Buyer and Westmoreland in accordance with Section 2.18.

"**Minimum Coal Inventory**" means with respect to a Mining Complex other than the Non-Core Mine Complexes, the amount of coal inventory set forth on Schedule 1.01(d).

"**Mining Complexes**" means, collectively, the Canadian Complexes and the US Mining Complexes.

"**MSHA**" means the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801, et seq.

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

"**New Working Capital Facility**" means an asset-based or cash flow revolving credit facility, to be entered into by the lenders thereunder and Buyer or its Affiliate on terms satisfactory to Buyer on or about the Closing Date.

"**Non-Acquired Entities**" means Westmoreland, together with its direct and indirect Subsidiaries and Affiliates, other than the Acquired Entities.

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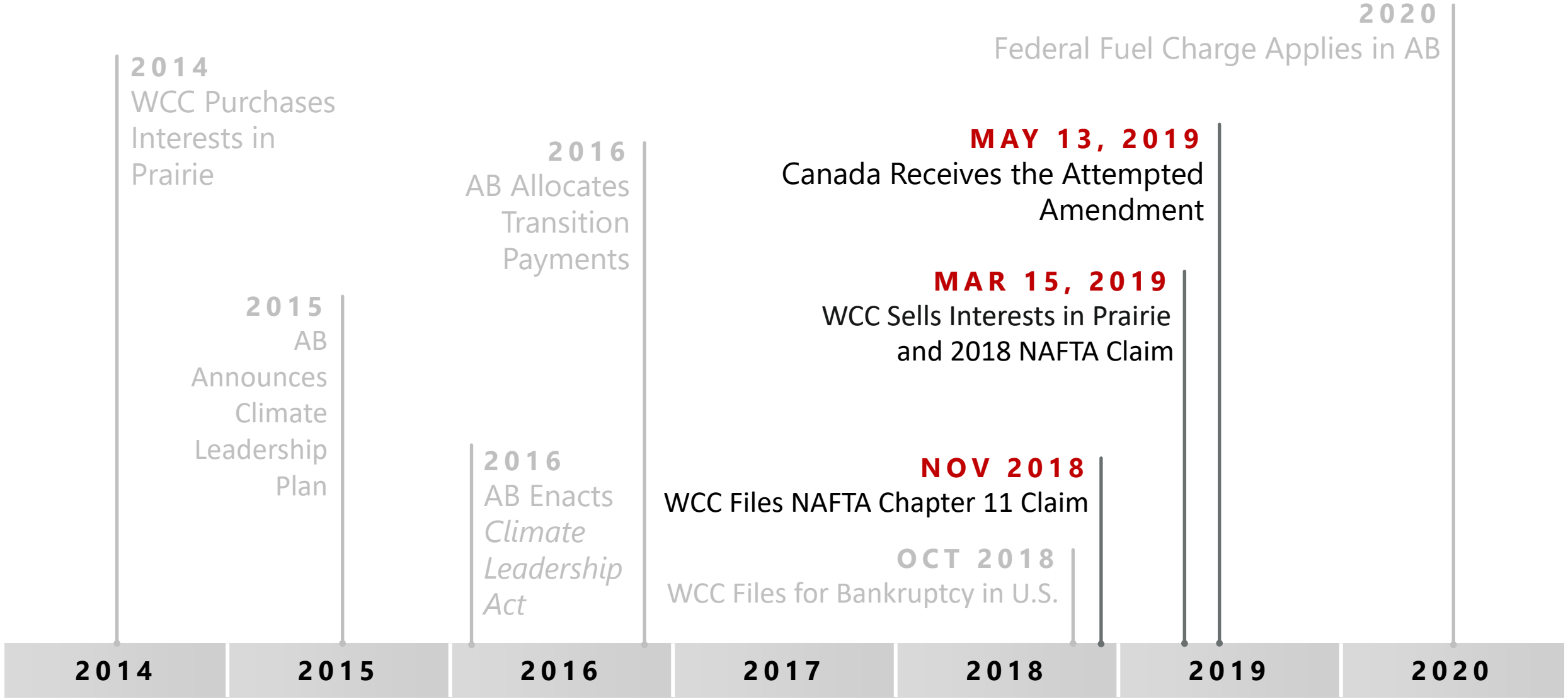
Stalking Horse Purchase Agreement, s. 1

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

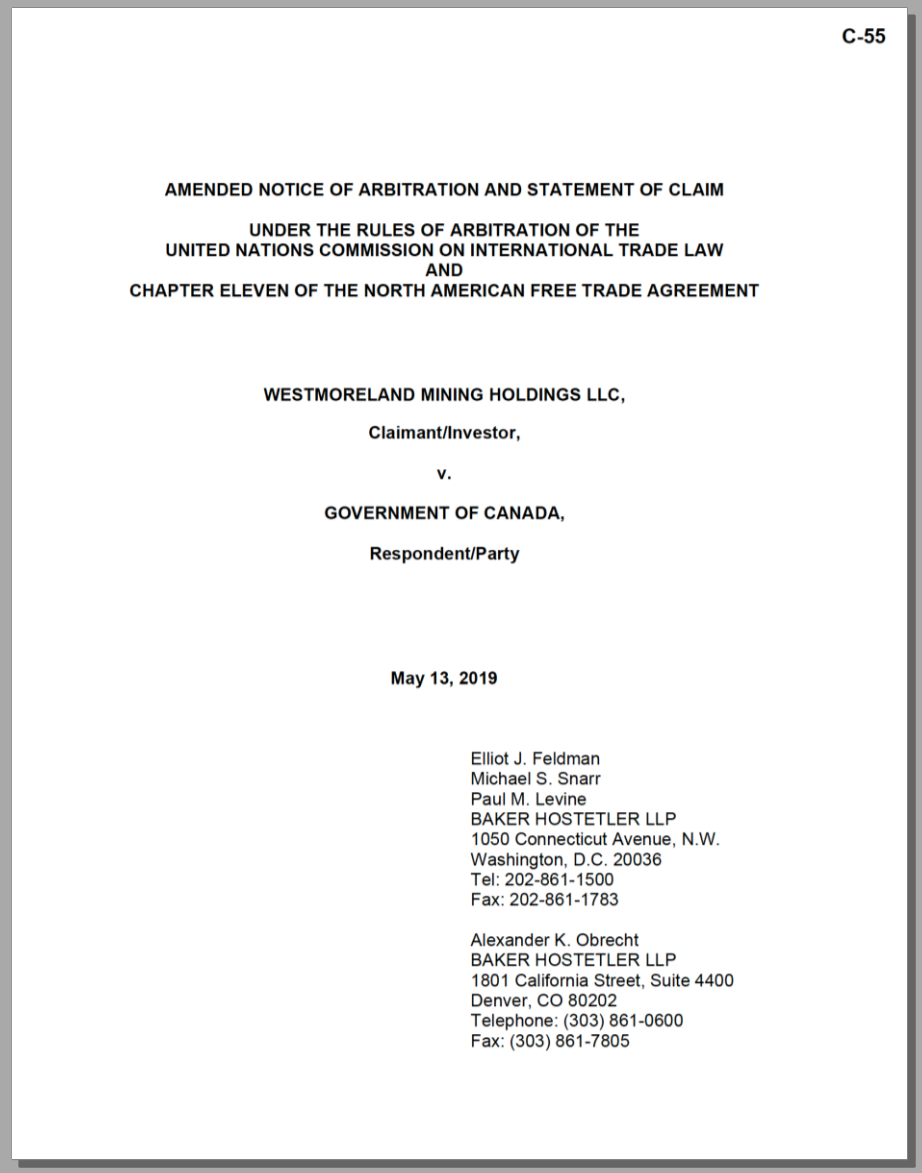
R-076, Stalking Horse Purchase Agreement, p. 11

Chapter 3: History of Prior Claims



See Canada's Memorial on Jurisdiction, ¶ 58

The Attempted Amendment Sought Substitution



C-55

AMENDED NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

UNDER THE RULES OF ARBITRATION OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

WESTMORELAND MINING HOLDINGS LLC,

Claimant/Investor,

v.

GOVERNMENT OF CANADA,

Respondent/Party

May 13, 2019

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WESTMORELAND MINING HOLDINGS LLC,

Claimant/Investor,

v.

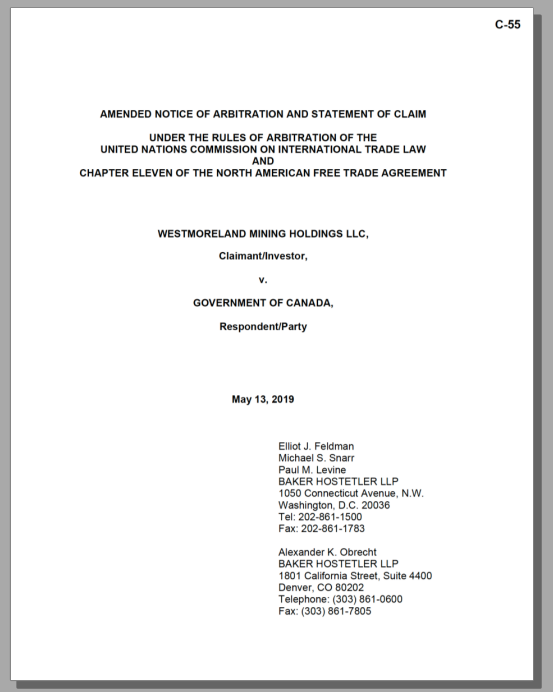
GOVERNMENT OF CANADA,

Respondent/Party

May 13, 2019

C-055, Amended Notice of Arbitration and Statement of Claim and Exhibits, 13 May 2019

The Attempted Amendment Sought Substitution



C-55

AMENDED NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

UNDER THE RULES OF ARBITRATION OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

WESTMORELAND MINING HOLDINGS LLC,

Claimant/Investor,

v.

GOVERNMENT OF CANADA,

Respondent/Party

May 13, 2019

Elliot J. Feldman
Michael S. Snarr
Paul M. Levine
BAKER HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
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Alexander K. Obrecht
BAKER HOSTETLER LLP
1801 California Street, Suite 4400
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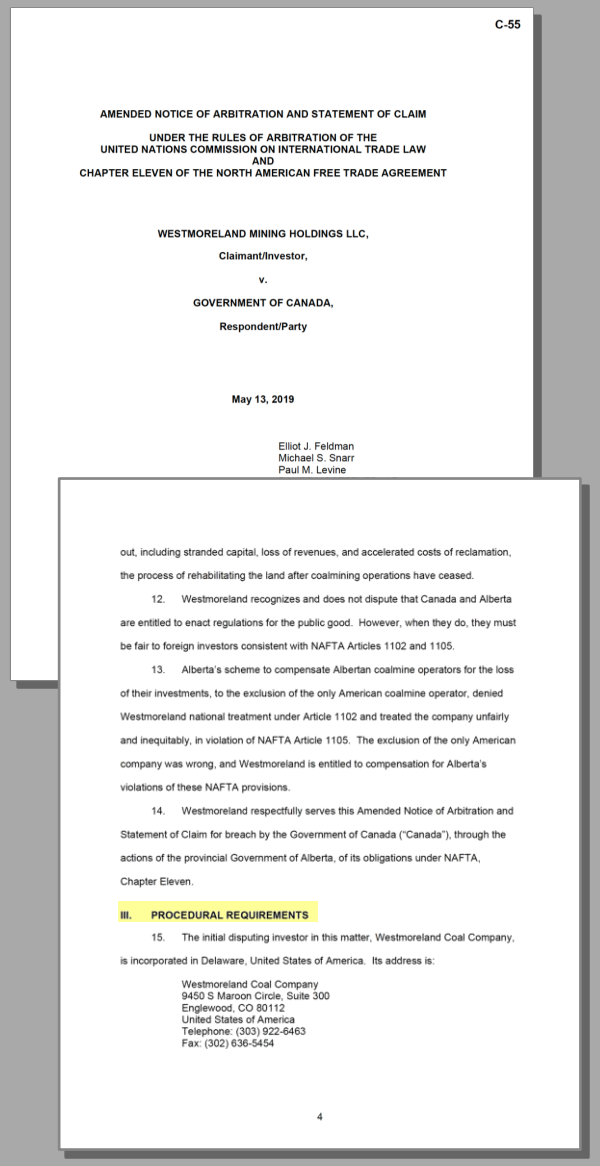
Fax: (303) 861-7805

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"), …

Westmoreland elects to proceed with this arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules, as provided under Article 1120(1)(c) of NAFTA.

C-055, Amended Notice of Arbitration and Statement of Claim and Exhibits, 13 May 2019, ¶ ¶ 1-2

The Attempted Amendment Sought Substitution



C-55

AMENDED NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

UNDER THE RULES OF ARBITRATION OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
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Respondent/Party

May 13, 2019

Elliot J. Feldman
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out, including stranded capital, loss of revenues, and accelerated costs of reclamation, the process of rehabilitating the land after coalmining operations have ceased.

12. Westmoreland recognizes and does not dispute that Canada and Alberta are entitled to enact regulations for the public good. However, when they do, they must be fair to foreign investors consistent with NAFTA Articles 1102 and 1105.

13. Alberta's scheme to compensate Albertan coalmine operators for the loss of their investments, to the exclusion of the only American coalmine operator, denied Westmoreland national treatment under Article 1102 and treated the company unfairly and inequitably, in violation of NAFTA Article 1105. The exclusion of the only American company was wrong, and Westmoreland is entitled to compensation for Alberta's violations of these NAFTA provisions.

14. Westmoreland respectfully serves this Amended Notice of Arbitration and Statement of Claim for breach by the Government of Canada ("Canada"), through the actions of the provincial Government of Alberta, of its obligations under NAFTA, Chapter Eleven.

III. PROCEDURAL REQUIREMENTS

15. The initial disputing investor in this matter, Westmoreland Coal Company, is incorporated in Delaware, United States of America. Its address is:

Westmoreland Coal Company
9450 S Maroon Circle, Suite 300
Englewood, CO 80112
United States of America
Telephone: (303) 922-6463
Fax: (302) 636-5454

4

III. PROCEDURAL REQUIREMENTS

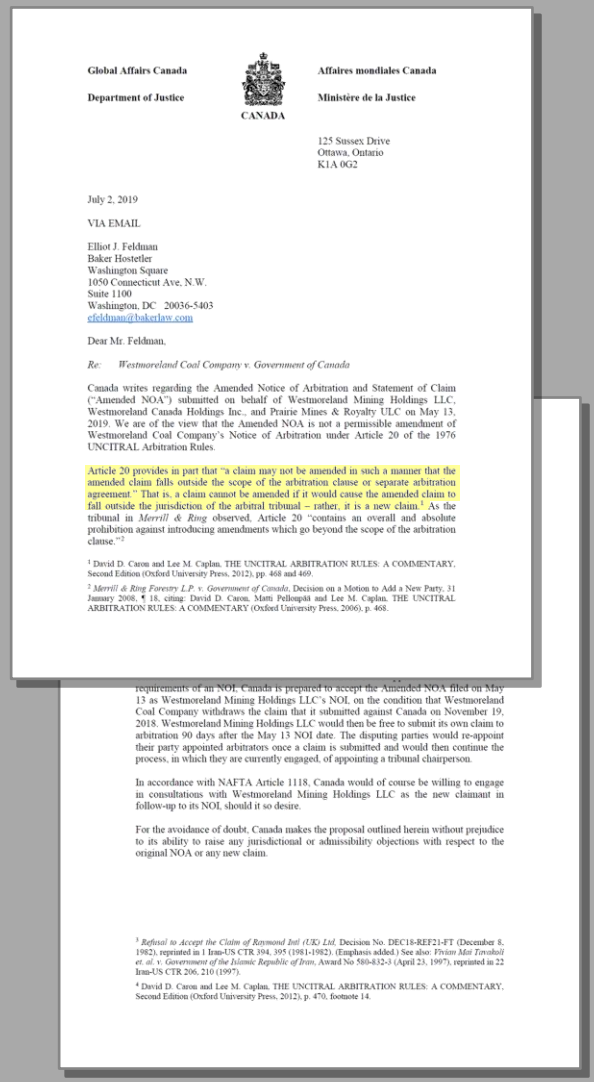
15. The **initial disputing investor** in this matter, Westmoreland Coal Company, is incorporated in Delaware, United States of America.

20. Westmoreland Mining Holdings LLC, a Delaware company, is the owner of the assets, interest [*sic*], rights and claims of the initial disputing investor, Westmoreland Coal Company.

21. **The disputing investor**, Westmoreland Mining Holdings LLC, is located at the following address: …

C-055, Amended Notice of Arbitration and Statement of Claim and Exhibits, 13 May 2019, ¶ 15, 20, 21

Canada Viewed the Attempted Amendment as an Impermissible Substitution



Global Affairs Canada
Department of Justice

CANADA

Affaires mondiales Canada
Ministère de la Justice

125 Sussex Drive
Ottawa, Ontario
K1A 0G2

July 2, 2019

VIA EMAIL

Elliot J. Feldman
Baker Hostetler
Washington Square
1050 Connecticut Ave, N.W.
Suite 1100
Washington, DC 20036-5403
efeldman@bakerlaw.com

Dear Mr. Feldman,

Re: Westmoreland Coal Company v. Government of Canada

Canada writes regarding the Amended Notice of Arbitration and Statement of Claim ("Amended NOA") submitted on behalf of Westmoreland Mining Holdings LLC, Westmoreland Canada Holdings Inc., and Prairie Mines & Royalty ULC on May 13, 2019. We are of the view that the Amended NOA is not a permissible amendment of Westmoreland Coal Company's Notice of Arbitration under Article 20 of the 1976 UNCITRAL Arbitration Rules.

Article 20 provides in part that "a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement." That is, a claim cannot be amended if it would cause the amended claim to fall outside the jurisdiction of the arbitral tribunal – rather, it is a new claim.[1] As the tribunal in *Merrill & Ring* observed, Article 20 "contains an overall and absolute prohibition against introducing amendments which go beyond the scope of the arbitration clause."[2]

[1] David D. Caron and Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY, Second Edition (Oxford University Press, 2012), pp. 468 and 469.

[2] *Merrill & Ring Forestry L.P. v. Government of Canada*, Decision on a Motion to Add a New Party, 31 January 2008, ¶ 18, citing: David D. Caron, Matti Pellonpää and Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (Oxford University Press, 2006), p. 468.

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

In accordance with NAFTA Article 1118, Canada would of course be willing to engage in consultations with Westmoreland Mining Holdings LLC as the new claimant in follow-up to its NOI, should it so desire.

For the avoidance of doubt, Canada makes the proposal outlined herein without prejudice to its ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim.

[3] *Refusal to Accept the Claim of Raymond Intl (UK) Ltd*, Decision No. DEC18-REF21-FT (December 8, 1982), reprinted in 1 Iran-US CTR 394, 395 (1981-1982). (Emphasis added.) See also: *Vivian Mai Tavakoli et. al. v. Government of the Islamic Republic of Iran*, Award No 580-832-3 (April 23, 1997), reprinted in 22 Iran-US CTR 206, 210 (1997).

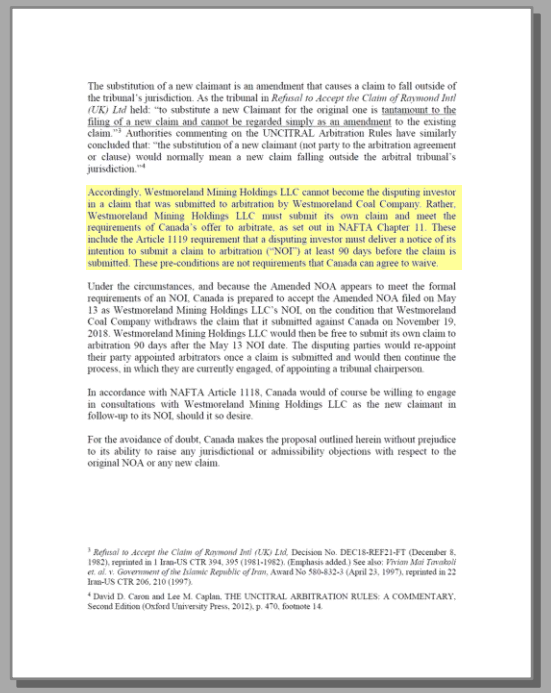
[4] David D. Caron and Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY, Second Edition (Oxford University Press, 2012), p. 470, footnote 14.

Article 20 provides in part that "a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement." That is, **a claim cannot be amended if it would cause the amended claim to fall outside the jurisdiction of the arbitral tribunal – rather, it is a new claim**.

The substitution of a new claimant is an amendment that causes a claim to fall outside of the tribunal's jurisdiction.

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

Canada Viewed the Attempted Amendment as an Impermissible Substitution



The substitution of a new claimant is an amendment that causes a claim to fall outside of the tribunal's jurisdiction. As the tribunal in *Refusal to Accept the Claim of Raymond Intl (UK) Ltd* held: "to substitute a new Claimant for the original one is tantamount to the filing of a new claim and cannot be regarded simply as an amendment to the existing claim."[3] Authorities commenting on the UNCITRAL Arbitration Rules have similarly concluded that: "the substitution of a new claimant (not party to the arbitration agreement or clause) would normally mean a new claim falling outside the arbitral tribunal's jurisdiction."[4]

Accordingly, Westmoreland Mining Holdings LLC cannot become the disputing investor in a claim that was submitted to arbitration by Westmoreland Coal Company. Rather, Westmoreland Mining Holdings LLC must submit its own claim and meet the requirements of Canada's offer to arbitrate, as set out in NAFTA Chapter 11. These include the Article 1119 requirement that a disputing investor must deliver a notice of its intention to submit a claim to arbitration ("NOI") at least 90 days before the claim is submitted. These pre-conditions are not requirements that Canada can agree to waive.

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

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

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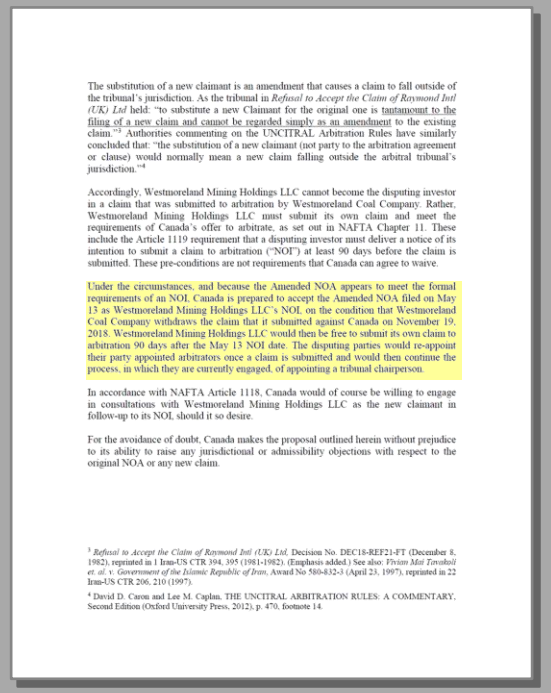

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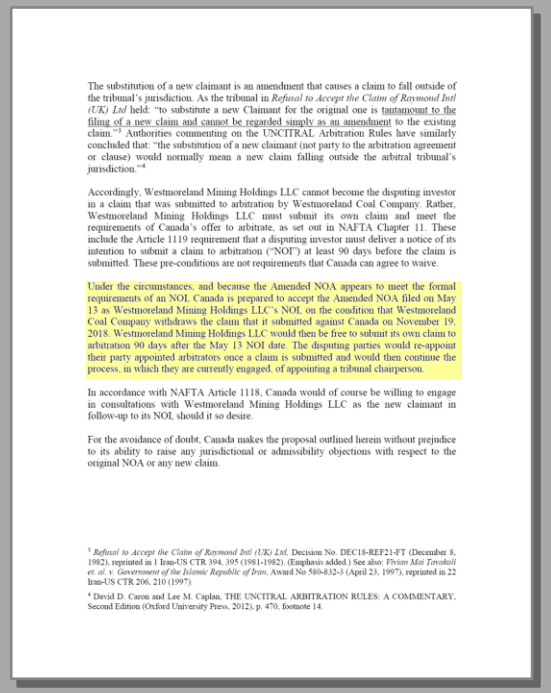
Canada Reserves Its Right to Raise Jurisdictional or Admissibility Objections



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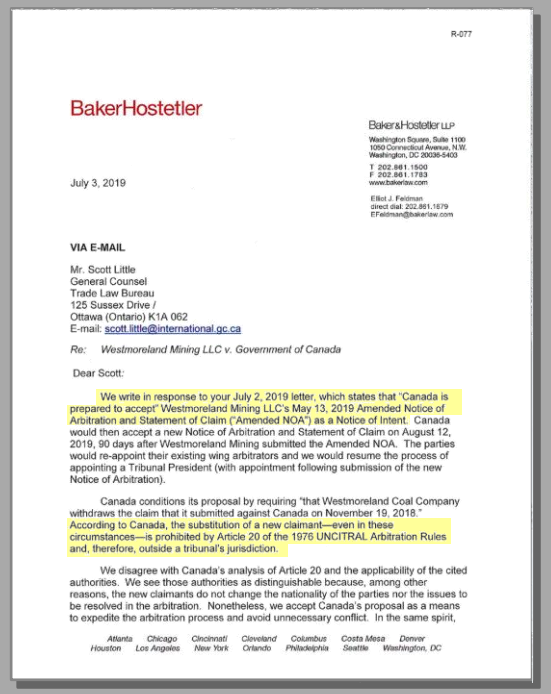
R-081, Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada", 2 July 2019. p. 2

The Requestors Accepted Canada's Offer The Next Day



R-077

BakerHostetler

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July 3, 2019

Elliot J. Feldman
direct dial: 202.861.1679
EFeldman@bakerlaw.com

VIA E-MAIL

Mr. Scott Little
General Counsel
Trade Law Bureau
125 Sussex Drive /
Ottawa (Ontario) K1A 062
E-mail: scott.little@international.gc.ca

Re: Westmoreland Mining LLC v. Government of Canada

Dear Scott:

We write in response to your July 2, 2019 letter, which states that "Canada is prepared to accept" Westmoreland Mining LLC's May 13, 2019 Amended Notice of Arbitration and Statement of Claim ("Amended NOA") as a Notice of Intent. Canada would then accept a new Notice of Arbitration and Statement of Claim on August 12, 2019, 90 days after Westmoreland Mining submitted the Amended NOA. The parties would re-appoint their existing wing arbitrators and we would resume the process of appointing a Tribunal President (with appointment following submission of the new Notice of Arbitration).

Canada conditions its proposal by requiring "that Westmoreland Coal Company withdraws the claim that it submitted against Canada on November 19, 2018." According to Canada, the substitution of a new claimant—even in these circumstances—is prohibited by Article 20 of the 1976 UNCITRAL Arbitration Rules and, therefore, outside a tribunal's jurisdiction.

We disagree with Canada's analysis of Article 20 and the applicability of the cited authorities. We see those authorities as distinguishable because, among other reasons, the new claimants do not change the nationality of the parties nor the issues to be resolved in the arbitration. Nonetheless, we accept Canada's proposal as a means to expedite the arbitration process and avoid unnecessary conflict. In the same spirit,

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

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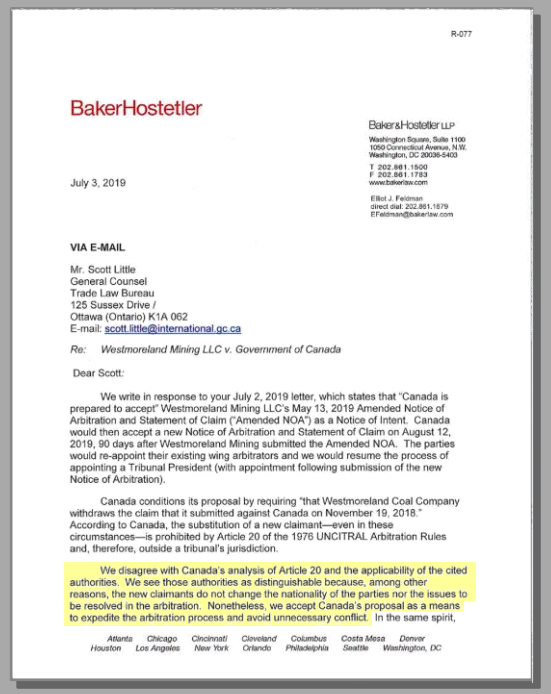
R-082, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 1

The Requestors Accepted Canada's Offer The Next Day



R-077

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July 3, 2019

Elliot J. Feldman
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VIA E-MAIL

Mr. Scott Little
General Counsel
Trade Law Bureau
125 Sussex Drive /
Ottawa (Ontario) K1A 062
E-mail: scott.little@international.gc.ca

Re: Westmoreland Mining LLC v. Government of Canada

Dear Scott:

We write in response to your July 2, 2019 letter, which states that "Canada is prepared to accept" Westmoreland Mining LLC's May 13, 2019 Amended Notice of Arbitration and Statement of Claim ("Amended NOA") as a Notice of Intent. Canada would then accept a new Notice of Arbitration and Statement of Claim on August 12, 2019, 90 days after Westmoreland Mining submitted the Amended NOA. The parties would re-appoint their existing wing arbitrators and we would resume the process of appointing a Tribunal President (with appointment following submission of the new Notice of Arbitration).

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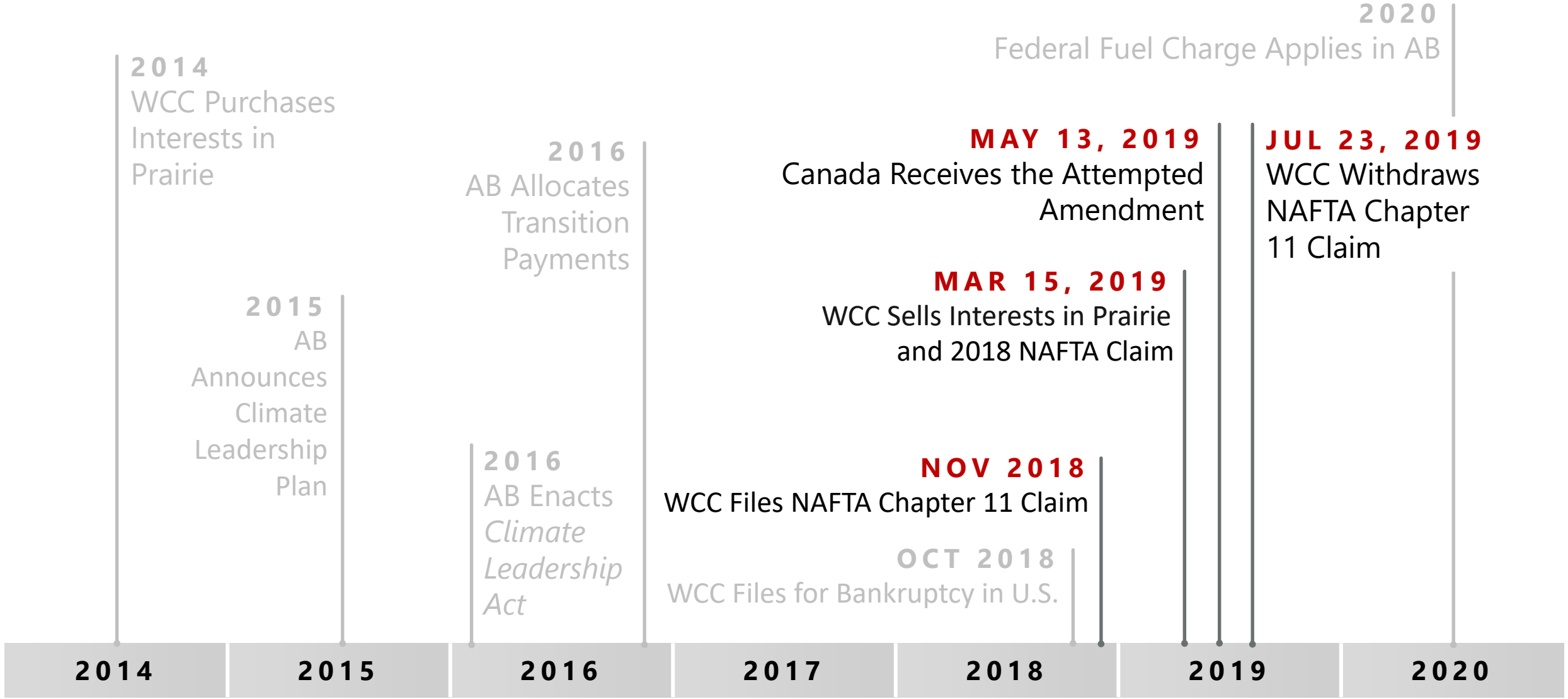
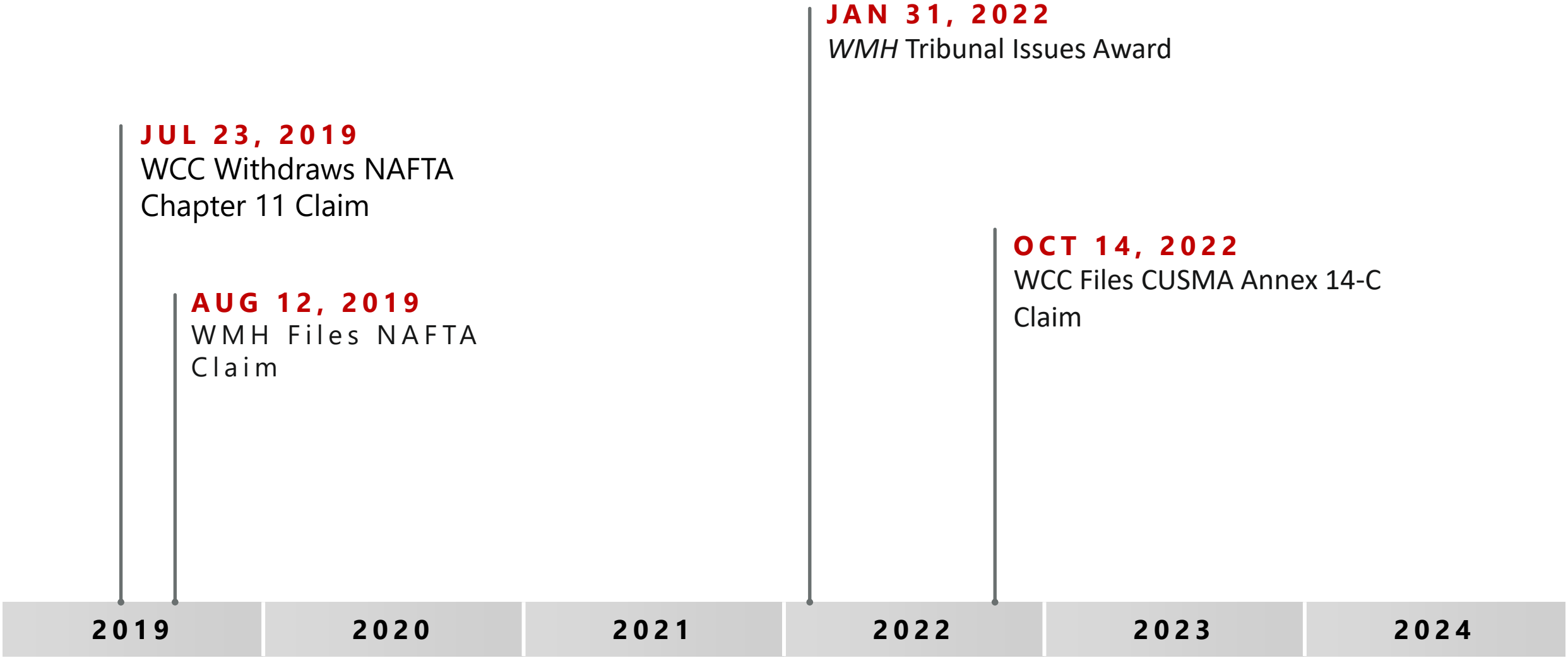
R-082, Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada", 3 July 2019, p. 1

Chapter 3: History of Prior Claims



***See* Canada's Memorial on Jurisdiction, ¶ 62**

Chapter 3: History of Prior Claims



See Canada's Memorial on Jurisdiction, ¶ ¶ 63-74

Tribunal Question 2: The Claimant Has Not Established Identity Between the Claims

	Date	Waivers	Treaty	Claimant	Investment	Alleged Breach	Alleged Loss	Measures	Status
2018 NOA	2018	Withdrawn	NAFTA	WCC	Interests in Prairie	1102, 1105	$470M	Emissions Phase-Out, Transition Payments	Withdrawn
2019 NOA	2019	Effective	NAFTA	WMH	Interests in Prairie	1102, 1105	$470M	Emissions Phase-Out, Transition Payments	Adjudicated – Final Award
2022 NOA	2022	None	CUSMA + NAFTA	WCC	Interests in Prairie and "NAFTA Claim"	1102, 1105, 1110	?	Emissions Phase-Out, Transition Payments, Fuel Levies	Pending – Jurisdictional Phase
Identity?	**No**	**No**	**No**	**No**	**No**	**No**	**No**	**No**	**No**

R-079; *WCC* – 2018 NOA, R-085, *WMH* – 2019 NOA

Overview of Canada's Opening Statement

I Factual Background

II The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

III The Claimant Has Not Submitted Valid Waivers Under NAFTA Article 1121

IV The Claimant's Claim Is Not Timely Under NAFTA Articles 1116(2) and 1117(2)

V The Claimant Has Not Made a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

VI Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

1 **The express requirements of CUSMA Annex 14-C**

Please elaborate on the definition of a legacy investment under Article 6(a) of Annex 14-C of the USMCA and, in particular, on the requirement that a legacy investment must be "in existence on the date of entry into force of this Agreement".

2 The Claimant has failed to establish it meets the express requirements

3 The Claimant cannot establish jurisdiction based on equitable principles

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

CUSMA Annex 14-C, Paragraph 1

1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

(a) Section A of Chapter 11 (Investment) of NAFTA 1994;

…

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

CUSMA Annex 14-C, Paragraph 6(a)

6. 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**;

…

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

CUSMA Annex 14-C, Paragraph 6(b)

6. For the purposes of this Annex:

…

(b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994

…

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

NAFTA Article 1139

Article 1139: Definitions

For purposes of this Chapter:

"**investment** means: …"

"**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;"

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

CUSMA Annex 14-C, Paragraph 6(a)

6. 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**;

…

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

NAFTA Article 1139

Article 1139: Definitions

For purposes of this Chapter:

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

The CUSMA Parties Agree that an Investor Must Hold The Relevant Investment When CUSMA Entered Into Force

In this regard, for an investor to validly pursue a claim under USMCA Annex 14-C, it has to prove that it owned or controlled the enterprise […] as of the date of entry into force of the USMCA.

Annex 14-C limits the submission of arbitration claims to those investors with ongoing investments in the host states after the NAFTA's termination.

Article 1128 Submission of Mexico, ¶ 34; R-156, *TC Energy v. United States of America* – Reply on its Prelim. Objection, ¶ 52. *See also* Canada's Memorial, ¶¶ 81-90; Canada's Reply, ¶¶ 71-72

Canada's Consent to Arbitrate Claims Under CUSMA Annex 14-C Is Limited

CUSMA Annex 14-C, Paragraph 6(a)

6. 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**;

…

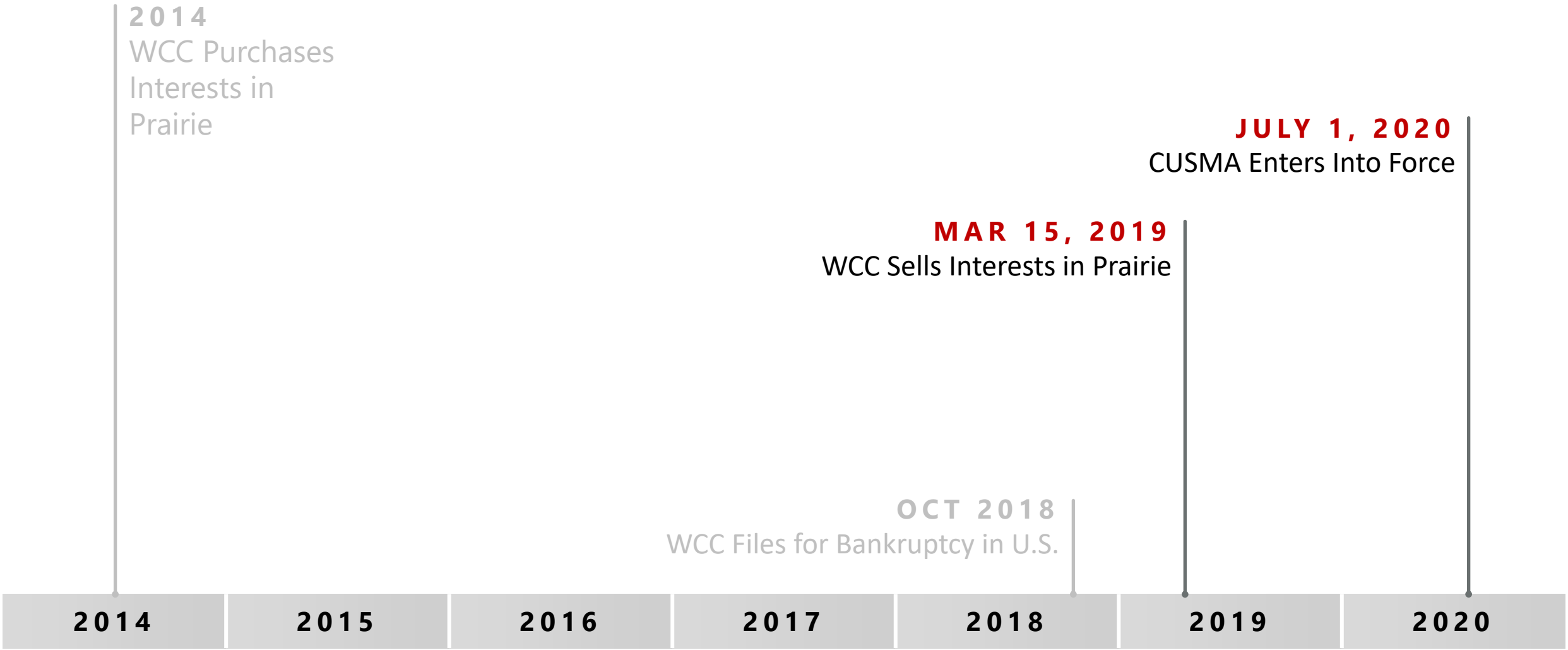
The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

1. The express requirements of CUSMA Annex 14-C
2. **The Claimant has failed to establish it meets the express requirements**
3. The Claimant cannot establish jurisdiction based on equitable principles

The Claimant's Alleged Investments Are Not Legacy Investments

	2022 NOA
Measures Challenged	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments • 2016 Imposition of Consumer Fuel Levy • *Federal Fuel Charge (withdrawn)*
Alleged Breaches	• NAFTA Article 1102 • NAFTA Article 1105 • NAFTA Article 1110
Alleged Investments	• Prairie, interests in Prairie • Certain of Prairie's assets • "NAFTA claim" as a "claim to money"
Alleged Damages (Heads)	• Lost revenues from Prairie's coal sales • Prairie's accelerated reclamation costs
Alleged Damages (Quantum)	• Damages not yet quantified

The Claimant Sold Its Interests in Canada Prior to July 1, 2020



See Canada's Memorial on Jurisdiction, ¶ 53. Claimant's Response on Jurisdiction, ¶ 30

The Claimant's Alleged Investments Are Not "Legacy Investments"

	2022 NOA
Measures Challenged	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments • 2016 Imposition of Consumer Fuel Levy • *Federal Fuel Charge (withdrawn)*
Alleged Breaches	• NAFTA Article 1102 • NAFTA Article 1105 • NAFTA Article 1110
Alleged Investments	• ~~Prairie, interests in Prairie~~ • ~~Certain of Prairie's assets~~ • ~~"NAFTA claim" as a "claim to money"~~
Alleged Damages (Heads)	• Lost revenues from Prairie's coal sales • Prairie's accelerated reclamation costs
Alleged Damages (Quantum)	• Damages not yet quantified

The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

1. The express requirements of CUSMA Annex 14-C
2. The Claimant has failed to establish it meets the express requirements
3. **The Claimant cannot establish jurisdiction based on equitable principles**

Estoppel Cannot Create Jurisdiction Where It Does Not Exist On the Law

Koch Industries et al. v. Canada

First and foremost, the jurisdiction of the Tribunal is a matter of law. The Tribunal must be satisfied that the jurisdictional requirements of the NAFTA are met, and if not, must decline its jurisdiction. The Tribunal therefore concurs with the tribunal in *Oded Besserglik v. Mozambique* that "the jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel."

RLA-094, *Koch* – Award, ¶ 397 (citing RLA-063, *Oded Besserglik v. Mozambique*), ¶ 422

The Claimant Has Not Established The Tribunal's Jurisdiction

1 Does the Claimant hold a "legacy investment" under CUSMA Annex 14-C? → **NO**

DISMISS ENTIRE CLAIM

Overview of Canada's Opening Statement

I Factual Background

II The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

III The Claimant Has Not Submitted Valid Waivers Under NAFTA Article 1121

IV The Claimant's Claim Is Not Timely Under NAFTA Articles 1116(2) and 1117(2)

V The Claimant Has Not Made a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

VI Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

Overview of Canada's Opening Statement

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VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

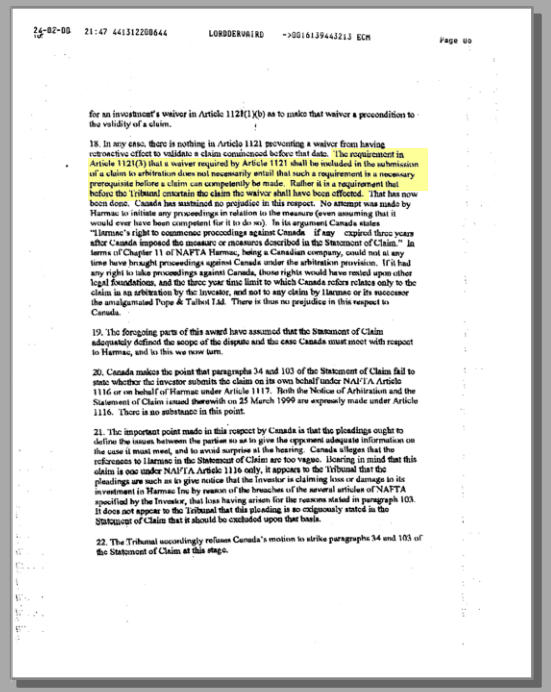
Requirements of Article 1121 is a Condition Precedent to Submission of a Claim to Arbitration

NAFTA Article 1121(3)

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

Requirements of Article 1121 is a Condition Precedent to Submission of a Claim to Arbitration



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for an investment's waiver in Article 1121(1)(b) as to make that waiver a precondition to the validity of a claim.

18. In any case, there is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date. The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected. That has now been done. Canada has sustained no prejudice in this respect. No attempt was made by Harmac to initiate any proceedings in relation to the measure (even assuming that it would ever have been competent for it to do so). In its argument Canada states "Harmac's right to commence proceedings against Canada if any expired three years after Canada imposed the measure or measures described in the Statement of Claim." In terms of Chapter 11 of NAFTA Harmac, being a Canadian company, could not at any time have brought proceedings against Canada under the arbitration provision. If it had any right to take proceedings against Canada, those rights would have rested upon other legal foundations, and the three year time limit to which Canada refers relates only to the claim in an arbitration by the investor, and not to any claim by Harmac or its successor the amalgamated Pope & Talbot Ltd. There is thus no prejudice in this respect to Canada.

19. The foregoing parts of this award have assumed that the Statement of Claim adequately defined the scope of the dispute and the case Canada must meet with respect to Harmac, and to this we now turn.

20. Canada makes the point that paragraphs 34 and 103 of the Statement of Claim fail to state whether the investor submits the claim on its own behalf under NAFTA Article 1116 or on behalf of Harmac under Article 1117. Both the Notice of Arbitration and the Statement of Claim issued therewith on 25 March 1999 are expressly made under Article 1116. There is no substance in this point.

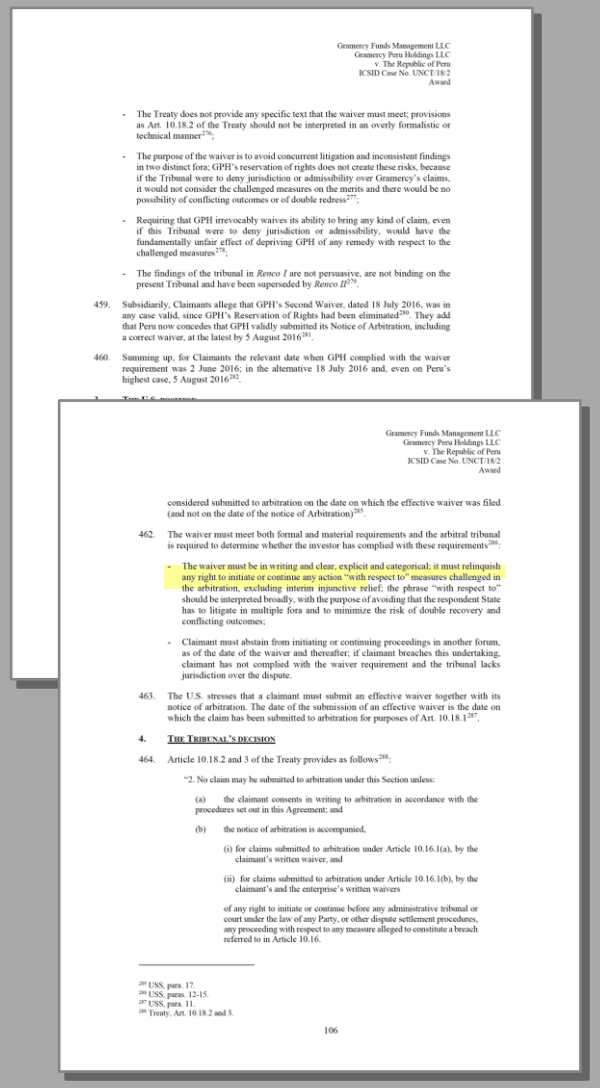
21. The important point made in this respect by Canada is that the pleadings ought to define the issues between the parties so as to give the opponent adequate information on the case it must meet, and to avoid surprise at the hearing. Canada alleges that the references to Harmac in the Statement of Claim are too vague. Bearing in mind that this claim is one under NAFTA Article 1116 only, it appears to the Tribunal that the pleadings are such as to give notice that the Investor is claiming loss or damage to its investment in Harmac Inc by reason of the breaches of the several articles of NAFTA specified by the Investor, that loss having arisen for the reasons stated in paragraph 103. It does not appear to the Tribunal that this pleading is so calgiously stated in the Statement of Claim that it should be excluded upon that basis.

22. The Tribunal accordingly refuses Canada's motion to strike paragraphs 34 and 103 of the Statement of Claim at this stage.

Pope & Talbot v. Canada

[T]he requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather, it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected.

Requirements of Article 1121 is a Condition Precedent to Submission of a Claim to Arbitration



Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
v. The Republic of Peru
ICSID Case No. UNCT/18/2
Award

- The Treaty does not provide any specific text that the waiver must meet; provisions as Art. 10.18.2 of the Treaty should not be interpreted in an overly formalistic or technical manner[276];

- The purpose of the waiver is to avoid concurrent litigation and inconsistent findings in two distinct fora; GPH's reservation of rights does not create these risks, because if the Tribunal were to deny jurisdiction or admissibility over Gramercy's claims, it would not consider the challenged measures on the merits and there would be no possibility of conflicting outcomes or of double redress[277];

- Requiring that GPH irrevocably waives its ability to bring any kind of claim, even if this Tribunal were to deny jurisdiction or admissibility, would have the fundamentally unfair effect of depriving GPH of any remedy with respect to the challenged measures[278];

- The findings of the tribunal in *Renco I* are not persuasive, are not binding on the present Tribunal and have been superseded by *Renco II*[279].

459. Subsidiarily, Claimants allege that GPH's Second Waiver, dated 18 July 2016, was in any case valid, since GPH's Reservation of Rights had been eliminated[280]. They add that Peru now concedes that GPH validly submitted its Notice of Arbitration, including a correct waiver, at the latest by 5 August 2016[281].

460. Summing up, for Claimants the relevant date when GPH complied with the waiver requirement was 2 June 2016; in the alternative 18 July 2016 and, even on Peru's highest case, 5 August 2016[282].

Gramercy Funds Management LLC
Gramercy Peru Holdings LLC
v. The Republic of Peru
ICSID Case No. UNCT/18/2
Award

considered submitted to arbitration on the date on which the effective waiver was filed (and not on the date of the notice of Arbitration)[285].

462. The waiver must meet both formal and material requirements and the arbitral tribunal is required to determine whether the investor has complied with these requirements[286]:

- The waiver must be in writing and clear, explicit and categorical; it must relinquish any right to initiate or continue any action "with respect to" measures challenged in the arbitration, excluding interim injunctive relief; the phrase "with respect to" should be interpreted broadly, with the purpose of avoiding that the respondent State has to litigate in multiple fora and to minimize the risk of double recovery and conflicting outcomes;

- Claimant must abstain from initiating or continuing proceedings in another forum, as of the date of the waiver and thereafter; if claimant breaches this undertaking, claimant has not complied with the waiver requirement and the tribunal lacks jurisdiction over the dispute.

463. The U.S. stresses that a claimant must submit an effective waiver together with its notice of arbitration. The date of the submission of an effective waiver is the date on which the claim has been submitted to arbitration for purposes of Art. 10.18.1[287].

4. THE TRIBUNAL'S DECISION

464. Article 10.18.2 and 3 of the Treaty provides as follows[288]:

"2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

[285] USS, para. 17.
[286] USS, paras. 12-15.
[287] USS, para. 11.
[288] Treaty, Art. 10.18.2 and 3.

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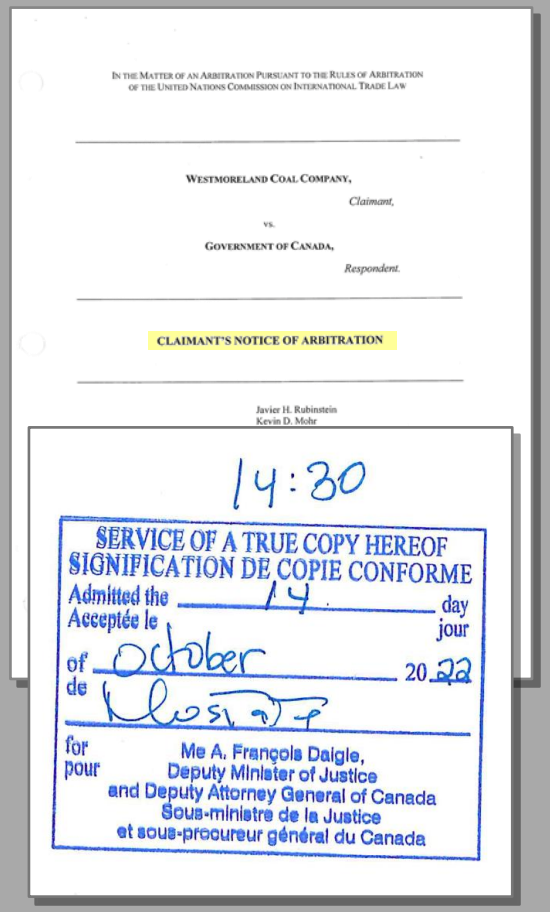
Gramercy Funds v. Canada

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

WCC Has Failed to Meet the Requirements of Article 1121(3)



IN THE MATTER OF AN ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

WESTMORELAND COAL COMPANY,

Claimant,

vs.

GOVERNMENT OF CANADA,

Respondent.

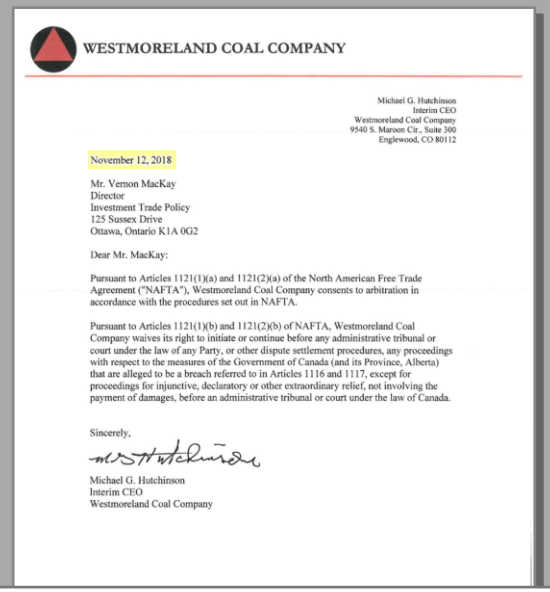
CLAIMANT'S NOTICE OF ARBITRATION

Javier H. Rubinstein
Kevin D. Mohr

14:30

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME
Admitted the 14 day
Acceptée le jour
of October 20 22
de

for Me A. François Daigle,
pour Deputy Minister of Justice
and Deputy Attorney General of Canada
Sous-ministre de la Justice
et sous-procureur général du Canada



WESTMORELAND COAL COMPANY

Michael G. Hutchinson
Interim CEO
Westmoreland Coal Company
9540 S. Maroon Cir., Suite 300
Englewood, CO 80112

November 12, 2018

Mr. Vernon MacKay
Director
Investment Trade Policy
125 Sussex Drive
Ottawa, Ontario K1A 0G2

Dear Mr. MacKay:

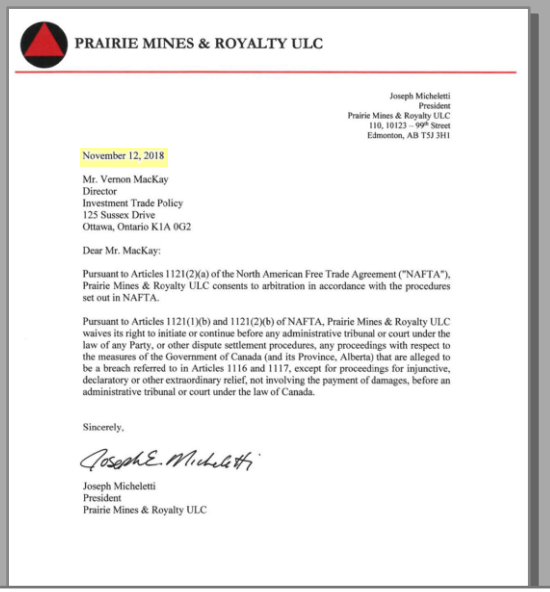
Pursuant to Articles 1121(1)(a) and 1121(2)(a) of the North American Free Trade Agreement ("NAFTA"), Westmoreland Coal Company consents to arbitration in accordance with the procedures set out in NAFTA.

Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, Westmoreland Coal Company waives its 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 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.

Sincerely,

Michael G. Hutchinson
Interim CEO
Westmoreland Coal Company

"November 12, 2018"



PRAIRIE MINES & ROYALTY ULC

Joseph Micheletti
President
Prairie Mines & Royalty ULC
110, 10123 – 99th Street
Edmonton, AB T5J 3H1

November 12, 2018

Mr. Vernon MacKay
Director
Investment Trade Policy
125 Sussex Drive
Ottawa, Ontario K1A 0G2

Dear Mr. MacKay:

Pursuant to Articles 1121(2)(a) of the North American Free Trade Agreement ("NAFTA"), Prairie Mines & Royalty ULC consents to arbitration in accordance with the procedures set out in NAFTA.

Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, Prairie Mines & Royalty ULC waives its 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 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.

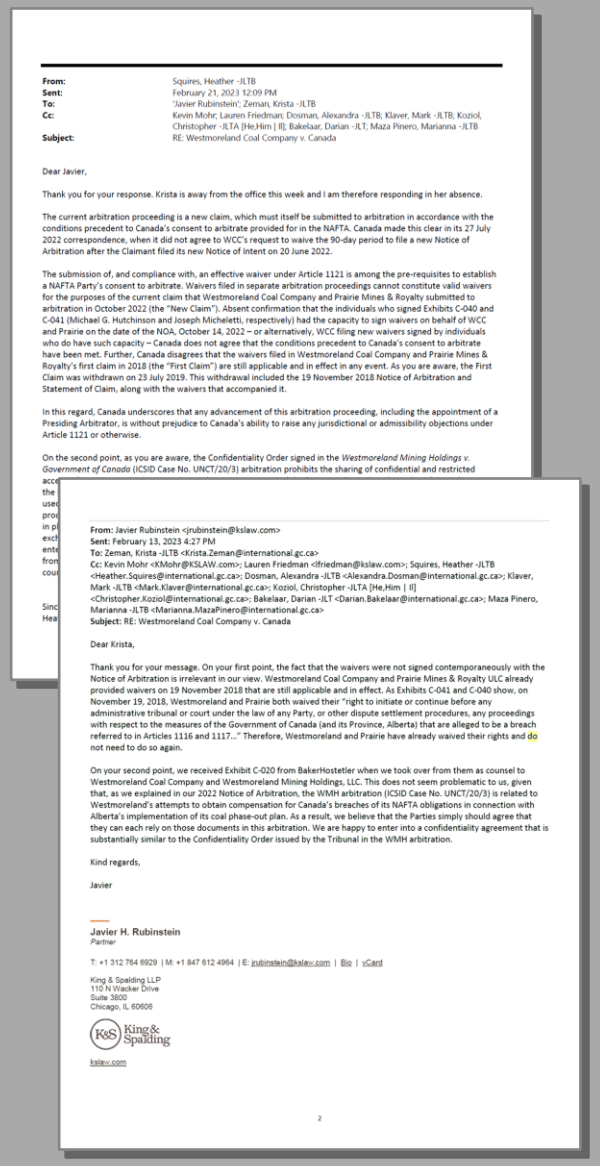
Sincerely,

Joseph Micheletti
President
Prairie Mines & Royalty ULC

"November 12, 2018"

Claimant's Notice of Arbitration; C-040, Prairie Mines Waiver, 12 November 2018; C-041, WCC Waiver, 12 November 2018

WCC Has Failed to Meet the Requirements of Article 1121(3)



From: Squires, Heather -JLTB
Sent: February 21, 2023 12:09 PM
To: 'Javier Rubinstein'; Zeman, Krista -JLTB
Cc: Kevin Mohr; Lauren Friedman; Dosman, Alexandra -JLTB; Klaver, Mark -JLTB; Koziol, Christopher -JLTA [He,Him | Il]; Bakelaar, Darian -JLT; Maza Pinero, Marianna -JLTB
Subject: RE: Westmoreland Coal Company v. Canada

Dear Javier,

Thank you for your response. Krista is away from the office this week and I am therefore responding in her absence.

The current arbitration proceeding is a new claim, which must itself be submitted to arbitration in accordance with the conditions precedent to Canada's consent to arbitrate provided for in the NAFTA. Canada made this clear in its 27 July 2022 correspondence, when it did not agree to WCC's request to waive the 90-day period to file a new Notice of Arbitration after the Claimant filed its new Notice of Intent on 20 June 2022.

The submission of, and compliance with, an effective waiver under Article 1121 is among the pre-requisites to establish a NAFTA Party's consent to arbitrate. Waivers filed in separate arbitration proceedings cannot constitute valid waivers for the purposes of the current claim that Westmoreland Coal Company and Prairie Mines & Royalty submitted to arbitration in October 2022 (the "New Claim"). Absent confirmation that the individuals who signed Exhibits C-040 and C-041 (Michael G. Hutchinson and Joseph Micheletti, respectively) had the capacity to sign waivers on behalf of WCC and Prairie on the date of the NOA, October 14, 2022 – or alternatively, WCC filing new waivers signed by individuals who do have such capacity – Canada does not agree that the conditions precedent to Canada's consent to arbitrate have been met. Further, Canada disagrees that the waivers filed in Westmoreland Coal Company and Prairie Mines & Royalty's first claim in 2018 (the "First Claim") are still applicable and in effect in any event. As you are aware, the First Claim was withdrawn on 23 July 2019. This withdrawal included the 19 November 2018 Notice of Arbitration and Statement of Claim, along with the waivers that accompanied it.

In this regard, Canada underscores that any advancement of this arbitration proceeding, including the appointment of a Presiding Arbitrator, is without prejudice to Canada's ability to raise any jurisdictional or admissibility objections under Article 1121 or otherwise.

On the second point, as you are aware, the Confidentiality Order signed in the *Westmoreland Mining Holdings v. Government of Canada* (ICSID Case No. UNCT/20/3) arbitration prohibits the sharing of confidential and restricted

From: Javier Rubinstein <jrubinstein@kslaw.com>
Sent: February 13, 2023 4:27 PM
To: Zeman, Krista -JLTB <Krista.Zeman@international.gc.ca>
Cc: Kevin Mohr <KMohr@KSLAW.com>; Lauren Friedman <lfriedman@kslaw.com>; Squires, Heather -JLTB <Heather.Squires@international.gc.ca>; Dosman, Alexandra -JLTB <Alexandra.Dosman@international.gc.ca>; Klaver, Mark -JLTB <Mark.Klaver@international.gc.ca>; Koziol, Christopher -JLTA [He,Him | Il] <Christopher.Koziol@international.gc.ca>; Bakelaar, Darian -JLT <Darian.Bakelaar@international.gc.ca>; Maza Pinero, Marianna -JLTB <Marianna.MazaPinero@international.gc.ca>
Subject: RE: Westmoreland Coal Company v. Canada

Dear Krista,

Thank you for your message. On your first point, the fact that the waivers were not signed contemporaneously with the Notice of Arbitration is irrelevant in our view. Westmoreland Coal Company and Prairie Mines & Royalty ULC already provided waivers on 19 November 2018 that are still applicable and in effect. As Exhibits C-041 and C-040 show, on November 19, 2018, Westmoreland and Prairie both waived 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 measures of the Government of Canada (and its Province, Alberta) that are alleged to be a breach referred to in Articles 1116 and 1117…" Therefore, Westmoreland and Prairie have already waived their rights and do not need to do so again.

On your second point, we received Exhibit C-020 from BakerHostetler when we took over from them as counsel to Westmoreland Coal Company and Westmoreland Mining Holdings, LLC. This does not seem problematic to us, given that, as we explained in our 2022 Notice of Arbitration, the WMH arbitration (ICSID Case No. UNCT/20/3) is related to Westmoreland's attempts to obtain compensation for Canada's breaches of its NAFTA obligations in connection with Alberta's implementation of its coal phase-out plan. As a result, we believe that the Parties simply should agree that they can each rely on those documents in this arbitration. We are happy to enter into a confidentiality agreement that is substantially similar to the Confidentiality Order issued by the Tribunal in the WMH arbitration.

Kind regards,

Javier

Javier H. Rubinstein
Partner

T: +1 312 764 6929 | M: +1 847 612 4964 | E: jrubinstein@kslaw.com | Bio | vCard

King & Spalding LLP
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Suite 3800
Chicago, IL 60606

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The submission of, and compliance with, an effective waiver under Article 1121 is among the pre-requisites to establish a NAFTA Party's consent to arbitrate

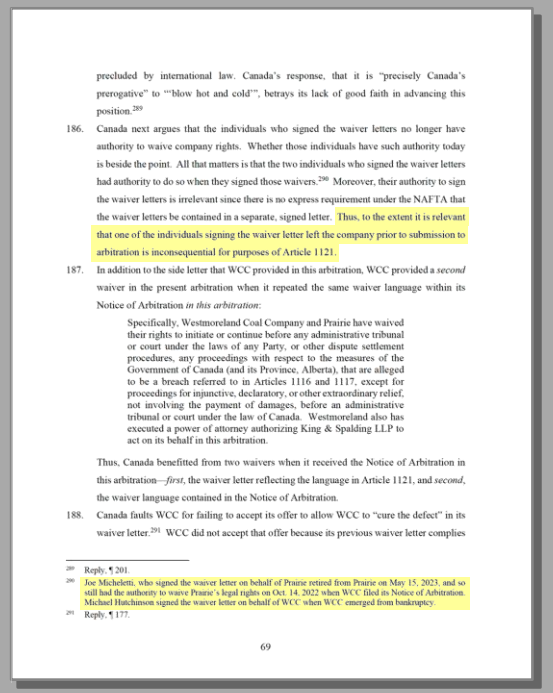
Waivers filed in separate arbitration proceedings cannot constitute valid waivers for the purposes of the current claim

Canada disagrees that the waivers filed in Westmoreland Coal Company and Prairie Mines & Royalty's first claim in 2018 (the "First Claim") are still applicable and in effect

Absent confirmation that the individuals who signed Exhibits C-040 and C-041 (Michael G. Hutchinson and Joseph Micheletti, respectively) had the capacity to sign waivers on behalf of WCC and Prairie on the date of the NOA

R-091, E-mail from Canada to Claimant, 21 February 2023

Claimant has Failed to Meet the Requirements of NAFTA Article 1121(3)



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

[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.

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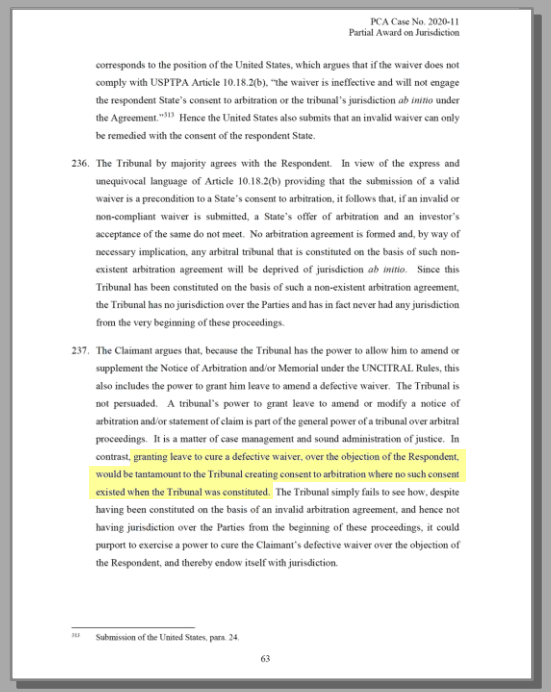
Claimant's Rejoinder on Jurisdiction

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.

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.

Claimant's Rejoinder on Jurisdiction, ¶ 186, fn. 290

WCC Has Failed to Meet the Requirements of Article 1121(3)



PCA Case No. 2020-11
Partial Award on Jurisdiction

corresponds to the position of the United States, which argues that if the waiver does not comply with USPTPA Article 10.18.2(b), "the waiver is ineffective and will not engage the respondent State's consent to arbitration or the tribunal's jurisdiction *ab initio* under the Agreement."[313] Hence the United States also submits that an invalid waiver can only be remedied with the consent of the respondent State.

236. The Tribunal by majority agrees with the Respondent. In view of the express and unequivocal language of Article 10.18.2(b) providing that the submission of a valid waiver is a precondition to a State's consent to arbitration, it follows that, if an invalid or non-compliant waiver is submitted, a State's offer of arbitration and an investor's acceptance of the same do not meet. No arbitration agreement is formed and, by way of necessary implication, any arbitral tribunal that is constituted on the basis of such non-existent arbitration agreement will be deprived of jurisdiction *ab initio*. Since this Tribunal has been constituted on the basis of such a non-existent arbitration agreement, the Tribunal has no jurisdiction over the Parties and has in fact never had any jurisdiction from the very beginning of these proceedings.

237. The Claimant argues that, because the Tribunal has the power to allow him to amend or supplement the Notice of Arbitration and/or Memorial under the UNCITRAL Rules, this also includes the power to grant him leave to amend a defective waiver. The Tribunal is not persuaded. A tribunal's power to grant leave to amend or modify a notice of arbitration and/or statement of claim is part of the general power of a tribunal over arbitral proceedings. It is a matter of case management and sound administration of justice. In contrast, granting leave to cure a defective waiver, over the objection of the Respondent, would be tantamount to the Tribunal creating consent to arbitration where no such consent existed when the Tribunal was constituted. The Tribunal simply fails to see how, despite having been constituted on the basis of an invalid arbitration agreement, and hence not having jurisdiction over the Parties from the beginning of these proceedings, it could purport to exercise a power to cure the Claimant's defective waiver over the objection of the Respondent, and thereby endow itself with jurisdiction.

[313] Submission of the United States, para. 24.

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Bacilio Amorrortu v. Peru

A tribunal's power to grant leave to amend or modify a notice of arbitration and/or statement of claim is part of the general power of a tribunal over arbitral proceedings. It is a matter of case management and sound administration of justice. In contrast, **granting leave to cure a defective waiver, over the objection of the Respondent, would be tantamount to the Tribunal creating consent to arbitration where no such consent existed when the Tribunal was constituted**.

Tribunal Question 4

If there is a residual expropriation claim, for instance in relation to measures adopted in 2015 and 2016, what are the Parties' positions in relation to that claim in terms of limitation periods and the scope of WCC's waivers?

Tribunal Question 5

How does the Respondent respond to the Claimant's request in note 234 of its Rejoinder that, if the Tribunal were to dismiss the claims, the Tribunal should issue an order confirming that WCC has not effectively waived its right to pursue relief in other venues?

WCC Has Failed to Meet the Requirements of Article 1121(3)

1 Does the Claimant hold a "legacy investment" under CUSMA Annex 14-C? → NO

2 Has the Claimant submitted valid waivers consistent with NAFTA Article 1121? → NO

DISMISS ENTIRE CLAIM

Overview of Canada's Opening Statement

I Factual Background

II The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

III The Claimant Has Not Submitted Valid Waivers Under NAFTA Article 1121

IV The Claimant's Claim Is Not Timely Under NAFTA Articles 1116(2) and 1117(2)

V The Claimant Has Not Made a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

VI Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

The Temporal Limitation on Consent

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

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

(a) Section A […], and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor **may not make a claim** if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

The Temporal Limitation on Consent

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

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

(a) **Section A** […], and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor **may not make a claim** on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Dates for Article 1116(2) and 1117(2) Analysis

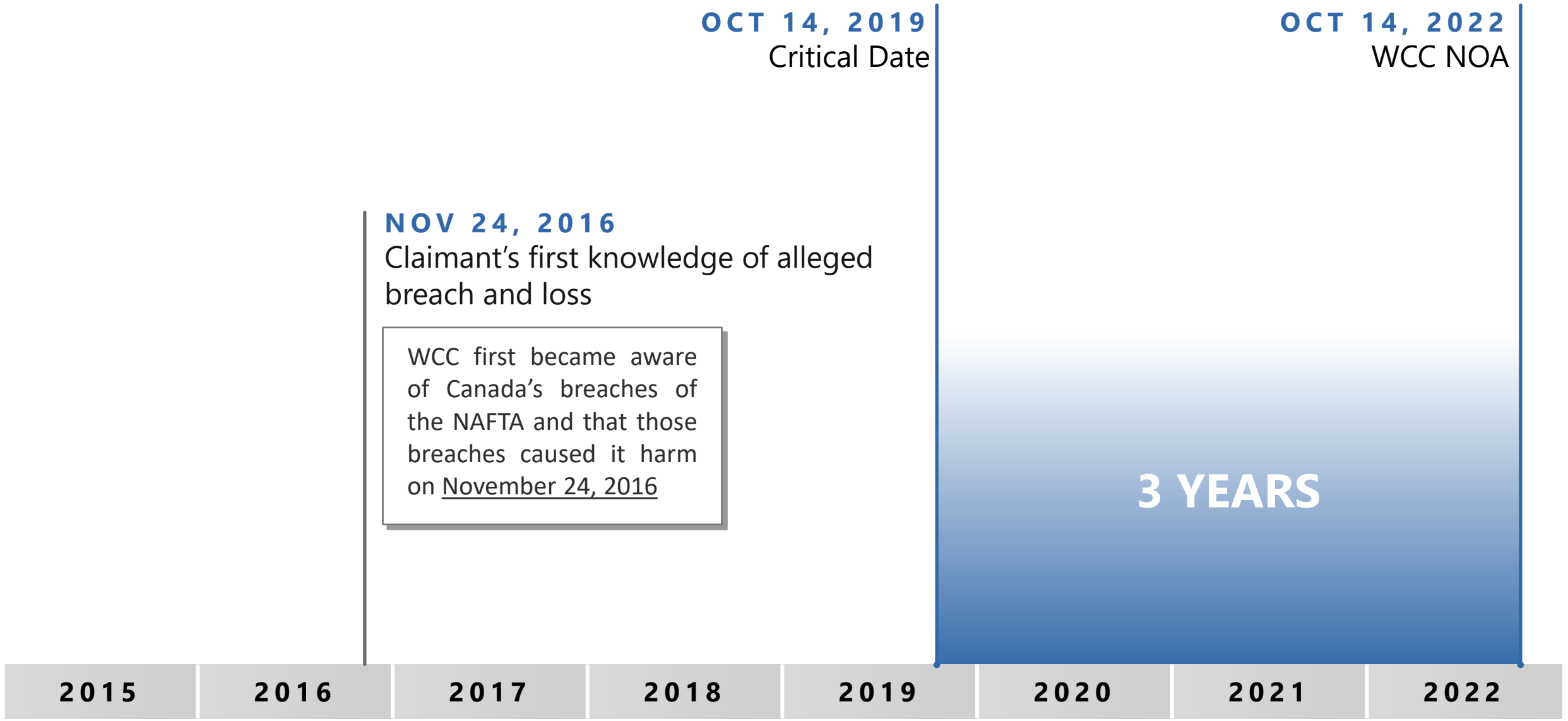
Critical Date

Submission of Claim to Arbitration (Art. 1137(1))

3 YEARS

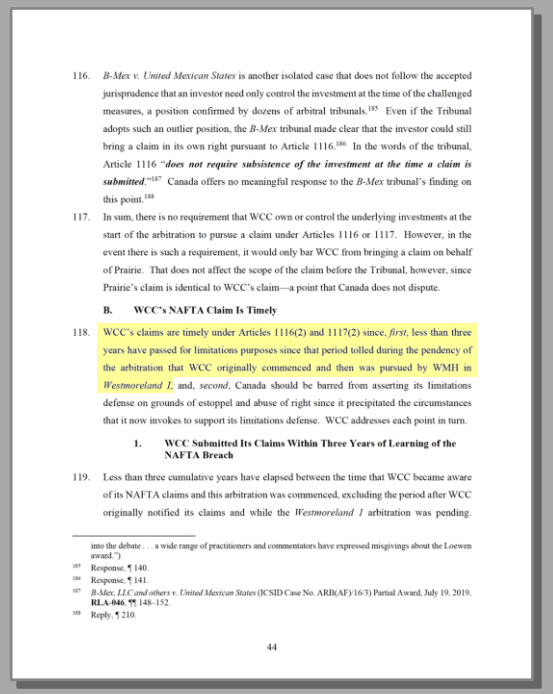
Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8

Dates for Article 1116(2) and 1117(2) Analysis



Claimant's Response to Memorial on Jurisdiction, ¶ 151 (emphasis in original)

The Claimant's False Premise



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.

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.

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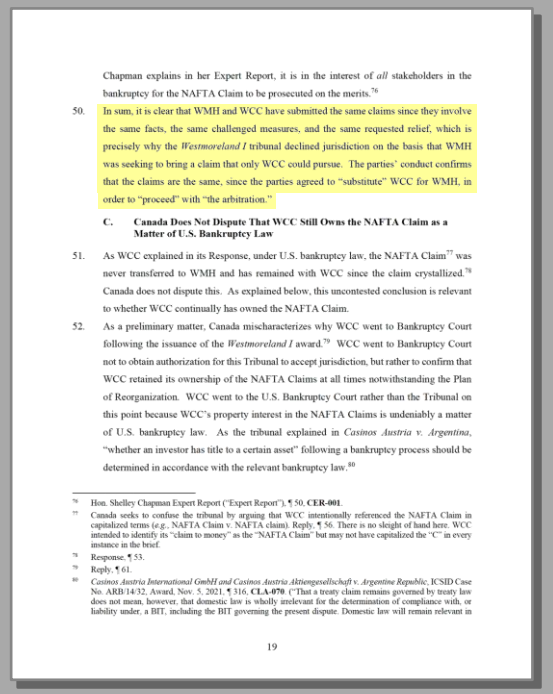
Claimant's Rejoinder on Jurisdiction

WCC's claims are timely under Articles 1116(2) and 1117(2) since … 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*.

Claimant's Rejoinder on Jurisdiction, ¶ 118

The Claimant's False Premise



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]

[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

19

Claimant's Rejoinder on Jurisdiction

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."

Claimant's Rejoinder on Jurisdiction, ¶ 50

NAFTA: Claims Arising out of the Same Events

Article 1117

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 **arising out of the same events that gave rise to the claim** under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

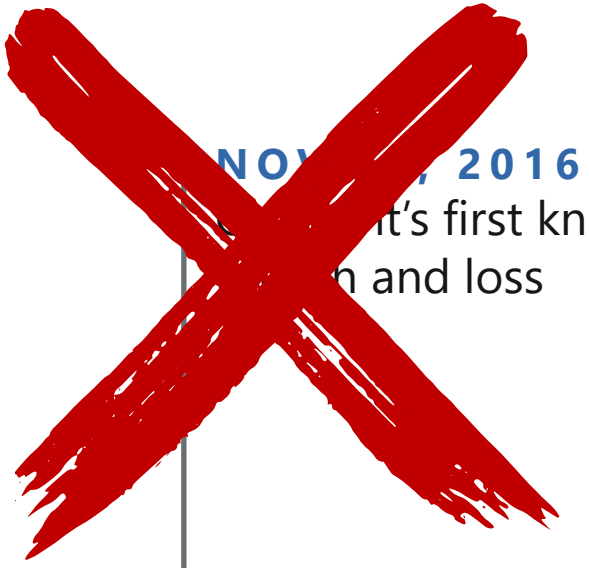
Tribunal Question 2

Please elaborate on the identity of the claims advanced in 2018, 2019 and 2022, respectively. In particular, are the claims identical, as the Claimant argues, or are they separate and distinct, as the Respondent contends, and what is the effect of such a determination?

Dates for Article 1116(2) and 1117(2) Analysis

OCT 14, 2019
Critical Date

OCT 14, 2022
WCC NOA



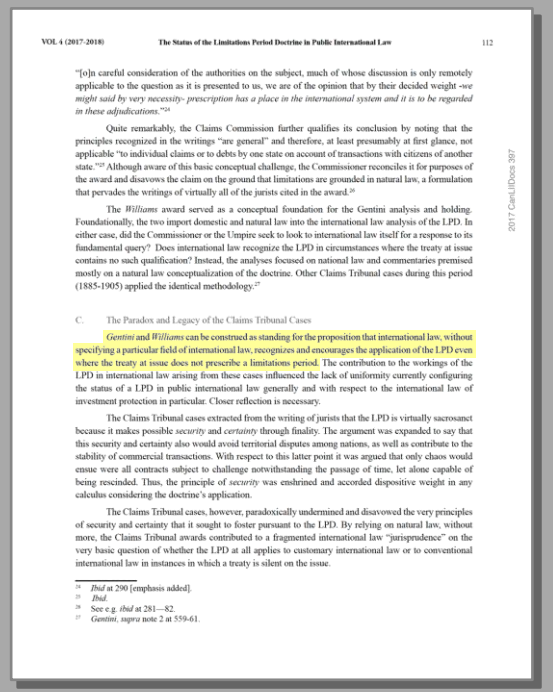
NOV , 2016
t's first knowledge of alleged
h and loss

3 YEARS

2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022

Claimant's Response to Memorial on Jurisdiction, ¶ 151 (emphasis in original)

NAFTA: Limitation Period is Not Flexible



VOL 4 (2017-2018) The Status of the Limitations Period Doctrine in Public International Law 112

"[o]n careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of the opinion that by their decided weight -*we might said by very necessity- prescription has a place in the international system and it is to be regarded in these adjudications.*"[24]

Quite remarkably, the Claims Commission further qualifies its conclusion by noting that the principles recognized in the writings "are general" and therefore, at least presumably at first glance, not applicable "to individual claims or to debts by one state on account of transactions with citizens of another state."[25] Although aware of this basic conceptual challenge, the Commissioner reconciles it for purposes of the award and disavows the claim on the ground that limitations are grounded in natural law, a formulation that pervades the writings of virtually all of the jurists cited in the award.[26]

The *Williams* award served as a conceptual foundation for the Gentini analysis and holding. Foundationally, the two import domestic and natural law into the international law analysis of the LPD. In either case, did the Commissioner or the Umpire seek to look to international law itself for a response to its fundamental query? Does international law recognize the LPD in circumstances where the treaty at issue contains no such qualification? Instead, the analyses focused on national law and commentaries premised mostly on a natural law conceptualization of the doctrine. Other Claims Tribunal cases during this period (1885-1905) applied the identical methodology.[27]

C. The Paradox and Legacy of the Claims Tribunal Cases

Gentini and *Williams* can be construed as standing for the proposition that international law, without specifying a particular field of international law, recognizes and encourages the application of the LPD even where the treaty at issue does not prescribe a limitations period. The contribution to the workings of the LPD in international law arising from these cases influenced the lack of uniformity currently configuring the status of a LPD in public international law generally and with respect to the international law of investment protection in particular. Closer reflection is necessary.

The Claims Tribunal cases extracted from the writing of jurists that the LPD is virtually sacrosanct because it makes possible *security* and *certainty* through finality. The argument was expanded to say that this security and certainty also would avoid territorial disputes among nations, as well as contribute to the stability of commercial transactions. With respect to this latter point it was argued that only chaos would ensue were all contracts subject to challenge notwithstanding the passage of time, let alone capable of being rescinded. Thus, the principle of *security* was enshrined and accorded dispositive weight in any calculus considering the doctrine's application.

The Claims Tribunal cases, however, paradoxically undermined and disavowed the very principles of security and certainty that it sought to foster pursuant to the LPD. By relying on natural law, without more, the Claims Tribunal awards contributed to a fragmented international law "jurisprudence" on the very basic question of whether the LPD at all applies to customary international law or to conventional international law in instances in which a treaty is silent on the issue.

[24] *Ibid* at 290 [emphasis added].
[25] *Ibid.*
[26] See e.g. *ibid* at 281—82.
[27] *Gentini*, *supra* note 2 at 559-61.

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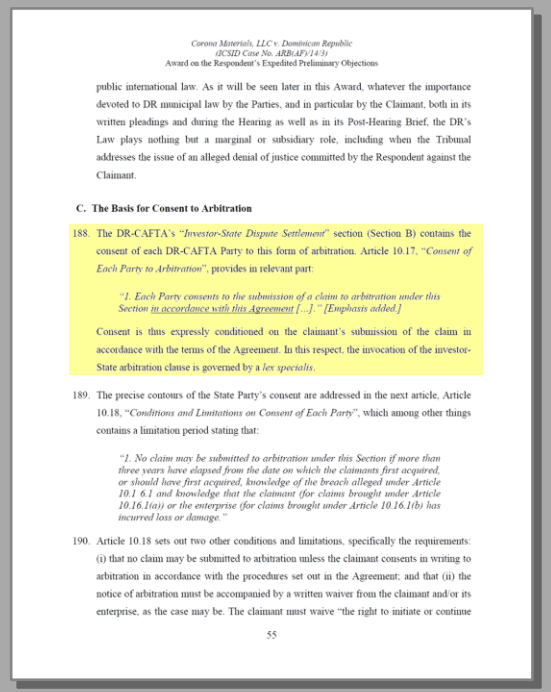
[T]he Limitations Period Doctrine in Public International Law

Gentini and *Williams* can be construed as standing for the proposition that international law, without specifying a particular field of international law, recognizes and encourages the application of the [limitation period doctrine] even where the treaty at issue does not prescribe a limitations period.

NAFTA: Limitation Period is Not Flexible



Corona Materials, LLC v. Dominican Republic
(ICSID Case No. ARB(AF)/14/3)
Award on the Respondent's Expedited Preliminary Objections

public international law. As it will be seen later in this Award, whatever the importance devoted to DR municipal law by the Parties, and in particular by the Claimant, both in its written pleadings and during the Hearing as well as in its Post-Hearing Brief, the DR's Law plays nothing but a marginal or subsidiary role, including when the Tribunal addresses the issue of an alleged denial of justice committed by the Respondent against the Claimant.

C. The Basis for Consent to Arbitration

188. The DR-CAFTA's "*Investor-State Dispute Settlement*" section (Section B) contains the consent of each DR-CAFTA Party to this form of arbitration. Article 10.17, "*Consent of Each Party to Arbitration*", provides in relevant part:

> "*1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement* […]." *[Emphasis added]*

Consent is thus expressly conditioned on the claimant's submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.

189. The precise contours of the State Party's consent are addressed in the next article, Article 10.18, "*Conditions and Limitations on Consent of Each Party*", which among other things contains a limitation period stating that:

> "*1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimants first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 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."*

190. Article 10.18 sets out two other conditions and limitations, specifically the requirements: (i) that no claim may be submitted to arbitration unless the claimant consents in writing to arbitration in accordance with the procedures set out in the Agreement; and that (ii) the notice of arbitration must be accompanied by a written waiver from the claimant and/or its enterprise, as the case may be. The claimant must waive "the right to initiate or continue

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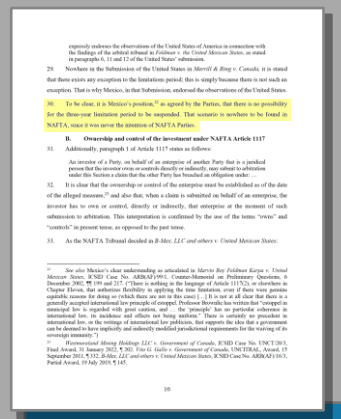
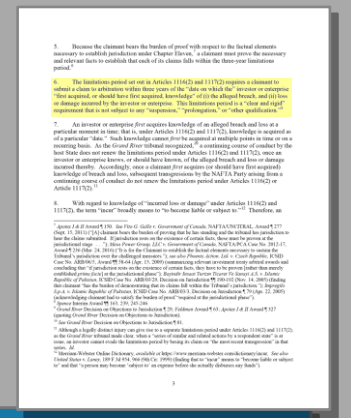
Corona Materials, LLC v. Dominican Republic

Consent is thus expressly conditioned on the claimant's submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.

RLA-026, *Corona Materials* – Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the CAFTA-DR, ¶ 188

NAFTA: Limitation Period is Not Flexible





Submission of Mexico

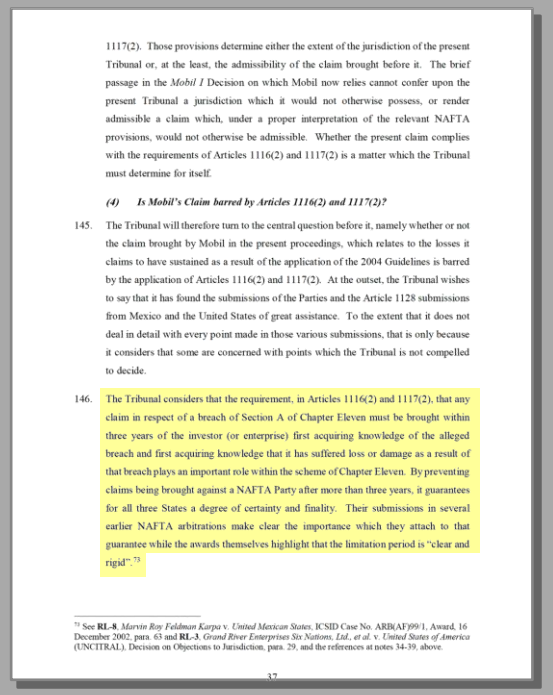
To be clear, it is Mexico's position, as agreed by the Parties, that there is no possibility for the three-year limitation period to be suspended. That scenario is nowhere to be found in NAFTA, since it was never the intention of NAFTA Parties.

U.S. Submission in *Resolute*

The limitations period set out in Articles 1116(2) and 1117(2) […] is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."

1128 Submission of Mexico, ¶ 30; R-098, *Resolute* – U.S. 1128 Submission, ¶ 6

NAFTA: Limitation Period is Not Flexible



1117(2). Those provisions determine either the extent of the jurisdiction of the present Tribunal or, at the least, the admissibility of the claim brought before it. The brief passage in the *Mobil I* Decision on which Mobil now relies cannot confer upon the present Tribunal a jurisdiction which it would not otherwise possess, or render admissible a claim which, under a proper interpretation of the relevant NAFTA provisions, would not otherwise be admissible. Whether the present claim complies with the requirements of Articles 1116(2) and 1117(2) is a matter which the Tribunal must determine for itself.

(4) Is Mobil's Claim barred by Articles 1116(2) and 1117(2)?

145. The Tribunal will therefore turn to the central question before it, namely whether or not the claim brought by Mobil in the present proceedings, which relates to the losses it claims to have sustained as a result of the application of the 2004 Guidelines is barred by the application of Articles 1116(2) and 1117(2). At the outset, the Tribunal wishes to say that it has found the submissions of the Parties and the Article 1128 submissions from Mexico and the United States of great assistance. To the extent that it does not deal in detail with every point made in those various submissions, that is only because it considers that some are concerned with points which the Tribunal is not compelled to decide.

146. The Tribunal considers that the requirement, in Articles 1116(2) and 1117(2), that any claim in respect of a breach of Section A of Chapter Eleven must be brought within three years of the investor (or enterprise) first acquiring knowledge of the alleged breach and first acquiring knowledge that it has suffered loss or damage as a result of that breach plays an important role within the scheme of Chapter Eleven. By preventing claims being brought against a NAFTA Party after more than three years, it guarantees for all three States a degree of certainty and finality. Their submissions in several earlier NAFTA arbitrations make clear the importance which they attach to that guarantee while the awards themselves highlight that the limitation period is "clear and rigid".[73]

[73] See **RL-8**, *Marvin Roy Feldman Karpa* v. *United Mexican States*, ICSID Case No. ARB(AF)99/1, Award, 16 December 2002, para. 63 and **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al.* v. *United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, para. 29, and the references at notes 34-39, above.

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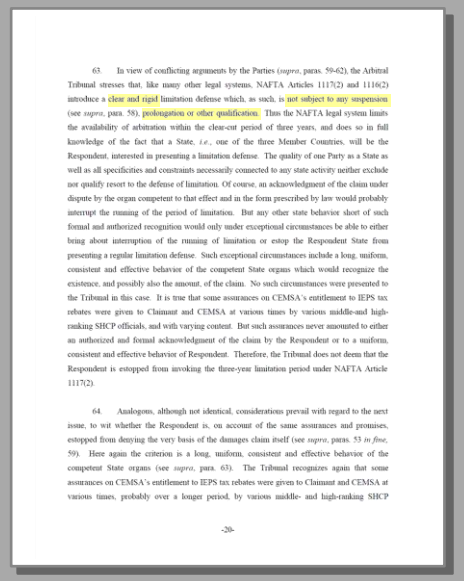
Mobil Investments Canada Inc. v. Canada

The Tribunal considers that the requirement, in Articles 1116(2) and 1117(2), […] **plays an important role within the scheme of Chapter Eleven**. By preventing claims being brought against a NAFTA Party after more than three years, **it guarantees for all three States a degree of certainty and finality**. Their submissions in several earlier NAFTA arbitrations make clear the importance which they attach to that guarantee while the awards themselves highlight that the limitation period is "clear and rigid".

RLA-027, *Mobil* – Decision on Jurisdiction, ¶ 146

NAFTA: Limitation Period is Not Flexible



63. In view of conflicting arguments by the Parties (*supra*, paras. 59-62), the Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension (see *supra*, para. 58), prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years, and does so in full knowledge of the fact that a State, *i.e.*, one of the three Member Countries, will be the Respondent, interested in presenting a limitation defense. The quality of one Party as a State as well as all specificities and constraints necessarily connected to any state activity neither exclude nor qualify resort to the defense of limitation. Of course, 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. But any 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 which would recognize the existence, and possibly also the amount, of the claim. No such circumstances were presented to the Tribunal in this case. It is true that some assurances on CEMSA's entitlement to IEPS tax rebates were given to Claimant and CEMSA at various times by various middle-and high-ranking SHCP officials, and with varying content. But such assurances never amounted to either an authorized and formal acknowledgment of the claim by the Respondent or to a uniform, consistent and effective behavior of Respondent. Therefore, the Tribunal does not deem that the Respondent is estopped from invoking the three-year limitation period under NAFTA Article 1117(2).

64. Analogous, although not identical, considerations prevail with regard to the next issue, to wit whether the Respondent is, on account of the same assurances and promises, estopped from denying the very basis of the damages claim itself (see *supra*, paras. 53 *in fine*, 59). Here again the criterion is a long, uniform, consistent and effective behavior of the competent State organs (see *supra*, para. 63). The Tribunal recognizes again that some assurances on CEMSA's entitlement to IEPS tax rebates were given to Claimant and CEMSA at various times, probably over a longer period, by various middle- and high-ranking SHCP

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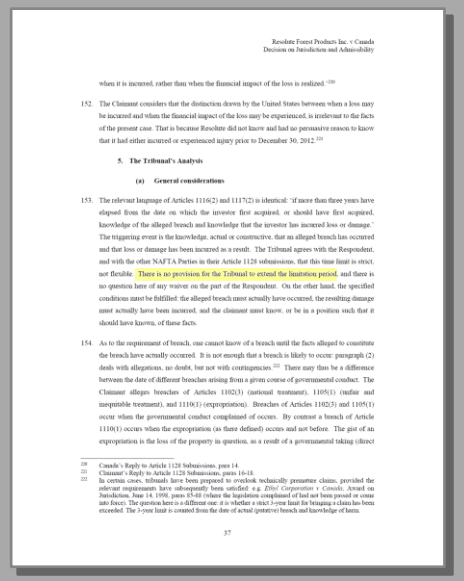

Resolute Forest Products Inc. v Canada
Decision on Jurisdiction and Admissibility

when it is incurred, rather than when the financial impact of the loss is realized.[220]

152. The Claimant considers that the distinction drawn by the United States between when a loss may be incurred and when the financial impact of the loss may be experienced, is irrelevant to the facts of the present case. That is because Resolute did not know and had no persuasive reason to know that it had either incurred or experienced injury prior to December 30, 2012.[221]

5. The Tribunal's Analysis

(a) General considerations

153. The relevant language of Articles 1116(2) and 1117(2) is identical: '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.' The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result. The Tribunal agrees with the Respondent, and with the other NAFTA Parties in their Article 1128 submissions, that this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period, and there is no question here of any waiver on the part of the Respondent. On the other hand, the specified conditions must be fulfilled: the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and the claimant must know, or be in a position such that it should have known, of these facts.

154. As to the requirement of breach, one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur: paragraph (2) deals with allegations, no doubt, but not with contingencies.[222] There may thus be a difference between the date of different breaches arising from a given course of governmental conduct. The Claimant alleges breaches of Articles 1102(3) (national treatment), 1105(1) (unfair and inequitable treatment), and 1110(1) (expropriation). Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs. By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct

220 Canada's Reply to Article 1128 Submissions, para 14.
221 Claimant's Reply to Article 1128 Submissions, paras 16-18.
222 In certain cases, tribunals have been prepared to overlook technically premature claims, provided the relevant requirements have subsequently been satisfied: e.g. *Ethyl Corporation v Canada*, Award on Jurisdiction, June 14, 1998, paras 85-88 (where the legislation complained of had not been passed or come into force). The question here is a different one: it is whether a strict 3-year limit for bringing a claim has been exceeded. The 3-year limit is counted from the date of actual (putative) breach and knowledge of harm.

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Marvin Roy Feldman Karpa v. United Mexican States

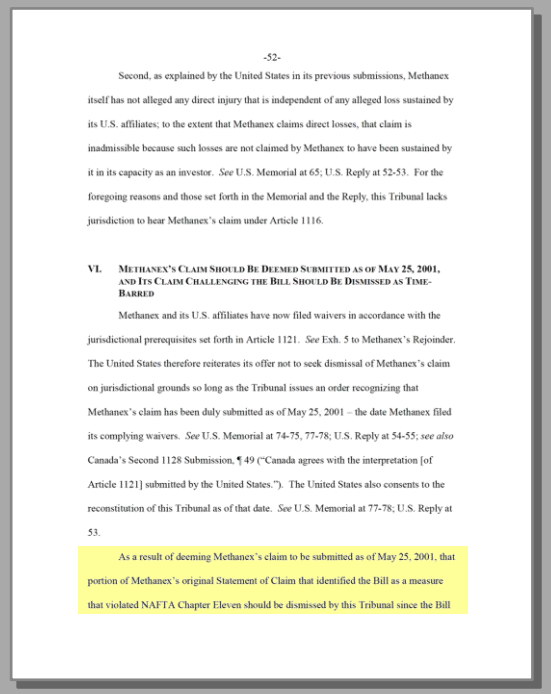
NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification.

Resolute Forest Products Inc. v. Canada

There is no provision for the Tribunal to extend the limitation period […].

RLA-023, *Feldman* – Award, ¶ 63; RLA-021, *Resolute* – Decision on Jurisdiction, ¶ 153; Canada's Memorial on Jurisdiction, fn. 173

NAFTA: Limitation Period is Not Flexible



-52-

Second, as explained by the United States in its previous submissions, Methanex itself has not alleged any direct injury that is independent of any alleged loss sustained by its U.S. affiliates; to the extent that Methanex claims direct losses, that claim is inadmissible because such losses are not claimed by Methanex to have been sustained by it in its capacity as an investor. *See* U.S. Memorial at 65; U.S. Reply at 52-53. For the foregoing reasons and those set forth in the Memorial and the Reply, this Tribunal lacks jurisdiction to hear Methanex's claim under Article 1116.

VI. METHANEX'S CLAIM SHOULD BE DEEMED SUBMITTED AS OF MAY 25, 2001, AND ITS CLAIM CHALLENGING THE BILL SHOULD BE DISMISSED AS TIME-BARRED

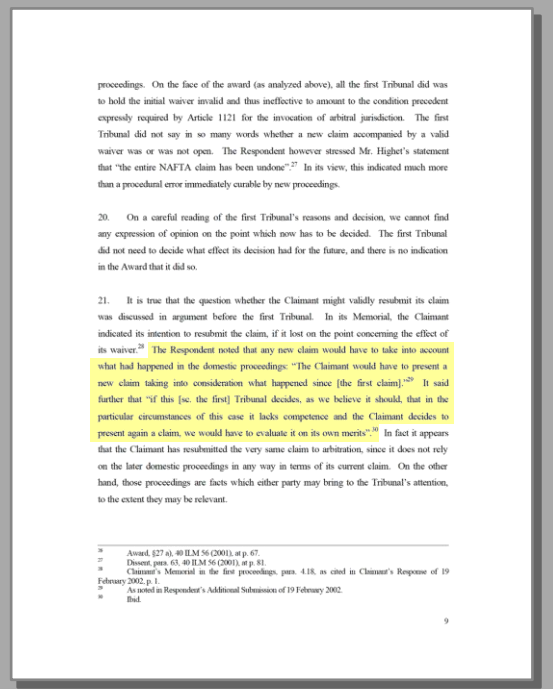
Methanex and its U.S. affiliates have now filed waivers in accordance with the jurisdictional prerequisites set forth in Article 1121. *See* Exh. 5 to Methanex's Rejoinder. The United States therefore reiterates its offer not to seek dismissal of Methanex's claim on jurisdictional grounds so long as the Tribunal issues an order recognizing that Methanex's claim has been duly submitted as of May 25, 2001 – the date Methanex filed its complying waivers. *See* U.S. Memorial at 74-75, 77-78; U.S. Reply at 54-55; *see also* Canada's Second 1128 Submission, ¶ 49 ("Canada agrees with the interpretation [of Article 1121] submitted by the United States."). The United States also consents to the reconstitution of this Tribunal as of that date. *See* U.S. Memorial at 77-78; U.S. Reply at 53.

As a result of deeming Methanex's claim to be submitted as of May 25, 2001, that portion of Methanex's original Statement of Claim that identified the Bill as a measure that violated NAFTA Chapter Eleven should be dismissed by this Tribunal since the Bill

Methanex Corp. v. United States

As a result of deeming Methanex's claim to be submitted as of [the date of proper waivers], that portion of Methanex's original Statement of Claim that identified the Bill as a measure that violated NAFTA Chapter Eleven should be dismissed by this Tribunal since **the Bill was passed more than three years before the submission of Methanex's claim to arbitration**.

NAFTA: Limitation Period is Not Flexible



proceedings. On the face of the award (as analyzed above), all the first Tribunal did was to hold the initial waiver invalid and thus ineffective to amount to the condition precedent expressly required by Article 1121 for the invocation of arbitral jurisdiction. The first Tribunal did not say in so many words whether a new claim accompanied by a valid waiver was or was not open. The Respondent however stressed Mr. Highet's statement that "the entire NAFTA claim has been undone".[27] In its view, this indicated much more than a procedural error immediately curable by new proceedings.

20. On a careful reading of the first Tribunal's reasons and decision, we cannot find any expression of opinion on the point which now has to be decided. The first Tribunal did not need to decide what effect its decision had for the future, and there is no indication in the Award that it did so.

21. It is true that the question whether the Claimant might validly resubmit its claim was discussed in argument before the first Tribunal. In its Memorial, the Claimant indicated its intention to resubmit the claim, if it lost on the point concerning the effect of its waiver.[28] The Respondent noted that any new claim would have to take into account what had happened in the domestic proceedings: "The Claimant would have to present a new claim taking into consideration what happened since [the first claim]."[29] It said further that "if this [sc. the first] Tribunal decides, as we believe it should, that in the particular circumstances of this case it lacks competence and the Claimant decides to present again a claim, we would have to evaluate it on its own merits".[30] In fact it appears that the Claimant has resubmitted the very same claim to arbitration, since it does not rely on the later domestic proceedings in any way in terms of its current claim. On the other hand, those proceedings are facts which either party may bring to the Tribunal's attention, to the extent they may be relevant.

[27] Award, §27 a), 40 ILM 56 (2001), at p. 67.
[28] Dissent, para. 63, 40 ILM 56 (2001), at p. 81.
[29] Claimant's Memorial in the first proceedings, para. 4.18, as cited in Claimant's Response of 19 February 2002, p. 1.
[30] As noted in Respondent's Additional Submission of 19 February 2002.
[31] Ibid.

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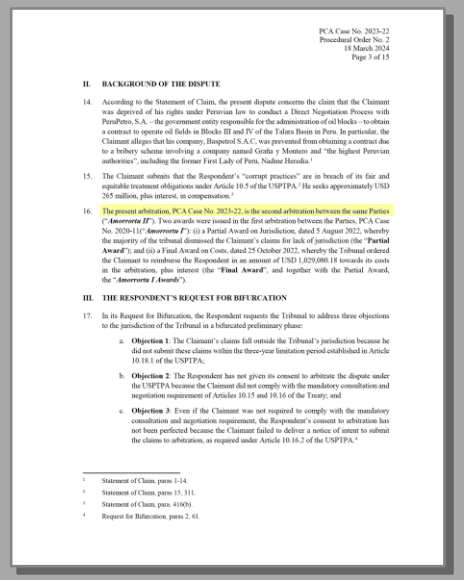
Waste Management v. Mexico

The Respondent noted that any new claim would have to take into account what had happened in the domestic proceedings: **"The Claimant would have to present a new claim** taking into consideration what happened since [the first claim]." It said further that "if this [sc. the first] Tribunal decides, as we believe it should, that in the particular circumstances of this case it lacks competence and the Claimant decides to present again a claim, **we would have to evaluate it on its own merits**".

RLA-036, *Waste Management v Mexico* – Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, ¶ 21

Limitation Period is Not Flexible



PCA Case No. 2023-22
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II. BACKGROUND OF THE DISPUTE

14. According to the Statement of Claim, the present dispute concerns the claim that the Claimant was deprived of his rights under Peruvian law to conduct a Direct Negotiation Process with PeruPetro, S.A. – the government entity responsible for the administration of oil blocks – to obtain a contract to operate oil fields in Blocks III and IV of the Talara Basin in Peru. In particular, the Claimant alleges that his company, Basportol S.A.C, was prevented from obtaining a contract due to a bribery scheme involving a company named Gratia y Montero and "the highest Peruvian authorities", including the former First Lady of Peru, Nadine Heredia.[1]

15. The Claimant submits that the Respondent's "corrupt practices" are in breach of its fair and equitable treatment obligations under Article 10.5 of the USPTPA.[2] He seeks approximately USD 265 million, plus interest, in compensation.[3]

16. The present arbitration, PCA Case No. 2023-22, is the second arbitration between the same Parties ("***Amorrortu II***"). Two awards were issued in the first arbitration between the Parties, PCA Case No. 2020-11("***Amorrortu I***"): (i) a Partial Award on Jurisdiction, dated 5 August 2022, whereby the majority of the tribunal dismissed the Claimant's claims for lack of jurisdiction (the "**Partial Award**"); and (ii) a Final Award on Costs, dated 25 October 2022, whereby the Tribunal ordered the Claimant to reimburse the Respondent in an amount of USD 1,029,080.18 towards its costs in the arbitration, plus interest (the "**Final Award**", and together with the Partial Award, the "***Amorrortu I Awards***").

III. THE RESPONDENT'S REQUEST FOR BIFURCATION

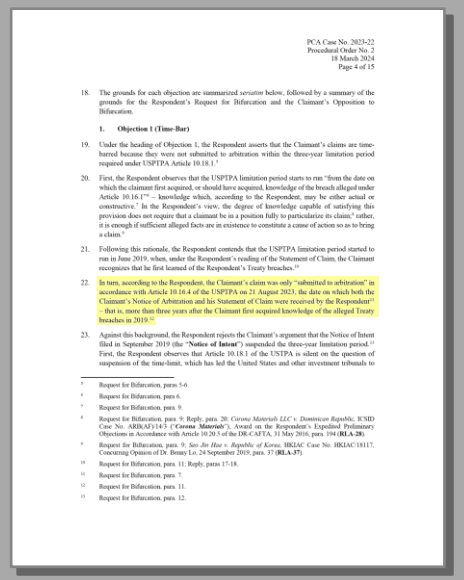
17. In its Request for Bifurcation, the Respondent requests the Tribunal to address three objections to the jurisdiction of the Tribunal in a bifurcated preliminary phase:

a. **Objection 1**: The Claimant's claims fall outside the Tribunal's jurisdiction because he did not submit these claims within the three-year limitation period established in Article 10.18.1 of the USPTPA;

b. **Objection 2**: The Respondent has not given its consent to arbitrate the dispute under the USPTPA because the Claimant did not comply with the mandatory consultation and negotiation requirement of Articles 10.15 and 10.16 of the Treaty; and

c. **Objection 3**: Even if the Claimant was not required to comply with the mandatory consultation and negotiation requirement, the Respondent's consent to arbitration has not been perfected because the Claimant failed to deliver a notice of intent to submit the claims to arbitration, as required under Article 10.16.2 of the USPTPA.[4]

[1] Statement of Claim, paras 1-14.
[2] Statement of Claim, paras 15, 311.
[3] Statement of Claim, para. 416(b).
[4] Request for Bifurcation, paras 2, 61.



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18. The grounds for each objection are summarized *seriatim* below, followed by a summary of the grounds for the Respondent's Request for Bifurcation and the Claimant's Opposition to Bifurcation.

1. Objection 1 (Time-Bar)

19. Under the heading of Objection 1, the Respondent asserts that the Claimant's claims are time-barred because they were not submitted to arbitration within the three-year limitation period required under USPTPA Article 10.18.1.[5]

20. First, the Respondent observes that the USPTPA limitation period starts to run "from the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged under Article 10.16.1"[6] – knowledge which, according to the Respondent, may be either actual or constructive.[7] In the Respondent's view, the degree of knowledge capable of satisfying this provision does not require that a claimant be in a position fully to particularize its claim;[8] rather, it is enough if sufficient alleged facts are in existence to constitute a cause of action so as to bring a claim.[9]

21. Following this rationale, the Respondent contends that the USPTPA limitation period started to run in June 2019, when, under the Respondent's reading of the Statement of Claim, the Claimant recognizes that he first learned of the Respondent's Treaty breaches.[10]

22. In turn, according to the Respondent, the Claimant's claim was only "submitted to arbitration" in accordance with Article 10.16.4 of the USPTPA on 21 August 2023, the date on which both the Claimant's Notice of Arbitration and his Statement of Claim were received by the Respondent[11] – that is, more than three years after the Claimant first acquired knowledge of the alleged Treaty breaches in 2019.[12]

23. Against this background, the Respondent rejects the Claimant's argument that the Notice of Intent filed in September 2019 (the "**Notice of Intent**") suspended the three-year limitation period.[13] First, the Respondent observes that Article 10.18.1 of the USTPA is silent on the question of suspension of the time-limit, which has led the United States and other investment tribunals to

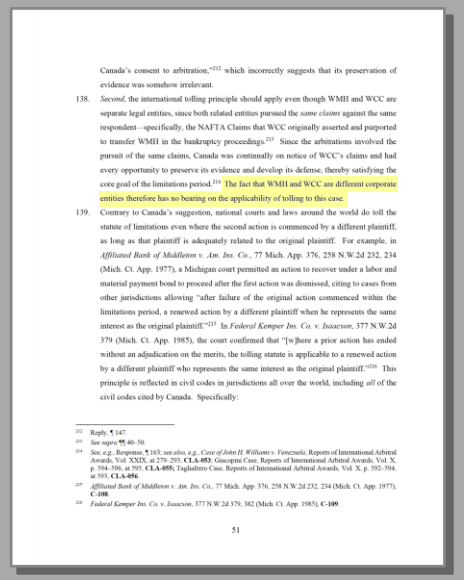
[5] Request for Bifurcation, paras 5-6.
[6] Request for Bifurcation, para 6.
[7] Request for Bifurcation, para. 9.
[8] Request for Bifurcation, para. 9; Reply, para. 20; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 ("**Corona Materials**"), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, para. 194 (**RLA-28**).
[9] Request for Bifurcation, para. 9; *Seo Jin Hee v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Concurring Opinion of Dr. Benny Lo, 24 September 2019, para. 37 (**RLA-37**).
[10] Request for Bifurcation, para. 11; Reply, paras 17-18.
[11] Request for Bifurcation, para. 7.
[12] Request for Bifurcation, para. 11.
[13] Request for Bifurcation, para. 12.

Bacilio Amorrortu v. Peru

The present, PCA Case No. 2023-22, is the second arbitration between the same Parties.

In turn, according to the Respondent, the Claimant's claim was only "submitted to arbitration" in accordance with Article 10.16.4 of the USPTPA on **21 August 2023**, the date on which both the Claimant's Notice of Arbitration and his Statement of Claim were received by the Respondent – that is, more than three years after the Claimant first acquired knowledge of the alleged Treaty breaches in 2019.

NAFTA: Limitation Period is Not Flexible



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. Inv. 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:

[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. Inv. 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**.

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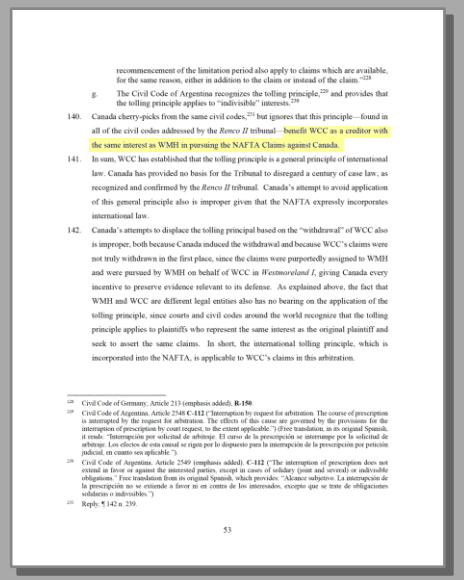

recommencement of the limitation period also apply to claims which are available, for the same reason, either in addition to the claim or instead of the claim."[228]

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.

[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.

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Claimant's Rejoinder on Jurisdiction

[T]he fact that WMH and WCC are different corporate entities therefore has no bearing on the applicability of tolling to this case.

This principle […] benefit [sic] WCC as a creditor with the same interest as WMH in pursuing the NAFTA Claims against Canada.

Claimant's Rejoinder on Jurisdiction, ¶¶ 138, 140

NAFTA: Limitation Period is Not Flexible

2883. Prescription may not be renounced in advance, but prescription acquired or the benefit of the time elapsed in the case of prescription that has begun to run may be re

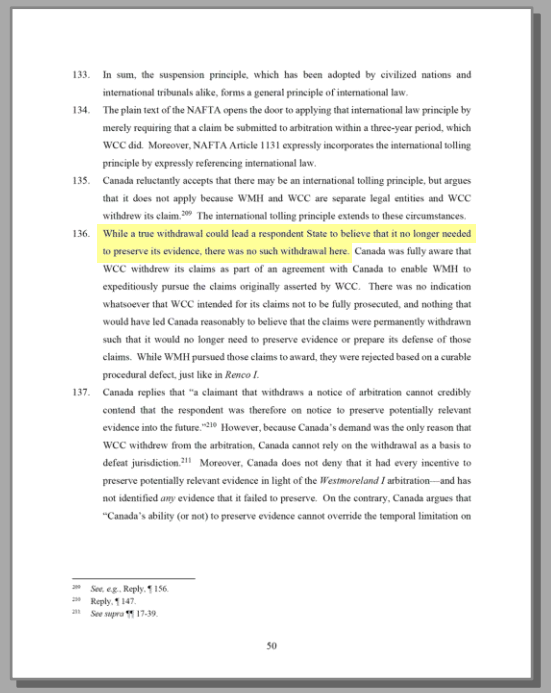
2893. Any demand by a creditor to share in a distribution with other creditors also

M.C.L. s. 600.5856; M.S.A. s. 27.5856. **The statutes of limitations are tolled when** (1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when (2) jurisdiction over the defendant is otherwise acquired, or when (3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an offer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter.

1975. La interrupción de la prescripción contra el deudor principal por reclamación judicial de la deuda, surte efecto también contra su fiador; pero no perjudicará a éste la que se produzca por reclamaciones extrajudiciales del acreedor o reconocimientos privados del deudor.

C-110, Civil Code of Quebec; C-112, Civil Code of Argentina; C-111, Civil Code of Spain; C-109, Federal Kemper Ins. Co. v. Isaacson, 377 N.W.2d 379 (Mich. Ct. App.1985)

NAFTA: Limitation Period is Not Flexible



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

[209] *See, e.g.*, Reply, ¶ 156.
[210] Reply, ¶ 147.
[211] *See supra* ¶¶ 17-39.

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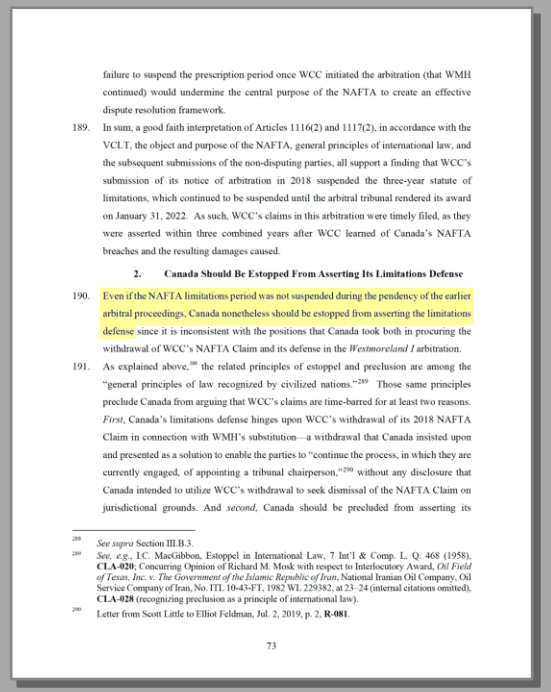
Claimant's Rejoinder on Jurisdiction

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.

Claimant's Rejoinder on Jurisdiction, ¶ 136

NAFTA: Limitation Period is Not Flexible



failure to suspend the prescription period once WCC initiated the arbitration (that WMH continued) would undermine the central purpose of the NAFTA to create an effective dispute resolution framework.

189. In sum, a good faith interpretation of Articles 1116(2) and 1117(2), in accordance with the VCLT, the object and purpose of the NAFTA, general principles of international law, and the subsequent submissions of the non-disputing parties, all support a finding that WCC's submission of its notice of arbitration in 2018 suspended the three-year statute of limitations, which continued to be suspended until the arbitral tribunal rendered its award on January 31, 2022. As such, WCC's claims in this arbitration were timely filed, as they were asserted within three combined years after WCC learned of Canada's NAFTA breaches and the resulting damages caused.

2. Canada Should Be Estopped From Asserting Its Limitations Defense

190. Even if the NAFTA limitations period was not suspended during the pendency of the earlier arbitral proceedings, Canada nonetheless should be estopped from asserting the limitations defense since it is inconsistent with the positions that Canada took both in procuring the withdrawal of WCC's NAFTA Claim and its defense in the *Westmoreland I* arbitration.

191. As explained above,[288] the related principles of estoppel and preclusion are among the "general principles of law recognized by civilized nations."[289] Those same principles preclude Canada from arguing that WCC's claims are time-barred for at least two reasons. *First*, Canada's limitations defense hinges upon WCC's withdrawal of its 2018 NAFTA Claim in connection with WMH's substitution—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,"[290] without any disclosure that Canada intended to utilize WCC's withdrawal to seek dismissal of the NAFTA Claim on jurisdictional grounds. And *second*, Canada should be precluded from asserting its

[288] *See supra* Section III.B.3.

[289] *See, e.g.*, I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L. Q. 468 (1958), **CLA-020**; Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, National Iranian Oil Company, Oil Service Company of Iran, No. ITL 10-43-FT, 1982 WL 229382, at 23–24 (internal citations omitted), **CLA-028** (recognizing preclusion as a principle of international law).

[290] Letter from Scott Little to Elliot Feldman, Jul. 2, 2019, p. 2, **R-081**.

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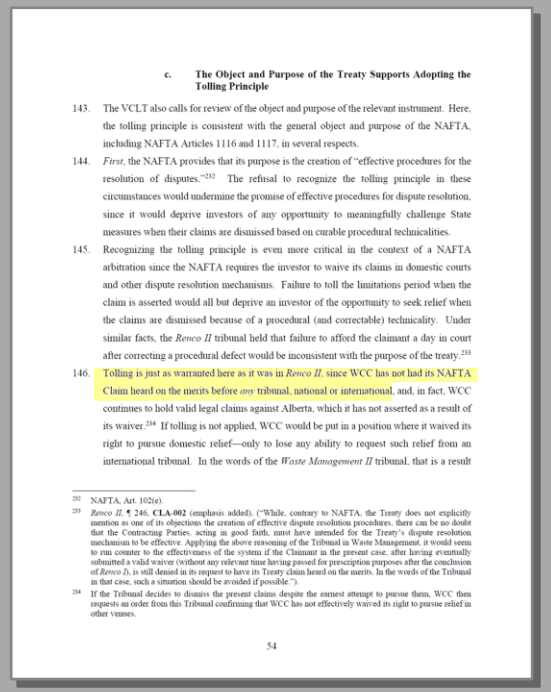
Claimant's Response on Jurisdiction

Even if the NAFTA limitations period was not suspended during the pendency of the earlier arbitral proceedings, Canada nonetheless should be estopped from asserting the limitations defense […].

Claimant's Response on Jurisdiction, ¶ 190; see also, Canada's Memorial on Jurisdiction, ¶¶ 105-122; Canada's Reply Memorial, ¶¶ 159-165

NAFTA: Claimant Must Establish Jurisdiction



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

[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 objectives 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.

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Claimant's Rejoinder on Jurisdiction

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 […].

NAFTA: Claimant Must Establish Jurisdiction

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that **assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal**.

Tribunal Question 4

If there is a residual expropriation claim, for instance in relation to measures adopted in 2015 and 2016, what are the Parties' positions in relation to that claim in terms of limitation periods and the scope of WCC's waivers?

The Claimant Has Not Established The Tribunal's Jurisdiction

1. Does the Claimant hold a "legacy investment" under CUSMA Annex 14-C? → NO
2. Has the Claimant submitted valid waivers consistent with NAFTA Article 1121? → NO
3. Is the Claim timely pursuant to NAFTA Articles 1116(2) and 1117(2)? → NO

If YES to ALL

Proceed to Next Three Jurisdictional Issues

DISMISS ENTIRE CLAIM

Overview of Canada's Opening Statement

I Factual Background

II The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

III The Claimant Has Not Submitted Valid Waivers Under NAFTA Article 1121

IV The Claimant's Claim Is Not Timely Under NAFTA Articles 1116(2) and 1117(2)

V The Claimant Has Not Made a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

VI Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

Alleged Damages Claimed by WCC

	2022 NOA
Measures Challenged	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments • 2016 Imposition of Consumer Fuel Levy • *Federal Fuel Charge (withdrawn)*
Alleged Breaches	• NAFTA Article 1102 • NAFTA Article 1105 • NAFTA Article 1110
Alleged Investments	• Prairie, interests in Prairie • Certain of Prairie's assets • "NAFTA claim" as a "claim to money"
Alleged Damages (Heads)	• Lost revenues from Prairie's coal sales • **Prairie's accelerated reclamation costs**
Alleged Damages (Quantum)	• Damages not yet quantified

Article 1116 Permits a Claim by an Investor for Loss or Damage Incurred by the Investor

NAFTA Article 1116(1)

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

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

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

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

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

Permissible Claims for Damage by a Shareholder Investor under Article 1116

NAFTA

Damages caused by the loss of voting rights

Damages caused by the loss of the right to receive dividends

Damages caused by the loss of an ability to transfer share ownership

Damages caused by the loss of a right to acquire further shares

Canada's Memorial on Jurisdiction, ¶ 132. RLA-040, *Bilcon* - Award on Damages, ¶ 330

Article 1117 Permits a Claim by an Investor for Loss or Damage Incurred by the Enterprise

NAFTA Article 1117(1)

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

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

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

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

Permissible Claims for Damage by an Investor on Behalf of an Enterprise under Article 1117

NAFTA

Damages caused by a loss in the value of an enterprise's assets

Damages caused by a reduction in the value of a corporation's shares

Damages caused by lost profits

Canada's Memorial on Jurisdiction, ¶ 132. RLA-040, *Bilcon* - Award on Damages, ¶ 330

Damages for an Article 1117 Claim are Paid to the Enterprise not the Investor

NAFTA Article 1135(2)

2. Subject to paragraph 1, **where a claim is made under Article 1117(1):**

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

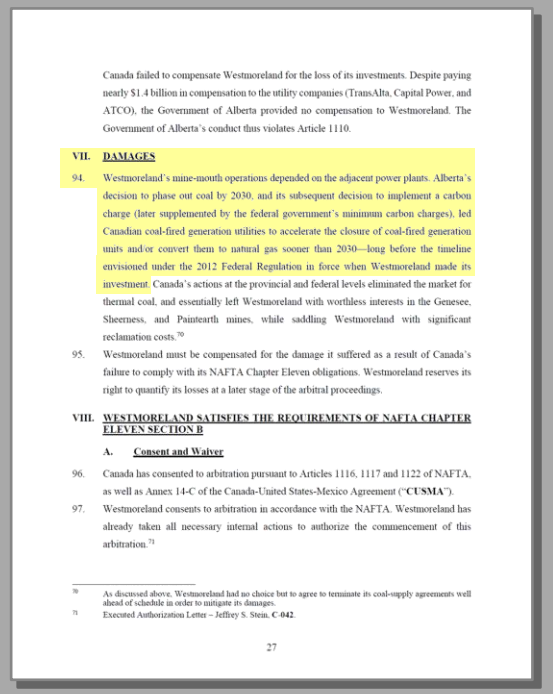
The NAFTA Parties Agree that Articles 1116 and 1117 Address Discrete and Non-Overlapping Types of Injury

NAFTA Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under NAFTA Article 1116. Where the investor seeks to recover loss or damage to an enterprise that the investor owns or controls, the investor's injury is only *indirect*. Such a derivative claim must be brought, if at all, under NAFTA Article 1117.

While Article 1116 is the avenue that permits an investor to pursue a claim for loss or damages incurred by the investor directly, Article 1117 allows an investor to pursue a claim for loss [*sic*] or damages incurred indirectly, through an enterprise. This distinction is clear.

Article 1128 Submission of United States, ¶ 6; Article 1128 Submission of Mexico, ¶ 24. *See also* Canada's Memorial on Jurisdiction, ¶ 132; Canada's Reply on Jurisdiction, ¶ 218

Alleged Damages Claimed by WCC



Canada failed to compensate Westmoreland for the loss of its investments. Despite paying nearly $1.4 billion in compensation to the utility companies (TransAlta, Capital Power, and ATCO), the Government of Alberta provided no compensation to Westmoreland. The Government of Alberta's conduct thus violates Article 1110.

VII. DAMAGES

94. Westmoreland's mine-mouth operations depended on the adjacent power plants. Alberta's decision to phase out coal by 2030, and its subsequent decision to implement a carbon charge (later supplemented by the federal government's minimum carbon charges), led Canadian coal-fired generation utilities to accelerate the closure of coal-fired generation units and/or convert them to natural gas sooner than 2030—long before the timeline envisioned under the 2012 Federal Regulation in force when Westmoreland made its investment. Canada's actions at the provincial and federal levels eliminated the market for thermal coal, and essentially left Westmoreland with worthless interests in the Genesee, Sheerness, and Paintearth mines, while saddling Westmoreland with significant reclamation costs.[70]

95. Westmoreland must be compensated for the damage it suffered as a result of Canada's failure to comply with its NAFTA Chapter Eleven obligations. Westmoreland reserves its right to quantify its losses at a later stage of the arbitral proceedings.

VIII. WESTMORELAND SATISFIES THE REQUIREMENTS OF NAFTA CHAPTER ELEVEN SECTION B

A. Consent and Waiver

96. Canada has consented to arbitration pursuant to Articles 1116, 1117 and 1122 of NAFTA, as well as Annex 14-C of the Canada-United States-Mexico Agreement ("**CUSMA**").

97. Westmoreland consents to arbitration in accordance with the NAFTA. Westmoreland has already taken all necessary internal actions to authorize the commencement of this arbitration.[71]

[70] As discussed above, Westmoreland had no choice but to agree to terminate its coal-supply agreements well ahead of schedule in order to mitigate its damages.

[71] Executed Authorization Letter – Jeffrey S. Stein, **C-042**.

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VII. DAMAGES

Westmoreland's mine-mouth operations depended on the adjacent power plants. Alberta's decision to phase out coal by 2030, and its subsequent decision to implement a carbon charge (later supplemented by the federal government's minimum carbon charges), led Canadian coal-fired generation utilities to accelerate the closure of coal-fired generation units and/or convert them to natural gas sooner than 2030—long before the timeline envisioned under the 2012 Federal Regulation in force when Westmoreland made its investment. **Canada's actions at the provincial and federal levels eliminated the market for thermal coal, and essentially left Westmoreland with worthless interests in the Genesee, Sheerness, and Paintearth mines, while saddling Westmoreland with significant reclamation costs.**

Claimant's Notice of Arbitration, 14 October 2022, ¶ 94

Alleged Damages Claimed by WCC

	2022 NOA
Measures Challenged	• 2015 Climate Leadership Plan (Phase-Out of Coal-Fired Emissions) • 2016 Allocation of Transition Payments • 2016 Imposition of Consumer Fuel Levy • *Federal Fuel Charge (withdrawn)*
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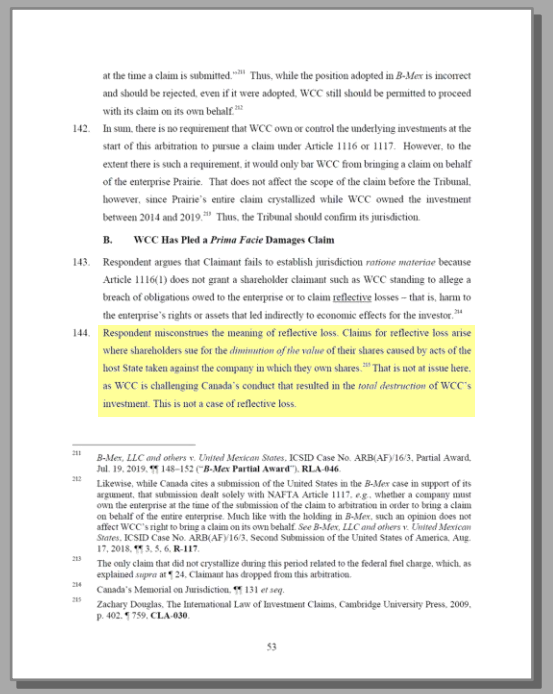
Alleged Damages Claimed by WCC



at the time a claim is submitted."[201] Thus, while the position adopted in *B-Mex* is incorrect and should be rejected, even if it were adopted, WCC still should be permitted to proceed with its claim on its own behalf.[202]

142. In sum, there is no requirement that WCC own or control the underlying investments at the start of this arbitration to pursue a claim under Article 1116 or 1117. However, to the extent there is such a requirement, it would only bar WCC from bringing a claim on behalf of the enterprise Prairie. That does not affect the scope of the claim before the Tribunal, however, since Prairie's entire claim crystallized while WCC owned the investment between 2014 and 2019.[203] Thus, the Tribunal should confirm its jurisdiction.

B. WCC Has Pled a *Prima Facie* Damages Claim

143. Respondent argues that Claimant fails to establish jurisdiction *ratione materiae* because Article 1116(1) does not grant a shareholder claimant such as WCC standing to allege a breach of obligations owed to the enterprise or to claim reflective losses – that is, harm to the enterprise's rights or assets that led indirectly to economic effects for the investor.[204]

144. Respondent misconstrues the meaning of reflective loss. Claims for reflective loss arise where shareholders sue for the *diminution of the value* of their shares caused by acts of the host State taken against the company in which they own shares.[205] That is not at issue here, as WCC is challenging Canada's conduct that resulted in the *total destruction* of WCC's investment. This is not a case of reflective loss.

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

[202] Likewise, while Canada cites a submission of the United States in the *B-Mex* case in support of its argument, that submission dealt solely with NAFTA Article 1117, *e.g.*, whether a company must own the enterprise at the time of the submission of the claim to arbitration in order to bring a claim on behalf of the entire enterprise. Much like with the holding in *B-Mex*, such an opinion does not affect WCC's right to bring a claim on its own behalf. *See B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Second Submission of the United States of America, Aug. 17, 2018, ¶¶ 3, 5, 6, **R-117**.

[203] The only claim that did not crystallize during this period related to the federal fuel charge, which, as explained *supra* at ¶ 24, Claimant has dropped from this arbitration.

[204] Canada's Memorial on Jurisdiction, ¶¶ 131 *et seq*.

[205] Zachary Douglas, The International Law of Investment Claims, Cambridge University Press, 2009, p. 402, ¶ 759, **CLA-030**.

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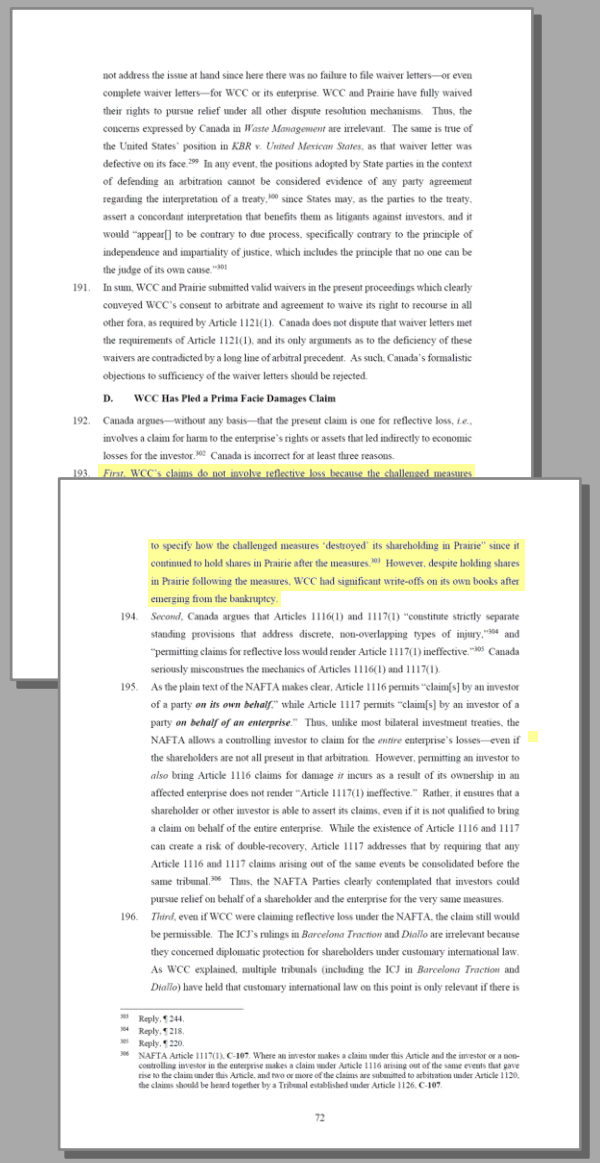
Claimant's Response on Jurisdiction

Respondent misconstrues the meaning of reflective loss. Claims for reflective loss arise where shareholders sue for the *diminution of the value* of their shares caused by acts of the host State taken against the company in which they own shares.[215] That is not at issue here, **as WCC is challenging Canada's conduct that resulted in the *total destruction* of WCC's investment**. This is not a case of reflective loss.

Claimant's Response on Jurisdiction, ¶ 144

Alleged Damages Claimed by WCC



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 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

[301] 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**.

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Claimant's Rejoinder on Jurisdiction

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 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**.

Claimant's Rejoinder on Jurisdiction, ¶ 193

The Claimant Has Not Established the Tribunal's Jurisdiction

4 Has the Claimant made a *prima facie* damages claim under NAFTA Article 1116?

→ **NO** → **DISMISS ART. 1116 CLAIM**

Overview of Canada's Opening Statement

I Factual Background

II The Claimant Does Not Have a "Legacy Investment" Under CUSMA Annex 14-C

III The Claimant Has Not Submitted Valid Waivers Under NAFTA Article 1121

IV The Claimant's Claim Is Not Timely Under NAFTA Articles 1116(2) and 1117(2)

V The Claimant Has Not Made a *Prima Facie* Damages Claim Under NAFTA Article 1116(1)

VI Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

Requirements of Article 1121 is a Condition Precedent to Submission of a Claim to Arbitration

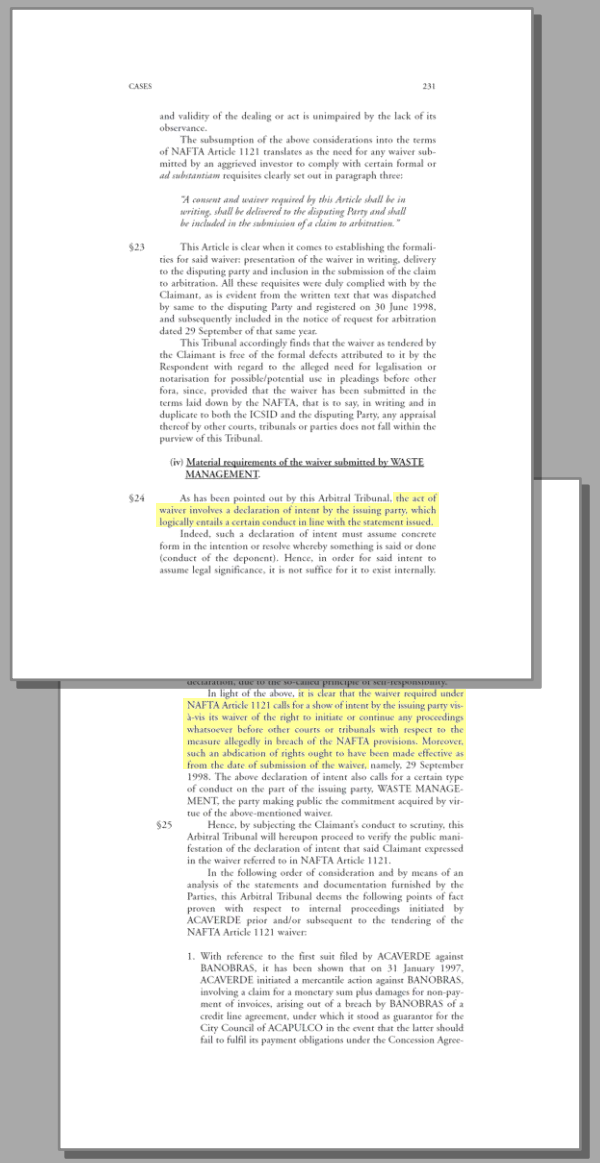
NAFTA Article 1121(2)(b)

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

[…]

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

Article 1121: Material Requirements



CASES 231

and validity of the dealing or act is unimpaired by the lack of its observance.

The subsumption of the above considerations into the terms of NAFTA Article 1121 translates as the need for any waiver submitted by an aggrieved investor to comply with certain formal or *ad substantiam* requisites clearly set out in paragraph three:

> *"A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration."*

§23 This Article is clear when it comes to establishing the formalities for said waiver: presentation of the waiver in writing, delivery to the disputing party and inclusion in the submission of the claim to arbitration. All these requisites were duly complied with by the Claimant, as is evident from the written text that was dispatched by same to the disputing Party and registered on 30 June 1998, and subsequently included in the notice of request for arbitration dated 29 September of that same year.

This Tribunal accordingly finds that the waiver as tendered by the Claimant is free of the formal defects attributed to it by the Respondent with regard to the alleged need for legalisation or notarisation for possible/potential use in pleadings before other fora, since, provided that the waiver has been submitted in the terms laid down by the NAFTA, that is to say, in writing and in duplicate to both the ICSID and the disputing Party, any appraisal thereof by other courts, tribunals or parties does not fall within the purview of this Tribunal.

(iv) Material requirements of the waiver submitted by WASTE MANAGEMENT.

§24 As has been pointed out by this Arbitral Tribunal, the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued.

Indeed, such a declaration of intent must assume concrete form in the intention or resolve whereby something is said or done (conduct of the deponent). Hence, in order for said intent to assume legal significance, it is not suffice for it to exist internally.

declaration, due to the so-called principle of self-responsibility.

In light of the above, it is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver, namely, 29 September 1998. The above declaration of intent also calls for a certain type of conduct on the part of the issuing party, WASTE MANAGEMENT, the party making public the commitment acquired by virtue of the above-mentioned waiver.

§25 Hence, by subjecting the Claimant's conduct to scrutiny, this Arbitral Tribunal will hereupon proceed to verify the public manifestation of the declaration of intent that said Claimant expressed in the waiver referred to in NAFTA Article 1121.

In the following order of consideration and by means of an analysis of the statements and documentation furnished by the Parties, this Arbitral Tribunal deems the following points of fact proven with respect to internal proceedings initiated by ACAVERDE prior and/or subsequent to the tendering of the NAFTA Article 1121 waiver:

1. With reference to the first suit filed by ACAVERDE against BANOBRAS, it has been shown that on 31 January 1997, ACAVERDE initiated a mercantile action against BANOBRAS, involving a claim for a monetary sum plus damages for non-payment of invoices, arising out of a breach by BANOBRAS of a credit line agreement, under which it stood as guarantor for the City Council of ACAPULCO in the event that the latter should fail to fulfil its payment obligations under the Concession Agree-

Waste Management, Inc. v. Mexico

The act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. […] **[I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions.** Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver […].

Article 1121 Provides a Limited and Narrow Exception

NAFTA Article 1121(2)

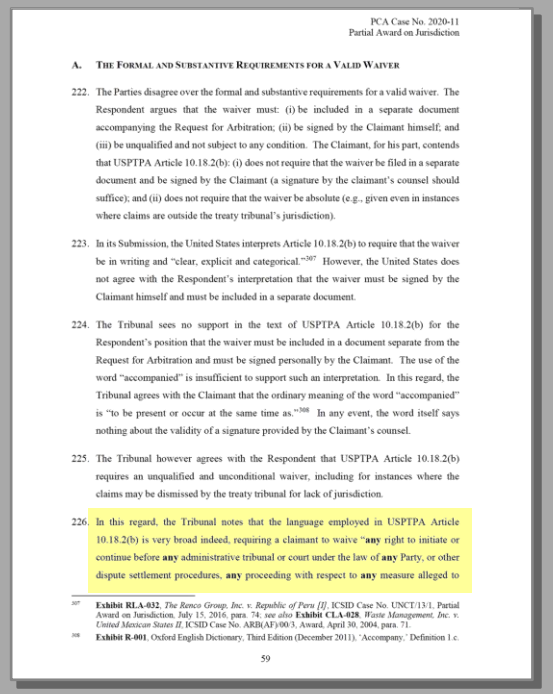
Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

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

The Claimant's Argument is Contrary to the Text of Article 1121(2)(b)



PCA Case No. 2020-11
Partial Award on Jurisdiction

A. THE FORMAL AND SUBSTANTIVE REQUIREMENTS FOR A VALID WAIVER

222. The Parties disagree over the formal and substantive requirements for a valid waiver. The Respondent argues that the waiver must: (i) be included in a separate document accompanying the Request for Arbitration; (ii) be signed by the Claimant himself; and (iii) be unqualified and not subject to any condition. The Claimant, for his part, contends that USPTPA Article 10.18.2(b): (i) does not require that the waiver be filed in a separate document and be signed by the Claimant (a signature by the claimant's counsel should suffice); and (ii) does not require that the waiver be absolute (e.g., given even in instances where claims are outside the treaty tribunal's jurisdiction).

223. In its Submission, the United States interprets Article 10.18.2(b) to require that the waiver be in writing and "clear, explicit and categorical."[307] However, the United States does not agree with the Respondent's interpretation that the waiver must be signed by the Claimant himself and must be included in a separate document.

224. The Tribunal sees no support in the text of USPTPA Article 10.18.2(b) for the Respondent's position that the waiver must be included in a document separate from the Request for Arbitration and must be signed personally by the Claimant. The use of the word "accompanied" is insufficient to support such an interpretation. In this regard, the Tribunal agrees with the Claimant that the ordinary meaning of the word "accompanied" is "to be present or occur at the same time as."[308] In any event, the word itself says nothing about the validity of a signature provided by the Claimant's counsel.

225. The Tribunal however agrees with the Respondent that USPTPA Article 10.18.2(b) requires an unqualified and unconditional waiver, including for instances where the claims may be dismissed by the treaty tribunal for lack of jurisdiction.

226. In this regard, the Tribunal notes that the language employed in USPTPA Article 10.18.2(b) is very broad indeed, requiring a claimant to waive "**any** right to initiate or continue before **any** administrative tribunal or court under the law of **any** Party, or other dispute settlement procedures, **any** proceeding with respect to **any** measure alleged to

307 **Exhibit RLA-032**, *The Renco Group, Inc. v. Republic of Peru [II]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, para. 74; *see also* **Exhibit CLA-028**, *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, para. 71.

308 **Exhibit R-001**, Oxford English Dictionary, Third Edition (December 2011), 'Accompany,' Definition 1.c.

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Bacilio Amorrortu v. Peru

There is simply no textual support for the Claimant's attempt to carve out of USPTPA Article 10.18.2(b) claims that may eventually be dismissed by the treaty tribunal for lack of jurisdiction or otherwise (i.e., without deciding on the merits). Such an interpretation would in fact amount to an impermissible rewriting of the text of the USPTPA. A similar argument was heard and dismissed by the Renco I tribunal, with whose views on this point this Tribunal also aligns […].

RLA-038, *Amorrortu* – Partial Award on Jurisdiction, ¶ 226

The Claimant Has Not Established the Tribunal's Jurisdiction

4 Has the Claimant made a *prima facie* damages claim under NAFTA Article 1116? → NO → DISMISS ART. 1116 CLAIM

5 Has Prairie acted consistently with its waiver in *WMH*? → NO → DISMISS ART. 1117 CLAIM

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VI Prairie's *WMH* Waiver Bars the Claimant From Bringing its NAFTA Article 1117(1) Claim

VII The Claimant Did Not Own or Control Prairie When It Submitted its Claim to Arbitration Under NAFTA Article 1117(1)

Article 1117(1) Requires Ownership or Control When Claim is Submitted

NAFTA Article 1117(1)

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

NAFTA Article 1117(1). *See*, Canada's Memorial on Jurisdiction, ¶ 132; Claimant's Rejoinder on Jurisdiction, ¶ 107

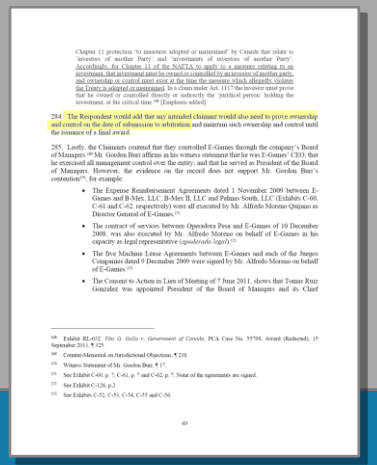
The NAFTA Parties Use Different Temporal Tenses in Chapter 11

NAFTA Article 1139

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that **seeks to make**, **is making** or **has made** an investment;

NAFTA Article 1139.

The Clear Understanding of the NAFTA Parties

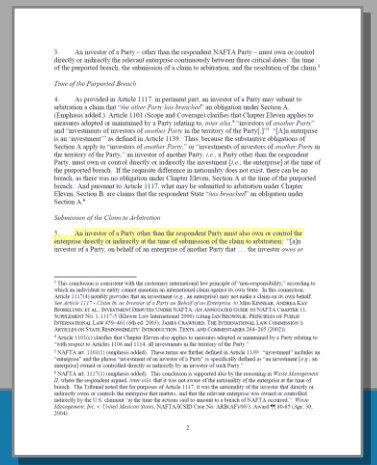


284. The Respondent would add that any intended claimant would also need to prove ownership and control on the date of submission to arbitration and maintain such ownership and control until the issuance of a final award.

285. Lastly, the Claimants contend that they controlled E-Games through the company's Board of Managers.[168] Mr. Gordon Birr affirms in his witness statement that he was E-Games' CEO, that he exercised all management control over the entity, and that he served as President of the Board of Managers. However, the evidence on the record does not support Mr. Gordon Birr's contention[169], for example:

- The Expense Reimbursement Agreements dated 1 November 2009 between E-Games and B-Mex, LLC, B-Mex II, LLC and Palmas South, LLC (Exhibits C-60, C-61 and C-62, respectively) were all executed by Mr. Alfredo Moreno Quijano as Director General of E-Games.[170]
- The contract of services between Operadora Pesa and E-Games of 10 December 2008, was also executed by Mr. Alfredo Moreno on behalf of E-Games in his capacity as legal representative (*apoderado legal*).[171]
- The five Machine Lease Agreements between E-Games and each of the Juegos Companias dated 9 December 2009 were signed by Mr. Alfredo Moreno on behalf of E-Games.[172]
- The Consent to Action in Lieu of Meeting of 7 June 2011, shows that Tomas Ruiz Gonzalez was appointed President of the Board of Managers and its Chief

[168] Exhibit RL-032. *The G. Gallo v. Government of Canada*, PCA Case No. 55798, Award (Redacted), 15 September 2011, ¶ 325.
[169] Counter-Memorial on Jurisdictional Objections, ¶ 218.
[170] Witness Statement of Mr. Gordon Birr, ¶ 17.
[171] See Exhibit C-60, p. 7, C-61, p. 7 and C-62, p. 7. None of the agreements are signed.
[172] See Exhibit C-126, p.2.
[173] See Exhibits C-52, C-53, C-54, C-55 and C-56.



3. An investor of a Party – other than the respondent NAFTA Party – must own or control directly or indirectly the relevant enterprise continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.[3]

Time of the Purported Breach

4. As provided in Article 1117, in pertinent part, an investor of a Party may submit to arbitration a claim that "*the other Party has breached*" an obligation under Section A. (Emphasis added.) Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*,[4] "investors of *another Party*" and "investments of investors of *another Party* in the territory of the Party[.]"[5] "[A]n enterprise is an 'investment'" as defined in Article 1139. Thus, because the substantive obligations of Section A apply to "investors of *another Party*," or "investments of investors of *another Party* in the territory of the Party," an investor of another Party, *i.e.*, a Party other than the respondent Party, must own or control directly or indirectly the investment [*i.e.*, the enterprise] at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A at the time of the purported breach. And pursuant to Article 1117, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State "*has breached*" an obligation under Section A.[6]

Submission of the Claim to Arbitration

5. An investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration. "[A]n investor of a Party, on behalf of an enterprise of another Party that . . . the investor *owns or*

[3] This conclusion is consistent with the customary international law principle of "non-responsibility," according to which unsatisfied or entity cannot maintain an international claim against its own State. In this connection, Article 1117 explicitly provides that an investment (*e.g.*, an enterprise) may not make a claim on its own behalf. *See Article 1117 - Claim by an Investor of a Party on Behalf of an Enterprise*, 6 MEX REVISED, ANNOTATED GUIDE TO NAFTA CHAPTER 11, SUPPLEMENT NO. 1 117-5 (Juris Law International 2006); GEORG JAN BRONCKER, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 459-461 (6th ed. 2003); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS AND COMMENTARIES 284-285 (2002).

[4] Article 1101(c) clarifies that Chapter Eleven also applies to measures adopted or maintained by a Party relating to: "with respect to Articles 1106 and 1114, all investments in the territory of the Party."

[5] NAFTA art. 1101(1) (emphasis added). These terms are further defined in Article 1139: "investment" includes an "enterprise" and the phrase "investment of an investor of a Party" is specifically defined as "an investment [*e.g.*, an enterprise] owned or controlled directly or indirectly by an investor of such Party."

[6] NAFTA art. 1117(1) (emphasis added). This conclusion is supported also by the reasoning in *Waste Management II*, where the respondent argued, *inter alia*, that it was not aware of the nationality of the enterprise at the time of breach. The Tribunal noted that for purposes of Article 1117, it was the nationality of the investor that directly or indirectly owns or controls the enterprise that matters, and that the relevant enterprise was owned or controlled indirectly by the U.S. claimant "at the time the actions said to amount to a breach of NAFTA occurred." *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶¶ 80-85 (Apr. 30, 2004).

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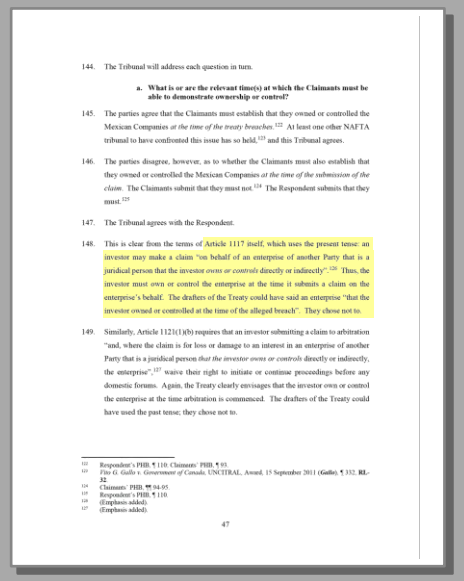
"The Respondent would add that any intended claimant [under Article 1117] would **also need to prove ownership and control on the date of submission to arbitration**…")

"[A]n investor of a Party other than the respondent Party must **also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration.**"

R-155, *B-Mex – Mexico's* Reply on Jurisdictional Objections, ¶ 284; R-117, *B-Mex* - Second Submission of the United States of America, ¶ 5

NAFTA Tribunals Have Confirmed This Understanding



144. The Tribunal will address each question in turn.

a. What is or are the relevant time(s) at which the Claimants must be able to demonstrate ownership or control?

145. The parties agree that the Claimants must establish that they owned or controlled the Mexican Companies *at the time of the treaty breaches*.[122] At least one other NAFTA tribunal to have confronted this issue has so held,[123] and this Tribunal agrees.

146. The parties disagree, however, as to whether the Claimants must also establish that they owned or controlled the Mexican Companies *at the time of the submission of the claim*. The Claimants submit that they must not.[124] The Respondent submits that they must.[125]

147. The Tribunal agrees with the Respondent.

148. This is clear from the terms of Article 1117 itself, which uses the present tense: an investor may make a claim "on behalf of an enterprise of another Party that is a juridical person that the investor *owns or controls* directly or indirectly".[126] Thus, the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf. The drafters of the Treaty could have said an enterprise "that the investor owned or controlled at the time of the alleged breach". They chose not to.

149. Similarly, Article 1121(1)(b) requires that an investor submitting a claim to arbitration "and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person *that the investor owns or controls* directly or indirectly, the enterprise",[127] waive their right to initiate or continue proceedings before any domestic forums. Again, the Treaty clearly envisages that the investor own or control the enterprise at the time arbitration is commenced. The drafters of the Treaty could have used the past tense; they chose not to.

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121 Respondent's PHB, ¶ 110; Claimants' PHB, ¶ 95.
122 *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award, 15 September 2011 (**Gallo**), ¶ 332; **RL-32**.
123 Claimants' PHB, ¶¶ 94-95.
124 Respondent's PHB, ¶ 110.
125 (Emphasis added).
126 (Emphasis added).

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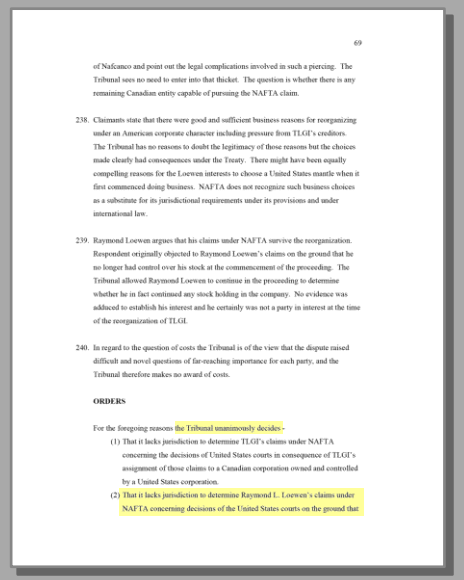

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of Nafcanco and point out the legal complications involved in such a piercing. The Tribunal sees no need to enter into that thicket. The question is whether there is any remaining Canadian entity capable of pursuing the NAFTA claim.

238. Claimants state that there were good and sufficient business reasons for reorganizing under an American corporate character including pressure from TLGI's creditors. The Tribunal has no reasons to doubt the legitimacy of those reasons but the choices made clearly had consequences under the Treaty. There might have been equally compelling reasons for the Loewen interests to choose a United States mantle when it first commenced doing business. NAFTA does not recognize such business choices as a substitute for its jurisdictional requirements under its provisions and under international law.

239. Raymond Loewen argues that his claims under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen's claims on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

240. In regard to the question of costs the Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs.

ORDERS

For the foregoing reasons the Tribunal unanimously decides -

(1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.

(2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that

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

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…the Tribunal unanimously decides…[t]hat it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts **on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration**…

RLA-046, *B-Mex* – Partial Award, ¶¶ 148-152; RLA-045, *Loewen* - Award, pp. 69-70

The Claimant Has Not Established the Tribunal's Jurisdiction