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CERTIFICATE

WESTMORELAND COAL COMPANY

v.

GOVERNMENT OF CANADA

(ICSID CASE NO. UNCT/23/2)

I hereby certify that the attached document is a true copy of the Tribunal's Final Award dated December 17, 2024.

[signed]

Martina Polasek
Secretary-General

Washington, D.C., December 17, 2024

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

- and -

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

- between -

Westmoreland Coal Company

Claimant

v.

Government of Canada

Respondent

ICSID Case No. UNCT/23/2

AWARD

Arbitral Tribunal
Prof. Gabrielle Kaufmann-Kohler, President
Mr. Laurence Shore, Arbitrator
Ms. Judith Levine, Arbitrator

Assistant to the Tribunal
Mr. Lukas Montoya

Secretary of the Tribunal
Ms. Anna Holloway

17 December 2024

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I. INTRODUCTION

1. This dispute arises out of the development and operation of coal mines in the province of Alberta, Canada. The claims before the Tribunal are brought on the basis of Chapter 11 of the North American Free Trade Agreement ("**NAFTA**") and Annex 14-C of the United States-Mexico-Canada Agreement ("**USMCA**", jointly with NAFTA, the "**Treaties**").

2. The International Centre for Settlement of Investment Disputes ("**ICSID**") served as registry and administrator of these arbitral proceedings, which were conducted in accordance with the Treaties and the 2013 Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Arbitration Rules**").

A. THE CLAIMANT

3. The Claimant is Westmoreland Coal Company ("**WCC**"), a company incorporated under the laws of Delaware, United States of America ("**US**"), with the following registered address:

Westmoreland Coal Company c/o Cogency Global Inc.
850 New Burton Road, Suite 201
Dover, DE 19904
United States of America

4. The Claimant is represented in this arbitration by:

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Mr. Cedric Soule
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B. THE RESPONDENT

5. The Respondent is the Government of Canada ("**Canada**"). The Respondent is represented in this arbitration by:

Ms. Krista Zeman
Ms. Heather Squires
Ms. E. Alexandra Dosman
Mr. Mark Klaver
Ms. Maria-Cristina Harris
Mr. Christopher Koziol
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MariaCristina.Harris@international.gc.ca
Christopher.Koziol@international.gc.ca

6. The Claimant and the Respondent are collectively referred to as the "**Parties**".

C. THE TRIBUNAL

7. The Tribunal is composed of:

Prof. Gabrielle Kaufmann-Kohler (President)
LÉVY KAUFMANN-KOHLER
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Paddington, NSW
Australia
Email: judithlevine@levinearbitration.com

8. With the consent of the Parties, the Tribunal appointed an Assistant to the Tribunal. Dr. Magnus Jesko Langer acted in that capacity until 5 July 2024 and was then replaced by:

Mr. Lukas Montoya
LÉVY KAUFMANN-KOHLER
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II. FACTUAL BACKGROUND

9. Unless otherwise indicated in this section of the Award, the factual background is undisputed or considered established by the Tribunal.

A. STATE MEASURES BEFORE WCC'S ACQUISITION OF COAL OPERATION INTERESTS (2003-2012)

10. In 2003, the Government of the Canadian Province of Alberta ("**Alberta**") passed the Climate Change and Emissions Management Act,[1] now known as the Emissions Management and Climate Resilience Act.[2] Its goal was to reduce greenhouse gas ("**GHG**") emissions in Alberta by 50% of 1990 levels by 2020.[3]

11. To that end, on 17 July 2007, Alberta enacted the Specified Gas Emitters Regulation ("**SGER**"),[4] which imposed emission standards and a system for carbon pricing on qualifying facilities, including coal-fired electricity generating units ("**Generating Units**").[5] The set price for excess GHG carbon emissions varied during the years in which the SGER was in place.[6]

12. On 30 August 2012, Canada's Federal Government promulgated the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations ("**2012 Federal Regulations**").[7] The 2012 Federal Regulations addressed GHG emissions and set out a scheme to phase out Generating Units at the end of their useful life, then generally defined as 50 years from commissioning.[8]

B. WCC'S ACQUISITION OF COAL OPERATION INTERESTS, INCLUDING PRAIRIE (2013-2014)

13. In December 2013, WCC announced its commitment to acquire the coal-related assets and operations of the Canadian company Sherritt International ("**Sherritt**"). These assets included Sherrit's Alberta subsidiary, Prairie Mines & Royalty ULC ("**Prairie**"), which owned several coal surface mines. Three of these mines were in Alberta, namely Genesee, Sheerness, and Paintearth (together, the "**Mines**").[9]

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[1] **R-18**, Climate Change and Emissions Management Act, 2003.

[2] **R-19**, Emissions Management and Climate Resilience Act, 2003.

[3] **R-18**, Climate Change and Emissions Management Act, 2003, Ch. C-16.7, § 3(1); **R-19**, Emissions Management and Climate Resilience Act, 2003, Ch. E-7.8, § 3(1).

[4] **R-17,** Specified Gas Emitters Regulation (Alberta Regulation 139/2007), 17 July 2007, §§ 2, 3(1).

[5] Memorial, ¶ 22.

[6] Initially it was set at CAD 15 per tonne for 2007-2015, then increased to CAD 20 per tonne for 2016, and then increased to CAD 30 per tonne for 2017 (*see* **R-17,** Specified Gas Emitters Regulation (Alberta Regulation 139/2007), 17 July 2007, § 8(2); **R-20**, Alberta Minister of Environment, Ministerial Order 26/2011, 24 June 2011, Appendix; **R-21**, Alberta Minister of Environment and Parks, Ministerial Order 13/2015, 30 June 2015, Appendix). *See also infra*, fn. 33.

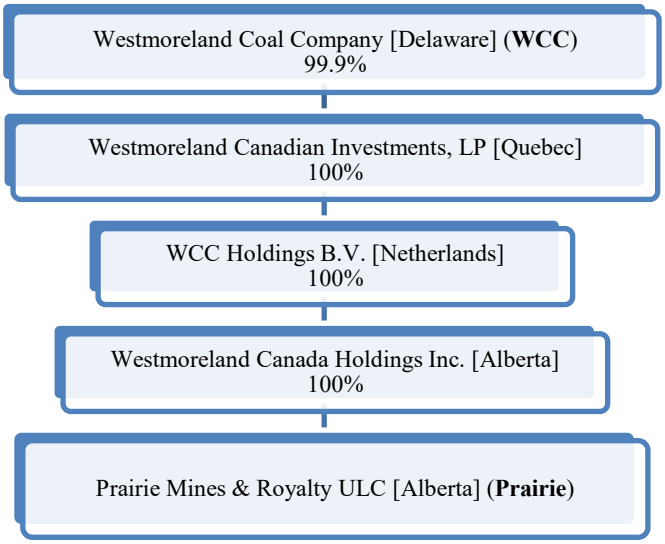
[7] **C-3,** Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (SOR/2012-167), 30 August 2012 (amended on 30 November 2018), p. 6 (of PDF).

[8] *See inter alia* NoA, ¶¶ 18-19; Memorial, ¶ 18.

[9] *See generally* **C-4,** Press Release, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations, 24 December 2013; **C-5**, Presentation, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations, 24 December 2013. *See also* NoA, ¶ 23; Memorial, fn. 64.

14. The Mines engaged in mine-mouth operations, thereby supplying the totality of their "sub-bituminous" coal to adjacent Generating Units.[10] ATCO, TransAlta, and/or Capital Power, all Canadian companies, owned the Generating Units supplied by the Mines ("**Canadian Owners**").[11]

15. On 28 April 2014, WCC's acquisition of Sherritt's coal assets reached closing.[12] In consequence, WCC acquired indirect ownership of Prairie through a series of intermediate companies, as follows:[13]



C. STATE MEASURES AFTER WCC'S ACQUISITION OF PRAIRIE (2015-2020)

16. On 25 June 2015, Alberta announced that it was establishing a Climate Change Advisory Panel ("**Advisory Panel**") to advise relevant governmental authorities on policy measures to reduce GHG emissions.[14]

17. On 22 November 2015, largely based on a report by the Advisory Panel,[15] Alberta announced a Climate Leadership Plan ("**Climate Plan**").[16] In line with the Climate Plan, Alberta sought to

[10] **R-58**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 18 (of PDF).

[11] **R-58**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 18 (of PDF).

[12] **C-49**, Westmoreland Coal Company, Current Report (Form 8-K), 28 April 2014, p. 1 (of PDF); **R-58**, Westmoreland Coal Company, 2014 Annual Report, 6 March 2015 [Excerpt], p. 8 (of PDF).

[13] Figure by the Tribunal on the basis of the information in: **R-60**, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Expert Report of Kathryn A. Coleman, 16 December 2020, ¶ 77; Memorial, ¶ 46, referring to **R-59**, Westmoreland Coal Company, Current Report (Form 8-K), 21 May 2018, Ex. 99.2 (p. 6 of PDF); Canada's Opening Presentation, 2 May 2024, p. 7 (of PDF).

[14] *See generally* **R-24**, Government of Alberta, Press Release, "Province takes meaningful steps toward climate change strategy", 25 June 2015.

[15] *See generally* **R-23**, Climate Change Advisory Panel, Climate Leadership Report, 20 November 2015.

[16] *See generally* **R-22,** Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015.

phase out all emissions from coal-fired electricity generation by 2030 **(1)**; revise its emissions reduction and carbon pricing regulations **(2)**; and impose a carbon levy on consumer fuels **(3)**.

1. 2030 phase-out of all emissions from coal-fired electricity generation

18. According to the Climate Plan, Alberta would phase out coal-fired power and transition to renewable energy and natural gas generation by 2030.[17] The phase-out therefore focused on the six (out of 18) Generating Units in Alberta that were expected to operate beyond 2030. These six units were all owned by one or more of the Canadian Owners, and generated electricity through mine-mouth operations with coal supplied by three surface coal mines, including two of the Mines, namely Sheerness and Genesee.[18]

19. On 16 March 2016, Alberta announced it had retained Mr. Terry Boston, an independent expert in electricity markets and systems, to advise on the phase-out.[19] Mr. Boston was tasked with proposing a framework to achieve the goal of zero emissions from coal-fired electricity generation that maintained "electric system reliability", "reasonable stability and electricity prices for consumers and business", and "investors' confidence in Alberta".[20]

20. On 30 September 2016, Mr. Boston provided his recommendations to "achieve 5,000 megawatts of new renewable capacity, the retirement of over 6,000 megawatts of coal generation, and the build-out of 9,000 megawatts of natural gas to replace the retiring coal and to meet economic growth by 2030".[21] He mainly recommended that Alberta make voluntary long-term payments to the Canadian Owners for their Generating Units, which would otherwise be operational post-2030, based on the net book value of these units ("**Transition Payments**").[22]

21. On 24 November 2016, in accordance with Mr. Boston's recommendation, Alberta concluded off-coal agreements with each of the Canadian Owners ("**Off-Coal Agreements**").[23] Pursuant to the Off-Coal Agreements, the Canadian Owners stood to receive Transition Payments totaling CAD 1.36 billion over a 14-year period,[24] in return for the Generating Units ending their coal-fired emissions by 31 December 2030.[25] Neither Prairie nor WCC received any compensation from Alberta for the phase-out.

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[17] *See inter alia* **R-23**, Climate Change Advisory Panel, Climate Leadership Report, 20 November 2015, pp. 6, 30; **R-22,** Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015, p. 2.

[18] Memorial, ¶ 31, referring to **R-33**, Market Surveillance Administrator, "Market Share Offer Control 2015", 30 June 2015, pp. 11-16.

[19] *See generally* **R-34**, Government of Alberta, Press Release, "Alberta takes next steps to phase-out coal pollution under Climate Leadership Plan", 16 March 2016.

[20] **C-14**, Letter from Terry Boston to the Honourable Rachel Notley, Premier of Alberta, 30 September 2016, p. 1.

[21] **C-14**, Letter from Terry Boston to the Honourable Rachel Notley, Premier of Alberta, 30 September 2016, p. 2.

[22] **C-14**, Letter from Terry Boston to the Honourable Rachel Notley, Premier of Alberta, 30 September 2016, pp. 1-2.

[23] **C-12**, Government of Alberta, Press Release, "Revised: Alberta announces coal transition action", 24 November 2016.

[24] **C-21**, Capital Power Off-Coal Agreement, 24 November 2016 (referring to an annual Transition Payment of CAD 52,414,828.49); **R-37**, TransAlta Off-Coal Agreement, 24 November 2016, §§ 3(a)-(b) (referring to an annual Transition Payment of CAD 39,851,704.60); [redacted]

[25] **C-21**, Capital Power Off-Coal Agreement, 24 November 2016, § 2; **R-37**, TransAlta Off-Coal Agreement, 24 November 2016, § 2; [redacted]

22. For its part, on 17 December 2017, Canada's Federal Government announced its intention to amend the 2012 Federal Regulations to "phase out traditional coal-fired electricity by 2030".[26] The amendment, which eventually entered into force on 30 November 2018 ("**2018 Federal Regulations**"),[27] *inter alia* maintained Canada's objective to phase out Generating Units throughout the country at the end of their useful life.[28] Yet, with respect to Generating Units commissioned after 1974, like those supplied by the Mines, the 2018 Federal Regulations changed the definition of the term "useful life" and limited it to 31 December 2029 at the latest.[29]

2. Revision of emissions reduction and carbon pricing regulations

23. The Climate Plan envisaged replacing the SGER[30] with a new Carbon Competitiveness Incentive Regulation ("**CCIR**") applicable to qualifying facilities.[31] Alberta passed this regulation in 2017 and it came into effect on 1 January 2018.[32] In addition to maintaining the SGER's latest price for excess GHG carbon emissions,[33] the CCIR increased the stringency of the SGER's GHG emissions performance standards. The Generating Units, in particular, were required to match the emissions performance recommended by the Advisory Panel,[34] namely that of best-in-class natural gas combined cycle facilities.[35]

3. Carbon levy on consumer fuels

24. The Climate Plan envisaged the imposition of a carbon levy on transportation and heating fuels at the consumer level ("**Consumer Fuel Levy**").[36] To that end, on 13 June 2016, Alberta passed the Climate Leadership Implementation Act ("**CLIA**").[37]

25. The CLIA's Consumer Fuel Levy required "every consumer" to pay a carbon levy at a rate varying per type of fuel,[38] subject to certain exceptions.[39] Notably, "low heat value coal", including sub-

[26] **R-11**, Canada Gazette, Part I, Vol. 150, No. 51, Canadian Environmental Protection Act, 1999, Notice of Intent to develop greenhouse gas regulations for electricity generation in Canada, 17 December 2016, pp. 4-5 (of PDF).

[27] *See generally* **C-3,** Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (SOR/2012-167), 30 August 2012 (amended on 30 November 2018).

[28] *See supra*, ¶ 12.

[29] **C-3,** Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (SOR/2012-167), 30 August 2012 (amended on 30 November 2018), p. 5 (of PDF).

[30] *See supra*, ¶ 11.

[31] **R-23**, Climate Change Advisory Panel, Climate Leadership Report, 20 November 2015, pp. 5, 31ss (of PDF).

[32] *See generally* **R-25**, Carbon Competitiveness Incentive Regulation, Alberta Regulation 255/2017, 1 January 2018.

[33] *See supra*, fn. 6. *See also generally* **R-27**, Alberta Minister of Environment and Parks, Ministerial Order 58/2017, 21 December 2017.

[34] *See supra*, ¶¶ 16-17.

[35] **R-26**, Alberta, *Carbon Competitiveness Incentive Regulation Fact Sheet,* April 2018, p. 1.

[36] **R-23**, Climate Change Advisory Panel, Climate Leadership Report, 20 November 2015, pp. 5, 31ss (of PDF).

[37] **C-25**, Climate Leadership Implementation Act, SA 2016.

[38] **C-25**, Climate Leadership Implementation Act, SA 2016, § 9(2).

[39] **C-25**, Climate Leadership Implementation Act, SA 2016, §§ 9(3), 15.

bituminous coal,[40] was subject to a levy of CAD 35.39 per tonne in 2017, and of CAD 53.09 per tonne in 2018 and subsequent years.[41]

26. On 4 June 2019, Alberta repealed the CLIA and thereby the Consumer Fuel Levy.[42] As a result, the existing but previously inapplicable federal Greenhouse Gas Pollution Pricing Act ("**GGPPA**")[43] became partly applicable in Alberta as of 1 January 2020.[44] Part I of the GGPPA, imposed a regulatory charge on producers, distributors, and importers of various types of carbon-based fuel, including that produced by the Mines ("**Federal Fuel Charge**").

D. PREVIOUS PROCEEDINGS AND SALE OF WCC'S COAL ASSETS (2018-2022)

1. WCC's NAFTA claims in 2018

27. On 20 August 2018, WCC filed a notice of intent to initiate arbitration against Canada under Chapter 11 NAFTA on its own behalf and on behalf of Prairie ("**2018 NoI**").[45] WCC contested the acceleration of the phase-out of coal-generated electricity pursuant to the Climate Plan, as well as Canada's consequent decision to compensate the Canadian Owners in relation to the Generating Units without equivalent compensation to WCC and Prairie.[46] According to WCC, these measures breached NAFTA Articles 1102 (national treatment),[47] 1105 (minimum standard of treatment),[48] and 1110 (expropriation).[49]

28. On 19 November 2018, WCC filed a notice of arbitration pursuant to Chapter 11 NAFTA ("**2018 NoA**").[50] Like the 2018 NoI, WCC submitted the 2018 NoA on behalf of itself and Prairie.[51] In the 2018 NoA, WCC asserted claims under NAFTA Articles 1102 and 1105,[52] but not under Article 1110.

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[40] *See supra*, ¶ 14.

[41] **C-25**, Climate Leadership Implementation Act, SA 2016, Schedule 1, § 1(1)(s) and "Table – Carbon Levy Rates".

[42] **R-48**, An Act to Repeal the Carbon Tax, SA 2019, Ch. 1, § 1.

[43] **R-49**, Greenhouse Gas Pollution Pricing Act, SC 2018.

[44] **R-53**, Government of Canada News Release, "Government of Canada Announces Intent to Apply Pollution Pricing in Alberta", 13 June 2019. **R-54**, Government of Canada, "Backgrounder: Proposed Application of the Federal Carbon Pollution Pricing System in Alberta", 13 June 2019; **R-055**, Canada Gazette, Part II, Vol. 153, No. 17, *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)*, SOR/2019-294, 8 August 2019, § 8. *See also* NoA, ¶ 57; Memorial, ¶ 43.

[45] **C-30**, 2018 NoI.

[46] **C-30**, 2018 NoI, ¶¶ 6-7.

[47] **C-30**, 2018 NoI, ¶ 6.

[48] **C-30**, 2018 NoI, ¶ 7.

[49] **C-30**, 2018 NoI, ¶ 8.

[50] **R-79**, 2018 NoA, ¶¶ 1-2. *See also* Memorial, ¶¶ 57, 99 (including fn. 174), 108, and "Table 2: Summary of Key Events"; Response, ¶¶ 23, 160; Reply, ¶¶ 40, 63, 132; Rejoinder, ¶ 126.

[51] **R-79**, 2018 NoA, ¶ 1.

[52] **R-79**, 2018 NoA, ¶¶ 82, 85ss, 90ss.

2. US Bankruptcy proceedings and sale of WCC's assets

29. On 9 October 2018, in the time period between the 2018 NoI and 2018 NoA, WCC and several affiliated companies ("**Debtors**") filed a voluntary petition for relief under Chapter 11 of the US Bankruptcy Code ("**Bankruptcy Code**") before the US Bankruptcy Court for the Southern District of Texas ("**Bankruptcy Court**").[53]

30. Among other documents annexed to the Bankruptcy Code petition was a Restructuring Support Agreement ("**RSA**"), also dated 9 October 2018, concluded between the Debtors and certain creditors, including some that had provided debt financing and held first priority liens on the Debtors' assets ("**First Lien Lenders**").[54] The RSA envisaged a "going concern sale of substantially all of the [Debtors'] assets"[55] by auction pursuant to a plan of reorganization ("**PoR**").[56] To protect against "lowball" bids,[57] however, the RSA provided that the First Lien Lenders would set a "floor purchase price in the upcoming auction",[58] thereby serving as a "stalking horse" bidder for the sale,[59] through the submission of a "credit bid".[60]

31. On 15 November 2018, the Bankruptcy Court authorized the First Lien Lenders to serve as the stalking horse bidder and submit the announced floor credit bid.[61] The Bankruptcy Court also set 15 January 2019 as the deadline for the Debtors to receive other bids for their assets.[62]

32. By 15 January 2019, the Debtors had not received any bid other than the floor credit bid by the First Lien Lenders.[63] Therefore, on 21 January 2019, the First Lien Lenders were declared the

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[53] **R-65**, Westmoreland Coal Company, Voluntary Petition For Non-Individuals Filing For Bankruptcy (Case No. 18-35672), 9 October 2018, pp. 1, 6 (of PDF).

[54] *See generally* **R-68**, Restructuring Support Agreement (Case No. 18-35672), 9 October 2018. *See also* **R-67**, Westmoreland Coal Company, News Release, "Westmoreland Enters into Restructuring Support Agreement with Members of Ad Hoc Lending Group; WMLP Simultaneously Files Chapter 11 to Sell Assets", 9 October 2018.

[55] **R-66**, Bidding Procedures Motion (Case No. 18-35672), 18 October 2018, ¶ 1.

[56] *See generally* **R-68**, Restructuring Support Agreement (Case No. 18-35672), 9 October 2018, Exhibit A (Plan Term Sheet) pp. 36ss (of PDF).

[57] **R-60**, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Expert Report of Kathryn A. Coleman, 16 December 2020, ¶ 59.

[58] **R-60**, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Expert Report of Kathryn A. Coleman, 16 December 2020, ¶ 42; **CER-1**, Chapman ER, fn. 6.

[59] **R-60**, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Expert Report of Kathryn A. Coleman, 16 December 2020, ¶ 55; **CER-1**, Chapman ER, ¶ 16. *See also generally* **R-68**, Restructuring Support Agreement (Case No. 18-35672), 9 October 2018, Exhibit B (Sale Transaction Term Sheet), pp. 51ss (of PDF).

[60] **R-68**, Restructuring Support Agreement (Case No. 18-35672), 9 October 2018, Exhibit B (Sale Transaction Term Sheet), Definition of "Purchase Price", p. 53 (of PDF). Credit bidding allows secured creditors to use the money owed to them as consideration to purchase the debtor's assets, notwithstanding the value of their collateral, through a bid at the lowest price at which they are willing to accept satisfaction for their secured claim, rather than effecting repayment by taking possession of the collateral (*see* **CER-1**, Chapman ER, fn. 11; **R-60**, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Expert Report of Kathryn A. Coleman, 16 December 2020, ¶ 43).

[61] **R-70**, Order Approving the Bidding Procedures Motion (Case No. 18-35672), 15 November 2018, ¶¶ C-D (pp. 3-4 of PDF), ¶¶ 5-6 (p. 7 of PDF); and ¶ V(d)(i), fn. 5, p. 19 (of PDF).

[62] **R-70**, Order Approving the Bidding Procedures Motion (Case No. 18-35672), 15 November 2018, ¶ 3(c), p. 6 (of PDF).

[63] **C-72**, Notice of Cancellation of Auction and Designation of Successful Bidder (Case No. 18-35672), p. 2 (of PDF).

successful bidder.[64] Yet, according to the PoR,[65] the First Lien Lenders would not acquire the Debtors' assets directly. Rather, they would use one or more special acquisition vehicles to consummate the purchase on their behalf.[66] To that end, the First Lien Lenders incorporated Delaware companies Westmoreland Mining Holdings LLC ("**WMH**") on 31 January 2019,[67] and Westmoreland Mining LLC ("**WML**") on 12 February 2019.[68]

33. On 2 March 2019, the Bankruptcy Court approved the PoR and thereby authorized the Debtors (including WCC) and WMH/WML to conclude a Stalking Horse Purchase Agreement ("**SHPA**"),[69] which was executed on 15 March 2019 ("**Effective Date**").[70] As a result of this transaction, WMH and WML took title over some of the Debtors' assets. In WMH's case, these assets included:

    i. 100% equity in Westmoreland Canada Holdings Inc. ("**WCHI**"),[71] an Alberta company that wholly and directly owned Prairie;[72]

    ii. Certain "Transferred Causes of Action",[73] in principle including a "NAFTA Claim",[74] which the SHPA defined as the "claim filed with the Office of the Deputy Attorney General of Canada on [19 November 2018] by [WCC] on its own behalf and on behalf of [Prairie] against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)"[75] ("**NAFTA Claim**");

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[64] **C-72**, Notice of Cancellation of Auction and Designation of Successful Bidder (Case No. 18-35672), p. 2 (of PDF).

[65] The Debtors originally filed the PoR on 25 October 2018 (see **C-71**, Disclosure Statement Approval (Case No. 18-35672), pp. 3, 51 (of PDF)). As is usual practice in US bankruptcy proceedings, however, the PoR was modified or supplemented on multiple opportunities (*see* **R-76**, Notice of Sixth Amendment to the PoR (Case No. 18-35672), pp. 1-2 (of PDF) (listing some of the PoR's amendments)). Not all versions of the PoR are in the record. Therefore, for ease of understanding and reference, the Tribunal refers below to the content of the PoR as approved by the Bankruptcy Court on 2 March 2019 (*see infra*, fns. 66, 69).

[66] **C-73**, Confirmed Amended PoR, 2 March 2019, ¶ 209 (p. 24 of PDF) (defining "Stalking Horse Purchaser" as "the newly-formed Delaware limited liability Entity or other form of Entity or Entities as selected by the Required Consenting Stakeholders to serve as the Buyer (as defined in the Stalking Horse Purchase Agreement) under the Stalking Horse Purchase Agreement").

[67] **R-71**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining Holdings LLC, Entity No. 7262545.

[68] **R-72**, State of Delaware, Department of State, Division of Corporations, Entity Details, Westmoreland Mining LLC, Entity No. 7266728.

[69] **C-32**, PoR Confirmation Order (Case No. 18-35672), ¶ 1 (p.2 of PDF); **C-73**, Confirmed Amended PoR, 2 March 2019, ¶ 210 (p. 24 of PDF).

[70] **C-35**, Stalking Horse Purchase Agreement, 15 March 2019.

[71] **R-75**, Notice of Sixth Amendment to the PoR (Case No. 18-35672), Exhibit G Excerpt – Description of Transaction Steps, § III.c (p. 13 of PDF).

[72] *See supra*, ¶ 15.

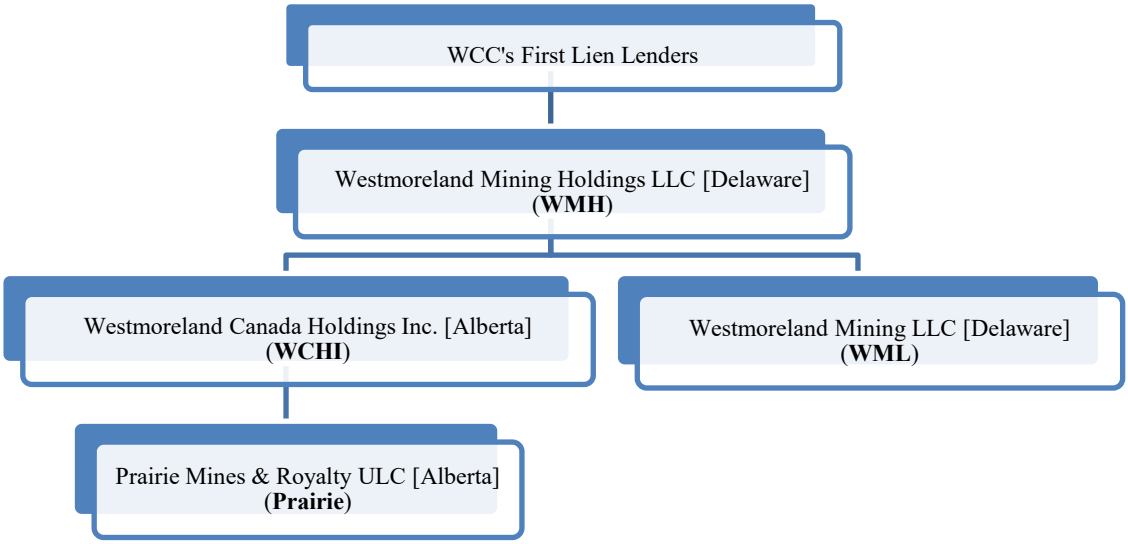
[73] **C-35**, Stalking Horse Purchase Agreement, 15 March 2019, § 2.01(l) (p. 31 of PDF); **R-75**, Notice of Sixth Amendment to the PoR (Case No. 18-35672), Exhibit G Excerpt – Description of Transaction Steps, § III.d (p. 13 of PDF).

[74] **R-75**, Notice of Sixth Amendment to the PoR (Case No. 18-35672), Exhibit G Excerpt – Description of Transaction Steps, § III.d (p. 13 of PDF).

[75] **C-35**, Stalking Horse Purchase Agreement, 15 March 2019, § 1.01, Definition of "Nafta Claim" (p. 18 of PDF).

iii. 100% equity in WML.[76]

34. The following figure illustrates the corporate structure of the First Lien Lenders following their acquisition of the Debtor's assets, including the indirect ownership of Prairie:[77]



3. WCC's 2019 amended Notice of Arbitration

35. On 13 May 2019, following the outcome of the Bankruptcy Court proceedings, WCC and WMH filed an amended notice of arbitration and statement of claim on behalf of WCC, WMH, WCHI, and Prairie ("**Amended NoA**").[78] The Amended NoA identified WCC as "initial disputing investor",[79] and WMH as both "Claimant"[80] and "disputing investor".[81] The cover letter transmitting the Amended NoA to Canada represented that "[t]here [were] no changes to the substance of the claim" asserted in the 2018 NoA.[82]

36. By letter of 2 July 2019, Canada stated that the Amended NoA was not a "permissible amendment" to the 2018 NoA, as WMH could not "become the disputing investor in a claim that was submitted to arbitration" by WCC. According to Canada, WMH had to "submit its own claim" and meet the requirements of Chapter 11 NAFTA, including the submission of a notice of intent 90 days beforehand. However, Canada indicated its willingness to accept the Amended NoA as

[76] **R-75**, Notice of Sixth Amendment to the PoR (Case No. 18-35672), Exhibit G Excerpt – Description of Transaction Steps, § III.c (p. 13 of PDF).

[77] Figure by the Tribunal on the basis of the information in: Memorial, ¶ 55; **R-60**, *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Expert Report of Kathryn A. Coleman, 16 December 2020, ¶ 81.

[78] **C-55**, Amended NoA, 13 May 2019, ¶ 1.

[79] **C-55**, Amended NoA, 13 May 2019, ¶ 15.

[80] **C-55**, Amended NoA, 13 May 2019, Cover Page

[81] **C-55**, Amended NoA, 13 May 2019, ¶ 21.

[82] **R-80**, Letter from Elliot Feldman to Scott Little, 13 May 2019, p. 1.

WMH's notice of intent, subject to WCC "withdraw[ing] the claim that it submitted" in the 2018 NoA.[83]

37. By letter of 3 July 2019, WCC and WMH stated their "disagree[ment]" with Canada's characterization of the Amended NoA.[84] However, they accepted "Canada's proposal as a means to expedite the arbitration process and avoid unnecessary conflict"; requested confirmation from Canada that it accepted the Amended NoA as a "compliant" notice of intent; and represented that thereafter they would "proceed" with a "new [n]otice of [a]rbitration and [s]tatement" of [c]laim".[85]

38. By letter of 12 July 2019, Canada proposed that WCC withdraw the 2018 NoA; that at the same time WMH submit a "clean version" of the Amended NoA to serve as its notice of intent, which could be backdated to 13 May 2019; and that, as of 12 August 2019, meaning 90 days after the backdated notice of intent, WMH could submit a notice of arbitration and statement of claim.[86]

4. The withdrawal of WCC's claims and the submission and dismissal of WMH's claims

39. On 23 July 2019, consistent with Canada's letter of 12 July 2019:[87]

i. WCC withdrew the 2018 NoA;[88]

ii. WMH filed a notice of intent to submit a claim against Canada under Chapter 11 NAFTA on its behalf and on behalf of WCHI and Prairie ("**2019 NoI**").[89] The 2019 NoI was backdated to 13 May 2019,[90] the date of the Amended NoA,[91] and invoked breaches of NAFTA Articles 1102 and 1105.[92]

40. On 12 August 2019, WMH filed a notice of arbitration and statement of claim against Canada pursuant to Chapter 11 NAFTA ("**2019 NoA**").[93] Like the 2019 NoI, WHM submitted the 2019 NoA on behalf of itself, WCHI, and Prairie,[94] and asserted claims under NAFTA Articles 1102 and 1105.[95]

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[83] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019, pp. 1-2.

[84] **R-82**, Letter from Elliot Feldman to Scott Little, 3 July 2019, p. 1.

[85] **R-82**, Letter from Elliot Feldman to Scott Little, 3 July 2019, p. 1.

[86] **R-83**, Letter from Scott Little to Elliot Feldman, 12 July 2019, ¶¶ 1-2.

[87] *See supra*, ¶ 38.

[88] **R-84**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, 23 July 2019, p. 1 (of PDF).

[89] **R-84**, 2019 NoI, ¶ 1 (p. 7 of PDF).

[90] **R-84**, 2019 NoI, Cover and Signature Pages (pp. 5, 39 of PDF).

[91] *See supra*, ¶ 35.

[92] **R-84**, 2019 NoI, ¶¶ 83, 86ss, 90ss, (pp. 33-38 of PDF).

[93] **R-85**, 2019 NoA.

[94] **R-85**, 2019 NoA, ¶ 1.

[95] **R-85**, 2019 NoA, ¶¶ 88, 91ss, 96ss.

41. On 24 February 2020, an arbitral tribunal was constituted to address WMH's claims ("**WMH Tribunal**" and "**WMH Arbitration**"),[96] against which Canada raised jurisdictional objections. Among other objections, Canada argued that, under NAFTA Articles 1116(1) and 1117(1), WMH was not a protected investor at the time of the alleged breaches of NAFTA.[97]

42. On 31 January 2022, the WMH Tribunal issued its Final Award ("**WMH Award**"), where it held that WMH did "not have standing to bring [its] claim[s] on the basis [*inter alia* that] it was not a protected investor at the time of the alleged breaches as required by NAFTA Articles 1116(1) and 1117(1)".[98] The WMH Tribunal therefore "dismissed" WMH's claims in their "entirety".[99]

5. Proceedings before the Bankruptcy Court

43. On 17 June 2022, with the consent of WMH,[100] WCC sought an order from the Bankruptcy Court finding that WCC "retained title to the NAFTA Claim to the same extent it did prior to the [SHPA's] Effective Date";[101] and authorizing WCC to "pursue the NAFTA Claim to the extent permitted under applicable law for the benefit of [WMH]".[102]

44. On 27 June 2022, the Bankruptcy Court entered an order holding that the "NAFTA Claim did not transfer to [WHM] or any other party pursuant to the [SHPA]"; that "WCC's rights to the NAFTA Claim remained with WCC as reorganized"; that "WCC retain[ed] title to the NAFTA Claim to the same extent it did prior to the […] Effective Date"; that "WCC [was] authorized to pursue the NAFTA Claim"; and that WMH "[was] entitled to the economic benefits and proceeds of the NAFTA Claim".[103]

III. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

45. On 30 June 2022, the Claimant served on the Respondent a notice of intent to submit a claim to arbitration under Chapter 11 NAFTA ("**NoI**"),[104] on its own behalf and on behalf of Prairie. The

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[96] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶¶ 15-16, 94.

[97] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 95(a).

[98] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 252(1).

[99] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 252(2).

[100] **R-87**, Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim (Case No. 18-35672 (DRJ), 17 June 2022, p. 1 (of PDF).

[101] **R-87**, Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim (Case No. 18-35672 (DRJ), 17 June 2022, ¶ 35; *supra*, ¶ 33.

[102] **R-87**, Agreed Motion for Order Authorizing Debtor WCC to Prosecute Claim (Case No. 18-35672 (DRJ), 17 June 2022, ¶ 35.

[103] **C-38** Order (Case No. 18-35672), 23 June 2022, entered on 27 June 2022, ¶¶ 1-3.

[104] While the NoI is dated 28 June 2022, Canada received it on 30 June 2022.

NoI states that it "relates to the same dispute that was the subject" of the 2018 NoI and the 2018 NoA.[105]

46. On 14 October 2022, the Claimant served on the Respondent a notice of arbitration pursuant to NAFTA's Chapter 11 and the USMCA's Annex 14-C (the "**NoA**").[106] The Claimant submitted the NoA on its own and on Prairie's behalf.[107] Consistent with the NoI's reference to the 2018 NoI,[108] the NoA asserted breaches of NAFTA Articles 1102, 1105, and 1110.[109]

47. Thereafter, the Tribunal was constituted. The President accepted the appointment on 27 February 2023 and made some disclosures, with which the Parties indicated having no issues on 1 and 14 March 2023 respectively.

B. INITIAL PHASE

48. On 14 March 2023, the Parties updated the Tribunal on their discussions concerning draft Procedural Order No. 1 ("**PO1**") and draft Procedural Order No. 2 ("**PO2**") on confidentiality. The Parties also indicated that they had agreed to resolve any jurisdictional objections in a preliminary phase.

49. On 21 March 2023, following consultations with the Parties, the Tribunal informed the Parties that the first session would take place on 18 April 2023. On the same day, the Tribunal circulated draft Terms of Appointment ("**ToA**") and a draft PO1 for comment.

50. On 5 April 2023, with the consent of the Parties, the Tribunal requested that ICSID administer the arbitration. The ICSID Secretary-General confirmed ICSID's ability to do so the same day.

51. On 13 April 2023, the Parties provided their comments on the draft ToA and PO1, and circulated a draft PO2.

52. On 18 April 2023, the first session took place as scheduled, during which the Parties and the Tribunal discussed the draft ToA, PO1, and PO2. It was agreed to incorporate the ToA into PO1.

53. On 8 May 2023, after some additional exchanges between the Tribunal and the Parties, the Tribunal issued PO1 and PO2. PO1 *inter alia* confirmed Washington D.C. as the seat of the arbitration.[110] PO1 also recorded the Parties' agreement that ICSID serve as registry and administrator of the proceedings[111] and that the proceedings be bifurcated between jurisdiction and merits.[112]

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[105] NoI, p. 2. *See supra*, ¶¶ 27-28.

[106] NoA, ¶ 2. While the NoA is dated 11 October 2022, Canada received it on 14 October 2022 (*see* Memorial, ¶ 74; Rejoinder, fn. 290).

[107] NoA, ¶ 1.

[108] *See supra*, ¶ 45.

[109] NoA, ¶ 75.

[110] PO1, ¶ 7.1.

[111] PO1, ¶ 3.1.

[112] PO1, ¶¶ 12.1-12.2, 14.3-14.4, 16.2; *supra*, ¶ 48.

C. WRITTEN PHASE

54. On 28 June 2023, the Respondent filed its Memorial on Jurisdiction and Response to the Notice of Arbitration (the "**Memorial**").

55. On 20 September 2023, the Claimant filed its Response to the Memorial on Jurisdiction (the "**Response**").

56. On 13 December 2023, the Respondent filed its Reply on Jurisdiction (the "**Reply**").

57. On 15 February 2024, ICSID informed the Non-Disputing NAFTA Parties ("**NDNP(s)**"), namely the United Mexican States ("**Mexico**") and the US, of the time limit for submissions under Article 1128 NAFTA and of the timing and format of the hearing on jurisdiction, scheduled to take place on 2-3 May 2024 (the "**Hearing**").

58. On 13 March 2024, the Claimant filed its Rejoinder on Jurisdiction (the "**Rejoinder**").

59. On 10 April 2024, Mexico and the US filed NDNP submissions pursuant to Annex 14-C of the USMCA, Article 1128 NAFTA, and Section 20 of PO1. They confirmed that representatives of both States would attend the Hearing.

60. On 24 April 2024, the Parties filed their comments on the NDNP submissions.

D. ORAL PHASE

61. On 9 October 2023, the Tribunal confirmed that, further to the Parties' agreement, the Hearing would be held online.

62. On 26 March 2024, the Tribunal circulated a draft Procedural Order No. 3 ("**PO3**") on the organization of the Hearing.

63. On 2 April 2024, the Parties submitted their joint comments on draft PO3.

64. On 3 April 2024, the Tribunal and the Parties held a pre-hearing conference to discuss draft PO3 and other issues concerning the organization of the Hearing. On the same date, the Tribunal issued PO3, which recorded the Parties' agreement that the Hearing would be dedicated only to presenting oral argument and answering the Tribunal's questions.

65. On 16 April 2024, pursuant to Paragraphs 22.6 of PO1 and 4.7 of PO3, the Tribunal conveyed to the Parties the following questions and issues for the Parties to address at the Hearing:

> 1. 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. 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?

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 Article 1110 NAFTA.

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?

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?

66. The Hearing was held remotely on the Zoom platform from 2 to 3 May 2024. The following persons were in attendance:

Tribunal:	
Prof. Gabrielle Kaufmann-Kohler	President
Mr. Laurence Shore	Arbitrator
Ms. Judith Levine	Arbitrator
ICSID Secretariat:	
Ms. Anna Holloway	Secretary of the Tribunal
Ms. Ekaterina Minina	ICSID Paralegal
Mr. Petar Tsenkov	World Bank Technical Operator
Assistant to the Tribunal	
Dr. Magnus Jesko Langer	
For the Claimant(s):	
Mr. Javier Rubinstein	Partner, King & Spalding LLP
Ms. Lauren Friedman	Partner, King & Spalding LLP
Mr. Cedric Soule	Counsel, King & Spalding LLP
Ms. Tamsin Parzen	Associate, King & Spalding LLP
Ms. Teresa Sandoval	Legal Practice Assistant, King & Spalding LLP
Mr. Jeremy Cottrell	General Counsel, Westmoreland
For the Respondent(s):	
Ms. Krista Zeman	*A/Deputy Director and Senior Counsel* Trade Law Bureau, Government of Canada
Ms. Heather Squires	*Deputy Director and Senior Counsel* Trade Law Bureau, Government of Canada
Ms. E. Alexandra Dosman	*A/Deputy Director and Senior Counsel* Trade Law Bureau, Government of Canada
Ms. Maria Cristina Harris	*Counsel* Trade Law Bureau, Government of Canada
Mr. Christopher Koziol	*Counsel* Trade Law Bureau, Government of Canada
Ms. Darian Bakelaar	*Senior Paralegal* Trade Law Bureau, Government of Canada
Ms. Marianna Maza Pinero	*Paralegal* Trade Law Bureau, Government of Canada
Mr. Scott Little	*Director and General Counsel* Trade Law Bureau, Government of Canada

Mr. Ryan Knecht	*Trial Graphics Expert*, Core Legal Concepts
Ms. Krista Zeman	*A/Deputy Director and Senior Counsel* Trade Law Bureau, Government of Canada
Ms. Heather Squires	*Deputy Director and Senior Counsel* Trade Law Bureau, Government of Canada
Ms. E. Alexandra Dosman	*A/Deputy Director and Senior Counsel* Trade Law Bureau, Government of Canada
Ms. Maria Cristina Harris	*Counsel* Trade Law Bureau, Government of Canada
Mr. Christopher Koziol	*Counsel* Trade Law Bureau, Government of Canada
Ms. Darian Bakelaar	*Senior Paralegal* Trade Law Bureau, Government of Canada
Ms. Marianna Maza Pinero	*Paralegal* Trade Law Bureau, Government of Canada
Mr. Scott Little	*Director and General Counsel* Trade Law Bureau, Government of Canada
Mr. Ryan Knecht	*Trial Graphics Expert*, Core Legal Concepts
For the US :	
Ms. Lisa Grosh	Assistant Legal Adviser, U.S. Department of State, Office of the Legal Adviser, Office of International Claims and Investment Disputes
Mr. John Daley	Deputy Assistant Legal Adviser, U.S. Department of State, Office of the Legal Adviser, Office of International Claims and Investment Disputes
Mr. David Bigge	Chief of Investment Arbitration, U.S. Department of State, Office of the Legal Adviser, Office of International Claims and Investment Disputes
Ms. Julia Brower	Attorney Adviser, U.S. Department of State, Office of the Legal Adviser, Office of International Claims and Investment Disputes
For Mexico:	
Mr. Alan Bonfiglio Ríos	Ministry of Economy, Mexico
Ms. Pamela Hernández Mendoza	Ministry of Economy, Mexico
Mr. Alejandro Rebollo Ornelas	Ministry of Economy, Mexico
Court Reporter(s):	
Ms. Dawn Larson	Larson Reporting

67. The Hearing was audio and video-recorded and transcribed verbatim. Copies of the audio-video recordings and the transcripts were delivered to the Parties. In accordance with paragraph 6.2.1 of PO3, the audio-video recordings were uploaded on the ICSID website.

68. At the end of the Hearing, the Tribunal and the Parties discussed post-hearing matters. It was agreed *inter alia* that Post-Hearing Briefs were unnecessary and the Parties would submit costs statements, as opposed to costs submissions.

E. POST-HEARING PHASE

69. On 10 June 2024, ICSID circulated the final Hearing transcripts with the Tribunal and the Parties.

70. On 14 June 2024, the Parties submitted their costs statements.

71. On 5 July 2024, the Respondent requested that each Party be given leave to provide brief observations on the opposing Party's statement of costs.

72. On 11 July 2024, the Claimant commented on the Respondent's request.

73. On 12 July 2024, the Tribunal granted each Party the opportunity to submit a one-page observation on the other's statement of costs, by 19 July 2024.

74. On 19 July 2024:

    i. Each Party submitted its observations on the opposing Party's costs statement.

    ii. The Claimant sought leave to submit comments on the award issued by the tribunal in *TC-Energy v. United States (II)* ("**TC Energy Award**"), upon its publication.

75. On 24 July 2024, the Respondent commented on the Claimant's request concerning the *TC Energy* Award.

76. On 25 July 2024, the Tribunal denied the Claimant's request regarding the *TC Energy* Award, noting that, if it deemed so necessary, it would revert to the Parties in this respect.

77. On 10 December 2024, ICSID advised the Parties that the ruling would be issued one week later.

78. On 17 December 2024, the Tribunal informed the Parties that the hearings were closed in accordance with Article 31(2) of the UNCITRAL Arbitration Rules.

IV. PRAYERS FOR RELIEF

79. The Respondent requests the Tribunal to:

> (a) dismiss the Claimant's claim in its entirety for lack of jurisdiction;
>
> (b) require the Claimant to bear all costs of the arbitration, including Canada's costs of legal assistance and representation, pursuant to NAFTA Article 1135(1) and Articles 40 and 42 of the 2013 UNCITRAL Rules; and
>
> (c) grant any other relief that it deems appropriate.[113]

80. The Claimant requests the Tribunal to issue an award:

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

[113] Reply, ¶ 227. *See also* Memorial, ¶ 160. While the written submissions for this phase of the proceedings focused on preliminary objections, the Respondent recorded in its Memorial, in accordance with Procedural Order No. 1, a brief response to the NoA in which it denied it had violated NAFTA Chapter 11 and maintained that the Claimant's damages claim was flawed and must be rejected (*see* Memorial, ¶¶ 147-159).

> (ii) Ordering Canada to bear all the costs of this proceeding, including (but not limited to) Claimant's attorneys' fees and expenses; and
>
> (iii) Granting any other relief that it deems appropriate.[114]

V. PRELIMINARY MATTERS

A. SCOPE OF THE AWARD

81. The Parties agreed to bifurcate these proceedings between jurisdiction and merits. Accordingly, this Award addresses the Respondent's jurisdictional objections.

B. LEGAL FRAMEWORK

1. The USMCA and NAFTA

82. The entry into force of the USMCA on 1 July 2020 terminated and "replace[d]"[115] NAFTA as the free trade agreement between the US, Mexico, and Canada, "without prejudice to those provisions set forth in the USMCA that refer to [NAFTA] provisions".[116]

83. Article 14.2.3 of the USMCA provides that its Chapter 14 on "Investment" does "not bind a [State] Party in relation to an act or fact that took place or a situation that ceased to exist before the date of [the USMCA's] entry into force", "except as provided for in Annex 14-C". Meanwhile, Article 14.2.4 of the USMCA states *inter alia* that "an investor may only submit a claim to arbitration under [Chapter 14] as provided under Annex 14-C".

84. Consistent with USMCA Articles 14.2.3, 14.2.4, and the USMCA-NAFTA replacement protocol,[117] Annex 14-C of the USMCA ("**Annex 14-C**"), entitled "Legacy Investment Claims and Pending Claims", refers to NAFTA. Notably, Paragraphs 1, 3, and 6 of Annex 14-C in relevant parts read as follows:

> 1. Each [USMCA] Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with [Chapter 11 NAFTA] and this Annex alleging breach of an obligation under [Chapter 11 NAFTA].
>
> […]
>
> 3. A [USMCA] Party's consent under paragraph 1 shall expire three years after [NAFTA's] termination [on 1 July 2020].
>
> […]
>
> 6. For the purposes of this Annex:

[114] Rejoinder, ¶ 207. *See also* Response, ¶ 234.

[115] USMCA, Preamble (where the USMCA Parties resolve to "REPLACE [NAFTA] with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region").

[116] Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States, 30 November 2018, ¶ 1.

[117] *Supra* fn. 116.

> (a) "legacy investment" means an investment of an investor of another [USMCA] Party in the territory of the [USMCA] Party established or acquired between [1 January 1994] and the date of [NAFTA's] termination [on 1 July 2020], and in existence on the date of [the USMCA's] entry into force [also 1 July 2020]; [and]
>
> (b) "investment", "investor", and "Tribunal" have the meanings accorded in [NAFTA Chapter 11].

85. The Claimant alleges breaches of NAFTA by Canada with respect to measures adopted latest by 24 November 2016,[118] while NAFTA was in force. Yet, the Claimant commenced this arbitration on 14 October 2022,[119] after the termination and replacement of NAFTA by the USMCA.

86. It follows from the provisions quoted above that NAFTA's Chapter 11 and the USMCA's Annex 14-C jointly determine the legal framework applicable to the instant case. The Claimant's claims may only proceed to the merits if the Tribunal is satisfied that the jurisdictional requirements of both Treaties are met. The requirements of the Treaties that are in dispute are addressed below, to the extent necessary.

2. Law governing jurisdiction

87. The Tribunal's jurisdiction is governed by international law, primarily the Treaties. The Parties disagree on whether other components of international law may be applicable, as discussed below.[120]

3. Law governing the procedure

88. This arbitration is governed by (in the following order of precedence):

i. The mandatory rules of the law on international arbitration applicable at the seat of the arbitration, namely Washington D.C.;

ii. The UNCITRAL Arbitration Rules, except as modified by the provisions of Section B of NAFTA Chapter 11; and

iii. The rules set out in PO1.[121]

4. Relevance of Previous Decisions or Awards

89. While both Parties have relied on previous decisions or awards in support of their positions, the Tribunal is not bound by the decisions of other arbitral tribunals. However, the Tribunal considers that, unless there are compelling reasons to the contrary, it should adopt the legal solutions established in a series of consistent cases, subject to the particular provisions of the Treaties and the circumstances of the instant case. This will contribute to the harmonious development of

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[118] *See infra*, ¶ 106.

[119] *See supra*, ¶ 46.

[120] *See infra*, ¶¶ 131-133, 176-181.

[121] PO1, ¶ 9.1.

investment law and thereby meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

VI. DISCUSSION

A. INTRODUCTION

90. The Claimant submits that Canada's coal-related measures constitute breaches of NAFTA Articles 1102, 1105, and 1110, and on these grounds brings claims on its own behalf pursuant to NAFTA Article 1116(1) ("**Direct Claims**") and on behalf of Prairie pursuant to NAFTA Article 1117(1) ("**Representative Claims**").[122]

91. According to the Respondent, the Tribunal's lacks jurisdiction over the Direct Claims and/or the Representative Claims (jointly, "**Claims**") for the following reasons:

i. The Claims do not concern a "legacy investment" under Annex 14-C, as the Claimant did not hold an investment in Canada at the time when the USMCA entered into force ("**Legacy Objection**");[123]

ii. The Claims are time-barred by virtue of NAFTA Articles 1116(2) and 1117(2), as the Claimant submitted the NoA more than three years after WCC and Prairie knew or should have known about the alleged NAFTA breaches and the resulting loss ("**Time-Bar Objection**");[124]

iii. The Claimant has not met the requirements of NAFTA Article 1121, as it submitted the NoA without contemporaneous waivers by WCC and Prairie ("**Contemporaneous Waiver Objection**");[125]

iv. With respect to the Direct Claims, the Claimant has not made out a *prima facie* case that WCC incurred damages arising directly out of the alleged NAFTA breaches, as required by NAFTA Article 1116(1). It seeks recovery of reflective loss caused by harm allegedly incurred by Prairie, which loss cannot be recovered through claims brought on WCC's behalf ("**WCC Damages Objection**");[126]

v. With respect to the Representative Claims:

[122] *See supra*, ¶ 46. *See also infra,* ¶ 106.

[123] Memorial, § III; Reply, § IV.

[124] Memorial, § IV.A; Reply, § V.A.

[125] Memorial, § IV.B.1-2; Reply, § V.B.1.

[126] Memorial, § IV.C.1; Reply, § V.D.

a. Pursuant to NAFTA Article 1121, the waiver by Prairie submitted with the Amended NoA[127] and the 2019 NoI,[128] prevents the Claimant from raising claims on behalf of Prairie ("**Prairie Waiver Objection**").[129]

b. In any event, the Claimant did not own or control Prairie when it filed the NoA and thus cannot assert claims on Prairie's behalf under NAFTA Article 1117(1) ("**Prairie Control Objection**").[130]

92. The jurisdictional nature of the Respondent's objections is undisputed, and rightly so. The objections all go to Canada's consent to arbitrate. If either one of the WCC Damages Objection, the Prairie Waiver Objection, or the Prairie Control Objection is successful, the Tribunal would lack jurisdiction over either the Direct Claims or the Representative Claims and the arbitration would continue with respect to the other category of claims. By contrast, the success of either one of the Legacy Objection, the Time-Bar Objection, or the Contemporaneous Waiver Objection, would affect all the Claims and negate jurisdiction in full, thereby ending the proceedings.

93. Therefore, to affirm jurisdiction, the Tribunal must address all objections raised by the Respondent. By contrast, to deny jurisdiction, the Tribunal need only determine that the Legacy Objection, or the Time-Bar Objection, or the Contemporaneous Waiver Objection hold merit.

94. Accordingly, the Tribunal finds it most efficient to start by addressing the Time-Bar Objection **(B)** followed by the Legacy Objection **(C)**. In light of the outcome reached, it will then examine the Claimant's submission that the doctrines of estoppel, abuse of rights, and/or preclusion prevent the Respondent from advancing either objection **(DD)**. As a last topic, it will deal with the Claimant's alternative request for an "order […] confirming that WCC has not effectively waived its rights to pursue relief in other venues" **(EE)**.[131]

95. Prior to the discussion of each topic, the Tribunal will summarize the Parties' main arguments, though it addresses the Parties' submissions in greater detail where appropriate during the analysis. For the avoidance of doubt, the Tribunal has considered all of the Parties' allegations and arguments, even if no specific reference is made to a given allegation or argument.

B. TIME-BAR OBJECTION

1. Overview of the Parties' positions

96. According to the Respondent, the text of NAFTA Articles 1116(2) and 1117(2) is "clear, unambiguous, and dispositive":[132] an investor "may not make a claim"[133] on its own behalf pursuant to NAFTA Article 1116(1) or on behalf of an enterprise pursuant to Article 1117(1), "if more than three years have elapsed from the date on which the [investor and/or the enterprise (as

[127] *See supra*, ¶ 35.

[128] *See supra*, ¶ 39.ii.

[129] Memorial, § IV.B.3; Reply, § V.B.2.

[130] Memorial, § IV.C.2; Reply, § V.C.1.

[131] Rejoinder, fn. 234.

[132] Reply, ¶ 133. *See also* Reply, ¶ 148.

[133] Reply, ¶ 131, quoting NAFTA Articles 1116(2) and 1117(2) (underline by the Respondent).

applicable)] first acquired, or should have first acquired, knowledge of the alleged breach and [of the] incurred loss or damage".[134]

97. The Respondent submits that this three-year limitation period "is not subject to any suspension, prolongation, or other qualification".[135] It notes that, while WCC and Prairie acquired knowledge of the alleged breaches and resulting loss underlying the Claims on 24 November 2016,[136] the Claimant did not submit the Claims to arbitration until almost six years later, on 14 October 2022, with the notification of the NoA.[137] Accordingly, argues the Respondent, the Claims are time-barred under NAFTA Articles 1116(2) and 1117(2).[138]

98. By contrast, the Claimant contends that a good faith reading of NAFTA Articles 1116(2) and 1117(2) supports a finding that the limitation period is suspended once the relevant NAFTA Party is notified of the dispute,[139] as this achieves the core purpose of allowing the responding State to preserve relevant evidence and prepare its defense.[140]

99. The Claimant accepts that the applicable three-year limitation started running on 24 November 2016, when WCC and Prairie first acquired knowledge of the alleged breaches and resulting harm.[141] However, it argues that it submitted the Claims to arbitration less than two years thereafter, when it filed the 2018 NoA on 19 November 2018.[142] It further asserts that the limitation period was suspended then and remained so during the "diligent prosecution"[143] of the Claims until 31 January 2022,[144] when the WMH Tribunal dismissed the Claims on curable procedural defects.[145] The Claimant thus contends that, when it re-submitted the NoA on 14 October 2022, i.e. about nine months after the end of the WMH Arbitration,[146] "less than three combined years ha[d] passed" between the commencement of the limitation period and the filing of "this arbitration, in compliance with [NAFTA Articles 1116(2) and 1117(2)]".[147]

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[134] Memorial, ¶¶ 96-97, referring to and quoting NAFTA Articles 1116(2) and 1117(2).

[135] Memorial, ¶ 98.

[136] Memorial, ¶¶ 4, 108 (including fn. 194) and "Table 2: Summary of Key Events"; Reply, ¶¶ 14 (including fn. 7), 127 (including fn. 207), 130 (including fn. 209); Tr. (Day 1) 69:12-15 (Respondent); Tr. (Day 2) 220:11-20 (Respondent); Canada's Opening Presentation, 2 May 2024, p. 74 (of PDF). *See infra*, ¶ 99.

[137] Memorial, ¶ 104; Reply, ¶¶ 127, 132; *see supra*, ¶ 46.

[138] Memorial, ¶ 95; Reply, ¶ 127.

[139] Response, ¶ 156.

[140] Response, ¶¶ 163-165. *See also* Response, ¶¶ 174, 186; Rejoinder, ¶¶ 7, 138, 148, 150.

[141] NoA, ¶ 116; Response, ¶ 151.

[142] Response, ¶ 151. *See also* Response, ¶¶ 158, 163, 176, 179; Reply, ¶¶ 119, 125, 127, 148; *see supra*, ¶ 28.

[143] Response, ¶¶ 164-165.

[144] Response, ¶ 152. *See also* Rejoinder, ¶ 12, 136; s*ee supra*, ¶ 42.

[145] Response, ¶ 160; Rejoinder, ¶ 12, 136, 144, 179.

[146] Response, ¶ 153.

[147] Response, ¶ 154.

2. Analysis

a. Introduction

100. Under NAFTA Article 1116(2), an investor may not submit a claim to arbitration if more than three years have elapsed since the investor acquired knowledge of the alleged breach and loss, be it actual or constructive knowledge. Articles 1116(1) and (2) have the following content:

> 1. An investor of a Party may submit to arbitration […] a claim that another Party has breached an obligation under [*inter* alia Chapter 11] 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.

101. NAFTA Article 1117(2) provides for the same statute of limitation in respect of claims brought on behalf of an enterprise. Articles 1117(1) and (2) read as follows:

> 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 […] a claim that the other Party has breached an obligation under [*inter alia* Chapter 11] 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 enterprise has incurred loss or damage.

102. The "claim" that an investor "may submit to arbitration" under NAFTA Articles 1116(1) and 1117(1) refers to the "claim" that an investor "may not make" if the three-year limitation period in NAFTA Articles 1116(2) and 1117(2) has elapsed. Therefore, a claim is timely if "submit[ted] to arbitration" within three years of the investor and/or the enterprise first knowing of the alleged breach and resulting loss.

103. In this respect, NAFTA Article 1137 provides that a "claim is [deemed] submitted to arbitration […] when […] the notice of arbitration […] is received by the disputing [NAFTA] Party".[148] Contrary to the Respondent's view, the claim need not meet "all of the [other] conditions of the State's consent",[149] such as being accompanied by "valid waivers" in accordance with NAFTA Article 1121.[150] Those conditions are not contained or referred to in NAFTA Articles 1116, 1117, or 1137. Moreover, the possibility that a claim may fail to meet other jurisdictional requirements

[148] NAFTA, Article 1137, entitled "*Time when a Claim is Submitted to Arbitration*" ("1. **A claim is submitted to arbitration** under this Section when: (a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention has been received by the Secretary-General; (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; **or (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party**") (emphasis added). *See also* Response, ¶ 158; Reply, fn. 215.

[149] Reply, ¶ 132.

[150] Reply, fn. 216.

does not negate the fact that it was submitted to arbitration, provided it was asserted in the notice of arbitration served on the respondent State.

104. Here, the Parties agree that "[WCC] and Prairie first acquired knowledge of Canada's [alleged] breaches [of NAFTA] and of their resulting damages",[151] on 24 November 2016 ("**Knowledge Date**").[152] Yet, they disagree on the specific notice of arbitration that is relevant to determine when the Claims were submitted to arbitration and on the legal effects of that submission:

    i. The Claimant argues that the Claims are timely because they were submitted to the Tribunal for determination within three cumulative years from the Knowledge Date. According to the Claimant, the Claims were first submitted on 19 November 2018 through the 2018 NoA, which suspended the limitation period until 31 January 2022 at the time of the WMH Award, and were re-submitted on 14 October 2022 through the NoA.[153]

    ii. The Respondent disputes that the limitation period can be suspended and contends that the Claims are time-barred, as they were submitted on 14 October 2022 almost six years after the Knowledge Date.[154]

105. To resolve this disagreement, the Tribunal first considers whether the Claims in the NoA are identical to those asserted in 2018 NoA **(b)**. If they are not, no potential tolling could have taken place, with the result that the Claims are time-barred. On the other hand, if the Claims in the NoA and in the 2018 NoA are identical (or partially identical), the Tribunal will need to assess whether the assertion of the Claims through the 2018 NoA tolled the limitation period until the conclusion of the WMH Arbitration **(c)**. If so, it would follow that the Claims were resubmitted through the NoA 0.7 years after the WMH Award, that is within 2.6 cumulative years from the Knowledge Date, making the Claims timely.

b. The Claims in the NoA and the 2018 NoA

106. The Claims in the NoA refer to alleged breaches of NAFTA Articles 1102, 1105, and 1110.[155] According to the Claimant:

    i. In breach of the Minimum Standard of Treatment in NAFTA Article 1105, the Climate Plan's "program"[156] to accelerate the phase-out of coal-generated electricity by 2030 frustrated WCC's legitimate expectations, based *inter alia* on the 2050 phase-out provided in the 2012 Federal Regulations ("**MST Claim**");[157]

    ii. In breach of NAFTA Articles 1102 and 1105, the Transition Payments to the Canadian Owners for the phase-out of the Generating Units without equivalent compensation to WCC

[151] NoA, ¶ 116.

[152] *See supra*, fns. 136, 141.

[153] *See supra*, ¶ 99.

[154] *See supra*, ¶ 97.

[155] NoA, ¶¶ 11, 123(i). *See also supra*, ¶ VI.A.

[156] NoA, ¶¶ 86, 87; Response, ¶ 25.

[157] *See supra*, ¶ 12; NoA, ¶¶ 86-88. *See also* Response, ¶ 25. Alberta announced the Climate Plan on 22 November 2015 (*see supra*, ¶ 17).

for the phase-out's effect on the Mines constituted discriminatory, arbitrary, and grossly unfair treatment ("**Discrimination Claim**");[158]

iii. In breach of NAFTA Article 1110, the Climate Plan's phase-out program and the Transition Payments, "combined with [the Consumer Fuel Levy] that hiked the price of coal", substantially deprived the Mines and hence Prairie of their economic value, thereby amounting to an uncompensated expropriation of WCC's investment ("**Expropriation Claim**").[159]

107. The NoA initially included the Federal Fuel Charge[160] as a constitutive measure of the Expropriation Claim.[161] However, in the Response, the Claimant "agree[d] to withdraw its [submissions] related to the [F]ederal [F]uel [C]harge measure from the arbitration".[162] It confirmed that withdrawal at the Hearing.[163] which the Respondent "acknowledge[d] and accept[ed]".[164]

108. The 2018 NoA included the MST Claim and the Discrimination Claim. WCC submitted then that the Climate Plan's phase-out program, along with the Transition Payments to the Canadian Owners without equivalent compensation to itself, constituted breaches of NAFTA Articles 1102 and 1105.[165] However, WCC did not assert a breach of NAFTA Article 1110, meaning that the 2018 NoA did not include the Expropriation Claim.[166]

109. The Claimant attempts to overcome this omission by arguing that the 2018 NoA nevertheless referred to "the same [c]hallenged [m]easures" underlying the Expropriation Claim.[167] Still, while the 2018 NoA did refer to the Climate Plan's phase-out program and the Transition Payments in the context of the MST Claim and the Discrimination Claim, it did not encompass the Consumer Fuel Levy, that is the third component of the Expropriation Claim.[168]

110. In a footnote of its Rejoinder, and again at the Hearing, the Claimant represented being "prepared" to "withdraw" all allegations with respect to the Consumer Fuel Levy, if the Tribunal were to find that the latter distinguished the Claims in the NoA from those in the 2018 NoA.[169] Yet, withdrawals require formal action by the party making the allegation and must be explicit. The

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[158] NoA, ¶¶ 76-80, 85; Response, ¶ 25. Alberta concluded the Off-Coal Agreements with the Canadian Owners, providing for the Transition Payments, on 24 November 2016 (*see supra*, ¶ 21).

[159] NoA, ¶¶ 91-92, 108. *See also* Tr. (Day 2) 265:6-7, 266:5-10 (Claimant); Claimant's Answers to Tribunal's Questions, 3 May 2024, p. 4 (of PDF) (identifying the Consumer Fuel Levy as one of the measures underlying the breaches subject of the Claims). Alberta passed the CLIA, providing for the Consumer Fuel Levy, on 13 June 2016 (*see supra*, ¶¶ 24-25).

[160] *See supra*, ¶ 26.

[161] NoA, ¶ 92.

[162] Response ¶ 24 and fn. 22.

[163] Tr. (Day 2) 265:4-5; Claimant's Answers to Tribunal's Questions, 3 May 2024, p. 4 (of PDF).

[164] Reply, ¶ 19.

[165] **R-79**, 2018 NoA, ¶¶ 82, 85ss, 90ss. *See also* Claimant's Answers to Tribunal's Questions, 3 May 2024, p. 4 (of PDF); Canada's Opening Presentation, 2 May 2024, p. 24 (of PDF).

[166] *See supra*, ¶ 28.

[167] Tr. (Day 1) 143:12-15 (Claimant). *See also* Tr. (Day 2) 266:17-20.

[168] *See supra*, ¶ 106.iii.

[169] Rejoinder, fn. 51; Tr. (Day 2) 265:4-16 (Claimant).

Tribunal cannot deem an allegation withdrawn simply based on the interested Party's stated preparedness. It thus remains that the Claimant has not withdrawn its submissions regarding the Consumer Fuel Levy, as it did for instance with respect to the Federal Fuel Charge.[170]

111. In any event, under NAFTA Articles 1116 and 1117, a claim requires an allegation that the respondent State has breached NAFTA. However, not only did WCC fail to allege a breach of NAFTA Article 1110, but as the Respondent correctly observes,[171] the term "expropriation" appears nowhere in the 2018 NoA. This stands in contrast to the 2018 NoI, filed on 20 August 2018 before the 2018 NoA,[172] where WCC submitted that Canada had "breached its obligations under NAFTA Article 1110 (Expropriation) by substantially depriving [WCC] of its investment".[173] This difference makes the absence of a claim under NAFTA Article 1110 in the 2018 NoA even clearer. As a result, the Tribunal cannot but consider that WCC raised no expropriation claim until the NoA.

112. The NoA was filed 5.9 years after the Knowledge Date, i.e. long after the expiration of the three-year limitation period. As a consequence, the Expropriation Claim is time-barred in accordance with NAFTA Articles 1116(2) and 1117(2). Therefore, the sections below deal only with the MST and Discrimination Claims.

c. The tolling of the limitation period

113. The Tribunal turns to the Claimant's argument that the submission of the MST and Discrimination Claims, which occurred 1.9 years following the Knowledge Date, tolled the limitation period until the issuance of the WMH Award, such that their resubmission 0.7 years later through the NoA was made within the three-year limitation.

114. As a threshold point, the Tribunal observes that NAFTA, like most if not all other treaties providing for the filing of claims within a prescribed limitation period, does not regulate the tolling of the statute of limitations. In 2002, the tribunal in *Feldman* interpreted this silence to mean that NAFTA Articles 1116(1) and 1117(1) "introduce a clear and rigid limitation defense which, as such, is not subject to any suspension[,] prolongation or other qualification".[174] Since then, multiple NAFTA tribunals have endorsed this interpretation.[175] All the NAFTA Parties have also

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[170] *See supra*, ¶ 107.

[171] Tr. (Day 2) 241:16-22 (Respondent).

[172] *Supra*, ¶ 27.

[173] **C-30**, 2018 NoI, ¶ 8.

[174] **RLA-23**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63 (cross-referencing to ¶ 58, which in turn reads in relevant parts as follows: "In substance, in view of the Tribunal, such suspension or 'tolling' of the period of limitation is unwarranted. NAFTA […] does not provide for any suspension of the three-year period of limitation.").

[175] *See inter alia* **RLA-24**, *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29; **RLA-7**, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 328-328; **RLA-21**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153; **RLA-27**, *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶¶ 146-147.

done so consistently, be it as disputing parties[176] or in non-disputing party submissions.[177] This includes Mexico's NDNP submission in this arbitration.[178]

115. On this basis, the Respondent argues that there is a well-established rule that NAFTA Articles 1116(2) and 1117(2) preclude tolling, with the consequence that the MST and Discrimination Claims are time-barred.[179] Yet, as the Claimant emphasizes, neither *Feldman* nor subsequent NAFTA decisions dealt with a fact situation such as the present one and the resulting legal question whether "the limitations period (even if strict) may be suspended where a claim is timely asserted and then resubmitted to arbitration following dismissal [in a previous NAFTA Arbitration]".[180]

116. The Claimant also correctly observes that *Feldman* itself hinted at potential reservations to the apparent rigor of the limitation provisions.[181] Indeed, while affirming that "suspension or 'tolling' of the [three-year] period of limitation is unwarranted" because NAFTA explicitly "does not provide for any [such] suspension",[182] the *Feldman* tribunal went on to state that "an acknowledgment of the claim under dispute by the [State] organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation".[183] It then added that "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", such as "a long, uniform, consistent and effective behavior of the competent State organs [recognizing] the existence, and possibly also the amount, of the claim".[184]

117. Although quite restrictive, these reservations suggest that NAFTA's silence on the tolling of the statute of limitations does not necessarily exclude tolling in all circumstances. The question

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[176] So has Canada in **R-146**, *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Submission of the Government of Canada, 6 October 2000, ¶ 10 (agreeing with Mexico's interpretation of the Limitation Articles, found at **R-95**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Counter-Memorial on Preliminary Questions, ¶ 199); **R-92**, *Tennant Energy, LLC v. Government of Canada*, UNCITRAL, Reply of the Government of Canada to NAFTA Article 1128 Submissions of the Government of the United States of America and the United Mexican States, 26 July 2021, ¶ 18.

[177] So have the US and Mexico in **RLA-74**, *Windstream Energy LLC v. Canada (II)*, UNCITRAL, PCA Case No. 2021-26, Submission of Mexico pursuant to Article 1128 of NAFTA, 29 November 2023, ¶¶ 4-5; **R-99**, *Merrill & Ring Forestry L.P. v. Government of Canada* ICSID Case No. UNCT/07/1, Submission of the United States, 14 July 2008, ¶ 6; **R-100**, *Merrill & Ring Forestry L.P. v. Government of Canada,* ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009 (including a blanket endorsement of the US' submission of 14 July 2008, with respect *inter alia* to the Limitation Articles); **R-98**, *Resolute Forest Products Inc. v. Government of Canada,* UNCITRAL, Submission of the United States of America, 14 June 2017, ¶ 6; **R-93**, *Tennant Energy, LLC v. Government of Canada*, UNCITRAL, Second Submission of the United States of America, 25 June 2021, ¶ 4; **R-94**, *Tennant Energy, LLC v. Government of Canada*, UNCITRAL, Second Submission of the United Mexican States, 25 June 2021, ¶ 9.

[178] Mexico's NDNP Submission, ¶¶ 26-30; *see supra*, ¶ 57-59. *See also* **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 214. The US did not address this point in its NDNP submission.

[179] Memorial, ¶¶ 98ss, 104ss; Reply, ¶¶ 129ss, 134ss.

[180] Rejoinder, ¶ 156.

[181] Response, ¶¶ 177-179; Rejoinder, ¶ 157.

[182] **RLA-23**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 58; *supra*, fn. 174.

[183] **RLA-23**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63.

[184] **RLA-23**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63.

therefore remains whether in the present circumstances it can be found that the limitation period for the MST and Discrimination Claims was tolled between 19 November 2018, the date of the 2018 NoA, and 31 January 2022, the date of the WMH Award. For the following two main reasons, the Tribunal reaches a negative answer.

118. First, NAFTA Article 1137, which was quoted above and informs the interpretation of Articles 1116(2) and 1117(2), specifies that a claim is submitted to arbitration when the disputing NAFTA Party receives "the" notice of arbitration, not when it receives "a" notice of arbitration.[185] The Claimant raised the MST and Discrimination Claims in *this* arbitration through the NoA. Thus, for purposes of *this* arbitration, "the" notice of arbitration is the NoA.

119. The Tribunal sees no indication in NAFTA that would allow it to accept a notice filed in an earlier arbitration as "the" notice of arbitration through which claims are brought in *this* arbitration.[186] In line with the longstanding interpretation by NAFTA tribunals shared by all NAFTA Parties as set out above,[187] WCC's submission of the MST and Discrimination Claims through the 2018 NoA thus has no bearing on whether those claims were filed in a timely manner in this arbitration. As a result, the ordinary meaning of the relevant NAFTA provisions viewed in their context appear to exclude tolling in the situation before the Tribunal.

120. Second and more importantly, even assuming that NAFTA Articles 1116(2) and 1117(2) permit tolling during the pendency of a prior NAFTA arbitration, the specific facts of this dispute cannot be reconciled with the statute of limitations being tolled throughout the WMH Arbitration. WCC filed the MST and Discrimination Claims by way of the 2018 NoA only to withdraw them on 23 July 2019, *before* the commencement of the WMH Arbitration (the "**Withdrawal**").[188]

121. While the Tribunal addresses the circumstances surrounding the Withdrawal in greater detail in the context of the discussion on estoppel, abuse of rights, and preclusion,[189] for present purposes it recalls the following facts:

    i. On 19 November 2018, WCC filed the 2018 NoA submitting the MST and Discrimination Claims to arbitration;[190]

    ii. On 15 March 2019, WCC and WMH concluded the SHPA, through which WMH was to acquire title over assets of WCC, especially a NAFTA Claim defined as the "claim filed [by] WCC on its own behalf and on behalf of [Prairie]" against Canada under Chapter 11,[191] that is the MST and Discrimination Claims asserted in the 2018 NoA;

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[185] *Supra*, ¶ 103.

[186] Reply, ¶ 132. *See also* Reply, ¶ 154.

[187] *See supra*, ¶ 114.

[188] **R-84**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, 23 July 2019, p. 1 (of PDF); *see supra*, ¶ 39.i.

[189] *See infra*, ¶¶ 182ss.

[190] *See supra*, ¶ 28.

[191] **C-35**, Stalking Horse Purchase Agreement, 15 March 2019, § 1.01, Definition of "Nafta Claim" (p. 18 of PDF). *See supra*, ¶ 33.ii.

iii. On 23 July 2019, WCC withdrew the 2018 NoA and thereby the MST and Discrimination Claims.[192] On the same day, WMH filed the 2019 NoI on its own behalf and on behalf of Prairie;[193]

iv. On 12 August 2019, WMH submitted the 2019 NoA,[194] on its own behalf and for Prairie,[195] asserting claims under NAFTA Articles 1102 and 1105;[196]

v. On 24 February 2020, the WMH Tribunal was constituted to address WMH's claims;[197]

vi. On 31 January 2022, the WMH Tribunal dismissed WMH's claims in their "entirety".[198] It held that WMH did "not have standing to bring [the] claim[s]" because "[WMH] was not a protected investor at the time of the alleged breaches as required by NAFTA Articles 1116(1) and 1117(1)".[199]

122. Against this background, the Claimant contends that WCC and WMH's claims involve the "exact same investments", the "exact same measures",[200] and the "same requested relief",[201] and hence the two entities are not "unrelated entities" with "differing interests". According to the Claimant, "the most significant proof" that WCC and WMH "pursued the same claim" is that, by holding that "WMH could not step into the shoes of the rightful claimant, [namely] WCC",[202] the WMH Tribunal implied that it would have jurisdiction if WCC had brought the claims instead of WMH.[203] Moreover, the Claimant argues that the conduct of WMH/WCC and Canada "confirms the claims are the same, since [they] agreed to 'substitute' WCC for WMH, in order to 'proceed' with 'the arbitration'".[204] Therefore, says the Claimant, the limitation period for the MST and Discrimination Claims must be deemed suspended during the pendency of "the arbitration initially commenced by WCC, and then prosecuted by WMH".[205]

123. The Tribunal has no difficulty in accepting, as the Respondent does, that WCC's 2018 NoA and WMH's 2019 NoA share "nearly identical" allegations of fact, breach, and harm.[206] This near

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[192] **R-84**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, 23 July 2019, p. 1 (of PDF); *see supra*, ¶ 39.i.

[193] **R-84**, 2019 NoI, ¶ 1 (p. 7 of PDF); s*ee supra*, ¶ 39.ii

[194] *See supra*, ¶ 40.

[195] **R-85**, 2019 NoA, ¶ 1.

[196] **R-85**, 2019 NoA, ¶¶ 88, 91ss, 96ss.

[197] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶¶ 15-16, 94; *see supra*, ¶ 41.

[198] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 252(2); *see supra*, ¶ 42.

[199] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 252(1).

[200] Response, ¶ 182. *See also* Rejoinder, ¶¶ 41-42.

[201] Rejoinder, ¶ 50. *See also* Rejoinder, ¶¶ 46-47.

[202] Rejoinder, ¶ 47.

[203] Rejoinder, ¶ 38.

[204] Rejoinder, ¶ 50. *See also* Rejoinder, ¶¶ 42-45.

[205] Response, ¶ 174.

[206] Memorial, ¶ 64.

identity is apparent from the redlined version of the two notices which is in the record.[207] However, that does not mean that the claims are the same. A claim is defined by the parties involved, the facts and the law out of which it arises, and the relief sought. Here, whatever the position in respect of the second and third elements, the first is not met. Under NAFTA, WMH and WCC cannot be regarded as the same Party as they qualify as distinct investors.

124. Indeed, while NAFTA does not define the notion of "claim", NAFTA Articles 1116(1) and 1117(2) do provide that "an investor" is the one who may submit "a claim" to arbitration.[208] Hence, the fact that WCC and WMH may be related companies and that they may share common interests is irrelevant. What matters is that WCC and WMH be the same "investor" and the fact is they are not. In this respect, it is significant that both Parties endorse the WMH Tribunal's finding[209] that WMH "was not the legal successor of WCC but a separate company to which the NAFTA claim was **purportedly** transferred after the alleged Treaty breaches".[210] This Tribunal agrees that the two entities are separate. Hence, they cannot be the same investor.

125. It is noteworthy that the Claimant avoids stating that WMH acquired the NAFTA Claim. For instance, mirroring the language used by the WMH Tribunal, the Claimant contends that "WMH never **purported** to pursue any claim other than the one it **attempted** to purchase from WCC".[211] This choice of language is in line with the Claimant's position in the context of the Legacy Objection,[212] where it argues that the NAFTA Claim constitutes a protected investment under NAFTA, which WCC never transferred to WMH and thus held when the USMCA entered into force.[213]

126. This being so, the Claimant's argument that WMH, WCC, and Canada treated the claims as being the same does not assist its position. Whether WMH could and did pursue WCC's claims is a matter that goes to the law governing those claims, not conduct. Under that governing law, namely NAFTA and international law more generally, WCC submitted the MST and Discrimination Claims through the 2018 NoA and then withdrew them before WMH filed the 2019 NoA asserting its own claims. Accordingly, the WMH Arbitration ultimately resulted in the dismissal of WMH's claims, not WCC's.

127. For these reasons, the Tribunal finds that WCC's claims were never at issue in the WMH Arbitration. Hence, the time bar applying to these claims could not have been suspended during

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[207] **C-95**, 2018 NoA v. 2019 NoA Redline.

[208] *See supra*, ¶¶ VI.B.2.a-101.

[209] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 230. See also, Memorial, ¶ 68; Response, 47; Rejoinder, 47.

[210] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 230 (emphasis added).

[211] Rejoinder, ¶ 47 (emphasis added). *See also inter alia* Response, ¶ 182 ("WMH only entered into the picture as a result of a **purported assignment** of the NAFTA Claim by WCC to WMH during the course of the WCC bankruptcy") (emphasis added), ¶ 206 ("[A]s the [WMH Tribunal] recognized, the **purported transfer** of the NAFTA Claim was unrelated to any attempt to create jurisdiction to assert a claim") (emphasis added).

[212] *See supra*, ¶ 91.i.

[213] Rejoinder, ¶¶ 53, 54 ("[B]ecause the NAFTA Claims could not be transferred to WMH as a matter of international law, the purported transfer of the claim from WCC to WMH did not occur[.] [I]t is indisputable that WCC owned and controlled the investment (the NAFTA Claim) when the USMCA went into effect, and when WCC submitted the present claim to arbitration"); *see infra*, ¶ 139.

the pendency of that arbitration, assuming that NAFTA Articles 1116(2) and 1117(2) admit tolling.

128. The conclusion just reached is buttressed by NAFTA's objective to "create effective procedures […] for the resolution of disputes",[214] whereby Chapter 11 "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".[215] In this vein, like any statute of limitation,[216] the purpose of NAFTA Articles 1116(2) and 1117(2) is to ensure predictability and certainty of the law.[217]

129. NAFTA tribunals have noted the "important role" of providing "certainty",[218] "legal stability",[219] and "finality" for respondent States within the system of Chapter 11.[220] Other tribunals have interpreted similarly worded limitation provisions as constituting "a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring".[221]

130. The Claimant objects that the 2018 NoA met the purposes of the statute of limitation,[222] and that "[t]he refusal to recognize […] tolling […] 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".[223] Whether the WMH Tribunal dismissed the claims on mere

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[214] NAFTA, Article 102(e).

[215] NAFTA, Article 1115.

[216] And as is common ground between the Parties (Response, ¶ 163; Reply, ¶ 146).

[217] **R-92**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Reply of the Government of Canada to NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 26 July 2021, ¶ 18; **R-93**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Second Submission of the United States of America, 25 June 2021, ¶ 5; **R-99**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Submission of the United States of America, 14 July 2008, ¶ 16; **R-100**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009 (including a blanket endorsement of **R-99**).

[218] **R-92**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Reply of the Government of Canada to NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 26 July 2021, ¶ 18; **RLA-27**, *Mobil Investments Canada v. Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 146.

[219] **R-93**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Second Submission of the United States of America, 25 June 2021, ¶ 5; **R-99**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Submission of the United States of America, 14 July 2008, ¶ 16; **R-100**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009 (including a blanket endorsement of **R-99**).

[220] **RLA-27**, *Mobil Investments Canada v. Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 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**. [E]arlier NAFTA arbitrations make clear the importance which they attach to that **guarantee**".)(emphasis added).

[221] **RLA-16**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica,* ICSID Case No. UNCT/13/2, Corrected Interim Award, 30 May 2017, ¶ 208 (decided under the Dominican Republic–Central America–United States Free Trade Agreement).

[222] Response, ¶ 163.

[223] Rejoinder, ¶ 144. *See also* Response, ¶¶ 160, 218; Rejoinder, ¶ 10, 12, 136, 156, 177

"procedural technicalities" need not be considered. The Claimant's argument cannot overcome the finding that the MST and Discrimination Claims were not before the WMH Tribunal, thus the claims before that tribunal and before this one are not identical.

131. Finally, the Claimant refers to a general principle of international law that the timely presentation of a claim suspends the statute of limitations during the pendency of that claim.[224] In support, the Claimant mainly relies on *Renco II* and the authorities cited there.[225] *Renco II* was decided under the US-Peru TPA, of which Article 10.18.1 is equivalent to NAFTA Articles 1116(2) and 1117(2) for all material purposes.[226]

132. For Canada, on the other hand, the existence of a general principle of international law on the suspension of limitation periods is not established.[227] Alternatively, it submits that NAFTA Articles 1116(2) and 1117(2) operate as *lex specialis* and that there is no basis to resort to general international law to vary NAFTA.[228]

133. The Tribunal need not consider whether there exists a general principle according to which limitation periods are tolled in certain situations. It can also leave unanswered whether, if such a general principle were to exist, it would apply in the context of NAFTA. In any event, such a principle could not apply to claims brought by different claimants and to claims that have been withdrawn. Unsurprisingly, the investor and claimant in *Renco II* had been in the same roles in *Renco I*, which distinguishes that case from the present one. It is also striking that the authorities cited by the Claimant encompass certain domestic civil codes that specifically provide that tolling or interruption ends if the claim is withdrawn.[229]

d. Conclusion

134. For the foregoing reasons, the Tribunal finds that all the Claims are time-barred under NAFTA Articles 1116(2) and 1117(2) and, therefore, are outside its jurisdiction. While the Tribunal could end here its analysis of the Respondent's jurisdictional objections, it turns to the Legacy Objection for completeness.

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[224] Response, ¶¶ 167-174; Rejoinder, ¶¶ 128-142.

[225] **CLA-2**, *The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020. The significant weight that the Claimant places on the *Renco* saga is evident from the consistent references to it in its submissions. *See inter alia* Response, ¶¶ 159-160, 172, 187-188; Rejoinder, ¶¶ 7-10, 12, 124-125, 132, 136, 140-141, 145-146, 155, 157, 162-166.

[226] US-Peru TPA, Article 10.18.1 ("No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage").

[227] Reply, ¶¶ 149-151.

[228] Tr. (Day 1) 72:16-22 (Respondent); Tr. (Day 2) 239:7-21 (Respondent); Reply, ¶ 148.

[229] **R-149**, Civil Code of France, Articles 2242, 2243; **R-151**, Civil Code of Portugal, Article 327(2); **R-152**, Civil Code of Peru, Article 1997.

C. LEGACY OBJECTION

1. Overview of the Parties' positions

135. The Respondent submits that, following the replacement of NAFTA by the USMCA, investors may only commence investor-State dispute settlement ("**ISDS**") proceedings against Canada under the USMCA's Annex 14-C.[230] It contends that Annex 14-C limits Canada's consent to arbitration to claims made pursuant to NAFTA Chapter 11 with respect to "legacy investments".[231] Referring to the definition of this term in Paragraph 6(a) of Annex 14-C,[232] the Respondent argues that a legacy investment is one that was "established or acquired" while NAFTA was in force and that was "in existence" when the USMCA entered into force on 1 July 2020.[233] According to Canada, the words "in existence" entail that the investor must have owned or controlled the investment for which it claims, on 1 July 2020.[234]

136. In this context, the Respondent observes that the Claims concern Prairie, namely WCC's purported investment in Canada, which WCC acquired while NAFTA was in force but sold to WMH on 15 March 2019.[235] Therefore, it submits that the Claims fall outside the Tribunal's jurisdiction, as WCC did not own or control Prairie when the USMCA entered into force on 1 July 2020.[236]

137. The Claimant, on the other hand, asserts that Annex 14-C does not require the investor to have owned or controlled the investment on 1 July 2020; it suffices that it "made" a protected investment before that date,[237] which WCC did.[238] According to the Claimant, this interpretation is consistent with the purpose of ensuring a "smooth transition" between NAFTA and the USMCA[239] and with the USMCA's protection of "claims that materialized" under NAFTA.[240]

138. The Claimant adds that an investor must only own or control the investment at the time of the alleged breach of Chapter 11, as is the case here.[241] Accordingly, a "legacy investment is in existence if the [investor] was able to invoke NAFTA protection" prior to the entry into force of the USMCA.[242]

139. Alternatively, it is the Claimant's submission that, even if Annex 14-C were to require investors to hold an investment on 1 July 2020, the fact that WCC sold Prairie to WMH on 15 March 2019

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[230] Memorial, ¶ 81.

[231] Memorial, ¶ 82; Reply, ¶ 85.

[232] Memorial, ¶ 83.

[233] Memorial, ¶¶ 84-85.

[234] Memorial, ¶¶ 89-90; Reply, ¶¶ 73-86.

[235] Memorial, ¶ 91; Reply, ¶ 86.

[236] Memorial, ¶ 91.

[237] Response, ¶ 61.

[238] Response, ¶¶ 58-60, 122-132; *see also*, NoA, ¶¶ 107-108.

[239] Response, ¶ 86.

[240] Rejoinder, ¶ 60. *See also*, Rejoinder, ¶¶ 61-68.

[241] Response, ¶¶ 66-81; Rejoinder, ¶ 69-87.

[242] Tr. (Day 2) 270:10-11 (Claimant).

has no bearing on jurisdiction because, on 1 July 2020, WCC was holding the NAFTA Claim. For the Claimant, that claim is a "claim to money" and as such a protected investment under NAFTA Article 1139.[243]

140. In this latter respect, the Respondent disputes that the NAFTA Claim qualifies as a protected investment that the Claimant held on 1 July 2020.[244] It emphasizes that an investment treaty claim cannot itself constitute an investment,[245] and holding otherwise would "eviscerate" the jurisdictional requirements in NAFTA and the USMCA.[246]

2. Analysis

a. Introduction

141. As noted previously, the Claims arise out of measures adopted at the latest on 24 November 2016 while NAFTA was in force.[247] They were filed on 14 October 2022, after the USMCA had terminated and replaced NAFTA.[248] The Legacy Objection involves the interpretation and application of the USMCA's Chapter 14 on "Investment" ("**Chapter 14**") and Annex 14-C, with which the Claims must comply to establish jurisdiction.

142. In accordance with Chapter 14, investors "may only submit a claim to arbitration" in accordance with Annexes 14-C, 14-D, or 14-E.[249] While Annex 14-C applies to all USMCA Parties, Annexes 14-D and 14-E apply exclusively to the US and Mexico. As a consequence, after the termination of NAFTA, claims against Canada can only be brought pursuant to Annex 14-C.

143. According to USMCA Article 14.2.3, Chapter 14 "does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before" the USMCA superseded NAFTA, "*except* as provided for in Annex 14-C".[250] As such, it offers investment protection for breaches preceding the USMCA that occurred while NAFTA was still in force, a proposition that is common ground between the Parties.[251] To this end, Annex 14-C essentially incorporates NAFTA's Chapter 11 by reference.[252] Annex 14-C thereby enables investors to bring claims pursuant to Chapter 11 through the USMCA framework, notwithstanding the termination of

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[243] Response, ¶¶ 64, 88-100; Rejoinder, ¶¶ 51-58, 76-87; NoA, ¶¶ 109-110.

[244] Reply, ¶¶ 89-99.

[245] Reply, ¶¶ 94-96.

[246] Reply, ¶ 97.

[247] *See supra*, ¶¶ 106, 85.

[248] *See supra*, ¶¶ 85, 105.

[249] USMCA, Article 14.2.4 ("For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).").

[250] USMCA, Article 14.2.3 (cursive added); *see supra*, ¶ 83. *See also* VCLT, Article 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to **any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty** with respect to that party") (emphasis added).

[251] Rejoinder, ¶ 62; Tr. (Day 1) 43:6-15 (Respondent); Claimant's letter of 18 July 2024, p. 2; Respondent's letter of 24 July 2024, p. 2.

[252] *See infra,* ¶ 144.

NAFTA.[253] Yet, due to its particular purpose, Annex 14-C imposes jurisdictional requirements in addition to those provided in Chapter 11.

144. Specifically, Paragraphs 1 and 3 of Annex 14-C limit the USMCA Parties' consent to arbitration to claims for breaches of Chapter 11 that are made "in accordance" with Chapter 11 within three years of NAFTA's termination and with respect to a "legacy investment":

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with [Chapter 11 NAFTA] and this Annex alleging breach of an obligation under [Chapter 11 NAFTA]. […]
>
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA […].[254]

145. The question that therefore arises is whether the Claims relate to a "legacy investment". If the answer is negative, the Claims are not within the scope of the Tribunal's jurisdiction because they do not comply with Paragraph 1 of Annex 14-C.

146. The Claims challenge a series of coal-related measures adopted by Canada between 2015 and 2016, allegedly affecting the operation and value of the Mines owned by Prairie, which at that time was owned indirectly by WCC.[255] In other words, the Claims concern WCC's interests in Prairie, which it sold on 15 March 2019 through the SPHA.[256] Accordingly, the key issue is whether those former interests constitute a "legacy investment".

147. Paragraph 6(a) of Annex 14-C defines "legacy investment" in the following terms:

> "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.[257]

148. In applying this provision, the Tribunal must determine whether the investment at issue is an "investment of an investor" in the territory of a USMCA Party "established or acquired" while NAFTA was in force **(b)**, which was "in existence" when the USMCA entered into force **(c)**.

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[253] *See inter alia* **C-59**, Congressional Research Service, "USMCA: Implementation and Considerations for Congress", Legal Sidebar No. LSB10399, 30 January 2020, p. 3 (of PDF) ("[Annex 14-C] permits the relevant NAFTA provisions to apply […] after NAFTA is terminated."); **C-58**, "Quoted: Senior Administration Officials on the USMCA", *World Trade Online*, 1 October 2018, p. 3 (of PDF) ("[After the USMCA supersedes NAFTA the] investment protections in Chapter 11 are going to continue to be available."); **C-60**, Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment", 26 February 2020, p. 33 (of PDF) ("With respect to the NAFTA ISDS, the parties agreed [that] cases can still be brought forward under NAFTA for investments made prior to the entry into force of CUSMA.").

[254] USMCA, Annex 14-C, ¶¶ 1, 3; *see supra*, ¶ 84. *See also inter alia* **C-106**, USTR Talking Points on Scrub Items in USMCA, 28 November 2018, p. 3 (of PDF) ("Article 14.2(3) (Scope): The original text stated that the Investment Chapter does not apply to acts/events that occurred prior to entry into force of the USMCA, consistent with the default Vienna Convention rules. In the scrub, we clarified that there is one exception: Annex 14-C (the grandfather provision) allows investors to bring ISDS claims **with respect to legacy investments** where the alleged breach took place before entry into force of the USMCA.") (emphasis added); **C-113**, Talking Points on USTR Investment Chapter for OECD Investment Meetings (in consultation with Canada), 19 October 2018, p. 2 (of PDF) ("[I]nvestors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures **with respect to those "legacy investments" for three years after the termination of NAFTA**.") (emphasis added).

[255] *See supra*, ¶ 106.

[256] *See supra*, ¶ 33.

[257] USMCA, Annex 14-C, ¶ 6(a); *see supra*, ¶ 84.

b. "investment of an investor […] established or acquired" while NAFTA was in force

149. The inquiry underlying part one of Paragraph 6(a) comprises two inter-related questions. First, is there is an "investment of an investor" in the territory of a USMCA Party? Second, was that investment "established or acquired" while NAFTA was in force? With respect to the first question, Paragraph 6(b) provides that the terms "investment" and "investor" in Annex 14-C "have the meaning accorded" in Chapter 11.[258] The second question seeks to ascertain that the investment was "established or acquired" between 1 January 1994 and 1 July 2020 while NAFTA was in force.

150. In short, consistent with the purpose of Annex 14-C,[259] when applying part one of Paragraph 6(a) one must consider the following definitions contained in NAFTA Article 1139:[260]

i. "**investment** means"[261] a series of assets, including enterprises,[262] their shares,[263] and real estate or other property;[264]

ii. "**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";[265]

iii. "**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party".[266]

151. WCC's former interests in Prairie fall within the scope of the definition of an "investment of an investor" in the territory of Canada, "established or acquired" while NAFTA was in force as required in Paragraph 6(a). Indeed, on 28 April 2014, well before NAFTA's termination, WCC, a US enterprise, acquired Sherritt's coal-related assets in Canada, including Prairie, which owned and operated the Mines.[267] It made the acquisition by "paying in excess of US$ 320 million and assuming liabilities in excess of US$ 420 million".[268] As a result, through a series of holding companies,[269] WCC indirectly owned or controlled Prairie, its shares, and the Mines, all of which fall within NAFTA's list of protected investment assets.

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[258] USMCA, Annex 14-C, ¶ 6(b) (For the purposes of this Annex [14-C]: […] "**investment**", "**investor**", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994.") (emphasis added); *see supra*, ¶ 84.

[259] *See supra*, ¶ 143.

[260] While not dispositive, the Parties have relied on these same definitions in their submissions (*see inter alia* Memorial, ¶ 84; Response, ¶¶ 69-72; Reply, ¶ 79.)

[261] Emphasis original.

[262] NAFTA, Articles 1139(a).

[263] NAFTA, Articles 1139(e).

[264] NAFTA, Articles 1139(g).

[265] Emphasis original.

[266] Emphasis original.

[267] *See supra*, § II.B.

[268] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 75.

[269] *See supra*, ¶ 15.

152. The fact that WCC sold Prairie on 15 March 2019 through the SPHA and therefore no longer owns or controls the investment is irrelevant for purposes of NAFTA Article 1139.[270] The definition of "investment" does not mention ownership or control and the definition of "investor" includes someone who "*has made* an investment".[271] This use of the present perfect indicates that it suffices that the action of making the investment was completed in the past. Similarly, an "investment of an investor", which is the exact wording employed in the definition of "legacy investment" in Paragraph 6(a), is an investment "*owned* or *controlled* […] *by* an investor".[272] This past participle qualifies the status of the investment as being owned or controlled by an investor, without specifying the timing of that status. Absent a temporal specification, it suffices that the investor owned or controlled the investment at a given point, regardless of whether that ownership or control persists.

153. In other words, WCC held an investment while NAFTA was in effect. It thus satisfies the first leg of the definition of a "legacy investment". For the avoidance of doubt, these findings are without prejudice to the jurisdictional requirement that NAFTA investors must hold their investments at the time of the alleged breaches, which does not stem from NAFTA Article 1139, and is addressed below to the extent necessary.[273]

c. "in existence" when the USMCA entered into force

154. The next question is whether that investment was "in existence" when the USMCA entered into force on 1 July 2020, as required in part two of Paragraph 6(a).

155. For the Respondent, the words "in existence" require ownership or control over the investment on 1 July 2020. As the Claimant sold its interests in Prairie in 2019, Canada argues that the investment is not a "legacy investment".[274]

156. By contrast, the Claimant contends that "a legacy investment is 'in existence' when the USMCA went into force if, on that date, it would have qualified as an investment of an investor under […] NAFTA".[275] It insists that WCC's former interests in Prairie meet this test.[276] Alternatively, the Claimant states that on 1 July 2020 WCC held the NAFTA Claim and hence owned or controlled an investment "in existence", if this term were construed as requiring ownership or control.[277]

157. In view of the Parties' positions and the relevant treaty provisions, the Tribunal structures its analysis of the second leg of Paragraph 6(a) by addressing first whether the term "in existence" merely requires that the investment qualify as such under NAFTA **(i)**. It then examines whether the term "in existence" requires the investor to have had ownership or control of the investment

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[270] As explained below, Prairie's sale is relevant and material in the assessment of part two of Paragraph 6(a) and the "in existence" requirement therein (*see infra*, ¶¶ 161ss).

[271] Emphasis added.

[272] Cursive added.

[273] *See infra*, ¶ 165.

[274] *See supra*, ¶¶ 135-136.

[275] Claimant's Opening Presentation, 2 May 2024, p. 13 (of PDF). See also Response, ¶ 61; *see supra*, ¶ 137.

[276] Tr. (Day 1) 110:2-5 (Claimant) ("WCC's investment in Prairie was in existence on July 1, 2020, because it met [NAFTA's] definitions of 'investment' of an investor on that date").

[277] *See supra*, ¶ 139.

when the USMCA entered into force **(ii)**. Finally, it reviews whether the NAFTA Claim was an investment "in existence" **(iii)**.

(i) *"in existence" as requiring an investment under NAFTA*

158. The Tribunal cannot accept the Claimant's primary argument. Its proposed interpretation renders the "in existence" language devoid of all effect. Whether a given asset qualifies as an investment of an investor under NAFTA is already covered by the first part of the "legacy investment" definition addressed above.

159. To argue otherwise, the Claimant adjusted its position at the Hearing. There, in response to the Tribunal's questions,[278] it submitted that its "reading of the legacy clause does not [divest] the term[] 'in existence' [of meaning] because the 'in existence' language creates an additional requirement that's not captured by [the] first part of the provision".[279] According to the Claimant, the first part of Paragraph 6(a) provides that the investment "must be acquired at any point" between 1 January 1994 and 1 July 2020,[280] while the second part "based on the 'in existence' language requires that all elements of the [c]laim be present on [1 July 2020]".[281] For the Claimant, therefore, what must be "in existence" when the USMCA entered into force is the investor's "acquisition of the ownership and control of the breach and the loss, [or in other words] all the things that make [a] NAFTA [c]laim that is recognized and crystallized".[282]

160. However, the Claimant's adjusted primary argument is also untenable. It not only fails to give effect to the "in existence" requirement but to the entire "legacy investment" definition. As the Respondent correctly notes,[283] the Claimant in essence seeks to substitute the notion of "legacy investment" with that of "legacy investment claim". Yet, Paragraph 6(a) defines the former, not the latter. The term "claim" appears nowhere in that provision.

(ii) *"in existence" as requiring ownership or control when the USMCA entered into force*

161. The language in Paragraph 6(a) requiring an investment "in existence" upon the entry into force of the USMCA is a distinct element of the "legacy investment" definition that must be given *effet utile*. In doing so, the Tribunal finds that an investment is "in existence" at a given time if it is owned or controlled by the investor at that time. As explained below and contrary to the Claimant's view, this interpretation is consistent with the relevant definitions in NAFTA Article 1139;[284] the purpose of the USMCA;[285] the requirement under NAFTA that the investor must hold

[278] Tr. (Day 1) 189:8-14 ("[A] question for the Claimant about the interpretation of [Paragraph 6(a):] does the interpretation urged by the Claimant of that provision mean that the provision would have the same meaning and impact if the words 'and in existence on the date of entry into force of [the USMCA]' were not in the text ?") (Tribunal Question – Arbitrator Levine).

[279] Tr. (Day 2) 277:10-14 (Claimant).

[280] Tr. (Day 2) 277:14-17 (Claimant).

[281] Tr. (Day 2) 277:14-21 (Claimant).

[282] Tr. (Day 2) 277:22 – 278:2 (Claimant).

[283] Tr. (Day 2) 308:11-14 (Respondent).

[284] *cf.* Response, ¶¶ 70-73.

[285] *cf.* Response, ¶¶ 85-86, *supra*, ¶ 137.

the investment at the time of the alleged breaches;[286] and it does not yield allegedly "absurd" results,[287] such as "abruptly" leaving investors with no investment protection under NAFTA,[288] in relation to expropriatory measures or generally.[289]

162. First, the requirement that the investment be owned or controlled by the investor when the USMCA entered into force conforms with the pertinent definitions of "investment" and "investor" in NAFTA Article 1139, which apply by virtue of Paragraph 6(b) to interpret the phrase "investment of an investor" in Paragraph 6(a):[290]

    i. The definitions of "investment" and "investor of a Party" are not linked to notions of ownership or control,[291] with the result that no inconsistency arises in reading these definitions alongside the "in existence" requirement in Paragraph 6(a). The function of those definitions is not to address the legal relationship between the investment and the investor. It is rather to outline the categories of protected assets and set out how an individual or entity becomes an investor, namely by seeking to make, making, or having made an investment;

    ii. The definition of "investment of an investor" mentions ownership or control in a passive way ("owned or controlled […] by") without specifying the timing of that status.[292] Accordingly, the "in existence" requirement in Paragraph 6(a) serves as a temporal marker, indicating that the critical time is that of the USMCA's entry into force.

163. Second, the Claimant rightly stresses that USMCA Article 34.1 "recognize[s] the importance of a smooth transition" from NAFTA to the USMCA.[293] However, while that provision concerns certain NAFTA chapters and provisions that continue to apply, it does not cover Chapter 11.[294] Indeed, the USMCA Parties did not intend for Chapter 11 to continue indefinitely under the USMCA. Instead, as the Respondent put it, they "were leaving [Chapter 11] behind".[295] This becomes apparent from the combined reading of USMCA Article 14.2.3 and Annex 14-C, which limit the application of Chapter 11 to claims filed within three years of NAFTA's termination, provided they materialized while NAFTA was in force and involve a "legacy investment".[296]

164. Furthermore, the USMCA Parties were under no obligation to extend Chapter 11 protection into the USMCA framework, even with a limited scope. Their decision to do so through Annex 14-C reflects a policy choice to balance past commitments with the forward-looking nature of the

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[286] *cf.* Rejoinder, ¶¶ 69ss.

[287] *cf.* Rejoinder, ¶ 67.

[288] *cf.* Rejoinder, ¶ 67; Response, ¶ 86.

[289] *cf.* Rejoinder, ¶¶ 62, 72; Tr. (Day 2) 273:7-17 (Claimant); Claimant's Answers to Tribunal's Questions, 3 May 2024, pp. 11, 14 (of PDF).

[290] *See supra*, ¶ 149-150150.

[291] *See supra*, ¶ 152.

[292] *See supra*, ¶ 152.

[293] USMCA, Article 34.1 ("The Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement"); *see supra*, ¶ 137.

[294] *See generally* USMCA, Article 34.1.

[295] Tr. (Day 2) 223:19 (Respondent).

[296] *See supra*, ¶¶ 143-144.

USMCA. In these circumstances, it is understandable that the USMCA Parties made the protection conditional upon an investor's ownership or control over the investment that is the subject of the Chapter 11 claim at the time the USMCA entered into force. They had no reason to offer Chapter 11 benefits to investors who had divested before NAFTA's termination and thus lacked an "ongoing interest in the [USMCA] world".[297]

165. Third, the fact that under NAFTA investors must hold their investments at the time of the alleged breach is of no relevance to the present issue. This *ratione temporis* jurisdictional condition,[298] which is undisputed,[299] was developed primarily pursuant to NAFTA Articles 1101(1), 1116(1), and 1117(1).[300] None of these provisions defines the terms "investment" or "investor". As such, their content is not applicable to Paragraph 6(b) and does not inform the notion of "legacy investment". In other words, while holding the investment at the time of the alleged breach is necessary for a claim to be brought "in accordance with" Chapter 11 as required by Paragraph 1 of Annex 14-C,[301] it is insufficient to meet all criteria of Annex 14-C, including the "in existence" requirement in Paragraph 6(a).

166. Fourth, there is nothing "absurd"[302] about investors, whose claims arise from acts taken while NAFTA was in force but who filed their claims after NAFTA was terminated, having to meet new requirements under the USMCA framework to receive NAFTA protection. Chapter 11 had no sunset clause. Following NAFTA's termination, international law only required that the USMCA Parties refrain from hindering pending NAFTA arbitrations, an obligation explicitly restated in Paragraph 5 of Annex 14-C.[303] Beyond that, the Contracting States were entitled to tailor their consent to ISDS as they saw fit. While this included the option to withhold ISDS protection entirely for NAFTA-era claims, the USMCA Parties instead chose to offer limited protection by prolonging the effects of NAFTA subject to additional conditions, such as the "in existence" language embedded in Paragraph 6(a).

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[297] Tr. (Day 2) 224:13-14 (Respondent).

[298] **RLA-11**, *Vito G. Gallo v. Government of Canada,* UNCITRAL, Award, 15 September 2011, ¶ 326; ; **RLA-6**, *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, Award, 24 March 2016, ¶ 326; **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶¶ 194, 201, 208-209.

[299] While the Respondent "agrees [with the Claimant] that a relevant time for assessing ownership or control of an investment under [Chapter 11] is the date of the challenged measures" (Reply, ¶ 205, emphasis in original), it argues, with respect to WCC's Representative Claims under NAFTA Article 1117(1) (*see supra*, ¶ 90), that the investor must also hold the investment at the time it submitted the claim to arbitration (Reply, ¶ 205). The Parties dispute this issue in the context of the Prairie Control Objection (*see supra*, ¶ 91.v.b), which this Award need not address.

[300] **RLA-11**, *Vito G. Gallo v. Government of Canada,* UNCITRAL, Award, 15 September 2011, ¶¶ 325, 327; ; **RLA-6**, *Mesa Power Group, LLC v. Government of Canada* UNCITRAL, Award, 24 March 2016, ¶¶ 324-325; **RLA-21**, *Resolute Forest Products Inc. v. Government of Canada*, UNCITRAL, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶¶ 242, 244; **RLA-46**, *B-Mex, LLC and others v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 145ss; **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶¶ 196-200, 202-207, 209, 212.

[301] *See supra*, ¶ 144.

[302] *See supra*, ¶ 161.

[303] USMCA, Annex 14-C, Paragraph 5 ("For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.").

167. Moreover, the USMCA did not terminate NAFTA "abruptly", as the Claimant posits.[304] The draft text of the USMCA, including for all material purposes the final version of Chapter 14 and Annex 14-C, was published on 1 October 2018, well in advance of the USMCA superseding NAFTA.[305] This publication also predated the filing of the 2018 NoA on 19 November 2018 and the Withdrawal of 23 July 2019. The Claimant thus had ample time to assess whether the Claims would meet the USMCA's jurisdictional provisions, or alternatively to pursue the Claims before NAFTA's termination to avoid having to comply with the "in existence" requirement.

168. Fifth, while ownership or control at the time of the USMCA's entry into force would present a difficulty in disputes involving expropriation, the Tribunal does not see such difficulty as an obstacle to its reading of Paragraph 6(a). Assuming that an investment was expropriated prior to NAFTA's termination, the investor would have lost ownership or control by the time when the USMCA entered into force. It would thus arguably lack an investment "in existence" and thus a "legacy investment".

169. The Respondent conceded at the Hearing that "there may be limited circumstances where a State would not be able to rely on the 'in existence' requirement", but submitted they were hypothetical.[306] In the Tribunal's view, given the wording of Paragraph 1 of Annex 14-C, in which the USMCA Parties consented to arbitrate claims of breach of an obligation under Chapter 11,[307] including expropriation under Article 1110, a good faith interpretation of the "in existence" requirement would imply disregarding that requirement in cases where the "non-existence" is caused by the respondent State.

170. At this juncture, it makes sense to clarify that this is not the place to address the Claimant's argument that it sold its interests in Prairie "as part of a forced bankruptcy that was precipitated, at least in part, by Canada".[308] Indeed, the Tribunal held earlier that the Expropriation Claim is time-barred,[309] a finding that holds true irrespective of the fate of the Legacy Objection.

171. For these reasons, the Tribunal determines that WCC's former interests in Prairie were not an investment "in existence" when the USMCA entered into force, as WCC had no ownership or control over them on 1 July 2020. Consequently, they also do not constitute a "legacy investment".[310]

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[304] *See supra*, ¶ 161.

[305] **R-144**, Web Archive, Office of the United States Trade Representative, "United States-Mexico-Canada Agreement Text", 1 October 2018, available at: https://web.archive.org/web/20181001081423/https:/ustr.gov/trade-agreements/free-trade-agreements/united-statesmexico-canada-agreement/united-states-mexico.

[306] Tr. (Day 2) 225:12-17 (Respondent).

[307] *See supra*, ¶¶ 84, 144.

[308] Rejoinder, ¶ 72. *See also* Response, ¶¶ 27, 94; Rejoinder, ¶ 18.

[309] *See supra*, ¶ 112.

[310] *See supra*, ¶ 145-146; *infra*, ¶ 175.

(iii) *The NAFTA Claim as an investment "in existence"*

172. As an alternative argument, the Claimant asserts that the NAFTA Claim itself qualifies as a protected investment under NAFTA, which was held by WCC and was "in existence" when the USMCA entered into force. That argument lacks merit.

173. First, Paragraph 1 of Annex 14-C provides for Canada's consent to arbitrate only claims "made with respect to a legacy investment".[311] The Claims, however, are not *made with respect* to the NAFTA Claim. They *are* the NAFTA Claim. Second, as discussed above, the Claims concern WCC's former interests in Prairie,[312] which do not constitute a "legacy investment".[313] Hence, even if the NAFTA Claim were a protected investment, *quod non*, it would still not be within the scope of the Tribunal's jurisdiction.

174. Consequently, the Tribunal can dispense with further examining the Claimant's alternative argument and concludes by dismissing such argument.

d. Conclusion

175. On the basis of the foregoing analysis, the Tribunal finds that the Claims are not brought "with respect to a legacy investment" and therefore exceed the Tribunal's jurisdiction.

D. ESTOPPEL, ABUSE OF RIGHTS, AND PRECLUSION

1. Overview of the Parties' positions

176. The Claimant submits that neither the Time-Bar Objection nor the Legacy Objection would be at issue had Canada not "demand[ed]",[314] "procured",[315] and/or "insisted"[316] that WCC withdraw the MST and Discrimination Claims, and then obtained the dismissal of WMH's claims by arguing that WCC was the rightful claimant.[317] It contends that, "[b]ut for Canada's conduct", WCC and WMH could have jointly pursued these claims on the merits, before the USMCA entered into force.[318] The Claimant also highlights that, contrary to its position in the present arbitration, the Respondent acknowledged in the WMH Arbitration that WCC had a residual right to bring a claim on its own behalf under NAFTA Article 1116 despite the sale of its interests in Prairie.[319] On this basis, the Claimant submits that the doctrines of estoppel, abuse of rights, and/or preclusion prevent the Respondent from advancing either of its objections.[320]

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[311] *See supra*, ¶ 144.

[312] *See supra*, ¶¶ 145-146.

[313] *See supra*, ¶ 171.

[314] Response, ¶ 40.

[315] Claimant's Opening Presentation, 2 May 2024, pp. 68-70 (of PDF)

[316] Response, ¶ 3.

[317] Response, ¶¶ 101, 190-191; Rejoinder, ¶¶ 88, 158.

[318] Response, ¶ 105. *See also inter alia* Response, ¶¶ 194-195; Rejoinder, ¶¶ 94, 97.

[319] Response, ¶¶ 112, 196; Rejoinder, ¶¶ 88, 161.

[320] Response, ¶¶ 101-115, 190-209; Rejoinder, ¶¶ 88-104, 158-168; Claimant's Opening Presentation, 2 May 2024, pp. 24, 44, 66-74 (of PDF); Claimant's Answers to Tribunal's Questions, 3 May 2024, pp. 22-28 (of PDF).

177. The Respondent disputes the Claimant's reliance on equitable doctrines to establish jurisdiction where none exists,[321] and states that the facts do not support resort to these doctrines.[322] It stresses that it never "induce[d] or force[d]" WCC to withdraw its claims in 2019,[323] but simply made a proposal which WCC was free to reject;[324] that it never represented that it would refrain from advancing jurisdictional objections against investment claims filed by WCC or WMH following the Withdrawal;[325] and that its statements during the WMH Arbitration, which are irrelevant here as they were made to WMH and not WCC,[326] are consistent with its position in this arbitration.[327]

2. Analysis

a. Introduction

178. Both the statute of limitations of NAFTA Articles 1116(2) and 1117(2) and the existence of a "legacy investment" are conditions to Canada's consent to arbitrate. The absence of these conditions cannot be overcome by invoking doctrines such as estoppel, abuse of rights, and preclusion. In investment treaty arbitration, the existence and scope of jurisdiction depends on the applicable treaty.[328] The Tribunal must satisfy itself that the jurisdictional requirements of NAFTA and the USMCA are met and, if they are not, it must decline jurisdiction.[329] The Tribunal cannot ignore those requirements and create or extend its jurisdiction where jurisdiction does not exist under the relevant treaty.[330]

179. The decisions to which the Claimant chiefly refers in support of its argument do not hold otherwise.[331] In *Chevron*, the tribunal precluded Ecuador from arguing that Chevron and TexPet were distinct legal personalities and that Chevron never had assets in Ecuador.[332] It did so after noting that Ecuador's judiciary had repeatedly held that Chevron stood in the shoes of TexPet and

[321] Reply,¶¶ 104-107, 123, 158-160.

[322] Reply, ¶¶ 105, 108-122, 124, 158.

[323] Reply, ¶ 118.

[324] Reply, ¶¶ 32-33, 114.

[325] Reply, ¶¶ 110-111.

[326] Reply, ¶ 121

[327] Reply, ¶ 120.

[328] **RLA-94**, *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Final Award, 13 March 2024, ¶ 397.

[329] **RLA-94**, *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Final Award, 13 March 2024, ¶ 397; **RLA-62**, *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I,* UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 220.

[330] **RLA-94**, *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Final Award, 13 March 2024, ¶ 397; **RLA-62**, *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I,* UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 220; **RLA-63**, *Oded Besserglik v. Republic of Mozambique,* ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 422.

[331] Claimant's Answers to Tribunal's Questions, 3 May 2024, pp. 24-28 (of PDF), referring to **CLA-73**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 Aug 2018, and **CLA-68**, *Cyprus Bank v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction, 8 January 2019. *See also* Claimant's Opening Presentation, 2 May 2024, pp. 73-74 (of PDF); Tr. (Day 2) 286:17 – 289:4 (Claimant).

[332] **CLA-73**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 Aug 2018, ¶ 7.110.

thus had significant assets in the country,[333] which aligns with the principle that the existence or ownership of assets in the host State is governed by domestic law. The tribunal ascertained separately that the conditions of Ecuador's consent to arbitrate under the US-Ecuador BIT were satisfied. It adopted its view on preclusion after having confirmed that the BIT did not require Chevron to have direct investments and that its indirect investments were sufficient for jurisdictional purposes.[334]

180. In *Cyprus Popular Bank*, another award on which the Claimant relies, the tribunal considered that Greece was estopped from arguing that the dispute resolution clause in the Cyprus-Greece BIT was "abrogated" in 2004 when Cyprus acceded to the EU.[335] It found that Greece had never raised that point contemporaneously.[336] It only resorted to estoppel to "reinforc[e]" its earlier "conclusions",[337] dismissing Greece's intra-EU objection "on the basis of the applicable rules of international law[,] the BIT and the TFEU".[338]

181. As a consequence, the analysis could end here concluding that the Claimant cannot seek to create jurisdiction that does not exist under NAFTA and the USMCA by operation of the doctrines of estoppel, abuse and preclusion. As it did earlier, the Tribunal nevertheless proceeds with its review as a matter of completeness. It does so by first addressing the facts and evidence relied upon by the Claimant **(b)** and then each of the doctrines at issue **(c** to **e)**.

b. Facts and evidence

182. The Claimant's submissions are premised mainly on the following facts and evidence:

i. In its letter of 2 July 2019,[339] Canada challenged the Amended NoA, which identified WCC as "initial disputing investor",[340] and WMH as both "Claimant"[341] and "disputing investor".[342] It stated that WMH needed to file its own claim and comply with NAFTA's Chapter 11 requirements, including a 90-day notice of intent, and offered to treat the Amended NoA of 13 May 2019 as WMH's notice of intent, provided WCC withdrew its original claim, while reserving its right to raise jurisdictional or admissibility objections.[343] The communication reads in pertinent parts:

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[333] **CLA-73**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 Aug 2018, ¶¶ 7.108-7.109, 7.111-7.112.

[334] **CLA-73**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 Aug 2018, ¶¶ 7.69-7.71, 7.78.

[335] **CLA-68**, *Cyprus Bank v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction, 8 January 2019, ¶ 694.

[336] **CLA-68**, *Cyprus Bank v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction, 8 January 2019, ¶¶ 687, 694.

[337] **CLA-68**, *Cyprus Bank v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction, 8 January 2019, ¶ 679.

[338] **CLA-68**, *Cyprus Bank v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction, 8 January 2019, ¶ 678.

[339] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019.

[340] **C-55**, Amended NoA, 13 May 2019, ¶ 15.

[341] **C-55**, Amended NoA, 13 May 2019, Cover Page; *see supra*, ¶ 35.

[342] **C-55**, Amended NoA, 13 May 2019, ¶ 21; *see supra*, ¶ 35.

[343] *See supra*, ¶ 36.

> […] We are of the view that the Amended NOA is not a permissible amendment of [the 2018 NoA] under Article 20 of the 1976 UNCITRAL Arbitration Rules. […]
>
> The substitution of a new claimant is an amendment that causes a claim to fall outside of the tribunal's jurisdiction. […]
>
> Accordingly, [WMH] cannot become the disputing investor in a claim that was submitted to arbitration by [WCC]. Rather, [WMH] 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 [WMH's] NOI, on the condition that [WCC] withdraws the claim that it submitted against Canada [through the 2018 NoA]. [WMH] would then be free to submit its own claim to arbitration 90 days after the May 13 NOI date. […]
>
> 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.[344]

ii. In WCC and WMH's letter of 3 July 2019,[345] the two companies challenged Canada's view of the Amended NoA. However, they agreed with Canada's withdrawal proposal to expedite matters, while requesting confirmation that Canada accepted the Amended NoA as a compliant notice of intent. They also wrote that they would then proceed with a new notice of arbitration by WMH:[346]

> Canada conditions its proposal by requiring "that [WCC] withdraws the claim that it submitted against Canada [through the 2018 NoA]. 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. […] Nonetheless, we accept Canada's proposal as a means to expedite the arbitration process and avoid unnecessary conflict. […]
>
> Please confirm that […] you are accepting the Amended NOA as a compliant Notice of Intent. We then will proceed with a new Notice of Arbitration and Statement of Claim […] on August 12, 2019.
>
> Thank you for proposing a fair compromise that enables us to proceed with the arbitration without unnecessary procedural delay.[347]

[344] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019.

[345] **R-82**, Letter from Elliot Feldman to Scott Little, 3 July 2019.

[346] *See supra*, ¶ 37.

[347] **R-82**, Letter from Elliot Feldman to Scott Little, 3 July 2019.

iii. In its letter of 12 July 2019,[348] Canada suggested instead that WCC withdraw the 2018 NoA and that WMH submit a clean version of the Amended NoA as its notice of intent, backdated to 13 May 2019. Then, as of 12 August 2019, 90 days after the backdated notice, WMH could submit a notice of arbitration:[349]

> We understand that your clients agree with Canada's proposal of July 2, 2019 as a way forward. In this regard, we suggest the following next steps in order to allow for an orderly transition over to the new claim:
>
> 1. [WCC] delivers a clean version of the WMH NOA, as Notice of Intent to Submit a Claim to Arbitration ("WMH NOI") […]. The WMH NOI can be backdated to May 13, 2019. At the same time, [WCC] provides written notice of the withdrawal of its [2018 NoA].
>
> 2. As of August 12, 2019, [WMH] may deliver a Notice of Arbitration and Statement of Claim […].[350]

iv. In its letter of 23 July 2019,[351] WCC withdrew the MST and Discrimination Claims asserted in the 2018 NoA,[352] while transmitting WMH's 2019 NoI backdated to 13 May 2019,[353] which preceded WMH's 2019 NoA of 12 August 2019:[354]

> We hereby submit the enclosed [2019 NoI] on behalf of [WMH]. Pursuant to the July 12, 2019 letter from counsel for the Government of Canada appended to this letter, the Notice is dated May 13, 2019.
>
> On behalf of [WCC] and pursuant to the appended July 12, 2019 letter, we hereby withdraw [WCC]'s [2018 NoA].[355]

v. At the jurisdictional hearing in the WMH Arbitration,[356] while noting Canada's argument that WCC's "attempt to transfer the [NAFTA] Claim as part of the bankruptcy plan fail[ed] as a matter of public international law", but that a "change in ownership of the [other] Canadian assets" nevertheless occurred, the WMH Tribunal asked Canada about "WCC's position" in July 2021, and particularly whether WCC had "any residual rights to bring a treaty claim".[357] In response, Canada stated that WCC could still bring a claim on its own behalf under NAFTA Article 1116 ("**Hearing Statement**"):

> So, I think, if I understand your question – and you can let me know if I haven't – it is: What would be WCC's position today? And I think if they no longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf. Canada's view is that

[348] **R-83**, Letter from Scott Little to Elliot Feldman, 12 July 2019.

[349] *See supra*, ¶ 38.

[350] **R-83**, Letter from Scott Little to Elliot Feldman, 12 July 2019.

[351] **R-84**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, 23 July 2019.

[352] *See supra*, ¶ 120.

[353] *See supra*, ¶ 39.

[354] *See supra*, ¶ 40.

[355] **R-84**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, 23 July 2019.

[356] **C-46**, *Westmoreland Mining Holdings LLC v. Canada*, Jurisdictional Hearing transcript, Day 2, 15 July 2021.

[357] **C-46**, *Westmoreland Mining Holdings LLC v. Canada*, Jurisdictional Hearing transcript, Day 2, 15 July 2021, 278:16-279:2 (Arbitrator Hosking).

> you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf.
>
> So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that the investment in this case retained jurisdiction even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf.[358]

c. Estoppel

183. It is well established that estoppel applies only when a party makes "unambiguous"[359] and "unequivocal"[360] representations by statement or conduct that are "voluntary [and] unconditional",[361] and the other party relies on those representations in "good faith" to its detriment or to the advantage of the representing party.[362]

184. Yet, at no point has Canada represented, let alone unequivocally, that it would refrain from objecting to WCC's or WMH's claims following the Withdrawal. To the contrary, Canada clarified on 2 July 2019 that its proposal that WCC withdraw the claims was "without prejudice to its ability to raise any jurisdictional or admissibility objections with respect to the [2018 NoA] or any new claim".[363]

185. The Claimant says that it "understood" that reservation as Canada "reserving its right to challenge WCC's original claims, [which] were identically copied into [the] 2019 NoA[,] and any new claim asserted by WMH that was not asserted by WCC".[364] Be that as it may, there was no need for Canada to reserve its right to raise an objection to jurisdiction in the first place. Save perhaps for

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[358] **C-46**, *Westmoreland Mining Holdings LLC v. Canada*, Jurisdictional Hearing transcript, Day 2, 15 July 2021, 279:10-280:4 (Canada).

[359] *See inter alia Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, ¶ 325; *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022, ¶ 455; **RLA-63**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 423(i); **CLA-21**, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 160; **RLA-64**, *Pope & Talbot v. Government of Canada*, Interim Award, 26 June 2000, ¶ 111.

[360] *See inter alia* **RLA-69**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 353; *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, ¶ 261; **RLA-67**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 249; *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022, ¶ 305; **RLA-73**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (I)*, UNCITRAL, PCA Case No. 2009-14, Award on Jurisdiction, 22 April 2010, ¶ 143.

[361] *See inter alia* **RLA-63**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 423(ii); **CLA-21**, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 160; **RLA-64**, *Pope & Talbot v. Government of Canada*, Interim Award, 26 June 2000, ¶ 111.

[362] *See inter alia* **RLA-63**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 423(iii); **RLA-64**, *Pope & Talbot v. Government of Canada*, Interim Award, 26 June 2000, ¶ 111; **RLA-72**, *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 47.

[363] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019, p. 2.

[364] Tr. (Day 2) 281:14-22 (Claimant).

instances of abuse,[365] respondents retain that right, provided they exercise it in accordance with the applicable procedural rules, which Canada did in the WMH Arbitration and in the instant proceedings. Assuming it would have been necessary, Canada's reservation of rights of July 2019 was sufficiently broad to encompass its Time-Bar and Legacy Objections.

186. As to the Hearing Statement, the Claimant has not furnished any evidence indicating that it relied on it to advance the Claims in this arbitration. Moreover, the Hearing Statement was not meant to be comprehensive. Its purpose was to provide a theoretical answer to a theoretical question. The WMH Tribunal asked whether, in July 2021, WCC, who was not a party and therefore was not at issue in the WMH Arbitration, had "any residual rights to bring a treaty claim" despite the sale of its interests in Prairie in 2019.[366] Canada answered that it did under NAFTA Article 1116, thereby distinguishing the position regarding claims under NAFTA Article 1117, where "Canada's view [was] that you have to own and control the enterprise at the date that you submit a claim".[367] The Respondent has maintained the same position in this arbitration.[368] Matters concerning the statute of limitations and "legacy investments" were not part of the answer as they were not part of the question.

187. Consequently, the Tribunal holds that the estoppel defense lacks merit.

d. Abuse of rights

188. The doctrine of abuse of rights is a general principle of law that "prohibits the exercise of a right for purposes other than those for which the right was established".[369] It is subject to a high threshold.[370] Only in exceptional circumstances the holder of a right can be deprived from enforcing it.

189. The Tribunal discerns no such exceptional circumstances here, either in the lead up to the Withdrawal or in relation to the Hearing Statement. It was reasonable for Canada to take issue with the Amended NoA, which identified WCC as "initial disputing investor"[371] and WMH as

[365] *See infra*, ¶¶ 188ss.

[366] **C-46**, *Westmoreland Mining Holdings LLC v. Canada*, Jurisdictional Hearing transcript, Day 2, 15 July 2021, 278:16 (Arbitrator Hosking).

[367] **C-46**, *Westmoreland Mining Holdings LLC v. Canada*, Jurisdictional Hearing transcript, Day 2, 15 July 2021, 279:14-17 (Canada).

[368] *See* Prairie Control Objection at *supra*, ¶ 91.v.b

[369] **RLA-82**, *Rand Investments Ltd. and others v. Republic of Serbia,* ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 464; **RLA-30**, *The Renco Group, Inc. v. The Republic of Peru,* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 175; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, ¶ 540; *Saipem SpA v The People's Republic of Bangladesh* ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 160.

[370] **CLA-18**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶ 143; **RLA-30**, *The Renco Group, Inc. v. The Republic of Peru,* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 177; **RLA-82**, *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award, 29 June 2023, ¶ 464; **RLA-79**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru,* ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 186; **RLA-83**, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 317.

[371] **C-55**, Amended NoA, 13 May 2019, ¶ 15.

both "Claimant"[372] and "disputing investor".[373] Specifically, it was reasonable for Canada to argue, as it did on 2 July 2019,[374] that WMH could not "become the disputing investor in a claim that was submitted to arbitration" by WCC, and that WMH had to "submit its own claim" and meet the requirements of Chapter 11 NAFTA, including the submission of a 90-day notice of intent.[375] In the interest of dealing with one "disputing investor" only, it was also sensible for Canada to indicate its willingness to accept the Amended NoA as WMH's notice of intent, subject to WCC withdrawing the claims submitted in the 2018 NoA.[376]

190. Faced with such a proposal, it was up to WCC and WMH to analyze the merits and risks of the suggested course, including the effects of the reservation that the proposal was "without prejudice to its ability to raise any jurisdictional or admissibility objections with respect to the [2018 NoA] or any new claim".[377] Yet, on 3 July 2019,[378] one day after receiving it, WCC and WMH accepted Canada's proposal.[379] They could have asked Canada to withdraw its reservations, sought assurances, made a counter-proposal, or otherwise engaged to protect their interests. However, they chose not to do so. Instead, following Canada's letter of 12 July 2019 on how to proceed,[380] on 23 July 2019, WCC effected the Withdrawal of the MST and Discrimination Claims.[381]

191. Turning to the Hearing Statement, it is true that Canada did not specify that, while WCC retained the right to file a claim under NAFTA Article 1116 on its own behalf, that right was subject to the statute of limitations under NAFTA and to the "legacy investment" requirement provided in Annex 14-C. The Claimant asserts that, if "Canada had said WCC's claims were barred, the [WMH Tribunal] could have taken steps to preserve WCC's rights".[382] It further insists that the Hearing Statement "convinced the [WMH Tribunal] to dismiss WMH as a claimant, based on the understanding that WCC could resubmit its Claim[s]".[383]

192. On its face, the WMH Tribunal's question focused on whether in July 2021 WCC retained the right to claim under NAFTA despite having sold Prairie in 2019. Canada confirmed that was indeed the position under Article 1116 and has maintained that view in this arbitration. There was nothing more to the answer. In particular, the Tribunal cannot see it as a waiver to object to jurisdiction over claims that WCC could bring nor as an attempt to mislead the WMH Tribunal.

193. In any event, there is no indication that the Hearing Statement had any bearing on the WMH Tribunal's decision to deny jurisdiction. The WMH Award barely refers to the Withdrawal in the

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[372] **C-55**, Amended NoA, 13 May 2019, Cover Page

[373] **C-55**, Amended NoA, 13 May 2019, ¶ 21.

[374] *See supra*, ¶ 182.i.

[375] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019, p. 2.

[376] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019, p. 2.

[377] **R-81**, Letter from Scott Little to Elliot Feldman, 2 July 2019, p. 2.

[378] *See supra*, ¶ 182.ii.

[379] **R-82**, Letter from Elliot Feldman to Scott Little, 3 July 2019, p. 1.

[380] **R-83**, Letter from Scott Little to Elliot Feldman, 12 July 2019, p. 1; *see supra*, 182.iii.

[381] **R-84**, Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, 23 July 2019, p. 1 (of PDF); *see supra*, ¶ 182.iv.

[382] Claimant's Opening Presentation, 2 May 2024, p. 71 (of PDF).

[383] Claimant's Opening Presentation, 2 May 2024, p. 72 (of PDF).

procedural history[384] and makes no mention of WCC's residual right to claim pursuant NAFTA Article 1116. Conversely, it is unclear how the WMH Tribunal could have "preserved WCC's rights", when WCC was not a party to the WMH Arbitration.

194. In conclusion, there is no basis on the facts of this case for a finding of abuse of rights.

e. Preclusion

195. It is the Claimant's submission that the doctrine of preclusion "exists" as a "principle", but it concedes there is debate as to whether it constitutes a "general principle of law".[385] It also acknowledges that the doctrines of estoppel and preclusion "often have been employed interchangeably".[386] That being so, it considers that the main difference between the two doctrines is that estoppel requires proof of detrimental reliance, while preclusion does not.[387] The Respondent contends that the Claimant has established neither the status of preclusion under international law nor the content of the doctrine, and that in any event Canada's conduct has always been consistent such that any purported preclusion cannot operate.[388]

196. It is true that preclusion differs from estoppel to the extent that it does not require detrimental reliance. The other elements of the two doctrines are identical. Therefore, but for the reliance discussion, the analysis conducted in the context of estoppel applies here *mutatis mutandis*, with the consequence that the preclusion defense must be deemed unfounded.

E. REQUEST FOR AN ORDER ON WCC'S RIGHT TO PURSUE THE CLAIMS IN OTHER VENUES

1. Overview of the Parties' positions

197. In footnote 234 of its Rejoinder, the Claimant "requests an order from this Tribunal confirming that WCC has not effectively waived its right to pursue relief in other venues" if "the Tribunal decides to dismiss the [Claims]".[389] When asked to respond to the Claimant's request,[390] the Respondent stated at the Hearing that the Tribunal has jurisdiction to determine whether "valid waivers were filed before it", and whether the waivers submitted with the 2018 NoA and later withdrawn "are no longer effective".[391] Yet, Canada stated it could not "speak as to whether WCC would face other hurdles in bringing a claim before domestic court[s] or otherwise".[392]

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[384] **CLA-1**, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶¶ 7, 92.

[385] Response, fn. 159.

[386] Response, ¶ 106.

[387] Rejoinder, ¶ 99.

[388] Reply, ¶¶ 123-124.

[389] Rejoinder, fn. 234.

[390] *See supra*, ¶ 65.

[391] Tr. (Day 1) 66:11-15 (Respondent).

[392] Tr. (Day 1) 66:18-20 (Respondent).

2. Discussion

198. On the one hand, the Tribunal has reached the conclusion that it does not have jurisdiction over the Claims and the relief requested here is ancillary to the Claims. On the other hand, and more importantly, the requested order goes to the jurisdiction of other courts and tribunals before which WCC might bring claims in the future. It would be contrary to the general principle of *Kompetenz-Kompetenz*, according to which each court and tribunal has the power to rule on its own jurisdiction, for this Tribunal to weigh in on the jurisdiction of other judicial or quasi-judicial bodies. Whether or not WCC has waived its right to pursue relief in other fora is a matter for those other fora, in the event WCC decides to pursue the Claims before them.

199. On this basis, the Tribunal denies the Claimant's request.

VII. COSTS

A. LEGAL FRAMEWORK

200. Among other rules, these proceedings are governed by the UNCITRAL Arbitration Rules,[393] Article 40 of which addresses the definition of costs as follows:

> 1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
>
> 2. The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
>
> (b) The reasonable travel and other expenses incurred by the arbitrators;
>
> (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the fees and expenses of [ICSID].

201. This provision recognizes broadly three categories of costs: Tribunal costs, comprising the fees and expenses of the Tribunal and the Assistant to the Tribunal; administrative costs, comprising the fees and expenses of ICSID, including Hearing and other expenses; and Party costs, covering the legal and other costs incurred by the Parties in connection with the arbitration.

202. Moreover, Article 42 of the UNCITRAL Arbitration Rules sets out the standard further to which the Tribunal must determine the allocation of the above categories of costs. It provides that, while

[393] *See supra*, ¶ 88.ii.

the "costs of the arbitration shall in principle be borne by the unsuccessful [P]arty", the Tribunal "may apportion each of such costs between the [P]arties if it determines that apportionment is reasonable, taking into account the circumstances of the case".[394]

B. FEES AND COSTS INCURRED

203. Pursuant to PO1, the "fees and expenses of each member of the Tribunal shall be determined and paid in accordance with Regulation 14 of the ICSID Administrative and Financial Regulations, the ICSID Schedule of Fees (2022), and the ICSID Memorandum on the Fees and Expenses (2022)".[395] Specifically, "each member of the Tribunal shall receive a fee of USD 500 for each hour of work performed in connection with the proceeding",[396] and "subsistence allowances, reimbursement of travel, including travel time at half of the regular rate, and other fees and expenses".[397] The Parties moreover agreed that the Assistant to the Tribunal would "be remunerated at an hourly rate of USD 280", and "receive subsistence allowances, reimbursement of travel, including travel time at half of the regular rate, and other fees and expenses within the limits set forth in the ICSID Schedule of Fees (2022) and the ICSID Memorandum on the Fees and Expenses (2022)".[398] In this respect:

i. The Tribunal's fees are as follows: Mr. Laurence Shore USD 55,750; Ms. Judith Levine USD 48,800; and Prof. Gabrielle Kaufmann-Kohler USD 146,000. The Assistant's fees amount to USD 73,290. Finally, the Tribunal has incurred expenses in the amount of USD 2,388.72.

ii. ICSID's fees for the administration of the case amount to USD 94,000. Other costs, relating in particular to court reporting and audio-visual services, amount to USD 11,670.

204. Therefore, the total cost of the proceedings is USD 431,898.72, rounded up to USD 431,899, and the Tribunal will revert to the payment of this amount after having allocated the costs. The Tribunal also notes here that the Parties have made advances on costs of USD 500,000 in equal parts. ICSID will refund half of the remainder to each Party.[399]

205. Turning to Party costs, and excluding the advances on costs, the Claimant seeks reimbursement of USD 2,553,072.18,[400] while the Respondent requests CAD 1,566,666.23.[401] The Tribunal will revert to these claims after setting the allocation of costs below.

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[394] UNCITRAL Arbitration Rules, Article 42(1).

[395] PO1, ¶ 5.2.

[396] PO1, ¶ 5.2.a.

[397] PO1, ¶ 5.2.b.

[398] PO1, ¶ 5.3.

[399] The ICSID Secretariat will provide the Parties with a detailed Financial Statement after the Award is published. The remaining balance in the case account will be reimbursed to the Parties in proportion to the payments that they have advanced to ICSID.

[400] Claimant's Statement of Costs, 14 June 2024 (total claimed costs - advance on costs - success fee of USD 786,552.50 "invoiced and payable if Claimant succeeds on jurisdiction").

[401] Respondent's Statement of Costs, 14 June 2024 (total claimed costs - advance on costs).

C. COST ALLOCATION

206. Under Article 42 of the UNCITRAL Arbitration Rules, costs in principle follow the event, and the Tribunal has no reason to depart from this principle in the instant case. While both Parties acted in a professional and diligent manner, the Respondent has comprehensively prevailed on jurisdiction.

207. The Claimant therefore must assume its own costs, the costs of the proceedings, and most of the Respondent's legal and other costs. Indeed, the Tribunal finds that the Respondent's costs are reasonable and notes that they amount to less than half of the costs requested by the Claimant. That being said, under the heading of "Expert and Consultant Costs", the Respondent seeks the reimbursement of CAD 104,899.87 in relation to "Hughes Hubbard & Reed LLP" ("**HHR**").[402] Yet, the Respondent has submitted no expert report by HHR. Nor has it given any insight into the services of HHR.

208. At the end of the Hearing, it was agreed that, instead of cost submissions, the Parties would file statements of costs incurred broken down by category without supporting documentation.[403] It was thus essential for items within a given category to be presented in a way that sufficiently indicated their purpose or basis. The Respondent did so with respect to all items claimed, except for the one involving HHR. The Claimant stressed the lack of clarity in this respect in its observations of 19 July 2024,[404] and the Respondent did not seek a further opportunity to provide explanations.

209. In these circumstances, the Tribunal cannot confidently establish the purpose and reasonableness of the HHR cost item, as required by Article 40(2)(e) of the UNCITRAL Arbitration Rules.[405] Consequently, it will deduct CAD 104,899.87 from the Respondent's claimed costs, which thus amount to CAD 1,461,766.36 rounded down to CAD 1,461,766.

210. For these reasons, the Claimant shall reimburse the Respondent for its share of the total costs of the proceedings, that is USD 215,949.50 and shall pay the Respondent's legal fees and other expenses in an amount of CAD 1,461,766.

VIII. DECISION

211. For the reasons set forth above, the Arbitral Tribunal:

i. Declines jurisdiction over the dispute before it;

ii. Fixes the costs of the proceedings at USD 431,899, and orders the Claimant to pay to the Respondent USD 215,949.50 for such costs; and

iii. Fixes the Respondent's legal representation and other costs at CAD 1,461,766 and orders the Claimant to pay such amount to the Respondent.

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[402] Respondent's Statement of Costs, 14 June 2024, p. 4 (of PDF).

[403] Tr. (Day 2) 318:4-16 (Tribunal), 321:5 (Respondent), 323:11-12 (Claimant).

[404] Claimant's observations on the Respondent's Statement of Costs, 19 July 2024, ¶ 4; *see supra*, ¶ 74.i.

[405] *See supra*, ¶ 200.

Seat of Arbitration: Washington, D.C.

Date: 17 December 2024

[signed]

Ms. Judith Levine
Arbitrator

[signed]

Mr. Laurence Shore
Arbitrator

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal