PUBLIC DOCUMENT

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

between

WESTMORELAND MINING HOLDINGS LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

ICSID Case No. UNCT/20/3

FINAL AWARD

Members of the Tribunal
Ms Juliet Blanch, President
Mr James Hosking
Professor Zachary Douglas QC

Secretary of the Tribunal
Ms Veronica Lavista

Date of dispatch to the Parties: 31 January 2022

Toronto, Canada

REPRESENTATION OF THE PARTIES

Representing Westmoreland Mining Holdings LLC:

Mr Jeremy Cottrell
General Counsel and Corporate Secretary
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and

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Mr Paul Levine
Mr Michael Snarr
Mr Alexander Obrecht
Ms Analía González
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Representing the Government of Canada:

Mr Adam Douglas
Ms Krista Zeman
Ms Megan Van den Hof
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TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

C-[#]	Claimant's Factual Exhibit
CL-[#]	Claimant's Legal Authority
Coleman 1	Expert Report of Kathryn A. Coleman dated 16 December 2020
Coleman 2	Rebuttal Expert Report of Kathryn A. Coleman dated 9 April 2021
Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 26 February 2021
Hearing on Jurisdiction	Hearing on Jurisdiction held virtually via Zoom from 14 July 2021 to 15 July 2021
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial on Jurisdiction	Respondent's Memorial on Objections to Jurisdiction dated 18 December 2020
NAFTA or the Treaty	North American Free Trade Agreement
NoA/SoC	Notice of Arbitration and Statement of Claim dated 12 August 2019
Paulsson 1	Legal Expert Report of Professor Jan Paulsson dated 26 February 2021
Paulsson 2	Rebuttal Legal Expert Report of Professor Jan Paulsson dated 21 May 2021
R-[#]	Respondent's Factual Exhibit
RL-[#]	Respondent's Legal Authority
Rejoinder on Jurisdiction	Claimant's Rejoinder Memorial on Jurisdiction dated 21 May 2021
Reply on Jurisdiction	Respondent's Reply on Objections to Jurisdiction dated 9 April 2021
Respondent or Canada	Government of Canada

Tr. Day [#], [page:line]	Transcript of the Hearing on Jurisdiction (as revised by the Parties on 20 August 2021)
Tribunal	Arbitral Tribunal composed of Ms Juliet Blanch, Mr James Hosking and Professor Zachary Douglas QC
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law adopted by the United Nations General Assembly on 15 December 1976
VCLT	Vienna Convention on the Law of Treaties
WCC	Westmoreland Coal Company
Westmoreland or Claimant	Westmoreland Mining Holdings LLC

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted on the basis of Chapter Eleven of the North American Free Trade Agreement ("**NAFTA**" or the "**Treaty**") and the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the United Nations General Assembly on 15 December 1976 (the "**UNCITRAL Rules**"). By agreement of the Parties, the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") serves as the Administering Authority for this proceeding.

2. The claimant is Westmoreland Mining Holdings LLC ("**Westmoreland**" or the "**Claimant**"), a company incorporated in the state of Delaware, United States of America. The claim is also brought on behalf of Westmoreland Canada Holdings Inc. ("**WCHI**") and Prairie Mines & Royalty ULC ("**Prairie**") (WCHI and Prairie, jointly "**Canadian Enterprises**"), both companies incorporated in the Province of Alberta in Canada.

3. The respondent is the Government of Canada ("**Canada**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute arises out of the Claimant's ownership of various coalmines in Alberta, Canada, and Alberta's subsequent actions to phase out coal-fired power plants by 2030.

6. The Tribunal issues the present Final Award addressing jurisdictional objections raised by Canada with regards to the existence of an investment that qualifies as such under NAFTA Chapter Eleven.

II. PROCEDURAL HISTORY

7. On 23 July 2019, the Claimant, WCHI and Prairie sent a Notice of Intent backdated to 13 May 2019 to the Deputy Attorney General of Canada, in the same letter Westmoreland Coal Company withdrew its 19 November 2018 Notice of Arbitration and Statement of Claim. Canada accepted this document as the Notice of Intent for this case on 12 July 2019.

8. On the basis of Article 3 of the UNCITRAL Rules, the Notice of Arbitration and Statement of Claim sent by Claimant on 12 August 2019 commenced this arbitration. The Notice of Arbitration and Statement of Claim ("**NoA/SoC**") was accompanied by Exhibits 1 to 25.

A. THE CONSTITUTION OF THE TRIBUNAL AND ADMINISTRATION OF PROCEEDINGS

9. The Claimant appointed Mr James Hosking, a national of the United States and New Zealand, as co-arbitrator in this case. The Respondent appointed Professor Zachary Douglas, QC, a national of Australia, as co-arbitrator in this case.

10. On 19 November 2019, the Parties informed the ICSID Secretariat that the Parties had been unable to agree on the selection of the Presiding Arbitrator and more than ninety (90) days had elapsed since Westmoreland submitted its NoA/SoC on 12 August 2019. Instead of following NAFTA Article 1124(3), the Parties agreed previously to the following procedure, proposed originally by Canada, for the appointment of the presiding arbitrator:

> 1. The Secretary General will provide the disputing parties with a list of seven candidates to serve as President of the Tribunal. ICSID will pre-screen the candidates for conflicts and confirm that they are available to serve as presiding arbitrator if selected. The fact that candidates have been previously considered by the disputing parties does not disqualify that candidate from inclusion on ICSID's list.
>
> 2. Within fifteen business days of receiving this list from ICSID, either disputing party can agree to appoint a candidate from the other party's previously exchanged lists of candidates, which the disputing parties will not disclose to ICSID. In this regard, at 5:00 p.m. EST on the fifteenth business day after receipt of the list provided by ICSID, the disputing parties shall provide written notice to one another of such decision to appoint or of the fact that they are not prepared to appoint a candidate from the other party's previously exchanged list. Any candidate selected in this manner will be selected to serve as presiding arbitrator of the Tribunal, subject to screening for conflicts, availability, and acceptance of appointment. In the event that two candidates have been selected as a result of this Step, and are able to serve as presiding arbitrator, the Secretary-General will make the final selection by the drawing of lots.
>
> 3. If the President is not selected as a result of Step 2:
>
> a. Within twenty business days of receiving the list from ICSID, each disputing party has the option to strike two names from the list by providing written notice to the other disputing party and to ICSID at 5:00 p.m. EST on the twentieth business day after receipt of the list provided by ICSID.
>
> b. Within twenty-five business days of receiving the list from ICSID, each disputing party will send to ICSID their respective

> rankings of the remaining candidates, without copying the other party.
>
> c. ICSID will calculate the cumulative number of points assigned by both disputing parties to each candidate, equivalent to their ranking (e.g., a ranking of 1 would give a candidate 1 point). The Secretary-General shall appoint as presiding arbitrator of the Tribunal the candidate with the fewest points.
>
> d. In the event of a tie, the Secretary-General will select the presiding arbitrator of the Tribunal from the tied candidates by the drawing of lots.[1]

11. By letter of the same date, the ICSID Secretariat informed counsel for Westmoreland that pursuant to ICSID's Schedule of Fees, "[a] non-refundable fee of US$10,000 is payable to the Centre by a party requesting that the Secretary-General appoint an arbitrator […] in proceedings not conducted under the Convention or Additional Facility Rules. This fee will be credited to that party's share of the administrative charge if ICSID administers the proceeding."[2]

12. On 13 December 2019, the ICSID Secretariat informed counsel for Westmoreland that ICSID's Finance Department had confirmed that the prescribed appointment fee was received by wire transfer. The ICSID Secretariat invited the Claimant to confirm its agreement with the procedure as set out in the appointment request by 18 December 2019. The Claimant was also invited to confirm that candidates to be proposed in the ballot need not be from the ICSID Panel of Arbitrators.

13. By communication of 16 December 2019, the Claimant notified the ICSID Secretariat that the candidates to be proposed in the ballot need not be from the ICSID Panel of Arbitrators.

14. On 18 December 2019, the Respondent notified the ICSID Secretariat that it agreed with the process for the appointment of the presiding arbitrator set out in Steps 1 through 4 of the Claimant's letter dated 19 November 2019. The Respondent also confirmed that the candidates to be proposed in the ballot need not be from the ICSID Panel of Arbitrators. In addition, Canada requested that *(i)* the ICSID Secretariat include women in its list of candidates to serve as President of the Tribunal, and *(ii)* the candidates have experience in international investment arbitration.

15. On 24 February 2020, the Secretary-General of ICSID notified the Parties that in accordance with the procedure agreed to by them, she appointed Ms. Juliet Blanch as the

[1] Letter from counsel for Westmoreland to ICSID dated 19 November 2019.

[2] Communication from ICSID to the Parties dated 19 November 2019.

President of the Tribunal. The Secretary-General also invited the Parties to consider the appointment of ICSID as the Administering Authority.

16. By separate communication of the same date, the Secretary-General of ICSID notified Ms Blanch of her appointment as the President of the Tribunal. The Tribunal was constituted in accordance with the UNCITRAL Arbitration Rules (1976), its members are Ms Juliet Blanch, a national of the United Kingdom, President, appointed by the Secretary General in accordance with the agreement of the Parties; Professor Zachary Douglas, QC, a national of Australia, appointed by the Respondent; and Mr James Hosking, a national of the United States and New Zealand, appointed by the Claimant.

17. By communication of 10 March 2020, the President of the Tribunal instructed the Parties to provide their views on the following: *(i)* the Tribunal's strong preference for this dispute to be administered and, accordingly, the Parties were invited to confer and to revert to the Tribunal either confirming the identity of the agreed institution or alternatively setting out their respective positions; *(ii)* whether the Parties had reached agreement on the seat of this arbitration, without prejudice to the fact that hearings may take place in an alternative jurisdiction(s); *(iii)* whether there was agreement on the applicable version of the UNCITRAL rules; and *(iv)* the Tribunal further confirmed its availability for a procedural hearing via telephone conference on any of the following dates: 6-9 April and 12 or 14 May 2020.

18. On 2 April 2020, the Secretary-General of ICSID confirmed that she had been informed by the President of the Tribunal that the Parties and the Tribunal had agreed to appoint ICSID as the Administering Authority. The Secretary-General of ICSID accepted the appointment as Administering Authority and informed the Parties that Ms Veronica Lavista, ICSID Legal Counsel, would serve as Secretary of the Tribunal. ICSID agreed to act as registry under the following terms:

> a) The Registry shall manage deposits made by the Disputing Parties to cover the costs of the arbitration, subject to the Tribunal's supervision;
>
> b) Consistent with its document retention policies, the Registry shall maintain an archive of filings and submissions;
>
> c) The Registry shall provide such other registry services as the Tribunal may direct; and

d) Work carried out by the Registry will be paid in accordance with ICSID's Schedule of Fees from deposits placed with the Registry.[3]

B. THE FIRST PROCEDURAL HEARING AND THE CONFIDENTIALITY ORDER

19. After several exchanges between the Parties, the Parties submitted their respective proposals reflecting the agreements and disagreements between the Parties for the *(i)* draft Confidentiality Order and *(ii)* draft Procedural Order No. 1.

20. On 7 April 2020, the Tribunal and the Parties held a preliminary procedural consultation via telephone conference.

21. On 14 April 2020, the Secretary of the Tribunal circulated to the Parties the statements of independence of all three of the Members of the Tribunal.

22. Following this first procedural consultation, on 22 April 2020, the Tribunal issued Procedural Order No. 1 ("**PO1**"), embodying the agreements of the Parties and the decisions of the Tribunal on disputed procedural matters. PO1 provided, *inter alia*, that the applicable arbitration rules would be the UNCITRAL Rules, as defined above, except to the extent that they are modified by Section B, Chapter 11 of the NAFTA (per Article 1120(2) of the NAFTA), that the procedural language would be English, and that the legal seat of the arbitration shall be Toronto, Ontario. PO1 also established rules on the confidentiality and publication of documents (which would be developed in a separate procedural order), the procedural calendar and a document production schedule. The Parties also confirmed that the Tribunal had been properly constituted and that neither Party had an objection to the appointment of any of its members.

23. On the same date, the Tribunal issued the Confidentiality Order, indicating the procedures governing the designation of confidential information and the preparation of redacted copies of documents for publication.

24. By second letter of 22 April 2020, the Secretary of the Tribunal notified the Parties that pursuant to Section 26.1 of PO1 and the Confidentiality Order, ICSID would proceed to publish the following documents on the ICSID website: *(i)* Notice of Arbitration, dated 12 August 2019, *(ii)* PO1, dated 22 April 2020, and *(iii)* Confidentiality Order, dated 22 April 2020.

C. THE WRITTEN PHASE ON BIFURCATION

25. On 26 June 2020, the Respondent filed its Statement of Defence together with Exhibits R-001 to R-040 and Legal Authority RLA-001. In its Statement of Defence, Canada

[3] Letter from ICSID to the Parties dated 2 April 2020.

proposed to bifurcate the proceedings, with a first phase designated to address issues of jurisdiction and admissibility.

26. On 3 July 2020, the Claimant notified Canada of its intent to oppose bifurcation.

27. By communication of 7 July 2020, the Tribunal requested that the Parties inform it if they had reached an agreement on the remainder of the procedural calendar or whether a procedural hearing was required.

28. By communication of the same date, the Parties notified the Tribunal of their agreed-upon schedule concerning Canada's proposal to bifurcate the proceedings. The proposed schedule was as follows: *(i)* 24 July 2020: Canada files a Request for Bifurcation, *(ii)* 14 August 2020: Claimant files a Reply to Canada's Request, *(iii)* 28 August 2020: Canada files a Response to Claimant's Reply, and *(iv)* 11 September 2020: Claimant files a Rejoinder to Canada's Response.

29. By communication of 9 July 2020, the Tribunal notified the Parties that it agreed to the proposed timetable to hear Canada's application for bifurcation. In addition, the Tribunal requested that the Parties consult and agree on alternative procedural calendars depending on whether or not the application for bifurcation is successful. The Tribunal requested that the Parties notify the Tribunal of their agreements in this regard by 23 July 2020.

30. On 16 July 2020, the Parties agreed that a hearing on bifurcation would be held on 24 September 2020 via the video streaming platform WebEx.

31. By communication of 22 July 2020, the Parties requested an extension until 31 July 2020 to submit to the Tribunal their agreed proposal for alternative schedules (with or without bifurcation).

32. On 24 July 2020, the Respondent filed Canada's Request for Bifurcation, together with *(i)* Exhibits R-001, R-002 and R-029 and *(ii)* Legal Authorities RLA-002 to RLA-035 ("**Bifurcation Application**").

33. On 31 July 2020, the Parties submitted to the Tribunal their agreed proposal for alternative schedules (with or without bifurcation).

34. On 14 August 2020, the Claimant submitted Claimant's Response to Canada's Request for Bifurcation, together with *(i)* Exhibits C-019, C-023, C-026 and C-027; *(ii)* Legal Authorities CLA-001 to CLA-007; and *(iii)* certain Legal Authorities submitted by the Respondent ("**Claimant's Opposition**").

35. On 28 August 2020, the Respondent filed Canada's Reply to the Claimant's Response regarding Bifurcation, together with *(i)* Exhibit R-041 and *(ii)* Legal Authorities RLA-036 to RLA-041("**Respondent's Bifurcation Reply**").

36. On 11 September 2020, the Claimant filed Claimant's Rejoinder to Canada's Reply in Support of its Request for Bifurcation, together with *(i)* Exhibits C-009, C-019, C-023, C-028 to C-031; *(ii)* Legal Authorities CLA-002, CLA-004, CLA-008 to CLA-012; and *(iii)* certain Exhibits and Legal Authorities submitted by the Respondent ("**Claimant's Opposition Rejoinder**").

D. THE HEARING ON BIFURCATION

37. On 17 September 2020, the Tribunal transmitted to the Parties a draft Procedural Order No. 2 (Protocol for the Hearing) and invited the Parties to submit any comments by 18 September 2020. In addition, the Tribunal notified the Parties that pursuant to Section 16.1 of PO1, the Centre would inform the Governments of Mexico and the United States as Non-Disputing NAFTA Parties of the dates and venue of the upcoming hearing on bifurcation and invite them to confirm whether they intended to attend the hearing.

38. By letter of 18 September 2020, the Tribunal notified the Governments of Mexico and the United States as Non-Disputing NAFTA Parties of the dates and venue of the upcoming hearing on bifurcation and invited them to confirm whether they intended to attend the hearing.

39. By communications of the same date, the Parties submitted their respective comments on the draft Procedural Order No. 2 (Protocol for the Hearing).

40. On 21 September 2020, the Tribunal issued Procedural Order No. 2 (Protocol for the Hearing) (**"PO2**").

41. A hearing on bifurcation was held virtually on 24 September 2020 (the "**Hearing on Bifurcation**"). The following persons were present at the Hearing on Bifurcation:

Tribunal:

Ms Juliet Blanch	President
Mr James Hosking	Arbitrator
Professor Zachary Douglas, QC	Arbitrator

ICSID Secretariat:

Ms Veronica Lavista	Secretary of the Tribunal

For the Claimant:

Counsel	
Mr Elliot Feldman	Baker & Hostetler, LLP
Mr Michael Snarr	Baker & Hostetler, LLP
Mr Paul Levine	Baker & Hostetler, LLP
Ms Analia Gonzalez	Baker & Hostetler, LLP
Mr Alexander Obrecht	Baker & Hostetler, LLP
Party Representative	
Mr Jeremy Cottrell	Westmoreland Mining Holdings LLC

For the Respondent:

Counsel	
Mr Adam Douglas	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms Krista Zeman	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms Megan Van den Hof	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms Alexandra Dosman	Trade Law Bureau, Global Affairs Canada, Government of Canada
Mr Mark Klaver	Trade Law Bureau, Global Affairs Canada, Government of Canada
Mr Benjamin Tait	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms Nadine Robinson	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms Jennifer Sadaka-Alberti	Trade Law Bureau, Global Affairs Canada, Government of Canada
Party Representatives	
Mr Kyle Dickson-Smith	Ministry of Justice and Solicitor General, Government of Alberta
Ms Landy Zhao	Ministry of Justice and Solicitor General, Government of Alberta
Mr Peter Ciechanowski	Ministry of Justice and Solicitor General, Government of Alberta
Ms Sheri Anderson	Trade Policy International Unit, Ministry of Jobs, Economy and Innovation, Government of Alberta
Ms Marieke Dube	Climate Partnerships and Initiatives, Regulatory and Compliance Branch, Ministry of Environment and Parks, Government of Alberta

Ms Julie Boisvert	Investment Trade Policy Division, Global Affairs Canada, Government of Canada
Mr Don McDougall	Investment Trade Policy Division, Global Affairs Canada, Government of Canada
Ms Elena Lapina	Investment Trade Policy Division, Global Affairs Canada, Government of Canada

Court Reporter:

Ms Dawn Larson	Worldwide Reporting

42. In addition, the following people attended on behalf of the Non-Disputing Parties:

The United Mexican States

Mr Antonio Nava	Director de Consultoría Jurídica de Comercio Internacional
Ms Cindy Rayo	Directora General de Comercio Internacional de Servicios e Inversión

The United States of America

Ms Nicole C. Thornton	US Department of State
Mr John I. Blanck	US Department of State

43. Each Party gave an opening presentation, the Respondent then gave its reply followed by the Claimant's rebuttal, and questions were asked of each Party by the Tribunal.

44. On 2 October 2020 the Claimant filed a note, in accordance with the Tribunal's direction, providing its submissions on the *Sastre v. Mexico* case,[4] which was incorporated into the record as RLA-042 by the Tribunal at the commencement of the Hearing.

45. On 16 October 2020, the Parties submitted their joint corrections to the transcript of the Hearing on Bifurcation. The Secretary of the Tribunal circulated to the Parties the corrected and final version of the transcript on 20 October 2020.

46. On 20 October 2020, the Tribunal issued Procedural Order No. 3 ("**PO3**") granting the Respondent's Request for Bifurcation in part, as further discussed below.

E. THE WRITTEN PHASE ON JURISDICTION

47. On 30 October 2020, the Tribunal transmitted the bifurcated schedule as agreed to by the Parties. The Tribunal further noted that it would be available to hold the Hearing on Jurisdiction between 14-16 July 2021 or on the week of 19 July 2021. The Tribunal

[4] Email from the Tribunal to the Disputing Parties on 24 September 2020.

requested that the Parties confer and confirm their availability on either of those dates by 9 November 2020.

48. On 6 November 2020, the Respondent confirmed its availability to hold the Hearing on Jurisdiction between 14-16 July 2021. On 10 November 2020, the Claimant also confirmed its availability in the aforementioned dates.

49. On 11 November 2020, the Tribunal confirmed its availability for the 14-16 July 2021 dates.

50. On 2 December 2020, after several exchanges between the Parties regarding the number of hearing days, the Tribunal circulated a revised procedural schedule holding 14-17 July 2021 as the new hearing dates.

51. On 8 December 2020, the Secretary-General of ICSID notified the Tribunal and the Parties that Ms Anneliese Fleckenstein, ICSID Legal Counsel, would serve as Acting Secretary of the Tribunal during the absence of Ms Lavista.

52. On 18 December 2020, the Respondent submitted Canada's Memorial on Jurisdiction, accompanied by the following documentation: *(i)* Exhibits R-033, R-040, R-042, R-043 to R-080; *(ii)* Legal Authorities RLA-020 to RLA-029, RLA-033, RLA-034, RLA-043 to RLA-051; and *(iii)* Expert Report of Kathryn A. Coleman ("**Respondent's Memorial on Jurisdiction**").

53. On 26 February 2021, the Claimant submitted its Counter-Memorial on Jurisdiction, accompanied by Appendix A to the Claimant's Counter-Memorial on Jurisdiction as well as by the following documentation: *(i)* Exhibits C-019, C-032 to C-044; *(ii)* Legal Authorities CLA-013 to CLA-026; *(iii)* Legal Opinion of Professor Jan Paulsson; and *(iv)* certain Exhibits and Legal Authorities submitted by the Respondent ("**Claimant's Counter-Memorial on Jurisdiction**").

54. By communication of 7 April 2021, the Tribunal notified the Parties that due to the unforeseen circumstances surrounding the COVID-19 pandemic, the hearing scheduled for 14-17 July 2021 would have to be conducted in a virtual manner. The Tribunal invited the Parties to confer with a view to reaching agreement as to: *(i)* the platform to be used (Zoom or WebEx); *(ii)* whether the Parties required an outside vendor for the administration of the hearing; *(iii)* a draft virtual hearing protocol; and *(iv)* a proposed hearing timetable. The Parties were ordered to revert to the Tribunal with their proposals by 30 April 2021. To the extent the Parties were unable to reach agreement on any issue, they were requested to provide their respective positions.

55. On 9 April 2021, the Respondent submitted Canada's Reply Memorial on Jurisdiction, accompanied by the following documentation: *(i)* Exhibits R-042, R-043, R-045-Amended Excerpt, R-049 to R-051, R-053, R-057, R-060 to R-063, R-074, R-076, R-079 to R-096; *(ii)* Legal Authorities RLA-020 to RLA-024, RLA-033, RLA-026 to RLA-030, RLA-033, RLA-035, RLA-044 to RLA-069; *(iii)* Second Expert Report of Kathryn A. Coleman; and *(iv)* certain Exhibits and Legal Authorities submitted by the Claimant ("**Respondent's Reply Memorial on Jurisdiction**").

56. On 4 May 2021, the Parties submitted their joint answers to the Tribunal's request of 7 April 2021.

57. On 14 May 2021, after considering the Parties' positions, the Tribunal informed the Parties that it would hold the pre-hearing conference on 2 July 2021.

58. On 21 May 2021, the Claimant submitted its Rejoinder on Jurisdiction, accompanied by the following documentation: *(i)* Exhibits C-036, C-037, C-039, C-042 to C-050; *(ii)* Legal Authorities CLA-013, CLA-014, CLA-018, CLA-020 to CLA-022, CLA-029, CLA-031, CLA-033 to CLA-062; *(iii)* Second Legal Opinion of Professor Jan Paulsson; and *(iv)* certain Exhibits and Legal Authorities submitted by the Respondent ("**Claimant's Rejoinder on Jurisdiction**").

59. By communications of 4 June 2021, the Parties notified the Tribunal that they would not call on the opposing Party's expert for cross-examination.

60. By communication of the same date, the Secretary of the Tribunal informed the Parties that pursuant to Section 16.1 of PO1, ICSID would notify the NAFTA Non-Disputing Parties that if they wished to make a submission under NAFTA Article 1128, they should do so on 11 June 2021, as established in the schedule for the bifurcated proceeding of 2 December 2020.

61. By letter of 7 June 2021, the Secretary of the Tribunal informed the NAFTA Non-Disputing Parties that 11 June 2021 was the deadline to make a written submission to the Tribunal pursuant to NAFTA Article 1128.

62. On 10 June 2021 Mexico filed its Non-Disputing Party submission ("**Mexico's Article 1128 submission**").

63. On 25 June 2021 the Parties filed their responses to Mexico's Article 1128 submission ("**Claimant's response to Mexico's Article 1128 submission**" and "**Respondent's response to Mexico's Article 1128 submission"**).

F. THE HEARING ON JURISDICTION

64. On 4 May and 17 June 2021, the Parties transmitted to the Secretariat and the Tribunal a draft agenda for the pre-hearing organizational meeting, with their comments.

65. On 2 July 2021, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference. On the same date, the Respondent submitted two new authorities as authorized by the Tribunal: Legal Authorities RLA-076 and RLA-077. On 9 July 2021, the Tribunal confirmed that RLA-076 and RLA-077 were part of the record.

66. On 8 July 2021, the Tribunal issued Procedural Order No. 4 on the organization of the hearing on jurisdiction.

67. A hearing on jurisdiction was held virtually via Zoom from 14 to 15 July 2021 (the "**Hearing on Jurisdiction**"). The following persons were present at the Hearing on Jurisdiction:

Tribunal:

Ms Juliet Blanch	President
Mr James Hosking	Arbitrator
Professor Zachary Douglas QC	Arbitrator

ICSID Secretariat:

Ms Anneliese Fleckenstein	Secretary of the Tribunal

For the Claimant:

Counsel

Mr Elliot Feldman	Baker & Hostetler, LLP
Mr Michael Snarr	Baker & Hostetler, LLP
Mr Paul Levine	Baker & Hostetler, LLP
Ms Analia Gonzalez	Baker & Hostetler, LLP
Mr Jim East	Baker & Hostetler, LLP
Mr Alexander Obrecht	Baker & Hostetler, LLP
Mr John Lehrer	Baker & Hostetler, LLP
Mr Andrew Layden	Baker & Hostetler, LLP
Mr Ricky Dyer	Baker & Hostetler, LLP

Party Representative

Mr Martin Purvis	Westmoreland Mining Holdings LLC
Mr Jeremy Cottrell	Westmoreland Mining Holdings LLC

For the Respondent:

Counsel	
Mr Adam Douglas	Global Affairs Canada
Ms Krista Zeman	Global Affairs Canada
Ms Megan van Den Hof	Global Affairs Canada
Ms Alexandra Dosman	Global Affairs Canada
Mr Mark Klaver	Global Affairs Canada
Mr Benjamin Tait	Global Affairs Canada
Ms Natalie Benischek	Global Affairs Canada
Ms Jennifer Sadaka-Alberti	Global Affairs Canada
Ms Sylvie Zidan	Global Affairs Canada
Mr Jason Bencze Jason Bencze	Global Affairs Canada
Mr Don McDougall	Global Affairs Canada
Ms Elena Lapina	Global Affairs Canada
Mr Scott Little	Global Affairs Canada
Mr Jean-Francois Hebert	Global Affairs Canada
Ms Prabhjot Punnia	Global Affairs Canada
Mr Ivan Barkar	Global Affairs Canada

Party Representatives	
Mr Kyle Dickson-Smith	Government of Alberta
Mr Peter Ciechanowski	Government of Alberta
Ms Angela von Hauff	Government of Alberta
Ms Sheri Anderson	Government of Alberta
Ms Marieke Dube	Government of Alberta
Mr Michael Fabiyi	Government of Alberta
Ms Nicole Spears	Government of Alberta

Expert	
Ms Katie Coleman	Hughes Hubbard & Reed, LLP
Ms Elizabeth A. Beitler	Hughes Hubbard & Reed, LLP

Court Reporter:

Ms Dawn Larson	B&B Reporting

Zoom Technical Support:

Ms Elizabeth Ann Wetter	World Bank Group
Ms Emebet Alemu Demissie	World Bank Group

68. In addition, the following attended on behalf of the Non-Disputing Parties:

The United Mexican States	
Mr Diego Pacheco	Ministry of Economy
Mr Aristeo Lopez	Ministry of Economy

The United States of America	
Ms Nicole Thornton	US Department of State
Ms Catherine Gibson	Office of the US Trade Representative
Ms Cara Yi	US Department of Treasury

69. On 29 July 2021, the Secretary-General of ICSID notified the Tribunal and the Parties that Ms Lavista would resume her functions as Secretary of the Tribunal.

70. On 20 August 2021, the Parties filed their costs submissions and confirmed that all necessary corrections to the transcript had been made.

71. On 16 September 2021, pursuant to Section 24.1 of PO1, the video recording of the Hearing on Jurisdiction was streamed on the ICSID website.

III. FACTUAL BACKGROUND

72. The following summary of the factual background comprises the Tribunal's assessment of the pertinent facts based upon the verified evidence on the record and provides the necessary context for the Tribunal's determination of those issues which were ordered to be bifurcated.

73. Given the increasing awareness of the negative environmental and human health impacts of coal combustion to produce electricity, governments around the world have increasingly been committed to reducing emissions from coal-fired electricity generation.

74. In 2007, Alberta imposed emission performance standards and a carbon pricing system on large industrial facilities pursuant to its Specified Gas Emitters Regulation ("**SGER**"). The SGER was originally scheduled to expire in September 2014 but the Government of Alberta extended it to June 2015 whilst it engaged in consultations with the various stakeholders. Meanwhile in 2012, Canada enacted the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (the "**Federal Regulations**")[5] pursuant to the Canadian Environmental Protection Act 1999. These regulations addressed greenhouse gas emissions, committing to phasing out and eventually closing all coal-fired power stations within a fifty-year period.

75. Westmoreland Coal Company ("**WCC**") is incorporated in Delaware, United States of America. In April 2014, WCC acquired the coal assets of Sherritt International ("**Sherritt**"), a Canadian company, paying in excess of US$ 320 million and assuming liabilities in excess of US$ 420 million. Sherritt's assets included Prairie which owned a

[5] Ex R-018.

number of mine-mouth coal mines, including three in Alberta: the Genesee, Sheerness and Paintearth Mines (the "**Mines**"). Mine-mouth operations are those where the coalmine is developed adjacent to and in conjunction with a power plant enabling economic delivery of the coal to the power plant. The Mines are dependent on the mine-mouth operations as the adjacent coal-burning units are the only viable market for the coal produced from the Mines. At the time of this acquisition, Canadian Federal Regulations contained a comprehensive scheme to address greenhouse gas emissions from coal-burning power plants, ensuring that all such facilities would be phased out over a period of fifty years from the date of commissioning. Five of the mine-mouth coal-burning units fed by coal produced from the Mines qualified for this full fifty year useful life under these Regulations.

76. After the acquisition, Prairie was directly owned by WCHI, an Albertan entity, owned by WCC. Prairie and WCHI are together called the **Canadian Enterprises**. This acquisition more than doubled WCC's business and Prairie's mine-mouth coalmines formed its core.

77. In December 2014, certain lenders (the "**first-tier lien holders**") provided WCC with a US$ 700 million debt financing through a US$ 350 million Senior Secured Note loan with a 2020 maturity date and a US$ 350 million Term Loan Credit Agreement, again with a 2020 maturity date.

78. On 25 June 2015, Alberta announced it was establishing the Climate Change Advisory Panel (the "**Advisory Panel**") which was mandated, *inter alia*, to provide the Minister of Environment and Parks with advice on a comprehensive set of policy measures to reduce Alberta's greenhouse gas emissions and on 22 November 2015, Alberta announced its Climate Leadership Plan (the "**Plan**")[6] which was largely based on the Advisory Panel's recommendations. The Plan introduced a Carbon Competitiveness Incentive Regulation ("**CCIR**") to replace the SGER and included provision to phase out greenhouse gas emissions and air pollutants produced by coal-fired electricity generation by 2030, up to twenty-five years earlier than under the Federal Regulations.

79. At this time there were 18 coal-fired generating units operating in Alberta, six of which were expected to operate beyond 2030 and which would therefore have to transition to use other fuel sources or technologies. These six were supplied by three coal mines: Sheerness, Genesee and Highvale (the first two being owned or part owned by Prairie). Alberta engaged an independent consultant, Mr Terry Boston, ("**Mr Boston**") to advise on the best options to achieve Alberta's policy goal of zero emissions from coal-fired generating units. Mr Boston's guiding principles were to maintain: *(i)* electric system reliability; *(ii)* reasonable stability and electricity prices for consumers and businesses; and

[6] Ex C-007.

(iii) investors' confidence in Alberta by not unnecessarily stranding capital and ensuring that workers, communities and affected companies were treated fairly.

80. Mr Boston provided his report on 30 September 2016. He noted that the transition would require investment of CAD$ 20-30 billion in new generation assets and he made certain recommendations to enable the necessary investment to be attracted. In particular, Mr Boston recommended that voluntary Transition Payments (the "**Transition Payments**") be made to the three companies which owned the six coal-fired generation plants with remaining life beyond 2030 (the "**Alberta Companies**"). The Transition Payments were to be paid pursuant to Alberta's commitment to existing Alberta businesses[7] and in recognition of the "[…] economic disruption to their capital investments"[8] due to this accelerated conversion from coal to natural gas and their purpose was to encourage the future investments needed to maintain reliability during the transition to cleaner sources of energy.[9] This would be achieved by "creat[ing] a positive investor outlook in Alberta for market-based generation and renewables"[10] thus encouraging participation in "Alberta's transition from coal […]."[11]

81. On 24 November 2016, Alberta announced it had entered into Off-Coal Agreements with each of the Alberta Companies (the "**Off-Coal Agreements**") pursuant to which it would make Transition Payments to the Alberta Companies pursuant to its Energy Grants Regulation. These payments were to be made over the course of a fourteen-year period and totalled CAD$ 1.36 billion, based on the net book value of each coal-fired plant. The payments were subject to certain specified eligibility conditions, including minimum annual investment spending requirements and a commitment to *(i)* continue generating electricity or otherwise participate in the Albertan electricity market and *(ii)* cease emissions from the six generating units by 2030. In addition, the Alberta Companies each agreed to waive any claims with respect to this coal phase-out, "including with respect to the mines, coal supply agreements, mining contracts, or mining equipment related to the coal used to fuel the Plants."[12] Pursuant to these Off-Coal Agreements, the closure of the Mines was to be accelerated, closing before 2030.

82. No such payment was offered to WCC, an American company. Canada says this is because the Transition Payments were made in respect of capital at risk of stranding relating to

[7] Ex C-010.

[8] Ex C-009.

[9] Ex R-032.

[10] Ex R-032, p. 2.

[11] Ex C-009, Alberta Energy Minister Statement referred to in paragraph 9 of NoA/SoC.

[12] Ex C-023.

affected coal-fired generation units and not in respect of any interest in any coal mine, coal mining not being the object of Alberta's emissions reduction policy.

83. In 2016, the Federal Government published a notice of intent to amend the Federal Regulations, *inter alia* proposing a change in the definition of the useful life of a coal-fired generating unit from fifty years from its date of commissioning to 31 December 2029. These amended regulations came into force on 30 November 2018.

84. WCC was significantly overleveraged after a series of acquisitions in the prior decade that nearly tripled its debt obligations and it became unable to service its debt.[13] On 9 October 2018, WCC filed a petition for bankruptcy in the United States. The same day, WCC and the first-tier lien holders entered into a Restructuring Support Agreement (the "**RSA**") which included certain exhibits, including Exhibit A, which was a term sheet for the proposed Plan of Reorganization (the "**Plan of Reorganization**") and Exhibit B which was a sale transaction term sheet setting forth the proposed terms and conditions of a potential sale of WCC.[14] The RSA could be terminated by the first-tier lien holders pursuant to certain specified reasons, which would then enable them to enforce their liens against WCC.

85. At around the same time, on 19 November 2018, WCC filed a Notice of Arbitration and Statement of Claim against Canada under NAFTA Chapter Eleven claiming damages of more than CAD$ 470 million. The measures complained of were Alberta's introduction of the Plan and its decision to make the Transition Payments.

86. Whilst the intention was to sell WCC's assets by public auction, a Stalking Horse Purchase Agreement (the "**Stalking Horse Purchase Agreement**")[15] was entered into with the first-tier lien holders, pursuant to which they agreed they would provide a bid of last resort such that if no other bidders materialized, the first-tier lien holders would purchase certain of WCC's assets through an acquisition vehicle. The list of assets to be purchased by that acquisition vehicle, Westmoreland (the Claimant in this arbitration), included Prairie and the "NAFTA Claim" which was defined in the Stalking Horse Purchase Agreement as "[…] that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by Westmoreland on its own behalf and on behalf of its Canadian subsidiary [Prairie] against the Government of Canada pursuant to chapter 11 of [NAFTA] (as such claim may be amended)."[16] The Stalking Horse Purchase Agreement also detailed

[13] Whilst in its oral submissions, Claimant stated that this was unrelated to any act of Alberta (Tr. Day 1, p. 103:10-11), the Tribunal notes that there is a reference to the measures being undertaken in Alberta in the Declaration of Jeffrey Stein filed in the bankruptcy proceeding, R-049.

[14] Ex R-050.

[15] Ex R-053.

[16] Ex R-053, p 11.

the terms on which the acquisition would be effected, ensuring that substantially all of WCC's assets and equity interests would be sold, the proceeds distributed to WCC's creditors and WCC would then be wound down.[17]

87. The first-tier lien holders set a stalking horse credit bid of US$ 390,125,429.40 (being approximately 55% of the amount of the first-tier lien holders' claims) for the specified assets of WCC.

88. As anticipated in the Plan of Reorganization, Westmoreland was incorporated by the first-tier lien holders on 31 January 2019. On 2 March 2019, the US Bankruptcy Court for the Southern District of Texas ("**US Bankruptcy Court**") entered its Order confirming the Plan of Reorganization[18] and Disclosure Statement.

89. As no bidders for WCC's assets had come forward by 15 March 2019, being the effective date as specified in the Plan of Reorganization, most of WCC's assets, including the Canadian Enterprises, were acquired by Westmoreland and the remaining debt WCC owed to the first-tier lien holders beyond the amount of their successful credit bid, was satisfied through a combination of new loans and cash.[19] This was achieved by a Type G reorganization, a US bankruptcy procedure which enables an entity to restructure tax free. It is common ground that the approved transaction steps were as follows:[20]

    a. Step 1: Westmoreland Mining Acquisition LLC (subsequently rebranded as Westmoreland Mining LLC) was the purchaser of the assets and was described in the Plan of Reorganization as the "**Purchaser**".[21] Certain of WCC's subsidiaries transferred their membership interests to the Purchaser, receiving in exchange membership interests in the Purchaser. Those subsidiaries then distributed all their membership interests in the Purchaser to WCC such that at a particular point in time, WCC owned 100% of the Purchaser.

    b. Step 2: Westmoreland was constituted under the laws of Delaware on 31 January 2019 with a nominee of the first-tier lien holders serving as the initial sole member. WCC then contributed its 100% interest in the Purchaser to Westmoreland, receiving in return 100% of the membership interests of Westmoreland and the initial sole member then withdrew from Westmoreland.

[17] Ex R-057.

[18] Ex R-042.

[19] Claimant's Counter-Memorial on Jurisdiction, Appendix A.

[20] Claimant's Counter-Memorial on Jurisdiction, Appendix A, paras 35-39.

[21] Ex C-042.

c. Step 3: WCHI contributed its stock to Westmoreland in exchange for additional membership interests in Westmoreland which was then distributed to WCC such that WCC owned 100% of the membership interests in Westmoreland.

d. Step 4: WCC distributed all its equity interests in Westmoreland to the first-tier secured lenders.

90. Pursuant to the transaction steps described above, Westmoreland became the owner of the Canadian Enterprises and accrued WCC's tax history enabling it to use WCC's tax losses to offset its own future profits and reduce its own tax burden.

91. On 13 May 2019, Westmoreland, WCHI and Prairie filed a written notification with Canada seeking Canada's agreement that WCC's Notice of Arbitration be amended by the substitution of Westmoreland as Claimant.[22] Whilst Canada refused to agree to this requested substitution, Canada and Westmoreland ultimately did agree that this 13 May 2019 filing would be treated for purposes of the NAFTA as notice to Canada of Westmoreland's Notice of Intent to Arbitrate.[23]

92. On 23 July 2019, WCC withdrew its NAFTA claim against Canada and on 12 August 2019 (being ninety days after submission of its Notice of Intent referred to above), Westmoreland filed a Notice of Arbitration and Statement of Claim against Canada on its own behalf under NAFTA Article 1116 and on behalf of the Canadian Enterprises under Article 1117. The breaches identified were firstly Alberta's decision in the Plan to phase out emissions from coal-fired electricity generation by the year 2030 in breach of NAFTA Article 1105 and, secondly, Alberta's decision in 2016 to make the Transition Payments in breach of NAFTA Articles 1102 and 1105 (the "**Challenged Measures**").

93. WCC is in the process of being dissolved but at the time of the Hearing on Jurisdiction was still in existence.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

94. Westmoreland submits that Canada, through the actions of Alberta, its constituent political subdivision, in effecting the Challenged Measures, has breached its obligations owed to Westmoreland under Section A of Chapter Eleven of NAFTA, including but not limited to Articles 1102 and 1105. It claims the following relief:

[22] Ex. R-075.

[23] Exs R-076, R-077, R-078.

a. Damages exceeding CAD$ 470 million or such other amount to be proven in the proceedings as compensation for the damage caused by actions that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;

b. The full costs associated with the proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;

c. Pre- and post-award interest at a rate to be fixed by the Tribunal; and

d. Such further relief as counsel may advise and the Tribunal may deem just and appropriate.

95. Canada contends that the Tribunal does not have jurisdiction over the claims, on the following grounds:

a. Westmoreland was not a protected "investor of a Party" at the time of the alleged breaches under NAFTA Articles 1116(1) and 1117(1);

b. Westmoreland has not made out a *prima facie* damages claim under NAFTA Articles 1116(1) and 1117(1);

c. the Challenged Measures do not "relate to" the Claimant or its investments under NAFTA Article 1101(1);

d. the Claimant has not made a timely claim challenging the 2015 Plan under NAFTA Articles 1116(2) and 1117(2); and

e. the Transition Payments are "subsidies or grants provided by a Party" within the meaning of NAFTA Article 1108(7)(b) and were made voluntarily and accordingly NAFTA Article 1102 does not apply.

96. Canada further asserts that even if the Tribunal had jurisdiction, the allocation of the Transition Payments did not violate Article 1102; no treatment was accorded to Westmoreland as it acquired its investment after the treatment alleged to be in violation of Article 1102. Westmoreland was also not accorded treatment in 'like circumstances' to the Alberta Companies and neither Westmoreland nor its investment was accorded less favourable treatment, in like circumstances, than Canadian investors and their investments.

97. Canada finally asserts there has been no breach of Article 1105. Firstly, the treatment Westmoreland refers to was not accorded to Westmoreland's investment but to WCC's investment. Secondly, no individual or company received a Transition Payment in relation to an interest in a coal mine and thus there is nothing arbitrary in Canada's actions. Thirdly,

a customary international law minimum standard of treatment does not require a State to fulfil an investor's expectation of earning a reasonable return on its investment beyond 2030. Further, Westmoreland could not have reasonably expected the Federal Regulations to provide a "predictable future" for its investment.

98. As to Westmoreland's claim for damages, firstly Westmoreland has failed to establish a causal link between each of the alleged breaches and the damages claimed and, secondly, the quantum claimed has no basis.

99. Canada therefore requests the following relief from the Tribunal:

a. to dismiss the Claimant's claims in their entirety;

b. to 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 Article 40 of the 1976 UNCITRAL Rules; and

c. to grant any other relief that the Tribunal deems appropriate.

V. JURISDICTION

100. It is common ground that the 1976 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**" already defined above) apply to this arbitration.

101. The Tribunal held in PO3 that certain of the jurisdictional objections raised by Canada be determined on a bifurcated basis, namely that: *(i)* the Claimant was not a protected investor at the time of the alleged breaches as required by NAFTA Articles 1116(1) and 1117(1); *(ii)* the Claimant has not made out a *prima facie* damages claim under NAFTA Articles 1116(1) and 1117(1); and *(iii)* the Challenged Measures do not "relate to" the Claimant or its investment pursuant to NAFTA Article 1101(1). These three jurisdictional challenges are together referred to as the "**temporal objections**".

102. The Tribunal has considered all the relevant factual and legal arguments presented in the Disputing Parties' written submissions and oral presentations. The fact that any argument, allegation or specific piece of evidence is not mentioned in the following summaries or Tribunal's analysis does not mean that the Tribunal has not considered it.

103. As was stated by the Tribunal in paragraph 49 of PO3, the issue of the legal status of the Claimant at the time of the alleged breaches of NAFTA Articles 1102 and 1105 is at the heart of Canada's temporal objections. Each of Canada's three temporal objections rely, to a significant extent, on analysis of the same issues, namely *(i)* the proper construction of NAFTA Articles 1101(1), 1116(1) and 1117(1) and *(ii)* the legal effect of the steps pursuant

to which Westmoreland became the owner of the Canadian Enterprises. Accordingly, the Parties' respective arguments are considered below under the general heading of Canada's temporal objections.

104. As a preliminary point, whilst at times counsel for Westmoreland referred generically to Westmoreland irrespective of whether referring to WCC or to Westmoreland, the Tribunal has sought to identify precisely the entity to which it refers throughout this Final Award.

A. THE TEMPORAL OBJECTIONS

105. The relevant NAFTA Articles provide as follows:

"**Article 1101: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

[…]

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

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

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

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

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

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.

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

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

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

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

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.

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

4. An investment may not make a claim under this Section."

(1) The Parties' Positions

a. Respondent's Position

106. Westmoreland cannot bring a claim either on its own behalf or on behalf of WCC. Westmoreland was constituted on 31 January 2019 and its first investment in Canada was made on 15 March 2019 when it acquired WCHI and Prairie. It was only at this point that it became an investor of Canada and the Tribunal's jurisdiction *ratione temporis* is limited to claims arising out of a breach and consequential loss which occurred after that date. Loss, if any, arising from the Challenged Measures cannot have been suffered by Westmoreland as it did not exist at the time of those measures, such that it could not have been a protected investor at the time of the alleged Treaty breaches.

107. WCC's investment in Canada commenced in 2014 when it acquired the Canadian Enterprises. Westmoreland and WCC's investments are different, acquired at different times and Westmoreland and WCC are different entities. Only WCC can have a claim against Canada for damage allegedly suffered by the Challenged Measures.

Burden of proof

108. The burden is on Westmoreland to prove it has met NAFTA's jurisdictional requirements. This can be seen from *Vito G. Gallo v. Canada* ("***Gallo***")[24] where the tribunal held: "a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage."[25] A jurisdictional objection is not a defence because there is no presumption in favour of jurisdiction and therefore there is no burden of proof on Canada. Westmoreland's expert, Professor Paulsson, accepts this in his first report.[26]

Does the NAFTA require that Westmoreland was an investor of a Party at the time of the alleged breach in order to establish jurisdiction ratione temporis*?*

109. The Challenged Measures occurred on or before 2016. Westmoreland had not then come into existence, WCC was then the entity which was an investor of a Party. WCC commenced proceedings under Section B of the NAFTA against Canada, asserting substantially the same breaches and loss as are now claimed by Westmoreland. WCC and Westmoreland are distinct investors, separately constituted, unrelated and unaffiliated and they transacted at arm's-length. WCC is still in existence and could have continued its claim, yet it chose to withdraw its claim against Canada. There is no provision in the NAFTA entitling one investor to file a claim on behalf of a second investor and its investments, or to assign or otherwise transfer such a claim. It is widely accepted that a claimant must have been an investor at the time of the alleged breach and Westmoreland was not.

110. The substantive obligations under Section A of NAFTA Chapter Eleven are only owed to an "investor of a Party." If such an obligation is breached it is only that investor which has standing to bring a claim under Section B. The relevant Treaty provisions which establish the scope of the arbitration clause under NAFTA Chapter Eleven include Articles 1101, 1116 and 1117[27] and a disputing investor must satisfy each of these provisions to have jurisdiction to commence an arbitration. This can clearly be seen from the wording of these Articles which must be read together and in context in order properly to construe them.

111. Article 1101 defines the scope of Chapter Eleven. When read in the context of Articles 1116 and 1117, Article 1101 establishes that there must be a connection between the measures being challenged and the investor of the party bringing the claim, namely the

[24] RLA-021.

[25] RLA-021, para 227.

[26] Paulsson 1, para 71.

[27] RLA-026, para 120.

claimant. The measures referenced in Article 1101 are those measures alleged to have breached NAFTA Chapter Eleven and the relevant investor of another party is the investor bringing the claim under Articles 1116 and 1117. This was confirmed by the tribunal in *Apotex v. United States of America* ("***Apotex***"),[28] in stating that "[…] the [challenged measure] must relate to the Claimants as investors or to their investments […] within the meaning of NAFTA Article 1101(1)."[29] It cannot be possible for a putative claimant to create the necessary connection through its own actions after the fact. Consistent with the approach of every NAFTA tribunal and the understanding of the NAFTA Parties, Westmoreland must show that the Challenged Measures relate to it as an investor of a party. Westmoreland cannot show this as it was not in existence at the time the Challenged Measures were enacted.

112. A putative claimant cannot assert that an investment it now owns was subject to treatment in breach of the NAFTA at some prior stage before it itself acquired the investment. This can be seen from a proper construction of Articles 1116 and 1117. The title of Article 1116 is 'Claim by an Investor of a Party on its Own Behalf'. This makes it clear that to have the right to bring a claim under Article 1116, a claimant must firstly show a breach of an obligation owed to it and, secondly, that it has itself suffered loss or damage arising out of that breach. A claimant is not permitted to bring a claim on behalf of another investor which has suffered loss. This was the conclusion reached by the tribunal in *Mesa Power v. Canada* ("***Mesa***")[30] which held that its "[…] jurisdiction *ratione temporis* [was] limited to measures that occurred after the Claimant became an 'investor' holding an 'investment' […]"[31] and "[…] the investor must establish that it was seeking to make the very investment in respect of which it makes its claims."[32]

113. Turning to Article 1117, it cannot be correct that an enterprise is owed obligations independent from the owning investor; Prairie, as a domestic enterprise, is owed no independent Treaty protection. Article 1117(4) makes clear that an investment cannot itself make a claim. Article 1117 merely allows an investor to claim indirect damages incurred by a domestic enterprise that it owns or controls at the time of the treaty breach. This was confirmed by the tribunals in *B-Mex, LLC and others v. United Mexican States* ("***B-Mex***")[33] and in *Gallo,* where the tribunal noted that to have a right to claim under Article 1117, "[…] the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time" and

[28] RLA-046.

[29] RLA-046, paras 6.2-6.3.

[30] RLA-020.

[31] RLA-020, para 327.

[32] RLA-020, para 330.

[33] RLA-022, para 145.

"[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."[34] Article 1135 does not alter this; whilst it provides that damages payable under Article 1117 are payable to the enterprise, that does not mean the obligations are owed to the domestic enterprise. Westmoreland cannot bring a claim on behalf of the Canadian Enterprises as it did not own or control them at the time of the alleged breaches.

114. The rationale for this requirement is that protection afforded under the NAFTA begins when an investor takes a risk and makes an investment. Article 1139 contains the definition of "investment of an investor of another Party" requiring that the investment be owned or controlled by the relevant investor. This is also clear from the French text which provides '*investissements effectués par les investisseurs d'une autre Partie*' in place of 'investment of an investor of another Party'; the word '*effectués*', meaning 'to make', again evidencing that the investment only commences when it is made by the claimant investor. The same can be seen from the Spanish text which uses the words "*realizar*", again meaning "to make".

115. Westmoreland's claim is made pursuant to Articles 1102 and 1106, yet both refer to the protection being accorded to 'investments of an investor of another Party.' An investment can only be made once, by one investor; WCC's investment is distinct from Westmoreland's investment. The Challenged Measures must relate to Westmoreland's investment and yet Westmoreland was not in existence at the time of the Challenged Measures. Neither Westmoreland nor its investments could have been treated in an unfair or discriminatory manner when they did not even exist at that point in time.

Is Westmoreland a successor entity to WCC?

116. Westmoreland's submission that it is the same investor as WCC must also fail. Canada is not seeking to elevate form over substance. The issue to be determined is the legal personality of the investor. Canada's consent to arbitrate under NAFTA Chapter Eleven is limited to an 'investor of a party' as defined in NAFTA. To determine whether, or not, Westmoreland falls within that definition the Tribunal must determine whether Westmoreland is the same entity as WCC, merely with a new corporate form following WCC's reorganisation, or whether it is a separate investor. To determine this issue the Tribunal must undertake a case-specific, fact-based enquiry, subject to US domestic law. However, Westmoreland has presented no expert evidence as to the relevant US law to support its assertion that Westmoreland is substantially the same investor as WCC, emerging through a bankruptcy with merely a change in corporate form.

[34] RLA-021, paras 324-330.

117. Westmoreland is not the same entity as WCC. Westmoreland's formation document[35] evidences that it was created by WCC's first-tier lien holders and not by WCC. It was constituted as a new entity on behalf of the first-tier lien holders to purchase certain assets from WCC in an arms-length transaction to satisfy partially the first-tier lien holders' claims against WCC. The first-tier lien holders, as WCC's creditors, were adverse to WCC[36] so Westmoreland must equally have been adverse to WCC.

118. WCC, a corporation, and Westmoreland, a limited liability company, have continued to co-exist as independent corporate entities. The US Bankruptcy Court confirmed its approval of the amended joint Chapter 11 plan of WCC and certain of its debtor affiliates, holding that the Stalking Horse Agreement and other relevant transaction documents for Westmoreland's acquisition of the Canadian Enterprises were "negotiated, proposed and entered into by [WCC and the first-tier lien holders] and [Westmoreland] without collusion, in good faith and from arm's-length bargaining positions. [Westmoreland] is not an 'insider' of the [first-tier lien holders], as that term is defined in section 101(31) of the Bankruptcy Code."[37] Affiliates are included in the Bankruptcy Code definition of 'insider' and an 'affiliate' is defined in the Bankruptcy Code as an entity owning or controlling the debtor, that is owned by the debtor, or that is owned by an entity owning or controlling the debtor.[38]

119. The US Bankruptcy Court also determined that Westmoreland would not face successor liability[39] and the Notice of Auction for the sale of WCC's assets stated that "[t]o the greatest extent allowable by applicable law, the Successful Bidder shall not be deemed, […] to (a) be a legal successor, or otherwise be deemed a successor to the WLB Debtors […]; (b) have, de facto or otherwise, merged with or into the WLB Debtors; or (c) be an alter ego or mere continuation or substantial continuation of the WLB Debtors […]."[40] The effect of this is that Westmoreland could not be held liable for WCC's obligations solely by virtue of acquiring its assets. This of course would not have been possible had Westmoreland purchased an equity interest in WCC. This successor liability protection was a selling feature for any potential buyer of WCC's assets and it was noted by WCC in the sales notice that the first-tier lien holders would not have entered into the Stalking Horse Agreement without this protection. It cannot be the case that Westmoreland can be the same entity as WCC and yet not assume all its liabilities; had Westmoreland been a

[35] Ex R-081.

[36] Westmoreland's founding member was Thomas Moers Mayer (the "**Member**"), a partner at the law firm which represented the first-tier lien holders in WCC's bankruptcy proceedings. Westmoreland was initially owned by its Member.

[37] Ex R-063, para 47.

[38] Coleman 1, fn 103 and Coleman 2, fn 19.

[39] Ex R-054.

[40] Ex R-054.

successor entity to WCC it would have acquired all of WCC's assets and assumed all of its liabilities.

120. Finally, given the US Bankruptcy Court found that *(i)* the transaction between WCC and Westmoreland was at arm's-length, *(ii)* the two companies were not insiders and *(iii)* Westmoreland would not have successor liability to WCC, the US Bankruptcy Court clearly also was of the belief that WCC and Westmoreland were not the same entity under US law. On this basis, the US Bankruptcy Court effectively determined that neither Westmoreland nor WCC owned or controlled the other and further that Westmoreland was not owned nor controlled by any entity that also owned or controlled WCC. This is binding upon Westmoreland.

121. Westmoreland is therefore not a successor entity to WCC.

Can a NAFTA claim be sold or otherwise transferred?

122. Westmoreland first contends that where the claimant and the previous owner of the investment in question held the same nationality, it is not necessary that the claimant had to be a protected investor at the time of the alleged breach, citing in support the decision in *STEAG v. Spain* ("***STEAG***")[41] and award in *GEA Group Aktiengesellschaft v. Ukraine* ("***GEA Group***").[42] Westmoreland incorrectly relies on these cases for its proposition that as both it and WCC have US nationality, that is sufficient for jurisdictional purposes. The tribunals in both these cases held the reverse, namely that even where the claimant and the previous owner of the investment in question held the same nationality, the claimant still had to have been a protected investor at the time of the breach. It is of note that in any event given that not all the first-tier lien holders have been identified by Westmoreland nor has their nationality or respective interests in Westmoreland been detailed, this argument is not available to Westmoreland. For Westmoreland's jurisdictional argument to have any validity, continuity of US nationality is critical, but it is not possible to verify the nationality of the first-tier lien holders in circumstances where they are not all identified.

123. Westmoreland then contends that in circumstances where there has been a transfer of the claim, the claimant has jurisdiction to bring a claim under the NAFTA if *(i)* there has been a *bona fide* investment and *(ii)* the transfer is between companies that have a continuity of interest and a closeness between them.[43]

124. WCC's claim was withdrawn in July 2019 and therefore no longer existed after that date and, as such, could not thereafter be assigned. The claim before this tribunal is the claim

[41] RLA-056.

[42] RLA-023, para 170.

[43] Tr. Day 1, p. 139:2-15.

commenced by Westmoreland in August 2019. Westmoreland's claim is not the same claim as WCC's claim. NAFTA does not provide a mechanism for the transfer of a claim and a transfer is not otherwise facilitated by a rule of international law. Other than very specific circumstances expressly agreed by the contracting states, such as where there has been subrogation, a NAFTA State's consent to arbitrate is specific to the investor of the party which brings the claim. Indeed, a provision permitting a subrogated claim to be brought would be unnecessary if Westmoreland's contention that a claim could be transferred were correct.

125. It is established case law that where an investment is sold or transferred after the date of an alleged breach, no subsequent owner will acquire a right to advance a treaty claim. For example, in *Daimler Financial Services AG v. Argentine Republic* ("***Daimler***"), the tribunal held that "[…], the rationale for recognizing the severability of a damages claim from the underlying asset may be even stronger in the case of ICSID claims, since a strong argument can be made that the ICSID Convention and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment. […] This follows from the nationality requirement of the ICSID Convention and most BITs, as well as from the fact that most BITs afford standing to bring ICSID 'claims' only to 'nationals' or 'companies' of the other State Party which made an investment in the Respondent State prior to the advent of the facts or circumstances giving rise to the dispute."[44]

126. The same can be seen in *EnCana v. Republic of Ecuador* ("***EnCana***") where the tribunal held that the right to file a claim remained with the investor that held the investment at the time the dispute arose (being the time at which loss or damage is caused to an investor as a result of a breach of the treaty).[45] Whilst the tribunal may not have expressly addressed the question whether a subsequent purchaser can also bring a claim, it cannot be the case that each subsequent purchaser can file a claim in addition to the initial investor. Again, in *Mondev v. United States of America* ("***Mondev***"), the tribunal held that the fact the investor no longer owned or controlled the investment did not mean it had lost its right to bring a claim.[46]

127. Westmoreland says that these cases do not expressly address the right of the party to whom the claim is assigned or otherwise transferred to bring a claim, only addressing the right of the transferor party to bring a claim and not the right of the transferee. Westmoreland's construction, however, would produce an unreasonable outcome. Under Article 1116(2), a claimant must bring a claim within three years of when it gained or should have gained

[44] RLA-054, para 144.

[45] RLA-053, para 131.

[46] RLA-035.

knowledge both of the alleged breach and that it has suffered loss as a result. If Westmoreland's construction were correct, this limitation period could be indefinitely tolled by an investor selling its investment to an investor that has only just come into existence and hence has only at that point gained the requisite knowledge, with that process being continually repeated to ensure the limitation period is never triggered. Article 1121(1) would also be rendered meaningless. Any investor, after selling its investment to a newly incorporated investor, could then commence international or domestic proceedings for damages as only the investor which decided to commence the NAFTA Chapter Eleven claim would need to waive that right. All former investors would retain the right to claim in international or domestic proceedings in respect of the same measure and investment. It would open up NAFTA dispute resolution to an indeterminate class of claimants, encourage claim-shopping in that the claim would be an acquirable asset and risk overlapping claims and divergent outcomes with respect to the same measure, none of which can have been the intention of the NAFTA Parties.

128. Turning to the cases relied upon by Westmoreland, two did not involve the transfer of the investment after the date of the treaty breach and are thus inapplicable here.[47] The third case cited by Westmoreland is *African Holding* where *(i)* the claims were denied on jurisdictional grounds; *(ii)* the *dicta* relied upon by Westmoreland is *obiter*; and *(iii)* the case relates to a transfer between two affiliated companies and is thus distinguishable on the facts.[48] Although *CME v. Czech Republic* involved the transfer of the investment after the treaty breach, it is again distinguishable for the following reasons: *(i)* the investment in question comprised shares transferred from a parent to subsidiary; *(ii)* the challenged measures occurred both before and after the transfer; *(iii)* the Czech Republic's jurisdictional argument with respect to the pre-transfer measures was only made at the hearing; *(iv)* the tribunal recognised that the Czech Republic had prospectively authorised the transfer; *(v)* the definition of investment included rights derived from acquired shares; *(vi)* the treaty language had no equivalent wording to NAFTA Article 1101 and thus the tribunal concluded the treaty in question did not require the investment to have been owned or controlled by the claimant at the time of the breach; and *(vii)* as the parent continued to hold the investment indirectly, it remained protected and indeed had been protected from the time of the breach to the time of filing the claim.[49] It is also of note that this decision has not been followed. Finally, *S.D. Myers* did not involve the assignment of a claim after the date of the alleged breach.

[47] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5) (where the alleged breach occurred in March 2000 after the share transfer had happened in August 1998 – paras 26 and 33 of CLA-020) and *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) CLA-022.

[48] CLA-031.

[49] CLA-021.

129. If no rule exists in the Treaty permitting an investor of a party to buy a claim from a disputing investor and then itself pursue it, it is not open to Westmoreland to look for rules in international law to assist it. Whilst Westmoreland asserts there is ample evidence of customary international law to this effect, it has not adduced any State practice or *opinio juris* demonstrating this and none of the cases it cites refer to a principle of 'continuity of interest'. For the Tribunal to agree with Westmoreland, it would entail a significant expansion of international law, potentially enabling major financial institutions with no foreign investment other than the loans they make, to have standing in ISDS proceedings.

130. Westmoreland's submission that there is continuity of interest between it and WCC also has no validity. Westmoreland's argument as to why WCC's NAFTA claim was validly transferred to it has shifted significantly since it commenced its claim. Initially, Westmoreland asserted it had a "continuing beneficial interest" as a consequence of the interests of WCC's first-tier lien holders or that there was a "continuity in the beneficial interest"[50] and that the first-tier lien holders controlled Westmoreland and its assets. In its Rejoinder, Westmoreland then asserted that WCC could assign the NAFTA claim due to a "continuity of interests"[51] (a concept not referred to in its Counter-Memorial on Jurisdiction) and appeared to limit the time period over which the first-tier lien holders had control over WCC to the period of the bankruptcy. It has variously characterised its relationship with WCC as one of associated companies, corporate affiliates, reflecting a continuity of beneficial interest and finally just representing a continuity of interest without reference to the interest being beneficial.

131. Continuity of interest is a US tax law concept and Westmoreland has not explained how and why this US tax concept applies to Canada's jurisdictional challenge. Whilst Westmoreland had the opportunity to adduce expert US bankruptcy and tax law evidence it chose not to do so.

132. There is no reference in NAFTA Chapter Eleven to the term 'continuity of interest' and such a term is not referred to in any case law on the record or academic writings. US tax law is not the applicable law, however, even if it were, there is no ruling from any US tax authority or US court and no audit on record that there has been continuity of interest between WCC and Westmoreland. Westmoreland has not sought such a ruling, and its Disclosure Statement filed with the US Bankruptcy Court noted that "[n]o opinion of Counsel has been obtained and the [first-tier lien holders] do not intend to seek a ruling from the IRS as to any of the tax consequences of the Plan discussed below. The discussion below is not binding upon the IRS or the courts. No assurance can be given that the IRS would not assert, or that a court would not sustain, a different position than any position

[50] Claimant's Counter-Memorial on Jurisdiction, para 9.

[51] Claimant's Rejoinder on Jurisdiction, Section IV.

discussed herein."[52] Westmoreland has merely self-judged that there is continuity of interest, it has not filed any expert or other evidence in support of its assertion of continuity of interest. This can be contrasted with the US Bankruptcy Court's legally binding finding that WCC and Westmoreland are not affiliated. The determination of whether Westmoreland can qualify for certain tax benefits is a distinct enquiry from whether it was an unaffiliated buyer of WCC's assets.[53]

133. It must also be recognised that the Type G reorganisation where assets are purchased from a debtor is not the equivalent of a debt for equity swap. Westmoreland accepts that the first-tier lien holders had various options when deciding whether or not to follow the Type G reorganisation process. It was their choice to adopt a process that enabled them to purchase assets from WCC in an arm's-length transaction through an acquisition vehicle that they owned or controlled at all material times for tax purposes. The fact that this decision resulted in them not having standing to bring a NAFTA claim is not Canada's responsibility but is a consequence of a decision made by the first-tier lien holders themselves.

134. Westmoreland's assertion that the first-tier lien holders controlled WCC and the bankruptcy process is equally unavailing. Although one of the transaction steps involved WCC holding the equity in Westmoreland before the equity was then distributed to the first-tier lien holders to satisfy their claims, this was only one step. At no time did WCC have a meaningful role or relationship with respect to Westmoreland's management or operations. The asserted control is in any event irrelevant because *(i)* the bankruptcy occurred three years after the date of the alleged breach and *(ii)* the first-tier lien holders' control (if any) is not the same as control by Westmoreland. The first-tier lien holders are not the claimant, there is a separate legal personality between Westmoreland and its owners and there is no mechanism under NAFTA for piercing the corporate veil to find jurisdiction. Pursuant to NAFTA Article 1139, an "investment of an investor of a Party" must be held directly or indirectly by the actual investor of the Party. The reference to an indirect holding permits the Tribunal to look down the corporate chain (as the tribunal did in *Waste Management II*[54]) but it cannot look up the chain.

135. Even if piercing of the corporate veil were permitted it still would not assist Westmoreland as the first-tier lien holders neither controlled WCC nor the bankruptcy process[55] nor did they control WCC through debt instruments (as confirmed by the US Bankruptcy Court). Ms Coleman's comments referred to by Westmoreland have been taken out of context; the parties to the RSA other than WCC (the debtor) do not control the bankruptcy process.[56]

[52] Ex C-044, Sch 1.

[53] Coleman 2, para 33.

[54] CLA-014.

[55] Coleman 2, para 23.

[56] Coleman 2, para 27.

WCC had a fiduciary duty to maximise the value of its assets for the benefit of all stakeholders and not just for the benefit of the first-tier lien holders. This can be seen from the 'fiduciary out' provision in the RSA permitting WCC to terminate the RSA in favour of a better alternative.

136. Despite Westmoreland's criticism that Canada is making an argument that elevates form over substance, the reality is that in asserting that the purchase transaction was merely a case of reshuffling equity between affiliates, it is Westmoreland that is elevating form over substance.

The NAFTA States' understanding

137. The NAFTA States also all agree with Canada's construction of Articles 1101(1), 1116(1) and 1117(1)[57] and the Tribunal should accord considerable weight to these views.

138. In its non-disputing party submission, Mexico confirms its agreement that "Articles 1101(1), 1116(1), and 1117(1), read together, set a temporal limitation on a NAFTA tribunal's jurisdiction, requiring a claimant to demonstrate that it was an investor of a Party, as defined in Article 1139, when the alleged breach occurred."[58] Mexico also agrees that Article 1101(1) sets a threshold requirement that there be a connection between a claimant bringing the claim and the challenged measure. In other non-disputing party submissions Mexico refers to that connection as being "a legally significant connection between the impugned measure and [the investor of the party] or its investment", "[…] some indirect economic effect" being insufficient.[59]

139. Although it did not file a non-disputing party submission in the present case, the United States has stated that "[…] a claimant (*i.e.* the investor bringing the claim) must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach, and incurred loss or damage thereby. There is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor."[60] Article 1101(1) cannot be satisfied by "the mere, or incidental, effect that a challenged measure had on a claimant" again referring to the need for a "'legally significant connection' between the measure and the investor or its investment. […] Negative impact of a challenged measure on a claimant, without more, does not satisfy the

[57] The position of the United States that "[…] there must be a legally significant connection between the complained of measures and the specific investor who is the claimant, or its investments" can be seen from its Reply Memorial in *Methanex Corporation v. United States of America*, RLA-072, p 44. The position of Mexico is to be found in its non-disputing party submission in the instant arbitration.

[58] Mexico's Non-Disputing Party Submission, para 2.

[59] RLA-075, para 8.

[60] RLA-076, para 11.

standard. Rather a 'legally significant connection' requires a more direct connection between the challenged measure and the foreign investor or investment."[61]

Westmoreland has not suffered any loss

140. Westmoreland must identify loss it itself has suffered; it cannot bring a claim on behalf of another investor who has suffered loss. This is clear from the text of Articles 1101(1), 1116(1) and 1117(1) and is confirmed by the three NAFTA States and the tribunal in *Mesa*.

141. Westmoreland has suffered no damage. The losses referred to in its Notice of Arbitration all crystallised before Westmoreland was incorporated and became an investor of a party such that Westmoreland cannot show any damage, even on a *prima facie* basis. The loss alleged to have been suffered by Westmoreland in its Notice of Arbitration is WCC's loss. This inability to show any loss suffered means there can be no jurisdiction, as was held by the tribunals in *UPS v. Canada* and *Saluka v. Czech Republic*[62] and is again confirmed by the NAFTA parties.

142. Westmoreland has included new arguments as to its loss in its jurisdictional submissions which are not contained in its Request for Arbitration, but none has any validity. Firstly, Westmoreland says that it can claim losses on behalf of WCC under Article 1116(1) for an alleged violation of WCC's expectations, but an investor cannot claim for a loss to a separate investor. Secondly, it claims the losses suffered by Prairie in 2016 pursuant to Article 1117(1), but again an investor cannot make a claim on behalf of another investor's enterprise. Canada does not independently owe obligations to Prairie, a domestic investor, as Prairie's losses are claimable only by a protected investor, which Westmoreland is not. Thirdly, Westmoreland claims pending damage but no such pending damage exists; the losses claimed are for the loss caused by conclusion of the Off Coal Agreements which is the loss claimed by WCC and which loss WCC claimed was certain. The fact the payments are made over a period of time is irrelevant, the methodology for allocating the payments was determined in 2016 such that the resulting damage, if any, was certain as at that time. Westmoreland made its investment in 2019 with full knowledge of the existence of the Off Coal Agreements and the existing regulatory environment and it cannot claim any pending loss as a result. It is without doubt that the losses claimed by Westmoreland are in fact losses suffered by WCC in relation to an investment made by WCC.

143. In conclusion, it is not Canada that is seeking a windfall in this matter but Westmoreland. When examining the equities (to the extent they are relevant) it is relevant to note that the beneficial owners of WCC and Westmoreland are not the same; indeed, WCC's beneficial owners are not participating in this arbitration. Any beneficiary of an award will be

[61] RLA-073, paras 6-7.

[62] RLA-025 and RLA-024.

Westmoreland's beneficial owners, namely the first-tier lien holders but Westmoreland accepts that the debt that was owed to the first-tier lien holders was satisfied through WCC's bankruptcy process.[63] If successful in this claim, the first-tier lien holders will therefore be the recipient of a windfall of a CAD$ 470 million NAFTA Award.

144. There is no bad faith on the part of Canada. It was Westmoreland that sought to substitute itself for WCC at a time that it had already acquired WCC's NAFTA claim and that wanted WCC to be withdrawn from the proceedings. When Westmoreland sought to amend WCC's claim to substitute itself for WCC, Canada advised that an investment claim cannot be amended if the effect is to cause the amended claim to fall outside of the NAFTA's jurisdiction, referring to *Merrill & Ring v. Canada* in support.[64] The essential point is that the claim Westmoreland seeks to bring is not the claim that was brought by WCC; WCC's claim was withdrawn and Westmoreland commenced a new claim.

b. Claimant's Position

145. Westmoreland meets the requirements of Articles 1101, 1116 and 1117. It is common ground that: *(i)* Prairie is a mining enterprise in Alberta (thus qualifying under the definition of 'investment' pursuant to Article 1139); *(ii)* Prairie was owned at all material times by an American company, namely WCC at the time of the Challenged Measures and Westmoreland at the time the arbitration was commenced; *(iii)* there was no abuse of process in the restructuring of WCC; and *(iv)* this issue must be determined by reference to the Treaty text and customary international law, not the US Bankruptcy Code.

146. Westmoreland does not bear the burden of proof. Westmoreland referred to *Grand River v. United States of America* ("***Grand River***") saying that the Tribunal in that case held that "Investment Tribunals have declined to adopt a method whereby one of the Parties carries the burden of proof in matters of jurisdiction. They have adopted a different approach to deciding whether jurisdiction exists. Under this method, the decision-maker looks at the preponderance of authority for or against jurisdiction. […] A focus on burden of proof is not the correct approach."[65] Westmoreland further submits that given Canada has brought its jurisdictional challenge by way of defence, the burden of proof in relation to its jurisdictional defences lies with Canada as it does with all elements of Canada's defence.

[63] Coleman 1, fn 72 as accepted by Westmoreland, Claimant's Counter Memorial, App A, paras 28-30.

[64] Ex R-076.

[65] Tr. Day 1, p. 101:13-21. The Tribunal notes this is not an accurate citation from *Grand River*. The tribunal held in *Grand River* that whilst both parties had presented extensive evidence to support their positions and the tribunal had considered all of the extensive documentation produced without excluding any evidence on the ground that it was belatedly produced, "[..] the Tribunal did not find it necessary to determine which Party had a burden of going forward with the evidence." RLA-030, para 37.

Does the NAFTA require that Westmoreland was an investor of a Party at the time of the alleged breach in order to establish jurisdiction ratione temporis*?*

147. Pursuant to Article 31 of the VCLT, the first step of treaty interpretation is to consider the plain language of the treaty, to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Canada asserts that the entity that existed at the time of the alleged breach must be the same entity as existed at the time the claim is commenced, but nowhere in the NAFTA text can be found the phrase "at the time of the alleged breach". The object and purpose of the Treaty (being to promote investment and permit ownership transfers related to the investment in fairness and equity) do not support this interpretation which would deny jurisdiction when an investor restructures in bankruptcy for ordinary business reasons. No supplementary means of interpreting the Treaty are necessary as the Treaty text is not ambiguous and the result not manifestly absurd. All that is required is diversity of nationality and a tribunal has jurisdiction when corporate change occurs for a legitimate business purpose, there is continuity of interest and the right to assert the claim is connected to the claimant's *bona fide* investment.

148. Articles 1116(1) and 1117(1) stand on their own and do not need to be interpreted with reference to Article 1101(1). Neither Article 1116(1) nor Article 1117(1) contains a temporal requirement; there is no express provision that a claimant must be an investor of a Party at the time when the alleged breach of the Treaty occurred. They both impose nationality requirements which Westmoreland satisfies, Westmoreland being a US limited liability company that made an investment in Canada (Prairie) which in turn satisfies the definition of 'investment' in Article 1139.

149. The NAFTA drafters could have included an express provision requiring that the claimant be the same entity as that which owned the investment at the time of the alleged treaty breach but they did not, notwithstanding that they did insert temporal provisions in other Articles such as Articles 1116(2) and 1117(2).[66] Indeed, in Article 1108(4), the treaty drafters used the 'at the time of' language Canada seeks to imply as follows: "No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective."

[66] Article 1116(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.

Article 1117(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.

150. The definition of "investment of an investor of a Party" is contained in Article 1139. Canada says that this requires that the investment be owned by the "relevant investor"[67] but in fact the definition in Article 1139 states that it is "an investment owned or controlled, directly or indirectly, by an investor of such Party." There is no reference to 'relevant investor'.

151. Canada also places emphasis on the French text of Article 1101 and the use of the word '*effectué*' such that, it says, the investment is made when 'a particular investor' makes its investment but again the words 'particular investor' cannot be found in the text of the NAFTA. Canada relies upon the use of the word '*effectué*' in its submission that an investment can only be made once, and yet this is not what Article 1139 states, it merely requires that there is ownership or control, which could come by way of sale or acquisition.

152. Article 1101 reinforces the nationality requirement set out in Articles 1116 and 1117 and again has no 'at the time of the breach' wording. It provides that "[t]his Chapter [Eleven] applies to measures adopted or maintained by a Party relating to […]". The ordinary meaning of this is that the challenged measures must relate to the investor or the investment. Canada has adduced no legal materials to support its restrictive interpretation of 'relating to'. Canada's reference to *Apotex* as supporting its contention that Article 1101(1), when read together with Articles 1116(1) and 1117(1), requires that the measure complained of must relate to the protected investor or investments is wrong. The *Apotex* tribunal dismissed the restrictive interpretation asserted now by Canada, instead finding that "[…] there is no reason to interpret or apply NAFTA Article 1101(1) as an unduly narrow gateway to arbitral justice under NAFTA's substantive provisions […]" instead holding that the claimant had established a "sufficient legal connection".[68]

153. Whilst Canada asserts that an investment *per se* is not owed any treaty obligation, it can be seen that the obligations owed under Articles 1102 and 1105 expressly apply to investments and pursuant to Article 1135, any award for restitution or compensation paid pursuant to Article 1117 must be paid to the investment enterprise and not to the claimant. This suggests that an investment enterprise is owed obligations and may be owed damages, provided it is owned by a foreign investor who submits the claim.

154. Canada's argument requires a static view of 'investment' which is inconsistent with the NAFTA's object and purpose. Measures can breach treaty provisions and continue to inflict damages for a considerable time after the Measure is adopted. Hence Articles 1116(2) and 1117(2) distinguish between the date on which the investor or investment has knowledge of the breach and the date on which there is knowledge that damage has been incurred as a

[67] Tr. Day 1, p. 31:16.

[68] RLA-046, paras 6.27-6.28.

result of such breach. Damage has continued to be incurred after WCC's bankruptcy and this damage is now being incurred by Westmoreland.

155. Given that the ordinary meaning of Articles 1101, 1116 and 1117 when read together is not ambiguous or obscure and does not lead to a result which is manifestly absurd or unreasonable, it should not be necessary to have recourse to any supplementary means of interpretation. However, without any express NAFTA text answering the question, the Tribunal may choose to consider the relevant caselaw to determine whether a prescriptive legal norm, as argued by Canada, exists in customary international law. However, none of the cases cited by Canada presents a factual scenario directly comparable to the current case.

156. The first of the two NAFTA cases principally relied upon by Canada is *Gallo*.[69] The particular sentences relied upon by Canada are, firstly, "[…] for Chapter II of the NAFTA to apply to a measure relating to an investment, that investment must be owned and controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained" and secondly, when considering the Article 1117 claim, "[…] the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time."[70] These statements do not support Canada's interpretation. The first sentence demonstrates that all that is required for there to be jurisdiction is that at the time of the alleged treaty violation, 'an' investor of another party owns or controls the investment to which the challenged measures relates: there is no requirement that that investor must be the same investor as the investor which brings the NAFTA claim. The word 'and' does not mean that the investor must be the same entity at the time of the alleged breach and the time the claim is commenced. The reason the *Gallo* tribunal found it had no jurisdiction was the lack of foreign ownership, there was merely a domestic investment owned by a domestic investor.

157. Canada argues with respect to the second sentence cited that "Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted." This is not the *ratio decidendi* of the *Gallo* award. It is important to consider this in the context of the facts of the case. The *Gallo* tribunal found that a Canadian person was the true owner of the investment such that the agency transaction between the Canadian individual and Mr Gallo was a sham. It was for this reason that the *Gallo* tribunal declined jurisdiction. Having found that there was no foreign ownership, the *Gallo* tribunal did not consider whether, for jurisdiction to be established,

[69] RLA-021.

[70] RLA-021, para 325.

there had to be continuity of ownership between the date on which the breach occurred and the date on which the claim was commenced.

158. Turning to the second case on which Canada relies, *Mesa Power*, the tribunal declined jurisdiction on the basis that there was no existing foreign investment at the time of the measures being challenged. This is not the case here where an American investor, WCC, owned or controlled investments in Canada at the time of the Challenged Measures. Such foreign ownership and foreign investment activated Canada's NAFTA foreign investment protection obligations.

159. Canada has also cited *B-Mex* in support of its submissions but that case is not applicable because the claimant in that case had never made an investment in the entity on behalf of which the claim was brought.

160. The non-NAFTA cases cited by Canada are equally non availing; none holds that the claimant must have been the owner of the investment at the time of the alleged breach and at the time of commencement of the arbitration and all are distinguishable on the facts. Whilst they state the requirement of a foreign investor and a foreign investment, none expressly states that the identity of the claimant must be the same as the entity which held or controlled the investment at the time the challenged measures were enforced or maintained. Indeed, some expressly permit a transfer of ownership or corporate restructuring where it is undertaken for ordinary business purposes and there is continuity of interest and a closeness between the investor and investment.

161. As stated in *Waste Management II*, "[…] [w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements […]."[71] Professor Paulsson notes that to construe the NAFTA as asserted by Canada would be a "leap" and not a "necessary inference" and that "[s]uch a significant dispositive rule would surely have been spelled out."[72]

162. Canada's submission that an investment can only be made once would also fall afoul of Article 1102, which expressly provides treaty protection to the acquisition, expansion, management, conduct, operation and sale or other disposition of investments. Canada's interpretation is also unsupported by any official interpretative documents.

163. Canada's submissions with respect to Article 1121 and the risk of double recovery or multiple proceedings are not valid concerns. Multiple investors can have interests in the same investment and tribunals ensure that any award issued does not give rise to the risk

[71] CLA-014, para 85.

[72] Paulsson 1, para 32.

of double recovery. Article 1126 permits consolidation of multiple proceedings where there are common questions of fact or law.

164. Canada's concern with respect to the potential for financial institutions to gain ISDS rights is also invalid. Loans with a maturity of more than three years are expressly included in the definition of "investment' in Article 1139.

Is Westmoreland the same entity as WCC?

165. Westmoreland emerged as the successor company to WCC as a result of its restructuring and, as such, is merely a new manifestation of WCC. There has been no allegation from Canada of bad faith or forum shopping and a change to the corporate identity of the investor is not fatal to the jurisdiction of a claim by *ratione temporis*. A corporate restructuring undertaken for a good faith business reason, and which ensures the maintenance of diversity of nationality, will not fall afoul of jurisdictional requirements. Companies with foreign investments frequently change their corporate structures and yet if Canada's interpretation were to be correct, an investor could never change its corporate form post breach; by changing its corporate form it would be deemed to be a different investor. This cannot be correct and would frustrate the NAFTA's objectives to "eliminate barriers to trade", "promote conditions of fair competition in the free trade area" and to "increase substantially investment opportunities in the territories of the Parties".[73]

Can a NAFTA claim be sold or otherwise transferred?

166. Even if Westmoreland is not found to be the same entity as WCC, an assignment or transfer of a claim is permitted, particularly where there has been a continuity of interest between transferor and transferee, which is the case with respect to WCC and Westmoreland. There are at least three applicable principles of international law: *(i)* international law favours access to justice; *(ii)* international law focuses on the plain language of the relevant treaty; and *(iii)* international law favours continuity of interest, a claim may be preserved only when it remains substantially within the ownership of common interest, whether a family or family of businesses.

167. For the purposes of determining a jurisdictional challenge, a tribunal should assume a breach of the relevant treaty. Whilst Canada did not push WCC into bankruptcy, the company that emerged from WCC's bankruptcy, Westmoreland, is a product of a US Type G reorganization that deliberately and specifically assured continuity of interest. The effect of Canada's jurisdictional challenge if successful would be that Canada could push a company into bankruptcy and yet evade liability by asserting lack of jurisdiction with respect to the successor company, thereby gaining a windfall. That cannot be right. There

[73] NAFTA Article 102(a), (b) and (c).

is nothing in NAFTA mandating that the corporate form of the putative claimant can never change between the time of the alleged breach and the time the claim is commenced. There is no official statement of interpretation from the NAFTA Free Trade Commission providing for this. The investment remained Canadian at all points in time and the owners of the investment remained American at all points in time. The investment (ownership of Prairie) and its investor's claim for breach of Articles 1102 and 1105 were transferred through bankruptcy from a parent company to another wholly-owned subsidiary. There was no 'shopping' of the claim, or other treaty manipulation, the restructuring was undertaken in good faith and there is the requisite diversity of nationality. The first-tier lien holders saw value in the NAFTA claim and ensured the claim was preserved during the bankruptcy process. This investment in Canada was owed protection under NAFTA and denial of access to justice would be extreme and unjustified.

168. Whilst Canada asserts that there is no provision in NAFTA permitting the *bona fide* assignment of claims, it is equally the case that there is no provision preventing it. Indeed, such a prohibition would contradict Article 1109(1) as well as the object and purpose of the Treaty. Articles 1101(1) and 1116(1) merely require a NAFTA claim to be brought by *(i)* 'an' investor of a party to whom the challenged measure(s) relate *(ii)* who was the subject of the alleged breaches of obligations contained within Section A as a protected investor of a Party and *(iii)* who suffered damages as a result. Articles 1101(1) and 1117(1) merely require a NAFTA claim to be brought by 'an investor of a Party' 'on behalf of an enterprise of another Party'. Canada's construction is inconsistent with the actual wording of the relevant Articles. Westmoreland complies with the requirements of NAFTA; at the time the Off Coal Agreements were concluded they related to WCC and Prairie and at the time this arbitration was commenced, they related and continue to relate to Westmoreland and Prairie.

169. Case law supports this construction and demonstrates that international law does not favour form over substance; the concern is to allow claims to be made arising from genuine investments of at-risk capital, but to prevent claims arising from a sham transaction or other abuse of process.[74] This is consistent with Article 31 of the VCLT because it represents a good faith interpretation of the Treaty and is in harmony with the Treaty's object and purposes and causes no prejudice to Canada. It also ensures a consistency of approach. What is not permitted is forum shopping; a transfer of ownership that is a sham or otherwise an abuse of investment protection rights is not acceptable. That is not the position in this case.

170. Under international law, the application of the continuity of interest principle such that claims can be assigned can be seen from the cases cited by the Parties. In *CME v. Czech*

[74] CLA-028; RLA-049; and RLA-050.

Republic, ("***CME***") the assignment of the claim from the parent to daughter company did not prove to be a bar to jurisdiction, the tribunal holding that as the relevant investment treaty allows the protection of indirect investments, it must "[…] continuously protect the parent company's investment assigned to its daughter company under the same Treaty regime."[75] Canada wrongly seeks to distinguish *CME, inter alia*, requiring the Tribunal to accept Canada's (incorrect) construction of the NAFTA that a claimant must have owned or controlled the particular investment at the time of the alleged breach. Canada is further incorrect when it says that the relevant treaty expressly included rights derived from acquired shares as part of the definition of an investment. In any event, the NAFTA definition of an investment is equally broad. It is also irrelevant that CME's parent was also treaty protected, the tribunal finding that the assignment from parent to subsidiary was permissible, indeed the case demonstrates that more than one claimant can seek relief for an alleged treaty breach.

171. In *Autopista v. Venezuela*, ("***Autopista***") the transfer was from a Mexican company to a United States company, both owned by a common Mexican company. Whilst Venezuela asserted that the restructuring was an abuse of corporate form as a means to secure ICSID jurisdiction, the Tribunal disagreed, observing: (i) that the transferee had been created eight years before the concession agreement that was a central element of the investment; (ii) the restructuring had been notified to the Venezuelan authorities and approved by them; and (iii) it had a business purpose, namely mobilizing finance in the face of a crisis affecting the Mexican currency.

172. The tribunal in *Koch Minerals and Koch Nitrogen v. Venezuela*, ("***Koch***") permitted an assignment carried out as a part of an internal reorganisation between associated companies within the same Koch group of companies, notwithstanding that the two Koch companies in question had different legal personalities. This was on the basis that "[t]he assignment […] was an internal reorganization between associated companies within the same Koch group of companies. It did not introduce an unrelated third party or materially change the transaction. […] Respondent does not challenge the efficacy of the assignment under the Offtake Agreement. Hence, although different in form, given the different legal personalities of KOMSA and KNI, the assignment produced no material economic, legal or commercial difference in substance."[76] This is precisely the same with the transfer from WCC to Westmoreland; there is no material economic, legal or commercial difference in substance.

173. Again in *S.D. Myers v. Canada*, ("***S.D. Myers***") where a business had been transferred from father to his sons ensuring the business stayed within the family, the tribunal accepted

[75] CLA-021, para 424.

[76] CLA-022, para 6.70.

that "[…] an otherwise meritorious claim should [not] fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs."[77]

174. Jurisdiction was denied in *GEA v. Ukraine*[78] and *STEAG v. Spain*[79] as both involved transfers where there was no prior relationship between the transferor and transferee companies.

175. The submissions made by Canada put form over substance. Prairie is the same investment that has existed the entire period since the Challenged Measures were enacted: at the time of the alleged breach (when Canada's treaty obligations were triggered) it was owned by an American investor, the Challenged Measures continue, payments continue to be made and Prairie is still owned by an American investor, namely now Westmoreland. Canada owed obligations to Prairie under Articles 1102 and 1105 when it was owned by WCC and it continues to owe them now. The NAFTA claim was transferred by WCC to Westmoreland when Westmoreland was WCC's direct wholly-owned subsidiary. Westmoreland is the investor parent of Prairie and Prairie is being damaged by the challenged measures. WCC's first-tier lien holders became the shareholders of Westmoreland as a result of WCC's bankruptcy. Westmoreland's shareholders and Prairie are the appropriate beneficiaries of any award.

176. Whilst Westmoreland terms the nature of the relationship between WCC and Westmoreland a 'continuity of interest', it is not a term of art and other terms could be used. Westmoreland chooses to use this term in the present case given the fact of WCC's bankruptcy reorganisation. Whilst determination of jurisdiction does not rely upon US bankruptcy or tax law, it is necessary to understand the process by which WCC transferred the NAFTA claim to Westmoreland to see the closeness of connection between WCC and Westmoreland.

177. WCC owed in excess of US$ 700 million to the first-tier lien holders. The purpose of the bankruptcy was to ensure these secured creditors received payment for this interest in WCC and by virtue of being secured creditors this gave them the right to 'credit bid' (a process of using outstanding debt to make a purchase) allowing them to take over WCC through a new entity (Westmoreland) using their existing stake in WCC. The transaction steps followed are detailed in a document attached to the Plan of Reorganization. As a part of these steps, after being set up, Westmoreland became a wholly owned subsidiary of WCC

[77] CLA-019, para 229. Other examples cited by Canada which on the facts do not support Canada's construction include *CME v Czech Republic* (CLA-021), *Bayview Irrigation District et al v. United Mexican States* (RLA-029); *Cementownia v. Turkey* (RLA-049); and *Libananco v. Turkey* (RLA-050).

[78] RLA-023.

[79] RLA-056.

and owner of Prairie through its holding of WCHI. WCC then distributed its ownership of Westmoreland to the secured creditors. The final step of the transaction was that the first-tier lien holders took ownership of Westmoreland by taking the membership interest of Westmoreland. Therefore, there was a point of time at which WCC wholly owned Westmoreland and at the same time, Westmoreland wholly owned WCHI which itself wholly owned Prairie. No new money changed hands, there was merely the conversion of debt in WCC to equity in Westmoreland.

178. The debt held by the first-tier lien holders in WCC is a proprietary interest which is preserved in Westmoreland in partial satisfaction of WCC's debt to the first-tier lien holders. The continuity of interest requirement was met because the first-tier lien holders, creditors of WCC, end up as equity owners of Westmoreland such that there is continuous involvement in both companies of the first-tier lien holders. Whilst Westmoreland does not accept generally the conclusions reached by Canada's US law bankruptcy expert, it does accept her view that there is a shift of power and control to secured creditors in this type of reorganisation, such that the secured creditors controlled the material aspects of WCC during the restructuring process. A Type G reorganization under the US Tax Code expressly preserves lender control. The first-tier lien holders chose not to exercise their collateral on WCC's default by way of a debt for equity swap but instead allowed a Type G reorganization which Canada's expert accepts is the "tool of choice to put a quick close to a bankruptcy case […] avoid[ing] time, expenses, and, some would say, the Bankruptcy Code's unbending rules."[80] Pursuant to this objective, the first-tier lien holders executed various documents which gave a number of indicia of control to them. In particular, the RSA, pursuant to which WCC ceded control to the secured creditors. This gave the secured creditors approval rights over all key bankruptcy documents and also ensured a quick and efficient process. The consequence was that the secured creditors exchanged their debt in WCC for the same assets that they could have acquired through a debt for equity swap.

179. The transaction structure adopted, a Type G reorganization, therefore preserved the continuity of interests through a valid assignment. Such continuity of interest between WCC and Westmoreland is recognized by US federal law and the continuity of interest between WCC and Westmoreland was ensured by the bankruptcy process. It is not necessary to obtain a US court order or IRS approval to confirm the continuity of interest: whilst it could subsequently be challenged, it is for the company in question to determine whether there is continuity of interest when filing its tax returns.

180. Canada's submission that this was in reality a sale of assets is incorrect. The first-tier lien holders acquired Westmoreland by way of a credit bid, by which they used their investment in WCC to purchase Westmoreland. As is clear from the sale agreement, what they were

[80] CD-002, Claimant's Jurisdictional Hearing PowerPoint, slide 61, citing Coleman 1, paras 35 and 78.

buying was the membership interest of Westmoreland. This occurred pursuant to the transaction steps which included Westmoreland becoming a wholly owned subsidiary of WCC. The fact the US Bankruptcy Court, in its Final Order approving the Plan, found that the secured creditors were a good faith purchaser acting at arm's-length does not evidence that the transaction was an asset sale but was merely required to ensure the US Bankruptcy Court did not need to undertake a more rigorous analysis to satisfy itself there was no insider self-dealing. This rigorous analysis was unnecessary for the intermediate transaction steps where WCC transferred assets to Westmoreland. Indeed, the US Bankruptcy Court also stated in its Final Order that the NAFTA claim was not extinguished by virtue of the bankruptcy process and found that the continuity between WCC and Westmoreland was a necessary part of the transaction which expressly contemplated Westmoreland becoming a wholly owned subsidiary of WCC. It further expressly provided that the NAFTA claim be preserved.

181. The fact that the US Bankruptcy Court ordered there be no successor liability is also of little significance. This is a standard provision in bankruptcies and is not limited to sales; a debtor will receive a discharge upon confirmation of a Reorganization Chapter Eleven Plan which has a similar effect. Indeed, elimination of debt is typically a debtor's goal in filing for bankruptcy and is a fundamental feature of the US Bankruptcy Code. Of equal insignificance is the fact that Westmoreland did not take all of WCC's assets; the assets not taken, such as directors' and officers' insurance, do not relate to Prairie or the claim.

182. It is also of note that to qualify as a Type G reorganization, there is an express requirement that there is continuity of interest between the two companies such that they should be treated as the same. US federal tax law provides a definition of 'continuity of interest' which requires that the equity holders of a transferor receive and own an equity interest in an acquiring entity in connection with the transaction. The regulations further provide that, in certain circumstances, "[…] stock received by creditors may count for continuity of interest purposes both inside and outside of bankruptcy proceedings. […] The final regulations treat such senior claims as representing proprietary interests in the target corporation."[81] In the context of bankruptcies, the continuity of interest requirement includes creditors of a bankrupt corporation in the group of relevant stakeholders essentially treating creditors as proprietors. This means that the bankruptcy reorganisation should not break the chain of continuity between WCC and Westmoreland.

183. For there to be continuity of interest, two tests must be satisfied: one relating to continuity of equity interest and one relating to continuity of asset ownership. The US Treasury regulations specify that these reorganisations "[…] effect only a readjustment of continuing interest in property under modified corporate forms" and that "Continuity of interest

[81] US Federal Register, A Rule by the Internal Revenue Service on 12/12/2008, Creditor Continuity of Interest, available at: https://www federalregister.gov/documents/2008/12/12/E8-29271/creditor-continuity-of-interest.

requires that in substance a substantial part of the value of the proprietary interests in the target corporation be preserved in the reorganization."[82] The regulations further provide that a creditor's claim against a target corporation may be preserved as a proprietary interest in the target corporation if the target corporation is in a Chapter 11 bankruptcy.

184. Canada's submissions in support of its contention that there is no valid assignment are wrong, putting form over substance. The fact Westmoreland was set up by the lawyer representing the first-tier lien holders is irrelevant; it is common practice for companies in such a situation to be set up by the advising lawyer. The significant issue is the structure used. The reality is that Westmoreland was owned by WCC at the time of the transfer of Prairie to Westmoreland's ownership.

185. In summary all that has happened is that there has been a change in form but this should not defeat jurisdiction; as can be seen from *Perenco v. Ecuador*[83] and *Waste Management II v. Mexico*,[84] formalistic objections to jurisdiction should be dismissed where there is a continuity or privity in the beneficial interests of the investor entities. WCC could have changed form from a corporate entity to a limited liability company and this would not have defeated jurisdiction; the secured creditors could have exchanged debt for equity and this would also not have defeated jurisdiction; so why should the Type G reorganization defeat jurisdiction when the secured creditors used Westmoreland to achieve the same end result? As confirmed by US federal law, continuity of interest was preserved.

186. Canada's argument that WCC could have continued the claim is also incorrect as Canada insisted upon the withdrawal of WCC's claim as a condition for it accepting an amended Notice of Arbitration for Westmoreland. However, although the claim was refiled with Westmoreland as Claimant, the arbitral process which had been commenced by WCC was continued and Westmoreland was not required to recommence the process of constituting this Tribunal. Canada's submission is inconsistent with the decision of the tribunal in *Loewen*.[85] Whilst the *Loewen* tribunal declined jurisdiction, it was not on the basis of the claimant's change in corporate form nor the transfer of the claim, but instead it was as a result not only of the break in diversity of nationality but also its finding that the claimant company was a shell with no ownership of any assets of the investment, as is the case with WCC. WCC will not face the costs arising out of the challenged measures and is in the process of being dissolved.

[82] Department of Treasury, Internal Revenue Service, 26 CFR § 1.368-1 - Purpose and scope of exception, available at: https://www.govinfo.gov/content/pkg/CFR-1999-title26-vol4/pdf/CFR-1999-title26-vol4-sec1-368-1.pdf.

[83] CLA-023, para 522.

[84] CLA-014.

[85] CLA-036.

187. *Encana*[86] is also not on point; although the tribunal found that the company which held the investment at the time of the alleged breach could advance a claim even if it had subsequently sold the investment, it did not address whether an additional claimant could also advance a claim. In *Daimler*,[87] the tribunal found that the claimant's parent had an independent right to bring a claim on the basis it had an indirect investment at the time of the alleged breach. Canada's submission that the investor who owned or controlled the investment at the time of the alleged breach could bring a claim even if it had subsequently transferred its investment is inconsistent with its own construction of the NAFTA. Were WCC to bring the claim instead of Westmoreland, no doubt Canada would assert no jurisdiction on the basis the loss being suffered was borne by Westmoreland and not WCC such that no valid NAFTA claim arose.

Has Westmoreland suffered loss?

188. Canada's argument that the Off Coal Agreements do not relate to Westmoreland is incorrect. Westmoreland is the company which emerged from WCC's bankruptcy as a result of the continuity of interest between the two companies and the Off Coal Agreements clearly related to WCC. Even if it is not accepted that Westmoreland is the same corporate entity as WCC, the Off Coal Agreements related to Prairie and Westmoreland at the time Westmoreland commenced this arbitration. Pursuant to these agreements, Prairie's mines will be required to close no later than 2030, with closure being accelerated. Payments continue to be made pursuant to these agreements to the Albertan utilities to stop using Prairie's coal. Prairie is incurring losses as a result and these losses affect Westmoreland's investment in Prairie, stranding its capital. The Tribunal should accept these facts as pled for the purposes of considering jurisdiction.

189. With respect to Westmoreland's actual damages, as there have been no substantive pleadings or evidentiary hearing with respect to the damages suffered by Westmoreland, it is not possible for this Tribunal to make a finding that the damages claimed by Westmoreland all crystallised before it was incorporated. However, Westmoreland has suffered its own loss. The Off Coal Agreements damage Prairie and its American investor by removing Prairie's customers prematurely, shortening the time horizon for Prairie's coal mines for between six to twenty-five years, and increasing the mine reclamation costs. As Prairie's investor, Westmoreland will thus be harmed and this is a loss which will be suffered by Westmoreland, not WCC.

190. In conclusion, there is no abuse of process and the equities strongly favour Westmoreland. As summarized by Professor Paulsson: "What matters is the ultimate economic reality;

[86] RLA-053.

[87] RLA-054.

does the recovery pursued ultimately and legitimately seek *reparation of the harm done to protected investors who put their capital at risk*? Canada does not address the rationale for this proposition, but simply repeats that a claimant who was not an investor when the dispute arose has no standing."[88] WCC died but the people who ran it, controlled it and effectively owned it survive and should now be permitted to bring this claim against Canada. Canada cannot assert in good faith that it would suffer prejudice or other injustice were jurisdiction to be confirmed. This is not the position with Westmoreland. Had WCC been in a stronger financial position it would not have needed to be restructured and could have recovered its losses from Canada.

c. Mexico's Position

191. In its non-disputing party submission, Mexico confirms its agreement with Canada's submissions that Articles 1101(1), 1116(1) and 1117(1) read together require a claimant to demonstrate that it was an investor of a Party at the time of the alleged breach, submitting that there is a "threshold connection between a claimant bringing the claim and the challenged measure that must be met (i.e., the existence of an investor of a Party and its investment at the time of the alleged breach). There is no obligation under Section A owned [*sic*] to that claimant and its investment in the absence of that connection. Thus, no claim can be submitted to arbitration under Articles 1116(1) and 1117(1)."[89]

(2) The Tribunal's Analysis

192. As a preliminary point the Tribunal notes there is no suggestion that there was any element of *male fides* in the manner in which WCC's assets were transferred to Westmoreland. It is clear that at all times WCC and Westmoreland and the first-tier lien holders acted in good faith. Merely acting in good faith, however, is not sufficient to establish jurisdiction; Westmoreland must meet the requirements of Articles 1101(1), 1116(1) and 1117(1) of the NAFTA.

Burden of Proof

193. The question of burden of proof arises only with respect to matters of fact, where each party has the burden of establishing those facts that they assert. If the Claimant cannot establish, on the balance of probabilities, those facts which are critical to founding jurisdiction, there is no jurisdiction. However, it is clear to the Tribunal that few disputed questions of fact arise here. The Tribunal's determination on jurisdiction rests predominantly on the application of the relevant legal principles to the agreed factual matrix.

[88] Paulsson 2, para 18 (emphasis in original).

[89] Mexico's Non-Disputing Party Submission, para 3.

Does the NAFTA require that Westmoreland was an investor of a Party at the time of the alleged breach in order to establish jurisdiction ratione temporis*?*

194. A fundamental question raised by the temporal challenges is whether, to bring a claim under NAFTA Chapter Eleven, Westmoreland must have owned or controlled the investment at the time of the alleged Treaty breach. If the answer to this question is 'yes', given it is common ground that Westmoreland was not in existence at the time of the enactment of the Challenged Measures, it will be necessary to determine whether Westmoreland is the same entity as WCC, albeit in a new corporate form, failing which Westmoreland's claim must fail for lack of jurisdiction *ratione temporis*. If, however, the answer is 'no' it will fall to be determined whether WCC's NAFTA claim has been successfully assigned or otherwise transferred to Westmoreland such that Westmoreland has standing to bring its own NAFTA claim against Canada.

195. Having reviewed the cases cited by the Parties, certain principles can be drawn: *(i)* a sham transaction will be fatal to jurisdiction, *(ii)* just because a transaction is *bona fide* does not of itself guarantee jurisdiction; and *(iii)* there must be beneficial ownership at all relevant times with a NAFTA investor. However, none of the cases cited by the Parties is directly on point in respect of the issue in dispute in this case, in particular, whether the investor at the time the challenged measures are adopted or maintained must be the same entity as the investor at the time the arbitration is commenced.

196. The relevant Articles are Articles 1101(1), 1116(1) and 1117(1) of the NAFTA. Pursuant to Article 31 of the VCLT, interpretation of these Articles must be undertaken in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

197. Turning first to Article 1101(1), the Tribunal cannot accept Westmoreland's submission that Articles 1116(1) and 1117(1) should be construed without reference to Article 1101(1). The wording of Article 1101(1) is unambiguous: it is titled 'Scope and Coverage' thus describing the scope of application of the NAFTA by way of an introduction to the remainder of Chapter Eleven. Article 1101(1) specifies the requirements which must be satisfied for a putative claimant to be entitled to the protection provided by Chapter Eleven, thus operating as the gateway to the remaining Articles of Chapter Eleven. Access to Chapter Eleven, including Articles 1116(1) and 1117(1) is thus restricted only to those entities which can satisfy the provisions of subparagraphs 1101(1)(a) – (c), namely that the measures in question relate to:

> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and

> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

198. Westmoreland asserts that *Apotex* does not support this construction of Article 1101, but this is not correct. Whilst the *Apotex* tribunal held that Article 1101 could not be narrowly interpreted to introduce a legal test of causation enabling "[…] only a claimant with a successful case on causation to pass through its threshold gateway […]",[90] it nonetheless accepted that it acted as a gateway to the rest of Chapter Eleven, albeit one that is not an "[…] unduly narrow gateway to arbitral justice […]".[91] Again in considering the meaning of the phrase 'relating to' in Article 1101(1) the tribunal in *Methanex* proceeded on the understanding that Article 1101 acted as a 'threshold' to a NAFTA arbitration.[92]

199. It is less clear, however, whether the reference to 'investor[s] of another Party' in Article 1101(1)(a) is a reference to the same 'investor[s] of another Party' as that 'investor[s] of another Party' referred to in Article 1101(b), such that Westmoreland must show the Challenged Measures related to Westmoreland itself as well as to the Canadian Enterprises. Whilst the text of Article 1101(1) does not expressly address this question, it would seem implausible that the entity referred to as an 'investor[s] of another Party' in one limb of Article 1101(1) is a different entity to the 'investor[s] of another Party' referred to in the limb that immediately follows.

200. The text of Articles 1116 and 1117 provide further guidance. The title of Article 1116 is 'Claim by an Investor of a Party on Its Own Behalf' which suggests the claim must be brought by the entity which was affected by the alleged treaty breach. This understanding is reinforced by the wording of the final part of Article 1116(1). To bring a claim to arbitration 'the' investor must have incurred loss or damage as a result of the alleged breach. What is meant by 'the' investor? Had the text of this article referred to 'an' investor it could be argued that there need not be a connection between the investor bringing the claim and the investor which suffered loss or damage. The use of the word 'the', however, directs the reader to the clear understanding that the investor which brings the claim must be 'the' investor which has suffered loss. Accordingly, the Tribunal finds that to have jurisdiction to bring a claim under Article 1116(1), the investor/claimant must comply with two requirements: firstly it must be claiming 'on its own behalf' such that it held the investment at the time of the alleged breach and is not bringing the claim on another's behalf; and secondly, that same investor (*i.e.* 'the' investor) must <u>itself</u> have suffered loss or damage arising out of that breach. Article 1117(1) contains the same requirements.

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[90] RLA-046, para 6.26.

[91] RLA-046, para 6.28.

[92] RLA-026, para 137.

201. Whilst Westmoreland seeks to impress on us that we should not be quick to infer a stipulation where none is express, this construction comports with the object and purpose of the NAFTA which is, *inter alia*, to "increase substantially investment opportunities in the territories of the Parties".[93] In order to encourage and support this investment, the Parties further agree certain protections for investors as detailed in Chapter Eleven. It must be a necessary element of the NAFTA that the duty on a NAFTA Party to accept certain obligations of investment protection is predicated upon an investor taking the risk of making an investment or, to put it the other way, an investor must have taken a risk by making an investment in order to be assured of treaty protection. A purchaser or assignee of an investment prior to any alleged treaty breach evidently takes a risk that there may be a subsequent treaty breach. However, once an alleged treaty breach has taken place, it cannot be argued that a subsequent purchaser of the investment or assignee of a claim takes such a risk. After the occurrence of an alleged breach, a subsequent assignee or purchaser can assess the likely damage arising from such breach and factor the risk level into the terms of any purchase or assignment. Whilst the actual quantification of such loss may not be certain, the risk is not that the breach may occur, it has already occurred.

202. This construction is also consistent with the NAFTA cases cited by Canada in support of its submissions. The tribunal in *Gallo* "without hesitation", agreed with the Respondent, holding that, for there to be jurisdiction *ratione temporis* "[…] the Claimant must have owned or controlled the Enterprise at the time the [challenged measure] was enacted."[94] In further support of the Tribunal's construction, the *Gallo* tribunal specifically referred to 'the' investor, not 'an' investor as follows: "Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."[95] The *Gallo* tribunal further noted that "[i]n a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time."[96] (The critical time is again the date on which the treaty was allegedly breached.) In its reasoning, the tribunal referred to the *Phoenix* award[97] in which that tribunal declared "it does not need extended explanation to assert that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, because the treaty cannot be applied to acts committed by a State before the claimant invested in the host country."[98]

[93] NAFTA Article 102(a), (b) and (c).

[94] RLA-021, para 326.

[95] RLA-021, para 328.

[96] RLA-021, para 325.

[97] RLA-021, para 326, referring to *Phoenix Action Limited v. Czech Republic*, ICSID Case No. ARB/06/5.

[98] RLA-021, para 326.

203. Whilst Westmoreland is correct that the *Gallo* tribunal found that the asserted agency transaction between the actual Canadian owner and the claimant was a sham, this does not detract from the tribunal's analysis of the necessary requirements for jurisdiction *ratione temporis* to be established which supports Canada's construction.

204. Again, whilst the tribunal in *Mesa Power* declined jurisdiction on the basis there was no existing foreign investment at the critical time, it is instructive to consider its findings with respect to the correct application of Article 1101. It found that "Article 1101 circumscribes the scope of application of the treaty […]",[99] "[…] [t]he scope of application so defined limits the Tribunal's jurisdiction for the obvious reason that [Article 1116] derives from the dispute settlement provisions embodied in Chapter 11. […]"[100] and accordingly, its jurisdiction *ratione temporis* was "[…] limited to measures that occurred after the claimant became an 'investor' holding an 'investment'."[101] It further noted that "[a]s a consequence, investment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted."[102]

205. The *Mesa Power* tribunal also held that it was an obvious implication from Article 1101 that "[…] there must be a link between the investor that seeks to make an investment, and the investment that the investor seeks to make. Put differently, the investor must establish that it was seeking to make the very investment in respect of which it makes its claims."[103] Its jurisdiction was therefore limited to claims based on measures which occurred after the date on which the relevant investment companies were incorporated. Applying this reasoning to the present case, Westmoreland must demonstrate that it was itself, Westmoreland, that was seeking to make the Canadian Investments in relation to which this claim is being brought.

206. Again, it is notable that the tribunal and the parties in *B-Mex* all agreed that for there to be jurisdiction *ratione temporis* the claimants had to establish that they themselves owned or controlled the relevant investment "at the time of the treaty breaches".[104] Whilst the tribunal came to this conclusion on the basis of its construction of Article 1117, noting that the article was drafted in the present tense rather than specifying that the ownership or control was to be at the time of the breach, this should be understood in the context that the

[99] RLA-020, para 324.

[100] RLA-020, para 325.

[101] RLA-020, para 327.

[102] RLA-020, para 326.

[103] RLA-020, para 330.

[104] RLA-022, para 145.

tribunal had already determined ownership or control was required at the time of the breach.

207. That this construction is correct is also supported by certain investment treaty cases which have held that the term 'relating to' contained in Article 1101(1) links Article 1101 with Articles 1116(1) and 1117(1). For example, the tribunal in *Apotex*, held that the correct construction of Chapter Eleven was that the challenged measure must have a "direct and immediate effect" on the claimant.[105] This would not be possible were the claimant not to have owned or controlled the investment in question at the time the challenged measure was adopted or maintained. This requirement that the claimant owned or controlled the investment at the time of the alleged treaty breach can also be seen from the case of *Resolute Forest Products* where the test adopted by the tribunal was whether the measure in question "[…] directly address[ed], target[ed], implicate[d] or affect[ed] the Claimant".[106]

208. Westmoreland argues that WCC, being an investor of a party which owned or controlled the Canadian Enterprises at the time the Challenged Measures were adopted, was able to sell, assign or otherwise transfer its NAFTA claim to Westmoreland. Although Westmoreland has been unable to cite to any NAFTA cases where an assignee of an investment has had jurisdiction *ratione temporis* to bring a claim, it says this is not prohibited by the provisions of NAFTA Chapter Eleven. In support of this proposition, Westmoreland cites a number of investment treaty cases. Against this, Canada says there is no mechanism under NAFTA which would permit such a sale, transfer or assignment of a NAFTA claim.

209. The question here is whether under NAFTA Chapter Eleven, a NAFTA claim can be transferred together with the underlying investment when the investment is transferred or whether it remains with the party which owned or controlled it at the time of the alleged treaty breach. The short answer to Westmoreland's argument is that given the Tribunal's construction of Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction *ratione temporis* to bring a claim. Whilst not directly on point, the fact that a claimant seeking NAFTA protection must have been the owner or controller of the investment at the time of the alleged treaty breach tribunal is implicit from the decision in *Mondev.* Here the tribunal considered the corollary situation, holding that a claimant investor which owned or controlled an investment at the time of an alleged treaty breach was not required to maintain a continuing status as an investor at the time the arbitration was commenced.[107] Although not addressing

[105] RLA-022, para 6.22.

[106] RLA-033, para 244.

[107] RLA-035, para 91.

the same factual matrix as the current claim, by analogy it can be seen that ownership or control at the time the challenged measures were adopted or maintained is of critical importance.

210. The cases cited by Westmoreland are not of assistance. The tribunals in *Mihaly*, *EnCana* and *Daimler* were not addressing the factual scenario where the claimant is a subsequent owner of the investment but instead the scenario where the claimant had owned or controlled the investment at the time of the alleged treaty breach but no longer owned or controlled the investment at the time the arbitration was commenced. These tribunals were further not addressing the situation where (as is contended by Westmoreland) the entity which owned or controlled the investment at the time of the treaty breach expressly transferred the treaty claim to the claimant. However, it is clear that these tribunals proceeded on the basis there was a requirement that the claimant must have suffered damage as a result of the challenged measures. This indicates that to have jurisdiction, a claimant must have owned or controlled the investment at the time the challenged measure was adopted or maintained, although it may be the case, as stated by the tribunal in Daimler, that such party might be found to have relinquished its claim.

211. Given the above, we do not accept that Professor Paulsson is correct that to construe the NAFTA such that the claimant must have owned or controlled the investment at the time of the alleged treaty breach is a "leap" and not a "necessary inference" in circumstances where this requirement could have been spelled out by the NAFTA Parties when drafting this provision.

212. The Tribunal therefore finds that the correct construction of Articles 1101(1), 1116(1) and 1117(1) is that the challenged measures alleged to be in breach of a Section A obligation must relate to the investor of the party that is filing the claim under Section B. In considering the nature of this relationship, we accept Canada's submission that the challenged measure must "directly address, target, implicate, or affect the claimant" or have a "direct and immediate effect on the claimant."[108] The Tribunal does not accept that the effect of this is to impose any constraint on the ability of an investor to seek protection under Chapter Eleven but merely acknowledges the fact that to be entitled to Chapter Eleven protection, an investor must have accepted risk.

213. It is also of note that this is the construction that each of the NAFTA States has submitted to be the correct construction. Mexico's construction is contained in its non-disputing party submission (see paragraph 191 above). Whilst the United States did not file a non-disputing party submission, it has made submissions to this effect in *Methanex Corporation v. United States of America*, where, as the Respondent party, the United States contended that "[…] there must be a legally significant connection between the complained of measures and the

[108] Canada's Memorial on Jurisdiction, paras 49-50; Canada's Reply Memorial on Jurisdiction, paras 47-48.

specific investor who is the claimant, or its investments."[109] It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments.

214. The Tribunal accepts that significant weight should be placed upon Mexico's non-disputing party submission given that Mexico has no interest in the outcome of this dispute. The Tribunal further has regard to the submissions of the NAFTA States acknowledging that they have a unique perspective on how the NAFTA should be interpreted and also in recognition of the systemic interest of States in ensuring consistency of interpretation.

215. For Westmoreland to be able to bring its claim it must therefore show firstly that the Challenged Measures applied to it and secondly that it itself suffered loss as a result of those Challenged Measures.

216. As a preliminary point, the Tribunal agrees that corporate restructuring or internal reorganization is not in and of itself fatal to establishing jurisdiction; the mere fact of a change in corporate identity post a treaty breach would not in itself be a bar to treaty protection. Professor Paulsson says: "It should surprise no one that investments that lead to treaty-based arbitrations against States tend to be troubled businesses that often require restructuring as a way of mitigating the adverse consequences of the difficulties encountered. Given the goal of promoting the inflow of investments, it should be obvious that restructuring ought to minimize the prejudice suffered, rather than to provide an excuse for denying Treaty protection."[110] The Tribunal does not necessarily disagree, and it does not appear that Canada denies this.

217. The question for the Tribunal, therefore, is not whether or not there was a corporate restructuring of WCC but rather whether, pursuant to the process by which Westmoreland came into being and became the owner of the Canadian Enterprises, Westmoreland is WCC's legal successor? Is it even possible for Westmoreland to be the legal successor of WCC given they are both in existence?

218. It is common ground that Westmoreland was not in existence at the time the Challenged Measures were introduced. Westmoreland therefore cannot show they applied to it rather than to WCC, unless it can satisfy the Tribunal that it is the legal successor of WCC pursuant to WCC's restructuring and not a separate legal entity which acquired the NAFTA claim after the Challenged Measures had been adopted. In considering this issue, the fact there has been no illicit gain either by Westmoreland or the first-tier lien holders is irrelevant. It is also irrelevant that WCC could have been restructured in a way that

[109] RLA-072, p 44.

[110] Paulsson 2, para 15.

preserved Westmoreland's NAFTA claim. The issue must be determined on the basis of the actual process which was undertaken.

219. Westmoreland sought to persuade the Tribunal that there are circumstances other than a corporate restructuring in which a separate legal entity may bring a claim that has been transferred to it after the alleged treaty breach. Westmoreland submitted that to ground jurisdiction where the claimant is not the same entity as the entity that existed at the time the challenged measures were enacted, the putative claimant must evidence: *(i)* a *bona fide* investment; *(ii)* the corporate restructuring or transfers are taken for ordinary business purposes; and, *(iii)* there is continuity of interests among the investor and investments. From analysis of the cases referred to, continuity of interest means that there exists "[…] a closeness of relationships. There are ties. That you can think of a – in the context of a corporation. A corporation has a bundle of rights, and you have another corporate entity, but there is some sharing of rights, some commonality between them. So this is distinct from a situation where you would have a company trying to transfer to another company with which there is no connection, no ties, a completely separate company that would be coming in."[111] In its reply submissions, Westmoreland further explained the operation of its suggested test by reference to a family business or an individual, stating that "[…] a claim may be preserved only when it remains substantially within the ownership of common interest, whether a family or family of businesses."[112] Indeed, Westmoreland posited the question whether it was Canada's position that the death of an investor would terminate the investor's claim.[113]

220. The Tribunal does not accept Westmoreland's test. Having determined that jurisdiction under Chapter Eleven requires that a claimant shows that the challenged measures applied to it and that it suffered loss as a result of the challenged measures, it follows that Westmoreland must show that it is the legal successor to WCC. It is common ground that this issue is one of fact. Westmoreland's expert did not address this issue and, whilst Canada adduced expert US bankruptcy evidence, the Tribunal notes Canada's expert's evidence (which is not disputed by Westmoreland) that US bankruptcy law is not relevant to this question.[114] Accordingly, we approach determination of this question on the basis

[111] Tr. Day 1, p. 138:4 – 141:3.

[112] Tr. Day 2, p. 225:6-12.

[113] Tr. Day 2, p. 240:22 – 241:1.

[114] Coleman 1, para 88: "[US] Bankruptcy Code defers to applicable non-bankruptcy law—whether it be state, federal, or international law—as to two important aspects of transferred claims. First, the Bankruptcy Code is silent on the issue of transferability itself. In other words, if applicable non-bankruptcy law limits the transferability of a particular claim, the fact that the claim is sold as part of an asset sale in chapter 11 does not change that result. Second, the Bankruptcy Code also defers to applicable non-bankruptcy law as to the merits of a claim and who may assert it. Accordingly, the Bankruptcy Code does not alter the applicable non-bankruptcy limitations on who may assert 'NAFTA Claim,' and whether the 'NAFTA Claim' is transferable."

of the facts before us and against the background of US domestic law as the law governing Westmoreland and WCC.

221. In addressing this issue, considerable detail was provided by the Parties as to the purpose and nature of a Type G restructuring, being the form of restructuring followed by WCC, and it was clear that a Type G restructuring is now a common form of reorganization under US Bankruptcy Law.

222. A number of factors are relevant in the Tribunal's assessment of whether Westmoreland is the legal successor to WCC. Firstly, the transaction between WCC and the first-tier lien holders, pursuant to which Westmoreland was established, was negotiated at arm's-length (as found by the US Bankruptcy Court). Whereas WCC had a fiduciary obligation to obtain the best available price for its assets (including the NAFTA claim), the first-tier lien holders were motivated to obtain the best recovery they could in respect of the debt owed to them by WCC. It therefore cannot be said that the interests of WCC and Westmoreland were aligned.

223. Secondly, Westmoreland says the NAFTA claim was transferred by WCC to Westmoreland when Westmoreland was WCC's direct wholly-owned subsidiary, and this was the case for a period of time during the course of the implementation of the Type G reorganization. However, Westmoreland itself refers to the step by which it was inserted into the ownership chain as being an 'intermediate' step, one of several steps carried out during the transaction and not a step with any significant duration. The importance of this step was to ensure the first-tier lien holders' continuity of interest so that the tax and other benefits of a Type G reorganization are obtained.

224. In this regard, Westmoreland notes that its assertion of continuity of interest has not, as at the date of the Jurisdiction Hearing, been challenged, either successfully or at all. In its response, Canada notes that equally no US authority (including the US Bankruptcy Court, tax authority and US court) has attested to there having been a continuity of interest between WCC and Westmoreland. Canada says this is not surprising as it is for the tax payer to make its own judgement call as to whether there is continuity of interest and this self-assessment will only be the subject of a ruling from a tax authority or court if the tax payer is audited or a specific decision is sought; but Westmoreland has not sought such a ruling.

225. Upon being asked by the Tribunal whether Westmoreland had effectively self-certified its continuity of interest with WCC, Westmoreland confirmed that: "It is for the company to determine in filing tax returns, in taking positions, etcetera. It is up to the company, it is up to the Parties, to determine under our system. And it certainly is possible that somebody could disagree with that determination in the future, but it does not mean that, in order to solidify that position, you need a court order or you need approval of our taxing authorities

to get to that position, as it is the case may be in some other countries."[115] The Tribunal understands from this that Westmoreland was permitted to self-determine the existence of a continuity of interest and the fact there has, to date, been no challenge to this self-determination should not be construed as implying that a challenge will not be brought, nor that it would be unsuccessful.

226. Thirdly, as a result of the first-tier lien holders choosing to follow a Type G restructuring, Westmoreland did not take on any successor liability with respect to WCC, nor did it acquire all of WCC's assets, although those it did not acquire are not material or relevant to the Canadian Enterprises. It is difficult to conceive that Westmoreland is merely a new personification of WCC in circumstances in which the two companies currently exist and where not all of WCC's assets or liabilities were transferred to Westmoreland. In this regard, the Tribunal notes that there was no suggestion that Westmoreland was created as a spin off from WCC or that the process by which Westmoreland was created was equivalent to a change in corporate form. Whilst, Westmoreland says that by structuring the transaction as a Type G reorganization it would be able to use certain tax benefits, such as losses accrued previously by WCC,[116] no evidence was adduced that Westmoreland did, in fact, take on prior year losses of WCC and apply them against future year profits. The Tribunal notes Westmoreland's statement that: "The continuity of interest requirement is present in reorganizations because the term 'reorganization' presupposes a continuance of interest on the part of the transferor in the properties transferred. In other words, U.S. law requires that the equity holders of a transferor receive and own an equity interest in an acquiring entity, in connection with the transaction. This continuity-of-interest requirement is modified in the context of bankruptcy proceedings or bankruptcy-related restructuring transactions, to include creditors of a bankrupt corporation in the group of relevant stakeholders for purposes of determining whether this continuity requirement has been met, essentially treating creditors as proprietors."[117] The Tribunal further notes Ms Coleman's evidence that the determination of whether Westmoreland may qualify for certain tax benefits is a distinct enquiry from whether it was an unaffiliated buyer of WCC's assets.[118]

227. It is clear from this that not only is there a presumption that there will be continuity of interest in such reorganisations but further that, in the context of a bankruptcy-related restructuring, such continuity of interest may include the creditors of the company being restructured. However, such determination of continuity of interest is self-determined by the relevant tax payer and the fact that Westmoreland's self-determination has not yet been challenged does not mean it will not be challenged. Further, it does not of itself prove that

[115] Tr. Day 2, p. 233:12-21.

[116] Claimant's Rejoinder on Jurisdiction, para 75.

[117] Tr. Day 2, p. 229:21 – 230:14.

[118] Coleman 2, para 33.

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

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

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

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

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

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

231. Whilst this determination means the Tribunal does not have jurisdiction over Westmoreland's claim, for the sake of completeness, we also consider whether Westmoreland has shown, on a *prima facie* basis, that it has suffered loss as a result of the Challenged Measures and whether the Challenged Measures relate to Westmoreland or its investments.

232. It cannot be said that Westmoreland, if not a successor of WCC, but instead in its capacity as the purchaser of the WCC assets or purported assignee of WCC's NAFTA claim, has taken any risk. No additional funds have been invested by Westmoreland into the Canadian Enterprises; indeed any capital invested has not been stranded by the Challenged Measures but instead has been utilised to satisfy, at least partially, WCC's debt to the first-tier lien holders. Westmoreland submitted that there was no difference between an equity investor who bears enterprise risk and a debt investor who does not, on the basis a debt investor still expects to see a return on its investment by way of interest and therefore has a stake in the company. However, we do not accept that Westmoreland took any investment risk in the sense of being exposed to Canadian sovereign measures on acquiring the Canadian investment from WCC. The Challenged Measures had already been adopted, and it was clear what impact they would have on the Mines. The fact that Westmoreland may have incurred certain additional loss in terms of reclamation activities in excess of that estimated at the time of the acquisition is of no assistance to Westmoreland. The risk was a known risk at the time of the transfer of the Canadian Enterprises from WCC to Westmoreland and it should have been within the contemplation of Westmoreland that certain of the coal-fired power plants associated with the Mines might accelerate their closure. Such potential loss could be, and no doubt was, factored into the price tendered by the first-tier lien holders. In any event, whether or not this was factored into the first-tier lien holders' tendered price is irrelevant.

233. Westmoreland sought to persuade us that it continued to incur losses separate to, and independent from, the loss suffered by WCC. In answer to questions from the Tribunal, Westmoreland accepted that it could not seek to recover the first-tier lien holders' losses but asserted that the losses it was claiming included not only the damages suffered by WCC (which constituted the claim purportedly transferred by WCC to Westmoreland) but also additional loss suffered only by Westmoreland relating to the effects of the reduction of the life of the Mines and the reclamation activity that will need to be undertaken. This is, however, a difficult argument for Westmoreland to make given that the Notice of Arbitration filed by Westmoreland contains substantially the same prayer for relief as that contained in the Notice of Arbitration filed by WCC. This can be seen from the following:

    a. As a result of the actions and breaches of the Government of Canada described above, Westmoreland Mining Holdings claims relief for the following:

- damages exceeding $470 million or such other amount to be proven in these proceedings in compensation for the damages caused by actions that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;

- the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;

- pre- and post-award interest at a rate to be fixed by the Tribunal;

- such further relief as counsel may advise and the Tribunal may deem just and appropriate.[121]

b. As a result of the actions and breaches of the Government of Canada described above, Westmoreland claims relief for the following:

- damages exceeding $470 million or such other amount to be proven in these proceedings in compensation for the damages caused by actions that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;

- the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;

- pre- and post-award interest at a rate to be fixed by the Tribunal;

- such further relief as counsel may advise and the Tribunal may deem just and appropriate.

234. Whilst it may be correct that these additional losses referred to may be incurred by Westmoreland only after it became the owner of Prairie, they arise only as a result of the Challenged Measures, all of which were adopted before Westmoreland came into existence. Whilst a decision may have been taken to close some of the Mines earlier than had been anticipated at the time of the Challenged Measures and when WCC's bankruptcy occurred, there has been no suggestion that any additional steps have been taken by Canada to induce or promote these early closures. Furthermore, reclamation activities would always have been required to be undertaken; the only question being when. Indeed, it is uncontested that to the extent Westmoreland has suffered any loss not claimed by WCC, it

[121] RLA-077, pp. 39-40.

is only as a result of subsequent steps taken by the mine-mouth coal-fired plants pursuant to the original Challenged Measures.

235. Westmoreland submits that given there has been no evidentiary hearing considering Westmoreland's pleaded case, including its case on quantum of loss suffered, that we cannot determine whether or not it has suffered loss not suffered by WCC. However, the point is that it has not identified any subsequent act of Canada which has caused any such possible loss and it has claimed precisely the same loss as that claimed by WCC. Given these circumstances, the Tribunal struggles to comprehend how Westmoreland can show it has suffered any loss independent of that loss suffered by WCC or how it can be said that Westmoreland has suffered loss on account of other measures not encompassed by the Challenged Measures.

236. Finally, given our finding that Westmoreland did not exist at the time the Challenged Measures were adopted, it is unarguable that the Challenged Measures could not, and did not, relate either to Westmoreland or to its investment; a measure cannot relate to an entity which was not in existence at the time it was allegedly affected or to its investment which had not yet been made.

237. Accordingly, the Tribunal finds that: *(i)* Westmoreland was not a protected investor at the time of the alleged breaches as required by NAFTA Articles 1101(1), 1116(1) and 1117(1); *(ii)* Westmoreland has not made out a *prima facie* damages claim under NAFTA Articles 1116(1) and 1117(1); and *(iii)* the Challenged Measures do not "*relate to*" Westmoreland or its investment pursuant to NAFTA Article 1101(1).

VI. COSTS

A. CLAIMANT'S COST SUBMISSIONS

238. Westmoreland claims total legal costs of US$ 2,190,537.95 covering both the bifurcation and jurisdiction applications together with disbursements of US$ 70,085.82 comprising the following:

Costs	Total (US$)
Professor Jan Paulsson (Expert Witness Statements)	US$ 49,320.00
Counsel Travel Costs	US$ 15,064.69
Delivery Services	US$ 820.40
Legal Research	US$ 1,350.00
Other Professional Services	US$ 3,346.16
Materials & Supplies	US$ 184.57

Total Costs	**US$ 70,085.82**

239. If it successfully defends Canada's jurisdictional objections, Westmoreland submits this should be a factor to be considered in the Tribunal's final merits decision and costs award.

240. Westmoreland further submits that, if Canada prevails, Westmoreland should not be obliged to bear any of Canada's costs or legal fees. Firstly, whilst the Tribunal has commended the Parties' submissions as being "clear and helpful", Canada's late concession that "WCC could still be in a position to bring a claim on its own behalf"[122] raises doubts as to the purpose of Canada's jurisdictional objections and, if correct, has caused an unnecessary wastage of Party resources by making a formalistic objection over a claim that WCC could still bring. This should be taken into account by the Tribunal when deciding upon the allocation of costs, pursuant to paragraph 21.7 of PO1. Secondly, the issues raised by Canada's jurisdictional objections, whilst novel, are not complex.

B. RESPONDENT'S COST SUBMISSIONS

241. Canada has incurred total costs of CAD$ 3,603,010.37 comprising legal costs of CAD$ 2,344,240.96 and disbursements of CAD$ 1,050,372.91 comprising the following:

Disbursement	**Total (CAD$)**
Hughes Hubbard & Reed (Ms. Kathryn Coleman and Ms. Elizabeth Beitler)	CAD$ 513,593.51
Core Legal (Trial Technology & Graphic Consultants)	CAD$ 18,957.20
Noticia LLP (Document Management Consultant)	CAD$ 492,751.91
Travel Costs	CAD$ 22,307.44
Boardroom Rentals (Hearing)	CAD$ 2,762.85
TOTAL DISBURSEMENTS	**CAD$ 1,050,372.91**

242. Canada submits that if it is unsuccessful in its jurisdictional objections, the Tribunal should reserve its decision on costs until a final award on the merits. If, however, Canada is successful, Westmoreland should be ordered to pay the totality of Canada's costs pursuant to the principle that an unsuccessful party should bear the reasonable costs of its opponent,[123] which principle has been routinely followed by NAFTA tribunals.[124]

[122] Tr. Day 2, p. 280:2-5.

[123] RLA-078; RLA-079; RLA-080; and RLA-083.

[124] Canada's Submission on Costs, fn 3. *See e.g.*, RLA-084, paras 49 and 6; RLA-051, Part VI, para 1; RLA-016, para 92; and RLA-020, para 706.

243. According to Canada, the Tribunal's discretion should be exercised in favour of awarding Canada its costs on the basis that Westmoreland's case has advanced "unreasonable and shifting arguments", initially impermissibly seeking to substitute itself for WCC, then filing a nearly identical claim to that filed by WCC and using the generic term of 'Westmoreland' to refer both to itself and to WCC, then submitting its case to prove that Westmoreland was substantially the same investor as WCC required a "deep inquiry" into WCC's bankruptcy proceedings which it submitted were "complicated" necessitating Canada's retention of a US bankruptcy expert, before again changing its position to argue that expert testimony was not required as the NAFTA permitted an assignment of a claim where the two entities have a "continuity of interest" or are otherwise affiliated. These changing bases of claim have required Canada to incur costs which have proved to be unnecessary as Westmoreland's case has changed.[125]

244. Canada further submits that its costs are reasonable given the complexity of the matter, the fact the hourly rates are below market rates and that Canada was obliged to retain a US bankruptcy expert and document management consultants. It should also be noted that they do not reflect the total cost to the Governments of Canada and Alberta.

C. THE TRIBUNAL'S DECISION ON COSTS

245. It is common ground that the relevant provisions that must guide the Tribunal are Articles 40(1) and (2) of the UNCITRAL Rules and paragraph 21.7 of PO1 which provide as follows:

> "Article 40, UNCITRAL Rules:
>
> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.
>
> […]"

[125] Canada's Submission on Costs, para 3.

PO1

> "21.7 Upon the issuance of an award, the Tribunal may apportion the costs of the arbitration between the Disputing Parties, if it determines such apportionment is reasonable under the circumstances of the award. In determining the appropriate apportionment of costs, the Tribunal shall consider all relevant circumstances, including: (a) the outcome of any part of the proceeding; (b) the Disputing Parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed. […]"

246. Canada also submits that the Tribunal should be guided by NAFTA Article 1135(1) which provides as follows:

> "Article 1135: Final Award
>
> 1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:
>
> (a) monetary damages and any applicable interest;
>
> (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.
>
> A tribunal may also award costs in accordance with the applicable arbitration rules."

247. Pursuant to these provisions, it is clear the Tribunal has discretion, in circumstances where it finds it appropriate, to order that the costs of the arbitration are allocated other than by being borne by the unsuccessful party.

248. Whilst Canada notes that Westmoreland's case has evolved since Canada first brought its jurisdictional objections, this is not uncommon in proceedings where parties develop and refine their pleaded cases as submissions are exchanged. We find no evidence of *male fides* on the part of Westmoreland. No evidence has been adduced to the effect that Westmoreland believed other than that it was the rightful party to bring this claim against Canada. Indeed, this can be seen from the manner in which Westmoreland sought to substitute itself for WCC in the NAFTA proceedings commenced by WCC and its conduct during these proceedings. At all times, Westmoreland has conducted itself as if it were the rightful successor to WCC with respect to this claim.

249. Whilst the Tribunal finds that Westmoreland does not have jurisdiction to bring this claim, given Westmoreland's evident good faith and given the circumstances detailed above, the

Tribunal determines that the appropriate allocation of costs in this case is that each Party is to bear its own costs of legal representation and the arbitration costs are to be shared by the Parties equally.

250. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US$):

Arbitrators' fees and expenses Ms. Juliet Blanch Professor Zachary Douglas Mr. James Hosking	 US$ 68,212.50 US$ 30,731.36 US$ 36,450.86
ICSID's administrative fees	US$ 84,000.00
Direct expenses (estimated)	US$ 13,588.35
Total	**US$ 232,983.07**

251. The above costs have been paid out of the advances made by the Parties in equal parts.[126] As a result, each Party's share of the costs of arbitration amounts to US$ 116,491.50.

VII. DECISION

252. For the reasons set forth above, the Tribunal decides as follows:

(1) Westmoreland does not have standing to bring this claim on the basis that *(i)* it was not a protected investor at the time of the alleged breaches as required by NAFTA Articles 1116(1) and 1117(1); *(ii)* it has not made out a *prima facie* damages claim under NAFTA Articles 1116(1) and 1117(1); and *(iii)* the Challenged Measures do not "*relate to*" Westmoreland or its investment pursuant to NAFTA Article 1101(1);

(2) Westmoreland's claim is accordingly dismissed in its entirety;

(3) Each Party shall bear its own costs of legal representation and disbursements; and

(4) Each Party shall bear its share of the arbitration costs.

[126] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

Place of Arbitration: Toronto, Canada

Date: 31 January 2022

[Signed]

Mr James Hosking
Arbitrator

Professor Zachary Douglas QC
Arbitrator

Ms Juliet Blanch
President of the Tribunal

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