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

Westmoreland Coal Company,

Claimant

v.

Government of Canada,

Respondent

Claimant's Opening Argument

May 2, 2024

King & Spalding

Claimant’s Jurisdiction Overview

Claimant's Jurisdiction Overview

- WCC filed its NAFTA Claim against Canada on November 19, 2018.
- WCC purported to transfer its Claim to WMH per the WCC bankruptcy, and sought to add WMH as a co-claimant in its May 13, 2019 Amended NOA.
- Canada objected to the amendment, proposing as a "solution" that WCC withdraw its NOA so that WMH could be substituted as the sole claimant.
- WCC accepted Canada's proposal as "a fair compromise" so that the arbitration could "proceed [] without unnecessary procedural delay."
- Immediately following the proposed substitution, Canada challenged WMH's standing, thereby producing the very delay that WCC was seeking to avoid.
- WMH was shocked and complained to the *Westmoreland I* tribunal, citing Canada's lack of good faith and the principle against self-contradiction.

Claimant's Jurisdiction Overview (2)

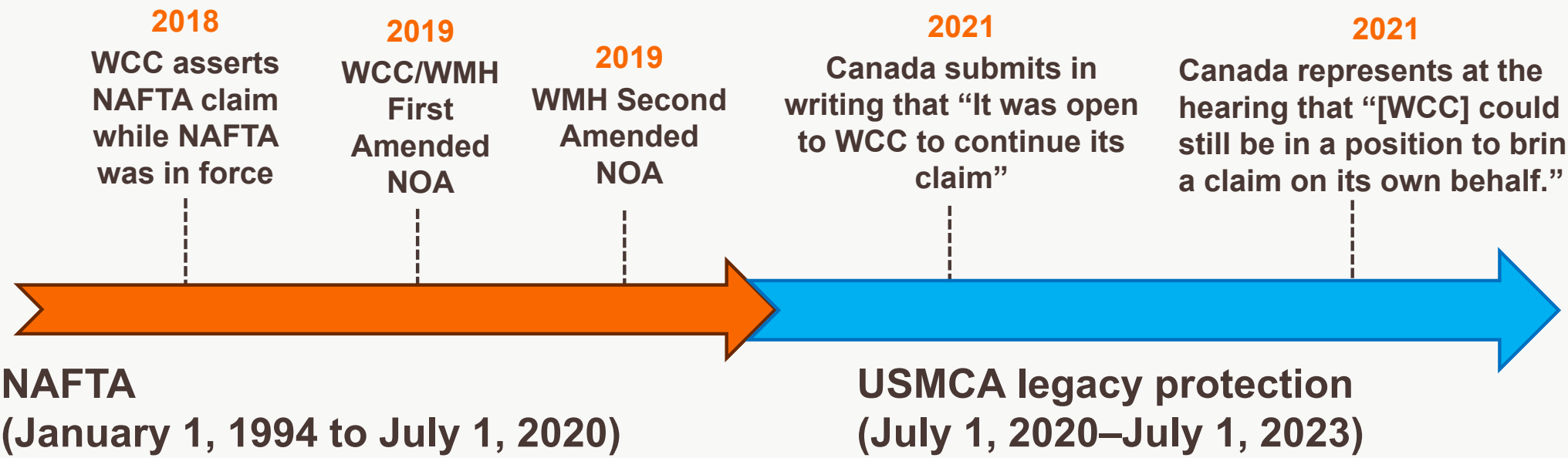
- Seeking to minimize the obvious unfairness of its tactic, Canada assured the *Westmoreland I* tribunal that WCC still could pursue its claim.
- Tribunal issued its award on January 31, 2022, accepting Canada's position that WMH had no standing because WCC was the proper claimant.
- Following the award, WCC went back to the bankruptcy court to confirm that WCC still owned the NAFTA Claim it originally commenced in 2018.
- Following the court's order, WCC reasserted the NAFTA claim before you.
- Despite its representations to the *Westmoreland I* tribunal, Canada now argues that WCC's claim is barred due to a series of jurisdictional objections, none of which were mentioned to original tribunal.
- Canada's jurisdictional objections are meritless and should be rejected.

Agenda

- The Tribunal has jurisdiction under the USMCA.
- WCC's claims meet the requirements of the NAFTA.
  - The claims are timely under the limitations period
  - WCC owned and controlled Prairie at the relevant time
  - The prior waiver letters do not bar the present claim and WCC has presented adequate waiver letters
  - The reflective damages argument is meritless
- Canada should be estopped from challenging this tribunal's jurisdiction.
- International law principles require that this case be heard on the merits once and for all.

WCC Has a Legacy Investment Under the USMCA

WCC is entitled to legacy investment protection



Sources: First Notice of Arbitration, Nov. 19, 2018, **C-043**; Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, **C-055**; Notice of Arbitration, Aug. 12, 2019, **C-037**; Westmoreland Mining Holdings, LLC v. Canada, ICSID Case No. UNCT/20/3, Canada's Reply Memorial on Jurisdiction, ¶ 12, **C-047**; Jurisdictional Hearing Transcript, Day 2, 279:12–280:4, **C-046**.

Roadmap

- The object and purpose of the "legacy investment" protection
- The plain language of the USMCA and relevant NAFTA provisions
- Even on Canada's view, WCC still has a legacy claim
- Canada should be estopped from raising its legacy investment objections

Object and purpose to preserve NAFTA protection

- Article 14-2-3 states that the legacy clause provides protection for acts that took place before the USMCA went into force (retroactive)

> For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.

- This is the only part of the USMCA that applies to past acts
- It makes no sense to apply the USMCA to prior acts –but to deny protection to investors completely deprived of their investments by those past acts.
- Denying protection to investors who lost their investment due to past acts would destroy the protection against "past acts"– and destroy Article 14-2-3

Sources: Canada-United States-Mexico Agreement ("USMCA") Annex 14-C(6)(a)-(b), Art. 14.2(3), **C-044**.

Object and purpose to preserve NAFTA protection (2)

- To provide protection against past acts, the legacy clause PRESERVES claims that arose before the USMCA went into force.
- All the available evidence confirms the focus was on preserving protection.
- USTR talking points prepared during negotiations confirm:

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

> investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those "legacy investments" for three years after the termination of the NAFTA.

- A grandfather clause works by freezing the legal status quo that existed at the time the law or treaty goes into effect—here, for three years

Sources: Email from D. O'Brien to J. Melle and other USTR personnel, "RE: Call Tomorrow Morning, attaching Talking Points", **C-106**; Talking Points on USTR Investment Chapter for OECD Investment Meetings, **C-113**.

Object and purpose to preserve NAFTA protection (3)

- Official announcements of the USMCA also confirm that the legacy clause would preserve NAFTA claims. E.g., confirm that that:

> With respect to the NAFTA ISDS, the parties agreed to a transitional period of three years, during which ISDS cases can still be brought forward under NAFTA for investments made prior to the entry into force of CUSMA."

- There is no evidence in the public record that the Contracting Parties intended to abruptly terminate protection for any prior acts.
- Canada has not explained purpose of the legacy clause—let alone provided evidence of the purpose
- Canada has full access to the negotiating history since it sat at the negotiating table
- Canada presented **no evidence** to support its position.

Sources: Global Affairs Canada, "The Canada-United States-Mexico Agreement: Economic Impact Assessment", p. 32, **C-060**; "Quoted: Senior Administration Officials on the USMCA," World Trade Online, https://insidetrade.com/trade/quoted-senior-administration-officials-usmca, **C-058**; Congressional Research Service, "USMCA: Implementation and Considerations for Congress," Legal Sidebar No. LSB10399, **C-059**.

Object and purpose to preserve NAFTA protection (4)

- Mexico and the United States did not dispute WCC's interpretation of their publications. On contrary, Mexico confirmed that:

> "the ordinary meaning of Annex 14-C **preserves the ability of investors to submit claims to arbitration alleging NAFTA breaches in relation to acts or facts that took place before the termination of the NAFTA**

  - That is, the purpose of legacy protection is to preserve claims for past acts
- Mexico also confirms that "NAFTA breaches could **only** have occurred before NAFTA was terminated"
  - U.S. took this same position in its Article 1128 submission in *Vulcan v. Mexico*.
- If "NAFTA breaches could only have occurred before NAFTA was terminated" then requiring ownership on July 1, 2020 would make even less sense—since legacy protection would not provide protection at any time whatsoever

Sources: Submission of the United Mexican States, ¶ 9; *Legacy Vulcan LLC v. United Mexcan States*, ICSID Case No. ARB/19/1, Second Submission the United States, **CLA-078**, ¶ 9.

The meaning of USMCA's "in existence" language

- **Question 1:** what is meant that a legacy investment is "in existence" on July 1, 2020?

> "Legacy investment" means an **investment of an investor** of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and **in existence** on the date of entry into force of this Agreement; (b) "**investment**", "**investor**", and "Tribunal" **have the meanings accorded in Chapter 11** (Investment) of NAFTA 1994 (Article 14-C(1)-6(a))

- **Answer:** a legacy investment is "in existence" when the USMCA went into force if, on that date, it would have qualified as an investment of an investor under the NAFTA
  - The Contracting Parties incorporated the NAFTA terms to define those protected
  - The terms of a treaty must be interpreted as a whole

Sources: USMCA, Article 14-C-1-6(a), **C-044**.

The meaning of USMCA's "in existence" language (2)

- All of the NAFTA definitions incorporated into the USMCA are framed in the past tense to provide protection to investments of investors based on ownership at the time of the measures.

Article 1139: Definitions

For purposes of this Chapter:

Investment of an investor of a Party means an investment owned or controlled directly or indirectly by the investor of such Party (**Art. 1139**)

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment (**Art. 1139**)

"An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." (**Art. 1116**)

- All three requirements must be satisfied to submit a claim under the NAFTA
  - If the Contracting Parties wanted to limit coverage to investors that still owned the investment on July 1, 2020, they would have used the USMCA definition of investment (that definition is in the present tense ("owns or controls"))

Sources: NAFTA, Arts. 1116, 1139, **C-107**.

The meaning of USMCA's "in existence" language (3)

- NAFTA tribunals **always** look to the date of the measures to determine the protected "investor" and "investment"

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

> To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition."

- *See also Vito G. Gallo v. Canada*, Award, Sept. 15, 2011, **RLA-011**, ¶ 325; *EnCana v. Ecuador*, Award, Feb. 3, 2006, **CLA-006**, ¶¶ 126–31, *Jan de Nul N.V. and Dredging International N.V. v. Egypt*, Decision on Jurisdiction, June 16, 2006, **CLA-007**, ¶ 135, *IC Power Asia Development Ltd v. Guatemala*, Final Award, Oct. 7, 2020, **CLA-008**, ¶¶ 12, 355, 370, 390, *WNC Factoring v. Czech Republic*, Award, Feb. 22, 2017, **CLA-009**, ¶¶ 8, 57, 63, 65–68, 401–03, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, **CLA-010**, ¶¶ 124–25, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, Aug. 22, 2012, **CLA-011**, ¶ 144–45

Sources: *Westmoreland I* Award, ¶ 200, **CLA-001**; *Mondev*, Award, **CLA-005**, ¶ 91.

The meaning of USMCA's "in existence" language (4)

- In negotiating NAFTA, Canada repeatedly tried to insert a continuous ownership requirement:

> "provided that such business enterprise continues to be controlled by such investor or the investor continues to own a significant minority interest in such business enterprise."

> "provided that such business enterprise continues to be controlled by such investor"

- Despite Canada's proposals, the limitation did not make it into Art. 1139
- That the NAFTA parties discussed continuous ownership, but did not incorporate it, confirms that the NAFTA does not require continuous ownership – the only date the matters is the date of the measures

Sources: INVEST.221, Dallas Composite, Feb. 21, 1992, 32, **C-056**; INVEST.403, Washington Composite (Apr. 23, 1992) 32, **C-057**.

The meaning of USMCA's "in existence" language (5)

"Legacy investment" means an **investment of an investor** of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and **in existence** on the date of entry into force of this Agreement; (b) "**investment**", "**investor**", and "Tribunal" **have the meanings accorded in Chapter 11** (Investment) of NAFTA 1994 (Article 14-C(1)-6(a))

WCC's investment in Prairie was in existence on July 1, 2020, because as of that date

- Prairie is "owned or controlled directly or indirectly by the investor of such Party" (**Art. 1139**)
- "WCC…has made an investment" (**Art. 1139**)
- "the investor [WCC] has incurred loss or damage by reason of, or arising out of, th[e] breach" (**Art. 1116**)

Sources: USMCA Article 14-C-1-6(a), **C-107**; NAFTA, Arts. 1116, 1139, **C-107**.

Canada's "in existence" argument is baseless

- Canada agrees in its Memorial on Jurisdiction that the Tribunal should look to the NAFTA to define what is meant by an "investment of an investor" under the legacy clause (Memorial on Jurisdiction, ¶ 84)
- Canada agrees that investment tribunals, including NAFTA tribunals, find that a claimant needs to hold the investment ONLY at the time of breach.
- Canada "**does not seek to depart from**" this well-founded principle:

> The Claimant contends that "the view of the overwhelming majority of investment tribunals, both under NAFTA and other investment treaties" is that a claimant needs to hold the investment only at the time of the alleged breach. Claimant's Response on Jurisdiction, ¶ 76. It further contends that "there is no textual basis in the NAFTA to depart from the well-established principle" that a claimant must hold the investment at the time of the alleged breach. Claimant's Response on Jurisdiction, ¶ 83. This is a straw man argument. Canada does not seek to depart from the principle.

Sources: Reply n.128

Canada's "in existence" argument is baseless (2)

- Canada invents an alleged "immediate and direct effect" requirement:

> NAFTA tribunals have consistently applied Article 1101(1) to require a "legally significant connection" between the challenged measure and the claimant or its investment. Thus, where a claimant cannot establish that the challenged measure had an **"immediate and direct effect**" on itself or its investment, the claim must fail for lack of jurisdiction under Article 1101(1). The same reasoning applies to paragraph 6(a) of CUSMA Annex 14-C. Its language on "an investment of an investor of another Party […] in existence on the date of entry into force of this Agreement" requires the claimant to have held the investment at issue on July 1, 2020.

- Multiple tribunals have rejected that requirement—it is inconceivable that the USMCA drafters meant to incorporate it
- In any event, the ***only date*** on which there can be an "immediate and direct effect" is on the date of the measures
  - At all points in time, WCC is the only entity that experienced an "immediate and direct effect" from the challenged measures

Sources: Memorial on Jurisdiction, ¶¶ 88-89.

WCC had a claim to money pending on July 1, 2020

- Even on Canada's reading of legacy protection, WCC had a legacy investment on July 1, 2020 in the form of a "claim to money"
- The NAFTA Claim was not a theoretical unasserted claim—
  - Before July 1, 2020, WCC had already asserted its NAFTA Claim in *Westmoreland I*.
  - The NAFTA Claim was underway when the USMCA went into force
- Even on Canada's reading of the USMCA, the NAFTA Claim was "in existence" on July 1, 2020

WCC had a claim to money pending on July 1, 2020 (2)

- Article 1139 expressly protects interests arising from the commitment of capital

> **Investment** … (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions … but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h);

- This protection extends to claims to money, as long as those claims involve the kinds of interests that are generally protected by the NAFTA. *See, e.g., Mondev*, **CLA-5**, ¶ 80.
- Claims to money are a core part of the investment because of the value of legal rights—if the enforcement of claims were not protected, the investment is not protected.

WCC had a claim to money pending on July 1, 2020 (3)

- This position is supported by a long line of jurisprudence:

> "**Mondev's claims involved "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" as at 1 January 1994, and they were not caught by the exclusionary language in paragraph (j)** of the definition of "investment", since they involved "the kinds of interests set out in subparagraphs (a) through (h)". They were to that extent "investments existing on the date of entry into force of this Agreement", within the meaning of Note 39 of NAFTA"

  - *See also Jan de Nul v. Egypt*, **CLA-07**, ¶ 135; *Chevron v. Ecuador*, Interim Award, **CLA-14**, ¶ 184-185

Sources: *Mondev v. United States*, ¶ 80, **CLA-005**.

WCC had a claim to money pending on July 1, 2020 (4)

- Here, WCC retains the right to the NAFTA Claim it submitted to arbitration in 2018
- "[W]hether an investor has title to a certain asset" following a bankruptcy process should be determined in accordance with the relevant bankruptcy law (**CLA-070**, ¶ 316)
- The U.S. bankruptcy court and Judge Chapman concluded that WCC has held its claim to money at all times:

> The Court finds that: (a) the NAFTA Claim did not transfer to Westmoreland Mining LLC ("New Westmoreland") or any other party pursuant to the Purchase Agreement, the Confirmation Order, the Plan, or any other Plan Documents or Sale Transaction Documentation; (b) pursuant to the Plan, on the Plan Effective Date, WCC's rights to the NAFTA Claim remained with WCC as reorganized, and (c) WCC retains title to the NAFTA Claim to the same extent it did prior to the Plan Effective Date.

> because the transfer of the NAFTA Claim from WCC to WMH was void ab initio, the claim, as a matter of law and fact, remained with WCC as a Retained Cause of Action and it remains there still, regardless of the parties' original intent to transfer it.

- The Tribunal should accept this unchallenged evidence.

Sources: In re Westmoreland Coal Company et al., Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), Jun. 23, 2022, ¶ 1, **C-038**; Hon. Shelley Chapman Expert Report, ¶ 47, **CER-001**.

Canada should be estopped from contesting legacy investment protection

- The only reason we are addressing the USMCA is because of Canada's abuse of rights
- WCC asserted a NAFTA claim while the NAFTA was in force and it intended to pursue that claim until the end
- If it weren't for Canada's tactics, WCC's claim would have been adjudicated under the NAFTA without reference to the USMCA.

Legacy Investment Summary

- The object and purpose of the legacy clause is to continue to provide NAFTA protection for three years, including for acts and events that pre-dated the USMCA. Excluding investors who no longer own their investment due to government measures would defeat this purpose.
- The drafters used the NAFTA definitions of "investor" and "investment," knowing full well that the NAFTA looks to the date of the measures to determine the protected party.
- Even if the Tribunal determines the USMCA only protects continuing investments, WCC's claim to money qualifies as an "investment"
- WCC should not have to satisfy the USMCA requirements, since, but for Canada's proposal that WCC withdraw from the first arbitration, WCC would never have had to confront any of Canada's arguments on legacy investments.

The Tribunal Has Jurisdiction Under the NAFTA

Disputed Issues Under the NAFTA

- **The NAFTA claim is timely**
- WCC has the requisite ownership and control to assert a claim on behalf of Prairie
- Canada's waiver letter objections are baseless
- Canada's reflective loss objections also are meritless

Why WCC's NAFTA Claim is Timely

- WCC filed its NAFTA Claim on November 19, 2018, just under two years after the NAFTA limitations period began to run
- WCC unsuccessfully sought to assign its NAFTA Claim to WMH in order for WMH to continue pursuing the Claim
- After the *Westmoreland I* tribunal held that WMH could not pursue the Claim because only WCC could bring it, WCC promptly renotified its claim.
- WCC re-filed its claim in October 2022, less than one year after the tribunal issued its award in *Westmoreland I*
- If the limitations period was tolled, it is undisputed that the Claim is timely
- Canada tries to avoid tolling on multiple grounds, every one of which fails

Sources: First Notice of Arbitration, ¶¶ 2, 16, **C-043**; Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada," July 2, 2019, **R-081**; Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada," July 3, 2019, **R-082**; Claimant's Notice of Arbitration, Oct. 11, 2022.

The Tolling Principle Is Incorporated into NAFTA

- The NAFTA does not address tolling. However, Article 1131 of the NAFTA and the VCLT both incorporate applicable rules of international law into the treaty.

> **NAFTA Art. 1131**: "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this **Agreement and applicable rules of international law**."
>
> **VCLT Art. 31(3)(c): "[a]ny relevant rules of international law applicable in the relations between the parties" shall be taken into account**, together with "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

- The tolling principle is incorporated into the NAFTA as a well-accepted principle of international law

Sources: NAFTA, **C-107**; VCLT, **CLA-004**.

Tolling Is an Established Principle of International Law

- The principle that limitations periods are tolled once a claim is asserted has been well-recognized for more than a century.
  - *Williams v. Venezuela* — limitations period "ceases to run" when the claim is notified because "[t]his puts that government on notice, and enables it to collect and preserve its evidence and prepare its defense."
  - *Gentini* — claim notification "interrupt[s] the running of prescription."
- As the tribunal explained in *Renco II*:

> The Claimant has pointed to the laws of Peru, Argentina, France, Germany, Portugal, Spain, the United Kingdom, and the United States. The Claimant also cites early arbitral decisions from which the rules of prescription in international law originated as a general principle adopted by analogy from national legal systems and Roman law, including most notably the *Gentini* Case, which held that "the presentation of a claim to competent authority within proper time will interrupt the running of prescription."

Sources: *Case of John H. Williams v. Venezuela*, Reports of International Arbitral Awards, Vol. XXIX, at 279–293, **CLA-053**. *Gentini Case*, Reports of International Arbitral Awards, Vol. X, pp. 551–561, at 561, **CLA-054**. *The Renco Group, Inc. v. The Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, June 30, 2020, ¶¶ 249, 251 ("*Renco II*"), **CLA-002**.

Tolling Is an Established Principle of International Law (2)

- *Renco II* held that tolling is a "general principle of law recognized by civilized nations."
- *Renco II* held that the tolling principle was incorporated into the FTA, and that the filing of a notice of arbitration in *Renco I* thus suspended the limitations period even though Renco submitted a defective waiver:

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

Sources: *Renco II*, ¶¶ 12, 249-251, **CLA-002**.

Tolling Is an Established Principle of International Law (3)

- *Renco II* also held that application of the tolling principle was necessary to allow claimants to cure jurisdictional defects so as to provide an effective dispute resolution mechanism for such claims:

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

- Unlike the Peru-U.S. FTA, Article 1102(1)(e) of the NAFTA confirms that the purpose of Chapter 11 is to "create effective procedures [] for the resolution of disputes."

Sources: *Renco II*, ¶ 246, **CLA-002**.

Tolling is Essential to Enable Cure of Procedural Defects

- *Renco II* applied tolling to permit the cure of a procedural defect (defective waiver) so that the claim could be heard on the merits.

> "To hold otherwise would not only create perverse incentives for a respondent State to elicit grounds for setting aside, it would frustrate a claimant's due process rights: a successful vindication of those rights would be rewarded with a prescribed claim. Such a manifestly unreasonable result—which flies in the face of the object and purpose of the Treaty under Article 31(1) of the VCLT—also confirms the Tribunal's interpretation under Article 32(b) of the VCLT."

- WCC's re-filing cures the procedural defect from *Westmoreland I*.
- As *Waste Management II* held, preventing a claim from being heard on the merits due to a curable procedural defect "should be avoided."
- That is especially true where, as in *Renco* and this case, the claimant has waived all other forms of recourse.

Sources: *Renco II*, ¶ 233, **CLA-002**; *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002, ¶ 35, **RLA-036**.

Renco II Is Consistent with *Feldman v. Mexico*

- *Feldman v. Mexico* acknowledged that the NAFTA limitations period would probably be interrupted by the assertion and acknowledgement of a claim:

> **NAFTA Articles 1116 and 1117 introduce a clear and rigid limitations defense … Of course, an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation."**

- While Canada and Mexico both discuss *Feldman*, they ignore this language.
- Applying the *Feldman* test, the limitations period was interrupted on November 19, 2018 when WCC served its Notice of Arbitration.
- Canada acknowledged WCC's claim as far back as 2019 by working with WCC to form the arbitral tribunal.

Sources: *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, Dec. 16, 2002, ¶ 63, **RLA-023**; Canada's Memorial on Jurisdiction, ¶ 98 n. 173; Canada's Reply on Jurisdiction, ¶ 106 n. 85; Submission of the United Mexican States, ¶ n. 20; Letter from Scott Little to Elliot J. Feldman, May 1, 2019, **C-053.**

The NAFTA's Limitations Objectives Are Fully Met Here

- In its Reply, Canada agreed with WCC that the purpose of the NAFTA limitations period is to **provide predictability and ensure availability of reliable evidence**.
- Those objectives were achieved here when WCC filed its claim in 2018, and by the continuous prosecution of that claim by WCC and WMH.
- Canada has not pointed to any unfair prejudice.
- Since 2018, Canada has been on notice of the need to defend itself.
- Canada's argument that its "ability (or not) to preserve evidence cannot override" the three-year limitations period misses the point.
- The lack of prejudice shows that Canada's limitations defense does not vindicate any legitimate right,
- Canada simply seeks to escape WCC's claim without having to defend it.

Sources: Canada Reply on Jurisdiction, ¶ 146; WCC Response to Memorial on Jurisdiction, ¶ 163 and n. 249.

Canada's Reliance on WCC's "Withdrawal" is Misplaced

- WCC never abandoned its Claim; no indication that WCC ever meant for its claim not to be prosecuted
- WCC agreed to the substitution of WMH so that WMH could pursue the Claim on its behalf – *based on Canada's proposal*!
- Canada acknowledged in *Westmoreland I* that WCC still could pursue its claim, despite the WCC withdrawal
- WCC's Claim has been diligently pursued since 2018
- This is not a case in which the investor abandoned its claims
- WCC is merely pursuing the claim it originally brought in 2018

Sources: Jurisdictional Hearing Transcript, Day 2, 278:9-280:5, **C-046**; *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Reply Memorial on Jurisdiction, Apr. 9, 2021, ¶ 112, **C-047.**

WCC and WMH Have Pursued the Same NAFTA Claim

- Canada argues the claims pursued by WCC and WMH are different.
- A redline of the NOAs proves the claims are substantively the same.
  - The transmittal email for Amended NOA stated that "[t]here are no changes to the substance of the claim."
- Canada concedes "the allegations of breach and damage, and the description of the factual circumstances leading to them in the WMH NOA, were nearly identical to those alleged in WCC's 2018 NOA."

Sources: Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining Holdings LLC v. Government of Canada Amended Notice of Arbitration and Statement of Claim," May 13, 2019, **R-080**; Redline-WCC Notice of Arbitration (Nov. 19, 2018) and WMH Notice of Arbitration (Aug. 12, 2019), **C-095**; Canada's Memorial on Jurisdiction, ¶ 64; Email from J. Hosking to E. Feldman Re: Westmoreland (Acknowledgement), Aug. 16, 2019 (emphasis added), **C-097**.

WCC and WMH Have Pursued the Same NAFTA Claim (2)

- *Tribunal Question No. 2: Are the claims identical, and what is the effect of such a determination?*
  - The 2018 and 2019 claims are identical, except for the change of claimant
  - Same challenged measures, facts, treaty breaches and relief sought
  - The 2022 NOA also is substantively identical
    - Same challenged measures, same facts and same claims, along with the inclusion of an expropriation claim
    - The expropriation claim is based on the same measures and facts
- The claims are substantively identical, which is all that matters to support tolling of the limitations period
  - No substantive differences that would cause Canada any unfair prejudice.

Sources: Claimant's Notice of Arbitration, Oct. 11, 2022; Notice of Arbitration, Aug. 12, 2019, **C-037**; First Notice of Arbitration, Nov. 19, 2018, **C-043**.

WCC and WMH Have Pursued the Same NAFTA Claim (3)

- In *Westmoreland I*, the tribunal held that WMH did not have standing precisely because it was seeking to assert *WCC's claim* even though WMH is not WCC's legal successor
- In *Westmoreland I*, Canada characterized the WMH claim as being the same claim previously asserted by WCC:

> WMH "**only alleges breaches** ... that occurred years before its existence as a protected investor, and **that concern an entirely different investor – WCC**."

> "The Claimant [] seeks millions of dollars in damages for the alleged economic disruption ***caused to WCC* and its investments in coal mines by the Government of Alberta's decision**."

- The identity of the claims was the essential basis for the tribunal's holding in *Westmoreland I*

Sources: *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, Jan. 31, 2022, ¶ 230, **CLA-001**; *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Memorial on Jurisdiction, Dec. 18, 2020, ¶ 66, **R-086**; *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Canada's Statement of Defense, June 26, 2020, ¶ 4, **R-031**.

WCC is Reasserting its Original NAFTA Claim

- On June 23, 2022, the Bankruptcy Court found that WCC "retain[ed] title to the NAFTA claim" and that "the NAFTA Claim did not transfer to Westmoreland Mining LLC … or any other party."
- The Court also found that "WCC's rights to the NAFTA Claim remained with WCC as reorganized" and "WCC retains title to the NAFTA Claim to the same extent it did prior to the Plan Effective Date."
- Judge Chapman's report also explains that in light of *Westmoreland I*, WCC's "claim was never transferred pursuant to the Plan Confirmation Order. At all times, the NAFTA Claim remained with WCC as a Retained Cause of Action."
- WCC is simply reasserting its original 2018 NAFTA Claim.

Sources: *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), June 23, 2022, p. 2, **C-038**; Hon. Shelley Chapman Expert Report, ¶ 39, **CER-001**.

WCC/WMH Status as Separate Entities Is Irrelevant

- While WCC and WMH are different (albeit related) entities, it does not matter because they have pursued the same claim
- Well-recognized that tolling applies across different claimants so long as they purport to advance the "same interest"
  - *Affiliated Bank of Middleton v. Am. Ins. Co.*, 77 Mich. App. 376, 258 N.W.2d 232, 234 (Mich. Ct. App. 1977) (applying tolling to different claimants) ("after failure of the original action commenced within the limitations period, a renewed action by a different plaintiff when he represents the same interest as the original plaintiff.")
  - *Federal Kemper Ins. Co. v. Isaacson*, 377 N.W.2d 379 (Mich. Ct. App. 1985) ("Where a prior action has ended without an adjudication on the merits, the tolling statute is applicable to a renewed action by a different plaintiff who represents the same interest as the original plaintiff.")

Sources: *Affiliated Bank of Middleton v. Am. Ins. Co.*, 77 Mich. App. 376, 258 N.W.2d 232, 234 (Mich. Ct. App. 1977), **C-108**; *Federal Kemper Ins. Co. v. Isaacson*, 377 N.W.2d 379, 381 (Mich. Ct. App. 1985), **C-109**.

WCC/WMH Status as Separate Entities Is Irrelevant (2)

- Civil Codes around the world (including Canada) confirm that tolling extends to all parties seeking to vindicate the same right:
  - **Civil Code of Quebec**, art. 2896 (tolling principle "has effect with regard to all the parties with respect to any right arising from the same source.")
  - **Civil Code of Peru**, Art. 1999 ("La suspensión y la interrupción pueden ser alegadas por cualquiera que tenga un legítimo interés").
  - **Civil Code of Spain**, Art. 1974 ("La interrupción de la prescripción de acciones en las obligaciones solidarias aprovecha o perjudica por igual a todos los acreedores y deudores. Esta disposición rige igualmente respecto a los herederos del deudor en toda clase de obligaciones. En las obligaciones mancomunadas, cuando el acreedor no reclame de uno de los deudores más que la parte que le corresponda, no se interrumpe por ello la prescripción respecto a los otros codeudores.")
  - **Civil Code of Portugal**, Art. 558 (a claim is tolled following notice of the claim, and that the "interruption of prescription, in favor of any of the joint creditors, can be availed by all.")
  - **Civil Code of France**, Art. 1312 (acknowledges the tolling principle 225 and that an event that "suspends the running of time for the purposes of prescription with regard to one of the joint and several creditors operates for the benefit of the other creditors.")
  - **Civil Code of Germany,** Art. 213 recognizes tolling principle and provides that "The suspension, suspension of expiry of the limitation period and recommencement of the limitation period also apply to claims which are available, for the same reason, either in addition to the claim or instead of the claim."
  - **Civil Code of Argentina**, Art. 2549 recognizes tolling principle and extends to "indivisible" interests.

Sources: Civil Code of Quebec, Article 2896, **C-110**; Civil Code of Peru, Article 1996, **R-152**; Civil Code of Spain, Article 1974, **C-111**; Civil Code of Argentina, Article 2549, **C-112**; Civil Code of France, Article 1312, **R-149**; Civil Code of Germany, Article 213, **R-150**; Civil Code of Portugal, Article 558, **R-151**.

WCC/WMH Have A Common Interest in the NAFTA Claim

- Canada also tries to avoid tolling by arguing that WCC and WMH have "adverse interests." That is factually and legally wrong.
- Debtors and creditors in a US bankruptcy have a shared interest in maximizing the value of the estate.
- The Bankruptcy Court found that WCC's pursuit of the NAFTA Claim "is in the best interests of the WLB Debtors' estates, their creditors, the WLB Plan Administrator and other parties in interests…."
- It is undisputed that WCC's pursuit of the NAFTA Claim is meant "to maximize WCC's value for the benefit of WMH."
- Canada has not challenged the findings of the Bankruptcy Court, Judge Chapman's Expert Report, or the Stein testimony.

Sources: Hon. Shelley Chapman Expert Report, ¶ 50, **CER-001**; *In re Westmoreland Coal Company et al.*, Case No. 18-35672 (DRJ) Order (Court Docket, Doc. 3315), June 23, 2022, p. 1, **C-038**, Witness Statement of Jeffrey S. Stein, Sept. 20, 2023, ¶ 17, **CWS-1;** *In re Innkeepers USA Trust*, 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010), **C-104**; Rejoinder, ¶ 49.

Canada's Limitations Defense Is An Abuse of Rights

- *Renco I* warned that assertion of a limitations defense following the cure of a procedural defect might constitute an abuse of rights.

> "**an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred**" since "Renco would suffer material prejudice if Peru were to claim in any subsequent arbitration that Renco's claims were now time-barred under Article 10.18(1)."

- The tribunal thus warned Peru to accept tolling:

> While this Tribunal cannot prevent Peru from exercising in the future what it then considers to be its legal rights**, the Tribunal can, and it does, admonish Peru to bear in mind, if that scenario should arise, Renco's submission that Peru's conduct with respect to its late raising of the waiver objection constitutes an abuse of rights.** In the unanimous view of the Tribunal, justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011.

- *Renco* shows that Canada's limitations defense is an abuse of rights.

Sources: *The Renco Group, Inc. v. The Republic of Peru* (ICSID Case No. UNCT/13/1) Partial Award on Jurisdiction, July 15, 2016, ¶¶ 187–188, **RLA-030** ("*Renco I*").

Scope and Impact of Fuel Charge Claim Withdrawal

- *Tribunal Question No. 3: What is the scope and impact of the fuel charge withdrawal on the expropriation claim?*
  - No impact on the Tribunal's jurisdiction to hear the expropriation claim
  - The expropriation claim is not based solely on the federal fuel charge
  - Expropriation claim is based on the same measures challenged in 2018
    - Climate Leadership Plan to phase out coal use
    - Inability to transport and sell produced coal anywhere else
    - Lack of just compensation for the destruction of WCC's investment
  - Impact (if any) on damages will be assessed at the merits stage.

Question No. 4: Timeliness of WCC's Expropriation Claim?

- WCC's expropriation claim is timely for several reasons:
  - The expropriation claim was asserted within the tolled 3-year limitations period
  - The expropriation claim is based on the same challenged measures and alleged facts as the original 1102 (national treatment) and 1105 (minimum standard of treatment) claims asserted in 2018.
  - Expropriation claim will not cause any unfair prejudice to Canada

Reasons Why WCC's NAFTA Claim Is Timely

1. WCC's Claim was timely notified in 2018
2. WCC's Claim has been actively pursued by WCC and WMH (on WCC's behalf) ever since
3. WCC diligently sought Bankruptcy Court approval to reassert its Claim following *Westmoreland I*, and promptly notified Canada
4. The tolling principle is incorporated into the NAFTA via international law, consistent with the NAFTA Parties' positions
5. The goals of the NAFTA limitations period were fully satisfied
6. The NAFTA limitations period was tolled from October 2018 until January 2022 due to the pendency of WCC's Claim
7. Canada's limitations defense constitutes an abuse of rights

The Issues in Dispute Under the NAFTA

- The NAFTA claim is timely
- **WCC has the requisite ownership and control to assert a claim on behalf of Prairie**
- Canada's waiver letter objections are baseless
- Canada's reflective loss objections also are baseless

WCC Can Pursue an Article 1117 Claim on Behalf of Prairie

- *Westmoreland I*:

> "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.' (The critical time is again the date on which the treaty was allegedly breached.)"

- Cases in which the investor lost ownership after the measures and was still allowed to bring a claim:
  - *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, ¶¶ 76–83, **CLA-005;** *EnCana v. Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, Feb. 3, 2006 ¶¶ 126–31, **CLA-006;** *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 135, **CLA-007**; *IC Power Asia Development Ltd v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, Oct. 7, 2020 ¶¶ 12, 355, 370, 390, **CLA-008**; *WNC Factoring v. Czech Republic*, PCA Case No. 2014-34, Award, Feb. 22, 2017, ¶¶ 8, 57, 63, 65–68, 401–03, **CLA-009**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, Mar. 31, 2011, ¶¶ 124–25, **CLA-010**; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, Aug. 22, 2012, ¶ 144–45, **CLA-011**.
- The "continuous ownership" requirement would deprive the enterprise of effective Article 1117 protection.

Sources: *Westmoreland I*, Award, **CLA-001**, ¶ 202

WCC Can Pursue an Article 1117 Claim on Behalf of Prairie (2)

- *Loewen v. United States* has attracted significant criticism for imposing a "continuous ownership" requirement, e.g., *Daimler v. United States*:

> Moreover, to impose a continuous ownership requirement may defeat the ends of justice in cases where the sale of the investment was forced – e.g. under domestic bankruptcy laws, where the bankruptcy itself may have been caused by some act of the respondent state in violation of the BIT. To this Tribunal's knowledge, only the *Loewen* tribunal has actually declined jurisdiction on a parallel (though not identical) ground….[T]he *Loewen* tribunal's imposition of this continuous nationality requirement has been criticized from many quarters.
>
> FN 252: *See e.g.* EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI 788 (2004); Maurice Mendelson, The Runaway Train: The "Continuous Nationality" Rule from the Panavezys-Saldutiskis Railway case to Loewen, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005); Noah Rubins, Loewen v. United States: The Burial of an Investor-State Arbitration Claim, 21 ARB. INT'L 1 (2005); Jan Paulsson, Continuous Nationality in Loewen, 20 ARB. INT'L 213 (2004))

- This case is the perfect example for why imposing the continuous investment requirement would deprive the investor of effective NAFTA protection.

Sources: Memorial on Jurisdiction, ¶ 138 n. 244; Reply on Jurisdiction, ¶ 211; *Daimler v. Argentina*, Award, **CLA-011**, ¶ ¶ 142-143.

WCC Can Pursue an Article 1117 Claim on Behalf of Prairie (3)

- WCC has submitted extensive evidence that it owned Prairie at the time of the measures
  - *See* Response ¶ 125 (citing **R-059**; **C-005**; **R-058; CLA-001**)
- The *Westmoreland I* tribunal found that WCC owned Prairie at the time of the measures—Canada does not challenge this
  - *Westmoreland I* Award, ¶¶ 75–89
- Since WCC owned Prairie at the time of the measures (the only relevant time for determining jurisdiction), WCC is entitled to submit an Article 1117 claim on behalf of Prairie

Sources: *Westmoreland I* Award, ¶ 202, **CLA-001**; Response to Memorial on Jurisdiction,¶ 125.

WCC can still assert a claim under Article 1116

- Even the Tribunal decides to reject the Article 1117 claim, it should accept jurisdiction over WCC's Article 1116 claim.
  - Article 1116 "**does not require subsistence of the investment at the time a claim is submitted**." *B-Mex v. United States* (**RLA-046**, ¶ 152)
  - Canada acknowledged that WCC could still bring a claim under Article 1116 at the *Westmoreland I* hearing.

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

Disputed Issues Under the NAFTA

- The NAFTA claim is timely
- WCC has the requisite ownership and control to assert a claim on behalf of Prairie
- **Canada's waiver letter objections are baseless**
- Canada's reflective loss objections also are meritless

Canada's waiver arguments are baseless

- Before starting the first arbitration in 2018, WCC and Prairie submitted waiver letters to waive their rights to pursue relief in any other forum.
- The waiver letters had an immediate and permanent effect
  - Canada acknowledges that "[t]he waiver required by Article 1121 must be legally enforceable now and in perpetuity." Memorial on Jurisdiction, n.197
  - Canada's argument that WCC withdrew its waiver undermines the entire purpose of the waiver
- When WCC lodged this arbitration, it submitted the **same** two 2018 waiver letters with its Notice of Arbitration.
- This was appropriate because there was nothing more to waive.
- There is no dispute about the substantive sufficiency of the waiver – only whether it was executed at the right time.

Sources: Amended Notice of Arbitration and Statement of Claim and Exhibits, May 13, 2019, p. 35, **C-055**; Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, "Re: Notice of Intent To Submit A Claim To Arbitration Under Chapter Eleven Of the North American Free Trade Agreement On Behalf Of Westmoreland Mining Holdings LLC and Prairie Mines & Royalty ULC", July 23, 2019, p. 43,. **R-084**.

WCC submitted valid waivers with its Notice of Arbitration in this arbitration

- NAFTA Article 1121 waiver requirements:

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

- Three requirements: (i) "in writing," (ii) "included in the submission of the claim to arbitration," and (iii) "delivered to the disputing Party."
- WCC complied by submitting **written** waivers attached to its **Notice of Arbitration** in this arbitration (**C-040** and **C-041**), as well as in the text of the Notice of Arbitration (¶ 98), which it **delivered to Canada**.

Sources: NAFTA, Art. 1121, **C-107**.

WCC submitted valid waivers with its Notice of Arbitration in this arbitration (2)

- Canada objects to the 2018 waiver letters attached to the Notice of Arbitration because they were not signed "contemporaneously"
- Canada did not assert this objection when WMH in 2019 attached Prairie's 2018 trigger letter – even though it was not signed "contemporaneously" with WMH's Notice of Arbitration (**R-085**)
- WCC relied on the fact that Canada accepted this practice when we prepared our waiver letters in this arbitration
- Canada cannot switch positions at its convenience—it cannot blow hot and cold

> The decision to accept a defective waiver lies with the respondent State only. Thus, while the Claimant argues that "Canada cannot blow hot then cold by accepting a procedural approach in one arbitration" and not in another, it is precisely Canada's prerogative to do so.

Sources: Canada's Reply, ¶ 201.

WCC submitted valid waivers with its Notice of Arbitration in this arbitration (3)

- In any event, WCC's waivers are effective because:
  - The 2018 waiver letter was signed by executives who **had authority to waive the rights at the time they signed**
    - The waiver letter became **immediately and permanently effective** in 2018
  - In addition, in 2022, WCC provided an additional waiver that was "contemporaneous" to the Notice of Arbitration
  - Both forms of waiver meet the three Article 1121 requirements
    - In writing, included with Notice of Arbitration, delivered to Canada.

Sources: Notice of Arbitration, Oct. 11, 2022, ¶ 98; Rejoinder, ¶ 186.

WCC's waiver effectively waived its expropriation claim

- **Question:** what is WCC's position on waiver of the expropriation claim?
- **Answer:** WCC effectively waived its expropriation claim in its written waivers because the waivers extended to any claims that relate to the measures at issue in the arbitration, irrespective of the treaty breach
  - Article 1121 provides:

> the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

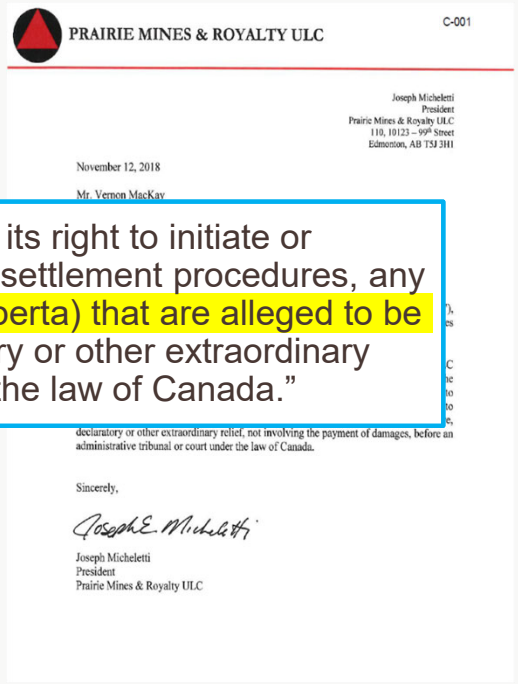
  - Article 1121 does not require waiver of **specific** treaty breaches—it is broader because it requires waiver of *measures*

Sources: NAFTA, Art. 1121, **C-107**.

WCC's waiver effectively waived its expropriation claim (2)

- WCC and Prairie waived their rights to pursue relief in other fora for **all measures** alleged to breach the NAFTA

"Pursuant to Article 1121(1)(b) and 1121(2)(b) of NAFTA, Prairie Mines & Royalty ULC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or any dispute settlement procedures, any proceedings with respect to the measures of the Government of Canada (and its Province, Alberta) that are alleged to be a breach referred to in Articles 1116 and 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada."



PRAIRIE MINES & ROYALTY ULC

C-001

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

November 12, 2018

Mr. Vernon MacKay

declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada.

Sincerely,

Joseph E. Micheletti

Joseph Micheletti
President
Prairie Mines & Royalty ULC

- The **same measures** underlie the expropriation claim, the NT claim, and the MST claim, including:
  - (1) Climate leadership plan, (2) lost opportunity to transport coal elsewhere, and (3) lack of compensation for the destruction of WCC's investment
- While WCC did not assert expropriation claim in first arbitration, it already waived the right to pursue relief for all measures that caused the expropriation, which is all that is required

Sources: Prairie Mines Waiver, **C-40**; WCC Waiver, **C-41**; Notice of Arbitration, Oct. 11, 2022, ¶ 98.

Prairie's waiver does not preclude the Article 1117 claim (2)

- NAFTA Article 1121 only requires the investor to waive their rights with respect to proceedings before courts and *other dispute settlement procedures*:

> 1. "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

- The words "other dispute settlement procedures" means any procedures that are *distinct* from the investment arbitration procedures chosen by the investor

Sources: NAFTA, Art. 1121, **C-107**.

Prairie's waiver does not waive the Article 1117 claim (3)

- The waiver letter does not prevent re-submission of a claim to arbitration after curing a procedural defect.

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

Sources: *Waste Management II* Decision, **RLA-036**, ¶¶ 35-37.

Disputed Issues Under the NAFTA

- The NAFTA claim is timely
- WCC has the requisite ownership and control to assert a claim on behalf of Prairie
- Canada's waiver letter objections are baseless
- **Canada's reflective loss objections also are meritless**

Canada's Reflective Losses Argument is Baseless

- The NAFTA recognizes the rights of an investor to bring a claim for loss—independent of the enterprise

> **Article 1139: Definitions**
> **investment** means:….(b) an equity security of an enterprise
>
> **equity or debt securities** includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants

- Nothing in the NAFTA prevents an investor for pursuing relief to harm to its shares under Article 1116:

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

Sources: NAFTA, Arts. 1116, 1139, **C-107**.

Canada's Reflective Losses Argument is Baseless (2)

- Article 1117 provides an additional mechanism to assert a claim on behalf of an entire enterprise—and requires consolidation to avoid double-recovery

> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
> …(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...

- There would be no need to safeguard against double recovery if the shareholder was unable to assert a claim for harm to the enterprise that indirectly led to investor losses

Sources: NAFTA, Arts. 1117, **C-107**.

Canada's Reflective Losses Argument is Baseless (3)

- The U.S. and Canada have argued in many prior arbitrations that the reflective loss rule applies to the NAFTA—but no tribunal has adopted that position
- No NAFTA tribunal has rejected jurisdiction based on the reflective loss defense

> In the Tribunal's view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA.

> [I]t could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise…, it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116.

  - *See also; see also GAMI Investments Inc. v. Mexico*, **CLA-044**, ¶¶ 27–33; *UPS v. Canada*, **CLA-045**, ¶ 35; *SD Myers v. Canada*, **CLA-043**, ¶ 122.

- In any event, WCC can submit a claim for its own losses under Article 1116.

Sources: *Mondev v. United States*, Award, **CLA-005**, ¶ 82; *Pope & Talbot v. Canada*, Award, ¶ 80, **CLA-042**.

Canada Should be Estopped from Challenging the Tribunal's Jurisdiction

Canada Should Be Estopped From Challenging Jurisdiction

- The principle of estoppel is well-recognized under international law
- Estoppel prevents a state party from benefiting from its own inconsistent statements to the detriment of another party
- Estoppel defined as "detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party."
- Canada should be estopped from challenging the Tribunal's jurisdiction based on:
  - Its role in securing the WCC/WMH substitution that it now seeks to use as a sword to prevent WCC's claim from being heard on the merits;
  - Its prior inconsistent statements to the tribunal in *Westmoreland I*

Sources: *Pan American Energy LLC v. Argentina, ICSID Case Nos. ARB/03/13, ARB 04/8, Decision on Prliminary Objections*, July 27, 2006 , ¶ 159, **CLA-021**; WCC Response to Memorial on Jurisdiction, ¶ 105; WCC Rejoinder on Jurisdiction, ¶ 89.

Canada Procured the WCC/WMH Substitution

- WCC/WMH sought to proceed with the arbitration as co-claimants
  - This is confirmed by the NOA itself, which listed both claimants and attached waiver letters for each of them, and by the testimony of Jeffrey Stein

AMENDED NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

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

WESTMORELAND MINING HOLDINGS LLC,

Claimant/Investor,

v.

GOVERNMENT OF CANADA,

Respondent/Party

May 13, 2019

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INTRODUCTION

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

WESTMORELAND COAL COMPANY

Michael G. Hutch
Interim
Westmoreland Coal Co
9540 S. Maroon Cir., Suit
Englewood, CO 8

November 12, 2018

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

Dear Mr. MacKay:

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

Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, Westmoreland Coal Company waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedi with respect to the measures of the Government of Canada (and its Province, Alberta)

PRAIRIE MINES & ROYALTY ULC

Joseph Miche
Presi
Prairie Mines & Royalty U
110, 10123 – 99th St
Edmonton, AB T5J

November 12, 2018

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

Dear Mr. MacKay:

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

Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, Prairie Mines & Royalty U
waives its right to initiate or continue before any administrative tribunal or court under
law of any Party, or other dispute settlement procedures, any proceedings with respec

WESTMORELAND MINING HOLDINGS LLC

May 10, 2019

Mr. Scott Little
Global Affairs Canada
Department of Justice
125 Sussex Drive
Ottawa, Ontario K1A 0G2

Dear Mr. Little:

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

Pursuant to Articles 1121(1)(b) and 1121(2)(b) of NAFTA, Westmoreland Mining Holdings LLC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of Canada (and its Province, Alberta) that are alleged to be a

Sources: First Amended Notice of Arbitration, May 13, 2019, **C-055**, ¶ 1; *Id.*, Exhibit 1, PDF pp. 38-41.

Canada Procured the WCC/WMH Substitution (2)

- Canada objected to the amendment, and then proposed the WCC/WMH substitution in its letter of July 12, 2019.

> Canada proposed that "**Westmoreland Coal Company withdraws** the claim that it submitted against Canada on November 19, 2018. **Westmoreland Mining Holdings LLC would then be free to submit its own claim** to arbitration 90 days after the May 13 NOI date."

- WCC accepted Canada's proposal as "a fair compromise," allowing the parties "to proceed [] without unnecessary procedural delay."

> "WCC believed that Canada was working in good faith to allow the claim to proceed without unnecessary conflict… We accepted Canada's compromise solution in good faith, and on July 23, 2019, WCC withdrew its claim against Canada without prejudice."

- WCC accepted Canada's substitution proposal in good faith:

> "On behalf of Westmoreland Coal Company ***and pursuant to the appended July 12, 2019 letter [from Canada]***, we hereby withdraw Westmoreland Coal Company's November 19, 2018 Notice of Arbitration and Statement of Claim."

Sources: Letter from Scott Little to Elliot Feldman, "Re: Westmoreland Coal Company v. Government of Canada," July 12, 2019, pp. 1-2, **R-083**; Letter from Elliot Feldman to Scott Little, "Re: Westmoreland Mining LLC v. Government of Canada," July 3, 2019, p. 2, **R-082** ; Stein WS, CWS-1, ¶ ¶ 12, 14.; Letter from Elliot Feldman to the Office of the Deputy Attorney General of Canada, July 23, 2019, **R-084**.

Canada Procured the WCC/WMH Substitution (3)

- Undisputed that WCC was "shocked" by Canada's gamesmanship.

> "Given all of the 'good faith' negotiations between the parties, ***I was shocked when, after our agreement was implemented, Canada immediately challenged WMHs standing to pursue the NAFTA claims against Canada.*** Had I known that Canada would argue that WMH did not have standing…, I would have never authorized WCC to withdraw its claim…***I believed that Canada's compromise solution was a good faith offer, not an act of gamesmanship to prevent Westmoreland from being able to pursue its claims at all.***"

- WMH complained to the *Westmoreland I* tribunal of Canada's bad faith, citing the principle against self-contradiction

Sources: Stein WS, CWS-1, ¶ 15; Westmoreland Mining Holdings v. Government of Canada, ICSID Case No. UNCT/20/3, Claimant WMH's Rejoinder on Jurisdiction, May 21, 2021, ¶ 123, **CLA-069**.

Canada's Representations to the *Westmoreland I* Tribunal

- Canada assured the tribunal WCC still could bring its Claim:
  - Canada acknowledged in its Reply (at ¶ 112) that "it was open to WCC to continue with its NAFTA claim; the company still exists as an enterprise constituted under the laws of Delaware."
  - Arbitrator Hosking then pressed Canada as to whether WCC "ha[s] any residual rights to bring a treaty claim" in light of the WCC withdrawal
  - Canada responded that "[WCC] could still be in a position to bring a claim on its own behalf."
- Canada never said that WCC's Claim was barred *on any grounds*.
- If Canada had said WCC's claims were barred, the tribunal could have taken steps to preserve WCC's rights, including the warning in *Renco I* that such a defense would be an abuse of rights.

Sources: Jurisdictional Hearing Transcript, Day 2, 278:15–280:4, **C-046**; *Westmoreland Mining Holdings, LLC v. Canada*, ICSID Case No. UNCT/20/3, Canada's Reply Memorial on Jurisdiction ¶ 112, **C-047**.

Canada Cannot Profit from its Own Inconsistent Positions

- Canada's substitution proposal obviously was designed to ensure that WCC's NAFTA claim would not be heard on the merits.
- Canada's statements in *Westmoreland I* convinced the tribunal to dismiss WMH as a claimant, based on the understanding that WCC could resubmit its Claim
- Estoppel prevents Canada from taking advantage of its earlier contradictory statements in order to "cause serious injustice"
- The serious injustice to WCC here is obvious
  - Barring WCC from asserting its claim in any forum, especially in light of its waiver of other recourse.

Sources: WCC's Rejoinder on Jurisdiction, ¶¶ 89-94 and n.133

Canada's Contradictory Positions Are Barred by Preclusion

- In addition to estoppel, the preclusion principle under international law also prohibits parties from taking advantage of inconsistent positions
- The preclusion principle "may be utilized, even in the absence of technical municipal law requirements, such as reliance."

> *Chevron v. Ecuador:* "no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment."

- Canada nevertheless insists on its prerogative to blow hot and cold:

> "while the Claimant argues that 'Canada cannot blow hot then cold by accepting a procedural approach in one arbitration' and not in another, ***it is precisely Canada's prerogative to do so***."

Sources: *Oil Field of Texas v. The Government of the Islamic Republic of Iran et al.* (1 Iran-U.S.C.T.R. 347), Concurring Opinion of Richard M. Mosk with Respect to Interlocutory Award, Dec. 9, 1982, p. 24, **CLA-028**; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, Aug. 30, 2018, ¶¶ 7.105, 7.107, **CLA-073**; Canada's Reply on Jurisdiction, ¶ 201.

WCC Is Not Using Estoppel to Create Jurisdiction

- Jurisdiction arises from WCC's 2018 Notice and Canada's consent thereto.

- Estoppel can be used to prevent a State from raising jurisdictional objections.
  - *Cyprus Popular Bank ("Laiki") v. Hellenic Republic* — When Laiki commenced arbitration, it had a "legitimate expectation" that Greece's offer to arbitrate was valid. The Tribunal "estopped" Greece from arguing that it "secretly abrogated" that offer when Cyprus acceded to the EU.

- In addition, it is a fundamental principle of international law that events taking place after the date on which judicial proceedings are instituted are irrelevant to a determination of jurisdiction
  - *Eskosol v. Italy* — *Achmea* "could not be applied retroactively to invalidate a consent to arbitration given before the *Achmea* Judgment, but only prospectively for purposes of investors who have not yet initiated an ECT arbitration."

Sources: *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to intra-EU Disputes, May 7, 2019, ¶ 199, **CLA-052**; Cyprus Popular Bank v. Hellenic Republic, ICSID Case No. ARB/14/16, Decision on Jurisdiction, Jan. 8, 2019, ¶ 694, **CLA-068**.

WCC's Claim should be heard on the merits—once and for all

- As the tribunal held in *Waste Management II*, claims that are dismissed on curable jurisdictional or procedural grounds should be heard on the merits where, as in this case, the underlying defect is cured.

> "**Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant [] recommencing its action**. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies. As the International Court said in the *Barcelona Traction* case: . . . 'it can be said that the **Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted to judgment, or discontinued in circumstances involving its final renunciation** – neither of which constitutes the position here.'"

- WCC has been seeking to have its claims heard since 2018.
- It is time for WCC to receive the due process it is entitled to under the NAFTA by having its claim heard on the merits—once and for all.

Sources: *Waste Management II*, ¶ 36, **RLA-036**.