

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

- and -

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

- between -

**WESTMORELAND COAL COMPANY**

*Claimant*

**and**

**GOVERNMENT OF CANADA**

*Respondent*

**(ICSID Case No. UNCT/23/2)**

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**PROCEDURAL ORDER NO. 3**

**Hearing Organization**

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*Tribunal*

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Mr. Laurence Shore

Ms. Judith Levine

*Assistant to the Tribunal*

Dr. Magnus Jesko Langer

*Secretary of the Tribunal*

Ms. Anna Holloway

**3 April 2024**

## TABLE OF CONTENTS

1.	PROCEDURAL BACKGROUND.....	3
2.	HEARING FORMAT AND VIDEOCONFERENCE PLATFORM.....	4
3.	PARTICIPANTS .....	4
4.	HEARING SCHEDULE AND TIME ALLOCATION.....	5
5.	ADVANCE TESTING .....	6
6.	ACCESS TO THE VIDEOCONFERENCE.....	7
7.	VIDEOCONFERENCE ETIQUETTE.....	8
8.	INTERNET CONNECTION AND DEVICES .....	9
9.	DOCUMENTATION.....	10
10.	LANGUAGE .....	12
11.	TRANSCRIPT AND RECORDINGS .....	12
12.	TECHNICAL PROBLEMS .....	13
13.	POST-HEARING BRIEFS AND STATEMENTS OF COSTS.....	13
14.	DATA PRIVACY.....	14
15.	MISCELLANEOUS.....	14
	ANNEX I.....	15
	ANNEX II .....	17

**1. PROCEDURAL BACKGROUND**

- 1.1. The Parties and the Tribunal have agreed to schedule a hearing with respect to the Respondent’s objections to jurisdiction on 2 and 3 May 2024 (with 4 May 2024 in reserve) (the “**Hearing**”).
- 1.2. On 9 October 2023, having invited and received the comments of the Parties, the Tribunal informed the Parties in accordance with paragraph 22.3 of Procedural Order No. 1 (“**PO1**”) that the Hearing would take place by videoconference in order to avoid the costs and damage to the environment that would result from travelling for an in-person hearing.
- 1.3. On 26 March 2024, the Tribunal circulated a draft of this Procedural Order for the Parties’ comments.
- 1.4. On 2 April 2024, the Parties submitted their joint comments on the draft Procedural Order, including their respective positions on the issues that remained outstanding.
- 1.5. On 3 April 2024, in accordance with paragraph 22.5 of PO1, the Tribunal held a pre-hearing conference with the Parties (the “**Pre-Hearing Conference**”).
- 1.6. The following participants joined the Pre-Hearing Conference:

The Tribunal:

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal  
Mr. Laurence Shore, Arbitrator  
Ms. Judith Levine, Arbitrator

Assistant to the Tribunal:

Dr. Magnus Jesko Langer, Assistant to the Tribunal

ICSID Secretariat:

Ms. Anna Holloway, Secretary of the Tribunal  
Ms. Ekaterina Minina, Paralegal

On behalf of the Claimant:

Mr. Javier Rubinstein, Partner, King & Spalding LLP  
Ms. Lauren Friedman, Partner, King & Spalding LLP  
Ms. Tamsin Parzen, Associate, King & Spalding LLP

On behalf of the Respondent:

Ms. Krista Zeman, A/Deputy Director and Senior Counsel, Trade Law Bureau  
Ms. Heather Squires, Deputy Director and Senior Counsel, Trade Law Bureau  
Ms. E. Alexandra Dosman, A/Deputy Director and Senior Counsel, Trade Law Bureau  
Ms. Maria Cristina Harris, Counsel, Trade Law Bureau  
Mr. Christopher Koziol, Counsel, Trade Law Bureau  
Ms. Darian Bakelaar, Senior Paralegal, Trade Law Bureau  
Ms. Marianna Maza Pinero, Paralegal, Trade Law Bureau  
Mr. Opeyemi Bello, Counsel, Government of Alberta  
Mr. Sean Peister, Counsel, Government of Alberta  
Mr. Matthew Noel, Junior Trade Policy Analyst, Government of Canada

- 1.7. During the Pre-Hearing Conference, the Parties and Tribunal discussed the draft of this Procedural Order that had been circulated to the Parties and the Parties' comments on the draft.
- 1.8. A recording of the Pre-Hearing Conference was deposited in the archives of ICSID. It was made available to the Members of the Tribunal and the Parties on 3 April 2024.
- 1.9. This Order sets out the procedural rules that the Parties have agreed or the Tribunal has determined to govern the conduct of the Hearing.

**2. HEARING FORMAT AND VIDEOCONFERENCE PLATFORM**

- 2.1. The Hearing shall be conducted online using Zoom (the "**Hearing Platform**").
- 2.2. ICSID will administer the videoconference, and will provide a dedicated technician to assist during the Hearing. Ms. Anna Holloway (aholloway1@worldbank.org) and Ms. Ekaterina Minina (eminina@worldbank.org) will act as the "**Hearing Managers**" and will, with the assistance of the technician, provide the Tribunal and the Parties administrative and technical support as described in the sections below.

**3. PARTICIPANTS**

- 3.1. The persons participating in the Hearing (the "**Participants**") and the locations from which they will be participating are set out in Annex I. The Parties are invited to complete the list of Participants by 12 April 2024. Each Party may make changes to its list of Participants by amending Annex I and returning it to ICSID by 24 April 2024.

**4. HEARING SCHEDULE AND TIME ALLOCATION**

- 4.1. The Hearing will take place on 2 and 3 May 2024.
- 4.2. Each Hearing day shall start at 9:30 AM EDT (Washington, D.C.) / 2:30 PM BST (London) / 3:30 PM CET (Geneva) and end no later than 2:00 PM EDT (Washington, D.C.) / 7:00 PM BST (London) / 8:00 PM CET (Geneva).
- 4.3. During the first day, each Party will have one hour and forty-five minutes to present opening oral arguments, starting with the Respondent, followed by questions from the Tribunal to be answered on the following day. A 15-minute break will take place after the Respondent's oral argument, and a 30-minute break will take place after the Claimant's oral argument.
- 4.4. During the second day, each Party will have up to 45 minutes to answer any questions from the Tribunal, the Respondent going first. The Tribunal may modify this time allocation based on the number and scope of its questions. The question-and-answer period will be followed by a one-hour break. Each Party will then have 15 minutes for rebuttal arguments.
- 4.5. The schedule of the Hearing (the "**Hearing Schedule**") is set out in Annex II to this Order. The Tribunal may vary the Hearing Schedule if and when necessary, in particular due to delays or other interruptions caused by technical problems in the functioning of the videoconference facilities.
- 4.6. The Parties are expected to use the Hearing days efficiently and avoid unnecessary slippage (e.g., delays in returning from breaks). In the event of excess slippage, the Tribunal may revisit the length of the sitting day or, in exceptional circumstances, the time allocated to the Parties, bearing in mind principles of predictability, equal treatment and a fair opportunity for the Parties to be heard.

- 4.7. Recalling paragraph 22.6 of PO1, and to help facilitate the Parties' efficient use of time at the Hearing, the Tribunal will endeavour to provide the Parties with guidance on questions or issues that it would like the Parties to address at the Hearing by 19 April 2024.
- 4.8. Time spent dealing with objections from a Party shall not be counted against that Party's time unless the Tribunal determines otherwise. Time used for housekeeping or to resolve technical difficulties shall not be counted against any Party's time unless the Tribunal determines otherwise. Time used answering follow-up questions from the Tribunal on the second day of the Hearing shall not be counted against that Party's time unless the Tribunal determines otherwise.
- 4.9. The Tribunal Secretary shall keep a record of each Party's use of time in accordance with the chess clock method and report at the end of each Hearing day about the total of daily time used.

**5. ADVANCE TESTING**

- 5.1. The Hearing Managers will arrange for a trial videoconference ("**Trial VC**") on 1 May 2024, with all Participants who will join the Hearing from a different connection than during prior videoconferences held in this arbitration to test the connections.
- 5.2. For the Trial VC, Participants shall strive to replicate the conditions under which they will participate in the Hearing. In particular:
- 5.2.1. each Participant should join the Trial VC with the same device(s), headset/microphone set-up, and internet connection and from the same physical location that they intend to use for the Hearing;
- 5.2.2. Participants will join the Trial VC using the same procedure as for the Hearing itself (Section 6 below);
- 5.2.3. the Trial VCs shall include a test of each of the functions of Zoom that is intended to be used by the relevant Participants during the hearing (e.g., presentation of evidence via shared screen);

5.2.4. the Trial VCs shall include a test of the real time transcript.

5.3. In addition to the Trial VCs, at the Parties' request, the Hearing Managers may facilitate additional testing and training of the Hearing Platform for Participants, if useful to facilitate the readiness of all Participants for the Hearing.

**6. ACCESS TO THE VIDEOCONFERENCE**

6.1. In accordance with paragraph 22.8 of PO1, the Hearing shall be public.

6.2. To facilitate public access to the Hearing:

6.2.1. An audio-video recording will be made of the Hearing and uploaded onto the ICSID website after the Hearing.

6.2.2. To the extent possible, a Party shall inform the Tribunal before addressing a topic involving confidential or restricted access information, allowing for the transcript and recording to be marked "confidential". In case of disagreement, the Tribunal will decide whether the information in question shall be protected from disclosure.

6.2.3. The ICSID Secretariat will make the necessary technical arrangements to record the Hearing and upload the recording onto the ICSID website as set out above.

6.3. In accordance with paragraph 20.1 of PO1, the non-disputing State parties may attend the Hearing. To facilitate access to the Hearing by representatives of the Governments of Mexico and the United States, ICSID will provide identified representatives with the Zoom access information; all such participants will be identified on the List of Participants.

6.4. Access to the Hearing will be password protected. The Hearing Managers shall circulate the log-in details for the videoconference to the Participants' email addresses identified in Annex I no later than two days prior to the start of the Hearing. Participants shall not forward or share the Hearing link or password. Access to the videoconference will be available via the same link throughout the Hearing.

- 6.5. All Participants shall join the videoconference at least 15 minutes in advance of the start of each Hearing day to facilitate the identification of Participants and early resolution of any technical difficulties.
- 6.6. Participants will join the videoconference through a “waiting room” to be managed by the Hearing Managers, with the assistance of the technician. In order to facilitate identification, Participants must join the videoconference showing a username that enables them to be readily identified and assigned to the appropriate breakout room (i.e., T (for Members of the Tribunal), C (for Claimant) or R (for Respondent) followed by first name and last name, e.g., “T – Gabrielle Kaufmann-Kohler”). Prospective Participants who cannot be identified shall not be granted access to the videoconference, unless otherwise decided by the Tribunal upon request of a Party.
- 6.7. Private breakout rooms (within the main videoconference) will be made available for the exclusive use of the Tribunal and each Party. The Parties will make use of the breakout room functions within the Hearing Platform to avoid delays associated with admission to the videoconference and to enable the Tribunal to reconvene promptly following breaks. Each Party may make separate arrangements for private communication with their respective teams during the Hearing by instant messenger or other appropriate means.
- 6.8. After having been identified by the Hearing Managers, Participants will be assigned to, and placed into, their appropriate breakout room until the Hearing commences.
- 6.9. Access to the videoconference shall be restricted to the Participants, who bear an ongoing duty to warn of the presence of any other person on the videoconference. No person other than the Participants shall be admitted to the videoconference, unless otherwise decided by the Tribunal.

**7. VIDEOCONFERENCE ETIQUETTE**

- 7.1. Once admitted to the videoconference, and barring technical issues or other exceptional circumstances, Participants should remain connected throughout the Hearing day, including during breaks.



- 7.2. During the videoconference, all Participants without an active role at any given moment should mute their own audio and turn off their video. All active participants (Tribunal members and lead counsel) shall have their videos on. The Tribunal may request Participants without an active role also to turn on their video.
- 7.3. Participants should join the Hearing from a location without background noise and with adequate lighting. All participants should consider using a headset (headphones with integrated microphone) of good quality, and active Participants should ensure they have access to such a headset. All Participants should further ensure that all devices (e.g., telephones, mobile phones) other than the device through which the Participant is connected are in silent mode and that there is no other person in the same physical room with them unless that person is listed in Annex I.
- 7.4. Participants shall endeavor to speak one at a time, except to interpose an objection to a question asked or to alert other Participants of technical difficulties.
- 7.5. The technician shall disable the Zoom built-in chat function, except for communications with the technician.
- 7.6. The Tribunal may adjust or supplement the above provisions on etiquette, in consultation with the Parties, during the course of the Hearing.

**8. INTERNET CONNECTION AND DEVICES**

- 8.1. Each Party shall be responsible for ensuring that its Participants connect to the Hearing Platform through a stable internet connection, offering sufficient bandwidth (a minimum bandwidth of 8 Mbps download and 1.5 Mbps upload speed is recommended), and use a camera, microphone, and speaker of good quality. All active Participants at the Hearing are required to use good quality microphones and cameras, as tested by the technician before the start of the Hearing.

- 8.2. All Participants shall have access to at least two screens (with a recommended minimum size of 13” and 1920x1080 screen resolution), as tested by the technician before the start of the Hearing.
- 8.3. It is recommended that the Participants adjust their cameras in a manner that their face and part of their torso may be clearly visible in adequate lighting, as tested by the technician before the start of the Hearing. If two or more people are attending the Hearing together in a room, the active speaker may use his or her own camera focused on his or her face.
- 8.4. Participants are also encouraged to keep a smartphone or tablet, having at a minimum a 4G data connection and mobile hotspot functionality, available as a backup internet connection at all times during the Hearing. The Hearing Managers will provide a dial-in telephone audio option as a backup option for Participants experiencing difficulties with computer audio.

**9. DOCUMENTATION**

- 9.1. The use of documents during the Hearing is governed by paragraph 15.12 of PO1, subject to any different rule in this Order.
- 9.2. The Parties shall jointly prepare a single Electronic Hearing Bundle. The Electronic Hearing Bundle shall contain all pleadings, witness statement(s), expert report(s), exhibits, legal authorities, and Tribunal’s orders, with a consolidated hyperlinked index. It shall not contain any document not previously filed. It shall be organized as follows:

Electronic Hearing Bundle:

**01. Pleadings**

- A. Claimant
- B. Respondent

**02. Witness Statement(s)**

- A. Claimant

**03. Expert Report(s)**

- A. Claimant

**04. Exhibits**

- A. Claimant

B. Respondent

**05. Legal Authorities**

A. Claimant

B. Respondent

**06. Tribunal's Rulings**

- 9.3. The Electronic Hearing Bundle shall be uploaded to a designated sub-folder in the BOX filesharing platform by 9 April 2024. To ensure operation of the hyperlinked index, the entire Electronic Hearing Bundle shall be housed within one folder and then uploaded to BOX as a single zip file . A separate bundle containing NAFTA Article 1128 submissions, and comments of the Parties thereto, if any, shall be uploaded by 25 April 2024.
- 9.4. For their oral submissions, the Parties may make use of PowerPoint or similar presentations, provided they (i) identify the source in the record from which the information is derived and (ii) do not contain materials not in the record. The Parties shall provide electronic copies of any PowerPoint or similar presentations, by email to all other Participants (including the other side, the Members of the Tribunal, the Tribunal Secretary, the Assistant to the Tribunal, and the court reporters) 30 minutes prior to their use during the Hearing.
- 9.5. The Parties may use demonstrative exhibits (i.e., charts, tabulations, etc. compiling information that is on the record but not presented in such form), provided that such demonstrative exhibits (i) identify the source in the record from which the information is derived, (ii) do not contain information not in the record, and (iii) are distributed by email to all other Participants (including the other side, the Members of the Tribunal, the Tribunal Secretary, the Assistant to the Tribunal, and the court reporters) by 20:00 EDT on the eve of the day of their use.
- 9.6. In addition, promptly after the conclusion of the Hearing day on which a demonstrative exhibit or PowerPoint presentation is used, the relevant Party shall upload such demonstrative exhibit or PowerPoint presentation to the case folder in the BOX filesharing platform, designating each with the corresponding CD-\_\_\_ or RD-\_\_\_ number for demonstrative exhibits and with CP- or RP- number for PowerPoint presentations.

9.7. The display of PowerPoint presentations, including demonstrative exhibits, shall be made through the screen-sharing function of the Hearing Platform, the speaker and the relevant document being seen simultaneously at all times. The Parties are encouraged to designate one person on each side who shall be responsible for such display.

9.8. Documents that do not form part of the record may not be presented or referred to at the Hearing, unless otherwise agreed by the Parties or authorized by the Tribunal.

**10. LANGUAGE**

10.1. The Hearing shall be conducted in English.

**11. TRANSCRIPT AND RECORDINGS**

11.1. Transcripts and recordings shall be governed by paragraph 22.9 of PO1, subject to the following provisions:

11.1.1. ICSID will arrange for court reporting services (the “Court Reporter”).

11.1.2. The Court Reporter shall provide verbatim, real-time transcriptions of the Hearing, which shall be made available on a separate remote platform. The Hearing Managers shall circulate the connection details for the transcript no later on the day prior to the Trial VCs. Transcripts will be circulated by email at the end of each Hearing day. Participants are encouraged to use an additional device (e.g., a tablet) or screen for viewing the transcript. The cost of court reporting services shall be borne equally by both Parties, subject to the Tribunal’s award of costs.

11.1.3. The technician shall arrange for the Hearing to be audio and video recorded. No Participant, other than the Court Reporter, shall record, via audio, video, or screenshot, any part of the Hearing, unless the Tribunal grants express leave to this effect. Recordings will be made available to the Participants after the Hearing.

11.1.4. The Parties shall endeavor to agree on transcript corrections and advise the Tribunal accordingly by 31 May 2024. The Tribunal will resolve any remaining disagreement.

**12. TECHNICAL PROBLEMS**

12.1. By 24 April 2024, each Party shall designate one of its representatives to act as videoconferencing contact person (the “**VC Emergency Contact Person**”) for purposes of addressing any technical incidents that may arise during the videoconference. The VC Emergency Contact Person shall be responsible for immediately advising the Tribunal and the Tribunal Secretary if an essential Participant from that Party is disconnected or otherwise cannot participate, such that the Tribunal may pause the Hearing. In case of other difficulties, the VC Emergency Contact Person shall notify and address technical issues with the Hearing Manager and/or the Tribunal Secretary, without interrupting the Hearing.

12.2. The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the videoconference system to be inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding.

12.3. The Parties may liaise with the Hearing Managers on such other logistical aspects as necessary.

**13. POST-HEARING BRIEFS AND STATEMENTS OF COSTS**

13.1. In accordance with paragraph 25.1 of PO1, there will be no post-hearing briefs on preliminary objections, unless after consultation of the Parties the Tribunal requests the Parties to address specific issues. In the latter event, the Tribunal will give appropriate directions at the close of the hearing or shortly thereafter.

13.2. In accordance with paragraph 25.2 of PO1, the Tribunal will issue directions on the Parties’ statements of costs at the appropriate stage.

**14. DATA PRIVACY**

14.1. The list of participants will contain personal data provided to ICSID, including names and contact information, such as business email addresses and telephone numbers. This data will be processed for the legitimate interests of the Parties in resolving efficiently their dispute and, in particular, to ensure that procedural documents and Hearing arrangements are properly communicated to the Hearing Participants.

**15. MISCELLANEOUS**

15.1. It is noted that videoconferencing constitutes an acceptable means of conducting a hearing, permitted by Article 28 of the 2013 UNCITRAL Arbitration Rules and paragraph 22.3 of PO1.

Date: 3 April 2024

[signed]

Prof. Gabrielle Kaufmann-Kohler  
On behalf of the Tribunal

**ANNEX I**  
**LIST OF PARTICIPANTS**

Name	Designation	Location	Venue	Email
<b>Arbitral Tribunal and Assistant to the Tribunal</b>				
Prof. Gabrielle Kaufmann-Kohler	Tribunal			gabrielle.kaufmann-kohler@lk-k.com
Mr. Laurence Shore	Tribunal			laurence.shore@belex.com
Ms. Judith Levine	Tribunal			judithlevine@levinearbitration.com
Dr. Magnus Jesko Langer	Assistant to the Tribunal			magnusjesko.langer@lk-k.com
<b>Tribunal Secretary and ICSID</b>				
Ms. Anna Holloway	Tribunal Secretary	ICSID Washington, D.C.	ICSID	aholloway1@worldbank.org
Ms. Ekaterina Minina	ICSID Secretariat	ICSID Washington, D.C.	ICSID	eminina@worldbank.org
<b>Claimant</b>				
<b>Respondent</b>				

<b>Non-Disputing NAFTA Party Representatives (if any)</b>				
<i>[For the United States of America]</i>				
<i>[For the United Mexican States]</i>				
<b>Court Reporter</b>				



**ANNEX II**

**HEARING SCHEDULE**

**Note:** this Hearing Schedule is indicative only. The specific times may be adjusted by the Tribunal depending on the progress of the hearing.

<b>Day 1 Thursday, 2 May 2024</b>	
<b>Time (EDT / CET)</b>	<b>Description</b>
9:30 AM (EDT) 3:30 PM (CET)	Tribunal's opening remarks / housekeeping
--	Respondent's oral argument (max. 1h45)
--	BREAK (15 minutes)
--	Claimant's oral argument (max. 1h45)
--	BREAK (30 minutes)
--	Q&A Session (15 minutes)

<b>Day 2 Friday, 3 May 2024</b>	
<b>Time (EDT / CET / PKT)</b>	<b>Description</b>
9:30 AM (EDT) 3:30 PM (CET)	Housekeeping
--	Respondent's answers to Tribunal questions (up to 45 minutes)
--	BREAK (5-10 minutes)
--	Claimant's answers to Tribunal questions (up to 45 minutes)
--	BREAK (1 hour)
	Respondent's rebuttal arguments (15 minutes)
	Claimant's rebuttal arguments (15 minutes)
	Procedural discussion / Conclusion of the Hearing