

PUBLIC DOCUMENT

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

BETWEEN:

WESTMORELAND MINING HOLDINGS LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/20/3)

GOVERNMENT OF CANADA

REQUEST FOR BIFURCATION

July 24, 2020

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I. INTRODUCTION

1. In accordance with the procedure agreed to by the disputing parties and confirmed by the Tribunal,¹ Canada requests that the Tribunal bifurcate these proceedings and hear the jurisdictional and admissibility objections set out in Canada's Statement of Defence in a preliminary phase.²

2. In particular, Canada requests that the Tribunal hear Canada's jurisdictional objections under NAFTA Articles 1101(1), 1116(1), 1116(2), 1117(1), and 1117(2), along with Canada's objection under Article 1108(7)(b), as a preliminary matter. These objections are discrete and ripe for determination.

3. The *1976 UNCITRAL Arbitration Rules* (the "1976 UNCITRAL Rules") establish a presumption that questions of jurisdiction should be heard in a preliminary phase, a presumption aimed at ensuring efficiency in arbitration proceedings. In this case, bifurcation is the fairest and most efficient method of proceeding. Preliminary consideration of Canada's serious and substantial objections will not require the Tribunal to prejudge or enter the merits and, if successful, will eliminate the totality of the Claimant's claim. It would be procedurally unfair and inefficient to require either disputing party to spend potentially millions of dollars and thousands of hours of lawyer, expert, and witness time litigating claims over which the Tribunal has no jurisdiction or which are inadmissible. For these reasons, the Tribunal should first consider issues of jurisdiction and admissibility, rather than combining these preliminary objections with an unnecessary and expensive merits phase.

II. JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS SHOULD BE CONSIDERED AS A PRELIMINARY MATTER WHEN DOING SO WILL INCREASE THE FAIRNESS AND EFFICIENCY OF THE PROCEEDINGS

4. Article 21(4) of the 1976 UNCITRAL Rules provides: "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal

¹ See Correspondence from the Tribunal to the Disputing Parties, dated 9 July 2020.

² Canada's Statement of Defence, 26 June 2020 ("Statement of Defence"), ¶¶ 62-74, 95-103.

may proceed with the arbitration and rule on such a plea in their final award.”³ This rule creates a presumption in favour of bifurcating jurisdictional questions.⁴

5. The presumption in favour of bifurcation is intended to increase the fairness and efficiency of arbitration proceedings.⁵ Holding a preliminary phase to hear jurisdictional objections “enables the parties to know where they stand at an early stage; and it will save them spending time and money on arbitral proceedings that prove to be invalid.”⁶ It also helps to ensure that the tribunal only hears and decides a dispute where the conditions of consent to arbitrate have been met. This principle is particularly salient in investment treaty arbitration, including under NAFTA Chapter Eleven, because

³ 1976 UNCITRAL Rules, Article 21(4). Unlike Article 23(3) of the *2010 UNCITRAL Arbitration Rules*, which provides that the Tribunal “may” bifurcate, the preceding 1976 UNCITRAL Rules provide that the tribunal “should” rule on a plea concerning its jurisdiction as a preliminary question. The use of “should” rather than “may” provides narrower discretion to a tribunal under the 1976 UNCITRAL Rules and creates a presumption in favour of bifurcation. See **RLA-002**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014 (“*Philip Morris – Procedural Order No. 8*”), ¶ 101.

⁴ See, e.g., **RLA-003**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 18 January 2013, ¶ 16 (holding that under the 1976 UNCITRAL Rules “when a Party raises an objection to jurisdiction, the presumption is in favor of addressing the objection as a preliminary question”); **RLA-004**, *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile II* (UNCITRAL) Decision on Respondent’s Request for Bifurcation, 27 June 2018 (“*Pey Casado – Decision on Request for Bifurcation*”), ¶ 100 (“The Tribunal agrees with Respondent that Article 21(4) of the UNCITRAL Rules creates a presumption in favor of treating the issue of jurisdiction as a preliminary question”); **RLA-005**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4, Decision on Bifurcation, 18 November 2016 (“*Resolute – Decision on Bifurcation*”), ¶ 4.3 (“As a starting point, Article 21(4) of the UNCITRAL Rules provides that ‘[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.’ This creates a presumption in favour of bifurcation, subject to the Tribunal exercising discretion to deal with jurisdictional pleas together with the merits in appropriate circumstances.”).

⁵ See, e.g. **RLA-006**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India* (UNCITRAL) Decision on the Respondent Application for Bifurcation (Procedural Order No. 4), 19 April 2017, ¶ 78 (“These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal’s discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules.”); **RLA-007**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005 (“*Glamis Gold – Procedural Order No. 2 (Revised)*”), ¶ 11 (“In examining the drafting history of Article 21(4) of the UNICTRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings”), ¶12(c) (“[I]f an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so.”).

⁶ **RLA-008**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004) [Excerpt], p. 258. See also **RLA-009**, Gary Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2009), Volume I [Excerpt], pp. 994-995 (“Although no absolute rules can be prescribed, the more appropriate course for the arbitral tribunal is generally to conduct a preliminary proceeding on credible good faith jurisdictional challenges. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on merits. It also avoids forcing a party, who may not be subject to a tribunal’s jurisdiction, to litigate the merits of its claims in what may be an illegitimate forum.”).

it is a “basic rule of international law and a principle of international relations that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established.”⁷ NAFTA and other international arbitral tribunals frequently decide questions of jurisdiction as a preliminary matter separate from the merits,⁸ a practice described as “standard procedure” in ICSID arbitrations.⁹

6. Similarly, Article 15(1) of the 1976 UNCITRAL Rules confers the Tribunal discretion to consider other matters as preliminary questions even if they do not fall within the ambit of Article 21(4) of the 1976 UNCITRAL Rules, as long as the disputing parties are treated with equality and have a full opportunity to present their case.¹⁰ The imperative of procedural efficiency “may [...] be

⁷ **RLA-010**, Shabtai Rosenne, *The World Court: What It Is and How It Works*, 5th ed. (Dordrecht: Martinus Nijhoff, 1995) [Excerpt], p. 99. See also **RLA-011**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (106 I.L.R. 531) Decision on Jurisdiction, 14 April 1988, ¶ 63 (in bifurcating, the tribunal confirmed “there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the tribunal must examine [a sovereign’s] objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties”).

⁸ See, e.g., **RLA-005**, *Resolute – Decision on Bifurcation*, ¶ 5.1 (NAFTA Chapter Eleven tribunal deciding to treat the respondent’s jurisdictional and admissibility objections as a preliminary question); **RLA-012**, *Canfor Corp. v. United States of America* (UNCITRAL) Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, ¶ 55 (NAFTA Chapter Eleven tribunal deciding to treat the respondent’s jurisdictional objection as a preliminary question); **RLA-013**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 2, 22 May 2003, ¶ 1 (NAFTA Chapter Eleven tribunal deciding to address preliminary issues separate from proceeding on the merits); **RLA-014**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Decision of the Tribunal on the Filing of a Statement of Defence, 17 October 2001, ¶ 16 (“[Jurisdictional issues] are [...] frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter.”); **RLA-015**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, (NAFTA Chapter Eleven tribunal addressing the respondent’s objections to competence and jurisdiction as a question separate from the merits); **RLA-016**, *Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998, (NAFTA Chapter Eleven tribunal directing parties to brief and argue preliminary issues separate from proceeding on the merits); **RLA-017**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (ICSID Case No. ARB/12/2) Decision on Respondent’s Application for Bifurcation, 13 June 2013, ¶ 57 (“*Emmis International – Decision on Application for Bifurcation*”) (deciding to hear respondent’s objections to jurisdiction as a preliminary question); **RLA-004**, *Pey Casado – Decision on Request for Bifurcation*, ¶ 118 (deciding to hear jurisdictional objections as a preliminary question).

⁹ **RLA-018**, Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2009) [Excerpt], pp. 534 (“ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.”), 537 (“In the practice of ICSID tribunals, treatment of jurisdictional issues as preliminary questions is standard procedure.”).

¹⁰ Article 15(1) of the 1976 UNCITRAL Rules states: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity of presenting its case.”

used to bifurcate in order to end the procedure at the phase of preliminary objections if that saves the very considerable work and time that would be needed for a procedure on the merits.”¹¹

7. The tribunal in *Philip Morris v. Australia*, an arbitration governed by the 2010 UNCITRAL Arbitration Rules, considered bifurcation to be appropriate for issues of both jurisdiction and admissibility¹² when the objection: (i) is *prima facie* serious and substantial, (ii) can be examined without prejudging or entering the merits, and, (iii) if successful, would dispose of all or an essential part of the claims raised.¹³ NAFTA and other investment treaty arbitration tribunals have adopted a similar approach, applying these factors to questions of both jurisdiction¹⁴ and admissibility.¹⁵ These questions provide a useful framework for assessing whether to bifurcate each of Canada's preliminary objections. If an objection satisfies each question, then it is fair and efficient to have that issue heard in a preliminary phase.

¹¹ **RLA-002**, *Philip Morris – Procedural Order No. 8*, ¶ 118. The *Philip Morris* tribunal made this observation with respect to Article 17(1) of the 2010 UNCITRAL Arbitration Rules, which were applicable in that arbitration, and state in relevant part: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.” This provision is similar to Article 15(1) of the 1976 UNCITRAL Rules.

¹² In *Philip Morris*, the tribunal found that “at least for the issue of bifurcation, it does not matter whether [the objection] is characterized as going to jurisdiction or admissibility,” since the tribunal had the power to rule on such an objection as a preliminary matter under its general powers. See **RLA-002**, *Philip Morris – Procedural Order No. 8*, ¶ 118.

¹³ **RLA-002**, *Philip Morris – Procedural Order No. 8*, ¶ 109.

¹⁴ See, e.g., **RLA-005**, *Resolute – Decision on Bifurcation*, ¶ 4.3 (stating “[t]he Disputing Parties also agree that for a Tribunal to determine whether bifurcation is appropriate in a given case, it is helpful to apply the three-part test applied in *Philip Morris v. Australia* [...]”, and proceeding to apply the framework); **RLA-007**, *Glamis Gold – Procedural Order No. 2 (Revised)*, ¶ 12; **RLA-017**, *Emmis International – Decision on Application for Bifurcation*, ¶ 37 (“The overarching question is one of procedural efficiency. Factors that may be relevant in this regard are: (a) whether the request is substantial or frivolous, (b) whether the request, if granted, would lead to a material reduction in the proceedings at the next stage, (c) whether bifurcation is impractical in the sense that the issues are too intertwined with the merits.”); **RLA-019**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey* (ICSID Case No. ARB/11/28) Decision on the Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012 (“*Tulip Real Estate – Decision on Request for Bifurcation*”), ¶¶ 30-31 (“Three considerations have been identified as relevant to the exercise of the Tribunal's discretion. These are (i) whether it is desirable to bifurcate for reasons of procedural economy; and (ii) whether the preliminary objection is intimately linked to the merits; and (iii) whether a determination of the preliminary objection is capable of resulting in the dismissal of the entire case or reducing significantly its scope and complexity.”).

¹⁵ See, e.g., **RLA-019**, *Tulip Real Estate – Decision on Request for Bifurcation*, ¶¶ 30-31, 39-44; **RLA-005**, *Resolute – Decision on Bifurcation*, ¶¶ 4.17-4.19.

III. BIFURCATION WILL INCREASE THE FAIRNESS AND EFFICIENCY OF THE PROCEEDINGS

8. All of Canada's jurisdictional and admissibility objections are *prima facie* serious and substantial, do not require prejudging or entering the merits, and will, if accepted, dispose of the totality of the Claimant's claim.

A. Canada's Objections That the Alleged Breaches Pre-Date the Claimant's Investment in Canada

9. In its Statement of Defence, Canada submits that the Tribunal has no jurisdiction over the entirety of the Claimant's claim because the alleged breaches pre-date the Claimant's investment in Canada.¹⁶ Specifically, the Tribunal lacks jurisdiction *ratione temporis* because the Claimant was not an "investor of a Party" at the time of the alleged breaches. Moreover, neither the Claimant nor its enterprise could have suffered damages arising out of the alleged breaches because the alleged breaches transpired in 2015 and 2016, before the Claimant acquired its investments in 2019. Finally, the measures that the Claimant challenges do not "relat[e] to" the Claimant or its investments because they pre-date the existence of the Claimant and its investments in Canada.

10. Canada's jurisdictional objections raise discrete and serious issues concerning the Claimant's standing to bring its claim¹⁷ and the 1976 UNCITRAL Rules create a presumption that these objections should be heard in a preliminary phase. Consistent with that presumption, and as set out in greater detail below, bifurcation of these objections is the fairest and most efficient method of proceeding in this arbitration.

¹⁶ Statement of Defence, ¶¶ 63-68.

¹⁷ As Canada noted in its Statement of Defence, ¶ 3, the Claimant uses the term "Westmoreland" generically throughout its Notice of Arbitration and Statement of Claim to describe itself (Westmoreland Mining Holdings LLP) and Westmoreland Coal Company. *See* NOA, ¶ 5, fn. 1. However, the Claimant is not the same entity as Westmoreland Coal Company. The companies are distinct. Canada has consistently taken the position that this distinct corporate identity has implications for the Tribunal's jurisdiction over the Claimant's claim.

1. The Claimant Was Not a Protected Investor at the Time of the Alleged Breaches

11. Canada submits that the Tribunal has no jurisdiction over the claims under NAFTA Article 1116(1) and 1117(1) because the Claimant was not a protected “investor of a Party” at the time of the alleged breaches.¹⁸ This objection should be heard in a preliminary phase.

12. First, Canada's objection that the Claimant was not a protected investor at the time of the alleged breaches is *prima facie* serious and substantial. It is well-established that a tribunal will lack jurisdiction if the claimant cannot establish that it was a protected investor at the time a challenged measure was adopted.¹⁹ As the NAFTA tribunal in *Mesa Power Group LLC v. Canada* held, “this Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an ‘investor’ holding an ‘investment.’”²⁰ This is precisely the situation that arises here. The Claimant acquired its investment in Canada in March 2019, years after the alleged breaches occurred in 2015 and 2016. Accordingly, the Claimant was not protected by NAFTA Chapter Eleven at the time of the alleged breaches. The absence of Canada's consent to arbitrate this claim raises a *prima facie* serious and substantial objection that should be determined before the Tribunal considers the merits of the Claimant's claim.

13. Second, Canada's objection can be determined without prejudging or entering the merits. The objection involves a discrete issue: whether the Claimant has standing to bring its claim when it was not an “investor of a Party” under NAFTA Chapter Eleven at the time of the alleged breaches. The only relevant facts concern when the Claimant became an “investor of a Party” and when the alleged breaches occurred. There appears to be no dispute that the Claimant became an “investor of a Party” in March 2019,²¹ years after the breaches of NAFTA Chapter Eleven it alleges occurred in 2015 and

¹⁸ Statement of Defence, ¶¶ 63-65.

¹⁹ See, e.g., **RLA-020**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶¶ 325-327; **RLA-021**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶¶ 324-326; **RLA-022**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019, ¶ 145; **RLA-023**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶ 170.

²⁰ **RLA-020**, *Mesa – Award*, ¶ 327.

²¹ The Claimant explains in its Notice of Arbitration that it acquired its Canadian investment in March 2019. See Notice of Arbitration, ¶ 5, fn. 1 (“Westmoreland Coal Company transferred most of its assets, including the assets at issue here, to Westmoreland Mining Holdings. This transfer was accomplished pursuant to a Plan of Reorganization approved by a

2016. No further factual details concerning the measures will be necessary and, as a result, there will be no need to prejudge or enter the merits to decide this objection.

14. Third, Canada's objection would dispose of the totality of the Claimant's claim. The Claimant alleges that Canada breached NAFTA Chapter Eleven obligations that protected the Claimant and its investments. If the Tribunal finds that the Claimant was not protected by NAFTA Chapter Eleven at the time of all of the alleged breaches, the Tribunal will lack jurisdiction over the entirety of the claim.

15. Accordingly, and consistent with the presumption in favour of bifurcation established under the 1976 UNCITRAL Rules, hearing Canada's jurisdictional objection in a preliminary phase is the fairest and most efficient method of proceeding in the arbitration.

2. The Claimant Has Not Made Out a *Prima Facie* Damages Claim

16. In its Statement of Defence, Canada explains that the Tribunal does not have jurisdiction over the Claimant's claim because neither the Claimant nor its enterprise could have suffered damages arising out of the alleged breaches, as required under NAFTA Articles 1116(1) and 1117(1).²² This objection should be heard in a preliminary phase.

17. First, Canada's objection is *prima facie* serious and substantial. Articles 1116(1) and 1117(1) require that the Claimant allege that it or its enterprise, respectively, have incurred a loss or damage by reason of, or arising out of, the alleged breach.²³ The Claimant alleges that breaches of NAFTA Chapter Eleven transpired in 2015 and 2016, before the Claimant acquired its investments in 2019.

U.S. federal bankruptcy court on March 15, 2019."). As a separate "investor of a Party", the Claimant submitted a Notice of Arbitration and provided a consent and waiver separate from WCC, as required by NAFTA Article 1121. *See* Notice of Arbitration, ¶¶ 25-26, and Notice of Arbitration, Exhibit 1 (containing consent and waiver of Westmoreland Mining Holdings LLC).

²² Statement of Defence, ¶ 66.

²³ *See, e.g., RLA-024, Saluka Investments B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244; *RLA-025, United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 37, where the tribunal decided that, under NAFTA Article 1116, a claimant must show a *prima facie* case of damage ("UPS and its expert have supplied enough to state a *prima facie* case of damage to UPS from Canada's actions at issue in this proceeding. As we indicated in our preliminary Award on Jurisdiction, that showing is enough for us to proceed to a consideration of the merits of UPS' claims.").

The Claimant thus cannot establish *prima facie* that it has incurred loss or damage by reason of the alleged breaches under Article 1116(1). Instead, the Claimant alleges that Westmoreland Coal Company (“WCC”) incurred loss or damage by reason of the alleged breaches, which is not permissible.²⁴ Moreover, the Claimant cannot establish *prima facie* that any damages were incurred by an enterprise that the Claimant owned or controlled at the relevant time under Article 1117(1). Instead, the Claimant alleges that the enterprise incurred a loss prior to the Claimant’s choice to acquire it. This objection is *prima facie* serious and substantial and should be determined before the Tribunal reaches the merits of the Claimant’s claim.

18. Second, Canada’s objection can be determined without requiring the Tribunal to prejudge or enter the merits. In fact, no evidence will be required to evaluate this objection. The Tribunal need only determine whether, as a matter of law, the Claimant or its enterprise could have suffered damages arising out of the alleged breaches, as required under NAFTA Articles 1116(1) and 1117(1), when the Claimant became an investor of a Party and acquired its investments in 2019, after the alleged breaches.

19. Third, Canada’s objection would dispose of the totality of the Claimant’s claim. If the Claimant has failed to make a *prima facie* damages claim under both Articles 1116(1) and 1117(1), the Tribunal has no jurisdiction to hear any of its claims.

20. Accordingly, it will be fair and efficient, and consistent with the presumption in favour of bifurcation contained within the 1976 UNCITRAL Rules, to hear this jurisdictional objection in a preliminary phase.

²⁴ The Claimant refers to alleged losses incurred by “Westmoreland” to obscure that its claim refers to losses incurred by WCC and its enterprise. For example, *see* Notice of Arbitration, ¶ 86, where the Claimant argues that “Westmoreland will lose nearly US\$441 million it otherwise expected to earn” as a result of alleged “early Mine closures”. However, the Claimant acquired the mines well after the 2015 Climate Leadership Plan, a policy decision which the Claimant alleges caused this change in expected earnings, and could thus not have suffered this alleged loss. *See also* Notice of Arbitration, ¶ 11, where the Claimant argues that “Westmoreland received no compensation for damages caused by the accelerated Alberta coal phase-out, including stranded capital, loss of revenues, and accelerated costs of reclamation, the process of rehabilitating the land after coalmining operations have ceased.” However, the “accelerated” phase-out that the Claimant alleges “caused” damages occurred more than three years prior to its decision to invest in Canada. The Claimant’s investment could thus not have been “stranded” by the decision to phase-out emissions from coal-fired electricity generation. *See also* Notice of Arbitration, ¶¶ 34, 84-87, 95, and 109.

3. The Challenged Measures Do Not Relate to the Claimant or its Investments under NAFTA Article 1101(1)

21. In its Statement of Defence, Canada submits that the Tribunal does not have jurisdiction to decide claims concerning the challenged measures because they do not fall within the scope and coverage of NAFTA Chapter Eleven as set out in Article 1101(1).²⁵ This objection should be heard in a preliminary phase.

22. First, Canada's objection that the challenged measures do not "relat[e] to" the Claimant or its investments – and are thus not within the scope of NAFTA Chapter Eleven – is *prima facie* serious and substantial. Article 1101(1) has been described as the "gateway" to NAFTA Chapter Eleven arbitration, and tribunals have explained that "the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met".²⁶ In this case, the challenged measures cannot "relat[e] to" the Claimant or its investment because the Claimant was not an "investor of a Party" and had no "investments" in Canada at the time of the measures. Whether, as a matter of law, the Claimant can pass the threshold set out by Article 1101(1) constitutes a *prima facie* serious and substantial objection.

23. Second, Canada's objection can be determined without prejudging or entering the merits. This objection will require the Tribunal to evaluate whether the challenged measures "relat[e] to" the Claimant and its investments despite the fact that it became an investor of a Party with investments in Canada well after the 2015 and 2016 measures it alleges breached NAFTA Chapter Eleven. As such, the only relevant facts are that the Claimant became an "investor of a Party" in March 2019, which it has confirmed,²⁷ and that the measures challenged as breaches of the NAFTA Chapter Eleven

²⁵ Statement of Defence, ¶ 67.

²⁶ **RLA-026**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex – Partial Award*"), ¶ 106(i). See also **RLA-027**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶¶ 76-80; **RLA-028**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 118-128; **RLA-029**, *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award on Jurisdiction, 19 June 2007, ¶ 85.

²⁷ See footnote 21, above.

occurred in 2015 and 2016. The Tribunal will not be required to prejudge or enter the merits to decide this objection.

24. Third, Canada's objection would dispose of the totality of the Claimant's claim. A claimant does not have access to arbitration under NAFTA Chapter Eleven if the challenged measures do not "relat[e] to" the Claimant or its investment.

25. Accordingly, the Tribunal should not deviate from the presumption in favour of bifurcation established under the 1976 UNCITRAL Rules. Hearing this jurisdictional objection in a preliminary phase is the fairest and most efficient method of proceeding in the arbitration.

B. Canada's Objection That the Claimant Has Not Made a Timely Claim

26. In its Statement of Defence, Canada explains that the Tribunal has no jurisdiction with respect to the Claimant's claims challenging the Government of Alberta's decision to phase out emissions from coal-fired generating units in its 2015 Climate Leadership Plan because those claims are time-barred pursuant to Articles 1116(2) and 1117(2).²⁸ As a matter of NAFTA practice, time-bar issues are normally decided as preliminary questions,²⁹ and the same approach should be taken in this case.

27. First, Canada's objection that the Claimant has not made a timely claim is *prima facie* serious and substantial. Articles 1116(2) and 1117(2) are an integral aspect of the NAFTA Parties' consent

²⁸ Statement of Defence, ¶¶ 69-71.

²⁹ See **RLA-005**, *Resolute – Decision on Bifurcation*, ¶ 4.6 ("As a matter of NAFTA practice, time bar issues are normally decided as preliminary questions"), citing **RLA-030**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River – Decision on Objections to Jurisdiction*"), ¶ 29 ("Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification - the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue.").

to arbitration,³⁰ and constitute a “clear and rigid limitation defense.”³¹ A claimant may not bring a claim if more than three years have elapsed since it, or its enterprise, first acquired knowledge, or should have first acquired knowledge, of the fact of the alleged breach and resulting loss.³² In this case, the alleged breach and resulting loss occurred when the Government of Alberta publicly announced its decision to phase out emissions from coal-fired generating units on November 22, 2015,³³ more than three years prior to the filing of the Notice of Arbitration on August 12, 2019. Accordingly, any claim challenging this measure is time-barred by virtue of Articles 1116(2) and 1117(2), and this objection is serious and substantial.

28. Second, Canada's objection can be determined without requiring the Tribunal to prejudge or enter the merits. The Tribunal need only consider the dates on which actual or constructive knowledge of the alleged breach and loss was acquired.³⁴ This assessment is straightforward in this case because the Claimant confirms that the Government of Alberta's decision on November 22, 2015 “curtailed

³⁰ See, e.g., **RLA-026**, *Methanex – Partial Award*, ¶ 120 (holding that in order to establish consent to arbitration under NAFTA Chapter Eleven, a Claimant must show, among other things, that the “claim has been brought by a claimant investor in accordance with Articles 1116 or 1117”); **RLA-031**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon – Award on Jurisdiction and Liability*”), ¶ 229 (holding that “[t]he heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors”, and proceeding to analyze Canada's time bar objection as a question of jurisdiction.).

³¹ **RLA-032**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 63. Numerous NAFTA tribunals have applied the time-bar limitation strictly. As the Tribunal in *Resolute* stated, “this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period”. See **RLA-033**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153. See also **RLA-030**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 29, 83, and 103; **RLA-034**, *Apotex Inc. v. The Government of the United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 314-335; **RLA-031**, *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 258-282.

³² NAFTA tribunals have found that knowledge of the fact of loss or damage does not require knowledge of the extent of loss or damage. See, e.g., **RLA-035**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87; **RLA-030**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 78.

³³ **R-029**, Government of Alberta, Press Release, “Climate Leadership Plan will protect Albertans' health, environment and economy”, 22 November 2015.

³⁴ As Canada explains above, there could have been no breach of NAFTA Chapter Eleven, or any resulting loss or damage, with respect to the Claimant or its enterprise because the Claimant became an investor of a Party with investments in Canada long after the alleged breaches occurred. As such, neither the Claimant nor its enterprise could have the requisite knowledge of breach or loss. Canada's objection proceeds on the basis that, if this was not the case, the claim challenging the decision to phase out emissions from coal-fired generating units in the 2015 Climate Leadership Plan would nevertheless be time-barred.

the time horizon for Westmoreland's investments in the Mines, reducing their value and accelerating the time in which Westmoreland would have to complete its reclamation of the Mines at a cost that is no longer justified by the investments."³⁵ Knowledge of breach and loss therefore should have first been acquired when the phase-out of emissions from coal-fired generating units was announced on November 22, 2015, more than three years prior to August 12, 2019. No further inquiry is necessary, let alone any sort of inquiry that requires the Tribunal to prejudge or enter the merits.

29. Third, if accepted, Canada's objection would dispose of the entirety of the claims challenging Alberta's decision to phase out emissions from coal-fired generating units in its 2015 Climate Leadership Plan. The objection could thus significantly reduce the scope of the arbitration.

30. Accordingly, it would be fair, efficient, and consistent with the presumption in favour of bifurcation to hear this discrete objection alongside Canada's other jurisdictional objections.

C. Canada's Objection That NAFTA Article 1102 Does Not Apply to Alberta's Allocation of Transition Payments by Virtue of NAFTA Article 1108(7)(b)

31. In its Statement of Defence, Canada explains that, even if the Tribunal does have jurisdiction, the Claimant's national treatment claim is inadmissible. Specifically, NAFTA Article 1102 does not apply to the Government of Alberta's allocation of Transition Payments³⁶ because those payments are "subsidies or grants provided by a Party", which are excluded from the application of Article 1102 by virtue of Article 1108(7)(b).³⁷ This objection should be heard in a preliminary phase.

32. First, Canada's objection is *prima facie* serious and substantial. The NAFTA Parties expressly carved out "subsidies or grants provided by a Party" from the application of the national treatment obligation. The ordinary meaning of "subsidies or grants provided by a Party" is broad and it is clear that the Transition Payments fall within that meaning. For example, the Transition Payments are

³⁵ Notice of Arbitration, ¶ 109; **R-029**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015.

³⁶ The "Transition Payments" are voluntary payments that the Government of Alberta undertook, in 2016, to provide to the owners of the six coal-fired generating units in the province that were expected to operate – and produce emissions – beyond 2030. In exchange for these payments, the owners committed to ceasing emissions from the six generating units by 2030, and to continue participating in the electricity market in Alberta. *See* Statement of Defence, ¶¶ 6, 43-49.

³⁷ Statement of Defence, ¶¶ 72-74.

made pursuant to Alberta's *Energy Grants Regulation* and are publicly disclosed as "grants" by Alberta in the ordinary course.³⁸ Accordingly, whether the Claimant's NAFTA Article 1102 claim falls outside the scope of NAFTA Chapter Eleven by virtue of Article 1108(7)(b) amounts to a serious and substantial objection.

33. Second, Canada's objection can be determined without prejudging or entering the merits. In order to decide this objection, the Tribunal will need only to determine whether the Transition Payments fall within the meaning of "subsidies or grants provided by a Party". By contrast, the substance of Claimant's NAFTA Article 1102 claim is concerned with whether the Claimant was accorded treatment in like circumstances to domestic comparator investors or investments and, if so, whether that treatment was less favourable. None of those issues is intertwined with, or necessary to decide, whether the Transition Payments are "subsidies or grants provided by a Party" under Article 1108(7)(b).

34. Third, Canada's objection, if successful, would dispose of the entirety of the Claimant's allegation that the Government of Alberta's decision to allocate the Transition Payments constitutes a breach of NAFTA Article 1102. The objection would thus significantly reduce the scope of the arbitration.

35. Accordingly, the Tribunal should hear Canada's objection under NAFTA Article 1108(7)(b) as a preliminary matter along with Canada's jurisdictional objections, as it will be the fairest and most efficient way of proceeding in the arbitration.

IV. CONCLUSION

36. Canada's proposal to bifurcate the proceedings is based on fairness and efficiency for both disputing parties. Canada's objections are serious and substantial, will not require the Tribunal to prejudge or enter the merits, and will dispose of the entirety of the Claimant's claim. It is apparent from the Claimant's Statement of Claim and Canada's Statement of Defence that, if this case proceeds to the merits, it will likely cost both parties millions of dollars in legal and expert fees and other

³⁸ Statement of Defence, ¶¶ 45, 73, and 102, citing **R-001**, *Energy Grants Regulation*, A.R. 103/2003; **R-002**, Government of Alberta, Grant payments disclosure table, "CLP Coal Generation Transition", "Energy General Armed" [Excerpts], available at: <https://www.alberta.ca/grant-payments-disclosure-table.aspx>.

expenses incurred over years of argument. It would be unfair for both disputing parties to incur this cost, time, and effort when the proceedings could be resolved on the basis of discrete preliminary issues. Accordingly, Canada respectfully requests that the Tribunal bifurcate these proceedings and hear Canada's jurisdictional and admissibility objections in a preliminary phase.

July 24, 2020

Respectfully submitted on behalf of Canada,

A handwritten signature in blue ink, consisting of several fluid, connected strokes that form a stylized, somewhat abstract shape.

Adam Douglas
Krista Zeman
Megan Van den Hof
E. Alexandra Dosman
Mark Klaver