

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

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**WESTMORELAND MINING HOLDINGS LLC,**

**Claimant,**

**v.**

**GOVERNMENT OF CANADA,**

**Respondent**

**(Case No. UNCT/20/3)**

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**RESPONSE TO CANADA'S REQUEST FOR BIFURCATION**

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## TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | INTRODUCTION .....  | 1  |
| II.  | THE TEST FOR BIFURCATION.....   | 3  |
| III. | BIFURCATION IS NOT APPROPRIATE FOR CANADA’S DEFENSE THAT<br>THE BREACHES SUPPOSEDLY PRE-DATED CLAIMANT’S INVESTMENT ..... | 6  |
|      | A. Canada’s Objections Are Not Serious And Substantial .....  | 7  |
|      | B. The Remaining Factors Do Not Support Bifurcation .....   | 13 |
| IV.  | CANADA IS NOT ENTITLED TO BIFURCATION FOR ITS ARTICLE<br>1108(7)(b) OBJECTION.....  | 14 |
| V.   | CANADA’S STATUTE OF LIMITATIONS OBJECTION DOES NOT<br>WARRANT BIFURCATION .....   | 17 |
| VI.  | CONCLUSION.....   | 19 |

## I. INTRODUCTION

1. Canada contends that decisions on jurisdiction and admissibility are ripe, require no factual inquiry, and can be decided as a matter of law as if subject to a motion to dismiss.<sup>1</sup> Claimant, Westmoreland Mining Holdings LLC (“Westmoreland”), disagrees.

2. Canada invokes a three-factor test for determining when bifurcation is appropriate to decide jurisdiction and admissibility.<sup>2</sup> First, the moving party’s arguments must be *prima facie* serious and substantial. But here, Canada’s arguments regarding jurisdiction *ratione temporis*, the exception in Article 1108(7)(b) for “subsidiaries and grants,” and the statute of limitations all reflect a cramped view of the law and a limited appreciation of the facts. Second, Canada contends there is no factual overlap of the facts pertaining to jurisdiction and admissibility, on the one hand, and the merits of the dispute, on the other. However, there is overlap. And, third, Canada argues that Article 1108(7)(b) and the statute of limitations would dispose of the entirety of this arbitration, which is not so.

3. Canada’s primary plea for bifurcation is for efficiency. Canada argues that “[i]t 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.”<sup>3</sup>

4. The value of efficiency as presented by Canada presumes an outcome, that the Tribunal would determine, pursuant to bifurcation, that it has no jurisdiction. But

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<sup>1</sup> Canada Request for Bifurcation (“Canada Req.”) (24 July 2020), ¶¶ 13, 18, 22, 23.

<sup>2</sup> *Id.* ¶ 7.

<sup>3</sup> *Id.* ¶ 3.

were the Tribunal to decide against Canada and find that it does have jurisdiction, everything Canada says about efficiencies would be untrue. The parties would have spent more money and hours of lawyer, expert, and witness time on separate and additional pleadings and hearings, and proceedings to arbitrate the merits may be delayed as much as a year. The proposed jurisdictional phase envisions a hearing (subject to Tribunal availability) in mid-July 2021; assuming the Tribunal takes two months to render a decision, the merits phase will not begin until almost October 2021. Under this schedule, the merits phase would be delayed by another year and Claimant would not get to a merits hearing until fall/winter 2023—four years after initiating this arbitration. Canada knows this trap because it has led tribunals into it before.<sup>4</sup>

5. Canada presents its arguments as simple inquiries, but this superficial analysis omits complicated issues regarding the bankruptcy restructuring of Westmoreland Coal Company; the basis (as opposed to the funding source) of the Off-Coal Agreements; and any measures involved with Alberta's Climate Leadership Plan. All of these issues will require factual inquiry despite Canada's contentions otherwise.

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<sup>4</sup> In *Resolute Forest Products v. Canada*, Canada obtained bifurcation for a jurisdictional phase but substantially lost on its jurisdictional and admissibility objections, leading to a nearly two-year delay before a yet-to-occur merits hearing. See RLA-033, *Resolute Forest Products, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Decision of Jurisdiction and Admissibility ¶ 242 (30 Jan. 2018). In *Mesa Power Group, LLC v. Government of Canada*, Canada sought and obtained bifurcation only for the Tribunal to discontinue the jurisdictional phase. See RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award ¶¶ 70-72, 80 (24 March 2016). In *United Parcel Service of America Inc. v. Canada*, Canada challenged jurisdiction and won in part, but the remainder of the dispute proceeded to a merits phase. See CLA-001, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction ¶¶ 134-141 (22 Nov. 2002). In *Ethyl Corporation v. Government of Canada*, Canada challenged jurisdiction but lost, with the tribunal rejecting some of Canada's jurisdictional defenses and joining the remainder with the merits. See RLA-016, *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction ¶ 96 (24 June 1998).

Were the Tribunal to bifurcate and then find it has jurisdiction, it would have to resolve overlapping arguments and complicated factual issues twice. The significant risk of increased burdens on the Tribunal and the Parties ought to persuade the Tribunal not to bifurcate.

## II. THE TEST FOR BIFURCATION

6. The three-part test upon which Canada relies to determine whether bifurcation is appropriate was identified by the tribunal in *Phillip Morris v. Australia*:<sup>5</sup>
- a. Is the jurisdictional objection *prima facie* serious and substantial?
  - b. Can the objection be examined without prejudging or entering the merits?
  - c. Could the objection, if successful, dispose of all or an essential part of the claims raised?

Canada answers all three questions affirmatively. Claimant disagrees about all three.

7. The *Phillip Morris v. Australia* approach has been followed by other tribunals.<sup>6</sup> However, these factors are not “stand-alone” criteria. Some tribunals have declined to bifurcate even when all three factors have been satisfied.<sup>7</sup> In *Rand*

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<sup>5</sup> RLA-002, *Phillip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Procedural Order No. 8 Regarding Bifurcation of the Procedure ¶ 109 (14 April 2014).

<sup>6</sup> See RLA-005, *Resolute Forest Products Inc. v. Government of Canada*, UNCITRAL, Procedural Order No. 4, Decision on Bifurcation ¶ 4.3 (18 Nov. 2016). The determination of whether an objection is *prima facie* serious and substantial is not intended to prejudge the preliminary objections or the merits of the dispute. *Id.* ¶ 4.4.

<sup>7</sup> CLA-002, *Rand Investments, Ltd. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 ¶ 16 (24 June 2019); see also CLA-003, *Gavrilovic v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation ¶ 66 (21 Jan. 2015) (stating that factors should not be a “straightjacket”); CLA-004, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent’s Request for Bifurcation) ¶ 26 (17 Jan. 2020).

*Investments v Serbia*, the tribunal found that “if bifurcation is unlikely to produce efficiency gains, a tribunal should be disinclined to bifurcate.”<sup>8</sup>

8. Canada contends that Article 21(4) of the 1976 UNCITRAL Rules creates a presumption in favor of bifurcation but “that presumption is not absolute. The Tribunal retains a significant degree of discretion when determining whether the efficient administration of the proceedings counsels in favor of hearing an objection to jurisdiction separately from, or joined to, the merits.”<sup>9</sup> In *Phillip Morris v. Australia*, the tribunal decided that “the present procedure must be examined in light of its own specific factual and legal circumstances which differ in various ways from the cases addressed by other courts and tribunals.”<sup>10</sup> The tribunal in *Glamis Gold Ltd. v. United States* explained that Article 21(4) “ensure[s] efficiency in the proceedings” but does not create “an absolute right of the requesting party” to obtain bifurcation.<sup>11</sup>

9. Not every jurisdictional and admissibility objection warrants bifurcation. “[I]t is self-evident that a frivolous objection would not warrant bifurcation....But this does not

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<sup>8</sup> CLA-002, *Rand Investments, Ltd. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 ¶¶ 15 (24 June 2019); see also CLA-003, *Gavrilovic v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation ¶¶ 66 (21 Jan. 2015) (“[A] governing principle that a decision on an application for bifurcation, like other procedural orders, must have regard to the fairness of the procedure to be involved and the efficiency of the Tribunal’s proceedings. To identify, and discuss in turn, only certain identified factors may distract from the task at hand.”).

<sup>9</sup> RLA-004, *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile II*, UNCITRAL, PCA Case No. 2017-30, Decision on Respondent’s Request for Bifurcation ¶¶ 101 (27 June 2018).

<sup>10</sup> RLA-002, *Phillip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Procedural Order No. 8 Regarding Bifurcation of the Procedure ¶¶ 103 (14 April 2014); see also CLA-003, *Gavrilovic v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation ¶¶ 64 (21 Jan. 2015) (“[T]he Tribunal considers that little assistance is gained by seeking to identify, if it may exist, the common practice of international arbitral tribunals.”).

<sup>11</sup> RLA-007, *Glamis Gold, Ltd v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) ¶¶ 12, 16 (31 May 2005).

mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation....[A] tribunal always must be guided by its ultimate duty to protect the integrity of the proceedings, including its ability to hear all appropriate evidence and to provide meaningful relief.”<sup>12</sup>

10. The tribunal in *Glamis Gold* rejected bifurcation. It applied the *Philip Morris v. Australia* three-part test and found that bifurcation “would not ultimately avoid expense for the Parties, contribute to Tribunal efficiency, or be practical.”<sup>13</sup>

11. Numerous NAFTA tribunals have joined jurisdictional issues with the merits of the dispute. The tribunal in *Mondev International v. United States* found that “the Respondent’s objections to competence could conveniently be, and should be, joined to the merits of the case.”<sup>14</sup> The tribunal in *GAMI Investment Inc. v. The United Mexican States*, decided that, “[i]n light of the submissions the Tribunal decided to join the jurisdictional issues to the merits.”<sup>15</sup> In *Mesa Power v. Canada*, Canada sought and obtained bifurcation but the tribunal later reversed its decision and required that jurisdictional issues be joined with the merits.<sup>16</sup>

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<sup>12</sup> CLA-004, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent’s Request for Bifurcation) ¶ 27 (17 Jan. 2020).

<sup>13</sup> RLA-007, *Glamis Gold, Ltd v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) ¶¶ 12, 16 (31 May 2005).

<sup>14</sup> RLA-035, *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002).

<sup>15</sup> CLA-005, *GAMI Investment Inc. v. The United Mexican States*, UNCITRAL, Final Award ¶ 7 (15 Nov. 2004).

<sup>16</sup> See RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award ¶¶ 70-72, 80 (24 March 2016).

**III. BIFURCATION IS NOT APPROPRIATE FOR CANADA’S DEFENSE THAT THE BREACHES SUPPOSEDLY PRE-DATED CLAIMANT’S INVESTMENT**

12. Canada offers three different legal theories based on its contention that “the alleged breaches pre-date the Claimant’s investment in Canada:”<sup>17</sup> (1) the Tribunal lacks jurisdiction *ratione temporis* because the Claimant was not an “investor of” Canada at the time of the alleged breaches; (2) neither Claimant nor its enterprise could have suffered damages because the alleged breaches took place in 2015-16, before Claimant acquired the investment; and (3) the measures do not “relat[e] to” the Claimant or investments because they predate the existence of Claimant and its Canadian investments.<sup>18</sup> Canada is not entitled to bifurcation based upon these arguments.

13. Canada’s objection about pre-dating is not *prima facie* serious and substantial because it relies solely on cases where claimants made completely new investments in a foreign country subsequent to alleged breaches of international obligations. Here, the Claimant continued with its pre-existing investment through a bankruptcy restructuring. This theory will require a factual inquiry and cannot be decided strictly as a matter of law.<sup>19</sup> Canada’s objection will not lead to any efficiency gains in this arbitration. To the contrary, Canada’s objection is likely to lead to multiple phases with detailed briefing and factual development. Under these circumstances, bifurcation is not appropriate.

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<sup>17</sup> Canada Req. ¶ 9.

<sup>18</sup> *Id.* ¶ 9.

<sup>19</sup> *Id.* ¶¶ 18, 22.



**A. Canada's Objections Are Not Serious And Substantial**

14. Canada's objections are not *prima facie* serious and substantial. Canada first contends that Claimant here was not a "protected investor at the time a challenged measure was adopted."<sup>20</sup> Canada, to reach this conclusion, relies solely on the Statement of Claim and a facile understanding of the bankruptcy process that led to Claimant's involvement in this arbitration. Contrary to Canada's assertion, the Tribunal will be required to undertake a complicated legal and factual analysis of the bankruptcy process in order to decide on Canada's argument.

15. The cases cited by Canada are also distinguishable from the facts here because they involve claimants making completely new investments in a foreign country. Here, in contrast, an American investment in Alberta indisputably existed when the alleged breaches occurred. It was the direct holding entity, not the investment and not the nationality of the investor, that changed.

16. Canada cites *Vito G. Gallo v. The Government of Canada*.<sup>21</sup> The claimant there, a U.S. civil servant without business experience in waste management, could not prove that he purchased the investment from a separate person prior to the enactment of the measure in question. Mr. Gallo claimed that he purchased the investment from Notre Development Corporation before the measure in question (the *Adams Lake Mine Act*) was enacted,<sup>22</sup> but there was no evidence of any prior affiliation between Notre and the claimant.

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<sup>20</sup> *Id.* ¶ 12.

<sup>21</sup> *Id.* ¶ 12.

<sup>22</sup> See RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶¶ 121-122, 148-149 (15 Sep. 2011).

17. The claimant in *Gallo* did not sign corporate resolutions or make contemporaneous tax filings.<sup>23</sup> Ownership issues were further clouded by a supposed arrangement between the claimant and Mario Cortellucci, a wealthy Canadian real estate developer, who supposedly acted as an agent for the claimant. However, Mr. Cortellucci found the investment, performed the management tasks, took on the reputational risks of ownership, had the political and personal connections, and provided the financing.<sup>24</sup> The tribunal held that the claimant, the American, could not demonstrate his right to ownership of the investment prior to the enactment of the *Adams Lake Mine Act* when the indicia of ownership pointed to a Canadian. The tribunal generally expressed skepticism regarding the claimant's supposed ownership of the investment, as opposed to the apparent ownership of Mr. Cortellucci.<sup>25</sup>

18. In *Mesa Power Group, LLC v. Government of Canada*, the claimant was unable to show that it was seeking to or had made new wind farm investments in Canada prior to the measures in question. There, a number of the challenged measures were adopted in late September 2009 (or earlier), and the claimant attempted to show an endeavor to invest in Canada in August or early September.<sup>26</sup> The Canadian corporate entities that were going to hold the new wind farm investments were not incorporated until (at the earliest) November 2009.<sup>27</sup> Therefore, the claimant could not

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<sup>23</sup> *Id.* ¶¶ 292-296.

<sup>24</sup> *Id.* ¶¶ 150, 298-311.

<sup>25</sup> *See id.* ¶¶ 149, 169, 290, 312.

<sup>26</sup> *See* RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award ¶¶ 334-337 (24 March 2016).

<sup>27</sup> *Id.* ¶¶ 331-333.

demonstrate it held a Canadian investment at the time the breaching measures were enacted.

19. The remaining cases cited by Canada are also distinguishable or inapplicable. In *GEA Group Aktiengesellschaft v. Ukraine*, the tribunal found jurisdiction existed to hear the arbitration despite outstanding questions about the relative timing of acquisition and breaching measures. The claimant (through its subsidiary) purchased the shares of a company known as Klöckner Chemiehandel GmbH (“KCH”).<sup>28</sup> Prior to the claimant’s acquisition, KCH had entered into a contract (the investment in question) to provide funding to a former-Ukrainian state-owned entity.<sup>29</sup> The claimant purchased KCH from SF Beteteiligungs-GmbH, an entity with no affiliation to the claimant prior to the alleged breaches.<sup>30</sup> Some of the breaching actions did occur prior to the claimant’s purchase of KCH but the tribunal still found that jurisdiction was proper because other breaching actions, which led to the alleged expropriation of the investment, occurred after claimant’s acquisition of KCH.<sup>31</sup>

20. In *B-Mex, LLC and Others v. United Mexican States*, the tribunal was not asked to resolve any issues regarding ownership or control of the investment at the time of the breach. Instead, the dispute was whether the claimant owned the foreign

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<sup>28</sup> See RLA-023, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award ¶¶ 33-38 (31 March 2011).

<sup>29</sup> See *id.* ¶¶ 7, 44-46, 144-153.

<sup>30</sup> See *id.* ¶¶ 33-38, 182-183.

<sup>31</sup> See *id.* ¶¶ 185-199. The tribunal did not find jurisdiction over some other alleged breaches because the tribunal held the claims did not involve “investments” under the investment treaty but, rather, were settlement agreements and an ICC arbitration award. See *id.* ¶¶ 154-164.

investment “at the time of the submission of the claim,” an issue not raised by Canada here.<sup>32</sup>

21. According to Canada, Westmoreland Mining Holdings obtained its interests after the breaches.<sup>33</sup> Canada ignores that the interests were transferred through a U.S. Chapter 11 bankruptcy restructuring meant to preserve assets and rework liabilities so that the Westmoreland assets could function as an ongoing concern.<sup>34</sup> The investment in the Albertan coal mines was the same American investment and remained an American investment. The only change was in the restructured entity emerging from bankruptcy and holding the investments in Alberta, unencumbered by preexisting liabilities.<sup>35</sup>

22. Canada’s arguments offer little else to address the Article 1117 claim relating to the Albertan enterprise, Prairie Mines and Royalty. Canada rests solely on its contention that Prairie Mines and Royalty, unchanged, was acquired by Westmoreland Mining Holdings in 2019,<sup>36</sup> without consideration of the bankruptcy restructuring or the prior or current holding structures.

23. Unlike the investment in *Mesa Power*, Westmoreland’s Albertan investments pre-date the measures in dispute here. The investments were purchased

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<sup>32</sup> See RLA-022, *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award ¶¶ 145-46 (19 July 2019).

<sup>33</sup> Canada Req. ¶ 9.

<sup>34</sup> C-026, “Colorado coal. co. files for \$1.4B bankruptcy | Houston court, *Houston Business Journal* (10 Oct. 2018); C-027, “US coal company leaving bankruptcy mines go to creditors,” *The Associated Press* (4 March 2019).

<sup>35</sup> Canada Req. ¶ 9.

<sup>36</sup> *Id.* ¶ 9.

by April 2014, long before the measures giving rise to this dispute occurred.<sup>37</sup> And, in contrast to *Gallo*, Westmoreland Mining Holdings is not a “new” investor in Canada seeking to take advantage of measures previously enacted to profit off a sovereign investment treaty.<sup>38</sup>

24. Canada repackages twice its *ratione temporis* arguments. First, Canada contends that Claimant incurred no damages from the measures because they had no investments at the time of the alleged breaches,<sup>39</sup> relying principally on *Saluka Investments B.V. v. The Czech Republic*, where the claim was based on the Netherlands-Czech and Slovak Federal Republic bilateral investment treaty.<sup>40</sup> Canada relies on a single paragraph in the arbitral award<sup>41</sup> that prohibited consideration of damages suffered by Nomura, claimant’s parent entity and original purchaser of the foreign shares (later transferred to the claimant).<sup>42</sup> But Nomura was incorporated outside the Netherlands and, therefore, could not take advantage of the bilateral investment treaty.<sup>43</sup>

25. Canada’s reliance on *United Parcel Service of America Inc. v. Government of Canada* is even more tenuous, with the merits award stating merely that “UPS and its expert”—again, at the merits phase—“have supplied enough to state a

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<sup>37</sup> Westmoreland Mining Holdings Statement of Claim ¶ 44 (12 Aug. 2019).

<sup>38</sup> See Canada Req. ¶ 13.

<sup>39</sup> See Canada Req. ¶ 17.

<sup>40</sup> RLA-024, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award ¶ 2 (17 March 2006).

<sup>41</sup> *Id.* ¶ 244.

<sup>42</sup> See *id.* ¶¶ 70-71.

<sup>43</sup> *Id.* ¶ 42.

*prima facie* case of damage to UPS from Canada’s actions at issue in this proceeding.”<sup>44</sup> The next sentence of the merits award<sup>45</sup> explains that these issues were addressed in the preliminary award on jurisdiction, where the tribunal rejected Canada’s contention that the claimant’s amended statement of claim provided insufficient information to put Canada on notice to respond adequately to the damages claims.<sup>46</sup> Canada fails to explain why the *UPS* award is otherwise meaningful here.

26. Second, Canada repackages its *ratione temporis* argument by contending that the challenged measures do not “relat[e] to” Claimant or its investments under NAFTA Article 1101(1).<sup>47</sup> The “relate to” test requires a “legally significant connection” between the measures and the investment based on the facts alleged *pro tem* without requiring a test of legal causation.<sup>48</sup> Canada cites to a number of authorities in footnote 26 of its request, none of which addresses the issue raised by Canada in its request: whether the alleged breaches pre-date the Claimant’s investment in Canada.<sup>49</sup>

27. For both repackaged arguments Canada fails to offer any explanation as to how its authorities apply meaningfully to this dispute. Canada fails to provide any rationale that distinguishes these additional arguments from its primary contention that

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<sup>44</sup> RLA-025, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits ¶ 37 (24 May 2007).

<sup>45</sup> *Id.* ¶ 37.

<sup>46</sup> See CLA-001, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction ¶¶ 118-122 (22 Nov. 2002).

<sup>47</sup> Canada Req. ¶ 22.

<sup>48</sup> See RLA-033, *Resolute Forest Products, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Decision of Jurisdiction and Admissibility ¶ 242 (30 Jan. 2018).

<sup>49</sup> Canada Req. at 5.

Westmoreland Mining Holdings is a new investor in Canada. Therefore, these additional objections are not *prima facie* serious and substantial.

**B. The Remaining Factors Do Not Support Bifurcation**

28. Canada argues that “no evidence will be required to evaluate [its] objection”<sup>50</sup> that Claimant has not made out a *prima facie* damages claim. The factual complexities of Canada’s authorities, however, demonstrate that facts in these cases matter and, by ignoring the bankruptcy issues underlying Canada’s claims about Westmoreland’s ownership, Canada reveals its own deficiencies in appreciating or having sufficient knowledge or understanding of the facts in this arbitration.

29. The issues raised by Canada’s claims on jurisdiction and admissibility likely overlap with the merits of this arbitration. One defense offered by Canada provides that “[a]ny informed investor would have known that provinces have the constitutional prerogative to regulate emissions within their borders and that Alberta was contemplating further emissions regulations” and that Westmoreland was aware of these risks when purchasing the Canadian mines.<sup>51</sup> Another defense contends that Claimant and its investment were not in like circumstances with the Albertan power companies who received payments under the Off-Coal Agreements.<sup>52</sup> Canada suggests that Claimant’s damages are not supported, failing “to establish a causal link between each of the breaches of NAFTA Chapter Eleven that it alleges and the damages that it

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<sup>50</sup> Canada Req. ¶ 18; see also *id.* ¶ 13 (arguing that “[t]he only relevant facts concern when the Claimant became an ‘investor of a Party’ and when the alleged breaches occurred, facts that Canada contend are not in dispute); ¶ 23 (contending that “the only relevant facts” are when Claimant became an investor and whether the challenged measures pre-date that investment).

<sup>51</sup> Canada Statement of Defence ¶¶ 89-90 (26 June 2020) (“Statement of Defence”).

<sup>52</sup> *Id.* ¶¶ 75-81.

claims as a result.”<sup>53</sup> These issues all go beyond jurisdiction and admissibility, likely would be addressed in a responsive Memorial on jurisdiction, and will not escape, therefore, the Tribunal’s attention through bifurcation.

30. Claimant agrees that resolution of these issues would, if decided entirely in favor of Canada, likely dispose of the entirety of the claim. They also require, however, fact-intensive considerations and examination of an untested legal theory that overlaps with the merits. Canada’s arguments (as to whether Claimant made a timely investment, for example) cannot be resolved strictly “as a matter of law.”

31. The Tribunal should not bifurcate to address Canada’s *ratione temporis* objection, including its repackaged formulations that Claimant suffered no damages from the measures and that the measures do not “relate to” Claimant under Article 1101(1), because the objection is intertwined with the merits and is not strictly a matter of law.

#### **IV. CANADA IS NOT ENTITLED TO BIFURCATION FOR ITS ARTICLE 1108(7)(B) OBJECTION**

32. Canada contends that Claimant’s Article 1102 claim is barred by NAFTA Article 1108(7)(b), which provides that Article 1102 does not apply to “subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.”

33. To date, no NAFTA decision has set forth the parameters for what constitutes a “grant” that falls within the terms of this provision, and Canada cites no authorities for its contention that the payments at issue constitute “grants.”

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<sup>53</sup> *Id.* ¶ 93.



34. There are three reasons, each derived from the three-part test, why Canada's Article 1108(7)(b) objection is not appropriate for a bifurcated award. First, this objection is not *prima facie* serious and substantial. Exceptions such as those under Article 1108(7)(b) are to be interpreted narrowly.<sup>54</sup> Canada offers in its request for bifurcation no definition of "grant," instead relying on Alberta's self-serving indication that its Off-Coal Agreements are listed on a "grants table."<sup>55</sup> What nomenclature Alberta or Canada chooses for the payments and how Alberta funds or tracks them publicly cannot be determinative of whether a payment meets the definition of "grant" for purposes of Article 1108(7)(b). Were it otherwise the exception would eviscerate the rule. The Off-Coal Agreements themselves make no mention of the source of funding, and the word "grant" cannot be found in the agreements.<sup>56</sup>

35. Second, arbitration of this objection will require consideration of the merits. Canada argues, with no analysis, that its objection will not require an analysis of "whether the Claimant was accorded treatment in like circumstances to domestic comparator investors or investments."<sup>57</sup> Canada's resort to the Article 1108(7)(b) exception may not require the legal analysis needed for an Article 1102 claim, but the

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<sup>54</sup> See CLA-006, *Canfor Corp. and Terminal Forest Products Ltd. v. The United States of America*, UNCITRAL, Decision on Preliminary Question ¶ 187 (6 June 2006) (citing *Canada – Import Restrictions on Ice Cream and Yoghurt*, L/6568 – 36S/68) (5 Dec. 1989)); accord CLA-007, Kinnear, Bjorklund and Hannaford, Article 1108 – Reservations and Exceptions, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* at 1108-25-26 (2006).

<sup>55</sup> Canada Req. ¶ 32.

<sup>56</sup> C-019, Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen In Right Of Alberta (represented by Ministry of Energy) ("TransAlta Agreement") (24 Nov. 2016); C-023, Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy) ("Capital Power Agreement") (24 Nov. 2016). The ATCO agreement has yet to be obtained by Claimant.

<sup>57</sup> Canada Req. ¶ 33.

factual analysis to determine whether the Off-Coal Agreement payments were grants would require analysis of the same set of facts as to both Articles 1105 and 1102. Whether the companies were in like circumstances and whether the transition payments were “grants” are distinct and separate fact-bound questions. To determine whether the payments are “grants,” the Tribunal will need to analyze, *inter alia*, the Off-Coal Agreements, the obligations contained in them, and the benefits afforded to Alberta, on the one hand, and the Albertan electricity companies, on the other, when they signed the Off-Coal Agreements. The Tribunal will be forced to analyze these facts to determine whether Claimant is in like circumstances with the comparator investors.<sup>58</sup>

36. Third, resolution of Canada’s objection in Canada’s favor will not end the overall dispute. Claimant will retain its Article 1105 claim, which must be decided upon the merits. There are no efficiency gains in the resolution of Canada’s Article 1108(7)(b) objection, even if Canada were successful on it.

37. Therefore, Canada’s request to bifurcate for its Article 1108(7)(b) objection should be denied.

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<sup>58</sup> See, e.g., Canada Statement of Defence ¶ 48 (“[N]o interest in coal mines, coal mining equipment, coal mineral rights, or coal supply contracts was included in the Transition Payment amounts, even though two of the power companies (Capital Power and TransAlta) also owned, directly or indirectly, coal-related interests.”); ¶ 78 (contending that Claimant was not in like circumstances to the power company because “[a]s explained above [in paragraph 48], the Transition payments were granted to these companies to facilitate Alberta’s transition from coal-fired electricity generation to lower-emitting forms of electricity generation while maintaining the reliability of the electricity system.”).

**V. CANADA’S STATUTE OF LIMITATIONS OBJECTION DOES NOT WARRANT BIFURCATION**

38. Canada contends that “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” should be bifurcated because they are “time-barred pursuant to Articles 1116(2) and 1117(2).” The Tribunal should decline to bifurcate for this reason. It is another argument that fails the three-part test.

39. First, the objection is not *prima facie* serious and substantial. NAFTA Article 201(1) provides that a “measure includes any law, regulation, procedure, requirement, or practice.” As Canada has argued elsewhere, “an unenacted legislative proposal, which is unlikely to have resulted even in a ‘practice,’ cannot constitute a measure.”<sup>59</sup> Canada relies for the triggering event to run the statute of limitations on the announcement of the Alberta “Climate Leadership Plan,” an unenacted statement of future policy goals that Alberta would like to implement.<sup>60</sup> Claimants’ claims run from actual measures, not the policy aspirations of the Alberta Government.

40. Second, Canada’s objection would require prejudging the merits of the dispute. Because of the vagueness of the so-called “measure” that Canada suggests here, the parties would be forced to expend substantial resources determining the effect of a policy statement. Canada argues that Claimant should have known of its potential loss when Alberta announced the Climate Leadership Plan, but at that point there were no requirements in place that would have changed Claimant’s operations in Alberta.

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<sup>59</sup> RLA-016, *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction ¶ 67 (24 June 1998).

<sup>60</sup> Canada Req. ¶¶ 27-28.

Canada's choice of a triggering event for the statute of limitations, which distorts and misrepresents Westmoreland's claim, would cause in a bifurcated proceeding substantial overlap with the merits of the dispute.

41. Third, if accepted, Canada's objections would have little (if any) effect on the remainder of the arbitration. For example, Claimant could still raise its arguments relating to the Off-Coal Agreements, an actionable measure independent of the Climate Leadership Plan, even if Westmoreland could not argue harm from the announcement of the Climate Leadership Plan (which, regardless, is not the basis of Westmoreland's claim). Resolving the statute of limitations objections in a jurisdictional phase would be a wasteful detour that would prolong this arbitration.

42. Therefore, Canada's request to bifurcate its statute of limitations objections should be denied.

**VI. CONCLUSION**

43. Canada cannot satisfy the three-factor bifurcation test for any of the arguments it advances for bifurcation. Above all, a bifurcated jurisdictional phase could prolong this arbitration as much as a year without the prospect of reaching a final conclusion.

44. Therefore, the Tribunal should deny Canada's request and join any jurisdictional and admissibility arguments to the merits.

Dated this 14th day of August, 2020

Respectfully submitted,



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