

**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

**REPLY TO THE CLAIMANT'S RESPONSE TO
CANADA'S REQUEST FOR BIFURCATION**

August 28, 2020

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I. INTRODUCTION

1. Canada submits this Reply to the Claimant's Response to Canada's Request for Bifurcation ("Claimant's Response", or "Response") filed on August 14, 2020. Canada maintains its request that the Tribunal bifurcate these proceedings and decide the jurisdictional and admissibility objections set out in Canada's Statement of Defence in a preliminary phase.

2. The Claimant does not disagree that Article 21(4) of the 1976 *UNCITRAL Arbitration Rules* (the "1976 UNCITRAL Rules") establishes a presumption that questions of jurisdiction should be determined in a preliminary phase, but argues that the Tribunal should exercise its discretion to reject that presumption.¹ The Claimant's overarching argument is that Canada's preliminary objections will raise complicated legal and factual issues and should therefore be determined alongside the merits. However, the Claimant overstates the complexity of Canada's objections and the mere fact that issues could be complex is neither a basis to reject the presumption under Article 21(4), nor a basis to join issues with the merits. So long as questions of jurisdiction and admissibility are serious and substantial, can be examined without prejudging or entering the merits, and would dispose of all or an essential part of the claims raised, they should be decided on a preliminary basis, especially when there is a presumption under the applicable rules to do so.

3. Each of Canada's objections satisfies these factors, and it would be procedurally fair and efficient to both parties to have the Tribunal decide them in a preliminary phase. In particular, the disputing parties have been able to agree on an efficient schedule for a preliminary phase whereby written pleadings will be complete in only seven months, with an oral hearing held shortly thereafter. The Tribunal and the disputing parties should seek to avoid finding themselves in the circumstances which caused another tribunal to lament that, "[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been

¹ Claimant's Response to Canada's Request for Bifurcation, 14 August 2020 ("Claimant's Response to Request for Bifurcation"), ¶ 8.

avoided" had the proceedings been bifurcated and the respondent's objections been heard in a preliminary phase.²

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

4. As Canada explained in its Request for Bifurcation, Article 21(4) of the 1976 UNCITRAL Rules creates a presumption in favour of bifurcating jurisdictional questions.³ The Claimant does not disagree, but argues that bifurcation is not an "absolute right" and that the Tribunal retains "a significant degree of discretion" not to bifurcate jurisdictional questions from the merits.⁴ Canada agrees that Article 21(4) does not create an "absolute right" to bifurcation and that the Tribunal retains discretion to decide whether to bifurcate jurisdictional questions from the merits. However, as the text of Article 21(4) makes clear, the starting point of the Tribunal's analysis must be that it "should" bifurcate jurisdictional questions from the merits:

In 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. (Emphasis added)

5. The Claimant agrees with Canada that this Tribunal, when deciding whether to bifurcate questions of jurisdiction and admissibility from the merits, should consider the three factors

² **RLA-036**, *Caratube International Oil Company v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award, 5 June 2012, ¶ 487. The Claimant argues that the "value of efficiency as presented by Canada presumes an outcome" and that "were the Tribunal to decide against Canada and find that it does have jurisdiction, everything Canada says about efficiencies would be untrue". See Claimant's Response to Request for Bifurcation, ¶ 4. However, the same is true should the proceedings not be bifurcated and the Tribunal ultimately decides that it has no jurisdiction or that aspects of the Claimant's claim are inadmissible. In that context, both disputing parties would likely have expended significant resources litigating claims over which the Tribunal has no jurisdiction, or which are inadmissible, which would be unfair and inefficient to both parties. It is for this reason that the presumption in favour of bifurcating jurisdictional issues exists under Article 21(4) of the 1976 UNCITRAL Rules.

³ Canada's Request for Bifurcation, 24 July 2020 ("Canada's Request for Bifurcation"), ¶¶ 4-5. As Canada explained in its Request for Bifurcation, Article 21(4) of the 1976 UNCITRAL Rules is unlike Article 23(3) of the 2010 UNCITRAL Arbitration Rules, which provides that the Tribunal "may" bifurcate. 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 Canada's Request for Bifurcation, fn. 3. Canada further notes that, under NAFTA Article 1120, the Claimant has the freedom to choose the arbitration rules that will govern the claim. In this case, the Claimant elected to bring its claim under the 1976 UNCITRAL Rules. It must bear the consequences of that decision.

⁴ Claimant's Response to Request for Bifurcation, ¶ 8.

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enunciated by the tribunal in *Philip Morris v. Australia*.⁵ However, the Claimant makes several statements throughout its pleading that misconstrue the factors set out by that tribunal.

6. First, while the Claimant acknowledges that the Tribunal should not prejudge the merits of an objection to determine whether it is “*prima facie* serious and substantial”,⁶ it nonetheless invites extensive arguments on Canada's preliminary objections now. As explained by the tribunal in *Philip Morris v. Australia*, the question under the first factor is whether a tribunal can “*prima facie* exclude that [an] Objection might be successful.”⁷ In other words, if an objection *might* be successful on a *prima facie* analysis, the first factor is satisfied. NAFTA tribunals operating under the 1976 UNCITRAL Rules have adopted a similar approach, generally finding that an objection is “*prima facie* serious and substantial” when it is not “frivolous or vexatious”.⁸ This approach strikes the right balance between ensuring that the Tribunal only hears the case on the merits once its

⁵ 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 No. 8*”), ¶ 109. The Claimant consistently refers to the factors as a “test” that must be satisfied by Canada. See Claimant's Response to Request for Bifurcation, ¶¶ 2, 6, 10, 34, 38, and 43. However, as Canada explained in its Request for Bifurcation, the factors provide tribunals with “a useful framework” when analyzing a request for bifurcation and that the overriding consideration should be “the fairness and efficiency of arbitration proceedings”, with a presumption in favour of bifurcating jurisdictional questions from the merits. See Canada's Request for Bifurcation, ¶¶ 5 and 7. Importantly, the arbitration in *Philip Morris v. Australia* was governed by the 2010 UNCITRAL Rules, not the 1976 UNCITRAL Rules. The three factors set out by the tribunal in *Philip Morris v. Australia* thus cannot be construed as a “test” to supplant the presumption under Article 21(4). Canada maintains that if an objection satisfies each factor, then it is fair and efficient to have that objection heard in a preliminary phase. See Canada's Request for Bifurcation, ¶ 7. However, the Claimant alleges that “[s]ome tribunals have declined to bifurcate even when all three factors have been satisfied.” See Claimant's Response to Request for Bifurcation, ¶ 7. None of the cases cited by the Claimant supports this proposition because, in each case, the tribunal found that at least one of three factors was not met. See **CLA-002**, *Rand Investments, Ltd. v. Republic of Serbia* (ICSID Case No. ARB/18/8) Procedural Order No. 3, 24 June 2019, ¶¶ 18-19; **CLA-003**, *Gavrilovic v. Republic of Croatia* (ICSID Case No. ARB/12/39) Decision on Bifurcation, 21 January 2015, ¶¶ 90-93; **CLA-004**, *Gran Colombia Gold Corp. v. Republic of Colombia* (ICSID Case No. ARB/18/23) Procedural Order No. 3 Decision on the Respondent Request for Bifurcation, 17 January 2020, ¶ 30. Moreover, none of these cases were decided under the 1976 UNCITRAL Rules and the Claimant's argument therefore does not take into account the presumption under Article 24(1).

⁶ Claimant's Response to Request for Bifurcation, fn. 6.

⁷ **RLA-002**, *Philip Morris – Procedural Order No. 8*, ¶¶ 111, 119, and 125.

⁸ **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*”), ¶ 4.4; **RLA-003**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 18 January 2013 (“*Mesa – Procedural Order No. 2*”), ¶ 18; **RLA-007**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12. The same is true of other tribunals operating under the 1976 UNCITRAL Rules. See e.g., **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 Respondent's Request for Bifurcation*”), ¶ 102; **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, ¶ 76.

jurisdiction and the admissibility of claims have been established, and not delaying its consideration of the merits to hear frivolous or vexatious preliminary objections. David Caron, Lee Caplan, and Mattie Pellonpää highlighted the same balance in their seminal commentary on the 1976 UNCITRAL Arbitration Rules:

Article 21(4) addresses when the arbitration tribunal should rule upon preliminary questions concerning jurisdiction. On the one hand, early resolutions of significant preliminary issues may yield substantial savings to the parties by either deciding the case or narrowing the scope of the dispute. On the other hand, preliminary hearings to decide frivolously raised objections to jurisdiction constitute an abuse of process that is costly to all parties. Article 21(4) balances these competing interests by stating that the tribunal in general should rule on such pleas as preliminary questions, but placing the choice not to do so clearly within the tribunal's discretion.⁹

7. The Claimant's extensive arguments on Canada's preliminary objections at this stage are thus unwarranted. As will be explained below, none of Canada's objections can be properly characterized as frivolous or vexatious. To the contrary, each is serious and substantial.

8. Second, the Claimant states that Canada's objections will require the Tribunal to prejudge or enter the merits, but repeatedly fails to explain how.¹⁰ Instead, the Claimant suggests throughout its Response that an objection that involves "complicated issues",¹¹ requires "a complicated legal and factual analysis",¹² or involves a "factual inquiry",¹³ is grounds to reject a request for bifurcation. As will be explained below, the Claimant overstates the complexity of the issues involved in Canada's objections. Regardless, nothing – under the *Philip Morris v. Australia* factors or otherwise – precludes the Tribunal from addressing complex legal or factual issues in a preliminary phase, so long as those issues are not intertwined with the merits.

⁹ **RLA-037**, David D. Caron, Lee M. Caplan, and Mattie Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary*, Second Edition (Oxford University Press, 2012), pp. 449-450.

¹⁰ For example, the Claimant argues that Canada's three objections relating to the date when the Claimant made its investment in Canada will require "fact-intensive considerations and examination of an untested legal theory that overlaps with the merits", but provides no further explanation. See Claimant's Response to Request for Bifurcation, ¶ 30.

¹¹ Claimant's Response to Request for Bifurcation, ¶ 5.

¹² Claimant's Response to Request for Bifurcation, ¶ 14.

¹³ Claimant's Response to Request for Bifurcation, ¶¶ 5, 13, and 14.

9. Finally, the Claimant incorrectly suggests that, in order to satisfy the third factor enunciated by the tribunal in *Philip Morris v. Australia*, an objection must “end the overall dispute”.¹⁴ The third factor considers whether an objection, if successful, would “dispose of all or an essential part of the claims raised.”¹⁵ Thus, an objection that would dispose of an essential part of the claims satisfies the third factor, even if it would not “end the overall dispute”, because its resolution would increase the fairness and efficiency of the arbitration proceedings.¹⁶ Moreover, the Claimant agrees that three of Canada's five objections would end the overall dispute,¹⁷ and it would be procedurally fair and efficient for the Tribunal to address all of Canada's objections in a bifurcated proceeding.¹⁸

¹⁴ Claimant's Response to Request for Bifurcation, ¶ 36.

¹⁵ **RLA-002**, *Philip Morris – Procedural Order No. 8*, ¶ 109 (emphasis added). See also Claimant's Response to Request for Bifurcation, ¶ 6.

¹⁶ The Claimant's mistaken view of the *Philip Morris* factors is further confirmed by its assertion that Canada's Request for Bifurcation is an attempt to lead the Tribunal into a “trap” because bifurcation in past NAFTA cases did not result in an end to the overall dispute (Claimant's Response to Request for Bifurcation, ¶ 4 and fn. 4). However, the Claimant selectively chooses four cases to cite and does not acknowledge other NAFTA tribunals that have decided that claims cannot proceed beyond a preliminary phase because the tribunal lacks jurisdiction or the claims are inadmissible. See e.g., **RLA-021**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 (“*Gallo – Award*”), ¶ 341; **RLA-038**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 2 April 2015, ¶¶ 338 and 340; **RLA-028**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 193; **RLA-034**, *Apotex Inc. v. The Government of the United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 12.1. Regardless, in three of the four cases cited by the Claimant (*Resolute*, *UPS*, *Ethyl*), the tribunal determined that it had no jurisdiction over significant aspects of the claim, thus increasing the fairness and efficiency of the proceedings on the merits. For example, in *Resolute*, not only did the tribunal rule that several measures alleged to violate NAFTA Chapter Eleven were outside of its jurisdiction, but its findings with respect to the claimant's expropriation claim likely prompted the claimant to drop the claim. The decision thus significantly reduced the scope of the merits phase, increasing the overall efficiency of the proceeding. Moreover, the Claimant is incorrect when it states that bifurcation in that case led “to a nearly two-year delay” because the tribunal issued its Decision on Jurisdiction and Admissibility 14 months after its Decision on Bifurcation. The fourth case cited by the Claimant, *Mesa Power*, is inapposite because the tribunal “expressly reserved” the right to amend its decision on bifurcation after further briefing from the parties. See **RLA-003**, *Mesa – Procedural Order No. 2*, ¶¶ 17 and 21. In any event, Canada's request to bifurcate jurisdictional and admissibility objections in this case should be judged on its own merits, taking into account the presumption in Article 21(4) of the 1976 UNCITRAL Rules and the consideration of the *Philip Morris* factors.

¹⁷ Claimant's Response to Request for Bifurcation, ¶ 30.

¹⁸ **RLA-005**, *Resolute – Decision on Bifurcation*, ¶ 4.12 (“In circumstances where it is appropriate to bifurcate the proceedings for the purpose of hearing Canada's time bar objection, it would be procedurally efficient to deal with the three other objections to jurisdiction and admissibility in a bifurcated proceeding, even if the Tribunal might not have ordered bifurcation on the basis of any of those other objections alone. Having so decided, it is unnecessary for the Tribunal to determine whether the Respondent's other objections would justify bifurcation.”).

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

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

10. The Claimant has taken the unusual step of filing a claim alleging breaches of NAFTA that occurred before it acquired its investments in Canada and of claiming damages that it and its enterprise could not have incurred. Canada has raised three distinct jurisdictional objections arising out of the circumstances of this claim: (1) the Claimant was not a protected "investor of a Party" at the time of the alleged breaches; (2) neither the Claimant nor its enterprise could have suffered damages arising out of the alleged breaches; and (3) the claim does not fall within the scope and coverage of NAFTA Chapter Eleven as set out in Article 1101(1). Contrary to the Claimant's assertion, these objections do not "repackage" each other.¹⁹ They reflect distinct requirements of NAFTA Chapter Eleven that are not satisfied in this case.

11. The Claimant's Response provides no basis to rebut the presumption in favour of bifurcating these jurisdictional objections. To the contrary, the Claimant continues to confusingly refer to a generic "Westmoreland" in describing its claims,²⁰ rather than precisely identifying whether it is referring to "Westmoreland Mining Holdings LLC" and its investments or "Westmoreland Coal Company" and its investments. If the proceedings are not bifurcated, Canada expects this continued imprecision and lack of clarity will persist, and will require Canada to simultaneously defend against two cases: one involving Westmoreland Mining Holdings LLC and its investments, and one involving Westmoreland Coal Company and its investments. Waiting until the merits to untangle these fundamental jurisdictional questions would not be a fair or efficient way to proceed in the arbitration.

12. Canada's jurisdictional objections concerning the timing of the Claimant's investment in Canada should be heard in a preliminary phase. Despite the Claimant's unwarranted invitation to enter the merits of the objections at this stage, Canada has firmly established that its objections raise serious and substantial questions concerning the Claimant's standing to bring its claim. These

¹⁹ Claimant's Response to Request for Bifurcation, ¶¶ 24, 26, 27, and 31.

²⁰ Claimant's Response to Request for Bifurcation, ¶¶ 21, 23, 28, 29, 40, and 41.

questions are fully distinct from the merits and could efficiently resolve the proceedings. The Claimant agrees that, if successful, any of these three objections would eliminate the totality of the claim.²¹ Given the Claimant's agreement on this third factor, Canada will not address it further.

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

13. Canada's objection that the Claimant was not an "investor of a Party" at the time of the alleged breaches should be considered as a preliminary matter.

14. First, the Claimant's Response confirms the serious and substantial nature of Canada's objection. In particular, the Claimant does not contest the fundamental principle that an investor of a Party only has standing to bring a claim challenging breaches that occurred *after* the investor acquired its investments in Canada.²² Instead, it attempts at length to factually distinguish prior cases on the basis that they involve claimants "making completely new investments".²³ However, that is precisely

²¹ Claimant's Response to Request for Bifurcation, ¶ 30.

²² NAFTA Tribunals have consistently confirmed this fundamental principle. For example, the tribunal in *B-Mex v. Mexico* agreed with the parties in that case "that the Claimants must establish that they owned or controlled the Mexican Companies at the time of the treaty breaches." See **RLA-022**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019, ¶ 145 (emphasis in original). Rather than arguing against the tribunal's articulation of the principle in *B-Mex v. Mexico*, the Claimant simply highlights that both *B-Mex* parties were in agreement with the tribunal on this issue. See Claimant's Response to Request for Bifurcation, ¶ 20. Similarly, in *Mesa v. Canada*, the tribunal found that its "jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an 'investor' holding an 'investment.'" See **RLA-020**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 327. Instead of disputing the *Mesa* tribunal's articulation of the general principle, the Claimant acknowledges that the tribunal lacked jurisdiction in that case because the claimant "could not demonstrate it held a Canadian investment at the time the breaching measures were enacted." See Claimant's Response to Request for Bifurcation, ¶ 18 (emphasis added). This is exactly the situation here. The principle is repeated again in *Gallo v. Canada*, where the tribunal found that, "for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained." See **RLA-021**, *Gallo – Award*, ¶ 325. While the Claimant recites the facts of the case, it does not offer any reason why the rule articulated in *Gallo* could not apply to the Claimant's circumstances. See Claimant's Response to Request for Bifurcation, ¶ 17. The principle also finds support outside of NAFTA. For example, the tribunal in *GEA Group v. Ukraine* agreed with this principle as a general matter, finding that "in order for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed." See **RLA-023**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶ 170. The Claimant highlights that the tribunal in *GEA Group* found it had jurisdiction when it applied this principle to the facts, because the claimant did have an interest in the investment at the time of the alleged breaches. See Claimant's Response to Request for Bifurcation, ¶ 19. Yet again, the Claimant does not dispute the general principle that a Claimant must be protected by the relevant treaty at the time of the alleged breach or explain why Canada's objection is not *prima facie* serious and substantial.

²³ Claimant's Response to Request for Bifurcation, ¶¶ 16-20, 23.

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the situation here. All of the information available to Canada confirms that the Claimant is a completely new company with distinct ownership that made investments in Canada in March 2019.²⁴ The Claimant is thus mistaken when it claims that “the investment in the Albertan coal mines was the same American investment.”²⁵ The investments made by Westmoreland Coal Company (“WCC”) in 2014 – even if they involve some of the same assets – are not the Claimant's investments.²⁶

15. Importantly, the Claimant acknowledges that the “direct holding entity”²⁷ of the relevant assets in Canada changed. The Tribunal's jurisdiction is grounded in NAFTA Articles 1116 and 1117, which are exclusive in their focus on the ability of an “investor of a Party” to bring a claim. The identity of the relevant “investor of a Party”, and the timing of its investment in Canada, are thus of primary concern to the Tribunal in establishing its jurisdiction, and the Claimant's acknowledgement that this entity changed after the alleged breaches underscores the serious and substantial nature of Canada's objection.

16. To avoid this conclusion, the Claimant suggests that special rules should apply to backdate its investment in Canada because it acquired WCC's assets through U.S. Chapter 11 bankruptcy proceedings.²⁸ However, NAFTA Chapter Eleven does not afford special treatment to a new investor

²⁴ See e.g., **R-038**, S&P Global Market Intelligence, “Westmoreland Coal to liquidate, but mines will continue bearing its name”, 8 March 2019, p. 1 (offering the following explanation of the process from a partner who focuses on restructuring and bankruptcy issues with U.S. law firm Vinsen & Elkins LLP: “[WCC's] Chapter 11 plan is not uncommon, though it is ‘not a real reorganization’ because the company is selling its assets to new entities. Companies that go through bankruptcy proceedings sometimes prefer to shed their former corporate shell and ‘start with a clean slate with a new corporate entity.’” (emphasis added)). The same article describes that creditors of Westmoreland Coal Company “acted as a stalking horse bidder” for the company's assets, referring to Westmoreland Mining Holdings as a “new entity owned by the creditors”, and to the creditors as “new mine owners”. See also **C-026**, “Colorado coal. co. files for \$1.4B bankruptcy in Houston court,” *Houston Business Journal*, 10 October 2018, p. 1 (stating that “a group of lenders” bid for substantially all of WCC's business assets).

²⁵ Claimant's Response to Request for Bifurcation, ¶ 21.

²⁶ That two distinct legal entities owned or controlled the same enterprise at different times does not make their distinct interests in that enterprise the same “investment” for the purposes of NAFTA Chapter Eleven. The Claimant's explanation that the “only change [to the investment] was in the restructured entity emerging from bankruptcy and holding the investments in Alberta, unencumbered by pre-existing liabilities” (emphasis added) underscores that WMH and WCC were different entities who made investments at different times and under different terms (e.g. with different liabilities), and thus did not make the same investment. See Claimant's Response to Request for Bifurcation, ¶ 21.

²⁷ Claimant's Response to Request for Bifurcation, ¶ 15.

²⁸ See e.g., Claimant's Response to Request for Bifurcation, ¶ 21 (“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. 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

of a Party that acquired investments following a bankruptcy process. The Claimant further states that “a complicated legal and factual analysis of the bankruptcy process” will be necessary to determine Canada’s objection, which should somehow weigh against bifurcation.²⁹ While Canada does not accept the premise, the Claimant has provided no explanation as to how the “complexity” of the bankruptcy process undermines the serious and substantial nature of the objection, or how the presumption in favour of bifurcation should be displaced on this basis. Having submitted a new Notice of Arbitration, and consent and waiver, on its own behalf,³⁰ the Claimant’s own actions in bringing its claim indicate it is a separate “investor of a Party” from WCC, and further confirms that Canada’s objection is *prima facie* serious and substantial.

17. Second, the Claimant has raised nothing to suggest that Canada’s jurisdictional objection is intertwined with the merits of the Claimant’s case. Indeed, rather than address how this objection would require the Tribunal to prejudge or enter the merits, the Claimant simply quotes a selection of Canada’s defences to the Claimant’s claim on the merits under Articles 1102 and 1105,³¹ and asserts that they go beyond jurisdiction and admissibility. It should be self-evident that Canada’s defences on the merits—which Canada does not propose to address in a preliminary phase—go beyond jurisdiction and admissibility.

18. The Claimant otherwise suggests that the objection would be better heard with the merits because it will entail factual determinations, including with respect to the bankruptcy process.³² However, as explained above, the mere existence of factual issues requiring decision in a preliminary phase is insufficient to rebut the presumption in favour of bifurcation under Article 21(4) of the

from bankruptcy and holding the investments in Alberta, unencumbered by preexisting liabilities.” (internal citations omitted).

²⁹ Claimant’s Response to Request for Bifurcation, ¶ 14.

³⁰ Westmoreland Mining Holdings LLC, Notice of Arbitration, 12 August 2019 (“Notice of Arbitration”), ¶¶ 25-26, and Exhibit 1 (containing consent and waiver of Westmoreland Mining Holdings LLC).

³¹ Claimant’s Response to Request for Bifurcation, ¶ 29, which cites the defences 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”; that WCC and its investment were not in like circumstances with the Albertan power companies who received payments under the Off-Coal Agreements; and that the Claimant’s damages claim fails “to establish a causal link between each of the breaches of NAFTA Chapter Eleven that it alleges and the damages that it claims as a result.”

³² See e.g., Claimant’s Response to Request for Bifurcation, ¶¶ 28 and 30.

1976 UNCITRAL Rules, particularly where, as here, there is no overlap between the factual issues raised by the jurisdictional objection and the merits. Tellingly, the Claimant offers no explanation of how any factual considerations that might be required to decide this objection – including with respect to the bankruptcy process – are intertwined with the merits.

19. Canada has previously explained that 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. It remains unclear whether the Claimant contests that it is a new entity with different ownership than WCC, and that it acquired its investments in 2019. To the extent these facts are in dispute, the inquiry into them will be limited and straightforward.³³ However, even if further factual analysis of the bankruptcy process were necessary to determine these factual questions, that analysis would be distinct from the merits.

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

20. Canada maintains that its objection that the Claimant has not made its *prima facie* damages claim should be heard as a preliminary matter. The Claimant's submissions fail to meaningfully engage with the substance of Canada's objection or with the basis for hearing this objection as a preliminary matter.

21. First, the Claimant has not demonstrated that Canada's objection is not *prima facie* serious or substantial. The Claimant quibbles with Canada's cited authorities, rather than engaging with the text of NAFTA Chapter Eleven. Under NAFTA Article 1116(1), the Claimant may only file a claim on its own behalf for damages that it has suffered by reason of the alleged breach.³⁴ In this case, the Claimant could not have incurred damage by reason of the alleged breaches because those breaches pre-date its existence as an “investor of a Party”. The Claimant thus seeks to file a claim on behalf of WCC; however, Article 1116(1) does not allow one investor of a Party to claim damages on behalf

³³ See e.g., fn. 24 above. The end result of WCC's bankruptcy process would also be confirmed through its public bankruptcy filings.

³⁴ Article 1116(1) provides: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation [...] and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”

of another investor of a Party. Similarly, under Article 1117(1), a claimant can only file a claim alleging that an enterprise “that is a juridical person that the investor owns or controls” incurred loss or damage by reason of the alleged breaches.³⁵ In this case, the Claimant did not own or control an enterprise at the time of the alleged breaches. Consequently, no damages could have been incurred by an enterprise under the Claimant's ownership or control by reason of the alleged breaches. Canada's objections under Articles 1116(1) and 1117(1) are serious and substantial.

22. The Claimant is incorrect that Canada relies “principally” on the decision in *Saluka v. Czech Republic* as the basis for the seriousness of this objection.³⁶ Instead, Canada's argument is based on the requirements of Articles 1116(1) and 1117(1). The Tribunal in *UPS v. Canada* confirmed the requirement that an investor under NAFTA Chapter Eleven show a *prima facie* case of damages at the jurisdictional stage.³⁷ The *Saluka* tribunal further confirmed the principle, explaining that the tribunal's “jurisdiction is limited to claims brought by the Claimant, Saluka, in respect of damage suffered by itself in respect of the investment”.³⁸ Accordingly, the Claimant must establish a *prima facie* damages case in order for the Tribunal to have jurisdiction over its claims.

23. Second, this jurisdictional objection is distinct from the merits. In the paragraph where the Claimant purports to address this factor of the *Philip Morris* framework, it quotes Canada's defence on the merits that the Claimant has “failed to establish a causal link between each of the breaches of NAFTA Chapter Eleven that it alleges and the damages that it claims as a result”,³⁹ without further explanation of how this defence is intertwined with Canada's jurisdictional objections. As Canada has explained, the Claimant need only show at the jurisdictional stage that, *prima facie*, its claim falls

³⁵ Article 1117(1) provides: “An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation [...] and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.”

³⁶ Claimant's Response to Request for Bifurcation, ¶ 24.

³⁷ **RLA-025**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 37 (“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.”)

³⁸ **RLA-024**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244.

³⁹ Claimant's Response to Request for Bifurcation, ¶ 29; Canada's Statement of Defence, 26 June 2020 (“Statement of Defence”), ¶ 93.

within the scope of what may be claimed under Articles 1116(1) and 1117(1). This narrow question does not involve a factual inquiry into the quantum or cause of the Claimant's alleged damages. Instead, the Tribunal need simply assess whether, as a legal matter under NAFTA Chapter Eleven, the Claimant may make a claim for damages that it and its enterprise could not have incurred.

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

24. The Claimant's Response does not provide a basis to rebut the presumption that Canada's objection under NAFTA Article 1101(1) should be decided as a preliminary matter.

25. First, Canada's objection that the challenged measures do not "relate to" the Claimant and its investments because the challenged measures pre-date the Claimant's investment in Canada is *prima facie* serious and substantial. Despite the fact that "the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met",⁴⁰ the Claimant does not address the substance of Article 1101(1) in its Response.⁴¹ Instead, the Claimant takes issue with the fact that other tribunals considering the jurisdictional requirements of Article 1101(1) dealt with different factual scenarios than the one at issue here.⁴² However, the unique and unusual nature of the Claimant's claim does not change the requirements of Article 1101(1), and does not render Canada's objection frivolous or vexatious.

26. Second, the Claimant does not appear to contest that the jurisdictional requirements of Article 1101(1) are not intertwined with the merits, providing no arguments to the contrary on this issue.⁴³ In fact, the Claimant acknowledges that the "relating to" test under Article 1101(1) does not require any "test of legal causation" that might otherwise be applied on the merits.⁴⁴ As Canada has explained, the primary facts relevant to the Article 1101(1) inquiry are that the Claimant became an "investor of a Party" and acquired investments in March 2019, and that the measures challenged as

⁴⁰ See Canada's Request for Bifurcation, ¶ 22, citing **RLA-026**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 106(i).

⁴¹ Claimant's Response to Request for Bifurcation, ¶ 26.

⁴² Claimant's Response to Request for Bifurcation, ¶ 26.

⁴³ Claimant's Response to Request for Bifurcation, ¶ 29.

⁴⁴ Claimant's Response to Request for Bifurcation, ¶ 26.

breaches of NAFTA Chapter Eleven occurred in 2015 and 2016.⁴⁵ These facts do not overlap with the merits.

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

27. The Claimant has not made a timely claim under NAFTA Articles 1116(2) and 1117(2) regarding Alberta's decision in its 2015 Climate Leadership Plan to phase out emissions from coal-fired electricity generation. There is nothing in the Claimant's Response to rebut the presumption that the Tribunal should resolve this jurisdictional objection as a preliminary matter.

28. First, the Claimant's argument that this objection is not *prima facie* serious and substantial because Canada "distorts and misrepresents Westmoreland's claim"⁴⁶ is not credible. While the Claimant now contends that it does not challenge the 2015 Climate Leadership Plan, its Notice of Arbitration ("NOA") expressly articulates an alleged breach and loss arising out of that Plan. For example:

In November 2015, the Alberta provincial government sought to address greenhouse gas emissions emanating from coal-fired power plants through its Climate Leadership Plan, which will phase out all coal-fired power plants by 2030.⁴⁷

The coal phase-out program also denies Westmoreland of the reasonable expectations of its investments in Canada in breach of Article 1105.⁴⁸

The coal phase-out program, adopted in 2015 (just one year later), has curtailed 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.⁴⁹

⁴⁵ Canada's Request for Bifurcation, ¶ 23.

⁴⁶ Claimant's Response to Request for Bifurcation, ¶ 40.

⁴⁷ Notice of Arbitration, ¶ 30 (emphasis added).

⁴⁸ Notice of Arbitration, ¶ 105 (emphasis added).

⁴⁹ Notice of Arbitration, ¶ 109 (emphasis added).

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29. In fact, the Claimant mentions the 2015 Climate Leadership Plan over 15 times in its NOA, including once in every paragraph of its section on Damages.⁵⁰ If the Claimant is now seeking to withdraw its claim challenging Alberta's decision to phase out emissions from coal-fired electricity generation in the Plan, Canada welcomes that withdrawal.

30. However, if that is not the case, the Claimant's approach to this claim in its Response confirms that Canada's jurisdictional objection is *prima facie* serious and substantial. The Claimant has not identified any measure other than the 2015 Climate Leadership Plan as constituting Alberta's decision to phase out emissions from coal-fired electricity generation. Nor could it. The 2015 Climate Leadership Plan states explicitly: "Alberta will phase out all pollution created by burning coal and transition to more renewable energy and natural gas generation by 2030."⁵¹ There can be no doubt that the 2015 Climate Leadership Plan constituted Alberta's decision to phase out emissions from coal-fired electricity generation.⁵² The Claimant cannot amend its claim now by pointing to an as-yet identified "measure" in order to evade the limitation period under Articles 1116(2) and 1117(2). Its attempt to side-step the claim it put forward in its NOA demonstrates that Canada's objection is *prima facie* serious and substantial.

⁵⁰ Notice of Arbitration, ¶¶ 84-87. *See e.g.*, Notice of Arbitration, ¶ 86 ("Westmoreland will lose even more should the mines close earlier because of accelerated closures occasioned by the Climate Leadership Plan and coal-to-gas conversions.").

⁵¹ **R-029**, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015, p. 2. This decision was based on the Climate Change Advisory Panel Report to Minister of Environment and Parks. *See R-028*, Climate Change Advisory Panel, Climate Leadership Report to Minister, 20 November 2015, p. 29. Moreover, as Canada explained in its Statement of Defence, in advance of issuing its report, the Advisory Panel conducted broad consultations with the public and industry groups covering the breadth of the Alberta economy, including the Coal Association of Canada. WCC was a member of the Coal Association of Canada. *See* Statement of Defence, ¶ 30.

⁵² The Claimant's argument that the Government of Alberta's decision in the 2015 Climate Leadership Plan does not qualify as a "measure" under NAFTA Article 201 is unavailing. *See* Claimant's Response to Request for Bifurcation, ¶ 39. Article 201 states that a measure "includes any law, regulation, procedure, requirement or practice", which is sufficiently broad to capture Alberta's decision to phase out emissions from coal-fired electricity generation. For example, the *Ethyl* tribunal explained that, "[c]learly something other than a 'law,' even something in the nature of a 'practice,' which may not even amount to a legal stricture, may qualify" as a measure. *See RLA-016, Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998, ¶ 66. *See also CLA-006, Canfor Corp. and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006 ("*Canfor – Decision on Preliminary Question*"), ¶ 258 ("Within the terminology used in the NAFTA, "measure" is indeed broader than 'law.'").

31. Second, the Claimant states that a determination under Articles 1116(2) and 1117(2) would have “substantial overlap with the merits of the dispute”,⁵³ but does not explain how. As Canada explained in its Request, under Articles 1116(2) and 1117(2), the Tribunal need only consider the dates on which actual or constructive knowledge of the alleged breach and loss was acquired.⁵⁴ The Claimant confirmed in its NOA that the Government of Alberta’s “coal phase-out program” (i.e. the Government of Alberta’s decision in the 2015 Climate Leadership Plan to phase out emissions from coal-fired electricity generation) was “adopted in 2015” and reduced the value of “Westmoreland’s” investments.⁵⁵ This is sufficient to establish actual or constructive knowledge of the alleged breach and loss on the date the Climate Leadership Plan was adopted – November 22, 2015 – which was prior to the August 12, 2016 limitation period cut-off date.⁵⁶ Thus, the assessment of this jurisdictional objection entails a self-contained set of issues that will not require the Tribunal to prejudge or enter the merits.

32. Third, the Claimant states that resolving Canada’s limitation period objection “would have little (if any) effect on the remainder of the arbitration”.⁵⁷ This is yet another mischaracterization of its own claim. The Government of Alberta’s decision in the 2015 Climate Leadership Plan to phase out emissions from coal-fired power is one of just two measures the Claimant challenges in this arbitration, the other being Alberta’s decision to allocate Transition Payments. If the Tribunal determined that it has no jurisdiction over the 2015 Climate Leadership Plan, it would significantly

⁵³ Claimant’s Response to Request for Bifurcation, ¶ 40.

⁵⁴ Canada’s Request for Bifurcation, ¶ 28.

⁵⁵ Notice of Arbitration, ¶ 109. As explained above, the Claimant’s generic use of the term “Westmoreland” in the description of its claims obfuscates the identity of the relevant “investor of a Party” in any given part of its claim. Under Articles 1116(1) and 1117(1), the Claimant cannot submit a claim on behalf of another investor (i.e. WCC) or on behalf of an enterprise that the Claimant did not own or control at the time of the alleged breaches.

⁵⁶ Canada has previously explained that 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 limitation period 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 fall outside the limitation period. *See* Canada’s Request for Bifurcation, fn. 34.

⁵⁷ Claimant’s Response to Request for Bifurcation, ¶ 41.

narrow the scope of issues for the Tribunal to resolve on the merits and increase the fairness and efficiency of the proceedings.

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)

33. The Claimant's Response does not disturb the conclusion that Canada's objection under Article 1108(7)(b) should be bifurcated and considered as a preliminary matter.

34. First, there can be no doubt that the objection is *prima facie* serious and substantial. In Article 1108(7)(b), the NAFTA Parties expressly carved out "subsidies or grants provided by a Party" from the application of the national treatment obligation.⁵⁸ Contrary to the Claimant's suggestion,⁵⁹ tribunals have consistently rejected the view that Article 1108 should be interpreted narrowly because it is an exception to substantive protections.⁶⁰ Instead, like any other treaty terms, the terms of Article

⁵⁸ Article 1108(7) provides: "Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise; or (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance." The NAFTA Parties made it clear that where there is a subsidy or grant, Article 1102 "do[es] not apply". In other words, where a subsidy or grant is at issue, a claimant is foreclosed from establishing a breach of Article 1102. Deciding this matter in advance will thus result in important efficiencies in the proceedings.

⁵⁹ Claimant's Response to Request for Bifurcation, ¶ 34.

⁶⁰ See e.g., **RLA-039**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018, ¶ 6.34 ("Nor, in the Tribunal's view, does the word 'procurement' require a restricted meaning in NAFTA Article 1108(7), because it operates as an exception to the grant of protection to investors and investments under NAFTA Articles 1102 and 1103. To the contrary, its ordinary meaning is broad and not restrictive"); **RLA-020**, *Mesa – Award*, ¶ 405 ("Mesa suggests that Article 1108(7)(a) must be interpreted restrictively because it is an exception. The Tribunal does not consider that the mere characterization of a treaty term as an 'exception' requires an interpretation different from other treaty terms. Indeed, whatever their characterization, all terms of a treaty are subject to the ordinary rules of treaty interpretation"); **RLA-040**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 251 and 254 ("The task of ascertaining the meaning of a reservation [under Article 1108], like the task of interpreting any other treaty text, involves understanding the intention of the NAFTA Parties, and it is to be achieved by following the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the VCLT"). The Claimant cites the tribunal's decision in *Canfor* for the proposition that Article 1108 should be interpreted "narrowly", but Article 1108 was not at issue in that decision. At issue was whether NAFTA Article 1901(3) barred the submission of the claimants' claims with respect to U.S. antidumping and countervailing duty law to arbitration under Chapter Eleven of the NAFTA. See **CLA-006**, *Canfor – Decision on Preliminary Question*, ¶ 251. The Claimant also cites a secondary source that discusses *Canfor*, which does not support its argument. **CLA-007**, Kinnear, Bjorklund and Hannaford, Article 1108 – Reservations and Exceptions, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006).

1108(7)(b) must be assessed in accordance with the customary international law rules of treaty interpretation, beginning with their ordinary meaning.⁶¹

35. The exact interpretation of the scope of “subsidies or grants provided by a Party” is a matter for the Parties to argue fully when the Tribunal considers the substance of Canada’s objection. However, even at this preliminary stage, it is evident that the ordinary meaning of “subsidies or grants provided by a Party” is broad,⁶² and that the Transition Payments fall within the Article 1108(7)(b) exception. In addition to the Claimant’s characterization of the Transition Payments as “payouts”,⁶³ the facts that Alberta contemporaneously disclosed the payments as “grants” and that the payments were made under the Alberta *Energy Grants Regulation* are, at minimum, highly probative of their nature.⁶⁴ The question of whether the Transition Payments are excluded from the scope of treaty protection by virtue of Article 1108(7)(b) thus falls well above the *prima facie* serious and substantial threshold.

36. Second, the determination of whether the Transition Payments constitute “subsidies or grants provided by a Party” will not require the Tribunal to prejudge or enter the merits of either of the Claimant’s Article 1102 or 1105 claims. Once the Tribunal has assessed the scope of the exception (a purely legal exercise), it will need to determine whether the Transition Payments are “subsidies or grants”. The Tribunal already has at its disposal all of the factual elements required to determine that the Transition Payments are grants (because they are an “assignment of money” by Alberta) or subsidies (because they are “sum[s] of money granted” by Alberta “to support something held to be in the public interest”) for the purposes of NAFTA Article 1108(7)(b). In addition to the public

⁶¹ Article 31(1) of the *Vienna Convention on the Law of Treaties* provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁶² Dictionary definitions provide a general reference point as to the ordinary meaning of the phrase. The Oxford English Dictionary defines the noun “subsidy” as: “Money or a sum of money granted by the state or a public body to help keep down the price of a commodity or service, or to support something held to be in the public interest. Also: the granting of money for these purposes” and the noun “grant” as: “An authoritative bestowal or conferment of a privilege, right, or possession; a gift or assignment of money, etc. by the act of an administrative body or of a person in control of a fund or the like; [t]he thing granted; a tract of land, a sum of money, etc. which is the subject of a formal grant.” Available at www.oed.com.

⁶³ See Notice of Arbitration, ¶¶ 9 and 10.

⁶⁴ The Claimant alleges that the fact that the payments are made under the *Energy Grants Regulation* is “self-serving”. See Claimant’s Response to Request for Bifurcation, ¶ 34. However, the legislative authority for the Transition Payments and their public disclosure as “grants” far pre-date this arbitration and thus cannot be called “self-serving”.

disclosure as “grants” and legislative authority under which the payments were made, the Off-Coal Agreements themselves establish that money was assigned or granted and explicitly state: “the Province has determined that it is in the public interest to ensure that no more carbon dioxide and other air contaminants emanate from the combustion of coal after 2030.”⁶⁵

37. The Claimant argues that an analysis under Article 1108(7)(b) will require the Tribunal to enter or prejudge the merits of its national treatment claim under Article 1102, but confirms that “[w]hether the companies were in like circumstances and whether the transition payments were ‘grants’ are distinct and separate fact-bound questions.”⁶⁶ Canada agrees with this statement. Indeed, in order to determine Article 1108(7)(b), the Tribunal will not be required to examine the complex factual questions necessary to determine the merits of the Claimant's national treatment claim. That determination would be necessarily comparative: was the treatment of the Claimant accorded “in like circumstances” to appropriate domestic comparators? Beyond determining whether the Claimant was accorded “treatment”, the fact and expert evidence for an Article 1102 claim would likely treat a wide variety of issues, including the regulatory regimes applicable to the production of electricity (on the one hand) and to the extraction of coal (on the other) in Alberta, the emissions profiles of electricity generation and coal extraction, the competitive position of the Claimant and the appropriate comparator group, and the economics of the relevant business sectors. In contrast, the determination of whether particular payments constitute “subsidies or grants” requires neither the establishment of a domestic comparator group nor the determination of whether treatment was accorded to both groups “in like circumstances”.

⁶⁵ See **C-019**, Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy), 24 November 2016, p. 1; **C-023** Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy), 24 November 2016, p. 1. These agreements also state as a public interest “maintain[ing] a positive investment environment while ensuring that workers and communities affected by the coal phase out are supported [...]”. *Ibid.* The Claimant states that it has yet to obtain the ATCO Off-Coal Agreement. See Claimant's Response to Request for Bifurcation, fn. 56. Canada questions the relevance of the ATCO Off-Coal Agreement to the Claimant's case, given that its claims under Articles 1102 or 1105 are premised on allegations that the Government of Alberta made payments to electricity companies with interests in coal mines, and that the Claimant has confirmed that ATCO does not have “a mine ownership interest”. See Notice of Arbitration, ¶¶ 73, 76, 79, and 92. In any event, the Transition Payment provided to ATCO would also fall within the Article 1108(7)(b) exception: **R-041**, Off-Coal Agreement between Canadian Utilities Ltd. et al., and Her Majesty the Queen In Right of Alberta (represented by the Minister of Energy), effective 24 November 2016.

⁶⁶ Claimant's Response to Request for Bifurcation, ¶ 35.

38. The Claimant states that, in order to determine both Articles 1108(7)(b) and 1102, the Tribunal will need to examine the Off-Coal Agreements. Canada agrees that the Tribunal will likely want to examine the Off-Coal Agreements in both instances, but the mere fact that the same piece of evidence will be examined does not mean that the Tribunal will be required to enter or prejudge the merits.⁶⁷ To the contrary, the Off-Coal Agreements are only relevant under Article 1108(7)(b) to the extent that they establish an “assignment of money” (i.e. a “grant”) or sums of money granted “to support something held to be in the public interest” (i.e. a “subsidy”).⁶⁸ There is no obstacle to bifurcation on this basis.

39. The Claimant also argues that an analysis under Article 1108(7)(b) will require the Tribunal to enter or prejudge the merits of its claim that it was “arbitrarily and uniquely excluded”⁶⁹ from receiving a Transition Payment contrary to the customary international law minimum standard of treatment under Article 1105, but fails to explain how.⁷⁰ As Canada explained in its Statement of Defence, the Claimant's Article 1105 claim is an impermissible repetition of its Article 1102 claim, which NAFTA tribunals have repeatedly rejected.⁷¹ Regardless, for the same reasons explained

⁶⁷ **RLA-004**, *Pey Casado – Decision on Respondent's Request for Bifurcation*, ¶ 106 (“The Tribunal does not exclude that, in this analysis, it will have to examine some evidence that is also relevant to the merits of this case, for instance some findings made by the First Tribunal, the First Committee or the Resubmission Tribunal. However, the Tribunal is of the view that the existence of some degree of overlap between the evidence relevant for answering jurisdictional questions and evidence relevant for answering questions pertaining to the merits is not an obstacle to bifurcation. What would be required in order to join an objection to the merits is a more substantial overlap, such that a jurisdictional question could not be decided efficiently without also ruling on the merits of the case.”). See also **RLA-041**, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2) Procedural Order No. 3 Decision on Bifurcation and Related Requests, 8 July 2016, ¶ 25(b) (“The Tribunal believes that to address these issues it may not have to enter into a full array of facts pertinent to the merits. While the Tribunal may have to engage with some factual evidence, it is not sufficiently convinced that significant issues involved in the Claimants substantive claims would have to be determined.”).

⁶⁸ The Claimant overstates the extent to which the Tribunal will be required to examine the relevant Off-Coal Agreements in order to decide Canada's Article 1108(7)(b) objection. For example, while the Claimant argues that the Tribunal will need to examine “the obligations contained in [the Off-Coal Agreements], 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,” it does not explain how any of these facts are relevant to an analysis under either Article 1108(7)(b) or Article 1102, let alone both. See Claimant's Response to Request for Bifurcation, ¶ 35.

⁶⁹ Notice of Arbitration, ¶ 100.

⁷⁰ Claimant's Response to Request for Bifurcation, ¶ 35.

⁷¹ Statement of Defence, ¶ 86. See e.g., **RLA-039**, *Mercer – Award*, ¶¶ 7.58 (“So far as concerns the Claimant's claims of ‘discriminatory treatment’ contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).”); and 7.61 (“The Tribunal adds that it would be inconsistent with the principle of *effet utile* for a claimant to avoid the ‘procurement’ exception in NAFTA Article 1108(7) (which excludes discrimination claims under NAFTA

above, an analysis under Article 1108(7)(b) will not require the Tribunal to enter or prejudge the merits of the Claimant's Article 1105 claim.

40. Third, Canada has never argued that its Article 1108 objection would end the entire dispute. It will, however, significantly narrow the scope of the case by eliminating the Claimant's Article 1102 claim and its "like circumstances" analysis and thus will significantly increase the efficiency of these proceedings.

41. Accordingly, each of the factors enunciated by the tribunal in *Philip Morris v. Australia* are satisfied and the Tribunal should decide Canada's objection under NAFTA Article 1108(7)(b) as a preliminary matter as it will be the fairest and most efficient way of proceeding in the arbitration.

IV. CONCLUSION

42. 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 together will dispose of the entirety of the Claimant's claim. Accordingly, Canada respectfully requests that the Tribunal bifurcate these proceedings and rule on Canada's jurisdictional and admissibility objections in a preliminary phase.

August 28, 2020

Respectfully submitted on behalf of Canada,



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Articles 1102 and 1103 in relation to 'procurement') simply by advancing the same discrimination claims as a breach of the minimum standard of treatment in NAFTA Article 1105(1).")