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

WESTMORELAND MINING HOLDINGS LLC,

Claimant,

v.

GOVERNMENT OF CANADA,

Respondent

(Case No. UNCT/20/3)

REJOINDER TO CANADA'S REPLY IN SUPPORT OF ITS REQUEST FOR BIFURCATION

September 11, 2020

Elliot J. Feldman
Michael S. Snarr
Paul M. Levine
Analía González
BAKER HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel: 202-861-1500
Fax: 202-861-1783

Alexander K. Obrecht
BAKER HOSTETLER LLP
1801 California Street, Suite 4400
Denver, CO 80202
Telephone: (303) 861-0600
Fax: (303) 861-7805

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I. INTRODUCTION

1. The Government of Canada ("Canada") says its "approach [to bifurcation] strikes the right balance between ensuring that the Tribunal only hears the case on the merits once its jurisdiction and the admissibility of claims have been established, and not delaying its consideration of the merits to hear frivolous or vexatious preliminary objections."[1] Yet Canada's theory is that a bifurcated preliminary proceeding must be presumed[2] so long as a respondent makes any non-frivolous objection[3] that "might [or might not] be successful"[4] "even if it would not 'end the overall dispute.'"[5] There is no balance in that proposition: Canada's view would require that objections to jurisdiction or admissibility always be heard in bifurcated preliminary proceedings.

2. Canada acknowledges that the objections must be "serious and substantial," but it interprets those words to mean that the objections "might be successful," which also means that they "might" not, and that the objections need not end the overall dispute. The objections must not be frivolous or vexatious, but a threshold standard that is the equivalent of "not in bad faith" is a bar so low as to be no bar at all. Good faith should be presumed without bifurcation being its special reward.

3. Canada has three objections, one of which is expressed creatively in three different ways. Canada objects that Westmoreland Coal Company, a Delaware company who filed a Statement of Claim on November 19, 2018 on its behalf and on

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[1] Canada Reply in Support of Bifurcation ("Canada Reply") ¶ 6 (28 Aug. 2020).

[2] *Id.* ¶ 2.

[3] *Id.* ¶ 6.

[4] *Id.* ¶ 6.

[5] *Id.* ¶ 9.

behalf of Prairie Mines Royalty ULC ("Prairie"), was restructured in bankruptcy on March 15, 2019, transferring its assets, its ownership of Prairie and the instant NAFTA claim into Westmoreland Mining Holdings LLC ("Westmoreland"), also a Delaware company.[6] Canada characterizes Westmoreland as though it were an entirely new investor, completely unrelated to Westmoreland Coal Company, with no breach, no damages and no relation to the challenged measures.[7]

4. Breach, damages, relation to the measures, even one's status as an "investor" having an "investment" are all merits questions.[8] Canada has selected those aspects of the merits that it would like to litigate first, in hopes that it "might be successful" in preliminarily dismissing "all or an essential part" of Westmoreland's claims.

5. Canada's two other objections likewise are intertwined with the merits. Canada wants to debate what "measure" constituted a breach causing damage to Westmoreland's investment for the purpose of supporting a statute of limitations defense.[9] But that question cannot be answered without an examination of the Government of Alberta's ("Alberta") actions and their impacts on Westmoreland and Prairie, which are at the heart of the merits of the Articles 1102 and 1105 claims.

6. Canada also claims that Alberta's decision to pay out nearly $1.4 billion to three Albertan coal-consuming power utilities in exchange for "the economic disruption

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[6] Westmoreland Notice of Arbitration and Statement of Claim ("Westmoreland Statement of Claim") ¶¶ 18-19 (12 Aug. 2019).

[7] Canada Request for Bifurcation ("Canada Req.") § III.A (24 July 2020).

[8] Article 1102(1) and (2) apply to "investors of another Party" and "investments of investors of another Party." Article 1105(1) applies to "investments of investors of another Party."

[9] Canada Req. § III. B.

to [their] capital investments" and for waiver of any claims with respect to the phase-out of coal was a "subsidy," which Article 1108(7)(b) removes from suit under Article 1102. That objection cannot be answered without examination of the Off-Coal Agreements and the conduct of the Albertan government toward Albertan companies to determine whether the payout was a "grant," freely provided without consideration. These issues, once again, go directly to Westmoreland's claims on the merits.

7. A newly elected Government of Alberta decided to enact climate change legislation. Alberta did its own inquiry and drew its own conclusions about the consequences of that new policy. Alberta took the initiative to pay for it, structuring the Off-Coal Agreements and payments in the manner it saw fit. Alberta may (or may not) have calculated the losses/damages for Westmoreland, but Alberta decided behind closed doors not to compensate Westmoreland. Despite public denials and selective vocabulary (*i.e.*, "grants"), Westmoreland's claim is that Albertan companies were compensated for their coal assets, sleight of language notwithstanding. In the same manner that Alberta chose to compensate companies for their transition from coal to natural gas as a source of electricity generation, Alberta should have compensated Westmoreland for the transition away from coal as a source of electricity.

8. Canada's central point in its request for bifurcation is efficiency, arguing that the jurisdiction and admissibility issues are so simple they could be decided "as a matter of law." Now that Westmoreland, in its response brief, has demonstrated otherwise, Canada seeks to distract from its own arguments by misrepresenting repeatedly Westmoreland's. Canada argues that Westmoreland does not explain how

the Tribunal will be required to prejudge the merits whereas Westmoreland has stated that the dispute involves "complicated issues" or a "factual inquiry."[10]

9. Canada ignores the full context of its selective quotations, which were Westmoreland's responses to Canada's contentions that bifurcation would be efficient because the jurisdictional and admissibility issues are so simple and could be decided with "no evidence" at all.[11] Absent these efficiencies, however, "a tribunal should be disinclined to bifurcate."[12]

10. Confronted with more complexity, Canada now argues that one tribunal "lament[ed]" that it had hindsight reservations that the respondent chose not to seek bifurcation.[13] But Canada agrees with Westmoreland that declaring bifurcation efficient presumes an outcome.[14] For this reason, "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."[15]

11. Therefore, Canada has not made the case for bifurcation.

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[10] Canada Reply ¶ 8.

[11] Canada Req. ¶¶ 13, 18, 22, 23.

[12] CLA-002, *Rand Investments, Ltd. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 ¶ 15 (24 June 2019).

[13] *See* Canada Reply ¶ 3 (citing RLA-036, *Caratube International Oil Company v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award ¶ 487 (5 June 2012)). That lament was of Respondent's own making; the *Phillip Morris v. Australia* tribunal noted, "as both Parties refer to the wording in the award in the *Caratube* case, it should be pointed out that, in the *Caratube* case, the Respondent had been expressly given the choice to request bifurcation and decided not to do so, which then led to the hindsight evaluation that the decision to deny jurisdiction in that case had the effect that the work on the merits proved to be without relevance for the final decision on the case." RLA-002, *Phillip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Procedural Order No. 8 Regarding Bifurcation of the Procedure ("*Phillip Morris*") ¶ 103 (14 April 2014).

[14] *See* Canada Reply n.3.

[15] RLA-002, *Phillip Morris* ¶ 103.

II. THE APPLICATION OF THE BIFURCATION TEST

12. The parties agree that the general approach outlined in *Phillip Morris v. Australia* should be followed to resolve a request for bifurcation.[16] The parties also agree that UNCITRAL 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."[17] The parties disagree as to how the *Phillip Morris v. Australia* standard is applied.

A. A Non-Frivolous Objection May Not Warrant Bifurcation

13. Canada contends that the first *Phillip Morris* factor, whether an objection is "prima facie serious and substantial," requires only a showing that the objection is not "frivolous or vexatious."[18] Canada ignores the *Gran Colombia Gold Corp. v. Colombia* tribunal decision, which states that "[I]t is self-evident that a frivolous objection would not warrant bifurcation….But this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation."[19] Similarly, the tribunal in *Glencore Finance (Bermuda) Limited v. Bolivia* rejected bifurcation, finding that while "the objection is not frivolous, and the arguments posed by the Respondent in this regard are capable of being argued and worth exploring in depth, it is not convinced

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[16] Canada Reply ¶ 5.

[17] Canada Reply ¶ 4.

[18] Canada Reply ¶ 6; *see also* RLA-007, *Glamis Gold, Ltd v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) ¶¶ 12, 16 (31 May 2005) (explaining that Article 21(4) "ensure[s] efficiency in the proceedings" but does not create "an absolute right of the requesting party" to obtain bifurcation).

[19] 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).

that the objection is sufficiently serious and substantial as to justify bifurcation."[20] The recent decision of the tribunal in *Red Eagle Exploration Limited v. Colombia* explained that it "is of the view that between frivolous and serious there may be degrees of seriousness that do not carry the weight to justify bifurcation."[21]

14. Canada has framed the standard incorrectly as one where bifurcation must be presumed as long as Canada's objection is not made in bad faith. Presumably, Canada would never raise frivolous objections, so bifurcation would be required in every case in which Canada offered a potentially dispositive jurisdictional or admissibility defense. Contrary to Canada's assertions, an objection may not warrant bifurcation even when non-frivolous.

B. Overlap, Not Complexity, Defines The Second Factor

15. Canada and Westmoreland agree that the second *Phillip Morris* factor examines whether the jurisdictional question can be examined without prejudging the merits. But Canada argues incorrectly that Westmoreland focused solely on the complexity of the factual inquiry instead of overlap with the merits.[22] Complexity alone is not Westmoreland's argument. [23] All Canada's objections are intertwined with the merits because they overlap with the elements of Westmoreland's Articles 1102 and 1105

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[20] CLA-008, *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia,* PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation) ¶ 5 (31 Jan. 2018).

[21] CLA-009, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation ¶ 42 (3 Aug. 2020).

[22] Canada Reply ¶ 8; s*upra* ¶ 8. Another Canadian misrepresentation is its contentions about how "Westmoreland" is being presented. Canada states that "Claimant continues to confusingly refer to a generic 'Westmoreland' in describing its claims." Canada does not cite paragraph 1 of the Response that states "Claimant, Westmoreland Mining Holdings LLC ('*Westmoreland*'), disagrees" (emphasis added).

[23] Westmoreland Response to Request for Bifurcation ("Westmoreland Resp.") ¶¶ 29, 35, 40 (14 Aug. 2020); *supra* ¶¶ 22, 26, 29, 37.

claims: Westmoreland's status as an investor of another Party; Prairie's status as its foreign investment; Albertan measures that breached obligations of both national treatment and the minimum standard of treatment damaging Westmoreland and its investment.

C. Bifurcation Is Not Warranted When It Will Not Likely Resolve The Dispute

16. Canada contends that bifurcation is appropriate even when a jurisdictional decision in favor of the Respondent will "not result in an end to the overall dispute"[24] (the third *Phillip Morris* factor). According to Canada, "in three of the four cases cited by 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."[25]

17. The only decision of the three that Canada analyzes is *Resolute v. Canada*, which did not lead to "efficiency gains" but, instead, led to a two-year jurisdictional detour. Canada failed to dismiss the case on grounds of a statute of limitations defense and that the claim did not "relate to" Resolute's investments in Canada. The tribunal resolved two minor issues in favor of Canada that were hardly "significant aspects of the claim," finding that parts of two measures were not actionable, but neither of these measures disposed of Resolute's claims.[26] Most of the

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[24] Canada Reply n.16.

[25] Canada Reply n.16.

[26] *See* RLA-033, *Resolute Forest Products, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Decision of Jurisdiction and Admissibility ¶¶ 244, 325-329. (30 Jan. 2018) ("interim funding" measure and provincial tax measure—two among many others—were not actionable). Despite the efficiency gains Canada now touts with respect to its Article 1108(7)(b) objection, Canada refused to advance a similar objection during the jurisdictional phase in

disputed measures remained after the jurisdictional hearing, awaiting a third hearing, finally, on the merits.[27] Canada also cites the decision by the *Mesa Power v. Canada* tribunal where it "expressly reserved" the right to amend its bifurcation decision.[28] That "express reservation" led to no further efficiency gains because the Tribunal resolved the dispute in a single phase.[29]

18. Regardless the legal authority, Canada's position is that bifurcation is warranted when only a portion of the claims may be excised from the dispute. There is little if any efficiency gained when the dispute continues past a hearing on jurisdiction and admissibility.[30]

III. CANADA HAS NOT OFFERED ANYTHING NEW TO JUSTIFY ITS OBJECTION THAT THE BREACHES SUPPOSEDLY PRE-DATED CLAIMANT'S INVESTMENT

19. Canada is not entitled to seek bifurcation based upon its contention that "the [A]lleged [B]reaches [P]re-[D]ate the Claimant's [I]nvestment in Canada."[31]

Resolute. *See* CLA-010, *Resolute Forest Products, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Decision of Jurisdiction and Admissibility Decision on Bifurcation ¶ 2.15 (29 Sept. 2016).

[27] There was a hearing on whether to bifurcate that Canada won; on jurisdiction and admissibility (that Canada lost); and a third (pending) on the merits. *See supra* n.26.

[28] Canada Reply n.16.

[29] RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award ("*Mesa Power*") ¶¶ 43-180 (24 March 2016) (addressing procedural history of the dispute).

[30] RLA-007, *Glamis Gold, Ltd v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) ¶¶ 12, 16 (31 May 2005).

[31] Canada Reply § III.A. The three objections are: (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.[31]

Although Canada offers three distinct objections (as Westmoreland stated in its Response[32]), Canada groups them together under the same heading and relies upon the same operative facts to resolve each one.[33] No matter how Canada repackages the facts into separate legal arguments, the objections must stand or fall together.

20. To demonstrate that its objections are *prima facie* serious and substantial, Canada offers no new legal authorities, significant facts, or arguments. Canada's response brief again relies on *Mesa Power* and other cases to argue a principle without a rationale. "State conduct cannot be governed by rules that are not applicable when the conduct occurs," the *Mesa Power* tribunal explained.[34] Canada then cites a string of cases in which there was no foreign investor nor foreign investment at the time of the breaches. By contrast, it is undisputed that Prairie at all times relevant to this dispute has existed as a foreign investment, owned by a foreign investor, and that Canada's conduct toward the investment and its investor were governed by NAFTA Chapter 11.

21. None of those facts is present in the cases relied upon by Canada. Instead, those cases,[35] particularly *Gallo* and *Mesa Power*, involve situations where there was no "link between the investor that seeks to make an investment, and the

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[32] Westmoreland Resp. ¶ 12 ("Canada offers three different legal theories based on its contention that the 'alleged breaches pre-date the Claimant's investment in Canada.'").

[33] *Compare* Canada Reply ¶ 13-14 (contending Westmoreland was not an investor at time of the alleged breaches), *with id.* ¶ 21 ("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'."), *with id.* ¶ 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….").

[34] RLA-020, *Mesa Power* ¶ 325.

[35] *See* Westmoreland Resp. ¶¶ 15-20, 23.

investment that the investor seeks to make" prior to the date of the claims.[36] All of them involved either (i) foreign investments that did not exist at the time of acquisition or (ii) domestic investments that existed and, therefore, were not governed by treaty protections when they were later acquired by the foreign investor.

22. Canada misconstrues the Westmoreland bankruptcy process to argue that it is being used to "backdate" the acquisition of an investment.[37] Canada cites no factual support for its proposition. Moreover, Canada's legal argument is that an investor is not entitled to restructure its holdings in any manner. But Canada has cited no authority that extends the *ratione temporis* argument to prohibit a corporate restructuring, particularly one, such as here, where Canada knew that its conduct was subject to claims of a potential NAFTA breach.

23. Canada's objection is based on the hope for a windfall; that the restructuring of a foreign investor through bankruptcy proceedings absolves Canada of breaches and damages committed with respect to the foreign investor and its investment. To win this argument, Canada must persuade the Tribunal that the NAFTA Parties intended court-approved bankruptcy restructuring for foreign investors to lie outside the bounds of NAFTA's investment protections. Host governments, according to Canada, would be immunized from conduct violating international law in the presence of a corporate restructuring.

24. Assuming Canada could persuade the Tribunal of such immunization, which seems to reach well beyond the threshold of jurisdiction, Canada then must

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[36] *See* RLA-020, *Mesa Power* ¶¶ 330.

[37] Canada Reply ¶ 16.

persuade the Tribunal of facts showing that the commonality of interests between Westmoreland and Westmoreland Coal Company with respect to their commonly shared investment in Prairie were so attenuated by the bankruptcy restructuring as to extinguish Westmoreland's rights as the successor owner of the foreign investment. This objection, like the others, is intertwined with the merits of the case.

25. Canada argues that Westmoreland's claims under Article 1101(1) do not "relate to" the challenged measures[38] while contending, on the merits, that Westmoreland's damages are not supported because they lack a "causal link between each of the breaches of NAFTA Chapter Eleven."[39] However, both tests require analysis of the causal effects of a measure (even if the "relate to" test were to require a lower threshold).[40] Similarly, Canada contends that Westmoreland "has not made its *prima facie* damages claim"[41] yet disputes on the merits whether Westmoreland has any damages at all.[42] Canada claims that its objections do not require an analysis of causation or damages,[43] begging the questions of how these objections differ from the *ratione temporis* objection and why these objections are serious and substantial enough to warrant bifurcation.

26. Canada's *ratione temporis* objection overlaps with the merits in additional ways. Canada argues that "the only relevant facts concern when the Claimant became

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[38] Canada Reply ¶ 25.

[39] Canada Statement of Defence ("Statement of Defence") ¶ 93 (26 June 2020).

[40] *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).

[41] Canada Reply ¶ 20.

[42] Statement of Defence ¶ 93.

[43] Canada Reply ¶ 23, 26.

an 'investor of a Party' and when the alleged breaches occurred."[44] That issue overlaps specifically with arguments Canada raises for the merits. For example, Canada alleges that "the Government of Alberta has not accorded treatment to the Claimant or its investment" because Westmoreland "acquired its investment in Canada in March 2019."[45] Canada did not advance this argument as a jurisdictional objection, yet it presumably reserves the right to argue on the merits that Westmoreland was not accorded treatment.[46] Canada's positions will require Westmoreland to present similar facts in both a jurisdictional and merits phase, with the Tribunal's factual findings developed during the jurisdictional phase prejudicing any potential merits decision.[47]

27. Canada also contends that "WCC's alleged expectations are contradicted by contemporaneous statements it made to its investors" that "climate change regulations in Canada, and in Alberta specifically, for coal-fired plants could change" and could have a "material adverse effect on our business, results of operations and financial performance."[48] Canada suggests that Claimant's damages are not supported, failing "to establish a causal link between each of the breaches of NAFTA Chapter

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[44] Canada Request ¶ 13.

[45] Statement of Defence ¶ 77.

[46] Canada's "accorded treatment" defense has been advanced in prior arbitrations. *E.g.*, CLA-011, *Resolute Forest Products, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Canada Rejoinder on Merits and Damages ¶¶ 103-109 (4 March 2020) (arguing that the government "did not accord 'treatment' to [the claimant] or its investments").

[47] CLA-012, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent Application for Termination, Trifurcation and Security for Costs ("*Orlandini-Agreda*") ¶¶ 133-134 (9 July 2019).

[48] Statement of Defence ¶ 90 (quoting R-039, Westmoreland Coal Company, 2013 Annual Report, 28 February 2014, [Excerpt], p. 29).

Eleven that it alleges and the damages that it claims as a result."[49] Canada here appears to be arguing that the corporate restructuring deprived this Tribunal of jurisdiction and the fact of the restructuring and the factors leading to it deprived Westmoreland of damages. Hence, Canada's *ratione temporis* objection does not "concern[] a self-contained, limited set of facts different from those relating to the merits of the dispute."[50]

IV. BIFURCATING CANADA'S ARTICLE 1108(7)(B) OBJECTION WILL NOT INCREASE EFFICIENCY

28. Canada has argued previously that "it is normal for NAFTA tribunals to deal with Articles 1102 and 1108(7) together with the merits."[51] Canada's arguments here that 1108(7)(b) can be addressed preliminarily and apart from the merits defy that "normal" expectation and the standards set out in *Phillip Morris*.

29. Canada concedes that the Tribunal will need to examine the Off-Coal Agreements to resolve the Article 1108(7)(b) objection. Canada would have the Tribunal, as a preliminary matter, review those documents and ascertain whether the compensation they provided was a grant or subsidy rather than payment for both what Alberta's Energy Minister termed the "economic disruption to [their] capital investments"[52] and the waiver of claims with respect to the phase-out of coal.[53]

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[49] Statement of Defence ¶ 93.

[50] CLA-009, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation ¶ 43 (3 Aug. 2020).

[51] CLA-011, *Resolute Forest Products, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Canada Rejoinder on Merits and Damages ¶ 81 & n.146 (4 March 2020).

[52] C-009, Government of Alberta, *Phasing Out Coal Pollution*, ALBERTA.

[53] C-019, Off-Coal Agreement between TransAlta Corp. and Alberta § 7(a) (24 Nov. 2016); C-023, Off-Coal Agreement between Capital Power Corp. Alberta § 7(a) (24 Nov. 2016).

30. In addition to determining whether compensation in the Agreements was an unconditional "grant" or "subsidy" rather than payments for damages and other consideration, the Tribunal would need to examine whether the Alberta Government's conduct was consistent with the provision of a grant or subsidy. Canada is asking the Tribunal to undertake that contractual and factual examination as a preliminary matter, independent of the merits, and without addressing whether Westmoreland was, for purposes of Article 1102, in like circumstances with the Albertan companies who entered into those Agreements.

31. Canada is also asking the Tribunal to ignore whether Alberta's compensation scheme was unfair to Westmoreland in violation of Article 1105 until such time as the Tribunal would review the Agreements and the government's conduct a second time in a separate merits-phase proceeding. Canada would have a first phase dispose of the Article 1105 claim without examination.

32. According to Canada, 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')."[54] But dictionary definitions of a "grant" describe that term as a "gift," something that is not provided in exchange for consideration. Were Alberta in fact so generous as to grant unconditionally $1.4 billion dollars to three companies for the sake of the "public interest," one would have to wonder why a "grantee" has sued Alberta claiming that cuts in the agreed compensation for their coal-plant closures were

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[54] Canada Reply ¶ 38.

unreasonable.[55] The *prima facie* evidence suggests that the Off-Coal Agreements were contracts for consideration, not instruments of a benevolent government gift.

33. Canada would like to narrow its jurisdictional inquiry into a rote recitation of the terms of the Off-Coal Agreements. Westmoreland's factual analysis, however, could encompass: (1) the Off-Coal Agreements and the obligations contained in them;[56] (2) the negotiations over the Agreements;[57] (3) the benefits afforded to Alberta by the Off-Coal Agreements;[58] (4) any related disputes Alberta had with its local power companies over the terms of the Off-Coal Agreements,[59] (5) disputes between Alberta with the local power companies over Alberta's "unique" energy market, which Canada addresses in its Statement of Defence;[60] and (6) the payment mechanism for the Off-Coal Agreements.[61]

34. These facts and others are identical to those the Tribunal would hear during the merits phase, making likely a duplicative review of evidence and raising due process concerns from prejudging the merits in a bifurcated first phase.[62] Canada's

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[55] C-028, Capital Power sues province over alleged 'unreasonable' cut to coal-plant closure payments, *Edmonton Journal* (7 May 2018).

[56] Statement of Defence ¶¶ 43-49.

[57] *Id.* ¶¶ 43-49.

[58] *Id.* ¶¶ 43-56.

[59] C-028, Capital Power sues province over alleged 'unreasonable' cut to coal-plant closure payments, *Edmonton Journal* (7 May 2018).

[60] Statement of Defence ¶¶ 26-27; *see also, e.g.*, C-029, TransAlta Press Release, "Arbitration Concludes Favourably For TransAlta Regarding the Sundance B and C Power Purchase Arrangements Termination Payment" (26 Aug. 2019).

[61] Statement of Defence ¶ 45.

[62] CLA-012, *Orlandini-Agreda* ¶¶ 133-134.

constrained, compartmentalized role for the Tribunal discredits claims about the efficiency of considering Article 1108(7)(b) in a preliminary proceeding.[63]

35. Canada states that resolving the Article 1102 claim will "significantly increase" the efficiency of these proceedings but concedes the proceedings would still continue even if the Tribunal were to find in favor of Canada on this issue.[64] The parties would still have to engage in document exchanges, multiple rounds of briefing, and a separate merits hearing. Therefore, resolution of Canada's 1108(7)(b) defense in a jurisdictional phase will not "significantly increase" efficiency; instead, the parties will have expended an additional year of time and expenses to resolve one claim on a truncated record.

V. CANADA'S TIME BAR OBJECTION DOES NOT WARRANT BIFURCATION

36. Canada persists with its argument that the Albertan Government's November 2015 announcement of the coal phase-out is subject to the time-bars of NAFTA Articles 1116(2) and 1117(2). Canada does not cite any legal consequence arising from this announcement or point to any legislative or regulatory action emanating from a government press release. Instead, Canada reiterates that a political press release from a government leader, which lacks any binding effect, constitutes a "practice" under NAFTA Article 201.[65] Canada's principal issue seems to be that

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[63] Canada Reply ¶ 38.

[64] *Id.* ¶ 40.

[65] *See id.* ¶ 30 n.52; R-029, Government of Alberta, Press Release, "Climate Leadership Plan will protect Albertans' health, environment and economy", 22 November 2015, p. 2 Alberta's non-binding climate goals espoused in the press release changed in 2019 after an election led to a new provincial government. C-030, UCP government prepares to end climate leadership plan as MLAs sworn in, *Edmonton Journal* (22 May 2019); C-031, UCP and NDP at odds over climate policies as Alberta legislature returns, *The Globe and Mail* (21 May 2019).

Alberta's Climate Leadership Plan is referenced repeatedly in the Notice of Arbitration,[66] which cannot be construed as a serious and substantial defense.

37. Canada's objection would require prejudging the merits of the dispute. During the jurisdictional phase, the parties would debate the import of the Climate Leadership Plan. Because it was a statement of policy goals, the Tribunal would be forced to judge that so-called measure, including the "measure's" scope and extent. This analysis would far exceed Canada's simple "assessment of this jurisdictional objection."[67]

38. Canada's objections would have little (if any) effect on the remainder of the arbitration. Whatever the Tribunal's conclusion about the Climate Leadership Plan, Westmoreland would continue legitimately to reference it, if only as a background fact to the arbitration.[68] Canada's objections thus seem designed to complicate rather than simplify issues. If Canada were to succeed in this motion, the parties would spend time and resources disputing whether a certain referenced fact is actionable or, worse, whether an actionable measure (such as the Off-Coal Agreements) can somehow be tied back to a non-binding announcement of policy goals. Separate resolution of Canada's time-bar objections would be an inefficient waste of resources.

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[66] *See* Canada Reply ¶¶ 28-32.

[67] *Id.* ¶ 31.

[68] RLA-020, *Mesa Power* ¶ 338 ("[I]t is to be noted that while the measures just listed are beyond the reach of the Tribunal's jurisdiction, the circumstances in which they occurred may be considered in so far as they provide background and context to the analysis of the claims over which the Tribunal does have jurisdiction.").

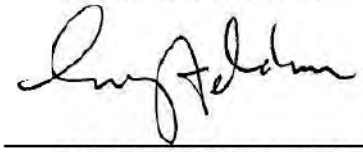
VI. CONCLUSION

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

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

Dated this 11th day of September, 2020

Respectfully submitted,



BAKER AND HOSTETLER LLP
1050 Connecticut Avenue NW., Suite 1100
Washington, DC 20036
United States of America
Elliot J. Feldman, efeldman@bakerlaw.com
Michael Snarr, msnarr@bakerlaw.com
Paul Levine, pmlevine@bakerlaw.com
Analía González, agonzalez@bakerlaw.com
Telephone: (202) 861-1500
Fax: (202) 861-1783

1801 California Street, Suite 4400
Denver, CO 80202
United States of America
Alexander K. Obrecht,
aobrecht@bakerlaw.com
Telephone: (303) 861-0600
Fax: (303) 861-7805