IN THE MATTER OF AN ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

WESTMORELAND COAL COMPANY,

Claimant,

vs.

GOVERNMENT OF CANADA,

Respondent.

CLAIMANT'S NOTICE OF ARBITRATION

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I. INTRODUCTION

1. Westmoreland Coal Company ("**Westmoreland**"), a U.S. corporation, respectfully submits this Notice of Arbitration and Statement of Claim on behalf of itself and its Canadian enterprise, Prairie Mines & Royalty ULC ("**Prairie**"), as to the following legal dispute with the Government of Canada ("**Canada**," or "**Respondent**") in accordance with Chapter Eleven of the North American Free Trade Agreement ("**NAFTA**") and Annex 14-C of the United States-Canada-Mexico Agreement ("**CUSMA**").

2. Westmoreland elects to proceed with this arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules adopted on December 15, 1976, as provided under Article 1120(1)(c) of NAFTA. Westmoreland also proposes that the arbitration be administered by the International Centre for the Settlement of Investment Disputes ("**ICSID**") and that the arbitration be seated in Washington, D.C.

II. SUMMARY OF THE CLAIM

3. Throughout the twentieth century, coal was an essential input to the mass production of electricity, supplying more than half of all electricity produced in Alberta. It was cheap and abundant, which kept electricity prices low and guaranteed an affordable and reliable supply of electricity for consumers.

4. In 2012, the Government of Canada decided to take action to address the greenhouse effects of burning coal. However, in enacting the regulations, Canada proposed that the conversion away from coal take place over a fifty-year period to minimize the burden of the energy transition to the impacted parties.

5. In 2014, Westmoreland acquired a number of coal mines in Canada, including the "mine-mouth" operations in Alberta at issue in this dispute. For mine-mouth operations, coal mines are developed adjacent to and in conjunction with a power plant so that the coal can be delivered to the power plant economically. Such mine-mouth operations formed the core of Westmoreland's business and offered a predictable return, especially in Canada, which had just committed to allow coal production for fifty years from the date of commissioning of the relevant power plant.

6. Shortly after Westmoreland completed its investment in Canada, the value of that investment came under threat in November 2015 when a new Alberta provincial government announced its "Climate Leadership Plan." Alberta, which historically relied primarily on its abundant coal supply to fuel its power plants, decided that it wanted to eliminate all power emanating from coal by 2030 (*i.e.*, decades earlier than provided in Canada's 2012 regulations).

7. Alberta recognized that an accelerated transition from coal would have an adverse effect on companies that had invested in the coal-powered electricity generation sector. By 2015, Alberta made "clear commitments not to strand investor capital" and, consistent with those commitments, recognized the need to provide "appropriate compensation to investors in coal generating assets which will be affected" by the Climate Leadership Plan.[1] Pursuant to those commitments, Alberta agreed to pay out nearly CA$1.4 billion to three coal-consuming power utilities – ATCO, Capital Power, and TransAlta – all of which were Albertan companies and considered household names.[2]

8. Notwithstanding Alberta's recognition in the Climate Leadership Plan of the importance of protecting stranded investments, and notwithstanding its decision to compensate the power plants affected by the Climate Leadership Plan, Alberta provided no compensation to Westmoreland's mine-mouth operations. Unlike the Albertan companies that received compensation for their transferred investments caused by the energy transition, however, Westmoreland received no compensation under the Climate Leadership Plan.

9. Thereafter, in 2016 and 2018, Alberta and the federal government, respectively, enacted carbon pricing regulations. The carbon pricing regulations imposed higher surcharges on coal-fired emissions relative to other sources of energy, such as natural gas. These measures increased the cost of coal-fired electricity generation compared to other sources of electricity and effectively eliminated the market for thermal coal. Alberta's payments to coal-consuming power utilities, which provided capital to retrofit coal-fired power plants

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1 Climate Leadership, Report to Minister, Alberta, Canada, Nov. 20, 2015, https://open.alberta.ca/publications/climate-leadership-2015 (last visited Oct. 6, 2022), p. 49, 58, **C-001**.

2 Capital Power is a Canadian company headquartered in Edmonton, Alberta. TransAlta is a Canadian company headquartered in Calgary, Alberta. ATCO is a Canadian company also headquartered in Calgary, Alberta.

to run on natural gas, combined with these carbon charges, accelerated the transition away from coal even earlier than the 2030 deadline in the Climate Leadership Plan.

10. The combined effect of these measures was devastating for Westmoreland's investments. Because of the mine-mouth structure of the operations that Westmoreland had acquired, there was no other market for the coal produced from those mines; the quality and location of the coal rendered it uncompetitive for any use other than as a dedicated supply for the adjacent power plants.

11. Westmoreland does not dispute that Canada and Alberta are entitled to enact regulations to combat climate change. However, the state must carry out such acts in a manner that is consistent with Canada's obligations under NAFTA. Alberta's decision to transition away from coal-fired power generation and Alberta's scheme to compensate Albertan coal mine operators for the loss of their investments—to the exclusion of the only American coal mine operator similarly affected—denied Westmoreland national treatment under Article 1102; constituted unfair and inequitable treatment of the company in violation of NAFTA Article 1105; and unlawfully expropriated Westmoreland's investment after 2030 under NAFTA Article 1110. In addition, the imposition of carbon charges by Alberta and Canada, which rendered thermal coal economically unviable well before 2030, unlawfully expropriated Westmoreland's investment before 2030 in violation of NAFTA Article 1110.

12. Westmoreland respectfully serves this Notice of Arbitration for Canada's multiple breaches of its obligations under NAFTA, Chapter Eleven, including, but not limited to, the actions of the provincial Government of Alberta described herein.

13. The facts of this case are not new to Canada. They are related to an earlier arbitration in which Canada successfully argued that WMH—which attempted to purchase Westmoreland's NAFTA claim in U.S. bankruptcy proceedings—had no standing. This Notice of Arbitration relies on the same or related claims, facts, and harms of which Westmoreland and its purported successor-in-interest, Westmoreland Mining Holdings LLC ("**WMH**"), put Canada on notice no later than 2018 in ICSID Case No. UNCT/20/3. In that case, Canada prevailed in arguing that WMH lacked standing under NAFTA because the purported assignment of the claims from Westmoreland to WMH in the bankruptcy proceedings of Westmoreland was ineffective under international law. As set

forth in further detail below, Westmoreland has cured that jurisdictional defect in the present arbitration, and seeks relief for Canada's wrongful conduct.

III. PROCEDURAL REQUIREMENTS

14. The disputing investor, Westmoreland, is incorporated in Delaware, United States of America, and thus is an investor of a NAFTA Party pursuant to NAFTA Article 1139. As a result of the bankruptcy proceedings described in more detail below, Westmoreland is no longer an operating company, and is controlled by the WLB Liquidating Trust. Its address is:

Westmoreland Coal Company
c/o Jeffrey S. Stein, WLB Plan Administrator for the WLB Liquidating Trust
Stein Advisors LLC
42 River Wind Road
New Canaan, CT 06840

Its registered address is:

Westmoreland Coal Company c/o Cogency Global Inc.
850 New Burton Road, Suite 201
Dover, DE 19904
United States of America

15. At the time relevant to this dispute, Westmoreland owned and controlled Prairie, a Canadian corporate enterprise whose rights have been infringed directly by acts for which Canada is responsible under NAFTA. Prairie's address is:

Prairie Mines & Royalty ULC
1100, 10123 99 Street
Edmonton, AB T5J 3H1 Canada
Telephone: (780) 420-5810
Fax: (780) 420-5835

16. The following counsel are duly empowered to act on behalf of Westmoreland in this matter, and correspondence should be served upon them at the addresses listed below:

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IV. FACTUAL BASIS FOR THE CLAIMS

17. Coal has long served as a key source of income for Canada, and in particular, the state of Alberta. In 2011, thermal coal represented 55 percent of Alberta's electricity generation supply.[3] At that time, the Alberta Department of Energy described coal as a low-cost fuel for electricity that plays a major role in keeping power prices at reasonable levels.

18. While Canada recognized the impact of coal on greenhouse gas emissions, it proposed to phase out the industry gradually over a period of fifty years. To that end, in 2012, Canada promulgated the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* (the "**2012 Federal Regulations**"),[4] enacted pursuant to the *Canadian Environmental Protection Act, 1999*. The 2012 Federal Regulations provided a comprehensive scheme to gradually phase out coal burning power plants fifty years after their date of commissioning.

19. With respect to a coal-burning unit within a power plant with commissioning dates on or after 1986, the 2012 Federal Regulations defined the "useful life" as ending on "December

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[3] Alberta Ministry of Energy, Annual Report 2011–2012, https://open.alberta.ca/dataset/cbd7147b-d304-4e3e-af28-78970c71232c/resource/5b636c06-96fe-4bc2-85f8-699519db47c6/download/6847119-2011-2012-alberta-energy-annual-report.pdf (last visited Oct. 6, 2022), p. 15, **C-002**.

[4] Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations, SOR/2012-167, Sept. 22, 2022, https://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-167/index.html (last visited Oct. 6, 2022), **C-003**.

31 of the calendar year that is 50 years after the commissioning date."[5] That is, the regulations made it clear that a coal unit would have a useful life of at least 50 years from the date of commissioning for modern power plants.

A. Westmoreland Invests in Canada

20. Westmoreland had over 150 years of experience successfully developing and operating coal mines before it invested in Canada. Westmoreland's major emphasis was on "mine-mouth" operations, where mines supply thermal coal to "mine-mouth" coal-fired units in power plants that are located adjacent to, designed to use, and serviced exclusively by, the adjacent mine (hence the term "mine-mouth"). These mine-mouth operations generated niche coal market for Westmoreland, which sold the vast majority of its coal to customers under long-term, cost-protected contracts that guaranteed stable and steady profits. Moreover, when it came time to renew or extend long-term contracts (in connection with expanding development and/or exploitation of reserves in existing coal mines), Westmoreland was the natural—and only—choice for its long-term customers, the adjacent power plants. Westmoreland's executive leadership had extensive mining experience and oversaw significant growth of the company.

21. In mid-2013, Westmoreland learned that Sherritt, a Canadian entity headquartered in Toronto, Ontario, and Canada's largest thermal coal producer, producing 70 percent of all thermal coal in Canada, was selling its Canadian coal operations. The sale presented an important strategic opportunity for Westmoreland to expand its presence across North America and become the leading mine-mouth coal producer in the region.

22. Before submitting a bid, Westmoreland conducted due diligence on the potential acquisition. As part of its diligence efforts, Westmoreland reviewed the impact of the 2012 Federal Regulations on Sherritt's operations, potential changes to the legal landscape, and any governmental, regulatory or other issues that could impede operation at the mines. This diligence did not reveal any significant issues. In fact, Canada's regulatory climate was friendlier to coal than the United States' and Westmoreland was attracted to the 50-year life of the facilities under the 2012 Federal Regulations.

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[5] The 2012 Federal Regulations also provided that Canada could, in certain circumstances, grant extensions to extend the life of a coal-burning unit, **C-003**.

23. In December 2013, Westmoreland committed to acquire Sherritt's coal assets, including the three mines in Alberta that are relevant to this dispute, organized under Sherritt's subsidiary, Prairie: the Genesee Mine,[6] the Sheerness Mine,[7] and the Paintearth Mine[8] (together the "**Mines**").[9] Westmoreland's acquisition of the Mines more than doubled its existing operations and diversified its customer base. Westmoreland's move into Alberta provided an entry into one of the world's most favorable mining jurisdictions.[10]

24. Prairie had over 594 million tons of coal reserves as of December 31, 2012. Its mines supplied thermal coal under long-term contracts to mine-mouth coal-fired units in power plants that are located adjacent to, and serviced exclusively by, Prairie's mines. The power plants also were the sole purchasers of the coal. In 2012 alone, Prairie delivered approximately 19 million tons of coal to the adjacent power plants and generated $360.8 million in revenue.

25. The Prairie Mines were developed in conjunction with, and at the same time as, the adjacent power plants, for the sole purpose of fueling the adjacent coal-generating units. The Mines, therefore, lack the necessary infrastructure, such as railroad access, to serve other potential markets. Even if the Mines were to have the necessary infrastructure, the coal produced from the Mines is not of a high enough heating content to be exported profitably. Thus, there is no commercially reasonable way to use coal from the Mines for anything other than supplying the adjacent power plants.

26. Prairie's reserves were expected to provide fuel well beyond the term of long-term contracts with the adjacent power plants. Consistent with industry practice, in which the owner of the mine-mouth operations and the adjacent coal-fired generation unit regularly extend long-term contracts (often in conjunction with updated assessments of reserves,

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6 The Genesee Mine supplied coal for three coal-burning units at the Genesee Generating Station. Two of these units were owned by Capital Power and the third unit was jointly owned by Capital Power and TransAlta. The operation of the Genesee Mine was a 50/50 joint venture between Westmoreland and Capital Power.

7 The Sheerness Mine supplied coal for two coal-burning units at the Sheerness Generating Station, jointly owned by ATCO and TransAlta.

8 The Paintearth Mine supplied coal for three coal-burning units owned by ATCO at the Battle River Generating Station.

9 Prairie's mines also included two coal mines in Saskatchewan (Estevan and Poplar River), another mine with established sales in Asia, a char production facility, and a 50% interest in an activated carbon plant, none of which are relevant to this dispute.

10 Press Release, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations, Dec. 24, 2013, **C-004**; Presentation, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations 9, Dec. 24, 2013, **C-005**.

expansion of permitted areas, and/or increases in future demand for electricity), Westmoreland reasonably expected that, as the sole source of fuel for the adjacent coal-fired generation units, Prairie's long-term contracts would be extended for the useful lives of the plants.

27. Five of Westmoreland's mine-mouth coal-burning units that were the sole purchasers of the coal produced from the Mines qualified for a 50-year useful life under the 2012 Federal Regulations and would not reach the end of those useful lives until:

- 2036 for the Sheerness 1 unit supplied by the Sheerness Mine;
- 2039, for the Genesee 2 unit supplied by the Genesee Mine;
- 2040 for the Sheerness 2 unit supplied by the Sheerness Mine;
- 2044 for the Genesee 1 unit supplied by the Genesee Mine; and
- 2055 for the Genesee 3 unit supplied by the Genesee Mine.

28. Westmoreland expected the mines to provide a predictable cash flow because of the structure of the contracts that served mines that had long remaining lives.

29. Westmoreland's investment decisions were based in significant part on the 2012 Federal Regulations establishing the useful life of the coal-burning units within the power plants that were the sole purchasers for the coal produced from the Mines. For example, in a December 24, 2013 Question & Answer session with its investors regarding the acquisition, Westmoreland explained that its investment was compatible with the regulatory environment in Canada:

Brian Taddeo – Robert W. Baird

"<Q>: Good morning, happy holidays. I just have a quick one. Just going back to the customers of the offtake plants for the mines. Are there any environmental issues tied to any of the plants? In the U.S., lots of concerns or questions always about having to retrofit plants or shut them down. Any issues with these?"

Robert King – Chief Executive Officer [of Westmoreland]

"As part of our due diligence, we did do and had consultants weigh in on what these plants look like from the standpoint of their mine lives and their criticality to the grid. Our analysis

indicates that these are all long-lived plants, that they'll be around for a while and that there are no impending environmental issues associated with them."[11]

30. A few months later, in a February 21, 2014 Earnings Call, Westmoreland explained it was relying on the 2012 Federal Regulations in making its Canadian acquisition:

Nelson Jay Obus – Wynnefield Capital, Inc.

"Just in terms -- this is a big-picture question and just want to be light about it. There's a whole bunch of stuff going on here with the EPA, the Clean Air Act and all this stuff that could go either way and stuff getting up to the Supreme Court. Could you very quickly, and I know we could spend hours on this, just a couple of bullet points about how Canada approaches this?"

Robert P. King – Former President of US Operations and Director [of Westmoreland][12]

"Canada has a bit of a different philosophy particularly with regard to the CO2 issue, which is sort of the big thing out there that we don't know what's going on in the U.S. In Canada, with regard [to] power plants, they have what's -- what we term as the 50-year rule. And basically, what that is, is that power plants before they're required to do something with regard to CO2 will be able to operate for 50 years beyond the time that they were commissioned. So that gives us a clear direction as to what it is we think will happen up there."

Keith E. Alessi – Chief Executive Officer-Emeritus

"Yes, and the 50-year rule just says that they don't have to do anything, but at the end of 50 years, they can go back and request extensions and we would expect that to occur..."[13]

31. Canada also reviewed and approved the investment proposal, including Westmoreland's long-term plans to take root in the country. Canada approved Westmoreland's investment to purchase the Mines pursuant to the Investment Canada Act and Competition Act, based in part on Westmoreland's commitment to make certain capital expenditures and satisfy other benchmarks for a three-year period, including the following:

- maintaining certain Canadian headquarters and management requirements, for both Prairie and Westmoreland;

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[11] Transcript, Westmoreland Coal Co., Investor Conference Call 9–10, Dec. 24, 2013, **C-006**.

[12] Mr. King served as President of US Operations and Director before becoming CEO of Westmoreland in 2013.

[13] Transcript, Westmoreland Coal Co., FY 2013 Earnings Call 10, Feb. 21, 2014, **C-007**; *see also* Westmoreland Coal Co., Form 8-K, Exhibit 99.2 at 8, Feb. 21, 2014, **C-008**.

- leveraging its coal mining experience to strengthen the performance and practices at the Mines;
- maintaining minimum employment levels or providing appropriate severance and benefits for employees dismissed due to the Sherritt acquisition;
- making substantial capital investments—over $20 million in excess of capital investments planned by Sherritt, for a total of $233 million;
- committing to Canadian suppliers for the provision of goods and services to the Mines;
- participating in Canadian industry associations; and
- sustaining historic charitable contributions and community investments.

32. Westmoreland informed Canada in a regulatory filing at the time of acquisition that it did not intend to engage in any other business in Canada other than the existing business. The mine-mouth coal mines were therefore central to Westmoreland's acquisition strategy.

33. In view of these commitments, on April 9, 2014, the Office of the Minister of Industry determined that the Sherritt acquisition was "likely to be of net benefit to Canada," and approved Westmoreland's investment, including in Prairie, under the Investment Canada Act.[14]

34. The acquisition closed in April 2014, with Westmoreland paying over US$320 million for the coal assets and assumed liabilities in excess of US$420 million as part of the purchase.

B. Alberta Enacts its Climate Leadership Plan

35. On November 20, 2015, shortly after Westmoreland completed its investment in Canada, a new Alberta provincial government announced a "Climate Leadership Plan."[15] Alberta characterized this plan as a "made-in-Alberta strategy designed to diversify our economy, create jobs and reduce greenhouse gas emissions."[16] The Climate Leadership Plan planned to eliminate all power generated from coal in Alberta by 2030, decades earlier than some of the useful lives established under the 2012 Federal Regulations.[17] The new plan

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14 Letter from the Honourable James Moore, Minister of Industry, to Joe Micheletti, President of Westmoreland Canada Holdings, Inc., Apr. 9, 2014, **C-009**.

15 *See* Climate Leadership, Report to Minister, Alberta, Canada, Nov. 20, 2015, **C-001**.

16 Government of Alberta, *Climate Leadership Plan*, Alberta, Canada, Nov. 12, 2018, **C-010**.

17 *Supra* n.1, Climate Leadership, Report to Minister, Nov. 20, 2015, **C-001**; *see also* Government of Alberta, *Phasing Out Coal Pollution*, ALBERTA, Nov. 12, 2018, **C-011**. Five power plants and their associated mine-

hastened, by as many as twenty-five years for the Mines, the expiration of the time in which coal-generated electricity would be allowed in Alberta.

36. At the time it published the Climate Leadership Plan, Alberta knew that both coal-fired generation units and their "associated mines" would be affected by the province's plans to phase-out coal by 2030. Specifically, in a pamphlet published by the Government of Alberta in March 2016, Alberta recognized that the "coal-fired generation unit[s] and owner[s]" were affected by its "action to phase-out coal-fired emissions."[18]

37. From the outset, Alberta recognized that the Climate Leadership Plan would have an adverse economic impact on producers of coal-generated electricity. Therefore, the Climate Leadership Plan recognized Alberta's intention to compensate "investors in coal generating assets," and made "clear commitments not to strand investor capital" (*i.e.*, capital that would be reduced based on the difference between the federal 50-year end-of-life and an accelerated coal phase-out in Alberta).[19] Alberta therefore initiated a process to compensate electric utilities for the reduced lifespan of their coal-burning units with their power plants and the associated coal mines.

C. Compensates Only Canadian Companies for Reducing The Useful Life Of Coal Burning Units

38. As explained above, at the time that Alberta implemented the Climate Leadership Plan, it promised to assist the companies that would be negatively affected by the new initiative. Alberta charged Terry Boston, an industry executive,[20] with developing a compensation methodology that would "[m]aintain investors' confidence in Alberta by not unnecessarily stranding capital and ensure that workers, communities and affected companies are treated fairly in this process."[21]

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mouth coal operations were slated to have useful lives past 2030 under the 2012 Federal Regulations, meaning the Climate Leadership Plan reduced their useful life by decades from the 2012 Federal Regulations. Press Release, Government of Alberta, REVISED: Alberta Announces Coal Transition Action, Nov. 24, 2016, **C-012**. In addition to the five plants and mines discussed above, *supra* ¶ 27, Keephills 3 would reach the end of its useful life by 2061. This unit was jointly owned by Capital Power and TransAlta and was serviced by a mine-mouth coal mine owned by TransAlta.

[18] Alberta, Phase-out of coal fired emissions in Alberta, March 2016, https://open.alberta.ca/publications/phase-out-of-coal-fired-emissions-in-alberta (last visited Oct. 6, 2022), **C-013**.

[19] Climate Leadership, Report to Minister, Nov. 20, 2015, p. 58, **C-001**.

[20] Terry Brown was the former head of PJM Interconnection (one of the world's largest wholesale electricity markets) and former Vice President of the Tennessee Valley Authority.

[21] Letter from Terry Boston to the Honourable Rachel Notley, Premier of Alberta, Sept. 30, 2016, **C-014**.

39. There were only four coal companies that faced any exposure under Alberta's Climate Leadership Plan to phase out coal-fired power: Capital Power, TransAlta, ATCO, and Westmoreland. However, as described below, through the compensation process, Alberta decided to pay the three Canadian companies—to the exclusion of the one American company.

40. In the aftermath of the Climate Leadership Plan, Westmoreland repeatedly wrote to and met with elected leaders in Alberta, including Minister for Economic Development and Trade, Deron Bilous; Minister of Energy, Margaret Ellen McCuaig-Boyd; various Deputy Ministers; and even Alberta Premier Rachel Notley (and members of her staff), to ensure that Westmoreland's Albertan assets would not be "stranded" and that its employees would be protected. Westmoreland explained in its meetings with Alberta leaders that it would face millions of dollars in stranded capital as a result of the premature closures of the coal-fired units. Westmoreland also explained that reclamation costs— costs associated with closure of the mines and reclaiming the surrounding land at the end of their lives—would be accelerated because of Alberta's actions, leading to a potential increase of millions in annual cash expenditures.

41. Westmoreland, the American investor, was able to secure only a cursory meeting with Mr. Boston, who explained that Westmoreland's issues were outside his mandate even though he was charged with maintaining investor confidence by not stranding capital. Westmoreland was unable to participate in common meetings held between Alberta and TransAlta, ATCO, and Capital Power (all of which are Canadian companies) to discuss compensation.

42. By contrast, Capital Power was able to have meaningful discussions with Mr. Boston. As Capital Power explained in a press release at the time:

> "'We continue to be engaged with the Alberta government to ensure fair compensation is received for the proposed accelerated closure of coal- fired generating units by 2030 under the Alberta government's Climate Leadership Plan,' added Mr. Vaasjo [President and CEO of Capital Power]. 'Initial discussions with the government-appointed facilitator took place earlier this month. We continue to work collaboratively with the

> government and remain optimistic that a fair and appropriate outcome will be reached for our shareholders.'"[22]

So, too, was TransAlta, who by this point had decided to focus on "minimiz[ing] stranded capital" because the company generated 3,500 Megawatts of power in Alberta from coal.[23]

43. In September 2016, Mr. Boston recommended that Alberta compensate the Canadian companies through voluntary "net book value" payments for their coal-burning units and related capital with useful lives that extended beyond 2030. Mr. Boston "believe[d] that voluntary payment will go a long way to securing a positive investment climate in the province," and he "worked with the three coal plant owners to propose a framework that has considered the interests of all parties involved."[24] Mr. Boston also stated that the payments to the Canadian companies (TransAlta, Capital Power, and ATCO) would "create a positive investor outlook in Alberta for market-based generation and renewables," and "[m]aintain investors' confidence in Alberta by not unnecessarily stranding capital."[25] He said nothing about the fourth investor, the lone American investor, impacted by the change in policy.

44. In November 2016, Alberta implemented Mr. Boston's recommendations— "[i]n support of its made-in-Alberta" Climate Leadership Plan—and announced nearly CA$19 in compensation for the electric utilities to be paid over a 14-year period.[26]

45. The compensation was memorialized in three contracts, known as Off-Coal Agreements, between the Government of Alberta, on the one hand, and each of TransAlta, Capital Power, and ATCO, on the other hand. Each of ATCO, Capital Power, and TransAlta agreed *inter alia* to cease coal-fired emissions on or before December 31, 2030, years before required under the 2012 Federal Regulations.[27] In exchange, each of these entities would receive compensation from the Government of Alberta.

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22 Press Release, Capital Power, Capital Power Reports First Quarter 2016 Results, Apr. 25, 2016, **C-016**.

23 Transcript, TransAlta Corp., Second Quarter 2016 Results Conference Call & Webcast 8, Aug. 9, 2016, **C-017**; *see also* Transcript, TransAlta Corp., Third Quarter 2016 Results Conference Call & Webcast 12, 23–24, Nov. 4, 2016, **C-018**.

24 Letter from Terry Boston to the Honourable Rachel Notley, Premier of Alberta, Sept. 30, 2016, at 1, **C-014**.

25 *Id.* at 1, 2, **C-014**.

26 Press Release, Government of Alberta, REVISED: Alberta Announces Coal Transition Action, Nov. 24, 2016, **C-012**.

27 TransAlta Off-Coal Agreement, § 2, **C-019**; [redacted] Notably, none of the Off-Coal Agreements obliged electricity utilities to convert their generation units from coal to natural gas.

46. In November 2016, Alberta entered into a contract with TransAlta, a Canadian company headquartered in Alberta that owns a mine-mouth coal mine and an associated coal-fired generation unit. Under the TransAlta Off-Coal Agreement, Alberta agreed to pay TransAlta $557,923,864.40 based upon the "net book value of the Plants." TransAlta essentially was compensated in full for the effective forfeiture of its interests in coal mines. [28] As TransAlta understood it, it received the support from Alberta because it was a "strong Alberta Company" that "invest[s] in the Province."[29]

47. Alberta provided a similar deal to Capital Power, another Canadian company headquartered in Alberta. Capital Power owned coal-fired generation units and interests in mines associated with mine-mouth operations. In November 2016, Alberta agreed to pay Capital Power $733,807,598.86 based upon the "net book value of the Plants." Capital Power essentially was compensated in full for the effective forfeiture of its interests in coal mines.[30]

48. Finally, Alberta entered into an agreement with ATCO for CA $65.8 million.[31]

49. In total, Alberta agreed to pay CA$1.36 billion to TransAlta, Capital Power, and ATCO for the coal phase-outs, including their coal mines. The largest shares of the compensation went to TransAlta ($557 million) and Capital Power ($733 million), both of whom also had ownership interests in mines feeding their utilities. ATCO, the only company without

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Rather, the Off-Coal Agreements required each company to spend a portion of the consideration it would receive from Alberta "each calendar year on investment and investment related activities in Alberta with respect to its electricity business," which permitted – but did not require – investments in coal-to-gas conversion. TransAlta Off-Coal Agreement, § 5(a), **C-019** Capital Power Off-Coal Agreement, § 5(a), **C-021**; [redacted]

[28] *See* Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen in Right of Alberta (represented by Ministry of Energy) ("TransAlta Agreement"), Nov. 24, 2016, **C-019**.

[29] TransAlta Transition Update Transcript, at 4, **C-021**. ("[W]e've agreed to maintain a strong Alberta Company that supports our employees, communities, and continues to invest in the Province. This agreement will allow us to raise capital to reduce the long-term debt associated with our newer coal plants. This is significant for shareholders who will see improved cash flows that support TransAlta's ability to refinance our existing debt maturities, as we refocus the business.").

[30] *See* Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen in Right of Alberta (represented by Ministry of Energy) ("Capital Power Agreement"), Nov. 24, 2016, **C-021**. Nothing in this agreement required Capital Power to convert its electricity plants to using natural gas. In any event, the compensation far exceeded the cost to convert the electricity plants. At the time, Capital Power also considered accelerating its transition from coal-to-gas. Capital Power estimated it could convert its existing coal- fired units to gas units in approximately 9 months at a cost of $25–$50 million per conversion, demonstrating that the conversion costs represented a modest fraction of the total compensation. Presentation, Capital Power, "Driving a Sustainable Future" Investor Presentation 10, Jan. 2018, **C-023**.

[31] Press Release, ATCO, ATCO Reaches Agreement with the Government of Alberta on Coal Transition, Nov. 25, 2016, **C-024**.

a mine ownership interest, received significantly less ($66 million). That is, a significant portion of the payout appeared to be tied to the ownership of the coal mines, which makes sense since the power plants themselves can be converted to run on natural gas. Alberta engaged in no serious discussions with Westmoreland, a U.S. company and the largest owner of coalmining assets in Alberta.

50. Alberta, in a press release announcing the agreements with the Albertan companies, stated that:

> "In support of its made-in-Alberta transition to a stable, reliable and cleaner electricity system, the Government of Alberta has announced agreements with TransAlta, Capital Power and ATCO to end coal-fired emissions on or before Dec. 31, 2030.
>
> The agreements will see the companies, which own six coal-fired electricity units originally slated to operate beyond 2030, provided with transition payments for investments that have been reduced in value by the transition away from coal-fired generation – funds that can be reinvested into Alberta's electricity market.
>
> This approach is part of a larger government commitment to building a stable, reliable electricity system while ensuring that workers, communities and affected companies are supported and treated fairly during the transition from coal-fired electricity generation."

In that same press release, Alberta Energy Minister Margaret McCuaig-Boyd stated that:

> "The government is committed to working with existing Alberta businesses as we transition away from coal, and we are making good on that commitment today."[32]

51. According to Alberta, its Climate Leadership Plan had a stated goal of advancing "a made-in-Alberta" strategy, which compensated only Canadian companies, what the province called "the existing Alberta businesses," and made sure to provide significantly more compensation to those companies with ownership interests in coal mines.

52. Westmoreland, by contrast to the three Canadian companies, received no compensation for the loss of its investment in the Mines in Alberta, even though its loss was caused by the

[32] Press Release, Government of Alberta, REVISED: Alberta Announces Coal Transition Action, Nov. 24, 2016, **C-012**.

Government's Climate Leadership Plan. The Mines will have no commercial future once the coal phase-out has been completed.

53. The denial of compensation for Westmoreland is contrary to Alberta's stated commitment to compensate affected companies for disruption to capital investments, to provide and maintain investor confidence, to refrain from stranding capital, to protect employees and communities, and to ensure that affected companies are treated fairly. It treated Canadian companies differently from a similarly situated American-owned company with no credible justification.

D. Canada Accelerates the Phase-Out of Coal Even Before 2030, Exacerbating Westmoreland's Losses

54. In addition to the phase-out date for coal, in the Climate Leadership Plan, Alberta also committed to implementing a levy on carbon emissions to further reduce such emissions in the province. [33] Coupled with the Compensation Leadership Plan and the corresponding compensation payments to the power plants, this carbon pricing system, further motivated the power plants to transition away from the use of coal long decades earlier than prior promises.

55. On June 13, 2016, Alberta passed the Climate Leadership Implementation Act, which required "every consumer [to] pay to the Crown a carbon levy on fuel" at a specified rate, "at the time the consumer…purchases fuel if the fuel is located in Alberta at the time of purchase…."[34] The specific amount of the carbon levy depended on the type of fuel consumed. "High heat value coal" (including thermal coal) was subject to a carbon levy of $44.37 per ton in 2017 and $66.56 per ton in 2018 and subsequent years.[35] By contrast, natural gas carried a much lower levy. The Albertan carbon levy was set to come into effect on January 1, 2017,[36] with proceeds going to initiatives including rebates to businesses and communities.[37]

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33 *See generally* Climate Leadership, Report to Minister, Alberta, Canada Nov. 20, 2015, pp. 31–32, **C-001**.

34 Climate Leadership Implementation Act, SA 2016, https://www.canlii.org/en/ab/laws/astat/sa-2016-c-16/latest/sa-2016-c-16.html (last visited Oct. 6, 2022), Section 9(2)(a), **C-025**.

35 Climate Leadership Implementation Act, SA 2016, Schedule 1, **C-025**.

36 Climate Leadership Implementation Act, SA 2016, Section 80, **C-025**.

37 Climate Leadership Implementation Act, SA 2016, Section 3(2), **C-025**.

56. The federal government enacted its own levy on carbon emissions shortly thereafter. Specifically, on June 21, 2018, the federal government passed the Greenhouse Gas Pollution Pricing Act (GGPPA), which implemented a federal carbon pollution pricing system. [38] The GGPPA government set minimum national stringency standards for a charge on consumption of carbon-based fuels and an output-based emissions trading system for polluting industries. If a province or territory decided not to price pollution, or proposed a system that did not meet the GGPPA standards, then the federal system would be put in place.

57. At the time of GGPPA's enactment, Alberta's regulations met the minimum national stringency standards, and thus provincial, rather than federal, regulations prevailed. However, Alberta repealed its carbon charge in June 2019 with the defeat of Premier Notley's New Democratic Party. Accordingly, the minimum federal charges went into effect in Alberta on January 1, 2020, the next commencement day under the GGPPA.[39] The 2012 Federal Regulations imposed significantly higher charges on coal than other forms of fuel, such as natural gas.[40]

58. The provincial and federal carbon charges also diminished the competitive advantages of thermal coal over other sources of fuel for electricity generation well before 2030 in Alberta. Combined with the payments promised by Alberta to the three Canadian coal-burning power utilities, carbon charges practically eliminated the market for coal-fired electricity generation and, with it, thermal coal for domestic electricity production.

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38 Carbon pollution pricing – what you need to know, Government of Canada https://www.canada.ca/en/revenue-agency/campaigns/pollution-pricing.html (last accessed Oct. 6, 2022), **C-026**.

39 The federal regulations were subject to challenges in the Canadian courts, including by Alberta. However, in March 2021, the Supreme Court of Canada held that the federal carbon charges were constitutional and furthermore that they were not a tax, but valid "regulatory charges whose purpose is to advance the GGPPA's regulatory purpose [i.e., the reduction in carbon emissions] by altering behaviour." *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [Reference re GGPPA (SCC)], Mar. 25, 2021, **C-027**.

40 Greenhouse Gas Pollution Pricing Act (S.C. 2018, c. 12, Schedule 2), **C-028**. In November 2018, the federal government also decided to phase-out coal-fired electricity generation. The federal government cut short the useful lives of coal-fired generation units to 2029 and incentivized the conversion of such units to natural gas. Specifically, Federal Regulations extended the useful lives of facilities that could run on natural gas for 5–10 years, provided these units met performance test emission standards. *See* Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (SOR/2012-167), as amended on Nov. 30, 2018, **C-003**; *see also References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [Reference re GGPPA (SCC)], Mar. 25, 2021, https://www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/technical-backgrounder-regulations-2018.html (last accessed Oct. 6, 2022), **C-027**.

Accordingly, each of ATCO, Capital Power, and TransAlta requested early termination of Prairie's coal supply agreements.

59. Against this regulatory backdrop, in which Westmoreland had little negotiating power, Westmoreland agreed to early termination of its coal supply agreements for the Genesee, Paintearth, and Sheerness mines in order to mitigate its damages. Specifically:

- In 2017, Westmoreland entered into a buy-out agreement with Capital Power, in which Westmoreland agreed to assign its interests in the Genesee Mine coal mine (as well as related assets) for approximately CA$68 million. Early termination cut short Westmoreland's expected returns from these agreements by approximately [13 years].
- In 2020, Westmoreland entered into a buy-out agreement with Alberta Power (2000), Ltd., ATCO's successor, in which Westmoreland agreed to terminate its interests in the Paintearth coal supply agreements for CA$42 million.
- In 2021, Westmoreland entered into a buy-out agreement with Alberta Power (2000) and TransAlta in which Westmoreland agreed to terminate its interests in the Sheerness coal supply agreements for CA$62 million. Early termination cut short Westmoreland's expected returns from these agreements. Here, too, Westmoreland reasonably expected – as the sole supplier of coal to the adjacent coal-fired generation units and consistent with industry practice – that its coal supply agreements would be renewed and that it would reap future returns for the useful lives of the coal-fired generation units.

60. The buy-out agreements cemented Westmoreland's exit from the coal-fired electricity sector in Alberta, at a significant loss to Westmoreland.

E. Alberta Expects to Eliminate Coal-Fired Emissions from Electricity Generation by 2023

61. The significant payments by Alberta to coal-generation units under the Off-Coal Agreements, combined with federal and provincial carbon charges, destroyed the economic viability of coal and ensured the transition to natural gas. As S&P Global Markets observed:

> "Under the Alberta government's Climate Leadership Plan, coal plants that provide the bulk of the province's power must be shuttered by 2030. The province also hiked its emissions levy, prompting operators to look at alternative ways to make their plants profitable. Switching burners at the

> plants to cheap, abundant natural gas and shutting the adjacent mines provides an inexpensive way to extend the life of the facilities."[41]

62. Thus, Canada's measures, including through the actions of the Government of Alberta, eviscerated the value of Westmoreland's investment and deprived it of compensation.

V. WESTMORELAND FILES FOR ARBITRATION AND FOR BANKRUPTCY

63. On August 20, 2018, Westmoreland filed a Notice of Intent to Submit a Claim to Arbitration against Canada under NAFTA Chapter Eleven ("First Notice of Intent").[42] Westmoreland met with officials from the Government of Canada, but the parties were unable to amicably resolve their dispute. Accordingly, on November 19, 2018, Westmoreland filed a Notice of Arbitration and Statement of Claim against Canada under NAFTA Chapter Eleven to initiate the first arbitration ("First Arbitration").[43]

64. Canada's measures pushed Westmoreland to the brink of insolvency, forcing Westmoreland and some of its affiliates to file for bankruptcy in U.S. bankruptcy court in the Southern District of Texas, Houston Division ("Texas Bankruptcy Court").[44]

65. On December 14, 2018, Westmoreland, among other debtors, filed a plan of reorganization, which was amended on February 28, 2019 ("the Plan") and subsequently confirmed by the Court on March 2, 2019.[45] The Plan provided, among other things, for the sale of substantially all of Westmoreland's assets, as well as other affiliated debtors,[46] to a

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41 S&P Global Markets, ATCO Plans to Convert Alberta Coal Plants to Gas by 2020, available at https://www.spglobal.com/marketintelligence/en/news-insights/trending/b6xr0rf4ca4mwyaeeauulg2, **C-029** (emphasis added).

42 Notice of Intent to Submit a Claim to Arbitration, Aug. 20, 2018, **C-030**.

43 *Westmoreland Mining Holdings LLC v. Canada*, ICSID Case No. UNCT/20/3, Jan. 31, 2022 ("Award"), ¶ 85, **CL-01**.

44 *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 54, Oct. 9, 2018, **C-031**.

45 *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 1561, **C-032**.

46 Collectively Westmoreland Coal Company, Absaloka Coal, LLC, Basin Resources, Inc., Buckingham Coal Company, LLC, Dakota Westmoreland Corporation, Haystack Coal Company, San Juan Coal Company, San Juan Transportation Company, Texas Westmoreland Coal Company, WCC Land Holding Company, Inc., WEIRoanoke Valley, Inc., Western Energy Company, Westmoreland Coal Company Asset Corp., Westmoreland Coal Sales Company, Inc., Westmoreland Energy Services New York, Inc., Westmoreland Energy Services, Inc., Westmoreland Energy, LLC, Westmoreland Mining LLC, Westmoreland North Carolina Power LLC, Westmoreland Partners, Westmoreland Power, Inc., Westmoreland Resources Inc., Westmoreland San Juan Holdings, Inc., Westmoreland San Juan, LLC, Westmoreland Savage Corporation, Westmoreland Texas Jewett Coal Company, Westmoreland-Roanoke Valley, LP, and WRI Partners, Inc. *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Amended Ch. 11 Plan, Docket No. 1532, ¶ 241, **C-033**.

purchaser pursuant to the Bankruptcy Code, the Plan, and the order confirming the Plan.[47] The Plan included a Stalking Horse Purchase Agreement, pursuant to which certain creditors of Westmoreland and its direct subsidiaries would purchase the debtors' assets if no buyer emerged in exchange for a credit bid of $390,125,429.40, as well as assumption of all assumed liabilities as defined in the Agreement.[48]

66. Because no other buyer emerged in the sale process, on March 15, 2019, Westmoreland entered into an execution version of the Stalking Horse Purchase Agreement with Westmoreland Mining LLC as Purchaser.[49] Westmoreland Mining LLC acquired Westmoreland's US assets and equity interests (as well as those of its direct and indirect subsidiaries'), including certain Transferred Causes of Action, as defined in the Stalking Horse Purchase Agreement.[50] Notably, the Stalking Horse Purchase Agreement specifically identified Westmoreland Coal Company's NAFTA claim, as discussed above, as a Transferred Cause of Action.[51]

67. In order to effectuate the Stalking Horse Purchase Agreement, on May 13, 2019, Westmoreland Mining Holdings LLC and two Canadian enterprises, Westmoreland Canada Holdings Inc. ("**WCHI**") and Prairie requested Canada's agreement that Westmoreland's Notice of Arbitration be amended to substitute WMH as Claimant.[52] Canada refused. Instead, Canada offered to accept Westmoreland's Notice of Arbitration as WMH's Notice of Intent, conditioned upon the withdrawal of Westmoreland's claim.[53] Accordingly, on July 23, 2019, Westmoreland duly withdrew its NAFTA claim without

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47 *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Plan, Article IV.C.1(a), **C-033**.

48 *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 789 (the "Disclosure Statement"), Section I.C, **C-034**; *id.*, Exhibit B, **C-034**; Plan, Article IV.C.1(a), Docket No. 1532, **C-033**.

49 Stalking Horse Purchase Agreement, **C-035**.

50 Stalking Horse Purchase Agreement, §§ 2.01–2.02, **C-035**.

51 The Purchase Agreement defined the "NAFTA Claim" as "that certain claim filed with the Office of the Deputy Attorney General of Canada on November 19, 2018 by WCC on its own behalf and on behalf of its Canadian Subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to chapter 11 of the North American Free Trade Agreement (as such claim may be amended)." *In re: Westmoreland Coal Company, et al.*, Case No. 18-35672, Docket No. 789, Exhibit B, § 1.01, **C-034**. *See also* Stalking Horse Purchase Agreement § 2.01(l), **C-035**.

52 Award, ¶ 91.

53 Award, ¶ 186.

prejudice.[54] On August 12, 2019, WMH filed a Notice of Arbitration and Statement of Claim against Canada.[55]

68. Immediately thereafter, Canada argued for the first time that the tribunal had no jurisdiction over WMH. In particular, Canada argued that NAFTA Articles 1101, 1116, and 1117 require a claimant to own or control the investment at the time of the alleged treaty breach. Because WMH was formed in January 2019 and therefore became an investor after the alleged treaty breaches, Canada argued that WMH lacked jurisdiction *ratione temporis*.[56] In response, WMH contended that the relevant jurisdictional requirements are "diversity of nationality" and where there is a "corporate change . . . for a legitimate business purpose, there is continuity of interest and the right to assert the claim is connected to the claimant's bona fide investment."[57]

69. The tribunal agreed with Canada. Specifically, the tribunal found that to meet NAFTA's *ratione temporis* requirement, an investor/claimant "firstly . . . must be claiming 'on its own behalf' such that it held the investment at the time of the alleged breach and is not bringing the claim on another's behalf; and secondly, that same investor . . . must itself have suffered loss or damage arising out of that breach."[58] In other words, the tribunal rejected the notion that "a NAFTA claim can be transferred together with the underlying investment when the investment is transferred," finding instead that "it remains with the party which owned or controlled it at the time of the alleged treaty breach."[59]

70. The tribunal noted that its interpretation was consistent with the object and purpose of NAFTA, which is to "increase substantially investment opportunities in the territories of the Parties."[60] The tribunal reasoned that "a necessary element of the NAFTA [is] that the duty on a NAFTA Party to accept certain obligations of investment protection is predicated upon an investor taking the risk of making an investment or, to put it the other way, an

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[54] Award, ¶ 92.

[55] Award, ¶ 92. The delay was required under NAFTA Article 1119, which stipulates that 90 days must elapse between the Notice of Intent and the submission of a claim.

[56] *See* Award, ¶¶ 106–144.

[57] Award, ¶ 147.

[58] Award, ¶¶ 197, 199–200.

[59] Award, ¶ 209. *See also id*., ("The short answer to Westmoreland's argument is that given the Tribunal's construction of Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction ratione temporis to bring a claim.").

[60] Award, ¶ 201.

investor must have taken a risk by making an investment in order to be assured of treaty protection."[61] By contrast, a subsequent purchaser or assignee of a claim after the alleged treaty breaches do not take any such risk.[62]

71. Although the tribunal recognized that "corporate restructuring or internal reorganization is not in and of itself fatal to establishing jurisdiction," the tribunal found that the relevant test in those circumstances was whether the new entity was the legal successor of the entity that suffered the alleged harm. [63] The tribunal found that WMH was not Westmoreland's legal successor. Among other things, the tribunal noted that WMH negotiated the transfer of Westmoreland's assets, including the NAFTA claim, in a transaction that the Texas Bankruptcy Court certified as arms-length. Moreover, in that transaction, WMH did not acquire all of Westmoreland's assets and did not take on successor liability.[64]

72. Based on the above reasoning, the tribunal held that WMH lacked standing and dismissed its claim in its entirety. Notably, at the hearing on jurisdiction, the tribunal asked whether Canada believed that Westmoreland had "any residual rights to bring a treaty claim." Significantly, Canada conceded that Westmoreland could still bring the NAFTA claim today.[65]

73. In order to obtain relief once and for all from Canada for the measures at issue, Westmoreland has commenced the present arbitration, curing the jurisdictional defect in the First Arbitration.[66]

74. In support of this Notice of Arbitration, the United States Bankruptcy Court for the Southern District of Texas has recognized Westmoreland's right to pursue the present NAFTA claim under international law and certified that Westmoreland, not WMH, has at

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[61] Award, ¶ 201.

[62] Award, ¶ 201.

[63] Award, ¶¶ 216–217.

[64] *See* Award, ¶¶ 222–230.

[65] At the Hearing on Jurisdiction, due to "Canada's position that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law," the tribunal asked Canada whether WCC has "any residual rights to bring a treaty claim." Canada replied a claim would "not [be] preclude[d] . . . on their own behalf." Hr'g. Tr. (Day 2) 279:12-19, **C-036**; *see also id*. at 280:2-5 ("WCC could still be in a position to bring a claim on its own behalf.").

[66] Westmoreland filed a Notice of Arbitration on August 12, 2019, as a courtesy to Canada, **C-037**. However, it made clear that no new notice of intent was necessary given the substantial overlap between the present claim and the claim described in Westmoreland's August 2018 Notice of Intent ("First Notice of Intent"), a claim that Westmoreland withdrew at Canada's request in exchange for Canada's agreement that WMH be substituted as a claimant in the previous arbitration.

all times owned the NAFTA claim under U.S. Bankruptcy Law. In particular, on June 27, 2022, the Bankruptcy Court certified that the NAFTA claim did not transfer to any party pursuant to the Plan, the Stalking Horse Purchase Agreement or any other agreement or document executed in connection with Westmoreland's reorganization under the U.S. Bankruptcy Code.[67] The Bankruptcy Court further certified that pursuant to the Plan, on the Plan Effective Date, Westmoreland's rights to the NAFTA claim remained with Westmoreland as reorganized, and Westmoreland retained title to the NAFTA claim to the same extent it did prior to the Plan Effective Date.[68]

VI. CANADA'S VIOLATIONS OF NAFTA CHAPTER ELEVEN

75. Canada, through the actions of its constituent political subdivision, Alberta, for which it is responsible under NAFTA, has breached its obligations to Westmoreland under Section A of Chapter Eleven of NAFTA, including, but not limited to, Article 1102 (National Treatment), Article 1105 (Minimum Standard of Treatment), and Article 1110 (Expropriation), as described below.

A. Canada's Breach Of Article 1102 – National Treatment

76. NAFTA Article 1102 requires a NAFTA Party to provide national treatment to investors of another Party:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or

[67] *In re: Westmoreland Coal Company et al.,* Case No. 18-35672 (DRJ), Dkt. No. 3315, Jun. 23, 2022, **C-038**.

[68] *In re: Westmoreland Coal Company et al.,* Case No. 18-35672 (DRJ), Dkt. No. 3315, Jun. 23, 2022, **C-038**.

> province to investors, and to investments of investors, of the Party of which it forms a part.

77. Westmoreland, a U.S. company, and TransAlta, Capital Power, and ATCO, Canadian companies, were at all relevant times investors in coal to generate electricity.

78. Canada did not treat Westmoreland equally with the Albertan companies. Alberta implemented a regulatory scheme to phase out the use of coal in the province by 2030. Alberta compensated the Canadian companies with nearly $1.4 billion in payments. Westmoreland, a U.S. investor, did not receive any compensation.

79. The payments made by Alberta were designed to be a "made in Alberta" solution to benefit Canadian companies headquartered in Alberta. The payments helped maintain investor confidence in Canadian companies and ensured that the capital of Canadian companies would not be stranded. Westmoreland, an American investor, did not receive the same "made in Alberta" treatment, notwithstanding the obligations it met under the Investment Canada Act.

80. Westmoreland has been damaged by Alberta's inequitable measures. As a result of Alberta's coal phase-out, Westmoreland lost substantial revenue, and incurred increased costs in relation to reclamation of the mines.

B. Canada's Breach Of Article 1105 – Minimum Standard Of Treatment

81. NAFTA Article 1105 requires that a NAFTA Party provide investors of another Party the minimum standard of treatment under customary international law.

> *Article 1105: Minimum Standard of Treatment*
>
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

82. The minimum standard of treatment under NAFTA Article 1105 protects investors of a Party from government treatment constituting conduct that infringes a sense of fairness, equity and reasonableness, including conduct that is egregious, arbitrary, unfair, unjust or idiosyncratic, discriminatory, or exposes a claimant to sectional prejudice. The minimum standard of treatment also protects investors of a Party from being deprived of their legitimate investment-backed expectations through the unexpected detrimental conduct of the host government.

83. Alberta recognized that its decision to accelerate dramatically the phase-out of coal-generated electricity would cause significant “economic disruption” to the capital investments of companies in that sector and threatened to harm investor confidence in Alberta. [69] Alberta, therefore, decided to compensate businesses in the coal-generated electricity sector, including utilities with ownership interests in coal mines, but it arbitrarily and uniquely excluded Westmoreland from receiving any compensation.

84. Westmoreland is in the same position as the utilities, if not a worse position, due to the economic disruption of Alberta’s coal phase-out. While the utilities can convert their plants to continue providing electricity using a different supply source (natural gas), Westmoreland has no alternative use for the coal produced from the three mines at issue. Alberta recognized the greater impact of its measures on coal mines by providing far greater compensation to power plant owners who owned coal mines. Despite this, Alberta did not provide Westmoreland any compensation in relation to the coal phase-out.

85. Alberta’s decision to pay out nearly $1.4 billion in compensation to those three companies (and predominantly to TransAlta and Capital Power) and not a dollar to Westmoreland is arbitrary and grossly unfair, and a violation of the minimum standard of treatment under customary international law in breach of Article 1105.

86. The coal phase-out program also is contrary to Westmoreland’s reasonable expectations regarding its investments in Canada, in breach of Article 1105. In 2014, Canada required Westmoreland to undertake certain investments and terms in Alberta as conditions of its foreign investment to acquire the Mines, including capital investments of more than $20 million in excess of the capital investments planned by its predecessor, along with other undertakings. Westmoreland complied with these obligations with the reasonable expectation, in accordance with Canadian federal regulations, that Westmoreland’s investments in the Mines would provide a reasonable return on investment beyond 2030.

87. The coal phase-out program, adopted in 2015 (just one year later), suddenly 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.

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[69] Government of Alberta, *Phasing Out Coal Pollution*, ALBERTA, Nov. 12, 2018, **C-011**.

88. Canada's conduct violates Westmoreland's reasonable and legitimate expectations regarding its investments, and, therefore, is a violation of the minimum standard of treatment under customary international law and Article 1105.

C. <u>Canada's Breach of Article 1110 – Expropriation</u>

89. NAFTA Article 1110 prohibits a NAFTA Party from directly or indirectly expropriating the investment of an investor of another Party, unless that Party's actions meet the four requirements to constitute an exception.

> <u>*Article 1110: Expropriation and Compensation*</u>
>
> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

90. Article 1110 protects an investor from government actions which substantially deprive them of the economic value of their investments, even where the investor retains physical control of the investment.

91. Second, by introducing a regulatory scheme to phase out coal by 2030, along with its punishing levies on coal, Alberta substantially deprived Westmoreland of the value of its investments. Due to the chemistry of the coal at the Mines and the lack of any viable transportation facilities, it cannot be sold anywhere else. Without the possibility of selling the coal the Mines produced to the neighboring power plants, the Mines lost all or substantially all of their economic value as a result of Alberta's regulations.

92. First, Alberta, through its payments to coal-fired electricity units, combined with federal and provincial carbon taxes that hiked the price of coal, rendered coal-fired electricity generation wholly uneconomic and unable to compete with other sources of fuel for electricity generation. These actions deprived Westmoreland of the value of its investments in the Mines between 2017 and 2030. In order to mitigate its losses, Westmoreland entered into buy-out agreements with coal-generation units between 2017–2020.

93. None of these actions falls under the Article 1110 exception. Even assuming Alberta's and Canada's actions were undertaken for a public purpose, the Government of Alberta and

Canada failed to compensate Westmoreland for the loss of its investments. Despite paying nearly $1.4 billion in compensation to the utility companies (TransAlta, Capital Power, and ATCO), the Government of Alberta provided no compensation to Westmoreland. The Government of Alberta's conduct thus violates Article 1110.

VII. DAMAGES

94. Westmoreland's mine-mouth operations depended on the adjacent power plants. Alberta's decision to phase out coal by 2030, and its subsequent decision to implement a carbon charge (later supplemented by the federal government's minimum carbon charges), led Canadian coal-fired generation utilities to accelerate the closure of coal-fired generation units and/or convert them to natural gas sooner than 2030—long before the timeline envisioned under the 2012 Federal Regulation in force when Westmoreland made its investment. Canada's actions at the provincial and federal levels eliminated the market for thermal coal, and essentially left Westmoreland with worthless interests in the Genesee, Sheerness, and Paintearth mines, while saddling Westmoreland with significant reclamation costs.[70]

95. Westmoreland must be compensated for the damage it suffered as a result of Canada's failure to comply with its NAFTA Chapter Eleven obligations. Westmoreland reserves its right to quantify its losses at a later stage of the arbitral proceedings.

VIII. WESTMORELAND SATISFIES THE REQUIREMENTS OF NAFTA CHAPTER ELEVEN SECTION B

A. Consent and Waiver

96. Canada has consented to arbitration pursuant to Articles 1116, 1117 and 1122 of NAFTA, as well as Annex 14-C of the Canada-United States-Mexico Agreement ("**CUSMA**").

97. Westmoreland consents to arbitration in accordance with the NAFTA. Westmoreland has already taken all necessary internal actions to authorize the commencement of this arbitration.[71]

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70 As discussed above, Westmoreland had no choice but to agree to terminate its coal-supply agreements well ahead of schedule in order to mitigate its damages.

71 Executed Authorization Letter – Jeffrey S. Stein, **C-042**.

98. Westmoreland also has submitted waivers consistent with the requirements of NAFTA Articles 1121(1)(b) and 1121(2)(b) as Exhibits C-040 and C-041, respectively.[72] Specifically, Westmoreland Coal Company and Prairie have waived their rights to initiate or continue before any administrative tribunal or court under the laws of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of the Government of Canada (and its Province, Alberta), that are alleged to be a breach referred to in Articles 1116 and 1117, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada. Westmoreland also has executed a power of attorney authorizing King & Spalding LLP to act on its behalf in this arbitration.[73]

B. Westmoreland is Qualified to Submit its Claims to Arbitration Pursuant to NAFTA Articles 1116 and 1117

99. Westmoreland is qualified to submit this dispute to arbitration pursuant to Articles 1116 and 1117 of the NAFTA, as *first*, Westmoreland already initiated this dispute against Canada when it filed its Notice of Arbitration dated November 19, 2018 in ICSID Case No. UNCT/20/3 (the "First Notice of Arbitration"). The commencement of this arbitration thus should be deemed to relate back to the commencement of the arbitration, through the submission of the First Notice of Arbitration. Alternatively, Westmoreland is entitled to bring this arbitration given that it has a "legacy investment" as defined under Annex 14-C of the CUSMA.

1. Westmoreland Qualifies as an "Investor"

100. *First*, Westmoreland properly initiated this dispute against Canada when it filed its First Notice of Arbitration, in which Westmoreland established that it was qualified to submit this dispute to arbitration pursuant to Articles 1116 and 1117. [74] Under Article 1116 of the

[72] For the avoidance of doubt, the present arbitration is within the terms of the waivers previously executed by Westmoreland and Prairie. Westmoreland has asserted the same claims against the Government of Canada as in the First Arbitration, but simply cured the jurisdictional defect identified in the First Award. Westmoreland has made no changes to either the claims asserted with respect to the measures that are alleged to be breaches of NAFTA Articles 1116 and 1117 or the dispute settlement procedures identified by Westmoreland in the First Notice of Arbitration (*i.e.*, the UNCITRAL Rules). Accordingly, the present arbitration is within the terms of the waivers previously executed by Westmoreland and Prairie.

[73] Executed Power of Attorney – Jeffrey S. Stein, **C-039**.

[74] Notice of Arbitration dated November 19, 2018, ¶¶ 15–21, **C-043**.

NAFTA, an Investor of a Party may make a claim on its own behalf for loss or damage arising out of a breach of Section A of Chapter 11 by another Party. Under Article 1117, that Investor may make such a claim on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.

101. In the First Notice of Arbitration, Westmoreland also established that it is an investor pursuant to Article 1139 of the NAFTA. Article 1139 defines an "investor" of a Party to include an enterprise of a NAFTA Party that seeks to make, is making or has made an investment. Article 201 further defines enterprise as any "entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association," and an enterprise of a Party as "an enterprise constituted or organized under the law of a Party."

102. As Westmoreland explained in its First Notice of Arbitration, it is a U.S. corporation constituted under the laws of the State of Delaware in the United States and is therefore an enterprise of the United States within the meaning of Article 201 of the NAFTA. [75] Moreover, Westmoreland established that it has made investments in Canada.[76] Westmoreland therefore established that it is an "investor" of the United States within the meaning of Articles 1116(1) and 1139 of the NAFTA. [77] Since Westmoreland already initiated a dispute in respect of these measures, the submission of the instant Notice of Arbitration should be deemed, under the applicable law, to relate back to the submission of the First Notice of Arbitration, especially the claimant in this arbitration is identical to the claimant in the First Arbitration, and because the dispute concerns the same transactions as the original claims in the First Arbitration.

103. *Second*, Westmoreland is entitled to initiate arbitration pursuant to the NAFTA by virtue of Annex 14-C of CUSMA, which provides that arbitration pursuant to Chapter 11 of the NAFTA remains available to investors where they have "legacy investments," provided they commence the arbitration proceeding within three years of the NAFTA termination (*i.e.*, by July 1, 2023). Canada specifically consented to arbitrate claims related to such

[75] Notice of Arbitration dated November 19, 2018, ¶¶ 1, 15, **C-43**.

[76] Notice of Arbitration dated November 19, 2018, ¶¶ 16, 83, **C-043**.

[77] Notice of Arbitration dated November 19, 2018, ¶ 83, **C-043**.

"legacy" investments under the NAFTA as long as the arbitration is filed by July 1, 2023. Annex 14-C.6 provides:

> 1. Each Party consents, with respect to a **legacy investment**, to the submission of a claim to arbitration **in accordance with Section B of Chapter 11 (Investment of NAFTA 1994)** and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; [. . .]

104. Article 14-C.6(6) of the CUSMA defines the "legacy investments" that are entitled to pursue investment claims under the NAFTA until July 1, 2023 as follows:

> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.
>
> [. . .]
>
> 6. For the purposes of this Annex:
>
> > (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement . . . .
> >
> > (b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994.[78]

105. That is, an investment qualifies as a "legacy investment" if it was (a) an investment of (b) an investor (both as defined under NAFTA) that was established or acquired between January 1, 1994 and July 1, 2023, and the investment remained in existence on July 1, 2023. Westmoreland meets both of those conditions.

106. Under NAFTA, "investor" is defined broadly to include a "national" or an "enterprise" of a NAFTA party. As explained above, Westmoreland is an investor for purposes of NAFTA.

2. This Arbitration Involves a Protected "Investment"

107. Under NAFTA, "investment" also is defined broadly to include:

(a) an enterprise;

(b) an equity security of an enterprise;

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78 CUSMA, Annex 14-C(6)(a)-(b) (emphasis added), **C-044**.

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise . . .

108. Westmoreland (a qualified investor) held rights that qualify as "investments" under the NAFTA, including because, *inter alia*, it held Prairie, which is an enterprise (item a), it held an interest in Prairie, which is an enterprise (item e), it held the Prairie Mines, which qualify as real estate or other property (item g), and it held interests arising from the commitment of capital or other resources (item h).

109. In addition, Westmoreland is an investor in that it held "claims to money," which also qualify as investments under the NAFTA. Specifically, NAFTA Chapter 11 carves out claims to money only where such claims to money arise solely from specific contexts. In relevant part, NAFTA provides that, "investment does not mean":

(i) claims to money that arise solely from the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

110. That is, NAFTA covers "claims to money" when such claims arise out of an investment as defined under the NAFTA, with limited exceptions. Where a claim to money arises from an the above-described categories, including "enterprise" (item a), interest in an enterprise (item e), or interests arising from the commitment of capital (item h), it is considered an "investment" under NAFTA Chapter 11. Therefore, Westmoreland also had claims to money against Canada as a result of the Measures, which related to losses to its enterprise as well as losses related to its commitment of capital and other resources in Canada to economic activity it carried out in Canada.

111. In sum, Westmoreland has "legacy investments" within the meaning of Annex 14-C.6, which allows Westmoreland to initiate arbitration against Canada pursuant to Articles 1116 and 1117 of the NAFTA.

3. Westmoreland's Claims are Timely.

112. This submission also complies with the time requirements under Articles 1116(2) and 1117(2). In order for a claimant to submit a claim to arbitration under Articles 1116 and 1117 of the NAFTA, no "more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." As explained below, Westmoreland complies with the time requirements established in Articles 1116 and 1117 because, under the applicable law, this submission should be deemed to relate back to the submission of the First Notice of Arbitration. In any event, Westmoreland's claims are timely by virtue of the equitable tolling doctrine recognized under international law.

113. *First*, Westmoreland complies with the prescription period under Articles 1116 and 1117, as less than three years elapsed between, on the one hand, the date on which Westmoreland and Prairie first acquired knowledge of Canada's breaches and of their resulting damages and, on the other hand, the date on which Westmoreland made its claim against Canada in the First Arbitration. Specifically, Canada breached its obligations under NAFTA Articles 1102 and 1105 on November 24, 2016, when the Government of Alberta, as part of its coal phase-out plan, announced nearly $1.4 billion in compensation for Canadian electric utilities and signed agreements with them to that effect, arbitrarily excluding

Westmoreland from this scheme.[79] Less than two years later, on November 19, 2018, Westmoreland filed a Notice of Arbitration against Canada. [80] As explained above, the submission of the instant Notice of Arbitration should be deemed to "relate back" to the original filing date of the First Notice of Arbitration on November 19, 2018.

114. *Second*, and in any event, Westmoreland's claims are timely asserted within the three-year prescription period because that period tolled during the pendency of the First Arbitration. The tolling of a prescription period during an arbitration proceeding is a general principle of law recognized under Article 38(1) of the ICJ Statute. [81] Pursuant to this principle, the relevant prescription period is suspended from the time the arbitration is begun (*i.e.*, when the claimant submits its notice of arbitration) until the arbitration ends (*i.e.*, when the tribunal issues its final award).

115. In accordance with the tolling principle described above, the three-year prescription period under NAFTA Articles 1116(2) and 1117(2) was suspended during the pendency of ICSID Case No. UNCT/20/3, because that case related to Westmoreland's attempts to obtain compensation for Canada's breaches of its NAFTA obligations in connection with Alberta's implementation of its coal phase-out plan. Moreover, this is the only equitable result, since Canada refused to allow Westmoreland to continue to pursue its claim, but then immediately argued that WMH was the wrong claimant, while accepting that Westmoreland would be entitled to bring the claim in its own name. The suspension of the prescription period began on November 19, 2018, when Westmoreland filed a Notice of Arbitration and Statement of Claim against Canada in the First Arbitration, and ended on January 31, 2022, when the tribunal in the First Arbitration issued its Final Award declining jurisdiction over the case.[82]

116. Taking into account the 38-month suspension of the prescription period discussed above, only two years and eight months have elapsed since November 24, 2016, when Westmoreland and Prairie first acquired knowledge of Canada's breaches and of their

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79 *See supra* ¶¶ 44–53.

80 *See supra* ¶ 63.

81 *See Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, Jun. 30, 2020, ¶ 212, **CL-002**.

82 *See* Award.

resulting damages. Thus, Westmoreland's claim against Canada on its behalf and on Prairie's behalf satisfies the time requirement of Articles 1116(2) and 1117(2).

4. Notice Requirements

117. This submission also complies with the notice requirement set out in NAFTA Article 1119. Under Article 1119, "[t]he disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted."

118. Westmoreland first notified Canada of its intention to submit a claim to arbitration in August 2018 ("First Notice of Intent"), more than 90 days ago.[83] Since the present dispute is the same dispute at issue in the First Notice of Intent, but simply cures the jurisdictional defect identified in the First Award, no new Notice of Intent is needed.

119. Nevertheless, as a courtesy to Canada, Westmoreland served a second Notice of Intent on Canada on June 29, 2022, attached hereto as Exhibit C-45 ("Second Notice of Intent"). Consistent with the requirements of NAFTA Article 1119, Westmoreland's Second Notice of Intent included in a description of (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; (c) the issues and the factual basis for the claim; and (d) the relief sought and the approximate amount of damages claimed.

C. <u>Constitution of the Arbitral Tribunal</u>

120. Under Article 1123 of the NAFTA:

> [U]nless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

121. As Westmoreland and Canada have not otherwise agreed to the number and appointment of arbitrators, the default provision of Article 1123 remains applicable.

122. Westmoreland hereby appoints the following arbitrator to serve as a member of the Tribunal:

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[83] For the avoidance of doubt, Canada has consented to arbitration pursuant to NAFTA Article 1122.

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IX. RELIEF SOUGHT AND APPROXIMATE DAMAGES CLAIMED

123. As a result of the actions and breaches of the Government of Canada described above, Westmoreland claims relief for the following:

(i) Compensation for the damages caused to Westmoreland and Prairie by Canada's actions that are in breach of its obligations under Section A of NAFTA Chapter Eleven, in an amount to be quantified at a later stage of the arbitral proceedings, to be determined by the Tribunal;

(j) the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the Tribunal and any administering institution;

(k) pre- and post-award interest at a rate to be fixed by the Tribunal;

(l) such further relief as counsel may advise and the Tribunal may deem just and appropriate.

Dated October 11, 2022

Respectfully submitted,

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