

PUBLIC DOCUMENT

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

between

WESTMORELAND MINING HOLDINGS LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/20/3)

PROCEDURAL ORDER NO. 3

DECISION ON BIFURCATION

ARBITRAL TRIBUNAL

Ms. Juliet Blanch (Presiding Arbitrator)

Mr. James Hosking

Professor Zachary Douglas QC

Secretary of the Tribunal

Dr. Veronica Lavista

20 October 2020

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I. PROCEDURAL HISTORY

1. On 24 July 2020, the Respondent filed Canada's Request for Bifurcation together with Exhibits R-001, R-002 and R-029 and Legal Authorities RLA-002 to RLA-035 ("Bifurcation Application").
2. On 14 August 2020, the Claimant submitted Claimant's Response to Canada's Request for Bifurcation together with Exhibits C-019, C-023, C-026 and C-027, Legal Authorities CLA-001 to CLA-007, and certain Legal Authorities submitted by the Respondent ("Claimant's Opposition").
3. On 28 August 2020, the Respondent filed Canada's Reply to the Claimant's Response regarding Bifurcation together with Exhibit R-041 and Legal Authorities RLA-036 to RLA-041 ("Respondent's Bifurcation Reply").
4. On 11 September 2020, the Claimant filed Claimant's Rejoinder to Canada's Reply in Support of its Request for Bifurcation together with Exhibits C-009, C-019, C-023, C-028 to C-031, Legal Authorities CLA-002, CLA-004, CLA-008 to CLA-012, and certain Exhibits and Legal Authorities submitted by the Respondent ("Claimant's Opposition Rejoinder").
5. On 16 July 2020, the Disputing Parties further agreed that a Hearing on Bifurcation (the "Hearing") would be held on 24 September 2020 via the video streaming platform WebEx.
6. The following individuals attended the Hearing on behalf of the Disputing Parties:

For Claimant:

Counsel

Mr. Elliot Feldman	Baker & Hostetler, LLP
Mr. Michael Snarr	Baker & Hostetler, LLP
Mr. Paul Levine	Baker & Hostetler, LLP
Ms. Analia Gonzalez	Baker & Hostetler, LLP
Mr. Alexander Obrecht	Baker & Hostetler, LLP

Party

Mr. Jeremy Cottrell	Westmoreland Mining Holdings LLC
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For Respondent:

Counsel

Mr. Adam Douglas	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Krista Zeman	Trade Law Bureau, Global Affairs Canada,

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Ms. Megan Van den Hof	Government of Canada Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Alexandra Dosman	Trade Law Bureau, Global Affairs Canada, Government of Canada
Mr. Mark Klaver	Trade Law Bureau, Global Affairs Canada, Government of Canada
Mr. Benjamin Tait	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Nadine Robinson	Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Jennifer Sadaka-Alberti	Trade Law Bureau, Global Affairs Canada, Government of Canada

Parties

Mr. Kyle Dickson-Smith	Ministry of Justice and Solicitor General, Government of Alberta
Ms. Landy Zhao	Ministry of Justice and Solicitor General, Government of Alberta
Mr. Peter Ciechanowski	Ministry of Justice and Solicitor General, Government of Alberta
Ms. Sheri Anderson	Trade Policy International Unit, Ministry of Jobs, Economy and Innovation, Government of Alberta
Ms. Marieke Dube	Climate Partnerships and Initiatives, Regulatory and Compliance Branch, Ministry of Environment and Parks, Government of Alberta
Ms. Julie Boisvert	Investment Trade Policy Division, Global Affairs Canada, Government of Canada
Mr. Don McDougall	Investment Trade Policy Division, Global Affairs Canada, Government of Canada
Ms. Elena Lapina	Investment Trade Policy Division, Global Affairs Canada, Government of Canada

7. In addition, the following attended on behalf of the Non-Disputing Parties:

The United Mexican States

Mr. Antonio Nava	Director de Consultoría Jurídica de Comercio Internacional
Ms. Cindy Rayo	Directora General de Comercio Internacional de Servicios e Inversión

The United States of America

Ms. Nicole C. Thornton	U.S. Department of State
Mr. John I. Blanck	U.S. Department of State

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8. Each Party gave an opening presentation, the Respondent then gave its reply followed by the Claimant's rebuttal, and questions were asked of each Party by the Tribunal.
9. On 2 October 2020 the Claimant filed a note, in accordance with the Tribunal's direction, providing its submissions on the *Sastre v. Mexico* case,¹ which was incorporated into the record as RLA-42 by the Tribunal at the commencement of the Hearing.
10. This Procedural Order sets out the Tribunal's decision on the Respondent's Bifurcation Application.

II. THE DISPUTING PARTIES' ARGUMENTS

11. The Disputing Parties' positions, insofar as relevant to the issue of bifurcation, are set out below.

A. THE RESPONDENT'S POSITION

12. The Respondent makes four objections that it characterises as relating to jurisdiction and one with respect to admissibility:
 - i. the Claimant was not a protected investor at the time of the alleged breaches;
 - ii. the Claimant has not made out a *prima facie* damages claim;
 - iii. the challenged measures do not "relate to" the Claimant or its investments pursuant to NAFTA Article 1101(1);
 - iv. the Claimant has not made a timely claim; and
 - v. NAFTA Article 1102 does not apply by virtue of NAFTA Article 1108(7)(b).
13. As a preliminary point, the Respondent says that Article 21(4) of the applicable procedural rules, the 1976 UNCITRAL Arbitration Rules (the "**1976 UNCITRAL Rules**") establishes a presumption that questions of jurisdiction should be heard in a preliminary phase to ensure fairness and efficiency in the arbitral proceedings such that the Tribunal's discretion is fettered. In determining whether bifurcation is fair and efficient it is necessary to consider the resources which would be expended in litigating an ultimately unsuccessful claim, such resources extending to the "*significant time and resources....at both the federal and provincial levels that will not be captured in a Costs*

¹ Email from the Tribunal to the Disputing Parties on 24 September 2020.

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*Award.*² If some of the Respondent’s objections warrant bifurcation then it would be procedurally unfair and inefficient not to hear all the objections together.

14. The Respondent’s objection with respect to Article 1108 is being brought pursuant to the Tribunal’s general powers granted under Article 15(1) of the 1976 UNCITRAL Rules.
15. The Respondent next says it is common ground that the factors to be considered by the Tribunal in determining whether to exercise its discretion in favour of ordering bifurcation are those set out in *Philip Morris v. Australia*,³ (the “**Philip Morris factors**”) namely:
 - i. Is the objection *prima facie* serious and substantial: the Respondent contends an objection is *prima facie* serious and substantial if it is not frivolous or vexatious, citing the only four NAFTA cases proceeding under the 1976 UNCITRAL Rules which have had to consider the question of bifurcation as well as the decisions of many other investment tribunals operating under the 1976 UNCITRAL Rules. The Respondent says it is important to apply the same standard to ensure consistency for all future disputing parties but it further notes that were the Tribunal minded to apply a higher standard, the Respondent’s objections would meet such higher standard.
 - ii. Can the objection be determined without prejudging or entering the merits: the test is not, the Respondent notes, whether there is any overlapping of issues. Whilst some evidence may need to be reviewed both with respect to jurisdictional objections as well as the merits, this is not sufficient of itself to avoid bifurcation.⁴
 - iii. If successful, will the objection dispose of all or any essential part of the claims raised.
16. The Respondent makes three temporal jurisdictional objections as detailed in paragraph 12(i)-(iii) above (the “**temporal objections**”). At the heart of each of the Respondent’s temporal objections is the fact that the Claimant did not come into existence until January 2019 and did not acquire the Canadian business the subject of the claim until March 2019. The Respondent says that the Claimant “*is a new company owned by a former creditor of Westmoreland Coal Company, or WCC. WCC sold its Canadian*

² Transcript, 14:11-14.

³ RLA-002, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Provisional Order No. 8 (14 April 2014), ¶ 109.

⁴ RLA-041, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd., IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Provisional Order No. 3, Decision on Bifurcation and Related Requests (8 July 2016), ¶ 25(b).

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business to the Claimant in an arms-length purchase as part of WCC's bankruptcy proceedings. Now WCC is set to dissolve.”⁵ Whilst each of these emanate from similar facts, they are three independent objections which must be determined individually but it would be efficient for all three to be determined as preliminary issues.

17. The Respondent's temporal objections are the first three set out below.
 - i. **Was the Claimant a Protected Investor at the time of the alleged breaches as required by NAFTA Articles 1116(1) and 1117(1)?**
18. Given the Claimant did not acquire the Canadian businesses until March 2019 when it purchased them at arm's length as part of Westmoreland Coal Company ("WCC")'s restructuring, the Claimant's status as an investor in Canada can only have commenced at that date. At the time of the measures complained of, it could not, therefore have been a protected investor nor could it have had protected investments. The Claimant is not WCC; indeed, this is clearly demonstrated by the Claimant's act, upon acquiring the Canadian businesses, of initiating new arbitration proceedings in its own name and filing its own consent and waiver as required by NAFTA rather than continuing the arbitration proceedings commenced by WCC. The Claimant is a new entity seeking to claim for losses allegedly suffered by WCC, the seller of the Canadian investments.
19. The Respondent contends that this objection meets each of the Philip Morris factors: (i) it is clearly serious and substantial given the Tribunal only has jurisdiction if the Claimant can demonstrate it was protected by NAFTA at the time of the alleged breaches; (ii) it requires consideration of a discrete issue, namely when did the Claimant become an 'investor of a Party' (the Respondent says March 2019 when it acquired the investments) whereas the merits require consideration of WCC's treatment in 2015 and 2016 (the fact that the Respondent asserts in its substantive defence that the Claimant has not been accorded treatment under Articles 1102 and 1105 does not mean there is any overlap with the merits, it just highlights the absurdity of the Claimant claiming a breach that predates its investment in Canada); and (iii) it is common ground that if successful it disposes of the entirety of the Claimant's claims.
- ii. **The Claimant has not made out a *prima facie* damages claim under NAFTA Articles 1116(1) and 1117(1)**
20. The Claimant is claiming for damages suffered by WCC; it itself could not have incurred damage by reason of the alleged breaches as (i) they predate its existence as an investor of a Party and (ii) it did not own or control an enterprise at the time such enterprise incurred damages. Again determining this objection will not require the prejudgement of the merits as, for the purposes of the jurisdictional challenge, the

⁵ Transcript, 25:10-14.

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Claimant need only show as a matter of law that either it or its enterprise could have incurred the claimed loss or damage by reason of the alleged breach given it only became an investor and acquired the investment in March 2019, whereas at the merits stage, the Claimant will have to prove causation and quantum. Finally, if the Respondent succeeds with this jurisdictional challenge, the claim is disposed of as no loss will have been suffered by the Claimant.

iii. Did the challenged measures “relate to” the Claimant or its investment as required by NAFTA Article 1101(1)?

21. The Claimant has failed to show that the challenged measures relate to it. NAFTA Article 1101(1) is a gateway provision, limiting access to NAFTA Chapter Eleven to circumstances where a challenged measure relates to a claimant and its investment. At the time the challenged allocation of Transition Payments was made in 2016 the Claimant neither existed nor had any investments in Canada. The same is true with respect to Alberta’s 2015 Climate Leadership Plan (the “**Climate Plan**”). The objection is clearly serious and substantial, does not enter the merits nor require the Tribunal to prejudge the merits as again it merely requires consideration of, on the one hand, when the Claimant became an investor of a party and acquired its investment and on the other hand when the challenged measures occurred. It does not require any analysis of whether the alleged damages have a causal link to each of the claimed breaches but is a distinct enquiry.

iv. Time limits under NAFTA Articles 1116(2) and 1117(2)

22. The Respondent’s fourth jurisdictional objection arises out of the three year time limitation period under NAFTA Articles 1116(2) and 1117(2). As a matter of NAFTA practice, such an objection is usually determined as a preliminary issue. The Respondent accepts that the temporal objections must be established before this fourth objection can be determined.
23. The critical date pursuant to Articles 1116(2) and 1117(2) is 12 August 2016 as the Notice of Arbitration was received on 12 August 2019. To determine this jurisdictional challenge it is only necessary to identify the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and loss: there is no prejudging of the merits in undertaking this analysis.
24. The Claimant now says it is not challenging the Climate Plan (which was announced on 22 November 2015, being outside this limitation period) but its Request for Arbitration is replete with references to the Climate Plan, identifying it as the challenged measure and noting that the value of its investment was reduced as a result of the Climate Plan. The Claimant now refers to “*Albertan Measures that breached the*

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minimum standard of treatment”,⁶ but those measures are unidentified, the Claimant asserting that “*What the Measure is cannot be identified without an examination of Alberta’s action and their impacts on Westmoreland.*”⁷ This suggests that the Claimant will be using the document production phase as a fishing exercise to identify possible NAFTA breaches. However pursuant to Article 18(2) of the 1976 UNCITRAL Rules, a Claimant must identify the facts supporting the claim and the points at issue. By saying that it is not challenging the Climate Plan but equally not identifying the measure in issue, the Claimant is in breach of Article 18(2). The reason the Claimant has not identified the measure out of which its claim arises is because the only relevant measure is the Climate Plan and the Claimant is seeking to create ambiguity over its claim to circumvent this limitation period. This evidences that the objection is serious and substantial. It would be unfair and inefficient to proceed to the merits phase before the Claimant identifies the measure it challenges. Determining this question will not require the Tribunal to prejudge the merits as the only question to be resolved is one of timing. As the Climate Plan was announced before the critical date, no investigation will be required into the effect of the Climate Plan (to the extent consideration of the Climate Plan is required as part of considering background facts, this is not an issue) and if the objection were resolved in the Respondent’s favour, it would result in a material reduction in the scope of the merits phase, leaving just the Transition Payments as a disputed measure.

v. Inadmissibility due to NAFTA Article 1108(7)(b)

25. The Respondent also raises an admissibility objection pursuant to Article 1108(7)(b) which provides that, *inter alia*, Article 1102 does not apply to “*subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance.*” As an objection to inadmissibility as opposed to jurisdiction, the Tribunal is asked to exercise its discretion to bifurcate under Article 15(1) of the 1976 UNCITRAL Rules, however the Respondent submits that in any event the objection meets the Philip Morris factors and says that the Disputing Parties both agree that this is the test the Tribunal should apply to determine this objection.
26. The wording of the Article indicates that Article 1108(7) objections should be determined prior to turning to the merits. Considering the ordinary meaning of the words used in this Article, it should be interpreted broadly. The dictionary definitions of a “*subsidy*” and “*grant*” together with the fact that the payments were made voluntarily under the Alberta Grants Regulations, expressly on the basis that “*the Province is under no legal obligation to compensate or otherwise pay any amount to [the recipients]*” and were publicly described as ‘grants’ are all highly probative of the fact that the Transition Payments under the Off Coal Agreements (“OCAs”) were

⁶ Transcript, 43:9-10.

⁷ Transcript, 43:14-17.

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indeed grants or subsidies. This objection is serious and substantial. No investigation into the merits will be required because the issue for the purposes of the Respondent's admissibility objection is whether "*the transition payments [were] assignments of money by Alberta? Were they sums of money granted by Alberta to support something held to be in the public interest?*" whereas the issue to be considered for the merits is whether "*the Claimant [was] discriminated against because Canadian companies received payments relating to their coalmine assets? Was the Claimant inequitably or arbitrarily excluded from receiving a transition payment?*"⁸ The questions for determining admissibility therefore do not require prejudgement of the questions for determining the merits of whether there was a breach of Article 1102. The Respondent accepts that the OCAs are contracts but says that is irrelevant – government-supported loans, guarantees and insurance are all affected by contracts.

27. The fact the Tribunal may need to review the OCAs in both analyses is not on point; rather it will not need to make any determinations which prejudge the merits. How the Government decided to whom Transition Payments should be made is not a question that needs to be answered to determine the Article 1108(7)(b) objection. Examining the OCAs to determine whether or not the Transition Payments were 'grants' or 'subsidies' for the purposes of Article 1108(7)(b) does not require any examination into the questions of whether domestic companies received payment for their coal assets or into how Alberta decided to allocate the Transition Payments. For the purposes of the Article 1108(7)(b) analysis, the OCAs speak for themselves. There is not a sufficient overlap to deny bifurcation of this question. There are just two questions for the Tribunal to address: (i) determining the correct meaning of 'grant' and 'subsidy' and then (ii) applying that meaning to the Transition Payments to determine if they come within it.⁹ Finally, if the objection were resolved in the Respondent's favour it would dispose of the Claimant's claim that the Transition Payments were in breach of NAFTA Article 1102, which would "*eliminate the need for a factually complex, inherently comparative national treatment analysis.*"¹⁰

B. THE CLAIMANT'S POSITION

28. As a preliminary point, whilst the Claimant accepts the application of the Philip Morris factors, it notes that the Tribunal always retains discretion as to whether or not to order bifurcation, irrespective of whether the three Philip Morris factors are met. Each case turns on its own facts and the Tribunal should not be bound by the "*straitjacket*" of only

⁸ Transcript, 54:5-14.

⁹ Transcript, 66:1-14.

¹⁰ Transcript, 57:18-19.

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considering whether bifurcation should be ordered by reference to the Philip Morris factors.¹¹

29. Turning to the first of these three factors, the Claimant says the Respondent is wrong to say serious and substantial equates to frivolous and unworthy: there is a threshold between these two positions which the Tribunal should apply.
30. The Claimant further says that the facts necessary to examine each of the Respondent's objections are intertwined with the facts necessary to determine the merits. For example, "*Canada's argument that the Claimant is not an investor of another Party with a foreign investment to which the alleged breaches relate under Article 1101 is a Merits question*" and "*Canada's theory that Westmoreland was not accorded treatment because [the Claimant] purchased the assets after the Measures were enacted is the same argument that Canada has advanced in its jurisdictional objections....*"¹² necessitate the determination of facts which fall to be considered both with respect to jurisdictional objections and the merits.
31. Further, the questions to be answered are not entirely legal and will require significant resources and delay in the procedural timetable. In any event, even were the Respondent's objections to be determined in its favour, not all of the Claimant's claims would be disposed of. Thus bifurcation will not lead to efficiency.
32. Finally, the Claimant says that there is no efficiency to be gained in hearing any of the objections in a bifurcated hearing. Were the Claimant to successfully defeat the Respondent's objections significant time and resources would have been wasted. Bifurcation may be appropriate where the question is entirely legal and is a clear issue but that is not the case here where the facts pertinent for the jurisdictional objections are intertwined with the merits and the bifurcated issues would require factual development.

i. The temporal objections

33. The Claimant concedes it is a new entity from WCC but the change from WCC was not a complete change; there was a consistent connection between the two entities. When WCC filed for bankruptcy protection in 2018 it owned Prairie Mines and Royalty. As part of the restructuring, the Claimant was created as a wholly owned subsidiary of WCC. Prairie Mines and Royalty were transferred from WCC to Westmoreland Mining Holdings LLC ("WMH") and WCC then transferred its equity ownership in WMH to the first lienholders of WCC. "*The Westmoreland that emerged from bankruptcy was*

¹¹ Transcript, 98:9-99:16. CLA-003, *Gavrilovic v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 January 2015), ¶ 66.

¹² Transcript, 97:3-18.

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substantially the same as the Westmoreland that entered.”¹³ At all relevant times Prairie Mines and Royalty were owned by a U.S. investor such that the nationality of the investment and the investor remained the same, the only material change was the restructured entity.

34. The Respondent recognised this continuity and did not require adherence by the Claimant to the NAFTA formalities, for example consultation, on the basis these had already been carried out by WCC. Upon commencing arbitration, the Claimant did not materially change the Statement of Claim or the Notice of Intent from that issued by WCC and it merely changed the waiver letters to change the name of the Claimant. It cannot be the case that “*NAFTA’s draftsmen intended to deny fundamental investment protections for foreign investors undergoing restructuring, whether it be an intracompany transfer of assets, bankruptcy, or, as here, both.*”¹⁴
35. The investigation the Tribunal would need to undertake to determine if the Westmoreland of 2019 is the same as the Westmoreland of 2018 “*would be a deep inquiry intoa fairly complicated processintroducing probably Expert Witnesses on bankruptcies, on corporate reorganizations, on an explanation of why we think that the Claim survived the corporate reorganization, which at the time was, indeed, the advice of a small army of specialized lawyers. So, the Tribunal would have to examine that, and that would also be at the heart of how Westmoreland was being distinguished because we don’t know for sure exactly what the Government of Alberta’s reasoning was in excluding Westmoreland from payment. So, perhaps it perceived a different company or perhaps at that time when it made the decision not to compensate Westmoreland it had some sense of a character of Westmoreland that’s different that we don’t know about yet. So, it is one thing to examine whether the Company was the same and that – but that’s a deep and complicated examination, but also, knowing what the company is, is, it seems to us, central to the Merits of the Claim.*”¹⁵ No prior cases have considered this issue and the Claimant contends there would be no efficiency in bifurcating this issue.
36. Whilst the Claimant concedes that, were the Respondent to succeed in these temporal objections, its claims would all be disposed of, they are not serious or substantial and they cannot be examined without prejudging or entering the merits.

ii. Time limits under NAFTA Articles 1116(2) and 1117(2)

37. The measure the Claimant asserts as the basis of its claim is the disparate treatment occasioned by the Transition Payments and not the announcement of the Climate Plan.

¹³ Transcript, 93:15-17.

¹⁴ Transcript, 93:6-11.

¹⁵ Transcript, 110:21-111:20.

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Whilst the Climate Plan is “*an important contextual fact*”,¹⁶ it is a statement of intent and not a measure for which the Claimant seeks redress. The Claimant was not directly damaged by the announcement of the Climate Plan: the date for the Claimant’s actual or constructive knowledge must be the point at which it knew or should have known that it was damaged. It “*arises when the Government started handing out money. And even then, it was not yet a closed matter as to whether Westmoreland was going to see some of that money. They were continuing behind-the-scenes conversations, and it is not until Westmoreland knows it’s damaged and knows it’s not going to get any money that there’s a measure to be challenged here.*”¹⁷ This was July 2017. “[W]hat the character of these transition payments is, is central to determining how [the Claimant] was treated compared to the others. That is the – that’s our Claim.”¹⁸

38. This objection is not serious or substantial, it cannot be considered without prejudging or entering the merits and if successful it would not dispose of all of the claim, leaving the claim arising out of the Transition Payments to be determined.

iii. Inadmissibility due to NAFTA Article 1108(7)(b)

39. Article 21(4) of the 1976 UNCITRAL Rules does not apply to this claim and the burden shifts to the Respondent: it has failed to meet this burden. The relevant words in Article 1108(7)(b) must be construed narrowly as it is an exception. The fact the Transition Payments were described by the Respondent as grants is irrelevant; the ordinary definition of ‘grant’ is a “*gift*” and these Transition Payments were not gifts. The express terms of the OCAs note there was consideration for the Transition Payments, providing that:

“7(a) Subject to the provisions of Section 7(b), neither the Company nor any Plant Owner shall commence any legal action against the Province or any provincial agency, including the Independent System Operator and the coal facilitator, with respect to the mines, coal supply agreements, mining contracts or mining equipment related to the coal used to fuel the Plants, or alleging any other cause of action in relation to the phase out of Coal Fired Emissions from the Plants.”¹⁹

40. To understand whether the Transition Payments were indeed grants or subsidies, the Tribunal will need to look behind the words of the OCAs, review the negotiations leading to their conclusion, their intent, whether the Albertan Government’s conduct was consistent with the payment of a grant or subsidy, and consider how they were

¹⁶ Transcript, 90:6-15.

¹⁷ Transcript, 107:19-108:4.

¹⁸ Transcript, 107:15-18.

¹⁹ C-023, Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy), 24 November 2016, § 7(a).

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administered and how the money was distributed pursuant to the OCAs. In any event even if the Respondent were successful with respect to this objection, it would have no effect on the Claimant's Article 1105 claim.

41. Again, this objection is neither serious or substantial, it cannot be examined without prejudging or entering the merits and will not dispose of the entire case, leaving the Article 1105 claim to be determined.

C. THE RESPONDENT'S REPLY

42. The Respondent noted the Claimant's apparent withdrawal in its oral submissions of its allegation that the coal phase out programme denied it the reasonable expectation of its investments in breach of Article 1105 (as stated in paragraph 105 of its Notice of Arbitration), such that the only measure it now challenges is the Transition Payment. The Respondent sought the Claimant's confirmation of this but otherwise reiterated its submission that the Climate Plan was outside the limitation period.

D. THE CLAIMANT'S REBUTTAL

43. In its rebuttal, the Claimant explained there is nothing to withdraw: its claim relates to "*the limitation of the policy, and that policy is implemented when these payments begin to be paid out, and when they are paid out, to the exclusion of Westmoreland, and we learned that we are not going to receive any.*"²⁰

III. THE TRIBUNAL'S ANALYSIS

44. The Tribunal has considered all the relevant factual and legal arguments presented in the Disputing Parties' written submissions and oral presentations. The fact that any argument, allegation or specific piece of evidence is not mentioned in the following analysis does not mean that the Tribunal has not considered it.
45. The decision in this Procedural Order 3 only relates to bifurcation. The Tribunal's considerations and decisions regarding bifurcation do not prejudice any future decision the Tribunal will make with respect to the substance of the Respondent's preliminary objections or the Disputing Parties' submissions on the merits.
46. Article 21(4) of the 1976 UNCITRAL Rules provides as follows: "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award." It follows that when a party raises an objection to jurisdiction, the presumption is that such objection will be determined as a preliminary

²⁰ Transcript, 134:5-10.

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issue. Having said that, this is a matter for the Tribunal's discretion and we are not bound by that presumption; it is after all only a presumption. There will be circumstances where this presumption will not be followed, in particular where the matters raised by the objection are inextricably interlinked with the merits.

47. Before we turn to consider each of the Respondent's objections, we first consider the test we should apply in determining whether each objection should be heard as a preliminary issue. Both Disputing Parties referred to the Philip Morris factors but disagree as to the meaning of the first one, namely whether the objection is *prima facie* serious and substantial. The Respondent says we should follow the meaning used in all four NAFTA arbitrations under the 1976 UNCITRAL Rules such that an objection is serious and substantial if not frivolous or vexatious. This would ensure consistency of decisions and also comport with the presumption to bifurcate under the 1976 UNCITRAL Rules. The Respondent says it has cited authorities and case law and has demonstrated that each objection, on its face, is serious and substantial. The Claimant on the other hand points to other decisions where tribunals have applied a test which sets a higher threshold than non-frivolous, being "*a shade grayer than Canada's black-and-white description*".²¹
48. In applying the first factor against each of the Respondent's objections, we find that each is, on its face, certainly not frivolous or vexatious and, moreover, satisfies the higher threshold of *prima facie* serious and substantial if indeed that is a higher threshold, as the Claimant appears to submit.
49. We therefore turn to the first three objections raised by the Respondent: the temporal objections. The Respondent submits that the three temporal objections must be considered independently being based on different aspects of the language used in the relevant NAFTA Articles, however for the purposes of considering the application of the Philip Morris factors we consider the three together as the question of the legal status of the Claimant at the time of the alleged breaches of NAFTA Articles 1102 and 1105 is at the heart of each of these objections.
50. The first of the Respondent's temporal objections is that the Claimant was not a protected investor at the time of the alleged breach. The Claimant clarified its position during the oral hearing, explaining that the measure out of which its claims arise is the payment of the Transition Payments which commenced in July 2017. The Claimant does not dispute that it had not been incorporated at that time. As explained during the oral hearing, its case rests on the fact that both the investment and investor were at all

²¹ Transcript, 96:1-2, see RLA-007, *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) (17 January 2020) ¶ 27; CLA-008, *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation) (31 January 2018) ¶ 5; CLA-009, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 August 2020) ¶ 42.

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material times United States nationals and that the Westmoreland that went into bankruptcy in 2018 is materially the same as the Westmoreland that emerged from restructuring in 2019. The U.S. bankruptcy restructuring was intended to preserve assets and rework liabilities so that the Westmoreland assets could function as an ongoing concern. Whilst the Claimant submits that determination of this issue may require evidence from several specialised experts as to, *inter alia*, U.S. bankruptcy and restructuring law, and that these issues may be complex, we do not accept that that is of itself grounds for refusing bifurcation. We further do not accept the Claimant's submission that determination of this issue would require any consideration of how the Claimant was perceived by the Government of Alberta and on what basis payment to it was declined. These are issues which, whilst they may be relevant to the merits, do not impinge on the legal status of the 2018 and 2019 Westmoreland companies.

51. We next turn to the second temporal objection: can the Claimant (i) claim for a loss suffered before it came into existence and/or (ii) claim on behalf of an enterprise it did not own or control at the time of the alleged breach. Again, we do not accept that determination of this issue will require prejudging or entering the merits. The issue to be determined is again a legal question: could the Claimant or its enterprise have incurred the claimed loss or damage by reason of the alleged breach where the Claimant only became an investor and acquired the investment in March 2019. Determination of this question will again likely require expert evidence on U.S. bankruptcy and restructuring law but again will not require a factual analysis that overlaps with the merits; nor does it present a risk of prejudging or entering the merits.
52. The third temporal objection, whether the challenged measure(s) relate to the Claimant or its investment, again turns on the legal effects of the restructuring process undertaken by WCC and the status of the Westmoreland that entered into bankruptcy as opposed to the Claimant when it was incorporated. Again, we do not accept that determination of this objection will require a factual analysis that overlaps with the merits; nor does it present a risk of prejudging or entering the merits. Accordingly, the second Philip Morris factor is satisfied with respect to each of the Respondent's temporal objections.
53. Finally, it is common ground between the Disputing Parties that if any of the three temporal objections is successful, it would dispose of the entirety of the claims raised. Accordingly, the third Philip Morris factor is satisfied with respect to the temporal objections.
54. We next turn to the Respondent's fourth jurisdictional objection, that the Claimant's actual or constructive knowledge of the alleged breach and loss occurred more than three years before it commenced this arbitration, in breach of the time limitation period under NAFTA Articles 1116(2) and 1117(2). The Respondent says the cut-off date for the purposes of the limitation period is 12 August 2016. The Claimant explained in the

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oral hearing that the measure it complains of was the entry into the OCAs in November 2016 by the Government of Alberta and the payments made thereunder that started in July 2017, not the publishing of the Climate Plan. Further, the Claimant says that the Respondent's fourth objection cannot be examined without the risk of prejudging or entering the merits. Determining the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and loss is not a simple issue. Whilst it had awareness of the content of the Climate Plan as announced and of the fact the OCAs were being concluded and even that Transition Payments were being made, it was not aware at the time that Transition Payments were first made that it would be excluded from such payments. Therefore, determining the date on which it acquired constructive knowledge will require investigation *inter alia* into: (i) the Government of Alberta's decision-making process in deciding to which companies Transition Payments should be made; (ii) how and when those decisions were reached; and, (iii) consideration of the wider factual matrix. Such analysis will clearly require traversing issues relating to the merits of the dispute.

55. We accept the Claimant's submission as to the scope of the exercise that will likely be required to determine the date on which it acquired actual or constructive knowledge of the breach and loss suffered and accordingly we agree that this fourth objection cannot be determined without traversing the merits. With respect to the third Philip Morris factor, it is accepted by both Disputing Parties that a successful determination will not dispose of all of the claims raised. Indeed it seems to us that it would not in any event determine any claims arising out of the payment of the Transition Payments given that the first of the OCAs pursuant to which the payments were made were only entered into three months after the cut-off point of 12 August 2016.
56. We turn finally to Canada's objection as to the admissibility of the claims premised on NAFTA Article 1108(7)(b). Without specifically addressing the utility of applying the Philip Morris factors to admissibility objections, the Disputing Parties both made reference to these factors whilst considering whether or not this objection should be determined as a preliminary issue. In determining whether to exercise our discretion to order that this objection be heard as a preliminary issue, we therefore also take note of the Philip Morris factors.
57. We accept that determining the correct meaning of the words 'grant' and 'subsidy' as contained in the article is purely a question of law, however, we do not accept that applying that interpretation to the OCAs to determine whether the Transition Payments were a grant or subsidy can be undertaken solely by considering the OCAs on their face. The fact that the payments were made pursuant to the Alberta Grants Regulation and publicly disclosed as grants is relevant but not conclusive and we accept that it may be necessary to go beyond the wording used in the OCAs and consider the wider factual matrix existing at the time the OCAs were concluded in order to determine whether

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these Transition Payments come within the meaning of a ‘grant’ or ‘subsidy’ for the purposes of NAFTA Article 1108(7)(b). Accordingly, to the extent relevant, the second Philip Morris factor is not satisfied. With respect to the third factor, if this objection were decided in the Respondent’s favour, it would dispose of the Claimant’s Article 1102 claim and the necessarily complex and expensive analysis of “*like circumstances*” but it would not dispose of the Claimant’s Article 1105 claim.

58. Having completed our analysis of the five objections applying the Philip Morris factors, and having found that those factors weigh in favour of bifurcating the temporal objections but against bifurcation of the remaining objections, we turn now to whether the presumption contained in Article 21(4) of the 1976 UNCITRAL Rules should be followed. In considering this question we note the Claimant’s submissions that it would not be fair if the Respondent’s objections were heard before it were able to present its case in a merits hearing, particularly in the circumstances that Transition Payments were made to three Canadian companies whereas the Claimant, being the only non-Canadian company, did not receive any payment. We also understand the Claimant’s submissions that efficiency would not be achieved if the Respondent’s objections were unsuccessful, leading only to delay. However, we have found that the Philip Morris factors support bifurcation of the three temporal objections and we do not accept there would be any potential duplication of issues or evidence in determining these objections as a preliminary issue. Accordingly, we see no reason either in terms of fairness or efficiency not to follow the presumption that the three temporal objections should be determined as preliminary issues.
59. The position is different with the fourth and fifth objections. Whilst we appreciate that, as a matter of NAFTA practice, the limitation objection is usually determined as a preliminary issue, we are concerned that determining both it and the fifth objection would likely stray into areas of the merits. We understand the Respondent’s concerns with respect to the need to expend federal and provincial time and resources which could not adequately be captured by a costs award and its submissions that if we are to determine any of the objections it would be procedurally efficient to determine them all. However, given that there is no linkage between the investigation and analysis we would need to undertake to determine the three temporal objections and that required with respect to the fourth and fifth objections, we do not believe there to be any efficiency to be gained in also hearing these two final objections: indeed it appears to us to be likely that it would only lead to inefficiency and delay. Accordingly, we do not exercise our discretion to order that the fourth and fifth objections should be heard as preliminary issues.

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IV. DECISION

60. For the reasons set out above, the Tribunal:
- a. Grants the Respondent's request to bifurcate the present proceedings between (i) the temporal jurisdictional objections and (ii) the merits of the case and any and all other jurisdictional or admissibility objections;
 - b. Directs the Disputing Parties to confer as to whether the proposed timetables set out in the Disputing Parties' 31 July 2020 email to the Tribunal should be followed or whether a revised timetable should be agreed in the light of this order; and
 - c. Reserves costs for subsequent determination.

Date: 20 October 2020

On behalf of the Tribunal:

[Signed]

Ms. Juliet Blanch
Presiding Arbitrator