

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

WESTMORELAND MINING HOLDINGS LLC

Claimant,

v.

GOVERNMENT OF CANADA

Respondent,

ICSID Case No. UNCT/20/3

**CLAIMANT WESTMORELAND MINING HOLDINGS LLC'S
PRELIMINARY COSTS SUBMISSION**

August 19, 2021

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1. Westmoreland Mining Holdings LLC (“Westmoreland”) provides this preliminary costs submission pursuant to the Tribunal’s August 5 instructions. The 1976 UNCITRAL Arbitration Rules govern this proceeding. Rule 40(1) suggests that costs of the arbitration be borne by the non-prevailing party but allows the Tribunal to apportion costs between the parties depending on the circumstances of the case. Rule 40(2) allows the Tribunal to determine how to allocate the costs of the parties’ legal fees and experts, without any initial presumption.

2. Paragraph 21.7 of Procedural Order 1 explains that a decision to allocate costs may be guided by (a) the outcome of the proceeding; (b) the parties’ conduct, including the expeditiousness and the efficiency of the proceeding; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed.

3. Should Westmoreland prevail with respect to Canada’s jurisdictional objection, that factor should be considered in the Tribunal’s final merits decision and costs award. Were Canada to prevail at this stage on its jurisdictional objection, Westmoreland should not be required to bear any of Canada’s costs or legal fees.

4. The conduct of this arbitration, by itself, does not suggest any party bear another party’s costs and legal fees. The Tribunal has commended the clarity, quality and efficiency of the parties’ submissions.¹ However, Canada’s concession in the final moments of the Hearing on Jurisdiction, that “WCC [Westmoreland Coal Company] could still be in a position to bring a claim on its own behalf,”² raises doubts about the purpose of Canada’s jurisdictional objection. If Canada were correct, then it has

¹ June 30, 2021 E-mail from Ms. Fleckenstein to the Parties (“I write to you as instructed by the President of the Tribunal to inform you that given the Parties’ clear and helpful submissions, the Tribunal has no specific questions for the Parties at this stage.”); see *also* Hr’g Tr. 267:1-268:2 (President Blanch).

² Hr’g Tr. 280:2-5 (Mr. Douglas).

unnecessarily wasted the parties' resources with a formalistic objection over a claim that WCC could still bring.³

5. The jurisdictional issue here is novel but not complex. Professor Paulsson testified that "the issue of temporal jurisdiction raised here may be unprecedented," and "the question put to me may be one of first impression under NAFTA...."⁴

6. Canada's objection relies on *Gallo v. Canada* and *Mesa Power v. Canada*, but those cases, unlike this one, lacked foreign investments and, therefore, treaty obligations, at the time of the alleged breaches.⁵ Canada cited *GEA v. Ukraine* and *STEAG v. Spain* as directly on point but they are not: both involved transfers of claims where the transferor and transferee had no prior relationship. Westmoreland cited *CME v. Czech Republic*, *SD Myers v. Canada*, *Koch v. Venezuela*, and others, where jurisdiction was maintained for post-breach investors and explained why Canada's attempts to distinguish those cases failed. Canada's assertion that the bankrupted, soon-to-be-terminated, naked shell company of WCC could still bring a claim was ruled out by the tribunal in *Loewen v. United States*.⁶

7. Westmoreland's costs of arbitration, expert witness fees and costs of legal representation are reasonable and are attached in Annexes 1 and 2.

Respectfully submitted,



Elliot J. Feldman

³ See Hr'g Tr. 281:7-22 (Mr. Snarr)("if [WCC] could bring a claim now ... then we've invested a lot of time and energy on something that might be interesting but might be proven to be rather pointless....")

⁴ CER Paulsson Counter-Memorial Statement p. 3 (but also noting "a *jurisprudence constante* [showing] that restructuring *per se* is not fatal to jurisdiction.")

⁵ See Hr'g Tr. 242:7-15 (Mr. Snarr).

⁶ See Hr'g Tr. 254:8-15 (Mr. Levine re *GEA* and *STEAG*); 254:15-256:13 (Mr. Levine re Canada's distinctions); 258:9-259:11 (Mr. Levine re *Loewen*).

ANNEX 1

Westmoreland Mining Holdings LLC v. Government of Canada
Preliminary Costs Submission of Westmoreland Mining Holdings LLC
ANNEX 1 -- Expense Disbursements

Costs	Total (US \$)
Professor Jan Paulsson (Expert Witness Statements)	\$49,320.00
Counsel Travel Costs	\$15,064.69
Delivery Services	\$820.40
Legal Research	\$1,350.00
Other Professional Services	\$3,346.16
Materials & Supplies	\$184.57
ICSID Administration Fees	\$150,000.00
Total Costs	\$220,085.82

ANNEX 2

Westmoreland Mining Holdings LLC v. Government of Canada
Preliminary Costs Submission of Westmoreland Mining Holdings LLC
ANNEX 2 -- Legal Fees

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Pre-Bifurcation and Jurisdiction

2018			
Professional	Professional Fees		
	Hourly Rate	Hours	Total Fees
Attorneys			
Elliot J. Feldman			\$95,238.75
Michael S. Snarr			\$49,387.50
Brian V. Johnson			\$25,737.50
Paul M. Levine			\$83,942.50
Alexander K. Obrecht			\$64,721.25
Laura E. Peterson			\$25,931.20
2018 Total			
	\$344,958.70		

January 1 to June 11, 2020			
Professional	Professional Fees		
	Hourly Rate	Hours	Total Fees
Attorneys			
Elliot J. Feldman			\$65,866.50
Analia Gonzalez-Rivero			\$45,198.00
Paul M. Levine			\$32,571.00
Alexander K. Obrecht			\$15,950.25
Michael S. Snarr			\$21,925.50
Erica E. Youngstrom			\$6,672.50
January 1 to June 11, 2020 Total			
	\$188,183.75		

2019			
Professional	Professional Fees		
	Hourly Rate	Hours	Total Fees
Attorneys			
Elliot J. Feldman			\$149,034.00
Analia Gonzalez-Rivero			\$15,356.25
Brian V. Johnson			\$2,812.50
Paul M. Levine			\$113,553.00
Alexander K. Obrecht			\$24,021.00
Michael S. Snarr			\$152,526.00
2019 Total			
	\$457,302.75		

Pre-Bifurcation and Jurisdiction Subtotal
\$990,445.20

Westmoreland Mining Holdings LLC v. Government of Canada
Preliminary Costs Submission of Westmoreland Mining Holdings LLC
ANNEX 2 -- Legal Fees

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Bifurcation and Jurisdiction

June 12 to December 31, 2020			
Professional	Professional Fees		
	Hourly Rate	Hours	Total Fees
Attorneys			
James J. East			\$25,852.00
Elliot J. Feldman			\$154,413.00
Analia Gonzalez-Rivero			\$58,218.00
Paul M. Levine			\$99,687.00
Alexander K. Obrecht			\$32,091.75
Michael S. Snarr			\$68,949.00
June 12 to December 31, 2020 Total			
\$439,210.75			

2021			
Professional	Professional Fees		
	Hourly Rate	Hours	Total Fees
Attorneys			
James J. East			\$193,941.00
Elliot J. Feldman			\$174,988.00
Analia Gonzalez-Rivero			\$82,240.00
Andrew V. Layden			\$2,960.00
John R. Lehrer			\$4,526.00
Paul M. Levine			\$154,979.00
Alexander K. Obrecht			\$11,322.00
Michael S. Snarr			\$135,926.00
2021 Total			
\$760,882.00			

Bifurcation and Jurisdiction Subtotal
\$1,200,092.75

Total (Pages 1 and 2)
\$2,190,537.95