

**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. 1

ARBITRAL TRIBUNAL

Mrs. Juliet Blanch (Presiding Arbitrator)

Mr. James Hosking

Professor Zachary Douglas

Secretary of the Tribunal

Ms. Veronica Lavista

22 April 2020

Table of Contents

INTRODUCTION	4
1. BACKGROUND	5
2. THE DISPUTING PARTIES AND THEIR REPRESENTATIVES.....	5
3. THE ARBITRAL TRIBUNAL.....	7
4. CASE ADMINISTRATION AND APPOINTING AUTHORITY	8
5. LEGAL SEAT OF THE ARBITRATION AND LOCATION OF THE HEARINGS.....	9
6. APPLICABLE LAW AND ARBITRATION RULES	9
7. PROCEDURAL LANGUAGE, TRANSLATION AND INTERPRETATION	9
8. CALENDAR.....	10
9. WRITTEN SUBMISSIONS	10
10. EXHIBITS AND LEGAL AUTHORITIES	11
11. DOCUMENT PRODUCTION	12
12. WITNESSES.....	12
13. EXPERTS	14
14. MOTIONS AND PROCEDURAL REQUESTS	14
15. NOTIFICATIONS AND COMMUNICATIONS.....	14
16. NON-DISPUTING NAFTA PARTIES	15
17. AMICI.....	15
18. QUORUM AND DECISIONS OF THE TRIBUNAL	15
19. STATUS OF ORDERS.....	16
20. FEES AND EXPENSES OF THE MEMBERS OF THE ARBITRAL TRIBUNAL.....	16
21. ADVANCES OF ARBITRATION COSTS	16
22. THIRD PARTY FUNDING	17

Procedural Order No. 1

23.	PRE-HEARING CONFERENCE.....	17
24.	RECORD OF HEARINGS	17
25.	TIME LIMITS	18
26.	PUBLICATION.....	18
27.	CONFIDENTIALITY AND PRIVACY	18
28.	IMMUNITY FROM SUIT.....	18
29.	DISPOSAL OF RECORD	18
	ANNEX A	20

Procedural Order No. 1

INTRODUCTION

The preliminary procedural consultation between the Arbitral Tribunal and the Disputing Parties was held on 7 April 2020 by telephone conference.

Participating in the conference call were:

Members of the Tribunal,

Mrs. Juliet Blanch, Presiding Arbitrator
Professor Zachary Douglas, Arbitrator
Mr. James Hosking, Arbitrator

ICSID Secretariat:

Ms. Veronica Lavista, Secretary of the Tribunal

Participating on behalf of the Claimant:

Mr. Jeremy Cottrell, Westmoreland Mining Holdings
Mr. Elliott Feldman, BakerHostetler LLP
Mr. Michael Snarr, BakerHostetler LLP
Mr. Paul Levine, BakerHostetler LLP
Ms. Analia Gonzalez, BakerHostetler LLP
Mr. Alexander Obrecht, BakerHostetler LLP

Participating on behalf of the Respondent

Mr. Kyle Dickson-Smith, Legal Services Division, Economic Development, Trade and Tourism, Justice and Solicitor General Government of Alberta
Ms. Landy Zhao, Legal Services Division, Economic Development, Trade and Tourism, Justice and Solicitor General Government of Alberta
Ms. Shannon Derrick, Economic Development, Trade and Tourism, Justice and Solicitor General Government of Alberta
Mr. Don McDougall, Investment Trade Policy, Global Affairs Canada, Government of Canada
Ms. Elena Lapina, Investment Trade Policy, Global Affairs Canada, Government of Canada
Mr. Adam Douglas, Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Krista Zeman, Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Megan Van den Hof, Trade Law Bureau, Global Affairs Canada, Government of Canada
Ms. Alexandra Dosman, 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

The Tribunal and the Disputing Parties considered the following:

- The Draft Procedural Order circulated by the Disputing Parties on 3 April 2020.

Procedural Order No. 1

- The Draft Confidentiality Order circulated by the Disputing Parties on 3 April 2020.

An audio recording of the session was made and deposited in the archives of the International Centre for Settlement of Investment Disputes (ICSID). The recording was subsequently distributed to the Members of the Tribunal and the Disputing Parties.

Following the session, the Tribunal now issues the present order:

ORDER

This first Procedural Order sets out the Procedural Rules that govern this arbitration.

1. BACKGROUND

- 1.1 This first procedural order sets out the procedural rules to which the Claimant and the Respondent (the “Disputing Parties”) have agreed, or which the Tribunal has determined shall govern this arbitration.

2. THE DISPUTING PARTIES AND THEIR REPRESENTATIVES

- 2.1 The Claimant is:

Westmoreland Mining Holdings, LLC
1209 Orange Street
Wilmington, Delaware 19801
United States of America

(“WMH” or “the Claimant”)

The Claimant is represented in this arbitration by:

Mr. Elliot J. Feldman
Mr. Michael S. Snarr
Mr. Paul Levine
Ms. Analia Gonzalez
Baker Hostetler LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
United States of America
Tel: + 1 202 861 1500
Fax: + 1 202 861 1783
efeldman@bakerlaw.com
msnarr@bakerlaw.com
pmlevine@bakerlaw.com
agonzalez@bakerlaw.com
westmoreland@bakerlaw.com

Mr. Alexander Obrecht
1801 California Street, Suite 4400
Denver, CO 80202

Procedural Order No. 1

United States of America
Tel: +1 303 861 0600
Fax: +1 303 861 7805
aobrecht@bakerlaw.com

All hard copy correspondence and documents in this arbitration will be delivered to the attention of Mr. Feldman and Mr. Obrecht at the addresses of counsel for the Claimant and all e-mail correspondence will be delivered to the six e-mail addresses above.

2.2 The Respondent is:

The Government of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
Canada

("Canada" or "the Respondent")

The Respondent is represented in this arbitration by:

Mr. Adam Douglas, Counsel
Ms. Krista Zeman, Counsel
Mr. Mark Klaver, Counsel
Ms. Alexandra Dosman, Counsel
Ms. Megan Van den Hof, Counsel
Mr. Benjamin Tait, Paralegal
Ms. Nadine Robinson, Paralegal
Trade Law Bureau (JLT)
Global Affairs Canada
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada
Tel: +1 343 203 2297
Fax: +1 613 944 0027
adam.douglas@international.gc.ca
krista.zeman@international.gc.ca
mark.klaver@international.gc.ca
alexandra.dosman@international.gc.ca
megan.vandenhof@international.gc.ca
benjamin.tait@international.gc.ca
nadine.robinson@international.gc.ca

Any hard copy correspondence and documents in this arbitration will be delivered to the attention of Mr. Douglas at the address of counsel for the Respondent, and all e-mail correspondence will be delivered to the seven emails listed above.

Procedural Order No. 1

- 2.3 Any change or addition to a Disputing Party's representatives listed above shall be promptly notified in writing by that Disputing Party to the other Disputing Party, the Tribunal and the Administering Authority.

3. THE ARBITRAL TRIBUNAL

- 3.1 On 24 February 2020, the ICSID Secretary-General appointed Ms. Juliet Blanch as President of the Tribunal, in accordance with the proceeding established by the Disputing Parties. Her contact details are:

Mrs. Juliet Blanch (Presiding Arbitrator)

Lamb Building, 3rd Floor South
Temple, London
EC4Y 7AS
United Kingdom
Tel: +44 (0) 207 167 2040
Fax: +44 (0) 207 583 3388
juliet.blanch@arbchambers.com

- 3.2 On 12 August 2019, the Claimant appointed Mr. James Hosking as the first arbitrator. His contact details are as follows:

Mr. James Hosking

Chaffetz Lindsey LLP
1700 Broadway, 33rd Floor
New York, NY 10019
Tel: +1 212-257-6960
Fax: +1 212-257-6950
james.hosking@chaffetzlindsey.com

- 3.3 On 21 August 2019, the Respondent appointed Professor Zachary Douglas as the second arbitrator. His contact details are as follows:

Professor Zachary Douglas

Matrix Chambers
Rue General Dufour 15
1204 Geneva, Switzerland
Tel: +41 22 310 6873
zacharydouglas@matrixlaw.co.uk

- 3.4 Each arbitrator is and shall remain at all times impartial and independent of the Disputing Parties and the Tribunal will take into account the IBA Guidelines on Conflict of Interest, 2014. Each arbitrator has provided the Disputing Parties with a Statement of Independence.

- 3.5 The Disputing Parties confirm that the Tribunal has been duly constituted in accordance with Article 1124 of the NAFTA. The Disputing Parties have no objections whatsoever to the

Procedural Order No. 1

constitution of the Tribunal or to the appointment of any Member of the Tribunal in respect of matters known to them on the date of this Procedural Order.

- 3.6 If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the reconstituted arbitral tribunal decides otherwise.

4. CASE ADMINISTRATION AND APPOINTING AUTHORITY

- 4.1 By letter of 2 April 2020, the International Centre for Settlement of Investment Disputes ("ICSID") accepted its designation as the administering authority. ICSID shall act as registry ("the Registry") in this arbitration under the following terms:

- a) The Registry shall manage deposits made by the Disputing Parties to cover the costs of the arbitration, subject to the Tribunal's supervision;
- b) Consistent with its document retention policies, the Registry shall maintain an archive of filings and submissions;
- c) The Registry shall provide such other registry services as the Tribunal may direct; and
- d) Work carried out by the Registry will be paid in accordance with ICSID's Schedule of Fees from deposits placed with the Registry.

- 4.2 The Secretary-General of ICSID shall act as the Appointing Authority in this arbitration.

- 4.3 The contact details of the Registry are as follows:

International Centre for Settlement of Investment Disputes

Attn: Ms. Veronica Lavista, or whomever ICSID would designate from time to time
MSN C3-300
1818 H Street N.W.
Washington, D.C. 20433
USA
Tel: +1 (202) 458-8887
Fax: +1 (202) 522-2615/2027
E-mail: ylavista@worldbank.org
Paralegal : jargueta@worldbank.org

For local messenger deliveries, the contact details are:

Ms. Veronica Lavista
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
USA
Tel. +1 (202) 458-1534

Procedural Order No. 1

5. LEGAL SEAT OF THE ARBITRATION AND LOCATION OF THE HEARINGS

- 5.1 The Disputing Parties agree that the legal seat of the arbitration shall be Toronto, Ontario.
- 5.2 The Disputing Parties share an intention to hold hearings at ICSID's facilities in Washington, D.C. subject to travel restrictions or other impediments that may not make that feasible at the time of a hearing. The Tribunal may also hold hearings by telephone or videoconference after hearing the Disputing Parties and taking into account all relevant circumstances. Unless otherwise agreed by the Disputing Parties, the Tribunal may meet at any location or by any means it considers appropriate for any other purpose.
- 5.3 The Tribunal may deliberate and conduct internal meetings at any place it considers convenient, including by video or telephone conference. Irrespective of the place where an award or order is signed, it will be deemed to have been issued at the legal seat of the arbitration.

6. APPLICABLE LAW AND ARBITRATION RULES

- 6.1 The governing law for this arbitration is the NAFTA and applicable rules of international law (*per Article 1131 of the NAFTA*).
- 6.2 In addition to the provisions of this Procedural Order, the procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules ("UNCITRAL Rules") except as modified by the provisions of Section B of Chapter 11 of the NAFTA (*per Article 1120(2) of the NAFTA*). If these provisions and rules do not address a specific procedural issue, the Tribunal shall, after consultation with the Disputing Parties, determine the applicable procedure. In addition, the Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration.

7. PROCEDURAL LANGUAGE, TRANSLATION AND INTERPRETATION

- 7.1 The language of the arbitration shall be English.
- 7.2 All written submissions and administrative or procedural correspondence shall be submitted in English, provided that witness statements or expert reports may be submitted in the principal language of the witness or expert and shall be accompanied by an English translation.
- 7.3 All documentary evidence in a language other than English shall be translated to English by the Disputing Party submitting that evidence at its own cost. If the document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any Party or on its own initiative. Translation of documents into English need not be certified. However, if a dispute arises as to the accuracy of a translation, the matter shall be decided by the Tribunal. Witness or expert testimony in a language other than English shall be interpreted simultaneously to English. The costs of the interpreter(s) will be paid from the advance payments made by the Disputing Parties, without prejudice to the decision of the Tribunal as to which Disputing Party shall

Procedural Order No. 1

ultimately bear those costs. The Disputing Parties agree that the costs shall be borne by the Disputing Party who proffered the witness testimony.

8. CALENDAR

- 8.1 The Government of Canada will file its Statement of Defence on 26 June 2020, subject to any impediments caused by the spread of COVID-19. Canada will provide the Claimant with an update on the filing date by 1 June 2020. If the Statement of Defence is filed on 26 June 2020, the Disputing Parties shall attempt to come to an agreement on the procedural calendar for this arbitration by 10 July 2020. A procedural hearing has been set on 10 July 2020 with the Tribunal in the case that the Disputing Parties are unable to come to an agreement. If the Statement of Defence has not been filed on 26 June 2020, the Disputing Parties have agreed that the deadline to establish a procedural calendar and the procedural hearing shall be on 31 July 2020. The Disputing Parties should use their best efforts in advance of the filing of the Statement of Defence to begin work on establishing a procedural timetable.

9. WRITTEN SUBMISSIONS

- 9.1 Electronic versions of written submissions, including briefs, memorials, expert reports, and witness statements, and indices of exhibits and legal authorities, shall be filed in MS Word or "searchable" PDF format. Electronic filings and the accompanying indexes shall follow the naming conventions in **Annex A**.
- 9.2 On the date on which a written submission is due, the relevant Disputing Party shall submit an electronic version of the written submission and an index of its exhibits and legal authorities, if any, by e-mail to the other Disputing Party, and to the Registry.
- 9.3 Within five (5) calendar days following the filing of its written submissions by e-mail (provided the fifth day is not a weekend or holiday and, if so, the delivery shall be made on the next business day), the submitting Disputing Party shall file through a secure FTP site that will be created by ICSID for purposes of this case, which can only be accessed by counsel to the Disputing Parties, each arbitrator, and the Registry, its submissions, exhibits and legal authorities, and Consolidated Hyperlinked Index in electronic format, either by MS Word, or "searchable" PDF format.
- 9.4 Written submissions and correspondence shall be deemed to have been timely filed if sent via e-mail on or before midnight Eastern Time on the date due.
- 9.5 In instances where the Tribunal orders simultaneous filings, the procedure shall be as follows:
- a) Each Disputing Party shall file its submission with the Registry and the arbitrators by the agreed deadline.
 - b) Each Disputing Party shall then notify the other Disputing Party that it has filed its submission.
 - c) The Registry will hold the submissions until both simultaneous submissions have been received. Once both submissions have been received, the Registry will then circulate the submissions to the Disputing Parties. Due to the agreed midnight deadline, it is understood that in some cases the Disputing Parties may not receive the submissions until the following morning. In such circumstances, the Registry will use best efforts to circulate the submissions by 9 a.m. Eastern Time the following morning.

Procedural Order No. 1

9.6 The Disputing Parties shall limit the scope of responsive written submissions and supporting evidence to responding to or rebutting the previous submissions of the other Disputing Party.

10. EXHIBITS AND LEGAL AUTHORITIES

10.1 The Disputing Parties shall identify each exhibit and legal authority submitted to the Tribunal with a distinct number. Exhibits and legal authorities shall follow the naming conventions in **Annex A**.

10.2 Each pleading shall be accompanied by a cumulative index of the supporting exhibits and legal authorities. An index of exhibits must set forth for each exhibit: (a) the exhibit number; (b) the date of the exhibit; and (c) a title or other identifying information of the exhibit. An index of legal authorities must set forth for each legal authority: (a) the legal authority number; (b) the date of the legal authority; and (c) the title of the legal authority.

10.3 A Disputing Party may elect to file a hyperlinked version of a brief or memorial. The hyperlinked version may be provided after the brief or memorial is filed.

10.4 The Disputing Parties shall submit all exhibits together with written submissions expressly referring to them. As a general rule, the Tribunal shall not receive any exhibits that have not been introduced with a written submission.

10.5 In exceptional cases, the Tribunal may allow a Disputing Party upon requesting leave and after hearing the other Disputing Party, to submit additional exhibits at a later stage of the proceedings if appropriate in view of all the relevant circumstances. If the Tribunal grants such an application for the submission of additional exhibits, the Tribunal shall ensure that the other Disputing Party is afforded sufficient opportunity to make its observations concerning the exhibits.

10.6 The use of demonstrative exhibits in aid of argument (such as charts or tabulations) will be allowed at oral hearings, provided that no new evidence is contained therein, and that such exhibits include citations to the relevant record. A hard copy of any such demonstrative exhibit shall be simultaneously provided by the Disputing Party submitting such exhibit to the other Disputing Party, to the Registry, to each arbitrator, and to the court reporter.

Procedural Order No. 1

- 10.7 All documents, including both originals and copies, submitted to the Tribunal shall be deemed to be authentic unless disputed by the other Disputing Party, in which case the Tribunal will determine whether authentication is necessary.
- 10.8 The Disputing Parties shall either submit all documents to the Tribunal in complete form or indicate the respects in which any document is incomplete.

11. **DOCUMENT PRODUCTION**

- 11.1 Document production issues will be the subject of a separate procedural order to be issued by the Tribunal.

12. **WITNESSES**

- 12.1 Any person may present evidence as a witness, including a Disputing Party or a Disputing Party's officer, employee, or other representative.
- 12.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. The witness statement(s) for each witness shall, except as provided herein, comprise the affirmative testimony of that witness. The Tribunal shall not admit testimony of a witness who has not submitted a written witness statement.
- 12.3 Witness statements shall be submitted together with the Disputing Parties' memorials. The witness statements shall be numbered separately from other documents and follow the naming conventions in **Annex A**.
- 12.4 Each witness statement shall state: (1) the name and address of the witness; (2) his or her relationship to, and interest in, any of the Disputing Parties in this arbitration; (3) an affirmation of the truth of the witness statement; and (4) the date and place of signature.
- 12.5 Only witnesses who are called to be cross-examined by the other Disputing Party, or who are directed to appear by the Tribunal, shall testify at the hearing. Notwithstanding the preceding, at the request of a Disputing Party, the Tribunal may allow a witness offered by that Disputing Party but not called to be cross-examined by the other Disputing Party, or directed by the Tribunal to appear, to testify at the hearing.
- 12.6 Each Disputing Party shall be responsible for ensuring the attendance of its own witnesses at the applicable hearing, except when the other Disputing Party has waived cross-examination of a witness, the Tribunal does not direct his or her appearance, and the Disputing Party decides not to call the witness. Each Disputing Party shall cover the costs of appearance of its own witnesses. The Tribunal will decide upon the appropriate allocation of such costs in the final award or at the time the arbitration is concluded.
- 12.7 If a witness cannot appear during the scheduled dates or without notice fails to appear when first summoned to a hearing, the Tribunal may, at its discretion, summon the witness to appear a second time, if it is satisfied that: (1) there was a compelling reason for the witness' first failure

Procedural Order No. 1

to appear; (2) the testimony of the witness is relevant to the adjudication of the dispute; and (3) providing a second opportunity for the witness to appear will not unduly delay the proceeding.

- 12.8 The Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear when summoned to a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. A witness who is not called for cross-examination has a valid reason not to appear. The Tribunal may decline to consider the witness statement of a witness who fails to appear and does not provide a valid reason.
- 12.9 Witnesses shall be examined in person except in exceptional circumstances as determined by the Tribunal.
- 12.10 At any hearing the examination of each witness shall proceed as follows:
- a) the Disputing Party summoning the witness may briefly (for a maximum of five minutes) examine the witness for the purpose of introducing the witness; summarizing briefly the testimony the witness has already provided; correcting, if necessary, any errors in the witness statement; and addressing matters arising after the witness statement was given, if any;
 - b) the adverse Disputing Party may then cross-examine the witness;
 - c) the Disputing Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination. At the discretion of the Tribunal, the adverse Disputing Party may re-cross examine the witness, with the re-cross examination limited to the witness' testimony on re-examination; and
 - d) the Tribunal may examine the witness at any time, either before, during or after examination by one of the Disputing Parties.
- 12.11 In advance of the pre-hearing conference, each Disputing Party shall provide to the other Disputing Party, with a copy to the Tribunal, the names of the witnesses it requests to be present for cross-examination at the hearing. During the pre-hearing conference, the Tribunal in consultation with the Disputing Parties shall determine the order in which such witnesses shall be examined.
- 12.12 Unless agreed otherwise, a fact witness shall not be present in the hearing room during the opening statement, the hearing of oral testimony, nor shall he or she read any transcript of any oral testimony, prior to his or her examination. This limitation does not apply to expert witnesses or to a witness of fact if that witness is a party representative.
- 12.13 The party representative referred to in section 12.12 means the individual(s) designated by a Disputing Party to act as its agent and give instructions to counsel at the hearing.
- 12.14 Issues concerning the attendance during the hearing of any person not entitled to view certain materials because they are designated either "Confidential" or "Restricted Access" shall be governed by the Confidentiality Order entered in this arbitration.
- 12.15 It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations. Once direct examination begins, a witness shall remain sequestered from counsel until his or her testimony is complete.

Procedural Order No. 1

- 12.16 The facts contained in the written statement of a witness whose cross-examination has been waived by the other Party and who has not been called by the Tribunal to testify shall not be deemed established by the sole fact that no cross-examination has been requested. The Tribunal will assess the weight of the witness statement taking into account the entire record and all the relevant circumstances.

13. EXPERTS

- 13.1 Each Disputing Party may retain and submit the evidence of one or more experts to the other Disputing Party, the Registry and the Tribunal. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted as exhibits with the Disputing Parties' memorials, in which case reference to such exhibits shall be sufficient. The procedural rules set out in the above Section 12 shall apply by analogy to the evidence of experts.
- 13.2 Each expert report shall include the information listed in Section 12.4 above, as well as a statement of qualifications of the expert in the claimed area of expertise. Each expert report shall attach a current curriculum vitae evidencing such qualifications.
- 13.3 Before he or she is cross-examined, each expert shall be permitted to make a brief presentation summarizing the contents of his or her expert report(s) filed by a Disputing Party in the arbitration. The expert shall not be permitted to introduce new expert testimony during this presentation.
- 13.4 The Disputing Parties may, before the pre-hearing conference, discuss or consider other options for presenting expert testimony at the hearing, if appropriate.

14. MOTIONS AND PROCEDURAL REQUESTS

- 14.1 If a Disputing Party introduces a motion or procedural request, as a general rule, the other Disputing Party shall have five business days, not including the day on which the request was made, to reply, unless otherwise agreed by the Disputing Parties or ordered by the Tribunal, taking into account, among other factors as necessary, whether the moving or requesting Disputing Party has provided notification under the Confidentiality Order that its motion or request contains Restricted Access Information. Further submissions on a request shall be at the discretion of the Tribunal.

15. NOTIFICATIONS AND COMMUNICATIONS

- 15.1 The Disputing Parties and their representatives and counsel, or anyone acting on their behalf, shall not engage, directly or indirectly, in any oral or written *ex parte* communications with any Member of the Tribunal in connection with the subject-matter of the arbitration.
- 15.2 The Registry shall be the channel of written communication between the Disputing Parties and the Tribunal.
- 15.3 Each Disputing Party shall address all communications, submissions and documents directly and simultaneously to the other Disputing Party and the Registry, who shall send them to the Tribunal subject to Section 9.

Procedural Order No. 1

- 15.4 The Registry shall not be copied on direct communications between the Disputing Parties which are not intended to be transmitted to the Tribunal.
- 15.5 All notifications and communications in this arbitration shall be valid, provided that they are made: in the case of the Tribunal, to each of its members at the addresses set out in Section 3 above, or as subsequently notified during the course of the proceedings; in the case of the Disputing Parties, to their respective counsel at the addresses set out in Section 2 above, or as subsequently notified during the course of the proceedings. Any changes in the addresses or other particulars set out in Sections 2 or 3 above shall be notified to the Disputing Parties' counsel, the Tribunal and the Registry. Prior to the receipt of such notification, all communications and notifications may be validly made to addresses set out in Section 2 above.
- 15.6 Subject to Section 9 above, all notifications and communications by the Disputing Parties and by the Tribunal shall be made by e-mail.

16. NON-DISPUTING NAFTA PARTIES

- 16.1 The Governments of Mexico and the United States may attend hearings and make submissions to the Tribunal in accordance with Article 1128 of the NAFTA by the dates to be indicated in a separate procedural calendar or as determined by the Tribunal. Subject to the Confidentiality Order, they shall be entitled to receive a copy of the evidence and submissions referred to in Article 1129 of the NAFTA.
- 16.2 The Disputing Parties shall have the opportunity to comment on any Article 1128 submission by the relevant date indicated in the procedural calendar.

17. AMICI

- 17.1 If a request for the submission of an amicus curiae brief were to be filed by the date indicated in the procedural calendar, the Tribunal would give the appropriate directions in the exercise of its powers under Article 15 of the UNCITRAL Rules and take into consideration the recommendation of the North American Free Trade Commission on non-disputing party participation of 7 October 2003.
- 17.2 By the relevant dates to be indicated in the procedural calendar or as determined by the Tribunal, the Disputing Parties shall have the opportunity to: (1) make submissions on any request for the submission of an amicus curiae brief; and (2) file simultaneous observations on issues raised in any amicus curiae brief submitted pursuant to a decision of the Tribunal.

18. QUORUM AND DECISIONS OF THE TRIBUNAL

- 18.1 The presence of all three members of the Arbitral Tribunal shall constitute a quorum and shall be required to conduct proceedings unless the Disputing Parties agree otherwise.
- 18.2 The arbitrators and the Disputing Parties agree that the Presiding Arbitrator may sign procedural rulings alone provided that the Presiding Arbitrator consults with the other arbitrators, excepting requests for an extension of time where the urgency of the request is such that no consultation with the other arbitrators is feasible.

Procedural Order No. 1

18.3 The Tribunal will draft all awards and decisions within a reasonable time period. If a decision, other than an award, has not been issued within one month after the final submission on a particular matter, the Tribunal will provide the Parties with status updates every month. If an award has not been issued within six months after the final submission, the Tribunal will provide the Parties with status updates every three months.

19. STATUS OF ORDERS

19.1 Any order of the Tribunal may, at the request of a Party or at the Tribunal's own initiative, be varied if the circumstances so require.

20. FEES AND EXPENSES OF THE MEMBERS OF THE ARBITRAL TRIBUNAL

20.1 Each member of the Tribunal shall receive:

- a) a fee of USD 3,000, or such other fee as may be set forth from time to time in the ICSID Schedule of Fees, for each day of participation in meetings of the Tribunal or 8 hours of other work performed in connection with the proceeding or pro rata;
- b) subsistence allowances and reimbursement of travel (in business class) and other expenses within the limits set forth in Regulation 14 of the ICSID Administrative and Financial Regulations and the Memorandum on the Fees and Expenses of ICSID Arbitrators.

20.2 All payments to the Tribunal shall be made from deposits placed with the Registry.

21. ADVANCES OF ARBITRATION COSTS

21.1 Without prejudice to the final decision of the Tribunal regarding allocation of costs, the Claimant and the Respondent agree to share equally in advance payments for the fees and costs of the Tribunal and of the Registry.

21.2 In accordance with Article 41(1) of the UNCITRAL Rules and in order to ensure sufficient funds for the Tribunal's fees and expenses, the Disputing Parties are requested to deposit a sum of **USD 300,000** (i.e., USD 150,000 from each side) by transfer in accordance with the Registry's letter of 9 April 2020.

21.3 The Registry will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may request the Disputing Parties to make supplementary deposits in accordance with Article 41(2) of the UNCITRAL Arbitration Rules.

21.4 When making a request for a supplementary deposit, or upon the request of a Disputing Party, the Registry shall provide the Disputing Parties with a statement of accounts detailing the fees and expenses of the Tribunal and the Registry to date.

21.5 Any transfer fees or other bank charges will be charged by ICSID to the deposit. The funds advanced by the Disputing Parties are deposited in trust funds that generate interest. The interest accrues in favour of each Party.

21.6 The unused balance held on deposit at the end of the arbitration shall be returned to the Disputing Parties in proportion to the payments that they advanced to ICSID, without prejudice to the final decision of the Tribunal as to the allocation of costs.

Procedural Order No. 1

21.7 Upon the issuance of an award, the Tribunal may apportion the costs of the arbitration between the Disputing Parties, if it determines such apportionment is reasonable under the circumstances of the award. In determining the appropriate apportionment of costs, the Tribunal shall consider all relevant circumstances, including: (a) the outcome of any part of the proceeding; (b) the Disputing Parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed. Costs incurred by the Tribunal or the Disputing Parties under paragraphs [16 and 17] of the Confidentiality Order after the dispatch of an award may be resolved by a subsequent order or award of the Tribunal.

22. THIRD PARTY FUNDING

22.1 Each Disputing Party shall file a written notice disclosing its use of third-party funding to cover any of the costs of this arbitration in return for remuneration dependent on the outcome of the dispute. Such notice shall include: (a) the identity of any third-party funder; (b) any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the Claimant in this arbitration (any such terms should be quoted in full in the Claimant's disclosure); and (c) where no such terms set out at (b) above exist, the Claimant is to inform the Tribunal and the Respondent of that fact. The notice shall be sent to the Tribunal and the opposing Disputing Party once the third-party funding arrangement has been agreed.

22.2 Each Disputing Party bears the ongoing duty to disclose any change in the information addressed in Section 22.1 after the initial disclosure, including termination or withdrawal of the third-party funding arrangement.

23. PRE-HEARING CONFERENCE

23.1 A pre-hearing conference shall be held on a date to be determined by the Tribunal by telephone or videoconference between the Tribunal, or its Presiding Arbitrator, and the Disputing Parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.

23.2 The Tribunal shall make best efforts to provide the Disputing Parties, 30 days in advance of the hearing, with a list of questions that it wishes the Disputing Parties to address in their oral submissions.

24. RECORD OF HEARINGS

24.1 Hearings shall be open to the public. The Tribunal shall hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information.

24.2 Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the Disputing Parties and the Members of the Tribunal.

24.3 Verbatim transcripts shall be made of any hearing other than hearings on procedural issues.

24.4 Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the Disputing Parties and Members of the Tribunal in the hearing room. The transcripts of proceedings should be made available on a same day service basis where practicable.

Procedural Order No. 1

24.5 The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the Disputing Parties disagree on corrections to be made to transcripts, the Tribunal shall determine whether any such corrections are to be adopted.

25. TIME LIMITS

25.1 The Tribunal shall, in consultation with the Disputing Parties, fix the time limits in respect of all documents to be filed. In case of urgency, the Presiding Arbitrator may fix a time limit or amend an existing time limit.

26. PUBLICATION

26.1 In accordance with Annex 1137.4 of the NAFTA, the Note of Interpretation of the NAFTA Free Trade Commission of 31 July 2001, and subject to the Confidentiality Order, ICSID shall publish redacted, public versions of: the Notice of Arbitration; Statements; Memorials; witness statements; expert reports; submissions made pursuant to NAFTA Article 1128 and any comments on those submissions; requests for the submission of amicus curiae briefs; transcripts of hearings; procedural rulings; and orders and awards.

26.2 The Disputing Parties also authorise ICSID to publish, on its website, the case details of the case, including the instrument involved and procedural details updates.

27. CONFIDENTIALITY AND PRIVACY

27.1 Matters concerning confidentiality and privacy of the arbitral proceedings, rulings, orders, decisions, awards, submissions and evidence, including the publication of documents produced or filed, shall be the subject of a separate Confidentiality Order.

28. IMMUNITY FROM SUIT

28.1 Neither Disputing Party shall seek to make the Tribunal, the Registry, or any of their members liable in respect of any act or omission in connection with any matter related to the arbitration.

28.2 Neither Disputing Party shall require any member of the Tribunal or the Registry to be a Party or witness in any judicial, administrative, or other proceedings arising out of or in connection with this arbitration.

29. DISPOSAL OF RECORD

29.1 Six months after the Tribunal has notified the final award to the Disputing Parties, the arbitrators shall dispose of the record of the arbitration, unless the Disputing Parties ask that the documents be returned to them or to their counsel, which will be done at the expense of the requesting Disputing Party.

Procedural Order No. 1

Date: 22 April 2020

Mrs. Juliet Blanch
Presiding Arbitrator

Mr. James Hosking

Professor Zachary Douglas

Procedural Order No. 1 – Annex A

ANNEX A

ELECTRONIC FILE NAMING GUIDELINES

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

Documents in a language other than English shall indicate the language in which they are submitted and the corresponding translations.

SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
MAIN PLEADINGS	Title of Pleading
	<i>Memorial on Jurisdiction</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction</i>
	<i>Reply on Annulment</i>
	<i>Rejoinder on Quantum</i>
SUPPORTING DOCUMENTATION Exhibits	C-####
	R-####
	To be produced sequentially throughout the case.
	CLAIMANT'S FACTUAL EXHIBITS
	<i>C-0001</i>
	<i>C-0002</i>
	RESPONDENT'S FACTUAL EXHIBITS
	<i>R-0001</i>
	<i>R-0002</i>
	CLA-####
Legal Authorities	RLA-####
	To be produced sequentially throughout the case.
	CLAIMANT'S LEGAL AUTHORITIES
	<i>CLA-0001</i>
	<i>CLA-0002</i>
	RESPONDENT'S LEGAL AUTHORITIES
	<i>RLA-0001</i>
	<i>RLA-0002</i>
	CWS (or RWS)-Surname of Witness-Name of Submission-Number
	<i>CWS- Jones-Memorial on Jurisdiction</i>
Witness Statements	<i>CWS- Jones-Reply on Jurisdiction-[Second Statement]</i>
	CER (or RER) Expert Report-Surname of Expert-Type-Name of Submission-Number
	<i>RER- Smith-Valuation-Memorial on Quantum</i>
	<i>RER-Smith-Valuation-Reply on Quantum-[Second Report]</i>

Procedural Order No. 1 – Annex A

INDICES	Consolidated Hyperlinked Index
	Index of Exhibits-C-#### to C-####
	<i>Index of Exhibits-C-0001 to C-0023</i>
	Index of Legal Authorities-RLA-### to RLA-###
	<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>
OTHER APPLICATIONS	Name of Application-[Party]-LANGUAGE
	<i>Preliminary Objections under Rule 41(5)</i>
	<i>Request for Bifurcation</i>
	<i>Request for Provisional Measures-[Respondent]</i>
	<i>Request for Production of Documents-[Claimant]</i>
	<i>Request for Stay of Enforcement</i>
	<i>Request for Discontinuance-[Claimant]</i>
	<i>Post-Hearing Brief-[Claimant]</i>
	<i>Costs Submissions-[Respondent]</i>
	<i>Observations to Request for [XX]-[Claimant]</i>