

**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)**

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**PROCEDURAL ORDER NO. 2**

**HEARING PROTOCOL**

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**ARBITRAL TRIBUNAL**

Mrs. Juliet Blanch (Presiding Arbitrator)

Mr. James Hosking

Professor Zachary Douglas

**Secretary of the Tribunal**

Ms. Veronica Lavista

**21 September 2020**

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**I. PROCEDURAL HISTORY**

1. On 16 July 2020, the Disputing Parties agreed that the Hearing on Bifurcation (“Hearing”) would be held on 24 September 2020 via the video streaming platform WebEx.
2. On 8 September 2020, the Disputing Parties proposed a schedule for the Hearing as set out in **Annex A**.
3. On 17 September 2020, the Tribunal sent to the Disputing Parties a Draft Hearing Protocol for their comments.
4. The Tribunal received the comments of the Disputing Parties on 18 September 2020.

**II. ORGANIZATION OF THE HEARING**

**A. DATE AND FORMAT**

5. The Hearing will take place virtually through ICSID’s video conference platform **WebEx** on 24 September 2020. The details to join the WebEx session will be shared by the ICSID Secretariat in advance of the Hearing.
6. In order to accommodate the multiple time zones of all Hearing participants, the Hearing will start at 10am D.C. time. It is expected to conclude by 4pm D.C. time. There will be one 1 hour break.

**B. TIME ALLOCATION**

7. *Opening Statements*: Each Disputing Party shall be allowed a maximum of 1 hour and 30 minutes for its Opening Statement.
8. *Rebuttals*: Each Disputing Party shall be allowed a maximum of 45 minutes for its rebuttal. A Disputing Party may reserve time from its Opening Statement to use in reply or rebuttal. Reply and rebuttal shall be limited to the issues raised in the points or arguments in the prior presentation.
9. *Tribunal Questions*: Time taken by the Tribunal for its own questions during the Disputing Parties’ presentations and the answers to those questions shall not be counted against the Disputing Parties’ time.
10. The Secretary of the Tribunal shall keep a record of the time used and advise the Disputing Parties of the time used.

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**III. DEMONSTRATIVE EXHIBITS**

11. Demonstrative exhibits (including a Power Point or other slide presentations) shall be used in accordance with Section 10.6 of Procedural Order No. 1 (reproduced below), with certain adjustments indicated in paragraph 12 *infra*:

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.

12. To account for the remote nature of the Hearing, Section 10.6 of Procedural Order No. 1 above is amended such that: (i) hard copy submission of demonstratives is not required; and (ii) an electronic copy of each demonstrative shall be distributed by the Disputing Party intending to use it via email sent to the entire case email distribution for each Disputing Party, the Secretary of the Tribunal, the Members of the Tribunal and the court reporter, no later than 1 hour *prior* to its use, in order to facilitate offline access to the demonstrative by the Hearing participants. The Disputing Parties should send .ppt and .pdf versions of their presentations. This will enable participants to print the demonstrative if desired.
13. In addition, promptly after the conclusion of the Hearing, the Disputing Parties shall upload such demonstrative exhibit to the case folder in the BOX filesharing platform, designating each with the corresponding CD-\_\_ or RD-\_\_ number.

**IV. VIDEOCONFERENCE PLATFORM AND SECURITY**

14. The Disputing Parties have agreed to use Cisco WebEx as the videoconferencing platform to host the remote Hearing.
15. The WebEx platform shall be password-protected and restricted to the approved list of Hearing participants.
16. The Disputing Parties shall notify the Tribunal and opposing counsel of all anticipated attendees at least three days before the Hearing, by **21 September 2020**, using the format in **Annex B**.
17. The Disputing Parties may not provide the WebEx password to the virtual hearing room to any person not on the approved list of hearing participants.
18. To avoid any confusion during the Hearing, the participants should join the WebEx platform using the name and affiliation indicated in the attendance sheet.

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19. The President of the Tribunal shall confirm at the start of the Hearing that the only persons permitted to attend the Hearing are those approved by the Disputing Parties and the Tribunal, and that no unauthorized parties shall attend in violation of that agreement.
20. The Secretary of the Tribunal shall identify and announce all participants at the start of the Hearing and confirm any new participant after each break.

**V. ACTIVE PARTICIPANTS**

21. The Secretary of the Tribunal or other ICSID staff shall serve as the “host” of the Hearing session. The host will have the ability *inter alia* to admit and exclude participants and to mute participants’ microphones.
22. Before the Hearing, the Disputing Parties shall notify the Secretary of the Tribunal who will be the active speaker(s) to present arguments during the Hearing.
23. If at any point the Tribunal members, or the Parties’ active speakers are not visible and cannot be heard through WebEx, the Secretary of the Tribunal shall be immediately alerted in order to resolve the issue as soon as possible.
24. The other Hearing participants shall be muted and will not appear on video.
25. The Secretary of the Tribunal shall monitor the connections of all participants; if any member of the Tribunal, or active speaker is disconnected, the Secretary of the Tribunal shall pause the Hearing until he or she is able to reconnect. A telephone dial-in shall be available in the event a Tribunal member or active speaker is unable to reconnect to WebEx.

**VI. TECHNOLOGY**

26. Each Disputing Party is responsible for ensuring that its representatives have reliable, high-speed Internet connections and suitable video and audio capabilities and equipment.
27. The Disputing Parties shall adhere, to the extent possible, to the following recommendations for video and audio technology, Internet connections, and equipment.

a. Video

- i. Generally, the Disputing Parties shall aim to comply with the following:
  1. Receiving 1080p HD video – 2.5 Mbps upload/download
  2. Sending 1080p HD video – 3Mbps upload/download

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ii. The Disputing Parties at a minimum shall ensure that their representatives meet the recommended requirements of the WebEx platform.

b. Audio

i. A headset with integrated microphone is preferred.

ii. If a speaker is used, it shall have sufficient volume to be audible for all participants.

iii. In order to minimize background noise, participants shall mute their microphone and all electronic devices when others are speaking.

c. Connection

i. A wired connection is preferred over wireless connections.

1. Stable, reliable Internet connection.

2. Minimum of 3 Mbps upload/download and 0% packet loss is preferred.

d. Virtual breakout rooms

i. ICSID shall arrange for breakout rooms for the Tribunal members to meet privately.

ii. The Disputing Parties shall arrange for their own breakout rooms.

28. The Secretary of the Tribunal shall participate in technical preparation with the Disputing Parties and the Members of the Tribunal prior to the Hearing.

29. The Disputing Parties agree to use best efforts to cooperate on technical issues that may arise to ensure the efficient and orderly conduct of the Hearing.

**VII. LANGUAGE**

30. Interpretation will not be provided at the Hearing. All arguments will be presented in English.

**VIII. TRANSCRIPTS AND RECORDINGS**

31. Sections 24.2 to 24.5 of Procedural Order No. 1 (reproduced below) will apply to transcript and sound recordings.

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.

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

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.

32. The live transcription will not be visible through WebEx, but will be made available on a website provided by the court reporter.
33. The link for the live transcription shall be restricted to the approved list of hearing participants.
34. The Disputing Parties may not provide the link for the live transcription website to any person not on the approved list of hearing participants.

**IX. TRANSPARENCY**

35. In accordance with Section 24.1 of the Procedural Order No. 1 hearings shall be made available to the public.
36. In this regard, the Disputing Parties agree that a video recording of the Hearing shall be made. The video recording will then be made available to the public by streaming the recording on the ICSID website as soon as possible after the Hearing.
37. Before streaming the recording on the ICSID website and in order to avoid the disclosure of confidential or restricted access information, the recording will be edited after the Hearing in accordance with the following Confidentiality Protocol:
  - i. At any time during the Hearing, the Disputing Parties may request that a part of the Hearing be held in private and thus excluded from the recording. To this effect, a Disputing Party shall orally inform the Tribunal before topics are raised (or immediately as they begin to be raised) which could reasonably be expected to address confidential information.
  - ii. If the other Disputing Party has an objection to the request, it shall immediately alert the Tribunal, which shall hear the Disputing Parties and decide on the matter. The discussion between the Disputing Parties and the Tribunal shall be held privately and excluded from the recording;
  - iii. Resumption of the non-confidential part of the Hearing shall be orally requested by the same Disputing Party which made the confidentiality request or by the other Disputing Party, if it deems it necessary;
  - iv. The Tribunal shall rule on any dispute between the Disputing Parties in that respect;

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- v. In order to minimize the number of interruptions, the Disputing Parties are invited to organize the topics addressed during their oral statements so that those which involve confidential documents and information are grouped together, wherever possible;
  - vi. Exceptionally, either Disputing Party may request that a specific section of the Hearing be considered confidential and therefore excluded from the recording AFTER the allegedly confidential document or information has been discussed, addressed or shown by the Disputing Party (“ex-post confidentiality requests”). The Disputing Party making the ex-post confidentiality request shall be responsible for providing to the Tribunal, the Secretary of the Tribunal and the opposing Disputing Party the exact period of time which it seeks to be removed from the recording. If the opposing Disputing Party has an objection to such request, the Tribunal shall decide after Hearing both Disputing Parties. The timeframe for these requests shall be those in sections 16 and 17 of the Confidentiality Order.
  - vii. The Disputing Parties will provide their suggested edits to ICSID who will edit the recording and the transcripts accordingly and send them to Disputing Parties for their confirmation. The Tribunal will decide if there are any pending disagreements. ICSID will then publish the edited recordings on the Centre’s website.
38. ICSID will announce the Hearing on the Centre’s website three days before the Hearing, below is a draft of the public announcement:

*“A hearing on bifurcation in the above case is scheduled to take place remotely on 24 September 2020.*

*Pursuant to Section 24.1 of Procedural Order No. 1, the hearing shall be open to the public, except for those parts involving confidential information. A video of the hearing will be streamed through a videoconference platform as soon as possible after the hearing.*

*Please continue to monitor our website for further announcements with the exact dates and times of the streaming.”*

**Date:** 21 September 2020

**On behalf of the Tribunal:**

[Signed]

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Mrs. Juliet Blanch  
Presiding Arbitrator

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**ANNEX A**

**Hearing on Bifurcation – Agenda**

24 September 2020 – All times indicated are in D.C. time

10:00-10:15	Introductions
10:15 to 11:45	Respondent Argument
11:45 to 13:15	Claimant Argument
13:15 to 14:15	Break
14:15 to 15:00	Respondent Reply
15:00 to 15:45	Claimant Reply

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**ANNEX B**

**WESTMORELAND MINING HOLDINGS, LLC v. GOVERNMENT OF CANADA  
(ICSID CASE NO. UNCT/20/3)**

**Hearing on Bifurcation**

24 September 2020 at 10:00 (Washington, D.C.)

**LIST OF PARTICIPANTS**

<b>TRIBUNAL</b>	
Mrs. Juliet Blanch	President
Mr. James Hosking	Arbitrator
Professor Zachary Douglas	Arbitrator

<b>ICSID SECRETARIAT</b>	
Ms. Veronica Lavista	Secretary of the Tribunal

<b>CLAIMANT</b>	
<b>Mr./Ms. First Name/ Last Name</b>	<b>Affiliation</b>
<i>Counsel:</i>	
<i>Parties:</i>	

<b>RESPONDENT</b>	
<b>Mr./Ms. First Name/ Last Name</b>	<b>Affiliation</b>
<i>Counsel:</i>	
<i>Parties:</i>	