

IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED
STATES-MEXICO AGREEMENT AND CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE
AGREEMENT

- and -

THE 2013 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW

- between -

WESTMORELAND COAL COMPANY

Claimant

and

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/23/2)

PROCEDURAL ORDER NO. 1

Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Mr. Laurence Shore

Ms. Judith Levine

Assistant to the Tribunal

Dr. Magnus Jesko Langer

Secretary of the Tribunal

Ms. Anna Holloway

5 May 2023

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INTRODUCTION

The first session of the Tribunal was held on 18 April 2023, at 9:30 am (ET time), by videoconference. The session was adjourned at 11:00 am (ET time).

An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the Parties.

Participating in the conference were:

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Laurence Shore, Arbitrator
Ms. Judith Levine, Arbitrator

Assistant to the Tribunal

Dr. Magnus Jesko Langer

ICSID Secretariat

Ms. Frauke Nischke, Team Leader/Legal Counsel
Ms. Ekaterina Minina, ICSID Paralegal

Attending on behalf of the Claimant

Mr. Javier Rubinstein, King & Spalding LLP
Ms. Lauren Friedman, King & Spalding LLP
Mr. Rikki Stern, King & Spalding LLP
Mr. Tamzin Parzen, King & Spalding LLP
Mr. Jeremy Cottrell, Westmoreland Mining LLC¹

Attending on behalf of the Respondent

Ms. Krista Zeman, A/Deputy Director and Senior Counsel, Trade Law Bureau, Government of Canada
Ms. Heather Squires, Deputy Director and Senior Counsel, Trade Law Bureau, Government of Canada
Ms. E. Alexandra Dosman, Counsel, Trade Law Bureau, Government of Canada
Mr. Mark Klaver, Counsel, Trade Law Bureau, Government of Canada
Ms. Maria Cristina Harris, Counsel, Trade Law Bureau, Government of Canada
Mr. Christopher Koziol, Counsel, Trade Law Bureau, Government of Canada
Ms. Marianna Maza Pinero, Paralegal, Trade Law Bureau, Government of Canada
Mr. Kyle Dickson-Smith, Counsel, Legal Services Division, Government of Alberta, Canada

¹ The Parties are in ongoing discussions about Mr. Cottrell's affiliation with the Claimant.

Mr. Opeyemi Bello, Counsel, Legal Services Division, Government of Alberta, Canada
Mr. Kristopher Lensink, Counsel, Legal Services Division, Government of Alberta, Canada
Ms. Mary Ballantyne, Executive Director, International Trade Policy, Government of Alberta, Canada
Ms. Sheri Anderson, Trade Policy Negotiator, International Trade Policy, Government of Canada
Mr. Michael Wylie, Deputy Director, Investment Trade Policy, Government of Canada
Ms. Elena Lapina, Trade Policy Analyst, Investment Trade Policy, Government of Canada
Mr. Matthew Noel, Junior Trade Policy Analyst, Investment Trade Policy, Government of Canada
Ms. Louise McIsaac, Counsel, Environmental Legal Services, Justice Canada
Ms. Sarah Cosgrove, Manager, Compliance and Regulations, Carbon Markets Bureau, Environmental Protection Branch Environment and Climate Change Canada
Mr. Daragh Byrne, Counsel, Finance Legal Services, Government of Canada

The Tribunal and the Parties considered:

- The draft Terms of Appointment and the draft Procedural Order circulated by the Tribunal on 21 March 2023;
- The Parties' comments on these Drafts received on 13 April 2023, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree;
- The draft Confidentiality Order circulated by the Parties on 13 April 2023.

During the session, the Parties agreed to consolidate the draft Terms of Appointment and the draft Procedural Order into a single procedural order. Following the session, the Tribunal now issues the present order, which implements such agreement and sets out the procedural rules that govern this arbitration.

1. THE PARTIES

1.1 The claimant is Westmoreland Coal Company (the "Claimant" or "WCC"), a corporation organized under the laws of the United States. The Claimant is represented in this arbitration by:

Mr. Javier H. Rubinstein
Mr. Kevin D. Mohr
Ms. Lauren F. Friedman
Mr. Cedric Soule
Ms. Rikki Stern
Ms. Tamsin Parzen
Ms. Emma Iannini
KING & SPALDING LLP
110 N Wacker Drive
Suite 3800
Chicago, IL 60606
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lfriedman@kslaw.com
csoule@kslaw.com
rstern@kslaw.com
tparzen@kslaw.com
eiannini@kslaw.com

1.2 The respondent is the Government of Canada (the “Respondent” and, jointly with the Claimant, the “Parties”, and each a “Party”). The Respondent is represented in this arbitration by:

Ms. Krista Zeman

Ms. Heather Squires

Ms. Alexandra Dosman

Mr. Mark Klaver

Ms. Maria-Cristina Harris

Mr. Christopher Koziol

Ms. Darian Bakelaar

Ms. Marianna Maza Pinero

Trade Law Bureau (JLT)

Global Affairs Canada

125 Sussex Drive

Ottawa, Ontario K1A 0G2

Canada

Email: Krista.Zeman@international.gc.ca

Heather.Squires@international.gc.ca

Alexandra.Dosman@international.gc.ca

Mark.Klaver@international.gc.ca

MariaCristina.Harris@international.gc.ca

Christopher.Koziol@international.gc.ca

Darian.Bakelaar@international.gc.ca

Marianna.MazaPinero@international.gc.ca

1.3 All correspondence and documents in this arbitration directed to the Parties shall be delivered to the Parties’ representatives at the addresses set out above.

2. THE ARBITRAL TRIBUNAL

2.1 The Claimant appointed as arbitrator:

Mr. Laurence Shore

Bonelli Erede

1 Via Barozzi

20122 Milan

Italy

Email: laurence.shore@belex.com

2.2 The Respondent appointed as arbitrator:

Ms. Judith Levine

Levine Arbitration
13 Glenview Street
Paddington, NSW
Australia
Email: judithlevine@levinearbitration.com

2.3 The Parties appointed as President of the Tribunal:

Prof. Gabrielle Kaufmann-Kohler

Lévy Kaufmann-Kohler
3-5 rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
Switzerland
Email: gabrielle.kaufmann-kohler@lk-k.com

2.4 The Parties having confirmed the appointment of Prof. Kaufmann-Kohler by correspondence of 1 and 14 March 2023, the Tribunal is deemed to have been constituted as of 14 March 2023 in accordance with Article 1123 of the North American Free Trade Agreement (“NAFTA”).

2.5 Each Member of the Tribunal confirms that she or he is, and shall remain, impartial and independent of the Parties. In the context of the constitution of the Tribunal, Prof. Kaufmann-Kohler, Mr. Shore and Ms. Levine made disclosures. The Parties confirm that they have seen these disclosures and that they have no objection arising from the disclosures or otherwise to the constitution of the Tribunal or to any of its Members on the basis of facts of which they have knowledge. Each Member of the Tribunal confirms that she or he will promptly disclose any circumstances likely to give rise to justifiable doubts as to her or his impartiality or independence that may arise in the future. The Tribunal will take into account the IBA Guidelines on Conflicts of Interest, 2014.

2.6 For the Members of the Tribunal to fulfil their continuing disclosure obligations, the Tribunal seeks the cooperation of each Party in promptly drawing to the Tribunal’s attention any circumstances known to that Party in respect of which it considers that further information would be appropriate as soon as such circumstances become known to that Party.

2.7 If an Arbitrator is replaced for any reason, 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, following consultation with the Parties.

3. CASE ADMINISTRATION AND APPOINTING AUTHORITY

3.1 By agreement of the Parties, the International Centre for Settlement of Investment Disputes (“ICSID”) shall serve as registry (“Registry”) and administer the arbitral proceedings on the following terms:

- a. In consultation with the Tribunal, the Secretary-General of ICSID has designated Ms. Anna Holloway, legal counsel, or such other person as the Secretary-General may notify the Tribunal and the Parties from time to time, to act as Secretary of the Tribunal.
- b. ICSID shall maintain an archive of correspondence and submissions. ICSID shall also provide the Parties and the Tribunal with administrative or logistical support, if necessary.
- c. ICSID shall manage the Parties’ deposits to cover the costs of the arbitration, subject to the Tribunal’s supervision.
- d. ICSID shall create and maintain a secure online platform for the purposes of filing or producing large documents in this proceeding.
- e. ICSID shall create and maintain an online database or website for the publication of documents in accordance with Procedural Orders Nos. 1 and 2.
- f. If needed, ICSID shall make its hearing and meeting rooms available to the Parties and the Tribunal at no or at reduced charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings shall be borne by the Parties, and paid pursuant to paragraph 3.4 below.

3.2 The contact details of the Tribunal Secretary are as follows:

Ms. Anna Holloway
ICSID
1818 H Street, N.W.
MSN C3-300
Washington, D.C. 20433
U.S.A.

Phone No. +1 (202) 473-7762
Fax No. +1 (202) 522-2615
E-mail: aholloway@worldbank.org
Paralegal: eminina@worldbank.org

For local messenger deliveries, the contact details are:

Ms. Anna Holloway
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
U.S.A.
Phone No. +1 (202) 458-1534

- 3.3 In accordance with Article 1124 of the NAFTA, the Secretary-General of ICSID shall act as the Appointing Authority in this arbitration.
- 3.4 Work carried out by ICSID, and costs of the proceeding, shall be paid in accordance with ICSID's Schedule of Fees (2022) from the deposits placed with ICSID.

4. ASSISTANT TO THE TRIBUNAL

- 4.1 With the consent of the Parties, the Tribunal has appointed as Assistant to the Tribunal:

Dr. Magnus Jesko Langer
Lévy Kaufmann-Kohler
3-5 rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
Switzerland
Email: magnusjesko.langer@lk-k.com

- 4.2 The Assistant is and shall remain impartial and independent of the Parties. His CV has been circulated to the Parties.
- 4.3 The Assistant shall undertake only such specific tasks as are assigned to him by the Tribunal or the President, which may include:
- a. assisting the Tribunal or the President in the review of the evidence and of the issues in dispute, including through the review of submissions and evidence, preparation of summaries and/or memoranda, and research on specific factual or legal issues;
 - b. assisting the Tribunal or the President in the preparation and communication of the Tribunal's decisions to the Parties on issues of procedure and substance, including by preparing initial drafts of procedural orders and awards, under the direction and supervision of the President; and
 - c. providing other administrative support to the Tribunal and the President, at any time, especially during hearings and deliberations, which the Assistant may attend.

4.4 Under no circumstances shall the Tribunal or the President delegate any decision-making functions to the Assistant. The Assistant will work at all times under the specific instructions and continuous control and supervision of the President.

4.5 The Assistant will not duplicate the work performed by the Tribunal Secretary.

5. FEES AND EXPENSES OF THE TRIBUNAL AND THE TRIBUNAL ASSISTANT

5.1 In accordance with Article 41 of the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”), which by agreement of the Parties are applicable in this arbitration as recorded in Section 9.1 below, the fees of the Arbitral Tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

5.2 The fees and expenses of each member of the Tribunal shall be determined and paid in accordance with Regulation 14 of the ICSID Administrative and Financial Regulations, the ICSID Schedule of Fees (2022), and the ICSID Memorandum on the Fees and Expenses (2022). On this basis, each member of the Tribunal shall receive:

- a. a fee of USD 500 for each hour of work performed in connection with the proceeding, including each hour spent participating in hearings, sessions and meetings; and
- b. subsistence allowances, reimbursement of travel, including travel time at half of the regular rate, and other fees and expenses within the limits set forth in the ICSID Schedule of Fees (2022) and the ICSID Memorandum on the Fees and Expenses (2022).

5.3 The Assistant shall be remunerated at an hourly rate of USD 280 and shall receive subsistence allowances, reimbursement of travel, including travel time at half of the regular rate, and other fees and expenses within the limits set forth in the ICSID Schedule of Fees (2022) and the ICSID Memorandum on the Fees and Expenses (2022).

5.4 Value Added Tax (VAT) and any other local tax or duty applicable shall also be reimbursed.

5.5 If a hearing is to take place at a location where any member of the Tribunal, the Assistant or the Secretary requires a visa or other permission for entry or work purposes, each Party shall do all things necessary in a timely fashion to assist in obtaining such visa or permission.

5.6 Members of the Tribunal and the Assistant shall submit a statement for fees and expenses to the ICSID Secretariat for payment quarterly.

- 5.7 Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.

6. ADVANCES OF ARBITRATION COSTS

- 6.1 Article 43(1) of the UNCITRAL Rules applies in respect of the advance on costs. 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 ICSID.
- 6.2 The Tribunal has already requested the Parties to make an initial deposit and the Secretary has communicated the account details for payment of the deposit.
- 6.3 The Secretary will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may request the Parties to make supplementary deposits in accordance with Article 43(2) of the UNCITRAL Rules. When making a request for a supplementary deposit, or upon the request of a Party, the Secretary shall provide the Parties with a statement of accounts detailing the fees and expenses of the Tribunal, the Assistant and ICSID to date.
- 6.4 Any transfer fees or other bank charges shall be charged by ICSID to the deposit.
- 6.5 The unused balance held on deposit at the end of the arbitration shall be returned to the Parties by ICSID.
- 6.6 Upon the issuance of the Final Award, the Tribunal may apportion the costs of the arbitration between the Parties, if it determines such apportionment is reasonable under the circumstances of the Final 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 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.

7. SEAT OF THE ARBITRATION

- 7.1 The seat of the arbitration shall be Washington, D.C. 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.

8. LANGUAGE OF THE ARBITRATION

- 8.1 The language of the arbitration shall be English.

9. APPLICABLE PROCEDURAL RULES

- 9.1 This arbitration shall be governed by (in the following order of precedence):

- a. the mandatory rules of the law on international arbitration applicable at the seat of the arbitration;
 - b. by agreement of the Parties, the 2013 UNCITRAL Arbitration Rules, except as modified by the provisions of Section B of Chapter 11 of the NAFTA in accordance with its Article 1120(2) and the procedural rules issued by the Tribunal; and
 - c. this Order and any amendments thereof.
- 9.2 If the provisions therein do not address a specific procedural issue, the applicable procedural issue shall be determined by agreement of the Parties or, in the absence of such agreement, by the Tribunal.
- 9.3 The Tribunal may seek guidance from, but shall not be bound by, the 2020 IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “2020 IBA Rules”).

10. APPLICABLE SUBSTANTIVE LAW

- 10.1 The Tribunal will apply the provisions of the NAFTA, including Article 1131 which reads as follows:

Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.
- 10.2 The Parties shall, in principle, establish the content of the applicable law. While it is not required to do so, the Tribunal may make its own inquiries into the content of the applicable law and refer to sources not cited by the Parties. In so doing, the Tribunal will give the Parties an opportunity to comment on legal sources or positions that depart substantially from the arguments advanced by the Parties.

11. RULINGS AND AWARDS

- 11.1 The presence of all members of the Tribunal, including by any appropriate means of communication, constitutes a quorum for the Tribunal’s decisions.
- 11.2 Decisions shall be taken by a majority of the Members of the Tribunal. The President may decide urgent routine matters (such as requests to extend time limits) without consulting the Members of the Tribunal, subject to possible reconsideration by the full Tribunal.
- 11.3 The President is authorized to issue procedural orders on behalf of the Tribunal, provided that the President 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. An order signed by the Presiding Arbitrator shall be taken to be an order of the Tribunal.

- 11.4 Any procedural 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 after consultation with the Parties.
- 11.5 Procedural Orders made by the Tribunal shall remain in force unless expressly amended or terminated by the Tribunal.
- 11.6 The Tribunal may resolve this dispute by way of one or more awards as it may deem appropriate. All awards shall be in writing and shall state the reasons upon which the award is based.
- 11.7 The Tribunal will issue all rulings, including the award, 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.

12. PROCEDURAL CALENDAR

- 12.1 The procedural calendar for the jurisdictional phase of the arbitration is set forth in Annex 1 hereto.
- 12.2 If needed after the jurisdictional phase, the Tribunal shall, following consultation with the Parties, enter a further procedural order setting out the specific dates for the merits phase.
- 12.3 Upon the request of either Party and a showing of good cause, the Tribunal has the power to modify the procedural calendar.
- 12.4 At any stage of the proceedings, the Parties may seek directions from the Tribunal regarding procedural steps relating to and/or in addition to those set out in the procedural calendar. Subject to exceptional circumstances, if additional steps are required, the Parties and the Tribunal will ensure that they do not jeopardize the hearing dates.

13. NOTIFICATIONS AND COMMUNICATIONS

- 13.1 The rules on filing written submissions and supporting materials, and compliance with time limits for these submissions, are in Sections 14 and 15 below.
- 13.2 All other notifications and communications by the Parties and by the Tribunal shall be made by email.

- 13.3 The 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.
- 13.4 The Parties shall address all their communications referred to in Section 13.2 above directly to each member of the Arbitral Tribunal, the Assistant, and the Secretary, with a copy to the other Party, as set out below. Communications to be filed simultaneously shall be transmitted to the Secretary only, who shall send them to the Tribunal, the Assistant, and the opposing Party once the communications or submissions are received. Due to the agreed midnight deadline, it is understood that in some cases the Parties may not receive the submissions until the following morning. In such circumstances, the Secretary will use best efforts to circulate the submissions by 9:00 a.m. Eastern Time the following morning.
- 13.5 All notifications and communications in this arbitration shall be valid, provided they are made:
- a. If to the Tribunal, to each member and the Assistant at the addresses set out in Sections 2 and 4 above or notified later in this arbitration, and to the Secretary at the address set out in Section 3 above; and
 - b. If to the Parties, to their respective counsel at the addresses set out in Section 1 above or notified later in this arbitration.
- 13.6 Notifications and communications shall be timely if the email to which they are attached is sent by 23:59 (Eastern Time) of the day of the expiration of the relevant time limit, subject to Section 27.2.

14. WRITTEN SUBMISSIONS

- 14.1 The Parties shall file their memorials in accordance with the procedural calendar set out in Annex 1 and with the rules set out below.
- 14.2 The memorials, witness statements, expert reports, and the list of exhibits and legal authorities shall be uploaded on a secure file-sharing platform administered by ICSID and will be deemed timely if they are uploaded on such platform by 23:59 (Eastern Time) of the day of the expiration of the relevant time limit, subject to Section 27.2. Exhibits and legal authorities shall be uploaded on the platform within three business days from the time limit for the submission.
- 14.3 In their first exchange of submissions on the relevant jurisdiction or merits phase, the Parties shall set forth the facts and legal arguments on which they intend to rely for each relevant phase. Allegations of fact and legal arguments shall be detailed, specific and comprehensive, and shall respond to all allegations of fact and legal arguments made by the other Party. Together with such submissions, each Party shall produce all of the evidence upon which it wishes to rely, including

documentary evidence, written witness statements and expert reports, if any, with the exception of documents to be obtained during the document production phase (if applicable). The Parties shall also produce excerpts of the legal sources they invoke.

- 14.4 In their second exchange of submissions on the relevant jurisdiction or merits phase, absent a showing of good cause, the Parties shall limit themselves to responding to allegations of fact and legal arguments made by the other Party in the first exchange of relevant submissions, or to address elements deriving from evidence obtained during the document production phase (if applicable), unless new facts have arisen after the first exchange of relevant submissions. Together with the second exchange of submissions on the relevant jurisdiction or merits phase, the Parties may file additional documents, witness statements and expert reports only insofar as the relevance of such additional evidence has arisen as a result of the adverse Party's preceding submission (including the documents, witness statements and expert reports produced therewith) or the documents produced by the Parties during the document production phase.
- 14.5 Following each factual allegation, the Parties shall, whenever possible, identify the evidence adduced in support of that allegation. Following each legal argument, the Parties shall, whenever possible, identify the legal authority adduced or to be adduced in support of that argument.
- 14.6 All written submissions shall be divided into consecutively numbered paragraphs.
- 14.7 Electronic versions of written submissions (including witness statements and expert reports; for exhibits see Section 15 below) shall be submitted in either .doc (Word) or text searchable .pdf format, and without password protection.
- 14.8 Neither Party shall be permitted to submit additional or responsive written submissions or documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist, based on a reasoned written request followed by observations from the other Party.
- 14.8.1 If a Party requests leave to file additional or responsive written submissions or documents, that Party may not annex the written submission or documents that it seeks to file to its request.
- 14.9 If the Tribunal grants an application for submission of an additional or responsive written submission or document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to submit its observations and any responsive documents relating to such a written submission or document.

15. DOCUMENTS

- 15.1 Exhibits and legal authorities shall be consecutively numbered.

- 15.2 Each fact exhibit submitted by the Claimant shall commence with the letter “C” followed by the applicable number. Each fact exhibit submitted by the Respondent shall commence with the letter “R” followed by the applicable number.
- 15.3 Legal authorities shall commence with the letters “CLA” for the Claimant and “RLA” for the Respondent, followed by the applicable number.
- 15.4 A comprehensive index of exhibits listing each exhibit by number, and including the date, type of document, author and addressee (if applicable), title, or other identifying information of the exhibit shall be filed with the written submission. A comprehensive index of authorities listing each legal authority by number and including the legal citation of the legal authority shall be filed with the written submission.
- 15.5 Subject to Section 14.2 above, exhibits shall be annexed to the corresponding written submission. As a general rule, the Tribunal shall not receive any exhibits that have not been introduced with a written submission.
- 15.6 The Parties shall submit exhibits in electronic format, which may be submitted in text searchable .pdf format, and without password protection. Each exhibit shall constitute a single electronic document. Neither Party at this time expects exhibits to be in a language other than English. However, to the extent that any translations are required, translations shall be submitted as separate documents with the same exhibit number, such as C-1_EN and C-1_FR. Electronic versions of exhibits shall commence by the appropriate letter and number, so that they may be ordered consecutively.
- 15.7 Exhibits and legal authorities shall be clearly referenced by their distinct number in the written submissions (including expert reports and witness statements). In addition, any reference to documents filed as exhibits that were received or produced by either Party through document production must identify its corresponding bates number.
- 15.8 Documents shall either be submitted in complete form or the Parties shall indicate in which respect a document is incomplete. All documents filed, including originals and copies, shall be deemed to be authentic and complete, unless disputed by the other Party, in which case the Tribunal will determine whether authentication is necessary.
- 15.9 Exhibits, legal authorities, witness statements and expert reports shall be submitted in the original language together with a translation into English. Whenever long documents need to be translated, the translation may be limited to all relevant passages together with such other portions of the document necessary to put such passages in proper context, except that the Tribunal, *proprio motu* or on request, may require a full translation of documents of particular importance to the dispute.

Unless otherwise ordered by the Tribunal *proprio motu* or on an objection of the other Party, translations will be presumed to be accurate.

- 15.10 Translations need not be certified, unless there is a dispute as to the content of a translation provided and the Party disputing the translation specifically requests a certified version of the whole translation or of the relevant parts, in which case the Tribunal will determine whether certification is necessary.
- 15.11 As a general principle, the cost of a translation shall be borne initially by the Party providing the translation, without prejudice to the decision of the Tribunal as to which Party or Parties shall ultimately bear those costs and in what amount.
- 15.12 The use of demonstratives (such as charts, graphs, tabulations, etc., compiling information that is in the record but is not presented in that form) shall be permitted at the hearing by counsel and experts in their presentations, provided that such exhibits contain no new evidence, and that their sources in the record are referred to. PowerPoint presentations containing such demonstratives shall be submitted in electronic format to the other Party, to each Member of the Tribunal, the Assistant to the Tribunal, the Secretary of the Tribunal, and the court reporter, thirty minutes prior to the presentation.

16. DOCUMENT PRODUCTION

- 16.1 Document production issues will be the subject of a separate procedural order to be issued by the Tribunal in due course.
- 16.2 At this time, the Parties do not anticipate that document production will be necessary during the jurisdictional phase of the proceeding. The Parties agree to meet and confer in due course after the Claimant files its Response to the Respondent's Memorial on Jurisdiction to determine whether, and the procedures for, any targeted document production.

17. WITNESSES

- 17.1 Any person may present evidence as a witness, including a Party or a Party's officer, employee, or other representative.
- 17.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. A person who has not submitted a written witness statement shall not be heard as a witness. A witness's written and signed witness statement(s) shall be used in lieu of direct testimony at the hearing, which may be supplemented with a short 10-minute direct limited to corrections, if any, to any written witness statement(s) and addressing any facts that have arisen after the last opportunity for the Party presenting the witness to submit a written statement.

- 17.3 Each witness statement shall state the witness's name, city of residence, involvement in the case and any past or present relationship to, and interest in, any of the Parties, counsel, or Members of the Tribunal in this arbitration, an affirmation as to the truth of its contents, be signed by the witness and indicate the date and place of signature.
- 17.4 In accordance with Section 14.2 above, each Party will submit its witness statements together with its written submission. The witness statements shall be numbered independently from other documents and properly identified. Each witness statement submitted by the Claimant shall commence with the letters "CWS" followed by the applicable number. Each witness statement submitted by the Respondent shall commence with the letters "RWS" followed by the applicable number. If a Party submits two witness statements of the same witness, the subsequent witness statement shall be identified as "Second".
- 17.5 Witness statements shall be accompanied by any documents or information upon which the witnesses rely, unless such documents or information have already been submitted as exhibits with the Parties' submissions, in which case reference to such exhibits shall be sufficient.
- 17.6 It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements and the examinations. Once direct examination begins, witnesses shall remain sequestered from counsel until their testimony is complete.
- 17.7 Each Party shall be responsible for the attendance of its own witnesses at the hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct the witness's appearance. Accordingly, a witness who has not been called for cross-examination and whose appearance has not been ordered by the Tribunal will not be examined.
- 17.8 The fact that a Party does not call a witness or expert whose statement or report has been submitted with the opposing party's written submissions does not mean that it accepts the content of the witness statement or expert opinion. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances. The same applies in case of partial cross-examination of a witness, regarding the matters that have not been the subject of the cross-examination.
- 17.9 Each Party shall be responsible for the practical arrangements, costs, and availability of the witnesses and experts it offers. The Tribunal will decide upon the appropriate allocation of such costs in the final award.
- 17.10 The Tribunal may, having regard to all the surrounding circumstances, summon the appearance as a witness of a person who may have knowledge of relevant facts and has not been offered as a witness by the Parties.

- 17.11 If a witness cannot appear during the scheduled dates or without notice fails to appear at a hearing (whether called for cross-examination by the opposing Party or called for examination by the Tribunal), the Tribunal may in its discretion allow the witness to appear at another time if satisfied that (i) there was a compelling reason for the first failure to appear, (ii) the testimony of the witness appears to be relevant to the adjudication of the dispute, and (iii) providing a second opportunity for the witness to appear will not unduly delay the proceedings or prejudice the opposing Party.
- 17.12 Witnesses shall be examined in person except in exceptional circumstances as determined by the Tribunal. If circumstances so justify, the Tribunal may allow a witness to appear and be examined by videoconference and will issue appropriate directions.
- 17.13 The Tribunal may consider the written statement of a witness who provides a valid reason for failing to appear at a hearing (whether called for cross-examination by the opposing Party or called for examination by the Tribunal), having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason. A witness who has not been called for cross-examination (or for examination by the Tribunal) has a valid reason not to appear and a witness who has been authorized to testify by videoconference, and does so, is deemed to have appeared.
- 17.14 The order of appearance of fact witnesses during the hearing as well as the modalities of the examinations shall be determined during the pre-hearing conference.

18. EXPERTS

- 18.1 Each Party may retain and produce evidence of one or more independent experts. The provisions set out in relation to the evidence of witnesses in Section 17 (Witnesses) shall apply, *mutatis mutandis*, to the evidence of experts except as stated in this Section.
- 18.2 Subject to Article 1133 of the NAFTA, the Tribunal may, after having heard the Parties, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference and conclusions of any such expert. The Tribunal may, on its own initiative or at the request of a Party, take oral evidence of such expert(s).
- 18.3 In accordance with Section 14.2 above, each Party will submit its expert reports together with its written submission. The expert reports shall be numbered independently from other documents and properly identified. Each expert report submitted by the Claimant shall commence with the letters "CER" followed by the applicable number. Each witness statement submitted by the Respondent shall commence with the letters "RER" followed by the applicable number. If a Party submits two expert reports of the same expert witness, the subsequent report shall be identified as "Second".

18.4 Expert reports shall be accompanied by any documents or information upon which the experts rely, including the native Excel or other spreadsheets containing any underlying formulae used in the expert's calculations, unless such documents or information have already been submitted as exhibits with the Parties' submissions, in which case reference to such exhibits shall be sufficient.

18.5 Each expert report shall include the information listed in Section 17.3 (Witnesses) and:

- a. a description of the instructions pursuant to which the expert is providing her or his opinions and conclusions;
- b. a confirmation that the expert report represents the expert's own, impartial, objective, unbiased opinion which has not been influenced by the pressure of the dispute resolution process or by any Party;
- c. a statement that the expert understands that, in giving her or his report, her or his duty is to the Tribunal, and that she or he complies with that duty;
- d. a current curriculum vitae evidencing the expert's qualifications;
- e. her or his expert opinions and conclusions, including a description of the methods, evidence, and information used in arriving at the conclusions; and
- f. a statement that, if the expert subsequently considers that her or his opinions require any correction, modification, or qualification, she or he will notify the Parties to this arbitration and the Tribunal forthwith.

18.6 Notwithstanding Section 17.7 above, at the request of a Party, the Tribunal may allow an expert offered by that Party but not called to be cross-examined by the other Party, or directed by the Tribunal to appear, to testify at the hearing.

18.7 The order and modalities of the examination of experts at the hearing (including whether experts may make presentations in lieu of direct examination) shall be addressed at the pre-hearing conference.

19. PROCEDURAL REQUESTS

19.1 If a Party introduces a procedural request, as a general rule, the other Party shall have 10 business days, not including the day on which the request was made, to reply, unless otherwise agreed by the Parties or ordered by the Tribunal, taking into account, among other factors as necessary, whether the moving or requesting Party has provided notification under the Confidentiality Order that its request contains Restricted Access Information.

19.2 No further submissions on a request shall be made by either Party without the express authorization of the Tribunal in advance.

20. NON-DISPUTING STATE PARTIES

20.1 The Governments of Mexico and the United States may make submissions to the Tribunal and may attend hearings within the meaning of Article 1128 of the NAFTA by the dates in the 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.

20.2 The Parties shall have the opportunity to comment on any Article 1128 submission by the relevant date indicated in the Procedural Calendar.

21. OTHER NON-DISPUTING PARTIES

21.1 If another non-disputing party applies to file a submission, the Tribunal will give appropriate directions in the exercise of its powers under Article 17 of the UNCITRAL Rules, taking into consideration the recommendation of the NAFTA Free Trade Commission on non-disputing party participation of 7 October 2003.

21.2 The Parties shall have the opportunity to comment on any such application and on any submission by another non-disputing party.

22. HEARING

22.1 On a date to be set by the Tribunal in advance of the hearing, each Party shall communicate the list of witnesses and experts of the other Party whom it intends to cross-examine during the hearing.

22.2 On a date to be determined by the Tribunal in advance of the hearing, each Party shall submit a cumulative index, listing all memorials, expert reports, witness statements, exhibits, and legal authorities filed by that party to date, with hyperlinks to each document.

22.3 The hearings will be held at ICSID's facilities in Washington, D.C., subject to travel restrictions or other impediments. The Tribunal may also hold hearings by telephone or videoconference after consulting the Parties and taking into account all relevant circumstances. On a date to be set by the Tribunal in advance of the hearing, after consultation with the Parties, the Tribunal will determine (i) whether the hearing shall be held in person, online or in a hybrid format, and (ii) if applicable, where the hearing will be held, subject to any later change that the circumstances may require.

22.4 If applicable, the Tribunal will issue an online/hybrid hearing protocol following consultation with the Parties.

- 22.5 On the date provided in Annex 1 hereto, the Tribunal and the Parties will hold a pre-hearing conference to discuss any outstanding questions regarding the organization of the hearing, including oral arguments, examination of witnesses and/or experts, time allocation and logistics. The Tribunal may be represented by the President on this occasion. The Tribunal will circulate to the Parties a draft pre-hearing procedural order sufficiently in advance of the pre-hearing conference.
- 22.6 At the pre-hearing conference, the Parties would welcome guidance from the Tribunal on questions or issues that the Tribunal would like the Parties to address at the hearing.
- 22.7 Unless expressly permitted by the Tribunal, at the hearing, the Parties shall not present new documents or new factual allegations. Each Party may make new legal arguments and, with leave, may present new legal authorities that are responsive to the other Party's most recent round of written submissions or its oral submissions.
- 22.8 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.
- 22.9 The following arrangements shall apply to hearings, other than procedural conferences:
- a. The hearings shall be sound recorded and transcribed verbatim in real time;
 - b. Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to counsel, each member of the Tribunal, the relevant witness/expert, the Assistant and the Secretary of the Tribunal, in the hearing room;
 - c. Documents, such as exhibits, slides and demonstratives presented during the hearing shall be displayed on screens available to counsel, each member of the Tribunal, the relevant witness/expert, the Assistant and the Secretary of the Tribunal;
 - d. Electronic versions of the transcripts shall be uploaded or provided by email on the same day to the Parties and the Tribunal;
 - e. The transcript shall be taken in English. Sound recordings shall be made in English and in any other language used by a witness or expert;
 - f. Testimony in a language other than English shall be interpreted simultaneously into English;
 - g. Any complaint with respect to the interpretation during the hearings shall, in principle, be raised immediately;
 - h. On a date to be determined by the Tribunal in consultation with the Parties at the end of the hearings, the Parties shall agree on the corrections to the transcript.

- 22.10 In principle, each Party will have an equal time allocation for examinations and oral arguments at the hearing, subject to adjustments required or appropriate under the circumstances.
- 22.11 Unless otherwise agreed during the pre-hearing conference, the Parties shall make opening statements. At the pre-hearing conference, the Parties and the Tribunal will discuss the need and modalities for oral closing statements.
- 22.12 In consultation with the Parties, the Secretary shall make the necessary arrangements for the reservation of the hearing rooms, breakout rooms, videoconferencing platform, if applicable, court reporters, interpreters, if any, and other logistics.
- 22.13 The expenses in connection with the hearings will initially be paid from the deposits placed with ICSID, without prejudice to the Tribunal's decision on the costs of the arbitration.

23. PUBLICATION

- 23.1 In accordance with NAFTA Annex 1137.4, 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 Memorials and written submissions of the Parties and decisions of the Tribunal, including the Notice of Arbitration; 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; Orders and Awards.
- 23.2 The Parties also authorize ICSID to publish, on its website, the case details of the case, including the instrument involved and procedural details and updates.

24. CONFIDENTIALITY AND TRANSPARENCY

- 24.1 The rules governing the confidentiality and transparency of this arbitration are dealt with in Procedural Order No. 2.

25. POST-HEARING BRIEFS AND STATEMENTS OF COSTS

- 25.1 In principle, there will be no post-hearing briefs on preliminary objections, unless after consultation of the Parties the Tribunal requests the Parties to address specific issues. In the latter event, the Tribunal will give appropriate directions at the close of the hearing or shortly thereafter.
- 25.2 The Tribunal will issue directions on the Parties' statements of costs at the appropriate stage.

26. TIME LIMITS

- 26.1 The time limits for the Parties' written submissions have been set by the Arbitral Tribunal in consultation with the Parties and are reflected in the Procedural Calendar contained in Annex 1.
- 26.2 Written submissions shall be timely if the email to which they are attached is sent by 23:59 (Eastern Time) of the day of the expiration of the relevant time limit. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the Party filing the submission, the period is extended until the first business day which follows.
- 26.3 As a rule, the Parties shall endeavor to comply with time limits and avoid jeopardizing the hearing dates.
- 26.4 Subject to situations of emergency, the Parties shall only seek extensions from the Tribunal after having consulted the other side. Any request should, to the extent reasonably practicable, be made at least five working days before the relevant deadline. If the Parties are unable to reach agreement, the Tribunal may extend time limits to the extent necessary.
- 26.5 The Tribunal will only grant the extension of a time limit as an exception and provided that the request is made without undue delay and before the time limit to be extended has lapsed.
- 26.6 Short extensions may also be agreed between the Parties as long as they do not affect later dates in the timetable and the Tribunal is informed before the original due date.

27. THIRD-PARTY FUNDING

- 27.1 A Party shall disclose the name and address of any non-party from which the Party or its counsel, directly or indirectly, has received or will receive funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person. A Party shall also disclose: (a) any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the Party in this arbitration (any such terms should be quoted in full in the Party's disclosure); or (b) the absence of any terms such as set out in (a).
- 27.2 A Party shall make the disclosure referred to in Section 27.1 with the Tribunal and the other Party upon the issuance of this order or, if entered into thereafter, immediately upon concluding a third-party funding arrangement. Each Party bears the ongoing duty to disclose any change in the information addressed in Section 27.1 after the initial disclosure, including termination or withdrawal of the third-party funding arrangement.

27.3 The Tribunal will only order disclosure of further information regarding the funding agreement and the non-party providing funding after having given the Parties an opportunity to submit their observations.

28. PARTY REPRESENTATION

28.1 The Parties are represented in this arbitration by the individuals identified in Section 1 above. A Party should promptly inform the Tribunal and the other Party of any change in such representation.

28.2 If such change in representation gives rise to a conflict of interest, following submissions by the Parties, the Tribunal may take appropriate measures to safeguard the integrity of the proceedings, including the exclusion of the new representative from participating in all or part of the arbitral proceedings.

28.3 For the purposes of this Section, “representative” means any person who appears in this arbitration on behalf of a Party and makes submissions, arguments or representations to the Tribunal on behalf of such Party, other than in the capacity as a witness or expert.

29. DATA PROTECTION

29.1 The Members of the Tribunal, the Assistant, the Secretary, the Registry, the Parties and their representatives acknowledge that the processing of their personal data is necessary for the purposes of these arbitration proceedings.

29.2 The Parties and their representatives note that applicable data protection and privacy regulations may require providing appropriate notice to data subjects whose personal data will be processed in the arbitration proceeding, obtaining the consent of relevant individuals, where necessary, and ensuring that witnesses and experts expressly agree in their relevant statements to the use of their personal data in this arbitration. Should applicable regulations require action from another participant in the arbitration, the Parties are invited to bring it to the attention of the other participants as necessary and/or to apply to the Tribunal for specific data protection measures to be put in place.

30. CYBER SECURITY

30.1 The Parties shall take appropriate measures for the secure transmission of documents, information and communications in this arbitration. If particular documents, information and/or communications require heightened security measures, the Parties will confer in order to take appropriate security measures for the transmission of such documents, information and/or communications. Unless instructed otherwise by the Parties, the Tribunal will not take any special measures beyond its standard procedures to safeguard the cyber security of arbitration-related information and the Parties confirm that communications may be sent by email.

31. DISPOSAL OF DOCUMENTS

- 31.1 Six months after the Tribunal has notified the final award to the Parties, the arbitrators shall destroy the documents submitted in the arbitration, unless a Party requests the return of documents, in which case that Party shall bear the related cost.

32. IMMUNITY

- 32.1 Save for conscious and deliberate wrongdoing or gross negligence:
- a. the Parties undertake not to initiate legal proceedings against, or in any other manner impair the independence and/or immunity of, any of the Members of the Tribunal, the Assistant, the Secretary or the staff of ICSID in respect of any act or omission in connection with this arbitration;
 - b. the Members of the Tribunal, the Assistant, the Secretary and the staff of ICSID shall not be required to be a party or witness in any judicial or other proceedings arising out of this arbitration; and
 - c. neither the Members of the Tribunal, the Assistant, the Secretary nor the staff of ICSID shall be liable to any Party in respect of any act or omission in connection with any matter related to this arbitration.

33. MEDIATION OR OTHER METHODS OF AMICABLE DISPUTE RESOLUTION

- 33.1 At any time in the course of the arbitration, considering the circumstances of the dispute and the interests at stake, the Tribunal may suggest to the Parties to agree to resort to mediation or other appropriate methods of amicable resolution.
- 33.2 Beyond making a suggestion to the Parties, the Tribunal will not get involved in mediation or other settlement attempts and will continue the proceedings if the Parties do not agree to follow the Tribunal's suggestion or if they agree but the attempt fails.

34. ACKNOWLEDGEMENT OF THE PARTIES

- 34.1 Each Party acknowledges that it has no present knowledge of any objection that would affect the regularity of the constitution of the Tribunal, the independence and impartiality of its members and/or compromise the integrity of the present arbitral proceedings. More generally, each Party confirms having no other objections of a procedural nature at this stage other than those mentioned in the present Order or those which the Parties have reserved to introduce at a later stage.

34.2 Each Party shall give prompt notice to the Tribunal of any complaint it may have with respect to these arbitration proceedings. In the absence of a prompt notification, the Party shall be deemed to have waived any such complaint.

Date: 5 May 2023

For the Tribunal

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Annex: 1. Procedural calendar

ANNEX 1: PROCEDURAL CALENDAR

Phase	No.	Description	Party/Tribunal	Date
JURISDICTION PHASE	1.	Response to Notice of Arbitration and Memorial on Jurisdiction	Respondent	June 28, 2023
	2.	Response to Memorial on Jurisdiction	Claimant	12 weeks from Memorial on Jurisdiction September 20, 2023
	3.	Consultation of Parties and decision on format of hearing	Tribunal	Around early October 2023
	4.	Reply on Jurisdiction	Respondent	12 weeks from Response to Memorial on Jurisdiction December 13, 2023
	5.	Rejoinder on Jurisdiction	Claimant	13 weeks from Reply on Jurisdiction March 13, 2024
	6.	Pre-Hearing Organizational Conference	All	3 weeks from Rejoinder on Jurisdiction April 3, 2024, 17:00 CET
	7.	NAFTA Article 1128 Submissions of United States and Mexico (if any)	United States/Mexico	1 week from Pre-Hearing Organizational Conference April 10, 2024
	8.	Parties' Comments on Article 1128 Submissions (if any)	Parties	2 weeks from NAFTA Article 1128 Submissions April 24, 2024
	9.	Hearing on Jurisdiction	All	2-3 May 2024, with 4 May kept in reserve

Phase	No.	Description	Party/Tribunal	Date
	10.	Award on Jurisdiction	Tribunal	Approximately 24 weeks from Hearing on Jurisdiction, with three-month status updates in conformity with paragraph 11.3 of PO1 if the award is not issued within 24 weeks