NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

UNDER THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

WESTMORELAND MINING HOLDINGS LLC,

Claimant/Investor,

v.

GOVERNMENT OF CANADA,

Respondent/Party

August 12, 2019

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I. INTRODUCTION

1. This Notice of Arbitration and Statement of Claim is submitted on behalf of Westmoreland Mining Holdings LLC ("Westmoreland Mining Holdings"), a U.S. limited liability company, Westmoreland Canada Holdings Inc. and Prairie Mines & Royalty ULC ("Prairie"), as to the following legal dispute with the Government of Canada ("Canada," "GOC" or "Respondent") in accordance with Chapter Eleven of the North American Free Trade Agreement ("NAFTA").

2. Westmoreland Mining Holdings elects to proceed with this arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules, as provided under Article 1120(1)(c) of NAFTA.

II. SUMMARY OF THE CLAIM

3. Coal was an essential input to the production of electricity on a mass scale in the 20th century. It has been the primary source of electricity for the last one hundred years. Still today, coal is a primary source for electricity in much of the world and is the source supplying almost half of all electricity production in Alberta. It has been cheap and abundant, keeping electricity prices low and guaranteeing for consumers an affordable supply. But coal also generates carbon when burned and has been blamed for increasing greenhouse gas emissions.

4. In 2012, the Government of Canada decided to take action with respect to the greenhouse effects of burning coal. It enacted regulations that committed to closing down all power utilities that relied on coal within fifty years. These regulations ensured

that existing coal-burning power utilities would be phased out over time, giving stability and predictability to both the power plants and the coal companies that provide the fuel.

5. In 2013-14, Westmoreland[1] acquired a number of coalmines, including the "mine-mouth" operations in Alberta at issue in this dispute. For mine-mouth operations, coalmines are developed adjacent to and in conjunction with a power plant so that the coal can be delivered to the power plant economically. Such mine-mouth operations formed the core of Westmoreland's business and offered a predictable return, especially so in Canada, which had just enacted regulations that provided a predictable future for coal.

6. The logic and value of Westmoreland's investment was threatened with change in November 2015 when a new Alberta provincial government announced its "Climate Leadership Plan." Alberta, which historically had relied primarily on its abundant coal supply to fuel its power plants, decided that it wanted to eliminate all power emanating from coal by 2030.

7. Alberta recognized that an accelerated conversion from coal would have an adverse effect on companies relying on coal to generate power. Alberta, therefore, commissioned Terry Boston, the retired head of one of North America's largest power grids, to determine how to reconcile the new policy of accelerated conversion from coal with the adverse impact on companies relying on coal.

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[1] As set forth in more detail below, Westmoreland Coal Company transferred most of its assets, including the assets at issue here, to Westmoreland Mining Holdings. This transfer was accomplished pursuant to a Plan of Reorganization approved by a U.S. federal bankruptcy court on March 15, 2019. The term "Westmoreland" is used generically throughout this Notice of Arbitration and Statement of Claim to describe the facts and circumstances of the dispute. When deemed appropriate, specific references have been made to Westmoreland Mining Holdings or Westmoreland Coal Company.

8. Based upon Mr. Boston's recommendation, Alberta agreed to pay out nearly $1.4 billion to three coal-consuming power utilities, all of which were Albertan companies and considered household names. Two of the three, TransAlta and Capital Power, also owned interests in mine-mouth coalmines.[2] All three companies are now accelerating their conversions of coal-burning units to natural gas before 2030. The new provincial policy also necessarily accelerates the end of Westmoreland's mine-mouth operations.

9. Alberta's Energy Minister, when the coal payouts were issued to the companies, stated that they were intended to compensate for the "economic disruption to {their} capital investments" caused by the sudden policy shift and to "provide investor confidence and encourage them to participate in Alberta's transition from coal." The compensation was directed to "Alberta businesses": "{t}he {Alberta} government is committed to working with existing Alberta businesses as we transition away from coal, and we are making good on that commitment today."

10. In return for these payouts, which were based on the book value of the assets (including the coal), the power companies agreed (among other things) to waive any claims with respect to the phase-out of coal, "including with respect to the mines, coal supply agreements, mining contracts, or other mining equipment related to the coal used to fuel the Plants."

11. Westmoreland's operations were integral to the operations of the Albertan power companies. Like the Albertan companies, Westmoreland owned and managed coalmines. Yet, unlike the Albertan companies, Westmoreland was an American

[2] All dollar references are to Canadian currency unless otherwise noted.

company and investor in Alberta. Unlike the Albertan companies, Westmoreland received no compensation for damages caused by the accelerated Alberta coal phase-out, including stranded capital, loss of revenues, and accelerated costs of reclamation, the process of rehabilitating the land after coalmining operations have ceased.

12. Westmoreland recognizes and does not dispute that Canada and Alberta are entitled to enact regulations for the public good. However, when they do, they must be fair to foreign investors consistent with NAFTA Articles 1102 and 1105.

13. Alberta's scheme to compensate Albertan coalmine operators for the loss of their investments, to the exclusion of the only American coalmine operator, denied Westmoreland national treatment under Article 1102 and treated the company unfairly and inequitably, in violation of NAFTA Article 1105. The exclusion of the only American company was wrong, and Westmoreland is entitled to compensation for Alberta's violations of these NAFTA provisions.

14. Westmoreland respectfully serves this Notice of Arbitration and Statement of Claim for breach by the Government of Canada ("Canada"), through the actions of the provincial Government of Alberta, of its obligations under NAFTA, Chapter Eleven.

III. PROCEDURAL REQUIREMENTS

15. Westmoreland Coal Company, at all times relevant to this Notice of Arbitration and Statement of Claim, was and remains incorporated in Delaware, United States of America. Its address was and remains:

Westmoreland Coal Company
9450 S Maroon Circle, Suite 300
Englewood, CO 80112
United States of America
Telephone: (303) 922-6463
Fax: (302) 636-5454

Its registered address was and remains:

Westmoreland Coal Company
c/o Cogency Global Inc.
850 New Burton Road Suite 201
Dover, DE 19904
United States of America

16. Westmoreland Coal Company owned and controlled Westmoreland Canada Holdings Inc, an Albertan entity, which directly owned Prairie. Prairie is a Canadian corporate enterprise owning certain coalmines in Alberta, whose rights have been infringed directly by acts for which Canada is responsible under NAFTA.

17. On October 9, 2018, Westmoreland Coal Company filed a petition for bankruptcy in the United States. *In re Westmoreland Coal Company,* 18-bk-35672 (S.D. Tex).

18. Pursuant to a Plan of Reorganization approved by the bankruptcy court on or around March 15, 2019, Westmoreland Coal Company transferred most of its assets, including Westmoreland Canada Holdings Inc. and its ownership of Prairie, other Canadian assets, and the instant NAFTA claim, to Westmoreland Mining Holdings LLC, a U.S. entity formed and registered in Delaware, United States of America.

19. Westmoreland Mining Holdings LLC, a Delaware company, is the owner of the assets, interest, rights and claims of the initial disputing investor, Westmoreland Coal Company.

20. The disputing investor, Westmoreland Mining Holdings LLC, is located at the following address:

Westmoreland Mining Holdings LLC
9450 S Maroon Circle, Suite 300
Englewood, CO 80112
United States of America
Telephone: (303) 922-6463
Fax: (302) 636-5454

Its registered address is:

Westmoreland Mining Holdings LLC
c/o Corporation Service Co.
251 Little Falls Drive
Wilmington, DE 19808

21. Westmoreland Canada Holdings' address is:

Westmoreland Canada Holdings Inc.
1100, 10123 99 Street
Edmonton, AB T5J 3H1
Canada
Telephone: (780) 420-5810
Fax: (780) 420-5835

22. Prairie's address is:

Prairie Mines & Royalty ULC
1100, 10123 99 Street
Edmonton, AB T5J 3H1
Canada
Telephone: (780) 420-5810
Fax: (780) 420-5835

23. Westmoreland Mining Holdings served its Notice of Intent to Arbitrate on Canada on May 13, 2019 in accordance with Article 1119. The last day of the ninety-day period required by NAFTA Article 1119 was August 11, 2019.

24. Westmoreland Coal Company met with Government of Canada officials on November 9, 2018 for consultations regarding the initial arbitration claim in accordance with NAFTA Article 1118. Discussions among Westmoreland, Government of Alberta and Government of Canada officials are continuing, but the disputing parties

have yet to agree to a resolution. The Parties agreed no further formal consultations would be required in conjunction with the Westmoreland Mining Holdings LLC Notice and Statement of Claim.

25. Westmoreland Mining Holdings has consented to arbitration under Article 1121. Westmoreland Mining Holdings submits this Notice of Arbitration and Statement of Claim under both NAFTA Article 1116 as an investor on its own behalf, and under NAFTA 1117 on behalf of Prairie.

26. Westmoreland Mining Holdings, Westmoreland Canada Holdings, Inc., and Prairie have executed waivers in accordance with NAFTA Article 1121, copies of which (along with certificates of good standing for Westmoreland Mining Holdings, Westmoreland Canada Holdings, and Prairie) are appended to this Notice of Arbitration as Exhibit 1.

27. Canada has consented to arbitration pursuant to NAFTA Article 1122.

28. The following are duly empowered to act on behalf of Westmoreland in this matter, and correspondence should be served upon them at the addresses listed below:

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29. Westmoreland Mining Holdings proposes that the fees and expenses of the tribunal appointed to decide this matter be governed by the International Centre for Settlement of Investment Disputes' July 6, 2005 "Memorandum on the Fees and Expenses."

IV. FACTUAL BASIS FOR THE CLAIM

30. In November 2015, the Alberta provincial government sought to address greenhouse gas emissions emanating from coal-fired power plants through its Climate Leadership Plan, which will phase out all coal-fired power plants by 2030. Alberta agreed to pay three Alberta companies with coal-fired plants—Capital Power, TransAlta, and ATCO—nearly $1.4 billion. Alberta's press release announcing the payments stated that "{t}he government is committed to working with existing Alberta businesses as we transition away from coal, and we are making good on that commitment today."

31. Westmoreland, an American company investing in Alberta, provides the coal for the majority of the phased-out power plants in mine-mouth operations that service the power plants directly. These mine-mouth operations, purchased in 2013-14 by Westmoreland on the expectation that they would have a 50-year lifespan under the Federal regulatory scheme, could service only the associated power plants. The mines are dedicated specifically to mine-mouth operations, inseparable from the operations of the adjacent power plants.

32. Alberta's payments were premised on the principle of "{m}aintaining investors' confidence in Alberta by not unnecessarily stranding capital and ensur{ing}

that workers, communities and affected companies are treated fairly in this process." Only four companies were affected by the Climate Leadership Plan's coal phase-out: the three Alberta companies receiving compensation, and Westmoreland, the American investor.

33. Westmoreland, unlike the three Alberta companies, was not compensated for the early closure of its mines. As a result, Westmoreland will lose future revenue; incur added costs for premature reclamation; have its capital unnecessarily stranded; and the future of Westmoreland's workers and their communities will be jeopardized; all contrary to Alberta's declared public policy.

34. This claim arises out of the disparate and improper treatment accorded to Westmoreland by the Government of Alberta that has damaged Westmoreland and its investments in Canada, in violation of the investment protections extended to foreign investors under NAFTA Articles 1102 and 1105. Canada is responsible for Alberta's actions under NAFTA and applicable principles of international law.

A. <u>Canada Enacts Federal Regulations For Carbon Dioxide Emissions</u>

35. According to Alberta Department of Energy statistics in 2011, thermal coal represented 55 percent of Alberta's electricity generation supply. Coal, therefore, was considered by the Alberta Department of Energy to be "a low-cost fuel for electricity {that} plays a major role in keeping power prices at reasonable levels." In 2012, Alberta used over 25 million tons of coal annually to generate electricity. Alberta also had over 37 billion tons in coal reserves, representing 70 percent of all of Canada's reserves.

36. In 2012, Canada promulgated the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* (the "Federal Regulations"),[3] which were enacted pursuant to the *Canadian Environmental Protection Act, 1999*. The Federal Regulations provided a comprehensive scheme to address greenhouse gas emissions from coal burning power plants and ensured that all such facilities would be phased out over fifty years from their date of commissioning.

37. The regulatory impact analysis statement accompanying the Federal Regulations explained that the Regulations "will apply a performance standard to new coal-fired electricity generation units and to old units that have reached the end of their useful life."[4] The performance standard was set "at the emissions intensity level with consideration of natural gas combined cycle technology," ensuring that coal-burning units within power plants eventually would be phased out under the new Federal Regulations standard.[5]

38. The Federal Regulations defined "useful life" of a coal-burning unit within a power plant in different ways, depending on the date the unit began producing electricity for sale to the electric grid (otherwise known as the "commissioning date" under the Federal Regulations). Relevant to this dispute are "units" with commissioning dates

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[3] Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations, SOR/2012-167 (Can.), http://www.gazette.gc.ca/rp-pr/p2/2012/2012-09-12/html/sor-dors167-eng.html.

[4] *Supra* n.3, at Reg. Impact Analysis Statement § 5.1.

[5] A "unit" is defined in the Federal Regulations as any "physically connected equipment located in a power plant – including boilers and other combustion devices, gasifiers, reactors, turbines, generators, and emission control devices – that operates together to produce electricity by means of thermal energy using coal as a fuel, whether in conjunction with other fuels or not."

starting in 1986 or later, which have a useful life that ends on "December 31 of the calendar year that is 50 years after the commissioning date."[6]

39. The Federal Regulations explained that an "old unit"—*i.e.*, one "that has reached the end of its useful life but continues to produce electricity"—could not exceed 420 tons of carbon dioxide annually. A coal-burning unit within a power plant cannot meet this limit.

B. Westmoreland's Canadian Operations

40. Westmoreland has over 154 years of experience successfully developing and operating coalmines. Westmoreland's executive leadership has decades of mining experience and has overseen a fourfold growth of the company in the last ten years. Prior to 2014, Westmoreland had no Canadian assets or revenues from sale in, from, or into Canada.

41. Westmoreland's major emphasis is on "mine-mouth" operations, where mines supply thermal coal under long-term contracts to "mine-mouth" coal-fired units in power plants that are located adjacent to, and serviced exclusively by, the adjacent mine (hence the term "mine-mouth"). Virtually all of Westmoreland's overall coal production is sold under long-term contracts to power plants located adjacent to the relevant mine. For example, in 2012, only 12 percent of Westmoreland's coal was sold to customers other than power plants.

42. Westmoreland performed due diligence on a potential acquisition of Sherritt International ("Sherritt") and committed to the acquisition of Sherritt's coal

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[6] The Federal Regulations also provided that Canada could, in certain circumstances, grant extensions to extend the life of a coal-burning unit.

assets, including the mines in Alberta that are relevant to this dispute, in 2013. Sherritt is a Canadian entity headquartered in Toronto, Ontario.

43. As part of its diligence efforts, Westmoreland reviewed the impact on Sherritt's operations of the Federal Regulations, potential changes to the legal landscape, and any governmental, regulatory or other issues that could impede operation at the mines. This diligence did not reveal any significant issues.

44. Westmoreland committed to the acquisition of Sherritt's coal assets in December 2013 and the acquisition closed in April 2014. Westmoreland paid over US$320 million for the coal assets and assumed liabilities in excess of US$420 million as part of the purchase.

45. The assets acquired by Westmoreland included Sherritt's Prairie operations, which in turn included the Genesee Mine, the Sheerness Mine, and the Paintearth Mine (the "Mines") located in Alberta, and other mines not relevant here.

46. The Sheerness Mine supplies coal for two coal-burning units at the Sheerness Generating Station, jointly owned by ATCO and TransAlta. The Sheerness Mine and the Sheerness Generating Station both opened at or around the same time, in 1986.

47. The Genesee Mine supplies coal for three coal-burning units at the Genesee Generating Station. Two of these units are owned by Capital Power and the third unit is jointly owned by Capital Power and TransAlta. The operation of the Genesee Mine is a 50/50 joint venture between Westmoreland and Capital Power. The Genesee Mine and the Genesee Generating Station both opened at or around the same time, in 1988.

48. The Paintearth Mine supplies coal for three coal-burning units owned by ATCO at the Battle River Generating Station.

49. Capital Power is a Canadian company headquartered in Edmonton, Alberta. TransAlta is a Canadian company headquartered in Calgary, Alberta. ATCO is a Canadian company also headquartered in Calgary, Alberta. These three companies own over 55 percent of the electricity production capability in Alberta and are considered household names in Alberta, particularly within the communities where they operate.

50. There is no commercially reasonable way to use coal from a mine-mouth operation in any other endeavor. The Prairie Mines are dependent on the "mine-mouth" operation because the adjacent coal-burning units are the only viable market for the coal produced from the Mines. The Mines were developed in conjunction with, and at the same time as, the adjacent power plants, for the sole purpose of fueling the coal-generating units at that location. The Mines, therefore, lack the necessary infrastructure, such as railroad access, to serve other potential markets. Even if the Mines were to have the necessary infrastructure, the coal produced from the Mines is not of a high enough heating content to be exported at a profit.

51. Prairie had over 594 million tons of coal reserves as of December 31, 2012. Its mines supplied thermal coal under long-term contracts to mine-mouth coal-fired units in power plants that are located adjacent to, and serviced exclusively by, the adjacent mines. The power plants were the sole purchasers of the coal. In 2012 alone, Prairie delivered approximately 19 million tons of coal to the adjacent power plants and generated $360.8 million in revenue.

52. Westmoreland's acquisition was a transformational opportunity to acquire a number of producing mines that were highly complementary to Westmoreland's existing operations and expertise. The acquisition more than doubled Westmoreland's business and diversified its customer base. The Mines would provide a predictable cash flow, consistent with Westmoreland's existing business model because the contracts with the power companies were structured to provide stable and predictable revenues in mines that had long remaining lives. Westmoreland's move into Alberta provided entry into one of the world's most favorable mining jurisdictions.[7]

53. Westmoreland informed Canada in a regulatory filing at the time of acquisition that its purchase of the Sherritt assets was not intended to "start selling coal into Canada from the United States . . . or otherwise commence business in Canada other than through" the existing business. The mine-mouth coalmines and their associated long-term contracts with the adjacent power companies were, therefore, central to Westmoreland's acquisition strategy.

54. Westmoreland obtained approval from Canada pursuant to the Investment Canada Act and Competition Act to purchase the Mines by committing to certain capital expenditures and satisfying other benchmarks for a three-year period, such as:

- maintaining certain Canadian headquarters and management requirements, for both Prairie and Westmoreland;
- leveraging its coal mining experience to strengthen the performance and practices at the Mines;

[7] Ex. 2, Press Release, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations (Dec. 24, 2013); Ex. 3, Presentation, Westmoreland Coal Co., Westmoreland Announces Transformational Acquisition of Sherritt's Coal Operations 9 (Dec. 24, 2013).

- maintaining minimum employment levels or providing appropriate severance and benefits for employees dismissed due to the Sherritt acquisition;
- making substantial capital investments—over $20 million in excess of capital investments planned by Sherrit, for a total of $233 million;
- committing to Canadian suppliers for the provision of goods and services to the Mines;
- participating in Canadian industry associations; and
- sustaining historic charitable contributions and community investments.

55. Five of the mine-mouth coal-burning units within the power plants that were the sole purchasers of the coal produced from the Mines qualified for a 50-year useful life under the Federal Regulations and would not reach the end of those useful lives until:

- 2036 for the Sheerness 1 unit supplied by the Sheerness Mine;
- 2039, for the Genesee 2 unit supplied by the Genesee Mine;
- 2040 for the Sheerness 2 unit supplied by the Sheerness Mine;
- 2044 for the Genesee 1 unit supplied by the Genesee Mine; and
- 2055 for the Genesee 3 unit supplied by the Genesee Mine.

56. Westmoreland's investment decisions were made based in significant part on the Federal Regulations establishing the useful life of the coal-burning units within the power plants that were the sole purchasers for the coal produced from the Mines. For example, in a December 24, 2013 Conference Call regarding the acquisition, Westmoreland explained that its investment was compatible with the regulatory environment in Canada:

<u>Lucas Pipes – Brean Capital</u> . . . .

In terms of the customers, are there—I'm not as familiar with regulatory changes in Canada. Is there anything on the horizon or are these also low cost ... power plants or are there any material differences to your current customers in the U.S.?

Robert King – Chief Executive Officer

These customers are key to the grid in Western Canada, and they are, by nature of the mine mouth model, low-cost producers of electricity. . . .

Brian Taddeo – Robert W. Baird

<Q>: Good morning, happy holidays. I just have a quick one. Just going back to the customers of the offtake plants for the mines. Are there any environmental issues tied to any of the plants? In the U.S., lots of concerns or questions always about having to retrofit plants or shut them down. Any issues with these?

Robert King – Chief Executive Officer

As part of our due diligence, we did do and had consultants weigh in on what these plants look like from the standpoint of their mine lives and their criticality to the grid. Our analysis indicates that these are all long-lived plants, that they'll be around for a while and that there are no impending environmental issues associated with them.[8]

57. A few months later, in a February 21, 2014 Earnings Call, Westmoreland explained it was relying on the Federal Regulations in making its Canadian acquisition:

Nelson Jay Obus – Wynnefield Capital, Inc.

Just in terms -- this is a big-picture question and just want to be light about it. There's a whole bunch of stuff going on here with the EPA, the Clean Air Act and all this stuff that could go either way and stuff getting up to the Supreme Court. Could you very quickly, and I know we could spend hours on this, just a couple of bullet points about how Canada approaches this?

Robert P. King – Former President of US Operations and Director

Canada has a bit of a different philosophy particularly with regard to the CO2 issue, which is sort of the big thing out there that we don't know what's going on in the U.S. In Canada, with regard {to} power plants, they have what's -- what we term as the 50-year rule. And basically, what that

[8] Ex. 4, Transcript, Westmoreland Coal Co., Investor Conference Call 9–10 (Dec. 24, 2013).

is, is that power plants before they're required to do something with regard to CO2 will be able to operate for 50 years beyond the time that they were commissioned. So that gives us a clear direction as to what it is we think will happen up there. Obviously, we also believe that 50 years out, lots can happen. But by the same token, we have assumed that those wouldn't be extended, and I think there's a high probability that critical plants in Canada will do something to extend the lives of those beyond that term.

Keith E. Alessi – Chief Executive Officer-Emeritus

Yes, and the 50-year rule just says that they don't have to do anything, but at the end of 50 years, they can go back and request extensions and we would expect that to occur. . . . [9]

C. Alberta Compensates Canadian Companies For Reducing The Useful Life Of Coal Burning Units

58. On November 20, 2015, the Canadian Province of Alberta published its "Climate Leadership Plan,"[10] characterizing it as a "made-in-Alberta strategy designed to diversify our economy, create jobs and reduce greenhouse gas emissions."[11] The Climate Leadership Plan will phase out all coal-fired power in Alberta by 2030.[12] Six power plants and their associated mine-mouth coal operations were slated to have useful lives past 2030 under the Federal Regulations.[13]

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[9] Ex. 5, Transcript, Westmoreland Coal Co., FY 2013 Earnings Call 10 (Feb. 21, 2014); *see also* Ex. 6, Westmoreland Coal Co., Current Report (Form 8-K), Exhibit 99.2 at 8 (Feb. 21, 2014).

[10] See Ex. 7 ALBERTA'S CLIMATE CHANGE ADVISORY PANEL, CLIMATE LEADERSHIP REPORT TO MINISTER (Nov. 20, 2015).

[11] Ex. 8 Government of Alberta, *Climate Leadership Plan*, ALBERTA (https://www.alberta.ca/climate-leadership-plan.aspx (last visited Nov. 8, 2018).

[12] Ex. 7, *supra* n.10, CLIMATE LEADERSHIP REPORT TO MINISTER, at 6, 30, 49; *see also* Ex. 9, Government of Alberta, *Phasing Out Coal Pollution*, ALBERTA, https://www.alberta.ca/climate-coal-electricity.aspx (last visited Nov. 8, 2018).

[13] *See* Ex. 10, Press Release, Government of Alberta, REVISED: Alberta Announces Coal Transition Action (Nov. 24, 2016). In addition to the five plants and mines discussed above, *supra* ¶ 55, Keephills 3 would reach the end of its useful life by 2061. This unit was jointly owned by Capital Power and TransAlta and was serviced by a mine-mouth coal mine owned by TransAlta.

59. The new plan hastened, by as many as twenty-five years for the Mines, the expiration of the time in which coal-generated electricity would be allowed in Alberta.

60. Capital Power was "actively engaged in the consultation process" regarding the Climate Leadership Plan.[14] TransAlta submitted transition plans to Alberta, but indicated it could make the transition without payments from the provincial government.[15]

61. Based on these consultations, Capital Power believed that "on the issue of compensation, {Alberta} will be directly engaging with the four coal companies and actually no other industry participants. . . . We would expect to be in common meetings and I think we all, all of the coal companies do recognize that the more aligned on our views and our expectations and principles, likely the more successful we'll be."[16]

62. The only "four coal companies" that had any exposure under Alberta's Climate Leadership Plan to phase out coal-fired power were Capital Power, TransAlta, ATCO, and Westmoreland. Apparently, Capital Power assumed that Westmoreland was similarly situated to Capital Power, TransAlta, and ATCO, and that all the companies would be treated the same way as to compensation.

63. Alberta recognized that the Climate Leadership Plan would have an adverse economic impact on producers of coal-generated electricity. Alberta, therefore,

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[14] Ex. 11, Transcript, Capital Power, Third Quarter 2015 Analyst Conference Call 3 (Oct. 26, 2015); *see also* Ex. 12, Press Release, Capital Power, Capital Power Reports Third Quarter 2015 Results 13 (Oct. 26, 2015) ("Capital Power continues to actively participate in the consultation process that is expected to lead to a provincial climate change strategy to be accounted in the fourth quarter of 2015.").

[15] *See* Ex. 13, Transcript, TransAlta Corp., Third Quarter 2015 Results Conference Call & Webcast 4 (Oct. 30, 2015).

[16] Ex. 14, Transcript, Capital Power, Fourth Quarter 2015 Conference Call 6 (Feb. 19, 2016).

started a process to compensate electric utilities for the reduced lifespan of their coal-burning units with their power plants and the associated coalmines, notwithstanding that TransAlta, at least, appeared ready to forgo payment.

64. Alberta explained that compensation was necessary for the "economic disruption to the {affected companies'} capital investments" and to "provide investor confidence and encourage them to participate in Alberta's transition from coal."[17]

65. Alberta decided to pay the three Canadian companies even though at least one had said it could phase out coal without government support.[18]

66. Alberta commissioned Terry Boston, formerly the head of PJM Interconnection (one of the world's largest wholesale electricity markets) and former Vice President of the Tennessee Valley Authority, to develop a compensation methodology. Mr. Boston's charge was to "{m}aintain investors' confidence in Alberta by not unnecessarily stranding capital and ensure that workers, communities and affected companies are treated fairly in this process."[19]

67. Following Alberta's announced plans to hasten the phase-out of coal and provide compensation for the consequential impact on investments, Westmoreland repeatedly wrote to and met with elected leaders in Alberta, including Minister for Economic Development and Trade, Deron Bilous; Minister of Energy, Margaret Ellen McCuaig-Boyd; various Deputy Ministers; and even Alberta Premier Rachel Notley (and

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[17] Ex. 9, *supra* n.12, Government of Alberta, *Phasing Out Coal Pollution*, at "Coal Phase-out Agreements."

[18] Ex. 13, *supra* n.15, TransAlta Third Quarter 2015 Transcript, at 4 ("Our proposal . . . requires no government support or payment for stranded capital.").

[19] Ex. 15, Letter from Terry Boston to the Honourable Rachel Notley, Premier of Alberta (Sept. 30, 2016).

members of her staff), to ensure that Westmoreland's Albertan assets would not be "stranded" and employees would be protected.

68. Westmoreland explained in its meetings with Alberta leaders that it would have millions in capital that would become stranded as a result of the premature closures of the coal-fired units. Westmoreland also explained that reclamation costs—costs associated with closure of the mines and reclaiming the surrounding land at the end of their lives—would be accelerated because of Alberta's actions, leading to a potential increase of millions in annual cash expenditures.

69. Westmoreland, the American investor, was able to secure only a cursory meeting with Mr. Boston, who explained that Westmoreland's issues were outside his mandate even though he was charged with maintaining investor confidence by not stranding capital. Nor was Westmoreland ever able to participate in common meetings with (a) Alberta or Mr. Boston and (b) TransAlta, ATCO, and Capital Power (all of which are Canadian companies) to discuss compensation.

70. In contrast to Westmoreland's experience, Capital Power was able to have meaningful discussions with Mr. Boston:

> "We continue to be engaged with the Alberta government to ensure fair compensation is received for the proposed accelerated closure of coal-fired generating units by 2030 under the Alberta government's Climate Leadership Plan," added Mr. Vaasjo. "Initial discussions with the government-appointed facilitator took place earlier this month. We continue to work collaboratively with the government and remain optimistic that a fair and appropriate outcome will be reached for our shareholders."[20]

[20] Ex. 16, Press Release, Capital Power, Capital Power Reports First Quarter 2016 Results 1 (Apr. 25, 2016).

So, too, was TransAlta, who by this point had decided to focus on "minimiz{ing} stranded capital" because the company generates 3,500 Megawatts of power in Alberta from coal.[21]

71. In September 2016, Mr. Boston recommended that Alberta compensate the Canadian companies through voluntary payments of "net book value" for their coal-burning units and related capital with useful lives that extended beyond 2030. Mr. Boston "believe{d} that voluntary payment will go a long way to securing a positive investment climate in the province," and he "worked with the three coal plant owners to propose a framework that has considered the interests of all parties involved." Mr. Boston also stated that the payments to the Canadian companies (TransAlta, Capital Power, and ATCO) would "create a positive investor outlook in Alberta for market-based generation and renewables," and {m}aintain investors' confidence in Alberta by not unnecessarily stranding capital."[22] He said nothing about the fourth investor, the lone American investor, impacted by the change in policy.

72. In November 2016, Alberta implemented Mr. Boston's recommendations"{i}n support of its made-in-Alberta" Climate Leadership Plan—and announced for the electric utilities nearly $1.4 billion in compensation to be paid over a 14-year period.[23]

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[21] Ex. 17, Transcript, TransAlta Corp., Second Quarter 2016 Results Conference Call & Webcast 8 (Aug. 9, 2016); *see also* Ex. 18, Transcript, TransAlta Corp., Third Quarter 2016 Results Conference Call & Webcast 12, 23–24 (Nov. 4, 2016).

[22] Ex. 15, *supra* n.19, Terry Boston Letter, at 1.

[23] Ex. 10, *supra* n.13, Alberta Press Release.

73. Alberta entered into a contract with TransAlta, a Canadian company headquartered in Alberta, in November 2016. TransAlta owns both a mine-mouth coalmine and an associated coal-fired generation unit (along with other coal-fired generation units associated with mine-mouth operations). Alberta agreed to pay TransAlta 14 annual payments of $39,851,704.60 each, for a total of $557,923,864.40. These payments are based upon the "net book value of the Plants." TransAlta agreed to waive any claims with respect to the phase-out of coal, "including with respect to the mines, coal supply agreements, mining contracts, or other mining equipment related to the coal used to fuel the Plants." TransAlta essentially was compensated in full for the effective forfeiture of its interests in coalmines.[24] This compensation was to be paid to a company that originally had volunteered that it would remain in Alberta and transition from coal to gas without compensation.

74. After executing the agreement, TransAlta decided to accelerate its conversion of coal-fired units to gas, placing at risk mines operated by Westmoreland.[25] TransAlta entered into a Memorandum of Understanding with Alberta to facilitate these conversions.[26] The costs of TransAlta's boiler conversions from coal to natural gas are estimated at $50-$60 million per unit and conversion is expected to take 1.5-3 years per

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[24] *See* Ex. 19, Off-Coal Agreement between TransAlta Corp. et al., and Her Majesty the Queen In Right Of Alberta (represented by Ministry of Energy) ("TransAlta Agreement") (Nov. 24, 2016).

[25] *See* Ex. 20, Press Release, TransAlta Corp., TransAlta Announces Accelerated Transition to Clean Energy (Dec. 6, 2017).

[26] Ex. 21, Transcript, TransAlta Corporation Transition Update Conference Call & Webcast at 2 (Nov. 29, 2016).

unit.[27] In connection with this conversion effort, TransAlta entered into an agreement to construct a pipeline that would allow TransAlta to blend natural gas with coal, thus further accelerating the coal phase-out without abandoning coal entirely.[28]

75. TransAlta explained the benefits of executing the "Off-Coal" Agreement and Memorandum of Understanding with Alberta. In return for $524 million backed by the credit of the Alberta government,

> {W}e've agreed to maintain a strong Alberta Company that supports our employees, communities, and continues to invest in the Province. This agreement will allow us to raise capital to reduce the long-term debt associated with our newer coal plants. This is significant for shareholders who will see improved cash flows that support TransAlta's ability to refinance our existing debt maturities, as we refocus the business.[29]

76. Alberta also entered into a contract with Capital Power, another Canadian company headquartered in Alberta, in November 2016. Capital Power owns coal-fired generation units and interests in mines associated with mine-mouth operations. Alberta agreed to pay Capital Power 14 annual payments of $52,414,828.49 each, for a total of $733,807,598.86. These payments are based upon the "net book value of the Plants." Capital Power agreed to waive any claims with respect to the phase-out of coal,

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[27] Reg. Impact Analysis Statement for Reg. Limiting Carbon Dioxide Emissions from Natural Gas-fired Generation of Electricity ("Impact Statement"), 152 No. 7 Canada Gazette n.17 (Feb. 17, 2018) (Can.), http://gazette.gc.ca/rp-pr/p1/2018/2018-02-17/html/reg4-eng.html. Canada promulgated revised regulations in February 2018 that permitted conversions of coal-fired units to burn natural gas with no ongoing emissions intensity standard. *Id.* § 3 ("The performance standard for coal boilers that cease using coal as a fuel . . . and continue operating using natural gas to generate electricity would not apply during a prescribed period.") The coal-to-gas conversions are expected to increase the lifespan of the converted power plants to no later than 2039. *See id.*

[28] *See* Ex. 22, Press Release, TransAlta Corp., TransAlta and Tidewater Midstream Announce Today a Letter of Intent to Construct a Natural Gas Pipeline to TransAlta's Facilities (Dec. 6, 2017).

[29] Ex. 21, *supra* n.26, TransAlta Transition Update Transcript, at 4.

"including with respect to the mines, coal supply agreements, mining contracts, or other mining equipment related to the coal used to fuel the Plants." Nothing in this agreement required Capital Power to convert its electricity plants to using natural gas. Capital Power essentially was compensated in full for the effective forfeiture of its interests in coalmines.[30]

77. Notwithstanding that Capital Power's compensation appears to be without even a conversion obligation, Capital Power is considering accelerating its transition from coal-to-gas, anticipating that it should make a decision about converting its power plants in approximately 2020. Capital Power estimated it could convert its existing coal-fired units to gas units in approximately 9 months at a cost of $25-$50 million per conversion, demonstrating that the conversion costs represented a modest fraction of the total compensation.[31]

78. Alberta entered into an agreement with ATCO to make 14 annual payments of $4.7 million each, for a total of $65.8 million to ATCO.[32] ATCO intends to convert its existing coal-fired units to gas (which ATCO estimates will cost approximately $50-$60 million per unit), including the Sheerness 1 facility that ATCO jointly owns with TransAlta and that is currently serviced by Westmoreland's mine-

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[30] *See* Ex. 23, Off-Coal Agreement between Capital Power et al. and Her Majesty the Queen In Right of Alberta (represented by Ministry of Energy) ("Capital Power Agreement") (Nov. 24, 2016).

[31] Ex. 24, Presentation, Capital Power, "Driving a Sustainable Future" Investor Presentation 10 (Jan. 2018).

[32] Ex. 25, Press Release, ATCO, ATCO Reaches Agreement with the Government of Alberta on Coal Transition (Nov. 25, 2016).

mouth coalmine.[33] ATCO is accelerating the closures of some of its Battle River coal-fired units that are serviced by Westmoreland's Paintearth mine operations.

79. In total, Alberta agreed to pay $1.36 billion to TransAlta, Capital Power, and ATCO for the coal phase-outs, including their coalmines. The largest shares of the compensation went to TransAlta ($557 million) and Capital Power ($733 million), both of whom also had ownership interests in mines feeding their utilities. ATCO, the only company without a mine ownership interest, was paid significantly less ($66 million). Alberta engaged in no serious discussions and offered to pay nothing to Westmoreland, a U.S. company and the largest owner of coalmining assets in Alberta.

80. Alberta, in a press release announcing the agreements with the Albertan companies, stated that:

> In support of its made-in-Alberta transition to a stable, reliable and cleaner electricity system, the Government of Alberta has announced agreements with TransAlta, Capital Power and ATCO to end coal-fired emissions on or before Dec. 31, 2030.
>
> The agreements will see the companies, which own six coal-fired electricity units originally slated to operate beyond 2030, provided with transition payments for investments that have been reduced in value by the transition away from coal-fired generation – funds that can be reinvested into Alberta's electricity market.
>
> This approach is part of a larger government commitment to building a stable, reliable electricity system while ensuring that workers, communities and affected companies are supported and treated fairly during the transition from coal-fired electricity generation.

In that same press release, Alberta Energy Minister Margaret McCuaig-Boyd stated that

> The government's decision to provide transition payments to these companies demonstrates our commitment to building a low-priced, reliable, investment-friendly electricity system for Albertans. The

[33] *See* Ex. 24, *supra* n.31, Capital Power Presentation, at 11.

> government is committed to working with existing Alberta businesses as we transition away from coal, and we are making good on that commitment today.[34]

81. Alberta, implementing the Climate Leadership Plan's stated goal as "a made-in-Alberta" strategy, thus compensated only Canadian companies, what the province called "the existing Alberta businesses," and made sure to provide significantly more compensation to those companies with ownership interests in coalmines.

82. Westmoreland, by contrast to the three Canadian companies, has been denied compensation for the loss of its investment in the Mines in Alberta, caused by the Government's Climate Leadership Plan, notwithstanding that the Mines will have no commercial future once the coal phase-out has been completed and Westmoreland will be facing land reclamation with no means to pay for it.

83. The denial of compensation for Westmoreland is contrary to Alberta's representations that it desired to compensate affected companies for disruption to capital investments, to provide and maintain investor confidence, to refrain from stranding capital, to protect employees and communities, and to ensure that affected companies are treated fairly. It treats Canadian companies similarly situated differently from the treatment of an American-owned company. Any other explanation for the disparate treatment (none has been offered) would only highlight the arbitrary distinction.

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[34] Ex. 10, *supra* n.13, Alberta Press Release.

D. **Damages**

84. Westmoreland's mine-mouth operations are dependent on the adjacent power plants. Under the Climate Leadership Plan and pursuant to the contracts Alberta executed with the three Canadian companies, Westmoreland's Mines will close no later than 2030.

85. Some of Westmoreland's Mines will close even sooner because the Canadian companies have either accelerated the closure of coal-fired units or are converting those units to gas sooner than 2030. The pre-2030 closures will have even more of an impact on Westmoreland than a 2030 closure as the mine-mouth coalmines will close in years earlier and, therefore, cause increased revenue loss, increased reclamation costs, and will strand Westmoreland's capital even sooner than the Climate Leadership Plan required.

86. Westmoreland will lose revenue as a result of the early Mine closures. Assuming all Mines (except those already slated for early closure) close in 2030, Westmoreland will lose nearly US$441 million it otherwise expected to earn. The Canadian companies, however, had indicated that they will cease their coal operations at the units serviced by the Mines even earlier than 2030. Westmoreland will lose even more should the mines close earlier because of accelerated closures occasioned by the Climate Leadership Plan and coal-to-gas conversions.[35]

87. Westmoreland's reclamation costs are accelerated as a result of the Climate Leadership Plan. The Mines are designed to be reclaimed over their original

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[35] The amounts in this section have not been discounted to present value. Westmoreland Mining Holdings reserves the right to amend its damages calculation generally, including its discount rate.

lifespans, so that Westmoreland essentially pays down the total reclamation costs of the Mines on an annual basis. The early closures of the Mines will require Westmoreland to incur nearly $42 million in uncompensated expense, in no way offset, for reclamation costs.

V. <u>ISSUES PRESENTING VIOLATIONS OF NAFTA CHAPTER ELEVEN</u>

88. Canada, through the actions of its constituent political subdivision, Alberta, for which it is responsible under NAFTA, has breached its obligations to Westmoreland Mining Holdings under Section A of Chapter Eleven of NAFTA, including but not limited to Article 1102 (National Treatment) and Article 1105 (Minimum Standard of Treatment).

89. Westmoreland Mining Holdings is an investor of a Party as defined in NAFTA Chapter Eleven and has incurred damage to its investments in Alberta by reason of Canada's breaches. Westmoreland Mining Holdings owns Prairie, an enterprise in Alberta, the Mines in Alberta, and the interests arising from the investments in those mines, all of which are investments under NAFTA Article 1139.

90. Westmoreland Mining Holdings must be compensated for Canada's failure to comply with its NAFTA Chapter Eleven obligations, as described below.

A. <u>Breach Of Article 1102 – National Treatment.</u>

91. NAFTA Article 1102 requires a NAFTA Party to provide national treatment to investors of another Party:

> <u>*Article 1102: National Treatment*</u>
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

92. Westmoreland, a U.S. company, and TransAlta, Capital Power, and ATCO, Canadian companies, are all investors in coal to generate electricity. Westmoreland, in mines that were developed in conjunction with and adjacent to the power plants they were always intended to service, provided the coal to fire the units; the power plants used the coal in their coal-burning units to generate electricity. TransAlta and Capital Power also had ownership interests in mines providing coal to fire the units.

93. Canada did not treat Westmoreland equally with the Albertan companies. Alberta implemented a regulatory scheme to phase out the use of coal in the province by 2030. Alberta compensated the Canadian companies with nearly $1.4 billion in payments. Westmoreland, a U.S. investor, did not receive any compensation.

94. The payments made by Alberta were designed to be a “made in Alberta” solution to benefit Canadian companies headquartered in Alberta. The payments helped maintain investor confidence in Canadian companies and ensured that the capital of Canadian companies would not be stranded. Westmoreland, a U.S. Investor, did not receive the same “made in Alberta” treatment, notwithstanding the obligations it

met under the Investment Canada Act. Its investor confidence was not maintained, and its capital was stranded as a result of Alberta's actions.

95. Westmoreland has been damaged by Alberta's inequitable measures. As a result of Alberta's coal phase-out, Westmoreland already is incurring increased costs in relation to reclamation of the mines. Westmoreland also is incurring a loss of revenue caused by the coal phase-out. These losses will continue. But instead of being compensated for these losses like the Canadian companies, Westmoreland has received no compensation from Alberta even as Alberta has decided to terminate the value of Westmoreland's assets.

B. Breach Of Article 1105 – Minimum Standard Of Treatment.

96. NAFTA Article 1105 requires that a NAFTA Party provide investors of another Party the minimum standard of treatment under customary international law.

> *Article 1105: Minimum Standard of Treatment*
>
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

97. The minimum standard of treatment under NAFTA Article 1105 protects investors of a Party from government treatment constituting conduct that infringes a sense of fairness, equity and reasonableness, including conduct that is egregious, arbitrary, unfair, unjust or idiosyncratic, discriminatory, or exposes a claimant to sectional prejudice.

98. The minimum standard of treatment also protects investors of a Party from being deprived of their legitimate investment-backed expectations through the unexpected detrimental conduct of the host government.

99. The Government of Alberta recognized that its decision to accelerate dramatically the phase-out of coal-generated electricity would present a significant "economic disruption" to the capital investments of companies in that sector and threatened to harm investor confidence in Alberta.[36]

100. The Government of Alberta, therefore, decided to compensate businesses in the coal-generated electricity sector, including utilities with ownership interests in coalmines, but it arbitrarily and uniquely excluded Westmoreland from receiving any compensation.

101. Westmoreland's mining operations in Alberta depend entirely on having the electricity utilities as their customers. The Mines are commercially inseparable from the electricity utilities because the chemistry of the coal at the Mines is such that it cannot be transported economically for use anywhere else. The coal at the Mines is suitable only for the utilities that were built at the mouth of those Mines, and the utilities were built at the Mines expressly for the purpose of consuming the Mines' coal for generating electricity.

102. Westmoreland is in the same position as the utilities, if not worse, for suffering an economic disruption and the stranding of its investment capital as consequences of the Government of Alberta's coal phase-out. The utilities can convert

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[36] Ex. 9, *supra* n.12, Government of Alberta, *Phasing Out Coal Pollution*.

their plants to continue providing electricity using a different supply source (natural gas), but Westmoreland has no alternative use for the coal produced from its mines.

103. Notwithstanding the economic disruption and loss of investment presented by the coal phase-out program, the Government of Alberta chose to compensate all of the companies in the supply and production of coal-generated electricity with the sole exception of Westmoreland. Moreover, it would appear that the utilities having ownership interests in mines (TransAlta and Capital Power) were paid about one hundred times more than the sole utility without any such ownership interests (ATCO).

104. The Government of Alberta's decision to pay out nearly $1.4 billion in compensation to those three companies (and predominantly to TransAlta and Capital Power) and not a dollar to Westmoreland is arbitrary, grossly unfair and, therefore, a violation of the minimum standard of treatment under customary international law in breach of Article 1105.

105. The coal phase-out program also denies Westmoreland of the reasonable expectations of its investments in Canada in breach of Article 1105.

106. The Government of Canada required Westmoreland to undertake certain investments and terms in Alberta as conditions of its foreign investment to acquire the Mines.

107. Westmoreland was required by the Government of Canada, pursuant to the Investment Canada Act and Competition Act, to make capital investments of more than $20 million in excess of capital investments planned by the seller of the Mines, and to pursue other undertakings for three years, which it did.

108. These undertakings were made in 2014 with the reasonable expectation, in accordance with Canadian Federal Regulations, that Westmoreland's investments in the Mines would provide a reasonable return on investment beyond 2030.

109. The coal phase-out program, adopted in 2015 (just one year later), has curtailed the time horizon for Westmoreland's investments in the Mines, reducing their value and accelerating the time in which Westmoreland would have to complete its reclamation of the Mines at a cost that is no longer justified by the investments.

110. The denial of Westmoreland's reasonable expectation of its investments is a violation of the minimum standard of treatment under customary international law and a breach of Article 1105.

VI. RELIEF SOUGHT AND APPROXIMATE DAMAGES CLAIMED

111. As a result of the actions and breaches of the Government of Canada described above, Westmoreland Mining Holdings claims relief for the following:

- damages exceeding $470 million or such other amount to be proven in these proceedings in compensation for the damages caused by actions that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;
- the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;
- pre- and post-award interest at a rate to be fixed by the Tribunal;

- such further relief as counsel may advise and the Tribunal may deem just and appropriate.

Dated this 12th day of August, 2019

Respectfully submitted,

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