

PUBLIC DOCUMENT

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

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

**CANADA'S SUBMISSION ON THE FINAL AWARD IN *WESTMORELAND MINING
HOLDINGS LLC V. GOVERNMENT OF CANADA***

May 4, 2022

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1. Canada respectfully provides this submission in response to the Tribunal’s invitation of April 20, 2022 to the disputing parties to file submissions on the decision of the tribunal in *Westmoreland Mining Holdings LLC v. Government of Canada* (“*Westmoreland*”) in its Final Award of January 31, 2022 (the “*Westmoreland* Final Award”).¹ The *Westmoreland* tribunal unanimously declined jurisdiction over the claim against Canada by Westmoreland Mining Holdings LLC (“*Westmoreland*”) under NAFTA Articles 1116(1), 1117(1), and 1101(1) because the claimant was not a protected investor at the time of the alleged breaches; the claimant had not made out a *prima facie* damages claim; and the challenged measures did not relate to the claimant or its investment.²

2. The *Westmoreland* tribunal reached conclusions on the very NAFTA interpretation issues facing this Tribunal pursuant to Canada’s first jurisdictional objection under Articles 1116(1) and 1101(1). The *Westmoreland* tribunal’s reasoning strongly supports Canada’s position that this Tribunal has no jurisdiction over Tennant Energy, LLC’s (the “*Claimant*” or “*Tennant Energy*”) NAFTA claim because it was not a protected investor when the alleged breach occurred. The *Westmoreland* tribunal rejected the main legal arguments that Tennant Energy advances in this case.

3. In this submission, Canada: (I) briefly summarizes the relevant facts in *Westmoreland*; (II) addresses the *Westmoreland* tribunal’s interpretation that a NAFTA claimant must be a protected investor at the time of the alleged breach to establish jurisdiction *ratione temporis*; (III) analyses the *Westmoreland* tribunal’s finding that NAFTA offers no mechanism to assign investment claims; (IV) describes the *Westmoreland* tribunal’s analysis of when a claimant qualifies as a “legal successor” to an investor; (V) addresses the four questions on the *Westmoreland* Final Award that the Tribunal raised in its correspondence of April 20, 2022; and (VI) concludes with Canada’s requested relief.

I. BRIEF SUMMARY OF RELEVANT FACTS IN WESTMORELAND

4. Canada provides the following summary of facts as context for the *Westmoreland* tribunal’s analysis of the jurisdictional issues addressed below.³ The dispute in *Westmoreland* concerned the

¹ **RLA-207**, *Westmoreland Mining Holdings LLC v. Government of Canada* (UNCITRAL) Final Award, 31 January 2022 (“*Westmoreland* Final Award”).

² **RLA-207**, *Westmoreland* Final Award, ¶ 252(1).

³ This summary derives solely from the *Westmoreland* tribunal’s factual findings in the *Westmoreland* Final Award.

Government of Alberta's measures to phase out emissions from coal-fired power plants.⁴ The challenged measures occurred in 2015 and 2016.⁵

5. Westmoreland Coal Company ("WCC"), a U.S. investor, had invested in coal mines in Alberta in 2014.⁶ Its investment comprised two Canadian enterprises.⁷

6. In December 2014, certain lenders (the "first-tier lien holders") provided major loans to WCC.⁸ Nonetheless, on October 9, 2018, WCC filed for bankruptcy in the United States.⁹ On November 19, 2018, WCC filed a Notice of Arbitration against Canada under NAFTA Chapter Eleven.

7. Westmoreland did not exist at the time of the alleged breaches.¹⁰ As part of WCC's bankruptcy plan, Westmoreland was incorporated by the first-tier lien holders on January 31, 2019¹¹ and acquired the investment from WCC on March 15, 2019 – years after the alleged breaches occurred.¹²

8. WCC subsequently withdrew its NAFTA claim against Canada. On August 12, 2019, Westmoreland filed a new Notice of Arbitration against Canada, alleging the same breaches that WCC had alleged.¹³ Canada objected to the *Westmoreland* tribunal's jurisdiction on the ground that Westmoreland was not a protected investor at the time of the alleged breaches.¹⁴

⁴ The two alleged breaches in *Westmoreland* were: (1) the Government of Alberta's decision in 2015 to phase out emissions from coal-fired electricity generation by the year 2030, which the claimant argued breached NAFTA Article 1105; and (2) the Government of Alberta's decision in 2016 to make transition payments to three companies that owned certain coal-fired generation plants, which the claimant argued breached NAFTA Articles 1102 and 1105. See **RLA-207**, *Westmoreland* Final Award, ¶¶ 74, 81, 85, 88, 92.

⁵ **RLA-207**, *Westmoreland* Final Award, ¶¶ 74, 81, 85.

⁶ **RLA-207**, *Westmoreland* Final Award, ¶ 75.

⁷ These two Canadian enterprises were Westmoreland Canada Holdings Inc. and Prairie Mines & Royalty ULC. See **RLA-207**, *Westmoreland* Final Award, ¶¶ 2, 75.

⁸ **RLA-207**, *Westmoreland* Final Award, ¶ 77.

⁹ **RLA-207**, *Westmoreland* Final Award, ¶ 84.

¹⁰ **RLA-207**, *Westmoreland* Final Award, ¶ 194.

¹¹ **RLA-207**, *Westmoreland* Final Award, ¶ 88.

¹² **RLA-207**, *Westmoreland* Final Award, ¶¶ 89-90.

¹³ **RLA-207**, *Westmoreland* Final Award, ¶ 92.

¹⁴ **RLA-207**, *Westmoreland* Final Award, ¶ 95.

9. At the outset of its analysis, the *Westmoreland* tribunal asked whether NAFTA requires a claimant to have owned or controlled the relevant investment at the time of the alleged breach.¹⁵ If the answer was 'no', it would be necessary to determine if WCC successfully assigned its NAFTA claim to Westmoreland. If the answer was 'yes', it would be necessary to determine if Westmoreland was the same entity as WCC. Canada addresses the *Westmoreland* tribunal's analysis of these issues in the following sections.¹⁶

II. A CLAIMANT MUST BE A PROTECTED INVESTOR AT THE TIME OF THE ALLEGED BREACH TO ESTABLISH JURISDICTION UNDER NAFTA

10. On its first question, the *Westmoreland* tribunal affirmed that to establish jurisdiction under Articles 1116(1), 1117(1), and 1101(1), a claimant must be a protected investor at the time of the alleged breach.¹⁷ The *Westmoreland* tribunal held that a claimant must meet two requirements under Article 1116(1).¹⁸ First, "it must be claiming 'on its own behalf' such that it held the investment at the time of the alleged breach and is not bringing the claim on another's behalf".¹⁹ This is evident from the title of Article 1116(1): "Claim by an Investor of a Party on Its Own Behalf". Second, since Article 1116(1) refers to "the" investor rather than "an" investor, "that same investor (*i.e.* 'the' investor) must itself have suffered loss or damage arising out of that breach."²⁰ The *Westmoreland* tribunal found this construction of Article 1116(1) (and Article 1117(1))²¹ aligns with the object and

¹⁵ **RLA-207**, *Westmoreland* Final Award, ¶ 194.

¹⁶ Although the *Westmoreland* tribunal asked the second and third questions in the reverse order in paragraph 194, its substantive analysis addressed these issues in order of: (i) jurisdiction *ratione temporis*, (ii) assignment of claims, (iii) legal successor. This order of analysis offers a useful framework to address the issues, as jurisdiction *ratione temporis* and the assignment of claims raise interrelated legal questions. See **RLA-207**, *Westmoreland* Final Award, ¶¶ 209, 220.

¹⁷ **RLA-207**, *Westmoreland* Final Award, ¶ 212. See also ¶ 209: under "the Tribunal's construction of Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction *ratione temporis* to bring a claim." Westmoreland filed its claim under Articles 1116(1) and 1117(1). Tennant Energy filed its claim under Article 1116(1) but not Article 1117(1).

¹⁸ **RLA-207**, *Westmoreland* Final Award, ¶ 200.

¹⁹ **RLA-207**, *Westmoreland* Final Award, ¶ 200 (emphasis added).

²⁰ **RLA-207**, *Westmoreland* Final Award, ¶ 200. Article 1116(1): "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation [...] and that the investor has incurred loss or damage by reason of, or arising out of, that breach" (emphasis added).

²¹ **RLA-207**, *Westmoreland* Final Award, ¶ 200: "Article 1117(1) contains the same [two] requirements [as Article 1116(1)]."

purpose of NAFTA because “the duty on a NAFTA Party to accept certain obligations of investment protection is predicated upon an investor taking the risk of making an investment”.²²

11. The *Westmoreland* tribunal also required Article 1116(1) to be construed with reference to Article 1101(1), which specifies that a claimant must show the challenged measures “relate to” it or its investment to gain Chapter Eleven protection.²³ The *Westmoreland* tribunal affirmed that to “relate to” an investor, a measure must have a “direct and immediate effect on the claimant”.²⁴ This is impossible where a claimant did not own or control its investment when the challenged measures were adopted or maintained.²⁵

12. The *Westmoreland* tribunal’s interpretation of Articles 1116(1) and 1101(1) is correct, and Canada has advanced the same textual interpretation in this arbitration.²⁶ Tennant Energy has offered no textual analysis of Articles 1116(1) and 1101(1) that warrants departure from this interpretation.²⁷

²² **RLA-207**, *Westmoreland* Final Award, ¶ 201.

²³ **RLA-207**, *Westmoreland* Final Award, ¶ 197: “The wording of Article 1101(1) is unambiguous: it is titled ‘Scope and Coverage’ thus describing the scope of application of the NAFTA by way of an introduction to the remainder of Chapter Eleven. Article 1101(1) specifies the requirements which must be satisfied for a putative claimant to be entitled to the protection provided by Chapter Eleven, thus operating as the gateway to the remaining Articles of Chapter Eleven. Access to Chapter Eleven, including Articles 1116(1) and 1117(1) is thus restricted only to those entities which can satisfy the provisions of subparagraphs 1101(1)(a) – (c)”. See also ¶ 205, citing **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 26 March 2016 (“*Mesa Power – Award*”), ¶ 330.

²⁴ **RLA-207**, *Westmoreland* Final Award, ¶ 212; ¶ 207: “the tribunal in *Apotex*, held that the correct construction of Chapter Eleven was that the challenged measure must have a “direct and immediate effect” on the claimant. This would not be possible were the claimant not to have owned or controlled the investment in question at the time the challenged measure was adopted or maintained. This requirement that the claimant owned or controlled the investment at the time of the alleged treaty breach can also be seen from the case of *Resolute Forest Products*”. See also **RLA-079**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 244.

²⁵ **RLA-207**, *Westmoreland* Final Award, ¶¶ 207, 209, 212, 236.

²⁶ *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Canada’s Post-Hearing Submission, 17 December 2021 (“Canada’s Post-Hearing Submission”), ¶ 19; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 26 July 2021 (“Canada’s Reply to the Second Article 1128 Submissions of the U.S. and Mexico”), ¶¶ 12-16; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Canada’s Rejoinder Memorial on Jurisdiction, 26 May 2021 (“Canada’s Rejoinder Memorial on Jurisdiction”), ¶¶ 28-31; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Canada’s Counter-Memorial on Jurisdiction, 21 September 2020 (“Canada’s Counter-Memorial on Jurisdiction”), ¶¶ 64-74.

²⁷ Notably, Tennant Energy did not even cite Article 1116(1) in its submission specifically on whether NAFTA claims may be assigned under Chapter Eleven, of December 22, 2021. *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Tennant Energy’s Response to Canada’s Post Hearing Submission, 22 December 2021 (“Tennant Energy’s Submission of 22 December 2021”).

Moreover, the *Westmoreland* tribunal's reading of NAFTA's object and purpose supports Canada's position here that the NAFTA Parties owe the substantive obligations in NAFTA Section A to the disputing investor only once it takes the risk of making (or seeking to make) its investment.²⁸ By contrast, allowing different investors to buy and sell investment claims after the alleged breach occurred would incentivize claim shopping, as investors who took no risk that the alleged breach might occur (it already has) could acquire investments solely to file claims.²⁹

13. The *Westmoreland* tribunal found its construction of Articles 1116(1) and 1101(1) aligns with NAFTA jurisprudence.³⁰ It agreed with the *Gallo* tribunal's confirmation that "the Claimant must have owned or controlled the Enterprise at the time the [challenged measure] was enacted."³¹ The *Westmoreland* tribunal considered instructive the *Mesa Power* tribunal's view that "investment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted."³² The *Westmoreland* tribunal also observed that the *B-Mex* tribunal upheld this construction.³³

14. In this arbitration, Canada has highlighted how each of these NAFTA cases, and many other investment cases, affirm that a claimant must demonstrate that it was a protected investor at the time of the alleged breach to establish jurisdiction.³⁴ Tennant Energy has provided no basis to overturn this fundamental rule on jurisdiction.

²⁸ Article 1139: "investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment". See also Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 13; Canada's Rejoinder Memorial on Jurisdiction, ¶ 28; Canada's Counter-Memorial on Jurisdiction, ¶¶ 62-67.

²⁹ Canada's Post-Hearing Submission, ¶ 22; Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 15.

³⁰ **RLA-207**, *Westmoreland* Final Award, ¶¶ 202-207.

³¹ **RLA-207**, *Westmoreland* Final Award, ¶ 202, citing **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶ 326. See also **RLA-207**, *Westmoreland* Final Award, ¶ 203.

³² **RLA-207**, *Westmoreland* Final Award, ¶¶ 204-205, citing **RLA-001**, *Mesa Power – Award*, ¶¶ 325-327.

³³ **RLA-207**, *Westmoreland* Final Award, ¶ 206, citing **RLA-121**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019 ("*B-Mex*") ¶ 145.

³⁴ Canada's Post-Hearing Submission, ¶ 23; Canada's Rejoinder Memorial on Jurisdiction, ¶ 28 and footnotes therein; Canada's Counter-Memorial on Jurisdiction, ¶¶ 68-73 and footnotes therein.

15. The *Westmoreland* tribunal further observed that its construction was the one all three NAFTA Parties considered correct.³⁵ It recognized the NAFTA Parties “have a unique perspective on how the NAFTA should be interpreted and also in recognition of the systemic interest of States in ensuring consistency of interpretation.”³⁶ It accepted that “significant weight” should be placed on Mexico’s Article 1128 submission in *Westmoreland*, as Mexico had no interest in the outcome of the dispute.³⁷

16. This Tribunal should similarly place significant weight on the Article 1128 submissions of the United States and Mexico in this arbitration.³⁸ The three NAFTA Parties agree on the proper interpretation of Article 1116(1).³⁹ To ensure the correct and consistent interpretation of jurisdiction *ratione temporis* under NAFTA, the Tribunal should affirm that a claimant must be a protected investor at the time of the alleged breach to establish jurisdiction under Article 1116(1).

III. NAFTA OFFERS NO MECHANISM TO ASSIGN INVESTMENT CLAIMS

17. Tennant Energy and *Westmoreland* both made legal arguments that NAFTA investors may assign investment claims to separate investors who were not protected at the time of the alleged breach.⁴⁰ The *Westmoreland* tribunal rejected this proposition without qualification:

“The short answer to *Westmoreland*’s argument is that given the Tribunal’s construction of Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction *ratione temporis* to bring a claim.”⁴¹

18. Having found that a claimant must prove it was a protected investor at the time of the alleged breach, the *Westmoreland* tribunal correctly concluded that a NAFTA claim cannot be assigned to a

³⁵ **RLA-207**, *Westmoreland* Final Award, ¶ 213.

³⁶ **RLA-207**, *Westmoreland* Final Award, ¶ 214 (emphasis added).

³⁷ **RLA-207**, *Westmoreland* Final Award, ¶ 214.

³⁸ Tribunals have accorded considerable weight to the concordant views of the NAFTA Parties. *See* Canada’s Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 7.

³⁹ Canada’s Post-Hearing Submission, ¶ 21; Canada’s Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 8. *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 25 June 2021, ¶¶ 10-11; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Second Submission of the United Mexican States, 25 June 2021, ¶¶ 6-7.

⁴⁰ **RLA-207**, *Westmoreland* Final Award, ¶ 208; Tennant Energy’s Submission of 22 December 2021, ¶ 6.

⁴¹ **RLA-207**, *Westmoreland* Final Award, ¶ 209 (emphasis added).

different investor who did not hold the investment when the alleged breach occurred.⁴² In so doing, the *Westmoreland* tribunal rejected four propositions that Tennant Energy also advances on this issue.

19. First, Tennant Energy has argued that *Loewen* and *Daimler* support its theory that NAFTA and international law offer a mechanism for the recipient/assignee of an investment to initiate a claim over measures that predated its acquisition of the investment.⁴³ *Westmoreland* cited these two cases to make the same argument, which the *Westmoreland* tribunal rejected. It found that *Westmoreland* was unable to cite any NAFTA cases where an assignee of an investment established jurisdiction.⁴⁴ The *Westmoreland* tribunal also correctly noted the *Daimler* tribunal's view that while a claimant can transfer its investment after commencing a claim, the right to bring the claim remains with the investor that held the investment at the time of the challenged measure.⁴⁵

20. Second, Tennant Energy advances a virtually limitless theory that the right to bring a NAFTA claim can be assigned, along with the investment, to any investor.⁴⁶ Yet like *Westmoreland*, it also alleges that if a potential claim remains within a family or family of businesses, a separate claimant may file a claim assigned to it after the alleged breach occurred.⁴⁷ The *Westmoreland* tribunal rejected this proposition because under Chapter Eleven a claimant must show the challenged measures applied

⁴² **RLA-207**, *Westmoreland* Final Award, ¶¶ 209, 220. See also Canada's Post-Hearing Submission, ¶¶ 19-20.

⁴³ Tennant Energy's Submission of 22 December 2021, ¶¶ 14-16, 52. **CLA-285**, *Loewen Group, Inc. and United States of America* (ICSID Case No. ARB (AF)/98/3) Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001; **CLA-309**, *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) Award, 22 August 2012.

⁴⁴ **RLA-207**, *Westmoreland* Final Award, ¶ 208. The *Loewen* tribunal declined jurisdiction, and never held that a claimant need not be a protected investor when the alleged breach occurred to establish jurisdiction. Canada's Post-Hearing Submission, ¶ 24. The *Westmoreland* tribunal also noted that the tribunal in *Daimler* found the claimant must have suffered damage from the challenged measures. See **RLA-207**, *Westmoreland* Final Award, ¶ 210; Canada's Post-Hearing Submission, ¶ 24; Canada's Rejoinder Memorial on Jurisdiction, fn. 46; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Jurisdictional Hearing Transcript ("Jurisdictional Hearing Transcript"), Day 5, 19 November 2021, p. 847:7-15.

⁴⁵ **RLA-207**, *Westmoreland* Final Award, ¶¶ 209-210: "it is clear that these tribunals proceeded on the basis there was a requirement that the claimant must have suffered damage as a result of the challenged measures. This indicates that to have jurisdiction, a claimant must have owned or controlled the investment at the time the challenged measure was adopted or maintained, although it may be the case, as stated by the tribunal in *Daimler*, that such party might be found to have relinquished its claim."

⁴⁶ Canada's Post-Hearing Submission, ¶¶ 17-18; Tennant Energy's Submission of 22 December 2021, ¶¶ 6-7.

⁴⁷ **RLA-207**, *Westmoreland*, Final Award, ¶ 166, 219; Tennant Energy's Submission of 22 December 2021, ¶ 118-119.

to it and it suffered loss from the challenged measures.⁴⁸ This reasoning is correct, and Tennant Energy's reliance on *S.D. Myers* for its flawed notion that NAFTA's jurisdictional rules apply more loosely based on the merits of a claim or the presence of a family business is unavailing.⁴⁹

21. Third, Tennant Energy has belatedly argued that Article 1109 authorizes the assignment of NAFTA claims.⁵⁰ *Westmoreland* also advanced this theory yet failed to convince the *Westmoreland* tribunal.⁵¹ Article 1109 is a substantive obligation within Section A that protects the international transfer of funds between the host and home States relating to a protected investor's investment. Article 1109 does not concern access to dispute settlement under Section B for matters that arose before a claimant made its investment. Article 1109 does not authorize a claimant to bring a claim allegedly assigned to it. Tennant Energy has not alleged a breach of Article 1109 in this arbitration, and Article 1109 is not relevant to the Tribunal's determination of its jurisdiction.

22. Fourth, Tennant Energy believes domestic law is determinative of whether NAFTA claims may be assigned. Yet the *Westmoreland* tribunal did not consider U.S. domestic law dispositive to this question. It addressed the issue under the applicable law, which as here is NAFTA and international law.⁵² Thus, Justice Grignon's opinion on whether John Tennant assigned the right to bring a NAFTA claim under California law does not determine the Tribunal's jurisdiction.⁵³

⁴⁸ **RLA-207**, *Westmoreland* Final Award, ¶ 220.

⁴⁹ Canada's Post-Hearing Submission, ¶¶ 11-16, fn. 34. Furthermore, the facts in *S.D. Myers* differ significantly from this case, and Tennant Energy has failed to show otherwise. For instance, the Claimant filed none of the evidence considered relevant by the *S.D. Myers* tribunal and Court to find indirect control. **CLA-111**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 12 November 2000; **R-080**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, 13 January 2004.

⁵⁰ Tennant Energy's Submission of 22 December 2021, ¶¶ 9-12. The Claimant never referred to Article 1109 in its Notice of Arbitration, Memorial on Jurisdiction, Reply Memorial on Jurisdiction, or at the Hearing on Jurisdiction.

⁵¹ **RLA-207**, *Westmoreland* Final Award, ¶ 168.

⁵² **RLA-207**, *Westmoreland* Final Award, ¶¶ 116, 220; Canada's Post-Hearing Submission, ¶ 27.

⁵³ Canada's Post-Hearing Submission, ¶ 27. Whatever rights John Tennant might have assigned to Tennant Travel under California law on January 15, 2015, the right to initiate a NAFTA claim over an alleged breach on July 4, 2011 was not one of them. The Claimant's name changed from "Tennant Travel, LLC" to "Tennant Energy, LLC" on April 20, 2015. See Canada's Counter-Memorial on Jurisdiction, ¶ 87.

IV. A SEPARATE ENTITY IS NOT A “LEGAL SUCCESSOR” WHO CAN CONTINUE A NAFTA CLAIM

23. Having affirmed that a claimant must be a protected investor at the time of the alleged breach, the *Westmoreland* tribunal analyzed whether Westmoreland was the “same entity” – or a “legal successor” – of WCC.⁵⁴ This is an issue of fact.⁵⁵ The *Westmoreland* tribunal assessed the transaction steps whereby Westmoreland acquired the investment. It concluded that Westmoreland was not a legal successor of WCC, including because: Westmoreland was not a new personification or corporate form of WCC;⁵⁶ the two companies currently exist;⁵⁷ and not all of WCC's assets or liabilities were transferred to Westmoreland.⁵⁸ Instead, Westmoreland was merely “a separate legal entity which acquired the NAFTA claim after the Challenged Measures had been adopted”.⁵⁹ Since Westmoreland was not WCC's legal successor, the claimant was not the protected investor that owned the investment when the alleged breach occurred. Thus, the *Westmoreland* tribunal found it had no jurisdiction over the claim.⁶⁰

V. THE TENNANT TRIBUNAL'S QUESTIONS ON THE WESTMORELAND FINAL AWARD

24. With these findings of the *Westmoreland* tribunal in mind – particularly, that a claimant must be a protected investor at the time of the alleged breach; NAFTA claims cannot be assigned; and a separate entity is not a “legal successor” who can continue a NAFTA claim – Canada now turns to the Tribunal's four questions on the *Westmoreland* Final Award.

⁵⁴ **RLA-207**, *Westmoreland* Final Award, ¶¶ 194, 217, 220.

⁵⁵ **RLA-207**, *Westmoreland* Final Award, ¶ 220.

⁵⁶ **RLA-207**, *Westmoreland* Final Award, ¶¶ 194, 226, 230.

⁵⁷ The *Westmoreland* tribunal considered if the facts involved a “restructuring pursuant to which Westmoreland emerged from WCC's ashes.” See **RLA-207**, *Westmoreland* Final Award, ¶ 230.

⁵⁸ **RLA-207**, *Westmoreland* Final Award, ¶¶ 221-230.

⁵⁹ **RLA-207**, *Westmoreland* Final Award, ¶ 218 (emphasis added).

⁶⁰ **RLA-207**, *Westmoreland* Final Award, ¶¶ 230, 237.

1. The *Tennant* Tribunal's Question 1

25. The Tribunal asked the disputing parties to address “the principles set out at paragraph 195 of the *Westmoreland* award”. Paragraph 195 states:

“Having reviewed the cases cited by the Parties, certain principles can be drawn: (i) a sham transaction will be fatal to jurisdiction, (ii) just because a transaction is *bona fide* does not of itself guarantee jurisdiction; and (iii) there must be beneficial ownership at all relevant times with a NAFTA investor. However, none of the cases cited by the Parties is directly on point in respect of the issue in dispute in this case, in particular, whether the investor at the time the challenged measures are adopted or maintained must be the same entity as the investor at the time the arbitration is commenced.”

26. Paragraph 195 summarizes three jurisdictional principles from the case law. The first principle is that a sham transaction is fatal to jurisdiction. The second principle is that a *bona fide* transaction does not guarantee jurisdiction. The third principle is that continuous foreign ownership of an investment by a NAFTA investor is necessary – but not sufficient – to establish jurisdiction.

27. The first two principles reflect each other. A sham transaction is a form of bad faith that can impede jurisdiction where it involves an attempt to abuse treaty rights. The Tribunal need not assess these issues because it lacks jurisdiction *ratione temporis*. Tennant Energy was not a protected investor when the alleged breach occurred on July 4, 2011.⁶¹ At that time, John Tennant owned the investment (beneficial ownership of Skyway 127 shares).⁶² He transferred it to the Claimant years later, on January 15, 2015.⁶³ This jurisdictional objection eliminates Tennant Energy's entire claim.

28. Nevertheless, if the Tribunal were to assess whether the Claimant made a “sham” transaction, Canada reiterates that Tennant Energy's claim that John Tennant created an oral trust to transfer the

⁶¹ Canada's Post-Hearing Submission, ¶¶ 28-50; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 39-62; Canada's Counter-Memorial on Jurisdiction, ¶¶ 81-96. *See also* C-116, Shareholder's Ledger Skyway 127, 9 June 2011; C-117, Shareholder's Ledger Skyway 127, 20 June 2011.

⁶² The specific share percentages held by John Tennant were 11.3% as of June 20, 2011, and 22.6% from December 30, 2011 to January 15, 2015. *See* Canada's Post-Hearing Submission, ¶ 6; Claimant's Reply Memorial on Jurisdiction, ¶¶ 96, 117, 125, 156. *See also* Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 32-33; C-117, Shareholder's Ledger Skyway 127, 20 June 2011; C-114, Shareholder's Ledger Skyway 127, 30 December 2011.

⁶³ C-115, Shareholder's Ledger Skyway 127, 15 January 2015; Canada's Post-Hearing Submission, ¶ 42; Jurisdictional Hearing Transcript, Day 1, 15 November 2021, p. 49:9-15; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 32-33; Canada's Counter-Memorial on Jurisdiction, ¶ 91.

investment to the Claimant on April 26, 2011 is a *post hoc* rationale developed solely to establish the Tribunal's jurisdiction.⁶⁴ The Claimant filed no reliable evidence to prove the alleged trust existed or that this transaction occurred.⁶⁵ It relies solely on testimony from witnesses with an interest in the outcome of the arbitration⁶⁶ – who gave inconsistent testimonies at the Hearing on Jurisdiction⁶⁷ – and just one exhibit created in contemplation of arbitration.⁶⁸

29. Furthermore, where an investor transfers its investment to an impecunious holding company after the alleged breach occurred solely for that company to bring a claim while protecting the former investor from an adverse costs order, this does not constitute a *bona fide* transaction: it undermines the integrity of the arbitral proceedings.⁶⁹ John Tennant confirmed that Tennant Energy has no assets, holds no financial resources in a bank account, and serves no other purpose besides holding the Skyway 127 shares and suing Canada.⁷⁰ In these circumstances, Tennant Energy appears to have acquired the investment after the alleged breach occurred not to make a *bona fide* transaction, but to bring this claim while protecting its owner(s) from an adverse costs order rendered against them personally.⁷¹ Thus, the Claimant fails the jurisdictional pre-requisites articulated in *Westmoreland*.

⁶⁴ Canada's Post-Hearing Submission, ¶¶ 31-32; Jurisdictional Hearing Transcript, Day 1, 15 November 2021, p. 46:19-24; Jurisdictional Hearing Transcript, Day 5, 19 November 2021, p. 709:2-19; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 27, 32; Canada's Counter-Memorial on Jurisdiction, ¶ 91. The *Gallo* dispute also involved a sham transaction in attempt to establish consent to arbitration. See **RLA-004**, *Gallo – Award*, ¶¶ 327-329, 333, 336.

⁶⁵ Canada's Post-Hearing Submission, ¶¶ 31-43; Jurisdictional Hearing Transcript, Day 1, 15 November 2021, p.19:8-18; Jurisdictional Hearing Transcript, Day 5, 19 November 2021, p. 728:3-6; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 39-57; Canada's Counter-Memorial on Jurisdiction, ¶¶ 88-92.

⁶⁶ Canada's Post-Hearing Submission, ¶¶ 29, 34; Canada's Rejoinder Memorial on Jurisdiction, ¶ 40. See also **RLA-205**, *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42) Award, 30 August 2021 ("*MAKAE – Award*"), ¶¶ 142-143, 169, 171.

⁶⁷ Canada's Post-Hearing Submission, ¶¶ 35-38.

⁶⁸ Canada's Post-Hearing Submission, ¶¶ 29, 40; Jurisdictional Hearing Transcript, Day 1, 15 November 2021, p. 44:3-21, and Day 5, 19 November 2021, pp. 716:7-717:7; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 34-38 and footnotes cited therein..

⁶⁹ Canada's Rejoinder Memorial on Jurisdiction, ¶ 41; Canada's Motion for Security for Costs and Third Party Funding, 16 August 2019, ¶¶ 10, 24, 34, 37.

⁷⁰ Jurisdictional Hearing Transcript, Day 3, 17 November 2021, p. 395: 10-24: "Q. Now, besides holding the Shares in Skyway 127 22 and suing the Government of Canada, Tennant Energy has no other purposes; correct? A. Not at the moment, no."

⁷¹ Canada's Post-Hearing Submission, ¶ 22.

30. The third principle in paragraph 195 provides that a claimant may fail to establish jurisdiction if a non-NAFTA investor beneficially owned the investment at the relevant times for jurisdiction. Yet the mere fact that a NAFTA investor beneficially owned the investment at all relevant times is not enough to establish jurisdiction over the claimant's claim under Articles 1116(1) and 1101(1). The *Westmoreland* tribunal stated that the cases summarized in paragraph 195 did not directly resolve the issue in dispute – whether the claimant itself must have owned or controlled the investment at the time of the alleged breach. As explained in Section II above, the *Westmoreland* tribunal's answer to this question was unambiguous: a claimant must prove it was the protected investor at the time of the alleged breach to establish jurisdiction. Thus, contrary to Tennant Energy's belief, continuous foreign nationality over the investment is necessary but not sufficient to establish jurisdiction.⁷²

2. The *Tennant* Tribunal's Question 2

31. The Tribunal asked the disputing parties to address, “whether ‘beneficial ownership at all relevant times with a NAFTA investor’ (award, paragraph 195) includes beneficial ownership of a minority shareholding in a NAFTA Chapter 11 claimant”. Where, as here, the “investment” is beneficial ownership of a minority shareholding, a protected investor must have owned that investment at all relevant times. Yet as explained under Question 1 above, a claimant cannot establish jurisdiction merely by showing that another NAFTA investor held the investment at the time of the alleged breach.⁷³ The claimant must itself have been the protected investor at that time.

32. Moreover, even if another NAFTA investor holds a minority shareholding in the claimant, there is no basis under NAFTA or international law to “pierce the corporate veil” of a claimant to find jurisdiction based on its purported owners' alleged interests in the investment and the claimant.⁷⁴

⁷² Canada's Post-Hearing Submission, ¶ 23 and footnote 52, citing **RLA-146**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011 (“*GEA Group – Award*”), ¶¶ 168-170; **RLA-174**, *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4) Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020 (“*STEAG – Decision on Jurisdiction, Liability and Principles of Quantum*”), [Spanish, with attached translated excerpts], ¶¶ 145-151, 380. Both tribunals treated continuous foreign nationality of the investor as insufficient to find jurisdiction.

⁷³ **RLA-146**, *GEA Group – Award*, ¶¶ 168-170; **RLA-174**, *STEAG – Decision on Jurisdiction, Liability and Principles of Quantum*, ¶¶ 145-151, 380. Both tribunals treated continuous foreign nationality of the investor as insufficient to find jurisdiction.

⁷⁴ See Canada's Post-Hearing Submission, ¶¶ 13-14; **RLA-205**, *MAKAE – Award*, ¶ 164.

John Tennant's past ownership of the Skyway 127 shares and unproven⁷⁵ minority shareholding in Tennant Energy cannot establish this Tribunal's jurisdiction.⁷⁶ He did not bring this claim. As explained in Section II above, the Claimant must prove it was the protected investor at the time of the alleged breach. Since it failed to meet this requirement, the Tribunal has no jurisdiction.

3. The *Tennant* Tribunal's Question 3

33. The Tribunal asked the disputing parties to address "the relevance, if at all, to the present case of the *Westmoreland* tribunal's assessment at paragraph 201 of its award (reflected also in paragraph 212 of the award)". Paragraph 201 states:

"[A]n investor must have taken a risk by making an investment in order to be assured of treaty protection. [...] [O]nce an alleged treaty breach has taken place, it cannot be argued that a subsequent purchaser of the investment or assignee of a claim takes such a risk [...] [T]he risk is not that the breach may occur, it has already occurred."⁷⁷

34. Paragraph 212 states:

"The Tribunal therefore finds that the correct construction of Articles 1101(1), 1116(1) and 1117(1) is that the challenged measures alleged to be in breach of a Section A obligation must relate to the investor of the party that is filing the claim under Section B. [...] [T]he challenged measure must "directly address, target, implicate, or affect the claimant" or have a "direct and immediate effect on the

⁷⁵ See Canada's Post-Hearing Submission, ¶ 16 and fn. 31.

⁷⁶ Canada's Post-Hearing Submission, ¶¶ 13-15; Canada's Rejoinder Memorial on Jurisdiction, ¶ 60; Canada's Counter-Memorial on Jurisdiction, ¶ 95.

⁷⁷ **RLA-207**, *Westmoreland* Final Award, ¶ 201 states in full: "Whilst *Westmoreland* seeks to impress on us that we should not be quick to infer a stipulation where none is express, this construction comports with the object and purpose of the NAFTA which is, *inter alia*, to "increase substantially investment opportunities in the territories of the Parties". In order to encourage and support this investment, the Parties further agree certain protections for investors as detailed in Chapter Eleven. It must be a necessary element of the NAFTA that the duty on a NAFTA Party to accept certain obligations of investment protection is predicated upon an investor taking the risk of making an investment or, to put it the other way, an investor must have taken a risk by making an investment in order to be assured of treaty protection. A purchaser or assignee of an investment prior to any alleged treaty breach evidently takes a risk that there may be a subsequent treaty breach. However, once an alleged treaty breach has taken place, it cannot be argued that a subsequent purchaser of the investment or assignee of a claim takes such a risk. After the occurrence of an alleged breach, a subsequent assignee or purchaser can assess the likely damage arising from such breach and factor the risk level into the terms of any purchase or assignment. Whilst the actual quantification of such loss may not be certain, the risk is not that the breach may occur, it has already occurred." (footnotes omitted).

claimant.” [...] [T]o be entitled to Chapter Eleven protection, an investor must have accepted risk.”⁷⁸

35. As explained in Section II above, the NAFTA Parties owe the substantive obligations in Section A to the disputing investor only once it takes the risk of making (or seeking to make) its investment. Applying this principle to the facts, the *Westmoreland* tribunal found:

“[I]t cannot be said that Westmoreland, which is not a successor of WCC but the purchaser of the WCC assets or purported assignee of WCC’s NAFTA claim, has taken any investment risk in the sense of being exposed to Canadian sovereign measures. The challenged measures had already been adopted, and it was clear what impact they would have on the Mines.”⁷⁹

36. The same holds true here. Tennant Energy took no investment risk that the challenged measures would occur. Having first acquired the investment on January 15, 2015, there was no risk to Tennant Energy that Skyway 127 would not receive a FIT Contract, the FIT Program would be cancelled, or the other challenged measures might occur. The alleged breach and alleged loss had already happened years earlier, on July 4, 2011. Yet at that time, the substantive protections in Section A did not cover Tennant Energy because it had accepted no investment risk. Nor could it experience loss from the challenged measures, as they did not “directly address, target, implicate, or affect” or have a “direct and immediate effect” on the Claimant.⁸⁰ Thus, Tennant Energy cannot establish jurisdiction for this claim under Articles 1116(1) and 1101(1), as it was not brought “on its own behalf” and concerns measures that did not “relate to” the Claimant.⁸¹

4. The *Tennant* Tribunal’s Question 4

37. The Tribunal asked the disputing parties to address, “having regard to paragraph 220 of the *Westmoreland* award, the relevance (if at all) of the *Westmoreland* award to circumstances in which a NAFTA Chapter 11 claimant may be the legal successor to a minority shareholding that may qualify

⁷⁸ **RLA-207**, *Westmoreland* Final Award, ¶ 212 (emphasis added, footnotes omitted).

⁷⁹ **RLA-207**, *Westmoreland* Final Award, ¶ 232.

⁸⁰ **RLA-207**, *Westmoreland* Final Award, ¶¶ 232-236; ¶ 236: “a measure cannot relate to an entity which was not in existence at the time it was allegedly affected or to its investment which had not yet been made”.

⁸¹ **RLA-207**, *Westmoreland* Final Award, ¶ 236; Canada’s Post-Hearing Submission, ¶¶ 19-20.

as an “investor” for purposes of NAFTA Chapter 11.”⁸² As explained in Section IV above, the term “legal successor” concerns whether two investors are the same entity.⁸³ A “legal successor” does not include a separate legal entity that merely purchased the investment from another investor.⁸⁴ Thus, irrespective of whether an “investment” is a minority or majority shareholding in an enterprise, a claimant that acquires an investment from a separate legal entity after the alleged breach occurred is not a “legal successor” of the former investor. Such a claimant would not qualify as the NAFTA-protected “investor” that held the investment at the time of the alleged breach.

38. It is imperative to clarify that the term “legal successor” used by the *Westmoreland* tribunal has a different meaning from the term “successor in interest” used by Tennant Energy. The Claimant uses “successor in interest” to capture any investor that acquired an investment from another investor – as opposed to the same entity.⁸⁵ Tennant Energy confirmed that its legal arguments on assignment and “successors in interest” are the same.⁸⁶ Yet as explained in Section III above, the *Westmoreland* tribunal rejected the notion that NAFTA claims may be assigned between separate entities.

39. Tennant Energy is not the “legal successor” of John Tennant. John Tennant is a natural person. Tennant Energy is an enterprise.⁸⁷ Of course, Tennant Energy is not a new personification or change

⁸² **RLA-207**, *Westmoreland* Final Award, ¶ 220 states: “The Tribunal does not accept *Westmoreland*’s test. Having determined that jurisdiction under Chapter Eleven requires that a claimant shows that the challenged measures applied to it and that it suffered loss as a result of the challenged measures, it follows that *Westmoreland* must show that it is the legal successor to WCC. It is common ground that this issue is one of fact. *Westmoreland*’s expert did not address this issue and, whilst Canada adduced expert US bankruptcy evidence, the Tribunal notes Canada’s expert’s evidence (which is not disputed by *Westmoreland*) that US bankruptcy law is not relevant to this question. Accordingly, we approach determination of this question on the basis of the facts before us and against the background of US domestic law as the law governing *Westmoreland* and WCC.” (emphasis added, footnotes omitted).

⁸³ **RLA-207**, *Westmoreland* Final Award, ¶ 194: “A fundamental question raised by the temporal challenges is whether, to bring a claim under NAFTA Chapter Eleven, *Westmoreland* must have owned or controlled the investment at the time of the alleged Treaty breach. If the answer to this question is ‘yes’, given it is common ground that *Westmoreland* was not in existence at the time of the enactment of the Challenged Measures, it will be necessary to determine whether *Westmoreland* is the same entity as WCC, albeit in a new corporate form, failing which *Westmoreland*’s claim must fail for lack of jurisdiction *ratione temporis*” (emphasis added).

⁸⁴ **RLA-207**, *Westmoreland* Final Award, ¶ 232: “It cannot be said that *Westmoreland*, if not a successor of WCC, but instead in its capacity as the purchaser of the WCC assets or purported assignee of WCC’s NAFTA claim, has taken any risk.”

⁸⁵ The Claimant provided no reliable evidence to support its assertion that Tennant Energy was a “successor in interest” to John Tennant or GE Energy under the applicable law. See Canada’s Post-Hearing Submission, ¶ 27.

⁸⁶ Canada’s Post-Hearing Submission, ¶¶ 17-18; Jurisdictional Hearing Transcript, Day 5, 19 November 2021, pp. 835:1-8; 909:25-910:1; Claimant’s Reply Memorial on Jurisdiction, ¶ 105.

⁸⁷ Canada’s Post-Hearing Submission, ¶ 26.

in corporate form of John Tennant. Nor have all of his assets and liabilities been transferred to Tennant Energy, which merely acquired the investment from John Tennant after the alleged breach occurred. This does not make Tennant Energy the “legal successor” of John Tennant.

VI. CONCLUSION AND REQUEST FOR RELIEF

40. The *Westmoreland* tribunal affirmed, and all three NAFTA Parties agree, that a claimant must prove it was a protected investor at the time of the alleged breach to establish jurisdiction under Article 1116(1). Yet Tennant Energy has failed to meet this burden. It did not provide reliable evidence to prove it acquired the investment on April 26, 2011, before the alleged breach occurred on July 4, 2011. The only reliable evidence on the record indicates it first acquired the investment on January 15, 2015. Moreover, Tennant Energy is not John Tennant’s “legal successor”: it merely acquired the investment from him years after the alleged breach occurred. Thus, Tennant Energy cannot establish the Tribunal’s jurisdiction *ratione temporis* over this claim.

41. For the foregoing reasons, along with Canada’s other submissions in this arbitration, Canada respectfully requests that the Tribunal:

- (a) Dismiss the Claimant’s claim in its entirety and with prejudice on the grounds of lack of jurisdiction under NAFTA Articles 1116(1) and 1116(2);
- (b) Order the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- (c) Grant any further relief it deems just and appropriate under the circumstances.

May 4, 2022

Respectfully submitted on behalf of the
Government of Canada,



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