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Subject: RE: Tennant Energy, LLC v. Canada - Response to Canada's Renewed Application for Security for Costs
Date: 20 April 2022 12:43:10

Dear Mesdames, dear Sirs,

I write on behalf of the Tribunal.

The Tribunal has carefully considered the Respondent's application dated 16 February 2022 to admit the final award in *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3). The Tribunal has also carefully considered the Claimant's response to that application dated 24 February 2022.

The Tribunal unanimously decides to grant the application and admit the final award in *Westmoreland* into the record. The Respondent is accordingly directed to submit the award into the record of the proceedings with an appropriate docket number. As the Tribunal previously indicated in its communication dated 10 November 2021, such awards are not binding and merely represent one tribunal's reasoning on a particular set of facts. The Tribunal sees no reason why it should not consider such reasoning, and the Tribunal will decide after hearing submissions from both Parties whether the reasoning in *Westmoreland* is helpful or otherwise.

In addition, the Tribunal is not persuaded by the Claimant's argument that "significant and burdensome" complications may arise from the Respondent's request to add the additional authority, or that this may delay any decision on the jurisdictional phase for up to 6 months. The Tribunal sees no basis for requesting or allowing further Article 1128 submissions. The Tribunal likewise sees no basis to seek and permit the admission of any of the associated materials, e.g. the expert opinion of Jan Paulsson or evidence on US bankruptcy law. As stated above, the Tribunal is merely considering another tribunal's reasoning on a particular set of facts, and will decide after hearing Parties whether such reasoning is helpful to the present facts or not.

In this regard, Parties are invited to address the Tribunal on the *Westmoreland* final award by **Wednesday, 4 April 2022**. Such submissions are to be limited to no more than 20 pages. Noting that the award is already in the public domain, and with a view to assisting the Parties in focusing their submissions, in addition to addressing any general points that each Party considers may be relevant arising from the award, the Tribunal would find it helpful if the Parties would also address the following:

- the principles set out at paragraph 195 of the *Westmoreland* award;
- 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;
- 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);
- 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 as an "investor" for purposes of NAFTA Chapter 11.

As for the Respondent's re-application for security for costs dated 16 February 2022, the Tribunal will address the application in its decision on the jurisdictional phase.

Yours sincerely,

José Luis Aragón Cardiel
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