INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the matter of Arbitration between:	
WESTMORELAND MINING HOLDINGS LLC,	
Claimant,	
and	ICSID Case No. UNCT/20/3
GOVERNMENT OF CANADA,	
Respondent.	

VIDEOCONFERENCE: HEARING ON JURISDICTION

Wednesday, July 14, 2021

The World Bank Group

The hearing in the above-entitled matter came on at 9:37 a.m. (EDT) before:

MS. JULIET BLANCH, President

MR. JAMES HOSKING, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

ALSO PRESENT:

On behalf of ICSID:

MS. ANNELIESE FLECKENSTEIN
Secretary of the Tribunal

Realtime Stenographer:

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On behalf of the Respondent:

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MS. KRISTA ZEMAN
MS. MEGAN VAN DEN HOF
MS. ALEXANDRA DOSMAN
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Party representatives:

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MR. PETER CIECHANOWSKI
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MS. MARIEKE DUBE
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MS. ELENA LAPINA
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APPEARANCES: (Continued)

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C O N T E N T S

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P R O C E E D I N G S

PRESIDENT BLANCH: I propose that we start.

So, I wanted to welcome everybody to Day 1 of the Jurisdictional Hearing between Westmoreland Mining Holdings, LLC, and the Government of Canada in the ICSID Case Number UNCT/20/3.

A couple of points, firstly, from the Tribunal. As a very initial point, I can absolutely guarantee we have read through everything we've been provided, and we've looked at it carefully.

(Interruption.)

(Stenographer clarification.)

PRESIDENT BLANCH: Good. Thank you.

It was just to reassure the Parties that the Members of the Tribunal have read everything. We haven't gone through the slides, the demonstratives, as they have only just arrived, but we have gone through everything else.

Secondly, pursuant to Paragraph 30 of PO4, I confirm the only persons committed to attend this Hearing are those approved by the Disputing Parties and the Tribunal, and no unauthorized person shall

attend in violation of this agreement.

Thirdly, I confirm we've received the confidentiality undertakings from the Non-Disputing Parties.

And then, finally, in terms of timetable, we'll need to take a break at about the two-hour point for the Transcribers, for the Reporters.

To the extent that the Members of the Tribunal ask questions during the course of the presentation, it might mean for the Respondent, and subsequently for the Claimant, that we have to have a break before the Opening Presentation is completed. If that's so, I apologize. I will try to remember to ask after about an hour and 50 minutes where you are in terms of progress as to whether--or to ask then for you to choose a good time to stop.

And I would also ask that each time you move to a new segment of your presentation, although it should be, I hope, obvious to us, if you remember, if you could mention it so that we can just see if we have any questions that we want to ask on that particular segment that has just been covered. Aside

from that, there is nothing else from the Tribunal.

Before we go into the Opening Submissions, firstly, Claimant, is there any housekeeping?

MR. FELDMAN: Sorry. I have to push all the buttons. But, no, I don't think so. Thank you very much, and thank you for making sure we have everyone here.

PRESIDENT BLANCH: Excellent. Thank you.

And Respondent? Any housekeeping from you?

Mr. Feldman, you're on mute.

MR. DOUGLAS: Nothing from Canada, President Blanch. Sorry, we're still figuring out our audio here, but I think we're sorted now.

PRESIDENT BLANCH: Excellent.

Well, in which case, then, I suggest at 2:41 English time--so I think that's 9:41 D.C. time, Respondent, if you'd like to give us your Opening Submissions.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

PRESIDENT BLANCH: And you're still on mute.

MR. DOUGLAS: Are you able to hear us now?

PRESIDENT BLANCH: Perfect.

MR. DOUGLAS: We keep automatically being muted for some reason, so just please wave your hands--well, actually, we can hear you, so let us know if I'm talking and you're not able to hear me.

Good morning, President Blanch and Members of the Tribunal. My name is Adam Douglas, and I'm here on behalf of the Government of Canada. The substantive obligations under Section A of NAFTA Chapter Eleven are not owed to a prospective Claimant until it becomes, A, an investor of a Party. A Tribunal's jurisdiction ratione temporis is limited to a claim for an alleged breach and resulting loss or damage that occur after a Claimant becomes an investor of a Party.

The Claimant in this case does not contest that it was constituted under the laws of Delaware on January 31, 2019, and was not an investor of a Party prior to this date. Nor does the Claimant contest that it first invested in Canada on March 15, 2019, when it acquired Westmoreland Canada Holdings and Prairie Mines & Royalty, known together as the "Canadian Enterprises."

Nonetheless, in its Notice of Arbitration and Statement of Claim, the Claimant only alleges breaches of NAFTA Chapter Eleven that occurred on or before 2016, years before its existence as an investor of a Party. In fact, the Claimant's Claim is nearly identical to a NAFTA Claim filed by a previous investor, Westmoreland Coal Company, also known as WCC.

The Claimant thus seemingly files a claim on behalf of WCC and WCC's investments. Even the amount of claimed damages, $470 million, is identical to the amount that was claimed by WCC. In its Pleadings, the Claimant offers various theories to explain why NAFTA Chapter Eleven should allow it to allege breaches and claim damages that predate its existence as an investor. And these arguments are not always clear.

For example, the Claimant argues that it was substantially the same investor as WCC, and that WCC merely underwent a bankruptcy restructuring through which the Claimant emerged on the other side. However, elsewhere, the Claimant confirms that it was, in fact, a different investor than WCC and that--but

has a continuity of interest with WCC that should allow its NAFTA Claim to proceed on WCC's behalf.

The Claimant also argues, rather boldly, that NAFTA allows one investor to file a claim on behalf of another investor, and then alternatively, that NAFTA in any event allows claims to be transferred or assigned between investors. None of the Claimant's various arguments can detract from the simple, straightforward operation of NAFTA Chapter Eleven. The obligations under Section A of Chapter Eleven are owed to investors and their investments, and if breached, those investors have standing to bring a claim under Section B.

Article 1116 does not allow a Claimant to bring a claim alleging breach and loss incurred by another investor. Article 1117 does not allow a Claimant to bring a claim alleging breach and loss incurred by another investor's enterprise. No Tribunal, under NAFTA or otherwise, has accepted a request to allow one investor to bring a claim on behalf of another investor and its investments.

To the contrary, Tribunals, including NAFTA

Tribunals, have routinely held that a prospective Claimant must have been an investor of a Party at the time of the alleged breach. If this Tribunal agrees with the Claimant in this case, it would be the first to chart that path.

You will likely hear the Claimant accuse of Canada today of elevating form over substance.

In its Rejoinder, the Claimant proffered examples of changes to corporate form, which they allege would negate jurisdiction under Canada's interpretation of NAFTA Chapter Eleven, but that is not Canada's position, and you are not being asked to address all possible scenarios today, just the case before you. The case before you is clear. The Claimant did not undergo a mere change in corporate form. The Claimant was constituted as a new enterprise to purchase certain WCC assets--

(Interruption.)

(Stenographer clarification.)

MR. DOUGLAS: Yes. Thank you. Sorry about that.

The Claimant did not undergo a mere change

in corporate form. The Claimant was constituted as a new enterprise to purchase certain WCC assets in an arm's-length transaction. You will also hear the Claimant today accuse Canada of using WCC's bankruptcy proceedings to seek a windfall. That is absolutely not the case.

It is important to recall that it was WCC's bankruptcy proceedings. It was not the Claimant's bankruptcy proceedings. If anything, the Claimant is trying to use WCC's bankruptcy proceedings as a cover to hide the fact that it was not an investor and had no investments at the time of the alleged breach. It was WCC that was an investor at the time of the alleged breach, not the Claimant. It was open to WCC to continue its claim. The Company still exists as an enterprise constituted under the laws of Delaware.

Canada's Opening Statement today will proceed as follows: First, we will present our affirmative case. My colleague Ms. Zeman will explain the key facts relevant to the Tribunal's jurisdiction ratione temporis. Ms. Van den Hof will then explain Canada's position on jurisdiction ratione temporis

under NAFTA Chapter Eleven. And Ms. Dosman will explain that the Tribunal does not have jurisdiction ratione temporis over the Claimant's Damages Claim.

The presentation of Canada's affirmative case will take about an hour, and depending on where we are at timing-wise, that may be a good place for a short break, but we will leave it for the Tribunal to decide when that is appropriate.

Canada's presentation will then turn to respond to the alternative arguments presented by the Claimant. Ms. Zeman will explain that the Claimant and WCC transacted at arm's length during WCC's bankruptcy proceedings and are not the same investor of a Party.

I will then return with a discussion of the assignment of claims, and my colleague Mr. Klaver will then explain that the Claimant's continuity of interest theory has no grounding in fact or in law.

With that, I will turn things over to Ms. Zeman.

MS. ZEMAN: Members of the Tribunal, a good part of the day where you are.

My presentation on background facts will begin by taking a brief look at how we got here today. I will then pause to highlight the most fundamental fact of this phase of the Arbitration: when the Claimant became an investor of a Party.

As the Tribunal considers the relevant questions of fact in this Jurisdictional Phase, Canada urges the Tribunal to pay particular attention to the evidence that has or has not been presented to establish each proposition. Canada has put forward evidence on the facts pertaining to how and when the Claimant became an investor of a Party.

That evidence includes two Expert Reports from Ms. Coleman on issues pertaining to U.S. law. Those Expert Reports are largely uncontested. The Claimant cites frequently to Ms. Coleman's evidence in support of statements in its own submissions. It has chosen not to cross-examine her.

Ms. Coleman has presented compelling evidence on the matters within her ambit. The Tribunal can comfortably rely on that evidence. By contrast, the Claimant frequently makes unsupported

assertions with respect to matters of fact. We will highlight some of those for you today.

So, to begin, how did we get here? In 2014, WCC purchased a number of Canadian assets in an arm's-length sale from a Canadian company called Sherritt International. These assets included an Alberta enterprise called Prairie Mines & Royalty ULC. WCC was a publicly traded Delaware corporation and held its interest in Prairie in the manner you see on the screen.

On November 22, 2015, the Government of Alberta announced its decision to phase out emissions from coal-fired power plants by 2030; and on November 24, 2016, Alberta announced that it had concluded agreements with certain coal-fired power plant owners to effectuate its decision to allocate voluntary Transition Payments.

On October 9, 2018, WCC filed for bankruptcy in the United States under Chapter Eleven of the U.S. Bankruptcy Code. As the Claimant explained at Paragraph 57 of its Counter-Memorial, WCC's bankruptcy process was unrelated to Alberta's 2015 and 2016

Decisions. Instead, WCC filed for bankruptcy because it was significantly overleveraged after a series of acquisitions in the decade prior that nearly tripled their debt obligations. These are words from WCC's Chief Restructuring Officer, which the Tribunal can find at Exhibit R-49. They are also discussed at Paragraph 50 of Ms. Coleman's First Expert Report and Paragraphs 16 and 17 of Canada's Memorial.

With input from its lenders, WCC devised a Plan to address its significant debt obligations in the bankruptcy process. As required under U.S. bankruptcy law, WCC filed its Plan with the U.S. Bankruptcy Court for the Southern District of Texas.

As WCC described it to the Bankruptcy Court, its Plan provided for the sale and transfer of substantially all of its assets and equity interests, efficient distributions to its creditors, and a subsequent wind down of its businesses and affairs upon distribution of the sale proceeds pursuant to the Plan.

WCC planned to sell its assets in a public

auction process to maximize the value of its assets and "provide enhanced stakeholder recoveries."

To protect their interests in their collateral, WCC's highest priority lenders, the First Lien Lenders, agreed to provide a bid of last resort, a stalking horse bid. If no one else wanted to purchase the assets for sale, the First Lien Lenders would purchase them through an acquisition vehicle. As we know, no other bidders came forward.

On November 19, 2018, one month after WCC began its bankruptcy proceedings and announced that it planned to dissolve, it filed a claim against Canada under NAFTA Article 1116 on its own behalf and Article 1117 on behalf of its Canadian enterprise Prairie. In its claim, WCC alleged that Canada had violated NAFTA Articles 1102 and 1105 by virtue of Alberta's 2015 Decision to phase out emissions from coal-fired electricity generation by 2030 and its 2016 Decision to allocate Transition Payments to the owners of the generating units. WCC claimed damages exceeding $470 million.

On January 31, 2019, the First Lien Lenders

created the Claimant as a Delaware limited liability company, or LLC. The Claimant was the acquisition vehicle that would take title to the purchased assets on behalf of the First Lien Lenders.

March 15, 2019, was WCC's bankruptcy Plan effective date. On that date, WCC and the Claimant executed the transactions contemplated by the Plan. This was the day the Claimant became the owner of two Alberta companies, the "Canadian Enterprises."

The transaction also included a listed purchased asset entitled the "NAFTA Claim."

The Stalking Horse Purchase Agreement defined this asset in the following terms: "'NAFTA Claim' means that certain claim filed with the Office of the Deputy Attorney-General of Canada on November 19, 2018, by Westmoreland on its behalf and on behalf of its Canadian subsidiary Prairie Mines & Royalty ULC against the Government of Canada pursuant to Chapter Eleven of the North American Free Trade Agreement (as such claim may be amended)."

The term "Westmoreland" was defined in the agreement to mean "Westmoreland Coal Company."

As Ms. Coleman explained at Paragraphs 86 to 88 of her First Expert Report, U.S. bankruptcy law defines property of the estate of a debtor in bankruptcy very broadly and includes legal claims. However, the Bankruptcy Code defers to applicable non-bankruptcy law, whether state, federal, or, as here, international law on the issue of transferability itself and as to the merits of a claim and who may assert it.

On May 13, 2019, Canada received an attempt to amend WCC's Notice of Arbitration. The attempted amendment was submitted on behalf of Westmoreland Mining Holdings and the Canadian Enterprises. It sought to substitute Westmoreland Mining Holdings as the claimant. Canada objected to the attempted amendment on the basis it was not a permissible amendment under the 1976 UNCITRAL Rules.

After some exchanges that my colleague Mr. Douglas will discuss in greater detail later, Canada and the Claimant agreed that this May 13, 2019, submission would serve as the Claimant's Notice of Intent to submit a claim to arbitration under NAFTA

Article 1119.

On July 23, 2019, WCC's NAFTA Claim against Canada was withdrawn, and on August 12, 2019, 90 days after the submission of its Notice of Intent, the Claimant initiated these proceedings with Claims under NAFTA Article 1116 on its own behalf and Article 1117 on behalf of both Prairie and Westmoreland Canada Holdings Inc.

The Claimant's NOA challenges the same Alberta Measures as alleged violations of the same NAFTA obligations and claims the same amount of damages as WCC claimed in its Claim.

It is this series of events that brings us here today and to our moment to pause on the most fundamental fact of this Jurisdictional Phase. It is undisputed that the Claimant made an investment in Canada on March 15, 2019. On that date, the Claimant became the owner of the Canadian Enterprises. It held these enterprises in the manner you see on the screen.

Prior to March 15, 2019, the Claimant did not have an investment in Canada. Prior to January 31, 2019, the Claimant did not exist.

Pending any questions from the Tribunal on this aspect of my presentation, I'll pass the floor to Ms. Van den Hof and then Ms. Dosman, who will address the consequences of this fact for the Tribunal's jurisdiction.

PRESIDENT BLANCH: Thank you.

Let me just check whether--Zac, do you have any questions at this point?

ARBITRATOR DOUGLAS: No.

PRESIDENT BLANCH: And James?

ARBITRATOR HOSKING: No.

PRESIDENT BLANCH: Okay. In which case, let's pass on. Thank you.

MS. ZEMAN: Thank you.

MS. VAN DEN HOF: Thank you, Members of the Tribunal. At the core of Canada's objection in this dispute is the principle that a claimant is only owed Treaty protection under NAFTA Chapter Eleven after it becomes an investor of a Party. NAFTA does not protect investors against historical events, nor does it free an investor of the need to conduct due diligence into the enterprise forming the basis of its

investment.

My colleague Ms. Zeman has already explained that the Claimant came into existence and made its investment in 2019. It became an investor of a Party on that date. We have also explained that the breaches alleged by the Claimant occurred in 2016, when Alberta provided Transition Payments to owners of coal-fired electricity generating units.

The Claimant appears to be alleging that Alberta should have provided WCC with a payment. But under the definition of "an investor of a Party," WCC and the Claimant are distinct investors. They are separately constituted, one as a corporation, and the other as a limited liability company. And, as Ms. Zeman will explain later in our presentation, the two companies are unrelated, unaffiliated entities and transacted at arm's length in the bankruptcy process. With these facts, Canada's objection is uncomplicated.

The Claimant did not exist and was not an investor of a Party when it alleges it was deprived of protection, and the Claimant has no standing to bring a claim on behalf of WCC.

In my presentation today, before turning to the legal basis for Canada's jurisdictional objection, I will recall that the Claimant bears the burden of proving it has satisfied NAFTA's jurisdictional requirements. I will then move on to Canada's legal position in this Arbitration, explaining first that the Claimant is incorrect that Articles 1116 and 1117 can be interpreted on their own. They must be read together with Article 1101.

Second, under Article 1101, the challenged measures must relate to the Claimant and its investments. There must be an immediate and direct connection between the Claimant and the challenged measures.

Third, the protection afforded to the Claimant's investment under Section A began when the Claimant took a risk and made its investment. A domestic enterprise is not protected independently of its investor.

Four, under Section B, Articles 1116 and 1117 require that a Claimant be a protected investor at the time of the alleged breach and resulting

damages.

Finally, I will address previous investment arbitration cases supporting Canada's position. These cases are directly on point and contradict the Claimant's position in this Arbitration. For the purposes of conserving time, I'll wait until the end of my presentation to pause and ask for questions. However, please feel free to stop me between these sections if you have any questions.

I will now turn to briefly addressing the Claimant's burden. In our Memorial on Jurisdiction, we explained that it is the Claimant's burden to demonstrate the Tribunal has jurisdiction. The Claimant did not address this issue in their Counter-Memorial, and we noted the absence of disagreement in our Reply.

The Claimant then changed course in the Rejoinder, arguing for the first time on Page 53 that: "Canada has the burden of proof in its jurisdictional objection." This is not correct. The Claimant cites authorities to support its point, explaining that a party bears the burden of proving its claim or

defense, but a jurisdictional objection is not a defense because there is no presumption in favor of jurisdiction. The Claimant's Authorities and its Expert agree that the Claimant has the burden of proving jurisdiction.

For example, the Claimant cites *Gallo*, but *Gallo* found on the same page the Claimant cites that: "A Claimant bears the burden of proving that he has standing and the Tribunal has jurisdiction to hear the Claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage."

And on Page 26 of his First Report, Professor Paulsson agrees that a NAFTA claimant must show the claim meets jurisdictional criteria. So, the Claimant's new argument here cannot be supported, and, in any case, the Claimant has not materially disputed the facts upon which Canada's jurisdictional objection rests and which the Tribunal will evaluate to determine whether it has jurisdiction.

I will now turn to explaining why the Claimant has not met NAFTA's jurisdictional

requirements.

First, the Claimant argues that Articles 1116 and 1117 stand on their own, and Article 1101 can be read without the context of the remainder of the chapter, but Articles 1101, 1116, and 1117 must be read together. This is the only conclusion consistent with the Vienna Convention's mandate to read any individual provision in context. In fact, the NAFTA text directs that they be read together.

First, Article 1101 defines the scope of the whole chapter. It circumscribes the scope of every provision, including Article 1116 and 1117.

Second, Articles 1116 and 1117 refer expressly to Section A, where Article 1101 is the first provision, requiring a Claimant to allege that a party has breached an obligation under Section A.

Finally, the NAFTA Parties agree that these provisions must be read together.

I'll now turn to Article 1101, which requires the challenged measures relate to the Claimant.

(Interruption.)

(Stenographer clarification.)

MS. VAN DEN HOF: Luckily, that is the last thing I said.

So, the Claimant argues that Article 1101 is a general statement which simply requires that the challenged measures relate to any investor or any investment. This is incorrect.

In the context of Articles 1116 and 1117, Article 1101 establishes that there must be a connection between the measures alleged to have breached Section A and the investor of a Party bringing the claim. The NAFTA Parties agree that Article 1101 requires a direct connection between the challenged measures and the claimant, and every NAFTA Chapter Eleven Tribunal evaluating Article 1101 has come to the same conclusion.

Not a single NAFTA Decision supports the Claimant's position. For example, the *Apotex* tribunal found it necessary to evaluate Article 1101 in the context of NAFTA's Chapter Eleven and the claimant's substantive claims. It ultimately found the

challenged measures must relate to the claimant and their investment, not any investor or any investment.

NAFTA Tribunals have also elaborated on the degree of connection required between the challenged measures and the claimant under Article 1101. For example, the *Apotex* tribunal found the relating-to requirement means the challenged measures must have a direct and immediate effect on the claimant. And the *Resolute* tribunal found, under Article 1101, the challenged measures must directly address, target, implicate, or affect the claimant.

As a result, Article 1101 is not simply a general statement with little substantive importance, at the Claimant alleges. Instead, it establishes that there must be a direct and immediate connection between the particular measure attributable to the Host State, the claimant, and the particular investment made by the claimant.

I will now explain why, under Section A, the protection afforded to the Claimant's investment began in 2019, when the Claimant acquired the Canadian enterprises. This is important because the challenged

measures must relate to the Claimant's investment, not any U.S. or Mexican investor's investment.

The Claimant has suggested that the challenged measures relate to it because they affected the Canadian Enterprises prior to the Claimant's acquisition of those enterprises. In doing so, the Claimant ignores that the Canadian Enterprises are domestic enterprises, Alberta companies. They are only protected as an investor's investment.

Under NAFTA Chapter Eleven, the protection afforded to an investment of an investor of another party begins when a particular investor takes a risk and makes its investment. First, "investment of investor of a Party" is a defined term in Article 1139 which requires that the investment be owned or controlled by the relevant investor.

Second, the equally authentic French version of NAFTA uses "les investissements effectués par les investisseurs d'une autre Partie" in the place of "investment of an investor of another party." The use of the word "effectuer," or "to make," is clear that an investment of an investor of another party begins

when a particular investor makes its investment. The Spanish text also uses the word "realizar" (speaking Spanish), meaning "to make."

An investment can only be made once by one investor. This means the investment made by each investor is unique. WCC's investment is distinct from the Claimant's investment.

The Claimant has no response to this point and simply argues that the English text is also valid, but Canada's interpretation is the only one consistent with all three equally authentic versions of the text. The Tribunal should adopt the interpretation consistent with the ordinary meaning, that an investment begins when it is made by a particular investor.

Third, the scope of the Section A obligations relevant to this case reinforces Canada's interpretation. The Claimant argues that respondents owe obligations to foreign investment enterprises under Articles 1102(2) and 1105, but this is not accurate. Under Articles 1102 and 1105, Canada owes protection to investments of investors of another

Party. The underlying domestic enterprise receives no independent protection.

As a result, the Claimant is incorrect that it has an investment that was owed protection in 2016.

As my Colleague Ms. Zeman explained earlier, the investment of WCC in the Canadian Enterprises occurred in 2014 when WCC acquired its interest in Prairie Mines & Royalty ULC from Sherritt. By contrast, the investment of the Claimant in the Canadian Enterprises occurred in 2019 when it purchased those enterprises.

The two investments cannot be equated. They were made at different times by different investors and under different conditions. Because the Claimant is different from WCC and its investment is different from WCC's investment, the challenged measures cannot relate to the Claimant and its investments.

The Claimant argues the measures breached an obligation to the Claimant because it and its investments were treated unfairly and in a discriminatory manner. But how could Alberta possibly have treated the Claimant or its investments unfairly

or in a discriminatory manner in 2016? The Claimant did not exist or have any investments at that time. The challenged measures cannot relate to the Claimant or its investments.

This concludes my submissions on Section A, and I will now move on to address Section B.

PRESIDENT BLANCH: Just before you do, let me just check whether there are any questions from either Zac or from James.

Okay. Please do continue.

MS. VAN DEN HOF: Okay. Thank you.

The Claimant argues that it has standing under Section B because it is currently an investor of a Party and has a grievance against Canada's treatment of the Canadian Enterprises prior to its investment in them. But the procedures in Section B do not pertain to any investor of a Party or any investment. Instead, they pertain to the disputing investor, or the claimant, with whom Canada consents to arbitrate and who is, A, alleging the breach of an obligation under Section A owed with respect to that claimant and its investment; and, B, alleging it directly or

indirectly incurred damages arising out of that breach. This is the only situation where there is a dispute between a Party and an investor that can be settled under Section B.

For example, the *EnCana* tribunal defined a dispute as "the taking of measures in breach of the Treaty which caused loss and damage to an investor." The specific requirements of a disputing investor's claim are set out in Articles 1116 and 1117.

As our Pleadings explain, NAFTA's object and purpose requires these provisions to be interpreted in a way that maintains the effectiveness of the dispute settlement procedures. Under Article 1116, the Claimant argues it can bring a claim on behalf of WCC and WCC's investments. However, Article 1116's title is clear that a claim under that provision is a claim by an investor on its own behalf.

In an Article 1116 Claim, there must be, A, a Measure alleged to have breached an obligation to the Claimant; and, B, loss or damage to the Claimant arising out of that breach. All three NAFTA Parties agree that Article 1116 does not authorize a claimant

to bring a claim on behalf of another investor who suffered loss or damage as a result of the alleged breach.

For example, the United States' *Tennant* Article 1128 Submission explains that a Claimant must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach and incurred loss or damage thereby.

There is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor. My colleague Ms. Dosman will establish later today that the Claimant does not even plead any damages that it could have incurred.

Canada's interpretation is also consistent with the tribunal's decision in *Mesa*. That tribunal found its jurisdiction limited to measures that occurred after the claimant became an investor holding an investment.

In response, the Claimant says *Mesa* finds that "foreign investment protections apply only where a foreign investment exists." But the Claimant

ignores that *Mesa* was based exclusively on whether the claimant had sought to make or made each of its investments at the time of the alleged breach and so qualified as an investor of a Party with respect to those investments. It found: "The investor must establish that it was seeking to make the very investment in respect of which it makes its claims at the time of the challenged Measures." The Claimant would not satisfy the test articulated by the *Mesa* tribunal.

The Claimant's theory of Article 1116 leads to unreasonable outcomes. First, Article 1116(2) establishes that a claimant may not bring a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

An investor cannot acquire knowledge of breach or loss before it even exists. When a new investor comes into existence, it could only acquire knowledge of an alleged breach at that moment. If an

investor could file a claim under Article 1116 alleging breach and loss that occurred prior to its existence, the limitation period could, therefore, be tolled indefinitely, and this would render the limitation period meaningless.

This shows that Article 1116(2) exclusively contemplates that a claimant's existence coincides with the alleged breach and loss or damage. The Claimant's interpretation of Article 1116 cannot be correct.

Second, the Claimant's interpretation of Article 1116 renders Article 1121(1) meaningless. Article 1121 requires only the disputing investor to waive its right to international or domestic proceedings for damages with respect to the challenged measure. This provision minimizes the risk of double recovery and inconsistent outcomes.

If Article 1116 allowed a disputing investor to file a claim alleging breach and loss incurred by another investor, as the Claimant contends, nothing would prevent the original investor from also pursuing a proceeding for damages with respect to the same

measure. As the United States explained in its *Tennant* Article 1128 Submission, this would potentially subject the respondents to two proceedings for the same alleged breach, defeating the purpose of Article 1121(1)(b).

The Claimant's Rejoinder offered no response to Canada's arguments on Article 1121. Its only argument is that the window for NAFTA claims is "nearly closed anyway." This does not make sense. The fact that NAFTA has been replaced cannot affect the interpretation of the Treaty.

For these reasons, the Claimant cannot bring a claim on behalf WCC. And the Claimant's theory of Article 1117 is equally flawed. It cannot bring its claim under Article 1117.

The Claimant argues that the enterprise is owed obligations under NAFTA independent of the particular investor that owns it. This cannot be true. As I explained earlier, an investment begins when a particular investor acquires its interests in an enterprise. The domestic enterprise itself is not owed any Treaty protection. In fact, under customary

international law, the Claimant would not be entitled to claim any damages to the enterprise arising out of any alleged breach of the Treaty.

Article 1117 creates a limited derogation from customary international law to allow investors to claim indirect damages incurred by a domestic enterprise the claimant owns or controls. However, it does not derogate further from customary international law to permit a claimant to submit a claim for an alleged breach of an obligation owed with respect to a different investor or its investment.

As a result, in an Article 1117 claim, the claimant must show, A, a Measure alleged to have breached an obligation owed with respect to the Claimant, and that it owned or controlled the enterprise that allegedly incurred a loss arising out of that breach at the time of the breach and at the time of the submission of the claim.

Canada's interpretation is consistent with every NAFTA decision looking at when ownership or control must exist under Article 1117.

In *Gallo*, the tribunal found a claimant must

own or control the enterprise at the time of the alleged breach. The tribunal observed that previous investment arbitration tribunals have been unanimous on this point. The Claimant responds by arguing that this case dealt with an abuse of process claim. This is just not true.

It is also just not true that the tribunal found that Article 1117 is satisfied when the enterprise was held by any foreign investor at the time of the alleged breach, as the Claimant alleges. Instead, the tribunal found that Mr. Gallo had not satisfied the quid pro quo necessary to access NAFTA dispute settlement, which requires the claimant seeking protection to show that it is a "protected foreign investor who at the relevant time owns or controls an investment in the host country."

The Claimant has not satisfied the test articulated by the *Gallo* tribunal.

The *B-Mex* tribunal also found that a claimant must own or control the enterprise at the time of the alleged breach. The Claimant agrees with Canada that the *B-Mex* parties and tribunal agreed that

the claimant had to own or control the enterprises at the time of the alleged breaches. The Claimant argues that this is irrelevant because the tribunal did not resolve any factual issues on this position. That's not true.

As you can see on this slide, the tribunal did find that the claimant owned the enterprises at all relevant times, including at the time of the alleged breach, and--rather, they found that they controlled the enterprise at all relevant times. In this case, the Claimant did not own or control the enterprise at all relevant times.

The Claimant's theory of Article 1117 leads to unreasonable outcomes, demonstrating that it cannot be correct.

First, the Claimant's argument that investments are owed obligations and can bring claims independent of their particular investor is inconsistent with Article 1117(4), which states that "an investment may not make a claim." It is also not consistent with the NAFTA obligations, which consistently protect only investments of investors of

another party, not investments by themselves.

Second, by abandoning the requirement that the challenged measures bear any relationship to the claimant, the Claimant's theory encourages claim-shopping. The interpretation makes it possible for a claimant to purchase an enterprise with a potential nascent NAFTA claim, making the claim an asset that can be purchased rather than a right arising out of the quid pro quo of investment.

The Claimant argues that this may be an abuse of process without explaining how it might be abusive. This situation has never arisen before, and it's not clear the abuse of process doctrine would apply.

Third, the Claimant's theory could lead to a multiplicity of proceedings under Article 1116 and 1117 with respect to the same enterprise and arising out of the same measures. This could lead to the undesirable prospect of overlapping claims and divergent outcomes with respect to the same measure.

The simpler explanation, which avoids all of these issues, is that the claimant's interests in an

enterprise must exist at the time of the alleged breach. For these reasons, the Claimant cannot bring a claim on behalf of the Canadian Enterprises because it did not own or control them at the time of the alleged breach.

I'll now move on from the NAFTA text to previous investment arbitration cases.

As we've shown in our submissions, tribunals have consistently found they have no temporal jurisdiction over alleged breaches that occurred before a claimant became an investor of a Party. The Claimant accuses us of reading these cases in search of a rule without a reasoned explanation, but the cases provide a consistent rationale. A claimant has no access to dispute settlement where the claimant couldn't have deprived--sorry, the State, rather, couldn't have deprived the claimant or its investment of any protection.

I have already explained that *Mesa*, *Gallo*, and *B-Mex* are cases where NAFTA tribunals have agreed that a claimant must have been an investor of a Party at the time of the alleged breach. Now I will respond

to the cases where the Claimant focused its attention in the Rejoinder, *STEAG* and *GEA Group*. I am happy to address questions concerning any other cases if you have them.

Both *STEAG* and *GEA Group* found that a claimant must be a protected investor at the time of the alleged breach in a situation where the claimant and the previous owner of its investment held the same nationality.

In *STEAG*, the tribunal found under the Energy Charter Treaty, in Canada's translation from Spanish, that "the Tribunal has jurisdiction to resolve the dispute between the Parties only if said dispute arises from a claim for violation of the Treaty that is related to the Claimant's investment in Spain." The tribunal found the relevant date for determining its jurisdiction to be the date that the claimant invested in Spain. It made this finding even though an investor of same nationality had previously held the investment at issue.

The Claimant has completely ignored this portion of the tribunal's decision. Instead, it

focuses on the fact that the tribunal considered additional injections of capital from the same claimant to be the same investment. We didn't refer to this finding in our submissions. The claimant cannot meaningfully distinguish this case.

Similarly, the *GEA Group* tribunal found that, in order for the tribunal to hear the claimant's claims, the claimant must have held an interest in the alleged investment before the alleged Treaty violations were committed. The Claimant argues that *GEA Group* is distinguishable because there was no evidence of a continuity of interest.

My colleagues will address the Claimant's misguided continuity of interest theory shortly. For now, I will just say that the Claimant has not meaningfully distinguished *GEA Group*, either.

There is nothing in any of the many cases we have cited to suggest that, if a claimant can demonstrate it has an untethered concept of continuity of interest, a tribunal has jurisdiction. Instead, each of these cases support that the claimant must be a protected investor at the time of the alleged

breach.

For all of these reasons, the Claimant has not shown that the Tribunal has jurisdiction under Articles 1101, 1116, and 1117. For the Tribunal to have jurisdiction, the Claimant would have to show that it was a protected investor in 2016. It has not done so.

My colleague Ms. Dosman will explain shortly that, in fact, the Claimant has not even claimed any damages it could have incurred.

Thank you for your attention today. I welcome any questions from the Tribunal on these issues before turning the microphone over to Ms. Dosman.

PRESIDENT BLANCH: Thank you.

James?

ARBITRATOR HOSKING: No.

PRESIDENT BLANCH: And Zac?

ARBITRATOR DOUGLAS: No.

PRESIDENT BLANCH: Thank you very much.

Moving on to Ms. Dosman.

MS. DOSMAN: Members of the Tribunal, hello.

My name is Alexandra Dosman.

Ms. Van den Hof has explained that the NAFTA does not permit claims by an investor of a Party prior to its existence and investment in the territory of another Party.

I will complement her submissions by addressing the Claimant's failure to plead a cognizable damages case.

The requirement for a claimant to show damages prima facie at the jurisdictional stage is evident from the language of the NAFTA. The Treaty requires a claimant to plead that it has incurred loss or damage by reason of, or arising out of, the alleged breach, either directly, under Article 1116(1), or indirectly, on behalf of its domestic enterprise under Article 1117(1).

Where a claimant or its investment could not have incurred damage arising out of the alleged breach, the tribunal does not have jurisdiction over the claim. Tribunals have confirmed this principle. For example, in *UPS v. Canada*, the tribunal noted that a claimant is required to "state a prima facie case of

damage at the jurisdictional stage."

Similarly, in *Saluka v. Czech Republic*, the tribunal found that it lacked jurisdiction in respect of claims for damage prior to the claimant's acquisition of the underlying investment.

The other NAFTA Parties agree that the possibility of establishing damages is a prerequisite to the submission of a claim to arbitration. México at Paragraph 4 of its Article 1128 Submission in this case states that an investor of a Party may only submit a claim to arbitration if that investor has incurred a loss. As Ms. Van den Hof noted, the United States in its Article 1128 Submission in *Tennant* agrees at Paragraph 10 that the investor bringing a claim under Article 1116 must "be the same investor who suffered loss or damage as a result of the alleged breach."

Here, the Claimant cannot establish a prima facie case of damage either to itself or to its investment because it did not exist at the time the alleged damages crystallized, and it had no investment at that time.

In its Notice of Arbitration, the Claimant's allegations of loss or damage concern WCC. There is nothing specific to the Claimant. What is more, the Notice of Arbitration makes no allegations of indirect damage specific to the Canadian Enterprises.

In its pleadings on jurisdiction, the Claimant attempted, belatedly, to establish a link between itself, its investment, and the alleged loss or damage. It makes three new arguments, none of which is grounded in its Notice of Arbitration, and, in any event, none of these new arguments has merit.

First, the Claimant argues that it can claim losses on behalf of WCC under Article 1116(1). For example, at Paragraph 127 of its Rejoinder on Jurisdiction, the Claimant states that "Prairie's mine-mouth operations were purchased in 2013-14 by WCC on the expectation that they would have a 50-year life span."

It argues that it can claim losses on behalf of WCC for an alleged violation of WCC's expectations in 2016. This is not permitted. An investor cannot make a claim for loss to another investor.

Second, the Claimant argues that it can claim losses under Article 1117(1) that were incurred by Prairie in 2016, years prior to the Claimant's acquisition of the Canadian Enterprises in 2019. This is also not permitted. An investor cannot make a claim on behalf of another investor's enterprise. Canada does not independently owe obligations to Prairie, the domestic enterprise.

NAFTA distinguishes between an investor's direct damages under Article 1116 in its capacity as owner and indirect damages under Article 1117 in its--on behalf of that investor's enterprise.

Damage to Prairie is only cognizable as indirect damage to an investor that has standing to bring a claim under NAFTA Chapter Eleven.

And, finally, the Claimant appeals to so-called "pending damages" in an attempt to save its claim. However, there are no pending damages here. As you can see on the slide, the Claimant is claiming losses as a result of Alberta's conclusion of the Off-Coal Agreements with electricity generators in November of 2016. These are exactly the same alleged

$470 million in damages that WCC claimed in 2018. As you can see on the screen, the Claimant alleges that: "Payments pursuant to the Off-Coal Agreements established that Prairie and its investors would be harmed." It also states that the alleged harm was certain.

Indeed, the Claimant states that it "had to file claims within three years of the November 2016 Off-Coal Agreements" in order to fall within the Limitation Period. That is at Paragraph 102 of its Counter-Memorial. That is, the Claimant acknowledges that the alleged damages crystallized prior to its formation and prior to its investments. There's nothing new or pending here.

The Claimant then points to the fact that the Off-Coal Agreements provided for the distribution of Transition Payments in annual installments. This is true; it is also unhelpful to the Claimant's case.

Alberta decided how to allocate the Transition Payments once in 2016. The Transition Payments contemplated by the OCAs were fully documented and accounted for in 2016. The OCAs and

any alleged resulting damage were certain on the Claimant's case in 2016.

Moreover, the Claimant made its investment in 2019 with full knowledge of the alleged losses. The Claimant would have made its own determination of what the Canadian Enterprises were worth in 2019 and decided to proceed on that basis.

Canada is not responsible for the valuation made by WMH when it invested in the Canadian Enterprises in 2019 with full knowledge of the regulatory landscape. WMH must make its own claim for prima facie damage arising out of the breach it alleges, but it has failed to meet this low bar.

Along with Ms. Van den Hof's submissions, this concludes Canada's affirmative case.

Following any questions from the Tribunal and pending any desire for a break, I will turn the microphone back to Ms. Zeman, Mr. Douglas, and Mr. Klaver, who, together, will explain why the Claimant has failed to establish the Tribunal's jurisdiction on the basis of its alternative theories.

PRESIDENT BLANCH: Thank you very much.

Let me just check.

Zac, do you have any questions?

And James? No?

A question for the reporter: Are you happy if we continue, or would you like to have a short break now?

REALTIME STENOGRAPHER: I'm just fine, Madam President. Thank you.

PRESIDENT BLANCH: Excellent. Then I propose we continue.

MS. ZEMAN: Okay. We have heard from both Ms. Van den Hof and Ms. Dosman that the fact that the Claimant was not an investor of a Party at the time of the alleged breach is fatal to its claim. The remainder of our statement today will address the Claimant's attempts to avoid that result by positing rules of international law that do not exist and failing to establish that it meets those rules as a matter of fact.

The Claimant's alternative theories of jurisdiction are largely premised on an alleged connection with WCC. Over the course of this

Jurisdictional Phase, the Claimant has characterized its relationship to WCC as one of "associated companies", "corporate affiliates", reflecting a "continuity of beneficial interests" and dropping the beneficial in its Rejoinder as reflecting a continuity of nondescript interests.

It asserted at the Bifurcation Hearing that it is "substantially the same" as WCC, and in its Rejoinder that WCC merely "changed form" to become WMH. However, it also indicated in its Counter-Memorial that it is a "distinct legal entity" and that it and WCC are separate investors, in the plural.

The Claimant has asserted that it is a new owner of a foreign investment and a "new investor parent" and that it is "not a 'new' investor in Canada". It has further stated that WCC created the Claimant as a wholly owned subsidiary and was the Claimant's parent, but also that it was the Claimant that had a "continuous interest" in WCC. These statements cannot be reconciled, either with each other, the evidence on the record, or with existing

rules of international law on which this Tribunal's jurisdiction could be based.

In some places, the Claimant additionally ties these various factual allegations to the bankruptcy context that facilitated its purchase of the Canadian Enterprises. For example, it has alleged what it calls a "simple proposition" that the entity emerging from bankruptcy, as the owner of the debtor company's investment, should be allowed to pursue a NAFTA Chapter Eleven claim for harm to the investment. But the Claimant does not tie its theory to the text of NAFTA.

On its most generous reading, the Claimant's theory appears to be that any entity emerging from a bankruptcy process should automatically be viewed as the same investor of a Party that entered. But as Canada explained in its Reply, there is no magic in the bankruptcy context. The characteristics of each particular transaction and the relationship between investors purporting to be the same must be assessed on a case-by-case basis.

In this case, the evidence establishes that

the Claimant and WCC were at arm's length and that WCC did not simply become the Claimant. They are not the same investor of a Party as would be required in order for the Tribunal to have jurisdiction over the Claimant's claim.

Today I will take the Tribunal through key evidence on the record that contradicts the Claimant's theories of connection to WCC as a factual matter; in particular, that it is a corporate affiliate of WCC and that it is the same as WCC. We will revisit four key facts: First, the Claimant's formation; and, second, the Bankruptcy Court's arm's length and no-insider findings. This evidence establishes that the Claimant's assertion that it was a corporate affiliate of WCC cannot be supported.

We will then revisit the Bankruptcy Court's determination that the Claimant would not have successor liability to WCC and the fact that the Claimant did not take on all of WCC's assets or liabilities through the Stalking Horse Purchase Agreement. All of this evidence establishes that the Claimant is not, and has not ever been, the same

investor of a Party as WCC. The two companies are not the same entity, nor do they share the same legal personality.

We will begin our highlights with the time the Claimant was created, three years after the alleged breach. The Claimant argues that it was a corporate affiliate of WCC because it was created by WCC as a wholly owned subsidiary of WCC. But the evidence shows that it was not WCC who created the Claimant; it was the First Lien Lenders. And it was not WCC who owned the Claimant at its creation; it was a nominee of the First Lien Lenders. It is undisputed that the First Lien Lenders were adverse in interest to WCC. The evidence, thus, establishes that there was no corporate link between the Claimant and WCC when the Claimant was formed.

Let's take a quick look at the Claimant's formation document, which is Exhibit R-081. An excerpt is on the screen in front of you. It defines Thomas Moers Mayer as the Member, or owner, and indicates that the Claimant was initially wholly owned by the Member and that the property, business, and

affairs of the company shall be conducted by the Member. Mr. Mayer was a partner at the law firm that represented the First Lien Lenders in WCC's bankruptcy process.

In its Rejoinder, the Claimant protested that Canada did not "explain why the fact WMH was created by an attorney for the secured creditors should matter."

Well, it matters for two reasons: First, the Claimant repeated its incorrect statement about WCC creating it as a wholly owned subsidiary no less than five times in its Counter-Memorial. The fact that the Claimant was not created by WCC thus serves as an important illustration of the need for caution when approaching unsubstantiated statements about matters of fact.

Second, it indicates the absence of a corporate link from the outset between WCC and the Claimant. And the Description of Transaction Steps, which set out the steps that would be taken to execute the transactions contemplated by WCC's Plan, further confirms the First Lien Lenders' nominee continued to

hold the Claimant until the beginning of the transaction, and the First Lien Lenders held the Claimant at the end of the transaction. That's at Exhibit R-043, and that specific confirmation can be found at Bates Pages R-043.13 and R-043.14.

As Ms. Coleman explained at Paragraph 11 of her Second Expert Report: "Lenders are inherently adverse to their borrowers." They have claims to repayment of their lent money. The First Lien Lenders and their borrower, WCC, were no exception. The fact that the First Lien Lenders created and owned the Claimant confirms that the Claimant was adverse in interest to, rather than a corporate relation of, WCC.

This is further confirmed by Mr. Mayer's continued representation of the Claimant in WCC's bankruptcy process. Canada refers the Tribunal to Footnote 35 of its Reply for references to the evidence establishing the parties' legal representation in the bankruptcy process.

Before I move to the Bankruptcy Court's findings with respect to the relationship between the Claimant and WCC, it is worth pausing on the

Claimant's Rejoinder assertion that it is a mere change in corporate form from WCC.

If the Claimant were serious about this allegation, it would have presented evidence on the rules of Delaware law pertaining to corporate form changes; it did not. On its face, the Claimant's formation document does not establish that its creation amounted to an amendment of WCC's corporate form. In fact, it indicates the opposite. WCC and the Claimant have coexisted as independent corporate entities since the Claimant's creation. To this day, they both remain separately in existence: WCC as a corporation, continuing to wind down its affairs; and the Claimant as an LLC. There is no evidentiary basis on which to reach the Claimant's conclusion on corporate form.

The next piece of evidence I'd like to highlight today are the Bankruptcy Court's legal findings that the Claimant and WCC were transacting at arm's length and were not insiders.

On the screen before you is Exhibit R-063, the Bankruptcy Court's Order confirming the WCC Plan.

This Order authorized WCC to enter into the transaction contemplated to effectuate the Plan. In Paragraph 47, the Court determined that the Claimant and WCC negotiated, proposed, and entered into the Stalking Horse Purchase Agreement, which set out the terms of the Claimant's purchase of the Canadian Enterprises, from arm's length bargaining positions. The Claimant never confronts the Bankruptcy Court's findings in this respect. The term "arm's length" did not appear once in the Claimant's Counter-Memorial. It appeared only in a footnote in its Rejoinder Memorial that responded to a different argument. It, thus, stands uncontested.

In the same paragraph, the Court goes on to find that the "purchaser is not an insider of the WLB debtors as that term is defined in Section 101(31) of the Bankruptcy Code."

The Claimant is the purchaser, and the WLB debtors are WCC and certain of its debtor affiliates. Ms. Coleman explained in her Expert Report that the Bankruptcy Code defines "insider" to include "affiliate." The Code also defines "affiliate" as--in

its translation into slightly plainer English--"an entity owning or controlling the debtor, that is owned by the debtor, or that is owned by an entity owning or controlling the debtor."

The Tribunal can find the references to the full Bankruptcy Code definitions at the bottom of this Slide 49.

According to Ms. Coleman, by determining that the Claimant was not an insider or affiliate of WCC, the Bankruptcy Court effectively determined that the Claimant did not own or control WCC, that WCC did not own or control the Claimant, and that the Claimant was not owned or controlled by an entity that also owned or controlled WCC.

The Claimant did not address the Court's determination, at all, in its Counter-Memorial, and spent a single paragraph attempting to downplay its significance in its Rejoinder.

There, the Claimant argued that the "Bankruptcy Court statement had nothing to do with the transaction steps." Under those steps, there was a finite and fleeting moment in time when WCC held

equity in the Claimant immediately before that equity was distributed to the First Lien Lenders to satisfy their claims. The Claimant has indicated that this step was for the purpose of obtaining favorable tax treatment for the Claimant. The Claimant argues that the Court found these steps "integral to [its] Confirmation of the Bankruptcy Plan." As a result, so says the Claimant, the Court's determination that the Claimant was not an affiliate of WCC is irrelevant.

But the Claimant's logic emphasizes just how striking the Court's no-insider finding is. Despite knowing all aspects of the transaction, including the micro step undertaken for tax purposes that the Claimant focuses on, the Court still determined that the Claimant was not affiliated with WCC.

As Ms. Coleman explained: "At no point did WCC have a meaningful role or relationship with respect to the management or operations of the Claimant that would lead to a different conclusion than the one in which the WCC Bankruptcy Court arrived."

The Claimant has expended significant effort

in this phase of the Arbitration, accusing Canada of prioritizing form over substance. Yet, that is precisely the approach that it takes on this question of corporate affiliation. It attempts to cast the transaction as a mere reshuffling of equity between corporate affiliates because the "formal transfer outlined in the description of transaction steps is between WCC, the parent company; and WMH, its wholly owned subsidiary."

Contrary to the Claimant's suggestion, Canada is not trying to read out this step from the transaction. Canada is asking the Tribunal to view this step in its proper context and draw the appropriate conclusion, that this was not a mere reshuffling of equity interest among members of a corporate family. It was a sale between Parties that a U.S. Court determined were transacting at arm's length. The Court reached its conclusion on the basis of a full evidentiary record.

Consistent with this finding, Ms. Coleman sums up that the Claimant was an unaffiliated third party to WCC, formed as a new entity on behalf of the

First Lien Lenders for the purposes of taking title to assets that would partially satisfy their claims, and the transaction both began and ended with the First Lien Lenders or their nominee owning the Claimant.

As a result, the Claimant's attempts to connect itself to WCC by claiming an affiliation are unsupported by the record. The Claimant was not an affiliate of WCC when the alleged breach occurred, when WCC entered bankruptcy, when WCC emerged from bankruptcy, or when the Claimant initiated these NAFTA proceedings.

That brings us to the third fact to highlight, which pertains to the Claimant's assertion that it is the same as WCC. In particular, the Bankruptcy Court determined that the sale of WCC's assets was free and clear of preexisting liens and claims, and the Claimant would not face successor liability with respect to WCC.

We've pulled up, on Slide 53, an excerpt of the language from Paragraph 49 of the Bankruptcy Court's Confirmation Order on Successor Liability. I won't read the excerpt out, but, as you can see, even

the excerpt is quite comprehensive.

Ms. Coleman explained, in her First Expert Report, that this determination means that the Claimant could not be held liable for the obligations of WCC solely by virtue of acquiring its assets. This result would not have been possible had the Claimant purchased equity interest in WCC.

It's worth noting that WCC viewed obtaining protection against successor liability as a selling feature for any potential buyer of its assets in the bankruptcy process. WCC described its expectations in this regard in the sales notice that went out to prospective buyers. In particular, the expectation was: To the greatest extent possible, the successful bidder would not be deemed to be a legal or other successor, to have merged in any way with or into WCC, or to be an alter ego or mere or substantial continuation of WCC.

WCC further explained in this sales notice that the First Lien Lenders would not have entered into the Stalking Horse Purchase Agreement without this kind of protection. The bankruptcy Court's "no

successor liability" finding, thus, confirms the Claimant and WCC are not the same entity and do not have the same legal personality.

The fourth fact to highlight is that the Claimant did not acquire all of WCC's assets or assume all of its liabilities. The Stalking Horse Purchase Agreement that Claimant and WCC executed was express. Only assets and liabilities that were expressly identified in the agreement were purchased or assumed.

For example, while equipment and coal inventory were included assets, director and officer insurance policies, certain specific real property leases, and certain employee benefit plans were excluded assets. On the liability side, workers' compensation liabilities for occupational injuries to transferred employees arising after the closing were assumed, but certain statutory liabilities for workers arising prior to the closing were excluded.

An agreement can be found at Exhibit R-053 and is discussed in Ms. Coleman's First Expert Report at Paragraphs 65 and 66.

It establishes that the Claimant did not

inherit all of WCC's characteristics when it purchased certain assets and assumed certain liabilities in the asset sale. It establishes that the Claimant is not the same entity and does not have the same legal personality as WCC.

As a final note on these issue, Ms. Coleman explained, at Footnote 98 of her First Expert Report, that "Orders such as the WCC Plan Confirmation Order are typically drafted and proposed by the Debtors before being filed with the Bankruptcy Court."

This means that the findings made by the Bankruptcy Court's Confirmation Order--including on arm's-length transacting, no insider relationship, taking the assets free and clear, and no successor liability--were specifically sought by WCC and likely negotiated with the First Lien Lenders. Indeed, the First Lien Lenders retained the right to terminate the Restructuring Support Agreement with WCC, and, correspondingly, their support of WCC's Plan, if WCC made changes to the draft confirmation order that was inconsistent with their agreement. This confirms that the Parties specifically sought these arm's-length,

no-insider, and no-successor-liability findings for the Claimant.

The Claimant cannot have it both ways. It cannot be a non-affiliate and non-successor to WCC to escape unwanted liabilities but assert that same affiliation and successor status to pursue a NAFTA claim.

The evidence establishes that the Claimant is not the same investor of a Party as WCC.

I'd be happy to take any questions that the Tribunal may have on the evidence. Otherwise, I'll pass the floor to my colleague, Mr. Douglas, who will address the Claimant's arguments with respect to assignment of claims.

PRESIDENT BLANCH: Thank you. Let me just check.

Zac? And James? No. Thank you very much.

MS. ZEMAN: Thank you.

MR. DOUGLAS: Good morning again, President Blanch and Members of the Tribunal.

Just to explain Canada's setup here, you might see us, from time to time, look up this way.

That's because there's a big screen over top of here, which has our slide presentation, as well as you, on the screen. That is kind of the layout here a little bit, in case you were wondering. Sometimes we might look at you up there, even though you are more directly in front of us.

Today I will be speaking to the assignment of claims. The Claimant maintains that both an investment claim and an investment may be assigned between investors without affecting the jurisdiction of a tribunal, but only in two circumstances: First, when the transfer is between investors who are affiliates; or, second, when the transfer is between investors that share a close continuity of interest between them. That's at Paragraph 56 of their Rejoinder.

My colleague Ms. Zeman has already explained that the Claimant and WCC were not affiliates but, instead, transacted at arm's length. My colleague Mr. Klaver will later explain that the Claimant's continuity-of-interest theory has no grounding in fact or in law. I will address the legal aspects of

assignment of claims more generally.

First, I will explain that the Claimant cannot establish this Tribunal's jurisdiction ratione temporis because WCC sold its investment claim under NAFTA to the Claimant.

Second, I will explain that the Claimant cannot establish this Tribunal's jurisdiction because WCC sold the Canadian Enterprises to the Claimant.

Now, before getting started, a quick note on terminology. As my colleague Ms. Zeman has explained, the NAFTA claim and the Canadian Enterprises were unequivocally sold by WCC to the Claimant. However, in its Pleadings, the Claimant refers to the sale as an assignment or transfer.

The Claimant's usage of these terms cannot be used to mask the market-based arm's length nature of the transaction. Canada will refer to the transaction as a "sale," which is what, in fact, transpired through WCC's bankruptcy process.

First, the sale of WCC's investment claim under NAFTA Chapter Eleven to the Claimant. Canada provides a full answer to the Claimant's argument at

Paragraphs 90-95 of its Memorial and Paragraphs 126-135 of its Reply.

In particular, Canada explained that WCC's Claim cannot establish this Tribunal's jurisdiction because it is not the Claim that is before this Tribunal. It is important to recall the chronology. WCC entered into bankruptcy in October of 2018. WCC then filed a NAFTA claim in November of 2018. WCC then sold its NAFTA claim to the Claimant four months later, in March of 2019. WCC's NAFTA claim was then withdrawn in July of 2019, and the Claimant filed its own NAFTA claim in August of 2019.

The Claimant does not dispute these facts. Thus, as a question of fact, whether or not WCC's NAFTA claim was sold, transferred, or assigned, the claim no longer exists. It was withdrawn.

Moreover, as a question of law, this Tribunal only has the competence to adjudicate the Claim that is before it. That is the Claim that was filed by the Claimant. This Tribunal has no competence over WCC's Claim. Nowhere in its Pleadings does the Claimant explain how WCC's Claim can still be

factually or legally relevant.

Even if WCC's NAFTA Claim was somehow relevant, there is no mechanism under NAFTA Chapter Eleven to allow a disputing investor to sell or transfer its claim to another investor of a Party. A state's consent to arbitrate under NAFTA Chapter Eleven is specific to the investor of a Party that brings the claim, except in narrow circumstances, like subrogation, which I will speak to in just a moment.

To establish consent, a NAFTA claim must be brought by the investor of a Party to whom the measure relates, who is the subject of an alleged breach of Section A, and who incurred loss or damage.

Canada alerted the Claimant to these issues in July of 2019, when the Claimant approached Canada seeking to substitute itself for WCC in WCC's NAFTA claim. That is Exhibit R-076. In that letter, Canada explained that an investment claim cannot be amended if it would cause the amended claim to fall outside of the jurisdiction of the tribunal.

Canada provided the Claimant with the decision of the NAFTA tribunal in *Merrill & Ring*

concerning a motion to add a new party. In that case, Merrill & Ring brought a motion to add a new party, Georgia Basin, as a claimant. Merrill & Ring and Georgia Basin were affiliated companies, and Merrill & Ring claimed that Georgia Basin was also affected by the measure it was challenging in that case.

The motion was made pursuant to Article 20 of the 1976 UNCITRAL Rules, the same provision through which the Claimant in this case sought to substitute itself for WCC in WCC's after-claim.

Canada opposed the motion in *Merrill & Ring* because the challenged measures in that case did not relate to Georgia Basin under Article 1101. Georgia Basin was not the subject of an alleged breach of Section A, and Georgia Basin could not have incurred any loss or damage.

The tribunal in that case agreed with Canada's analysis. They wrote: "the Tribunal must accordingly begin by examining whether the amendment requested by the Claimant's motion to add a new party is compatible with the scope of the arbitration

clause, i.e., do the impugned measures relate to Georgia Basin and are there credible allegations that it has been damaged by reason of the alleged breaches of Section A."

The *Merrill & Ring* tribunal denied the motion to add Georgia Basin as a claimant because doing so would not comport with the terms of the NAFTA or Article 20 of the 1976 UNCITRAL Rules.

The tribunal's decision in that case confirms Canada's position in this arbitration.

The challenged measures in this case do not relate to the Claimant or its investments. The Claimant and its investments have suffered no breach of Section A and could not have incurred any loss or damage.

In its Rejoinder, the Claimant accuses Canada of acting in bad faith because in our Reply, we wrote that it was "open to WCC to continue its NAFTA claim."

There is no bad faith here. The Claimant approached Canada requesting to substitute itself for WCC in WCC's NAFTA claim. It was the Claimant that

sought to have WCC removed. In fact, what Canada did not know at the time was that the Claimant had already purchased WCC's NAFTA claim. Presumably, WCC was thus already out of the picture well before the Claimant approached Canada to substitute itself in for WCC.

These were not decisions made by Canada. These were decisions made by the Claimant, and if the Claimant wasn't directly aware, it should have been aware that there is no mechanism under NAFTA Chapter Eleven that allows a purported claimant to buy a NAFTA claim from another investor and then pursue it.

For example, there is no case law under NAFTA or otherwise that has allowed an investment claim to be sold or transferred from one investor to another; not one. Moreover, when Treaty partners wish to establish a mechanism for the transfer of a claim, they do so expressly such as in the case of subrogation.

Canada made this point at Paragraph 130 of its Reply, yet, like with so many other points raised by Canada, the Claimant provides no response in its written Pleadings.

Subrogation allows an investment claim to be transferred by an investor to its insurer. The Host State consents to the transfer, typically in the investment treaty. An example of such a provision can be found at Article 14.15 of the Canada-United States-México Free Trade Agreement, which is RLA-066.

Subrogation provides an exception to the general rule that a claim cannot be transferred. If claims could be sold or transferred as in due course or as a matter of course, a provision allowing subrogation would not be necessary. The Claimant should have been aware of NAFTA Chapter Eleven's limitations, in particular with respect to the consent to arbitrate before it decided to purchase WCC's NAFTA claim.

But as I mentioned at the outset, the point is moot in any event because WCC's NAFTA claim was withdrawn and the Claimant filed its own.

I'd like to now discuss the sale of an investment from one investor to another after the date of an alleged breach. As I've mentioned, the Claimant argues that under NAFTA the right to file a claim

under Section B transfers with the investment to the new investor so long as the new investor is an affiliate or there is a continuity of interest.

And my colleagues Ms. Van den Hof and Ms. Dosman have already explained the proper interpretation of Articles 1101, 1116 and 1117, which leads to the conclusion we set out earlier, namely, that the alleged breach must relate to the Claimant and its investments. The Claimant and its investments must be the subject of an alleged breach of Section A, and the Claimant or its investments must have incurred loss or damage.

I will not repeat what my colleagues have already laid out, but I will address the case law the Disputing Parties have filed concerning investments that were sold or transferred after the date of an alleged breach. And the case law is clear: When an investor disposes of its investment after an alleged Treaty breach arises, the transfer does not imbue the subsequent owner with a right to advance the Treaty claim.

For example, *Daimler v. Argentina*, the

Claimant had transferred its investment after the date of an alleged breach, and subsequently filed the claim relating to that investment. Argentina argued that the right to file a claim transferred with the investment. And, thus, the tribunal did not have jurisdiction. The tribunal rejected that argument.

You can see up on the screen, the tribunal recognizes the severability of a claim from the underlying investment. The tribunal says that a strong argument can be made that only an investor with an investment prior to the dispute has standing to file the claim. For this reason, the tribunal rejected Argentina's argument that the right to file a claim transferred with the investment.

The tribunal held at Paragraph 145 that it should grant standing to the investor who suffered damages as a result of the alleged breach.

The tribunal in *EnCana v. Ecuador* reached the same result. In that case, the tribunal disagreed with Ecuador and concluded that the right to advance a claim remained with the investor that held the investment at the time the dispute arose.

You can see on the screen it defined a dispute at Paragraph 131 as "the taking of measures in breach of the Treaty which cause loss and damage to an investor." Canada notes that Professor Paulsson cites the same paragraph with approval at Page 5 of his Second Report.

In its Rejoinder, the Claimant argues that the *EnCana* tribunal did not address whether the purchaser of the investment could also assert a claim. That is not what the Tribunal said. It said that the investor that held the investment at the time of the dispute could file a claim. Given that language, it is hard to imagine how the purchaser of an investment could also have a dispute.

Moreover, the Claimant's assertion that any would-be purchaser of an investment should also be able to file a claim would lead to an absurd result.

What if there are multiple subsequent purchasers of the investment? Does each subsequent purchaser get to file a claim?

In Canada's view, that does not make sense, and is not what the tribunal in *EnCana* decided.

There are other examples as well. For example, in *Mondev v. The United States*, the question was whether Mondev had lost standing--sorry, lost standing to bring a claim because it no longer owned or controlled the investment. The tribunal found that Mondev's loss of its investment did not also mean that it lost its right to pursue a NAFTA claim.

Canada raised this case in its Reply, but the Claimant did not address it in its Rejoinder. The same result occurred in *Gemplus v. México*, where the tribunal found that the investor that owned or controlled the investment at the time of the alleged breach retained the rights to bring the claim, despite the fact that it had transferred the shares constituting the investment after the alleged breach.

These cases all support the view that, when a claimant sells its investment after the alleged breach, the right to advance the claims remains with the investor that owned and controlled the investment at the time of the alleged breach. In contrast to these cases, the Claimant cites four of its own, which it argues establishes a rule the right to file a claim

transfers with an investment when it is sold or transferred after the date of an alleged breach.

The Claimant is mistaken. Its four cases are *Autopista*, *Koch Minerals*, *African Holdings*, and *CME*. Neither *Autopista* nor *Koch Minerals* involve the transfer of an investment after the date of an alleged breach. There was, thus, no ratione temporis issue in those cases. They are not applicable here.

In fact, in *Koch Minerals*--and Arbitrator Douglas, I know you're on the tribunal, so you can let me know if I get this wrong--but in *Koch Minerals* the case--which is a case that Claimant relies on heavily--the issue facing the tribunal was whether two investments held individually by two investors could nonetheless be considered as one integrated investment. The tribunal agreed that it was one integrated investment because the two investments had a close nexus.

In the paragraph the Claimant cites, the tribunal considers whether the investment could have been integrated had the two investors not been affiliated companies, but concluded that such an issue

was not present in the case.

The Claimant, thus, inaccurately cites *Koch Minerals* for a proposition that it does not stand for. The same is true in the next case they cite, which is *African Holdings v. Congo*. The tribunal in that case found that neither Claimant was an investor on the date of the alleged breach. The tribunal, thus, denied the claims on grounds of jurisdiction ratione temporis.

The case, thus, supports Canada's position in this Arbitration. In obiter dicta, which Professor Paulsson confirms at Paragraph 60 of its First Report, the tribunal opined that African Holdings, as assignee of the Contract debts, could have had the same interests as SAFRICAS, including with respect to the investment claim.

However, the tribunal's statement is not applicable here because, well, it is obiter and, second, the tribunal made that comment because SAFRICAS and African Holdings were affiliated companies continuously owned by the same family. Thus, even if the tribunal's comments in obiter are

relevant, the factual circumstances of that case are different.

That leaves the Claimant with one last case, which is *CME v. Czech Republic*. This is the only case the Claimant cites that involved the transfer of an investment from one investor to another after an alleged breach. However, the facts and investment treaty in that case are unique.

The investment in that case were shares in an enterprise. The share transfer occurred from a parent company to its subsidiary. The challenged measures occurred both before and after the share transfer. The Czech Republic argued for the first time at the hearing that the claimant CME could only challenge measures that occurred after it had acquired the shares.

The tribunal disagreed on several grounds. First, the tribunal recognized that the Czech Republic had prospectively authorized the parent company to transfer its shares to its subsidiary. It was, thus, questionable for the Czech Republic to oppose jurisdiction when it had authorized the share

transfer.

Second, the definition of "investment" under the Treaty, which was the Dutch-Czech Republic BIT, allowed for the rights derived from acquired shares to qualify as part of the investment. The tribunal, thus, found that by acquiring the shares, CME had acquired all of the liabilities, rights, and obligations of its parent company. There is no similar definition of an "investment" under NAFTA.

Third, the tribunal concluded that the investment treaty did not specify whether the investment had to be owned or controlled by the claimant at the time of the alleged breach. The Treaty itself used quite loose language. This is in contrast to NAFTA, which requires that a challenged measure relates to the Claimant under Article 1101.

Moreover, the tribunal found that because the parent company continued to hold the investment indirectly, it did not matter under the Treaty that the parent had transferred its shares to its subsidiary because the parent remained protected indirectly.

In other words, the parent company remained protected as an investor from the moment of the alleged breach through to the filing of the claim. Those are not the circumstances here. For these reasons, factually and legally specific to that case, the tribunal rejected the Czech Republic's argument.

It is also worth noting that the tribunal's decision is from nearly 20 years ago and has not been followed by any tribunal, likely because the decision was tailored to the unique facts and investment treaty in that case.

In conclusion, the Claimant advocates for a law on assignment of claims between two investors that does not exist.

That is true whether the two investors are affiliates or have a close continuity of interest.

I will now turn things over to my colleague, Mr. Klaver, who will discuss the Claimant's continuity of interest theory, barring any questions from the Tribunal.

PRESIDENT BLANCH: Zac? And James? Thank you.

SECRETARY FLECKENSTEIN: If I may, Madam President, can I just update on time. I did update in the chat function, and now Canada has about 13 minutes left of its two-hour allotment.

MR. DOUGLAS: Okay. I think that is fine. I think our last presentation is about 15 minutes. I thought--well, we don't want you to talk fast, Mark. Our tally is slightly shorter just given some of the technical issues in the--so, with the grace of the Tribunal, if we do go over by ICSID's count by a couple of minutes, would that be okay?

PRESIDENT BLANCH: I'm going to make a unilateral decision here and say that's fine, if it's just a few minutes. And obviously, will grant the same discretion to Claimants.

MR. DOUGLAS: Yes. Thank you very much. Appreciate that.

MR. KLAVER: President Blanch, Arbitrator Douglas and Arbitrator Hosking, as my colleague Mr. Douglas explained, the Claimant contends that an investment claim may be assigned in one of two circumstances, first, between affiliates or, second,

between entities with a continuity of interest. I will address the Claimant's asserted continuity of interest. It is worth noting at the outset that the Claimant's continuity-related arguments have shifted significantly during this arbitration.

In its Counter-Memorial, the Claimant argued the Tribunal had jurisdiction because the First Lien Lenders provided a continuity of beneficial interest. It did not specify what this meant or how it connected to the applicable law. For his part, Professor Paulsson referred to a continuity of beneficial ownership. The Claimant also alleged the First Lien Lenders controlled WCC and its assets without specifying the timeline of this control.

In the Reply, Canada demonstrated that the First Lien Lenders never beneficially owned WCC or its assets.

In its Rejoinder, the Claimant did not attempt a rebuttal to this point. It even withdrew its reference to a beneficial interest.

Canada also showed that the First Lien Lenders never controlled WCC or its assets. In its

Rejoinder, the Claimant next argued that the NAFTA claim could be assigned due to a close continuity of interest.

The term "continuity of interest" derives from U.S. tax law. It relates to a Type G reorganization, which the Claimant asserts, allows an entity to restructure tax free. The Claimant never referenced a continuity of interest in its Counter-Memorial. It merely mentioned in two sentences in the last paragraph of its Appendix A that the transaction was structured to qualify as a Type G reorganization. The Claimant did not explain how this point related to its arguments on jurisdiction.

Yet, in its Rejoinder, the Claimant now places much weight on the alleged continuity of interest. If the Claimant was serious about this argument, it would have fully presented it in the Counter-Memorial.

Canada has had no opportunity to provide Expert or other evidence on the Claimant's alleged continuity of interest under U.S. tax law.

In addition, the Claimant again alleged that

the First Lien Lenders controlled WCC but now appeared to limit the time of such control to the bankruptcy process, not during the alleged breach.

Overall, then, the Claimant appears to use the term "continuity of interest" in two ways: First, as a term of art relating to its tax treatment and, second, as a de facto notion of continuing interest based on the First Lien Lenders' alleged control of WCC and the bankruptcy process.

I will explain that both formulations of a continuity of interest are irrelevant to establishing this Tribunal's jurisdiction and, in any event, the Claimant has not substantiated these assertions. I will address the Claimant's assertions on tax treatment and control separately.

Now, the Claimant does not explain how the concept of a continuity of interest under U.S. tax law is part of the applicable law to find jurisdiction here. U.S. tax law is not the applicable law, which of course is NAFTA and international law. NAFTA does not contain a renvoi or a reference to domestic tax laws for the purposes of establishing jurisdiction on

an assigned claim.

In fact, NAFTA Chapter Eleven does not use the term "continuity of interest" at all. Moreover, despite the Claimant insinuating that international law applies this concept, not a single investment decision on the record uses the term "continuity of interest," not one, including any NAFTA case, nor does any international law scholarship on the record use the term "continuity of interest."

The Claimant has made up its own legal test for the assignment of investment claims based on concepts selectively chosen from domestic tax laws that are not the applicable law here. It cannot establish the Tribunal's jurisdiction on this basis.

Nonetheless, even if the Tribunal considered that the Claimant's asserted tax treatment was somehow relevant to the applicable law to find jurisdiction, the Claimant did not submit reliable evidence to establish the alleged continuity of interest. The Claimant relies on its own self-judging and, frankly, self-serving position that it had a continuity of interest under U.S. tax law.

In its Rejoinder, it states the U.S. Government views WCC and WMH as having a continuity of interest. This is misleading. As with many areas of tax, taxpayers make their own judgment calls about which provisions they may qualify for. Only if they are audited or a specific decision is sought from a tax authority or court might there be an actual ruling on the question.

WCC appears to have had no intention of seeking a ruling from the Internal Revenue Services, the IRS, or a Court on its tax treatment.

On the screen is an excerpt of the disclosure statement that WCC filed with and was approved by the Bankruptcy Court. This is Exhibit C-044. The Claimant cites to this document to support its new argument that the transaction was designed to qualify for tax-free treatment.

Yet, the document states no opinion of counsel was obtained on tax issues, there was no intention to seek a ruling from the IRS, and WCC's statements about the potential tax treatment were not binding on the IRS or the courts, which could take a

different view. This completely undermines the Claimant's assertion about the U.S. Government finding a continuity of interest here.

Moreover, the Claimant filed no Expert Report, judicial Decision, or other independent evidence to confirm its alleged tax treatment. It simply asks the Tribunal to take it at its word. Yet, its unsupported assertions on self-judging tax treatment do not constitute a reliable evidentiary basis to find jurisdiction.

In this respect, it is revealing that the Claimant never once mentions the Internal Revenue Code by name. Instead, it refers generically to federal law regarding reorganization in an apparent attempt to blur the line between U.S. bankruptcy law on which there is ample evidence before the Tribunal and U.S. tax law on which there is paltry evidence.

The Claimant's inadequate evidence on its tax treatment stands in stark contrast to the legally-binding findings of the Bankruptcy Court on the unaffiliated relationship between the Claimant and WCC.

Accordingly, the Claimant's asserted tax treatment do not establish this Tribunal's jurisdiction. It is untethered to NAFTA, and the Claimant does not offer reliable evidence to support it.

And moving to the Claimant's de facto notion of continuity, it argues that the First Lien Lenders controlled WCC and the bankruptcy process without explaining why this would be relevant to establishing jurisdiction under NAFTA.

In fact, its assertions on control are irrelevant for two reasons: First, the bankruptcy occurred years after the alleged breach occurred, even if the First Lien Lenders controlled WCC in the bankruptcy in 2019, this could not establish that when the alleged breach occurred in 2016 the Claimant was a protected investor.

Second, the Claimant cannot establish jurisdiction based on the First Lien Lenders' alleged control because they are not the Claimant. The NAFTA Parties offer their consent to arbitrate with only a disputing investor. That is the claimant that files a

claim under Section B. Here, the disputing investor is WMH, which has separate legal personality from its owners.

NAFTA offers no mechanism for a tribunal to derogate from customary international law by piercing the corporate veil of a claimant to find jurisdiction based on other parties who might have an interest in the arbitration, such as a claimant's owners.

Canada and the Claimant both observe that the definition of "investment of an investor of a Party" refers to investments held indirectly by an investor.

As the slide illustrates, the term "indirectly" means a tribunal can look down the corporate chain to determine if the claimant, the relevant investor of a Party, owned or controlled the investment through intermediaries. This is what the tribunal did in *Waste Management II*.

However, this definition does not enable a tribunal to look up the corporate chain to find jurisdiction based on a claimant's owners. In this respect, NAFTA is unlike the Treaty in *Perenco* between

France and Ecuador, which expressly authorized that tribunal to find jurisdiction over a claimant of a non-party if French shareholders control it.

This Tribunal, by contrast, has no basis under NAFTA to pierce the Claimant's corporate veil to find jurisdiction. Nonetheless, even if the Tribunal sought to rely on the First Lien Lenders to find jurisdiction, it would be unable to do so for three main reasons: First, Ms. Coleman explained that on the facts, the First Lien Lenders did not control WCC or the bankruptcy process.

And rather than repeating her Expert analysis here, I would point the Tribunal to Paragraphs 12-14 and 20-27 of her Second Expert Report. There, she also discusses how the Bankruptcy Court confirmed that the First Lien Lenders did not control WCC through the debt instruments. The Claimant has not addressed the Court's determination here.

Instead, it attempts to discredit Ms. Coleman by misreading her comments on discussion panels. This is completely ineffective. The Claimant

took her words out of context and chose not to cross-examine her, revealing the frailty of its arguments that the First Lien Lenders controlled WCC and the bankruptcy.

The second flaw in the Claimant's bid to establish jurisdiction based on the First Lien Lenders' alleged control is that it has not identified who all of the First Lien Lenders are. It merely says that they included certain entities. We don't know how many other lenders there may be and what their interests in the Claimant might be.

Third, under the Claimant's theory of jurisdiction, continuous U.S. nationality is critical to upholding this claim. Yet, the Claimant offers no evidence of the First Lien Lenders' U.S. nationality. It does not confirm whether any other unidentified First Lien Lenders have or lack U.S. nationality. Nor does the Claimant clarify whether the Tribunal might need to pierce the veil of the First Lien Lenders, to ensure their beneficial owners have U.S. nationality.

Canada raised these concerns in its Reply at Paragraph 119, but the Claimant left them unanswered.

Its case rests on unsupported claims of control by an unspecified group of entities whose nationality it has not proven. This is no way to establish jurisdiction under NAFTA.

Thus, the Claimant's assertions of a continuity of interest are unavailing because its claims about tax treatment and control are irrelevant and unsubstantiated.

To conclude Canada's Opening today, the Claimant cannot establish this Tribunal's jurisdiction because it was not an investor of a Party when the alleged breach occurred, nor can the Claimant overcome this fundamental flaw in its claim with its shifting various bits to find a connection with WCC, a separate enterprise with which it was unaffiliated.

Thank you. I would now welcome any questions from the Tribunal.

PRESIDENT BLANCH: What I suggest we do--unless there is any imminent burning questions--James? And Zac? I suggest we now take our 10-minute break. And then, if the Tribunal have any questions after the break, we will raise them.

Otherwise, we'll then go into the Claimant's Opening Statement. So, it is now quarter to 2:00, so we will have a 10-minute break until 5 to.

Thank you very much.

MR. KLAVER: Thank you.

(Brief recess.)

PRESIDENT BLANCH: Well, firstly, I just want to apologize to Mr. Feldman and his team. I hope I didn't give you too much of a shock when I suggested we might be only having a 10-minute break before we went straight into your Opening Submissions. I do apologize. But hopefully now we've had our break, and you are ready to start.

And, like we did for the Respondent, if you need a couple of minutes extra--I think they went two or three minutes over, and obviously it's the same for you.

MR. FELDMAN: Thank you. We expect to be considerably under. We are particularly deferential in this situation to Mr. Hosking because I'm happy to say good afternoon, perhaps evening to everybody else, but for him it is still morning, I think.

So, with due apologies, would you like me to begin?

ARBITRATOR HOSKING: Thank you. No problem.

(Interruption.)

(Stenographer clarification.)

MR. FELDMAN: I'll try to stay close to the microphone.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. FELDMAN: Thank you very much. I'm Elliot Feldman, Baker Hostetler, representing Westmoreland, and, again, good afternoon to everyone except, unfortunately, for Mr. Hosking.

The NAFTA tribunal in *Grand River v. United States* confronted with the dispute over jurisdiction concluded that: "Investment Tribunals have declined to adopt a method whereby one of the Parties carries the burden of proof in matters of jurisdiction. They have adopted a different approach to deciding whether jurisdiction exists. Under this method, the decision-maker looks at the preponderance of authority for or against jurisdiction."

This is in our exhibits, RLA-030, Page 17,

Paragraph 37.

The tribunal went on to say that: "A focus on burden of proof is not the correct approach."

Canada, however, brought the motion to deny jurisdiction as a defense against Westmoreland's claim, and, therefore, Canada does have a burden of proving its defense. As international law prefers not to deny access to justice, this Tribunal must require Canada to meet its burden.

Let's assume, as we must for this jurisdictional proceeding, that Canada did breach NAFTA, a condition we expect to prove in the merits phase of this Arbitration. Let's then suppose a scenario that is not exactly the one here but could have been. Let's suppose that Canada's breach of NAFTA caused Westmoreland's bankruptcy. Finally, let's suppose Canada's version of the bankruptcy, that the company that emerged, albeit still American, does not have continuity with the company that entered bankruptcy.

In this scenario, as Canada would have it, there would be no compensation possible for Canada's

breach. Canada would enjoy a complete windfall by putting the company out of business. The message would be that, if there were to be a breach, Canada ought to breach completely, thoroughly, enough to destroy the company so that it would have no recourse, the very definition of a denial of access to justice.

We think such a scenario, as Professor Paulsson also suggested, is perfectly plausible. This scenario doesn't square with the facts here. The breach didn't cause Westmoreland's bankruptcy. We are not arguing the contrary. The company that emerged from bankruptcy is the product of a Type G reorganization that deliberately and specifically assured continuity of interest, and the most important facts are those required by the Treaty.

The investment was Canadian at the time of the breach, was unchanged through and after bankruptcy, always Canadian. The owners at the time of the breach were American. They remained American through and after the bankruptcy.

The Claimant, owner of the Canadian investment, was American at the time of the breach and

at all subsequent times including when the claim was made.

This diversity, American owners of a Canadian investment, the essential requirement of the Treaty and of its purpose to protect and encourage foreign investment applied here at all times. No one shopped the claim. No one manipulated the bankruptcy in order to obtain a claim they otherwise might not have had.

Even in a scenario where Canada could have breached and driven the company out of business, access to justice would have required acceptance of jurisdiction. But with the facts here, denial of access to justice would be extreme and unjustified.

The Vienna Convention requires starting with the plain language of the Treaty. Although more than 50 times in its Memorial--and I've lost track of how many times this morning--Canada invokes the phrase "at the time of the alleged breach." That phrase does not exist in NAFTA.

Canada wants the Treaty to say that the Westmoreland, as Claimant, has to be identical to the

Westmoreland "at the time of the alleged breach," but NAFTA doesn't say so.

My partner Mike Snarr is going to provide the detail of what the Treaty does and doesn't say and explain why Canada's ratione temporis argument has no place in NAFTA. He will also address the applicable international jurisprudence to show that Canada finds no support there for its argument, neither in NAFTA nor in any other Treaty.

He will explain that the damages here are falling mostly on the Claimant, the Westmoreland that has brought the Claim, because the stream of revenue to pay for land reclamation has been cut off by Alberta's measures impacting most of all over the next decade.

And, finally, he will show that there was no prejudice to Canada in dismissing its defense questioning jurisdiction over a claim arising from an American investment in Canada.

My partner Paul Levine will follow Mr. Snarr to explain the continuity of interest preferred in international law, as Professor Paulsson has testified

in two Expert Opinions, and the continuity of interest reserved in the Type G reorganization under the U.S. Tax Code in this case.

Canada, generally neglecting the tax implications of bankruptcy and the applicable rules, would like this case to be all about a bankruptcy that forfeited a claim, notwithstanding that a Type G reorganization expressly preserves lender control. Canada, denying the continuity of interest inherent in this type of reorganization, would like to use the bankruptcy to escape the responsibility thrust upon it by its rogue province and to deny access to justice by celebrating form over substance.

Canada this morning argued that the Type G reorganization is irrelevant because U.S. tax law is irrelevant. Yet, Canada's jurisdictional objection is all about U.S. bankruptcy law, the very law even Ms. Coleman acknowledged is not the applicable law here.

Canada likes to talk about not having things both ways. Either domestic law is relevant or it isn't. Professor Paulsson has explained that

international law, the applicable law, disfavors form over substance. But Mr. Levine will add that in this case, even if form were preferred, we should prevail.

Westmoreland satisfies the Treaty's requirements for diversity of investor and investment. The instances where international tribunals have dismissed for ratione temporis all have been concerned about Treaty manipulation, shopping for claims, conditions and circumstances bearing no resemblance to the case here.

Messrs. Snarr and Levine will both distinguish those cases. Investment in Canada was owed protection when Canada breached the Treaty, and nothing ever happened or changed that should or could release Canada from those Treaty obligations.

I'm happy now to invite Mr. Snarr to continue.

MR. SNARR: Good afternoon, Members of the Tribunal. Can you hear me all right?

Okay. I'm Mike Snarr, Counsel for Westmoreland Mining Holdings. I will speak for about 30 minutes on the NAFTA Treaty text and the principles

that emerge from the arbitration decisions that have been briefed by the Parties.

Next slide, please.

The Tribunal must decide first whether the terms of the NAFTA Treaty prohibit Westmoreland's claim, as Canada has argued. If they do not, then the Tribunal must decide whether there is a prohibition in customary international law. Assuming such a prohibition exists, the Tribunal must decide the scope of that prohibition and its application to the unique facts of this case.

Westmoreland has explained that the jurisdictional objection, as strictly and narrowly articulated by Canada is not found in the language of the NAFTA Treaty terms. Applying ratione temporis to the facts of this case, as it has been applied in other investment arbitration cases, the Tribunal has jurisdiction, and Westmoreland's claim should go forward.

There is no dispute that the elements of a foreign investor having a foreign investment are essential to trigger a Respondent State's foreign

investment protection obligations under NAFTA or bilateral investment treaties. It is required by the ordinary meaning of the terms of NAFTA and is recognized by investment arbitration tribunals that have considered other investment treaties.

This is the diversity of nationality that is at the heart of foreign investment protections under international law. The precondition that, in effect, puts a Host State on notice that treaty obligations are active and that its conduct towards the foreign investment and its investor must be guided by the terms of the Treaty.

What Canada argues in its ratione temporis jurisdictional objection is not just that a foreign investment and investor must exist, but that the corporate form of the investor may never change from what it was at the time of the breach and, by extension, that the corporate form of the investment may never change from what it was at the time of the breach if the foreign investment and investor hope to preserve the activated treaty rights to which they are entitled.

Canada argues that a foreign investor company must be the same entity in its same form, regardless of whether its operations or anything else about it might be the same.

Canada presents this rule as one that applies without regard to circumstances, international law policies, consequences, or prejudice. One might expect that a strict, absolute rule like this which limits the rights of an investor and investment post-breach, would be well-defined in the terms of the Treaty such that it could just be quoted directly, or that there might be some official Treaty interpretation articulated and agreed among the drafters, saying that the rule is embodied in a particular passage of the NAFTA text. But there is no such text in NAFTA, nor any official statement of interpretation by the NAFTA Free Trade Commission to that effect.

Next, please.

For all of Canada's references in its Memorials to the phrase "at the time of the alleged breach," neither that phrase nor any similar to it is

found in NAFTA's Chapter Eleven. You will see on the slide here the text of Articles 1116 and 1117, but modified as shown in the text highlighted in red.

Article 1116, which speaks to the submission of claims, does not say that an investor of a Party may submit to arbitration under this Section A Claim, provided that the investor is the same national or enterprise as it existed at the time of the breach.

Those words would have to be added to the text as shown here. The text of Article 1117 similarly lacks such "at the time of the breach" language. It does not say that "an investor of a Party on behalf of an enterprise of another Party may submit to arbitration under this Section A claim, provided that the investor is the same national or enterprise as it existed at the time of the breach and that the enterprise is the same enterprise as it existed at the time of the breach."

Moreover, the text of Article 1117 is configured so that a claimant/investor may make a claim, not on its own behalf, as in Article 1116, but on behalf of a foreign enterprise that it owns based

on a breach and damages that accrue to the foreign enterprise. Canada contends that investments--let's go back one slide, please. Thanks.

Canada contends that investments are not owed obligations and that Article 1117 does not allow the foreign investor who owns the investment to make the claim on its behalf. But it should be noted that the obligations of Articles 1102 and 1105 expressly apply to investments, and Article 1135 provides that any award for restitution or compensation under Article 1117 is to be paid to the investment enterprise, not the claimant, suggesting that an investment enterprise is owed obligations, and may be owed damages, provided it is owned by a foreign investor who submits the claim.

Now, let's go to the next slide.

The tribunal in *Waste Management II* chaired by Professor James Crawford wrote: "Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the Treaty additional requirements..."

The NAFTA drafters were capable of writing temporal limitations into the Agreement when they intended to do so.

Next slide.

Article 1117(2) contains a three-year statute of limitation for claims made by an investor on behalf of its investment enterprise, tying that date to the enterprise's first knowledge of the breach and damage incurred.

Article 1116(2) similarly contains a three-year statute of limitations for claims made by the investor on its own behalf.

Article 1108(4) shows the kind of language that might have been used in Articles 1116 and 1117 had the NAFTA Parties intended an "at the time of the breach" limitation as argued by Canada. 1108(4) states: "No Party may, under any measure covered by Annex 2, require an investor of another party by reason of its nationality to sell or otherwise dispose of an investment existing at the time the measure becomes effective."

Next slide, please.

Professor Paulsson wrote in his first Expert Report that it is indeed a leap, and not a necessary inference, that the foreign investor submitting the claim must be the same foreign investor that owned the foreign investment at the time of the breach. He added: "Such a significant dispositive rule would surely have been spelled out. Leaving it open means that the answer depends on the factual context and its effect on the policies that underlie the Treaty."

No such dispositive rule is spelled out in NAFTA. Canada therefore invites the Tribunal to see Articles 1116 and 1117 through the lens of Canada's interpretation of Article 1101 in order to read an "at the time of the breach" requirement into the Treaty.

Next slide.

To do that, the Tribunal has to ignore the fact that Article 1101 similarly lacks an "at the time of the breach" clause and to interpret the phrase "measures adopted or maintained by a Party relating to investors of another Party" as imposing such a requirement.

Canada offers no Free Trade Commission

formal statements of interpretation of Article 1101, nor any legislative statements contemporaneous to the NAFTA Parties' adoption of the Treaty, that would support that view. The ordinary meaning of "measures adopted or maintained by a Party relating to" is that the measures must relate to the investor or the investment. The only way that language of Article 1101 could be read as a jurisdictional bar is if there were no circumstances under which the breaching measures related to Westmoreland and Prairie.

Canada argues that the Off-Coal Agreements could not relate to Westmoreland Mining Holdings because Westmoreland Mining Holdings is a different entity than the one that existed at the time of the breach.

We do not agree that measures relating to Westmoreland Coal Company do not or could not relate to the Company emerging from the Westmoreland bankruptcy, given the continuity of interest between them. Yet, even if one assumed that the relation of the measures to the Westmoreland Coal Company must be

disregarded, we have made a prima facie showing that the measures do relate to both Westmoreland Mining Holdings and Prairie in the present.

We have explained that the Off-Coal Agreements ensure that Prairie's mines will close no later than 2030. The Off-Coal Agreements are measures that continue to be maintained by Alberta as compensation to the Albertan utilities to stop using Prairie's coal. These payments are being provided to the Albertan utilities in 14 annual installments that began in 2016. The closure of the coal-fired electricity units is being accelerated, leading to earlier closures of Prairie's mines, increased revenue losses, and increased coalmine reclamation costs.

These losses affect Westmoreland Mining Holdings' investment in Prairie, stranding its capital. Westmoreland Mining Holdings is losing and will continue to lose revenue as a result of the Off-Coal Agreements compelling the early mine closures, even assuming that some of the mines hold on until 2030. These facts as pled should be accepted by the Tribunal pro tempore in this proceeding. Canada

may disagree with them, but to the extent there is a factual dispute about them, that question should be addressed in the merits phase of the Arbitration.

Article 1101 provides no text to support an "at the time of the breach" clause, nor does any interpretation of "relating to" provide a basis for denying the Tribunal's jurisdiction over this claim.

NAFTA Chapter Eleven does have a number of express proscriptive requirements: The three-year statute of limitations, waivers of resolution of disputes in other fora, diversity of nationality. But "at the time of the alleged breach" is not one of them. It is not for the Tribunal to infer additional proscriptions in the Treaty text, and there is no support for the view that additional proscriptions were intended.

Next slide, please.

When Canada says at Paragraph 44 of its Memorial that Westmoreland Mining Holdings was not a protected investor when the alleged breaches and resulting damage occurred because it was not constituted until January 31, 2019, it presents an

unrealistic static view of "investment" that, for at least two reasons, is incongruent with the Treaty's terms, object, and purpose.

First, damages do not always occur all at once and all at the time of the breach, which is why the statute of limitation in Paragraph 2 of Articles 1116 and 1117 distinguishes between the time when an investor or investment has knowledge of the alleged breach and the time when there is knowledge that damage has been occurred.

Article 1101 also refers to "measures adopted" and "measures maintained," reflecting the fact that some measures may infringe Chapter Eleven protections and cause damage for some time after they were adopted. In this case, damages are being incurred after the Westmoreland bankruptcy and will continue to be incurred by Westmoreland Mining Holdings.

Second, the cases addressed in Professor Paulsson's First Expert Witness Statement and by the Parties in the Memorials demonstrate that is not uncommon for companies with foreign investments to

change their corporate structures over time. Canada's interpretation of the Treaty requires that an investor could never change its corporate form post-breach and still maintain a claim to protection under the Treaty because a different corporate form means a different person, a different investor, and, logically, the same would have to apply to an individual who dies and whose heirs inherit ownership of the investment.

Canada seems to adopt the view, without exception, that an investor with a different corporate form or person would have no rights with respect to events that had occurred previously, regardless of the connections.

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That narrow interpretation of the NAFTA Chapter Eleven Treaty requirements is not supported by the Treaty text and makes no practical sense given the object and purpose of the Treaty. NAFTA was an historic agreement for economic integration among three of the world's largest economies. The investment chapter was adopted in step with an emerging growth of bilateral investment treaties

around the world and with the objective to increase substantially investment opportunities in the territories of the Parties, to eliminate barriers to trade, and to promote conditions of fair competition. A static view of foreign investments, that they and their investors must be frozen in time to be worthy of protection, would frustrate those objectives. NAFTA's Chapter Eleven provided assurances from the Member States not only that fundamental norms of fairness, equity, and nondiscrimination would be extended to NAFTA-country foreign investors, but also that those standards would be enforceable through a private right of action for the settlement of disputes.

The notion that such assurances and protections could be cut off because the foreign investor changed its corporate structure through bankruptcy, even while acting in good faith and without abusing the treaty's nationality requirements, is capricious. It runs contrary to a State obligation of good faith that should be a baseline presumption for interpreting the ordinary meaning of a treaty's terms in international law.

The requirements of a foreign investor and a foreign investment are stated clearly enough in the treaty text, and those express prescriptions provide complete explanations for the decisions in the NAFTA cases that Canada cites for its jurisdictional rule.

Next slide, please.

I'll pause here for a moment to allow the Tribunal to ask any questions if it has them.

PRESIDENT BLANCH: James?

ARBITRATOR HOSKING: No.

PRESIDENT BLANCH: Zac?

ARBITRATOR DOUGLAS: No.

PRESIDENT BLANCH: No. Thank you.

Please continue.

MR. SNARR: Before looking at NAFTA cases upon which Canada principally relies, it is worth referring again to Professor Paulsson's First Expert Report in which he cautions against treating arbitration awards, let alone select passages extracted from them, as legal precedents. In most cases, the reader of an alleged precedent is most likely to be influenced by the reasons which

arbitrators say led them to the outcome for which they have taken personal responsibility ex-officio. That is where, one reasonably surmises, they exhibit particular care.

So the text of an award should not be read like the terms of a treaty. The factual context of a case, the rationale for the holding, and the persuasiveness for the rationale when applied in other contexts are critical to making valuable use of prior Decisions.

Next slide, please.

Let's look now at *Gallo* and *Mesa Power*, the two NAFTA cases on which Canada principally relies. In *Gallo*, the American claimant said he owned a Canadian Enterprise, 1532382 Ontario Inc., which owned the Adams Mine Site in Northern Ontario, which had been abandoned and was to be used as a waste disposal site.

He claimed that he had acquired the enterprise through a Canadian agent, Mr. Cortelluci, who had purchased it for Mr. Gallo from another Canadian company, Notre Development Corporation.

There is a dispute about whether Mr. Gallo had really purchased the Canadian Enterprise in 2002 through Mr. Cortelluci before Ontario passed legislation in 2004 prohibiting the Adams Mine from being used as a landfill.

The *Gallo* tribunal gave a detailed recitation of facts showing there was no evidence that Mr. Cortelluci truly acted as Mr. Gallo's agent in 2002 to acquire the mine. We refer to some of them in our Counter-Memorial starting at Paragraph 52, and a number of them are showing on the slide here.

Based on those facts, at the time of the Ontario legislation in 2004, Adams Mine, the investment, was owned by a Canadian company and acquired by a Canadian businessman. Adams Mine was just a domestic investment owned by a domestic investor.

Next slide, please.

The *Gallo* tribunal noted that Article 1101(1) limits Chapter Eleven protection to measures that relate to investors of another Party and investments of another Party. It wrote: "for

Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another Party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained."

That sentence reflects an appropriate interpretation of Article 1101. There must be an investor of another Party owning an investment in the host country at the time of the breach for the treaty obligations to be activated so that Chapter Eleven protections apply to the measures in question. That's not to suggest that the use of the word "and" in that statement was necessarily predetermined by the *Gallo* tribunal, but it is to suggest that the language of these awards has to be considered carefully and in their broader context. And as articulated there, that statement surely is correct and consistent with the terms of NAFTA.

Without a foreign investor or foreign investment, in *Gallo*, no NAFTA foreign investment treaty protections were activated in relation to the

Ontario legislation. There could be no NAFTA claim without a NAFTA obligation.

Next slide, please.

The rationale for the decision was expressed clearly in Paragraph 331 of the Award: "Investment treaties confer rights to foreign investors which are unavailable to nationals of the host country. Policy reasons mandates that the privileged rights conferred to the former are no abused by the latter, in violation of the stated objectives of the international treaty."

Mr. Gallo argued that he could make a claim on behalf of enterprise investment under Article 1117. But even under Article 1117, there was no scenario in which the Treaty had been activated in relation to the measures and the investment. The tribunal explained that the enterprise investment could not be nursing a nascent NAFTA claim if the enterprise was not under the control or ownership of a NAFTA-protected person when the alleged breach occurred.

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The *Gallo* tribunal said: "In a claim under

Article 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment at the critical time."

The "he" in that sentence should be interpreted as literally Canada would like. The *Gallo* tribunal was not confronted with the same facts presented by this case, where at the time of the breach there was an American investor owning a foreign investment which had activated Canada's NAFTA foreign investment protection obligations, and the foreign investment has, at all relevant times, continued to be owned by an American investor, and the investor entities have a continuity of interests between them.

Next slide, please.

Canada quotes the *Gallo* Award saying: "Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."

That statement, as you will see in the passage that follows on the slide, noted in Professor

Paulsson's Expert Report, is too broad for the facts and not the actual holding or ratio decidendi of the *Gallo* case. Mr. Gallo was the only person claiming to be an American investor for the alleged foreign investment, and therefore "he" needed to have owned or controlled the investment at the time of the breach.

The case turned on the tribunal seeing through the pretenses of a sham agency relationship between Mr. Gallo and Mr. Cortelluci that did not, in fact, produce the critical elements of a foreign investor owning a foreign investment at the time of the breach. Hence, the Tribunal declined to hear a contrived Treaty claim.

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In *Mesa Power Group v. Canada*, the American claimant company had challenged measures that allegedly impacted four wind-farm investments that it owned in Southwestern Ontario. Some of the measures had occurred in September 2009, prior to the formation of the wind farm project corporations beginning in November 2009. The claimant was not able to establish that it was seeking to make or had made its foreign

investments prior to that time, so the tribunal concluded that those measures were not actionable in the claim, although the tribunal made clear that the pre-investment measures could be considered for the background and context of the remaining measures that were actionable in the claim.

The *Mesa Power* tribunal explained: "There is no jurisdiction if disputed measures are not 'relating to investors' or to 'investments of an investor.' In addition to these express provisions of Chapter 11, the same conclusion arises as a general matter from the principle of nonretroactivity of treaties. State conduct cannot be governed by rules that are not applicable when the conduct occurs."

So here, again, there was no foreign owned investment in existence at the time of the alleged NAFTA Chapter Eleven breach.

Without a foreign investment, no NAFTA foreign investment treaty protections were activated in relation to the Ontario legislation. There could be no NAFTA claim as to measures for which there had been no NAFTA obligation.

This case is materially different from *Mesa Power* because, as everyone agrees, there was an American investor owning the foreign investment at the time of the alleged breach, and the existence of a foreign investor and investment had activated Canada's NAFTA foreign investment protection obligations. The ordinary terms of the Treaty require the existence of a foreign investor and investment at the time of the breach, but they do not require that the foreign investor submitting the claim be the identical corporate entity that was the foreign investor at the time of the alleged breach.

Canada has cited to B-*Mex v. México*, but that case has no analytical value to the question before the Tribunal because the disputing parties stipulated and agreed that the claimants had to have owned the investment at the time of the breach, and the tribunal accepted that stipulation and cited to *Gallo* in support. We have already addressed the terms of the *Gallo* decision.

Canada has presented cases arising under investment treaties other than NAFTA in support of its

objection. All the cases follow the basic requirement that there must be a foreign investor and a foreign investment in order for the Host State's treaty obligations to be activated. None of the cases supports application of the strict jurisdictional rule that Canada promotes to the facts, the unique facts of this case.

Some of Canada's cases and others that we have offered for the Claimant show that tribunals have held jurisdiction of claims in cases where ownership of a claim or investment has been transferred from one corporate entity, or one person, to another.

Next slide, please.

The key principles that emerge from the arbitration awards briefed by the Parties are that a transfer of ownership or corporate restructuring that is a sham or an abuse of investment protection rights will not be sustained. Forum shopping among investment treaties is not acceptable. Claimants should not be allowed to restructure in order to obtain investment treaty rights that otherwise would not exist for the investor and its investment.

Where there has been a bona fide investment, the corporate restructuring or transfers are taken for ordinary business purposes, and there is a continuity of interest, a closeness between the investor and investments. Such a restructuring or transfer does not divest the Tribunal of jurisdiction over an investment Claim.

Next slide, please.

For example, in *CME v. Czech Republic*, the tribunal stated: "The Respondent's view that the transfer of shares deprived the Claimant of the protection under the Treaty because the investment changed hands from one Dutch Shareholder to the other is not convincing...any claims deriving from the Claimant's predecessor's investment (also covered by the Treaty) follow the assigned shares. If the Treaty allows, as it does, the protection of indirect investments, the more the Treaty must continuously protect the parent company's investment assigned to its daughter company under the same Treaty regime."

Next slide.

In *Koch Minerals and Koch*

Nitrogen v. Venezuela, the tribunal said the question of "[The transfer] could have raised difficulties here but for one important factor. The assignment from KOMSA to KNI was an internal reorganization between associated companies within the same Koch group of companies. It did not introduce an unrelated third party or materially change the transaction, nor could it have done so given Articles 11.4 to 11.5 of the Offtake Agreement. The Respondent does not challenge the efficacy of the assignment under the Offtake Agreement. Hence, although different in form, given the different legal personalities of KOMSA and KNI, the assignment produced no material economic, legal, or commercial difference in substance."

Next slide, please.

In *S.D. Myers v. Canada*, a NAFTA case, the tribunal said at Paragraphs 229 and 230: "[T]he Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a Claimant in order to organize the way in which it conducts its business affairs. The Tribunal's view is reinforced by use of the word

'indirectly' in the second of the definitions quoted above. The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons, so that it remained wholly within the family, and that he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests."

There is ample evidence in customary international law that investors may undertake corporate restructuring that would transfer investments at Treaty claims, provided that diversity of nationality is maintained and no unfair advantage is obtained by the transfer in relation to the Host State.

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Canada's focus on the specific identity of the investor runs into conflict with cases where Tribunals have considered the chain of ownership between the investor and its investment. The context is different, but the principles are similar.

Professor Paulsson raised *Perenco v. Ecuador*

as an example where the Bahamian corporate claimant sought to invoke the France-Ecuador BIT which granted standing to non-French entities if they were controlled by French shareholders.

The claimant however was not French-owned, and although its parent company was opened by French shareholders, it was not owned by them when the ICSID Arbitration had been initiated due to a delay in the transfer shares through an inheritance. The tribunal found it had jurisdiction, saying that international law does not permit formalities to triumph over fundamental realities.

It was satisfied that there was the transfer--it was satisfied that there was the transfer occurring, could have happened at any time, and the reality that there was a French ownership of the shares to support jurisdiction.

Next slide, please.

Professor Paulsson explained: "[A]rbitrators applying international law are disinclined to put form over substance when they ascertain whether Claims are timely...and arise from genuine investments of at-risk

capital (rather than artificial transactions designed to put ostensibly protected investors in the place of investors who do not have standing under the relevant Treaty.)"

The facts of this case do not provide a sound rationale for denying jurisdiction.

Next slide, please.

We urge the Tribunal to ask: What is the essence of Canada's objection?

Can Canada claim it had no notice that it owed Prairie or its investors obligations under NAFTA?

Is this a case of forum-shopping among investment treaties?

Is Westmoreland Mining Holdings manipulating jurisdiction to exercise greater rights than what Westmoreland Coal Company had?

Was the bankruptcy restructuring undertaken to secure some advantage against Canada as to the NAFTA claim?

Is Westmoreland Mining Holdings pursuing damages other than those incurred by Prairie and flowing up to Westmoreland Mining Holdings as its

investor?

Is there a material, prejudicial difference to Canada whether Westmoreland Mining Holdings or Westmoreland Coal Company pursues the NAFTA claim?

Would this case open the floodgates for other claims?

Has Alberta relieved Prairie and Westmoreland Mining Holdings of the costs and burdens to reclaim the coal mines now that Westmoreland Coal Company is no longer the parent company?

The answer to all of these questions is an unequivocal no. Canada's jurisdictional objection is all form and no substance. Prairie is the same investment that existed at the time of the breach. It was owned by a foreign investor, Westmoreland Coal Company. Canada's NAFTA investment protection obligations were activated at the time of the breach when the measures were adopted.

The measures continue to be maintained by Alberta as Off-Coal Agreements--Off-Coal Agreement payments are continuing to be made.

Canada owed obligations to Prairie under

Articles 1102 and 1105, and it continues to owe them as Prairie is owned by Westmoreland Mining Holdings.

Westmoreland Coal Company transferred its interest in Prairie and its own NAFTA Claim to Westmoreland Mining Holdings while Westmoreland Mining Holdings was its direct wholly-owned subsidiary. Westmoreland Mining Holdings is the investor parent of Prairie who is being damaged by the measures. The former first priority secured lienholders of Westmoreland Coal Company became the shareholders of Westmoreland Mining Holdings as a result of the bankruptcy. And they, along with Prairie, would be the appropriate beneficiaries of any Award.

The Tribunal should find, based on the international law and unique facts of this case, that it has jurisdiction of Westmoreland Mining Holdings claim.

Mr. Levine will speak to the issues of the transfer of the investment and the claims, the Westmoreland restructuring, and the continuity of interest among Westmoreland Coal Company, Westmoreland Mining Holdings, and Prairie Mines.

And that concludes my portion of our presentation.

PRESIDENT BLANCH: Thank you, Mr. Snarr.

Just before we move on, James or Zac, do either of you have any questions? No.

I've got one question for you, Mr. Snarr, and I might--it may be that this is going to be answered by Mr. Levine, in which case--and by all means, you don't need to answer it now.

Can I just take you back to Slide 17?

MR. SNARR: Ricky, if you bring up Slide 17, please.

PRESIDENT BLANCH: The third bullet, is this the test that you would say is applicable in determining--I think everybody agrees, and the Claimant would agree--that a contrived claim is not admissible. So, it's working out what is the test for determining whether there is admissibility when the claimant is a different party from the investor at the time of the challenged measures.

So, I was just trying to work out, is this third bullet what you say the test is that we should

be applying?

MR. SNARR: Yes. We would say that the principles that emerge from the cases where you do see that there is a recognition of jurisdiction or an allowance of a transfer or restructuring, that these are the principles that would guide that. So, that there has to have been an actual bona fide investment.

I mean, this is the principle of the investment and that has to be made in order to activate the Treaty and take advantage of the dispute-resolution provisions. And then, when there's a transfer between companies that have a continuity of interest, a closeness between them, that that kind of a transfer does not divest the Tribunal of jurisdiction over the Claim.

PRESIDENT BLANCH: And when you talk about the continuity of interest, it is said against you by Canada that continuity of interest is not a concept that comes in NAFTA cases, or in academic treatises on NAFTA or even in investor-State, generally.

Are you able to point us to anything where continuity of interest is--has been determined or

argued in other cases, or can you explain what you mean by "continuity of interest"?

MR. SNARR: Yes. This is really an interpretation of the cases where--referring to some of the cases that I mentioned like *CME*, *S.D. Myers*. There is a closeness of relationships. There are ties. That you can think of a--in the context of a corporation. A corporation has a bundle of rights, and you have another corporate entity, but there is some sharing of rights, some commonality between them.

So, this is distinct from a situation where you would have a company trying to transfer to another company with which there is no connection, no ties, a completely separate company that would be coming in. Or in the case of a familial relationship that there--this connection of family members, if the family and the business is in S.D. Myers.

It is hard to imagine that, if an investor died, and the heirs of the investor inherited whatever rights that the investor had in the investment, it is hard to imagine that there would be a rule that it says, that's too bad, you don't inherit those rights.

That claim is extinguished upon the passing of the parent.

PRESIDENT BLANCH: That's very helpful. Thank you.

Just before we move to Mr. Levine, would everybody mind if we took a five-minute break? I just hear somebody at my door, and I can do it just running down to let somebody in. I'm really sorry. That is terribly unprofessional.

MR. SNARR: That is quite all right as far as we are concerned. Thank you.

MR. FELDMAN: That is fine with us. Thank you.

PRESIDENT BLANCH: Excellent.

(Brief recess.)

MR. LEVINE: May I proceed?

PRESIDENT BLANCH: Please do. And I apologize. Thank you.

MR. LEVINE: No problem. Thank you.

Good day, Members of the Tribunal. As my colleagues Mr. Feldman and Mr. Snarr mentioned, my name is Paul Levine.

Canada argues that Westmoreland Coal Company and Westmoreland Mining Holdings are "distinct entities." In so doing, Canada, through its bankruptcy attorney, denies the continuity of interest between Westmoreland Coal Company and Westmoreland Mining Holdings.

The owners of Westmoreland Mining Holdings are the secured creditors who invested $700 million of debt into Westmoreland Coal Company, secured by Westmoreland Coal Company's assets. Those were the assets that the secured creditors ultimately took possession of through Westmoreland Mining Holdings.

Notwithstanding this continuity of interest, Canada and its bankruptcy attorney regurgitate the record of the bankruptcy proceeding to adopt a hyper-technical, form-over-substance argument that requires its bankruptcy attorney to contradict her own prior statements.

Canada, while arguing this Tribunal must strictly analyze the bankruptcy to find that Westmoreland Coal Company and Westmoreland Mining Holdings are supposedly distinct, also denies the

actual form of the transaction.

Canada says that Claimant's arguments "disguise the market-based nature of the transaction." But it is undisputed that Westmoreland Mining Holdings was a wholly-owned subsidiary of Westmoreland Coal Company at the time. Substantially all of Westmoreland Coal Company's assets, including the Canadian assets at dispute here in the NAFTA claim, were transferred to Westmoreland Mining Holdings.

The law of assignments permits for this type of transfer of interest, which Canada does not contend was done as an abuse of process.

This type of reorganization is not what the ratione temporis objection was designed to prevent.

We think two useful scenarios are in order to demonstrate these issues: In the first scenario, Westmoreland Coal Company, like here, goes bankrupt during the pendency of the NAFTA proceedings, and the secured creditors executed debt-for-equity swap, so that the secured creditors trade their debt in whole or part to become the new equity holders of Westmoreland Coal Company.

Would there be jurisdiction in this case? The answer undoubtedly is yes. Canada, as it states in Paragraph 104 and Footnote 198 of its Reply Memorial appears to agree that jurisdiction would be proper in this scenario. There, Canada references the *Lone Pine* case where there was a debt for equity swap and Canada did not challenge jurisdiction.

In the second scenario, Westmoreland Coal Company, which was a Delaware corporation, decides during the pendency of the NAFTA proceedings to become a limited liability company in Delaware for whatever reason. The Company finds an LLC form to be more advantageous, or LLC form provides certain tax advantages, or let's say that Westmoreland Coal Company wants to become a limited liability company in Texas because Westmoreland Coal Company finds the Texas business culture more advantageous.

So, Westmoreland Coal Company transfers its assets to a new entity. Westmoreland Mining Holdings. Whether that be in Delaware or Texas, with all the same equity holders as in Westmoreland Coal Company, would there be jurisdiction in this scenario?

Next slide, Ricky.

According to Canada, there would be no jurisdiction. As Canada says in its Memorial, the Claimant is not the same as Westmoreland Coal Company, and NAFTA Chapter Eleven does not allow two enterprises to be the same investor of a Party. The Claimant was constituted in 2019. Westmoreland Coal Company was constituted more than 100 years earlier in 1910. The Claimant is a limited liability company. Westmoreland Coal Company is a corporation. The two entities cannot be the same enterprise.

Even today, now, Canada today still offers differing views on this point. Earlier this morning, in Mr. Douglas' presentation, he stated--and this can be found at line--Page 13, Line 15 of the realtime Transcript—"in its Rejoinder, the Claimant proffered examples of changes to corporate form, which they allege would negate jurisdiction under Canada's interpretation of NAFTA's Chapter Eleven.

But that is not Canada's position, and you are not being asked to address all possible scenarios today, just the case before you."

But later in their presentation--and I believe it was Ms. Zeman--she stated--and this is at Page 22, Line 20, it begins: "It is this series of events that bring us here today and to our moment to pause on the most fundamental fact of this Jurisdictional Phase. It is undisputed that the Claimant made an investment in Canada on March 15, 2019. On that date, the Claimant became the owner of the Canadian enterprises. It held these enterprises in the manner you see on the screen. Prior to March 15, 2019, the Claimant did not have an investment in Canada. Prior to January 31, 2019, the Claimant did not exist."

Now, to us, the answer in this scenario would be, yes, jurisdiction would exist. Canada's formulation, thus, produces an absurd result: The form has changed, but the substance remains the same.

So, the question for this Tribunal is, if the first scenario allowing a debt-for-equity swap is permissible, and the second scenario, allowing for a change of company form is permissible, than are the secured creditors allowed to swap their existing debt

to take control of Westmoreland Coal Company through the use of a new corporate vehicle, Westmoreland Mining Holdings?

Now, these scenarios underscore the weaknesses of Canada's objection. Canada does not claim that it was deprived of an investment in Canada by an American investor. Prairie has always been an American investment in Canada.

Next slide.

Canada does not claim that the secured creditors had no stake in the outcome of Westmoreland Coal Company. The secured creditors undoubtedly had a substantial stake. They had invested $700 million into the outcome of Westmoreland Coal Company and expected to get a return on that investment.

In fact, Canada's bankruptcy attorney, Ms. Coleman, calls the secured creditors "stakeholders." The entire point of the bankruptcy was to ensure that the secured creditors received payment for their interest in Westmoreland Coal Company. Indeed, the secured creditors had the highest priority of all the pre-bankruptcy debt.

Canada's argument exploits the bankruptcy reorganization, a proceeding designed to protect value for the secured creditors $700-million-plus investment in Westmoreland Coal Company, which led to the secured creditors taking over Westmoreland Coal Company through a new entity, which they did so by using their preexisting stake in Westmoreland Coal Company.

Beyond defending a NAFTA Arbitration, Canada does not claim any harm, prejudice, or unfairness. Canada does not say advancement of the claim would be inequitable.

Next slide, please.

Professor Paulsson in his Report says that this type of restructuring should not defeat jurisdiction.

"It should surprise no one that investments that lead to Treaty-based arbitration against States tend to be troubled businesses that often require restructuring as a way of mitigating the adverse consequences of the difficulties encountered. Given the goal of promoting the inflow of investments, it should be obvious that restructuring ought to minimize

the prejudice suffered, rather than to provide an excuse for denying Treaty protection."

Next slide, please.

There are three essential points in this argument: First, the transaction structure preserved the continuity of interests through a valid assignment.

Second, U.S. federal law recognizes there was a continuity of interests between Westmoreland Coal Company and Westmoreland Mining Holdings and, third, the bankruptcy process ensured there was a continuity of interests between Westmoreland Coal Company and Westmoreland Mining Holdings.

Before I go to the first topic, are there any questions at this point?

PRESIDENT BLANCH: James? No. And Zac?

ARBITRATOR DOUGLAS: I had some questions, but perhaps I'll wait until the end of the next segment, in case I am preempting something, so I'll reserve for the moment.

MR. LEVINE: Thank you.

So, the first topic is the investment claims

may be assigned. And if we could go to the next slide, please.

This is the structure of Westmoreland Coal Company prior to the transaction. Westmoreland Coal Company is broadly divided into its U.S. and Canadian components in this simplified diagram.

Next slide, please.

Now, here we are focusing solely on the Canadian component of Westmoreland Coal Company. As you can see, Westmoreland Coal Company owned Prairie Mines & Royalty through a group of companies, including Westmoreland Canada Holdings.

Next slide, please.

Now, as a result of the bankruptcy transaction process described in the description of transaction steps, that was attached to the Bankruptcy Plan of Reorganization, which is the operative document that controls how the bankruptcy is going to conclude, Westmoreland Mining Holdings becomes part of the ownership chain of the Canadian component.

Next slide, please.

This slide depicts how both Claimant and

Canada view the final structure. They are identical. Westmoreland Mining Holdings owns Westmoreland Mining LLC, which comprises the U.S. assets. Westmoreland Mining Holdings also owns the Canadian component, including Prairie Mines & Royalty.

Next slide, please.

According to Ms. Coleman, Westmoreland Coal Company, thus, received 100 percent of the membership interests in Westmoreland Mining Holdings as consideration in both the U.S. acquisition and the Canadian acquisition. As described below, these membership interests were ultimately distributed to the First Lien Lenders.

So, Ms. Coleman agrees that Westmoreland Coal Company owned 100 percent of Westmoreland Mining Holdings before those membership interests were transferred to the secured creditors.

Next slide, please.

Accepting what Canada's Expert opined about the transaction, this slide shows that Westmoreland Coal Company owned Westmoreland Mining Holdings.

Next slide.

And on this point, there is no dispute. Both Parties agree that Westmoreland Coal Company was at this point the 100 percent owner of Westmoreland Mining Holdings.

Next slide.

I want to go back to the original pre-transfer structure to show the transfer to make an additional point.

Next slide.

Here we see that Westmoreland Mining Holdings, as everyone agrees, becomes the wholly owned subsidiary of Westmoreland Coal Company. Westmoreland Mining Holdings is also in the ownership chain of Prairie Mines & Royalty.

Ricky, could you click it again, please.

Now, this is the key instance in the form of the transaction. Now, Canada argues that this Tribunal should ignore this form because the transaction happened almost virtually simultaneously or that the secured creditors created Westmoreland Mining Holdings. But Canada repeatedly refers to Westmoreland Coal Company as "distinct" or

"unaffiliated."

Given Canada's jurisdictional objection that prefers the form, you have to respect the form of the transaction, including the fact that Westmoreland Mining Holdings was owned by Westmoreland Coal Company at the time of the transfer, and then all the attending consequences of that fact.

Next slide, please.

The final step in the transaction is that the secured creditors take ownership of Westmoreland Mining Holdings. Now, they did not just take a collection of assets. What these stakeholders received in exchange for a portion of their $700 million-plus investment in Westmoreland Coal Company is the membership interest of Westmoreland Mining Holdings, which holds the collateral that the secured creditors were entitled to take as a result of their debt interests.

Now we can go to the next slide. I want to highlight two additional Canadian arguments.

First, Canada's states do not look at the identity of the owners of Westmoreland Mining

Holdings. It makes this point repeatedly.

Canada's states look only at the form of the transfer, the same form that Canada attempts to deny elsewhere, assuming arguendo that Canada's statements are correct, the form of the transfer is enough.

Now, we would argue that Westmoreland Coal Company and Westmoreland Mining Holdings have a continuity of interest, as evidenced by the continuous involvement in both companies of the highest priority stakeholders, the secured creditors who traded their preexisting interest in Westmoreland Coal Company for the new membership interest of Westmoreland Mining Holdings. But under either rubric, Canada's or ours, jurisdiction would still be proper.

And, Ricky, if you could click it again, please.

Second, Canada does not contend the restructuring was an abuse of process. Canada does not contend that the transaction was structured in a way to create jurisdiction where it would not otherwise exist.

As Professor Paulsson noted in his Report,

the opposite is true; Canada contends that an innocent restructuring somehow defeated jurisdiction.

Next slide.

Now, one of Canada's other arguments is that this transaction was a pure sale of assets, including the NAFTA claim. First, this was not an ordinary sale. The secured debt creditors "credit bid" by paying with their existing secured debt that Westmoreland Coal Company could not repay. The secured creditors, as Ms. Coleman states in Paragraph 43 of her Expert Report, were the only stakeholders allowed to execute this type of credit bidding. In effect, the secured creditors used their investment in Westmoreland Coal Company to make the purchase.

Second, the sale agreement stated that the secured creditors were buying the membership interest of Westmoreland Mining Holdings. Section 2.09 of the Agreement provides: "Notwithstanding anything contained herein to the contrary, the Closing and the other transactions contemplated to occur at Closing...shall be effected in accordance with the

Description of Transaction Steps."

How the transaction was conducted does matter. Indeed, as we cited in our Rejoinder Memorial, Delaware law would prevent this provision from being read out of the Agreement, as Canada seeks to do.

Once again, the form must be respected.

Next slide.

Another Canadian argument is that the Bankruptcy Court, in its Final Order approving the Plan, found that the secured creditors were a good-faith purchaser and that the secured creditors in Westmoreland Coal Company were at arm's length. But that finding ensures that the Bankruptcy Court does not apply a more rigorous analysis to review the bankruptcy to ensure there would be no insider self-dealing, as Ms. Coleman notes at Footnote 103 of her First Expert Report.

In the next footnote, she states that this insider analysis does not apply to the intermediate transaction steps where Westmoreland Coal Company transfers assets to Westmoreland Mining Holdings.

Regardless, Canada twists this finding in ways never envisioned by the Bankruptcy Court and directly contradictory to other rulings by the Bankruptcy Court. In that same order, the Bankruptcy Court ruled that: "[n]otwithstanding anything to the contrary in this Plan or Confirmation Order, the NAFTA Claim...is not being released...." That is, the Bankruptcy Court went out of its way to ensure that its final order did not extinguish the NAFTA claim through the bankruptcy process. Canada's argument seeks to do by implication what the Bankruptcy's Court sought explicitly to preserve.

The Bankruptcy Court also found that the form of the transaction, as contained in the description of the transaction steps found in the Supplement to the Bankruptcy Plan of Reorganization, was found to be an integral part of Court's Order approving that Plan. Again, the Bankruptcy Court understood that the continuity between Westmoreland Coal Company and Westmoreland Mining Holdings was a necessary part of the transaction.

Before I go on to some analysis of some of

the cases, does the Tribunal have any questions at this point?

ARBITRATOR DOUGLAS: Perhaps I'll ask a question now, then.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR DOUGLAS: Going back to the way in which the purchase occurred and during the bankruptcy process, just hypothetically suppose the Stalking Horse bid didn't work out because another bidder turned up; an American company turned up to bid for the assets, and that American company purchased the assets. Would your position be that that American company would have a viable NAFTA claim if it purchased the NAFTA claim as part of the assets? Or would that purchaser who turned up, who wasn't the Stalking Horse bid, would they be in a different position?

MR. LEVINE: Okay. So, first, let me just--this obviously is not the factual scenario that occurred here.

ARBITRATOR DOUGLAS: Of course.

MR. LEVINE: We have distinguished that.

Our position on that would be that the new purchaser did not have any interest in the prior iteration of the Westmoreland Coal Company. Westmoreland Coal Company, the eventual owners of Westmoreland Mining Holding, were those secured creditors who had the $700 million-plus investment in there. So this new investor is a new entity that does not have this continuity of interest, as Mr. Snarr described earlier, such that we think that that would be, by itself, an appropriate exercise of jurisdiction.

ARBITRATOR DOUGLAS: Okay. So the--there is a fundamental distinction, and that is based upon the status of the secured creditor throughout the investment cycle, if we can put it that way. But does that go into a difficulty, then, that a major financial institution which lends a lot of money to different people, or different companies, would typically be a secured creditor as well? Does that mean that, for investment treaty purposes, that major financial institution would potentially be able to bring a claim on behalf of all the various enterprises

that it has a secured interest in?

MR. LEVINE: Well, that's going to depend on that particular factual scenario, and who that major financial investor is, and how their downstream investors are. That position--given what's there, I don't know if there's enough of a connection between that and major financial investor into all the other stuff without additional facts for me to--

ARBITRATOR DOUGLAS: Fair enough.

Is there a distinction? I know it's a distinction, that we've seen in the Reports and that's been noted, between a debt investor, who obviously doesn't bear any enterprise risk, and an equity investor that does. So, whilst the secured creditor, clearly, under the documents recording the security interest, in certain circumstances may be able to do various things, but it doesn't bear any enterprise risk. Is that a problem in this analysis, or you say it doesn't matter?

MR. LEVINE: We would say it doesn't matter. When you make a $700 million debt investment into a company, you do expect to get some return for that

funding. If you look at corporations and you say, well, there's two types of investments: You have the equity investors, and then you also have the debt investors. And so those debt investors are hoping to get a return from the company through the company doing well. That's the nature of how debt is. And so, those debt investors are looking to get a return on those funds. And so, while there's different interests that go along with the debt versus the equity, the credit holders, they do have a stake in the success of that company. I would hazard to say that the creditors would prefer to be repaid back on their loan schedule as opposed to execute a bankruptcy and move through those things. But that's business.

ARBITRATOR DOUGLAS: Okay. But if--

PRESIDENT BLANCH: Can I stop you for a second. Can I stop just a second. We lost the Transcript when you were just about to ask your second question, and I just want to make sure that it is being recorded, even if it's not being--actually coming up on the live screen because I don't want to lose any of this.

(Comments off the record.)

PRESIDENT BLANCH: Zac, sorry, over to you. Back to your questions.

ARBITRATOR DOUGLAS: Okay. Now, where were we? So, we were talking about the difference between equity and debt and investors.

Here is, perhaps, another distinction. Whether you can bring counterclaims in investment arbitration is a bit of a fraught question. But assuming you can, just for present purposes, if a counterclaim were brought in relation to events that occurred around about the same time as the alleged breach, wouldn't the Claimant say: "Well, hang on. We are not liable for whatever WCC did during that time because there is no successor liability here"?

Wouldn't that be the Claimant's position?

MR. LEVINE: I would say if that happened in this scenario--right?--and let's just go back to what a bankruptcy does and just start from the beginning there.

In the bankruptcy process, liabilities are discharged. So, when Canada says: "There's no

successor liabilities," well, if there was a debt-for-equity swap and the secured creditors became the equity holders of Westmoreland Coal Company, there would be--there would be no claim there either provided all the claims were released. And usually bankruptcy courts, When they release parties from a bankruptcy, through a Plan of Reorganization, it starts off with we're going to execute with an automatic stay and prohibit further cases from proceeding; and at the end of it, there's a permanent injunction against those preexisting prior liabilities.

So, when Canada said says there is no successor liability, well, that is tied to the purchase--that's tied to these assets here and what they go with, but if there was a debt-for-equity swap, we would end up at the same point.

ARBITRATOR DOUGLAS: Sorry, you're talking about a debt/equity swap in context of bankruptcy.

MR. LEVINE: Correct. Correct.

ARBITRATOR DOUGLAS: Yeah. Because in a normal debt/equity swap, you would step into the shoes

of the equity, and you'd be liable; right? I mean, you would bear--

(Overlapping speakers.)

MR. LEVINE: Go ahead, I apologize.

ARBITRATOR DOUGLAS: So you wouldn't be personally liable, but you would have an equity stake in a company that retains its liability?

MR. LEVINE: If there was a straight equity swap outside the--like the confines of the bankruptcy, I think that potentially is correct, depending on how you structure that transaction and whether the--all the equity holders want to deal with the results on those claims and how you deal with that contractually.

But what I would say is, in this instance, you couldn't have had this credit bidding through this process to waive the successor liability without the bankruptcy either. So, you know, you need a finding from the Bankruptcy Court to insulate you from that, I believe. So, divorcing that hypothetical from the bankruptcy process is very hard to do.

ARBITRATOR DOUGLAS: Understood.

You said at some point that the Claimant

took control over WCC. Is that strictly correct? Because it took control of assets belonging to WCC. WCC, as far as I understand, still exists. It hasn't been extinguished yet as a corporate entity.

So, is that the strictly correct way of explaining this, or...

MR. LEVINE: Well, I'll get to that in a second with respect to the restructuring support agreement and, we would say, once you get into the bankruptcy process. And Westmoreland Coal Company says, "We can't pay you back anymore. We need to figure out how to work out our debt"; that, as Ms. Coleman's own writings and speeches say, they sign away everything. It's--they are made an offer they can't refuse because the credit holders can pretty much just take. And so now you are trying to find out what's the best way to make this situation work for everything.

So, I think at that point the creditors are taking control of Westmoreland Coal Company, and they are just trying to figure out a way through the bankruptcy process to say, "How do we reorganize this

company so that we can get the maximum value?"

And so, I would say they take control at that point. And then that allows the creditors to then say, "Let's take the good parts that we want, and we could have done it through the bankruptcy process, through a debt-for-equity swap, but do this in a very efficient, quick way so we don't have to be saddled with this bankruptcy for a longer period of time."

ARBITRATOR DOUGLAS: Thank you very much. That was very, very helpful. Thank you.

MR. LEVINE: Any additional questions?

PRESIDENT BLANCH: James?

ARBITRATOR HOSKING: No. Not for me, thanks.

PRESIDENT BLANCH: Please go ahead, Mr. Levine.

MR. LEVINE: Okay. So I believe I'm on now what's Slide 44 in my notes. So, Ricky, could we please turn to the next slide.

All right. Mr. Snarr talked some about this case, and so I will go through it very briefly. This is *CME v. Czech Republic*. These are the measures at

issue. As you can see here, the tribunal there was interested in measures that took place in 1996.

If we go to the next slide, CME Media Enterprises, who is not the claimant, acquired its investment in 1994 and 1996. In 1997, claimant acquired the investment from the parent company.

And if we go to the next slide, the tribunal found this structure was proper. First, CME Media Enterprises, claimant's predecessor, qualified as an investment; and, second, the tribunal found that the right assigned by CME Media Enterprises to its daughter company must also be protected. And I don't need to read the quotes there. They're on the screen for the Tribunal, and we've cited them in our Brief.

Next slide.

Another case where assignment was permissible was *Autopista v. Venezuela*. The transfer there was between a Mexican company to a United States company, both of which were owned by a common Mexican parent. That transfer did not defeat jurisdiction, even though México is not a party to the ICSID Convention. Canada states in its Reply Memorial that

the measures took place after the assignment to the United States entity. We've reviewed the Jurisdictional Decision, and we don't see any evidence in there of when the measures actually took place. I think the Tribunal would have to look at the merits decision to find out when the measures took place, which Canada did not cite.

Professor Paulsson explains why *Autopista* should apply here, and he states: "The core similarity relevant for jurisdictional purposes is that, like Venezuela, Canada knew that Prairie was held by a U.S. investment vehicle. The Autopista Tribunal's analysis remains relevant because, in both cases, a legitimate restructuring caused no prejudice to Venezuela and, in this case, to Canada."

The next case--and Mr. Snarr also talked about this--was *Koch Minerals v. Venezuela*. That involved the transfer from Koch Minerals Sárl to Koch Oil Marketing and then on to Koch Nitrogen Sárl. The holding in that case was that the assignment did not affect the transaction. I believe Mr. Snarr actually read this Paragraph 6.70, so it's there on the screen.

I don't want to read it again.

But we would say the same rationale applies here too. Although you are talking about different legal personalities, this was a transfer by form between companies in the same chain. There is not some unrelated third parties because the secured creditors had a significant interest in Westmoreland Coal Company.

The transaction was not changed. Prairie still has operations in Alberta as it did before. We would say there are no material economic, legal, or commercial differences in substance.

Next slide, please.

This is what Professor Paulsson says. It talks about in his Expert Report about these cases: "The passages quoted from these cases show that arbitrators applying international law are disinclined to put form over substance when they ascertain whether claims are timely. In the present case, the assignment of rights or its equivalent appears to be inherent, - subject to the Tribunal's assessment of the facts - in the restructuring affected via the

investor's recourse took protection under the relevant bankruptcy law."

I've only read the italicized portion on this slide.

Before I move to the next topic, are there any other additional questions?

ARBITRATOR DOUGLAS: Just one very small point. I think the *Autopista* case was a contract case. I'm not sure if that makes any difference to either party's views or not, but that is, perhaps, one important point to come back on; that it is not an investment treaty arbitration. It was an arbitration under a Concession Agreement but submitted to ICSID. I'm not sure if that changes anything from your position or the other party's position.

PRESIDENT BLANCH: I think James had a question.

ARBITRATOR HOSKING: Yeah, I just have a quick question, if I may.

Given that in Claimant's view, we are not in the abuse of process-type cases, what is the relevance of there not being any prejudice? You've mentioned

that a couple of times, including just a moment ago.

Is there a particular legal significance to the lack of prejudice, and is there a case that you can point us to where that's been taken into account in the context of the jurisdictional analysis?

MR. LEVINE: I don't mean to be squirrely on this answer, but I would defer to Mr. Snarr more on this question. Would it be okay if he answers that question at the conclusion of my presentation? Not to give you an avoidance of an answer, but I think he's dealt more with those issues--

ARBITRATOR HOSKING: Okay.

MR. LEVINE: --than I have.

ARBITRATOR HOSKING: Fine by me if it's fine with the President. Thank you.

PRESIDENT BLANCH: Absolutely.

MR. LEVINE: I appreciate your indulgence, Mr. Hosking.

Any further questions?

PRESIDENT BLANCH: I think, please, go ahead with the next topic.

MR. LEVINE: Well, the next topic I want to

discuss today is Type G reorganizations. Canada in its Memorials says almost nothing about Type G reorganizations, with Ms. Coleman, who is presented as a bankruptcy Expert, calling this "a distinct inquiry of whether Westmoreland Mining Holdings is an unrelated third-party purchaser of Westmoreland Coal Company's assets." We think she's wrong.

Next slide, please.

There are three essential points for a Type G reorganization, and they are up on this screen.

First, tax attributes ordinarily remain with the original company, but parties can opt out of this ordinary role by selecting intentionally what's known as a Type G reorganization, and to do so, there must be a continuity of interest between the original and new entity. The Type G reorganization roles thus reflect the substance of the transaction, recognizing that the entity starting the bankruptcy and the entity ending the bankruptcy has such a continuity of interest that they should she treated as the same.

Next slide.

This is a quote from 26 U.S.C. Section

368(a)(1)(G), which is the Internal Revenue Code, that provides for reorganizations involving a transfer by a corporation of all or part of its assets to another corporation in a U.S. Chapter 11 Bankruptcy. And this was clearly the type of reorganization that was selected intentionally in the Plan of Reorganization and the other documents, including an actual transaction document which we've exhibited, the Contribution and Distribution Agreement.

Next slide, please.

The Treasury regulations describing this type of transaction provide that a Type G reorganization affects only a readjustment of continuing interest in property under modified corporate forms. And this regulation recognizes that the form may be different, but the interest is continual.

Next slide, please.

The regulations also provide that: "Continuity of interest requires that, in substance, a substantial part of the value of the proprietary interests in the target corporation"--here, which

would be Westmoreland Coal Company--"be preserved in the reorganization."

That is, do the interests in the reorganized entity remain the same as the original entity?

Next slide.

PRESIDENT BLANCH: Mr. Levine, sorry, I'm going to do what I specifically said I wouldn't do. I'm really sorry, but could we go back to the previous slide?

MR. LEVINE: Sure.

PRESIDENT BLANCH: I just want to make sure I understand.

So, is this looking more at the--when it says "the value of the proprietary interests in the target corporation," what exactly does that mean?

MR. LEVINE: My understanding of that--and I'm not a tax lawyer, but we have one here who can answer the question, if I do flub this--is that the value of the proprietary interest in the target corporation, meaning: Are you going to retain what's in the original organization and carry it through to the end using some interest that you already had in

that original organization?

So, I think it's probably best answered by the next slide, actually, of all things, if we turn to Slide 55.

PRESIDENT BLANCH: Please do. I'm sorry for interrupting because I may--

(Overlapping speakers.)

MR. LEVINE: Yeah. It says: "'Creditor's claim as proprietary interest'… A creditor's claim against a target corporation"--so, that claim being the debt held in the target corporation--"may be a proprietary interest in the target corporation if the target corporation is in a [Chapter 11 of the U.S. Bankruptcy Code] type case. In such cases, if any creditor receives a proprietary interest in the issuing corporation in exchange for its claim, every claim in that class of creditors… is a proprietary interest in the target corporation immediately prior to the potential reorganization…"

So, what that is saying is that the creditors' debt holdings in Westmoreland Coal Company is that proprietary interest. That's the interest in

the target corporation.

PRESIDENT BLANCH: Thank you.

MR. LEHRER: This is John. May I interrupt for one second?

MR. LEVINE: Yeah, go ahead. I'm--

(Overlapping speakers.)

MR. LEHRER: Yeah. Just to be clear, so this test is focused on, essentially, the equity ownership and, you know, continuation there. There is a separate test which also must be met focusing on a continuing asset ownership as well. So, it's the combination of those two things that is going on, the focus being on the equity ownership and what is appropriate for continuing this continuity.

PRESIDENT BLANCH: Thank you.

MR. LEVINE: If we could turn to the next slide, please.

This is from a U.S. Treasury Department Decision, and it states: "The final regulations provide that, in certain circumstances, stock received by creditors may count for continuity of interest purposes both inside and outside of bankruptcy

proceedings… The final regulations treat such senior claims as representing proprietary interests in the target corporation."

And so, what these rules do is they give effect to the substance of the transaction, that the secured creditors have a substantial interest in a debtor entity, and that a bankruptcy reorganization should not break the chain of continuity between Westmoreland Coal Company and Westmoreland Mining Holdings.

Before I move on to the next topic, are there any further questions?

PRESIDENT BLANCH: No, thank you.

MR. LEVINE: I wonder if Mr. Snarr is available and if this would be a good time to answer Mr. Hosking's prior question.

MR. SNARR: Yes, I think I can do that. Is the mic working now? Okay. Good.

So, we are trying to find rules of international law here--excuse me--that apply to, really, a unique set of facts. We don't have anything in the text of NAFTA that speaks expressly to this.

In fact, as I discussed, there is text in NAFTA that suggests that there is not the strict rule intended that Canada has argued. So, we look to the text of NAFTA to see what we can find. If there were a strict express statement in NAFTA, then you might have a different perspective on how that rule should be applied because, with the language being expressly contained in NAFTA, the Parties on each side, the Respondent and the Claimant, are on notice about the application of a strict rule.

Let's take the diversity of nationality rule. I think that is certainly clearer in the NAFTA text that that applies, and it is clear in investor-State treaties. So, that rule and the principle of retroactivity of treaties is usually a pretty hard line.

Now, you can imagine, perhaps, an extreme circumstance where a respondent State decides to confer nationality on the claimant and therefore disrupt the diversity of nationality. And maybe in that situation, you would say, given that strict rule, we won't apply it as strictly as it's contained in the

text.

Well, we are dealing here with the absence of a provision that we are trying to find the source of law that is the root of this question, and Canada has cited NAFTA, and we've looked at the text, and it is not contained in the text.

So, we are trying to divine from the cases, the investor-State awards, what are the international law principles that apply here? And in looking at the international law principles, looking at the cases where an abuse of the Treaty has not been allowed or there's been forum-shopping, we have to take from that: Why were those cases decided the way that they were?

And so, we have to get at the rationale of it. And the rationale seems to be that there is a principle of good faith and fairness that comes into play with respect to restructuring and the timing of claims. And so, when we talk about, is there any prejudice here on the part of Canada, we raised it twice in our Briefs and I haven't seen anything yet from the Government of Canada to suggest that they are

prejudiced by whether it would be Westmoreland Coal Company versus Westmoreland Mining Holdings.

We are getting to the issue of fairness and good-faith principles with respect to the operation of the dispute-resolution provisions in the Treaty, and the connection of those procedures to what is an investment, an undisputed investment in Canada of a company, an enterprise owning and operating those mines. So, I think that prejudice ties to the international principles that we're culling from these cases, and we are trying to find out what the contours are of them in deciding this question.

And as Professor Paulsson states in his Expert Report, that this is a case that may be a case of first impression, and unless there are strict provisions contained in the terms of the Treaty as you do the international law analysis, then that opens the situation up for consideration on a case-by-case basis. And the equities of this case, we believe, strongly favor us and jurisdiction being found for the claim.

ARBITRATOR HOSKING: Okay. I appreciate

your answer. Thank you very much.

Sorry, Mr. Levine. I hope I didn't throw you off.

PRESIDENT BLANCH: I'm not sure we can hear you, Mr. Levine.

MR. LEVINE: There we go. There's two mute buttons I have to press to make this thing work. After 18 months, you would think I would have figured out how to use Zoom, but apparently not.

So, if we could turn to the final topic. And the next slide is that the "Bankruptcy Preserved a Continuity of Interests."

Next slide, Ricky.

The secured creditors had loaned over $700 million to Westmoreland Coal Company with the expectation of being repaid, somehow. And when Westmoreland Coal Company defaulted on those obligations, the secured remedy--creditors' remedy was the collateral they had, and they could have exercised on that collateral once there was a default. But, instead, they executed additional documents: The bridge loan, the restructuring support agreement, and

the debtor-in-possession financing agreement.

If we could turn to the next slide.

We've laid these out in our Memorials, but these agreements gave a number of indicia of control over to the secured creditors. There's approved budgets, there's financial metrics, there's weekly reporting obligations, approval rights over revenue-generating contracts longer than six months. A number of these are detailed in our Appendix page to the initial Memorial.

If we could go to the next slide, please.

But among the important ones here is the control given by the restructuring support agreement of the bankruptcy process to the secured creditors. A restructuring support agreement is an agreement that ensures the debtor entity cedes the control of the bankruptcy to the secured creditors. And in this case, that agreement had two principal effects.

First, the secured creditors had approval rights over all the key bankruptcy documents: The Plan; the Plan Supplement where the transaction was formally structured; the sale agreement; and numerous

other documents. And, normally, these are documents that the debtor could put together on their own, and, in this case, that reverse the ordinary course of events.

Second, the bankruptcy process was to be completed quickly. The secured creditors obviously valued efficiency and did not want to be tied up in bankruptcy for a long time. They've already had their debt defaulted on.

Next slide.

Now, as we've mentioned earlier, the secured creditors could have done a debt-for-equity swap through the bankruptcy process, but, instead, they used the reorganization process, that is, as Ms. Coleman explains in her own writings, the way bankruptcy gets conducted. As she says: "A typical Section 363 sale involves participation by existing lenders who are undersecured and often have 'everything,' a debtor in possession, by or with the consent of existing lenders and the debtor's management. These parties have substantial control over the terms of the price and sale,

especially...where...the obtainable price is well below the amount of the secured debt."

And that is exactly what happened here. The secured creditors exchanged their debt for the same assets they could have had acquired through the debt-for-equity swap.

Next slide, please.

Now, before I move on to this, I just want to say: Canada implies that we do not dispute what Ms. Coleman opines about because we chose not to cross-examine her. And that, of course, is not the standard in the Procedural Order. If that were the standard, Canada's choice not to cross-examine Professor Paulsson would lead to the same way of earn. We don't, of course, contend that's actually the case.

What we do dispute is Ms. Coleman's conclusions. The remainder of her Opinion repeats a lot of what's in the factual exhibits and what's in documents that we feel, as U.S. attorneys, we can address without the need for a further expert.

Now, what Ms. Coleman did say, in a taped interview, which we transcribed at C-046--and we

provided the interview video in our filings--is that this--how this bankruptcy got conducted is how bankruptcies get done these days. In this excerpt, conducted with MandA.TV, she stated there's a real shift of power and a real shift of control in the bankruptcy case to secured creditors who extend that credit.

What she's saying is, you get into bankruptcy and you don't have ability to fund your operations, you essentially accept more funding in exchange for turning over your rights to those creditors.

If we go to the next slide.

She's also written about this shift of power and shift of control and the effect it has on preparing the bankruptcy documents.

And she said: "Without first getting debtor-in-possession lender consent, the debtor cannot do anything outside the ordinary course of business. For example, the debtor is no longer free to seek to assume or reject contracts. It cannot propose an incentive plan to retain critical management players.

It cannot sell or decline to sell its assets. But most important, it cannot propose its own plan without lender approval, and it cannot obtain approval of the plan over the opposition of the debtor-in-possession lender--or that of any other creditor to whom the debtor-in-possession lender extends its protection..."

And, basically, the secured creditors control the material aspects of the Company.

If we could go to the next slide.

We have highlighted these two cases in our Rejoinder Memorial, and we've put some quotes up here from them. And I don't want to belabor these points because they are in the filings, but we think these cases are illustrative of what happened here, that there may be a change in form, but that change in form does not serve to defeat jurisdiction.

And if we could to the next slide, please.

Which brings me back to where we started. If Westmoreland Coal Company could have changed its corporate form from a corporate entity to a limited liability company, that would not have defeated jurisdiction. And if the secured creditors took

equity in Westmoreland Coal Company as a result of the bankruptcy, that would not have defeated jurisdiction.

So, using their control of the bankruptcy and using the outstanding debt they were owed, the secured creditors used the new corporate entity to do the same thing. They did flow through a transaction that made Westmoreland Coal Company the parent of Westmoreland Mining Holdings. And they did so in a way that United States federal law finds would preserve a continuity of interest.

So, if we could go to the final slide.

This is what Professor Paulsson said in his Second Report: "What matters is the ultimate economic reality; does the recovery pursued ultimately and legitimately seek reparation of the harm done to protected investors who put their capital at risk? Canada does not address the rationale for this proposition, but simply repeats that a claimant who was not an investor when the dispute arose has no standing."

In conclusion, Claimants have demonstrated that jurisdiction exists here, and Canada's objection

fails to demonstrate that jurisdiction does not exist.

We thank you for your time, and we are prepared to answer any further questions the Tribunal may have.

PRESIDENT BLANCH: What I'd like to propose is that we take something just like a 5- to 10-minute break so that the Tribunal Members can just work out if we have questions to raise, any questions to raise now, which may be for Claimants, or it may be points that we suggest that the Parties might want to address tomorrow. We will let you know as soon as we're ready to come back into the main Hearing. So, please, I would ask that nobody runs away very far.

Anneliese, could you get the three of us and yourself back into the Tribunal breakout room?

SECRETARY FLECKENSTEIN: Yes. One second.

(Brief recess.)

PRESIDENT BLANCH: The Tribunal thanks the Parties. Those Opening Submissions were really helpful, very clear, so thank you so much. And the PowerPoints are really helpful too.

You've been so clear that actually we have

no further questions for you, and we don't actually have any specific questions for you to consider for the Rebuttals tomorrow. We have every confidence that the Parties will pick out anything they want to cover in the Rebuttals.

So, on that, I propose to close the Proceedings for today, unless there is any housekeeping.

Firstly, Mr. Feldman, is there anything further on Claimant's side for tonight?

Mr. Feldman, I'm afraid we can't hear you.

MR. FELDMAN: Can you hear me now?

PRESIDENT BLANCH: Yes, we can.

MR. FELDMAN: Sorry. I used to teach and always worry at the end of a class when a class had no questions, and if I was really that clear, that you really think so. So my teaching instinct is coming out from this, but okay. We will try to anticipate what you are thinking about and try to answer it tomorrow.

PRESIDENT BLANCH: I suspect, as a teacher, you should feel slightly more comforted because I'm

not sure that we asked many, if any, questions to Canada; whereas, I think Claimant got a few. So, I can absolutely assure you, we really do feel very, very well briefed.

MR. FELDMAN: Thank you.

PRESIDENT BLANCH: Mr. Douglas, is there anything further housekeeping from Canada?

MR. DOUGLAS: No, there is nothing further from Canada. Thank you, President Blanch.

PRESIDENT BLANCH: Well, I hope everyone gets at least a bit of break before we meet again tomorrow, and I look forward to that.

Thank you.

MR. FELDMAN: Thank you very much.

MR. DOUGLAS: Thank you very much.

(Whereupon, at 2:41 p.m. (EDT), the Hearing was adjourned until 9:30 a.m. (EDT) the following day.)

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

Dawn K. Larson