INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the matter of Arbitration between:

WESTMORELAND MINING HOLDINGS LLC,

Claimant,

and

GOVERNMENT OF CANADA,

Respondent.

ICSID Case No. UNCT/20/3

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:

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Secretary of the Tribunal

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1 P R O C E E D I N G S
2 PRESIDENT BLANCH: I propose that we start.
3 So, I wanted to welcome everybody to Day 1
4 of the Jurisdictional Hearing between Westmoreland
5 Mining Holdings, LLC, and the Government of Canada in
6 the ICSID Case Number UNCT/20/3.
7 A couple of points, firstly, from the
8 Tribunal. As a very initial point, I can absolutely
9 guarantee we have read through everything we've been
10 provided, and we've looked at it carefully.
11 (Interruption.)
12 (Stenographer clarification.)
13 PRESIDENT BLANCH: Good. Thank you.
14 It was just to reassure the Parties that the
15 Members of the Tribunal have read everything. We
16 haven't gone through the slides, the demonstratives,
17 as they have only just arrived, but we have gone
18 through everything else.
19 Secondly, pursuant to Paragraph 30 of PO4, I
20 confirm the only persons committed to attend this
21 Hearing are those approved by the Disputing Parties
22 and the Tribunal, and no unauthorized person shall

1 attend in violation of this agreement.
2 Thirdly, I confirm we've received the
3 confidentiality undertakings from the Non-Disputing
4 Parties.
5 And then, finally, in terms of timetable,
6 we'll need to take a break at about the two-hour point
7 for the Transcribers, for the Reporters.
8 To the extent that the Members of the
9 Tribunal ask questions during the course of the
10 presentation, it might mean for the Respondent, and
11 subsequently for the Claimant, that we have to have a
12 break before the Opening Presentation is completed.
13 If that's so, I apologize. I will try to remember to
14 ask after about an hour and 50 minutes where you are
15 in terms of progress as to whether--or to ask then for
16 you to choose a good time to stop.
17 And I would also ask that each time you move
18 to a new segment of your presentation, although it
19 should be, I hope, obvious to us, if you remember, if
20 you could mention it so that we can just see if we
21 have any questions that we want to ask on that
22 particular segment that has just been covered. Aside

1 from that, there is nothing else from the Tribunal.
2 Before we go into the Opening Submissions,
3 firstly, Claimant, is there any housekeeping?
4 MR. FELDMAN: Sorry. I have to push all the
5 buttons. But, no, I don't think so. Thank you very
6 much, and thank you for making sure we have everyone
7 here.
8 PRESIDENT BLANCH: Excellent. Thank you.
9 And Respondent? Any housekeeping from you?
10 Mr. Feldman, you're on mute.
11 MR. DOUGLAS: Nothing from Canada,
12 President Blanch. Sorry, we're still figuring out our
13 audio here, but I think we're sorted now.
14 PRESIDENT BLANCH: Excellent.
15 Well, in which case, then, I suggest at
16 2:41 English time--so I think that's 9:41 D.C. time,
17 Respondent, if you'd like to give us your Opening
18 Submissions.
19 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
20 PRESIDENT BLANCH: And you're still on mute.
21 MR. DOUGLAS: Are you able to hear us now?
22 PRESIDENT BLANCH: Perfect.

1 MR. DOUGLAS: We keep automatically being
2 muted for some reason, so just please wave your
3 hands--well, actually, we can hear you, so let us know
4 if I'm talking and you're not able to hear me.
5 Good morning, President Blanch and Members
6 of the Tribunal. My name is Adam Douglas, and I'm
7 here on behalf of the Government of Canada. The
8 substantive obligations under Section A of NAFTA
9 Chapter Eleven are not owed to a prospective Claimant
10 until it becomes, A, an investor of a Party. A
11 Tribunal's jurisdiction ratione temporis is limited to
12 a claim for an alleged breach and resulting loss or
13 damage that occur after a Claimant becomes an investor
14 of a Party.
15 The Claimant in this case does not contest
16 that it was constituted under the laws of Delaware on
17 January 31, 2019, and was not an investor of a Party
18 prior to this date. Nor does the Claimant contest that
19 it first invested in Canada on March 15, 2019, when it
20 acquired Westmoreland Canada Holdings and Prairie
21 Mines & Royalty, known together as the "Canadian
22 Enterprises."

1 Nonetheless, in its Notice of Arbitration
2 and Statement of Claim, the Claimant only alleges
3 breaches of NAFTA Chapter Eleven that occurred on or
4 before 2016, years before its existence as an investor
5 of a Party. In fact, the Claimant's Claim is nearly
6 identical to a NAFTA Claim filed by a previous
7 investor, Westmoreland Coal Company, also known as
8 WCC.
9 The Claimant thus seemingly files a claim on
10 behalf of WCC and WCC's investments. Even the amount
11 of claimed damages, $470 million, is identical to the
12 amount that was claimed by WCC. In its Pleadings, the
13 Claimant offers various theories to explain why NAFTA
14 Chapter Eleven should allow it to allege breaches and
15 claim damages that predate its existence as an
16 investor. And these arguments are not always clear.
17 For example, the Claimant argues that it was
18 substantially the same investor as WCC, and that WCC
19 merely underwent a bankruptcy restructuring through
20 which the Claimant emerged on the other side.
21 However, elsewhere, the Claimant confirms that it was,
22 in fact, a different investor than WCC and that--but

1 has a continuity of interest with WCC that should
2 allow its NAFTA Claim to proceed on WCC's behalf.
3 The Claimant also argues, rather boldly,
4 that NAFTA allows one investor to file a claim on
5 behalf of another investor, and then alternatively,
6 that NAFTA in any event allows claims to be
7 transferred or assigned between investors. None of
8 the Claimant's various arguments can detract from the
9 simple, straightforward operation of NAFTA
10 Chapter Eleven. The obligations under Section A of
11 Chapter Eleven are owed to investors and their
12 investments, and if breached, those investors have
13 standing to bring a claim under Section B.
14 Article 1116 does not allow a Claimant to
15 bring a claim alleging breach and loss incurred by
16 another investor. Article 1117 does not allow a
17 Claimant to bring a claim alleging breach and loss
18 incurred by another investor's enterprise. No
19 Tribunal, under NAFTA or otherwise, has accepted a
20 request to allow one investor to bring a claim on
21 behalf of another investor and its investments.
22 To the contrary, Tribunals, including NAFTA

1 Tribunals, have routinely held that a prospective
2 Claimant must have been an investor of a Party at the
3 time of the alleged breach. If this Tribunal agrees
4 with the Claimant in this case, it would be the first
5 to chart that path.
6 You will likely hear the Claimant accuse of
7 Canada today of elevating form over substance.
8 In its Rejoinder, the Claimant proffered
9 examples of changes to corporate form, which they
10 allege would negate jurisdiction under Canada's
11 interpretation of NAFTA Chapter Eleven, but that is
12 not Canada's position, and you are not being asked to
13 address all possible scenarios today, just the case
14 before you. The case before you is clear. The
15 Claimant did not undergo a mere change in corporate
16 form. The Claimant was constituted as a new
17 enterprise to purchase certain WCC assets--
18 (Interruption.)
19 (Stenographer clarification.)
20 MR. DOUGLAS: Yes. Thank you. Sorry about
21 that.
22 The Claimant did not undergo a mere change

1 in corporate form. The Claimant was constituted as a
2 new enterprise to purchase certain WCC assets in an
3 arm's-length transaction. You will also hear the
4 Claimant today accuse Canada of using WCC's bankruptcy
5 proceedings to seek a windfall. That is absolutely
6 not the case.
7 It is important to recall that it was WCC's
8 bankruptcy proceedings. It was not the Claimant's
9 bankruptcy proceedings. If anything, the Claimant is
10 trying to use WCC's bankruptcy proceedings as a cover
11 to hide the fact that it was not an investor and had
12 no investments at the time of the alleged breach. It
13 was WCC that was an investor at the time of the
14 alleged breach, not the Claimant. It was open to WCC
15 to continue its claim. The Company still exists as an
16 enterprise constituted under the laws of Delaware.
17 Canada's Opening Statement today will
18 proceed as follows: First, we will present our
19 affirmative case. My colleague Ms. Zeman will explain
20 the key facts relevant to the Tribunal's jurisdiction
21 ratione temporis. Ms. Van den Hof will then explain
22 Canada's position on jurisdiction ratione temporis

1 under NAFTA Chapter Eleven. And Ms. Dosman will
2 explain that the Tribunal does not have jurisdiction
3 ratione temporis over the Claimant's Damages Claim.
4 The presentation of Canada's affirmative
5 case will take about an hour, and depending on where
6 we are at timing-wise, that may be a good place for a
7 short break, but we will leave it for the Tribunal to
8 decide when that is appropriate.
9 Canada's presentation will then turn to
10 respond to the alternative arguments presented by the
11 Claimant. Ms. Zeman will explain that the Claimant
12 and WCC transacted at arm's length during WCC's
13 bankruptcy proceedings and are not the same investor
14 of a Party.
15 I will then return with a discussion of the
16 assignment of claims, and my colleague Mr. Klaver will
17 then explain that the Claimant's continuity of
18 interest theory has no grounding in fact or in law.
19 With that, I will turn things over to
20 Ms. Zeman.
21 MS. ZEMAN: Members of the Tribunal, a good
22 part of the day where you are.

1 My presentation on background facts will
2 begin by taking a brief look at how we got here today.
3 I will then pause to highlight the most fundamental
4 fact of this phase of the Arbitration: when the
5 Claimant became an investor of a Party.
6 As the Tribunal considers the relevant
7 questions of fact in this Jurisdictional Phase, Canada
8 urges the Tribunal to pay particular attention to the
9 evidence that has or has not been presented to
10 establish each proposition. Canada has put forward
11 evidence on the facts pertaining to how and when the
12 Claimant became an investor of a Party.
13 That evidence includes two Expert Reports
14 from Ms. Coleman on issues pertaining to U.S. law.
15 Those Expert Reports are largely uncontested. The
16 Claimant cites frequently to Ms. Coleman's evidence in
17 support of statements in its own submissions. It has
18 chosen not to cross-examine her.
19 Ms. Coleman has presented compelling
20 evidence on the matters within her ambit. The
21 Tribunal can comfortably rely on that evidence. By
22 contrast, the Claimant frequently makes unsupported

1 assertions with respect to matters of fact. We will
2 highlight some of those for you today.
3 So, to begin, how did we get here? In 2014,
4 WCC purchased a number of Canadian assets in an
5 arm's-length sale from a Canadian company called
6 Sherritt International. These assets included an
7 Alberta enterprise called Prairie Mines & Royalty ULC.
8 WCC was a publicly traded Delaware corporation and
9 held its interest in Prairie in the manner you see on
10 the screen.
11 On November 22, 2015, the Government of
12 Alberta announced its decision to phase out emissions
13 from coal-fired power plants by 2030; and on
14 November 24, 2016, Alberta announced that it had
15 concluded agreements with certain coal-fired power
16 plant owners to effectuate its decision to allocate
17 voluntary Transition Payments.
18 On October 9, 2018, WCC filed for bankruptcy
19 in the United States under Chapter Eleven of the U.S.
20 Bankruptcy Code. As the Claimant explained at
21 Paragraph 57 of its Counter-Memorial, WCC's bankruptcy
22 process was unrelated to Alberta's 2015 and 2016

1 Decisions. Instead, WCC filed for bankruptcy because
2 it was significantly overleveraged after a series of
3 acquisitions in the decade prior that nearly tripled
4 their debt obligations. These are words from WCC's
5 Chief Restructuring Officer, which the Tribunal can
6 find at Exhibit R-49. They are also discussed at
7 Paragraph 50 of Ms. Coleman's First Expert Report and
8 Paragraphs 16 and 17 of Canada's Memorial.
9 With input from its lenders, WCC devised a
10 Plan to address its significant debt obligations in
11 the bankruptcy process. As required under U.S.
12 bankruptcy law, WCC filed its Plan with the
13 U.S. Bankruptcy Court for the Southern District of
14 Texas.
15 As WCC described it to the Bankruptcy Court,
16 its Plan provided for the sale and transfer of
17 substantially all of its assets and equity interests,
18 efficient distributions to its creditors, and a
19 subsequent wind down of its businesses and affairs
20 upon distribution of the sale proceeds pursuant to the
21 Plan.
22 WCC planned to sell its assets in a public

1 auction process to maximize the value of its assets
2 and "provide enhanced stakeholder recoveries."
3 To protect their interests in their
4 collateral, WCC's highest priority lenders, the First
5 Lien Lenders, agreed to provide a bid of last resort,
6 a stalking horse bid. If no one else wanted to
7 purchase the assets for sale, the First Lien Lenders
8 would purchase them through an acquisition vehicle.
9 As we know, no other bidders came forward.
10 On November 19, 2018, one month after WCC
11 began its bankruptcy proceedings and announced that it
12 planned to dissolve, it filed a claim against Canada
13 under NAFTA Article 1116 on its own behalf and
14 Article 1117 on behalf of its Canadian enterprise
15 Prairie. In its claim, WCC alleged that Canada had
16 violated NAFTA Articles 1102 and 1105 by virtue of
17 Alberta's 2015 Decision to phase out emissions from
18 coal-fired electricity generation by 2030 and its
19 2016 Decision to allocate Transition Payments to the
20 owners of the generating units. WCC claimed damages
21 exceeding $470 million.
22 On January 31, 2019, the First Lien Lenders

1 created the Claimant as a Delaware limited liability
2 company, or LLC. The Claimant was the acquisition
3 vehicle that would take title to the purchased assets
4 on behalf of the First Lien Lenders.
5 March 15, 2019, was WCC's bankruptcy Plan
6 effective date. On that date, WCC and the Claimant
7 executed the transactions contemplated by the Plan.
8 This was the day the Claimant became the owner of two
9 Alberta companies, the "Canadian Enterprises."
10 The transaction also included a listed
11 purchased asset entitled the "NAFTA Claim."
12 The Stalking Horse Purchase Agreement
13 defined this asset in the following terms: "'NAFTA
14 Claim' means that certain claim filed with the Office
15 of the Deputy Attorney-General of Canada on
16 November 19, 2018, by Westmoreland on its behalf and
17 on behalf of its Canadian subsidiary Prairie Mines &
18 Royalty ULC against the Government of Canada pursuant
19 to Chapter Eleven of the North American Free Trade
20 Agreement (as such claim may be amended)."
21 The term "Westmoreland" was defined in the
22 agreement to mean "Westmoreland Coal Company."

1 As Ms. Coleman explained at Paragraphs 86 to
2 88 of her First Expert Report, U.S. bankruptcy law
3 defines property of the estate of a debtor in
4 bankruptcy very broadly and includes legal claims.
5 However, the Bankruptcy Code defers to applicable
6 non-bankruptcy law, whether state, federal, or, as
7 here, international law on the issue of
8 transferability itself and as to the merits of a claim
9 and who may assert it.
10 On May 13, 2019, Canada received an attempt
11 to amend WCC's Notice of Arbitration. The attempted
12 amendment was submitted on behalf of Westmoreland
13 Mining Holdings and the Canadian Enterprises. It
14 sought to substitute Westmoreland Mining Holdings as
15 the claimant. Canada objected to the attempted
16 amendment on the basis it was not a permissible
17 amendment under the 1976 UNCITRAL Rules.
18 After some exchanges that my colleague
19 Mr. Douglas will discuss in greater detail later,
20 Canada and the Claimant agreed that this May 13, 2019,
21 submission would serve as the Claimant's Notice of
22 Intent to submit a claim to arbitration under NAFTA

1 Article 1119.
2 On July 23, 2019, WCC's NAFTA Claim against
3 Canada was withdrawn, and on August 12, 2019, 90 days
4 after the submission of its Notice of Intent, the
5 Claimant initiated these proceedings with Claims under
6 NAFTA Article 1116 on its own behalf and Article 1117
7 on behalf of both Prairie and Westmoreland Canada
8 Holdings Inc.
9 The Claimant's NOA challenges the same
10 Alberta Measures as alleged violations of the same
11 NAFTA obligations and claims the same amount of
12 damages as WCC claimed in its Claim.
13 It is this series of events that brings us
14 here today and to our moment to pause on the most
15 fundamental fact of this Jurisdictional Phase. It is
16 undisputed that the Claimant made an investment in
17 Canada on March 15, 2019. On that date, the Claimant
18 became the owner of the Canadian Enterprises. It held
19 these enterprises in the manner you see on the screen.
20 Prior to March 15, 2019, the Claimant did
21 not have an investment in Canada. Prior to
22 January 31, 2019, the Claimant did not exist.

1 Pending any questions from the Tribunal on
2 this aspect of my presentation, I'll pass the floor to
3 Ms. Van den Hof and then Ms. Dosman, who will address
4 the consequences of this fact for the Tribunal's
5 jurisdiction.
6 PRESIDENT BLANCH: Thank you.
7 Let me just check whether--Zac, do you have
8 any questions at this point?
9 ARBITRATOR DOUGLAS: No.
10 PRESIDENT BLANCH: And James?
11 ARBITRATOR HOSKING: No.
12 PRESIDENT BLANCH: Okay. In which case,
13 let's pass on. Thank you.
14 MS. ZEMAN: Thank you.
15 MS. VAN DEN HOF: Thank you, Members of the
16 Tribunal. At the core of Canada's objection in this
17 dispute is the principle that a claimant is only owed
18 Treaty protection under NAFTA Chapter Eleven after it
19 becomes an investor of a Party. NAFTA does not
20 protect investors against historical events, nor does
21 it free an investor of the need to conduct due
22 diligence into the enterprise forming the basis of its

1 investment.
2 My colleague Ms. Zeman has already explained
3 that the Claimant came into existence and made its
4 investment in 2019. It became an investor of a Party
5 on that date. We have also explained that the
6 breaches alleged by the Claimant occurred in 2016,
7 when Alberta provided Transition Payments to owners of
8 coal-fired electricity generating units.
9 The Claimant appears to be alleging that
10 Alberta should have provided WCC with a payment. But
11 under the definition of "an investor of a Party," WCC
12 and the Claimant are distinct investors. They are
13 separately constituted, one as a corporation, and the
14 other as a limited liability company. And, as
15 Ms. Zeman will explain later in our presentation, the
16 two companies are unrelated, unaffiliated entities and
17 transacted at arm's length in the bankruptcy process.
18 With these facts, Canada's objection is uncomplicated.
19 The Claimant did not exist and was not an
20 investor of a Party when it alleges it was deprived of
21 protection, and the Claimant has no standing to bring
22 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.

1 (Interruption.)
2 (Stenographer clarification.)
3 MS. VAN DEN HOF: Luckily, that is the last
4 thing I said.
5 So, the Claimant argues that Article 1101 is
6 a general statement which simply requires that the
7 challenged measures relate to any investor or any
8 investment. This is incorrect.
9 In the context of Articles 1116 and 1117,
10 Article 1101 establishes that there must be a
11 connection between the measures alleged to have
12 breached Section A and the investor of a Party
13 bringing the claim. The NAFTA Parties agree that
14 Article 1101 requires a direct connection between the
15 challenged measures and the claimant, and every NAFTA
16 Chapter Eleven Tribunal evaluating Article 1101 has
17 come to the same conclusion.
18 Not a single NAFTA Decision supports the
19 Claimant's position. For example, the *Apotex* tribunal
20 found it necessary to evaluate Article 1101 in the
21 context of NAFTA's Chapter Eleven and the claimant's
22 substantive claims. It ultimately found the

1 challenged measures must relate to the claimant and
2 their investment, not any investor or any investment.
3 NAFTA Tribunals have also elaborated on the
4 degree of connection required between the challenged
5 measures and the claimant under Article 1101. For
6 example, the *Apotex* tribunal found the relating-to
7 requirement means the challenged measures must have a
8 direct and immediate effect on the claimant. And the
9 *Resolute* tribunal found, under Article 1101, the
10 challenged measures must directly address, target,
11 implicate, or affect the claimant.
12 As a result, Article 1101 is not simply a
13 general statement with little substantive importance,
14 at the Claimant alleges. Instead, it establishes that
15 there must be a direct and immediate connection
16 between the particular measure attributable to the
17 Host State, the claimant, and the particular
18 investment made by the claimant.
19 I will now explain why, under Section A, the
20 protection afforded to the Claimant's investment began
21 in 2019, when the Claimant acquired the Canadian
22 enterprises. This is important because the challenged

1 measures must relate to the Claimant's investment, not
2 any U.S. or Mexican investor's investment.
3 The Claimant has suggested that the
4 challenged measures relate to it because they affected
5 the Canadian Enterprises prior to the Claimant's
6 acquisition of those enterprises. In doing so, the
7 Claimant ignores that the Canadian Enterprises are
8 domestic enterprises, Alberta companies. They are
9 only protected as an investor's investment.
10 Under NAFTA Chapter Eleven, the protection
11 afforded to an investment of an investor of another
12 party begins when a particular investor takes a risk
13 and makes its investment. First, "investment of
14 investor of a Party" is a defined term in Article 1139
15 which requires that the investment be owned or
16 controlled by the relevant investor.
17 Second, the equally authentic French version
18 of NAFTA uses "les investissements effectués par les
19 investisseurs d'une autre Partie" in the place of
20 "investment of an investor of another party." The use
21 of the word "effectuer," or "to make," is clear that
22 an investment of an investor of another party begins

1 when a particular investor makes its investment. The
2 Spanish text also uses the word "realizar" (speaking
3 Spanish), meaning "to make."
4 An investment can only be made once by one
5 investor. This means the investment made by each
6 investor is unique. WCC's investment is distinct from
7 the Claimant's investment.
8 The Claimant has no response to this point
9 and simply argues that the English text is also valid,
10 but Canada's interpretation is the only one consistent
11 with all three equally authentic versions of the text.
12 The Tribunal should adopt the interpretation
13 consistent with the ordinary meaning, that an
14 investment begins when it is made by a particular
15 investor.
16 Third, the scope of the Section A
17 obligations relevant to this case reinforces Canada's
18 interpretation. The Claimant argues that respondents
19 owe obligations to foreign investment enterprises
20 under Articles 1102(2) and 1105, but this is not
21 accurate. Under Articles 1102 and 1105, Canada owes
22 protection to investments of investors of another

1 Party. The underlying domestic enterprise receives no
2 independent protection.
3 As a result, the Claimant is incorrect that
4 it has an investment that was owed protection in 2016.
5 As my Colleague Ms. Zeman explained earlier,
6 the investment of WCC in the Canadian Enterprises
7 occurred in 2014 when WCC acquired its interest in
8 Prairie Mines & Royalty ULC from Sherritt. By
9 contrast, the investment of the Claimant in the
10 Canadian Enterprises occurred in 2019 when it
11 purchased those enterprises.
12 The two investments cannot be equated. They
13 were made at different times by different investors
14 and under different conditions. Because the Claimant
15 is different from WCC and its investment is different
16 from WCC's investment, the challenged measures cannot
17 relate to the Claimant and its investments.
18 The Claimant argues the measures breached an
19 obligation to the Claimant because it and its
20 investments were treated unfairly and in a
21 discriminatory manner. But how could Alberta possibly
22 have treated the Claimant or its investments unfairly

1 or in a discriminatory manner in 2016? The Claimant
2 did not exist or have any investments at that time.
3 The challenged measures cannot relate to the Claimant
4 or its investments.
5 This concludes my submissions on Section A,
6 and I will now move on to address Section B.
7 PRESIDENT BLANCH: Just before you do, let
8 me just check whether there are any questions from
9 either Zac or from James.
10 Okay. Please do continue.
11 MS. VAN DEN HOF: Okay. Thank you.
12 The Claimant argues that it has standing
13 under Section B because it is currently an investor of
14 a Party and has a grievance against Canada's treatment
15 of the Canadian Enterprises prior to its investment in
16 them. But the procedures in Section B do not pertain
17 to any investor of a Party or any investment.
18 Instead, they pertain to the disputing investor, or
19 the claimant, with whom Canada consents to arbitrate
20 and who is, A, alleging the breach of an obligation
21 under Section A owed with respect to that claimant and
22 its investment; and, B, alleging it directly or

1 indirectly incurred damages arising out of that
2 breach. This is the only situation where there is a
3 dispute between a Party and an investor that can be
4 settled under Section B.
5 For example, the *EnCana* tribunal defined a
6 dispute as "the taking of measures in breach of the
7 Treaty which caused loss and damage to an investor."
8 The specific requirements of a disputing investor's
9 claim are set out in Articles 1116 and 1117.
10 As our Pleadings explain, NAFTA's object and
11 purpose requires these provisions to be interpreted in
12 a way that maintains the effectiveness of the dispute
13 settlement procedures. Under Article 1116, the
14 Claimant argues it can bring a claim on behalf of WCC
15 and WCC's investments. However, Article 1116's title
16 is clear that a claim under that provision is a claim
17 by an investor on its own behalf.
18 In an Article 1116 Claim, there must be, A,
19 a Measure alleged to have breached an obligation to
20 the Claimant; and, B, loss or damage to the Claimant
21 arising out of that breach. All three NAFTA Parties
22 agree that Article 1116 does not authorize a claimant

1 to bring a claim on behalf of another investor who
2 suffered loss or damage as a result of the alleged
3 breach.
4 For example, the United States' *Tennant*
5 Article 1128 Submission explains that a Claimant must
6 be the same investor who sought to make, was making,
7 or made the investment at the time of the alleged
8 breach and incurred loss or damage thereby.
9 There is no provision in Chapter Eleven
10 which authorizes an investor to bring a claim for an
11 alleged breach relating to a different investor. My
12 colleague Ms. Dosman will establish later today that
13 the Claimant does not even plead any damages that it
14 could have incurred.
15 Canada's interpretation is also consistent
16 with the tribunal's decision in *Mesa*. That tribunal
17 found its jurisdiction limited to measures that
18 occurred after the claimant became an investor holding
19 an investment.
20 In response, the Claimant says *Mesa* finds
21 that "foreign investment protections apply only where
22 a foreign investment exists." But the Claimant

1 ignores that *Mesa* was based exclusively on whether the
2 claimant had sought to make or made each of its
3 investments at the time of the alleged breach and so
4 qualified as an investor of a Party with respect to
5 those investments. It found: "The investor must
6 establish that it was seeking to make the very
7 investment in respect of which it makes its claims at
8 the time of the challenged Measures." The Claimant
9 would not satisfy the test articulated by the *Mesa*
10 tribunal.
11 The Claimant's theory of Article 1116 leads
12 to unreasonable outcomes. First, Article 1116(2)
13 establishes that a claimant may not bring a claim if
14 more than three years have elapsed from the date on
15 which the investor first acquired, or should have
16 first acquired, knowledge of the alleged breach and
17 knowledge that the investor has incurred loss or
18 damage.
19 An investor cannot acquire knowledge of
20 breach or loss before it even exists. When a new
21 investor comes into existence, it could only acquire
22 knowledge of an alleged breach at that moment. If an

1 investor could file a claim under Article 1116
2 alleging breach and loss that occurred prior to its
3 existence, the limitation period could, therefore, be
4 tolled indefinitely, and this would render the
5 limitation period meaningless.
6 This shows that Article 1116(2) exclusively
7 contemplates that a claimant's existence coincides
8 with the alleged breach and loss or damage. The
9 Claimant's interpretation of Article 1116 cannot be
10 correct.
11 Second, the Claimant's interpretation of
12 Article 1116 renders Article 1121(1) meaningless.
13 Article 1121 requires only the disputing investor to
14 waive its right to international or domestic
15 proceedings for damages with respect to the challenged
16 measure. This provision minimizes the risk of double
17 recovery and inconsistent outcomes.
18 If Article 1116 allowed a disputing investor
19 to file a claim alleging breach and loss incurred by
20 another investor, as the Claimant contends, nothing
21 would prevent the original investor from also pursuing
22 a proceeding for damages with respect to the same

1 measure. As the United States explained in its
2 *Tennant* Article 1128 Submission, this would
3 potentially subject the respondents to two proceedings
4 for the same alleged breach, defeating the purpose of
5 Article 1121(1)(b).
6 The Claimant's Rejoinder offered no response
7 to Canada's arguments on Article 1121. Its only
8 argument is that the window for NAFTA claims is
9 "nearly closed anyway." This does not make sense.
10 The fact that NAFTA has been replaced cannot affect
11 the interpretation of the Treaty.
12 For these reasons, the Claimant cannot bring
13 a claim on behalf WCC. And the Claimant's theory of
14 Article 1117 is equally flawed. It cannot bring its
15 claim under Article 1117.
16 The Claimant argues that the enterprise is
17 owed obligations under NAFTA independent of the
18 particular investor that owns it. This cannot be
19 true. As I explained earlier, an investment begins
20 when a particular investor acquires its interests in
21 an enterprise. The domestic enterprise itself is not
22 owed any Treaty protection. In fact, under customary

1 international law, the Claimant would not be entitled
2 to claim any damages to the enterprise arising out of
3 any alleged breach of the Treaty.
4 Article 1117 creates a limited derogation
5 from customary international law to allow investors to
6 claim indirect damages incurred by a domestic
7 enterprise the claimant owns or controls. However, it
8 does not derogate further from customary international
9 law to permit a claimant to submit a claim for an
10 alleged breach of an obligation owed with respect to a
11 different investor or its investment.
12 As a result, in an Article 1117 claim, the
13 claimant must show, A, a Measure alleged to have
14 breached an obligation owed with respect to the
15 Claimant, and that it owned or controlled the
16 enterprise that allegedly incurred a loss arising out
17 of that breach at the time of the breach and at the
18 time of the submission of the claim.
19 Canada's interpretation is consistent with
20 every NAFTA decision looking at when ownership or
21 control must exist under Article 1117.
22 In *Gallo*, the tribunal found a claimant must

1 own or control the enterprise at the time of the
2 alleged breach. The tribunal observed that previous
3 investment arbitration tribunals have been unanimous
4 on this point. The Claimant responds by arguing that
5 this case dealt with an abuse of process claim. This
6 is just not true.
7 It is also just not true that the tribunal
8 found that Article 1117 is satisfied when the
9 enterprise was held by any foreign investor at the
10 time of the alleged breach, as the Claimant alleges.
11 Instead, the tribunal found that Mr. Gallo had not
12 satisfied the quid pro quo necessary to access NAFTA
13 dispute settlement, which requires the claimant
14 seeking protection to show that it is a "protected
15 foreign investor who at the relevant time owns or
16 controls an investment in the host country."
17 The Claimant has not satisfied the test
18 articulated by the *Gallo* tribunal.
19 The *B-Mex* tribunal also found that a
20 claimant must own or control the enterprise at the
21 time of the alleged breach. The Claimant agrees with
22 Canada that the *B-Mex* parties and tribunal agreed that

1 the claimant had to own or control the enterprises at
2 the time of the alleged breaches. The Claimant argues
3 that this is irrelevant because the tribunal did not
4 resolve any factual issues on this position. That's
5 not true.
6 As you can see on this slide, the tribunal
7 did find that the claimant owned the enterprises at
8 all relevant times, including at the time of the
9 alleged breach, and--rather, they found that they
10 controlled the enterprise at all relevant times. In
11 this case, the Claimant did not own or control the
12 enterprise at all relevant times.
13 The Claimant's theory of Article 1117 leads
14 to unreasonable outcomes, demonstrating that it cannot
15 be correct.
16 First, the Claimant's argument that
17 investments are owed obligations and can bring claims
18 independent of their particular investor is
19 inconsistent with Article 1117(4), which states that
20 "an investment may not make a claim." It is also not
21 consistent with the NAFTA obligations, which
22 consistently protect only investments of investors of

1 another party, not investments by themselves.
2 Second, by abandoning the requirement that
3 the challenged measures bear any relationship to the
4 claimant, the Claimant's theory encourages
5 claim-shopping. The interpretation makes it possible
6 for a claimant to purchase an enterprise with a
7 potential nascent NAFTA claim, making the claim an
8 asset that can be purchased rather than a right
9 arising out of the quid pro quo of investment.
10 The Claimant argues that this may be an
11 abuse of process without explaining how it might be
12 abusive. This situation has never arisen before, and
13 it's not clear the abuse of process doctrine would
14 apply.
15 Third, the Claimant's theory could lead to a
16 multiplicity of proceedings under Article 1116 and
17 1117 with respect to the same enterprise and arising
18 out of the same measures. This could lead to the
19 undesirable prospect of overlapping claims and
20 divergent outcomes with respect to the same measure.
21 The simpler explanation, which avoids all of
22 these issues, is that the claimant's interests in an

1 enterprise must exist at the time of the alleged
2 breach. For these reasons, the Claimant cannot bring
3 a claim on behalf of the Canadian Enterprises because
4 it did not own or control them at the time of the
5 alleged breach.
6 I'll now move on from the NAFTA text to
7 previous investment arbitration cases.
8 As we've shown in our submissions, tribunals
9 have consistently found they have no temporal
10 jurisdiction over alleged breaches that occurred
11 before a claimant became an investor of a Party. The
12 Claimant accuses us of reading these cases in search
13 of a rule without a reasoned explanation, but the
14 cases provide a consistent rationale. A claimant has
15 no access to dispute settlement where the claimant
16 couldn't have deprived--sorry, the State, rather,
17 couldn't have deprived the claimant or its investment
18 of any protection.
19 I have already explained that *Mesa*, *Gallo*,
20 and *B-Mex* are cases where NAFTA tribunals have agreed
21 that a claimant must have been an investor of a Party
22 at the time of the alleged breach. Now I will respond

1 to the cases where the Claimant focused its attention
2 in the Rejoinder, *STEAG* and *GEA Group*. I am happy to
3 address questions concerning any other cases if you
4 have them.
5 Both *STEAG* and *GEA Group* found that a
6 claimant must be a protected investor at the time of
7 the alleged breach in a situation where the claimant
8 and the previous owner of its investment held the same
9 nationality.
10 In *STEAG*, the tribunal found under the
11 Energy Charter Treaty, in Canada's translation from
12 Spanish, that "the Tribunal has jurisdiction to
13 resolve the dispute between the Parties only if said
14 dispute arises from a claim for violation of the
15 Treaty that is related to the Claimant's investment in
16 Spain." The tribunal found the relevant date for
17 determining its jurisdiction to be the date that the
18 claimant invested in Spain. It made this finding even
19 though an investor of same nationality had previously
20 held the investment at issue.
21 The Claimant has completely ignored this
22 portion of the tribunal's decision. Instead, it

1 focuses on the fact that the tribunal considered
2 additional injections of capital from the same
3 claimant to be the same investment. We didn't refer
4 to this finding in our submissions. The claimant
5 cannot meaningfully distinguish this case.
6 Similarly, the *GEA Group* tribunal found
7 that, in order for the tribunal to hear the claimant's
8 claims, the claimant must have held an interest in the
9 alleged investment before the alleged Treaty
10 violations were committed. The Claimant argues that
11 *GEA Group* is distinguishable because there was no
12 evidence of a continuity of interest.
13 My colleagues will address the Claimant's
14 misguided continuity of interest theory shortly. For
15 now, I will just say that the Claimant has not
16 meaningfully distinguished *GEA Group*, either.
17 There is nothing in any of the many cases we
18 have cited to suggest that, if a claimant can
19 demonstrate it has an untethered concept of continuity
20 of interest, a tribunal has jurisdiction. Instead,
21 each of these cases support that the claimant must be
22 a protected investor at the time of the alleged

1 breach.
2 For all of these reasons, the Claimant has
3 not shown that the Tribunal has jurisdiction under
4 Articles 1101, 1116, and 1117. For the Tribunal to
5 have jurisdiction, the Claimant would have to show
6 that it was a protected investor in 2016. It has not
7 done so.
8 My colleague Ms. Dosman will explain shortly
9 that, in fact, the Claimant has not even claimed any
10 damages it could have incurred.
11 Thank you for your attention today. I
12 welcome any questions from the Tribunal on these
13 issues before turning the microphone over to
14 Ms. Dosman.
15 PRESIDENT BLANCH: Thank you.
16 James?
17 ARBITRATOR HOSKING: No.
18 PRESIDENT BLANCH: And Zac?
19 ARBITRATOR DOUGLAS: No.
20 PRESIDENT BLANCH: Thank you very much.
21 Moving on to Ms. Dosman.
22 MS. DOSMAN: Members of the Tribunal, hello.

1 My name is Alexandra Dosman.
2 Ms. Van den Hof has explained that the NAFTA
3 does not permit claims by an investor of a Party prior
4 to its existence and investment in the territory of
5 another Party.
6 I will complement her submissions by
7 addressing the Claimant's failure to plead a
8 cognizable damages case.
9 The requirement for a claimant to show
10 damages prima facie at the jurisdictional stage is
11 evident from the language of the NAFTA. The Treaty
12 requires a claimant to plead that it has incurred loss
13 or damage by reason of, or arising out of, the alleged
14 breach, either directly, under Article 1116(1), or
15 indirectly, on behalf of its domestic enterprise under
16 Article 1117(1).
17 Where a claimant or its investment could not
18 have incurred damage arising out of the alleged
19 breach, the tribunal does not have jurisdiction over
20 the claim. Tribunals have confirmed this principle.
21 For example, in *UPS v. Canada*, the tribunal noted that
22 a claimant is required to "state a prima facie case of

1 damage at the jurisdictional stage."
2 Similarly, in *Saluka v. Czech Republic*, the
3 tribunal found that it lacked jurisdiction in respect
4 of claims for damage prior to the claimant's
5 acquisition of the underlying investment.
6 The other NAFTA Parties agree that the
7 possibility of establishing damages is a prerequisite
8 to the submission of a claim to arbitration. México
9 at Paragraph 4 of its Article 1128 Submission in this
10 case states that an investor of a Party may only
11 submit a claim to arbitration if that investor has
12 incurred a loss. As Ms. Van den Hof noted, the United
13 States in its Article 1128 Submission in *Tennant*
14 agrees at Paragraph 10 that the investor bringing a
15 claim under Article 1116 must "be the same investor
16 who suffered loss or damage as a result of the alleged
17 breach."
18 Here, the Claimant cannot establish a prima
19 facie case of damage either to itself or to its
20 investment because it did not exist at the time the
21 alleged damages crystallized, and it had no investment
22 at that time.

1 In its Notice of Arbitration, the Claimant's
2 allegations of loss or damage concern WCC. There is
3 nothing specific to the Claimant. What is more, the
4 Notice of Arbitration makes no allegations of indirect
5 damage specific to the Canadian Enterprises.
6 In its pleadings on jurisdiction, the
7 Claimant attempted, belatedly, to establish a link
8 between itself, its investment, and the alleged loss
9 or damage. It makes three new arguments, none of
10 which is grounded in its Notice of Arbitration, and,
11 in any event, none of these new arguments has merit.
12 First, the Claimant argues that it can claim
13 losses on behalf of WCC under Article 1116(1). For
14 example, at Paragraph 127 of its Rejoinder on
15 Jurisdiction, the Claimant states that "Prairie's
16 mine-mouth operations were purchased in 2013-14 by WCC
17 on the expectation that they would have a 50-year life
18 span."
19 It argues that it can claim losses on behalf
20 of WCC for an alleged violation of WCC's expectations
21 in 2016. This is not permitted. An investor cannot
22 make a claim for loss to another investor.

1 Second, the Claimant argues that it can
2 claim losses under Article 1117(1) that were incurred
3 by Prairie in 2016, years prior to the Claimant's
4 acquisition of the Canadian Enterprises in 2019. This
5 is also not permitted. An investor cannot make a
6 claim on behalf of another investor's enterprise.
7 Canada does not independently owe obligations to
8 Prairie, the domestic enterprise.
9 NAFTA distinguishes between an investor's
10 direct damages under Article 1116 in its capacity as
11 owner and indirect damages under Article 1117 in
12 its--on behalf of that investor's enterprise.
13 Damage to Prairie is only cognizable as
14 indirect damage to an investor that has standing to
15 bring a claim under NAFTA Chapter Eleven.
16 And, finally, the Claimant appeals to
17 so-called "pending damages" in an attempt to save its
18 claim. However, there are no pending damages here.
19 As you can see on the slide, the Claimant is claiming
20 losses as a result of Alberta's conclusion of the
21 Off-Coal Agreements with electricity generators in
22 November of 2016. These are exactly the same alleged

1 $470 million in damages that WCC claimed in 2018. As
2 you can see on the screen, the Claimant alleges that:
3 "Payments pursuant to the Off-Coal Agreements
4 established that Prairie and its investors would be
5 harmed." It also states that the alleged harm was
6 certain.
7 Indeed, the Claimant states that it "had to
8 file claims within three years of the November 2016
9 Off-Coal Agreements" in order to fall within the
10 Limitation Period. That is at Paragraph 102 of its
11 Counter-Memorial. That is, the Claimant acknowledges
12 that the alleged damages crystallized prior to its
13 formation and prior to its investments. There's
14 nothing new or pending here.
15 The Claimant then points to the fact that
16 the Off-Coal Agreements provided for the distribution
17 of Transition Payments in annual installments. This
18 is true; it is also unhelpful to the Claimant's case.
19 Alberta decided how to allocate the
20 Transition Payments once in 2016. The Transition
21 Payments contemplated by the OCAs were fully
22 documented and accounted for in 2016. The OCAs and

1 any alleged resulting damage were certain on the
2 Claimant's case in 2016.
3 Moreover, the Claimant made its investment
4 in 2019 with full knowledge of the alleged losses.
5 The Claimant would have made its own determination of
6 what the Canadian Enterprises were worth in 2019 and
7 decided to proceed on that basis.
8 Canada is not responsible for the valuation
9 made by WMH when it invested in the Canadian
10 Enterprises in 2019 with full knowledge of the
11 regulatory landscape. WMH must make its own claim for
12 prima facie damage arising out of the breach it
13 alleges, but it has failed to meet this low bar.
14 Along with Ms. Van den Hof's submissions,
15 this concludes Canada's affirmative case.
16 Following any questions from the Tribunal
17 and pending any desire for a break, I will turn the
18 microphone back to Ms. Zeman, Mr. Douglas, and
19 Mr. Klaver, who, together, will explain why the
20 Claimant has failed to establish the Tribunal's
21 jurisdiction on the basis of its alternative theories.
22 PRESIDENT BLANCH: Thank you very much.

1 Let me just check.
2 Zac, do you have any questions?
3 And James? No?
4 A question for the reporter: Are you happy
5 if we continue, or would you like to have a short
6 break now?
7 REALTIME STENOGRAPHER: I'm just fine, Madam
8 President. Thank you.
9 PRESIDENT BLANCH: Excellent. Then I
10 propose we continue.
11 MS. ZEMAN: Okay. We have heard from both
12 Ms. Van den Hof and Ms. Dosman that the fact that the
13 Claimant was not an investor of a Party at the time of
14 the alleged breach is fatal to its claim. The
15 remainder of our statement today will address the
16 Claimant's attempts to avoid that result by positing
17 rules of international law that do not exist and
18 failing to establish that it meets those rules as a
19 matter of fact.
20 The Claimant's alternative theories of
21 jurisdiction are largely premised on an alleged
22 connection with WCC. Over the course of this

1 Jurisdictional Phase, the Claimant has characterized
2 its relationship to WCC as one of "associated
3 companies", "corporate affiliates", reflecting a
4 "continuity of beneficial interests" and dropping the
5 beneficial in its Rejoinder as reflecting a continuity
6 of nondescript interests.
7 It asserted at the Bifurcation Hearing that
8 it is "substantially the same" as WCC, and in its
9 Rejoinder that WCC merely "changed form" to become
10 WMH. However, it also indicated in its
11 Counter-Memorial that it is a "distinct legal entity"
12 and that it and WCC are separate investors, in the
13 plural.
14 The Claimant has asserted that it is a new
15 owner of a foreign investment and a "new investor
16 parent" and that it is "not a 'new' investor in
17 Canada". It has further stated that WCC created the
18 Claimant as a wholly owned subsidiary and was the
19 Claimant's parent, but also that it was the Claimant
20 that had a "continuous interest" in WCC. These
21 statements cannot be reconciled, either with each
22 other, the evidence on the record, or with existing

1 rules of international law on which this Tribunal's
2 jurisdiction could be based.
3 In some places, the Claimant additionally
4 ties these various factual allegations to the
5 bankruptcy context that facilitated its purchase of
6 the Canadian Enterprises. For example, it has alleged
7 what it calls a "simple proposition" that the entity
8 emerging from bankruptcy, as the owner of the debtor
9 company's investment, should be allowed to pursue a
10 NAFTA Chapter Eleven claim for harm to the investment.
11 But the Claimant does not tie its theory to the text
12 of NAFTA.
13 On its most generous reading, the Claimant's
14 theory appears to be that any entity emerging from a
15 bankruptcy process should automatically be viewed as
16 the same investor of a Party that entered. But as
17 Canada explained in its Reply, there is no magic in
18 the bankruptcy context. The characteristics of each
19 particular transaction and the relationship between
20 investors purporting to be the same must be assessed
21 on a case-by-case basis.
22 In this case, the evidence establishes that

1 the Claimant and WCC were at arm's length and that WCC
2 did not simply become the Claimant. They are not the
3 same investor of a Party as would be required in order
4 for the Tribunal to have jurisdiction over the
5 Claimant's claim.
6 Today I will take the Tribunal through key
7 evidence on the record that contradicts the Claimant's
8 theories of connection to WCC as a factual matter; in
9 particular, that it is a corporate affiliate of WCC
10 and that it is the same as WCC. We will revisit four
11 key facts: First, the Claimant's formation; and,
12 second, the Bankruptcy Court's arm's length and
13 no-insider findings. This evidence establishes that
14 the Claimant's assertion that it was a corporate
15 affiliate of WCC cannot be supported.
16 We will then revisit the Bankruptcy Court's
17 determination that the Claimant would not have
18 successor liability to WCC and the fact that the
19 Claimant did not take on all of WCC's assets or
20 liabilities through the Stalking Horse Purchase
21 Agreement. All of this evidence establishes that the
22 Claimant is not, and has not ever been, the same

1 investor of a Party as WCC. The two companies are not
2 the same entity, nor do they share the same legal
3 personality.
4 We will begin our highlights with the time
5 the Claimant was created, three years after the
6 alleged breach. The Claimant argues that it was a
7 corporate affiliate of WCC because it was created by
8 WCC as a wholly owned subsidiary of WCC. But the
9 evidence shows that it was not WCC who created the
10 Claimant; it was the First Lien Lenders. And it was
11 not WCC who owned the Claimant at its creation; it was
12 a nominee of the First Lien Lenders. It is undisputed
13 that the First Lien Lenders were adverse in interest
14 to WCC. The evidence, thus, establishes that there
15 was no corporate link between the Claimant and WCC
16 when the Claimant was formed.
17 Let's take a quick look at the Claimant's
18 formation document, which is Exhibit R-081. An
19 excerpt is on the screen in front of you. It defines
20 Thomas Moers Mayer as the Member, or owner, and
21 indicates that the Claimant was initially wholly owned
22 by the Member and that the property, business, and

1 affairs of the company shall be conducted by the
2 Member. Mr. Mayer was a partner at the law firm that
3 represented the First Lien Lenders in WCC's bankruptcy
4 process.
5 In its Rejoinder, the Claimant protested
6 that Canada did not "explain why the fact WMH was
7 created by an attorney for the secured creditors
8 should matter."
9 Well, it matters for two reasons: First,
10 the Claimant repeated its incorrect statement about
11 WCC creating it as a wholly owned subsidiary no less
12 than five times in its Counter-Memorial. The fact
13 that the Claimant was not created by WCC thus serves
14 as an important illustration of the need for caution
15 when approaching unsubstantiated statements about
16 matters of fact.
17 Second, it indicates the absence of a
18 corporate link from the outset between WCC and the
19 Claimant. And the Description of Transaction Steps,
20 which set out the steps that would be taken to execute
21 the transactions contemplated by WCC's Plan, further
22 confirms the First Lien Lenders' nominee continued to

1 hold the Claimant until the beginning of the
2 transaction, and the First Lien Lenders held the
3 Claimant at the end of the transaction. That's at
4 Exhibit R-043, and that specific confirmation can be
5 found at Bates Pages R-043.13 and R-043.14.
6 As Ms. Coleman explained at Paragraph 11 of
7 her Second Expert Report: "Lenders are inherently
8 adverse to their borrowers." They have claims to
9 repayment of their lent money. The First Lien Lenders
10 and their borrower, WCC, were no exception. The fact
11 that the First Lien Lenders created and owned the
12 Claimant confirms that the Claimant was adverse in
13 interest to, rather than a corporate relation of, WCC.
14 This is further confirmed by Mr. Mayer's
15 continued representation of the Claimant in WCC's
16 bankruptcy process. Canada refers the Tribunal to
17 Footnote 35 of its Reply for references to the
18 evidence establishing the parties' legal
19 representation in the bankruptcy process.
20 Before I move to the Bankruptcy Court's
21 findings with respect to the relationship between the
22 Claimant and WCC, it is worth pausing on the

1 Claimant's Rejoinder assertion that it is a mere
2 change in corporate form from WCC.
3 If the Claimant were serious about this
4 allegation, it would have presented evidence on the
5 rules of Delaware law pertaining to corporate form
6 changes; it did not. On its face, the Claimant's
7 formation document does not establish that its
8 creation amounted to an amendment of WCC's corporate
9 form. In fact, it indicates the opposite. WCC and
10 the Claimant have coexisted as independent corporate
11 entities since the Claimant's creation. To this day,
12 they both remain separately in existence: WCC as a
13 corporation, continuing to wind down its affairs; and
14 the Claimant as an LLC. There is no evidentiary basis
15 on which to reach the Claimant's conclusion on
16 corporate form.
17 The next piece of evidence I'd like to
18 highlight today are the Bankruptcy Court's legal
19 findings that the Claimant and WCC were transacting at
20 arm's length and were not insiders.
21 On the screen before you is Exhibit R-063,
22 the Bankruptcy Court's Order confirming the WCC Plan.

1 This Order authorized WCC to enter into the
2 transaction contemplated to effectuate the Plan. In
3 Paragraph 47, the Court determined that the Claimant
4 and WCC negotiated, proposed, and entered into the
5 Stalking Horse Purchase Agreement, which set out the
6 terms of the Claimant's purchase of the Canadian
7 Enterprises, from arm's length bargaining positions.
8 The Claimant never confronts the Bankruptcy Court's
9 findings in this respect. The term "arm's length" did
10 not appear once in the Claimant's Counter-Memorial.
11 It appeared only in a footnote in its Rejoinder
12 Memorial that responded to a different argument. It,
13 thus, stands uncontested.
14 In the same paragraph, the Court goes on to
15 find that the "purchaser is not an insider of the WLB
16 debtors as that term is defined in Section 101(31) of
17 the Bankruptcy Code."
18 The Claimant is the purchaser, and the WLB
19 debtors are WCC and certain of its debtor affiliates.
20 Ms. Coleman explained in her Expert Report that the
21 Bankruptcy Code defines "insider" to include
22 "affiliate." The Code also defines "affiliate" as--in

1 its translation into slightly plainer English--"an
2 entity owning or controlling the debtor, that is owned
3 by the debtor, or that is owned by an entity owning or
4 controlling the debtor."
5 The Tribunal can find the references to the
6 full Bankruptcy Code definitions at the bottom of this
7 Slide 49.
8 According to Ms. Coleman, by determining
9 that the Claimant was not an insider or affiliate of
10 WCC, the Bankruptcy Court effectively determined that
11 the Claimant did not own or control WCC, that WCC did
12 not own or control the Claimant, and that the Claimant
13 was not owned or controlled by an entity that also
14 owned or controlled WCC.
15 The Claimant did not address the Court's
16 determination, at all, in its Counter-Memorial, and
17 spent a single paragraph attempting to downplay its
18 significance in its Rejoinder.
19 There, the Claimant argued that the
20 "Bankruptcy Court statement had nothing to do with the
21 transaction steps." Under those steps, there was a
22 finite and fleeting moment in time when WCC held

1 equity in the Claimant immediately before that equity
2 was distributed to the First Lien Lenders to satisfy
3 their claims. The Claimant has indicated that this
4 step was for the purpose of obtaining favorable tax
5 treatment for the Claimant. The Claimant argues that
6 the Court found these steps "integral to [its]
7 Confirmation of the Bankruptcy Plan." As a result, so
8 says the Claimant, the Court's determination that the
9 Claimant was not an affiliate of WCC is irrelevant.
10 But the Claimant's logic emphasizes just how
11 striking the Court's no-insider finding is. Despite
12 knowing all aspects of the transaction, including the
13 micro step undertaken for tax purposes that the
14 Claimant focuses on, the Court still determined that
15 the Claimant was not affiliated with WCC.
16 As Ms. Coleman explained: "At no point did
17 WCC have a meaningful role or relationship with
18 respect to the management or operations of the
19 Claimant that would lead to a different conclusion
20 than the one in which the WCC Bankruptcy Court
21 arrived."
22 The Claimant has expended significant effort

1 in this phase of the Arbitration, accusing Canada of
2 prioritizing form over substance. Yet, that is
3 precisely the approach that it takes on this question
4 of corporate affiliation. It attempts to cast the
5 transaction as a mere reshuffling of equity between
6 corporate affiliates because the "formal transfer
7 outlined in the description of transaction steps is
8 between WCC, the parent company; and WMH, its wholly
9 owned subsidiary."
10 Contrary to the Claimant's suggestion,
11 Canada is not trying to read out this step from the
12 transaction. Canada is asking the Tribunal to view
13 this step in its proper context and draw the
14 appropriate conclusion, that this was not a mere
15 reshuffling of equity interest among members of a
16 corporate family. It was a sale between Parties that
17 a U.S. Court determined were transacting at arm's
18 length. The Court reached its conclusion on the basis
19 of a full evidentiary record.
20 Consistent with this finding, Ms. Coleman
21 sums up that the Claimant was an unaffiliated third
22 party to WCC, formed as a new entity on behalf of the

1 First Lien Lenders for the purposes of taking title to
2 assets that would partially satisfy their claims, and
3 the transaction both began and ended with the First
4 Lien Lenders or their nominee owning the Claimant.
5 As a result, the Claimant's attempts to
6 connect itself to WCC by claiming an affiliation are
7 unsupported by the record. The Claimant was not an
8 affiliate of WCC when the alleged breach occurred,
9 when WCC entered bankruptcy, when WCC emerged from
10 bankruptcy, or when the Claimant initiated these NAFTA
11 proceedings.
12 That brings us to the third fact to
13 highlight, which pertains to the Claimant's assertion
14 that it is the same as WCC. In particular, the
15 Bankruptcy Court determined that the sale of WCC's
16 assets was free and clear of preexisting liens and
17 claims, and the Claimant would not face successor
18 liability with respect to WCC.
19 We've pulled up, on Slide 53, an excerpt of
20 the language from Paragraph 49 of the Bankruptcy
21 Court's Confirmation Order on Successor Liability. I
22 won't read the excerpt out, but, as you can see, even

1 the excerpt is quite comprehensive.
2 Ms. Coleman explained, in her First Expert
3 Report, that this determination means that the
4 Claimant could not be held liable for the obligations
5 of WCC solely by virtue of acquiring its assets. This
6 result would not have been possible had the Claimant
7 purchased equity interest in WCC.
8 It's worth noting that WCC viewed obtaining
9 protection against successor liability as a selling
10 feature for any potential buyer of its assets in the
11 bankruptcy process. WCC described its expectations in
12 this regard in the sales notice that went out to
13 prospective buyers. In particular, the expectation
14 was: To the greatest extent possible, the successful
15 bidder would not be deemed to be a legal or other
16 successor, to have merged in any way with or into WCC,
17 or to be an alter ego or mere or substantial
18 continuation of WCC.
19 WCC further explained in this sales notice
20 that the First Lien Lenders would not have entered
21 into the Stalking Horse Purchase Agreement without
22 this kind of protection. The bankruptcy Court's "no

1 successor liability" finding, thus, confirms the
2 Claimant and WCC are not the same entity and do not
3 have the same legal personality.
4 The fourth fact to highlight is that the
5 Claimant did not acquire all of WCC's assets or assume
6 all of its liabilities. The Stalking Horse Purchase
7 Agreement that Claimant and WCC executed was express.
8 Only assets and liabilities that were expressly
9 identified in the agreement were purchased or assumed.
10 For example, while equipment and coal
11 inventory were included assets, director and officer
12 insurance policies, certain specific real property
13 leases, and certain employee benefit plans were
14 excluded assets. On the liability side, workers'
15 compensation liabilities for occupational injuries to
16 transferred employees arising after the closing were
17 assumed, but certain statutory liabilities for workers
18 arising prior to the closing were excluded.
19 An agreement can be found at Exhibit R-053
20 and is discussed in Ms. Coleman's First Expert Report
21 at Paragraphs 65 and 66.
22 It establishes that the Claimant did not

1 inherit all of WCC's characteristics when it purchased
2 certain assets and assumed certain liabilities in the
3 asset sale. It establishes that the Claimant is not
4 the same entity and does not have the same legal
5 personality as WCC.
6 As a final note on these issue, Ms. Coleman
7 explained, at Footnote 98 of her First Expert Report,
8 that "Orders such as the WCC Plan Confirmation Order
9 are typically drafted and proposed by the Debtors
10 before being filed with the Bankruptcy Court."
11 This means that the findings made by the
12 Bankruptcy Court's Confirmation Order--including on
13 arm's-length transacting, no insider relationship,
14 taking the assets free and clear, and no successor
15 liability--were specifically sought by WCC and likely
16 negotiated with the First Lien Lenders. Indeed, the
17 First Lien Lenders retained the right to terminate the
18 Restructuring Support Agreement with WCC, and,
19 correspondingly, their support of WCC's Plan, if WCC
20 made changes to the draft confirmation order that was
21 inconsistent with their agreement. This confirms that
22 the Parties specifically sought these arm's-length,

1 no-insider, and no-successor-liability findings for
2 the Claimant.
3 The Claimant cannot have it both ways. It
4 cannot be a non-affiliate and non-successor to WCC to
5 escape unwanted liabilities but assert that same
6 affiliation and successor status to pursue a NAFTA
7 claim.
8 The evidence establishes that the Claimant
9 is not the same investor of a Party as WCC.
10 I'd be happy to take any questions that the
11 Tribunal may have on the evidence. Otherwise, I'll
12 pass the floor to my colleague, Mr. Douglas, who will
13 address the Claimant's arguments with respect to
14 assignment of claims.
15 PRESIDENT BLANCH: Thank you. Let me just
16 check.
17 Zac? And James? No. Thank you very much.
18 MS. ZEMAN: Thank you.
19 MR. DOUGLAS: Good morning again, President
20 Blanch and Members of the Tribunal.
21 Just to explain Canada's setup here, you
22 might see us, from time to time, look up this way.

1 That's because there's a big screen over top of here,
2 which has our slide presentation, as well as you, on
3 the screen. That is kind of the layout here a little
4 bit, in case you were wondering. Sometimes we might
5 look at you up there, even though you are more
6 directly in front of us.
7 Today I will be speaking to the assignment
8 of claims. The Claimant maintains that both an
9 investment claim and an investment may be assigned
10 between investors without affecting the jurisdiction
11 of a tribunal, but only in two circumstances: First,
12 when the transfer is between investors who are
13 affiliates; or, second, when the transfer is between
14 investors that share a close continuity of interest
15 between them. That's at Paragraph 56 of their
16 Rejoinder.
17 My colleague Ms. Zeman has already explained
18 that the Claimant and WCC were not affiliates but,
19 instead, transacted at arm's length. My colleague
20 Mr. Klaver will later explain that the Claimant's
21 continuity-of-interest theory has no grounding in fact
22 or in law. I will address the legal aspects of

1 assignment of claims more generally.
2 First, I will explain that the Claimant
3 cannot establish this Tribunal's jurisdiction ratione
4 temporis because WCC sold its investment claim under
5 NAFTA to the Claimant.
6 Second, I will explain that the Claimant
7 cannot establish this Tribunal's jurisdiction because
8 WCC sold the Canadian Enterprises to the Claimant.
9 Now, before getting started, a quick note on
10 terminology. As my colleague Ms. Zeman has explained,
11 the NAFTA claim and the Canadian Enterprises were
12 unequivocally sold by WCC to the Claimant. However,
13 in its Pleadings, the Claimant refers to the sale as
14 an assignment or transfer.
15 The Claimant's usage of these terms cannot
16 be used to mask the market-based arm's length nature
17 of the transaction. Canada will refer to the
18 transaction as a "sale," which is what, in fact,
19 transpired through WCC's bankruptcy process.
20 First, the sale of WCC's investment claim
21 under NAFTA Chapter Eleven to the Claimant. Canada
22 provides a full answer to the Claimant's argument at

1 Paragraphs 90-95 of its Memorial and
2 Paragraphs 126-135 of its Reply.
3 In particular, Canada explained that WCC's
4 Claim cannot establish this Tribunal's jurisdiction
5 because it is not the Claim that is before this
6 Tribunal. It is important to recall the chronology.
7 WCC entered into bankruptcy in October of 2018. WCC
8 then filed a NAFTA claim in November of 2018. WCC
9 then sold its NAFTA claim to the Claimant four months
10 later, in March of 2019. WCC's NAFTA claim was then
11 withdrawn in July of 2019, and the Claimant filed its
12 own NAFTA claim in August of 2019.
13 The Claimant does not dispute these facts.
14 Thus, as a question of fact, whether or not WCC's
15 NAFTA claim was sold, transferred, or assigned, the
16 claim no longer exists. It was withdrawn.
17 Moreover, as a question of law, this
18 Tribunal only has the competence to adjudicate the
19 Claim that is before it. That is the Claim that was
20 filed by the Claimant. This Tribunal has no
21 competence over WCC's Claim. Nowhere in its Pleadings
22 does the Claimant explain how WCC's Claim can still be

1 factually or legally relevant.
2 Even if WCC's NAFTA Claim was somehow
3 relevant, there is no mechanism under NAFTA Chapter
4 Eleven to allow a disputing investor to sell or
5 transfer its claim to another investor of a Party. A
6 state's consent to arbitrate under NAFTA Chapter
7 Eleven is specific to the investor of a Party that
8 brings the claim, except in narrow circumstances, like
9 subrogation, which I will speak to in just a moment.
10 To establish consent, a NAFTA claim must be
11 brought by the investor of a Party to whom the measure
12 relates, who is the subject of an alleged breach of
13 Section A, and who incurred loss or damage.
14 Canada alerted the Claimant to these issues
15 in July of 2019, when the Claimant approached Canada
16 seeking to substitute itself for WCC in WCC's NAFTA
17 claim. That is Exhibit R-076. In that letter, Canada
18 explained that an investment claim cannot be amended
19 if it would cause the amended claim to fall outside of
20 the jurisdiction of the tribunal.
21 Canada provided the Claimant with the
22 decision of the NAFTA tribunal in *Merrill & Ring*

1 concerning a motion to add a new party. In that case,
2 Merrill & Ring brought a motion to add a new party,
3 Georgia Basin, as a claimant. Merrill & Ring and
4 Georgia Basin were affiliated companies, and
5 Merrill & Ring claimed that Georgia Basin was also
6 affected by the measure it was challenging in that
7 case.
8 The motion was made pursuant to Article 20
9 of the 1976 UNCITRAL Rules, the same provision through
10 which the Claimant in this case sought to substitute
11 itself for WCC in WCC's after-claim.
12 Canada opposed the motion in *Merrill & Ring*
13 because the challenged measures in that case did not
14 relate to Georgia Basin under Article 1101. Georgia
15 Basin was not the subject of an alleged breach of
16 Section A, and Georgia Basin could not have incurred
17 any loss or damage.
18 The tribunal in that case agreed with
19 Canada's analysis. They wrote: "the Tribunal must
20 accordingly begin by examining whether the amendment
21 requested by the Claimant's motion to add a new party
22 is compatible with the scope of the arbitration

1 clause, i.e., do the impugned measures relate to
2 Georgia Basin and are there credible allegations that
3 it has been damaged by reason of the alleged breaches
4 of Section A."
5 The *Merrill & Ring* tribunal denied the
6 motion to add Georgia Basin as a claimant because
7 doing so would not comport with the terms of the NAFTA
8 or Article 20 of the 1976 UNCITRAL Rules.
9 The tribunal's decision in that case
10 confirms Canada's position in this arbitration.
11 The challenged measures in this case do not
12 relate to the Claimant or its investments. The
13 Claimant and its investments have suffered no breach
14 of Section A and could not have incurred any loss or
15 damage.
16 In its Rejoinder, the Claimant accuses
17 Canada of acting in bad faith because in our Reply, we
18 wrote that it was "open to WCC to continue its NAFTA
19 claim."
20 There is no bad faith here. The Claimant
21 approached Canada requesting to substitute itself for
22 WCC in WCC's NAFTA claim. It was the Claimant that

1 sought to have WCC removed. In fact, what Canada did
2 not know at the time was that the Claimant had already
3 purchased WCC's NAFTA claim. Presumably, WCC was thus
4 already out of the picture well before the Claimant
5 approached Canada to substitute itself in for WCC.
6 These were not decisions made by Canada.
7 These were decisions made by the Claimant, and if the
8 Claimant wasn't directly aware, it should have been
9 aware that there is no mechanism under NAFTA Chapter
10 Eleven that allows a purported claimant to buy a NAFTA
11 claim from another investor and then pursue it.
12 For example, there is no case law under
13 NAFTA or otherwise that has allowed an investment
14 claim to be sold or transferred from one investor to
15 another; not one. Moreover, when Treaty partners wish
16 to establish a mechanism for the transfer of a claim,
17 they do so expressly such as in the case of
18 subrogation.
19 Canada made this point at Paragraph 130 of
20 its Reply, yet, like with so many other points raised
21 by Canada, the Claimant provides no response in its
22 written Pleadings.

1 Subrogation allows an investment claim to be
2 transferred by an investor to its insurer. The Host
3 State consents to the transfer, typically in the
4 investment treaty. An example of such a provision can
5 be found at Article 14.15 of the Canada-United
6 States-México Free Trade Agreement, which is RLA-066.
7 Subrogation provides an exception to the
8 general rule that a claim cannot be transferred. If
9 claims could be sold or transferred as in due course
10 or as a matter of course, a provision allowing
11 subrogation would not be necessary. The Claimant
12 should have been aware of NAFTA Chapter Eleven's
13 limitations, in particular with respect to the consent
14 to arbitrate before it decided to purchase WCC's NAFTA
15 claim.
16 But as I mentioned at the outset, the point
17 is moot in any event because WCC's NAFTA claim was
18 withdrawn and the Claimant filed its own.
19 I'd like to now discuss the sale of an
20 investment from one investor to another after the date
21 of an alleged breach. As I've mentioned, the Claimant
22 argues that under NAFTA the right to file a claim

1 under Section B transfers with the investment to the
2 new investor so long as the new investor is an
3 affiliate or there is a continuity of interest.
4 And my colleagues Ms. Van den Hof and
5 Ms. Dosman have already explained the proper
6 interpretation of Articles 1101, 1116 and 1117, which
7 leads to the conclusion we set out earlier, namely,
8 that the alleged breach must relate to the Claimant
9 and its investments. The Claimant and its investments
10 must be the subject of an alleged breach of Section A,
11 and the Claimant or its investments must have incurred
12 loss or damage.
13 I will not repeat what my colleagues have
14 already laid out, but I will address the case law the
15 Disputing Parties have filed concerning investments
16 that were sold or transferred after the date of an
17 alleged breach. And the case law is clear: When an
18 investor disposes of its investment after an alleged
19 Treaty breach arises, the transfer does not imbue the
20 subsequent owner with a right to advance the Treaty
21 claim.
22 For example, *Daimler v. Argentina*, the

1 Claimant had transferred its investment after the date
2 of an alleged breach, and subsequently filed the claim
3 relating to that investment. Argentina argued that
4 the right to file a claim transferred with the
5 investment. And, thus, the tribunal did not have
6 jurisdiction. The tribunal rejected that argument.
7 You can see up on the screen, the tribunal
8 recognizes the severability of a claim from the
9 underlying investment. The tribunal says that a
10 strong argument can be made that only an investor with
11 an investment prior to the dispute has standing to
12 file the claim. For this reason, the tribunal
13 rejected Argentina's argument that the right to file a
14 claim transferred with the investment.
15 The tribunal held at Paragraph 145 that it
16 should grant standing to the investor who suffered
17 damages as a result of the alleged breach.
18 The tribunal in *EnCana v. Ecuador* reached
19 the same result. In that case, the tribunal disagreed
20 with Ecuador and concluded that the right to advance a
21 claim remained with the investor that held the
22 investment at the time the dispute arose.

1 You can see on the screen it defined a
2 dispute at Paragraph 131 as "the taking of measures in
3 breach of the Treaty which cause loss and damage to an
4 investor." Canada notes that Professor Paulsson cites
5 the same paragraph with approval at Page 5 of his
6 Second Report.
7 In its Rejoinder, the Claimant argues that
8 the *EnCana* tribunal did not address whether the
9 purchaser of the investment could also assert a claim.
10 That is not what the Tribunal said. It said that the
11 investor that held the investment at the time of the
12 dispute could file a claim. Given that language, it
13 is hard to imagine how the purchaser of an investment
14 could also have a dispute.
15 Moreover, the Claimant's assertion that any
16 would-be purchaser of an investment should also be
17 able to file a claim would lead to an absurd result.
18 What if there are multiple subsequent
19 purchasers of the investment? Does each subsequent
20 purchaser get to file a claim?
21 In Canada's view, that does not make sense,
22 and is not what the tribunal in *EnCana* decided.

1 There are other examples as well. For
2 example, in *Mondev v. The United States*, the question
3 was whether Mondev had lost standing--sorry, lost
4 standing to bring a claim because it no longer owned
5 or controlled the investment. The tribunal found that
6 Mondev's loss of its investment did not also mean that
7 it lost its right to pursue a NAFTA claim.
8 Canada raised this case in its Reply, but
9 the Claimant did not address it in its Rejoinder. The
10 same result occurred in *Gemplus v. México*, where the
11 tribunal found that the investor that owned or
12 controlled the investment at the time of the alleged
13 breach retained the rights to bring the claim, despite
14 the fact that it had transferred the shares
15 constituting the investment after the alleged breach.
16 These cases all support the view that, when
17 a claimant sells its investment after the alleged
18 breach, the right to advance the claims remains with
19 the investor that owned and controlled the investment
20 at the time of the alleged breach. In contrast to
21 these cases, the Claimant cites four of its own, which
22 it argues establishes a rule the right to file a claim

1 transfers with an investment when it is sold or
2 transferred after the date of an alleged breach.
3 The Claimant is mistaken. Its four cases
4 are *Autopista*, *Koch Minerals*, *African Holdings*, and
5 *CME*. Neither *Autopista* nor *Koch Minerals* involve the
6 transfer of an investment after the date of an alleged
7 breach. There was, thus, no ratione temporis issue in
8 those cases. They are not applicable here.
9 In fact, in *Koch Minerals*--and Arbitrator
10 Douglas, I know you're on the tribunal, so you can let
11 me know if I get this wrong--but in *Koch Minerals* the
12 case--which is a case that Claimant relies on
13 heavily--the issue facing the tribunal was whether two
14 investments held individually by two investors could
15 nonetheless be considered as one integrated
16 investment. The tribunal agreed that it was one
17 integrated investment because the two investments had
18 a close nexus.
19 In the paragraph the Claimant cites, the
20 tribunal considers whether the investment could have
21 been integrated had the two investors not been
22 affiliated companies, but concluded that such an issue

1 was not present in the case.
2 The Claimant, thus, inaccurately cites *Koch*
3 *Minerals* for a proposition that it does not stand for.
4 The same is true in the next case they cite, which is
5 *African Holdings v. Congo*. The tribunal in that case
6 found that neither Claimant was an investor on the
7 date of the alleged breach. The tribunal, thus,
8 denied the claims on grounds of jurisdiction ratione
9 temporis.
10 The case, thus, supports Canada's position
11 in this Arbitration. In obiter dicta, which Professor
12 Paulsson confirms at Paragraph 60 of its First Report,
13 the tribunal opined that African Holdings, as assignee
14 of the Contract debts, could have had the same
15 interests as SAFRICAS, including with respect to the
16 investment claim.
17 However, the tribunal's statement is not
18 applicable here because, well, it is obiter and,
19 second, the tribunal made that comment because
20 SAFRICAS and African Holdings were affiliated
21 companies continuously owned by the same family.
22 Thus, even if the tribunal's comments in obiter are

1 relevant, the factual circumstances of that case are
2 different.
3 That leaves the Claimant with one last case,
4 which is *CME v. Czech Republic*. This is the only case
5 the Claimant cites that involved the transfer of an
6 investment from one investor to another after an
7 alleged breach. However, the facts and investment
8 treaty in that case are unique.
9 The investment in that case were shares in
10 an enterprise. The share transfer occurred from a
11 parent company to its subsidiary. The challenged
12 measures occurred both before and after the share
13 transfer. The Czech Republic argued for the first
14 time at the hearing that the claimant CME could only
15 challenge measures that occurred after it had acquired
16 the shares.
17 The tribunal disagreed on several grounds.
18 First, the tribunal recognized that the Czech Republic
19 had prospectively authorized the parent company to
20 transfer its shares to its subsidiary. It was, thus,
21 questionable for the Czech Republic to oppose
22 jurisdiction when it had authorized the share

1 transfer.
2 Second, the definition of "investment" under
3 the Treaty, which was the Dutch-Czech Republic BIT,
4 allowed for the rights derived from acquired shares to
5 qualify as part of the investment. The tribunal,
6 thus, found that by acquiring the shares, CME had
7 acquired all of the liabilities, rights, and
8 obligations of its parent company. There is no
9 similar definition of an "investment" under NAFTA.
10 Third, the tribunal concluded that the
11 investment treaty did not specify whether the
12 investment had to be owned or controlled by the
13 claimant at the time of the alleged breach. The
14 Treaty itself used quite loose language. This is in
15 contrast to NAFTA, which requires that a challenged
16 measure relates to the Claimant under Article 1101.
17 Moreover, the tribunal found that because
18 the parent company continued to hold the investment
19 indirectly, it did not matter under the Treaty that
20 the parent had transferred its shares to its
21 subsidiary because the parent remained protected
22 indirectly.

1 In other words, the parent company remained
2 protected as an investor from the moment of the
3 alleged breach through to the filing of the claim.
4 Those are not the circumstances here. For these
5 reasons, factually and legally specific to that case,
6 the tribunal rejected the Czech Republic's argument.
7 It is also worth noting that the tribunal's
8 decision is from nearly 20 years ago and has not been
9 followed by any tribunal, likely because the decision
10 was tailored to the unique facts and investment treaty
11 in that case.
12 In conclusion, the Claimant advocates for a
13 law on assignment of claims between two investors that
14 does not exist.
15 That is true whether the two investors are
16 affiliates or have a close continuity of interest.
17 I will now turn things over to my colleague,
18 Mr. Klaver, who will discuss the Claimant's continuity
19 of interest theory, barring any questions from the
20 Tribunal.
21 PRESIDENT BLANCH: Zac? And James? Thank
22 you.

1 SECRETARY FLECKENSTEIN: If I may, Madam
2 President, can I just update on time. I did update in
3 the chat function, and now Canada has about 13 minutes
4 left of its two-hour allotment.
5 MR. DOUGLAS: Okay. I think that is fine.
6 I think our last presentation is about 15 minutes. I
7 thought--well, we don't want you to talk fast, Mark.
8 Our tally is slightly shorter just given some of the
9 technical issues in the--so, with the grace of the
10 Tribunal, if we do go over by ICSID's count by a
11 couple of minutes, would that be okay?
12 PRESIDENT BLANCH: I'm going to make a
13 unilateral decision here and say that's fine, if it's
14 just a few minutes. And obviously, will grant the
15 same discretion to Claimants.
16 MR. DOUGLAS: Yes. Thank you very much.
17 Appreciate that.
18 MR. KLAVER: President Blanch, Arbitrator
19 Douglas and Arbitrator Hosking, as my colleague
20 Mr. Douglas explained, the Claimant contends that an
21 investment claim may be assigned in one of two
22 circumstances, first, between affiliates or, second,

1 between entities with a continuity of interest. I
2 will address the Claimant's asserted continuity of
3 interest. It is worth noting at the outset that the
4 Claimant's continuity-related arguments have shifted
5 significantly during this arbitration.
6 In its Counter-Memorial, the Claimant argued
7 the Tribunal had jurisdiction because the First Lien
8 Lenders provided a continuity of beneficial interest.
9 It did not specify what this meant or how it connected
10 to the applicable law. For his part, Professor
11 Paulsson referred to a continuity of beneficial
12 ownership. The Claimant also alleged the First Lien
13 Lenders controlled WCC and its assets without
14 specifying the timeline of this control.
15 In the Reply, Canada demonstrated that the
16 First Lien Lenders never beneficially owned WCC or its
17 assets.
18 In its Rejoinder, the Claimant did not
19 attempt a rebuttal to this point. It even withdrew
20 its reference to a beneficial interest.
21 Canada also showed that the First Lien
22 Lenders never controlled WCC or its assets. In its

1 Rejoinder, the Claimant next argued that the NAFTA
2 claim could be assigned due to a close continuity of
3 interest.
4 The term "continuity of interest" derives
5 from U.S. tax law. It relates to a Type G
6 reorganization, which the Claimant asserts, allows an
7 entity to restructure tax free. The Claimant never
8 referenced a continuity of interest in its
9 Counter-Memorial. It merely mentioned in two
10 sentences in the last paragraph of its Appendix A that
11 the transaction was structured to qualify as a Type G
12 reorganization. The Claimant did not explain how this
13 point related to its arguments on jurisdiction.
14 Yet, in its Rejoinder, the Claimant now
15 places much weight on the alleged continuity of
16 interest. If the Claimant was serious about this
17 argument, it would have fully presented it in the
18 Counter-Memorial.
19 Canada has had no opportunity to provide
20 Expert or other evidence on the Claimant's alleged
21 continuity of interest under U.S. tax law.
22 In addition, the Claimant again alleged that

1 the First Lien Lenders controlled WCC but now appeared
2 to limit the time of such control to the bankruptcy
3 process, not during the alleged breach.
4 Overall, then, the Claimant appears to use
5 the term "continuity of interest" in two ways: First,
6 as a term of art relating to its tax treatment and,
7 second, as a de facto notion of continuing interest
8 based on the First Lien Lenders' alleged control of
9 WCC and the bankruptcy process.
10 I will explain that both formulations of a
11 continuity of interest are irrelevant to establishing
12 this Tribunal's jurisdiction and, in any event, the
13 Claimant has not substantiated these assertions. I
14 will address the Claimant's assertions on tax
15 treatment and control separately.
16 Now, the Claimant does not explain how the
17 concept of a continuity of interest under U.S. tax law
18 is part of the applicable law to find jurisdiction
19 here. U.S. tax law is not the applicable law, which
20 of course is NAFTA and international law. NAFTA does
21 not contain a renvoi or a reference to domestic tax
22 laws for the purposes of establishing jurisdiction on

1 an assigned claim.
2 In fact, NAFTA Chapter Eleven does not use
3 the term "continuity of interest" at all. Moreover,
4 despite the Claimant insinuating that international
5 law applies this concept, not a single investment
6 decision on the record uses the term "continuity of
7 interest," not one, including any NAFTA case, nor does
8 any international law scholarship on the record use
9 the term "continuity of interest."
10 The Claimant has made up its own legal test
11 for the assignment of investment claims based on
12 concepts selectively chosen from domestic tax laws
13 that are not the applicable law here. It cannot
14 establish the Tribunal's jurisdiction on this basis.
15 Nonetheless, even if the Tribunal considered
16 that the Claimant's asserted tax treatment was somehow
17 relevant to the applicable law to find jurisdiction,
18 the Claimant did not submit reliable evidence to
19 establish the alleged continuity of interest. The
20 Claimant relies on its own self-judging and, frankly,
21 self-serving position that it had a continuity of
22 interest under U.S. tax law.

1 In its Rejoinder, it states the U.S.
2 Government views WCC and WMH as having a continuity of
3 interest. This is misleading. As with many areas of
4 tax, taxpayers make their own judgment calls about
5 which provisions they may qualify for. Only if they
6 are audited or a specific decision is sought from a
7 tax authority or court might there be an actual ruling
8 on the question.
9 WCC appears to have had no intention of
10 seeking a ruling from the Internal Revenue Services,
11 the IRS, or a Court on its tax treatment.
12 On the screen is an excerpt of the
13 disclosure statement that WCC filed with and was
14 approved by the Bankruptcy Court. This is
15 Exhibit C-044. The Claimant cites to this document to
16 support its new argument that the transaction was
17 designed to qualify for tax-free treatment.
18 Yet, the document states no opinion of
19 counsel was obtained on tax issues, there was no
20 intention to seek a ruling from the IRS, and WCC's
21 statements about the potential tax treatment were not
22 binding on the IRS or the courts, which could take a

1 different view. This completely undermines the
2 Claimant's assertion about the U.S. Government finding
3 a continuity of interest here.
4 Moreover, the Claimant filed no Expert
5 Report, judicial Decision, or other independent
6 evidence to confirm its alleged tax treatment. It
7 simply asks the Tribunal to take it at its word. Yet,
8 its unsupported assertions on self-judging tax
9 treatment do not constitute a reliable evidentiary
10 basis to find jurisdiction.
11 In this respect, it is revealing that the
12 Claimant never once mentions the Internal Revenue Code
13 by name. Instead, it refers generically to federal
14 law regarding reorganization in an apparent attempt to
15 blur the line between U.S. bankruptcy law on which
16 there is ample evidence before the Tribunal and U.S.
17 tax law on which there is paltry evidence.
18 The Claimant's inadequate evidence on its
19 tax treatment stands in stark contrast to the
20 legally-binding findings of the Bankruptcy Court on
21 the unaffiliated relationship between the Claimant and
22 WCC.

1 Accordingly, the Claimant's asserted tax
2 treatment do not establish this Tribunal's
3 jurisdiction. It is untethered to NAFTA, and the
4 Claimant does not offer reliable evidence to support
5 it.
6 And moving to the Claimant's de facto notion
7 of continuity, it argues that the First Lien Lenders
8 controlled WCC and the bankruptcy process without
9 explaining why this would be relevant to establishing
10 jurisdiction under NAFTA.
11 In fact, its assertions on control are
12 irrelevant for two reasons: First, the bankruptcy
13 occurred years after the alleged breach occurred, even
14 if the First Lien Lenders controlled WCC in the
15 bankruptcy in 2019, this could not establish that when
16 the alleged breach occurred in 2016 the Claimant was a
17 protected investor.
18 Second, the Claimant cannot establish
19 jurisdiction based on the First Lien Lenders' alleged
20 control because they are not the Claimant. The NAFTA
21 Parties offer their consent to arbitrate with only a
22 disputing investor. That is the claimant that files a

1 claim under Section B. Here, the disputing investor
2 is WMH, which has separate legal personality from its
3 owners.
4 NAFTA offers no mechanism for a tribunal to
5 derogate from customary international law by piercing
6 the corporate veil of a claimant to find jurisdiction
7 based on other parties who might have an interest in
8 the arbitration, such as a claimant's owners.
9 Canada and the Claimant both observe that
10 the definition of "investment of an investor of a
11 Party" refers to investments held indirectly by an
12 investor.
13 As the slide illustrates, the term
14 "indirectly" means a tribunal can look down the
15 corporate chain to determine if the claimant, the
16 relevant investor of a Party, owned or controlled the
17 investment through intermediaries. This is what the
18 tribunal did in *Waste Management II*.
19 However, this definition does not enable a
20 tribunal to look up the corporate chain to find
21 jurisdiction based on a claimant's owners. In this
22 respect, NAFTA is unlike the Treaty in *Perenco* between

1 France and Ecuador, which expressly authorized that
2 tribunal to find jurisdiction over a claimant of a
3 non-party if French shareholders control it.
4 This Tribunal, by contrast, has no basis
5 under NAFTA to pierce the Claimant's corporate veil to
6 find jurisdiction. Nonetheless, even if the Tribunal
7 sought to rely on the First Lien Lenders to find
8 jurisdiction, it would be unable to do so for three
9 main reasons: First, Ms. Coleman explained that on
10 the facts, the First Lien Lenders did not control WCC
11 or the bankruptcy process.
12 And rather than repeating her Expert
13 analysis here, I would point the Tribunal to
14 Paragraphs 12-14 and 20-27 of her Second Expert
15 Report. There, she also discusses how the Bankruptcy
16 Court confirmed that the First Lien Lenders did not
17 control WCC through the debt instruments. The
18 Claimant has not addressed the Court's determination
19 here.
20 Instead, it attempts to discredit
21 Ms. Coleman by misreading her comments on discussion
22 panels. This is completely ineffective. The Claimant

1 took her words out of context and chose not to
2 cross-examine her, revealing the frailty of its
3 arguments that the First Lien Lenders controlled WCC
4 and the bankruptcy.
5 The second flaw in the Claimant's bid to
6 establish jurisdiction based on the First Lien
7 Lenders' alleged control is that it has not identified
8 who all of the First Lien Lenders are. It merely says
9 that they included certain entities. We don't know
10 how many other lenders there may be and what their
11 interests in the Claimant might be.
12 Third, under the Claimant's theory of
13 jurisdiction, continuous U.S. nationality is critical
14 to upholding this claim. Yet, the Claimant offers no
15 evidence of the First Lien Lenders' U.S. nationality.
16 It does not confirm whether any other unidentified
17 First Lien Lenders have or lack U.S. nationality. Nor
18 does the Claimant clarify whether the Tribunal might
19 need to pierce the veil of the First Lien Lenders, to
20 ensure their beneficial owners have U.S. nationality.
21 Canada raised these concerns in its Reply at
22 Paragraph 119, but the Claimant left them unanswered.

1 Its case rests on unsupported claims of control by an
2 unspecified group of entities whose nationality it has
3 not proven. This is no way to establish jurisdiction
4 under NAFTA.
5 Thus, the Claimant's assertions of a
6 continuity of interest are unavailing because its
7 claims about tax treatment and control are irrelevant
8 and unsubstantiated.
9 To conclude Canada's Opening today, the
10 Claimant cannot establish this Tribunal's jurisdiction
11 because it was not an investor of a Party when the
12 alleged breach occurred, nor can the Claimant overcome
13 this fundamental flaw in its claim with its shifting
14 various bits to find a connection with WCC, a separate
15 enterprise with which it was unaffiliated.
16 Thank you. I would now welcome any
17 questions from the Tribunal.
18 PRESIDENT BLANCH: What I suggest we
19 do--unless there is any imminent burning
20 questions--James? And Zac? I suggest we now take our
21 10-minute break. And then, if the Tribunal have any
22 questions after the break, we will raise them.

1 Otherwise, we'll then go into the Claimant's Opening
2 Statement. So, it is now quarter to 2:00, so we will
3 have a 10-minute break until 5 to.
4 Thank you very much.
5 MR. KLAVER: Thank you.
6 (Brief recess.)
7 PRESIDENT BLANCH: Well, firstly, I just
8 want to apologize to Mr. Feldman and his team. I hope
9 I didn't give you too much of a shock when I suggested
10 we might be only having a 10-minute break before we
11 went straight into your Opening Submissions. I do
12 apologize. But hopefully now we've had our break, and
13 you are ready to start.
14 And, like we did for the Respondent, if you
15 need a couple of minutes extra--I think they went two
16 or three minutes over, and obviously it's the same for
17 you.
18 MR. FELDMAN: Thank you. We expect to be
19 considerably under. We are particularly deferential
20 in this situation to Mr. Hosking because I'm happy to
21 say good afternoon, perhaps evening to everybody else,
22 but for him it is still morning, I think.

1 So, with due apologies, would you like me to
2 begin?
3 ARBITRATOR HOSKING: Thank you. No problem.
4 (Interruption.)
5 (Stenographer clarification.)
6 MR. FELDMAN: I'll try to stay close to the
7 microphone.
8 OPENING STATEMENT BY COUNSEL FOR CLAIMANT
9 MR. FELDMAN: Thank you very much. I'm
10 Elliot Feldman, Baker Hostetler, representing
11 Westmoreland, and, again, good afternoon to everyone
12 except, unfortunately, for Mr. Hosking.
13 The NAFTA tribunal in *Grand River v. United*
14 *States* confronted with the dispute over jurisdiction
15 concluded that: "Investment Tribunals have declined
16 to adopt a method whereby one of the Parties carries
17 the burden of proof in matters of jurisdiction. They
18 have adopted a different approach to deciding whether
19 jurisdiction exists. Under this method, the
20 decision-maker looks at the preponderance of authority
21 for or against jurisdiction."
22 This is in our exhibits, RLA-030, Page 17,

1 Paragraph 37.
2 The tribunal went on to say that: "A focus
3 on burden of proof is not the correct approach."
4 Canada, however, brought the motion to deny
5 jurisdiction as a defense against Westmoreland's
6 claim, and, therefore, Canada does have a burden of
7 proving its defense. As international law prefers not
8 to deny access to justice, this Tribunal must require
9 Canada to meet its burden.
10 Let's assume, as we must for this
11 jurisdictional proceeding, that Canada did breach
12 NAFTA, a condition we expect to prove in the merits
13 phase of this Arbitration. Let's then suppose a
14 scenario that is not exactly the one here but could
15 have been. Let's suppose that Canada's breach of
16 NAFTA caused Westmoreland's bankruptcy. Finally,
17 let's suppose Canada's version of the bankruptcy, that
18 the company that emerged, albeit still American, does
19 not have continuity with the company that entered
20 bankruptcy.
21 In this scenario, as Canada would have it,
22 there would be no compensation possible for Canada's

1 breach. Canada would enjoy a complete windfall by
2 putting the company out of business. The message
3 would be that, if there were to be a breach, Canada
4 ought to breach completely, thoroughly, enough to
5 destroy the company so that it would have no recourse,
6 the very definition of a denial of access to justice.
7 We think such a scenario, as
8 Professor Paulsson also suggested, is perfectly
9 plausible. This scenario doesn't square with the
10 facts here. The breach didn't cause Westmoreland's
11 bankruptcy. We are not arguing the contrary. The
12 company that emerged from bankruptcy is the product of
13 a Type G reorganization that deliberately and
14 specifically assured continuity of interest, and the
15 most important facts are those required by the Treaty.
16 The investment was Canadian at the time of
17 the breach, was unchanged through and after
18 bankruptcy, always Canadian. The owners at the time
19 of the breach were American. They remained American
20 through and after the bankruptcy.
21 The Claimant, owner of the Canadian
22 investment, was American at the time of the breach and

1 at all subsequent times including when the claim was
2 made.
3 This diversity, American owners of a
4 Canadian investment, the essential requirement of the
5 Treaty and of its purpose to protect and encourage
6 foreign investment applied here at all times. No one
7 shopped the claim. No one manipulated the bankruptcy
8 in order to obtain a claim they otherwise might not
9 have had.
10 Even in a scenario where Canada could have
11 breached and driven the company out of business,
12 access to justice would have required acceptance of
13 jurisdiction. But with the facts here, denial of
14 access to justice would be extreme and unjustified.
15 The Vienna Convention requires starting with
16 the plain language of the Treaty. Although more than
17 50 times in its Memorial--and I've lost track of how
18 many times this morning--Canada invokes the phrase "at
19 the time of the alleged breach." That phrase does not
20 exist in NAFTA.
21 Canada wants the Treaty to say that the
22 Westmoreland, as Claimant, has to be identical to the

1 Westmoreland "at the time of the alleged breach," but
2 NAFTA doesn't say so.
3 My partner Mike Snarr is going to provide
4 the detail of what the Treaty does and doesn't say and
5 explain why Canada's ratione temporis argument has no
6 place in NAFTA. He will also address the applicable
7 international jurisprudence to show that Canada finds
8 no support there for its argument, neither in NAFTA
9 nor in any other Treaty.
10 He will explain that the damages here are
11 falling mostly on the Claimant, the Westmoreland that
12 has brought the Claim, because the stream of revenue
13 to pay for land reclamation has been cut off by
14 Alberta's measures impacting most of all over the next
15 decade.
16 And, finally, he will show that there was no
17 prejudice to Canada in dismissing its defense
18 questioning jurisdiction over a claim arising from an
19 American investment in Canada.
20 My partner Paul Levine will follow Mr. Snarr
21 to explain the continuity of interest preferred in
22 international law, as Professor Paulsson has testified

1 in two Expert Opinions, and the continuity of interest
2 reserved in the Type G reorganization under the U.S.
3 Tax Code in this case.
4 Canada, generally neglecting the tax
5 implications of bankruptcy and the applicable rules,
6 would like this case to be all about a bankruptcy that
7 forfeited a claim, notwithstanding that a Type G
8 reorganization expressly preserves lender control.
9 Canada, denying the continuity of interest inherent in
10 this type of reorganization, would like to use the
11 bankruptcy to escape the responsibility thrust upon it
12 by its rogue province and to deny access to justice by
13 celebrating form over substance.
14 Canada this morning argued that the Type G
15 reorganization is irrelevant because U.S. tax law is
16 irrelevant. Yet, Canada's jurisdictional objection is
17 all about U.S. bankruptcy law, the very law even
18 Ms. Coleman acknowledged is not the applicable law
19 here.
20 Canada likes to talk about not having things
21 both ways. Either domestic law is relevant or it
22 isn't. Professor Paulsson has explained that

1 international law, the applicable law, disfavors form
2 over substance. But Mr. Levine will add that in this
3 case, even if form were preferred, we should prevail.
4 Westmoreland satisfies the Treaty's
5 requirements for diversity of investor and investment.
6 The instances where international tribunals have
7 dismissed for ratione temporis all have been concerned
8 about Treaty manipulation, shopping for claims,
9 conditions and circumstances bearing no resemblance to
10 the case here.
11 Messrs. Snarr and Levine will both
12 distinguish those cases. Investment in Canada was
13 owed protection when Canada breached the Treaty, and
14 nothing ever happened or changed that should or could
15 release Canada from those Treaty obligations.
16 I'm happy now to invite Mr. Snarr to
17 continue.
18 MR. SNARR: Good afternoon, Members of the
19 Tribunal. Can you hear me all right?
20 Okay. I'm Mike Snarr, Counsel for
21 Westmoreland Mining Holdings. I will speak for about
22 30 minutes on the NAFTA Treaty text and the principles

1 that emerge from the arbitration decisions that have
2 been briefed by the Parties.
3 Next slide, please.
4 The Tribunal must decide first whether the
5 terms of the NAFTA Treaty prohibit Westmoreland's
6 claim, as Canada has argued. If they do not, then the
7 Tribunal must decide whether there is a prohibition in
8 customary international law. Assuming such a
9 prohibition exists, the Tribunal must decide the scope
10 of that prohibition and its application to the unique
11 facts of this case.
12 Westmoreland has explained that the
13 jurisdictional objection, as strictly and narrowly
14 articulated by Canada is not found in the language of
15 the NAFTA Treaty terms. Applying ratione temporis to
16 the facts of this case, as it has been applied in
17 other investment arbitration cases, the Tribunal has
18 jurisdiction, and Westmoreland's claim should go
19 forward.
20 There is no dispute that the elements of a
21 foreign investor having a foreign investment are
22 essential to trigger a Respondent State's foreign

1 investment protection obligations under NAFTA or
2 bilateral investment treaties. It is required by the
3 ordinary meaning of the terms of NAFTA and is
4 recognized by investment arbitration tribunals that
5 have considered other investment treaties.
6 This is the diversity of nationality that is
7 at the heart of foreign investment protections under
8 international law. The precondition that, in effect,
9 puts a Host State on notice that treaty obligations
10 are active and that its conduct towards the foreign
11 investment and its investor must be guided by the
12 terms of the Treaty.
13 What Canada argues in its ratione temporis
14 jurisdictional objection is not just that a foreign
15 investment and investor must exist, but that the
16 corporate form of the investor may never change from
17 what it was at the time of the breach and, by
18 extension, that the corporate form of the investment
19 may never change from what it was at the time of the
20 breach if the foreign investment and investor hope to
21 preserve the activated treaty rights to which they are
22 entitled.

1 Canada argues that a foreign investor
2 company must be the same entity in its same form,
3 regardless of whether its operations or anything else
4 about it might be the same.
5 Canada presents this rule as one that
6 applies without regard to circumstances, international
7 law policies, consequences, or prejudice. One might
8 expect that a strict, absolute rule like this which
9 limits the rights of an investor and investment
10 post-breach, would be well-defined in the terms of the
11 Treaty such that it could just be quoted directly, or
12 that there might be some official Treaty
13 interpretation articulated and agreed among the
14 drafters, saying that the rule is embodied in a
15 particular passage of the NAFTA text. But there is no
16 such text in NAFTA, nor any official statement of
17 interpretation by the NAFTA Free Trade Commission to
18 that effect.
19 Next, please.
20 For all of Canada's references in its
21 Memorials to the phrase "at the time of the alleged
22 breach," neither that phrase nor any similar to it is

1 found in NAFTA's Chapter Eleven. You will see on the
2 slide here the text of Articles 1116 and 1117, but
3 modified as shown in the text highlighted in red.
4 Article 1116, which speaks to the submission
5 of claims, does not say that an investor of a Party
6 may submit to arbitration under this Section A Claim,
7 provided that the investor is the same national or
8 enterprise as it existed at the time of the breach.
9 Those words would have to be added to the
10 text as shown here. The text of Article 1117
11 similarly lacks such "at the time of the breach"
12 language. It does not say that "an investor of a
13 Party on behalf of an enterprise of another Party may
14 submit to arbitration under this Section A claim,
15 provided that the investor is the same national or
16 enterprise as it existed at the time of the breach and
17 that the enterprise is the same enterprise as it
18 existed at the time of the breach."
19 Moreover, the text of Article 1117 is
20 configured so that a claimant/investor may make a
21 claim, not on its own behalf, as in Article 1116, but
22 on behalf of a foreign enterprise that it owns based

1 on a breach and damages that accrue to the foreign
2 enterprise. Canada contends that investments--let's
3 go back one slide, please. Thanks.
4 Canada contends that investments are not
5 owed obligations and that Article 1117 does not allow
6 the foreign investor who owns the investment to make
7 the claim on its behalf. But it should be noted that
8 the obligations of Articles 1102 and 1105 expressly
9 apply to investments, and Article 1135 provides that
10 any award for restitution or compensation under
11 Article 1117 is to be paid to the investment
12 enterprise, not the claimant, suggesting that an
13 investment enterprise is owed obligations, and may be
14 owed damages, provided it is owned by a foreign
15 investor who submits the claim.
16 Now, let's go to the next slide.
17 The tribunal in *Waste Management II* chaired
18 by Professor James Crawford wrote: "Where a treaty
19 spells out in detail and with precision the
20 requirements for maintaining a claim, there is no room
21 for implying into the Treaty additional
22 requirements..."

1 The NAFTA drafters were capable of writing
2 temporal limitations into the Agreement when they
3 intended to do so.
4 Next slide.
5 Article 1117(2) contains a three-year
6 statute of limitation for claims made by an investor
7 on behalf of its investment enterprise, tying that
8 date to the enterprise's first knowledge of the breach
9 and damage incurred.
10 Article 1116(2) similarly contains a
11 three-year statute of limitations for claims made by
12 the investor on its own behalf.
13 Article 1108(4) shows the kind of language
14 that might have been used in Articles 1116 and 1117
15 had the NAFTA Parties intended an "at the time of the
16 breach" limitation as argued by Canada. 1108(4)
17 states: "No Party may, under any measure covered by
18 Annex 2, require an investor of another party by
19 reason of its nationality to sell or otherwise dispose
20 of an investment existing at the time the measure
21 becomes effective."
22 Next slide, please.

1 Professor Paulsson wrote in his first Expert
2 Report that it is indeed a leap, and not a necessary
3 inference, that the foreign investor submitting the
4 claim must be the same foreign investor that owned the
5 foreign investment at the time of the breach. He
6 added: "Such a significant dispositive rule would
7 surely have been spelled out. Leaving it open means
8 that the answer depends on the factual context and its
9 effect on the policies that underlie the Treaty."
10 No such dispositive rule is spelled out in
11 NAFTA. Canada therefore invites the Tribunal to see
12 Articles 1116 and 1117 through the lens of Canada's
13 interpretation of Article 1101 in order to read an "at
14 the time of the breach" requirement into the Treaty.
15 Next slide.
16 To do that, the Tribunal has to ignore the
17 fact that Article 1101 similarly lacks an "at the time
18 of the breach" clause and to interpret the phrase
19 "measures adopted or maintained by a Party relating to
20 investors of another Party" as imposing such a
21 requirement.
22 Canada offers no Free Trade Commission

1 formal statements of interpretation of Article 1101,
2 nor any legislative statements contemporaneous to the
3 NAFTA Parties' adoption of the Treaty, that would
4 support that view. The ordinary meaning of "measures
5 adopted or maintained by a Party relating to" is that
6 the measures must relate to the investor or the
7 investment. The only way that language of
8 Article 1101 could be read as a jurisdictional bar is
9 if there were no circumstances under which the
10 breaching measures related to Westmoreland and
11 Prairie.
12 Canada argues that the Off-Coal Agreements
13 could not relate to Westmoreland Mining Holdings
14 because Westmoreland Mining Holdings is a different
15 entity than the one that existed at the time of the
16 breach.
17 We do not agree that measures relating to
18 Westmoreland Coal Company do not or could not relate
19 to the Company emerging from the Westmoreland
20 bankruptcy, given the continuity of interest between
21 them. Yet, even if one assumed that the relation of
22 the measures to the Westmoreland Coal Company must be

1 disregarded, we have made a prima facie showing that
2 the measures do relate to both Westmoreland Mining
3 Holdings and Prairie in the present.
4 We have explained that the Off-Coal
5 Agreements ensure that Prairie's mines will close no
6 later than 2030. The Off-Coal Agreements are measures
7 that continue to be maintained by Alberta as
8 compensation to the Albertan utilities to stop using
9 Prairie's coal. These payments are being provided to
10 the Albertan utilities in 14 annual installments that
11 began in 2016. The closure of the coal-fired
12 electricity units is being accelerated, leading to
13 earlier closures of Prairie's mines, increased revenue
14 losses, and increased coalmine reclamation costs.
15 These losses affect Westmoreland Mining
16 Holdings' investment in Prairie, stranding its
17 capital. Westmoreland Mining Holdings is losing and
18 will continue to lose revenue as a result of the
19 Off-Coal Agreements compelling the early mine
20 closures, even assuming that some of the mines hold on
21 until 2030. These facts as pled should be accepted by
22 the Tribunal pro tempore in this proceeding. Canada

1 may disagree with them, but to the extent there is a
2 factual dispute about them, that question should be
3 addressed in the merits phase of the Arbitration.
4 Article 1101 provides no text to support an
5 "at the time of the breach" clause, nor does any
6 interpretation of "relating to" provide a basis for
7 denying the Tribunal's jurisdiction over this claim.
8 NAFTA Chapter Eleven does have a number of
9 express proscriptive requirements: The three-year
10 statute of limitations, waivers of resolution of
11 disputes in other fora, diversity of nationality. But
12 "at the time of the alleged breach" is not one of
13 them. It is not for the Tribunal to infer additional
14 proscriptions in the Treaty text, and there is no
15 support for the view that additional proscriptions
16 were intended.
17 Next slide, please.
18 When Canada says at Paragraph 44 of its
19 Memorial that Westmoreland Mining Holdings was not a
20 protected investor when the alleged breaches and
21 resulting damage occurred because it was not
22 constituted until January 31, 2019, it presents an

1 unrealistic static view of "investment" that, for at
2 least two reasons, is incongruent with the Treaty's
3 terms, object, and purpose.
4 First, damages do not always occur all at
5 once and all at the time of the breach, which is why
6 the statute of limitation in Paragraph 2 of
7 Articles 1116 and 1117 distinguishes between the time
8 when an investor or investment has knowledge of the
9 alleged breach and the time when there is knowledge
10 that damage has been occurred.
11 Article 1101 also refers to "measures
12 adopted" and "measures maintained," reflecting the
13 fact that some measures may infringe Chapter Eleven
14 protections and cause damage for some time after they
15 were adopted. In this case, damages are being
16 incurred after the Westmoreland bankruptcy and will
17 continue to be incurred by Westmoreland Mining
18 Holdings.
19 Second, the cases addressed in Professor
20 Paulsson's First Expert Witness Statement and by the
21 Parties in the Memorials demonstrate that is not
22 uncommon for companies with foreign investments to

1 change their corporate structures over time. Canada's
2 interpretation of the Treaty requires that an investor
3 could never change its corporate form post-breach and
4 still maintain a claim to protection under the Treaty
5 because a different corporate form means a different
6 person, a different investor, and, logically, the same
7 would have to apply to an individual who dies and
8 whose heirs inherit ownership of the investment.
9 Canada seems to adopt the view, without
10 exception, that an investor with a different corporate
11 form or person would have no rights with respect to
12 events that had occurred previously, regardless of the
13 connections.
14 Next slide.
15 That narrow interpretation of the NAFTA
16 Chapter Eleven Treaty requirements is not supported by
17 the Treaty text and makes no practical sense given the
18 object and purpose of the Treaty. NAFTA was an
19 historic agreement for economic integration among
20 three of the world's largest economies. The
21 investment chapter was adopted in step with an
22 emerging growth of bilateral investment treaties

1 around the world and with the objective to increase
2 substantially investment opportunities in the
3 territories of the Parties, to eliminate barriers to
4 trade, and to promote conditions of fair competition.
5 A static view of foreign investments, that they and
6 their investors must be frozen in time to be worthy of
7 protection, would frustrate those objectives. NAFTA's
8 Chapter Eleven provided assurances from the Member
9 States not only that fundamental norms of fairness,
10 equity, and nondiscrimination would be extended to
11 NAFTA-country foreign investors, but also that those
12 standards would be enforceable through a private right
13 of action for the settlement of disputes.
14 The notion that such assurances and
15 protections could be cut off because the foreign
16 investor changed its corporate structure through
17 bankruptcy, even while acting in good faith and
18 without abusing the treaty's nationality requirements,
19 is capricious. It runs contrary to a State obligation
20 of good faith that should be a baseline presumption
21 for interpreting the ordinary meaning of a treaty's
22 terms in international law.

1 The requirements of a foreign investor and a
2 foreign investment are stated clearly enough in the
3 treaty text, and those express prescriptions provide
4 complete explanations for the decisions in the NAFTA
5 cases that Canada cites for its jurisdictional rule.
6 Next slide, please.
7 I'll pause here for a moment to allow the
8 Tribunal to ask any questions if it has them.
9 PRESIDENT BLANCH: James?
10 ARBITRATOR HOSKING: No.
11 PRESIDENT BLANCH: Zac?
12 ARBITRATOR DOUGLAS: No.
13 PRESIDENT BLANCH: No. Thank you.
14 Please continue.
15 MR. SNARR: Before looking at NAFTA cases
16 upon which Canada principally relies, it is worth
17 referring again to Professor Paulsson's First Expert
18 Report in which he cautions against treating
19 arbitration awards, let alone select passages
20 extracted from them, as legal precedents. In most
21 cases, the reader of an alleged precedent is most
22 likely to be influenced by the reasons which

1 arbitrators say led them to the outcome for which they
2 have taken personal responsibility ex-officio. That
3 is where, one reasonably surmises, they
4 exhibit particular care.
5 So the text of an award should not be read
6 like the terms of a treaty. The factual context of a
7 case, the rationale for the holding, and the
8 persuasiveness for the rationale when applied in other
9 contexts are critical to making valuable use of prior
10 Decisions.
11 Next slide, please.
12 Let's look now at *Gallo* and *Mesa Power*, the
13 two NAFTA cases on which Canada principally relies.
14 In *Gallo*, the American claimant said he owned a
15 Canadian Enterprise, 1532382 Ontario Inc., which owned
16 the Adams Mine Site in Northern Ontario, which had
17 been abandoned and was to be used as a waste disposal
18 site.
19 He claimed that he had acquired the
20 enterprise through a Canadian agent, Mr. Cortelluci,
21 who had purchased it for Mr. Gallo from another
22 Canadian company, Notre Development Corporation.

1 There is a dispute about whether Mr. Gallo had really
2 purchased the Canadian Enterprise in 2002 through
3 Mr. Cortelluci before Ontario passed legislation in
4 2004 prohibiting the Adams Mine from being used as a
5 landfill.
6 The *Gallo* tribunal gave a detailed
7 recitation of facts showing there was no evidence that
8 Mr. Cortelluci truly acted as Mr. Gallo's agent in
9 2002 to acquire the mine. We refer to some of them in
10 our Counter-Memorial starting at Paragraph 52, and a
11 number of them are showing on the slide here.
12 Based on those facts, at the time of the
13 Ontario legislation in 2004, Adams Mine, the
14 investment, was owned by a Canadian company and
15 acquired by a Canadian businessman. Adams Mine was
16 just a domestic investment owned by a domestic
17 investor.
18 Next slide, please.
19 The *Gallo* tribunal noted that
20 Article 1101(1) limits Chapter Eleven protection to
21 measures that relate to investors of another Party and
22 investments of another Party. It wrote: "for

1 Chapter 11 of the NAFTA to apply to a measure relating
2 to an investment, that investment must be owned or
3 controlled by an investor of another Party, and
4 ownership or control must exist at the time the
5 measure which allegedly violates the Treaty is adopted
6 or maintained."
7 That sentence reflects an appropriate
8 interpretation of Article 1101. There must be an
9 investor of another Party owning an investment in the
10 host country at the time of the breach for the treaty
11 obligations to be activated so that Chapter Eleven
12 protections apply to the measures in question. That's
13 not to suggest that the use of the word "and" in that
14 statement was necessarily predetermined by the *Gallo*
15 tribunal, but it is to suggest that the language of
16 these awards has to be considered carefully and in
17 their broader context. And as articulated there, that
18 statement surely is correct and consistent with the
19 terms of NAFTA.
20 Without a foreign investor or foreign
21 investment, in *Gallo*, no NAFTA foreign investment
22 treaty protections were activated in relation to the

1 Ontario legislation. There could be no NAFTA claim
2 without a NAFTA obligation.
3 Next slide, please.
4 The rationale for the decision was expressed
5 clearly in Paragraph 331 of the Award: "Investment
6 treaties confer rights to foreign investors which are
7 unavailable to nationals of the host country. Policy
8 reasons mandates that the privileged rights conferred
9 to the former are no abused by the latter, in
10 violation of the stated objectives of the
11 international treaty."
12 Mr. Gallo argued that he could make a claim
13 on behalf of enterprise investment under Article 1117.
14 But even under Article 1117, there was no scenario in
15 which the Treaty had been activated in relation to the
16 measures and the investment. The tribunal explained
17 that the enterprise investment could not be nursing a
18 nascent NAFTA claim if the enterprise was not under
19 the control or ownership of a NAFTA-protected person
20 when the alleged breach occurred.
21 Next slide.
22 The *Gallo* tribunal said: "In a claim under

1 Article 1117 the investor must prove that he owned or
2 controlled directly or indirectly the 'juridical
3 person' holding the investment at the critical time."
4 The "he" in that sentence should be
5 interpreted as literally Canada would like. The *Gallo*
6 tribunal was not confronted with the same facts
7 presented by this case, where at the time of the
8 breach there was an American investor owning a foreign
9 investment which had activated Canada's NAFTA foreign
10 investment protection obligations, and the foreign
11 investment has, at all relevant times, continued to be
12 owned by an American investor, and the investor
13 entities have a continuity of interests between them.
14 Next slide, please.
15 Canada quotes the *Gallo* Award
16 saying: "Investment arbitration tribunals have
17 unanimously found that they do not have jurisdiction
18 unless the claimant can establish that the investment
19 was owned or controlled by the investor at the time
20 when the challenged measure was adopted."
21 That statement, as you will see in the
22 passage that follows on the slide, noted in Professor

1 Paulsson's Expert Report, is too broad for the facts
2 and not the actual holding or ratio decidendi of the
3 *Gallo* case. Mr. Gallo was the only person claiming to
4 be an American investor for the alleged foreign
5 investment, and therefore "he" needed to have owned or
6 controlled the investment at the time of the breach.
7 The case turned on the tribunal seeing
8 through the pretenses of a sham agency relationship
9 between Mr. Gallo and Mr. Cortelluci that did not, in
10 fact, produce the critical elements of a foreign
11 investor owning a foreign investment at the time of
12 the breach. Hence, the Tribunal declined to hear a
13 contrived Treaty claim.
14 Next slide, please.
15 In *Mesa Power Group v. Canada*, the American
16 claimant company had challenged measures that
17 allegedly impacted four wind-farm investments that it
18 owned in Southwestern Ontario. Some of the measures
19 had occurred in September 2009, prior to the formation
20 of the wind farm project corporations beginning in
21 November 2009. The claimant was not able to establish
22 that it was seeking to make or had made its foreign

1 investments prior to that time, so the tribunal
2 concluded that those measures were not actionable in
3 the claim, although the tribunal made clear that the
4 pre-investment measures could be considered for the
5 background and context of the remaining measures that
6 were actionable in the claim.
7 The *Mesa Power* tribunal explained: "There
8 is no jurisdiction if disputed measures are not
9 'relating to investors' or to 'investments of an
10 investor.' In addition to these express provisions of
11 Chapter 11, the same conclusion arises as a general
12 matter from the principle of nonretroactivity of
13 treaties. State conduct cannot be governed by rules
14 that are not applicable when the conduct occurs."
15 So here, again, there was no foreign owned
16 investment in existence at the time of the alleged
17 NAFTA Chapter Eleven breach.
18 Without a foreign investment, no NAFTA
19 foreign investment treaty protections were activated
20 in relation to the Ontario legislation. There could
21 be no NAFTA claim as to measures for which there had
22 been no NAFTA obligation.

1 This case is materially different from *Mesa*
2 *Power* because, as everyone agrees, there was an
3 American investor owning the foreign investment at the
4 time of the alleged breach, and the existence of a
5 foreign investor and investment had activated Canada's
6 NAFTA foreign investment protection obligations. The
7 ordinary terms of the Treaty require the existence of
8 a foreign investor and investment at the time of the
9 breach, but they do not require that the foreign
10 investor submitting the claim be the identical
11 corporate entity that was the foreign investor at the
12 time of the alleged breach.
13 Canada has cited to B-*Mex v. México*, but
14 that case has no analytical value to the question
15 before the Tribunal because the disputing parties
16 stipulated and agreed that the claimants had to have
17 owned the investment at the time of the breach, and
18 the tribunal accepted that stipulation and cited to
19 *Gallo* in support. We have already addressed the terms
20 of the *Gallo* decision.
21 Canada has presented cases arising under
22 investment treaties other than NAFTA in support of its

1 objection. All the cases follow the basic requirement
2 that there must be a foreign investor and a foreign
3 investment in order for the Host State's treaty
4 obligations to be activated. None of the cases
5 supports application of the strict jurisdictional rule
6 that Canada promotes to the facts, the unique facts of
7 this case.
8 Some of Canada's cases and others that we
9 have offered for the Claimant show that tribunals have
10 held jurisdiction of claims in cases where ownership
11 of a claim or investment has been transferred from one
12 corporate entity, or one person, to another.
13 Next slide, please.
14 The key principles that emerge from the
15 arbitration awards briefed by the Parties are that a
16 transfer of ownership or corporate restructuring that
17 is a sham or an abuse of investment protection rights
18 will not be sustained. Forum shopping among
19 investment treaties is not acceptable. Claimants
20 should not be allowed to restructure in order to
21 obtain investment treaty rights that otherwise would
22 not exist for the investor and its investment.

1 Where there has been a bona fide investment,
2 the corporate restructuring or transfers are taken for
3 ordinary business purposes, and there is a continuity
4 of interest, a closeness between the investor and
5 investments. Such a restructuring or transfer does
6 not divest the Tribunal of jurisdiction over an
7 investment Claim.
8 Next slide, please.
9 For example, in *CME v. Czech Republic*, the
10 tribunal stated: "The Respondent's view that the
11 transfer of shares deprived the Claimant of the
12 protection under the Treaty because the investment
13 changed hands from one Dutch Shareholder to the other
14 is not convincing...any claims deriving from the
15 Claimant's predecessor's investment (also covered by
16 the Treaty) follow the assigned shares. If the Treaty
17 allows, as it does, the protection of indirect
18 investments, the more the Treaty must continuously
19 protect the parent company's investment assigned to
20 its daughter company under the same Treaty regime."
21 Next slide.
22 In *Koch Minerals and Koch*

1 *Nitrogen v. Venezuela*, the tribunal said the question
2 of "[The transfer] could have raised difficulties here
3 but for one important factor. The assignment from
4 KOMSA to KNI was an internal reorganization between
5 associated companies within the same Koch group of
6 companies. It did not introduce an unrelated third
7 party or materially change the transaction, nor could
8 it have done so given Articles 11.4 to 11.5 of the
9 Offtake Agreement. The Respondent does not challenge
10 the efficacy of the assignment under the Offtake
11 Agreement. Hence, although different in form, given
12 the different legal personalities of KOMSA and KNI,
13 the assignment produced no material economic, legal,
14 or commercial difference in substance."
15 Next slide, please.
16 In *S.D. Myers v. Canada*, a NAFTA case, the
17 tribunal said at Paragraphs 229 and 230: "[T]he
18 Tribunal does not accept that an otherwise meritorious
19 claim should fail solely by reason of the corporate
20 structure adopted by a Claimant in order to organize
21 the way in which it conducts its business affairs.
22 The Tribunal's view is reinforced by use of the word

1 'indirectly' in the second of the definitions quoted
2 above. The uncontradicted evidence before the Tribunal
3 was that Mr. Stanley Myers had transferred his
4 business to his sons, so that it remained wholly
5 within the family, and that he had chosen his son
6 Mr. Dana Myers to be the controlling person in respect
7 of the entirety of the Myers family's business
8 interests."
9 There is ample evidence in customary
10 international law that investors may undertake
11 corporate restructuring that would transfer
12 investments at Treaty claims, provided that diversity
13 of nationality is maintained and no unfair advantage
14 is obtained by the transfer in relation to the Host
15 State.
16 Next slide, please.
17 Canada's focus on the specific identity of
18 the investor runs into conflict with cases where
19 Tribunals have considered the chain of ownership
20 between the investor and its investment. The context
21 is different, but the principles are similar.
22 Professor Paulsson raised *Perenco v. Ecuador*

1 as an example where the Bahamian corporate claimant
2 sought to invoke the France-Ecuador BIT which granted
3 standing to non-French entities if they were
4 controlled by French shareholders.
5 The claimant however was not French-owned,
6 and although its parent company was opened by French
7 shareholders, it was not owned by them when the ICSID
8 Arbitration had been initiated due to a delay in the
9 transfer shares through an inheritance. The tribunal
10 found it had jurisdiction, saying that international
11 law does not permit formalities to triumph over
12 fundamental realities.
13 It was satisfied that there was the
14 transfer--it was satisfied that there was the transfer
15 occurring, could have happened at any time, and the
16 reality that there was a French ownership of the
17 shares to support jurisdiction.
18 Next slide, please.
19 Professor Paulsson explained: "[A]rbitrators
20 applying international law are disinclined to put form
21 over substance when they ascertain whether Claims are
22 timely...and arise from genuine investments of at-risk

1 capital (rather than artificial transactions designed
2 to put ostensibly protected investors in the place of
3 investors who do not have standing under the relevant
4 Treaty.)"
5 The facts of this case do not provide a
6 sound rationale for denying jurisdiction.
7 Next slide, please.
8 We urge the Tribunal to ask: What is the
9 essence of Canada's objection?
10 Can Canada claim it had no notice that it
11 owed Prairie or its investors obligations under NAFTA?
12 Is this a case of forum-shopping among
13 investment treaties?
14 Is Westmoreland Mining Holdings manipulating
15 jurisdiction to exercise greater rights than what
16 Westmoreland Coal Company had?
17 Was the bankruptcy restructuring undertaken
18 to secure some advantage against Canada as to the
19 NAFTA claim?
20 Is Westmoreland Mining Holdings pursuing
21 damages other than those incurred by Prairie and
22 flowing up to Westmoreland Mining Holdings as its

1 investor?
2 Is there a material, prejudicial difference
3 to Canada whether Westmoreland Mining Holdings or
4 Westmoreland Coal Company pursues the NAFTA claim?
5 Would this case open the floodgates for
6 other claims?
7 Has Alberta relieved Prairie and
8 Westmoreland Mining Holdings of the costs and burdens
9 to reclaim the coal mines now that Westmoreland Coal
10 Company is no longer the parent company?
11 The answer to all of these questions is an
12 unequivocal no. Canada's jurisdictional objection is
13 all form and no substance. Prairie is the same
14 investment that existed at the time of the breach. It
15 was owned by a foreign investor, Westmoreland Coal
16 Company. Canada's NAFTA investment protection
17 obligations were activated at the time of the breach
18 when the measures were adopted.
19 The measures continue to be maintained by
20 Alberta as Off-Coal Agreements--Off-Coal Agreement
21 payments are continuing to be made.
22 Canada owed obligations to Prairie under

1 Articles 1102 and 1105, and it continues to owe them
2 as Prairie is owned by Westmoreland Mining Holdings.
3 Westmoreland Coal Company transferred its
4 interest in Prairie and its own NAFTA Claim to
5 Westmoreland Mining Holdings while Westmoreland Mining
6 Holdings was its direct wholly-owned subsidiary.
7 Westmoreland Mining Holdings is the investor parent of
8 Prairie who is being damaged by the measures. The
9 former first priority secured lienholders of
10 Westmoreland Coal Company became the shareholders of
11 Westmoreland Mining Holdings as a result of the
12 bankruptcy. And they, along with Prairie, would be
13 the appropriate beneficiaries of any Award.
14 The Tribunal should find, based on the
15 international law and unique facts of this case, that
16 it has jurisdiction of Westmoreland Mining Holdings
17 claim.
18 Mr. Levine will speak to the issues of the
19 transfer of the investment and the claims, the
20 Westmoreland restructuring, and the continuity of
21 interest among Westmoreland Coal Company, Westmoreland
22 Mining Holdings, and Prairie Mines.

1 And that concludes my portion of our
2 presentation.
3 PRESIDENT BLANCH: Thank you, Mr. Snarr.
4 Just before we move on, James or Zac, do
5 either of you have any questions? No.
6 I've got one question for you, Mr. Snarr,
7 and I might--it may be that this is going to be
8 answered by Mr. Levine, in which case--and by all
9 means, you don't need to answer it now.
10 Can I just take you back to Slide 17?
11 MR. SNARR: Ricky, if you bring up Slide 17,
12 please.
13 PRESIDENT BLANCH: The third bullet, is this
14 the test that you would say is applicable in
15 determining--I think everybody agrees, and the
16 Claimant would agree--that a contrived claim is not
17 admissible. So, it's working out what is the test for
18 determining whether there is admissibility when the
19 claimant is a different party from the investor at the
20 time of the challenged measures.
21 So, I was just trying to work out, is this
22 third bullet what you say the test is that we should

1 be applying?
2 MR. SNARR: Yes. We would say that the
3 principles that emerge from the cases where you do see
4 that there is a recognition of jurisdiction or an
5 allowance of a transfer or restructuring, that these
6 are the principles that would guide that. So, that
7 there has to have been an actual bona fide investment.
8 I mean, this is the principle of the
9 investment and that has to be made in order to
10 activate the Treaty and take advantage of the
11 dispute-resolution provisions. And then, when there's
12 a transfer between companies that have a continuity of
13 interest, a closeness between them, that that kind of
14 a transfer does not divest the Tribunal of
15 jurisdiction over the Claim.
16 PRESIDENT BLANCH: And when you talk about
17 the continuity of interest, it is said against you by
18 Canada that continuity of interest is not a concept
19 that comes in NAFTA cases, or in academic treatises on
20 NAFTA or even in investor-State, generally.
21 Are you able to point us to anything where
22 continuity of interest is--has been determined or

1 argued in other cases, or can you explain what you
2 mean by "continuity of interest"?
3 MR. SNARR: Yes. This is really an
4 interpretation of the cases where--referring to some
5 of the cases that I mentioned like *CME*, *S.D. Myers*.
6 There is a closeness of relationships. There are
7 ties. That you can think of a--in the context of a
8 corporation. A corporation has a bundle of rights,
9 and you have another corporate entity, but there is
10 some sharing of rights, some commonality between them.
11 So, this is distinct from a situation where
12 you would have a company trying to transfer to another
13 company with which there is no connection, no ties, a
14 completely separate company that would be coming in.
15 Or in the case of a familial relationship that
16 there--this connection of family members, if the
17 family and the business is in S.D. Myers.
18 It is hard to imagine that, if an investor
19 died, and the heirs of the investor inherited whatever
20 rights that the investor had in the investment, it is
21 hard to imagine that there would be a rule that it
22 says, that's too bad, you don't inherit those rights.

1 That claim is extinguished upon the passing of the
2 parent.
3 PRESIDENT BLANCH: That's very helpful.
4 Thank you.
5 Just before we move to Mr. Levine, would
6 everybody mind if we took a five-minute break? I just
7 hear somebody at my door, and I can do it just running
8 down to let somebody in. I'm really sorry. That is
9 terribly unprofessional.
10 MR. SNARR: That is quite all right as far
11 as we are concerned. Thank you.
12 MR. FELDMAN: That is fine with us. Thank
13 you.
14 PRESIDENT BLANCH: Excellent.
15 (Brief recess.)
16 MR. LEVINE: May I proceed?
17 PRESIDENT BLANCH: Please do. And I
18 apologize. Thank you.
19 MR. LEVINE: No problem. Thank you.
20 Good day, Members of the Tribunal. As my
21 colleagues Mr. Feldman and Mr. Snarr mentioned, my
22 name is Paul Levine.

1 Canada argues that Westmoreland Coal Company
2 and Westmoreland Mining Holdings are "distinct
3 entities." In so doing, Canada, through its
4 bankruptcy attorney, denies the continuity of interest
5 between Westmoreland Coal Company and Westmoreland
6 Mining Holdings.
7 The owners of Westmoreland Mining Holdings
8 are the secured creditors who invested $700 million of
9 debt into Westmoreland Coal Company, secured by
10 Westmoreland Coal Company's assets. Those were the
11 assets that the secured creditors ultimately took
12 possession of through Westmoreland Mining Holdings.
13 Notwithstanding this continuity of interest,
14 Canada and its bankruptcy attorney regurgitate the
15 record of the bankruptcy proceeding to adopt a
16 hyper-technical, form-over-substance argument that
17 requires its bankruptcy attorney to contradict her own
18 prior statements.
19 Canada, while arguing this Tribunal must
20 strictly analyze the bankruptcy to find that
21 Westmoreland Coal Company and Westmoreland Mining
22 Holdings are supposedly distinct, also denies the

1 actual form of the transaction.
2 Canada says that Claimant's arguments
3 "disguise the market-based nature of the transaction."
4 But it is undisputed that Westmoreland Mining Holdings
5 was a wholly-owned subsidiary of Westmoreland Coal
6 Company at the time. Substantially all of
7 Westmoreland Coal Company's assets, including the
8 Canadian assets at dispute here in the NAFTA claim,
9 were transferred to Westmoreland Mining Holdings.
10 The law of assignments permits for this type
11 of transfer of interest, which Canada does not contend
12 was done as an abuse of process.
13 This type of reorganization is not what the
14 ratione temporis objection was designed to prevent.
15 We think two useful scenarios are in order
16 to demonstrate these issues: In the first scenario,
17 Westmoreland Coal Company, like here, goes bankrupt
18 during the pendency of the NAFTA proceedings, and the
19 secured creditors executed debt-for-equity swap, so
20 that the secured creditors trade their debt in whole
21 or part to become the new equity holders of
22 Westmoreland Coal Company.

1 Would there be jurisdiction in this case?
2 The answer undoubtedly is yes. Canada, as it states
3 in Paragraph 104 and Footnote 198 of its Reply
4 Memorial appears to agree that jurisdiction would be
5 proper in this scenario. There, Canada references the
6 *Lone Pine* case where there was a debt for equity swap
7 and Canada did not challenge jurisdiction.
8 In the second scenario, Westmoreland Coal
9 Company, which was a Delaware corporation, decides
10 during the pendency of the NAFTA proceedings to become
11 a limited liability company in Delaware for whatever
12 reason. The Company finds an LLC form to be more
13 advantageous, or LLC form provides certain tax
14 advantages, or let's say that Westmoreland Coal
15 Company wants to become a limited liability company in
16 Texas because Westmoreland Coal Company finds the
17 Texas business culture more advantageous.
18 So, Westmoreland Coal Company transfers its
19 assets to a new entity. Westmoreland Mining Holdings.
20 Whether that be in Delaware or Texas, with all the
21 same equity holders as in Westmoreland Coal Company,
22 would there be jurisdiction in this scenario?

1 Next slide, Ricky.
2 According to Canada, there would be no
3 jurisdiction. As Canada says in its Memorial, the
4 Claimant is not the same as Westmoreland Coal Company,
5 and NAFTA Chapter Eleven does not allow two
6 enterprises to be the same investor of a Party. The
7 Claimant was constituted in 2019. Westmoreland Coal
8 Company was constituted more than 100 years earlier in
9 1910. The Claimant is a limited liability company.
10 Westmoreland Coal Company is a corporation. The two
11 entities cannot be the same enterprise.
12 Even today, now, Canada today still offers
13 differing views on this point. Earlier this morning,
14 in Mr. Douglas' presentation, he stated--and this can
15 be found at line--Page 13, Line 15 of the realtime
16 Transcript—"in its Rejoinder, the Claimant proffered
17 examples of changes to corporate form, which they
18 allege would negate jurisdiction under Canada's
19 interpretation of NAFTA's Chapter Eleven.
20 But that is not Canada's position, and you
21 are not being asked to address all possible scenarios
22 today, just the case before you."

1 But later in their presentation--and I
2 believe it was Ms. Zeman--she stated--and this is at
3 Page 22, Line 20, it begins: "It is this series of
4 events that bring us here today and to our moment to
5 pause on the most fundamental fact of this
6 Jurisdictional Phase. It is undisputed that the
7 Claimant made an investment in Canada on
8 March 15, 2019. On that date, the Claimant became the
9 owner of the Canadian enterprises. It held these
10 enterprises in the manner you see on the screen.
11 Prior to March 15, 2019, the Claimant did not have an
12 investment in Canada. Prior to January 31, 2019, the
13 Claimant did not exist."
14 Now, to us, the answer in this scenario
15 would be, yes, jurisdiction would exist. Canada's
16 formulation, thus, produces an absurd result: The
17 form has changed, but the substance remains the same.
18 So, the question for this Tribunal is, if
19 the first scenario allowing a debt-for-equity swap is
20 permissible, and the second scenario, allowing for a
21 change of company form is permissible, than are the
22 secured creditors allowed to swap their existing debt

1 to take control of Westmoreland Coal Company through
2 the use of a new corporate vehicle, Westmoreland
3 Mining Holdings?
4 Now, these scenarios underscore the
5 weaknesses of Canada's objection. Canada does not
6 claim that it was deprived of an investment in Canada
7 by an American investor. Prairie has always been an
8 American investment in Canada.
9 Next slide.
10 Canada does not claim that the secured
11 creditors had no stake in the outcome of Westmoreland
12 Coal Company. The secured creditors undoubtedly had a
13 substantial stake. They had invested $700 million
14 into the outcome of Westmoreland Coal Company and
15 expected to get a return on that investment.
16 In fact, Canada's bankruptcy attorney,
17 Ms. Coleman, calls the secured creditors
18 "stakeholders." The entire point of the bankruptcy
19 was to ensure that the secured creditors received
20 payment for their interest in Westmoreland Coal
21 Company. Indeed, the secured creditors had the
22 highest priority of all the pre-bankruptcy debt.

1 Canada's argument exploits the bankruptcy
2 reorganization, a proceeding designed to protect value
3 for the secured creditors $700-million-plus investment
4 in Westmoreland Coal Company, which led to the secured
5 creditors taking over Westmoreland Coal Company
6 through a new entity, which they did so by using their
7 preexisting stake in Westmoreland Coal Company.
8 Beyond defending a NAFTA Arbitration, Canada
9 does not claim any harm, prejudice, or unfairness.
10 Canada does not say advancement of the claim would be
11 inequitable.
12 Next slide, please.
13 Professor Paulsson in his Report says that
14 this type of restructuring should not defeat
15 jurisdiction.
16 "It should surprise no one that investments
17 that lead to Treaty-based arbitration against States
18 tend to be troubled businesses that often require
19 restructuring as a way of mitigating the adverse
20 consequences of the difficulties encountered. Given
21 the goal of promoting the inflow of investments, it
22 should be obvious that restructuring ought to minimize

1 the prejudice suffered, rather than to provide an
2 excuse for denying Treaty protection."
3 Next slide, please.
4 There are three essential points in this
5 argument: First, the transaction structure preserved
6 the continuity of interests through a valid
7 assignment.
8 Second, U.S. federal law recognizes there
9 was a continuity of interests between Westmoreland
10 Coal Company and Westmoreland Mining Holdings and,
11 third, the bankruptcy process ensured there was a
12 continuity of interests between Westmoreland Coal
13 Company and Westmoreland Mining Holdings.
14 Before I go to the first topic, are there
15 any questions at this point?
16 PRESIDENT BLANCH: James? No. And Zac?
17 ARBITRATOR DOUGLAS: I had some questions,
18 but perhaps I'll wait until the end of the next
19 segment, in case I am preempting something, so I'll
20 reserve for the moment.
21 MR. LEVINE: Thank you.
22 So, the first topic is the investment claims

1 may be assigned. And if we could go to the next
2 slide, please.
3 This is the structure of Westmoreland Coal
4 Company prior to the transaction. Westmoreland Coal
5 Company is broadly divided into its U.S. and Canadian
6 components in this simplified diagram.
7 Next slide, please.
8 Now, here we are focusing solely on the
9 Canadian component of Westmoreland Coal Company. As
10 you can see, Westmoreland Coal Company owned Prairie
11 Mines & Royalty through a group of companies,
12 including Westmoreland Canada Holdings.
13 Next slide, please.
14 Now, as a result of the bankruptcy
15 transaction process described in the description of
16 transaction steps, that was attached to the Bankruptcy
17 Plan of Reorganization, which is the operative
18 document that controls how the bankruptcy is going to
19 conclude, Westmoreland Mining Holdings becomes part of
20 the ownership chain of the Canadian component.
21 Next slide, please.
22 This slide depicts how both Claimant and

1 Canada view the final structure. They are identical.
2 Westmoreland Mining Holdings owns Westmoreland Mining
3 LLC, which comprises the U.S. assets. Westmoreland
4 Mining Holdings also owns the Canadian component,
5 including Prairie Mines & Royalty.
6 Next slide, please.
7 According to Ms. Coleman, Westmoreland Coal
8 Company, thus, received 100 percent of the membership
9 interests in Westmoreland Mining Holdings as
10 consideration in both the U.S. acquisition and the
11 Canadian acquisition. As described below, these
12 membership interests were ultimately distributed to
13 the First Lien Lenders.
14 So, Ms. Coleman agrees that Westmoreland
15 Coal Company owned 100 percent of Westmoreland Mining
16 Holdings before those membership interests were
17 transferred to the secured creditors.
18 Next slide, please.
19 Accepting what Canada's Expert opined about
20 the transaction, this slide shows that Westmoreland
21 Coal Company owned Westmoreland Mining Holdings.
22 Next slide.

1 And on this point, there is no dispute.
2 Both Parties agree that Westmoreland Coal Company was
3 at this point the 100 percent owner of Westmoreland
4 Mining Holdings.
5 Next slide.
6 I want to go back to the original
7 pre-transfer structure to show the transfer to make an
8 additional point.
9 Next slide.
10 Here we see that Westmoreland Mining
11 Holdings, as everyone agrees, becomes the wholly owned
12 subsidiary of Westmoreland Coal Company. Westmoreland
13 Mining Holdings is also in the ownership chain of
14 Prairie Mines & Royalty.
15 Ricky, could you click it again, please.
16 Now, this is the key instance in the form of
17 the transaction. Now, Canada argues that this
18 Tribunal should ignore this form because the
19 transaction happened almost virtually simultaneously
20 or that the secured creditors created Westmoreland
21 Mining Holdings. But Canada repeatedly refers to
22 Westmoreland Coal Company as "distinct" or

1 "unaffiliated."
2 Given Canada's jurisdictional objection that
3 prefers the form, you have to respect the form of the
4 transaction, including the fact that Westmoreland
5 Mining Holdings was owned by Westmoreland Coal Company
6 at the time of the transfer, and then all the
7 attending consequences of that fact.
8 Next slide, please.
9 The final step in the transaction is that
10 the secured creditors take ownership of Westmoreland
11 Mining Holdings. Now, they did not just take a
12 collection of assets. What these stakeholders
13 received in exchange for a portion of their
14 $700 million-plus investment in Westmoreland Coal
15 Company is the membership interest of Westmoreland
16 Mining Holdings, which holds the collateral that the
17 secured creditors were entitled to take as a result of
18 their debt interests.
19 Now we can go to the next slide. I want to
20 highlight two additional Canadian arguments.
21 First, Canada's states do not look at the
22 identity of the owners of Westmoreland Mining

1 Holdings. It makes this point repeatedly.
2 Canada's states look only at the form of the
3 transfer, the same form that Canada attempts to deny
4 elsewhere, assuming arguendo that Canada's statements
5 are correct, the form of the transfer is enough.
6 Now, we would argue that Westmoreland Coal
7 Company and Westmoreland Mining Holdings have a
8 continuity of interest, as evidenced by the continuous
9 involvement in both companies of the highest priority
10 stakeholders, the secured creditors who traded their
11 preexisting interest in Westmoreland Coal Company for
12 the new membership interest of Westmoreland Mining
13 Holdings. But under either rubric, Canada's or ours,
14 jurisdiction would still be proper.
15 And, Ricky, if you could click it again,
16 please.
17 Second, Canada does not contend the
18 restructuring was an abuse of process. Canada does
19 not contend that the transaction was structured in a
20 way to create jurisdiction where it would not
21 otherwise exist.
22 As Professor Paulsson noted in his Report,

1 the opposite is true; Canada contends that an innocent
2 restructuring somehow defeated jurisdiction.
3 Next slide.
4 Now, one of Canada's other arguments is that
5 this transaction was a pure sale of assets, including
6 the NAFTA claim. First, this was not an ordinary
7 sale. The secured debt creditors "credit bid" by
8 paying with their existing secured debt that
9 Westmoreland Coal Company could not repay. The
10 secured creditors, as Ms. Coleman states in
11 Paragraph 43 of her Expert Report, were the only
12 stakeholders allowed to execute this type of credit
13 bidding. In effect, the secured creditors used their
14 investment in Westmoreland Coal Company to make the
15 purchase.
16 Second, the sale agreement stated that the
17 secured creditors were buying the membership interest
18 of Westmoreland Mining Holdings. Section 2.09 of the
19 Agreement provides: "Notwithstanding anything
20 contained herein to the contrary, the Closing and the
21 other transactions contemplated to occur at
22 Closing...shall be effected in accordance with the

1 Description of Transaction Steps."
2 How the transaction was conducted does
3 matter. Indeed, as we cited in our Rejoinder
4 Memorial, Delaware law would prevent this provision
5 from being read out of the Agreement, as Canada seeks
6 to do.
7 Once again, the form must be respected.
8 Next slide.
9 Another Canadian argument is that the
10 Bankruptcy Court, in its Final Order approving the
11 Plan, found that the secured creditors were a
12 good-faith purchaser and that the secured creditors in
13 Westmoreland Coal Company were at arm's length. But
14 that finding ensures that the Bankruptcy Court does
15 not apply a more rigorous analysis to review the
16 bankruptcy to ensure there would be no insider
17 self-dealing, as Ms. Coleman notes at Footnote 103 of
18 her First Expert Report.
19 In the next footnote, she states that this
20 insider analysis does not apply to the intermediate
21 transaction steps where Westmoreland Coal Company
22 transfers assets to Westmoreland Mining Holdings.

1 Regardless, Canada twists this finding in
2 ways never envisioned by the Bankruptcy Court and
3 directly contradictory to other rulings by the
4 Bankruptcy Court. In that same order, the Bankruptcy
5 Court ruled that: "[n]otwithstanding anything to the
6 contrary in this Plan or Confirmation Order, the NAFTA
7 Claim...is not being released...." That is, the
8 Bankruptcy Court went out of its way to ensure that
9 its final order did not extinguish the NAFTA claim
10 through the bankruptcy process. Canada's argument
11 seeks to do by implication what the Bankruptcy's Court
12 sought explicitly to preserve.
13 The Bankruptcy Court also found that the
14 form of the transaction, as contained in the
15 description of the transaction steps found in the
16 Supplement to the Bankruptcy Plan of Reorganization,
17 was found to be an integral part of Court's Order
18 approving that Plan. Again, the Bankruptcy Court
19 understood that the continuity between Westmoreland
20 Coal Company and Westmoreland Mining Holdings was a
21 necessary part of the transaction.
22 Before I go on to some analysis of some of

1 the cases, does the Tribunal have any questions at
2 this point?
3 ARBITRATOR DOUGLAS: Perhaps I'll ask a
4 question now, then.
5 QUESTIONS FROM THE TRIBUNAL
6 ARBITRATOR DOUGLAS: Going back to the way
7 in which the purchase occurred and during the
8 bankruptcy process, just hypothetically suppose the
9 Stalking Horse bid didn't work out because another
10 bidder turned up; an American company turned up to bid
11 for the assets, and that American company purchased
12 the assets. Would your position be that that American
13 company would have a viable NAFTA claim if it
14 purchased the NAFTA claim as part of the assets? Or
15 would that purchaser who turned up, who wasn't the
16 Stalking Horse bid, would they be in a different
17 position?
18 MR. LEVINE: Okay. So, first, let me
19 just--this obviously is not the factual scenario that
20 occurred here.
21 ARBITRATOR DOUGLAS: Of course.
22 MR. LEVINE: We have distinguished that.

1 Our position on that would be that the new
2 purchaser did not have any interest in the prior
3 iteration of the Westmoreland Coal Company.
4 Westmoreland Coal Company, the eventual owners of
5 Westmoreland Mining Holding, were those secured
6 creditors who had the $700 million-plus investment in
7 there. So this new investor is a new entity that does
8 not have this continuity of interest, as Mr. Snarr
9 described earlier, such that we think that that would
10 be, by itself, an appropriate exercise of
11 jurisdiction.
12 ARBITRATOR DOUGLAS: Okay. So the--there is
13 a fundamental distinction, and that is based upon the
14 status of the secured creditor throughout the
15 investment cycle, if we can put it that way. But does
16 that go into a difficulty, then, that a major
17 financial institution which lends a lot of money to
18 different people, or different companies, would
19 typically be a secured creditor as well? Does that
20 mean that, for investment treaty purposes, that major
21 financial institution would potentially be able to
22 bring a claim on behalf of all the various enterprises

1 that it has a secured interest in?
2 MR. LEVINE: Well, that's going to depend on
3 that particular factual scenario, and who that major
4 financial investor is, and how their downstream
5 investors are. That position--given what's there, I
6 don't know if there's enough of a connection between
7 that and major financial investor into all the other
8 stuff without additional facts for me to--
9 ARBITRATOR DOUGLAS: Fair enough.
10 Is there a distinction? I know it's a
11 distinction, that we've seen in the Reports and that's
12 been noted, between a debt investor, who obviously
13 doesn't bear any enterprise risk, and an equity
14 investor that does. So, whilst the secured creditor,
15 clearly, under the documents recording the security
16 interest, in certain circumstances may be able to do
17 various things, but it doesn't bear any enterprise
18 risk. Is that a problem in this analysis, or you say
19 it doesn't matter?
20 MR. LEVINE: We would say it doesn't matter.
21 When you make a $700 million debt investment into a
22 company, you do expect to get some return for that

1 funding. If you look at corporations and you say,
2 well, there's two types of investments: You have the
3 equity investors, and then you also have the debt
4 investors. And so those debt investors are hoping to
5 get a return from the company through the company
6 doing well. That's the nature of how debt is. And
7 so, those debt investors are looking to get a return
8 on those funds. And so, while there's different
9 interests that go along with the debt versus the
10 equity, the credit holders, they do have a stake in
11 the success of that company. I would hazard to say
12 that the creditors would prefer to be repaid back on
13 their loan schedule as opposed to execute a bankruptcy
14 and move through those things. But that's business.
15 ARBITRATOR DOUGLAS: Okay. But if--
16 PRESIDENT BLANCH: Can I stop you for a
17 second. Can I stop just a second. We lost the
18 Transcript when you were just about to ask your second
19 question, and I just want to make sure that it is
20 being recorded, even if it's not being--actually
21 coming up on the live screen because I don't want to
22 lose any of this.

1 (Comments off the record.)
2 PRESIDENT BLANCH: Zac, sorry, over to you.
3 Back to your questions.
4 ARBITRATOR DOUGLAS: Okay. Now, where were
5 we? So, we were talking about the difference between
6 equity and debt and investors.
7 Here is, perhaps, another distinction.
8 Whether you can bring counterclaims in investment
9 arbitration is a bit of a fraught question. But
10 assuming you can, just for present purposes, if a
11 counterclaim were brought in relation to events that
12 occurred around about the same time as the alleged
13 breach, wouldn't the Claimant say: "Well, hang on.
14 We are not liable for whatever WCC did during that
15 time because there is no successor liability here"?
16 Wouldn't that be the Claimant's position?
17 MR. LEVINE: I would say if that happened in
18 this scenario--right?--and let's just go back to what
19 a bankruptcy does and just start from the beginning
20 there.
21 In the bankruptcy process, liabilities are
22 discharged. So, when Canada says: "There's no

1 successor liabilities," well, if there was a
2 debt-for-equity swap and the secured creditors became
3 the equity holders of Westmoreland Coal Company, there
4 would be--there would be no claim there either
5 provided all the claims were released. And usually
6 bankruptcy courts, When they release parties from a
7 bankruptcy, through a Plan of Reorganization, it
8 starts off with we're going to execute with an
9 automatic stay and prohibit further cases from
10 proceeding; and at the end of it, there's a permanent
11 injunction against those preexisting prior
12 liabilities.
13 So, when Canada said says there is no
14 successor liability, well, that is tied to the
15 purchase--that's tied to these assets here and what
16 they go with, but if there was a debt-for-equity swap,
17 we would end up at the same point.
18 ARBITRATOR DOUGLAS: Sorry, you're talking
19 about a debt/equity swap in context of bankruptcy.
20 MR. LEVINE: Correct. Correct.
21 ARBITRATOR DOUGLAS: Yeah. Because in a
22 normal debt/equity swap, you would step into the shoes

1 of the equity, and you'd be liable; right? I mean,
2 you would bear--
3 (Overlapping speakers.)
4 MR. LEVINE: Go ahead, I apologize.
5 ARBITRATOR DOUGLAS: So you wouldn't be
6 personally liable, but you would have an equity stake
7 in a company that retains its liability?
8 MR. LEVINE: If there was a straight equity
9 swap outside the--like the confines of the bankruptcy,
10 I think that potentially is correct, depending on how
11 you structure that transaction and whether the--all
12 the equity holders want to deal with the results on
13 those claims and how you deal with that contractually.
14 But what I would say is, in this instance,
15 you couldn't have had this credit bidding through this
16 process to waive the successor liability without the
17 bankruptcy either. So, you know, you need a finding
18 from the Bankruptcy Court to insulate you from that, I
19 believe. So, divorcing that hypothetical from the
20 bankruptcy process is very hard to do.
21 ARBITRATOR DOUGLAS: Understood.
22 You said at some point that the Claimant

1 took control over WCC. Is that strictly correct?
2 Because it took control of assets belonging to WCC.
3 WCC, as far as I understand, still exists. It hasn't
4 been extinguished yet as a corporate entity.
5 So, is that the strictly correct way of
6 explaining this, or...
7 MR. LEVINE: Well, I'll get to that in a
8 second with respect to the restructuring support
9 agreement and, we would say, once you get into the
10 bankruptcy process. And Westmoreland Coal Company
11 says, "We can't pay you back anymore. We need to
12 figure out how to work out our debt"; that, as
13 Ms. Coleman's own writings and speeches say, they sign
14 away everything. It's--they are made an offer they
15 can't refuse because the credit holders can pretty
16 much just take. And so now you are trying to find out
17 what's the best way to make this situation work for
18 everything.
19 So, I think at that point the creditors are
20 taking control of Westmoreland Coal Company, and they
21 are just trying to figure out a way through the
22 bankruptcy process to say, "How do we reorganize this

1 company so that we can get the maximum value?"
2 And so, I would say they take control at
3 that point. And then that allows the creditors to
4 then say, "Let's take the good parts that we want, and
5 we could have done it through the bankruptcy process,
6 through a debt-for-equity swap, but do this in a very
7 efficient, quick way so we don't have to be saddled
8 with this bankruptcy for a longer period of time."
9 ARBITRATOR DOUGLAS: Thank you very much.
10 That was very, very helpful. Thank you.
11 MR. LEVINE: Any additional questions?
12 PRESIDENT BLANCH: James?
13 ARBITRATOR HOSKING: No. Not for me,
14 thanks.
15 PRESIDENT BLANCH: Please go ahead,
16 Mr. Levine.
17 MR. LEVINE: Okay. So I believe I'm on now
18 what's Slide 44 in my notes. So, Ricky, could we
19 please turn to the next slide.
20 All right. Mr. Snarr talked some about this
21 case, and so I will go through it very briefly. This
22 is *CME v. Czech Republic*. These are the measures at

1 issue. As you can see here, the tribunal there was
2 interested in measures that took place in 1996.
3 If we go to the next slide, CME Media
4 Enterprises, who is not the claimant, acquired its
5 investment in 1994 and 1996. In 1997, claimant
6 acquired the investment from the parent company.
7 And if we go to the next slide, the tribunal
8 found this structure was proper. First, CME Media
9 Enterprises, claimant's predecessor, qualified as an
10 investment; and, second, the tribunal found that the
11 right assigned by CME Media Enterprises to its
12 daughter company must also be protected. And I don't
13 need to read the quotes there. They're on the screen
14 for the Tribunal, and we've cited them in our Brief.
15 Next slide.
16 Another case where assignment was
17 permissible was *Autopista v. Venezuela*. The transfer
18 there was between a Mexican company to a United States
19 company, both of which were owned by a common Mexican
20 parent. That transfer did not defeat jurisdiction,
21 even though México is not a party to the ICSID
22 Convention. Canada states in its Reply Memorial that

1 the measures took place after the assignment to the
2 United States entity. We've reviewed the
3 Jurisdictional Decision, and we don't see any evidence
4 in there of when the measures actually took place. I
5 think the Tribunal would have to look at the merits
6 decision to find out when the measures took place,
7 which Canada did not cite.
8 Professor Paulsson explains why *Autopista*
9 should apply here, and he states: "The core
10 similarity relevant for jurisdictional purposes is
11 that, like Venezuela, Canada knew that Prairie was
12 held by a U.S. investment vehicle. The Autopista
13 Tribunal's analysis remains relevant because, in both
14 cases, a legitimate restructuring caused no prejudice
15 to Venezuela and, in this case, to Canada."
16 The next case--and Mr. Snarr also talked
17 about this--was *Koch Minerals v. Venezuela*. That
18 involved the transfer from Koch Minerals Sárl to Koch
19 Oil Marketing and then on to Koch Nitrogen Sárl. The
20 holding in that case was that the assignment did not
21 affect the transaction. I believe Mr. Snarr actually
22 read this Paragraph 6.70, so it's there on the screen.

1 I don't want to read it again.
2 But we would say the same rationale applies
3 here too. Although you are talking about different
4 legal personalities, this was a transfer by form
5 between companies in the same chain. There is not
6 some unrelated third parties because the secured
7 creditors had a significant interest in Westmoreland
8 Coal Company.
9 The transaction was not changed. Prairie
10 still has operations in Alberta as it did before. We
11 would say there are no material economic, legal, or
12 commercial differences in substance.
13 Next slide, please.
14 This is what Professor Paulsson says. It
15 talks about in his Expert Report about these cases:
16 "The passages quoted from these cases show that
17 arbitrators applying international law are disinclined
18 to put form over substance when they ascertain whether
19 claims are timely. In the present case, the
20 assignment of rights or its equivalent appears to be
21 inherent, - subject to the Tribunal's assessment of
22 the facts - in the restructuring affected via the

1 investor's recourse took protection under the relevant
2 bankruptcy law."
3 I've only read the italicized portion on
4 this slide.
5 Before I move to the next topic, are there
6 any other additional questions?
7 ARBITRATOR DOUGLAS: Just one very small
8 point. I think the *Autopista* case was a contract
9 case. I'm not sure if that makes any difference to
10 either party's views or not, but that is, perhaps, one
11 important point to come back on; that it is not an
12 investment treaty arbitration. It was an arbitration
13 under a Concession Agreement but submitted to ICSID.
14 I'm not sure if that changes anything from your
15 position or the other party's position.
16 PRESIDENT BLANCH: I think James had a
17 question.
18 ARBITRATOR HOSKING: Yeah, I just have a
19 quick question, if I may.
20 Given that in Claimant's view, we are not in
21 the abuse of process-type cases, what is the relevance
22 of there not being any prejudice? You've mentioned

1 that a couple of times, including just a moment ago.
2 Is there a particular legal significance to
3 the lack of prejudice, and is there a case that you
4 can point us to where that's been taken into account
5 in the context of the jurisdictional analysis?
6 MR. LEVINE: I don't mean to be squirrely on
7 this answer, but I would defer to Mr. Snarr more on
8 this question. Would it be okay if he answers that
9 question at the conclusion of my presentation? Not to
10 give you an avoidance of an answer, but I think he's
11 dealt more with those issues--
12 ARBITRATOR HOSKING: Okay.
13 MR. LEVINE: --than I have.
14 ARBITRATOR HOSKING: Fine by me if it's fine
15 with the President. Thank you.
16 PRESIDENT BLANCH: Absolutely.
17 MR. LEVINE: I appreciate your indulgence,
18 Mr. Hosking.
19 Any further questions?
20 PRESIDENT BLANCH: I think, please, go ahead
21 with the next topic.
22 MR. LEVINE: Well, the next topic I want to

1 discuss today is Type G reorganizations. Canada in
2 its Memorials says almost nothing about Type G
3 reorganizations, with Ms. Coleman, who is presented as
4 a bankruptcy Expert, calling this "a distinct inquiry
5 of whether Westmoreland Mining Holdings is an
6 unrelated third-party purchaser of Westmoreland Coal
7 Company's assets." We think she's wrong.
8 Next slide, please.
9 There are three essential points for a
10 Type G reorganization, and they are up on this screen.
11 First, tax attributes ordinarily remain with
12 the original company, but parties can opt out of this
13 ordinary role by selecting intentionally what's known
14 as a Type G reorganization, and to do so, there must
15 be a continuity of interest between the original and
16 new entity. The Type G reorganization roles thus
17 reflect the substance of the transaction, recognizing
18 that the entity starting the bankruptcy and the entity
19 ending the bankruptcy has such a continuity of
20 interest that they should she treated as the same.
21 Next slide.
22 This is a quote from 26 U.S.C. Section

1 368(a)(1)(G), which is the Internal Revenue Code, that
2 provides for reorganizations involving a transfer by a
3 corporation of all or part of its assets to another
4 corporation in a U.S. Chapter 11 Bankruptcy. And this
5 was clearly the type of reorganization that was
6 selected intentionally in the Plan of Reorganization
7 and the other documents, including an actual
8 transaction document which we've exhibited, the
9 Contribution and Distribution Agreement.
10 Next slide, please.
11 The Treasury regulations describing this
12 type of transaction provide that a Type G
13 reorganization affects only a readjustment of
14 continuing interest in property under modified
15 corporate forms. And this regulation recognizes that
16 the form may be different, but the interest is
17 continual.
18 Next slide, please.
19 The regulations also provide that:
20 "Continuity of interest requires that, in substance, a
21 substantial part of the value of the proprietary
22 interests in the target corporation"--here, which

1 would be Westmoreland Coal Company--"be preserved in
2 the reorganization."
3 That is, do the interests in the reorganized
4 entity remain the same as the original entity?
5 Next slide.
6 PRESIDENT BLANCH: Mr. Levine, sorry, I'm
7 going to do what I specifically said I wouldn't do.
8 I'm really sorry, but could we go back to the previous
9 slide?
10 MR. LEVINE: Sure.
11 PRESIDENT BLANCH: I just want to make sure
12 I understand.
13 So, is this looking more at the--when it
14 says "the value of the proprietary interests in the
15 target corporation," what exactly does that mean?
16 MR. LEVINE: My understanding of that--and
17 I'm not a tax lawyer, but we have one here who can
18 answer the question, if I do flub this--is that the
19 value of the proprietary interest in the target
20 corporation, meaning: Are you going to retain what's
21 in the original organization and carry it through to
22 the end using some interest that you already had in

1 that original organization?
2 So, I think it's probably best answered by
3 the next slide, actually, of all things, if we turn to
4 Slide 55.
5 PRESIDENT BLANCH: Please do. I'm sorry for
6 interrupting because I may--
7 (Overlapping speakers.)
8 MR. LEVINE: Yeah. It says: "'Creditor's
9 claim as proprietary interest'… A creditor's claim
10 against a target corporation"--so, that claim being
11 the debt held in the target corporation--"may be a
12 proprietary interest in the target corporation if the
13 target corporation is in a [Chapter 11 of the U.S.
14 Bankruptcy Code] type case. In such cases, if any
15 creditor receives a proprietary interest in the
16 issuing corporation in exchange for its claim, every
17 claim in that class of creditors… is a proprietary
18 interest in the target corporation immediately prior
19 to the potential reorganization…"
20 So, what that is saying is that the
21 creditors' debt holdings in Westmoreland Coal Company
22 is that proprietary interest. That's the interest in

1 the target corporation.
2 PRESIDENT BLANCH: Thank you.
3 MR. LEHRER: This is John. May I interrupt
4 for one second?
5 MR. LEVINE: Yeah, go ahead. I'm--
6 (Overlapping speakers.)
7 MR. LEHRER: Yeah. Just to be clear, so
8 this test is focused on, essentially, the equity
9 ownership and, you know, continuation there. There is
10 a separate test which also must be met focusing on a
11 continuing asset ownership as well. So, it's the
12 combination of those two things that is going on, the
13 focus being on the equity ownership and what is
14 appropriate for continuing this continuity.
15 PRESIDENT BLANCH: Thank you.
16 MR. LEVINE: If we could turn to the next
17 slide, please.
18 This is from a U.S. Treasury Department
19 Decision, and it states: "The final regulations
20 provide that, in certain circumstances, stock received
21 by creditors may count for continuity of interest
22 purposes both inside and outside of bankruptcy

1 proceedings… The final regulations treat such senior
2 claims as representing proprietary interests in the
3 target corporation."
4 And so, what these rules do is they give
5 effect to the substance of the transaction, that the
6 secured creditors have a substantial interest in a
7 debtor entity, and that a bankruptcy reorganization
8 should not break the chain of continuity between
9 Westmoreland Coal Company and Westmoreland Mining
10 Holdings.
11 Before I move on to the next topic, are
12 there any further questions?
13 PRESIDENT BLANCH: No, thank you.
14 MR. LEVINE: I wonder if Mr. Snarr is
15 available and if this would be a good time to answer
16 Mr. Hosking's prior question.
17 MR. SNARR: Yes, I think I can do that. Is
18 the mic working now? Okay. Good.
19 So, we are trying to find rules of
20 international law here--excuse me--that apply to,
21 really, a unique set of facts. We don't have anything
22 in the text of NAFTA that speaks expressly to this.

1 In fact, as I discussed, there is text in NAFTA that
2 suggests that there is not the strict rule intended
3 that Canada has argued. So, we look to the text of
4 NAFTA to see what we can find. If there were a strict
5 express statement in NAFTA, then you might have a
6 different perspective on how that rule should be
7 applied because, with the language being expressly
8 contained in NAFTA, the Parties on each side, the
9 Respondent and the Claimant, are on notice about the
10 application of a strict rule.
11 Let's take the diversity of nationality
12 rule. I think that is certainly clearer in the NAFTA
13 text that that applies, and it is clear in
14 investor-State treaties. So, that rule and the
15 principle of retroactivity of treaties is usually a
16 pretty hard line.
17 Now, you can imagine, perhaps, an extreme
18 circumstance where a respondent State decides to
19 confer nationality on the claimant and therefore
20 disrupt the diversity of nationality. And maybe in
21 that situation, you would say, given that strict rule,
22 we won't apply it as strictly as it's contained in the

1 text.
2 Well, we are dealing here with the absence
3 of a provision that we are trying to find the source
4 of law that is the root of this question, and Canada
5 has cited NAFTA, and we've looked at the text, and it
6 is not contained in the text.
7 So, we are trying to divine from the cases,
8 the investor-State awards, what are the international
9 law principles that apply here? And in looking at the
10 international law principles, looking at the cases
11 where an abuse of the Treaty has not been allowed or
12 there's been forum-shopping, we have to take from
13 that: Why were those cases decided the way that they
14 were?
15 And so, we have to get at the rationale of
16 it. And the rationale seems to be that there is a
17 principle of good faith and fairness that comes into
18 play with respect to restructuring and the timing of
19 claims. And so, when we talk about, is there any
20 prejudice here on the part of Canada, we raised it
21 twice in our Briefs and I haven't seen anything yet
22 from the Government of Canada to suggest that they are

1 prejudiced by whether it would be Westmoreland Coal
2 Company versus Westmoreland Mining Holdings.
3 We are getting to the issue of fairness and
4 good-faith principles with respect to the operation of
5 the dispute-resolution provisions in the Treaty, and
6 the connection of those procedures to what is an
7 investment, an undisputed investment in Canada of a
8 company, an enterprise owning and operating those
9 mines. So, I think that prejudice ties to the
10 international principles that we're culling from these
11 cases, and we are trying to find out what the contours
12 are of them in deciding this question.
13 And as Professor Paulsson states in his
14 Expert Report, that this is a case that may be a case
15 of first impression, and unless there are strict
16 provisions contained in the terms of the Treaty as you
17 do the international law analysis, then that opens the
18 situation up for consideration on a case-by-case
19 basis. And the equities of this case, we believe,
20 strongly favor us and jurisdiction being found for the
21 claim.
22 ARBITRATOR HOSKING: Okay. I appreciate

1 your answer. Thank you very much.
2 Sorry, Mr. Levine. I hope I didn't throw
3 you off.
4 PRESIDENT BLANCH: I'm not sure we can hear
5 you, Mr. Levine.
6 MR. LEVINE: There we go. There's two mute
7 buttons I have to press to make this thing work.
8 After 18 months, you would think I would have figured
9 out how to use Zoom, but apparently not.
10 So, if we could turn to the final topic.
11 And the next slide is that the "Bankruptcy Preserved a
12 Continuity of Interests."
13 Next slide, Ricky.
14 The secured creditors had loaned over
15 $700 million to Westmoreland Coal Company with the
16 expectation of being repaid, somehow. And when
17 Westmoreland Coal Company defaulted on those
18 obligations, the secured remedy--creditors' remedy was
19 the collateral they had, and they could have exercised
20 on that collateral once there was a default. But,
21 instead, they executed additional documents: The
22 bridge loan, the restructuring support agreement, and

1 the debtor-in-possession financing agreement.
2 If we could turn to the next slide.
3 We've laid these out in our Memorials, but
4 these agreements gave a number of indicia of control
5 over to the secured creditors. There's approved
6 budgets, there's financial metrics, there's weekly
7 reporting obligations, approval rights over
8 revenue-generating contracts longer than six months.
9 A number of these are detailed in our Appendix page to
10 the initial Memorial.
11 If we could go to the next slide, please.
12 But among the important ones here is the
13 control given by the restructuring support agreement
14 of the bankruptcy process to the secured creditors. A
15 restructuring support agreement is an agreement that
16 ensures the debtor entity cedes the control of the
17 bankruptcy to the secured creditors. And in this
18 case, that agreement had two principal effects.
19 First, the secured creditors had approval
20 rights over all the key bankruptcy documents: The
21 Plan; the Plan Supplement where the transaction was
22 formally structured; the sale agreement; and numerous

1 other documents. And, normally, these are documents
2 that the debtor could put together on their own, and,
3 in this case, that reverse the ordinary course of
4 events.
5 Second, the bankruptcy process was to be
6 completed quickly. The secured creditors obviously
7 valued efficiency and did not want to be tied up in
8 bankruptcy for a long time. They've already had their
9 debt defaulted on.
10 Next slide.
11 Now, as we've mentioned earlier, the secured
12 creditors could have done a debt-for-equity swap
13 through the bankruptcy process, but, instead, they
14 used the reorganization process, that is, as
15 Ms. Coleman explains in her own writings, the way
16 bankruptcy gets conducted. As she says: "A typical
17 Section 363 sale involves participation by existing
18 lenders who are undersecured and often have
19 'everything,' a debtor in possession, by or with the
20 consent of existing lenders and the debtor's
21 management. These parties have substantial control
22 over the terms of the price and sale,

1 especially...where...the obtainable price is well
2 below the amount of the secured debt."
3 And that is exactly what happened here. The
4 secured creditors exchanged their debt for the same
5 assets they could have had acquired through the
6 debt-for-equity swap.
7 Next slide, please.
8 Now, before I move on to this, I just want
9 to say: Canada implies that we do not dispute what
10 Ms. Coleman opines about because we chose not to
11 cross-examine her. And that, of course, is not the
12 standard in the Procedural Order. If that were the
13 standard, Canada's choice not to cross-examine
14 Professor Paulsson would lead to the same way of earn.
15 We don't, of course, contend that's actually the case.
16 What we do dispute is Ms. Coleman's
17 conclusions. The remainder of her Opinion repeats a
18 lot of what's in the factual exhibits and what's in
19 documents that we feel, as U.S. attorneys, we can
20 address without the need for a further expert.
21 Now, what Ms. Coleman did say, in a taped
22 interview, which we transcribed at C-046--and we

1 provided the interview video in our filings--is that
2 this--how this bankruptcy got conducted is how
3 bankruptcies get done these days. In this excerpt,
4 conducted with MandA.TV, she stated there's a real
5 shift of power and a real shift of control in the
6 bankruptcy case to secured creditors who extend that
7 credit.
8 What she's saying is, you get into
9 bankruptcy and you don't have ability to fund your
10 operations, you essentially accept more funding in
11 exchange for turning over your rights to those
12 creditors.
13 If we go to the next slide.
14 She's also written about this shift of power
15 and shift of control and the effect it has on
16 preparing the bankruptcy documents.
17 And she said: "Without first getting
18 debtor-in-possession lender consent, the debtor cannot
19 do anything outside the ordinary course of business.
20 For example, the debtor is no longer free to seek to
21 assume or reject contracts. It cannot propose an
22 incentive plan to retain critical management players.

1 It cannot sell or decline to sell its assets. But
2 most important, it cannot propose its own plan without
3 lender approval, and it cannot obtain approval of the
4 plan over the opposition of the debtor-in-possession
5 lender--or that of any other creditor to whom the
6 debtor-in-possession lender extends its protection..."
7 And, basically, the secured creditors
8 control the material aspects of the Company.
9 If we could go to the next slide.
10 We have highlighted these two cases in our
11 Rejoinder Memorial, and we've put some quotes up here
12 from them. And I don't want to belabor these points
13 because they are in the filings, but we think these
14 cases are illustrative of what happened here, that
15 there may be a change in form, but that change in form
16 does not serve to defeat jurisdiction.
17 And if we could to the next slide, please.
18 Which brings me back to where we started.
19 If Westmoreland Coal Company could have changed its
20 corporate form from a corporate entity to a limited
21 liability company, that would not have defeated
22 jurisdiction. And if the secured creditors took

1 equity in Westmoreland Coal Company as a result of the
2 bankruptcy, that would not have defeated jurisdiction.
3 So, using their control of the bankruptcy
4 and using the outstanding debt they were owed, the
5 secured creditors used the new corporate entity to do
6 the same thing. They did flow through a transaction
7 that made Westmoreland Coal Company the parent of
8 Westmoreland Mining Holdings. And they did so in a
9 way that United States federal law finds would
10 preserve a continuity of interest.
11 So, if we could go to the final slide.
12 This is what Professor Paulsson said in his
13 Second Report: "What matters is the ultimate economic
14 reality; does the recovery pursued ultimately and
15 legitimately seek reparation of the harm done to
16 protected investors who put their capital at risk?
17 Canada does not address the rationale for this
18 proposition, but simply repeats that a claimant who
19 was not an investor when the dispute arose has no
20 standing."
21 In conclusion, Claimants have demonstrated
22 that jurisdiction exists here, and Canada's objection

1 fails to demonstrate that jurisdiction does not exist.
2 We thank you for your time, and we are
3 prepared to answer any further questions the Tribunal
4 may have.
5 PRESIDENT BLANCH: What I'd like to propose
6 is that we take something just like a 5- to 10-minute
7 break so that the Tribunal Members can just work out
8 if we have questions to raise, any questions to raise
9 now, which may be for Claimants, or it may be points
10 that we suggest that the Parties might want to address
11 tomorrow. We will let you know as soon as we're ready
12 to come back into the main Hearing. So, please, I
13 would ask that nobody runs away very far.
14 Anneliese, could you get the three of us and
15 yourself back into the Tribunal breakout room?
16 SECRETARY FLECKENSTEIN: Yes. One second.
17 (Brief recess.)
18 PRESIDENT BLANCH: The Tribunal thanks the
19 Parties. Those Opening Submissions were really
20 helpful, very clear, so thank you so much. And the
21 PowerPoints are really helpful too.
22 You've been so clear that actually we have

1 no further questions for you, and we don't actually
2 have any specific questions for you to consider for
3 the Rebuttals tomorrow. We have every confidence that
4 the Parties will pick out anything they want to cover
5 in the Rebuttals.
6 So, on that, I propose to close the
7 Proceedings for today, unless there is any
8 housekeeping.
9 Firstly, Mr. Feldman, is there anything
10 further on Claimant's side for tonight?
11 Mr. Feldman, I'm afraid we can't hear you.
12 MR. FELDMAN: Can you hear me now?
13 PRESIDENT BLANCH: Yes, we can.
14 MR. FELDMAN: Sorry. I used to teach and
15 always worry at the end of a class when a class had no
16 questions, and if I was really that clear, that you
17 really think so. So my teaching instinct is coming
18 out from this, but okay. We will try to anticipate
19 what you are thinking about and try to answer it
20 tomorrow.
21 PRESIDENT BLANCH: I suspect, as a teacher,
22 you should feel slightly more comforted because I'm

1 not sure that we asked many, if any, questions to
2 Canada; whereas, I think Claimant got a few. So, I
3 can absolutely assure you, we really do feel very,
4 very well briefed.
5 MR. FELDMAN: Thank you.
6 PRESIDENT BLANCH: Mr. Douglas, is there
7 anything further housekeeping from Canada?
8 MR. DOUGLAS: No, there is nothing further
9 from Canada. Thank you, President Blanch.
10 PRESIDENT BLANCH: Well, I hope everyone
11 gets at least a bit of break before we meet again
12 tomorrow, and I look forward to that.
13 Thank you.
14 MR. FELDMAN: Thank you very much.
15 MR. DOUGLAS: Thank you very much.
16 (Whereupon, at 2:41 p.m. (EDT), the Hearing
17 was adjourned until 9:30 a.m. (EDT) the following
18 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