IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT AND CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

- and -

THE 2013 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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In the Matter of Arbitration     :
Between:                         :
                                 :
WESTMORELAND COAL COMPANY        :
                                 :  ICSID Case No.
          Claimant,              :    UNCT/23/2
                                 :
     and                         :
                                 :
GOVERNMENT OF CANADA,            :
                                 :
          Respondent.            :
- - - - - - - - - - - - - - - - -x  Volume 1
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VIDEOCONFERENCE: HEARING ON JURISDICTION

Thursday, May 2, 2024

The World Bank Group

The Hearing in the above-entitled matter came on at 9:33 a.m. before:

PROF. GABRIELLE KAUFMANN-KOHLER, President

MR. LAURENCE SHORE, Co-Arbitrator

MS. JUDITH LEVINE, Co-Arbitrator

ALSO PRESENT:

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ICSID Secretary of the Tribunal

DR. MAGNUS JESKO LANGER
Assistant to the Tribunal

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1 P R O C E E D I N G S
2 PRESIDENT KAUFMANN-KOHLER: I'm pleased to
3 welcome you all to this Hearing. Good morning, or
4 good afternoon, depending on where you are.
5 Let me check who's online. We, of course,
6 have the Tribunal, Ms. Levine, Mr. Shore, and with me
7 in the same room, the Assistant of the Tribunal
8 Dr. Langer. Then we have the Tribunal Secretary from
9 ICSID and people who assist her, Ms. Holloway.
10 Then we have the Claimants. I see them in a
11 conference room.
12 Do I have everyone who's on the
13 participants' list? And I -- actually, I see
14 Mr. Cottrell, who must be in New York when the others
15 are -- no. All of them are in New York, but you're in
16 another place, apparently.
17 Let me check with Mr. Rubinstein, whether
18 you have everyone online for the Claimants.
19 MR. RUBINSTEIN: Yes, Madam President.
20 We're all here.
21 PRESIDENT KAUFMANN-KOHLER: Good.
22 Excellent. Let me, then, turn to the Respondent.

1 Do I see Ms. Zeman on the screen? Yes?
2 MS. ZEMAN: Yes.
3 PRESIDENT KAUFMANN-KOHLER: You're the
4 one in the middle.
5 MS. ZEMAN: Yes, hello. Yes, in the yellow.
6 PRESIDENT KAUFMANN-KOHLER: And you have
7 with you is Ms. Squires and Ms. Dosman; is that right?
8 MS. ZEMAN: That's right, and in the room we
9 have the other members of our litigation team,
10 Mr. Koziol, Ms. Harris, and our excellent paralegals,
11 Ms. Bakelaar and Ms. Maza Pinero.
12 PRESIDENT KAUFMANN-KOHLER: Excellent. Is
13 Mr. Little there as well?
14 MS. ZEMAN: He is joining us virtually.
15 PRESIDENT KAUFMANN-KOHLER: Yeah.
16 MS. ZEMAN: And he is here, yes.
17 PRESIDENT KAUFMANN-KOHLER: Yeah. He's
18 here. Yes.
19 MS. ZEMAN: Yes.
20 PRESIDENT KAUFMANN-KOHLER: Fine. And then
21 we have among the representatives of Alberta? Do I
22 have -- is everyone present? Maybe, Ms. Zeman, you

1 can let us know?
2 MS. ZEMAN: Yes. We have everyone but one
3 person who's logged in so far. We expect her to join.
4 That's Ms. Spears, but there's no need to wait to
5 proceed.
6 PRESIDENT KAUFMANN-KOHLER: Fine.
7 Excellent. Good. And then let me see. We also have
8 the Non-Disputing Party representatives for the U.S.
9 Am I correct, that we have Mr. Bigge?
10 MR. BIGGE: Yes, good morning. This is
11 David Bigge, and we also have Julia Brower.
12 PRESIDENT KAUFMANN-KOHLER: Excellent.
13 Thank you. And for México, I see Ms. Hernández; is
14 that right? And --
15 MS. HERNANDEZ: Yes. Yeah, I'm here joined
16 by Mr. Alan Bonfiglio and Alejandro Rebollo.
17 PRESIDENT KAUFMANN-KOHLER: Fine. So all
18 three of you who are on the participant list are
19 present. Excellent.
20 Then we also have the Court Reporter,
21 Ms. Larson, whose participation is very much
22 appreciated.

1 This Hearing is devoted to jurisdictional
2 objection. We will follow the rules set in Procedural
3 Order Number 3 and, in part, also Number 1, as well as
4 the schedule that is annexed to Procedural Order
5 Number 3, but a revised version was sent yesterday
6 with the addition of the oral presentation of México.
7 We -- there's just one question that arose a few
8 minutes before we start.
9 We received the Respondent's PowerPoint
10 presentation, and we assume that we can -- that ICSID
11 can share this with the non-disputing Parties.
12 Is there any issue with that? Because
13 reading PO2, it was not exactly clear where it was,
14 under which rubric it would fall.
15 Any objection from the Respondent?
16 MS. ZEMAN: No objection here.
17 PRESIDENT KAUFMANN-KOHLER: Any objection
18 from the Claimant?
19 MR. RUBINSTEIN: No objection, Madam
20 President.
21 PRESIDENT KAUFMANN-KOHLER: Good. Fine.
22 So, Anna, you can forward the presentation

1 and you can, of course, do the same when we receive
2 the Claimant's presentation.
3 So the schedule for today is to
4 hear -- essentially hear the Parties' oral argument.
5 In part, in answer to the questions that the Tribunal
6 had sent to you on 16 April, and for the rest we are
7 happy to hear your arguments in -- more generally, and
8 then we will -- at the end of today, if we have
9 additional questions, we will put them to you; so that
10 you can answer them tomorrow. And then tomorrow in
11 addition to the answers to the questions, there will
12 be some brief rebuttal presentations.
13 Is there any question or comment that
14 you -- the Parties would like to raise before I give
15 the floor to Canada for its oral argument?
16 Let me first turn -- since we're on
17 jurisdiction, I will, of course, give the floor to the
18 Respondent.
19 Ms. Zeman?
20 MS. ZEMAN: We have nothing further to raise
21 at this point. Thank you.
22 PRESIDENT KAUFMANN-KOHLER: Thank you.

1 Anything on the Claimant's side?
2 Mr. Rubinstein?
3 MR. RUBINSTEIN: No, Madam President. We do
4 not have any comments at this point.
5 PRESIDENT KAUFMANN-KOHLER: Good. Then
6 we're ready to listen. And I give the floor to you,
7 Ms. Zeman.
8 MS. ZEMAN: Thank you.
9 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
10 MS. ZEMAN: I'll begin today with a few
11 words of introduction before explaining how we
12 organized our Opening Presentation. As the Tribunal
13 knows well, investor-State arbitration is a creature
14 of consent. Canada's consent to arbitrate an
15 investor's claim under CUSMA Annex 14-C, and NAFTA
16 Chapter Eleven is subject to a number of conditions.
17 An investment claim under these Treaties
18 necessarily involves a particular investor, particular
19 investment, at least one allegation of Treaty breach,
20 and an allegation of loss as a result, all at a
21 particular point in time.
22 If the Claim, understood as comprising those

1 components, has been submitted to arbitration in
2 accordance with all of the requirements of the
3 Treaties, then Canada has consented to arbitrate it,
4 and it is that perfected consent that grounds the
5 jurisdiction of the Tribunal constituted to hear it.
6 An investment Tribunal constituted under
7 these Treaties does not have the authority, of course,
8 of inherent jurisdiction and cannot take jurisdiction
9 solely on equitable grounds.
10 The Claimant here has not established that
11 the Claim that it filed on a particular date,
12 October 14, 2022, which makes particular allegations
13 about itself as an investor, about particular
14 investments, and about Treaty violations and resulting
15 losses meets the conditions of Canada's consent to
16 arbitrate. As a result, this Tribunal does not have
17 jurisdiction.
18 The Claimant has attempted to avoid this
19 inevitable conclusion in a few ways. It has blurred
20 the lines between distinct claims. It has
21 misconstrued the factual background, blaming Canada
22 for its own actions. It has responded to legal

1 arguments it wishes that Canada made, rather than the
2 Treaty-based arguments Canada has actually made.
3 And it continues to ask the Tribunal to
4 create jurisdiction where it does not otherwise exist
5 by resorting to principles of equity. When the
6 Tribunal assesses the record and interprets the terms
7 of the Treaties as they are, it will find that none of
8 the Claimant's attempts can be sustained. The Claim
9 must be dismissed.
10 To that end, the Tribunal has six questions
11 to answer. Now, we'll address the details of each of
12 these over the course of the morning, or afternoon,
13 but, for now, I want to focus on the consequences of
14 the Tribunal's ultimate decisions with respect to each
15 for the Claimant's Claim.
16 The first question is whether the Claimant
17 holds a legacy investment under CUSMA Annex 14-C.
18 Canada's consent to arbitrate claims under the Annex
19 is limited to legacy investments, which, among other
20 things, must have been held by the Claimant when CUSMA
21 entered into force on July 1, 2020. The Claimant sold
22 all of its investments in Canada on March 15, 2019.

1 As a result, the answer to this first
2 question is no. And if the Tribunal agrees, the
3 consequence is dismissal of the entire Claim. The
4 Tribunal need not proceed further. If the Tribunal
5 answers yes, then it must proceed to evaluate whether
6 the Claimant's Claim also meets the jurisdictional
7 requirements of NAFTA, and we have made organizational
8 decisions about the ordering of the remaining
9 questions, but there's no particular magic to it.
10 The second question is as whether the
11 Claimant submitted valid waivers consistent with NAFTA
12 Article 1121. The Claimant has only submitted waivers
13 that accompanied a different Notice of Arbitration,
14 which were later withdrawn. Moreover, the Claimant
15 has not confirmed with evidence whether the
16 individuals who signed those waivers had the authority
17 to bind the Companies on October 14, 2022. As a
18 result, the answer to the second question is also no.
19 If the Tribunal agrees, the consequence is
20 dismissal of the entire Claim. If the Tribunal
21 answers yes, then it must proceed to the third
22 question: Is the Claim timely under NAFTA Articles

1 1116(2) and 1117(2)?
2 The Measures the Claimant challenges date
3 back to 2015 and 2016. The Claimant filed its Claim
4 more than six years later. As these Treaty provisions
5 do not permit suspension or prolongation of the
6 three-year Limitation Period, the answer to the third
7 question is also "no." If the Tribunal agrees, the
8 consequence is dismissal of the entire Claim. And,
9 again, the Tribunal need not proceed further.
10 Now, the Treaty requirements reflected in
11 Questions 1 through 3 are cumulative. The Claimant
12 must establish it meets all of them. If the Tribunal
13 answers "no" to any of them, the Claim cannot proceed.
14 In order to move on to the remaining three questions
15 and potentially to hearing the Claim, the Tribunal
16 must answer all three with a "yes," and, if that is
17 the case, it must then proceed to the next three
18 jurisdictional issues.
19 The Claimant has brought its Claim both on
20 its own behalf under NAFTA Article 1116, and on behalf
21 of Prairie under NAFTA Article 1117. There are three
22 additional independent jurisdictional hurdles the

1 Claimant must overcome.
2 The first of these, and the fourth question
3 before the Tribunal, is whether the Claimant has made
4 a prima facie damages claim as required by NAFTA
5 Article 1116. Since the Claimant has only asserted
6 loss that belongs directly to Prairie, which is not
7 recoverable under Article 1116, the answer to this
8 question is no.
9 If the Tribunal agrees, the consequence is
10 dismissal of the Article 1116 Claim, and that will
11 leave the Claimant only with its Article 1117 Claim.
12 But the fifth and sixth questions before the Tribunal
13 relate to this part. The fifth is whether Prairie has
14 acted consistently with the waiver that it submitted
15 in the Westmoreland Mining Holdings v. Canada or WMH
16 arbitration. In that proceeding, Prairie waived its
17 right to initiate or continue proceedings seeking
18 damages with respect to the Measures at issue in that
19 case.
20 Initiating such proceeding is precisely what
21 the Claimant has done on Prairie's behalf in this
22 Claim. As a result, the answer to this question is

1 "no." If the Tribunal agrees, the consequence is
2 dismissal of the Article 1117 Claim.
3 The sixth and final question is whether the
4 Claimant owned or controlled Prairie when it submitted
5 its Claim to arbitration as Article 1117 requires.
6 The Claimant sold its interest in Prairie
7 more than three years prior to filing its claim. The
8 answer here is, thus, "no." If the Tribunal agrees,
9 the consequence is the dismissal of the Article 1117
10 Claim. And if the Tribunal has also answered "no" to
11 the Article 1116 Claim, the consequence is dismissal
12 of the entire Claim, and that is the case even if the
13 Tribunal has answered "yes" to Questions 1 through 3.
14 Now, there's one question missing from this
15 decision tree, and that's whether the Federal Fuel
16 Charge relates to the Claimant or its investment under
17 NAFTA Article 1101, and that's because the Claimant
18 has withdrawn its allegations with respect to that
19 Measure, and Canada has accepted that withdrawal.
20 The remainder of Canada's Opening Statement
21 is organized along the lines of this decision tree.
22 First, I'll spend a bit of time addressing background

1 facts, and then we will address each of the questions
2 before the Tribunal, in turn.
3 I'll first address the legacy investment
4 issue, Ms. Squires will address the validity of the
5 waivers filed, Ms. Dosman will then address the
6 limitation period, Ms. Harris will address prima facie
7 damages, Ms. Squires will return to address Prairie's
8 waiver in the WMH proceeding, and Mr. Koziol will both
9 address ownership and control of Prairie and conclude
10 Canada's Opening Statement.
11 We'll address the five questions the
12 Tribunal put to the Parties on April 16 throughout our
13 statements, and have attempted to note expressly where
14 we are doing so.
15 Beginning with the factual background. I've
16 organized the facts into three chapters, Chapter 1
17 covers the Claimant's acquisition and sale of
18 interests in Canada. Chapter 2 covers the Measures
19 the Claimant has put at issue in this case and
20 summarizes its Claim. Chapter 3 covers certain
21 historical facts relating to separate, prior Claims of
22 the Claimant and of the arm's-length purchaser of its

1 interest in Canada, Westmoreland Mining Holdings.
2 We'll build all the key events across these
3 chapters into the same timeline for the Tribunal to
4 take away, but I also refer the Tribunal back to
5 Canada's Memorial on Jurisdiction starting at Page 33
6 for a summary of key dates for the Jurisdictional
7 Phase in a table form.
8 Chapter 1, the Claimant. The Claimant was
9 incorporated in Delaware in 1910. It was a
10 publicly-traded company that operated coal mines
11 throughout the United States. In 2014, it purchased a
12 number of interests in Canada from a Company called
13 Sherritt International. Among those assets was
14 Prairie Mines & Royalty, ULC, or Prairie for short, an
15 Alberta enterprise that owns thermal coal mines and
16 sold coal to power plants.
17 WCC held its interests in Prairie before it
18 sold them in the manner set out on Slide 6. As you
19 can see, it was a limited partner in the ultimate
20 partnership that held the interests in Prairie.
21 On October 9, 2018, the Claimant and 36 of
22 its U.S. affiliates filed voluntary petitions for

1 bankruptcy in Texas, citing a number of events that
2 led them to that point. Those included the rising
3 cost of capital, competition from inexpensive natural
4 gas, a lack of growth and energy demand, and increased
5 regulation. Those reasons can be found in
6 Exhibit R-057 at Pages 19 through 24.
7 The Claimant explained to the U.S.
8 bankruptcy court that its bankruptcy Plan contemplated
9 the sale and transfer of substantially all of the WCC
10 assets and equity interests, efficient distributions
11 to its creditors, and a subsequent wind-down of its
12 business upon completion of the distributions under
13 the Plan. And that is what the Claimant did.
14 On March 15, 2019, the sale transaction was
15 executed, and WCC transferred its interests in Prairie
16 to a new Company created on behalf of its first lien
17 lenders, Westmoreland Mine Holdings, LLC, or as we'll
18 refer to it throughout today, WMH.
19 You'll hear more about the legal
20 consequences of this fact for the Claimant's Claim
21 when I discuss what a legacy investment is, and when
22 Mr. Koziol addresses the ownership or control question

1 under NAFTA Article 1117. There is no dispute about
2 this date or the fact that the interests in Prairie
3 were sold.
4 It is important to understand that this sale
5 was negotiated at arm's length. This both provides
6 general context for the relationship between WCC and
7 WMH, and is relevant to the Claimant's erroneous time
8 bar theories.
9 In the Order confirming the Claimant's
10 bankruptcy plan, the U.S. bankruptcy judge presiding
11 over the case held the sale transaction was proposed
12 and entered into in good faith and from arm's-length
13 bargaining positions. The WMH Tribunal reached the
14 same conclusion in its Award in that case, finding
15 that the first-tier lienholders "were able to purchase
16 certain of WCC's assets, including the Canadian
17 Enterprises, in an arm's length transaction".
18 It further concluded that WCC's bankruptcy
19 "was not a corporate restructuring pursuant to which
20 [WMH] emerged from WCC's ashes". Both of those quotes
21 are from Paragraph 230 of RLA-001. Now, this brings a
22 close to Chapter 1. The Claimant purchased interests

1 in Prairie in 2014, and sold them in an arm's-length
2 transaction in 2019.
3 Chapter 2 will situate the Measures the
4 Claimant has challenged in this Claim on the same
5 timeline. On November 22, 2015, Alberta announced its
6 2015 Climate Leadership Plan. The plan included a
7 policy announcement to phase out emissions from
8 coal-fired electricity generation by 2030, an update
9 to Alberta's industrial emitters carbon pricing
10 Regulation, and the introduction of a new consumer
11 fuel levy that would apply to nonindustrial emitters.
12 On June 13, 2016, Alberta enacted the
13 Climate Leadership Act, which imposed the new carbon
14 levy on consumer fuels. On November 24, 2016, Alberta
15 announced that it had concluded Off-Coal Agreements
16 that allocated Transition Payments to three power
17 plant owners with generating units scheduled to
18 operate beyond 2030.
19 Finally, on January 1, 2020, Part 1 of the
20 Federal Greenhouse Gas Pollution Pricing Act, which
21 established the Federal Fuel Charge, a regulatory
22 charge applied to the producers, distributors, and

1 importers of various types of carbon-based fuel, began
2 to apply in Alberta. As noted earlier, the Claimant
3 has withdrawn its allegation of breach with respect to
4 this Measure.
5 In its Notice of Arbitration filed pursuant
6 to CUSMA Annex 14-C and NAFTA Chapter Eleven on
7 October 14, 2022 the Claimant alleges that these
8 Measures have violated NAFTA Articles 1102, National
9 Treatment; 1105, Minimum Standard of Treatment; and
10 1110, Expropriation.
11 Its alleged investments are Prairie,
12 interests in Prairie, and certain of Prairie's assets.
13 It is also asserted that a prior NAFTA Claim
14 constitutes a separate investment. Despite bringing
15 its Claim under both NAFTA Article 1116 on its own
16 behalf and under Article 1117 on behalf of Prairie, it
17 alleges damages representing only Prairie's lost
18 revenues from coal sales and Prairie's accelerated
19 reclamation costs.
20 It has not yet quantified its alleged
21 damages. The Claimant filed with its 2022 NOA waivers
22 for itself and for Prairie that were both dated from

1 2018. Ms. Squires will address the legal consequence
2 of this fact a bit later this morning.
3 Now, in its Question Number 3, the Tribunal
4 has asked the Parties about the scope and impact of
5 the Claimant's withdrawal of its claim with respect to
6 the Federal Fuel Charge, in particular, in respect of
7 the expropriation claim under NAFTA Article 1110.
8 Now, the Claimant has made two allegations
9 of violation of NAFTA Article 1110. The first is
10 based on Alberta's -- and I quote from Paragraph 92 of
11 the Claimant's NOA -- "payments to coal-fired
12 electricity units combined with federal and provincial
13 carbon taxes."
14 The second is based on Alberta's
15 "introduction of a regulatory scheme to phase out coal
16 by 2030, along with its punishing levies on coal."
17 That's at Paragraph 91.
18 Canada understands that, by withdrawing its
19 claim with respect to the Federal Fuel Charge, the
20 Claimant has withdrawn at least its first allegation
21 of violation of Article 1110. This is the only
22 alleged violation that involves the Federal Fuel

1 Charge. Now, I expect we may have a bit more to say
2 on this one tomorrow, once we hear from the Claimant.
3 But to the Tribunal's Question 4, to the
4 extent there is a residual expropriation claim based
5 only on 2015 and 2016 Alberta Measures, Ms. Squires
6 and Ms. Dosman will explain that Canada's positions
7 with respect to waiver and time bar remain unchanged.
8 There remains no waiver filed with the Claim, and such
9 an expropriation allegation is time barred.
10 And that brings us to Chapter 3, prior
11 Claims. And in this chapter, we'll get into part of
12 the Tribunal's Question Number 2, which asks whether
13 the 2018, 2019, and 2022 Claims are identical, as the
14 Claimant argues, or are they separate and distinct as
15 the Respondent contends, and what is the effect of
16 such a determination.
17 And we'll look at the parameters of the
18 prior Claims and how they compare to the Claim before
19 the Tribunal in this chapter. But as a first
20 observation, both the Parties' submissions and the
21 Tribunal's question illustrate that the term "claim"
22 can mean different things in different contexts.

1 And that can be useful. For example,
2 "claim" can refer to a factual allegation, or to a
3 particular allegation of Treaty violation or loss.
4 The Claimant largely refers to "claim" in this way.
5 But "Claim" can also refer to the broader
6 package of allegations that a particular investor
7 submits to arbitration in a Notice of Arbitration at a
8 particular point in time. This is what establishes
9 whether consent to arbitrate under the Treaties has
10 been perfected, and whether a Tribunal has
11 jurisdiction to consider the merits of the Claim.
12 Both CUSMA Annex 14-C and NAFTA Article 1122
13 establish that there are two parts to perfected
14 consent and, thus, to the creation of an Arbitration
15 Agreement.
16 First, the State Party consents to the
17 submission of a claim to arbitration in accordance
18 with the procedures of the Treaties.
19 Second, that consent, coupled with the
20 submission of a Claim to arbitration in accordance
21 with those same procedures, creates an Arbitration
22 Agreement. When is a Claim submitted to arbitration?

1 NAFTA Article 1137(1) tells us: when the NOA is
2 received by the disputing State Party.
3 It is, thus, the text of the Treaties on the
4 one hand, and the content of the NOA which represents
5 the Claim submitted to arbitration on the other, that
6 provide a Tribunal with the information it needs to
7 determine whether an agreement to arbitrate has been
8 reached and whether, by extension, it has
9 jurisdiction.
10 This is how Canada uses the term "claim"
11 when it says the Claims are separate and distinct.
12 Each NOA represents a Claim that was submitted to
13 arbitration and, thus, a potential agreement to
14 arbitrate.
15 And this is how Canada invites the Tribunal
16 to look at the prior Claims and their relevance to its
17 task here, determining whether WCC's 2022 NOA
18 establishes an agreement to arbitrate between Canada
19 and WCC.
20 Now, we have attempted to illustrate,
21 perhaps crudely, the components of the Arbitration
22 Agreement with this puzzle. All of the pieces laid

1 out in an NOA that submits the Claim to arbitration at
2 a particular time are necessary for the Tribunal to
3 find an Arbitration Agreement.
4 Allegations of Treaty breach and loss that
5 comply with the Treaties are only two components of
6 what is necessary to ground a Tribunal's jurisdiction.
7 When the Tribunal is assessing whether it has
8 jurisdiction, it must come back to the full set of
9 conditions of consent.
10 Similarity in allegations of breach and loss
11 between Claims that were separately submitted to
12 arbitration do not create the Arbitration Agreement.
13 And as we'll see over the next few minutes, no prior
14 agreement to arbitrate has crystallized between Canada
15 and WCC, or between Canada and WMH.
16 With that context, we'll return to 2018,
17 November 19, 2018, in particular, when WCC submitted
18 its first NAFTA Claim to arbitration. This was the
19 first potential agreement to arbitrate. In that NOA,
20 the Claimant brought its Claim under NAFTA Chapter
21 Eleven only. It brought it under Article 1116 on its
22 own behalf and Article 1117 on behalf of Prairie.

1 It alleged violations of only two of the
2 Measures we discussed in Chapter 2, Alberta's 2015
3 decision to phase out emissions from coal-fired
4 electricity generation, and its 2016 allocation of
5 transition payments to power plant owners.
6 It alleged that these Measures violated
7 NAFTA Articles 1102 and 1105, and alleged investments
8 in Prairie, interests in Prairie, and certain of
9 Prairie's assets. It alleged damages exceeding
10 $470 million that represented Prairie's lost revenues
11 from coal sales and accelerated reclamation costs.
12 You can see the differences between the 2018
13 NOA and the Claim before the Tribunal on Slide 23.
14 The 2022 NOA challenges Measures that the 2018 NOA did
15 not, and alleges the violation of Article 1110, which
16 the 2018 NOA did not. The 2022 NOA further asserts an
17 investment in what appears to be the 2018 NAFTA Claim.
18 It has not quantified damages, though claims the same
19 heads of damage as the 2018 Claim.
20 And the reason we're all here today can be
21 traced back to the next event in Chapter 3, the
22 Claimant's attempt to sell its 2018 NAFTA Claim.

1 You'll note that the Claim was filed after the
2 Claimant filed its bankruptcy petition, in contrast to
3 the Claimant's recent statement that it had lodged the
4 Claim prior to the bankruptcy.
5 It was the Claimant's choice to try to sell
6 the 2018 NOA in its bankruptcy process. The Claimant
7 was a sophisticated business entity. It was publicly
8 traded, and its own bankruptcy proceeding involved 36
9 of its U.S. affiliates.
10 As the Claimant explained in its response on
11 jurisdiction, the Company "handled its NAFTA Claim
12 with comprehensive deliberation involving input from
13 outside consultants, external bankruptcy counsel,
14 external NAFTA counsel, and WCC's Board of Directors."
15 Canada was not a party to WCC's bankruptcy
16 proceeding, and learned of the existence of WMH and
17 the attempted sale of the NAFTA Claim for the first
18 time on receipt of the attempted amendment.
19 So what exactly did WCC try to sell to WMH?
20 The Stalking Horse Purchase Agreement negotiated
21 between the First Lien Lenders on the one of hand and
22 the Claimant and its affiliates on the other, defined

1 the "NAFTA Claim" for sale as "that certain claim
2 filed with the Office of the Deputy Attorney General
3 of Canada on November 19, 2018". In other words, the
4 2018 NOA that had already been submitted to
5 arbitration.
6 You may also note that the definition
7 includes a parenthetical, "as such claim may be
8 amended". Now, that may be a general way of
9 preserving some flexibility with respect to a Claim,
10 but it may also suggest that WCC and WMH had already
11 been planning an amendment to the 2018 NOA to
12 substitute the new purchaser as the Claimant.
13 With the sale transaction completed on
14 March 15, the transactors' next step was to notify
15 Canada of the sale, and their proposal for reflecting
16 its results in the 2018 NOA. On May 13, 2019, Canada
17 received the attempted amendment.
18 Now, there's been much debate between the
19 Parties on the nature of the proposed amendment. Was
20 it substitution or was it addition? Why are we having
21 this debate? Well, it's because the Claimant has come
22 up with a litigation strategy to blame Canada for its

1 own decisions.
2 It's trying to rewrite what happened, saying
3 now that they were not proposing substitution at the
4 time, and that Canada forced it to withdraw its Claim.
5 It attempts to paint a picture of bad faith behavior,
6 that is not supported by the record, in its bid to
7 establish this Tribunal's jurisdiction.
8 The Tribunal will, no doubt, review the
9 contemporaneous evidence in the documents contained in
10 Exhibits R-080, C-055, and R-081 through R-084 closely
11 to form its own views. To assist the Tribunal with
12 its task, I'll highlight a few parts in this
13 correspondence this morning. Canada's view is that
14 the contemporaneous evidence demonstrates that
15 everyone understood at the time that this was an
16 attempted substitution.
17 At minimum, it is clear from the documents
18 that that was Canada's understanding at the time, and
19 if that was a misunderstanding, neither the Claimant
20 nor WMH attempted to correct it. The documents
21 instead confirm that the Claimant's post hoc
22 argumentation before this Tribunal cannot be

1 sustained.

2 In particular, the revised NOA, which is at

3 Exhibit C-055, indicated that there was a proposed

4 substitution, and not that WCC intended to participate

5 as a Claimant alongside WMH as the Claimant now

6 argues.

7 For example, the front page of the document

8 identifies only WMH as the Claimant/Investor. If WCC

9 were truly intending to participate, the clearest way

10 to identify that would have been to include both

11 Companies as the Claimants/Investors.

12 Now, the Claimant also argues in its

13 Rejoinder that "the case caption did not mention

14 Prairie, which Canada acknowledges was and remained a

15 Claimant". This is incorrect. Canada has never

16 acknowledged Prairie as a Claimant, because Prairie

17 cannot be a Claimant under NAFTA Chapter Eleven. It

18 is a Canadian enterprise, and NAFTA Article 1117(4) is

19 clear that it cannot bring a claim against Canada.

20 The text of the document also suggested that

21 WCC was looking to amend itself out of its Claim. The

22 Claimant points to the inclusion of WCC in the first

1 paragraph as support for its argument that WCC
2 intended to participate as a Claimant. But it's not
3 clear how WMH could have amended WCC's NOA without
4 some reference to WCC.
5 We also see that WMH is given the short
6 form, Westmoreland, for the document and, in the next
7 paragraph, Westmoreland just defined as WMH elects the
8 UNCITRAL Rules as the Claimant under NAFTA
9 Article 1120(1). The procedural requirements section
10 of the document identified WCC as the initial
11 disputing investor, and explained that WCC sold
12 Prairie, other assets, and the instant NAFTA Claim to
13 WMH.
14 It stated that WMH was the owner of the
15 assets, interests, rights and claims of the initial
16 disputing investor, WCC, and it introduced WMH as the
17 disputing investor.
18 Read in context, initial disputing investor
19 who sold all its rights and interests to the disputing
20 investor does not leave the impression that WCC would
21 continue to pursue the Claim alongside the new owner
22 of all its rights.

1 On July 2, 2019, Canada responded to the
2 attempted amendment articulating its view that the
3 proposed amendment was not permitted by Article 20 of
4 the UNCITRAL Rules. This is Exhibit R-081. In
5 particular, Canada explained that, under Article 20,
6 if an amendment would cause the Claim to fall outside
7 the jurisdiction of the Arbitral Tribunal, it is a new
8 Claim, and that the substitution of a new Claimant is
9 such an amendment.
10 As a result, Canada concluded that WMH could
11 not become the disputing investor in a Claim that was
12 submitted to arbitration by WCC. Instead, WMH needed
13 to submit its own Claim and meet the requirements of
14 Canada's offer to arbitrate. Those included the
15 delivery of a Notice of Intent at least 90 days before
16 submitting a claim to arbitration.
17 But, because it seemed evident that WCC and
18 WMH intended for WMH to replace WCC as the disputing
19 investor, Canada made an offer that would save WMH
20 time. Canada was prepared to accept the May 13
21 amended NOA as WMH's Notice of Intent, which meant
22 that WMH could then submit its own claim to

1 arbitration once 90 days had passed from May 13,
2 rather than from some date after the date of this
3 letter, July 2.
4 In exchange for the time savings and
5 consistent with Canada's understanding of what the
6 requestors were attempting to do, Canada proposed that
7 WCC withdraw its Claim. What Canada was not proposing
8 was that it would only accept a substitution "if" WCC
9 withdrew its Claim. Canada did not accept that
10 substitution was possible.
11 Canada was also not insisting that WCC
12 withdraw its Claim or no Claim could proceed at all.
13 Indeed, it's hard to understand how a proposal
14 conveyed in a single letter could be characterized at
15 all as insistence. But importantly, the letter and
16 the proposal were focused on the issues raised by the
17 attempted amendment and the appropriate mechanism for
18 changing a Claimant in a NAFTA claim, as WCC and WMH
19 were looking to do.
20 Canada made it clear that it was making its
21 proposal without prejudice to its ability to raise any
22 jurisdictional or admissibility objections with

1 respect to the original NOA, that is, the one
2 submitted to arbitration by WCC on November 19, 2018,
3 or to any new claim. For example, the Claim that
4 might be submitted to arbitration by WMH. Canada did
5 not suggest in this letter that it would not raise any
6 jurisdictional objections with respect to a WMH Claim,
7 nor did it state that it would accept the jurisdiction
8 of a tribunal constituted to hear either the original
9 WCC Claim or a new WMH Claim.
10 On July 3, 2019, just one day following
11 Canada's proposal, the requestors wrote to Canada at
12 Exhibit R-082. Notably, the letter acknowledged
13 Canada's view that the attempted amendment was filed
14 by WMH and not by WCC, acknowledged Canada's
15 understanding of the proposal as a substitution, it
16 expressed disagreement with Canada's analysis of
17 Article 20, and, despite this disagreement, chose to
18 benefit from the time savings for WMH's Claim and to
19 withdraw WCC's Claim.
20 Equally of interest in this response is what
21 it did not do. It did not state anywhere that WCC had
22 intended to continue on as a Claimant alongside WMH

1 and it did not convey its purported understanding that
2 Canada would not raise jurisdictional objections.
3 The Claimant's Witness, Mr. Stein, expresses
4 shock that, after this agreement was reached, Canada
5 raised jurisdictional objections with respect to WMH's
6 2019 NOA. Canada's letter does not provide a
7 reasonable basis for any conclusion that Canada had
8 waived jurisdictional objections.
9 Now, it's worth noting that Canada was not
10 communicating directly with Mr. Stein or with anyone
11 else at WCC or at WMH. There was an intermediary:
12 Claimant's Counsel. To the extent that the letter was
13 being interpreted, it was not Canada doing the
14 interpreting, nor was there any requirement to accept
15 Canada's proposal. It was an offer which WCC and WMH
16 were free to reject, counter-offer, or accept. The
17 choice to accept was entirely theirs guided by the
18 sophisticated and comprehensive advice they expressed
19 they were receiving.
20 Now, I want to pause here to note that,
21 regardless of whether the attempted amendment proposed
22 a substitution or an addition, what happened next was

1 neither. It was the withdrawal of one NAFTA Claim by
2 one investor and a submission of a new NAFTA Claim to
3 arbitration by another, each representing a distinct
4 potential agreement to arbitrate. On July 23, 2019,
5 WCC withdrew its 2018 Claim, along with the waivers
6 that were filed with it. That put an end to the first
7 potential agreement to arbitrate. We are going to
8 switch the timeline scale a bit here to address the
9 final few steps.
10 WMH then submitted its Claim to arbitration
11 only under NAFTA Chapter Eleven on August 12, 2019,
12 90 days after May 13. This was the second potential
13 agreement to arbitrate. The NOA asserted claims under
14 NAFTA Articles 1116 and 1117 and was accompanied by
15 valid waivers for WMH and Prairie. It alleged
16 violations of Articles 1102 and 1105, arising out of
17 the same two Measures that WCC had raised in its 2018
18 NOA. It did not allege a violation of the
19 expropriation obligation and did not claim to have an
20 investment in WCC's 2018 NAFTA Claim, despite having
21 purchased it in the U.S. bankruptcy transaction.
22 On January 31, 2022, the WMH Tribunal

1 dismissed WMH's Claim on the basis that it did not
2 hold its investment in Prairie at the time of the
3 alleged breach as NAFTA required. It further found
4 that WMH could not pursue the Claim anyway because it
5 was not the legal successor to WCC coming out of WCC's
6 bankruptcy process.
7 Disappointed with that result, on
8 October 14, 2022, WCC filed a new Claim before this
9 Tribunal. This is the third potential agreement to
10 arbitrate. Now, returning to the Tribunal's Question
11 Number 2, we have summarized on Slide 39 the many ways
12 in which the Claimant has not established that the
13 2018, 2019, and 2022 Claims are the same. And we
14 won't go through all of these, but their beginnings
15 and endings illustrate the differences.
16 The 2018 arbitration began when Canada
17 received WCC's 2018 NOA and ended when WCC withdrew
18 it. No agreement to arbitrate crystallized between
19 Canada and WCC.
20 The 2019 arbitration began when Canada
21 received WMH's 2019 NOA and ended when the WMH
22 Tribunal determined that there was no agreement to

1 arbitrate between Canada and WMH because the Claim did
2 not meet the conditions of Canada's consent to
3 arbitrate.
4 The 2022 arbitration began when Canada
5 received WCC's 2022 NOA without waivers. The
6 existence of an agreement to arbitrate between Canada
7 and WCC is the very question pending before this
8 Tribunal.
9 Despite similarity in allegations of breach
10 and loss, these Claims represent three distinct
11 potential agreements to arbitrate.
12 Now, the Claimant's allegations in this
13 regard relate primarily to their time bar arguments,
14 and so Ms. Dosman will return to the effect part of
15 the Tribunal's Question 2 when she addresses the
16 Limitation Period.
17 That brings a close to Chapter 3 and to our
18 survey of background facts. We'll move next to the
19 first legal question the Tribunal has to answer: Does
20 the Claimant hold a legacy investment under CUSMA
21 Annex 14-C? As I explained earlier, the answer to
22 this question is no. CUSMA Annex 14-C requires a

1 Claimant to hold the investment with respect to which
2 it brings its Claim when CUSMA entered into force.
3 The Claimant did not.
4 As a result, Canada has not consented to
5 arbitrate this Claim and the Tribunal does not have
6 jurisdiction. The Claimant has attempted to avoid
7 this conclusion by conflating distinct issues and
8 raising a number of straw man arguments. For example,
9 in its Rejoinder, the Claimant has posited that the
10 main area of disagreement between the Parties is
11 whether the legacy investment protection extends to
12 claims that materialized prior to the implementation
13 of CUSMA; but the question of what Government conduct
14 is captured by Annex 14-C is not disputed before this
15 Tribunal. Instead, the issue is when does a claimant
16 need to hold an investment for it to qualify as a
17 legacy investment?
18 We'll try to untangle some of these issues
19 this morning as we move through three parts of
20 argument.
21 First, we'll take a close look at the text
22 of CUSMA Annex 14-C and the express requirements of

1 Canada's consent to arbitrate. This part will address
2 the Tribunal's Question Number 1.
3 Second, we'll examine how the Claimant has
4 failed to establish that it meets these express
5 requirements.
6 Finally, we'll address why the Claimant's
7 efforts to establish jurisdiction based on equitable
8 principles must be rejected.
9 Turning to the first, on July 1, 2020, CUSMA
10 superseded NAFTA. This is the only Free Trade
11 Agreement in force between Canada, the United States,
12 and México. CUSMA Chapter 14, the investment chapter,
13 does not have a trilateral ISDS mechanism. In fact,
14 Canada has not consented to arbitrate any
15 investor-State claims that arise under CUSMA
16 Chapter 14.
17 Given that NAFTA was terminated at this
18 time, the Treaty Parties' consent to arbitrate claims
19 under NAFTA Chapter Eleven was also terminated. As
20 the United States has recently explained, the default
21 outcome after the NAFTA's termination was that there
22 would be no recourse to arbitration for alleged

1 breaches of the NAFTA. You can find that at R-156,
2 Paragraph 52.
3 There is one limited and narrowly
4 circumscribed exception contained in Annex 14-C.
5 Annex 14-C features six paragraphs. It sets out the
6 Treaty Parties' limited consent to arbitrate certain
7 claims arising under NAFTA Chapter Eleven for a period
8 of three years following its termination. The focus
9 of the annex is consent to arbitrate claims. Its
10 title is “Legacy Investment Claims and Pending
11 Claims."
12 Paragraph 1 of the Annex establishes that
13 each Party consents, with respect to a legacy
14 investment, to the submission of a claim to
15 arbitration in accordance with Section B of Chapter
16 Eleven of NAFTA and this Annex that alleges a breach
17 of Section A of NAFTA Chapter Eleven.
18 At the outset, in Paragraph 1, we see a few
19 limitations on this consent to arbitrate: First, the
20 consent is exclusively for a claim with respect to a
21 legacy investment; second, the submission of the claim
22 to arbitration must accord with the requirements of

1 the dispute settlement section of NAFTA Chapter Eleven
2 and with the requirements of CUSMA Annex 14-C; and,
3 third, the consent is with respect to a claim that
4 alleges breaches of the substantive protections of
5 NAFTA Chapter Eleven.
6 Paragraph 6 of the Annex sets out the
7 definitions applicable to the Annex. Subparagraph (a)
8 defines the term most relevant to the Tribunal's task
9 here, "legacy investment." For the purposes of the
10 Annex and the CUSMA Parties' consent to arbitrate
11 claims under the Annex, "legacy investment" means "an
12 investment of an investor of another Party in the
13 territory of the Party established or acquired" while
14 NAFTA was in force and "in existence on the date of
15 entry into force of this Agreement". Thus, a "legacy
16 investment" is an investment of an investor of another
17 Party that meets the three subsequent requirements.
18 While CUSMA Chapter 14 contains its own definitions of
19 "investment" and "investor of a Party" which would
20 otherwise apply to the definition of legacy
21 investment, subparagraph (b) indicates that the terms
22 "investment" and "investor" have the meanings accorded

1 to those terms in NAFTA for the purposes of the Annex.
2 So we go to the text of NAFTA to help inform our
3 understanding of the term "legacy investment" in the
4 Annex.
5 NAFTA Article 1139, the definition
6 provision, defines both terms. "Investment," for the
7 purposes of NAFTA's investment chapter, is a closed
8 definition that sets out certain of the parameters of
9 what qualifies for investment protection under the
10 Chapter. Now, apologies, the definition is too long
11 to fit readably on one slide, but suffice it to say
12 that there are eight categories of investment and an
13 alleged interest must fall within one of them and not
14 fall into one of the exceptions.
15 NAFTA Article 1139 also defines "investor of
16 a Party," which, for purposes of Annex 14-C, is
17 important for understanding who must have made and
18 held the relevant investment at the specified times.
19 According to NAFTA, an "investor of a Party"
20 means, in relevant part, "an enterprise of such Party
21 that seeks to make, is making, or has made an
22 investment."

1 So coming back to the definition of "legacy
2 investment," with the NAFTA definition in mind, we see
3 that a legacy investment must meet the definition of
4 "investment" under NAFTA Chapter Eleven; that is, it
5 must fall within one of the enumerated categories of
6 "investment" set out in NAFTA Article 1139; it must be
7 an investment of an investor of another Party, meaning
8 that, in our case, an enterprise, here in the U.S. or
9 México, has made the investment; the investment must
10 have been made in a territory of the Party -- here,
11 Canada -- and it must meet two temporal requirements:
12 First it must have been made -- or, in other words,
13 established or acquired, while NAFTA was in force;
14 and, second, it must have existed when CUSMA entered
15 into force.
16 What does it mean to be in existence when
17 CUSMA entered into force? And this, I think, gets to
18 the crux of the Tribunal's Question Number 1. And
19 there are a couple of places we can look to for
20 guidance on this. The first is the definition of
21 "legacy investment" itself. As we can see, the "in
22 existence" phrase comes immediately after the

1 requirement that the investment in question was made
2 while NAFTA was in force.
3 Contrary to the Claimant's argument, it is
4 not enough that the investment was established or
5 acquired prior to CUSMA's entry into force. If that
6 was enough, the "in existence" clause would be
7 redundant. Instead, this suggests that "in existence"
8 is a separate requirement and means continues as an
9 investment.
10 The second place we can look for guidance is
11 NAFTA's definition of the term "investment of an
12 investor of a party." Given that the CUSMA Parties
13 decided to tie their consent to arbitrate legacy
14 investment claims to the concepts of "investment" and
15 "investor" contained in NAFTA rather than in CUSMA,
16 the NAFTA definition of the same term of art,
17 "investment of an investor of a party," offers
18 guidance as to the contemplated relationship between
19 "investment" and "investor."
20 As you can see on Slide 47, that
21 relationship is one of ownership or control. An
22 investment of an investor is one that is owned or

1 controlled by that investor. So for an investment to
2 exist as an investment of an investor of a Party at a
3 given moment in time, it must be owned or controlled
4 by that investor at that time. Putting this all
5 together, to establish a legacy investment, a claimant
6 must establish that it held the relevant investment
7 with respect to which it brings its claim when CUSMA
8 entered into force.
9 All three CUSMA Parties agree with its
10 interpretation. As México has explained, a claimant
11 must prove that it owned or controlled the
12 enterprise -- that's the investment in
13 question -- among other times as of the date of entry
14 into force of CUSMA. The U.S. has also stated that
15 Annex 14-C limits the submission of arbitration claims
16 to those investors with ongoing investments in the
17 Host States after NAFTA's termination. In this way,
18 the U.S. explains that the definition of "legacy
19 investment" signals the USMCA's preference for
20 permitting claims by investors who maintained their
21 investment as of the Treaty's entry into force, as
22 opposed to those investors who do not.

1 The Tribunal must take this Agreement of the
2 CUSMA Parties into account in its interpretation of
3 "legacy investment," and should accord it significant
4 weight.
5 The Claimant appears to agree at
6 Paragraph 71 of its Rejoinder that, and I quote: "The
7 USMCA requires a tribunal to consider whether an
8 investment existed on the date the USMCA went into
9 force." But the elaboration of its argument makes
10 clear that it prefers to read out this express final
11 clause of the definition of "legacy investment." As
12 Canada has previously noted, it is not open to the
13 Claimant or to the Tribunal to alter the terms of
14 Canada's consent to arbitrate legacy claims. Each of
15 the Claimant's three arguments in this respect must be
16 dismissed.
17 First, the Claimant argues that the
18 incorporated NAFTA definitions of "investment" and
19 "investor" essentially operate to erase the “in
20 existence” clause. In particular, it argues that
21 NAFTA's definition of "investor" includes the phrase
22 "has made an investment in the past" -- in the past

1 tense, which means the Tribunal can ignore the
2 expressed temporal requirements of a legacy investment
3 definition because NAFTA allows an investment to have
4 been made in the past.
5 Canada does not dispute that one of the ways
6 to qualify as an investor of another Party under NAFTA
7 is to have made an investment in the past. In fact,
8 to qualify as a legacy investment under CUSMA, the
9 investor must have made the investment in the past
10 while NAFTA was in force.
11 Neither of these facts alter or operate to
12 erase the added temporal requirement to hold the
13 investment at the time that CUSMA entered into force.
14 Second, the Claimant argues that, under
15 NAFTA, the only relevant time to assess ownership or
16 control of an investment is the date of the Measures.
17 Not only is the Claimant's position incorrect under
18 NAFTA, it does nothing to displace the express text of
19 the “in existence” clause. While owning or
20 controlling the relevant investment at the time of the
21 alleged breaches is a necessary condition of
22 establishing a tribunal's jurisdiction under NAFTA

1 Chapter Eleven, it is not sufficient to establish
2 jurisdiction under CUSMA Annex 14-C.
3 The Claimant's third argument that other
4 tribunals have held that a claimant can bring a claim
5 post divestment similarly misses the mark. None of
6 those tribunals were dealing with treaty text like
7 that of CUSMA Annex 14-C, nor did they foreclose the
8 possibility that a second treaty with different rules
9 might supplant that idea.
10 In short, the Claimant cannot avoid that
11 CUSMA Annex 14-C imposes jurisdictional requirements
12 that are additional to those in NAFTA Chapter Eleven.
13 One of those requirements is that the Claimant hold
14 the investment with respect to which it brings a claim
15 at the time that CUSMA entered into force.
16 And that brings us to the second part of our
17 argument. The Claimant has not established that it
18 met this express requirement. To recall, the Claimant
19 alleges that its investments are interest in Prairie
20 and certain of Prairie's assets, and the 2018 NAFTA
21 Claim. Neither qualifies as a legacy investment.
22 First and foremost, the Parties agree that WCC sold

1 its interest in Prairie and its assets on March 15,
2 2019, long before CUSMA entered into force on July 1,
3 2020. Accordingly, any interest the Claimant
4 previously held in Prairie and its assets do not
5 qualify as a legacy investment and Canada has not
6 consented to arbitrate the 2022 Claim with respect to
7 them.
8 Understanding that its interests in Prairie
9 do not qualify as a legacy investment, the Claimant's
10 next argument is that it had an investment in the form
11 of a NAFTA Claim, which it does not precisely define.
12 It has posited that a NAFTA Claim can be an investment
13 under NAFTA, either as a standalone claim to money or
14 as an investment under Subparagraph (h) of the
15 definition of "investment" in Article 1139.
16 Now, there's a long list of reasons why this
17 argument cannot be sustained, primary among them is
18 that there is no basis in the Treaty to find that a
19 NAFTA claim qualifies as a protected investment under
20 NAFTA. But the Tribunal need not even decide that
21 issue because the Claimant has only alleged breaches
22 in its 2022 NOA with respect to the treatment of its

1 interests in Prairie. It had made no allegation of a
2 violation of Section A of NAFTA or an allegation of
3 damage with respect to its purported NAFTA Claim
4 investment.
5 The Claimant cannot rely on one alleged
6 investment for purposes of establishing jurisdiction
7 while advancing liability and damages claims about a
8 different investment over which the Tribunal lacks
9 jurisdiction.
10 This point alone is sufficient to dismiss
11 the Claimant's remaining claim about having a legacy
12 investment.
13 The Claimant has, thus, failed to establish
14 that it has a legacy investment, and Canada has not
15 consented to arbitrate its Claim.
16 The Claimant's final attempt to establish
17 jurisdiction is resort to equitable principles such as
18 estoppel and preclusion. The Tribunal's jurisdiction
19 is a question of law. If the Tribunal finds that the
20 Claimant has not established that it meets the
21 conditions of Canada's consent to arbitrate as a
22 matter of law, then it cannot create jurisdiction

1 anyway on the basis of equity. Neither CUSMA
2 Annex 14-C nor NAFTA Chapter Eleven permit this
3 result.
4 The Tribunal in Koch Industries v. Canada
5 recently agreed. That Tribunal was also constituted
6 under CUSMA Annex 14-C and NAFTA Chapter Eleven. It
7 agreed that its jurisdiction is a matter of law and
8 that estoppel could not step in as a solution if there
9 was no jurisdiction legally. This same holds true for
10 preclusion, such that it may be.
11 Here, the Tribunal need not reach the
12 Claimant's estoppel or preclusion arguments because
13 the Claimant has failed to establish that it held a
14 legacy investment under CUSMA Annex 14-C as a matter
15 of law. In any event, Canada has spent considerable
16 time today and in its written submissions explaining
17 why there is no basis to the Claimant's allegations on
18 the facts either. We refer to the Tribunal to
19 Paragraphs 104 through 124 of Canada's Reply and
20 remain happy to answer any questions on these issues.
21 In sum, the answer to the first question of
22 whether the Claimant has established it held a legacy

1 investment under CUSMA Annex 14-C is no. The
2 consequence is dismissal, and the Tribunal need not
3 proceed further.
4 And this is where I'll turn things over to
5 Ms. Squires to kick things off on the suite of NAFTA
6 issues the Claimant has failed to establish.
7 PRESIDENT KAUFMANN-KOHLER: Thank you.
8 Ms. Squires?
9 MS. SQUIRES: Thank you. Good morning,
10 Prof. Kaufmann-Kohler and Members of the Tribunal. My
11 presentation this morning will address the proper
12 interpretation of the waiver requirement in NAFTA
13 Article 1121 and, in doing so, explain the further
14 reason why this Tribunal is without jurisdiction.
15 As Ms. Zeman mentioned, Canada has two
16 arguments with respect to waiver. This also means
17 that you'll hear from me twice this morning. At this
18 juncture, I'm going to discuss Canada's first waiver
19 argument that this Tribunal is without jurisdiction
20 over the Claimant's Article 1116 and Article 1117
21 claims as the Claimant and Prairie have failed to
22 submit valid waivers as is required under

1 Article 1121(3) of NAFTA. So let's turn to that
2 argument.
3 Along with other conditions precedent to
4 arbitration in NAFTA, Article 1121 requires a claimant
5 and its enterprise investment, if a claim has been
6 submitted to arbitration under Article 1117, to waive
7 its right to initiate or continue other proceedings
8 for damages with respect to the Measure alleged to
9 breach the NAFTA in order to crystalize Canada's
10 consent to arbitrate and for a tribunal established
11 under Section B of the NAFTA to have jurisdiction.
12 Article 1121(3) explicitly indicates that a
13 waiver must be in writing, delivered to the disputing
14 Party, and included in the submission of a claim to
15 arbitration.
16 As can be seen from the title of
17 Article 1121, the filing of relevant waivers is a
18 condition precedent to submission of a claim to
19 arbitration. It clearly establishes that the Parties'
20 consent to arbitrate under NAFTA is only given if the
21 Claimant complies with the procedures of the Agreement
22 including the requirement of Article 1121(3) to

1 provide a valid waiver. The jurisdictional nature of
2 this article is important. It means that, for there
3 to be compliance with Article 1121, Canada must be in
4 possession of both the Notice of Arbitration and valid
5 waivers that waive future proceedings with respect to
6 the Measures identified in that Notice of Arbitration.
7 Only once both have been received will
8 Canada's consent be obtained and the Tribunal validly
9 constituted. When no waiver is provided, a State's
10 offer to arbitrate and an investor's acceptance of the
11 same do not meet. In such a case, no Arbitration
12 Agreement has been formed, any Tribunal constituted on
13 that basis will be deprived of jurisdiction.
14 The case law is clear that a valid waiver
15 must be received prior to constitution of the Tribunal
16 for that Tribunal to have jurisdiction, and that only
17 when both are received will a claim be submitted to
18 arbitration for the purposes of Article 1121. For
19 example, the Tribunal in Pope & Talbot noted that
20 before the Tribunal entertained the Claim the waiver
21 shall have been effected. The same points have been
22 emphasized by the DIBC, Waste Management, and KBR

1 NAFTA Tribunals and the Tribunals in Renco and
2 Gramercy Funds. The latter, who endorsed the position
3 of the United States in that proceeding in holding
4 that, "Where an effective waiver is filed subsequent
5 to the Notice of Arbitration but before constitution
6 of the tribunal, the claim will be considered
7 submitted to arbitration on the date on which the
8 effective waiver was filed, assuming all other
9 requirements have been satisfied, and not the date of
10 the Notice of Arbitration."
11 So what does this mean for the Claimant
12 here? The Claimant argues that its Claim was
13 submitted to arbitration at the time it filed its
14 Notice of Arbitration in this proceeding.
15 However, for Canada to have consented to
16 this Arbitration as of that date, on October 14, 2022,
17 and for this Tribunal to have jurisdiction as of that
18 same date, the Claimant must have included valid
19 waivers at the time of the Notice of Arbitration.
20 When Canada received the Claimant's NOA in this
21 Arbitration on October 14, 2022, attached to it as
22 exhibits, C-040 and C-041, were two waivers; one for

1 WCC and one for Prairie. The date of those waivers
2 was November 12, 2018. These are the waivers that WCC
3 and Prairie submitted in the 2018 proceeding. The
4 Claimant's argument that these waivers continue to be
5 applicable and in effect such that they would meet the
6 requirements of Article 1121 for this proceeding is
7 untenable.
8 As Ms. Zeman already explained, the 2018
9 waivers were withdrawn in 2019, along with the 2018
10 NOA; therefore, as a factual matter, the Claimant is
11 incorrect.
12 The Claimant has not pointed to any
13 authority that would support its view that if a Notice
14 of Arbitration is withdrawn prior to the constitution
15 of the Tribunal, the waivers filed with that Notice of
16 Arbitration continue to be effective.
17 Second, the Prairie waiver that was filed
18 and withdrawn in the 2018 proceeding was later used,
19 on Canada's consent, as Prairie's waiver in the WMH
20 proceeding. Again, the Claimant has not pointed to
21 any authority to say that the same waiver can be used
22 to satisfy the requirements of Article 1121 in two

1 separate proceedings. Nor has the Claimant pointed to
2 any authority for its proposition that waivers filed
3 in a separate arbitration in 2018 can establish
4 Canada's consent in this Arbitration where the NOA was
5 received by Canada in 2022.
6 The individuals that signed the 2018 waivers
7 had the legal authority to bind the Company at that
8 time. The waiver of those legal rights was withdrawn
9 in 2019. At the time the NOA was received by Canada
10 in this Arbitration in 2022, Canada had no evidence
11 that the individuals that signed the waivers in 2018
12 had the ability to waive the legal rights of WCC or
13 Prairie at the time Canada received that Notice of
14 Arbitration.
15 Canada raised this issue with the Claimant
16 on February 21, 2023, prior to this Tribunal being
17 constituted on March 14, 2023, in response to the
18 Claimant's statement that it was relying on the 2018
19 waivers in this Arbitration. Canada specifically
20 noted that the submission of and compliance of an
21 effective waiver under Article 1121 is among the
22 prerequisites to establish a NAFTA Party's consent to

1 arbitrate; that waivers filed in separate arbitration
2 proceedings cannot constitute valid waivers for the
3 purposes of the current Claim; and that Canada
4 disagrees that the waivers filed in the Westmoreland
5 Coal Company and Prairie Mines & Royalties' first
6 Claim in 2018 are still applicable and in effect.
7 Canada also noted that its consent to
8 arbitrate would not be given absent confirmation that
9 the individuals who signed Exhibits C-040 and C-041
10 had the capacity to sign waivers on behalf of WCC and
11 Prairie on the date of the Notice of Arbitration. No
12 further response was given from the Claimant at the
13 time.
14 Now, in its final written submission and
15 over two years after Canada's request to the Claimant,
16 the Claimant brings forth two pieces of information.
17 With respect to WCC, in its Rejoinder Memorial at
18 Footnote 290, the Claimant indicates that
19 Mr. Hutchinson, the individual that signed the waiver
20 on behalf of WCC in 2018, left the Company prior to
21 its submission of this Claim to arbitration. Thus, as
22 of 2022, Mr. Hutchinson did not have the legal

1 capacity to waive the rights of WCC to initiate or
2 continue proceedings with respect to Measures alleged
3 to breach the NAFTA.
4 With respect to Prairie, the Claimant
5 asserts, at Footnote 290 as well, that Mr. Micheletti,
6 the individual that signed the waiver on behalf of
7 Prairie in 2018, continued to have the authority to
8 waive Prairie's rights on October 14, 2022, when WCC
9 filed its NOA. Yet, it has presented no evidence in
10 support of its untimely assertion, despite the burden
11 to establish this Tribunal's jurisdiction resting
12 squarely on the Claimant's shoulders.
13 And this leads me to the Claimant's offer
14 that it has included in its Rejoinder submission to
15 file new waivers at this time. Canada does not accept
16 this offer, and, given the Tribunal has already been
17 constituted, the Claimant's offer comes too late.
18 This Tribunal cannot grant leave to cure a
19 defective waiver absent Canada's consent. As the
20 Tribunal in the Amorrortu case held, doing so would be
21 tantamount to the Tribunal creating consent to
22 jurisdiction when no such consent existed. Canada has

1 provided no such consent here, and this Tribunal
2 cannot endow itself with jurisdiction, nor would any
3 acceptance of new waivers resolve the jurisdictional
4 issues before this Tribunal. In fact, such an
5 acceptance would do nothing more than shift the date
6 the Claimant submitted to arbitration to today, thus,
7 emphasizing more the other jurisdictional issues faced
8 by the Claimant, such as those under the NAFTA
9 Limitation Period. It would also mean that the
10 Claimant's Claim was not submitted within the
11 three-year legacy period provided in CUSMA Annex 14-C.
12 The Claimant failed to have considered that the
13 resolution of one issue means failure on another.
14 Now, with respect to the Tribunal's fourth
15 question, the Tribunal has asked about the
16 consequences of finding an expropriation claim remains
17 following the Claimant's withdrawal of its allegation
18 with respect to the Federal Fuel Charge for Canada's
19 argument on the scope of WCC's waivers. If a residual
20 expropriation claim exists based on Alberta Measures
21 alone, Canada's waiver argument does not change.
22 Canada's Article 1121(3) objection is not based on the

1 scope of the waivers filed in the 2018 proceedings,
2 but, rather, that no waivers were filed at all in this
3 proceeding, and, as such, the Claimant has failed to
4 comply with the requirements of Article 1121(3).
5 As a result, any changes to the scope of the
6 Measures alleged to breach NAFTA in this proceeding
7 would not impact Canada's argument that the Claimant
8 and Prairie have failed to provide Canada with
9 necessary waivers.
10 With respect to the Tribunal's fifth
11 question, this Tribunal has jurisdiction to determine
12 whether valid waivers were filed before it. It also
13 has the jurisdiction to determine whether the 2018
14 waivers were withdrawn with that Claim, and are
15 therefore no longer effective. Both of these findings
16 will confirm whether the Claimant has waived its right
17 to other recourse in the context of this specific
18 proceeding. Canada cannot speak as to whether WCC
19 would face other hurdles in bringing a claim before
20 domestic court or otherwise. We would note, however,
21 that such finding would not displace the fact that
22 effective waivers from WMH and Prairie remain in place

1 with respect to the Measures alleged to breach the
2 NAFTA in the WMH proceeding.
3 In conclusion, the Claimant's failure to
4 meet the requirements of Article 1121(3) prior to the
5 constitution of the Tribunal means there is only one
6 path forward: The Claimant's Claim must be rejected.
7 Only a Respondent State holds the discretion to decide
8 whether to permit a Claimant to either proceed under
9 or remedy a defective waiver once the Tribunal has
10 been constituted. And Canada has provided no such
11 consent here.
12 I will now hand things over to my colleague
13 Ms. Dosman, who will walk the Tribunal through
14 Canada's arguments with respect to the Limitation
15 Period.
16 PRESIDENT KAUFMANN-KOHLER: Thank you.
17 Ms. Dosman.
18 MS. DOSMAN: Good day.
19 I will address the Claimant's failure to
20 establish this Tribunal's jurisdiction ratione
21 temporis. And one preliminary note, which is that,
22 for the purposes of my submissions, we will disregard

1 that the Limitation Period, in fact, continues to run
2 because of the Claimant's failure to file effective
3 waivers, as just explained by Ms. Squires.
4 Unlike many treaties that provide for
5 Investor-State Dispute Settlement, NAFTA explicitly
6 addresses the time aspect and the time limitation on
7 claims. In Articles 1116(2) and 1117(2), the NAFTA
8 Parties set out clear rules governing the temporal
9 aspect of the Tribunal's jurisdiction. They specified
10 that an investor may submit a claim to arbitration
11 alleging a treaty breach and resulting loss but also
12 that a claim is not possible if more than three years
13 have elapsed from the date of the investor's first
14 knowledge of the alleged breach and loss.
15 Article 1117(2) and imposes the same three-year
16 limitation on claims by an investor on behalf of an
17 enterprise that it owns or controls. These provisions
18 contain no caveats, no exceptions, and no tribunal
19 discretion to vary the three-year period.
20 Tribunals have approached the calculation of
21 the temporal limitation by looking back from the date
22 the Claim was submitted to arbitration and setting a

1 Critical Date or cut-off date three years prior. As
2 we know, Article 1137(1) specifies that the date of
3 the submission to arbitration is the date of receipt
4 of the Notice of Arbitration. From there, we look
5 back three years for the Critical Date. If the
6 Claimant learned of the alleged breach and loss prior
7 to the Critical Date, the Claim will be out of time.
8 The Claim before you today was submitted to
9 arbitration when Canada received the Claimant's Notice
10 of Arbitration on October 14, 2022. The Critical Date
11 for the purposes of temporal consent is, therefore,
12 October 14, 2019. And according to the Claimant, it
13 first acquired knowledge of the alleged breaches and
14 losses set out in the NOA on November 24, 2016, years
15 before the Critical Date. Therefore, this Claim does
16 not satisfy the requirements of NAFTA Chapter Eleven
17 Section B and falls outside the scope of Canada's
18 consent to arbitrate.
19 This is a complete answer to the question of
20 temporal jurisdiction.
21 In the face of this evident jurisdictional
22 bar, the Claimant attempts to read in what it calls an

1 international "tolling" principle to NAFTA. First,
2 I'd like to step back and address what the Claimant
3 means by "tolling". The Claimant appears to be
4 applying the principle that, once a claim is properly
5 submitted to arbitration and an agreement to arbitrate
6 has been formed, the Respondent cannot object on the
7 basis of the Limitation Period three years later.
8 That is not contested, but it is also not the
9 situation before you.
10 By "tolling," the Claimant is asking you to
11 merge WCC's 2018 Claim, which was withdrawn, and WMH's
12 2019 Claim, which proceeded to a Final Award, with the
13 2022 Claim that is before you today.
14 For the Claimant, it does not matter which
15 investor brings the Claim, under which Treaty, with
16 respect to which investment, and on which date. That
17 view cannot be reconciled with the terms of the
18 Treaty. As Ms. Zeman explained, the submission of a
19 claim to arbitration under NAFTA is what provides the
20 framework for the potential agreement to arbitrate
21 between Canada and the submitting investor. It is not
22 enough that different Notices of Arbitration allege

1 the same facts or that they arise out of the same
2 Challenged Measures. To the contrary, NAFTA Articles
3 1117(3) and the consolidation provision in
4 Article 1126 expressly recognize that there may be
5 distinct agreements to arbitrate arising out of the
6 same alleged Measures and alleged harm.
7 To return to the Tribunal's second question,
8 each of the three Claims must independently meet
9 NAFTA's jurisdictional requirements. The effect for
10 the Limitation Period analysis is clear. This
11 Tribunal has jurisdiction only if it determines that
12 WCC's submission of its Claim to arbitration in 2022
13 meets the requirements of Articles 1116(2) and
14 1117(2).
15 Now, with that core concept clarified, the
16 Claimant's arguments on temporal jurisdiction do not
17 even achieve lift off. The Claim submitted to
18 arbitration on October 14, 2022, the Claim before this
19 Tribunal, is out of time.
20 In any event, should the Tribunal wish to
21 consider this tolling theory, there is no need to look
22 further than the NAFTA itself. The Claimant relies

1 heavily on early arbitral cases. In those cases, the
2 governing treaties did not contain express limitation
3 periods. The arbitrators were required to determine
4 if, in the absence of positive rules set out in the
5 governing treaty, international law itself could
6 operate to bar claims as untimely; and in that
7 context, whether being on notice of a claim would
8 suffice.
9 These questions are inapplicable in the
10 NAFTA context, because the NAFTA Parties agreed to
11 clear, positive rules regarding the time limitation of
12 claims. As we saw in Article 1122, a NAFTA Party
13 consents to the submission of a claim to arbitration
14 only "in accordance with the procedures set out in
15 this Agreement."
16 As the Corona Materials Tribunal explained
17 with respect to the parallel provisions of the
18 DR-CAFTA, Section B of Chapter Eleven of NAFTA
19 operates as lex specialis. There is no basis on which
20 to read in a so-called international tolling principle
21 into the Treaty or to find that the Tribunal has the
22 power to vary the three-year limitation period. That

1 is also the view of the NAFTA Parties and of NAFTA
2 Tribunals determining the provisions.
3 As México confirms, there is no possibility
4 for the limitation period to be suspended. The United
5 States agrees that the limitation period is not
6 subject to any suspension or other qualification.
7 And this is consistent with the purpose of
8 limitation periods, which includes not only the
9 preservation of evidence, but also a guarantee of
10 finality for Respondent States.
11 It is also consistent with the findings of
12 NAFTA tribunals including Resolute and Feldman. The
13 Claimant has placed a great deal of weight on the
14 Feldman's tribunal's mention of theoretical potential
15 circumstances that could interrupt the limitation
16 period. As the dissenting arbitrator in Renco II
17 noted, this reflects the possibility that a Respondent
18 State is free to agree to vary the limitation period.
19 And on the topic of Renco II, I'd like to
20 refer the Tribunal to Canada's Reply Memorial at
21 Paragraphs 138 to 142, which sets out many and varied
22 differences between that case and this one. The

1 Claimant next attempts to bolster its case by stating
2 that other Respondent States have not objected to the
3 jurisdiction of a tribunal constituted after an
4 earlier claim has failed for lack of jurisdiction.
5 The Claimant here is incorrect. Canada is
6 aware of three occasions, in addition to this one, in
7 which Respondent States have insisted that a
8 subsequent claim must independently meet the Treaty's
9 jurisdictional requirements. In the interest of time,
10 I will simply identify them; and the references also
11 appear on Slides 84-86 before you. The cases are
12 Methanex v. México, Waste Management v. México, and
13 most recently, Amorrortu v. Perú II.
14 In summary, absent the Respondent's
15 Agreement, NAFTA does not provide for the suspension
16 of the three-year limitation period. But the Claimant
17 goes even further. It seeks to expand its so-called
18 "tolling principle" to capture claims made by
19 different claimants, as well as to claims that have
20 been withdrawn. Here it appeals to Civil Codes of
21 various jurisdictions and to court cases from
22 Michigan.

1 Far from showing anything universal, the
2 Claimant's examples, in fact, show that legislatures
3 can and do set out different and detailed conditions,
4 requirements, exceptions, and special circumstances if
5 and when they want to allow for tolling.
6 For example, here the statute spells it out:
7 The limitation period – "[T]he statutes of limitations
8 are tolled when...". The NAFTA Parties could have
9 included something similar in Chapter Eleven; they did
10 not. Instead, they agreed to a clear and rigid
11 three-year limitation period with no exceptions or
12 provisions for special circumstances. And although
13 given many opportunities, the Claimant also has not
14 identified any authority for the proposition that a
15 withdrawn claim could serve in any way as a basis for
16 tolling of the limitation period.
17 Perhaps as a result, the Claimant has put
18 forward in its Rejoinder the statement that this was
19 not a "true withdrawal." A claim is withdrawn or it
20 is not. There should be no dispute that the Claim WCC
21 submitted in 2018 was withdrawn in 2019. The Claimant
22 has also argued that Canada should be estopped and

1 precluded from presenting jurisdictional arguments
2 based on this withdrawal and that doing so constitutes
3 an abuse of rights.
4 The Claimant is, again, incorrect, for the
5 reasons set out in Canada's Memorial on Jurisdiction
6 at Paragraphs 105-122 and Canada's Reply Memorial at
7 Paragraphs 159-165.
8 We don't propose to elaborate on those
9 points today, but we are happy to do so tomorrow, if
10 that would be helpful.
11 Finally, in its submissions on the
12 limitation period, the Claimant makes the argument
13 that it is entitled to a hearing on the merits. Here
14 I'll simply draw the Tribunal's attention to
15 Article 1115, the first Article in Section B, and the
16 one that sets out its purpose.
17 Its purpose is to assure "equal treatment
18 among investors of the Parties in accordance with the
19 principle of international reciprocity and due process
20 before an impartial tribunal."
21 This includes the question of the
22 adjudication of whether an agreement to arbitrate even

1 exists with respect to a particular Claim. It does
2 not include a right to be heard on the merits. The
3 Claimant must first establish that the Claim meets the
4 conditions of state consent, meaning that an agreement
5 to arbitrate has been formed. And the Claimant here
6 has not done so.
7 Finally from me -- with respect to
8 Question 4 -- to the extent that there is a residual
9 expropriation claim, Canada's position remains the
10 same. Such an allegation would fall outside the scope
11 of Canada's agreement to arbitrate, because the
12 Claimant has acknowledged that it knew of the alleged
13 breach and loss on November 24, 2016, more than
14 three years prior to the Notice of Arbitration that
15 launched this proceeding.
16 And I would add that, even on the Claimant's
17 theory, an expropriation claim is out of time. The
18 2022 Claim is the first time that an alleged violation
19 of Article 1110 has appeared in one of the Notices of
20 Arbitration. An allegation of breach and loss that
21 was not made in a prior Claim cannot in any world have
22 been tolled.

1 For all of these reasons, the Claimant's
2 entire Claim must be dismissed for lack of
3 jurisdiction ratione temporis. And as Ms. Zeman
4 noted, any one of these first three jurisdictional
5 objections means that the Claim cannot proceed. It is
6 only in the event that all three are overcome that the
7 Tribunal need consider Canada's remaining
8 jurisdictional objections.
9 And I'll now turn things over to Ms. Harris
10 to address Canada's fourth objection, for which we are
11 going to do a bit of changing of chairs.
12 PRESIDENT KAUFMANN-KOHLER: Thank you.
13 Ms. Harris.
14 MS. HARRIS: Good afternoon members of the
15 Tribunal. I will address why the Claimant has failed
16 to make out a prima facie damages claim under
17 Article 1116(1) and, therefore, lacks standing. As
18 Ms. Zeman explained earlier, the Claimant's alleged
19 damages are only those of its former Canadian
20 enterprise, Prairie.
21 Specifically, the Claimant alleges damages
22 for lost revenues from Prairie's coal sales and for

1 Prairie's accelerated reclamation costs. These are
2 damages that cannot be claimed under Article 1116,
3 because they are not direct damages to WCC. The
4 requirement for a Claimant to show prima facie damages
5 at the jurisdictional stage is clear from the text of
6 Article 1116(1), which permits an investor to bring a
7 claim on its own behalf alleging that the investor has
8 incurred loss or damage.
9 As set out in Canada's Memorial at
10 Footnote 227, Tribunals have confirmed this
11 requirement. Therefore, to establish standing under
12 Article 1116, WCC must establish on a prima facie
13 basis that it has itself incurred loss or damage from
14 the alleged breaches of NAFTA.
15 And though this is not a high threshold to
16 meet, in that WCC need only plead facts sufficient to
17 be regarded as true to support a claim for direct loss
18 or damage, it has failed to do so. And this is so,
19 because WCC has not asserted any loss that it has
20 itself incurred separate from the loss allegedly
21 suffered by Prairie.
22 Examples of direct injury that a shareholder

1 investor could recover for under Article 1116 include
2 damage as a result of the loss of voting rights, the
3 loss of the right to receive dividends, the loss of an
4 ability to transfer share ownership, or the loss of a
5 right to acquire further shares. Although this is not
6 an exhaustive list, what all these examples share in
7 common is that there are damages associated with the
8 rights and entitlements of a shareholder investor.
9 Article 1116(1) is to be contrasted with
10 Article 1117(1) which gives an investor standing to
11 bring a claim on behalf of an enterprise that it owns
12 or controls where the enterprise has incurred loss or
13 damage as a result of the challenged measures.
14 Under Article 1117, a claim could be brought
15 on behalf of a corporate enterprise owned or
16 controlled by the investor for damages as a result of
17 loss in the value of an enterprise's assets, a loss in
18 value of the corporation's shares due to measures
19 affecting its overall viability, or lost profits, if
20 they can be proven with sufficient certainty.
21 Importantly, any award of damages for a
22 claim under Article 1117(1) is paid to the enterprise

1 and not to the investor pursuant to NAFTA
2 Article 1135(2)(b). The effect of this is to ensure
3 that when an investor recovers damages on behalf of
4 the enterprise, the interests of others in that
5 enterprise are respected, such as creditors and
6 minority shareholders.
7 The Claimant overlooks the fact that the
8 NAFTA Parties have consistently interpreted
9 Article 1116 and 1117 as addressing discrete,
10 nonoverlapping types of injury, and that a claim for
11 indirect injury to an investor, based on direct injury
12 to the enterprise or reflective loss, is not
13 recoverable under Article 1116.
14 The NAFTA Party's agreement in this regard
15 was affirmed in the recent Non-Disputing Party's
16 submissions of the U.S. and México.
17 NAFTA Tribunals have also recognized this
18 distinction and Canada discusses these cases at
19 Paragraphs 219-222 of its Reply. With this in mind,
20 let's now turn to WCC's claim for damages.
21 At Paragraph 94 of its Notice of
22 Arbitration, the Claimant alleges that Canada's action

1 at the provincial and federal levels eliminated the
2 market for thermal coal and, essentially, left
3 Westmoreland with worthless interests in the Genesee,
4 Sheerness and Paintearth Mines while saddling
5 Westmoreland with significant reclamation costs.
6 Although the Claimant refers to
7 Westmoreland, what it describes -- as we have
8 previously summarized -- appears at most, to be
9 indirect loss arising from alleged damage to Prairie.
10 WCC's claim is, essentially, one for reflective loss,
11 which cannot be brought under Article 1116.
12 To counter Canada's position that claims for
13 reflective loss are not recoverable under
14 Article 1116, in its Response the Claimant argues at
15 Paragraph 144 that this is not a case of reflective
16 loss because WCC is challenging Canada's conduct that
17 resulted in the total destruction of WCC's investment.
18 But the Claimant provides no explanation on
19 how its shares in Prairie or Prairie's operations were
20 totally destroyed. From the information on record, we
21 know that WCC continued to own its shares in Prairie
22 for many years after Alberta adopted the challenged

1 measures, and these shares were eventually sold to WMH
2 in the context of its U.S. bankruptcy proceedings.
3 We also know that Prairie continued to
4 operate after the challenged measures. The Claimant
5 attempts to provide clarification in its Rejoinder by
6 stating that "despite holding shares in Prairie
7 following the measures, WCC had significant write-offs
8 on its own books after emerging from the bankruptcy."
9 But this was the first time the Claimant
10 raised this point without any specificity and without
11 any connection to the particular damages it claimed in
12 its NOA. Its late attempt does not meet the low
13 threshold of asserting prima facie damages under
14 Article 1116.
15 Since the Claimant has not plead facts that,
16 as alleged, can substantiate a claim of direct loss or
17 damage to WCC, apart from that allegedly incurred by
18 Prairie, the Claimant has not made out a prima facie
19 damages claim and, as such, its Article 1116 claim
20 must be dismissed.
21 If anything, this is a claim for damage that
22 falls under Article 1117, but as my colleagues will

1 explain shortly, WCC also fails to meet the
2 requirements to submit a claim under Article 1117.
3 I will now turn it over to my colleague,
4 Ms. Squires.
5 MS. SQUIRES: Hello, everyone, again. I am
6 here before you now to discuss Canada's second
7 argument with respect to Article 1121. As the
8 Tribunal will recall in the WMH proceeding, Prairie
9 provided a waiver pursuant to Article 1121(3) of NAFTA
10 waiving its right to initiate or continue other
11 dispute settlement proceedings with respect to the
12 measure alleged to breach NAFTA in that proceeding.
13 As a result of that waiver, there can be no
14 basis upon which a second proceeding with respect to
15 those measures can be commenced on behalf of Prairie
16 by WCC under NAFTA Article 1117.
17 Article 1121(2)(b) requires an enterprise to
18 waive its right to initiate or continue before any
19 administrative tribunal or court under the law of any
20 party or other dispute settlement procedures, any
21 proceeding with respect to the measure of the
22 disputing Party that is alleged to be a breach

1 referred to in Article 1117.
2 The only exception to this requirement is
3 also explicitly stated in the same Article:
4 proceedings for injunctive, declaratory, or other
5 extraordinary relief not involving the payment of
6 damages. This is what is referred to as the material
7 requirement of the waiver provision which, when
8 combined with a formal requirement, requires a
9 Claimant to not only submit a valid waiver but act
10 consistently with that waiver as was clearly stated by
11 the Tribunal in Waste Management II.
12 As such, once Prairie submitted its waiver
13 in the WMH proceeding, it was barred from having any
14 Claimant initiate any other proceeding for damages on
15 its behalf, under Article 1117 of NAFTA, if those
16 proceedings were with respect to the Measure alleged
17 to breach the NAFTA in the WMH proceeding.
18 The Claimant argues that this proceeding
19 does not fall within the scope of the waiver submitted
20 by Prairie in the WMH proceeding for two reasons.
21 First, that the term "other dispute
22 settlement procedures" only requires a claimant to

1 waive their right to dispute settlement procedures
2 that are distinct from their chosen investment
3 arbitration procedure.
4 And, second, that even if this is not the
5 case, Article 1121 does not prevent the Tribunal from
6 finding jurisdiction, as there is a fundamental rule
7 in international law that -- to quote the
8 Claimant -- "does not prevent an investor whose claims
9 are dismissed on curable, procedural, or
10 jurisdictional ground, from recommencing arbitration a
11 second time after curing the defect."
12 On the first point, the phrase "other
13 dispute settlement procedures" in Article 1121(2)(b)
14 necessarily captures other NAFTA proceedings. The
15 Claimant's argument that Article 1121 requires only
16 the waiver of proceedings “other than the procedures
17 selected by the investor” is incorrect. This approach
18 runs counter to the text's ordinary meaning and reads
19 out the express and unambiguous terms of the provision
20 which includes no such exception.
21 The only exception to the material
22 requirement in Article 1121 is proceedings for

1 injunctive, declaratory, or other extraordinary relief
2 not involving the payment of damages. The phrase
3 "other disputes and procedures" cannot be interpreted
4 as carving back in proceedings that would otherwise
5 fall under the exception, such as other NAFTA
6 proceedings where requests for damages have been made.
7 The Claimant's view would, in fact, allow
8 multiple proceedings for damages to be brought against
9 the Respondent State. This is inconsistent with the
10 provision's purpose, which is to minimize the risk of
11 double recovery.
12 The limited and very specific exception to
13 Article 1121 contains no scope for the possibility of
14 duplicative proceedings that may lead to conflicting
15 outcomes on both law and fact.
16 Canada's argument stands even if the first
17 NAFTA proceeding that is commenced by a claimant is
18 later dismissed for want of jurisdiction, which is the
19 second point raised by the Claimant. The Claimant's
20 heavy and exclusive reliance on the Waste Management
21 II and Murphy II Decisions for this argument are of
22 little use.

1 First, the Murphy II Decision interprets
2 different treaty text that is not contained in
3 Article 1121, and it involves a factual circumstance
4 arising out of Ecuador's withdrawal from the ICSID
5 Convention. That does not arise here. It is it not
6 applicable from the situation at hand from both a
7 legal and factual perspective.
8 Second, the Waste Management II Tribunal's
9 finding that the express terms of NAFTA do not
10 preclude a claimant from commencing an arbitration a
11 second time specifically noted that the second
12 proceedings must be in compliance with the
13 prerequisites of submission of a claim to arbitration.
14 A specific way the Claimant was able to
15 comply with those prerequisites to México's consent in
16 that second proceeding was the lack of an effective
17 waiver under Article 1121 in the prior proceeding.
18 That is decisively not the case here where
19 an effective waiver was filed by Prairie in the WMH
20 proceeding. Despite three written submissions in this
21 proceeding, the Claimant has still failed to directly
22 address this fundamental difference.

1 The Claimant's exact argument was dismissed
2 by the Amorrortu Tribunal, who, in interpreting the
3 same text in a different treaty, held that such an
4 interpretation would, in fact, amount to an
5 impermissible rewriting of the treaty text.
6 There is simply no textual support for the
7 Claimant's attempt to read into the limited exception
8 in Article 1121, claims that may eventually be
9 dismissed by a tribunal for lack of jurisdiction.
10 As the waiver filed by Prairie in the WMH
11 procedure continues to be effective, the Claimant's
12 attempt to commence a second proceeding on behalf of
13 Prairie, under Article 1117(1) is inconsistent with
14 that waiver. This Tribunal is without jurisdiction,
15 and the Claimant's Article 1117 Claim must be
16 dismissed.
17 That ends my presentation this morning, and
18 I will now pass things over to Mr. Koziol, who will
19 speak to Canada's next jurisdictional objection.
20 PRESIDENT KAUFMANN-KOHLER: Thank you.
21 You know, Mr. Koziol, that there is not much
22 time left.

1 MR. KOZIOL: Yes.

2 PRESIDENT KAUFMANN-KOHLER: By my count,

3 there is three minutes, but if you need a little bit

4 more, we will give it to you, and then we will give

5 the same to the Claimants, of course.

6 MR. KOZIOL: Thank you very much. I will

7 endeavor to be efficient this morning and keep my

8 concluding remarks very brief.

9 Good morning. My presentation today will

10 address the proper interpretation of NAFTA

11 Article 1117(1) and provide an additional reason why

12 this Tribunal lacks jurisdiction to hear the

13 Claimant's Article 1117 Claim.

14 NAFTA Article 1117(1) allows an investor to

15 bring a claim on behalf of an enterprise that it owns

16 or controls at the time that claim is submitted to

17 arbitration. The Claimant cannot establish this

18 Tribunal's jurisdiction over its Article 1117(1)

19 Claim, which it makes on behalf of Prairie because it

20 did not own or control Prairie at the time it filed

21 its 2022 Notice of Arbitration. This is because the

22 Claimant sold Prairie to WMH on March 15, 2019, more

1 than three years prior.
2 Before I turn to the arguments made by the
3 Claimants, I want to take a brief moment to describe
4 the specific purpose of Article 1117(1). As you know,
5 a bedrock principle of customary international law is
6 that no international claim may be asserted against a
7 State on behalf of that State's own nationals.
8 In practice, however, investors often choose
9 to make an investment through a separate enterprise
10 such as a corporation that is incorporated in the Host
11 State. If the Host State were to injure that
12 enterprise in a manner that does not directly injure
13 the investor, then no remedy would, ordinarily, be
14 available under customary international law.
15 Article 1117(1) addressed this by creating a
16 limited derogation from customary international law to
17 allow investors to make claims against a Host State on
18 behalf of their enterprise incorporated in that State.
19 This derogation was carefully circumscribed
20 by the three NAFTA Parties through the addition of an
21 express temporal condition on the Claimant's ownership
22 or control of its enterprise investment.

1 Now, with respect to the Claimant's
2 Article 1117(1) Claim, the Claimant argues the only
3 time it needs to own or control the enterprise on
4 whose behalf it brings the Claim is at the time of the
5 Challenged Measures. The Claimant contends that
6 Canada's interpretation of Article 1117(1) is
7 incorrect and rests "entirely on the present tense use
8 of the words 'owns or controls' in Article 1117(1)."
9 But this is not accurate. Canada's
10 interpretation of this provision flows from, yes, the
11 express terms of Article 1117(1) but also the clear
12 and consistent understanding of all three NAFTA
13 Parties on its meaning and relevant investment
14 jurisprudence that confirms that understanding.
15 I will start with the terms of the provision
16 itself which are on your screen.
17 Its meaning is clear. The present tense
18 formulation of the phrase "owns or controls" in the
19 text of Article 1117(1) is an express temporal
20 condition. It means that you can only bring a claim
21 on behalf of an enterprise that you own or control at
22 the time your claim is submitted to arbitration.

1 The three NAFTA Parties rely to the use of
2 different temporal tenses when they negotiated NAFTA
3 Chapter Eleven. For example, Article 1139 defines the
4 term "Investor" to capture three temporal tenses: "An
5 investment that the investor seeks to make, is making,
6 or has made." In Article 1117(1), the NAFTA Parties
7 chose the present tense and, in so doing, deliberately
8 excluded enterprise investments that the investor
9 previously, but no longer, owns or controls.
10 This is reflected in the clear and
11 consistent understanding of the three NAFTA Parties, a
12 point the Claimant has never addressed, either in its
13 Response or its Rejoinder.
14 Finally, Canada's interpretation and the
15 clear and consistent understanding of the three NAFTA
16 Parties is confirmed by the relevant findings of NAFTA
17 Tribunals.
18 The Claimant has argued that its position on
19 Article 1117(1) is consistent with the interpretation
20 of investment tribunals constituted under NAFTA, as
21 well as under other treaties. However, as Canada
22 pointed out in its Reply, these are overwhelmingly

1 non-NAFTA cases decided under other treaties. Those
2 other treaties did not contain an analogous provision
3 to Article 1117(1), including its express temporal
4 ownership requirements.
5 In many of the cases the Claimant relies on,
6 ownership of the investment was not even at issue at
7 the time the Claim was submitted to arbitration. The
8 only NAFTA cases in which a tribunal was directly
9 seized with the issue of ownership or control of an
10 enterprise investment of the time of filing an
11 Article 1117(1) claim are B-Mex and Loewen.
12 Both of those Tribunals found that
13 Article 1117(1) requires an investor to demonstrate
14 ownership or control of the enterprise at the time it
15 submits a claim to arbitration on that enterprise's
16 behalf. In its Rejoinder, the Claimant offers no
17 response to those directly relevant Tribunal findings.
18 In sum, the Claimant's position that the
19 only time it needs to own or control the enterprise on
20 whose behalf it brings a claim is at the time of the
21 Challenged Measures, reads out the express text of the
22 Treaty provision, relies on cases that do not support

1 its position, and does not engage with the fact that
2 all three NAFTA Parties have consistently shared the
3 same view of what this provision means.
4 Consequently, the Claimant has failed to
5 establish this Tribunal's jurisdiction over its
6 Article 1117(1) Claim because it did not own or
7 control Prairie when it submitted this Claim to
8 arbitration in October 2022.
9 To conclude, you will recall that we began
10 this morning with a fundamental principle: Investor
11 State arbitration is a creature of consent. Canada's
12 consent to arbitrate the investor's Claim under CUSMA
13 Annex 14-C and NAFTA Chapter Eleven is subject to a
14 number of conditions.
15 For all of the reasons my colleagues and I
16 have put to you today, Canada has demonstrated how the
17 Claimant has failed to satisfy each of the conditions
18 that are relevant in this case. Therefore, Canada
19 respectfully requests that the Claimant's Claim be
20 dismissed in its entirety for lack of jurisdiction.
21 Thank you, and that concludes Canada's
22 presentation this morning.

1 PRESIDENT KAUFMANN-KOHLER: Thank you very
2 much to all five of you.
3 If I'm not mistaken -- and the Secretary
4 will correct me -- you have used 1 hour and
5 51 minutes.
6 Is that correct, Anna? I don't hear you.
7 SECRETARY HOLLOWAY: Sorry. That is the
8 same as my count.
9 PRESIDENT KAUFMANN-KOHLER: Good.
10 Excellent. Then, of course, the Claimant can use the
11 same time if it needs to.
12 We have now provided that we would have a
13 break of 15 minutes. This is what we would do, and we
14 will resume in 15 minutes from now.
15 Can the Secretary please bring people into
16 their breakout rooms? Thank you.
17 SECRETARY HOLLOWAY: Very good.
18 (Brief recess.)
19 PRESIDENT KAUFMANN-KOHLER: See, I can give
20 the floor now to the Claimants for their oral
21 presentation.
22 Mr. Rubinstein, can I give the floor to you?

1 You are on mute.

2 MR. RUBINSTEIN: Can you hear us now?

3 PRESIDENT KAUFMANN-KOHLER: Now is fine.

4 Yes.

5 MR. RUBINSTEIN: Okay. Excellent.

6 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

7 MR. RUBINSTEIN: Thank you, Madam President.

8 Good afternoon, Members of the Tribunal and

9 Secretariat. On behalf of the Claimant, Westmoreland

10 Coal Company, we want to thank you for giving us the

11 opportunity to address Canada's jurisdictional

12 objections. Ms. Friedman and I will be presenting the

13 Claimant's Opening Argument on Jurisdiction.

14 Before we get into the detail, I want to

15 start by providing an overview of the Claimant's

16 position, since there is a lot of ground to cover,

17 given the volume of Canada's objections. While the

18 history of this case is long, the factual record is

19 relatively straightforward, and for the most part

20 uncontested.

21 As explained in the Notice of Arbitration,

22 WCC's Claims arise from Alberta's Climate Leadership

1 Plan to accelerate its transition away from coal,
2 shortening the transition period from 50 years to
3 approximately 15 years.
4 And that acceleration occurred only one year
5 after WCC acquired the Mines at issue.
6 In November 2016, Alberta announced a
7 program to compensate coal companies for the stranded
8 capital they would face due to the significant
9 acceleration of the coal transition, paying
10 $1.4 billion to three Canadian coal companies, while
11 at the same time --
12 (Interruption.)
13 MR. RUBINSTEIN: In November 2016, Alberta
14 announced a program to compensate coal companies for
15 the stranded capital they would face due to the
16 significant acceleration of the coal transition,
17 paying $1.4 billion to three Canadian coal companies,
18 while at the same time refusing to provide any
19 compensation to WCC, the only non-Canadian coal
20 Company affected.
21 WCC filed its NAFTA claim against Canada on
22 November 19, 2018. WCC then, in the midst of the

1 arbitration, was forced into bankruptcy, in part due
2 to the Measures that are challenged in this
3 proceeding.
4 Pursuant to the bankruptcy, WCC purported to
5 transfer its Claim to WMH, and sought, as a result, to
6 add WMH as a Co-Claimant in its May 13, 2019, Amended
7 Notice of Arbitration.
8 As explained this morning, Canada objected
9 to that amendment, proposing instead as a "solution"
10 that WCC withdraw its Notice of Arbitration so that
11 WMH could be substituted as the sole Claimant. WCC
12 accepted Canada's proposal, although it disagreed with
13 Canada's objection. It accepted the proposal as "a
14 fair compromise" so that the arbitration could
15 "proceed without unnecessary procedural delay."
16 Yet, immediately following the
17 implementation of the proposed substitution, Canada
18 immediately challenged WMH's standing, thereby
19 producing the very delay that WCC was seeking to
20 avoid. WMH was shocked, and complained to the
21 Westmoreland I Tribunal, citing Canada's lack of good
22 faith and the principle against self-contradiction.

1 Apparently seeking to minimize the obvious
2 unfairness of its tactic, Canada assured the
3 Westmoreland I Tribunal that WCC still could pursue
4 its Claim, notwithstanding the withdrawal of its
5 earlier Notice of Arbitration.
6 The Tribunal in Westmoreland I then issued
7 its Award on January 31, 2022, accepting Canada's
8 position that WMH had no standing because WCC was the
9 proper Claimant. Following the Award, WCC went back
10 to the U.S. Bankruptcy Court to confirm that WCC still
11 owned the NAFTA Claim in light of the
12 Westmoreland I Award, and that WCC still had the
13 Authority to resubmit the Claim that it had originally
14 commenced in 2018.
15 Following the Court's order to that effect,
16 WCC renotified and resubmitted the NAFTA Claim that is
17 now before you. Despite its representations to the
18 Westmoreland I Tribunal, Canada now argues that WCC's
19 Claim is barred due to a series of jurisdictional
20 objections, none of which were mentioned to the
21 Westmoreland I Tribunal. For the reasons that we will
22 explain, Canada's jurisdictional objections are

1 meritless and should be rejected.
2 Here's an overview of the points that we
3 will be covering this afternoon. Ms. Friedman will
4 begin by explaining why WCC's Claim qualifies as a
5 legacy Claim under the U.S. Mexico Canada Agreement.
6 We will then address why the Tribunal has jurisdiction
7 under the NAFTA, specifically I will explain why WCC's
8 Claims are timely under the NAFTA.
9 Ms. Friedman will then address why WCC's
10 original 2018 waivers were sufficient to comply with
11 the NAFTA waiver requirement, why WCC has standing to
12 assert an 1117 Claim on behalf of Prairie, and why
13 Canada's reflective loss objection is meritless.
14 I will then conclude by addressing why
15 Canada should be estopped and precluded from
16 challenging the Tribunal's jurisdiction based on
17 the -- its statements and conduct during the
18 Westmoreland I proceedings, and why well-established
19 principles of international law require that WCC's
20 Claim be heard on the merits, now that the
21 jurisdictional defects cited in Westmoreland I has
22 been cured.

1 And, with that, I will pass it to
2 Ms. Friedman.
3 PRESIDENT KAUFMANN-KOHLER: Ms. Friedman,
4 please.
5 MS. FRIEDMAN: But before I get to the terms
6 of the USMCA, I want to provide what I hope will be
7 helpful background. The Measures at issue in this
8 Arbitration took place while the NAFTA was in force,
9 and WCC asserted a Claim against Canada while the
10 NAFTA was in force. And while that NAFTA Arbitration
11 was pending, the USMCA replaced NAFTA, but even after
12 that, Canada assured the Tribunal that WCC could still
13 bring a Claim. In its Reply on Jurisdiction in 2021,
14 Canada said it "was open to WCC to continue its
15 Claim."
16 (Interruption.)
17 (Comments off microphone.)
18 PRESIDENT KAUFMANN-KOHLER: We've got all
19 kinds of interference.
20 (Comments off microphone.)
21 MS. FRIEDMAN: Should I start over or should
22 I keep going from where I was.

1 PRESIDENT KAUFMANN-KOHLER: I think you can
2 continue unless Ms. Larson tells us otherwise, but it
3 was audible. It was just not very clear. But the
4 Transcript seems fine.
5 MS. FRIEDMAN: Okay. I'll keep going.
6 (Interruption.)
7 MS. FRIEDMAN: So when Canada submitted its
8 Reply on Jurisdiction, it said that WCC -- it was
9 still open to WCC to submit a Claim to arbitration,
10 and Canada noted at that time that it wasn't going to
11 take a position on jurisdiction; so at the Final
12 Hearing Arbitrator Hosking pressed Canada on this, and
13 asked whether or not WCC had residual rights to bring
14 a Claim.
15 Canada did not respond to that Hearing, no,
16 the WCC is in force now. It's too late. Instead,
17 Canada responded that WCC could still be in a position
18 to bring a Claim on its own behalf.
19 Canada was right, because WCC was and is
20 entitled to bring a Claim on its own behalf for
21 multiple reasons, including, because it benefits from
22 legacy protection.

1 Now, given the Vienna Convention
2 requirements on treaty interpretation, I'm going to
3 start with the object and purpose of the legacy
4 provision, and then I'll turn to the plain language of
5 USMCA. I'll then explain why, even if the Tribunal
6 were to accept Canada's view on legacy provision, WCC
7 still has a legacy Claim. Later, Mr. Rubinstein will
8 explain why Canada should be estopped from asserting
9 its legacy investment provision defense in the first
10 place.
11 So starting with the object and purpose of
12 the legacy clause, the USMCA itself provides the best
13 evidence of the purpose of legacy protection.
14 Article 14(2)(3) states that the legacy clause
15 provides protection for acts that took place before
16 the USMCA went into force; that is, it's retroactive.
17 And this is important because this is the only part of
18 the USMCA that applies to prior acts.
19 So think about that for a moment. It makes
20 no sense to apply the USMCA to prior acts, but to deny
21 protection to investors who are completely deprived of
22 their investments by those prior acts.

1 Denying protection to investors who lost
2 their investments due to past acts would destroy the
3 protection against past acts, it would destroy
4 Article 14(2)(3) altogether. Now, to provide
5 protection against past acts, the legacy clause
6 preserves claims that arose before the USMCA went into
7 force.
8 All of the available evidence confirms that
9 the focus of the legacy clause was to preserve prior
10 claims. The USTR, which was the Agency, the U.S.
11 agency that negotiated the USMCA with México and
12 Canada, produced talking points during the course of
13 negotiations, and some of those are on the Slide.
14 Now, as those talking points confirm,
15 Annex 14-C is a grandfather clause that allows
16 investors to bring claims where the breach took place
17 before the USMCA went into force.
18 A grandfather clause works by ensuring that
19 those who would have had protection continue to have
20 protection. It essentially freezes the status quo for
21 those who are protected. And here, the status quo is
22 frozen for three years. Now, WCC had protection under

1 the NAFTA, and, therefore, had and has legacy
2 protection for three years under the USMCA.
3 Statements from the Mexican, U.S., and
4 Canadian officials at the time the USMCA went into
5 force also confirm that the legacy clause was meant to
6 preserve claims. Those announcements confirm that
7 claims could still be brought forward for investments
8 made prior into entry into force of the USMCA. We
9 cited a Statement on the Slide here, and we have
10 references to other examples on Slide 10.
11 Now, there is no evidence anywhere in the
12 record, or anywhere in the public record that the
13 contracting Parties intended to abruptly terminate
14 protection for past acts. Canada has not explained
15 what the object and purpose of legacy protection is,
16 let alone has Canada provided any evidence that would
17 support an interpretation that -- consistent with its
18 view.
19 Canada should have full access to the object
20 and purpose of the USMCA, because it sat at the
21 negotiating table. If there were evidence to support
22 Canada's view, Canada would have provided it. Canada

1 provided nothing.
2 Now, México and the United States submitted
3 Article 1128 Submissions in this Arbitration. Canada
4 argued this morning that the Non-Disputing Parties
5 take Canada's side on legacy protection, but the quote
6 that Canada cites from México's Article 1128
7 Submission is taken entirely out of context, because
8 México made that comment that it cited in the context
9 of this discussion of Article 1117.
10 So I suggest the Tribunal go back to
11 México's submission to confirm what México -- in the
12 context in which México made that statement.
13 Now, if México intended to state otherwise,
14 that position was unreasoned. Now, Canada also cited
15 to the United States' defensive pleading in TC Energy
16 to support its position, but arguing a State Party,
17 like the U.S. and TC Energy makes, is -- while
18 defending their own interests, cannot be taken as
19 evidence what the Treaty means.
20 And that's because a Contracting State can
21 take a position simply to adopt its own interests, and
22 it would be unfair to investors, and it would also

1 undermine the purpose of Treaty protection to afford
2 any weight to those statements.
3 Now -- so México and the United States did
4 not dispute WCC's interpretation of their
5 publications, the ones that I just referred, the USTR
6 Statement, for example. On the contrary, México
7 confirmed that the ordinary purpose of Article 14(c)
8 preserves the ability to submit claims to arbitration
9 alleging NAFTA breaches in relation to facts that took
10 place before the NAFTA I was terminated.
11 So, again, more evidence that the purpose of
12 the USMCA is to preserve NAFTA protection.
13 México also confirmed that NAFTA breaches
14 could only have occurred before the NAFTA was
15 terminated, and the U.S. took this same position in
16 its Article 1128 Submission in Vulcan v. México, which
17 is on the record. Now, if NAFTA breaches could only
18 have occurred before the NAFTA was terminated, then
19 requiring ownership on July 1, 2020, would make even
20 less sense, because legacy protection would not
21 provide protection at any time whatsoever.
22 The plain text of the USMCA also supports

1 WCC's position. The Tribunal asked the Parties what
2 it means for a legacy investment to be in existence
3 when the USMCA went into force.
4 Now, in order to answer that question, you
5 have to look to both the USMCA and to the NAFTA terms
6 that are incorporated into the USMCA. A legacy
7 investment is "in existence" when the USMCA went into
8 force if, on that date, it would have qualified as an
9 investment of an investor under the NAFTA. That's
10 what the legacy provision says.
11 And this is the only possible conclusion
12 because the terms of the Treaty must be interpreted as
13 a whole and not in isolation. That's a basic
14 principle of the Vienna Convention, which requires
15 that a treaty be interpreted according to its terms,
16 plural, and in their context with reference to other
17 terms in the Treaty.
18 Now, Canada argued this morning that we're
19 omitting the term "in existence" from our analysis.
20 We are not. We are properly defining the term "in
21 existence" by reference to the specific terms that
22 govern what it means to be in existence here in the

1 NAFTA.
2 Now, here in this case WCC's investment in
3 Prairie was in existence on July 1, 2020, because it
4 met the definitions of "investment" of an investor on
5 that date. So I'm going to go a little bit deeper
6 into the substance of this, and I'll start with the
7 plain language of the NAFTA, and these are the terms
8 that were incorporated into the USMCA. We have them
9 on Slide 13. Now, the relevant terms are
10 Article 1139, Article 1116. 1139 is the definitions
11 clause, 1116 is the NAFTA standing clause.
12 Now, all of these definitions are framed in
13 the past tense, and the reason that all the relevant
14 NAFTA clauses are framed in the past tense is because
15 they're designed to provide protection to investments
16 of investors based on ownership at the time of the
17 Measures.
18 So Article 1139, an "investment of an
19 investor," the exact term of art used in the USMCA, is
20 defined as an "investment that is owned or controlled
21 by the investor." That's in the past tense.
22 "Investor of a party" is one that either

1 had -- seeks to make, is making, or has made an
2 investment -- again, includes the past tense -- and,
3 finally, and importantly, Article 1116 allows an
4 investor to submit a claim to arbitration if it's
5 incurred loss or damage by reason of or arising out of
6 the breach, again, looking at the past tense.
7 Now, we submit Canada this morning argued
8 that we say you only have to define -- only have to
9 comply with term "investment" or "investor." We
10 actually say an investor has to comply with all three
11 requirements in order to be able to submit a claim to
12 arbitration under the NAFTA.
13 And we also submit that, if the NAFTA -- if
14 the USMCA Contracting Parties wanted to limit coverage
15 to investors that still owned their investment on
16 July 1, 2020, they would have used the USMCA
17 definition of "investment," which is in the present
18 tense, owns or controls. They intentionally refer
19 back to these past tense definitions.
20 Now, because of this, NAFTA Tribunals always
21 look to the date of the Measure to determine the
22 protected investor and investment, and this is not

1 specific to the NAFTA. This is across investment
2 treaty jurisprudence, but specifically to the NAFTA,
3 the same principles apply.
4 Most relevant to this case, the Westmoreland
5 Tribunal applied the NAFTA and found that it imposed
6 two requirements: First, that the investor must have
7 held the investment at the time of the alleged breach
8 and, second, that the investor must have suffered loss
9 or damage arising out of the breach.
10 The Tribunal did not find a third
11 requirement that the investor own the investment at
12 the time it submitted the Claim to arbitration or at
13 any other present time.
14 Now, the reason the Westmoreland Tribunal
15 didn't include a third requirement is because it's
16 legally irrelevant. It's not relevant, as long as the
17 investor owned the investment at the time of the
18 breach.
19 The Mondev Tribunal gave the policy reasons
20 why, as have many other Tribunals, which is
21 essentially that requiring an investor to remain an
22 investor would frustrate the purpose of investment

1 treaties, because if a State can take acts that
2 deprive the investor of their investment, there is no
3 investment protection whatsoever.
4 There is more proof that the only Relevant
5 Date is the date of the Measures. In negotiating the
6 NAFTA, Canada repeatedly tried to insert continuous
7 ownership requirement, and some of its proposals are
8 on the Slide. And despite Canada's proposals for a
9 continuous ownership requirement, that limitation
10 never made it into Article 1139.
11 It never made it into Article 1116 either.
12 The fact that the NAFTA Parties discussed continuous
13 ownership, but did not incorporate it, confirms that
14 the NAFTA Parties did not intend the requirement, and
15 again, the only date that matters is the date of the
16 Measures.
17 Now, let's apply the relevant NAFTA
18 definitions to the USMCA legacy clause. On the left
19 of Slide 16 is the USMCA legacy clause, and on the
20 right are the NAFTA definitions that are incorporated
21 into the legacy clause. To be a legacy investment,
22 you must be an investment of an investor that acquired

1 or established the investment between '94 and the date
2 of entry of force of the USMCA, and you must be an
3 investment of an investor that existed on the date
4 that the USMCA went into force.
5 Now, WCC complies with both requirements.
6 The first one is not contested. WCC complies with the
7 requirement -- apologies. We're having technical.
8 Also complies with the requirement that the
9 investor owned the investment, have owned the
10 investment, has made an investment, and has incurred
11 loss or damage, and it complied with each of those
12 requirements on July 1, 2020.
13 Therefore, WCC has a legacy investment as
14 defined under the USMCA, and we hope that is the
15 answer to the Tribunal's question.
16 Now, Canada agreed in its Memorial on
17 Jurisdiction that the Tribunal should look to the
18 NAFTA to define what is meant by an "investment of an
19 investor" under the legacy clause. That's at
20 Paragraph 84 of its Memorial on Jurisdiction.
21 Canada also agreed that investment
22 Tribunals, including NAFTA Tribunals, find that a

1 Claimant needs to hold the investment only at the time
2 of the breach. And Canada said in its Briefing, it
3 does not seek to depart from this well-founded
4 principle.
5 Now, because Canada cannot dispute these
6 basic principles, Canada in its Briefings invented an
7 additional NAFTA requirement that it argues was also
8 incorporated into the USMCA. You have Canada's
9 argument on Slide 18.
10 Canada argued that NAFTA Tribunals have
11 consistently applied Article 1101 to require a legally
12 significant connection between Challenged Measures and
13 the Claimants and its investments, which it calls the
14 immediate and direct facts test.
15 It said the same reasoning applies to the
16 USMCA, Annex 14-C, the language investment of an
17 investor of a Party in existence on the date of entry
18 into force requires the Claimant to have held the
19 investment at issue on July 1, 2020.
20 So Canada, at the time that it submitted its
21 Briefs, accepted the exact way that WCC has
22 interpreted this, the legacy provision, except that it

1 tried to invent or incorporate another requirement
2 based on NAFTA precedent.
3 Now, I'll first start with Canada's original
4 argument, which is that this unsettled precedent of an
5 immediate and direct fact should be incorporated in
6 this legacy clause. Now, it really remains to be seen
7 whether the NAFTA imposes an immediate and direct
8 effect requirement. Most Tribunals, including
9 Cargill, Apotex, and Canadian Cattlemen have rejected
10 that requirement. So it's really inconceivable that
11 the USMCA drafters meant to incorporate such an
12 unsettled principle into the USMCA legacy provision.
13 (Interruption.)
14 (Comments off microphone.)
15 MS. FRIEDMAN: So I'm going to restate that
16 last submission I made, and please, Dawn, if there's
17 any other problem, please feel free to interrupt.
18 (Comments off microphone.)
19 MS. FRIEDMAN: So because multiple Tribunals
20 have rejected the immediate and direct effects
21 requirement, it's really inconceivable that the USMCA
22 drafters would have considered -- would have

1 incorporated that principle into the legacy clause.
2 And -- but even if -- let's assume that they
3 did, even if the immediate and direct effects
4 requirement is valid, that wouldn't change anything,
5 because the only date on which you can assess the
6 immediate and direct effect of the Measures is the
7 date of the Measures.
8 Here, the immediate and direct effect of
9 Canada's Measures can only be on WCC and its
10 investment. That's true as of the date of the
11 Measures, and that's true as of July 1, 2020.
12 Now, this morning Canada seemed to drop this
13 argument from its presentation, despite the Tribunal's
14 express request that the Parties address the "in
15 existence" requirements.
16 Canada seemed to scale back its arguments to
17 say that the only thing that needs to be
18 established -- or that, in addition to the -- that the
19 USMCA legacy provision requires that acquisition
20 between 1994 and the date of entry into force of the
21 USMCA, and simply that something exists on
22 July 1, 2020.

1 But what Canada didn't do is explain what is
2 meant by "in existence." How are those terms defined,
3 and how can you avoid incorporating the NAFTA terms
4 that are expressly incorporated immediately after that
5 provision into that definition.
6 Now, with all due respect, as a NAFTA
7 Contracting Party, Canada knew what the NAFTA said and
8 what the USMCA meant when it wrote its Briefs. Canada
9 cannot simply change its position at the final hour to
10 suit its position in this Arbitration, and the
11 Tribunal should adopt Canada's initial position that
12 accords with Claimant's interpretation, but that adds
13 an additional Article 1101 requirement for an
14 immediate direct effect.
15 Canada's argument, both its old argument and
16 its new one, also can't be squared with the legacy
17 clause, which is to protect against prior acts.
18 Canada does not explain how the USMCA legacy
19 protection can provide adequate protection if it
20 doesn't cover those investors whose investments were
21 lost at the hands of the State.
22 Only WCC provides a clear explanation of

1 what is meant by "in existence" on July 1, 2020, that
2 can be squared with the relevant Treaty terms that is
3 backed by official documents, and is consistent with
4 the object and purpose of the Treaty and Investment
5 Law altogether.
6 I'll turn to my third point on legacy
7 protection. Even on Canada's reading of legacy
8 protection, WCC had a legacy investment on
9 July 1, 2020, in the form of a Claim to money. The
10 NAFTA claim that's at issue in this arbitration is not
11 a theoretical, unasserted claim.
12 Before July 1, 2020, WCC had already
13 asserted its NAFTA Claim in Westmoreland I, and that
14 NAFTA Claim was underway when the USMCA went into
15 force. So even on Canada's reading of the USMCA,
16 NAFTA Claim was in existence on July 1, 2020.
17 Article 1139 of the NAFTA expressly protects
18 interests arising from the commitment of capital. And
19 this protection extends to claims to money as long as
20 those claims involve the kinds of interests that are
21 generally protected by the NAFTA. So if a claim to
22 money involves an enterprise, then the claim to money

1 is protected.
2 Now, claims to money are a core part of the
3 investment because of the core value, the inherent
4 value of legal rights. So if the enforcement of
5 claims is not protected, then the investment is not
6 protected. So if, for example, Canada can take
7 Measures that harm WCC's investment, but then block
8 WCC from pursuing investment protection, then the
9 NAFTA does not provide any protection whatsoever.
10 Many prior Tribunals have acknowledged that
11 a claim to money qualifies as an investment, both in
12 the context of the NAFTA and other treaties. The
13 leading NAFTA example is Mondev v. United States.
14 Mondev filed a NAFTA Claim, even though its real
15 estate Project in the United States had failed by the
16 time the NAFTA went into force.
17 So by that time, by the time the NAFTA was
18 available, Mondev had no investment activity
19 whatsoever in the United States. The only thing that
20 Mondev had in the U.S. after the NAFTA went into force
21 was a domestic lawsuit that Mondev eventually lost.
22 Now, despite this, the Tribunal upheld its

1 jurisdiction, finding that Mondev's lawsuit in the
2 United States constituted an investment under the
3 NAFTA. Now, Canada has argued that this case is
4 different because WCC has a NAFTA Claim instead of a
5 domestic lawsuit, but the principle is the same.
6   An investor seeks to enforce its legal
7 rights in investment arbitration just as it would in
8 the domestic litigation. Those rights are equally
9 integral to its investment.
10   WCC has at all times retained the right to
11 the NAFTA Claim that it submitted to arbitration in
12 2018. Canada argued this morning that WCC transferred
13 that Claim to WMH in the bankruptcy proceeding, but
14 whether WCC owns the NAFTA Claim is a question of U.S.
15 law, since the bankruptcy proceedings took place in
16 the United States, and this has been evaluated by
17 prior Tribunals, and is briefed in our submission.
18   WCC in this Arbitration submitted
19 uncontested evidence that WCC has maintained the NAFTA
20 claim at all times since it was submitted to
21 arbitration. We submitted evidence from the U.S.
22 Bankruptcy Court. We went back to the Court to

1 confirm that WCC has retained the NAFTA Claim, and the
2 Court found that WCC retains title to the NAFTA Claim
3 to the same extent that it did prior to the
4 bankruptcy.
5 WCC also submitted the Opinion of a retired
6 U.S. bankruptcy judge, the Honorable Shelly Chapman,
7 and she also concluded that the transfer to WMH was
8 void ab initio. It's as though it never happened, and
9 that's because WMH was not able to pursuit any relief
10 on behalf of WCC.
11 Now, Canada does not dispute these
12 conclusions under U.S. law. Canada has not presented
13 a conflicting legal view from any other jurisdiction,
14 and Canada has decided not to call Judge Chapman to
15 testify at this Hearing.
16 So the Tribunal should accept this evidence
17 as conclusive and should find that WCC today owns its
18 NAFTA Claim, which is a claim to money because it
19 arose from its investments in Canada. Because WCC
20 still has an unresolved NAFTA claim when the USMCA
21 went into force, WCC had an investment that remains in
22 existence on July 1, 2020, even on Canada's very

1 narrow reading of that provision.
2 Before I leave the USMCA, and recognizing
3 that Mr. Rubinstein will address estoppel, I want to
4 remind the Tribunal that the only reason we're here
5 today addressing USMCA is because of Canada's abuse of
6 rights. WCC asserted a NAFTA Claim while the NAFTA
7 was in force, and it intended to pursue that NAFTA
8 Claim until the end. If it weren't for Canada's
9 tactics, WCC's Claim would have been adjudicated under
10 the NAFTA without any reference to the USMCA.
11 Thank you.
12 MR. RUBINSTEIN: Canada's remaining
13 objections are focused on the requirements of the
14 NAFTA, specifically Canada asserts four objections,
15 the first of which is that WCC's Claim is time barred
16 under NAFTA's Limitations Period in Articles 1116 and
17 1117. For the reasons that I will explain, Canada's
18 limitations defense is meritless and should be
19 rejected since the Limitation Period was tolled when
20 WCC filed its Claim in 2018 until the Westmoreland
21 I Tribunal issued its Award in January 2022.
22 The analysis is straightforward: As I

1 mentioned, WCC filed its NAFTA Claim on November 19,
2 2018, just under two years after the NAFTA Limitations
3 Period began to run. WCC then unsuccessfully sought
4 to assign its NAFTA Claim to WMH as part of the
5 bankruptcy in order for WMH to continue pursuing the
6 Claim. After the Westmoreland I Tribunal held that
7 WMH could not pursue the Claim because only WCC could
8 bring it, WCC then approached the Bankruptcy Court to
9 confirm that it still had the ownership and title to
10 that claim and, as soon as the court gave its approval
11 on that basis, WCC promptly renotified its claim and
12 then resubmitted or refiled its claim in October of
13 2022, less than one year after the Tribunal issued its
14 Award in Westmoreland I. If the Limitations Period
15 was tolled, as WCC claims, it is undisputed that the
16 Claim is timely. Canada, therefore, focuses its
17 efforts on trying to avoid tolling on multiple grounds
18 every one of which fails for the reasons that I will
19 explain.
20 Starting with the language of the NAFTA
21 itself, it is true that the NAFTA does not address
22 tolling in the text of the Treaty itself. And that's

1 not surprising since Treaty limitations provisions
2 commonly do not address what happens after a claim is
3 asserted. For instance, the Perú-U.S. Free Trade
4 Agreement that was addressed in Renco likewise did not
5 mention tolling in the body of the Treaty. However,
6 there are specific provisions in both the NAFTA and
7 the Vienna Convention that serve to incorporate the
8 tolling principle by reference as a principle of
9 international law.
10 Specifically, Article 1131 of the NAFTA
11 provides that, in resolving a dispute pursuant to the
12 NAFTA, the Tribunal "shall decide the issues in
13 dispute in accordance with this Agreement and
14 applicable rules of international law."
15 Incorporation of applicable rules of
16 international law also is consistent with
17 Article 31(3)(c) of the Vienna Convention which also
18 provides that any relevant rules of international law
19 applicable in the relations between the Parties shall
20 be taken into account.
21 In this case, the tolling principle is
22 incorporated into the NAFTA as a well-accepted

1 principle of international law, as I will now discuss.
2 In our submissions, we've cited more than a
3 century of cases recognizing that Limitations Periods
4 are tolled under international law once a claim is
5 notified to the Respondent. The Williams and Gentini
6 cases that we've listed here are just a couple of
7 examples. Based on the very same authorities that we
8 have cited, the Tribunal in Renco II held that, under
9 international law, the presentation of a claim to a
10 Competent Authority within the proper time will
11 interrupt the running of prescription.
12 Canada has not addressed this holding in
13 Renco, including in its presentation this morning, nor
14 have the United States or México addressed this
15 holding in Renco in their Non-Disputing Party
16 submissions.
17 Instead, Canada cites authorities that deal
18 with the entirely separate question of when the
19 Limitations Period begins to run, which is not in
20 dispute here since WCC asserted its claim in 2018
21 within three years of the Limitations Period when it
22 began to run.

1 Now, applying these Authorities that we've
2 cited, the Renco II Tribunal based its holding on the
3 fact that tolling is "a general principle of law
4 recognized by civilized nations."
5 Again, Canada and the Non-Disputing Parties
6 do not address this holding in Renco II that the
7 tolling principle is a well-established principle of
8 international law. Nor do they challenge in their
9 written submissions the fact that tolling is a
10 well-accepted principle under the domestic laws of the
11 NAFTA Parties.
12 Based on its finding that tolling is a
13 general principle of law recognized by civilized
14 nations, the Renco II Tribunal held that the tolling
15 principle was incorporated by reference into the
16 Perú-U.S. Free Trade Agreement and that, therefore,
17 the filing of a Notice of Arbitration in Renco I
18 suspended the Limitations Period, even though Renco
19 had submitted a defective waiver with that claim.
20 In addition to holding that tolling is a
21 well-established principle of customary international
22 law, the Tribunal in Renco II also explained that

1 application of tolling is necessary in order to allow
2 claimants to cure jurisdictional defects so that they
3 can then resubmit a corrected claim and therefore
4 provide an effective dispute resolution mechanism for
5 the consideration of such claims on the merits.
6 As Renco II points out, this conclusion is
7 even more apparent under the NAFTA because
8 Article 1102(1)(e) of the NAFTA provides that one of
9 the essential purposes of Chapter Eleven is to provide
10 an effective dispute resolution mechanism, and, as a
11 result -- well, in any event, I think it's worth
12 pointing out that Renco has been a centerpiece of our
13 case on limitation since the beginning of this case,
14 yet Canada still has not addressed Renco's tolling
15 analysis for holding, much less show that Renco was
16 wrongly decided.
17 Now, in Renco -- the Tribunal in Renco II
18 applied tolling to permit the cure of a procedural
19 defect, in that case, a defective waiver letter, so
20 that the Claim could be heard on the merits. Likewise
21 here, WCC's resubmission cures the procedural defect
22 found by the Tribunal in Westmoreland I. As the

1 Tribunal held in Waste Management II, preventing a
2 claim from being heard on the merits due to a
3 procedural defect is an outcome that "should be
4 avoided." And that is especially true; whereas, in
5 Renco and this case, the Claimant has waived all other
6 forms of recourse. Without tolling, it would be
7 difficult and, in some cases, impossible for Claimants
8 to cure procedural defects and then resubmit their
9 claims to be heard on the merits without tolling.
10 As we all know, jurisdictional objections in
11 Treaty arbitrations can take years to adjudicate. As
12 the Tribunal recognized in Renco, tolling is,
13 therefore, essential in order to enable the cure and
14 the hearing of claims so that they may be properly
15 heard on the merits.
16 It's also worth noting that the holding in
17 Renco II on tolling is consistent with the NAFTA
18 Tribunal's Decision in Feldman v. México. Feldman
19 acknowledged that, while the NAFTA Limitations Period
20 was strict, and, therefore, would not extend the time
21 period in which the Claim can be initially asserted,
22 the Tribunal recognized that the filing of a claim and

1 the acknowledgment of a claim would probably interrupt
2 the running of the period of limitation. While Canada
3 and México both discuss Feldman, they do not address
4 the central language in the Feldman Award. Applying
5 the Feldman test, the Limitations Period here was
6 interrupted on November 19, 2018, when WCC served its
7 Notice of Arbitration on Canada.
8 We also know that Canada acknowledged WCC's
9 Claim as far back as 2019 by working with WCC to form
10 the Arbitral Tribunal based on the Notice of
11 Arbitration that WCC had filed in 2018.
12 In its Reply, Canada agrees with WCC that
13 the purpose of the NAFTA Limitations Period is to
14 provide predictability and to ensure the available of
15 reliable evidence. Those objectives were met here
16 when WCC filed its Claim in 2018 and then by the
17 continuous prosecution of that Claim by both WCC and
18 WMH. To this day, Canada has not pointed to any
19 unfair prejudice that would result from the
20 resubmission of WCC's Claim and the Hearing of that
21 Claim on the merits.
22 Since 2018, Canada has been on continuous

1 notice of the need to defend itself. Canada,
2 therefore, resorts to arguing that "its ability or not
3 to preserve evidence cannot override" the three-year
4 Limitations Period in the NAFTA.
5 But that misses the point. The lack of any
6 discernible prejudice shows that Canada's limitations
7 defense is not meant to vindicate any legitimate right
8 that they have. Rather, Canada is simply seeking to
9 escape WCC's Claim without having to defend it on the
10 merits.
11 As I mentioned earlier, Canada articulates a
12 series of justifications as to why the Tribunal should
13 not apply the tolling principle in this case. Canada
14 first tries to avoid tolling on the basis that WCC had
15 withdrawn its Claim, but to argue that WCC withdrew
16 its Claim is misleading and takes that withdrawal out
17 of context. The correspondence between the Parties
18 makes clear that WCC's Claim was not being abandoned,
19 but, rather, was being handed off. It was being
20 assigned to WMH so that WMH could continue asserting
21 that Claim. There is nothing in the record which
22 indicates that WCC meant to abandon its NAFTA Claim.

1 Likewise, there's the withdrawal of the
2 Notice of Arbitration, it had no preclusive effect
3 because the original Claim, the Notice of Arbitration
4 filed in 2018, was not submitted for consideration by
5 a tribunal and there was no resulting dismissal of
6 WCC's Claim. The withdrawal was without prejudice, as
7 explained in the Witness Statement submitted by
8 Mr. Stein. In fact, Canada effectively acknowledged
9 this in Westmoreland I when it said that it was still
10 open for WCC to continue its Claim.
11 Canada never told the Tribunal in
12 Westmoreland I that WCC's withdrawal somehow
13 foreclosed it from reasserting that Claim. So this is
14 not a case in which an investor has abandoned their
15 claims only to resurrect that claim later. WCC is
16 merely pursuing the Claim that it originally brought
17 in 2018.
18 Canada next argues that tolling should not
19 be applied because the Claims pursued by WCC and WMH
20 are different. But, in fact, a redline of the Notices
21 of Arbitration submitted by WCC in 2018 and by WMH in
22 2019 prove that the Claims are identical.

1 The transmittal email that was used to
2 submit the Amended Notice of Arbitration stated there
3 are no changes to the substance of the Claim. In
4 fact, Canada concedes in its submissions "the
5 allegations of breach and damage and the description
6 of the factual circumstances leading to them in the
7 WMH NOA were nearly identical to those alleged in
8 WCC's 2018 Notice of Arbitration."
9 To respond to the Tribunal's second question
10 as to whether the Claims are identical and what is the
11 effect of that determination, WCC's submission is that
12 the 2018 and 2019 Claims are identical. All that
13 changed was the identity of the Claimant. The same
14 Challenged Measures, the same facts, the same Treaty
15 breaches, and the same relief sought.
16 Now, the 2022 Notice of Arbitration also is
17 substantively identical because it includes the same
18 Challenged Measures, the same facts, and the same
19 Claims along with the inclusion of an expropriation
20 claim, as Canada pointed out in its submissions this
21 morning.
22 However, the Expropriation Claim that is

1 asserted is based on the same Measures and facts that
2 were alleged back in 2018. The Expropriation Claim is
3 based on the fact that the Measures adopted by Canada,
4 again, the original Measures alleged in 2018,
5 destroyed the value of WCC's investment due to the
6 Climate Leadership Plan that substantially accelerated
7 the coal transition because the coal that was produced
8 at the mines in question could not be transported or
9 sold in other markets and because WCC was denied any
10 compensation for the destruction of its investment.
11 Again, those allegations were contained in each of the
12 Notices of Arbitration.
13 The only additional measure that was
14 mentioned in the 2022 Notice of Arbitration is the
15 Federal Fuel Charge that went into effect in 2020,
16 however, as was pointed out this morning, WCC has
17 withdrawn the challenge to that measure and, as a
18 result, the Claims -- the Measures challenged in all
19 three Notices of Arbitration are identical.
20 In its Reply, Canada argued that the 2022
21 Claim also should be treated as different because the
22 2022 -- this Arbitration -- the 2022 Notice of

1 Arbitration, is governed by the 2013 UNCITRAL Rules
2 and not the 1976 Rules that were used to assert the
3 original claim in 2018. But that is simply wrong. I
4 mean, for several reasons.
5 First, this Arbitration, the 2022 Notice of
6 Arbitration, was filed under the 1976 UNCITRAL Rules.
7 Following the submission of that Notice of
8 Arbitration, Canada proposed the application of later
9 UNCITRAL Rules.
10 WCC, in our comments on the draft of
11 Procedural Order 1, stated that we would agree to the
12 use of later versions of the UNCITRAL Rules subject to
13 the reservation that Canada would not use that
14 agreement as a basis for challenging the Tribunal's
15 jurisdiction, which Canada did not disagree with. And
16 we are happy to submit the draft that contained the
17 comments of the Parties on the draft of Procedural
18 Order 1, if the Tribunal would like to see it.
19 What matters here is that we resubmitted the
20 2022 Notice of Arbitration under the 1976 Rules. It
21 was only pursuant to an agreement of the Parties that
22 the later versions of the UNCITRAL Rules were adopted

1 in both PO1 as well as the Terms of Appointment.
2 But, once again, what this shows is a
3 continuing course of conduct in which Canada makes
4 proposals with the intention of trying to use those
5 proposals as, essentially, a form of gamesmanship in
6 order to bolster its position.
7 We also know from the Westmoreland I Award
8 that the claim being advanced by WMH was the same
9 claim that was originally filed by WCC because that
10 was the very basis for the Tribunal's Award in
11 Westmoreland I. Specifically, the Tribunal held that
12 WMH did not have standing precisely because it was
13 seeking to assert WCC's Claim, even though WMH was not
14 WCC's legal successor in interest. In
15 Westmoreland I itself, Canada characterized the WMH
16 Claim as being the same claim previously asserted by
17 WCC.
18 For instance, as is quoted here in the
19 boxes, Canada alleged that WMH only alleges breaches
20 that occurred years before its existence as a
21 protected investor, and that concern an entirely
22 different investor, WCC. Canada also went on to

1 allege that the damage that was caused -- that was
2 alleged by WCC -- WMH, in fact, was "caused to WCC and
3 its investments in coal mines by the Government of
4 Alberta's Decision."
5 In other words, the identity of those Claims
6 was the essential basis for the Tribunal's holding in
7 Westmoreland I.
8 The Bankruptcy Court's June 23, 2022, Order
9 also confirms that WCC is now simply seeking to
10 reassert the Claim that it originally brought in 2018.
11 The Bankruptcy Court specifically found that WCC
12 retained title to the NAFTA Claim and that the NAFTA
13 Claim did not transfer to any other party. The Court
14 also found that WCC's rights to the NAFTA Claim
15 remained with WCC as reorganized, all of which was
16 also then reinforced by Judge Chapman's Expert Report,
17 which explains that, in light of the Westmoreland
18 I Award, WCC's Claim never transferred pursuant to the
19 plan of reorganization, and that, at all times, the
20 NAFTA Claim remained with WCC as a retained cause of
21 action. WCC is simply reasserting its original 2018
22 NAFTA Claim.

1 Canada next tries to avoid tolling by
2 pointing to the fact that WCC and WMH are separate
3 entities. However, that makes no difference since
4 they both have been seeking to assert the same claim
5 and to vindicate the same interests.
6 The concept that tolling can apply across
7 different entities that seek to assert the same claim
8 and to vindicate the same rights is well-accepted.
9 Here, we have cited a couple of cases applying U.S.
10 law, which recognized this principle.
11 In addition, in our submissions, we have
12 cited civil codes from multiple jurisdictions around
13 world -- including Canada, I might add -- which
14 recognize that the tolling principle extends to
15 different claimants as long as they are seeking to
16 advance the same claim and to vindicate the same
17 interest.
18 For instance, Article 2896 of the Civil Code
19 of Quebec states that the tolling principle "has
20 effect with regard to all the Parties with respect to
21 any right arising from the same source."
22 I should also point out that these are the

1 very same code provisions that were relied on by the
2 Tribunal in Renco II to support its finding that the
3 tolling principle is incorporated into customary
4 international law.
5 Canada next objects to tolling on the basis
6 that WCC and WMH supposedly had adverse interests.
7 But, once again, this is factually and legally wrong.
8 The Bankruptcy Court's 2022 Order, Judge Chapman's
9 Expert Report, and the Stein Witness Statement, all
10 established that WCC and WMH had a common interest in
11 the pursuit of the NAFTA Claim that is before you.
12 Specifically, as is explained in both the
13 Bankruptcy Court's Order as well as Judge Chapman's
14 Expert Report, there is a shared -- that debtors and
15 creditors in a U.S. bankruptcy have a shared interest
16 in maximizing the value of the bankruptcy estate. The
17 Bankruptcy Court specifically found in its 2022 Order
18 that WCC's pursuit of the NAFTA Claim "is in the best
19 interest of the WLB debtors' estates, their creditors,
20 the WLB Plan Administrator, and other parties in
21 interest."
22 It also is undisputed, as found by the

1 Court, that the pursuit of the NAFTA Claim by WCC is
2 meant "to maximize WCC's value for the benefit of
3 WMH."
4 Canada, as pointed out earlier by
5 Ms. Friedman, has not challenged the findings of the
6 Bankruptcy Court under U.S. law, nor have they
7 challenged Judge Chapman's Expert Report, nor have
8 they rebutted the Stein testimony.
9 The bottom line is that Canada has not
10 offered any factual or legal justification for not
11 applying the tolling principle in this case. WCC, on
12 the other hand, has established that tolling is
13 essential in order to enable WCC to cure the
14 procedural defect found by the Westmoreland Tribunal
15 and to have its Claim heard on the merits. That very
16 compelling interest was a central component of the
17 Tribunal's Decision in Renco II.
18 Based on these principles of international
19 law that I've described involving the tolling
20 principle, the Tribunal in Renco I warned that a
21 State's assertion of a limitations defense in order to
22 prevent the cure of a procedural defect would be

1 tantamount to an abuse of rights under international
2 law. That is precisely the situation here. Just like
3 Renco, WCC's resubmission of its Claim cures the
4 jurisdictional defect found in Westmoreland I, just as
5 Canada said in Westmoreland I that it was open to WCC
6 to do. The Tribunal in Renco I warned Perú not to
7 assert a limitations defense following the
8 resubmission of the correct claim.
9 Now, in Renco II, the Tribunal did not reach
10 the abuse of rights issue because it held that the
11 Limitations Period was tolled in any event. In this
12 case, the Westmoreland I Tribunal had no reason to
13 give Canada the same warning that was given by the
14 Tribunal in Renco I since Canada represented to the
15 Tribunal in Westmoreland I that WCC still could pursue
16 its Claim. Had Canada told the Tribunal that it would
17 object to the resubmission of the Claim or that the
18 Claim was barred on any grounds, the Tribunal would
19 have been able to deal with it at the time just as the
20 Tribunal did in Renco I.
21 In effect, Renco I and Renco II show that
22 Canada's assertion of its limitations defense in order

1 to prevent WCC from curing the procedural defect found
2 in Westmoreland I and to have its Claim resubmitted
3 and heard on the merits is tantamount to an abuse of
4 rights under international law.
5 Before I conclude on the issue of
6 timeliness, I do want to address the Tribunal's
7 remaining limitations questions. Question Number 3
8 asks about the scope and impact of the fuel charge
9 withdrawal on the Expropriation Claim asserted in the
10 2022 Notice of Arbitration.
11 WCC's response to that question is that the
12 withdrawal of the fuel charge allegation has no impact
13 on the Tribunal's jurisdiction to hear the
14 Expropriation Claim. The Expropriation Claim is not
15 based solely on the Federal Fuel Charge. As is
16 alleged in the Notice of Arbitration, the
17 Expropriation Claim is based on the same Measures that
18 were challenged in the 2018 Notice of Arbitration,
19 i.e., the Climate Leadership Plan and the phaseout of
20 coal use -- the accelerated phaseout of coal use, the
21 inability to transport and sell produced coal anywhere
22 else, and the lack of just compensation for the

1 destruction of WCC's investment.

2 The question of what impact, if any, the

3 withdrawal of the fuel charge allegation may have on

4 damages is something that will have to be addressed at

5 the merits stage.

6 With regard to Question 4 on the timeliness

7 of WCC's Expropriation Claim, WCC submits that the

8 Expropriation Claim is timely for several reasons.

9 First and foremost, the Expropriation Claim was

10 asserted within the toll three-year Limitations

11 Period.

12 Second, the Expropriation Claim is based, as

13 I mentioned, on the same Challenged Measures that were

14 alleged in the original Notice of Arbitration back in

15 2018.

16 And, finally, Canada's -- the assertion of

17 that Expropriation Claim will not cause any unfair

18 prejudice to Canada because it is based on the same

19 Measures and facts that were originally pled in 2018.

20 So for all of these reasons which are

21 summarized here on this slide and I will not repeat,

22 the Tribunal should find that WCC's resubmitted claim

1 is timely.
2 I will now turn it back over to Ms. Friedman
3 to address Canada's remaining objections under the
4 NAFTA.
5 MS. FRIEDMAN: Thanks, Javier.
6 So as Javier said, I'm going to address the
7 remaining issues in dispute under the NAFTA. I'm
8 going to start with WCC's right to bring a claim on
9 behalf of Prairie. Now, WCC submitted two Claims in
10 this Arbitration, an Article 1116 NAFTA Claim on
11 behalf of WCC and an Article 1117 Claim on behalf of
12 Prairie. On the ownership and control point, Canada
13 does not dispute the Article 1116 Claim.
14 WCC has standing under Article 1116 because
15 it owned Prairie at the time of the Measures. As I
16 explained earlier in the context of the legacy
17 provision, the investor need only hold the investment
18 at the time of the Measures to qualify for investment
19 protection. The Westmoreland I Tribunal -- you have
20 the Decision on the side -- held that, in a claim
21 under Article 1117 -- so applying the principle of
22 1117 -- the investor must prove that he owned or

1 controlled the investment at the critical time. The
2 critical time, again, is the date on which the Treaty
3 was allegedly breached.
4 We have cited plenty of cases in which the
5 investor lost ownership after the Measures and still
6 was allowed to bring the Claim. And we acknowledge
7 that few Tribunals have reviewed this issue in the
8 Article 1117 context. But we submit that Article 1117
9 should not impose a continuous ownership requirement
10 because that would effectively deprive the enterprise
11 of any Article 1117 relief anytime there has been a
12 change in ownership, and that's even where there has
13 been a state of -- even when that change of ownership
14 is due to State Measures.
15 Now, throughout investment treaty
16 jurisprudence, both under the NAFTA and under other
17 treaties, only a couple of Tribunals have required
18 ownership at the time the arbitration was filed,
19 including the now infamous case of Loewen v. United
20 States, which Canada relied on in its Opening
21 Submission.
22 The Daimler Tribunal and many others have

1 criticized the Loewen Award. As the Daimler Tribunal
2 held, to impose a continuous ownership requirement may
3 defeat the ends of justice in cases where the sale of
4 the investment was forced, such as under domestic
5 Bankruptcy Law, or where the bankruptcy was caused by
6 some act of the Respondent State.
7 The present case is the perfect example for
8 why imposing a continuous ownership requirement isn't
9 proper. If Article 1117 imposed an ongoing ownership
10 requirement, neither WCC nor WMH would be able to
11 assert a claim on behalf of Prairie, all because WCC
12 was forced into bankruptcy in part due to Canada's
13 Measures. That would be an effective deprivation of
14 investment protection.
15 WCC has submitted extensive evidence that it
16 owed Prairie at the time of the Measures. We
17 submitted that in our response. The relevant
18 references are on Slide 50, and the
19 Westmoreland I Tribunal adopted that -- accepted that
20 evidence and found that WCC owned Prairie at the time
21 of the Measures. Canada doesn't challenge this.
22 So since WCC owned Prairie at the time of

1 the Measures, which is the only relevant time for
2 determining jurisdiction, WCC is entitled to assert an
3 Article 1117 claim on behalf of Prairie.
4 But, in addition, we'll remind the Tribunal
5 that, even if the Tribunal decides to reject the
6 Article 1117 Claim, it would still have jurisdiction
7 to hear WCC's Article 1116 Claim.
8 Even the B-Mex v. United States case, which
9 Canada relies heavily on in its submissions and in its
10 Opening Statement this morning, acknowledged that
11 Article 1116 does not require subsistence of the
12 investment at the time a claim is submitted.
13 Canada does not and cannot deny that WCC has
14 a requisite ownership control as required by NAFTA
15 Article 1116. It can't because Canada assured the
16 First Tribunal that WCC could still bring a claim just
17 under Article 1116. It only contested WCC's ability
18 to bring a claim under Article 1117 of the Hearing.
19 And so there's no basis for Canada to argue
20 that anything has changed under the NAFTA since that
21 date because there has been no change in ownership as
22 of that date. WCC today has the same ownership and

1 control over NAFTA as it had when Canada made that
2 representation to the Westmoreland Tribunal.
3 So we submit that the Tribunal should accept
4 jurisdictions over the Article 1117 Claim but, in any
5 event, the Tribunal would have jurisdiction to review
6 all of the same Measures and all of the same breaches
7 under Article 1116.
8 I'll turn now to Canada's waiver arguments.
9 Before starting its first arbitration in 2018 -- the
10 first arbitration in 2018, WCC and Prairie submitted
11 Waiver Letters to waive their right to pursue relief
12 in any other forum. The Waiver Letters had an
13 immediate and permanent impact. They were effective
14 immediately and forever.
15 Canada acknowledged in its briefings that
16 the waiver required by Article 1121 must be legally
17 enforceable now and in perpetuity. Canada now argues
18 that a withdrawal of the Claim somehow invalidates
19 that prior waiver but there is no reason to adopt
20 that. There has been no jurisprudence on that, and it
21 would -- and that argument undermines the entire
22 purpose of the waiver, which is to irrevocably waive

1 your right for submitting to investment arbitration.
2 So at the time WCC lodged this Arbitration
3 in 2022, WCC decided to submit the same two 2018
4 Waiver Letters, but it submitted the first time it
5 filed its NAFTA Claim with its Notice of Arbitration
6 in this Arbitration, and this was the appropriate
7 course of action because there was nothing more for
8 WCC or Prairie to waive at that time. There is no
9 dispute about the substance of sufficiency of the
10 waiver. Canada only argues that it wasn't executed at
11 the right time.
12 Now, as I'll go through, there's no
13 requirements that the waiver be executed at all, let
14 alone at the right time. Instead, NAFTA Article 1121
15 sets out waiver requirements. The provision is on
16 Slide 54, and it creates three requirements:
17 First, the waiver must be in writing;
18 second, the waiver must be submitted -- included in
19 the submission of the claim to arbitration; and,
20 third, the waiver must be delivered to the disputing
21 Party.
22 WCC complied with these requirements because

1 it submitted written waivers which it attached in its
2 submission of the claim to arbitration, i.e., with its
3 Notice of Arbitration, and it was -- this was
4 delivered to Canada. Now, Canada does not object to
5 the substance of those waivers. Instead, true to
6 form, it invents formalistic arguments on the waiver
7 including positions that contradict its position in
8 Westmoreland I.
9 Now, Canada's main objection is that the
10 2018 Waiver Letters attached to the Notice of
11 Arbitration in this Claim were not submitted -- were
12 not signed contemporaneously. And notably, Canada did
13 not assert this objection when WMH, in 2019, attached
14 Prairie's 2018 Waiver Letter, even though that Waiver
15 Letter was also not signed contemporaneously with
16 WMH's Notice of Arbitration.
17 I apologize, there's a typo on the slide,
18 "trigger" should be "waiver."
19 Now, that's important because WCC relied on
20 the fact that Canada accepted this practice when we
21 prepared our Waiver Letters in this Arbitration.
22 Because Canada did not object to WMH including the

1 prior Waiver Letter, we assumed that was appropriate
2 practice that Canada would accept.
3 Canada, of course, has now changed its tune
4 and argues that that prior practice no longer is
5 acceptable because, it says, that was a defective
6 waiver but it accepted it and now it's going to
7 object. It argues it can blow hot and cold and choose
8 when to -- and choose to switch positions at its
9 convenience.
10 As Mr. Rubinstein will explain, blowing hot
11 and cold violates principles of international law. In
12 any event, WCC's waivers are effective, and they are
13 effective for multiple reasons. There are multiple
14 instruments that are effective. First, the 2018
15 Waiver Letter that we attached to the 2022 Notice of
16 Arbitration was signed by the Executives of WCC and
17 Prairie who have the authority to waive those
18 entities' rights at the time they were signed.
19 And, as I explained, Canada agrees those
20 Waiver Letters would become immediately and
21 permanently effective. So reattaching them simply
22 reinforces our claims have been waived since 2018, we

1 have abided by those waivers since 2018, and those
2 waivers continue in force today.
3 Now, in addition, even if there were a
4 contemporaneous waiver signature requirement, WCC also
5 provided an additional waiver that is contemporaneous
6 to the Notice of Arbitration, because it is included
7 in our 2022 Notice of Arbitration. That waiver is
8 verbatim. A verbatim waiver per NAFTA Article 1121,
9 follows its terms precisely, and clearly waives WCC's
10 rights to pursue its claim in any other forum.
11 So there are two forms of waiver that meet
12 Article 1121 requirements, because they are in
13 writing. They were included with the Notice of
14 Arbitration; and they were delivered to Canada.
15 Now, before I turn to Canada's second waiver
16 argument, I'll address the Tribunal's request for a
17 position on whether the Waiver Letters apply to the
18 expropriation claim.
19 The short answer is, yes. WCC effectively
20 waived its expropriation claim in its written waivers,
21 because those waivers extended to any claims that
22 relate to the measures at issue in the arbitration.

1 And those waivers apply irrespective of the treaty
2 breach at issue.
3 Article 1121 of the NAFTA provides that the
4 investor and the enterprise must waive their right
5 with respect to the measure of the disputing party
6 that is alleged to be a breach. So Article 21 does
7 not require waiver of specific treaty breaches. It is
8 broader because it applies to all measures
9 irrespective of the treaty breach.
10 Slide 58 contains Prairie's Waiver Letter
11 which is identical -- just a relevant portion of
12 it -- which is identical to WCC's Waiver Letter. As
13 you can see, Prairie and WCC because it used same
14 language, waived their rights to pursue relief in
15 other forum for all measures alleged to breach the
16 NAFTA.
17 And the same measures as Mr. Rubinstein
18 explained, underlie the expropriation claim as the
19 National Treatment Claim and the Minimum Standard of
20 Treatment claim. And those measures include the
21 Climate Leadership Plan, WCC's lost opportunity to
22 transport coal elsewhere, and the fact that Canada

1 failed to provide any compensation to WCC for the
2 destruction of WCC's investment.
3 So while WCC did not assert expropriation in
4 the first arbitration, it had already waived the
5 rights to pursue relief for all of the measures that
6 underlie the expropriation claim in that first Waiver
7 Letter. That is all that is required.
8 In answer to the Tribunal's question on
9 waiver of the expropriation claim, I'm going to turn
10 to Canada's second argument on waiver. Canada argues
11 that Prairie's 2018 waiver prevents WCC from seeking
12 relief for Prairie in this arbitration. At best, it
13 is inherently unfair, because Prairie waived its
14 rights to all forms of relief and should be entitled
15 to pursue the one avenue that it did not waive, which
16 is investment arbitration.
17 NAFTA Article 1121 requires that the
18 investor waive their right to initiate or continue
19 before any administrative tribunal or court under the
20 law of any party or other settlement procedures. And
21 that reference to "other settlement procedures" does
22 not apply to investment arbitrations; otherwise, the

1 waiver would immediately prevent the investor from
2 pursuing relief under the Treaty, just like it
3 immediately prevents investors from pursuing relief
4 before courts and administrative tribunals of the
5 contracting state.
6 For that reason, the investor does not need
7 to waive its right -- does not waive its right to
8 investment arbitration, which is the one avenue that
9 it has chosen to pursue. Here, WCC should be
10 permitted to pursue the Prairie claim because
11 Prairie's waiver only stopped Prairie from pursuing
12 the other avenues for relief.
13 Even if Article 1121 requires waiver of the
14 one dispute procedure selected, it should not prevent
15 an investor who has lost on jurisdictional grounds
16 from resubmitting its claim after hearing these facts.
17 All prior tribunals that have valuated resubmitted
18 claims have held that a waiver does not prevent the
19 investor from that second shot.
20 In Waste Management II, for example, the
21 NAFTA Tribunal rejected México's argument that
22 Article 1121 would allow only one bite at the apple,

1 because the first claim was dismissed on
2 jurisdictional grounds.
3 And it was clear that this morning Canada
4 tried to differentiate Waste Management, because the
5 earlier dismissal was due to a procedural defect in
6 the waiver saying that, therefore, the waiver wasn't
7 effective. That's not what the Waste
8 Management II Tribunal held.
9 The Waste Management II Tribunal said that,
10 even if it were the case that a Claimant could only
11 submit a claim under Article 1121 on one occasion,
12 this would not necessarily apply to a submission which
13 was defective by reason of a failure to comply with a
14 condition precedent under Article 21 such as that the
15 Tribunal lacked jurisdiction.
16 So this principle that you can resubmit your
17 claim, irrespective of your waiver, it's not -- it's
18 not cabined to whether there's a defective waiver or
19 not. It exists any time the first claim is dismissed
20 on jurisdictional grounds.
21 And the reason for that, as the Waste
22 Management II Tribunal expressed, is that it goes to

1 the underlying purpose of arbitration provisions in
2 Chapter Eleven. Because a Claimant has not had its
3 NAFTA claim heard on the merits before any tribunal,
4 national or international, the situation would be
5 irrevocable; right?
6 So an investor who has waived any
7 possibility of a local remedy -- and I'll point to the
8 beginning part of this provision here. If the
9 investor has waived any possibility of a local remedy
10 in respect to the measures in question, it might be
11 forgiven for doubting the effectiveness of
12 international procedures.
13 Waste Management II clearly was
14 contemplating that it would be unfair to require a
15 Claimant that has waived its rights to other
16 forum -- it would be unfair to prevent them from
17 resubmitting their claim after the first claim was
18 dismissed on jurisdictional grounds.
19 Barring the resubmission of the claim would
20 be unfair, because it would prevent the Claim from
21 being heard in any forum, national or international,
22 and that is a claim -- that is a situation that should

1 be avoided, if possible.
2 Canada argues that Waste Management is
3 somehow the only case that's on point. It says that
4 the Murphy v. Ecuador is not on point, that it's under
5 a different investment treaty. But the Murphy v.
6 Ecuador Tribunal found the same conclusion, because of
7 the same reason, which is that it would undermine
8 effective investment -- the effective protection of
9 rights if you were to bar claims based on a
10 technicality.
11 A fairness required that WCC be allowed to
12 pursue its claim both on its own behalf and on behalf
13 of Prairie, because Prairie cannot seek relief in any
14 other forum and WCC cannot seek relief in any other
15 forum.
16 Canada argues that it would be unfair for
17 Canada to have to face the same claims twice. But
18 that's not even a threat here, because Canada has not
19 had to face claims in this arbitration on the merits
20 even once.
21 This morning Canada said that this would
22 create a risk of double recovery. That's also not a

1 concern here, because WMH lost its claim on
2 jurisdiction. There is no risk here that two
3 Claimants will recover from Canada.
4 The only unfair outcome here is if Canada is
5 able to avoid any review before an arbitral tribunal,
6 because it encouraged an investor to withdraw its
7 claim and then used the Waiver Letters against the
8 investor to prevent the submission of the Claim. That
9 would be unfair.
10 Finally, I'll explain why Canada's
11 reflective loss argument is baseless.
12 The plain language of the NAFTA recognizes
13 the rights of an investor to bring a claim for loss
14 that is independent of the rights of the enterprise.
15 Article 1139, the definitions section under the NAFTA,
16 recognizes shares as "investments that are protected
17 by the NAFTA."
18 It is not just the right to vote. This
19 protection of an equity security extends to voting and
20 nonvoting shares. Canada today took just the voting
21 portion of the statement, but the shares themselves
22 are protected.

1 There is nothing in the NAFTA that says an
2 investor can only pursue a claim for shares through
3 Article 1117. In fact, Article 1116, the standing
4 clause under the NAFTA, permits claims by an investor
5 of a party on its own behalf.
6 And so if an investor is harmed
7 by -- investor is harmed, including its investments,
8 i.e., its shares, the investor can bring a claim on
9 its own behalf to pursue relief for the harm to those
10 shares.
11 If the investor were not allowed to bring a
12 claim for harm to its own shares, then Article 1116
13 would fail to protect the specific categories of
14 investments recognized by the NAFTA.
15 Article 1117 of the NAFTA supplements the
16 right of shareholders by allowing majority or
17 controlling shareholders to bring claims on behalf of
18 the entire enterprise. And the clearest evidence of
19 this -- of the fact that Article 1117 at least
20 supplements Article 1116 relief -- is that
21 Article 1117(3), which is on Slide 63, provides for a
22 consolidation mechanism when the investor asserts a

1 claim under Article 1116 and the enterprise asserts a
2 claim under 1117.
3 The reason for this consolidation mechanism
4 is to prevent double recovery. If it were true,
5 though, that an investor cannot submit claims for any
6 losses incurred to the enterprise itself, there would
7 be no possibility of double recovery. There would be
8 no risk that the enterprise would be asserting claims
9 that overlap with the investors. They would have
10 their own discrete categories of damages like the list
11 that Canada showed you this morning.
12 Canada has argued in this arbitration that
13 WCC offered no textual analysis of either Article 1116
14 or Article 1117; but the opposite is true. Canada did
15 not point to any text in Article 1116 or Article 1117
16 that suggests that the two mechanisms are mutually
17 exclusive. Canada does not even try to explain why
18 the consolidation mechanism under Article 1117(3)
19 exists at all.
20 No NAFTA tribunal has refused jurisdiction
21 based on the reflective loss principle. In fact,
22 NAFTA tribunals have repeatedly allowed investors

1 submitting claims under Article 1116 to recover
2 indirect losses as a result of their ownership in an
3 enterprise.
4 In Mondev v. United States, for example,
5 Mondev submitted an Article 1116 claim on its own
6 behalf for losses sustained to its enterprise in the
7 United States LPA. And Mondev asserted the entirety
8 of LPA's losses as its own losses in the arbitration
9 because Mondev was the sole owner of LPA.
10 And the Mondev Tribunal held that Mondev
11 would be entitled to show damages caused by the State
12 Measures, even if the enterprise also suffered those
13 losses. There is no limitation. As the Pope &
14 Talbot v. Canada Tribunal held, it can scarcely be
15 clearer that an investor can bring an Article 1116
16 claim for damage to its interest in an enterprise.
17 And this is especially true -- and
18 Pope & Talbot pointed to this -- it is especially true
19 where the investor is the sole owner of the
20 enterprise. Here, WCC was the sole owner of Prairie
21 at the time of the measures. There is no other
22 investor that would be allowed to claim those losses.

1 Now, we note that Canada -- I'm sorry. We
2 note that México and the United States submitted 1128
3 Submissions that disagree with our position, but we
4 would like to reaffirm that no NAFTA tribunal, despite
5 having received similar submissions in the past, has
6 adopted that position.
7 Finally, even if this tribunal were to
8 decide differently than all the other NAFTA tribunals
9 before it, that would not deprive the Tribunal of
10 jurisdiction since WCC has suffered its own direct
11 losses.
12 And while we disagree with the holding in
13 Bilcon v. Canada -- which Canada heavily relies
14 on -- even that case did not support dismissal or
15 Canada's argument on jurisdiction, because that
16 tribunal accepted jurisdiction over the case and even
17 held Canada liable of the merits.
18 And, on top of that, it found that Bilcon
19 had suffered losses independent of the enterprise at
20 the damages phase of the case. So this is
21 not -- reflective loss is not a jurisdictional defense
22 that can cause -- that should cause the Tribunal to

1 entirely dismiss jurisdiction.
2 Here, WCC's own losses are significant.
3 They include a write-down of WCC's shares, they
4 include a loss of opportunity to invest in Canada,
5 they include lost synergies with the U.S. market, and
6 many, many other losses that we have yet to quantify
7 because it is simply too early in the proceeding to do
8 that.
9 In sum, Canada's reflective loss argument
10 fails. Canada has not identified a single reason why
11 WCC does not have jurisdiction under the NAFTA.
12 I will now turn back to Mr. Rubinstein who
13 will address the remaining issues of estoppel and
14 principles of international law. Thank you.
15 PRESIDENT KAUFMANN-KOHLER: Thank you.
16 MR. RUBINSTEIN: Thanks, Lauren.
17 Even if Canada's jurisdictional objections
18 had any merits, which they do not, for the reasons
19 that we've already described, Canada should be
20 estopped from asserting jurisdictional objections
21 based on Canada's representations and conduct in
22 Westmoreland I.

1 The principle of estoppel is well-recognized
2 under international law; that is not seriously
3 disputed. As the Tribunal defined "estoppel" in Pan
4 American Energy v. Argentina, estoppel is,
5 effectively, "detrimental reliance by one party on
6 statements of another party so that reversal of the
7 position previously taken by the second party would
8 cause serious injustice to the first party."
9 Estoppel, thus, prevents a State party from benefiting
10 from its own inconsistent statements to the detriment
11 of another party.
12 In this case, Canada should be estopped from
13 challenging the Tribunal's jurisdiction based on:
14 One, its role in securing the WCC, WMH substitution
15 that it now seeks to invoke as a sword to prevent
16 WCC's Claim from being heard on the merits; and, two,
17 its prior inconsistent statements to the Tribunal in
18 Westmoreland I.
19 Starting with the substitution, it is
20 undeniable that Canada first proposed the substitution
21 of WMH as Claimant. We know this because following
22 the attempted transfer of the Claim in the bankruptcy,

1 WCC and WMH served Canada with an Amended Notice of
2 Arbitration in 2019 that identified them both as
3 Co-Claimants.
4 We know this both -- because in the body of
5 the Notice of Arbitration itself, both WCC and WMH are
6 identified as Co-Claimants, and, in addition to that,
7 the Notice of Arbitration attached Waiver Letters for
8 both WCC and WMH. There would be no reason for the
9 Waiver Letter from WCC to be attached unless the
10 intention was that WCC would be -- would remain a
11 Co-Claimant in that arbitration. This is also
12 reinforced by the unchallenged testimony of Jeffrey
13 Stein.
14 Now, in its Argument this morning, Canada
15 points to the cover letter that was used to transmit
16 the WMH -- the Amended Notice of Arbitration, as well
17 as the case caption, which did not mention or did not
18 list -- list WCC.
19 However, whether WCC was a -- was intended
20 to be a Co-Claimant or not is -- obviously has to be
21 determined by the body of the Notice of Arbitration
22 itself, not by a cover or by the caption -- by a cover

1 letter or the caption.
2 We also know that Canada was the one that
3 proposed the WCC/WMH Arbitration because it is
4 expressly included in Canada's letter of July 12,
5 2019.
6 As we see here in the quote, what Canada
7 proposed is: "Westmoreland Coal Company withdraws the
8 Claim that it submitted against Canada on November 19,
9 2018," and then Westmoreland Mining Holdings would
10 then be free to submit its own claim to arbitration.
11 Obviously, that is, on its face, a proposed
12 substitution.
13 While WCC disagreed with Canada's position
14 that the attempted amendment was improper, WCC
15 accepted Canada's proposal as a "fair compromise in
16 order to allow the Parties to proceed with the
17 arbitration without unnecessary procedural delay."
18 It is also beyond clear that WCC accepted
19 this substitution and the -- withdrawal and the
20 substitution in good faith based on Canada's proposal.
21 This is stated specifically in the letter that was
22 submitted by Counsel in which it was stated that: "On

1 behalf of Westmoreland Coal Company and pursuant to
2 the appended June 12, '19, letter from Canada, we
3 hereby withdraw the Notice of Arbitration and
4 Statement of Claim." Thus, there can be no question
5 that the impetus for the withdrawal and substitution
6 was Canada's proposal as set out in its letter of
7 July 2019.
8 WCC also has presented unrebutted witness
9 testimony from Mr. Stein who testified that he was
10 shocked when Canada challenged WMH's standing and that
11 WCC never would have agreed to the substitution had
12 WCC known that Canada intended to challenge WMH's
13 standing such that the Claim would not be able to
14 proceed.
15 Had WCC and WMH known of Canada's intention
16 to challenge WMH's standing, WCC and WMH would have
17 proceeded based on the Amended Notice of Arbitration
18 from May 2019. And had that happened, the Tribunal in
19 Westmoreland I would have had the ability to consider
20 the standing of both entities and rule that WCC was
21 the proper Claimant. And with that finding, then WCC
22 would have been able to proceed to have its claims

1 heard on the merits in that case.

2 Turning next to Canada's representations to

3 the Tribunal in Westmoreland I, in apparent response

4 to WMH's -- WMH's complaint about Canada's standing

5 defense, Canada stated in its Reply Memorial in

6 Westmoreland I at Paragraph 112 that: "It was open to

7 WCC to continue with its NAFTA Claim. The Company

8 still exists as an enterprise constituted under the

9 laws of Delaware."

10 Now, it is true, in the Reply, Canada did

11 say that it wasn't taking the position on the

12 ability -- the jurisdiction or the ability of WCC to

13 assert that claim, but then, at the Final Hearing in

14 Westmoreland I, Arbitrator Hosking pressed Canada with

15 respect to WCC's ability to resubmit its claim, in

16 light of the substitution and in light of Canada's

17 position that WMH had no standing.

18 And the -- I'm quoting from Arbitrator

19 Hosking, and this is at Page 278 of the transcript,

20 contained at Exhibit C-48: "The question really goes

21 to what the position of WCC is now in Canada's

22 submission. We understand that WCC still exists.

1 Does it have any residual rights to bring a treaty
2 claim?"
3 Canada responded to Arbitrator Hosking's
4 question by stating: "WCC could still be in a
5 position to bring a claim on its own behalf."
6 Canada never said, in response to that
7 question, that WCC's Claim was barred on any grounds
8 or that WCC would be prevented from resubmitting its
9 claim on any grounds. And, of course, had
10 Canada -- and that was Arbitrator Hosking's question:
11 What was WCC's position at that time?
12 Now, it's important to note that this
13 Hearing took place in 2021, and Canada made these
14 statements to the Tribunal in 2021, after the USMCA
15 was already enforced and more than three years after
16 the Limitations Period had started to run originally.
17 If Canada had said that WCC's Claims were
18 barred at the time -- in the Hearing in
19 Westmoreland I, the Tribunal could have taken steps to
20 preserve WCC's rights, or the Parties' could have done
21 that, and including the Tribunal giving the very
22 warning that was given in Renco I that such defense

1 would amount to an abuse of rights.
2 It's apparent now that Canada's substitution
3 proposal was designed to ensure that WCC's NAFTA Claim
4 would not be heard on the merits. Likewise, Canada's
5 statements in the Westmoreland I proceeding convinced
6 Tribunal to dismiss WMH as a Claimant based on the
7 understanding that WCC could resubmit its claim.
8 For the reasons we have mentioned
9 previously, estoppel prevents Canada from taking
10 advantage of its earlier contradictory statements in
11 order to cause serious injustice to WCC, and that
12 serious injustice is obvious by barring WCC from
13 asserting its claim in any form, especially in light
14 of its waiver of other recourse.
15 And as we heard from Canada this morning,
16 Canada's position is, indeed, that WCC should be
17 barred from proceeding in any forum to have its Claim
18 heard on the merits.
19 In addition to estoppel, the preclusion
20 principle under international law -- which we have
21 cited in our Memorials -- also prohibits parties from
22 taking advantage inconsistent positions. As described

1 in our Memorials, the preclusion principle may be
2 utilized, even in the absence of technical municipal
3 law requirements, such as reliance.
4 As the Tribunal stated in Chevron
5 v. Ecuador, no party to this arbitration can have it
6 both ways or blow hot and cold to affirm a thing at
7 one time and then to deny the same thing at another
8 time, according to the mere exigencies of the moment.
9 That is precisely what we have here. And boldly,
10 Canada, nevertheless -- in the face of this statement
11 in Chevron, Canada, nevertheless, insists in its Reply
12 on the prerogative to blow hot and cold.
13 And I'll just quote it. "While the Claimant
14 argues that Canada cannot blow hot then cold by
15 accepting a procedural approach in one arbitration and
16 then not in another, it is precisely Canada's
17 prerogative to do so."
18 In fact, Canada's position is untenable, and
19 it flies in the face of well-established principles of
20 international law. Canada has no right to make
21 representations to investors and to arbitral tribunals
22 and then to contradict those positions later at its

1 whim.
2 I also want to address Canada's Argument
3 this morning that WCC is trying to use estoppel to
4 create jurisdiction. That is not the case. WCC is
5 not looking to use estoppel to create jurisdiction.
6 The Tribunal's jurisdiction arises from WCC's 2018
7 Notice of Arbitration and Canada's consent to that
8 Notice of Arbitration.
9 Estoppel can be used to prevent a safe
10 raising jurisdictional objections, jurisdictional
11 defenses to a claim that, otherwise, the Tribunal has
12 jurisdiction to hear.
13 So, for instance, in Cyprus Popular
14 Bank v. Hellenic Republic, which we've cited, the
15 Claimant had commenced arbitration when it had a
16 legitimate expectation that Greece had offered to
17 arbitrate and that offer to arbitrate was valid.
18 The Tribunal estopped Greece from arguing
19 that it had secretly abrogated that offer to arbitrate
20 when Cyprus acceded to the European Union and
21 purported to vitiate its consent to arbitration. So
22 in that case, estoppel was applied by the Tribunal to

1 prevent Greece from asserting a jurisdictional
2 defense.
3 In addition, it's a fundamental principle of
4 international law that events taking place after the
5 date on which a proceeding is instituted are
6 irrelevant to a determination of jurisdiction.
7 This, for example, is mentioned in the
8 Eskosol v. Italy Case that we cited in our
9 submissions, in which the Tribunal held that the
10 Achmea defense could not be applied retroactively to
11 invalidate a consent to arbitration that had been
12 given before the Achmea Judgment.
13 And, likewise, here the consent to
14 arbitration, the jurisdiction to hear this claim was
15 established in 2018 when WCC initially filed its
16 arbitration. It is perfectly appropriate for Canada
17 to be estopped from asserting or invoking later
18 developments, particularly when it was asked -- as I
19 mentioned before, it was asked by the Westmoreland
20 Tribunal as to what Canada's position was, and Canada
21 unequivocally stated that it was open to WCC to
22 continue to pursue its claim, notwithstanding its

1 withdrawal and the substitution and notwithstanding
2 Canada's definition in the Westmoreland I Arbitration,
3 that WMH had no standing to pursue WCC's Claim.
4 As the Tribunal held in Waste Management II,
5 claims that are dismissed on curable, jurisdictional
6 or, procedural grounds should be allowed to be heard
7 on the Merits where, as in this case, the underlying
8 defect is cured.
9 Here WCC has been seeking to have its Claims
10 heard since 2018. It is time for WCC to receive the
11 due process that it is entitled to under the NAFTA by
12 having its Claim heard on the Merits once and for all.
13 For all of the reasons that we have
14 addressed this afternoon, the Tribunal should hold
15 that it has jurisdiction to hear WCC's resubmitted
16 Claim on the Merits.
17 We thank the Tribunal for its consideration.
18 PRESIDENT KAUFMANN-KOHLER: Thanks to the
19 two of you for your Arguments. I think -- unless my
20 colleagues have clarification questions right away,
21 the idea was for us to now have a break for, if I'm
22 not mistaken -- let me check -- 30 minutes. And then

1 come back.
2 We will have to then hear México, and we
3 will then be able, also, to put to the Parties any
4 remaining questions that we may have. For that, we
5 need the 30 minutes because we need to have an
6 exchange within the Tribunal.
7 Is that a good way forward? No comments on
8 either side?
9 MR. RUBINSTEIN: No comments for the
10 Claimant.
11 PRESIDENT KAUFMANN-KOHLER: Not from the
12 Respondents either, as I read the faces.
13 MS. ZEMAN: No, that's correct, for the
14 Transcript. No issue with that.
15 PRESIDENT KAUFMANN-KOHLER: Good. Fine.
16 Then let's go to the breakout rooms, and reconvene in
17 30 minutes.
18 (Brief recess.)
19 PRESIDENT KAUFMANN-KOHLER: I think we can
20 resume.
21 And the next step is for us to give the
22 floor to México.

1 Ms. Hernández, do I give the floor to you?
2 We don't hear you. No. We still don't hear
3 you.
4 MS. HERNÁNDEZ: I'll try without these,
5 without the headphones.
6 PRESIDENT KAUFMANN-KOHLER: You should, yes.
7 MS. HERNÁNDEZ: Okay.
8 PRESIDENT KAUFMANN-KOHLER: Good. So you
9 have the floor, and, as you know, we have -- you have
10 indicated not more than 30 minutes.
11 ORAL SUBMISSIONS BY MÉXICO
12 MS. HERNÁNDEZ: Yes, Madam President, thank
13 you.
14 Madam President, Members of the Tribunal and
15 representatives of the Parties, México welcomes the
16 opportunity given by the Tribunal to present an oral
17 submission in this case.
18 Before I start, I would like to introduce
19 México's delegation attending this Hearing. My name
20 is Pamela Hernández, and I am a Director in the
21 General Counsel for International Trade within the
22 México's Ministry of Economy.

1 Joining me is Alan Bonfiglio Rios, General
2 Counsel for International Trade and Alejandro Rebollo
3 from México's Ministry of Economy. I would like to
4 start with México's intervention.
5 On April 10, 2024, in accordance with the
6 procedural calendar, México submitted its
7 interpretation on several issues related to the USMCA
8 Annex 14-C. As the Tribunal may recall, México's 1128
9 Submission dealt with three topics. México stands by
10 those Declarations, and for the benefit of the
11 Tribunal, we would like to clarify certain issues
12 related to the México's position.
13 No inferences should be drawn from the
14 absence of a submission on the other topics that are
15 under consideration in this Arbitration.
16 First, the interpretation of Annex 14-C is
17 of the utmost importance for the USMCA Parties. This
18 is because this Annex sets out the specific
19 circumstances in which the USMCA Parties have
20 consented to the submission of a Claim to arbitration
21 under NAFTA after its termination.
22 Put another way, Annex 14-C constitutes the

1 agreement to arbitrate. It is broadly accepted that
2 consent is the cornerstone of jurisdiction. This is
3 precisely why the matter to be decided by this
4 Tribunal is relevant to each of the USMCA Parties. A
5 Parties' consent to arbitration is not lightly to be
6 presumed. In this regard, the boundaries and
7 conditions of this consent must be respected.
8 As México explained in its 1128 Submission,
9 Annex 14-C establishes the USMCA Parties' limited
10 consent with respect to a "legacy investment." To the
11 arbitration of a claim alleging a breach of certain
12 NAFTA obligations, using the dispute settlement
13 mechanism under Section B of NAFTA Chapter Eleven.
14 This consent expired on 1 July 2023, three years after
15 the termination of the NAFTA.
16 Pursuant to Paragraph 1 of Annex 14-C, at
17 least two key conditions must be met to validly submit
18 a NAFTA Claim to arbitration.
19 First, the Claim must be with respect to a
20 legacy investment, as defined in Paragraph 6(a) of
21 Annex 14-C. Second, the Claim must allege a breach of
22 an obligation under certain NAFTA provisions,

1 including those in Section A of NAFTA Chapter Eleven.
2 These are not optional, curable, or
3 rectifiable requirements. The investor must comply
4 with these requirements cumulatively, at the time when
5 the Claim is submitted to arbitration. If an investor
6 fails to comply with either of these requirements, the
7 Claim will fall outside the scope of the consent
8 established in Annex 14-C, leaving a Tribunal without
9 jurisdiction.
10 Today, I will focus mainly on clarifying the
11 scope of the term "legacy investment." Pursuant to
12 Paragraph 6(a) of Annex 14-C, an investment must meet
13 a number of conditions to qualify as a "legacy
14 investment." Beginning with the first condition, a
15 "legacy investment" is an investment of an investor of
16 another Party, which means that there must exist a
17 clear and direct relationship between the investment
18 in question and a particular investor of one of the
19 other USMCA Parties.
20 In addition, the investment must be located
21 "in the territory of the Party," whose consent is
22 established in Paragraph 1. Further, the investment

1 must have been "established or acquired between
2 January 1, 1994, and the date of termination of
3 NAFTA," which was July 1, 2020. Finally, this same
4 investment must continue to be "in existence on the
5 date of the entry into force of the USMCA."
6 These requirements should not be read in
7 isolation from one another, including the condition
8 that the investment must be linked to a particular
9 investment. Put simply, for an investor to submit a
10 valid "legacy investment Claim" under USMCA
11 Annex 14-C, it must prove that it established or
12 acquired the investment when the NAFTA was in force,
13 and that it continued to own or control that
14 investment as of July 1, 2020, when the USMCA entered
15 into force.
16 In México's view, it is clear that, to
17 qualify as a "legacy investment" under Annex 14-C, the
18 investment in question must be, at all relevant times,
19 the investment of the investor submitting the Claim.
20 Under Annex 14-C, consent is established for
21 the submission of a Claim to arbitration "in
22 accordance with Section B of Chapter 11 of NAFTA

1 1994." This means that, in addition to the Annex 14-C
2 conditions I mentioned a moment ago, the conditions
3 and requirements of the ISDS procedure in Section B of
4 NAFTA Chapter Eleven must also be met.
5 This includes, first, that the requirements
6 of Article 1101 are met; second, that a Claim has been
7 brought by a Claimant/Investor in accordance with
8 Articles 1116 or 1117, and third, that all
9 preconditions and formalities required under
10 Articles 1118 to 1121 are satisfied.
11 Article 1122 is satisfied, and a NAFTA
12 Party's consent to arbitration is established, only
13 where a Claimant has met these requirements. Today, I
14 will address certain aspects of the waiver
15 requirements established in Article 1121 and the
16 limitation period in Articles 1116 and 1117.
17 First, I would like to focus on the waiver
18 requirement established in Paragraph 1(b) and 2(b) of
19 Article 1121 of NAFTA. This waiver is a condition
20 that must necessarily be met in order to
21 be -- establish the consent of any of the NAFTA
22 Parties under Section B of Chapter 11 of the NAFTA.

1 Pursuant to this provision, an investor is
2 required to waive their right to initiate or continue
3 before any Administrative Tribunal or court under the
4 law of any party, or other dispute settlement
5 procedures, any proceedings with respect to the
6 Measure of the disputing Party that is alleged to be a
7 breach. Three aspects should be considered.
8 First, one must take into consideration the
9 rationale and purpose of Article 1121. The waiver
10 requirement set forth in Article 1121 serves a
11 specific purpose, namely to prevent a Party from
12 pursuing multiple domestic and international remedies
13 in relation to the same Measure alleged to be in
14 breach of an obligation under Section A, which could
15 either lead to conflicting outcomes or to double
16 recovery for the same conduct or measure.
17 Second, the terms of Article 1121 are clear.
18 Once an investor has chosen to activate a NAFTA
19 Party's consent under Chapter Eleven, it has
20 effectively waived its right to initiate or continue
21 "any proceedings with respect to the Measure of the
22 disputing Party that is alleged to be a breach."

1 The language of Article 1121 is broad, and
2 includes proceedings before any Administrative Court
3 or Tribunal under domestic law, as well as other
4 dispute settlement procedures, such as an ISDS
5 proceeding.
6 Third, Article 1121 exempts the waiver
7 requirement in the case of "proceedings for
8 injunctive, declaratory, or other extraordinary
9 relief, not involving the payment of damages before an
10 Administrative Tribunal or court under the law of the
11 disputing Party."
12 The limited nature of this exception
13 confirms that the waiver extends to international
14 arbitration.
15 In its comments on the Article 1128
16 Submission, the Claimant states that: "If an
17 Article 1121 waiver were to waive investment treaty
18 arbitration rights, the investor would be precluded
19 from ever bringing a NAFTA claim in the first place,
20 since Article 1121 provides no exception for a first
21 claim."
22 The Claimant misunderstands the point.

1 México's interpretation does not suggest that the
2 waiver requirement would prevent an investor from ever
3 bringing a NAFTA Claim in the first place. The waiver
4 requirement only arises in the context of a Claim
5 submitted to arbitration under Articles 1116 or 1117.
6 More specifically, the first sentence in
7 both Paragraph 1 and Paragraph 2 of Article 1121
8 presumes the existence of a NAFTA Claim submitted to
9 arbitration.
10 The waiver requirement only becomes relevant
11 because of the existence of this Claim. The Claim may
12 only proceed, however, if the investor provides a
13 valid and effective waiver.
14 México reiterates that the lack of a valid
15 waiver vitiates the existence of a valid agreement
16 between the disputing Parties to arbitrate, depriving
17 the Tribunal of the very basis of its existence.
18 Moreover, as México explained in its Article 1128
19 Submission, an investor cannot unilaterally cure a
20 defect or a breach of the waivers submitted in an
21 arbitration, given that the waiver requirement under
22 Article 1121 is a fundamental condition of the State

1 Party's consent to arbitration.
2 With respect to the Limitation Period under
3 Articles 1116 and 1117, México reiterates that the
4 NAFTA Parties and Tribunals have confirmed that this
5 Limitation Period is clear and rigid and that it
6 cannot be delayed, suspended, or tolled by resorting
7 to other proceedings, regardless of the nature of
8 those proceedings. Any other conclusion would provide
9 a means to evade the clear Limitation Period in the
10 NAFTA. Moreover, it would deprive the second
11 paragraph in Articles 1116 and 1117 of its effet utile
12 by providing an opportunity to extend the Limitation
13 Period beyond the three years established in the
14 Treaty text and effectively removing any definitive
15 limitation. This is clearly an important systemic
16 issue in terms of legal certainty.
17 The analysis of these provisions should take
18 into account that there is an agreement between the
19 NAFTA Parties, within the meaning of Article 31.3 of
20 the Vienna Convention, regarding the interpretation
21 and the application of the Limitation Period under
22 Articles 1116 and 1117.

1 México would like to clarify that the
2 recognition of tolling under México's civil law is not
3 relevant nor effects the clear and strict Limitation
4 Period that was negotiated by the NAFTA Parties as a
5 condition to their consent to arbitration. An
6 investor may not invoke the provisions of a State's
7 internal law as a justification for the investor's
8 failure to comply with the conditions of the State's
9 consent to arbitration under an international treaty.
10 Madam President, Members of the Tribunal,
11 this concludes México's oral submission. We thank
12 everyone present for your attention, reassuring our
13 gratitude for having this space in this Arbitration.
14 Thank you.
15 PRESIDENT KAUFMANN-KOHLER: Thank you very
16 much.
17 So this leads us now to the questions that
18 the Tribunal has for you to be answered, not now but
19 tomorrow, and we will do it one after the other. I
20 will first give the floor to Ms. Levine for questions
21 and then to Mr. Shore, and if something remains, I
22 will ask it.

1 QUESTIONS FROM THE TRIBUNAL
2 ARBITRATOR LEVINE: Thank you, Madam
3 President.
4 My first question relates to the factual
5 record in this Jurisdictional Phase. I noted that, at
6 Paragraph 3 of the Rejoinder, the Claimant refers to
7 the "uncontroverted factual record," and I believe
8 Mr. Rubinstein also said that, for the most part, the
9 facts are uncontested.
10 So the first question would be: Does the
11 Respondent accept that the factual record in this
12 Jurisdictional Phase is uncontroverted?
13 Secondly, for the Respondent, even assuming
14 the facts on the Claimant's case are accepted at their
15 highest, would the Respondent still maintain that the
16 Respondent lacks jurisdiction in this case?
17 In other words, for both Parties, what
18 disputed questions of fact must the Tribunal decide
19 before making a finding on jurisdiction. So that's
20 one set of questions relating to the factual record.
21 Secondly, some questions concerning the
22 meaning of "legacy investment" in Annex 14-C of the

1 CUSMA, and my colleagues may have more.
2 A question for the Respondent is whether
3 Canada can shed any light on the purpose of the
4 protection of "legacy investments" generally and, in
5 particular, the purpose of including the words "and in
6 existence on the date of entry into force of this
7 Agreement."
8 On the same topic, my question for the
9 Claimant about the interpretation of Article 6(a) of
10 Annex 14-C of CUSMA, does the interpretation urged by
11 the Claimant of that provision mean that the provision
12 would have the same meaning and impact if the words
13 "and in existence on the date of entry into force of
14 this Agreement" were not in the text?
15 Another question for the Claimant, which is
16 quite specific to a footnote in your Rejoinder,
17 Footnote Number 51, I believe, the Claimant
18 said: "While WCC's Notice of Arbitration asserted
19 some additional claims based on later acts, if those
20 later acts somehow distinguished the Claims, then WCC
21 is prepared to withdraw them."
22 My question simply to the Claimant is

1 whether you can be more specific about what those acts
2 are and if they have already been the subject of
3 withdrawal or if there are any other acts.
4 Another question concerns the
5 so-called "arguments about creation of jurisdiction
6 via bad faith or estoppel or abuse of process." And I
7 appreciate that Canada denies that it has behaved
8 inappropriately or engaged in gamesmanship, but,
9 assuming for purposes of argument that there may have
10 been unfair or inconsistent conduct, can conduct of
11 that nature ever bestow on a tribunal jurisdiction
12 which it otherwise does not have? And that question
13 is for both Parties, in particular, if they can point
14 to any examples where jurisdiction has been upheld on
15 the basis of estoppel or preclusion or abuse of
16 process on the part of a Respondent.
17 And, finally, just a question in relation to
18 waivers. I'm curious as to how waivers work in the
19 framework of the CUSMA Treaty for legacy claims. It's
20 not entirely clear if there's simply a reference back
21 to the requirements under NAFTA. I think I saw that
22 Claimant referred to provisions in Annex 14-D, which

1 concerns México-U.S. claims, but if there could be
2 some clarity on how a waiver might work for legacy
3 claims or how they're intended to work, that would be
4 helpful as well.
5 I'll leave my questions there for now. I
6 may have more tomorrow.
7 PRESIDENT KAUFMANN-KOHLER: Thank you.
8 I then turn to you, Larry.
9 ARBITRATOR SHORE: Thank you, Madam
10 President. And thanks to Ms. Levine for her
11 questions. I'm going to ask these, but I think that
12 Counsel know that they probably should cover these, or
13 they think they're unimportant and would not be
14 covering them in any event. So I will -- given those
15 two categories, I'm going to press on.
16 One question -- or I have a couple of
17 estoppel-related questions for Claimant. We did hear
18 from Claimant this afternoon, on the significance in
19 its view of the July 2, 2019 Letter, but I would like
20 Claimant specifically to consider the paragraph in
21 that letter that Canada pointed out this morning and
22 in their papers. "For the avoidance of doubt, Canada

1 makes the proposal outlined herein, without prejudice,
2 to its ability to raise any jurisdictional or
3 admissibility objections with respect to the original
4 Notice of Arbitration or any new claim." So I would
5 appreciate if Claimant can cover that tomorrow.
6 And then along those same lines, in Canada's
7 Reply, at Pages 19 and 20, Paragraphs 53 and 54,
8 Canada provides what it says is the context for the
9 representation that was made by its Counsel on WCC
10 would -- there wouldn't be a claim precluded for WCC.
11 And the explanation that's given in those two
12 paragraphs, or, particularly, Paragraph 54, I would
13 appreciate Claimant looking at and responding to so
14 that we understand how much weight we can put on it.
15 And then for Canada, in relation to that
16 same section, it would be helpful to me if Canada
17 would consider, leaving aside this particular context,
18 whether a representation by Counsel in a hearing can,
19 nonetheless, be considered something that would bind a
20 client. And so if it's a more general question about
21 what Counsel say in hearings -- appropriate, given
22 today -- that that would be substantive and binding, a

1 representation that its client was taking.

2 And back to Claimant. In Slide 2 of the

3 presentation this afternoon, Claimant commented that

4 WCC purported to transfer its claim to WMH per the

5 Bankruptcy Decision. And I'd like to understand more

6 what "purported" means. Having read the Expert Report

7 and having skimmed the Bankruptcy Decision, it is

8 something that I find perplexing. What

9 weight -- there are a couple of questions.

10 What weight can we accord to the Bankruptcy

11 Decision that's pointed to the provision pointed to

12 or -- by Claimant, that the Claim was never

13 transferred. Why should we be putting weight on a

14 U.S. Bankruptcy Court Decision?

15 And is it Claimant's position that, as of

16 July 1, 2020, there was no transfer, or did the

17 purported transfer only come into effect after the

18 Westmoreland I Decision on Jurisdiction, meaning,

19 that's when it became purported? Before that it was a

20 real transfer, then it became a purported transfer. I

21 would just like to understand more about that

22 Bankruptcy Decision.

1 And along the lines of Ms. Levine's
2 question, I would like Claimant, on Article 6, to say
3 exactly what meaning it gives to the language that
4 Ms. Levine quoted, "and in existence on the date of
5 entry into force of this Agreement." What's the
6 meaning of that phrase?
7 And for Canada, in relation to that phrase,
8 in the papers -- and I apologize if Canada has already
9 responded on this, but if you could respond more.
10 What is the circumstance of expropriation? An
11 investment that's lost before July 1, 2020? Is it
12 gone then because of the language "and in existence on
13 the date of entry into force of this Agreement"? How
14 would it be preserved if it is preserved? I think
15 that's a point that Claimant has raised, and I would
16 like to hear Canada say more about that.
17 And then just a couple of final questions,
18 one for Canada. If both sides, -- I'm not sure how
19 much Canada has looked at this, but it's Paragraph 63
20 of the Feldman v. México Award. And you will have
21 seen it in México's submission. And there, the
22 Tribunal says, in the middle of that paragraph: "Of

1 course, an acknowledgment of the claim under dispute
2 by the organ competent to that effect and in the form
3 prescribed by law would probably interrupt the running
4 of the period of limitation." And then -- I won't
5 quote the rest of the paragraph, but if you could look
6 at that paragraph specifically and explain why, in
7 relation to that, we should not consider looking at
8 tolling or suspension as a principle that may be
9 applicable. If we were to look at tolling or
10 suspension as an applicable principle, how -- in
11 relation to this Award in Feldman, how strong does the
12 interruption need to be? Because there's some
13 guidance in that paragraph about the nature of the
14 interruption, and if you could speak to that.
15 And then finally, on waivers -- but this is
16 just really an adjunct to what Ms. Levine asked. For
17 both sides -- well, for Claimant, why should we not
18 consider that the waivers submitted in 2018 were not
19 withdrawn when WCC withdrew its Notice of Arbitration?
20 And I think Mr. Rubinstein said that the
21 waivers -- Canada has taken the position that the
22 waivers were permanently effective. And if -- I may

1 be misquoting, but I wrote down that phrase, and if
2 you could explain that, and only if I have quoted you
3 properly. The 2018 waivers, I think, Mr. Rubinstein,
4 you said Canada has agreed that they were permanently
5 effective. So if you could explain that, and I'll
6 stop there.
7 Thank you, Madam President.
8 PRESIDENT KAUFMANN-KOHLER: Sure. I will
9 see what remains to be asked, and maybe I just follow
10 up on Mr. Shore's last question.
11 In Canada's Memorial on Jurisdiction in
12 Paragraph 113, it does say under Article 1121: "NAFTA
13 Claimants must waive the right to initiate or continue
14 any proceedings," and so on. And then there's a
15 sentence at the end of the paragraph that says: "Such
16 a waiver continues to be enforced following the end of
17 the arbitral proceedings."
18 So I understand -- I am asking myself, what
19 is the consequence of these waivers continuing to be
20 effective? Could the same waiver document not -- if
21 it continues to be effective, just be reproduced in
22 another proceeding?

1 That is one thing. And the other question
2 that is linked to this is what the effect of
3 withdrawal of the Claim, does that take back this
4 waiver? Does the waiver stay, provided of course, it
5 will not be -- barring the same claim being brought,
6 again, which otherwise it would be a withdrawal with
7 prejudice, and that, I don't think, was intended.
8 So this is on the waiver issue. If I stay
9 on the waiver issue, as was said today and in the
10 Pleadings as well, in the 2022 Notice of Arbitration,
11 there is the waiver -- there is waiver language as
12 well, and I have asked myself whether that could be
13 regarded as a waiver.
14 And having asked myself this, I was asking
15 myself whether that would be an authorized waiver
16 because the Notice of Arbitration is signed by
17 Counsel, which would then lead us to look at the Power
18 of Attorney, and I'm not sure the Power of Attorney is
19 broad enough to deal with a waiver, but these are
20 issues that would be helpful if both Parties could
21 address those. That was about waiver.
22 About the time bar and prescription and

1 tolling, this is a question to Canada first. Does
2 Canada accept the existence of a general principle of
3 law under Article 38 of the statute of the
4 International Court of Justice that provides for
5 tolling of the running of a prescription period due to
6 the fact that this Claim is pending?
7 Does it accept this general principle but
8 its argument is to say it does not come into play here
9 because the NAFTA provision is a lex specialis and has
10 a specific rule and, therefore, there is no rule for
11 the general principle?
12 And if that is the case, then I'm asking
13 myself how to interpret -- then I am asking myself,
14 when I have to interpret a treaty, how do I determine
15 whether there is room for general rule of
16 international law when the treaty provision is silent
17 about the specific issue?
18 There is nothing in NAFTA about tolling.
19 Does that mean that it is ruled out, or does it mean
20 it has a gap which I can fill by looking at a general
21 principle of law? And that is, of course, linked to
22 the applicable law that we find at 1131(1) of NAFTA

1 and in Article 31(3)(c) of the Vienna Convention.
2 That was on time bar. I think my colleagues
3 have covered questions about the "in existence"
4 language of 6(a) of Annex 14-C.
5 As a supplement to Ms. Levine's force
6 question that was whether inconsistent conduct can
7 bestow jurisdiction on a tribunal when, otherwise,
8 there would be no jurisdiction because some treaty
9 requirements are missing, at least that's how I
10 understood it.
11 I have asked myself in connection with the
12 estoppel preclusion arguments, and that is estoppel
13 from raising a jurisdictional objection. In a treaty
14 case, there is a good argument to say that the
15 Tribunal has to satisfy itself, that it has
16 jurisdiction under the treaty, that is, that the
17 treaty jurisdictional requirements are met,
18 irrespective of whether a jurisdictional objection is
19 raised or not.
20 And if that were right, then, of course, the
21 issue of estoppel becomes irrelevant. And I have
22 to -- if the Parties could address this doubt that I

1 have, it would be helpful.
2 A question that is more specifically to
3 Canada about 1116 NAFTA and reflective loss claims,
4 does Canada accept that 1116 allows reflective loss
5 Claims when the Claimant wholly owns or controls the
6 investment directly or indirectly?
7 And if the answer is "no," how do you
8 address the Legal Authorities that do consider this
9 and who accept the reflective loss claims as in
10 Pope & Talbot, S.D. Myers, GAMI, UPS, I mean, these
11 are all important NAFTA Decisions. I think I've
12 covered everything.
13 So then, obviously, there were many
14 questions now. You are, of course, free to group them
15 together how you consider most appropriate to make
16 sense of your answers. And before we close, I would
17 just like to make sure that the questions are clear or
18 whether there are any clarifications sought.
19 From the Respondent first?
20 MS. ZEMAN: No, it seems the questions are
21 all clear to us. Thank you.
22 PRESIDENT KAUFMANN-KOHLER: Yes,

1 Mr. Rubinstein?
2 MR. RUBINSTEIN: Yes. For the Claimant, I
3 think we also have the questions clearly in mind. We
4 had studied a different question, which is that there
5 are a number of questions that have been raised, and
6 we note that tomorrow the Parties have 45 minutes to
7 answer the Tribunal's questions and 15 minutes for
8 rebuttal. It is 45 -- 15 for --
9 PRESIDENT KAUFMANN-KOHLER: Yes. That's
10 correct, yes.
11 MR. RUBINSTEIN: Right. And so the question
12 is, can we choose to yield some of our rebuttal time
13 to be able to answer the Tribunal's questions? In
14 other words, have discretion as to how to apply the
15 overall 60 minutes? Obviously, for both Parties.
16 PRESIDENT KAUFMANN-KOHLER: Yes. I would
17 say so, but would Canada agree with the idea that
18 tomorrow you have 60 minutes and you apportion those
19 how you prefer?
20 MS. ZEMAN: We have no objection to that
21 approach.
22 PRESIDENT KAUFMANN-KOHLER: Fine. Then

1 let's say that each Party has 60 minutes and can use
2 those either for answer to Tribunal's questions or
3 rebuttal, as you wish.
4 MR. RUBINSTEIN: Thank you.
5 PRESIDENT KAUFMANN-KOHLER: Yes, I'm sorry
6 to come back, but I have forgotten to specifically
7 mention something that goes into the purpose of the
8 wording or the intent of the drafters of the wording
9 of Paragraph 6(a) of the Annex 14-C.
10 Are there -- the question has been asked in
11 general terms, but, the Tribunal has asked itself
12 whether there were any travauxes about these
13 provisions? That is, of course, more a question to
14 Canada. Fine.
15 Nothing to be added from my colleagues?
16 Nothing further? No?
17 ARBITRATOR LEVINE: I do have one further.
18 It relates to Article 6, and I'm sure the Parties --
19 PRESIDENT KAUFMANN-KOHLER: Yes, I'm sure it
20 is better to ask. We are not prohibited from asking
21 follow-up questions tomorrow, of course, but it would
22 be more efficient tomorrow if we have some advanced

1 notice.

2 ARBITRATOR LEVINE: And just in the context

3 of the Parties' arguments today about the investor

4 holding an investment for purposes of the legacy

5 investment, there were, I think, four different points

6 in time, that have been covered.

7 One is that the establishment or acquisition

8 of the investment; two, that the investment is held at

9 the time that CUSMA entered into force 1 July 2020;

10 third, we heard about holding the investment at the

11 time of the alleged breach of the Measures; and,

12 fourth, CUSMA 14.24 also refers to the submission of

13 the Claims, so the time that the Claim is submitted.

14 And in answering our questions about

15 Article 6, I'd be interested to know the same investor

16 needs to hold the investment at all of those points of

17 time and if the ownership of that investment needs to

18 be continuous between those points in time. Thank

19 you.

20 PRESIDENT KAUFMANN-KOHLER: Fine. So if

21 there is nothing else to be added, not from the

22 Parties either, then we can adjourn for today. It is

1 a little later than what we had envisaged, but it
2 should be shorter tomorrow.
3 So I wish you all a good end of the day and
4 look forward to seeing you again tomorrow at the same
5 time like today. Goodbye, everyone.
6 Can we quickly go to the breakout room,
7 Anna? Thank you. Bye-bye.
8 ARBITRATOR LEVINE: Thank you.
9 (Whereupon, at 2:59 p.m. (EST), the Hearing
10 was adjourned until 9:30 a.m. (EST) the following
11 day.)

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted by the Parties, were revised and re-submitted to the Parties per their instructions.

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.

[signed]

Dawn K. Larson