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

In the Matter of Arbitration Between: WESTMORELAND COAL COMPANY Claimant, and GOVERNMENT OF CANADA, Respondent.	:	ICSID Case No. UNCT/23/2
	:	Volume 2

VIDEOCONFERENCE: HEARING ON JURISDICTION

Friday, May 3, 2024

The World Bank Group

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

PROF. GABRIELLE KAUFMANN-KOHLER, President

MR. LAURENCE SHORE, Co-Arbitrator

MS. JUDITH LEVINE, Co-Arbitrator

ALSO PRESENT:

MS. ANNA HOLLOWAY
ICSID Secretary of the Tribunal

DR. MAGNUS JESKO LANGER
Assistant to the Tribunal

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT KAUFMANN-KOHLER: Good morning to everyone. I hope you hear me well. I see one connection less than yesterday. Let us just check who is online. Of course you see -- there's something wrong with my camera, or something wrong with my screen. Yeah, sorry about that. Need to fix this. Now it's fine.

We have the Tribunal as yesterday, the ICSID representatives as well, the Assistant of the Tribunal. For the Claimant, do we have everyone, Mr. Rubinstein, who's on your List of Participants?

MR. RUBINSTEIN: Yes, Madam President. We do. Everybody is here.

PRESIDENT KAUFMANN-KOHLER: Fine. And I understand that for the Respondent we have everyone but Mrs. Spears; is that correct? Let me ask --

MS. ZEMAN: Yes, that's correct.

PRESIDENT KAUFMANN-KOHLER: Thank you.

For the NDPs, we have for the U.S. the same two representatives who attended yesterday, Mr. Bigge and -- here he is. Yes. And Ms. Brower? Is that

right?

(Overlapping speakers.)

MR. BIGGE: Yes, Madam President. That's right.

THE PRESIDENT: Good. And for México, we have Mr. Rebollo; is that right as well?

MR. REBOLLO: Yes, that's correct, Madam President.

PRESIDENT KAUFMANN-KOHLER: And you're the only one attending today, or is --

MR. REBOLLO: Yes, today I'm going to be the only one.

SECRETARY HOLLOWAY: Madam President, sorry to interrupt. We just had another representative from México join. I'll let her.

PRESIDENT KAUFMANN-KOHLER: Is this Ms. Hernández? We have one more connection than a few minutes ago.

MR. REBOLLO: Yes, I think so.

PRESIDENT KAUFMANN-KOHLER: Or Mr. Bonfiglio?

SECRETARY HOLLOWAY: I believe it was

Ms. Hernández. I just can't see her on the list right now. Let me see. Yes, Ms. Hernández.

PRESIDENT KAUFMANN-KOHLER: Okay. Good. Fine. So we're clear on who is in attendance. We are also clear on the program for today.

The Respondent will start with answers to questions of the Tribunal, then we'll hear the Claimant, then we'll have a break, and then you have time for rebuttal, and we had agreed on 60 minutes, being clear that you can apportion the time between answers to questions and rebuttal as you wish.

We realized, actually, that there were a lot of questions. If the time is a little too tight, of course we will not be opposed to giving you some more time, not exceedingly more, but a little bit more if you need it as you go along.

Is there any question or comment before I give the floor to Canada? Doesn't seem to be the case. No?

MS. ZEMAN: No, not from Respondent. Thank you.

PRESIDENT KAUFMANN-KOHLER: Then -- and

nothing from Claimant either, I understand.

So, Ms. Zeman, you have the floor.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MS. ZEMAN: Thank you, Madam President. And, yes, we did have quite a bit of homework to do last night. So we're going to try to get through as much of it as we can in the one hour, and we appreciate the Tribunal's advance indication of a little bit of flexibility on that amount of time; so that we can make sure that we address all of the Tribunal's questions.

So we have taken the liberty of grouping Tribunal questions for the purposes of our answers, and we will be not -- we're not proposing to read out all of the questions, but we will provide an indication that we hope is sufficient for the Tribunal to know which questions we are, in fact, answering, and we have organized our answers along the same lines of our Opening Statement yesterday.

So I will first address questions related to the factual record, and then questions related to the legacy investment definition, and then Ms. Squires

will address questions related to waivers, Ms. Dosman will address the time bar questions, Ms. Harris will address reflective loss, and then Mr. Koziol, last, but definitely not least, will address the questions related to equitable principles.

And, with that, we will jump right into the questions on the factual record.

Arbitrator Levine has asked some questions about what aspects of the factual record are contested, and in particular, she referenced Paragraph 3 of the Claimant's Rejoinder, and I think it might be useful to pull that up on the screen here so we can look at it and see what the Claimant was saying was uncontroverted.

If we look at Paragraph 1, the Claimant refers to the Witness Statement of Mr. Stein, the Expert Report of Ms. Chapman, and documentary evidence that it says establishes four propositions, which I'll come back to in a second.

In Paragraph 2, the Claimant says that Canada has presented no witness testimony or documentary evidence that it says establishes

for -- to counter any of these facts, and this is what the Claimant called an uncontroverted factual record. To be clear, Canada does not agree.

The Parties dispute every single one of the four proposition that Claimants cite in Paragraph 1, and we note that some of these are legal questions, not factual questions. For example, whether the Claims they want to blur together are the same. Nor does the fact that Canada did not submit any witness or expert testimony in this Arbitration, or did not call either of the Claimant's witnesses for cross-examination, mean that it accepts the testimony of Mr. Stein and Ms. Chapman.

To the contrary, Canada pointed out several problems with Mr. Stein's testimony, which was made close to five years after the events in question, in Footnote 65 and 197 of its Reply. Canada also addressed certain of Ms. Chapman's incorrect propositions, for example, at Paragraphs 24-28, and Footnotes 95 and 98 of its Reply.

But the primary reason Canada did not engage with the substance of Ms. Chapman's Report is laid out

in Paragraph 61 of Canada's Reply, and that's because it's not relevant to what this Tribunal needs to decide. Indeed, which questions of fact the Tribunal must decide to make a finding on jurisdiction depends on the particular objection the Tribunal is deciding, and whether it is considering the Claimant's equitable arguments.

Most of the disputed factual questions go to the latter, which, as Mr. Koziol will discuss a bit later, in Canada's view, the Tribunal need not reach.

What is not disputed on the factual record is that WCC purchased interests in Prairie in 2014 and sold it to WMH in the context of its bankruptcy proceeding on March 15, 2019. I'm going to point you to specific points in the record where you can find that Agreement. On the purchase of Prairie assets, see the Claimant's NOA at Paragraphs 23-34, and Canada's Memorial at Paragraph 45.

On the sale, see the Claimant's Response at Paragraph 30 and Canada's Memorial at Paragraph 53. These facts are necessary to decide the Annex 14-C question and the Article 1117(1) question of ownership

or control at the time of submission of the Claim to arbitration.

What is not necessary to decide as a factual matter, for the Annex 14-C question, is whether WCC owned or controlled its alleged NAFTA Claim investment when CUSMA entered into force. This is where the Claimant points to Ms. Chapman's Report and the U.S. Bankruptcy Court's June 2022 Order.

In Canada's view, the Tribunal need not reach this question because a NAFTA Claim cannot qualify as an investment under NAFTA as a question of law in the first place, and U.S. bankruptcy law has nothing to say about that question of international law.

Canada did not engage with this evidence for this reason, but that does not mean that Canada agrees with it. Even if the Tribunal were inclined to consider this evidence, there are problems with it.

For example, neither Ms. Chapman nor the U.S. Bankruptcy Court grappled with the fact that the NAFTA Claim, which was specifically defined in the U.S. bankruptcy transaction that they were dealing

with as the 2018 NOA, and which was purportedly being transferred between WCC and WMH, was withdrawn under applicable law, which is international law.

No one put that fact before the U.S. Bankruptcy Court, and, most importantly, for the Tribunal's purposes, there was no 2018 NOA to hold as of July 1, 2020 under international law, because it was withdrawn.

You can see Paragraphs 99 and 101 of Canada's Reply where we address this point.

Now, with respect to the Limitation Period, the necessary facts for the Tribunal to decide this question are the date of knowledge of the alleged breach and resulting loss and the date of submission of the Claim to arbitration. There is no dispute about the Claimant's admitted knowledge dating to November 24, 2016, or the date the 2022 NOA was received by Canada.

On the first, see the Claimant's NOA at Paragraph 116, and Canada's Reply at Paragraph 130.

On the second, see Claimant's Rejoinder at Footnote 290 and Canada's Memorial at Paragraph 74.

Whether other Claims might be relevant to the Tribunal's task is a question of law that is very much disputed between the Parties and which Canada addressed in detail in its Reply at Paragraphs 55 through 66, and in its statement yesterday in response to the Tribunal's Question 2, particularly in the bookends of Chapter 3 of the imperfectly named "factual background" and in Ms. Dosman's discussion of the Limitation Period. You'll hear a bit more on this from her today.

Finally, with respect to the waiver and reflective loss questions, the issues for the Tribunal to decide are primarily legal. The one exception for waiver is the factual issue of capacity to waive. That issue is unproven, with the Claimant making their assertions for the first time on this question at Paragraph 186 and Footnote 290 of its Rejoinder, and you'll hear a little bit more about this from Ms. Squires when she addresses the waiver questions.

Arbitrator Levine also asked a question to the Claimant with respect to its Rejoinder Footnote 51. We look toward to hearing the Claimant's

answer to this question, in particular, about the Alberta carbon levies the Claimant challenged the first time in its 2022 NOA, for example at Paragraphs 91 and 92.

And that's what I have for the factual record. I'm moving quickly to try to get through as much of this as we can. Let me know if I should slow down at all.

PRESIDENT KAUFMANN-KOHLER: If you want to slow down, that's fine with us, because I see you're really running.

MS. ZEMAN: Yes, I'll slow it down to a fast walk.

PRESIDENT KAUFMANN-KOHLER: Yes.

MS. ZEMAN: All right. So next, I'm going to take the Tribunal's questions on the interpretation of the legacy investment definition, and I'm going to take them all together. These questions asked about the purpose of Annex 14-C, the existence of travaux, and about two potential consequences of different interpretations.

To start, I'm going to return to the

principles of treaty interpretation in Articles 31 and 32 of the VCLT, which impose a hierarchy on the sources one can look at when interpreting treaty provisions. Article 31(1), as we know, mandates that a treaty be interpreted in the first instance in accordance with the ordinary meaning of the Treaty's terms in their context and in the light of its object and purpose. Canada's presentation yesterday focused on the ordinary meaning to be given to the terms of Paragraph 6(a) of Annex 14-C in their context. Canada explained in its Memorial at Paragraph 90 that its interpretation is consistent with the core object and purpose of CUSMA to supersede NAFTA. We cited there to the preamble of CUSMA and to the protocol replacing the North American Free Trade Agreement with the Agreement between Canada, United States of America, and the United Mexican States.

In the context of that core object and purpose, the CUSMA Parties were leaving NAFTA behind, looking forward to the new world in which CUSMA was the Free Trade Agreement in force between them. We know that the CUSMA Parties offered limited consent to

use CUSMA Annex 14-C to submit ISDS claims in accordance with Section B of NAFTA Chapter Eleven. They were under no obligation to make this offer, but they did, and prioritized the offer for those investments that were ongoing in the new CUSMA world. That preference is consistent with the CUSMA purpose of superseding NAFTA.

For example, it would not make sense for the CUSMA Parties to offer their limited consent to arbitrate to an investor who made an investment in 2014 and sold that investment in 2019, or if an investor made an investment in 1998 and dismantled it in 2014 or 2017. If there is no ongoing interest in the CUSMA world, why extend the benefit of the limited consent to arbitrate?

The Claimant's arguments about the object and purpose of CUSMA seem to assume that there is a freestanding right to arbitrate investor-State claims, but ISDS is an extraordinary dispute settlement mechanism in international law. It is not a given, and the ability to bring a claim is based exclusively on a State's offer, which is expressly set out with

conditions in a treaty.

The Claimant's interpretation of the definition of "legacy investment" reads out one of those conditions, which is expressly set out in the text of the Treaty: The requirement to own or control the relevant investment at the time of CUSMA's entry into force.

On the Claimant's interpretation, the provision would have the same effect if the "in existence" clause was not there, and that can't be right.

To Arbitrator Shore's question, there may be limited circumstances where a State would not be able to rely on the "in existence" requirement, but we don't need to hypothesize about what those might be for the purposes of deciding this Claim because they do not arise before this Tribunal. Here, the circumstances of disposition are an arm's-length sale, not direct State deprivation of ownership or control.

The Claimant sold the alleged legacy investment to a third party in 2019, over a year prior to CUSMA's entry into force, and more than three years

before it first submitted an expropriation claim to arbitration.

Its plan then, as now, is to dissolve once these proceedings are through. There is no intention to own or control Prairie following the sale nor has the Claimant even attempted to argue, let alone establish, that the impugned Measures deprived it of ownership or control of Prairie and its assets, nor could it, because they did not. Neither Alberta nor Canada has ever owned or controlled Prairie or its assets.

It's telling that WMH, the purchaser of these interests and assets, also did not allege that it had purchased expropriated interests.

In any event, the Claimant's expropriation claim suffers from several other flaws, even before considering their merits. For example, it's out of time. Even on the Claimant's theory of time bar, the Measures it alleges violated the expropriation obligation date back to 2015 and 2016, six years prior to its submission of this Claim to arbitration and well outside the three-year Limitation Period. It is

not a claim that Canada consents to arbitrate anyway.

Article 31(3) of the VCLT requires that any subsequent agreement or subsequent practice of the Treaty Parties be taken into account in the interpretation of the Treaty's terms. Canada explained yesterday that all three Parties agree that the "in existence" clause refers to ongoing investments. The Tribunal must take this into account. The Claimant yesterday referred to Treaty Party submissions as self-serving, but the Treaty Parties are interested in the proper interpretation of the terms of their agreements. We've spent a lot of time talking about the conditions of a Respondent State's consent to arbitrate certain claims under these two Treaties in particular because we're in a Jurisdictional Phase, but we can't forget that those very same Respondent States are equally concerned about their own investors and their ability to submit claims to arbitration against other Treaty Parties in accordance with the terms of those same agreements.

The Treaty text reflects the balance that Treaty Parties reached between these interests, which

makes the proper interpretation of the terms especially important to the Treaty Parties, unlike to a particular Claimant like this one, who can try to read out express conditions and take creative interpretations of the definition of "investment", as examples, to advance its own interests.

Finally, Article 32 permits but does not mandate recourse to supplementary means in certain circumstances. Many of the public articles that the Claimant cites as support for its object and purpose arguments would fall within this category. Travaux do, too. Canada was not able to track down whether any Travaux exists on this particular issue overnight, but it is our position that recourse to supplementary means is not necessary here, given the meaning that can be gleaned from the text, context, and object and purpose under VCLT Article 31(1) and the Agreement of the Treaty Parties under 31(3).

Moreover, none of the supplementary means that Claimant points to, for example, at Paragraph 84 of its Response, purport to provide a fulsome accounting of the conditions and requirements to

bringing a claim that might be permitted under Annex 14-C. These sources are, thus, of limited use to the Tribunal in its task.

Arbitrator Levine then raised four points in time that are relevant for assessing ownership or control when it comes to determining a tribunal's jurisdiction to hear a claim under CUSMA Annex 14-C and NAFTA Chapter Eleven: The time of acquisition or establishment, CUSMA's entry into force, the time of the alleged breach, and the submission of the claim to arbitration. And she asked two questions here: First, whether the same investor needs to hold the investment at each of these times; and, second, whether this is a continuous ownership requirement. The short answer to the first question is a caveated yes, and the short answer to the second question is no.

And for the caveats on the first, I just want to clarify the bases for these requirements. Paragraph 6(a) of CUSMA Annex 14-C is the basis for the first two temporal requirements, that the investor bringing the Claim establish that it made the

investment when NAFTA was in force and that it owned or controlled it when CUSMA entered into force.

Paragraph 1 of CUSMA Annex 14-C conditions Canada's consent to arbitrate legacy investment claims on the submission of the claim to arbitration in accordance with Section B of NAFTA Chapter Eleven, which provides the basis for the other two temporal requirements.

NAFTA Articles 1116(1) and 1117(1), along with Article 1101, are the basis for the third requirement for the investor bringing the Claim to establish that it owned or controlled the investment at the time of the Alleged Breaches. And NAFTA Article 1117(1) is the basis for the final requirement: for the investor bringing the claim to establish that it owned or controlled the enterprise investment when the Claimant submitted to arbitration on its behalf.

We note that this is limited to Article 1117 claims and to the ownership of one type of investment, enterprise.

Now, CUSMA and NAFTA are necessarily written

in general terms with references to "an investor of a Party" and "an investment of an investor of a Party" as examples, but when it comes to the submission of a particular claim to arbitration, by a particular investor, tribunals have read these requirements as applying to the investor of a Party bringing a claim. In other words, the Claimant.

And that's right, because the Tribunal is assessing whether an Arbitration Agreement has been reached between Canada and a particular investor submitting a claim to arbitration, which is why the same investor bringing the Claim needs to hold the investment at each of these times to establish consent to arbitrate.

Now, I have two final quick points before handing things over to Ms. Squires to address waiver. The first relates to one of the Claimant's arguments responding to Canada's alleged interpretation of the legacy investment clause that refers to NAFTA Article 1101. I will refer the Tribunal to Canada's Reply at Paragraph 77-78 where we addressed this issue and the Claimant's continued misunderstanding of why

Canada raised those arguments. We set those out in our Reply at those paragraphs.

And, second, the Claimant continues to misinterpret the definition of "investment" under NAFTA Article 1139, particularly as it relates to claims to money and whether a NAFTA Claim can qualify itself as an investment. And we refer the Tribunal to our Reply at Paragraphs 91-99 where we address that issue. And in particular, we heard yesterday about Mondev and how there was an alleged Mondev -- an alleged investment in that case which was a domestic legal claim, we addressed that inaccuracy at Footnote 166 of our Reply as well. The alleged investment in Mondev was not the domestic legal claim and you can read about that at Footnote 166.

And with that, I will pass things over to my colleague, Ms. Squires, to address the waiver questions.

MS. SQUIRES: Hello, everyone. I'm going to spend my time this morning addressing three questions that were posed by the Tribunal yesterday with respect to waiver.

So first, Arbitrator Levine asked yesterday: How do waivers work under the framework of CUSMA for legacy claims? The waiver requirement for legacy claims is dealt with explicitly under Paragraph 1 of Annex 14-C, which notes that each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter Eleven of NAFTA and this Annex.

As such, for legacy claims, the waiver requirement is that found in Article 1121 of NAFTA. The Claimant's reference to Annex 14-D is of no relevance, that Annex does not relate to legacy claims. It relates only to investment disputes brought solely under CUSMA by American investors against México or Mexican investors against the United States. It has no relevance to this dispute.

Prof. Kaufmann-Kohler and Arbitrator Shore asked questions about a statement in Canada's Memorial at Paragraph 113 regarding the ongoing effects of waivers following the end of arbitral proceedings, and what would be the consequences if the 2018 waivers filed by WCC and Prairie continued to be effective

despite the withdrawal of the 2018 NOA. The question was also asked whether the same waiver, if it continues to be effective, can be reproduced to satisfy the requirements of Article 1121 in another proceeding.

First, Canada's statement at Paragraph 113 of its Memorial is a general statement on the enduring nature of waivers where a tribunal has been constituted and that the proceedings have ended by a tribunal award on jurisdiction or otherwise. Contrary to the Claimant's statement yesterday, that sentence should not be construed as a concession from Canada that the 2018 waivers continue to be effective.

When a Notice of Arbitration is withdrawn prior to constitution of the Tribunal, as was the case here with the 2018 NOA, a finding that waivers continue to be effective would, in effect, amount to a withdrawal of a claim with prejudice. The reason for this is that the filing of a new Notice of Arbitration with respect to the Measures that were alleged to breach the NAFTA in that first Notice of Arbitration would be the initiation of a second proceeding for

damages that is explicitly prohibited in NAFTA Article 1121(1) and (2)(b). The commencement of the second proceeding would be in direct contradiction to that ongoing waiver. Such a proceeding would be barred, thus, making the withdrawal of the first NOA a de facto with prejudice withdrawal of the Claimant's Claim.

This is also why an effective waiver from one proceeding cannot be used in a second proceeding. Rather than satisfy a State's consent to arbitrate under Article 1121, the waiver would bar a second proceeding for damages. Indeed, that is what we have here with Prairie's waiver in the WMH Proceeding, which continues to be effective.

As Canada explained yesterday, that waiver bars a second proceeding with respect to the Measures alleged to breach the NAFTA in that proceeding, the second proceeding being this current one.

Further, the fact that waivers are withdrawn when a Notice of Arbitration is withdrawn prior to constitution of a tribunal is also consistent with a finding in the Burlington Resources v. Ecuador

arbitration where the Tribunal held that the withdrawal of claims does not amount to a waiver of rights unless otherwise agreed.

If a NOA is withdrawn prior to the constitution of a tribunal, a claimant preserves its underlying right, that right being the right to submit a claim in accordance with a condition precedent to arbitration that the NAFTA Parties have set out. This includes filing valid waivers, that a claim is timely, and that the claim be brought by a protected investor with a covered investment. Whether those requirements have been met can only be decided at the time that new claim gets submitted to arbitration.

Professor Kaufmann-Kohler also asked whether the language in the Notice of Arbitration itself can be seen as a waiver that satisfies the requirements of Article 1121(3), given that the Notice of Arbitration is signed by Counsel and, as a follow-up to that, whether the Power of Attorney is broad enough to deal with the waiver.

To answer this question, let's pull up the relevant paragraph in the 2022 Notice of Arbitration,

Paragraph 98. In the first sentence, the Claimant states that it has submitted waivers consistent with the requirement of Article 1121 as Exhibit C-040 and Exhibit C-041 respectively. We spoke a lot about those yesterday. But the next paragraph is where we get to the subject of the Tribunal's questions -- or the next sentence, sorry, is where we get to the subject of the Tribunal's questions.

Sorry. I am leading you astray.

However, in those sentences, the Claimant is not providing new waivers but, instead, is simply referring to the contents of C-040 and C-041, noting specifically that WCC and Prairie have waived the rights in those documents.

Now, even if this paragraph could be construed as separate from Exhibit C-040 and C-041 and be characterized as new waivers for the purposes of this proceeding, whether or not this can constitute waivers provided by WCC and Prairie will depend on the Power of Attorney given to Counsel that signed the Notice of Arbitration.

The only Power of Attorney filed in this

Arbitration is referenced in the remainder of that paragraph and can be found at Exhibit C-039. So let's turn there.

The third paragraph is where we see the Claimant's Counsel listed, and it notes that they are authorized to act on behalf of Westmoreland. Westmoreland is defined in Paragraph 1 as WCC. There is no reference to Prairie in this document. A waiver of Prairie's rights cannot be derived out of this Power of Attorney.

Further, even based on the text of the Power of Attorney, it is far from certain that WCC is authorizing Counsel to waive its rights to initiate or continue the types of proceedings contemplated in Article 1121. There is no reference to Article 1121 in the Power of Attorney specifically or generally.

Yet as international law has held, for example, in the case that Claimants rely heavily on, Cyprus Bank, the waiver of a fundamental right, such as access to dispute settlement, should be unequivocal. We simply do not see that type of unequivocal wording here.

With that, it concludes Canada's submissions on waiver, and I will now hand things over to Ms. Dosman.

MS. DOSMAN: Thank you. I will address the Tribunal's questions regarding suspension of the Limitation Period.

First, in response to the President's questions, it is Canada's view that Section B of Chapter Eleven operates as lex specialis with respect to both the notification of claims and the time limitation on claims that can fall within the State's offer to arbitrate with investors. This is clear from the text of the Treaty itself.

The governing law of NAFTA is the Agreement itself plus applicable rules of international law. Those applicable rules would include, for example, the VCLT. With respect to state consent to arbitrate, however, Article 1122(1) refers only to "in accordance with the procedures set out in this Agreement". The NAFTA Parties agreed to more specific rules for which Claims they would offer to arbitrate and when.

That said, if the Tribunal wishes to

consider general principles, Canada does not accept that the Claimant has established a general principle of law that would apply to the facts before you. The Claimant has cited no authority, because there is none, that there is a general principle of law that a withdrawn Claim can operate to toll a limitation period or that a Claim by another Claimant can stop the Limitation Period for another Claim.

As Canada explained yesterday, a claim that is submitted to arbitration is a framework for a potential agreement to arbitrate. None of the three Claims at issue in these proceedings have actually resulted or should result in such an agreement. Contrary to the Claimant's Statement yesterday that Canada gave consent to arbitrate the WCC 2018 Claim, no such consent was ever established.

Why? The Claim was withdrawn. We do not know whether consent would have been obtained if proceedings to adjudicate that Claim had continued.

We also know because of the Final Award in the WMH Case that consent was not formed to adjudicate that Claim. Consent is also absent here for the many

reasons we have discussed.

I'd also like to note one additional important point of disagreement. The Claimant stated yesterday that it is uncontested that, if tolling applies, this Claim is within the time Limitation Period. That is wrong.

First, because the Claimant is applying a concept of tolling that appears nowhere in the Treaty or in any applicable rules of law. But it is also wrong because Canada does, in fact, contest that the Claim would be timely.

The Claimant has not filed effective waivers in this Claim, meaning that the time limitation has continued to run after October 14, 2022, and this is, again, adopting their flawed theory.

And, finally for the Claimant's expropriation claim, and again, on their theory, this cannot have been tolled. It did not exist to be tolled. If you look at C-043, which is WCC's 2018 NOA, and C-037, which is WMH's NOA, the word "expropriation" appears in neither, and you will see no reference to an alleged violation of Article 1110.

The Claimant's argument amounts to saying that you can make an allegation of breach at any time as long as it arises out of the same Measures that were challenged in a past Claim. And, further, that this applies even if that past Claim was withdrawn. That cannot be correct.

This also fits with the Claimant's overall approach, which is to disregard the Treaty in favour of an even more general, unproven, inapplicable principle, that once a State is on notice, that is all that is required to toll the Limitation Period. This would allow a Claimant to file an NOA, withdraw it, and renew its Claim at any point in the future, which is wholly inconsistent with the purpose of Limitation Periods.

Madam President, you also asked a question about the use of general principles of law to fill gaps in treaties. Whether there is a gap is a question of interpretation for the Tribunal, but in Canada's view, the specific issue here is not the use or not of the word "tolling," as the Claimant frames it, but, rather, how NAFTA treats the time limitation

on Claims. NAFTA is not silent on when a Claimant may bring a Claim and when, in contrast, a Claim is out of time.

NAFTA squarely and expressly addresses that issue by setting a clear and rigid three-year period, a view endorsed by all three Treaty Parties and by prior NAFTA Tribunals. That includes Feldman, which also provides a nice segue to Arbitrator Shore's question. Let's turn to Feldman, which is RLA-023.

And I think it would be helpful to look at what exactly the Feldman Tribunal was asked to decide. Let's pull up on the screen RLA-023, at Paragraph 53, which is at Pages 15-16 of the paper copy, in case anyone is still using paper, and Pages 18-19 of the PDF.

As you can see there in Subparagraph (a), the Tribunal addressed whether the Parties reached an agreement concerning a right to export in 1995 and whether this agreement was definitively ended in 1997, meaning that the Limitation Period was suspended for the intervening time.

As you can see in Paragraph 55, scrolling

down, the Claimant argued that the State had discouraged the Claimant from submitting a claim to arbitration, and that this amounted to an express agreement not to raise a defence based on the statute of limitations. The Respondent denied that any such agreement was reached.

At Paragraph 58 of Feldman, the Tribunal found, first, that NAFTA did not provide for suspension. It also found that, even under general principles of law, it appeared that suspension only occurred under municipal law when there was an unavoidable event.

The Feldman Tribunal also noted, toward the bottom of Paragraph 58, that the decision of whether and when to bring a lawsuit lies with the prospective plaintiff who also bears the respective benefit and risks. That was the context, whether there was an agreement to arbitrate -- an agreement by the State to suspend the Limitation Period.

Canada has never disputed that such an agreement is possible, and it is in this context that the Tribunal then went on to examine the Claimant's

arguments that the State was estopped from raising the Limitation Period. At Paragraph 63, the Tribunal stated that, of course, an acknowledgment of the claim under dispute by an organ competent to that effect and in a form prescribed by law, would probably interrupt the running of the period of limitation.

If the Tribunal here was referring to a State's receipt of a Notice of Arbitration, then Canada agrees. If a tribunal was then formed to hear that Claim and there were no Limitation Period issues, a State could not, three years later, raise a time limitation argument.

The paragraph goes on to note that there could be exceptional circumstances that would interrupt the Limitation Period and stop the Respondent State from presenting a limitation defense.

Canada disagrees that estoppel could, in fact, create jurisdiction as we will get to a bit later, and the Tribunal here appears to be using estoppel in a loose way without applying the three-part test.

The Feldman Tribunal probably had in mind

here the issue that was before it; that is, had the State recognized the existence of the claim, such that there was effectively an agreement not to raise the limitation defense. There is no such agreement here.

That was also a theory of the Renco dissenting arbitrator whose reasons are found at RLA-075. Let's pull that up now. It is on Page 14 of the PDF at the bottom of the Page.

The Arbitrator noted that the Limitation Period could be varied in the event of an agreement between the Disputing Parties. However, such a power does not rest with the Tribunal.

Finally, even if the Tribunal elects to follow Feldman's thought experiment, rather than the text of the Treaty and the interpretation of the Treaty Parties, let's look at whether there is here a long uniform, consistent, and effective behavior of the State that recognizes the existence and, perhaps, the amount of the Claim.

There is not. Canada has here at all times noted that it would carefully evaluate each claim for compliance with its offer to arbitrate in NAFTA

Chapter Eleven. Canada, in fact, explicitly reserved its right to raise jurisdictional objection, as we saw yesterday at Slide 34 and in R-081.

In the context of the attempted amendment, Canada stated for the avoidance of doubt, Canada makes the proposal outlined herein without prejudice to its ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim.

In addition, Canada has consistently treated the three Claims as separate. As one example, in the WMH Case, Canada made a time-bar objection because, due to the date of that Claim's submission to arbitration, which was August 12, 2019, allegations of breach and loss arising out of the Climate Leadership Plan measure were out of time.

And the reference here is to R-031, which is Canada's Statement of Defense starting at Paragraph 69, which is Page 30 of the PDF.

And in case this hasn't been made clear, Canada has not recognized the 2018 WCC Claim as anything existing or valid, let alone something with

value. Canada has acted consistently with the fact that the WCC NOA has been withdrawn.

So to answer your question squarely, how strong does the interruption need to be? Under NAFTA, the time limitation is calculated from the submission of the claim to arbitration. What NAFTA means by the submission of the claim to arbitration is a potential agreement to arbitrate that is encapsulated in a particular Notice of Arbitration. It does not mean the submission and then the withdrawal of a Claim, or the submission of a Claim by another investor.

Those are my submissions on the Limitation Period.

MS. ZEMAN: We are going to do a little reorganization of the table here to bring our other colleagues over. Bear with us, please.

MS. HARRIS: Hello, and I will respond to President Kaufmann-Kohler's question regarding reflective loss Claims under Article 1116.

Canada does not accept that Article 1116 allows reflective loss Claims when a Claimant wholly owns or controls the investment directly or

indirectly.

If this is allowed, it would be reading in language into Article 1116 that is not there and would be inconsistent with the framework that Articles 1116 and 1117 set out and the distinct damage that can be claimed under each.

Article 1116 contains no exception to the limited standing it confers simply because an investment may be wholly owned or controlled. Although the Tribunals in UPS and Mondev might have remarked that the distinctions between Articles 1116 and 1117 are mere formalities, they were incorrect in describing them as such. These legal provisions on standing are actually concerned with what rights ought to be protected and how those rights should be defined. They are not mere technicalities.

In every Corporate Law system, creditors receive payment on their obligations before Shareholders can take any money out. If Shareholders were allowed to directly recover for damage to the enterprise, it would flip this on its head and allow equity investors to jump the priority line and access

the enterprise's assets before creditors could recover on their loans to the enterprise. That's the case whether the enterprise is wholly owned or not.

NAFTA Articles 1116 and 1117 were designed to avoid this and, rather, ensure that the corporation's separate legal personality is maintained.

As we noted yesterday, NAFTA Article 1135(2), which provides that damages under Article 1117(1) shall be paid to the enterprise, protects the interests of secured and nonsecured creditors and Non-Claimant Shareholders to the enterprise where they exist.

And, to be clear, it makes no difference at all whether there are creditors present or not. The point here is one of principle, and it is a principle that lies at the very heart of the structure of Chapter Eleven. The NAFTA Parties have consistently emphasized this, and we have addressed this at Paragraph 134 of our Memorial and Paragraph 220 of our Reply.

We note that the Decisions of NAFTA

Tribunals have not been consistent with respect to how they have treated the distinction between Articles 1116 and 1117, and we acknowledge that some Tribunals have granted standing to a Claimant under Article 1116 that has alleged indirect loss. To the extent this has been allowed, such as UPS, Mondev, and GAMI, Canada disagrees with those findings.

Nevertheless, we note that the Tribunals in UPS, Mondev, and GAMI never granted an Award on damages, and both the Mondev and GAMI Tribunals recognized the importance of the distinction between Articles 1116 and 1117, which Canada has addressed in Paragraph 222 of its Reply.

The Claimant disregards the Mondev Tribunal's caution that Claimants should consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative.

With respect to Pope & Talbot and S.D. Myers, while the Tribunals in those cases did award damages for breaches of NAFTA, the Tribunals awarded damages only for losses suffered directly by

the investor bringing the Claim and not by the enterprise.

In Pope & Talbot, the Tribunal awarded damages for the investor's own out-of-pocket expenses, accountants' fees, and legal fees. And in S.D. Myers, the Tribunal characterized the damages as losses to the investors, lost and delayed income stream.

Canada considers that neither of these cases provides an example where a claim for indirect injury was allowed under Article 1116. We also note the Bilcon Tribunal's analysis in the damages phase of that arbitration offers the most recent and thorough analysis of the distinction between NAFTA Articles 1116 and 1117.

Although NAFTA Tribunals have varied in how they have treated a claim for indirect damage by an investor under Article 1116, these Decisions should not take precedence over the proper interpretation of the Treaty. The clear language of NAFTA Articles 1116 and 1117 and the consistent interpretation of the Parties to the Treaty cannot be written off as a mere and unimportant formality.

Finally, as a brief note, the Claimant's argument at Slide 63 of its presentation, with respect to Article 1117(3), requiring consolidation of certain claims relating to interests in an enterprise to avoid double recovery, misconstrues that provision.

If properly interpreted and applied, Article 1116 and Article 1117 do not create a risk of double recovery. Under Article 1116, the loss or damage that can be claimed is loss or damage that is a direct result of injury to the shareholder investor, and damages are paid directly to the Shareholder.

While under Article 1117, the loss or damage is as a result of injury to the enterprise that may flow indirectly to the Shareholder, but any award of damage is only paid to the enterprise.

The presumption for consolidation in Article 1117(3) exists to promote consistency of factual and legal determinations across distinct claims arising out of the same factual events. It cannot be interpreted to support an argument that a claim for reflective loss is permitted, and does not provide that, if such claims were consolidated, monies

paid to the investment should flow through to the investor.

Article 1117(3) also makes clear that nothing prevents an investor that owns or controls an enterprise, in an appropriate case, from submitting claims under both Articles 1116 and 1117. This allowance would be unnecessary if the controlling investor claimed for indirect loss under Article 1116(1).

And, finally, we note that WCC held Prairie in partnership and through many intermediaries that were incorporated in different jurisdictions. We do not know what the intercorporate arrangements might have been between these intermediaries.

Corporations adopt these organizational structures to shield themselves from liability, and we cannot now ignore Prairie's separate legal personalities by interpreting the difference between Articles 1116 and 1117 as a mere formality.

That ends my remarks on Article 1116, and I will pass it over to Mr. Koziol.

MR. KOZIOL: Thank you very much,

Ms. Harris.

Good morning and good afternoon.

I will address the Tribunal's questions regarding estoppel, preclusion, and abuse of rights. Ms. Levine and President Kaufmann-Kohler, you both posed a more general question as to whether, in principle, unfair or inconsistent conduct on the part of a Respondent State can ever bestow on a tribunal jurisdiction which it otherwise does not have.

In other words, would that unfair or inconsistent prior conduct, function to estop or preclude a Respondent State from successfully arguing a particular jurisdictional objection.

As you noted in your question, Madam President, in a treaty case there is a good argument to say that the Tribunal has to satisfy itself that it has jurisdiction under the Treaty. And if the Treaty's jurisdictional requirements are not met, then the issue of estoppel becomes irrelevant.

We would agree that, as a first principle, a tribunal has to satisfy itself that it has jurisdiction under the Treaty. To sidestep the

Treaty's express requirements and to find jurisdiction on other grounds would -- to put it in the more colloquial terms of the Tribunal in Renco I -- would be the Tribunal "pulling itself up by its own bootstraps in order to create jurisdiction when none exists."

So our answer to this overarching question about the role of estoppel, preclusion, or other equitable grounds, has been consistent in both our written Pleadings and in our presentation to you yesterday. It cannot be the basis for a tribunal's jurisdiction. The jurisdiction of the Tribunal is a matter of law and it flows from the express requirements of the Treaty at issue.

This has been affirmed by a number of ISDS Tribunals including the Koch v. Canada Tribunal which confirmed that "first and foremost, the jurisdiction of the Tribunal is a matter of law, and that the Tribunal must decline jurisdiction if the jurisdictional requirements of the Treaty are not met." This is RLA-094 at Paragraph 397. It is also noted in our presentation from yesterday at Slide 55.

Other Tribunals have made the same finding.

In the interest of time, I will point you to those relevant authorities. They are the ACME v. Slovak Republic Tribunal. That is RLA-062 at Paragraph 219. And I apologize if I'm mispronouncing this Tribunal name, Besserglik v. Mozambique. That is RLA-063 at Paragraph 422.

Now, even if you could establish jurisdiction on equitable grounds, and we do not agree that you can, there are clear legal tests for invoking these principles. It is the Claimant's burden to meet those tests. It is insufficient to simply invoke these principles in a general way.

Indeed, to decide this case without applying the legal tests for any of these doctrines, estoppel, preclusion, would be seen as a manifest excess of jurisdiction by this Tribunal. Previous Awards have been annulled or set aside on this basis.

In this case, there is no dispute between the Parties that, for example, estoppel requires a Claimant to demonstrate three specific elements. And I would add here that any assertion of estoppel or

other equitable grounds is subject to a high threshold of proof.

It is only – and I quote here from one of Claimant's Authorities – "in very exceptional circumstances that the holder of a right can nevertheless not raise or enforce the resulting claim." That is from CLA-018 at Paragraph 143.

On the facts of this case, the Claimant has not met this high threshold. They cannot establish the three distinct elements of estoppel. In fact, and as we noted both in our earlier responses to you this morning and in our presentation, the Claimant has pointed to one single piece of evidence, with respect to the requirement to demonstrate detrimental reliance.

This is a Witness Statement provided by Mr. Jeffrey Stein, made five years after the events in question, which, as Canada has pointed out in its Pleadings, is riddled with factual errors. Here I'll refer you specifically to Canada's Reply at Footnote 197.

We have comprehensively addressed the

Claimant's estoppel argument with respect to the July 2019 written correspondence in our Pleadings, and I'll refer you here to Paragraphs 110 to 118 of Canada's Reply.

Arbitrator Shore, you asked us yesterday to provide a little bit more discussion regarding the comments by Canada's counsel at the WMH Hearing in response to Arbitrator Hosking's question, and how those should be viewed in light of the legal test for preclusion and, perhaps, also estoppel.

So the oral answer given by counsel for Canada at the WMH hearing related solely to how Canada's jurisdictional objection in that case might apply to a hypothetical future claim filed by WCC, on its own behalf, under NAFTA Article 1116.

The question was asked because, at the time of the WMH hearing, WCC still existed as a corporate entity but was in the process of being dissolved as part of the company's bankruptcy proceedings. That is what WMH submitted to the Tribunal, and that is what the WMH Tribunal found. Now I refer you there to RLA-001 at Paragraph 93.

With that context in mind, if we apply the legal test for estoppel, do we have an unambiguous statement of fact, and was that statement unconditional? We do not.

Canada made no representation that it would refrain from making a jurisdictional objection to a potential claim that WCC might file in the future. Indeed, and as we have noted, Canada has expressly reserved its rights to bring jurisdictional objections, with respect to the former or any future claim.

Finally, was there detrimental reliance? Again, the answer is no. Canada made that statement in a contentious proceeding against WMH, not WCC. It was not a promise made to WCC.

And in its brief one-line answer at the WMH hearing also does not satisfy the test for preclusion.

I would note that the Claimant appears to be using the term "preclusion" without explaining any of the legal doctrine underlying its position, despite referring to "preclusion recognized under international law." That is at the Rejoinder

Paragraph 6.

They simply state that it arises "by virtue of the principle of good faith." That is at the Rejoinder Paragraph 99.

To be clear, the legal doctrine of preclusion requires a determination in another dispute settlement proceeding. That Decision may then preclude the making of another claim or defense.

The WMH Tribunal made no determination regarding WCC's ability to bring a future claim, let alone any determination that Canada's two-line answer meant that it was, in advance, agreeing that a future WCC Claim would fall within Canada's offer to arbitrate.

And, of course, I will conclude my remarks this morning with this: All of this discussion of equitable grounds is secondary, as we have repeatedly emphasized; in a treaty case a tribunal must be satisfied that the Treaty's jurisdictional requirements are met.

Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

I understand this concludes your answers to the Tribunal's questions. It took you exactly one hour, so we would say that you keep --

MS. ZEMAN: Perfect.

PRESIDENT KAUFMANN-KOHLER: -- you keep the 15 minutes for rebuttal, and, obviously, the Claimant gets the same time.

Could we move on now -- no. I think we had provided for a break, and we will stick to whatever we have provided. So we had said 15 minutes. Is that fine?

MR. RUBINSTEIN: That would be fine, Madam President. Thank you very much.

PRESIDENT KAUFMANN-KOHLER: Fine. Then let's resume in 15 minutes from now.

MR. RUBINSTEIN: Thank you.

(Brief recess.)

PRESIDENT KAUFMANN-KOHLER: I think everyone is ready to resume. So we can give the floor to the Claimant for your answers to the Tribunal's questions.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

MR. RUBINSTEIN: Thank you, Madam President.

We have a presentation that we will go through to address the Tribunal's questions.

Beginning with a few -- some of the preliminary factual questions that were raised by the Tribunal, beginning with the statements that were made in our Opening argument regarding the factual record. As we stated in our Opening Argument, when we said that the factual record is relatively straightforward and for the most part uncontested.

The reason that we said that was that Canada has not presented any fact witness or Expert witness to contradict the testimony of the two Witnesses that the Claimant has submitted, specifically the Jeffrey Stein testimony is not challenged by any other witness, and Judge Chapman's Expert Report also is not contested by any Expert presented by Canada.

As we've also mentioned, Canada did not call either of WCC's Witnesses to be cross-examined.

With respect to the written record, our position is that the record speaks for itself. We did not mean to suggest that Canada had accepted Claimant's narrative of the facts. What we were

referring to was the Claim that Canada had not presented evidence to contradict the evidence and the testimony presented by the Claimant.

With respect to the question of whether there are disputed factual issues that the Tribunal must resolve in order to establish its jurisdiction, it is the Claimant's position that there are no disputed factual issues that the Tribunal must resolve in order to find that it has jurisdiction to consider WCC's Claim, for instance, with respect to tolling or with respect to the legacy Claim. That is the Claimant's position on that question.

Now, with respect to the identity of the Claims, the Tribunal will need to decide whether the 2018, 2019, and 2022 Claims, as set out in those Notices of Arbitration, are sufficiently similar such that Canada has been fairly on notice of those Claims so as to be able to prepare its defense and to preserve reliable evidence.

WCC's position is that the Claims asserted in each NOA are the same for limitations purposes because they are substantively identical, such that

Canada has not been unfairly prejudiced through the submission of any of the Claims asserted in the 2022 Notice of Arbitration.

The only later Act alleged by WCC, other than the Federal Fuel Charge, which we have withdrawn, the only other later Act alleged in the 2022 Notice of Arbitration is with respect to Alberta's carbon levy. It is our submission that the reference to that Act does not create a new Claim or alter the substance of WCC's original Claims.

Arbitrator Levine asked about our Footnote 51 in our Rejoinder, where WCC stated that, if the Tribunal finds that any later Acts alleged distinguish the Claim, then WCC is prepared to withdraw them.

WCC stands by that position, and specifically what we mean by that is, if the Tribunal finds that there are any Claims or allegations contained in the 2022 Notice of Arbitration that Canada was not fairly on notice of, and that would unfairly prejudice Canada's ability to defend itself and to mount -- to preserve reliable evidence, WCC is

prepared to have those allegations or Claims withdrawn, and for the Tribunal, then, to proceed, based on the remainder of the Claims that have been asserted.

Yesterday, Canada presented a slide which is here on the screen. It's their Slide 23 from their Opening Submission. This slide identifies the differences between the 2018 Notice of Arbitration submitted by WCC and the current 2022 Notice of Arbitration.

It is, again, our submission that the changes that are identified here on this slide, which are identified in bold in the right-hand column, are not sufficient to create any substantive difference between the Claims that are being asserted now and the Claims that were asserted, originally, in 2018.

As we mentioned yesterday, the NAFTA Expropriation Claim, the Article 1110 Claim is based on facts that were alleged in the original 2018 Notice of Arbitration. That was covered yesterday in our Opening Argument. And so, it remains our position that the Claims are sufficiently and substantively

similar that they should support the tolling that WCC has argued for.

The Tribunal also asked about -- I believe it was Arbitrator Shore asked the question about the -- our reference to the transfer as a "purported" transfer. The reason that we described it as a purported transfer is because of the Westmoreland I Tribunal's holding that WMH had no standing to assert the Claim under international law, which rendered the transfer void as a matter of U.S. law.

As we pointed out yesterday, the U.S. Bankruptcy Court found that the NAFTA Claim did not transfer, and that WCC retained title to the Claim at all times including July 1, 2020.

The Bankruptcy Court's findings should be given significant weight by the Tribunal because the question of whether the Claim originally transferred as part of the bankruptcy, which was the context in which the purported transfer was originally agreed is a matter of U.S bankruptcy law.

Of course, so the question of whether the

Claim ever transferred in light of the Westmoreland I Award is a question of U.S. law. And, in fact, the Westmoreland I Tribunal considered bankruptcy issues against the background of U.S. domestic law, as the law governing Westmoreland and WMH and WCC.

That does not mean that it is a matter of U.S. law as to whether WCC can resubmit its Claim. That, of course, is a question of Treaty interpretation that would be governed by international law and, of course, that is for this Tribunal to decide. I think it's worth noting also that Canada has not challenged the Bankruptcy Court's Order, or argued that WCC continued to own the Claim, despite the holding of the Tribunal in Westmoreland I.

I'll turn it over now to Ms. Friedman to address the Tribunal's questions regarding legacy investment.

MS. FRIEDMAN: Thanks, Javier.

So as we explained yesterday, the USMCA legacy chapter is designed to preserve Claims that would have been protected by the NAFTA. As the title of the chapter indicates, the chapter addresses legacy

investment Claims. It's about preserving those Claims. That is why Annex 14-C -- yes, sorry.

Madam President, do you have a question?

PRESIDENT KAUFMANN-KOHLER: No.

MS. FRIEDMAN: Okay. That is why Annex 14-C expressly provides protection for prior Acts. It seeks to preserve what it calls legacy investment Claims.

Annex 14-C (1) is the gateway provision for legacy protection. It allows submission of a Claim for arbitration in accordance with Chapter Eleven. And Canada acknowledges that this means that the legacy laws applies the same criteria to admit a Claim as the NAFTA did.

You have on Slide 7 Canada's Reply on Jurisdiction, where Canada says that Parties consent to the submission of a Claim regarding legacy investment in accordance with Section B, NAFTA Chapter Eleven, NAFTA Articles 1116/1117, set out the circumstances under which an investor of a Party may bring a Claim under Section B. So USMCA incorporates the NAFTA provisions in this regard.

Annex 14(6)(a) defines the term "legacy investment," that are subject of those potential legacy Claims, legacy investment Claims.

And the Tribunal yesterday asked what meaning do you give to the words "in existence" on the date of entry into force of the USMCA. The meaning that is given to those terms, the meaning of the "in existence" language is that it protects those who are able to invoke NAFTA protection as of July 1, 2020. A legacy investment is in existence if the Claimant was able to invoke NAFTA protection as of that date.

Said another way, the investor can assert a NAFTA Claim if, as of July 1, 2020, it is an investment of an investor that is protected by the NAFTA, that is if it's acquired and owned and controlled the investment. And, as I said yesterday, that is determined by reference to the date of the breach, as required by the NAFTA and by all the NAFTA jurisprudence, and if the investor would have had standing under the NAFTA as of that date.

So as of July 1, 2020, the investor would have been able to claim that it incurred harm due to a

breach. Where those circumstances are satisfied, the investor can submit its Claim for arbitration.

(Overlapping speakers.)

PRESIDENT KAUFMANN-KOHLER: Can I now ask a question? Do I understand correctly that from the "in existence" you somehow go directly then to the NAFTA definitions and conditions? And I think this is right because if you look at Paragraph 1 of Annex 14-C, it does say each Party consent to the submission of a claim -- blah, blah, blah -- in accordance with Section B of Chapter Eleven, and this Annex. And "this Annex" has the "in existence" wording.

I would just like to make sure that we understand your position on this point correctly.

MS. FRIEDMAN: Yes. So the section you just pointed me to, Madam Chair, is it's the initial standing provision, so it provides that the investor can submit a Claim to arbitration if you have that requisite standing under Article 1116 or 1117 of the NAFTA.

It then also does point you to the Annex which, in turn, defines the term "investment of an

investor," and there you have to look at what is an investment of an investor that is in existence on the date of entry into force of the NAFTA, that has to be determined with reference to the NAFTA.

So if the NAFTA would recognize you as a protected investment -- would recognize a protected investment of an investor as of July 1, 2020, then that investment of the investor is a legacy investment, and it receives protection under the USMCA.

PRESIDENT KAUFMANN-KOHLER: Thank you. Pardon that for the interruption.

MS. FRIEDMAN: No, thank you.

So where the Measure took place before July 1, 2020, as here, the investment of the investor will remain in existence under the NAFTA requirements as long as those NAFTA requirements were met as of the July 1, 2020; that is, there had to have been the acquisition, ownership and control on the date of the breach and then loss due to the breach. That is how it -- that's how the provision preserves those prior Claims.

Only Claimant's interpretation is consistent with the stated purpose of legacy protection, which is to protect against past Acts. I pointed to the provision yesterday, Article 14(c)(3), which points out that the legacy investment -- Claimant's position is the only provision that applies to past Acts.

Now, if Canada were right and the investor had to continue to own or control the investment on July 1, 2020, then USMCA could not protect against prior expropriations, and that would contradict both the purpose of USMCA, which is to protect against past Acts, but it would also contradict the express terms of the USMCA, which say, in Annex 14-C (1) that each Party consent with respect to a legacy investment to the submission of a Claim to arbitration in accordance with Section B of Chapter Eleven and Section A of Chapter Eleven.

So what that does is it incorporates all of the Chapter Eleven protections of the NAFTA into the USMCA, and the protections that are incorporated into the USMCA must include expropriation. So to adopt Canada's position, you are writing out that protection

against expropriation, which must be incorporated into the USMCA.

There is no evidence that the contracting Parties meant to exclude expropriation from the ambit of protection as I explained, that would create internal inconsistency.

(Interruption.)

MS. FRIEDMAN: There's no evidence the Contracting Parties meant to exclude expropriation from the ambit of protection. In fact, this would create an internal inconsistency because it would read out the facts that the USMCA incorporates the NAFTA Chapter Eleven protections.

Now, Canada here today continues to fail to address the object and purpose of legacy provision. Yesterday, the Tribunal asked Canada "a question for the Respondent is whether Canada can shed any light on the purpose of the protection of legacy investments." The crystal-clear words of this question mean that the Tribunal wanted to know, what's the purpose of the legacy investment protection? What does it do?

The Tribunal was not asking about the

purpose of the USMCA overall. The Tribunal has that answer from Canada, because Canada already submitted that earlier in this Arbitration.

Despite this very crystal-clear question, Respondent still this morning did not explain what is the purpose of the legacy investment protection. It just continues to say that it exists to terminate the NAFTA.

So by the close of this Hearing, this Tribunal has nothing from Canada on the purpose of the legacy provision. Canada also said this morning it was unable to track down the travaux in time for this Hearing, and with all due respect, we have been submitting evidence on the meaning of the USMCA based on the public record since our Counter-Memorial on jurisdiction.

We supplemented that in our Reply Memorial on Jurisdiction, we actually obtained those documents via Freedom of Information Act for requests from the USTR, the Agency that negotiated the USMCA. And so, despite this, despite all of this evidence, Canada has not tried to get those travaux, has not tried to

respond to any of that evidence.

And as I said yesterday, if the travaux supported Canada's position, it would have provided it. If there were any evidence on the object and purpose that supported Canada's position, it would have provided it.

So since Canada has not explained the purpose of the legacy protection, we submit that the Tribunal should draw inferences that it considers appropriate.

The consent to arbitrate Legacy Investment Claims expires three years after the termination of NAFTA, and this gives investors with NAFTA Claims the same window of time to submit their Claims as they would have had under the NAFTA.

This ensures that there's a smooth transition from the NAFTA to the USMCA. Those who could have brought NAFTA Claims while the NAFTA was in force can continue to bring them for that same three-year window that they would have had under the NAFTA.

The Tribunal also asked whether Claimant's

interpretation means that the provision would have the same meaning and impact if the words "in existence at the date of entry into force of the Agreement" were not in it --

We say, no, our reading of the legacy clause does not --

(Interruption.)

PRESIDENT KAUFMANN-KOHLER: Now is good.

MR. RUBINSTEIN: Okay.

MS. FRIEDMAN: So Claimant's reading of the legacy clause does not read out the terms "in existence" because the "in existence" language creates an additional requirement that's not captured by that first part of the provision. The first part of Annex 14-C(6) says that the legacy clause must be acquired at any point between January 1, 1994, and July 1, 2020. So that talks about the acquisition date.

The second requirement is based on the "in existence" language requires that all elements of the Claim be present on July 1, 2020. So that refers to the acquisition of the ownership and control of the

breach and the loss, all of the things that make it a NAFTA Claim that is recognized and crystallized as of July 1, 2020.

Ms. Levine also asked whether the investor must hold the Claim at four points in time to qualify for legacy protection. Our answer is, no, because the term is -- because the term, again, is defined in the reference to the NAFTA and under the NAFTA and well-settled jurisprudence. The investor only needs to have acquired the investment and have owned the investment at the time of the breach.

The investor does not need to own the investment at the time the USMCA went into force or at the time of submission to arbitration. And requiring the investor to own the investment at any other time would create a continuous ownership requirement, which would wipe out the protection for expropriated investments that would also create a requirement that very few tribunals have adopted and which has been heavily criticized by the international community.

Now, even if the Tribunal were to adopt the view that an investor must hold the investment after

the date of the Measures -- so, when the USMCA went into force and at the time of submission to arbitration -- WCC still has an investment that meets that definition.

On July 1, 2020, WCC had a claim to money in the form of a NAFTA Claim that was pending on that date. That Claim to money is a protected investment under Article 1139. I went through case law yesterday, and this morning Canada argued that we improperly cited Mondev for that proposition because it said that Mondev did not involve a claim to money based on a legal claim.

I would like to direct the Tribunal to the Mondev Tribunal -- the Mondev Award. It's Exhibit CLA-5, Paragraph 83. And there the Tribunal concludes: "For these reasons, the Tribunal concludes that Mondev has standing to bring its Claim concerning the Decisions of the United States Courts by virtue of Article 1116 of NAFTA in conjunction with Paragraph B of the definition of 'investment' in Article 1139."

So we did not misrepresent what the Mondev Decision held.

Now, Canada this morning focused on the fact that WCC sold the NAFTA Claim before it went into force. That is irrelevant, as Mr. Rubinstein explained, since the same bankruptcy judge that oversaw the wind-up proceedings, including that transfer, confirmed that the NAFTA Claim remained with WCC at all times. And that conclusion must necessarily extend to July 1, 2020.

Therefore, WCC has held the NAFTA Claim at all times since July 1, 2020.

I will turn back to Mr. Rubinstein, who will address Canada's representations in Westmoreland I.

MR. RUBINSTEIN: So yesterday, the Tribunal had a number of questions concerning Canada's representations during the Westmoreland I proceedings. Arbitrator Shore asked about Canada's July 2, 2019, letter that proposed that WCC withdrawal and substitution of WMH. As Arbitrator Shore pointed out, the letter contains a reservation of rights which is quoted here in the box on the screen. In that reservation of rights, Canada stated that it makes the proposal allowed, outlined here, and without prejudice

to its ability to raise any jurisdictional or admissibility objections with respect to the original NOA or any new claim.

In its Reply at Paragraph 39, Canada argues that this reserved Canada's right to challenge WMH's standing because, in Canada's view, any claim asserted by WMH was a new claim.

Now, Canada's -- in our submission, Canada's reading of that reservation of rights is unreasonable. If every claim asserted by WMH was a new claim, there would have been no reason to refer to the original NOA, i.e., the NOA that was filed by WCC. In our view, the only reasonable reading of that reservation is that Canada was reserving its right to challenge WCC's original Claims, which, as we mentioned yesterday, were identically copied into the second, -- into the 2019 NOA and any new claim asserted by WMH that was not asserted by WCC. Neither of those would have picked up an across-the-board challenge to WMH's standing. And as is also explained in Mr. Stein's Witness Statement, that is how WCC understood the reservation of rights. That did not

put WCC on notice that, immediately following the substitution, Canada would assert an across-the-board objection to WMH's standing, such that the case, at least in Canada's view, should not proceed at all.

The Tribunal also had questions with respect to the statements that were made by Canada to the Tribunal in Westmoreland I. And we want to take the Tribunal through the questions and the answers that were given by Canada.

So, again, we're bearing in mind, this Hearing took place on July 15, 2021, after the USMCA had gone into effect and more than three years after the NAFTA statute of limitations began to run in 2016.

In that context, Arbitrator Hosking asked Canada about WCC's position as of that date as to whether WCC could still bring a treaty claim in light of Canada's position that the transfer of the Claim failed as a matter of international law and in light of the Prairie change of control.

The questions are here on the slide, but clearly Arbitrator Hosking was not asking a hypothetical question. Arbitrator Hosking was asking

a question: Does WCC have any residual rights to bring a treaty claim? And it specifically put in context as a consequence of the change in ownership and as a consequence of the bankruptcy proceeding reorganization. So the question ultimately was: So what is WCC's position today? That is not, in our submission, a hypothetical question.

Canada's Counsel then responded that WCC still could bring an Article 1116 Claim on its own behalf because it still existed as an entity. In the beginning -- I'm not going to read the entire text, but, as the Tribunal will see, Canada's Counsel stated that, if WCC no longer owns or controls the investment -- that is true, but that still would not preclude a claim under 1116 on their own behalf. So, again, this was -- and from the portion at the bottom, it underscores that the statement Canada was making was not hypothetical. WCC could still be in the position to bring a claim on its own behalf. As we've mentioned, it is still an entity constituted under the laws of Delaware.

Counsel's reference this morning to any

anticipated dissolution of WCC, that was not part of Arbitrator Hosking's question. Arbitrator Hosking's question took into account the fact that WCC still existed as of that date, and, in fact, WCC continues to exist and to be in good standing to this very day. And so, this was an unequivocal statement made in response to a concrete question asking for Canada's view about WCC's position as of that date.

It's also, I think, worth noting that at no point during the Westmoreland I proceedings did Canada argue that WCC's resubmitted Claim or that any resubmitted claim would be time-barred or would be precluded on any other jurisdictional ground.

Arbitrator Shore also asked the question about whether Canada should be bound by what Counsel said, and in our submission, Canada should be bound by the Statements made by Canada's Counsel because the Statements on their face express "Canada's view on concrete legal issues that were responding to direct questions by the Tribunal." It's also worth reinforcing the point, even if -- even if, for example, Canada's Counsel had made a statement that

was, let's say, off the cuff, you know, they felt that it was incorrect, Canada had every opportunity to correct or to withdraw or to clarify that statement later in the proceedings. The Hearing took place in July of 2021, the Tribunal did not issue its Award until January of 2022.

As the Tribunal explained and held in Caratube v. Kazakhstan, statements made by Counsel in one proceeding can bind a party with respect to subsequent proceedings.

With respect to -- to answer Arbitrator Shore's question directly, the Tribunal and WCC -- WMH and WCC, for that matter, which were represented by the same Counsel, all had a right to rely on the Statements made by Canada since they expressed Canada's position on concrete legal issues that were never later corrected or withdrawn. Had Canada said that WCC was foreclosed from reasserting its Claim, the Tribunal and the Parties could then have addressed it, just as the Tribunal did in Renco I, and the Tribunal could have done that as part of the ongoing NAFTA Arbitration. The Tribunal did

not ultimately address Canada's concession because there was no need for the Tribunal to address that concession.

Let me move on then to the topic of estoppel and preclusion. The Tribunal asked whether or not principles of estoppel or preclusion could be taken into consideration by the Tribunal at the jurisdiction phase. It remains our submission that, based on Canada's Statements in Westmoreland I, especially the Statements that we just read that -- the positions that were expressed to the Tribunal in 2021, that WCC could still resubmit its NAFTA Claim, at least with respect to Article 1116, the Tribunal should find that Canada is estopped and precluded from contradicting that position and now arguing that WCC's Claims cannot be adjudicated under either the USMCA or the NAFTA.

The question also was raised as to whether we have any authorities which have applied principles of estoppel or preclusion at the jurisdiction phase.

Starting with Chevron v. Ecuador, which we have cited, Ecuador in that case objected to the Tribunal's jurisdiction alleging that Chevron did not

have any investments in Ecuador. However, earlier, the Ecuadorian courts had previously found and taken the position that Chevron had investments in Ecuador. The Tribunal held that the abuse of rights doctrine is a general principle of international law, which includes an abuse of want of good faith and the exercise of a procedural right such as an objection to the jurisdiction of the Tribunal.

Based on that finding, the Chevron Tribunal held that a party was precluded from making inconsistent statements to defeat jurisdiction. And I do want to underscore that the Tribunal in Chevron was applying the principle of preclusion, not estoppel, and, as we have explained in our submissions, those principles are different in the sense that preclusion does not require proof of reliance. It is simply a doctrine that prevents a State from making inconsistent statements to the detriment of the opposing Party.

Based on all of that, the Chevron Tribunal, in what I will say is a very detailed award which sets out the jurisprudential basis for its application of

the preclusion principle, held that Ecuador was precluded from challenging Chevron's status as an investor in Ecuador. The Tribunal instead accepted the earlier Statements that Ecuador had made which recognized or acknowledged that Ecuador was an investor in Ecuador.

Similarly, in Laiki v. Greece, which we also cited at CLA-068, the Claimant had submitted a Request for Arbitration in June of 2014. Greece alleged that the Tribunal did not have jurisdiction because Greece had revoked the offer of ICSID Arbitration in the Cyprus-Greece BIT on 1 May 2004, more than 10 years before the Request for Arbitration was filed.

The Claimant argued that Greece should be estopped from relying on the revocation of that offer because the revocation of consent was not publicly communicated. Based on that, the Tribunal held that Greece was estopped from raising this jurisdictional objection because its revocation of the offer had not been publicly communicated. And I think it's very important to underscore, it may well be that Greece had revoked its offer to arbitrate in 2004,

nevertheless, the Tribunal prevented, through estoppel, through the application of estoppel, it prevented Greece from asserting that defense in order to defeat the Tribunal's jurisdictional objections.

Canada is suggesting that we -- that the Claimant here, WCC, is trying to use estoppel to create jurisdiction. I think that that reference is misleading. What we are saying is that, where a State makes inconsistent statements at an earlier stage, which support the Tribunal's jurisdiction, the Tribunal can rely on those earlier statements in order to establish its jurisdiction and at the same time preclude the Respondent State from now contradicting those earlier positions in order to defeat the Tribunal's jurisdiction.

So it is not that we are trying to use estoppel or preclusion to invent a jurisdictional instrument or an agreement to arbitrate. What we are saying is that the earlier statements can be considered and should be considered by the Tribunal. And both Chevron and Laiki confirm that estoppel and preclusion can be utilized by a tribunal to establish

its jurisdiction.

I will now turn to, -- the Tribunal had a few questions regarding tolling of the Limitations Period. So it is and remains WCC's consistent position throughout this Arbitration that the tolling of the Limitations Period during the pendency of a claim is a general principle of law under Article 38 of the ICJ statute. We've cited the various submissions where we have made that point and we have cited the Tribunal's Decision in Renco II which squarely supports that proposition. I do note that Canada repeatedly cites to the Dissenting Opinion in Renco II but does not address the majority's view that tolling is a general principle of law under the ICJ statute.

Now, it is true that Canada has disputed the existence of this general principle of law, but it has offered no legal analysis of its own to establish that it is not a general principle of law. And notably, again, Canada has not addressed the tolling analysis and holding of the majority in Renco II. That continues to be true even as of this morning.

Now, as we explained in our opening yesterday, Article 1131 of the NAFTA provides that the Tribunal must decide issues in dispute in accordance with the Agreement -- obviously the NAFTA itself -- and applicable rules of international law. So the question was raised by the President as to whether there is room for a general rule of international law when the Treaty provision is silent about the specific issue. And our answer is, yes. Article 1131 permits that on its face. In addition, Article 32(b) of the VCLT provides that recourse may be had to supplementary means of interpretation to determine the meaning when the interpretation, according to Article 31, leads to a result which is manifestly absurd or unreasonable.

And, in fact, the Tribunal in Renco II found that the tolling principle is a general principle of international law, precisely for this reason.

PRESIDENT KAUFMANN-KOHLER: Mr. Rubinstein, can I ask you just one clarification here?

MR. RUBINSTEIN: Sure.

PRESIDENT KAUFMANN-KOHLER: We heard earlier

from Canada's Counsel that there's no room for including the application of a general principle of law, assuming there is one, because -- not in connection with 1131, but in connection with 1122(1) of the NAFTA that says each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this agreement," meaning this is the framework in which you have to evolve and you cannot go beyond the four corners of the NAFTA.

Can you address this? Now, or later, but it would be helpful.

MR. RUBINSTEIN: No. I'd be happy to.

The response is that when the -- the reference in 1121 to incorporating the terms of this Agreement, i.e., the NAFTA, that must include Article 1131 which incorporates rules of international law and requires Tribunals to apply rules of international law when they are resolving a dispute submitted under Chapter Eleven.

And in our view, the -- there is no lex specialis in the limitations provisions in the NAFTA

because the NAFTA simply states that a claim must be submitted within three years, which occurred here. The question here is whether the assertion of a claim and the pendency of a claim serves to toll the Limitations Period.

That is not addressed anywhere, I mean, in the NAFTA, and so, as a result, I think it is reasonable to treat that question, at least as far as the NAFTA is concerned, as a gap, an issue in which the Treaty is silent.

And actually that -- I'm going to come back to Feldman in a minute, but the Tribunal's Decision in Feldman, I think, supports that point. But they're two separate questions, and as the Tribunal explained in Renco II, not incorporating or -- the tolling principle into a treaty, like the NAFTA where it is silent -- and I should again point out that the FTA that was addressed by the Tribunal in Renco, likewise, had a similar limitation structure to what we see in the NAFTA where it simply had a three-year limitations provision and was silent on the issue of tolling.

What the Tribunal explained in Renco II is

that, if tolling were not to be applied, it would create perverse incentives for States to assert procedural and admissibility objections in order to -- hopefully to extend the proceeding through the jurisdiction phase to a point in time when the three-year statute of limitations will have expired, thereby preventing the Claimant from resubmitting that Claim in light of either a curable defect, or imagine a situation in which an ICSID Case is an -- an award is annulled by an ad hoc committee.

Based on Canada's position, if the -- by the time that the ad hoc Committee finishes its review and issues its Decision annulling the underlying Award, if more than three years have expired, the Claimant would not be able to resubmit its Claim without the tolling principle. That is precisely why the Tribunal in Renco II held that it was essential to incorporate the tolling principle in order for the dispute resolution framework in the Treaty to be effective.

So I will not -- I think on this slide, I think I've covered most of these points. I'm not going to repeat them, but I do want to conclude on

this point by simply reiterating that, under NAFTA Article 1131, it is necessary to incorporate the tolling principle as a matter of international law to fill the gap on the question of what happens when a claim is actually filed and is pending.

I will now turn it back to Ms. Friedman to address the question of waiver.

MS. FRIEDMAN: Thank you.

WCC submitted the 2018 waivers from the Westmoreland I Arbitration into this Arbitration because those are the only waivers that continue to bind WCC and Prairie.

The Tribunal asked if the waiver is permanently affected and, if so, whether it could be used in the next arbitration. Our answer is, yes, the waiver is immediately and permanently affected and because of that it can be used in the next arbitration.

So the fact that a waiver is immediately and permanently effective has been confirmed by a number of Tribunals, including in Waste Management I, v. México and Canada v. Ecuador. We

have other cases on Slide 34.

For example, the Waste Management v. México Tribunal held that the abdication of rights ought to be made effective as of the date of submission of the waiver, so as soon as that waiver is submitted, the rights are abdicated. And the waiver will continue to have effect after the arbitration is concluded. So it starts as soon as it's submitted, and it continues even after the arbitration is over. It continues into perpetuity.

Because a waiver is permanently effective, the same waiver that is submitted in the first arbitration, as long as it is a valid waiver, can and should be submitted in the next arbitration. And that's because the first waiver already waives the investor's rights to bring a claim in any other form, so there's nothing left to waive. That waiver is the effective instrument that waives the rights.

The Tribunal asked whether the withdrawal of WCC's Claim effectively invalidated that first waiver. And our position is similar, no, the withdrawal did not invalidate WCC's first waiver because that waiver

had already taken effect immediately in 2018 and it remained in effect indefinitely.

Canada has acknowledged this principle in other arbitrations. The Tribunal asked about this yesterday. For example, in its Memorial on Jurisdiction in the Detroit International Bridge Company v. Canada case, it said that such a waiver continues to be, -- continues to be in force following the arbitral proceedings, and it also argues -- sorry, that was its Memorial jurisdiction in this case.

In the Detroit case it submitted the waiver required by Article 1121 must be legally enforceable now when submitted and in perpetuity. So Canada agrees with this well-founded principle that many, many investment Tribunals have found.

So, again, since the waiver had immediate and permanent effect, it cannot be retracted once given. A later withdrawal cannot undo a waiver that was immediately and permanently effective.

Now Canada cannot cite to a single case that held that a Claimant can simply withdraw its Claim and thereby invalidate its prior waiver. This morning

Canada cited to the Burlington v. Ecuador Award to purportedly support this point. But the fact that the Burlington Tribunal found that a withdrawal of Claims doesn't amount to a waiver has no bearing whatsoever on how a waiver, -- how a withdrawal affects an earlier waiver given in a NAFTA case.

Burlington v. Ecuador was decided under a different Treaty, under the U.S.-Ecuador BIT. That BIT does not contain a waiver requirement, and so, therefore, the finding in that Award has no bearing on this arbitration.

The Tribunal also asked: "Does it matter that the Claim was withdrawn without prejudice?" And we say, no, it does not matter whether the Claim was withdrawn with or without prejudice because, again, the waiver was permanently effective as soon as WCC submitted its waiver.

So if anything, the fact that the Claim was -- sorry, if anything, though, if it did have some importance, whether or not it was withdrawn with prejudice or without, the fact that the Claim was withdrawn without prejudice actually supports finding

that a waiver was not withdrawn, because a withdrawal without prejudice leaves open the investor's opportunity to resubmit the Claim to the investment arbitration. So that still remains the one chosen forum in which the investor is pursuing its Claim.

Tribunal also asked: "Can the waiver in a Notice of Arbitration be regarded as a waiver?" And yes, the waiver in the body of a Notice of Arbitration can be regarded as a waiver because the NAFTA says nothing about whether the waiver needs to be in a separate instrument or whether it needs to be signed.

The Bacilio v. Perú Tribunal, the Award that Canada cited to throughout its opening submissions yesterday confirms that a similar waiver provision contained in the U.S.-Perú FTA does not require that the waiver be included in a document that is separate from the Request for Arbitration.

The Tribunal found no support for that in the U.S.-Perú FTA, that is the exact exercise this Tribunal should undertake. It should look at the NAFTA itself to determine whether it imposes a requirement for signature or imposes a requirement

that the waiver be provided in a separate instrument.

And, much like the U.S.-Perú FTA that was at issue in Bacilio, the NAFTA also does not require a separate instrument or signature. It only has three stated requirements I explained yesterday, that the waiver be in writing, that it be delivered to Canada, and that it be included in the submission to the Claims Arbitration.

The fact that it's included in the submission, if you include it in a paragraph of the submission itself, it is included in the submission to arbitration. It satisfies that last requirement.

Even if though, -- even if there were a signature requirement under the NAFTA, we, as Counsel to the WCC we had broad Power of Attorney to -- we signed our Notice of Arbitration. We had Power of Attorney to execute a waiver in that Notice of Arbitration. We had the relevant text from Power of Attorney on Slide 39.

Among other things, the WCC granted King & Spalding Power of Attorney to execute documents necessary for the accomplishment of any action or

actions in relation to the NAFTA Claim. That included the right to execute and deliver consents and many others. It's a very broad Power of Attorney, which you can review at Exhibit C-39.

The Tribunal finally asked: "How do the waivers work in the context of Annex 14-D?" I think the Parties agree here that for USMCA claims the waiver requirement is governed by NAFTA Article 1121. Any waiver requirements that may exist under Annex 14-D does not reply to this arbitration since that chapter is devoted to resolution of disputes -- of Mexican-U.S. investment disputes.

So with that, this concludes our responses to the Tribunal's questions, for all of the reasons we explained, the Tribunal should accept jurisdiction over WCC's Claims.

Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you to the two of you. I don't know whether my colleagues have any follow-up questions at this stage for Counsel? That's not the last opportunity. We can also ask questions --

ARBITRATOR SHORE: Can I ask one, Madam President?

PRESIDENT KAUFMANN-KOHLER: -- after the rebuttals, but if you have any now, absolutely, go ahead.

ARBITRATOR SHORE: Thank you. Sorry, Madam President.

Mr. Rubinstein, I wonder if you would address what Canada submitted this morning, that is the issue Canada says is not that a NAFTA Claim was transferred or not transferred, but that the investment was sold in 2019. And so, in Judge Chapman's Expert Report, she talks about two classes of transfers. She says there's the transferred cause of action, retained cause of action, that's one thing. Then she says, but then there are purchased U.S. assets and excluded assets.

If the Prairie assets are purchased U.S. assets, does that mean that the investment, the assets underlying the Claim were sold and, therefore, it doesn't matter that the Claim itself was voidable as Judge Chapman opines?

So I wonder if you would address that specific point that Canada raised this morning. The investment was sold in 2019, so it doesn't matter what happens with the NAFTA Claim. The NAFTA Claim is not an investment.

MR. RUBINSTEIN: So I'm happy to answer the question. When the Bankruptcy Court issued its Order in 2022, it was obviously aware of the sale and disposition of assets as part of the bankruptcy estate, and the fact that the underlying investment was sold did not affect the WCC's ownership of the underlying NAFTA Claim from a U.S. bankruptcy perspective.

Now, whether that would impact the sale, would impact WCC's ability to assert or to resubmit its Claim, obviously that's a separate question that is governed by international law, and it is our submission that because, as we've previously explained, WCC's ownership and control of the assets in question when the Measures occurred is what is relevant from a NAFTA perspective.

And so, the Expert -- Judge Chapman's Expert

Report simply reinforces and validates the Judge's Decision in 2022 that because the purpose of the transfer could not be effectuated, the purpose of the planned reorganization was to enable the NAFTA Claim to be asserted for the benefit of creditors and debtors.

And since that purpose could not be achieved, for non-bankruptcy law reasons under international law, the Judge held that then, as a result, as a matter of U.S. bankruptcy law, the transfer never occurred.

And so the, -- and I believe that the 2022 Order validates that the sale or disposition of any assets did not affect, -- from a U.S. bankruptcy perspective, did not affect the original transfer because, as the Judge explained, and as is also explained by Judge Chapman, the transfer was void ab initio. I mean, when the purported transfer was initially agreed.

Does that answer your question?

ARBITRATOR SHORE: Thank you.

MS. FRIEDMAN: If I may just -- if I may add

just one additional submission, which is that in the purported transfer, what it reflects is that there was an intent to transfer the NAFTA Claim to a party that was entitled to bring the cause of action and to enforce the rights that were pending at the time. And so the fact that the -- that that intent was not able to be carried out because under international law that was the -- it was not transferred to the correct investor, it still remains, is the fact that there was an intent and a -- there was a full purpose to crystallize and to recognize that NAFTA Claim as a valuable asset that still existed at the time of the bankruptcy proceedings.

ARBITRATOR SHORE: Thank you. I think -- I understand the issue as to the Claim and that Judge Chapman says a transferred cause of action can become a retained cause of action. But I'm asking about Canada's submission that the assets were not excluded assets so that the assets, not the Claim, but the Canadian mining assets were sold as of 2019, and that was the investment, not the NAFTA Claim.

But, I mean, you've spoken to this, but

that's just what I would ask you maybe to focus on later. And I wouldn't want to take more time now. And maybe I haven't stated the issue properly. But that's what I'd like you to consider later.

Sorry, Madam President.

MR. RUBINSTEIN: We'll be happy to come back to that.

ARBITRATOR SHORE: Okay. Thank you very much.

PRESIDENT KAUFMANN-KOHLER: Does Ms. Levine have any questions at this stage?

ARBITRATOR LEVINE: No.

PRESIDENT KAUFMANN-KOHLER: It doesn't seem to be the case.

So if I look now at the schedule that we have for today, before we go to the Rebuttals, we had envisaged a one-hour break. I suppose we have done this to allow time for Counsel to prepare the Rebuttals, and we will, of course, stick to it unless you tell us that you can live with a shorter time. But that's entirely up to you.

Can I first ask Canada, Ms. Zeman?

MS. ZEMAN: Yes, thank you. We're happy to take a slightly shorter break, perhaps in the 45-minute range, but primarily to allow us to eat lunch. I know there are some points on rebuttal, but I don't think we'll need the full hour, but 45 minutes will give us just a little bit of breathing room to do both of those things. It's about noon here.

PRESIDENT KAUFMANN-KOHLER: Sure.

Mr. Rubinstein?

MR. RUBINSTEIN: We agree. I think we can live with 45 minutes, and we are going to be focused on lunch.

PRESIDENT KAUFMANN-KOHLER: Good. So it is not time for lunch for us, but we will take a break as well, and we will resume in 45 minutes from now.

MR. RUBINSTEIN: Thank you.

(Whereupon, at 11:54 a.m., the Hearing was adjourned until 12:40 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT KAUFMANN-KOHLER: Good. I hope you had a good lunch, and we can now continue with the last stretch, which is the Rebuttals. Can I give the

floor to Canada?

Ms. Zeman.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MS. ZEMAN: Yes, thank you, and we'll be fairly brief here. You know, there are three points -- discrete points on rebuttal from me and then two from Ms. Dosman.

So first from me, on the "in existence" clause, it is the investment of an investor that needs to be in existence, not the elements of a claim as the Claimant suggested before the break. They're trying to turn the definition of a "legacy investment" into a definition of legacy investment Claim. That is not what the text says.

Second, on whether a NAFTA Claim qualifies as an investment in its own right under NAFTA, the Claimant continues to conflate two distinct analytical questions: First, a claimant's standing to bring a claim with respect to a particular investment, on the one hand; and, second, on the other, whether that Claim independently qualifies as an investment in its own right as a question of subject matter

jurisdiction.

We heard this again in their discussion of Mondev, today. The discussion that Claimant cites to in that case, which is CLA-005, is under the heading of the Tribunal's discussion of whether Mondev had standing to bring a claim with respect to an investment in not a domestic legal Claim but interest in its locally established enterprise, LPA, which it no longer held at the time it submitted its Claim to arbitration. You can see that that's the alleged investment at Paragraph 2 of the Decision.

The quote that Claimant cited today confirmed that the Tribunal found the relevant investment was under Article 1139(b), as an equity security in an enterprise.

This question of standing is analytically distinct from whether a NAFTA Claim qualifies, as I said, as a question of subject matter jurisdiction, as an investment itself.

Mondev is just one example of the cases the Claimant cites -- did not address this latter question, and, as Canada has explained, there is no

basis in NAFTA for a NAFTA Claim to qualify as an investment under NAFTA.

Third and finally from me, on the Statement of Canada's Counsel at the WMH Hearing, in a Q&A like we had this morning with this Tribunal. This Tribunal will, no doubt, look at what was and what was not said in that exchange. Just a couple observations.

Counsel said "could." There was nothing categorical about it. A waiver of rights, as the Claimant suggests was undertaken in that exchange, must be clear and express. It was not.

Also note that Canada has not objected to this Tribunal's jurisdiction on the basis of the Article 1116(1) issue that Counsel for Canada was discussing with Arbitrator Hosking at the WMH Hearing. And Counsel's Statement at that Hearing was not purporting to assess all the requirements WCC might have to meet should it have tried submitting a new claim under Article 1116(1), and that is where I will leave those three points and hand things over to Ms. Dosman for our final two rebuttal points.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MS. DOSMAN: So two quick points from me. The first is that we've heard a lot about Renco II over the past couple of days, and I don't want to leave the impression that Canada has left the Claimant's submissions on that case unaddressed. Canada has provided its views on why the majority Decision in that case is of little use to this Tribunal in its written pleading, and I mentioned them again yesterday. I referred to the Tribunal to Canada's Reply Memorial at Paragraphs 138-142.

However much the Claimant may wish it was, this case is not a Renco do-over.

Second, the Claimant this morning argued that tolling must be brought into NAFTA because otherwise a claim could not be heard after annulment. That is simply wrong. In a NAFTA case that's submitted to arbitration under NAFTA and the ICSID Convention, the Convention and Rules will apply, except to the extent modified by Section B -- that's set out in NAFTA Article 1120(2).

As I'm sure this Tribunal is aware, the ICSID Convention and Rules address what happens in the

event of an annulment. Under the Convention Article -- Article 52(6): "If an award is annulled, the dispute shall, at the request of either Party, be submitted to a new tribunal, and, in turn, Rule 74 governs the resubmission of a dispute after annulment." As many cases have confirmed, in the resubmitted dispute, the Claim is confined to the scope of the Claim as originally submitted. NAFTA Section B provides a clear and unambiguous time limitation on claims.

The Tribunal should apply the Treaty as written and dismiss this Claim for lack of jurisdiction. Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you. Let me give the floor to the Claimant now.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

MS. FRIEDMAN: Thank you, Madam President.

Before the break, Mr. Shore asked if WCC still retains a legacy investment even though it transferred the underlying investment itself in bankruptcy. So I'm going to start my rebuttal with a response to his question.

WCC still had a legacy investment despite the transfer of Prairie in bankruptcy, and the reason for this is that WCC had a legacy investment Claim on July 1, 2020, because it owned the investment on the date of the Measures. It doesn't matter what happened after. What the legacy investment clause does is it preserves those Claims that existed on July 1, 2020.

The investor has a legacy investment Claim if, as of July 1, 2020, it would have been protected under the NAFTA. And that is what is meant by the "in existence" language for purposes of 14-C(6).

And to determine what is protected by the NAFTA on July 1, 2020, one must have acquired an investment between 1994 and the 2020, must have owned and controlled the investment on the date of the breach, and must have suffered losses due to the breach.

So a sale post-Measures won't affect the fact that the investor still had the Legacy Claim because, as of July 2020, they will have satisfied those requirements.

Now, the Tribunal has a difficult task ahead

of it. The Tribunal has to decide for the first time what is meant by a legacy investment Claim -- the legacy Claim investment provision under the USMCA.

There's no precedent for the Tribunal to look at. And in the face of this difficult task, Canada has not provided the travaux which could shed light on what Annex 14-C(6)(a) means, but what the Tribunal does have is decades of NAFTA jurisprudence. That jurisprudence has repeatedly confirmed that what matters in determining NAFTA protection is who held the investment on the date of the Measures.

And Canada does not dispute that well-founded principle and USMCA Contracting Parties knowingly incorporated that well-founded principle into the USMCA including into 14-C(6) itself.

If the NAFTA Contracting Parties wanted to say "owned or controlled" on July 1, 2020, as Canada argues, they could have said that. But, instead, they used the terms "in existence July 1, 2020," and they incorporated the terms of the NAFTA into that provision.

Claimant's interpretation of the legacy

investment -- of "legacy investment" is the only possible conclusion that reads the annex as a whole. It's the only way that USMCA can protect against prior acts as required by Article 14(2)(3), and it's the only way that it can protect against expropriation which is required by the fact that the NAFTA is incorporated into 14-C(1).

The Tribunal, therefore, should adopt the only interpretation of the Legacy Investment Claims Provision that reads the entire provision in its whole consistently and does not leave out key terms of that provision.

Mr. Rubinstein will conclude with some further remarks.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MR. RUBINSTEIN: I only have one point to address. This morning we were speaking about the similarity of the Claims that were included in the three different Notices of Arbitration, and perhaps this states a point that is already obvious. I mean, but in the Tribunal's assessment of whether the Claims are sufficiently similar to one another in order to

facilitate or permit the tolling of the Limitations Period during the pendency of the earlier arbitral proceedings, that would have to be assessed on a claim by claim of basis, and Canada has put particular focus on the Expropriation Claim.

And while we submit that the Expropriation Claim is timely and is subject to tolling because the predicate of that Claim covers the same measures and facts that were alleged in the original 2018 Notice of Arbitration, if the Tribunal has any concern about the timeliness of the Expropriation Claim, that would not impact the other Claims, particularly the National Treatment Claim and the Minimum Standard of Treatment Claim that have been in this case since the very beginning.

So that was the only point that I wanted to make, and we want to thank the Tribunal for your questions, and we're happy to answer any additional questions the Tribunal may have.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Do my colleagues have any further questions, either in follow up on those rebuttals or otherwise?

ARBITRATOR LEVINE: Nothing further, just to thank both Parties for their excellent presentations and useful and helpful answers to our questions. Thank you.

ARBITRATOR SHORE: Same for me. Thank you.

PRESIDENT KAUFMANN-KOHLER: Same for me as well.

So, now we could go over to some procedural matters that we need to discuss at this stage.

POST-HEARING MATTERS

PRESIDENT KAUFMANN-KOHLER: We had agreed there would be no Post-hearing Briefs and, indeed, they would serve little purpose because we have heard you now extensively, and we very much appreciated also the answers to our questions. We know there were many questions late yesterday, but it was helpful to us to hear you in this fashion.

So no Post-Hearing Brief. Transcript corrections are already set in PO3 to be due by 31st of May, which seems to be a long time, but for one reason we agreed this, so let's leave it.

Then we would need Cost Statements. We are

in your hands with respect to the time limit. It could be something like mid-June. It has to come after the Transcript corrections of course.

As to practicalities of the Cost Statements, we do not expect cost submissions, in the sense that we know what the allocation, cost allocation rules are, and unless the Parties insist, we don't think we would be assisted by cost submissions.

What we need is Cost Statements, that is a Statement of Costs incurred broken down by category of costs without supporting documentation unless for one reason or another the other side or the Tribunal, -- the other side request it and the Tribunal orders supporting documentation to be produced. So that would really be what the Cost Statements should be.

There's some questions with respect to publication or publicity of these proceedings. The audio/video recording will be uploaded on Box as soon as it is available, and thereafter it will also be posted on the ICSID website. We understood that none of the Parties has raised in the course of this

Hearing an objection to say that anything that was discussed was confidential, so we understand there is no confidentiality issue and the recordings can be posted.

Of course if we misunderstood that, then you would tell us. I'm just running through the different points and then now, of course, I give you the floor.

We are not certain what the rule is under the Procedural Order Number 2, which is the transparency Confidentiality Order on posting of PowerPoint presentation on the ICSID website. We would tend to treat them like submissions which are publishable as opposed to exhibits that are not publishable.

And it also seems that, when a party is sharing the screen during the Hearing, the PowerPoints will appear in the video recording. So we would suggest that they be uploaded on the ICSID website like the other submissions, but, of course, that is a proposal as well.

Unless my colleagues have any additions -- it does not seem to be the case. That is

what we thought we need to put forward to the Parties as this stage. Maybe I should also say that once these additional steps of Transcript corrections, Cost Statements, and publication are dealt with, of course the next step is for the Tribunal to reach a Decision.

In the procedural calendar we have a best-effort deadline that is 24 weeks. We would hope that we can do this earlier, but, of course, you appreciate there are numerous issues and some issues are quite complex. So that is the general framework. We do not think we will need any additional information from the Parties, but one never knows. Maybe when we get to deliberating one or the other issue may come up. But then we would revert to the Parties, but it would really be on a very specific well-defined question that could then be addressed in writing.

Having said this, maybe I turn to the Respondent first for your reactions to this. There's a question of deadline for Costs Statement, and then the question of the publication of the PowerPoints. And any other comments that you may have, of course,

are welcome.

MS. ZEMAN: Sure. Thank you.

First, I'd say there's certainly no issue here with no Post-hearing Briefs. We appreciate that.

On the question of Cost Statements, mid-June seems reasonable to us, particularly given the nature of the statement, that shouldn't be a problem from our perspective. I don't know if you're looking for a particular date. We can 13th -- no, 14th. June 14? We'll put it out there as a proposal. I mean, I think we put our filing deadlines on Wednesdays typically in this case, but we can, you know, somewhere in that week, the 12th, 13th, 14th.

PRESIDENT KAUFMANN-KOHLER: June 13 -- is 13 what you had said?

MS. ZEMAN: 14, initially, the Friday.

PRESIDENT KAUFMANN-KOHLER: 14, yeah.

MS. ZEMAN: Yeah. Subject to the Claimant's views, of course.

PRESIDENT KAUFMANN-KOHLER: Sure.

MS. ZEMAN: And with respect to both questions on publication, I think we will need to

revert to our clients on those questions because -- anyway, we need to consult with them. So we will endeavor to do that and get back to you soon on the question of the PowerPoints, in particular. It's not our typical practice to publish those, although we certainly appreciate that they will be apparent in the video, which will be published.

But, anyway, that is sort of a question of more systemic interest that we will need to run past our clients before giving a final answer on.

PRESIDENT KAUFMANN-KOHLER: When do you think you could revert? Is a week reasonable or not enough?

MS. ZEMAN: Yeah. A week should be fine.

PRESIDENT KAUFMANN-KOHLER: It could be two weeks. I mean, it doesn't matter really. It is just we have a date, and then we know that we need to follow up.

MS. ZEMAN: Yes. May 10 should be fine.

THE PRESIDENT: May 10. Good.

MS. ZEMAN: Yeah.

PRESIDENT KAUFMANN-KOHLER: That concludes

your comments?

MS. ZEMAN: It does, yes, other than to thank the Tribunal and the Tribunal Secretary and the ICSID staff for their close attention and the Court Reporter, -- how could I miss the most important -- for your close attention to our submissions and your very thoughtful question. We appreciate it very much.

PRESIDENT KAUFMANN-KOHLER: And let me turn to the Claimant now.

MR. RUBINSTEIN: Madam President, the proposals that you have outlined are all acceptable to the Claimant, and the June 14 date also is fine with us. I'm trying to think if there is --

MS. FRIEDMAN: We don't have any confidentiality designations in the PowerPoint, and we don't object to it being posted online. That said, if Canada reverts with any concerns, we would defer to that.

PRESIDENT KAUFMANN-KOHLER: Then we will take it from there, yes. Good. Is there anything my colleagues would like to add? No?

ARBITRATOR LEVINE: No. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good.

MR. RUBINSTEIN: On behalf of the Claimant, we also want to thank the Tribunal for your time, your attention, and your thoughtful questions. And also we want to thank the Secretariat, the staff, and, of course, the Court Reporter, and so our sincere thanks to all.

PRESIDENT KAUFMANN-KOHLER: Is there anything that Respondent would like to add?

MS. ZEMAN: No. I think we are all set here. Thanks.

PRESIDENT KAUFMANN-KOHLER: For the sake of the record, I should ask, however, whether you have any comments, complaints about the conduct of proceeding so far, be it the written phase or the Hearing? From the Respondents?

MS. ZEMAN: We do not.

PRESIDENT KAUFMANN-KOHLER: Thank you. On the Claimant's part?

MR. RUBINSTEIN: We also do not.

PRESIDENT KAUFMANN-KOHLER: Good. Then it

remains for the Tribunal now to thank you, thank, of course, the Court Reporter, the ICSID Secretary for the hosting this online Hearing, thank the Party representatives, whom we don't see but who are there and listening. So we know it's important -- it's important to us that they are present because it shows to us that it is a case that is important to them.

And then, of course, thanks to Counsel for very helpful presentation, both in terms of the Written Pleadings and over these two days. We very much appreciated how you engaged with our questions. It does assist us a lot in understanding the issues and really getting to a good -- getting a good grasp over the dispute and the matters that we now need to decide.

So, having said that, I would like to wish everyone a good and well-deserved weekend, and we can adjourn this Hearing. Goodbye to everyone.

(Whereupon, at 1:04 p.m. (EDT), the Hearing was concluded.)

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