INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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

HEARING ON BIFURCATION

Thursday, September 24, 2020

The hearing in the above-entitled matter came on at 10:00 a.m. (EDT) before:

MRS. JULIET BLANCH, President

MR. JAMES HOSKING, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

ALSO PRESENT:

On behalf of ICSID:

MS. VERONICA LAVISTA
Secretary of the Tribunal

Realtime Stenographer:

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ALSO PRESENT:

On behalf of the Claimant:

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MR. MICHAEL SNARR
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MR. JEREMY COTTRELL

APPEARANCES: (Continued)

On behalf of the Respondent:

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MS. KRISTA ZEMAN
MS. MEGAN VAN DEN HOF
MS. ALEXANDRA DOSMAN
MR. MARK KLAVER
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT BLANCH: Good morning, and good afternoon, everybody, to the Hearing to hear Canada's Request for Bifurcation of this Hearing.

Before we start, you should have all received Ms. Lavista's email concerning that the Tribunal is admitting RLA-042 on to the record, but that we are also giving the Claimant up to the end of next week to make any further comments in a post-hearing notes, if it so desires.

So, in addition to that, first speaking to the Claimant, is there anything else that you want to raise before we start with the presentation from each Party?

MR. FELDMAN: Just to thank the Tribunal for convening today in these unusual circumstances, and sorry to interrupt some people's afternoon and maybe evening. I don't know where all of you are. But apart from an expression of gratitude, I have nothing else.

PRESIDENT BLANCH: We all find it a pleasure to be here to listen to the Parties.

Is there anything from the Respondent before we start with the Submissions?

MR. DOUGLAS: No. Just on the case, thank you to the Tribunal for admitting it. And apologies; it is not our customary practice to admit the Authorities at such a late stage. It did come on the--was made publicly available yesterday, so we thank the Tribunal and would--I guess our only word of caution is with respect to the post-hearing note. We just wanted to ensure that the note would be restricted to a comment on the case alone and nothing further.

PRESIDENT BLANCH: That is exactly the intention of the Tribunal. So, just to clarify, so everybody--any post-hearing note must be limited just to comments on that specific case that has now been admitted.

On that basis then, even a few minutes early, I propose we start with Respondent's presentation. We all have the PowerPoint that was helpfully circulated an hour ago pursuant to the Procedural Order. That's why I invite the

Respondents.

Also, just one point, insofar as there is anything confidential, can you ensure that you notify us of confidentiality to enable us to put in place any restrictions before you continue? But on that note, over to the Respondents.

MR. DOUGLAS: Thank you, Arbitrator Blanch.

Maybe just one quick moment to get ourselves set up. We had arranged ourselves maybe to just do some introductions around the table, but I can appreciate why that might be a bit cumbersome, just given the virtual setting in which we find ourselves, but you'll see here the team and the camera will focus on me in just one moment.

PRESIDENT BLANCH: If I can make one further comment, just before we start. We've agreed as a Tribunal that we are not going to raise questions during the course of each Party's presentation mainly because, with a virtual hearing, it is not always convenient to be able to ask questions during the course. So, please don't think we are not interested in what you have to say, and we will be raising

questions at the end of each Party's presentation.

MR. DOUGLAS: Thank you for that clarification.

(Comments off microphone.)

MR. DOUGLAS: Well, let me say, as I mentioned, we are new to this type of Hearing virtually, and so if there are any issues that arise over the course of our presentation from a technological standpoint, please stop us and let us know and we'll adjust accordingly. It is a pleasure to be here, and it's nice to meet everybody in a two-dimensional setting, I guess, but nice to meet everybody in person finally.

It is a pleasure to be here. Even for my colleagues; we actually have not seen each other for quite some time. We have all been working remotely from home, but we did come together at the office today. We got special approval for that, so it is nice to see everybody in person here as well.

OPENING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. DOUGLAS: So, with that, I'll start our presentation.

President Blanch, Arbitrator Hosking, and Arbitrator Douglas, Canada has raised four jurisdictional objections pursuant to Articles 1101, 1116, and 1117. Canada also maintains that the Claimant's Claim under Article 1102 is inadmissible by virtue of Article 1108. We will review each of these objections, in turn, as they pertain to Canada's Request for Bifurcation.

I will first speak to the legal aspects of bifurcation under the 1976 UNCITRAL Rules. My colleague Megan Van den Hof will then take you through Canada's objections relating to the fact that the alleged breaches predate the Claimant's investment in Canada. Next, my colleague Mark Klaver will discuss Canada's objection that aspects of the Claimant's Claim are time-barred. And, finally, my colleague Alexandra Dosman will address Canada's objection under Article 1108.

Canada has an hour and 30 minutes for its presentation. I do not think we will be that long, and I was going to invite the Tribunal to ask us questions at any point in time, but if the preference

is to reserve questions for a later point in time, we are happy with that approach as well. But, of course, if something strikes you in a moment, please do not hesitate. We are happy to address your questions.

So, let me spend a few minutes discussing the legal aspects underpinning Canada's Request for Bifurcation. Under NAFTA Article 1102, Claimants are empowered to choose the arbitration rules that will govern their claim. The Respondent State has no choice in the matter.

In this case, the Claimant elected the 1976 UNCITRAL Rules. Article 21(4) of those Rules addresses the bifurcation of jurisdictional questions. Both Parties agree that Article 21(4) creates a presumption in favor of bifurcating jurisdictional questions because, unlike other Arbitration Rules, Article 21(4) states that, as a general rule, Tribunals should bifurcate jurisdictional questions.

While Canada agrees that the Tribunal retains discretion under Article 21(4), that discretion is fettered. The starting point of this Tribunal's analysis must be that jurisdictional

questions raised by Canada should be heard in a bifurcated proceeding.

With respect to questions of admissibility--and here I'm talking about Canada's objection under Article 1108--there is no presumption because the Request for Bifurcation is being made under the Tribunal's general powers granted by Article 15(1) of the 1976 Rules.

In both instances, though--that is, for both jurisdiction and admissibility objections--the Parties agree that the Tribunal should consider the three factors enunciated by the Tribunal in Philip Morris. Moreover, both Parties agree that the factors are not a test that must be satisfied. They are simply factors to help the Tribunal determine what is the most fair and efficient way of proceeding in the arbitration.

Now, before looking at the Philip Morris factors, I would like to briefly discuss the meaning of "fairness" and "efficiency."

It would be unfair and inefficient to require the disputing Parties to spend significant

resources litigating claims over which the Tribunal has no jurisdiction or which are inadmissible. And let me be clear about what I mean by "resources."

This is not just about costs. If the proceedings are not bifurcated and the Tribunal, nonetheless, ultimately decides that it has no jurisdiction or that claims are inadmissible, an award of costs at the end of the proceedings will not make Canada whole.

In a case such as this one, one that challenges the Measures of a province, significant time and resources are expended at both the federal and provincial levels that will not be captured in a Costs Award. In addition to requiring extensive federal and provincial engagement, this case touches on three separate Ministries in Alberta: the Ministry of Jobs, Economy, and Innovation; the Ministry of Energy; and the Ministry of Environment and Parks.

The level of dialogue, meetings, collection of documents, review of materials and briefings to various levels of Government that go into a case like this one is extensive. However, a Costs Award will

only capture legal and administrative fees. That is all. It will not capture the significant public resources that will be diverted and expended defending the Merits.

Fairness and efficiency is, thus, not just about costs. It is about not forcing a State to litigate the Merits of a claim when the State may not even be subject to the jurisdiction of the Tribunal or when claims are inadmissible. It is Canada's submission that, under the 1976 Rules, the appropriate course is for a Tribunal--the appropriate course for a Tribunal is generally to conduct preliminary proceedings on jurisdiction and admissibility challenges. This permits the Parties to fully address the issues upfront and, if jurisdiction or admissibility is lacking, avoids having to spend significant public resources defending the case on the Merits.

With those thoughts in mind, I would like to turn to the three Philip Morris factors. Canada maintains that if an objection satisfies each factor, then the most fair and efficient way of proceeding in

the arbitration is to have the objection heard in a preliminary phase. So, let us look at the first factor, which examines whether an objection is prima facie serious and substantial.

In its response to Canada's request, the Claimant writes at Footnote 6: "The determination of whether an objection is prima facie serious and substantial is not intended to prejudge the preliminary objections." Canada agrees with this statement.

The Tribunal's role at this stage is not to prejudge Canada's objections. However, the first factor will require the Tribunal to, at some level, evaluate Canada's objections. The question is: At which level?

Now, not many NAFTA Tribunals operating under the 1976 UNCITRAL Rules have been asked to bifurcate proceedings. However, in the four cases where they have been asked--and this includes the case RLA-042 that was filed last night, which brings the cases up to four that have been asked to bifurcate--each has found that an objection is prima

facie serious and substantial when it is not frivolous or vexatious.

Outside of the NAFTA context, Investment Tribunals under the 1976 Rules have also agreed that the standard is "frivolous or vexatious," and these cases are listed in Canada's Reply at Footnote 8. The Claimant does not offer an alternative standard, but argues that the frivolous or vexatious standard is too low of a bar. In support of its argument, it cites in its Rejoinder the Gran Colombia, Glencore, and Red Eagle Cases. However, none of those cases are NAFTA cases, and none of those cases were decided under the 1976 UNCITRAL Rules.

Canada maintains that the frivolous or vexatious standard should be maintained in this case for two reasons: First, applying a different standard would be a deviation from the case law under the 1976 Rules. While there is no binding precedent, it is important to all future disputing parties, Claimants and Respondent States alike, to have consistency. If this Tribunal were to apply a different standard, that consistency would no longer

exist and would create ambiguity in future cases.

The second reason is that a higher standard than frivolous or vexatious would not comport with the presumption in favor of bifurcation under the 1976 Rules. Requiring a higher standard would be inconsistent with the language that the Tribunal should bifurcate.

For these reasons, the frivolous or vexatious standard is the correct standard to apply because it strikes the right balance between ensuring that the Tribunal only hears the case on the Merits once the jurisdiction and admissibility of claims have been established and does not delay its consideration of the Merits to hear frivolous or vexatious preliminary objections.

Regardless, all of Canada's objections far surpass the frivolous or vexatious standard. Accordingly, even if a higher standard were applied, all of Canada's objections would meet that higher standard as well.

Let me turn to the second factor. The second factor looks at whether an objection can be

decided by the Tribunal without prejudging or entering the Merits. In its response to Canada's Request for Bifurcation, the Claimant appeared to suggest that the second factor cannot be met if a jurisdictional or admissibility objection raises complex legal or factual issues. But in its Rejoinder, the Claimant clarified that Canada's reading was not correct and titled one of its headings "Overlap, Not Complexity" defines the second factor. Both Parties, thus, agree that complexity is not a factor for the Tribunal to consider when deciding whether to bifurcate the proceedings.

Now, the Claimant uses this term "overlap," which is not the language used in the second Philip Morris factor. The language there is "prejudge or enter the Merits." In other words, will the Tribunal be required in a bifurcated proceeding to make a determination on the Merits of the Claimant's substantive 1102 and 1105 claims? This is not strictly a question of overlapping evidence.

In many cases, some of the same evidence will need to be examined by the Tribunal when deciding

jurisdictional or admissibility objections and when deciding the Merits of the claim. This not a sufficient reason to avoid bifurcation. This was precisely the point made by the Tribunal in the Lighthouse Case, which I'm hoping will appear on the screen. But let us know if you can't see it.

The Tribunal wrote: "The Tribunal believes that to address these issues, it may not have to enter into a full array of facts pertinent to the Merits. While the Tribunal may have to engage with some factual evidence, it is not sufficiently convinced that significant issues involved in the Claimant's substantive claims would have to be determined." That is the standard: would significant issues involved in the Claimant's substantive claims--that is, 1102 and 1105--have to be determined when deciding Canada's objections.

And you can take it down, please. Thanks.

As will be discussed when we proceed through each of Canada's five objections, we certainly do not think that is the case.

Members of the Tribunal, just a quick

question.

Our visual changed when we put up our demonstrative. Arbitrator Blanch, we had you in prime view, and you're now not there. I just want to make sure that you can still see me.

PRESIDENT BLANCH: I can see you, and it was very easy to read the demonstrative. That came up nicely on the screen. So, thank you.

MR. DOUGLAS: Good. We are wiping our brows. Glad it worked out.

Let me turn, lastly, to the third factor. The third factor examines whether an objection would, if successful, dispose of all or any essential part of the claims raised. The Claimant contends that, unless an objection--unless an objection will end the overall dispute, the third factor cannot be satisfied.

The Claimant agrees that, out of Canada's five objections, three would each independently end the overall dispute. So, the dispute over the third factor centers on only two of Canada's objections: Time bar and Article 1108.

Now, the Claimant argues that neither of

these objections should be bifurcated because neither would end the overall dispute. But this is yet another instance where the Claimant misapplies the factors in Philip Morris. The third factor is satisfied when an objection would dispose of an essential part of the claims raised. It need not end the overall dispute. This is especially the case under the 1976 Rules where there is a presumption to bifurcate jurisdictional objections.

As my colleagues will explain, both the time bar and the 1108 objections would independently dispose of an essential part of the claims raised.

And, with that, I will turn things over to my colleague, Megan Van den Hof, unless, of course, the Tribunal has any questions.

PRESIDENT BLANCH: Let me just check.

James, do you have any questions at this stage?

ARBITRATOR HOSKING: Nothing now. Thank you very much.

MS. LAVISTA: There seems to be another call-in user, if they could identify themselves.

MS. VAN DEN HOF: Sorry. This is Megan Van den Hof from the Government of Canada who's just connected.

MS. LAVISTA: Thank you. Sorry for the interruption.

PRESIDENT BLANCH: Zach, did you have any questions you wanted to raise at this stage?

ARBITRATOR DOUGLAS: I will save them up.

PRESIDENT BLANCH: In which case, over, Ms. Van den Hof, to you.

MR. DOUGLAS: Thank you.

PRESIDENT BLANCH: Ms. Van den Hof, have we lost you?

MS. VAN DEN HOF: I'm still here. Just moving to our chair.

PRESIDENT BLANCH: Excellent.

MS. VAN DEN HOF: Is the audio working right now?

PRESIDENT BLANCH: Very clear. Beautiful.

MS. VAN DEN HOF: Great. Thank you.

Thank you, Mr. Douglas. I'll begin now.

President Blanch, Arbitrator Hosking, and

Arbitrator Douglas, Canada has requested that the Tribunal hear its three jurisdictional objections arising out of the fact that the Claim predates the Claimant's investment in Canada in a preliminary phase.

The temporal scope of the Tribunal's jurisdiction begins when the Claimant became an investor of a Party. The Claimant became an investor of a Party and acquired its Canadian investment in March 2019. As a result, its Claim has three jurisdictional defects.

First, the Claimant was not an investor of a Party at the time of the alleged breaches, as required by NAFTA Articles 1116(1) and 1117(1).

Second, the Claimant and its enterprise could not have incurred damage arising out of the alleged breaches as required by Articles 1116(1) and 1117(1).

And, third, the Challenged Measures do not relate to the Claimant or its investments as required by Article 1101(1).

The Claimant argues that these objections

must stand or fall together. This is not true. Canada's objections are based on distinct requirements of NAFTA Chapter Eleven that the Claimant has not satisfied. Before I explain why bifurcation is the fair and efficient manner of addressing these jurisdictional defects, I will briefly summarize the simple factual basis for Canada's objections for the benefit of the Tribunal.

The Claimant, Westmoreland Mining Holdings LLC, is a new company owned by a former creditor of Westmoreland Coal Company, or WCC. WCC sold its Canadian business to the Claimant in an arm's-length purchase as part of WCC's bankruptcy proceedings. Now WCC is set to dissolve. The Claimant's status as an investor of a Party with an investment in Canada, therefore, began in March 2019. Before that point, it was not a protected investor, and it had no protected investments.

In fact, the Claimant was only incorporated in January 2019. The Claimant and WCC are not the same investor, and the Claimant has not demonstrated otherwise. In fact, immediately after acquiring its

investments in Canada, the Claimant initiated these NAFTA proceedings as a new investor. It submitted a waiver and consent as required under NAFTA Articles 1121 and 1122 in order to bring this new claim. Taking the Claimant at its word, it is a new investor of a Party distinct from WCC.

However, the proceedings initiated by the Claimant challenge alleged breaches that occurred far before its decision to acquire WCC's Canadian business. Essentially, it is trying to bring a claim for alleged breaches and damages that occurred in relation to a different investor and that investor's investments. This is impermissible.

The Claimant mischaracterizes Canada's position when it alleges that Canada's legal argument is that "an investor is not entitled to restructure its holdings in any manner". Canada's position is based on the particular circumstances of this case, where the Claimant is not the same entity as WCC, it has different ownership, and it does not act on behalf of WCC. This is not a situation where one investor simply restructured its holdings through a bankruptcy

process.

Because each of Canada's jurisdictional objections relates to distinct requirements of NAFTA Chapter Eleven, I will address the application of the Philip Morris factors to each objection separately. The application of these factors to Canada's objections demonstrates that hearing them as a preliminary manner will be fair, efficient, and consistent with a presumption in favor of bifurcation. I will demonstrate that each of Canada's objections are serious and substantial.

As these objections arise out of the Claimant's acquisition of its investments in 2019, they are completely distinct from the Merits of the Claimant's Claims, which concern the treatment of WCC in 2015 and 2016.

With respect to the third Philip Morris factor, the success of any of Canada's three objections will resolve the Claim in its totality. The Claimant agrees that, if Canada is correct, the entire claim is outside of the Tribunal's jurisdiction. In light of the seriousness of Canada's

objections, it would be inefficient and unfair to require Canada to wait until the Merits to potentially resolve the Claim. Because of the Claimant's agreement on this factor, I will not address it further.

Canada's first objection, that the Claimant was not a protected investor of a Party at the time of the alleged breaches, is prima facie serious and substantial. A Tribunal only has jurisdiction when a Claimant can demonstrate that it was protected by NAFTA at the time of the alleged breaches. The Claimant has failed to meet its burden of showing that it meets this basic requirement. Challenging the Claimant's standing to bring its claim on this basis is neither frivolous nor vexatious. NAFTA Tribunals have consistently agreed on this requirement. For example, the Tribunal in B-Mex agreed with both parties in that case that Claimants must establish that they owned or controlled the relevant investment at the time of the treaty breaches. The Tribunals in Mesa and Gallo repeat this requirement.

The Claimant has invited the Tribunal to

dive deeply into the facts of these cases when deciding whether to bifurcate. The general principles laid out in these NAFTA cases do apply in this case, but the level of analysis proposed by the Claimant would normally be conducted when the Tribunal evaluates the substance of Canada's claim. For the purposes of bifurcation, it is telling that, despite its attempts to argue that each case cited by Canada is fact-specific, the Claimant has not pointed to a single NAFTA case where an investor has succeeded in challenging alleged breaches that occurred before the Claimant's decision to invest. This demonstrates the seriousness of Canada's objection.

Instead, the Claimant argues that, because it obtained its Canadian business from another American investor, it is entitled to make a claim under NAFTA Chapter Eleven because of a "commonality of interest". It cites no authority in NAFTA to support its position.

As Canada has explained, NAFTA Articles 1116 and 1117 are exclusive in their focus on the ability of an investor of a Party to bring a claim. For these

reasons, Canada's objection is serious and substantial, and the Claimant has not demonstrated otherwise.

With respect to the second Philip Morris factor, this objection does not enter the Merits of the Claim, so no efficiencies will be gained by hearing it with the Merits.

As we have explained, the facts necessary to understand the Claimant's acquisition of its investments in 2019 are unrelated to those necessary to understand the alleged breaches in 2015 and 2016. In fact, Canada's objection is premised on the fact that the Claimant was not involved in any of the factual circumstances giving rise to the alleged breaches.

In its most recent submission, the Claimant raises that Canada argued in the Merits section of its Statement of Defence that WMH and its investments were not accorded "treatment" under Articles 1102 and 1105. It asserts that Canada's jurisdictional objections overlap with this statement.

However, Canada's statement that WMH has not

been accorded "treatment" simply highlights that WMH's Claim makes no sense because it claims a breach that predates its investment in Canada.

How can the Claimant claim--

(Audio interference.)

MS. VAN DEN HOF: Sorry, I heard a bit of feedback there, but it's gone now.

--that it was owed nondiscriminatory or fair and equitable treatment by Canada in 2015 and 2016, and that obligation was breached, when it did not exist and was not an investor of a Party at the time of that alleged breach?

The absence of treatment is a byproduct of the Claimant making a claim over which the Tribunal has no jurisdiction. The fact that Canada had to point this out demonstrates that, absent bifurcation, these proceedings will lack clarity on a fundamental question.

Canada expects to have to simultaneously defend against two cases in this Arbitration if the proceedings are not bifurcated: One involving Westmoreland Mining Holdings LLC, and its investment

and one involving Westmoreland Coal Company and its investment. Waiting until after the Merits have been argued to have clarity on these fundamental jurisdictional questions would not be a fair or efficient way of proceeding in this Arbitration.

Canada's second distinct objection arising out of the timing of the Claimant's investment is that the Claimant has not made out its prima facie damages claim under Articles 1116(1) and 1117(1). This objection is serious and substantial.

Under NAFTA Article 1116(1), the Claimant may only file a claim on its own behalf for damages that it has suffered by reason of the alleged breach. In this case, the Claimant could not have incurred damage by reason of the alleged breaches because those breaches predate its existence as an investor of a Party. Instead, the Claimant seeks to file a claim for damages incurred by Westmoreland Coal Company. This claim is plainly outside the scope of Article 1116 and outside of this Tribunal's jurisdiction.

Likewise, under Article 1117(1), a Claimant

may only file a claim alleging that the enterprise, which is an enterprise that the Claimant owned or controlled at the time of the alleged breaches, incurred damages arising out of those breaches. The Claimant may not claim damages that were incurred by an enterprise that it did not own or control at the relevant time. This is exactly what the Claimant attempts to do by making a claim for damages incurred by Prairie before that enterprise was purchased by the Claimant. Its claim falls outside the scope of Article 1117 and outside of the Tribunal's jurisdiction.

With respect to the second Philip Morris factor, this objection does not enter the Merits. Determining whether the Claimant has made a prima facie damages case as required at the jurisdictional stage will not require the Tribunal to prejudge the Merits of the Claimant's damages claim.

At the jurisdictional stage, the Claimant must only show that its damages claim is within the scope of what may be claimed under NAFTA Chapter Eleven. The Claimant must show the Tribunal that it

and its enterprise could have incurred the claimed loss or damage by reason of the alleged breach. This is a low bar, but the Claimant has not met it.

By contrast, at the Merits stage, the Claimant would have to demonstrate that any alleged breach was caused--or, pardon me, any alleged damage was caused by the alleged breach and establish the quantum of those damages. Neither of these analyses is necessary to resolve Canada's jurisdictional objection. In fact, these expensive and time-consuming inquiries on the Merits could be avoided if the Tribunal finds that the Claimant's entire damages claim is outside the scope of what may be claimed under NAFTA Chapter Eleven.

Finally, Canada's third objection arises out of the Claimant's failure to establish that the challenged measures relate to Westmoreland Mining Holdings LLC and its investments as required under Article 1101(1). This is a prima facie serious and substantial objection.

Article 1101(1) limits access to NAFTA Chapter Eleven to circumstances where a Challenged

Measure relates to a Claimant and its investment. Where such a connection does not exist, a Claimant does not have access to NAFTA Chapter Eleven.

In this case, the Claimant challenges Alberta's allocation of transition payments to owners of coal-fired generating units in 2016. At that time the Claimant did not exist, had no investments in Canada, and was not an investor of a Party. The required connection between the Claimant and the allocation of transition payments has not been met.

To the extent that the Claimant continues to challenge the 2015 decision to phase out emissions from coal-fired generating units, that measure also does not relate to the Claimant. At the time that Alberta made this decision, the Claimant did not exist, had no investments in Canada, and was not an investor of a Party.

By the time the Claimant made its investment in 2019, Alberta's climate change policies were simply part of the existing regulatory environment in which the Claimant made its investment. For these reasons, Canada's objection under Article 1101(1) is serious

and substantial.

Canada's objection does not enter the Merits of the claim, and resolving it will not require the Tribunal to prejudge the Merits of the Claimant's Claim. The primary facts relevant to the jurisdictional inquiry are that the Claimant became an investor of a Party and acquired its investments in March 2019 and that the challenged measures occurred in 2015 and 2016. It makes sense to conduct the simple inquiry into whether the Claimant has access to NAFTA Chapter Eleven before entering the complex Merits of the Claim.

The Claimant argues that, because Canada's Article 1101(1) objection may require an analysis of the causal effects of the Challenged Measure, it overlaps with the question of whether the Claimant's alleged damages have a causal link to each of the breaches it alleges.

The Claimant ignores that Canada is asking the Tribunal to answer a simple question in a preliminary phase: Does the Measure relate to the Claimant and its investments when the Claimant did not

exist or have any investments at the time of the Measure? The rationale for raising this jurisdictional objection as a preliminary matter is that the Claimant does not have the requisite connection to the merits of the case it pleads. There will be no need to address those Merits if the Tribunal finds that they do not relate to the Claimant because it did not exist as an investor of a Party at the time of the Challenged Measures. Deciding this objection will, therefore, not require the Tribunal to enter the Merits.

And the Claimant itself admits that the legal inquiry under the Merits is distinct from the inquiry under Article 1101(1). As the Tribunal in Apotex II stated, it is "inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven's substantive provisions for the Merit of the Claimant's claims."

To conclude, Canada's jurisdictional objections arising out of the fact that the Claims predate the Claimant's investments in Canada are serious and substantial. In Canada's view, the

Claimant has not met the jurisdictional requirements of NAFTA Chapter Eleven, and its claim should be dismissed in its entirety. The Claimant agrees with Canada that these objections could result in the dismissal of the entire claim.

These objections do not enter the Merits, and addressing them as a preliminary matter will not require the Tribunal to prejudge the Merits of the Claimant's Claim. In fact, regardless of the outcome, bifurcation will provide both Parties clarity on a fundamental question to this Arbitration.

I welcome any questions from the Tribunal on these issues, and otherwise, I will pass the camera over to my colleague, Mark Klaver.

PRESIDENT BLANCH: Just asking, James, do you have any questions at this stage?

ARBITRATOR HOSKING: Not at this stage. I'll save them for later. Thank you.

PRESIDENT BLANCH: And Zach?

ARBITRATOR DOUGLAS: Same. But I recognize that we are going to have a slight logistical problem at the end because we may need to have you all sitting

in the same row and violating Canadian social distancing policy. So, I'm not sure how this is going to work, but just to mark a problem that we may encounter later.

But I will save the questions to the end.

MS. VAN DEN HOF: We will find a way.

ARBITRATOR DOUGLAS: We will find a way.

MS. VAN DEN HOF: Great. Thank you very much.

MR. KLAVER: Before I begin, I would like to confirm that you can hear me all right.

PRESIDENT BLANCH: You're clear.

MR. KLAVER: Okay. Great.

President Blanch, Arbitrator Douglas, and Arbitrator Hosking, thank you for providing us an opportunity to explain why it would be fair and efficient to resolve in a preliminary phase Canada's objections concerning the three-year limitation period in NAFTA Chapter Eleven.

Specifically, the Claimant's Claim against Alberta's decision to phase out emissions from coal-fired electricity generation is outside the

Limitation Period under Article 1116(2) and Article 1117(2).

The NAFTA Parties consent to arbitrate only those claims filed within three years of the date when the Claimant or its enterprise first knew, or should have known, of the alleged breach and loss. NAFTA Tribunals apply this Limitation Period strictly. One finds the relevant dates by, first, identifying the date of the Notice of Arbitration; second, going back three years to identify the Critical Date, which is the cutoff for the Limitation Period; and, third, determining if the date when the requisite knowledge arose happened before the Critical Date.

In this case, the Claimant filed its Notice of Arbitration on August 12, 2019. Going back three years, the Critical Date is August 12, 2016. If the Claimant or its enterprise knew, or should have known, of the alleged breach and loss before this date, then the Claimant is outside the Limitation Period, and the Tribunal has no jurisdiction over the Claim.

Now, one of the distinctive features of this

case is that neither the Claimant nor its enterprise could have the requisite knowledge of any alleged breach or loss.

As my colleague, Ms. Van den Hof, just explained, the Claimant did not become an investor of a party until March 2019. Before that point, Canada owed none of the substantive obligations in Section A of Chapter Eleven to the Claimant or any enterprise owned by the Claimant. Thus, there could be no NAFTA breach in relation to this Claimant or its enterprise before March 2019 when the Claimant became an investor of the Party. The Claimant cannot bring a claim on behalf of a separate investor and its investment as the Claimant attempts to do here.

In any event, even if the Claimant could allege breaches on behalf of WCC and WCC's investment, the Claimant must still meet the Limitation Period. Yet, the Claim against Alberta's decision to phase out emissions from coal-fired electricity generation is outside the Limitation Period. This objection is serious and substantial. The Claimant does not contest that Alberta's 2015 Climate Leadership Plan is

outside the Limitation Period. Instead, it argues it is not challenging that plan; yet, its own claim states otherwise.

The Notice of Arbitration and Statement of Claim unequivocally identifies the Challenged Measure, the alleged breach, and the alleged loss as follows: First, on the Challenged Measure, the Claimant states that Alberta adopted what the Claimant called "the coal phase-out program" in November 2015 through the Climate Leadership Plan.

Second, on the alleged breach, the Claimant alleges that Alberta's coal phase-out program, which it says was adopted in 2015, breached Article 1105 by denying the expectation held from 2014 of earning a reasonable return on the investment beyond 2030.

Third, on the alleged loss, the Claimant states it incurred losses from Alberta's coal phase-out program alleging it curtailed the time horizon for the investments in the mines, reducing their value and accelerating the time for reclamation of the mines.

Accordingly, the Statement of Claim

expressly discloses knowledge of the alleged breach and the alleged loss in November 2015, over three years before the Claim was submitted in August 2019.

Having recognized that it failed to meet the Limitation Period, the Claimant now argues it challenges some other Measure than the 2015 Climate Leadership Plan. It refers in its Rejoinder on Bifurcation to what it calls "Albertan Measures that breached the minimum standard of treatment." Yet, the Claimant refuses to identify the Measure it challenges, even after Canada highlighted this deficiency in the Claim in Canada's Reply on Bifurcation. Instead, the Claimant says: "What the Measure is cannot be answered without an examination of Alberta's action and their impacts on Westmoreland."

The Claimant seems to imply here that it needs disclosure of evidence to know what Measure it is challenging. Yet Claimants are not entitled to use document production as a fishing expedition to identify possible NAFTA breaches. It is truly

extraordinary for a claimant not to identify the Measure that it alleges to violate NAFTA.

In fact, as you can see on the screen shortly, the Claimant has an obligation under Article 18(2) of the 1976 UNCITRAL Rules to identify the facts supporting the Claim and the points at issue. The Statement of Claim must inform Canada and the Tribunal of the essence of the Claim by providing sufficient particularity for Canada to mount a defense and for the Tribunal to be capable of adjudicating the Claim.

If the Claimant is not challenging Alberta's 2015 Climate Leadership Plan but some other Measure that it refuses to identify, then it has not met its obligation under Article 18 of the Rules.

Now, the reason the Claimant cannot identify a different Measure is clear: The 2015 Climate Leadership Plan was Alberta's decision to phase out emissions from coal-fired electricity generation. The Premier of Alberta announced this decision on November 22, 2015, in the Climate Leadership Plan. As you can see on the screen here, the Plan states:

"Alberta will phase out all pollution created by burning coal and transition to more renewable energy and natural gas generation by 2030."

This decision was based on the recommendations of a climate change advisory panel which, throughout 2015, undertook a comprehensive review of Alberta's climate change policy at the Premier's request. Thus, the Claim against Alberta's decision to phase out emissions from coal-fired electricity generation is unmistakably a claim against the 2015 Climate Leadership Plan, and the Parties do not dispute that the Plan is outside the Limitation Period.

The Claimant's attempt to create ambiguity over its own claim is nothing more than an attempt to circumvent NAFTA's Limitation Period. This underscores that Canada's objection is serious and substantial. Moreover, it would not be fair or efficient for the arbitration to proceed to a Merits phase before the Claimant identifies the Measure it challenges and before the Tribunal resolves whether this Claim is outside the Limitation Period.

On the Merits, Canada's Limitation Period objection would not require the Tribunal to prejudge the liability issues arising in this Arbitration in any way. The Tribunal only needs to resolve questions of timing; specifically, the dates when the Claimant or its enterprise first knew of the alleged breach and loss.

Finding the relevant dates here is straightforward. The Tribunal can determine that the requisite knowledge arose in November 2015 because, as I just explained, the Notice of Arbitration states that the coal phase-out program occurred in 2015, violated Article 1105, and caused the alleged losses. Thus, the Tribunal does not need to undertake an intensive inquiry into the effect of the 2015 Climate Leadership Plan. Rather, by reviewing the dates proffered by the Claim itself, the Tribunal can determine that the Claim against Alberta's decision to phase out emissions from coal-fired electricity generation is outside the Limitation Period. The Tribunal can reach this result with efficiency and without prejudging the Merits in any way.

Finally, Canada's Limitation Period objection. Hearing this objection in a preliminary phase could result in a material reduction in the scope of the next phase of the arbitration. The Claimant warns that if Canada prevails in this objection, the Tribunal could still consider the 2015 Climate Leadership Plan as a background fact to the remaining claim. This is a red herring. Taking account of background facts is materially different from adjudicating an alleged NAFTA breach.

The Claimant challenges only two Measures in this Arbitration: First, the Decision to phase out emissions from coal-fired electricity generation and, second, the transition payments.

If Canada prevails with its Limitation Period objection, it would eliminate one of just two Measures alleged to violate NAFTA in this case. This would significantly improve the procedural efficiency of this arbitration.

Recently, the Tribunal in Carlos Sastre decided to bifurcate the proceedings in order to hear the Respondent's objection that certain Claims fell

outside the Limitation Period under the applicable investment treaty. Moreover, as a matter of NAFTA practice, time-bar issues are normally decided as preliminary questions.

In this case, the Claimant has failed to rebut the presumption to hear Canada's Limitation Period objection in a preliminary phase.

I look forward to answering any questions from the Tribunal now or later on, and, otherwise, I will pass the floor to my colleague Ms. Dosman to address Canada's objection under NAFTA Article 1108.

PRESIDENT BLANCH: I'm assuming, James and Zach, you don't have any questions now? I'm assuming correctly.

MS. DOSMAN: Thank you, Mark, and good afternoon and good morning to Members of the Tribunal.

I will address Canada's fifth and final objection, and explain why it should be heard as a preliminary matter.

I'll ask my colleague to pull up the text of NAFTA Article 1108.

This Article lists reservations and

exceptions to various substantive obligations. As you can see in Paragraph 7, the NAFTA Parties agreed that the obligations set out in Articles 1102--that is national treatment--1103, and 1107, do not apply to procurement or to subsidies or grants provided by a Party.

The text indicates that the Tribunal should, first, decide whether the list of substantive obligations even apply before turning, if necessary, to the obligation itself. The Treaty language is telling us that it is appropriate for Article 1108(7) objections to be decided prior to the Merits.

Here the Claimant has alleged that Alberta's allocation of the transition payments is a violation of Article 1102. It is Canada's position that the transition payments are subsidies or grants provided by a party within the meaning of Article 1108(7)(b) and that, therefore, the national treatment obligation does not apply to them.

Of course, we are not here to determine that question today. The interpretation of the scope of the exception is a matter for the parties to argue

when the Tribunal considers the substance of Canada's objection. Instead, I'll turn to an application of the Philip Morris factors to show why this objection should be bifurcated and heard as a preliminary matter.

Canada's Article 1108 objection comfortably meets the first factor, its prima facie serious and substantial. As Canada explains in its Reply at Paragraph 34, Article 1108(7) must be interpreted in accordance with the Vienna Convention on the Law of Treaties, beginning with its ordinary meaning. NAFTA Tribunals considering the exception have rejected any suggestion that it should be interpreted narrowly merely because it is an exception. Indeed, Tribunals have found that the ordinary meaning of terms in Article 1108(7) is broad and not restrictive.

Moreover, the Claimant does not appear to take issue with Canada's suggested dictionary definitions of "subsidy" and "grant," which are a starting point in determining their ordinary meaning. These definitions are set out in Canada's Reply at Page 17, Footnote 62.

Instead, the Claimant focuses on only one disjunctive element in the dictionary definition of "grant" and then goes on to contest that the transition payments, in fact, meet that partial definition. As a factual matter, Canada has demonstrated that its objection is serious and substantial. For example, Alberta's authority to make the payments as grants and its presentation of those payments to the public as grants are highly probative of the Article 1108 question.

I'd like to take the Tribunal now briefly to excerpts from the four-page Energy Grants Regulation, which is Exhibit R-1, under which the payments were made.

The Energy Grants Regulation accords broad discretion to the Alberta Minister of Energy. Under Section 2, the Article--the Minister may, in accordance with this Regulation, make grants to any person or organization in respect of any matter within the Minister's administration.

Section 5 of the Regulation provides that the Minister may enter into agreements with respect to

any matters relating to the payment of grants and that there can be conditions.

The Tribunal will also want to look at the Off-Coal Agreements, or OCAs, as I will call them, which puts the transition payments into effect.

The TransAlta and Capital Power OCAs are substantially similar, so I'm going to ask my colleague to pull up the TransAlta OCA, which is Exhibit C-19.

The OCA sets out the Alberta Government's decision to provide the recipient with payments, subject to certain conditions and obligations.

At Section 3, as you can see, the Province covenants and agrees to pay the transition payments subject to the recipient meeting eligibility conditions and obligations. The eligibility conditions and obligations are set out on the face of the OCAs. They are straightforward agreements signed by the Minister of Energy that set out a decision by Alberta to provide payments to recipients in clearly articulated circumstances.

I'll also note that the OCAs set out

Alberta's determination that it is in the public interest to ensure that no more carbon dioxide and other air contaminants emanate from the combustion of coal after 2030. And that's the first recital of the OCAs, which you can see now on the screen. Thank you.

I took you to these documents because they illustrate the nature of the transition payments. Even a brief look shows that Canada's objection under Article 1108(7)(b)--its position that no national treatment obligation applies because the transition payments are subsidies or grants provided by a Party - is serious and substantial. That satisfies the first Philip Morris factor.

The application of the second Philip Morris factor also supports bifurcation because Canada's objection can be determined without prejudging or entering the Merits.

What are the Merits here? The Claimant summarizes its claim at Paragraph 13 of its Notice of Arbitration and Statement of Claim. It states: "Alberta's scheme to compensate Albertan coalmine operators for the loss of their investments,

to the exclusion of the only American coalmine operator, denied Westmoreland national treatment under Article 1102 and treated the Company unfairly and inequitably, in violation of NAFTA Article 1105."

Those are the Merit questions: Was the Claimant discriminated against because Canadian companies received payments relating to their coalmine assets? Was the Claimant inequitably or arbitrarily excluded from receiving a transition payment?

By contrast, the questions that matter for Article 1108(7)(b) are: Were the transition payments assignments of money by Alberta? Were they sums of money granted by Alberta to support something held to be in the public interest?

In Canada's view, these two sets of questions are distinct. Crucially, determining whether the transition payments are a grant or a subsidy does not require the Tribunal to prejudge or answer the Merit questions of whether other companies received payments for coalmining assets or whether the Claimant was arbitrarily or uniquely excluded.

The Claimant disagrees, arguing that the

Tribunal will need to examine the OCAs under both the 1108 analysis and the Merits, and that Canada's objection under Article 1108 should not be bifurcated as a result.

However, the mere fact that the Tribunal may need to consider the same piece of evidence for the purposes of distinct inquiries does not mean that the Tribunal will be required to prejudge or enter the Merits.

For example, the Claimant argues that the Tribunal will need to look at obligations in the OCAs as well as benefits afforded to Alberta by the OCAs under both the Article 1108 and the Merits analysis. But examining the terms of the OCAs to determine whether the transition payments were assignments of money or sums of money granted in support of something held to be in the public interest does not require any inquiry into the questions of whether domestic companies received payments for their coal assets or into how Alberta decided to allocate those transition payments.

The Claimant goes on to argue that the

Tribunal will need to decide whether the transition payments are "payments for damages or other consideration," in order to determine both questions, the Article 1108 and Article 1102.

As an initial matter, the OCAs expressly state that Alberta had no legal obligation to compensate, which you can find at Paragraph 4(a) of the OCAs.

But more importantly at this stage, resolving the issue of the character of the payments for the purposes of 1108 will not require the Tribunal to prejudge or enter the Merits questions on whether some companies, but not others, received payments in relation to coal assets and of how Alberta decided who was to receive those payments.

In Canada's submission, a more substantial overlap is required. As the Tribunal in Pey Casado concluded: "The existence of some degree of overlap between the evidence relevant for answering jurisdictional questions and evidence relevant for answering questions pertaining to the Merits is not an obstacle to bifurcation. What would be required in

order to join an objection to the Merits is a more substantial overlap such that a jurisdictional question could not be decided efficiently without also ruling on the Merits of the case."

Here, Canada's 1108 objection can be decided efficiently without also ruling on the Merits of the case, and, therefore, it meets the second Philip Morris factor, which leads nicely to the third Philip Morris factor. Canada's Article 1108 objection, if successful, would significantly reduce the scope of the arbitration. The third factor, as you recall, considered whether an objection would dispose of all or an essential part of the claims raised.

This objection would dispose entirely of the Claimant's allegation that the transition payments breached NAFTA Article 1102. This would be a significant narrowing of the scope of the case in that it would eliminate the need for a factually complex, inherently comparative national treatment analysis.

Examples of the types of questions that the Tribunal would not need to answer include: what regulatory regimes apply to the production of

electricity versus the extraction of coal? Does the Claimant compete with the enterprises in its chosen comparator group? Has the Claimant, in fact, identified the correct comparative group?

If Canada's Article 1108 objection is successful, the Tribunal would not need to determine any of those questions.

So, each the factors set out in Philip Morris are present here. Canada's Article 1108(7)(b) objection is serious and substantial, it does not require entering or prejudging the Merits, and it would significantly narrow the scope of this dispute. And, for those reasons, it should be bifurcated and heard as a preliminary matter.

Also, like my colleagues, I am happy to take questions now or at a different point in the hearing, as the Tribunal wishes.

PRESIDENT BLANCH: Am I correct that you are the last person to speak or do we have any more? Are you the last speaker for the Respondent?

MS. DOSMAN: That's right.

There is an echo here.

PRESIDENT BLANCH: Yes, it sounds as it's me. I'm sorry.

Let me turn it over to see if either of my co-arbitrators have questions for Canada at this stage. Let me first start with James.

James, do you have any questions?

ARBITRATOR HOSKING: I do have some questions, Juliet. Since we have the advantage of Ms. Dosman sitting in the hot seat, should we proceed now with asking her any questions that come out of her presentation?

PRESIDENT BLANCH: I think we have concluded completely with the Respondent's presentation, so we can ask all our questions, but, yes, let's start at the end.

MS. ZEMAN: My apologies, President Blanch, a couple of our colleagues here--it is Krista Zeman from the Government of Canada. A couple of our colleagues have lost the connection. We just need a couple minutes to dial back in, if that's all right.

PRESIDENT BLANCH: Of course.

MS. ZEMAN: Thank you.

PRESIDENT BLANCH: When they dial back in, we will hand it over to James to ask his questions.

MR. DOUGLAS: Apologies. We were actually just listening live to our colleague, Alexandra, and we didn't realize the system booted us. So, we are just dialing back in now. Just waiting for one more colleague.

PRESIDENT BLANCH: While we're waiting, what I would suggest is that James ask his questions of Ms. Dosman, and then, Zach, if you do, if you have any questions for Ms. Dosman, and then we will revert to the other speakers and ask all our questions per speaker.

MR. DOUGLAS: That sounds reasonable. I think we are all online now. Apologies for the delay. Let's proceed.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HOSKING: Right. Well, good morning, Ms. Dosman. A question arises out of Mr. Douglas' comments at the beginning but impacts the presentation that you made.

My understanding is that Canada acknowledges

that the Article 1108 objection does not fall within Article 21(4) of the UNCITRAL Rules and that the Tribunal is being asked under Article 15 to exercise its discretion to bifurcate; is that right?

MS. DOSMAN: That's right. There is no presumption in favor of bifurcation on this objection. Nevertheless, we think it meets the three Philip Morris factors.

ARBITRATOR HOSKING: So, that really was my question: Should we apply those same three Philip Morris factors to the analysis on this particular objection or is it a different prism that we should look at the question through?

MS. DOSMAN: No. The Parties agree that this is the correct approach to assess whether the Article 1108 objection should be bifurcated.

ARBITRATOR HOSKING: Okay. That is helpful.

So, then, just turning to a couple of other questions on this objection, you've noted the reliance on the Off-Coal Agreements and that the Parties can--or the Tribunal can review the Off-Coal Agreements to analyze what constitutes a grant or a

subsidy.

My question is: Isn't it likely that we need to go beyond those agreements to look at the evidence of the intent behind the agreements, the negotiations, whatever ministerial decision-making processes were conducted and even potentially the impact of the allocations on the specific alleged local investors? So, isn't it a potentially larger scope of inquiry than was suggested in your presentation?

MS. DOSMAN: Thank you for the question, Arbitrator Hosking.

It's our view that the OCAs speak for themselves; so, when it comes to the negotiation history, et cetera, the record of what was agreed should be the primary, indeed, the only source of authority for Article 1108, at least.

When it comes to the question--you mentioned the question of the allocation of the transition payments, and I think what's important for 1108 is to bring it back to the ordinary meaning of grants and subsidies. So, in the world of grants and subsidies,

what matters is: Was there an assignment of money, was there money granted to support something that was held to be in the public interest. So, we actually don't get into the questions that you mentioned about how Alberta decided to allocate those transition payments as it did or why it chose to provide transition payments to certain recipients and not to other companies.

So, in our view, those are distinct, and, although the Off-Coal Agreements are relevant to both, you would be looking at the Off-Coal Agreements for different purposes.

ARBITRATOR HOSKING: Is my understanding right that, in looking at the Off-Coal Agreements, to use your phrase, it's the character of the payments is the only legal determination the Tribunal would have to make to address the jurisdictional question?

MS. DOSMAN: Yes. Do the transition payments fall within the exception agreed by the NAFTA Parties for subsidies or grants provided by a Party.

ARBITRATOR HOSKING: And isn't it likely that--possible that those, the character of those

payments does, to some extent, overlap with the two substantive Merits Claims that the Claimant is making, and that, for example, the character of the payments may be relevant to the 1102 treatment claim?

MS. DOSMAN: So, you're saying whether it's a subsidy or grant would be relevant to the Article 1102 analysis?

ARBITRATOR HOSKING: Yes. Wouldn't we have to look at how--what the actual effect of the payment was in deciding what the character of the payment was so that we then are pretty close to looking at the same issue in the context of the Article 1102 claim?

MS. DOSMAN: Yeah, I mean, the Article 1102 claim is much more searching, you know, as the Tribunal knows, and it's our view that no--I mean, I guess, character can be--perhaps that was a choice of a word that was a little bit too broad because it's really coming back to the VCLT analysis of first determining the scope of subsidy or grant and the definitions that we have provided are, I think, quite clear, and then applying that definition to the Off-Coal Agreements; so--or the transition payments.

So, we submit, that all the lead-up to the Off-Coal Agreements, any subsequent things are not relevant to that initial core gateway question of whether they are subsidies or grants.

ARBITRATOR HOSKING: Okay. Those are my questions. Thank you very much.

MS. DOSMAN: Thank you.

PRESIDENT BLANCH: Zach, do you have any questions of Ms. Dosman?

ARBITRATOR DOUGLAS: I don't. Actually, working backwards might be a little bit difficult for my other questions. I probably need to start with Mr. Douglas and see if either he wants to answer or delegate. But I think working backwards might be rather complicated.

PRESIDENT BLANCH: Well, when we finished--this is terribly awful to say, "We are finished with you," Ms. Dosman, but we are finished asking you questions.

We will then move to Mr. Douglas.

Can I just clarify, then, just following through the questions from Mr. Hosking, it seems to me

there are two questions: One, what is the ordinary meaning, or what is the appropriate definition of "grants"; and then the second question is, looking as the TPSs, do they come within that definition of "grants"?

Would you agree those are the two steps for the Tribunal?

MS. DOSMAN: I would, except that I would add "subsidy" also at both stages. So, what is the meaning of "grant" and "subsidy" and then applying them to the transition payments, yes.

PRESIDENT BLANCH: Sorry. I was using shorthand, and you are absolutely right.

MS. DOSMAN: Yes.

PRESIDENT BLANCH: Perfect.

In which case, then, let's jump forward to Mr. Douglas. Thank you very much.

MS. DOSMAN: Thank you very much.

PRESIDENT BLANCH: Thank you very much, Ms. Dosman, for your time. It was very helpful.

James, are you happy if we start with Zach with Mr. Douglas?

ARBITRATOR HOSKING: Very happy.

MR. DOUGLAS: My technology is apparently a bit dated so I'm just going to use my colleague's. Thank you. Yes.

Arbitrator Douglas?

ARBITRATOR DOUGLAS: Let's go back to the very beginning and first principle of what test to apply. Both Parties place a lot of reliance on Philip Morris. We all know that Investment Treaty Arbitration, if a case applied--or a decision is applied twice, then it has almost canonical significance and is beyond criticism, but I'm a little bit interested as to what you said about whether the test was really frivolous or vexatious, because it might be said that if that's what the Tribunal had in mind, then it would have formulated that as the first limb, whether or not the objection is frivolous or vexatious. But it didn't do that. We will come on to what it did in a minute.

But some Tribunals have said subsequently--I take your point on NAFTA--but other Tribunals have said subsequently that it needs to be something more

than frivolous or vexatious.

MR. DOUGLAS: Yes. And so--I mean, interestingly the Philip Morris factors are enunciated under the 2010 UNCITRAL Rules too. As I mentioned, the factors themselves are some things for the Tribunal to consider, and the enunciation of the first factor being serious and substantial is one phraseology that is often used.

But in the NAFTA context, and Glamis is a good example because Glamis is also cited as another case of iterated factors, very similar to Philip Morris and often it's cited as being the principal factors when deciding bifurcation. But it determined that the first factor, serious and substantial, is frivolous or vexatious.

And as I mentioned, all other NAFTA cases operating under the 1976 Rules have applied the frivolous or vexatious standard. So, if this Tribunal applied a different standard in this context under these Arbitration Rules, it would be the first NAFTA Tribunal to do so.

And I think, you know, for Canada, who, as a

Respondent State in these disputes and as well for the United States and México, it is important for us to have consistency moving forward because if there is no consistency under the 1976 Rules and the standard deviates--and I recognize other cases have found that, but none of those cases were under the 1976 Rules--and if there is a deviation that creates inconsistency and ambiguity in future cases, which is the reason why we believe that the frivolous or vexatious standard should be applied here.

We recognize that it's not a high standard. It is quite a low standard, but it also comports with a presumption to bifurcate jurisdiction under the 1976 Rules.

ARBITRATOR DOUGLAS: Okay. So, wouldn't it be more coherent, then, to say you don't agree with the first limb of Philip Morris?

MR. DOUGLAS: I think we interpret the term "serious and substantial" to mean "frivolous or vexatious." But I don't know whether that is mincing words or not, but our view is that the frivolous or vexatious standard is an interpretation of those

words, and that's what other Tribunals have done and that's what we have done in our Pleadings.

ARBITRATOR DOUGLAS: Okay. Well, just to probe this a little bit further, I mean, assuming we are against you on that, assuming that we interpret those words to mean something more than "frivolous or vexatious" as some Tribunals have interpreted, what does it mean? This is where I confess to run into serious difficulty. I've got no idea what "prima facie serious and substantial means."

I could think about it for a week. I could ask 10 different people and I suspect I would get 10 different answers. So, what does it mean? It clearly doesn't mean on the balance of probabilities because that is deciding the objection on its merits, so I assume for the present purposes that it means something more than frivolous and vexatious.

What does it mean?

MR. DOUGLAS: I would say "prima facie" means "on its face." So, if you look at something is a very serious question being posed. So, I mean, in this case, I think for all of our objections, you

know, we have cited authorities and case law, time bar's a very clear example which has been consistently bifurcated in the NAFTA context.

The Sastre case, which we filed last night, bifurcated on a very similar issue to the one that Megan Van den Hof spoke of earlier this morning. And in 1108, as my colleague pointed out, the very language instructs the Tribunal that 1108 is an issue that should be discussed and decided first.

So, I think on the face of all these objections, if you look at them, there is a weight to them. There is some probative value to them that meets the standard.

ARBITRATOR DOUGLAS: Okay. Does it cause you any concern--this may be a slightly abstract question--that the Philip Morris test doesn't distinguish between questions of jurisdiction and other questions that may have a preliminary character, because the whole reason we get excited about jurisdictional questions is that until we have positively decided that we have jurisdiction, we are essentially--we are exercising Kompetenz-Kompetenz,

and there's a fragility there.

We may go through the whole case on the assumption that we have jurisdiction only to discover right at the end of the case, after exercising jurisdiction on that Kompetenz-Kompetenz basis, that actually we don't have jurisdiction after all. So, there's a particular sensitivity to jurisdiction, but the Philip Morris Tribunal doesn't make any distinction there.

Do you support that? Is there a problem?

MR. DOUGLAS: Yeah, let me maybe speak to a couple points. I mean, I think there's a starting point that both Parties have agreed, at least with respect to Canada's 1108 objection, that the Philip Morris factors are factors for the Tribunal to consider when deciding whether to bifurcate that. And the Philip Morris case itself applied those criteria to an admissibility question. And so did the Resolute Tribunal, for example, agree that these factors apply to admissibility objections as well.

But in terms of the weight or the seriousness of jurisdiction versus admissibility, I

would say they are the very same weight. Article 1108 is very clear that Article 1102 does not apply to subsidies or grants. It makes 1108 a very credible candidate to be heard as a preliminary matter. The NAFTA instructs the Tribunal that that is an issue that must be decided first before turning to 1102.

So, we would argue that arguing the Merits of 1102 and 1108 at the same time is not procedurally fair and it's not an efficient way to proceed in the arbitration.

ARBITRATOR DOUGLAS: Okay. A couple of questions just on the relationship between the objections. I hope these are questions that are to you, but if they're not, no doubt you'll tell me.

The first three--the Claimant has a point, doesn't it, that the first three are very interlinked, so that if--I'm trying to think--is it conceivable that you would fail on the first and succeed on the second or the third, for example?

MR. DOUGLAS: With these, are we turning to my--I'm happy to address these questions, but they are seeming to fall into the wheelhouse of my colleague,

Megan Van den Hof. Did we want to--by "factors" are you referring to Canada's first three jurisdictional objections?

ARBITRATOR DOUGLAS: That's correct. So, it's true that it's probably within her domain, but that's the only question I'm going to ask, basically just the relationship of the three.

And, in particular, I'm thinking aloud, whether it is conceivable, if you fail on the first, that you could succeed on the second or third. And if it's inconceivable, then obviously that--that may have a bearing on which we choose and on the rest of them.

MR. DOUGLAS: Okay. Well, at the risk of being slapped on the wrist by my colleague, who may want to clarify, I mean, our view is that they are three independent objections. Each are based on different aspects of the language of the Treaty, and I don't think there is any room to argue that, for example, 1101 and the language of 1101, which is sort of the gateway to NAFTA, if that is satisfied, then the language of 1116 and 1117 is automatically satisfied.

I don't think that's the case. The Treaty uses different language, and there are three different objections that we have made based on that language. And so, it is an exercise of the Tribunal having to consider each one of those objections independently. Granted, they all emanate from similar facts and the facts that alleged breaches predate the Claimant's investment in Canada and predate the Claimant's very existence as an investor of party, but a commonality of facts doesn't make them sort of rise and fall together. The Treaty text must be interpreted independently, individually, one by one.

ARBITRATOR DOUGLAS: Just to be crystal clear on the fourth one then, the fourth one is premised upon you not succeeding on the first, isn't it?

MR. DOUGLAS: Now, Arbitrator Douglas, you're going to start getting me in trouble with another colleague, Mr. Klaver, but, yes, it is. It is premised. The first three objections must be established or examined before the Limitation Period.

ARBITRATOR DOUGLAS: Okay. Those are my

questions, thank you very much.

PRESIDENT BLANCH: James, over to you. I think you might be on mute.

ARBITRATOR HOSKING: I'm off now only to say that, actually, Zach's questions were my questions, but he put them much more eloquently. So, I have nothing further.

ARBITRATOR DOUGLAS: Complement your previous ones with my questions as well. So, something is going on there.

MR. DOUGLAS: Glad to see we're all getting along.

PRESIDENT BLANCH: I'm going to take credit from both of you and say that you asked all the things that I wanted to ask more eloquently than me. So, I think that ends the questions from the Tribunal.

James, do you have any questions for Mr. Klaver or Ms. Van den Hof?

ARBITRATOR HOSKING: The short answer is yes.

MR. DOUGLAS: I will ask Ms. Van den Hof to come up here. Just give us one moment to reorganize

ourselves.

ARBITRATOR HOSKING: Good morning, Ms. Van den Hof. I'm really just going to sort of piggy-back on the exchange that Mr. Douglas just had with your colleague. It is really just a follow-up on the question--I understand that Canada's position is that each of the three different variations on the question of whether the Claimant had an investment at the relevant time should be looked at separately.

To the extent that the Tribunal has to consider questions of efficiency, would you agree that the answer to the first question on whether there was an investment held at the time of the impugned Measures, if we were to resolve that in a bifurcated hearing, would it not be possible, then, to narrow the scope of the other two issues such that they could be joined to the Merits and reviewed later, if there is still jurisdiction?

MS. VAN DEN HOF: So, it's an interesting question. I think the challenge with taking such an approach is that, although the objections are independent based on separate requirements of NAFTA

Chapter Eleven, the interpretation of each provision serves as relevant context for the other.

So, for example, if you look at Article 1116(1), an investor's claim must contain both that Canada has breached an obligation owed with respect to the investor of a party, the Claimant and its investments, and that the Claimant has incurred loss or damage arising out of that breach. So, the breach in the second requirement to show loss or damage arising out of the breach is connected, although doesn't rise or fall with the first part because both--you read it to understand what the breach is in order to answer both questions, it's the same word and the same provision.

I think in terms of efficiency, it would be most efficient to resolve these objections together, and same with Article 1101. This is viewed by NAFTA Parties as a gateway to NAFTA Chapter Eleven. I think if the Tribunal is analyzing these issues, this fact pattern in a preliminary phase, it makes sense to address all issues related to this fact pattern, the fact that Claimant's Claim predates its investment in

Canada in a preliminary phase.

ARBITRATOR HOSKING: Okay. Understood. Thank you. Perhaps just one other question. Focusing on the objection related to the alleged value to prove loss or damage arising out of the breach, is there any distinction between the Claimant's 1116 Claim and the Article 1117 derivative claim?

I believe you said that it wouldn't be necessary to look at questions of loss causation, but where there's a derivative claim where you are analyzing the impact--alleged impact of the Measures on Prairie, isn't that a different analysis than under 1116, and might that not involve some aspect of loss causation in looking at the jurisdictional objection? Or do you see the two of them as being completely the same?

MS. VAN DEN HOF: We see it would be the standard under--or the provision, Article 1116 and Article 1117. Obviously the text that the Tribunal will have to evaluate is different, but the jurisdictional objection really concerns the basic question of whether the Claimant is open to make the

Claim of damages.

(Interruption.)

ARBITRATOR HOSKING: There is an echo. I thought you were doing it for emphasis.

MS. VAN DEN HOF: Is that better?

ARBITRATOR HOSKING: Yes.

MS. VAN DEN HOF: So, the Claim for damages or the jurisdictional claim under Article 1117 with respect to the second objection is whether the Claimant is really open to make the Claim that it's making on behalf of an enterprise it did not own or control at the time of the alleged breach.

And so, if the Tribunal finds that it is open to make that claim, the subsequent questions that you've raised are ones that the Tribunal would assess on the Merits.

ARBITRATOR HOSKING: I understand. Thank you.

I have nothing further.

MS. VAN DEN HOF: Thank you.

PRESIDENT BLANCH: Thanks for that.

Do either of you have anything for

Mr. Klaver?

ARBITRATOR HOSKING: No, I don't think anything from me. Thank you, Juliet.

PRESIDENT BLANCH: Zach? Nothing from you, Zach?

All right. Okay. In which case, that concludes the Respondent's First Presentation.

Thank you, everybody, from the Respondent's side, for a very clear presentation.

We are now going to take a 15-minute break before the Claimant's presentation. So, that's rather conveniently at quarter to; so, let's start on the "o'clock." And I'm being lazy to say which "o'clock" it is depending on which time zone it is. So, we'll see everybody in 15 minutes.

(Brief recess.)

PRESIDENT BLANCH: Mr. Feldman, over to you.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. FELDMAN: Thank you very much, President Blanch and Professor Douglas and Mr. Hosking.

May it please the Tribunal, we are very

grateful, again, for convening, and I was expecting to say good morning, but I think it is not morning anymore for everyone, so good afternoon or evening.

May it please the Tribunal, I'm Elliot Feldman of Baker Hostetler, on behalf of Westmoreland Mining Holdings LLC.

The Tribunal has convened to hear Respondent Canada's Request to Bifurcate proceedings to create a separate phase for jurisdiction and admissibility.

Claimant Westmoreland opposes bifurcation because the facts presented to date in this Arbitration do not justify an additional separate proceeding, and neither the Parties nor the Tribunal will benefit from the efficiencies Canada promises. Mr. Douglas expressed a concern about the complexities for a price of Canadian confederation, that there's a complaint against a provincial Government that has been assumed by the Government of Canada. This happens quite frequently because of the nature of Canadian confederation.

Before setting out the reasons why bifurcation is not justified and wouldn't be

beneficial, we would like to remind the Tribunal why Westmoreland has stated a claim against the Government of Canada under NAFTA with respect to Measures of the Government of Alberta.

It's appropriate to provide this background because bifurcation should not be granted when the facts pertaining to jurisdiction overlap significantly with the Merits of the Claim. When a newly-elected Government of Alberta decided to accelerate Alberta's transition from coal to gas to generate electricity, four companies would be impacted directly: three companies were Albertan, one was American.

The Government of Alberta decided to address the likely economic impact of the new policy by compensating the three Albertan companies an approximate $1.4 billion expressly so their investment capital would not be stranded.

The Government also said it wanted to assure a smooth transition from coal to gas in the provision of electricity.

Paul, could you put on the slide, please. Thank you.

And it wanted to assure investors that Alberta remained, despite the new policy, an attractive place to invest. More precisely stated, as you can see on the screen, the criteria were to: "Maintain electric system reliability; Maintain reasonable stability and electricity prices for consumers and businesses; and Maintain investors' confidence in Alberta by not unnecessarily stranding capital and ensure that workers, communities, and affected companies are treated fairly in the process."

Westmoreland certainly had reason to think that this third criterion applied to Westmoreland, the lone foreign investor and the primary source of employment in more than one Albertan community. Yet the Government decided, notwithstanding these criteria, to compensate the lone American company nothing.

The Government of Canada doesn't want to reach the Merits of Alberta's choices among companies. Some distinctions have been offered, particularly that the compensated companies were all directly in the electricity business, and Westmoreland, the lone

American company, was not. But Westmoreland's coal could be used only to produce electricity as part of mine-to-mouth operations in Alberta. Although Westmoreland did not itself produce electricity, it had acquired mines whose sole market and purpose was to feed the adjacent facilities with which the mines were integrated. Those facilities were its only possible customers, the very customers Alberta was buying out.

The agreements are unambiguously called Off-Coal Agreements because the Government of Alberta paid the electric utilities for giving up coal in favor of natural gas as a source of electricity generation for giving up rights to sue over the lost value of their coal assets and, in the words of Alberta's Energy Minister, for the economic disruption of their investments.

Alberta protests that Westmoreland was not compensated because there was no compensation for coal, but the compensatory criteria focused on economic disruption to investments regardless of coal and there already is contrary evidence as to coal.

All the facts related to this defense, especially that Alberta compensated exclusively electric utilities for the utilities' conversion from using coal to using gas without regard to the value of holdings that they may have had in coal is essential to the measure of damages and the Merits of this dispute.

Canada's Request for Bifurcation is bound up in the Merits while constituting an expensive digression. Already this request has added four written Memorials, this Hearing, and at least three months to this Arbitration. If the Tribunal were to grant Canada's request, it would add four more Memorials, another Hearing, and at least another six months.

Canada's principal argument for bifurcation, perhaps ironically, is for efficiency, to spare the Parties' resources and Tribunal's time. Essential to such efficiency would be disposal of all Westmoreland's claims through threshold issues of jurisdiction and admissibility, that proceedings would conclude with the bifurcation hearing and a Tribunal Decision that it has no jurisdiction over

Westmoreland's claims or that Westmoreland's claims are inadmissible.

Canada's contention that bifurcation would save time and expense is premised entirely on the assumption that Canada would prevail. Were Canada not to prevail, if the Tribunal were to bifurcate and then not dismiss, Canada would have wasted everyone's time and resources. An undeniable problem with "efficiency" as a criterion, as an argument for or against bifurcation, is its circularity. If Respondent were to prevail, bifurcation isolating jurisdiction and admissibility would be efficient because the Parties would never present and the Tribunal would never hear the Merits of the claims, in this case, whether the Government of Alberta unfairly excluded Westmoreland when it compensated three Albertan companies.

But if Claimants were to prevail on jurisdiction and admissibility, bifurcation would be inefficient because it would have required two additional proceedings, this one on whether to bifurcate, and then another with distinct Memorials

and a hearing all before a subsequent proceeding on the Merits.

And in this case, because the facts pertinent for the jurisdictional objections are intertwined with the Merits, the Tribunal would be examining the Merits despite the intentions of a proceeding that is supposed to avoid considering them.

Bifurcation to address preliminary questions of jurisdiction may be useful when the question is entirely legal, the legal issue is clear, and a decision very likely would dispose of the entire case. In such cases, the relevant facts are simple, undisputed, or immaterial. It may be useful where the Tribunal knows enough to issue, in effect, the summary judgment. Canada initially argued that it met this "matter of law" standard, but now seems to agree, when conceding that "nothing precludes the Tribunal from addressing complex, legal, or factual issues in a preliminary phase", that a jurisdictional hearing will require factual development.

Canada's primary Objection to Jurisdiction expressed three different ways is that "the alleged

breaches predate Claimant's investment in Canada."

Canada argues that Westmoreland Mining Holdings is a new entity that did not exist at the time that Alberta announced its Climate Leadership Plan, which Canada claims is the Measure contested by Westmoreland. Because, according to Canada, it did not exist in 2015, Westmoreland could not have been damaged, and, again, because it did not exist in 2015, according to Canada, the Measures "do not 'relate to' the Claimant or its investment."

Three ways to say the same thing, all based on one contention: That the Westmoreland that emerged in which 2019 had no connection to the Westmoreland that had first stated a claim against Canada in 2018. All these formulations derive from the same assertions, that the breaches occurred in 2015, and that the Westmoreland that emerged from bankruptcy has no connection to the one that entered.

Canada then brings two more objections, the first of which resembles the arguments about the breaches predating Westmoreland's ownership of the investment in Canada.

This time, when Canada contends that Westmoreland's claims are based on the November 2015 announcement of the "Climate Leadership Plan" as a triggering "measure", Canada argues that the Claims are time-barred by the statute of limitation.

The Climate Leadership Plan was not a measure. It was a statement of intent to be followed with further action by the Albertan Government. The Climate Leadership Plan is an important contextual fact, but it's not a measure for which Westmoreland seeks redress. Westmoreland was not directly damaged by the announcement of the Climate Leadership Plan, and the dating for Westmoreland's complaint must be at the point of which it knew, or should have known, that, in fact, it was damaged.

To the contrary, Westmoreland said in its Statement of Claim "Westmoreland recognizes and doesn't dispute that Canada and Alberta are entitled to enact regulations for the public good. However, when they do, they must be fair to foreign investors consistent with NAFTA Articles 1102 and 1105." The Measure Westmoreland protests protected similarly

situated Canadian companies from "unnecessarily stranding capital," without protecting the American company.

Second, Canada says Westmoreland's Article 1102 Claim is barred by the grants and subsidies exception of Article 1108(7)(b). But the Tribunal couldn't examine that objection without analyzing the Off-Coal Agreements, an analysis that would necessarily overlap with the Merits, an analysis that must include the negotiations, the intent, the distribution of the money.

Canada has argued elsewhere that "it is normal for NAFTA Tribunals to deal with Articles 1102 and 1108(7) together with the Merits." The overlap in Canada's own observation, makes bifurcation inappropriate.

There are numerous facts overlapping Canada's jurisdictional objections on the Merits of Westmoreland's Claim. Westmoreland Coal Company, an American enterprise, owned Prairie Mines and Royalty and its mine-to-mouth coal operations in Alberta when it entered into bankruptcy in 2018. As part of the

plan for emergence, Westmoreland Mining Holdings, LLC was created as a wholly owned subsidiary, all of Westmoreland Coal Company. And Prairie Mines and Royalty was transferred from Westmoreland Coal Company to this wholly owned U.S. subsidiary, Westmoreland Mining Holdings, LLC. Westmoreland Coal Company then transferred its equity ownership in Westmoreland Mining Holdings, LLC to the first lienholders of Westmoreland Coal Company.

There is no contention that Prairie Mines and Royalty was at any relevant time owned by anyone other than a U.S. investor. Canada's objection, instead, seems to be that NAFTA Chapter Eleven would prohibit foreign investors from any corporate restructuring, even in bankruptcy, without forfeiting NAFTA's investment protections.

Canada and the Tribunal will not find such a prohibition in NAFTA. And even in discussing the change with Canadian Counsel, we did not go back and have an additional negotiation. We did not have a further consultation. We didn't change materially the Statement of Claim or the Notice of Intent. We merely

changed the waivers to change the name. Canada had no disagreement with those steps recognized in the continuity of the initial Westmoreland and the Westmoreland that emerged from bankruptcy.

Canada has identified no directly analogous case because there is none. It is hard to imagine that NAFTA's draftsmen intended to deny fundamental investment protections for foreign investors undergoing restructuring, whether it be an intracompany transfer of assets, bankruptcy, or, as here, both.

Corporate restructuring is not expected to be a windfall for Canada where there are damages that are avoided because of the corporate restructuring. The Westmoreland that emerged from bankruptcy was substantially the same as the Westmoreland that entered, and Westmoreland's Prairie Mines were entirely in Canada and were owned by the American company Westmoreland going in and coming out of corporate reorganization. There was no interruption in the operations of the Company.

Canada doesn't dispute that Westmoreland was

an American company before and after its corporate reorganization, nor that the Prairie Mines was a Canadian investment of that company. There is no question of whether Canada was on notice that it owed NAFTA Chapter Eleven obligations in Prairie Mines and its new investor parent, unlike in the cases cited by Canada.

In Gallo, for example, it was unclear whether the owner of the investment in Canada was Canadian or American. In Mesa Power, the Tribunal was not persuaded that an American owned the Canadian investment at the time of the breach. Here, the Canadian investment was owned at all relevant times by Americans. Canada has always known that it had obligations to Westmoreland under NAFTA Chapter Eleven, as Westmoreland was a foreign investor both before and after bankruptcy, and obligations to Prairie Mines and Royalty as a foreign investment, an investment in Canada owned by Americans.

Yet, Canada's principal basis for bifurcation requires the Tribunal to find, without an examination of all of the facts, especially as to

Westmoreland's bankruptcy and reorganization, that the Westmoreland of 2019 was unrelated to the Westmoreland of 2018.

Canada thinks it passes all three parts of the Philip Morris v. Australia test that the Parties agree define whether bifurcation is in order. You might note that our agreement about these three parts was not enthusiastic. We probably should have been referring to Glamis Gold, which predated by more than a decade Philip Morris and where these criteria first emerged. And in Glamis Gold, when these criteria were first applied, the interpretation of the UNCITRAL Rules led to a denial of bifurcation.

The first part of the Philip Morris test is built on the presumption that bifurcation should be preferred whenever there appears to be a nonfrivolous objection. That presumption does not, however, deprive Tribunals of discretion, and often Tribunals perceiving a nonfrivolous objection nevertheless deny Requests for Bifurcation. We've cited Gran Colombia Gold, Glencore Finance, and Red Eagle. These Tribunals all found there is ground between

non-frivolous and unworthy, a shade grayer than Canada's black-and-white description.

We might add that we do not find any consistent definitions either of "serious and substantial" or of "frivolous or nonfrivolous." The Tribunals who have considered these terms have not provided a lot of guidance about them.

And Mr. Douglas expressed a concern about precedent. If his precedent is in the context of the 1976 UNCITRAL Rules, he seemed to indicate that these rules were not adopted very much anymore in Tribunals. And if it's about NAFTA, this chapter of NAFTA is disappearing. This could well be the last case under it. So, precedent wouldn't seem to be a serious issue.

The second part of the Philip Morris test is whether jurisdiction and admissibility can be examined without examining facts involving the Merits, whether the facts necessary for an examination of jurisdiction overlap and are intertwined with the facts necessary to judge the Merits.

Here, the objections about Prairie Mines as

an investment in Canada of a U.S. investor involve fundamentally the Merits of Westmoreland's claim. Canada's argument that the Claimant is not an investor of another Party with a foreign investment to which the alleged breaches relate under Article 1101 is a Merits question, one that Canada prefers be considered in isolation from other issues on the Merits.

Canada, in its Statement of Defense, argued that Westmoreland was not "accorded treatment" by Alberta because the Claimant came to own Prairie Mines and Royalty after the alleged breaches. Canada didn't raise this issue expressly as a jurisdictional objection, apparently recognizing it as a dispute on the Merits. But Canada's theory that Westmoreland was not accorded treatment because Westmoreland Mining Holdings purchased the assets after the Measures were enacted is the same argument that Canada has advanced in its jurisdictional objections, revealing again that the facts and issues that Canada is presenting in its jurisdictional objections go to the Merits of Westmoreland's claim.

And the third part of the Philip Morris test

is whether Canada's promised efficiency gains are illusory. Canada promised these issues could be resolved as a matter of law. Canada now concedes the Jurisdictional Phase will entail far more and, if bifurcation were granted, would require four more Memorials, an additional Hearing, and perhaps a year's prolongation. Resources spent and time lost do not equal efficiency.

We would also like to call to the Tribunal's attention commentary more recent, in 2015, in the case of Gavrilovic. Gavrilovic is one of the exhibits in the record, and, Paul, if you could bring up some of that case and some of the passages from that case. We want to emphasize here both the difficulty in the terminology and words. The Tribunal there said: "The Tribunal considers that little assistance is gained by seeking to identify, if it may exist, the common practice of international Arbitral Tribunals." With respect to this question.

And that Tribunal went on to say: "What is clear is that each case must turn on its own facts." And, this being so: "The Tribunal does not consider

that it should be placed in the 'straitjacket' of considering this question by reference to the Glamis Gold factors and nothing further. To do so would be to overlook what can be discerned from relevant cases, namely a governing principle that a decision on an application for bifurcation, like other Procedural Orders, must have regard to the fairness of the procedure to be invoked and the efficiency of the Tribunal's proceedings. To identify and discuss in turn only certain identified factors may distract from the task at hand."

So, we agree with the points that Professor Douglas was making earlier, that these terms are not well-defined and that, ultimately, this is the discretion of this Tribunal on the basis of the facts that are peculiar to this case.

Canada's Article 1108(7) objection exemplifies why bifurcation will not dispose of all of Westmoreland's claims, as Counsel for Canada conceded this morning. Canada argues that the payments to the Canadian companies are exempt as "Measures" from Article 1102 because these "transition payments" were

"grants" exempted by NAFTA Article 1108(7)(b).

This argument is about the Merits, bootstrapped onto a jurisdictional objection. Westmoreland says the breaching Measure was the disparate treatment occasioned by the payouts, not a Government press release some two years earlier, and the payouts, whatever nomenclature preferred by the Governments of Canada and Alberta, were not "grants".

The ordinary definition of--dictionary definition of a grant is a gift, a definition that Canada has been avoiding by saying that the grants are conditional, which makes them something other than grants.

Canada contends that, when the Government of Alberta paid out $1.4 billion to compensate three companies for the damages resulting from changes in Albertan Government policy and for a waiver of their rights to sue over lost coal investments, Alberta was not compensating, but, instead, generously making grants.

We call the Tribunal's attention to the terms of the deal: "… neither the Company nor any

Plant Owner shall commence any legal action against the province or any provincial agency … with respect to the phase-out of Coal-Fired Emissions from the Plants, including with respect to the mines, coal supply agreements, mining contracts, or mining equipment relating to the coal used to fuel the Plants."

We think it not by chance that the most generous of these so-called "grants" by a very considerable margin went to the company with coalmines. The Company with no coalmines got the least of the payout. The Government of Alberta says this process and the Awards were transparent, but it would seem that they require much more inquiry.

Canada wants its own vocabulary to determine the Tribunal's Decisions. It wants to talk about "grants" and "subsidies", not contractual payments that involve material considerations. It emphasizes that these so-called "grants" were freely given voluntarily, without acknowledging their purchase of silence, requiring the companies paid to raise no further claims against the Government. And it

presumes that, because Alberta called the payments "grants," they must be grants. But the Tribunal will have to examine thoroughly the Off-Coal Agreements, the negotiations and intent, what they say and how they were administered to test that presumption.

There is obvious consideration for the so-called "grants" and the waiver of claims. Resolving that dispute unavoidably impacts the merits of Westmoreland's Claim and, therefore, is not suitable for preliminary dismissal.

Whether Alberta was providing a subsidy or, instead, entering an agreement to compensate the losses and settle potential disputes is a question the Tribunal must evaluate when it interprets the Off-Coal Agreements. Even if Canada's objection about Article 1108(7)(b) were somehow successful, the grant and subsidy exceptions apply only to Article 1102. Such success would have no effect on Westmoreland's Article 1105 Claim.

Every arbitration depends, above all, on peculiar facts. Tribunals must look to the letter of international law and to the persuasive opinions of

other Tribunals, but all must be considered according to the facts of the case.

The facts here are compelling but not simple. Four companies were exposed to the same policy change and Government reaction to compensate for its effects--three, all Canadians, were compensated; the fourth, American, was not.

The Tribunal must decide why not. It must decide whether the American company was different enough from the Canadian companies to justify radically different treatment. Canada's argument that the Company complaining of unfair treatment was unrelated to the company unfairly treated when $1.4 billion was distributed may not be settled simply without full factual inquiry in a preliminary phase of arbitration.

Thank you very much. I am very pleased to take questions.

PRESIDENT BLANCH: Thank you, Mr. Feldman.

James, do you want to pose any questions you have?

ARBITRATOR HOSKING: Sure. Thank you,

Juliet.

Good afternoon, Mr. Feldman.

QUESTIONS FROM THE TRIBUNAL

MR. FELDMAN: Good afternoon.

ARBITRATOR HOSKING: Just a couple of questions to make sure I understand the Claimant's position, and the first one has to do with the question that both Professor Douglas and I explored earlier.

What is the Claimant's position on whether the Article 1108 objection is actually an objection as to admissibility and whether that falls within Article 21(4) of the 1976 UNCITRAL Rules and what is the impact of that, if any, on the questions that the Tribunal has to grapple with on this application?

MR. FELDMAN: We don't think the 1108--have I disappeared?

ARBITRATOR HOSKING: I can see you, if that helps.

MR. FELDMAN: Yes. Thank you. Yes. It's good to know there is someone still out there because I otherwise have a black screen for some reason.

The 1108(7) appeal to admissibility shifts the burden to Canada to establish, and we think it's an inquiry that is based on entirely on an assumption about what the words mean, the vocabulary that they chose. So, we don't see how it succeeds as a defense, whether considered jurisdictional or one of admissibility because you would have to examine thoroughly--oh, there you are. It's better than staring at the blank screen--you would have to establish what these transition payments, what this money is really all about.

ARBITRATOR HOSKING: Well, can I follow up on that last point then?

In Ms. Dosman's submission, what are the actual legal determinations that the Tribunal would have to make on the 1108 issue as part of a jurisdiction finding and what, if any, is the overlap with either of the two Merits Claims that Claimants make?

MR. FELDMAN: Sorry. I was having a technical problem. Sorry.

So, the--as I indicated and as they

acknowledged this morning, the 1108(7) objection goes only to Article 1102, and the reason it goes only to Article 1102 is because the NAFTA allows governments to discriminate when it's making grants or subsidies, which is not the issue in the fair and equitable treatment in Article 1105. It's restricted to 1102, provided that we are talking about grants and subsidies.

But that's a factual question and a definitional question, and then it's bounded by its limitation to Article 1102. That is, a Government can discriminate in making a grant or subsidy between a foreign investor and a domestic investor, but it's got to be a grant or subsidy. And it's neither of those things here.

ARBITRATOR HOSKING: I understand, obviously, the distinction between 1102 and 1105. I'm just trying to work out what it is the Tribunal--so, one of the phrases that Ms. Dosman used was that the Tribunal would have to analyze the "character of the payments."

If it's limited to that narrow issue, is

there any factual overlap or legal overlap, I guess, that would touch on the decisions the Tribunal would have to make on either the 1102 Claim, assuming that we have jurisdiction, or the 1105 Claim that wouldn't be impacted?

(Overlapping speakers.)

MR. FELDMAN: I'm sorry.

Completely. Because our claim is that what was given to the other three companies was not given to Westmoreland, and the thing that is given is essential to doing that analysis. It's an analysis not just of the distinctions of Westmoreland with respect to the other three companies but what the Government did with respect to all four companies.

So, what they are, what the character of these transition payments is, is central to determining how Westmoreland was treated compared to the others. That is the--that's our Claim.

The Measure arises when the Government started handing out money. And even then, it was not yet a closed matter as to whether Westmoreland was going to see some of that money. They were continuing

behind-the-scenes conversations, and it's not until Westmoreland knows it's damaged and knows it's not going to get any money that there's a measure to be challenged here.

So, the Merits of our case are we were treated differently than the others. We didn't get the same fair and equitable treatment, and we suggest that it's because we weren't Canadian.

ARBITRATOR HOSKING: Let me follow up on something you just said about the behind-the-scene discussions that were going on because it touches on the time-bar objection.

I'm still struggling to work out what is the earliest date on the Claimant's case that it would say an actionable claim arose for purposes of the Limitation Period in the Treaty?

MR. FELDMAN: I think the first--if Paul could put back up the timeline, that might be helpful.

I think we had the first payouts in 2017, and--under the so-called "transition payments." And even then, arguably, we didn't know we weren't going to be compensated.

But you asked for what the earliest possible date was. That earliest possible date would be when the payouts began. So, July of 2017, because that's when we first know that the payments that were discussed and for which Terry Boston was hired would take place, that payments were being made. Even then, we weren't necessarily certain that we weren't getting paid. But if you want to go back to the earliest date, it seems to me that would be it.

ARBITRATOR HOSKING: I don't want to get too much into the Merits on this, but just one more question on that.

Would you not take the date of the actual Off-Coal Agreements themselves, around late 2016--why would you not take that date? Is it because negotiations were ongoing or--

(Overlapping speakers.)

MR. FELDMAN: Yes. I'm sorry.

Yes. Because we were still in conversations, as far as we know, in talking to the former CEO of Westmoreland. As far as we know, there were still conversations going on as to who was going

to be compensated.

ARBITRATOR HOSKING: Right. So, my last question has to deal with the first of the objections and the belated objections. I think the phrase you used in your presentation was that the Tribunal will have to look at--I think I got it right--whether the Westmoreland of 2018 is unrelated to the Westmoreland of 2015.

Why is it that the facts of the bankruptcy and the restructuring and the fact that the Claim was brought by Westmoreland Mining Holdings, LLC, why is that not in and of itself all the evidence we need on that point? I'm not saying it is determinative, but what other evidence would we really need to understand the analysis you're suggesting of the comparing the existing entity now to the predecessor entity?

MR. FELDMAN: To answer just the limited question of whether the Westmoreland of 2019 is the same as the Westmoreland of 2018 when the bankruptcy took place and the corporate reorganization took place, that would be a deep inquiry into what we think is a fairly complicated process which a lot of--and

which we would be introducing probably Expert Witnesses on bankruptcies, on corporate reorganizations, on an explanation of why we think that the Claim survived the corporate reorganization, which at the time was, indeed, the advice of a small army of specialized lawyers. So, the Tribunal would have to examine that, and that would be also at the heart of how Westmoreland was being distinguished because we don't know for sure exactly what the Government of Alberta's reasoning was in excluding Westmoreland from payment. So, perhaps it perceived a different company or perhaps at the time when it made that decision not to compensate Westmoreland it had some sense of a character of Westmoreland that's different that we don't know about yet.

So, it is one thing to examine whether the Company was the same and that--but that's a deep and complicated examination, but also, knowing what the company is, is, it seems to us, central to the Merits of the Claim.

ARBITRATOR HOSKING: Perhaps one follow-up on that, on the efficiency point. Why would it not be

efficient to resolve that question of the corporate character of Westmoreland as it exists today compared to previously? Why would it not be efficient to resolve that issue up front so as to know what we're dealing with when we get to the Merits if we get to the Merits?

MR. FELDMAN: Well, if we get--so, this is, again, a question of how you define "efficiency." It seems to us that, in the larger picture of efficiency, if you do have a separate proceeding and then you go on to another one, then that separate proceeding was not efficient. And because this is not a simple legal question and it does require a deep dive into facts, it is quite different from what Counsel for Canada characterized when it first made this Request for Bifurcation when it said this is a purely--a matter of law, that there aren't a lot of facts involved, that you can resolve it as a matter of law. We're suggesting that that is not true, that not only did the facts overlap, but there are a lot of facts not yet in the proceeding to answer your question.

So, yes, it's a jurisdictional question, and

it's a question that would need to be answered. But separating it is not a simple process, and therefore, the efficiency to be gained is very doubtful.

ARBITRATOR HOSKING: All right. I understand your position. Nothing further. Thank you.

Thank you, Juliet.

MR. FELDMAN: Thank you.

PRESIDENT BLANCH: Zach, do you have any questions?

ARBITRATOR DOUGLAS: Yeah, just a couple. And it may be more straightforward, if it's possible, to bring up the Claimants' Response to the Respondent's Request for Bifurcation. I'm not sure if that can be done on the screen. Normally, it can, but if it can't, then I imagine everyone has their own copies. But this is two paragraphs that I'd just like your commentary on. It is Paragraph 15 to start with.

MR. FELDMAN: Okay. So, we're looking at--I'm sorry, I need to get the right document in front of me. You're asking about our initial response to the Request for Bifurcation?

ARBITRATOR DOUGLAS: That's correct.

MR. FELDMAN: I have it here somewhere. What I don't have is a great filing system since I've been home all this time. This is my first foray to the office in six months.

ARBITRATOR DOUGLAS: Aha.

MR. FELDMAN: So, you'll excuse me, I hope, as I poke around for this. Okay. I think I have got the right one. So, ask again please, at Paragraph 15.

(Overlapping speakers.)

MR. FELDMAN: I managed to put it on the screen as well.

ARBITRATOR DOUGLAS: Yeah, it looks like someone has managed to do that, which might be helpful.

MR. FELDMAN: Faster than I. Okay.

ARBITRATOR DOUGLAS: So, you say that "the cases cited by Canada are also distinguishable from the facts here because they involve Claimants making completely new investments in a foreign country." And here is the two sentences: "Here, in contrast, an American investment in Alberta indisputably existed

when the alleged breaches occurred. It was the direct holding entity, not the investment and not the nationality of the investor, that changed."

Now, we don't want to get into the nitty-gritty here. And basically I'm just trying to establish what general proposition is coming out of this? And it seems one way of reading those two sentences is that you are suggesting that it's okay if the ultimate beneficial owner of the investment at any given stage was an American company, and that's sufficient. So, to take an example--and it's not this case, but just so, I can--see if I can narrow down the proposition.

I mean, suppose an American oil company acquires an oilfield in Australia. Soon afterwards the Australian government does something to undermine that project and the American company says there's a breach. And then a year later the American company sells the oilfield, which is held by an Australian subsidiary, to a completely separate American company, oil company.

Now, in that situation, the direct holding

entity of the Australian company holding the field has changed, but I think we'd agree that that is two different entities and the second entity wouldn't be able to say that it was the investor at the time of the breach.

Are we on the same page on that example, that hypothetical?

MR. FELDMAN: Let me make sure that I understand the hypothetical. American company owns the subsidiary in Australia, another American company buys the original American company. The subsidiary remains unchanged. Is that right?

ARBITRATOR DOUGLAS: Buys the subsidiary from the American company.

MR. FELDMAN: Buys the subsidiary from the American company as part of the purchase.

ARBITRATOR DOUGLAS: Yeah.

MR. FELDMAN: So, an American company buys another American company, including the subsidiary.

ARBITRATOR DOUGLAS: Well, no, the American company, the second American company just buys the Australian subsidiary from the first American company.

MR. FELDMAN: Ah, and only the subsidiary.

ARBITRATOR DOUGLAS: Yeah.

MR. FELDMAN: Okay. Which seems to me to be a fact pattern a little different from ours.

MR. DOUGLAS: And that I completely accept, and so, but I just wanted to establish that you're not saying that in--you're not arguing for that proposition in this paragraph?

MR. FELDMAN: No. I think it's been a principle in NAFTA that you shouldn't just be selling a claim. So, and I think your hypothetical would lead there, which is not what is happening here. The Claim traveled as an asset, but it traveled with the Company. So, it wasn't being sold off and it wasn't to an entirely new or different owner.

ARBITRATOR DOUGLAS: Okay. So, this is where I want to hone in a little bit. If it travels with the asset but it is acquired by a new company, the Claimant, which I think was established in 2019, how can we say that the entity traveled with the asset and the claim if a new entity acquired the asset with the claim? Is that what you are saying? Let's not

get into the Merits of it.

Is that the point, essentially?

MR. FELDMAN: Well, we are in the Merits, but that's okay because nothing in the operations changed, and, indeed, it's the first lienholders who have become the owners. It's a corporate reorganization to shed debt and the shedding of that is all that really happened. We're the same lawyers who filed the initial claim.

Nothing was changed in in the selection of arbitrators for this claim or that process. We report to the same people at Westmoreland, indeed, as Canada pointed out at one point, perhaps in some confusion, the Westmoreland name stayed for a reason. That all stayed the same. What we had was a corporate reorganization.

Now, it's true when you have a bankruptcy or a corporate reorganization, you may emerge with what's called a new company, and that's a complicated factor that would have to be examined by the Tribunal because we're not denying that there's a new entity, but we are denying that it's a complete change or that there

is no consistent connection between them.

And we think in Canada's Agreement that we didn't need to have another consultation and we didn't need to have negotiation. We didn't have to follow those formalities that are required by NAFTA Chapter Eleven. We didn't have to do any of that because there was a recognition of continuity.

ARBITRATOR DOUGLAS: Okay. Just if we could go to Paragraph 21. It's a similar point. But I just--I'm just trying to narrow it down, what the actual proposition that you're asserting. And I think I'm getting closer to it.

It's the--the final line of Paragraph 21. And you say that: "The only change was in the restructured entity emerging from bankruptcy and holding the investments in Alberta, unencumbered by preexisting liabilities." And so, the new entity, which is the Claimant, is not the same thing as the restructured entity, at least I don't understand that to be the case, emerging from bankruptcy.

So, when you say "restructured entity," does that mean the assets, essentially, that are then

acquired by the new entity?

MR. FELDMAN: Probably the word "material" should have appeared before "change," but the only material change was the restructured entity, which, indeed, it has a new name, but remember the process that we outlined today is that a subsidiary was created and a holding company, and the Westmoreland Coal Company that unquestionably existed at the time of the breach was--existed when the assets were transferred and then we were left with the holding company.

So, taking apart that whole process is what--is the analysis that eventually I think the Tribunal may have to do in reference to Canada's objections, and so, indeed, we may want to take apart that paragraph and the previous one. But it requires much more information than is currently before the Tribunal.

ARBITRATOR DOUGLAS: That's understood. Well, thank you. That's been very helpful.

I don't have any further questions.

MR. FELDMAN: Thank you.

PRESIDENT BLANCH: Mr. Feldman, I just have a couple questions. Then it may be that they are going too much into the Merits, and in which case, you don't need to answer them. But Canada, in their earlier presentation made a statement that it was a sale at arm's length. Now, at some stage we are clearly going to have to get into the weeds and really understand the whole of this restructuring process, but is that a question you can answer now? Do the Claimants agree that there was a sale at arm's length?

MR. FELDMAN: I'm not able to answer, both because I wasn't part of the bankruptcy proceeding and because I don't know.

PRESIDENT BLANCH: It's understood. Again, it's a factual question which you may not be able to answer, but Prairie was owned by Westmoreland Canada Holdings, Inc.

Do you know if Westmoreland Canada Holdings, Inc., is still a living company and what the ownership structure now of Prairie is?

MR. FELDMAN: My understanding has been that Prairie Mines was untouched, was not part of the

bankruptcy. And so, whatever was related to Prairie Mines stayed intact, but that's all I understand about it.

PRESIDENT BLANCH: Thank you.

Zach and James, do you have any further questions at this stage?

And I can see Zach shaking his head. No, James.

In which case, Mr. Feldman, thank you very much for your presentation.

The agreement is that we now have an hour's break. It is now 10 to the hour, and, therefore, I suggest we reconvene at 10 to the next hour.

Does that work for everybody? I'm assuming yes, unless I hear a positive no.

MR. FELDMAN: A positive yes. Thank you very much.

PRESIDENT BLANCH: Excellent. Well, enjoy your lunch, supper, or drink, whatever it happens to be.

MR. FELDMAN: Thank you.

PRESIDENT BLANCH: Thank you.

(Whereupon, at 12:49 p.m., (EDT) the Hearing was adjourned until 1:49 p.m., (EDT) the same day.)

AFTERNOON SESSION

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MR. DOUGLAS: I don't think we need a comprehensive Reply today. I am going to actually turn things over to my colleague, Mr. Klaver, to discuss some issues relating to time bar, and then that will be followed by Ms. Dosman on 1108, and then I will be back for some brief concluding remarks.

MR. KLAVER: I will be brief, and to the extent feasible will avoid repeating Canada's arguments from this morning.

This afternoon, the Claimant stated that it is not challenging the 2015 Climate Leadership Plan. Instead, it stated that it challenges the transition payments. Canada and the Tribunal already knew that the Claimant challenges the transition payments under Articles 1102 and 1105. Canada agrees that the transition payments are within the Limitation Period.

Yet, the Claimant has also clearly argued that, separate from the transition payments, the coal phase-out program deprived it of its reasonable expectations under Article 1105.

I would like to bring the Tribunal's attention to the Notice of Arbitration, Paragraphs 104 and 105. They are up on the screen here.

In Paragraph 104, the Claimant states--

PRESIDENT BLANCH: Could I stop you just for one second? Because it looks as though--it may just be mine, but there is nothing coming up on the Transcript.

(Interruption.)

PRESIDENT BLANCH: We can proceed. Excellent.

Mr. Klaver, sorry to interrupt. I understand the stenographer has everything recorded that you said so far, so please pick up from wherever you want to.

MR. KLAVER: Excellent. Okay. Thank you.

I was just explaining that the Claimant has clearly argued that, separate from the transition payments, the coal phase-out program violated its legitimate expectations under Article 1105. So, I'd like to bring the Tribunal's attention here to the Notice of Arbitration at Paragraphs 104 and 105.

In Paragraph 104, the Claimant states that the transition payments were arbitrary, grossly unfair, and therefore a violation of the minimum standard of treatment under Article 1105.

Then, in the subsequent paragraph, 105, the Claimant states that the coal phase-out program also denies Westmoreland of the reasonable expectation of its investments in breach of Article 1105.

Thus, by stating that the only Measure it challenges is the transition payments, the Claimant appears to have withdrawn its claim against the coal phase-out program.

Canada would accept that withdrawal and accept that the Arbitration should proceed focusing solely on the transition payments. We would appreciate if the Claimant confirms this withdrawal today; however, if the Claimant continues to challenge the decision to phase out emissions from coal-fired electricity generation, this Claim is outside the Limitation Period.

For the reasons I explained this morning, it would be procedurally inefficient for the Tribunal to

proceed to the Merits phase without obtaining clarity on this issue and without resolving Canada's objections concerning the Limitation Period in a preliminary phase.

Thank you. That's everything I have to say, and I welcome any questions from the Tribunal.

I'm sorry. I'm not hearing.

PRESIDENT BLANCH: That's because I forgot to unmute myself. I'm sorry.

James and Zach, do either of you have any questions at this stage? No from James?

ARBITRATOR HOSKING: No, thank you.

ARBITRATOR DOUGLAS: No.

PRESIDENT BLANCH: Excellent. Then I think we were proceeding from you, Mr. Klaver.

Are we moving to Ms. Dosman?

MR. KLAVER: Yes, we are. Thank you very much.

MS. DOSMAN: And I was on mute. I was just saying, I'm going to have to be brief because my computer is running out of batteries, but I do welcome the opportunity to come back to you on Article 1108.

I think the framework that Arbitrator Blanch put up this morning was very helpful. For Article 1108, all that the Tribunal needs to do is, first, determine the legal interpretation of the exception and, second, apply that exception to the transition payments. And, I argue, none of that overlaps with the Merits of the claim.

This afternoon, the Claimant explained that its claims were about what was given to other companies, but how the Government decided who to provide payments to is not a question that the Tribunal will need to answer Article 1108.

The Claimant objects to Canada's argument on 1108 on the basis that the OCAs were contracts given for consideration and were, therefore, not grants. That narrow question does not enter or prejudge the Merits at all. We also agree that the OCAs are a contract, but that does not determine the question of whether they are also--whether the transition payments are subsidies or grants.

If you look, actually, at the text of the NAFTA, which is what we are advising the Tribunal to

do, not, in Mr. Feldman's words, to make up our own vocabulary, in the list of illustrative examples of what can constitute subsidies or grants in Article 1108(7)(b), the illustrative list includes things that are all effected by contracts, like Government-supported loans, guarantees, or insurance. So, the fact that the OCAs are contracts, in our view, is not only not problematic, but it really has nothing to do with the Merits of how Alberta decided who was going to receive transition payments.

And I would just say that, similarly, to come back to my discussion with Arbitrator Hosking this morning, the issue of the impact and the effects of the transition payments are not, in our view, relevant for Article 1108. If you go back to the ordinary meaning of grants and subsidies, as Canada has set them out--and that's at Page 17, Footnote 62 of our Reply--those definitions do not require an evaluation of the impact or the effect of the transition payments.

So, we see the two issues as separate. We don't think that anything that the Claimant has shown

this morning reverses our position that the two can and should be determined separately.

PRESIDENT BLANCH: Thank you. Before we let you leave your chair, let me see if either Zach or James have any questions for you.

Nothing from Zach.

Nothing from James? No?

ARBITRATOR HOSKING: No. Thank you.

PRESIDENT BLANCH: Okay. Thank you very much. Are we now moving to Mr. Douglas, or are we hearing from Ms. Van den Hof?

MR. DOUGLAS: Apologies for the limitations. We're having to share and wipe down our headsets between each other. So, these are the times we are in, I guess.

Thank you, Ms. Dosman, or Alexandra, as I know her, and thank you, Members of the Tribunal. I just, again, wanted to have one concluding remark and of course thank the Tribunal for its time today. I know it's getting a little bit late for you, President Blanch and Arbitrator Douglas.

I think just one last point on the fairness

and efficiency of the proceedings as a whole.

If the Tribunal considers that some of Canada's objections warrant a preliminary phase, it is Canada's position that it would be procedurally and fair and efficient to hear all of the objections, even if the Tribunal might not have ordered bifurcation on the basis of other objections alone.

And this is because the overarching principle is the fairness and efficiency of the proceedings as a whole, and we just bring to your attention for the record the Resolute Decision, that is RLA-005 at Paragraph 4.12 makes the same point. In fact, I might have even plagiarized from them in my submission here, so that would be our final point on Bifurcation this morning. Subject to any final questions from the Tribunal on any issues whatsoever, we're happy to turn it over to the Claimant.

PRESIDENT BLANCH: Zach, do you have any final questions?

And James, do you have any final questions? I can't--

ARBITRATOR HOSKING: I need to shake my head

more vigorously. No, thank you. Thank you very much.

Thank you, Mr. Feldman--sorry, Mr. Douglas.

MR. DOUGLAS: It's okay. Thank you very much.

PRESIDENT BLANCH: Thank you, as well from us, Mr. Douglas. Like I said we will move now to Mr. Feldman.

Well, Mr. Feldman, you asked for the opportunity to have a 15-minute break after the Respondent's Submissions before giving your Reply Submissions.

Would you like that 15 minutes? It is obviously there for you, if you want.

MR. FELDMAN: I won't hold you up for 15, but can I borrow 10?

PRESIDENT BLANCH: Of course, you can. In which case we will reconvene at quarter past the hour.

MR. FELDMAN: Perfect. Thank you very much.

PRESIDENT BLANCH: Thank you.

(Brief recess.)

PRESIDENT BLANCH: Hi, Mr. Feldman.

(Comments off the record.)

PRESIDENT BLANCH: Do we have Canada? Mr. Douglas, are you there?

MR. DOUGLAS: Yes, we are here. Thank you, President Blanch.

PRESIDENT BLANCH: Excellent. And I see Zach and I see James. So, and we have got the Transcripts here.

So, Mr. Feldman, over to you.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

MR. FELDMAN: Thank you very much. This will only take a couple minutes.

On the first--and not necessarily in any particular order, but the illustrative list of loans, guarantees, and insurance is not an illustration of these Contracts, and it's a little surprising, that it may be of interest to the Tribunal, but some of the folks on the Canadian team, we sit together in Geneva on the same side of cases.

And when we do, we are often discussing grants and subsidies, so we know that they know that these aren't really grants. These are Contracts that have--that are for consideration, and we and they have

argued against such things together as to what constitutes a grant or subsidy.

On Paragraph 105 of our Statement of Claim, there is nothing to withdraw. We are not making a claim about a press release. We're making a claim about the limitation of the policy, and that policy is implemented when these payments begin to be paid out, and when they are paid out, to the exclusion of Westmoreland, and we learned that we are not going to receive any.

So, yes, it is connected to the Climate Leadership Plan, but that's not a trigger of anything with respect to the statute of limitations because we don't know and could not have known that we were necessarily going to be damaged by the announcement of a new policy.

As to fairness and efficiency, I think today's proceeding has established that almost everything in this case bleeds into the Merits. It is very hard to find anything that doesn't, and to the extent that you may contemplate separating anything, then nothing else goes with it. It is not as if other

objections go for the ride. And then there is nothing sufficient to be accomplished by separating one.

For fairness and efficiency, simply in a case such as this one, where so much is really about the Merits, it will not be accomplished as Mr. Douglas suggests, and, lastly, you began the day about the presumption that you should Bifurcate, and I think we've reached the conclusion that this is at the discretion of the Tribunal on the basis of the facts of this case, you will decide this question without a presumption because the presumption really doesn't prevail in terms of the facts. And that's really all that we think we need to add.

We thank you all again very much. We hope we've not interrupted your dinners, and we hope we have helped to move this along without taking too much time today.

Thank you.

PRESIDENT BLANCH: Thank you, Mr. Feldman. Before I release you, I first want to ask if Zach and James have any questions? And I sense that Mr. Douglas might want to make a further comment. I

might be wrong. But, firstly, Zach, do you have any further questions?

ARBITRATOR DOUGLAS: Nothing further. Thank you very much.

PRESIDENT BLANCH: James?

ARBITRATOR HOSKING: Nothing from me. Thank you.

PRESIDENT BLANCH: Excellent. There is not any provision in the timetable for any further submissions. It's the first--and still, Mr. Douglas, moving quite--well, moving, and I just wanted to check. That wasn't desiring to--

MR. DOUGLAS: I'm just here to bid the Tribunal a good evening. Just to conclude, unless, of course, the Tribunal has any further questions or issues they would like to discuss.

PRESIDENT BLANCH: No. I know I speak behalf of Zach and James to say it's a big thank you to all Counsel. And for the benefit of the Parties that may be listening in, you've really helped us today. They have been very clear submissions. You have helpfully fleshed out your excellent submissions

and I think it has been enormously useful for us.

So, I hope you have, whatever is left of your day--for Zach and me, not much, but for the rest of you, I hope the rest of your day goes well, and thank you for your time today. That concludes the proceedings. Thank you.

MR. DOUGLAS: Thank you very much.

MR. FELDMAN: Thank you.

(Whereupon, at 2:20 p.m., (EDT) the Hearing was concluded.)

CERTIFICATE OF REPORTER

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

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

Dawn K. Larson