INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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In the matter of Arbitration :
between: :
: :
WESTMORELAND MINING HOLDINGS LLC, :
: :
Claimant, :
: ICSID Case No.
and : UNCT/20/3
: :
GOVERNMENT OF CANADA, :
: :
Respondent. :
- - - - - - - - - - - - - - - - - - - x Volume 2

VIDEOCONFERENCE: HEARING ON JURISDICTION

Thursday, July 15, 2021

The World Bank Group

The hearing in the above-entitled matter came on at 9:32 a.m. (EDT) before:

MS. JULIET BLANCH, President

MR. JAMES HOSKING, Co-Arbitrator

PROF. ZACHARY DOUGLAS, Co-Arbitrator

ALSO PRESENT:

On behalf of ICSID:

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P R O C E E D I N G S

PRESIDENT BLANCH: Welcome, everybody, to Day 2 of the Jurisdictional Hearing between Westmoreland Mining Holdings, LLC, and the Government of Canada, an ICSID Case UNCT/20/3.

I'm going to give the same reminder as I gave yesterday pursuant to Paragraph 30 of PO4, in which I confirm the only persons permitted to attend this Hearing are those approved by the Disputing Parties and the Tribunal, and no unauthorized persons shall attend in violation of this agreement.

Is there any housekeeping before we continue?

Firstly, Claimants. Mr. Feldman?

MR. FELDMAN: I have to click a lot of things to answer you.

But I'm not aware of any housekeeping, unless there is anyone else on our team who has thought of something, but I think we're fine. Thank you.

PRESIDENT BLANCH: Excellent.

Mr. Douglas?

MR. DOUGLAS: Nothing from the side of Canada, President Blanch.

PRESIDENT BLANCH: Perfect. Well, then, in which case, we'll start, Mr. Douglas, with the Respondent's Rebuttal. We have 45 minutes, and, as yesterday, the Tribunal will do its best to refrain from asking any questions during the course of your rebuttal, keeping them until after both Parties' Rebuttals. But if we do have any questions, we will interrupt.

MR. DOUGLAS: Great. That sounds great. Thank you very much, President Blanch.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MR. DOUGLAS: Good morning and good morning to the Members of the Tribunal. It is nice to see you again.

Canada's Rebuttal will not take the full 45 minutes. I will first address a couple of high-level points concerning the Claimant's legal test on the assignment of claims and the Claimant's contention that Canada is seeking a windfall in this case.

Ms. Van den Hof will then address a few points raised by the Claimant concerning the Tribunal's jurisdiction ratione temporis under NAFTA Chapter Eleven. Mr. Klaver will then discuss flaws in the Claimant's case concerning continuity of interest, and Ms. Zeman will conclude Canada's rebuttal with a few remarks.

The Claimant confirmed yesterday that NAFTA contains no provision on the assignment of claims from one investor to another, and that the Claimant is, thus, required to look elsewhere in international law for a rule. The Claimant stated at Page 177 of the Transcript: "We are trying to find rules of international law."

But it is not permissible to find a rule of international law and then apply it to NAFTA when such a rule does not comport with the text of NAFTA itself. As Canada explained yesterday and in its Pleadings, there is no mechanism under NAFTA Chapter Eleven that allows an investor of a Party to buy a claim from a disputing investor and then pursue it. It is well-established that the scope of the arbitration

clause under NAFTA Chapter Eleven includes Articles 1101, 1116, and 1117. This was determined by the tribunal in *Methanex*, which is at Paragraph 120 of RLA-026.

To satisfy the arbitration clause, a disputing investor must satisfy those provisions which, as we explained yesterday, the Claimant in this case has not. Section B of NAFTA Chapter Eleven is an extraordinary remedy and cannot be expanded beyond its terms. The Claimant tries to read language into the NAFTA when it argues that claims can be assigned, so long as two investors have a continuity of interest.

President Blanch, you asked the Claimant whether the third bullet on Slide 17 of the Claimant's presentation was the rule the Claimant proposes. The Claimant confirmed at Page 139 of the Transcript that that is, indeed, its position.

There is nothing in the text of NAFTA allowing for this rule. The Claimant's rule is untethered to the applicable law. The Claimant's rule is something of its own creation. It is not a rule of international law. The Claimant argued at Page 133 of

the Transcript that there is ample evidence of customary international law for its proposed continuity test. If there is, the Claimant certainly hasn't provided any State practice or opinio juris to show that there is, and Canada contests the point.

Alternatively, at Page 179 of the Transcript, the Claimant states that it "divined the rule from investment law awards." However, none of the cases cited by the Claimant in this Arbitration discuss a concept of a continuity of interest. The Claimant pointed the Tribunal yesterday to *S.D. Myers* and *CME*. *S.D. Myers* did not involve the assignment of a claim after the date of an alleged breach, nor did it address the continuity-of-interest theory.

CME also did not address the concept of a continuity of interest, and, in any event, I explained yesterday why that case is not applicable here.

The Claimant did not raise *Autopista* on this point, but I can address it now. As I explained yesterday, the transfer of the investment in that case happened after the date of the alleged breach and, thus, there is no ratione temporis issue in this case.

The share transfer happened in August 1998, and the alleged breach happened in March of 2000. References to these facts can be found at Paragraphs 26 and 33 of the Award, which is CLA-020. Moreover, as Arbitrator Douglas pointed out yesterday, the case was a contract case, not an investment case. It, thus, has limited applicability to the Claimant's claim.

The Claimant's proposed international law rule, thus, has no grounding in international law at all. If the Tribunal agrees with the rule presented by the Claimant, it would be the first tribunal to do so. Moreover, relying on the Claimant's concept to create a new test for the assignment of claims would be highly problematic because, in this case, it would allow lenders, such as major financial institutions who make loans but otherwise have no foreign investments in the Host State at the time of an alleged breach, to, nonetheless, have standing in ISDS proceedings. That would significantly expand the scope of international investment law.

The better view, in Canada's view, is that investors are not in a position to transfer claims or

jurisdictional offers under NAFTA Chapter Eleven. That view comports with the text of the Treaty.

The next point I would like to discuss are the equities of the case. The Claimant yesterday accused Canada of using WCC's bankruptcy proceedings to seek a windfall. If we want to discuss the equities of this case, we can look to the beneficial owners of WCC and the Claimant. Now, let me be clear: Canada in no way views beneficial ownership as relevant to the Claimant's attempt to have standing in this case. However, we can recognize that the beneficial owners of WCC and the Claimant are not the same, and that the beneficial owners of WCC are no longer here.

The individuals who stand to benefit from an award in this Arbitration are the beneficial owners of the Claimant, that is, the First Lien Lenders. The Claimant confirmed this at Page 137 of the Transcript. The debt that WCC owed to those lenders was fully satisfied through WCC's bankruptcy process. Ms. Coleman explains this at Footnote 72 of her First Expert Report, and the Claimant does not contest this

point.

At Paragraphs 28-30 of Appendix A of its Counter-Memorial, it cites to Ms. Coleman's Footnote 72, confirming its accuracy. The debt that WCC owed to the First Lien Lenders was satisfied, and, yet, the First Lien Lenders would, through the Claimant, stand to benefit from an additional $470 million NAFTA Award in this Arbitration. That is a windfall.

Unless the Tribunal has any questions, I will turn things over to Ms. Van den Hof.

PRESIDENT BLANCH: (Audio interference.)

(Interruption.)

(Stenographer clarification.)

PRESIDENT BLANCH: I was just checking if James or Zac had any questions, but they both confirmed they don't, and I don't.

MS. VAN DEN HOF: Thank you, Members of the Tribunal.

Yesterday, the Claimant addressed Canada's position that, under Articles 1101, 1116, and 1117, an investor of a Party bringing a claim must establish

that the challenged measures alleged to breach an obligation under Section A relate to the claimant and its investments and that the claimant directly or indirectly incurred loss or damage arising out of that breach.

The Claimant has not satisfied these jurisdictional requirements. Today I will respond to three of Claimant's arguments concerning this interpretation.

First, Mr. Snarr argued, at Pages 114 and 117 of the Transcript, that it is not required for the foreign investor submitting the claim to be the same foreign investor that owned the foreign investment at the time of the breach. And Article 1101 provides no text to support an at-the-time-of-the-breach clause.

This argument ignores that Article 1101 needs to be read in the context of the Claimant's substantive claims in this Arbitration. In this context, the measures referenced in Article 1101 are those alleged to have breached NAFTA Chapter Eleven, and the relevant investor of another Party is the investor bringing a claim under Articles 1116 and

1117. Accordingly, under Article 1101, the Claimant must allege that the challenged measures relate to it as an investor of a Party.

As I explained yesterday, every NAFTA tribunal evaluating Article 1101 has come to this conclusion, along with all of the NAFTA Parties. Because the Claimant did not exist or have any investments at the time of the challenged measure, this requirement is not satisfied. The challenged measure, Alberta's 2016 conclusion of the Off-Coal Agreements, does not relate to the Claimant or its 2019 investment.

Not only is the Claimant's reading of Article 1101 inconsistent with the ordinary meaning of that provision, but it would open up NAFTA dispute settlement to an indeterminate class of claimants. This is because it removes the requirement for the challenged measure to relate to the investor bringing the claim and, instead, provides an investor standing when the challenged measure relates to any U.S. or Mexican investor.

Second, Mr. Snarr suggested yesterday that,

given the continuity of interest between WCC and the Claimant, the challenged measures could relate to the Claimant. That was at Page 115 of the Transcript. This argument suggests that the Claimant could create a nexus to the challenged measures through its arm's length purchase. That cannot be right.

As the tribunal in *Apotex* held, there must be an immediate and direct connection between the particular measure attributable to the State, alleged to be a breach of NAFTA Chapter Eleven, and the investor bringing the claim. A prospective claimant cannot create that connection through its own actions after the fact.

Third, Mr. Snarr asserted yesterday, at Page 137 of the Transcript, that Prairie was owed independent obligations under NAFTA Chapter Eleven, arguing that: "Canada owed obligations to Prairie under Articles 1102 and 1105, and it continues to owe them, as Prairie is owned by Westmoreland Mining Holdings."

I explained in detail yesterday that investments are not owed obligations independent of

their investors. And I explained why an investment of an investor of another Party begins when a particular investor takes a risk and makes an investment in Canada. WCC's investment in Canada is not the same as the Claimant's investment in Canada.

Prairie is a domestic enterprise. It is not independently owed obligations under NAFTA Chapter Eleven. Article 1117(4) also establishes Prairie may not bring a claim in its capacity as an investment. There is only one investor mentioned in Article 1117, and that investor is the claimant. Article 1117 addresses the narrow situation where a measure breaches an obligation owed with respect to the claimant but the loss is incurred indirectly through an enterprise. This indirect loss would be left unaddressed under customary international law.

The fact that the Claimant is permitted to claim indirect losses incurred by its enterprise does not mean that a claimant is permitted to allege breaches that occurred in relation to a different investor.

Mr. Snarr contested this yesterday, saying,

at Page 112 of the Transcript, that "Article 1135 suggests that an investment enterprise is owed obligations and may be owed damages provided it is owned by a foreign investor who submits the claim."

Article 1135 suggests no such thing. It simply provides that damages payable to the enterprise under Article 1117 are, in fact, paid to the enterprise. It says nothing about the scope of obligations owed.

For these and all of the reasons Canada has explained throughout this Jurisdictional Phase, the Claimant's arguments do not disturb the conclusion that it has failed to meet the jurisdictional requirements imposed by Articles 1101, 1116, and 1117.

Are there any questions from the Tribunal?

PRESIDENT BLANCH: No, not at this stage. Thank you.

MS. VAN DEN HOF: Great. Thanks.

MR. KLAVER: Members of the Tribunal, as my colleague Mr. Douglas explained, the Claimant's case now turns on its alleged continuity of interest. The Claimant continues to blur its dual use of this

concept regarding its tax treatment and the First Lien Lenders' alleged control of WCC and the bankruptcy process. On tax treatment, yesterday the Claimant argued that U.S. federal law recognizes a continuity of interest between WCC and the Claimant. This is misleading.

The Claimant's asserted continuity of interest is its own self-judging opinion. The Claimant has decided for itself that it had this tax treatment. In an attempt to substantiate its opinion, the Claimant advances argumentation by Counsel. Yet, while the Claimant said it considered that its attorneys can address factual matters, argumentation from Counsel is not fact evidence.

If it were serious about the alleged continuity-of-interest argument, it would not rely solely on argumentation from its Counsel. Yet the Claimant has filed no evidence to confirm its alleged tax treatment under U.S. law.

To be clear, the record contains no tax assessment from the IRS. No audit is on the record. No court decision confirming a continuity of interest

is on the record.

Despite the Claimant's suggestions, the Bankruptcy Court does not make conclusive determinations on questions of tax law.

Ms. Coleman explained at Paragraph 33 of her Second Expert Report that, under U.S. law, the determination of whether WMH may qualify for certain tax benefits is a distinct inquiry from whether it was an unaffiliated buyer of WCC's assets.

This makes sense; tax law is--frequently features idiosyncratic rules that apply for its purposes only, but may be absurd in other contexts. For example, tax law can deem a corporate entity to be liquidated for tax purposes, even though it remains in existence for all other purposes.

Outside the limited purposes of tax law in this NAFTA proceeding, the Claimant's asserted tax treatment is irrelevant, and the Claimant has not explained otherwise. In fact, the Bankruptcy Court made a legally-binding finding in the context of this specific transaction on the unaffiliated relationship between WCC and the Claimant.

Thus, the record does not contain reliable evidence to support the Claimant's alleged tax treatment but does contain reliable evidence that contradicts the Claimant's alleged association with WCC.

Moving to the First Lien Lenders' alleged control of WCC, yesterday, despite choosing not to cross-examine her, the Claimant again raised Ms. Coleman's comments on discussion panels. The Claimant mistakenly states that Ms. Coleman's prior statements about negotiating power and relative leverage are inconsistent with her statements on the specific facts of this case, and the legal concepts of control under the Bankruptcy Code.

In particular, the Claimant suggests that a Restructuring Support Agreement, an RSA, ensures the debtor and the--cedes control of the bankruptcy to the secured creditors. This is not correct.

Ms. Coleman explained in her Second Report at Paragraph 27, that the Parties to an RSA, other than the debtor, do not control the bankruptcy process.

The debtor here, WCC, had a fiduciary duty to maximize the value of its estate for the benefit of all stakeholders, not just the First Lien Lenders.

Consistent with this fiduciary duty, the RSA contained a "fiduciary out" provision that allowed WCC to terminate the Agreement in favor of a better alternative. This contradicts the Claimant's assertion that the First Lien Lenders controlled the bankruptcy process.

Finally, despite Canada again asking who all the First Lien Lenders are, the Claimant continues to avoid this issue. It even stated yesterday at Paragraph 137 of the Transcript that the First Lien Lenders would be the appropriate beneficiaries of any Award.

Canada maintains that the First Lien Lenders cannot create this Tribunal's jurisdiction, that they are not the Claimant. Nevertheless, the Claimant's reliance on the lenders, despite its failure to identify them or prove their U.S. nationality, reveals a major flaw in its attempt to create jurisdiction here.

Consequently, the Claimant's arguments on a continuity of interest based on its tax treatment and control are irrelevant to the applicable law in these proceedings and they are unsubstantiated.

Thank you. Unless the Tribunal has any further questions, I will pass the floor to Ms. Zeman.

PRESIDENT BLANCH: I have one question, which I think you answered in your very final sentence.

MR. KLAVER: Yes.

PRESIDENT BLANCH: You've explained that Canada's position is the Claimants haven't proved a continuity of interest. It's a self-judging, it hasn't been approved by the Courts or by the tax authorities. But am I correct that Canada's position is even had they proved to Canada's satisfaction this continuity of interest, that is not sufficient in Canada's view to give jurisdiction.

MR. KLAVER: That is absolutely correct. The continuity-of-interest concept is not part of the applicable law, and so it simply is irrelevant for finding jurisdiction here.

PRESIDENT BLANCH: Thank you.

Zac and James, do either of you have any questions? No. Thank you.

MR. KLAVER: Thank you.

MS. ZEMAN: Hello, again. The final point we'll make today pertains to the Claimant's several references yesterday to debt-for-equity swaps. Through those references, the Claimants seem to suggest that what the First Lien Lenders did was the functional equivalent of that type of transaction. For example, at Page 184 of yesterday's Transcript, Mr. Levine asserted that: "The secured creditors exchanged their debt for the same assets they could have acquired through the debt-for-equity swap."

But purchasing assets from the debtor and carrying out a debt-for-equity swap are not the same thing. A debt-for-equity swap involves acquiring equity in the debtor entity itself. That's not what happened here.

Importantly, the Claimant's focus on other possible ways for WCC to have settled its debts through the bankruptcy process, for example, by

offering its equity to the First Lien Lenders, is consistent with Ms. Coleman's explanations that the debtor has a great deal of latitude to decide how to settle its debts in a Chapter Eleven bankruptcy case.

That can be found at Paragraph 33 of her First Expert Report. It also underlines that the First Lien Lenders had options. As the Claimant stated yesterday, they could have acquired assets through the debt-for-equity swap, but they did not choose that option. They chose that option where they purchased assets from WCC in an arm's-length transaction through an acquisition vehicle that they owned or controlled at all material times, for tax purposes. This was their choice, not Canada's.

The fact that that choice has consequences for this Tribunal's jurisdiction is not a windfall to Canada. Instead, it supports Canada's position that there is no magic in the bankruptcy process itself and that each transaction must be assessed on a case-by-case basis.

And in this case, as Canada has explained throughout this Jurisdictional Phase, the consequence

of those choices is that the Tribunal does not have jurisdiction over the Claimant's claim.

That concludes Canada's rebuttal for today. We thank the Tribunal for your time and attention over these last couple of days and remain happy to answer any additional questions you may have.

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

I just have one. This is a question I have actually for the Claimants, as well.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BLANCH: That there is a--clearly, there is two extremes that we could be looking at. We have one extreme where you have a contrived claim, and I think it is accepted by Canada that this is--we are not in the situation of a contrived claim. It may be that you want to answer this question later, but I put it out now so you have a chance to think about it.

On the other extreme, you have a situation where, even if, for example, a company keeps its identity but goes from public to private, or you have an individual claimant who dies and the claim would be

pursued by that person's--a person who inherits--

(Interruption.)

(Stenographer clarification.)

PRESIDENT BLANCH: I don't think the background noise is me, but I apologize if it is.

If you have an individual claimant who dies and the claim would be continued by that person's executors under the will, I'm trying to work out where on each Party's perspective there would be the right to continue the claim and where it crosses over to being--there being no jurisdiction.

And as I say, it may be that you would like to think about this on the break and then answer it after the Claimant's rebuttal, but I would be interested for both Parties to explain to me where along that line it becomes from being permissible to being impermissible. Where does the jurisdiction go?

MS. ZEMAN: Yes, thank you. Yes. We would like to answer that question later. I beg your indulgence on that.

PRESIDENT BLANCH: Yeah. No, that is actually fine.

(Overlapping speakers.)

MS. ZEMAN: Perfect. Thank you.

PRESIDENT BLANCH: In which case, I thank Canada for their rebuttal.

We now have a 15-minute break before we move to the Claimant's Rebuttal. So, that would be, I think, 10:18, so let's say 10:20 to start with the Claimant's.

Anneliese, can you get the Tribunal back into the Tribunal breakout room?

SECRETARY FLECKENSTEIN: Yes. Yes.

PRESIDENT BLANCH: Perfect. Thank you.

(Brief recess.)

PRESIDENT BLANCH: So, Mr. Feldman, do you have everybody that you need from your team now on the line?

I can't hear you, if you're speaking.

MR. FELDMAN: Can you hear me now?

PRESIDENT BLANCH: I can perfectly.

MR. FELDMAN: Okay. Apparently, I have two buttons for speaking, and they seem to be mutually incompatible.

So, with apologies, would you like us to begin?

PRESIDENT BLANCH: Let me just check with Mr. Douglas that all his team is ready.

Mr. Douglas, are you okay for us to start?

MR. DOUGLAS: Mr. Feldman, if it makes you feel any better, I also cannot figure out the buttons.

Yes. Everybody from Canada is present. Thank you, President Blanch.

PRESIDENT BLANCH: Perfect. Well, I can almost guarantee that just about the time we finally master this and make no more mistakes will be when the world gets back to normal and we can travel again. But until that time, we are still trying.

Mr. Feldman, over to the Claimant for your rebuttal.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

MR. FELDMAN: Thank you very much. Thank the Tribunal again.

Canada's Expert Witness testified that bankruptcy law does not go in this Arbitration. We agree, which is why we've had no reason to call her

for cross-examination. This case is governed by the terms and plain language of NAFTA and customary international law.

The question presented by Canada to the Tribunal is whether the misfortune of bankruptcy can protect Canada against the claim arising from a breach of treaty obligations to protect the foreign investment. Canada doesn't contest that in dispute is the investment in Canada owned at all times by American investors.

In this case, the Government of Alberta changed the law, took significant value from an American investor, compensated similarly situated Canadian companies for their losses arising from the change in the law, but compensated the American investor not at all.

After Alberta began distributing money to the Canadian companies and confirmed that the American company Westmoreland would not receive any, Westmoreland went bankrupt.

Canada contends that the bankruptcy necessarily produced a new company, Alberta

discriminated against the old company, and the new company that emerged from bankruptcy forfeited the claim of the original company because of the bankruptcy. Canada argues that the buyers of the bankrupt company should have deducted the value of the claim from the purchase price of the bankrupt company because the buyers knew there was a damaging and costly treaty breach, and should have known that they couldn't collect on the claim. It is Canada's way to evade responsibility, and it is precisely the windfall to Canada that Professor Paulsson warned against in his Expert Opinion composed for this Tribunal.

It was not for the new company to abandon the claim to Canada's benefit. The secured creditors saw value in the claim, deliberately and mathematically preserved it through the bankruptcy and now are pursuing it. There are at least three applicable principles of international law here: First, international law favors access to justice; second, international law focuses on the plain language of treaties; third, international law favors continuity of interest.

Denial of jurisdiction would deny access to justice. The plain language of NAFTA doesn't contain the words "Canada needs or imagines," as it doesn't require an investor of an investment at the time of an alleged breach to be identical with the investor who brings a claim within the statute of limitations. And the Claimant here is substantially the same as the investor at the time of the breach.

Canada's defense against jurisdiction is Westmoreland's bankruptcy. Therefore, in rebuttal, we will spend some time on the bankruptcy showing again that there is a substantial continuity of interest between the Claimant and the investor owning the investment at the time of the breach.

Were NAFTA to require that the investor from the moment of breach couldn't change in form and preserve its claim, it would impose a rule directly contrary to the Treaty's purpose as it would discourage investors who may want to merge or acquire and who may in unfortunate circumstances, go through a restructuring or bankruptcy or with the example that was offered by the President of the Tribunal a short

while ago, someone dies and are the heirs not entitled to the claim?

Nonetheless--because here we have, in effect, a death of the company. Nonetheless, we do see limitations on transfers or assignments or sales of claims. The Tribunal seems to be looking for a line to draw, and we're happy to try to help draw that line. In addition to avoiding shams and shopping, a claim may be preserved only when it remains substantially within the ownership of common interest, whether a family or a family of businesses, such as the case here.

My partner John Lehrer will explain how Westmoreland's Type G reorganization preserved the continuity of interest. I would like to remind the Tribunal of Professor Paulsson's final comment on this subject in his Second Expert Report at Paragraph 18.

Ricky, if you could bring that up. That is CER.035.

Professor Paulsson does use more than one term--beneficial interest, beneficial ownership, continuity--but explains that the terms or expression

are not "self-defining and cannot achieve any effect by simple assertion. What matters," he says, "is the ultimate economic reality. Does the recovery pursue ultimately and legitimately seek reparation of the harm done to protected investors who put their capital at risk." Those italics are Professor Paulsson's.

"Canada does not address the rationale for this proposition but simply repeats that a Claimant who was not an investor when the dispute arose has no standing."

Indeed, that is what Canada did, again, yesterday and again this morning. Mr. Snarr will explain how the definition of "continuity of interest" in the U.S. Tax Code is useful in articulating the principle for continuity of interest or any of the terms Professor Paulsson suggested for this same--with the same intention in international law.

Mr. Snarr will also correct Canada's interpretations of a number of international arbitrations. My partner Andrew Layden will correct some of Canada's errors pertaining to bankruptcy in general and in this particular case. The essential

discrepancy in view is that Ms. Coleman's theoretical exegesis is divorced from the reality of bankruptcy, as she herself has acknowledged in her public speaking. Mr. Layden will rebut Canada's theory about the control of company through bankruptcy.

Finally, Mr. Levine will correct some apparent misunderstandings pertaining to some specific international arbitrations upon which Canada seeks to rely when arguing that a change in corporate form means the forfeiture of a Chapter Eleven claim. Canada interprets the cases rather liberally.

There is only one arbitration that appears truly on point with the case here, *CME v. The Czech Republic*. Canada recognizes the problem it has with this case. In its presentation yesterday and again today, Canada tries to make it go away. Mr. Levine will explain why, and I will close with a short comment. And we will try hard to stay within our time limitations.

So, I'm passing the baton.

Thank you very much.

MR. LEHRER: Thank you, Mr. Feldman.

I would like to thank the Members of the Tribunal for their time today. My name is John Lehrer. I would like to further address the continuity of interest principle discussed yesterday and related facts present in this case. It is important to bear in mind that U.S. federal tax laws do provide a definition of continuity of interest emanating from long-standing legal principles.

Mr. Snarr will show why that definition is helpful in the context of international law as applied to the bankruptcy.

Before we turn to the slides I would like to cover, I want to address one item raised by Canada in its earlier rebuttal: the use of the Type G reorganization was the chosen transaction form to obtain a particular tax result. To be clear, the same tax result could be obtained with a debt-for-equity swap, or continuity also would be present.

My first slide, please, Ricky.

As indicated on this slide, the confirmed bankruptcy plan specifically provides that, if the stalking horse purchaser--here, WMH--is the Successful

Bidder, the Sale Transaction may be structured either as a taxable transaction or a reorganization under Section 368(a)(1)(G) of the Internal Revenue Code; in other words, a Type G reorganization, as set forth in the description of the transaction steps.

Next slide, please.

There were no bidders other than WMH, resulting in WMH becoming the Successful Bidder. As indicated on this slide, the Contribution and Distribution Agreement specifically provides that the transaction steps collectively were structured to be treated as a single tax-free Type G reorganization. In other words, the transaction steps involving WCC and WMH were designed to qualify as a Type G reorganization. To qualify as a Type G reorganization, a number of requirements must be met, including, most important for purposes of this Jurisdictional Hearing, the continuity-of-interest requirement.

Next slide, please.

The continuity-of-interest requirement is present in reorganizations because the term

"reorganization" presupposes a continuance of interest on the part of the transferor in the properties transferred. In other words, U.S. law requires that the equity holders of a transferor receive and own an equity interest in an acquiring entity, in connection with the transaction.

This continuity-of-interest requirement is modified in the context of bankruptcy proceedings or bankruptcy-related restructuring transactions, to include creditors of a bankrupt corporation in the group of relevant stakeholders for purposes of determining whether this continuity requirement has been met, essentially treating creditors as proprietors.

As indicated on this slide, the Coleman Reply Report specifically provides that on December 16, 2014, WCC obtained approximately $700 million of debt financing from the First Lien Lenders. The Coleman Report provides that the First Lien Lenders' Stalking Horse Bid, through WMH, was a credit bid made using a portion of their $669 million secured claim.

As previously indicated, this bid was successful, and the effect or result of this successful bid is clearly provided in the Coleman Reply Report. The effect of the multi-step transaction was to transfer WCC's assets to WMH, the First Lien Lenders' designee, in partial satisfaction of WCC's debt to the First Lien Lenders.

The continuity-of-interest requirement was met because the First Lien Lenders, creditors of WCC, end up as equity owners of WMH under the undisputed facts in connection with the transaction steps.

If the Tribunal has no questions for me, I will turn the floor to Mr. Snarr.

PRESIDENT BLANCH: Sorry. I have just two questions.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BLANCH: Can I firstly take you back to Slide 3?

I don't think this is relevant; I just want to make sure I understand it.

Is it possible to pull Slide 3 up?

MR. LEHRER: So, this is numbered Slide 3.

Is it--

PRESIDENT BLANCH: It was basically talking about either some sort of transaction or a G--

MR. LEHRER: Ricky, go back to Slide 3.

Is it the language three lines down? Is that what you were looking for, President Blanch?

PRESIDENT BLANCH: Yeah. Sorry, I've got it. What I just wanted to say: Is a taxable transaction different from a reorganization under 368(a)(1)(G)?

MR. LEHRER: Yes. To be clear: So, a reorganization has a number of requirements that must be met, one of them being the continuity-of-interest requirement. Just because a transaction--let's say somebody wanted to structure a transaction as a G reorganization. Let's say it met the continuity-of-interest requirement. It may not meet another requirement which would then make it a taxable transaction, but just because a taxable transaction occurs or doesn't occur does not necessarily mean that the continuity-of-interest requirement still would not be met.

PRESIDENT BLANCH: And that takes me very neatly to my second question.

It is put against you by Canada that the Claimants have effectively self-satisfied themselves that there was continuity of interest, but that hasn't been confirmed by whichever U.S. authority, whether it's the tax authority or whether it's the Bankruptcy Courts or whoever would confirm it.

On your analysis, is that correct, or is it for the company to determine whether there is continuity of interest?

MR. LEHRER: It is for the company to determine in filing tax returns, in taking positions, etcetera. It is up to the company, it is up to the Parties, to determine under our system. And it certainly is possible that somebody could disagree with that determination in the future, but it doesn't mean that, in order to solidify that position, you need a court order or you need approval of our taxing authorities to get to that position, as it is the case may be in some other countries.

But, to be clear, the last slide--if we go

to that, Ricky.

The issue with continuity of interest is really: Do we have a group of stakeholders that were present in WCC that now end up being the Owners of WMH? And as the third bullet indicates, that group of stakeholders at WCC were the First Lien Lenders. It is undisputed that those First Lien Lenders became the Owners of WMH as a result of this transaction. That's in the record.

So, that's why continuity of interest in this case has been met under the facts.

PRESIDENT BLANCH: Thank you.

I don't have any other questions at this stage.

Zac or James? No.

So, please, let's move to your next speaker.

MR. LEHRER: Mr. Snarr.

MR. SNARR: Thank you.

Canada claims to have the higher ground for the simple, straightforward operation of NAFTA Chapter Eleven at Page 12 of the Transcript and then, in its presentation of 71 slides, seems not to have displayed

or quoted the actual text of Articles 1116 or 1117, which determine who may submit a claim to arbitration. Canada's presentation favors cases over the text of the Treaty, but that's not where treaty interpretation begins.

Where Canada did reference the Treaty text, its own biases often crept into the descriptions of what the text says. For example, Canada referenced Article 1139, but did not display it for the Tribunal. Let's look at what Canada said about Article 1139's definition of "investments of an investor" and what the text of Article 1139 actually says.

Ricky, can you bring up the next slide?

Canada said: "Under NAFTA Chapter Eleven, the protection afforded to an investment of an investor of another Party begins when a particular investor takes a risk and makes its investment. First, 'investment of investor of a Party' is a defined term in Article 1139 which requires that the investment be owned or controlled by the relevant investor." Page 31 of the Transcript.

"The relevant investor"; that's what Canada

says. Now, let's read what Article 1139 says. "'Investment of an investor of a Party' means an investment owned or controlled, directly or indirectly, by an investor of such Party." Contrary to Canada, the Treaty makes no reference to "the relevant investor." In fact, not only is it not in 1139, it is not anywhere else in Chapter Eleven.

Canada puts significant stock in the French translation of Article 1101 to explain how that Article changes Articles 1116 and 1117, making them require that the claimant/investor be the same investor in person as the investor that existed at the time of the alleged breach.

Next slide, please.

The English and French texts of 1101's references to "investments" are displayed here on the slide. Canada said that the use of the word "effectuer," or "to make," is clear that an investment of an investor of another Party begins when "a particular investor" makes its investment.

But "particular investor" is not found even in the text of the French translation, let alone the

equally authentic English text. If it were there, the French text would read differently, as shown in the language at the bottom of the slide.

Next slide, please.

Canada argues that the import of the French word "effectués" in Article 1101 is that: "An investment can only be made once by one investor. This means the investment made by each investor is unique. WCC's investment is distinct from the Claimant's investment." Page 32 of the Transcript.

That is a lot of weight to put on a word that the English translation apparently deemed superfluous in the phrase "investment of an investor of another Party." Nevertheless, let's go to the Treaty text to see how Canada's interpretation measures up to the definition of "investment" in Article 1139.

Article 1139 does not say that: "An investment of an investor of a Party must be made by an investor or that it can be made only once." It says that: "An 'investment' means an investment owned or controlled by an investor."

Now, we cannot imagine that Canada is suggesting that investments must be made only once and could not be sold to another investor. That would defeat the whole purpose of foreign investment treaties. Article 1139 requires only ownership or control, which could come by sale or acquisition.

Article 1102 expressly applies national treatment obligations to not only the establishment of an investment or making of an investment, but also its acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Canada's claim that an investment must be made, can only be made once, and that each investment is unique does not fit with the Treaty terms, saying that an investment, by definition, only needs to be owned or controlled by an investor of another Party and that the obligations under Section A of Chapter Eleven expressly assure treatment with respect to the expansion, sale, and disposition of investments.

Next slide, please.

There is no Free Trade Commission

interpretation of Article 1101 to support Canada's view. We submitted pages and pages of legislative text by both Canada and the United States at the time that NAFTA was implemented, each of which summarizes the intent and purpose of the NAFTA Chapter Eleven Articles. We refer the Tribunal to CLA-061 and CLA-062. Nothing in those official interpretive documents supports Canada's views, and Canada has not claimed otherwise.

We had not answered Canada's Article 1121 arguments previously because the answer is not complicated. Multiple investors can have interests in the same investment. If one investor's claim overlapped with another investor's claim for the same damages, any Tribunal hearing the claim would not make an award until it was satisfied that the award would not lead to a double recovery. There is no risk of double recovery in this case, in any event.

As to the fear of multiple cases involving common facts, NAFTA Article 1126 provides for consolidation of multiple NAFTA claims where there are questions of law or fact in common.

Consolidation tribunals have been formed several times in the past to streamline the cases and minimize potential conflicts. The risks that Canada has raised about double recoveries and multiple claims are not grounded in reality, and not present here.

Canada also raises the specter of banks having many potential investment claims for loans. I'm not sure that it's particularly relevant here, but when we go to the text of Article 1139, again, for the definition of "investment," we see that loans with a maturity of more than three years are expressly identified as "investments." So, if banks owned such loans, they would be investments under the Treaty.

Canada said in its Rejoinder the Claimant proffered examples of changes to corporate form, which they allege would negate jurisdiction under Canada's interpretation of NAFTA Chapter Eleven, but that is not Canada's position. Page 13 of the Transcript.

What, then, is Canada's position? Is it Canada's position that any change of corporate form for any reason post-breach relieves Canada of a claim? It is Canada's position that the death of an investor

terminates the investor's claim? I take it we will soon find out.

The rule at issue here is not a continuity-of-interest rule. It is the rule Canada has proffered to say no jurisdiction should apply here. We have demonstrated that Canada's rule is not found in the NAFTA text. NAFTA does have express limitations and requirements for making claims, showing that the drafters could have written them in and did write them in when they intended them. Even if Canada's "at the time of the breach" rule did exist in the NAFTA Treaty terms, the application of Canada's "form over substance" rule without exception would lead to extreme and absurd results.

Canada also has argued that there is no provision in NAFTA for the assignment of claims, yet Canada has cited no provision in NAFTA forbidding the assignment of claims. Again, the NAFTA drafters knew how to write limitations on claims in the Treaty text when they so intended.

Without a grounding in the text of NAFTA, the Tribunal is left to do a case law analysis of the

arbitration decisions and, based on the facts of the cases and the rationales provided, determine whether a proscriptive legal norm to some degree similar to what Canada is arguing exists in customary international law and, if so, to determine how it is shaped by customary international law principles.

When the facts of *Gallo* and *Mesa Power* are considered closely, it becomes apparent that the rule being applied there is that no investor protections, substantive or procedural, apply before there is a foreign investor and a foreign investment triggering Treaty obligations. The rule drawn from those cases does not address who the foreign investor might be or transfers between investors because those cases did not have more than one possible foreign investor.

The cases we have cited that show support for the continuation of a claim through restructuring have a common thread that there has been a bona fide investment, that corporate restructuring or transfers are taken for ordinary business purposes, and there is some common connection among the investor and investments: Corporate affiliation, perhaps a family

relationship, beneficial ownership of shares. We have called this common thread a continuity of interest.

It could be described in some other way, but "continuity of interest" also happens to be the same term used in the U.S. Tax Code when applied to a bankruptcy reorganization where the emerging company retains the tax attributes of the former company because of the fact that it has common interests, as shown by the stakeholders that are common between the two companies.

This common thread in cases that supports the continuation of a claim presents a narrow, reasonable distinction from those cases invoking broad dicta about the identity of a particular claimant at the time of a breach.

Consistent with the Rules of Article 31 of the Vienna Convention, it represents a good-faith interpretation of the Treaty, because it is in harmony with the Treaty's object and purposes, and because it works no prejudice to the Respondent State. It avoids a capricious Treaty interpretation that would allow a Respondent State to blow hot and cold, with respect to

the investment protection obligations depending on corporate changes necessitated by the misfortune of a bankruptcy or life changes resulting from the misfortune of an investor's untimely passing, which are immaterial to whether there is a bona fide foreign investment worthy of nondiscriminatory equitable treatment in the host country.

That concludes my remarks, and unless there are questions, I'll pass it to Mr. Layden.

PRESIDENT BLANCH: Zac or James? No.

ARBITRATOR HOSKING: Can I ask a quick question?

PRESIDENT BLANCH: Of course.

ARBITRATOR HOSKING: Mr. Snarr, with respect to the possibility of more than one investor meeting the jurisdiction requirements in 1116 and 1117, what is your answer to the point made by the Respondent that--the question, I guess, raised by the Respondent, that which of those investors has to be harmed? How do you measure where the harm comes from? And then a related question: How do you measure the statute of limitations?

MR. SNARR: Well, any investor making a claim has to demonstrate harm and damages, and if there were competing overlapping claims, the tribunal that would hear those claims, probably a consolidation tribunal under Article 1126, would have to sort out the extent to which there are different damages being claimed by the investors or whether the damages are overlapping in the same. It's a well-understood principle of international law that there can't be a double recovery of damages. And so, that's--I think that's the principal reason why Article 1126 consolidation tribunals were formed.

ARBITRATOR HOSKING: Quite apart from double recovery, you're saying that both--if you had two investors, you--both investors would have to suffer some harm in order to rely on those two investors to meet the requirements of those Articles of the Treaty?

MR. SNARR: Well, each investor making a claim has to demonstrate harm. Now, it may be that you could imagine a situation where you have different investors and they are both making claims, and maybe one has the better claim to the harm and a better

claim to the damages. If both those claims were made, I imagine the consolidation tribunal could be formed and hear that case, and then ensure that the harm and the damages were attributed appropriately to the right claimant. Even if there wasn't a consolidation tribunal, and you had two separate cases going on at the same time against the same State, I'm certain that the State would raise the argument that, in a particular case, that the claimant didn't have an entitlement to its damages claim because those damages were, to the extent they existed, belonged to somebody else. That would be an issue of proof in the merits on damages for the tribunal.

ARBITRATOR HOSKING: Okay. With respect to the statute of limitations, when does that start running?

MR. SNARR: Well, just as 1116 and 1117 say, it depends on the nature of the claim. The claimant who brings the claim under 1116 has to satisfy the three-year statute of limitations. It has to make the claim within three years of knowledge of the breach and damages. When it's a 1117 claim, then the statute

of limitations runs from the enterprise's knowledge of the breach or knowledge of the damages.

ARBITRATOR HOSKING: Okay. Thank you.

MR. LAYDEN: Thank you for the opportunity to speak today. My name is Andrew Layden, and I will try and limit my comments to the bankruptcy-related issues.

We believe we have made a convincing case that there was a continuity of interest between Westmoreland Coal and Westmoreland Mining where Westmoreland Coal's secured creditors exercised substantial control over the debtors during the bankruptcy cases, and that's detailed in our Appendix that was filed, as well as in our arguments yesterday. That is further supported by Ms. Coleman's statements, in other contexts, about the substantial control that a debtor-in-possession lender exercises over a debtor.

Additionally, the situation is such that Westmoreland Coal's senior secured lenders took title to substantially all of Westmoreland's coal's assets, via a Bankruptcy Court-approved credit bid with no new

money changing hands.

The transfer was effectuated by making Westmoreland Mining a wholly owned subsidiary of Westmoreland Coal and having those assets transferred via an intercompany transfer. And the transfer qualified for a Type G Reorganization under U.S. tax law because it had a continuity of interest.

Yesterday Canada made four main bankruptcy arguments in opposition to the Claimant's position that there was a continuity of interest, and I'll briefly address each of those.

Canada's first argument was that the formation document for the Claimant was important because the Claimant was technically formed by the lawyer representing the Secured Creditor group. This is just not important. It is very common for lawyers, even staff members like paralegals or secretaries, to create entities that will later be used in a transaction.

So, what is more significant here is the structure of the transaction itself, and that is that Westmoreland Mining was formed and then became a

wholly owned subsidiary, received the transfer of assets, and then the ownership of WMH was transferred to the lenders via the credit bid, again, with no new money changing hands, solely the conversion of the debt into the equity of Westmoreland Mining. So, we believe the focus on the initial formation document and who filled out the forms is immaterial here.

The second argument that Canada raised was that the Confirmation Order made a standard finding that Westmoreland Mining and Westmoreland Coal operated at arm's length and that Westmoreland Mining was not an insider of Westmoreland Coal.

We believe those findings have to be considered together with the other findings in the Confirmation Order. Specifically, the Bankruptcy Court approved the transaction steps as integral to the Plan, and it is undisputed that the transaction steps contemplated Westmoreland Mining becoming a wholly owned subsidiary of Westmoreland Coal.

The Bankruptcy Court Confirmation Order also specifically provided that the transfer of assets, which were defined to include causes of action, "shall

be preserved and shall vest in Westmoreland Mining, free and clear of liens, claims, charges and other encumbrances."

The confirmation order also provided specifically: "For the avoidance of doubt, and notwithstanding anything to the contrary in this Plan or the Confirmation Order, the NAFTA claim...is not being released...."

We think it is significant that the Parties and the Bankruptcy Court recognized the NAFTA claim was a potential asset of the bankruptcy estate and attempted to preserve it for the benefit of the Creditors, here, the senior Secured Creditors, which had, essentially, a blanket lien on all assets of Westmoreland Coal.

Canada's position is that the Bankruptcy Court's Order is not effective in this regard. But it is important to note that the Parties in the Bankruptcy Court made a conscious effort to preserve this claim in the bankruptcy case, and it's Canada, in this instance, arguing that the Bankruptcy Court's Confirmation Order is not effective.

The third argument raised by Canada was that the Bankruptcy Court's "no successor liability" language demonstrates that Westmoreland Coal and Westmoreland Mining are different for purposes of the NAFTA claim, but we believe Canada vastly overstates the significance of this language.

As an initial matter, virtually every transfer from a Debtor in bankruptcy includes similar and standard language, that the recipient of the assets is not liable for the Debtor's debts. This is because most Debtors in bankruptcy have significant liabilities, and no one would take title if the liabilities tagged along with the assets.

Canada suggests that this liability shield is only possible in a sale transaction, but that isn't so. Upon confirmation of a Reorganization Chapter Eleven Plan, a Debtor would receive a Discharge, which functions very similarly. The Discharge broadly eliminates the Debtors' debts, and that is often the goal of a Debtor filing bankruptcy in the first place. This is also noted in Ms. Coleman's First Report at Paragraph 18.

So, the ability to leave debts behind the reorganization or a transfer of assets is a fundamental feature of the U.S. Bankruptcy Code, and the language that Canada points out is very standard language effectuating that.

The fourth argument that Canada raised is that the Claimant only took most, but not all, of Westmoreland Coal's assets in the credit bid and, therefore, Westmoreland Coal and Westmoreland Mining are not exactly identical in their assets and liabilities.

First, Ms. Coleman recognized, herself, in Paragraph 89 of her First Expert Report, that the transfer involved substantially all of the assets. Canada yesterday pointed to some ancillary assets, like directors' and officers' insurance, and none of those have anything to do with the investment at issue here in Prairie.

What Westmoreland Mining did acquire is cited in Paragraph 100 of our Rejoinder. It was the U.S. properties; the mining lease; the equipment and fixed assets; the accounts receivable; the coal

inventories; the contracts; the cash; the permits; the books and records; the cause of action; the headquarters; the intercompany receivables; the tax assets; collateral securing any bonds; and the equity in the Canadian business, including, additionally, intellectual property, including trade dress, trademarks, and goodwill, and Westmoreland Coal's goodwill.

We must recall that the senior Secured Lenders here acquired these assets with no new money. It was a conversion of debt into equity in the new co., Westmoreland Mining. In doing so, Westmoreland Mining was served as a wholly owned subsidiary of Westmoreland Coal to accept the assets in an intercompany transfer.

We believe that demonstrates a continuity of interest here.

Thank you for the opportunity to address these, and I'm happy to answer any questions the Tribunal may have.

PRESIDENT BLANCH: James or Zac?

Thank you, Mr. Layden.

MR. LAYDEN: Thank you.

MR. LEVINE: Good day to everyone, and thank you for the opportunity to present again.

As Mr. Feldman mentioned, I will be discussing some of the authorities presented by Canada in its presentation yesterday and the rebuttal of those materials.

Canada's presentation yesterday relied on *GEA v. Ukraine*, found at RLA-023 and *STEAG v. Spain*, found at RLA-056 and CLA-037, for the proposition that this Tribunal should uphold the jurisdiction ratione temporis objection here. Both cases are distinguishable. Both involve transfers of an investment where the transferor and the transferee had no prior relationship. Canada attempts to distinguish *Koch*, *Autopista*, and *African Holdings* as well.

As Canada stated at Page 83 of the Transcript: "*Koch* permitted the transfer because there was a close nexus." *African Holdings* stands for the same proposition. Again, Canada concedes on Pages 84 and 85 of the Transcript that the *African Holdings* tribunal stated the two companies at issue were

affiliated companies continuously owned by the same family.

Autopista also involves transfers between companies within the same family. Mr. Douglas today says that the date of the breaching measures in that case can be found at Paragraph 33 of CLA-020. But that paragraph provides only the date when conciliation proceedings began. I would, therefore, urge the Tribunal to study Canada's interpretation of authority closely. You would have to look at the merits decision to determine when the breaching measures occurred in *Autopista*.

That includes what Canada says about *CME v. Czech Republic*. Canada offers a number of reasons to distinguish this case, including superficial reasons concerning the age of the case and whether other disputes cite *CME*. Substantively, Canada's reasons are not supported by the decision, and Canada did not bother to demonstrate where *CME* provides supports for its propositions yesterday.

Canada, for example, states that the Czech Republic prospectively approved of the share

transfers, but the Award provides at Paragraph 423 that the Memorandum of Association was silent as to the change of control that took place in 1997, not that future share transfers were prospectively authorized.

Canada also argues that the Czech-Dutch Bilateral Investment Treaty did not specify whether the investment had to be owned or controlled by the claimant at the time of alleged breach, where NAFTA requires this under Article 1101(1). That argument presupposes this Tribunal agreeing with Canada's position, and Mr. Snarr has explained yesterday why the Tribunal should not.

Canada further argued that the Czech-Dutch Treaty purportedly allowed for the rights derived from required shares to qualify as part of the investment, which, according to Canada, captured the prior rights of the parent entity. But the *CME* decision at Paragraph 147 states specifically what the investment constituted, and Canada's derived rights argument is not listed as an investment.

Regardless, NAFTA offers similarly broad

protection in the definition of an "investment" which includes enterprises and equity and provides protection for both direct and indirect investment, which are found in Articles 1139 and for enterprises also in Article 1117.

Canada's final attempt to distinguish *CME* is that the claimant's parent company was also treaty-protected, and it could have brought the claim. However, that parent was not the claimant in the case and the tribunal ruled specifically in Paragraph 424 that this assignment of the investment by the parent to the claimant was entirely permissible. But *CME* demonstrates that more than one claimant could seek relief for the same breaches.

We believe that the facts here fit the paradigm of these cases. The secured creditors had made their investment prior to the date of the breaching measures. They understood the business, well, but as a result of the bankruptcy, they have limited options for a recovery on their debt. Indeed, literally no one else wanted these assets. There were no other bidders for the assets during the bidding

process.

With no options to obtain a recovery for their debt after the default, the secured creditors used a portion of their previously contributed debt to obtain the assets at issue through Westmoreland Mining Holdings. Canada now seeks to reap a windfall from this misfortune, extinguishing its liability for its breaches through dint of a bankruptcy reorganization.

Canada also argues that Westmoreland Coal Company could have carried on with its claim, notwithstanding that Canada insisted Westmoreland Coal Company's had to be withdrawn as a condition for Canada to accept an amended Notice of Arbitration for Westmoreland Mining Holdings.

Canada's position is at odds with *Loewen*. The *Loewen* tribunal did not find that jurisdiction was lacking because the claimant changed its corporate form through a bankruptcy restructuring, nor did the *Loewen* tribunal object to the fact that the NAFTA claim was transferred. The tribunal there had two problems with jurisdiction. First, the Company that emerged from bankruptcy as the parent company of the

investment had become a U.S. company, breaking the diversity of nationality.

Second, the tribunal refused to accept that the Canadian company to which the claim was transferred could proceed with the claim because it was a naked shell company referenced as Nafcanco with no ownership of any assets of the investment. Here, Westmoreland Coal Company is an American company, but it is a naked shell company with no ownership of the investment, something that the *Loewen* tribunal did not tolerate.

Westmoreland Coal Company is not the company that will face increased reclamation costs because of the Measures. Westmoreland Mining Holdings is. Westmoreland Coal Company is slated to be dissolved and would have been closed by now but for a delay in the bankruptcy process and transfers of mining permits.

Canada's argument that the claim could not be pursued by the Westmoreland Coal Company turns the Westmoreland bankruptcy completely upside down because the goal of the bankruptcy is to preserve assets and

value for the secured creditors. Any award that might have accrued to Westmoreland Coal Company should inure to the benefit of its primary stakeholders, the Shareholders of Westmoreland Mining Holdings, the same secured creditors who had the stake in Westmoreland Coal Company.

Two additional non-NAFTA Decisions discussed by Canada require a response.

Canada cites *EnCana v. Ecuador*, found at RLA-053 for the proposition that the claimant at the time of the breach can advance its claim, even though the investment was later sold, but the tribunal there did not even address whether an additional claimant could assert a claim. Nor could it. The investment was transferred to entities that did not qualify for Treaty protection, based upon nationality.

This point is made clear by *Daimler v. Argentina*, found at RLA-054. The issue in *Daimler* was whether the claimant transferred the right to assert the claim to its parent company because the claimant had standing at the time of the breach and had not transferred its rights over the claim under

domestic law. Because the claimant had standing at the time of the breach and had not transferred its right over the claim under domestic law, it still had standing to proceed with the arbitration.

However, the tribunal later explained that the claimant's parent, who had an indirect investment at the time of the allegedly offending government measures, may also enjoy an independent right to bring its own claim for the same damages. That can be found at Paragraph 155 of the Award.

What would not be allowed, of course, was a double recovery. The same principle was found to be true in *Gemplus v. México*, which would have allowed a transfer from Gemplus to SLP but for a contractual agreement to the contrary. This case, found at CLA-029 is discussed in Paragraph 115 of our Rejoinder.

Moreover, Canada's citation of *Mondev* and other cases for the position that an investor should continue its claim after losing its investment is inconsistent with its own reading of NAFTA Article 1101.

Canada has argued that Chapter Eleven must relate to investors of another Party and investments of investments of another Party, and that it cannot relate to Westmoreland Mining Holdings because, even though it may be an investor now that it owns Prairie, it did not own Prairie at the time of the breach.

There is nothing about this interpretation that logically would have had--would have permitted Westmoreland Coal Company to continue its claim. Without Prairie as an investment, the same Article 1101 language Canada cites, applied in the same way, would mean Westmoreland Coal Company is not an investor and the measures do not relate to it.

If the cases were reversed, Canada certainly would be here arguing that the measures are not causing damages to Westmoreland Coal Company as it does not own the Mines and it will be unaffected by the future increases in mine reclamation costs that will be suffered by Prairie and its parent, Westmoreland Mining Holdings.

Absent any questions, Mr. Feldman will conclude.

PRESIDENT BLANCH: Thank you.

James and Zac? No.

Mr. Feldman, back to you.

MR. FELDMAN: I think I managed all the buttons.

You can hear me? Thank you.

So, we thank the Tribunal, again, in this Closing moment. We observe that we seem to turn to French yesterday probably in celebration of Bastille Day because otherwise the French doesn't have much meaning for this proceeding. And we've had a debate now about language, the critical part of our language is what the Treaty says and not what it doesn't say.

So, in today's argument, Mr. Douglas would like us to believe that because it doesn't say something, then that something is proscribed. But the language of the Treaty must be interpreted in terms of the terms that are in the Treaty.

What we have been offered is a static view of investment in an environment that is trying to encourage foreign investment. When a foreign investor makes their investment, they need the flexibility to

merge, acquire, and act in other ways and to change their form if they so choose.

The theory that is advanced by Canada is that at the moment that there's a breach of a treaty, such that there are damages that befall the Company, the Company is frozen. If it wants to protect the claim, it can't change because any changes will change the Company and therefore it won't be, in Canada's theory, the same.

I was thinking about Mr. Hosking's question. Obviously, more than one investment can be impacted by the same State action, and then there would be more than one claim arising from that State action. And those claims, as Mr. Snarr explained, would be consolidated if they arose. And the statute of limitations would apply in the same way that is written in the Treaty, under the same terms.

So, it seems to us, obvious and inevitable that there could be more than one claim, and there could be more than one claimant arising from the same circumstances and rules, and in those circumstances the Treaty does provide a solution.

So, we have thought about this now as something like a death in the family, and we have suggested that the line you would like to draw, and that we suggest you do draw, is consistent with the--President Blanch's inquiry this morning. There are cases that plainly don't qualify for jurisdiction where there has been shopping of the claim or there has been a manipulation, and then there are others where there is inheritance or someone dies.

In this case, a Company died. But the people who ran the Company, who controlled it and effectively owned it, they survived, and they still should own the Claim.

With that, we invite questions from the Tribunal that--and express our gratitude for the time and attention the Tribunal has given to this Hearing. Thank you.

PRESIDENT BLANCH: Thank you, Mr. Feldman.

What I suggest--we have 15 minutes' break now. And Mr. Feldman, this is not to suggest we don't have questions arising out of your final part of your Closing, but I think probably the best thing is for

the Tribunal Members to get together now just to see what questions that we may have for both of the Parties, and then we can regroup in 15 minutes for us to raise any questions we have to both Parties.

So, on that, I suggest we get back together at 31 minutes past the hours, wherever you are, and I would ask that the Members of the Tribunal are taken into the breakout room, please.

SECRETARY FLECKENSTEIN: Elizabeth, please. Thank you.

(Brief recess.)

PRESIDENT BLANCH: So, Mr. Feldman, do we have everybody of your team here?

And you're on mute.

MR. FELDMAN: It's the second button. Sorry.

We're all in different places, but, yes, I think we're all assembled. Thank you.

PRESIDENT BLANCH: Excellent.

Mr. Douglas?

MR. DOUGLAS: Yes, we have everyone. Thank you.

PRESIDENT BLANCH: So, as a preliminary comment, we wanted to thank both Parties. You have really given us pretty much everything that we could ask for. Your submissions have been really clear, and we are incredibly grateful for all the hard work that you both have done.

So, we have very few questions, and that should not be taken in any way other than a compliment to the work that everybody has done today.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BLANCH: How we propose is that, firstly, I would be grateful to get an answer from both Parties--I'll start with the Respondent and then Claimant--to the question I raised whilst Respondent, Canada, was making their Rebuttal submissions. Then Mr. Hosking has just a very few questions. It may be that Mr. Zac Douglas and I might have some points that we comment on, but I don't think that we will have that many questions for you.

So I just emphasize again, that is not in any way--in fact, it is a reflection on the caliber of your submissions, but it's a very positive reflection,

so I just want to make that very clear. We are very grateful.

So, therefore, moving on to the questions, if I could start, Mr. Douglas, with you and your team for an answer to the question that I rather ineloquently posed early on.

MR. DOUGLAS: Yes, absolutely, President Blanch.

Before we get to that question, with your indulgence, Canada had a brief comment about issues concerning evidence in this case, which I'm happy to address later. It will take but a minute. Or I can do that now, and then we can move on to answer your question or the question from the Tribunal.

PRESIDENT BLANCH: Please do that now. It may be that Mr. Feldman would like to make a responsive comment before.

FURTHER REBUTTAL BY COUNSEL FOR RESPONDENT

MR. DOUGLAS: Okay. That is absolutely fair.

Canada's comment is as follows: On June 18 of this year, Canada wrote a letter to the Tribunal

noting that the Claimant had added a tax lawyer and a bankruptcy lawyer to its Counsel of record, and we also noted that argument from Counsel is not evidence. In its Rebuttal, we heard from the tax lawyer and bankruptcy lawyer.

In Canada's view, it is not proper for the Claimant to testify from the Bar, if I can call it that, let alone in rebuttal. The Claimant had the opportunity to submit expert evidence on bankruptcy. It chose not to. Instead, it agreed that the bankruptcy issues in this case are not materially in dispute, and it elected not to cross-examine Ms. Coleman to testify.

The Claimant also had an opportunity to call a tax expert. It didn't. In fact, the Claimant did not raise its tax arguments until its Rejoinder, effectively preventing Canada from presenting any evidence on these issues.

We're not concerned by these issues. We don't see the Claimant's continuity of interest theory as having any relevance, but Canada does urge the Tribunal to pay particular attention to the evidence

that has been submitted to establish each of Claimant's propositions.

In Canada's view, argumentation from Counsel is not evidence on which this Tribunal can find jurisdiction.

I'm happy to answer any questions on that before we move on to the question that was posed by the Tribunal.

PRESIDENT BLANCH: Can I just open it to Mr. Feldman in case he wants to make any comment in reply?

MR. FELDMAN: Thank you, Madam President. I like the sound of "Madam President."

This is both exceptional and a bit objectionable. If there was an objection to a letter on June 18, he could have posed an objection on June 18. We did not think this case was about bankruptcy. We did not think it was about tax. We didn't need Experts. We have lawyers, and because Canada made such a case about this, we rebutted and replied, making the best use of lawyers. We don't see anything exceptional or objectionable about that.

We are a little surprised that we are now getting new argument at the end of this Hearing and that the Respondent is using this occasion to advance another argument. We have seen this before in letters to the Tribunal in which new argument was introduced about how the Tribunal should call Canada's Expert because we weren't interested in cross-examination.

So we don't think we have done anything extraordinary here. We use the best legal talent we have. There is no need for Expert testimony. Their Expert acknowledged that this was not about bankruptcy. We spent a lot of time on bankruptcy today only because it's rebuttal, and what we are rebutting, it seems, is the case about bankruptcy. And that seems to be the defense.

More than that we really don't--I don't have more to say. I can't say "we" because I haven't had an opportunity to confer with anybody about this new argument that's suddenly been introduced.

PRESIDENT BLANCH: Thank you, Mr. Feldman.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BLANCH: Mr. Douglas, would you

like to proceed now to the response to my question?

MR. DOUGLAS: Yes. Absolutely. I will pass things over to Ms. Zeman to provide an answer. Thank you.

MS. ZEMAN: Thank you.

All right. To answer your question from earlier, President Blanch, in Canada's view, what matters is the legal personality of the investor. Canada has explained that its consent to arbitrate under NAFTA Chapter Eleven is limited to particular investors of a Party. "Investor of a Party," as we know, is a defined term in NAFTA, which includes a reference to "an enterprise of such Party that seeks to make, is making, or has made an investment."

An "enterprise" under NAFTA Article 201 means "any entity constituted or organized under applicable law," and then it goes on to cite some examples. Accordingly, there may be scenarios where an investor maintains the same legal personality following a corporate reorganization pursuant to the applicable domestic law. Whether or not that transpires requires a case-specific and fact-based

inquiry.

Canada notes that the U.S. also explained in its NAFTA Article 1128 submission in *Tennant*, that the analysis of whether an investor remains the same investor following a corporate reorganization requires a case-specific and fact-based inquiry. That's at Footnote 15 of RLA-076.

If, under the applicable domestic law, a new entity is considered to have the same legal personality as a previous enterprise in a corporate reorganization, then the investor remains the same investor for the purposes of NAFTA Chapter Eleven. An example might be an amendment to an entity's corporate form, which domestic law finds maintains the same legal personality.

This is why Canada explained yesterday that, if the Claimant were looking to establish that it was a mere change in corporate form from WCC, then it should have put forward evidence about the applicable rules of domestic law on corporate form changes.

Now, you've also asked about heirs and natural persons. We're not experts on domestic will

and estate laws, but the same case-by-case analysis would be required. If the relevant domestic law contained a legal fiction whereby the deceased's estate is a continuation of the deceased's legal personality, that could be sufficient to grant jurisdiction, subject, of course, to the particular facts of the case.

In this case, you've heard the statement the Claimants state again today that it was substantially the same as WCC, that the Westmoreland that entered bankruptcy was substantially the same as the Westmoreland that emerged. That is a question that must be assessed by reference to domestic law. And, to be clear, that is a question of fact that requires evidence to establish.

Here, the U.S. Bankruptcy Court has turned its mind to the relationship between WCC and WMH as a matter of U.S. law and has determined on the basis of a complete evidentiary record that the two are at arm's length and were not insiders. It also determined that Claimant would not have successor liability to WCC. In short, it found that the

Claimant and WCC were not the same entity under U.S. law.

Those findings are binding on the Claimant, and they are determinative of the question of whether the Claimant and WCC are the same investor of a Party under NAFTA for the purposes of this claim. They are not, and the Tribunal does not have jurisdiction on the facts of this case.

I'd be happy to field any follow-ups the Tribunal may have. Otherwise, we're in your hands.

PRESIDENT BLANCH: I suggest that, first of all, Mr. Feldman and his team give their answer, and then we'll see if we have any follow-up questions from the Tribunal.

MR. FELDMAN: Thank you, Madam President. I will just say a word, and then I think Mr. Snarr would be best appointed to complete an answer.

We have here a question about where there's a line, and the line seems to be, from Canada, all-encompassing. A company can't move; it can't change; it can't do anything once there's a breach and it has a claim. That's contrary to the object and

purpose of an investment treaty. And it would do nothing but discourage foreign investors because, if subject to an act of State that is damaging, from that point forward, they are not permitted to change in any way, to become some different legal personality.

But Mr. Snarr would, I think, provide a more complete answer.

But you're on mute. You're not the only one--

MR. SNARR: It was on double-mute.

Thank you.

I think that we--I think that most of what we would want to say on this we just said in our Rebuttal. I will note that I think what I'm hearing from the Government of Canada now, for the first time, is that there may be an exception to the rule; perhaps a small exception, but an exception.

And if there's an exception, then it becomes a factual question, and it depends on what kind of change there is in the corporate form to determine whether it's really enough of a change to mean that Canada's strict rule should apply.

If there is an exception, then, one, I don't think that Canada has explained how, under its reading of the Treaty, there is an exception to this rule that it claims is in the Treaty. I don't know what the Treaty justification is for their rule, that until now has been a strict rule to which there have been no exceptions.

If there are factual issues, then factual issues are the kinds of issues that should be held over to the merits. If there are factual issues about whether the change in the corporate form affects the nature of the measures relating to the new entity, whether it relates differently to the damages than the prior entity or whether the breach relates differently to the entity, those are factual questions that should be held over for the Merits.

Otherwise, I think that we've answered this question in our prior submissions, and we will leave it at that unless there are further specific questions on this point from the Tribunal.

PRESIDENT BLANCH: Thank you, Mr. Snarr.

James, let's start with you. Are there any

follow-up questions that you want to ask from that?

ARBITRATOR HOSKING: No. No, thank you.

PRESIDENT BLANCH: Zac?

ARBITRATOR DOUGLAS: No. No, that was very complete.

PRESIDENT BLANCH: Thank you. In which case, can I turn over--James, do you have any other questions that you wanted to raise?

ARBITRATOR HOSKING: I do have a couple of hopefully quick questions, and I think the first one probably goes to the Respondent, and then perhaps the Claimant may want to comment on it afterwards. And the question really goes to what the position of WCC is now in Canada's submission.

We understand that WCC still exists; does it have any residual rights to bring a treaty claim? And the question really arises out of Canada's position that the attempt to transfer the Claim as part of the bankruptcy plan fails as a matter of public international law. That is Canada's submission. And then the related issue was: What is the consequence of the change in ownership of the Canadian assets as a

consequence of the bankruptcy reorganization? So, what is WCC's position today?

MS. ZEMAN: Thank you for that. I think the most appropriate person to answer that will be my colleague, Mr. Douglas, who is right here standing--lying in wait.

ARBITRATOR HOSKING: Nicely done.

MR. DOUGLAS: Canada has a bit of musical chairs happening.

So, I think, if I understand your question--and you can let me know if I haven't--it is: What would be WCC's position today? And I think if they no longer own or control the investment, that is true, the enterprise, but that still would not preclude a claim under 1116 on their own behalf. Canada's view is that you have to own and control the enterprise at the date that you submit a claim, as well as the date of the alleged breach. But under Article 1116, you file a claim on your own behalf.

So, like in *Daimler* and *EnCana*, all of those cases where the investor no longer held the investment, the tribunals determined nonetheless that

the investment in this case retained jurisdiction, even though it no longer held the investment. So, WCC could still be in a position to bring a claim on its own behalf. As we've mentioned, it is still an entity constituted under the laws of Delaware.

ARBITRATOR HOSKING: I think that answers the question, unless my colleagues have any questions on that. I think it would be helpful to hear from the Claimant if they have any response.

MR. FELDMAN: I think we probably do have a response. After all, Westmoreland Coal Company can't do much with the damages and they are not the ones now suffering from the damages. That's the secured creditors, especially because the damages are continuing--

(Interruption.)

(Stenographer clarification.)

MR. FELDMAN: It's the secured creditors who are suffering the damages, particularly because of the continuing damages related to the reclamation schedule, but Mr. Snarr may have something more to say about this.

MR. SNARR: Thank you. Yes, I would, perhaps, slightly amend that it is Westmoreland Mining Holdings held by the Secured Creditors as Shareholders that is incurring the damages.

I think we will not repeat our earlier submissions about what's happening with respect to Westmoreland Mining Holdings and Prairie now, but I am struck a little bit by the comment from Canada that Westmoreland Coal Company could bring a claim now, in part, because Canada had insisted that withdrawal of the Westmoreland Coal Company claim was a condition for recognition of the Notice of Arbitration for Westmoreland Mining Holdings, number one. And, two, if Westmoreland Coal Company could bring a claim now, so that, really, all of this argument has been an academic debate about the name of which company is proceeding as the Claimant for the appropriate claim here, then we've invested a lot of time and energy on something that might be interesting but might be proven to be rather pointless, if all we need to do is have Westmoreland Coal Company proceed as the Claimant now with that claim.

So, in any event, Westmoreland Mining Holdings has Prairie, and it is the one that is ultimately responsible for the reclamation costs of the mines that are hanging out there. And that's been a concern of our client for some time.

ARBITRATOR HOSKING: I think that was clear. Unless there is anything that my colleagues have to follow up on that, I just have one other short question, but--

MR. DOUGLAS: Would it be possible for Canada just to provide a short reply to the statement made by the Claimant?

PRESIDENT BLANCH: Yeah. I was going to ask, actually, if you had anything that you wanted to say in reply. And it may be that the Claimant might want to make a further comment once they have heard you.

But, please, Mr. Douglas, go ahead.

MR. DOUGLAS: Yes. Just, I think, first, on the question about whether Canada had conditioned the withdrawal, we will leave the Tribunal to review the correspondence between Canada and the Claimant on that

issue.

As I explained yesterday, it was the Claimant that approached Canada seeking to substitute itself for WCC in WCC's claim. It was the Claimant that wanted WCC removed from the picture. That was not Canada's decision. That was the Claimant's decision.

In terms of who is suffering damages, Mr. Snarr is correct, it's not the Secured Creditors; it would have to be Westmoreland Mining Holdings. But as Canada has already explained, Westmoreland Mining is not capable of suffering any damages. And the reclamation costs to which Mr. Snarr refers, they would have been fully aware of those costs at the time that they acquired the investment on March 15, 2019.

PRESIDENT BLANCH: Mr. Feldman or Mr. Snarr, is there anything you want to add before we go to Mr. Hosking's next question?

MR. FELDMAN: If I may, this is, perhaps, a silly debate, and there is a record, but Canada demanded a withdrawal of the Westmoreland Coal Company claim, and we responded to that demand in order to

move the case forward, and so we withdrew the claim. We didn't go to Canada and say "Let us withdraw this claim." That's not what happened.

What we did do is try to facilitate the process in recognizing that Westmoreland Mining Holdings had a different name for Westmoreland Coal Company and that we, therefore, tried to amend our request. Our request to amend was denied. We filed a new claim. Much was made yesterday about the claim being the same. Of course, it was the same. That was the intent of the amendment. All we wanted to do was change the name.

And so, we had to go through a further procedure, but not entirely, because there was recognition of continuity of interest on the part of Canada such that we chose you folks, for example, as a Tribunal, as a continuation of the process we were already in. So, we didn't completely streamline, but we did preserve a process, and we didn't start over again when we made the change. But the last step in the process was about withdrawal of the claim, and that was demanded by Canada.

PRESIDENT BLANCH: I can confirm that the Tribunal will be able to read the communications between the Parties and we'll be able to work out what actually happened.

I propose, Mr. Hosking, that you ask your next question.

ARBITRATOR HOSKING: Sure. And this is a relatively straightforward question. I just wanted to understand what the Tribunal is being asked to decide, and it goes to the Respondent's claim that there is no jurisdiction ratione temporis over the Claimant's damages claims, the part of the item dealt with by Ms. Dosman yesterday. And as I understand the argument, is it is that damages pled by the Claimant WMH mirror the claim that was made by WCC.

My question is: Purely for jurisdictional purposes, is it correct that all the Tribunal has to do is find that the Claimant has made out some prima facie basis for WMH having some harm at the jurisdictional stage? And then the question of whether WMH--should we decide that there is jurisdiction, the question of whether WMH can make out

that claim is really a question for the Merits?

MR. DOUGLAS: Yes. Thank you for the question. And with Ms. Dosman's leave, she has allowed me to answer.

You are correct, Canada's position is that it is a prima facie basis. A more fulsome damages analysis would have to be saved for the Merits. But Canada's position is that a prima facie damages case cannot be made out in this case.

Primarily--I mean, many reasons why, but the $470 million claim was filed by WCC in November of 2018, before the Claimant even existed, and the Claimant alleges the exact same damages. So, I think there's some clear indication there that the damages the Claimant is alleging in this case happened before it even existed as an investor of a Party.

Claimant keeps coming back to this notion that there are still damages that are pending for it. When you acquired the investment, when the Claimant acquired the investment in March of 2019, it would have been fully aware of the regulatory landscape in Alberta. So, whether or not there are any damages

that are ongoing for it, those are not attributable to Canada.

The Claimant would have conducted its own valuation of the investment when it acquired. Some of those figures are at Paragraph 28 of Appendix A to the Claimant's Counter-Memorial. When you decide how to value and what you are going to pay, there's a break in the attribution at that point in time. So, none of the damages claimed by the Claimant in this case can either be attributable to Canada--but, as Ms. Dosman explained, they all crystallized well before the Claimant became an investor of a Party. They crystallized in 2016 when the OCAs were signed by the Government of Alberta.

ARBITRATOR HOSKING: So, then, if I can just encapsulate that, is it the Respondent's position, then, that the damages--that there is no harm, as of March 2019, for which WMH could claim?

MR. DOUGLAS: I think our position is that the damages they have claimed--so, if you look at their NOA, the damages they have claimed are all in the past.

ARBITRATOR HOSKING: Okay.

MR. DOUGLAS: So, the Claimant, in later Pleadings, may have tried to draw out or explain or extrapolate damages that might be happening after 2019, but that is clearly not what their claim says. And, in any event, we don't see their arguments as having much credibility for the reasons I just stated, which is that they were a new investor acquiring a new investment at that time, and everything they are claiming in terms of damages is something that happened in the past.

And, on that basis, you cannot make out a prima facie case for damages. And the provisions of Article 1116 and 1117 which require you to state a prima facie case of damages are not made out.

ARBITRATOR HOSKING: Okay. I think I'm clear on that. With the President's approval, shall we ask the Claimant to respond briefly?

PRESIDENT BLANCH: Absolutely.

MR. FELDMAN: There's a tragic element to this, and I can't help but observe. We are all absorbed in the problems of climate change. This is a

coal mine. The Company is trying to clean it up. It has been put on a different calendar to do that by virtue of the actions of State. It doesn't have a revenue stream to pay for it anymore. It is asking for someone to be responsible.

It is trying not to walk away from its prior obligation, but if everything has been wiped out, maybe it doesn't have that obligation to clean it up. Maybe it is now left to the good citizens of Alberta to have to clean up after these mines.

That's potentially an implication here, which I can't help but observe as a kind of a tragic element of the Canadian argument. But one of my colleagues might want to add something more legal or technical to the proposition.

MR. SNARR: I would just add that I don't know how Canada can determine when damages were crystallized, as we've not had a hearing or Pleadings on damages beyond the initial Pleadings.

The other point that I would make is when Mr. Douglas talks about the acquirer looking at the value of the Company and looking at the regulatory

environment and deciding whether to get into that environment, that may be the case if you had a different situation where there was not a continuity of interest and you had a completely unrelated investor, somebody not in the coal business looking to decide to get in. And they are the ones who were bidding in the bankruptcy opportunity.

There weren't any other parties like that bidding. It was only the secured creditors, and they were already in the regulatory environment because they had already committed capital through Westmoreland Coal Company.

And so, in the process of making a bid, they were trying to maximize the value of the assets of the Company as they were coming out of bankruptcy, so that they could free from the liabilities left behind as a result of the bankruptcy, try to move forward and make the most of the Company as they could.

I think that's a materially different situation, and it has bearing on the question of how the Tribunal draws the contours around the rule that is being asked to be applied here.

ARBITRATOR HOSKING: Thank you. Those are the only questions I had. Thank you for your time.

PRESIDENT BLANCH: Thanks, James.

Zac, did you have any further or follow-up questions?

ARBITRATOR DOUGLAS: Perhaps just a very brief follow-up question to what was just being said. It is not being suggested by the Claimant, is it, that the first secured creditors are bringing a claim for a distinct loss caused to them as a first secured creditor?

MR. SNARR: No. The Claim is by Westmoreland Mining Holdings.

ARBITRATOR DOUGLAS: Yeah. So, when you were talking about how damages would be valuated when you decided to go through the reorganization, you are not talking about historic damage to the first secured creditors. You're talking about historic damage, if any, to WCC which was then on your case transferred--the Claim in respect to that damage was transferred to the Claimant?

MR. SNARR: It's the--I think we can break

it up in separate ways. There is damage to the investment, Prairie. Canada has said that Prairie is a different investment when it was owned by Westmoreland Coal Company than it is when it's owned by Westmoreland Mining Holdings. I think that's a legal fiction, and I understand how legal fictions sometimes have their purpose.

But let's be clear, that Prairie is the same Company, the same Owner of the Mines, and the investment that is being damaged, it's been our position that when it was owned by Westmoreland Coal Company, that the Treaty obligations were activated and that there was a breach and that there was harm to Prairie.

Now, Prairie was transferred to Westmoreland Mining Holdings, and we are talking also about a breach that has effects that extend over time because we are talking about the life of coal mines and the time horizon for that and the planning that goes into the reclamation of the mine that takes place over a period of years.

So, the damages that we're talking about are

damages to Prairie and damages associated with the transfer of the claim to Westmoreland Mining Holdings from Westmoreland Coal Company.

ARBITRATOR DOUGLAS: That's clear. Thank you very much.

PRESIDENT BLANCH: So, Zac, you've asked all your questions. James, you've asked all yours.

I have no further questions. So, on that, I think we turn to any final administrative matters.

POST-HEARING MATTERS

PRESIDENT BLANCH: Mr. Feldman, do you have any final housekeeping at this point?

MR. FELDMAN: I just wanted to add that we look forward to an in-person hearing, so we can actually meet all of you, but I don't think that is necessarily housekeeping.

PRESIDENT BLANCH: Well, certainly it would be lovely if we were all able to be together rather than having to cope with double-mute buttons and everything else we are trying to deal with.

Mr. Douglas, do you have any housekeeping or further comments?

MR. DOUGLAS: No. I agree it would be nice to meet everybody in person, but, given the circumstances, it is what it is. There is no further housekeeping issues from Canada.

PRESIDENT BLANCH: Excellent.

Well, in which case, it just falls to me to thank Dawn and the other Reporters--to the extent there were any others--thank you for a fantastic job. As always, I'm in awe of the work that you do.

I'd also like to thank everybody at ICSID for their help in putting this all together. I'd like to thank both sets of Parties for all your hard work and very clear submissions.

The Tribunal will now go into its deliberations and we will provide a Decision once we finish deliberating and it's drafted. But in the meantime, I hope everybody is able to have a bit of a rest and a lovely weekend.

Could I ask that the Tribunal is moved back into the breakout room.

Thank you, everybody.

(Whereupon, at 12:10 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