

**IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 1976 UNCITRAL ARBITRATION RULES**

WESTMORELAND MINING HOLDINGS LLC

Claimant,

v.

GOVERNMENT OF CANADA

Respondent,

ICSID Case No. UNCT/20/3

**CLAIMANT WESTMORELAND MINING HOLDINGS LLC'S
COUNTER-MEMORIAL ON JURISDICTION**

February 26, 2021

Elliot J. Feldman
Michael S. Snarr
Paul M. Levine
Analia Gonzalez
James J. East
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Eleventh Floor
Washington D.C. 20036
Tel: 202-861-1500
Fax: 202-861-1783
Email: westmoreland@bakerlaw.com

Alexander K. Obrecht
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, CO 80202
Telephone: (303) 861-0600
Fax: (303) 861-7805

Table of Contents

I.	INTRODUCTION	1
II.	PRAIRIE WAS AND IS A FOREIGN INVESTMENT OWNED BY U.S. INVESTORS AT ALL RELEVANT TIMES	6
III.	THE TEXT OF NAFTA DOES NOT REQUIRE, NOR DO THE FACTS OF THIS CASE SUPPORT, CANADA'S <i>RATIONE TEMPORIS</i> OBJECTION.....	10
A.	Canada's <i>Ratione Temporis</i> Objection Is Not Found In The NAFTA Texts That Canada Cites	10
B.	The Object And Purpose Of The Treaty, Policy Reasons For The <i>Ratione Temporis</i> Doctrine, Good Faith And Fair And Equitable Treatment All Support The Tribunal's Jurisdiction In This Case	14
C.	Decisions Considering <i>Ratione Temporis</i> Jurisdictional Objections Are Fact-Dependent And Do Not Support Canada's Objection	18
1.	<i>Ratione Temporis</i> Objections Appropriately Deny Jurisdiction Where, Unlike Here, The Restructuring Is A Sham Or Abuse Of Investment Protection Rights	19
2.	Provided That The True Investor's Qualifying Nationality Is Preserved, Restructuring That Has An Ordinary Business Purpose Should Not Divest A Tribunal Of Jurisdiction Over A Claim.....	26
3.	A Continuing Beneficial Interest In The Investment Prevails Over Formalistic Objections About The Entity Of The Investor	29
4.	The Right To Assert Investment Claims Is Derived From Claimant Having Made A <i>Bona Fide</i> Investment In Accordance With The Treaty's Purposes	34
5.	The Cases Proffered By Canada Do Not Support Denial Of Jurisdiction Here	35
IV.	PROVIDED DIVERSITY OF NATIONALITY IS MAINTAINED, NAFTA DOES NOT PROHIBIT ASSIGNMENT OF CLAIMS	41
V.	CANADA'S BREACH CONTINUES AND ITS DAMAGES REMAIN PENDING FOR PRAIRIE AND WMH	44
VI.	CONCLUSION	45

I. INTRODUCTION

1. There is no dispute that Prairie Mines & Royalty ULC ("Prairie") is a mining enterprise in Alberta, owned at all relevant times by a U.S. mining company, and subject at all relevant times to the foreign investment protections of NAFTA Chapter 11. There is no dispute that Westmoreland Coal Company ("WCC") was a U.S. mining company that owned Prairie. Nor is there any dispute that Westmoreland Mining Holdings LLC ("WMH"), the company emerging from WCC's bankruptcy as the owner of WCC's mining assets, including Prairie, is a U.S. mining company.

2. The only dispute now before the Tribunal is whether WCC's creation of WMH as a wholly-owned subsidiary and the transfer of Prairie to WMH through the U.S. bankruptcy process destroys the Tribunal's jurisdiction of any NAFTA claims for Canada's breach of its Chapter 11 obligations to Prairie and its American investors.

3. Canada does not claim that it would suffer any harm, prejudice or unfairness resulting from the Tribunal finding jurisdiction to hear WMH's claim. Canada makes no argument about the equities of its position.

4. Canada's objection to jurisdiction elevates form over substance: that the principle of *ratione temporis* cuts off any and all claims where there has been a change in the corporate form of the investor. Canada asserts the rule applies strictly even where the change is the result of bankruptcy proceedings. As Canada sees it, a respondent state might violate its investment treaty obligations with impunity and, with a bit of luck, the investor might undergo a corporate restructuring leaving the respondent entirely free from liability.

5. Canada seems to have anticipated that the legal question could be resolved according to U.S. bankruptcy law (the corporate restructuring) and engaged an

expert, a U.S. bankruptcy lawyer, to support its argument. However, attorney Kathryn A. Coleman concludes her thirty-six page analysis of WCC's bankruptcy that accompanies Canada's Memorial by finding (at page 34) that "the Bankruptcy Code is silent on the issue of transferability" and "the Bankruptcy Code also defers to applicable non-bankruptcy law as to the merits of a claim and who may assert it."¹ That deference, she writes, is owed to "state, federal or international law."² Hence, Canada's expert witness expresses no opinion on the Tribunal's jurisdiction of WMH's claim, leaving the matter instead to international law.

6. Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") teaches that the international law analysis begins with the text of the treaty, to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."³ Article 32 states that "[r]ecourse may be had to supplementary means of interpretation ... to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."⁴

7. NAFTA's Chapter 11 provides no textual foundation for Canada's *ratione temporis* objection. The NAFTA Articles that Canada cites—1101, 1116 and 1117—do not require the investor submitting a claim for arbitration to be the same entity, either in

¹ RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 88.

² RER-Coleman-Bankruptcy-Memorial on Jurisdiction ¶ 88.

³ CLA-013, Vienna Convention on the Law of Treaties (1969), Art. 31.

⁴ CLA-013, Vienna Convention on the Law of Treaties (1969), Art. 32.

form or in substance, as the investor existing at the time of a breach. Nor do the object and purpose of NAFTA—to promote investment and permit ownership transfers related to the investment in fairness and equity—support Canada's interpretation of the text to deny jurisdiction when an investor restructures in bankruptcy for ordinary business reasons unrelated to the investment or the claim.

8. No supplementary means of interpreting the treaty text on this question should be necessary. The text of the treaty is not ambiguous, nor is the result manifestly absurd. Canada's *ratione temporis* objection depends on imprecise language in some investor-state tribunal awards, particularly in cases, unlike this one, where there was no qualified foreign investment in place prior to the date of the alleged breaches. Canada stretches these authorities to propose a rule of strict, universal application that goes beyond the text of the treaty, beyond the facts and holdings of arbitral decisions, and beyond reason in Canada's proposed application.

9. International law Professor Jan Paulsson explains in his expert opinion accompanying this Counter-Memorial that a change to the corporate entity of an investor for ordinary business purposes is not fatal to the jurisdiction of a claim by virtue of *ratione temporis*.⁵ The doctrine appropriately denies jurisdiction where the restructuring might be a sham, an abuse of investment treaty rights to obtain jurisdiction that otherwise would not be available. Investors and investments also must maintain diversity of nationality. But a tribunal has jurisdiction when corporate change occurs for a legitimate business purpose; there is continuity in the beneficial interest in the

⁵ See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction.

investment; and the right to assert the claim is connected to the claimant's *bona fide* investment in harmony with the purposes of the treaty.

10. Canada's broad application of *ratione temporis* is not based on the *ratio decidendi* of the cases that it cites. The policy reasons for denying jurisdiction based on *ratione temporis* do not apply to this case. Professor Paulsson finds that Canada should not be entitled to windfall relief, through the misfortune of a bankruptcy that befell Prairie's American owner, from the duties it owed to Prairie and its investors.

11. The facts about the WCC bankruptcy are publicly available and are not materially disputed. WCC owned and controlled Westmoreland Canada Holdings Inc, an Albertan entity, which directly owned Prairie, a Canadian corporate enterprise owning the Alberta coal mines at issue in the dispute. WCC filed a petition for bankruptcy in the United States on October 9, 2018 to restructure its debt. Secured Creditors with first priority lien interests in WCC's debt approved a bankruptcy reorganization plan by which WMH would be created as a wholly-owned subsidiary of WCC and would receive its coal-mining assets. WCC transferred those interests to WMH, along with its interests in the NAFTA Chapter 11 claim as an investor in Prairie. The first priority debt interests of the Secured Creditors of WCC were converted to equity interests in WMH and, therefore, the debt-investors of WCC became the equity-investors of WMH.

12. The bankruptcy proceeding provided an orderly process for the debt reduction and restructuring of the company. It protected and preserved the investment interests of the Secured Creditors including the investment of an American coal company in Prairie, a Canadian entity. The bankruptcy restructuring did not confer any

new nationality or status on the emerging company to obtain treaty protections that were not previously available. There is no suggestion that the bankruptcy restructuring was a sham transaction in abuse of investment arbitration rights.

13. No tribunal has held that a bankruptcy restructuring for legitimate business purposes and that respects the diversity of nationality requirements of Articles 1116 and 1117 undoes jurisdiction over an investment claim. The treaty's text, in light of its object and purpose, does not support the application of Canada's *ratione temporis* objection to these facts. The ordinary meaning of the treaty is not ambiguous, nor would the Tribunal's decision to recognize jurisdiction lead to a manifestly absurd or unreasonable result.

14. If the Tribunal were to conclude that it need resort to supplementary means of interpreting the NAFTA text, the relevant international arbitration awards suggest that the present factors of restructuring for an ordinary business purpose, in good faith, with a continuity of the beneficial investment interests, in harmony with the purposes of the treaty, all sustain the Tribunal's jurisdiction over the claim. Here, NAFTA existed long before Alberta breached it. Prairie was a U.S.-owned investment in Canada well before Alberta breached Canada's NAFTA obligations. Investors in Prairie were at all relevant times American. The chains of nationality were never broken.

15. A finding that the Tribunal has jurisdiction in this case would be consistent with *ratione temporis* jurisprudence, not a departure from it. This case is not an example of treaty-forum shopping, nor an example of an investor transferring better rights to an investment than it otherwise had. Even were the Tribunal to acknowledge the broad, formalistic rule Canada advocates, it should recognize a narrow exception

here. There is a legitimate public policy, consistent with the purposes of NAFTA, to allow lawful bankruptcy restructurings. WMH is operating as a revitalized WCC. There is no prejudice to Canada, nor equitable reason, why jurisdiction should be denied.

II. PRAIRIE WAS AND IS A FOREIGN INVESTMENT OWNED BY U.S. INVESTORS AT ALL RELEVANT TIMES

16. Canada hopes to capitalize on the misfortune of WCC's bankruptcy in order to escape arbitration of the merits in the NAFTA Chapter 11 obligations Alberta owed to Prairie and its U.S. investors. It has offered a formalistic theory with the appearance of familiarity in investment arbitration cases, but none of the decisions that it has advanced reflects the facts of this case. Canada has cited investment arbitration cases where an investment was not actually owned by a foreign investor at the time of the government's breach,⁶ and cases where the claimant "investor" was not a true investor because it did not have a foreign investment in the respondent country.⁷ None of these cases resembles this one, where there is no dispute that there is a continuous foreign investment that existed at the time of the breach, legitimately owned by a U.S. investor prior to the alleged breaches and up to the present time. Canada appears committed to a cramped reading of the treaty language, with narrow gateways and diminished rights, but an expansive reading of the jurisprudence to ascribe outcomes and reasoning not there.

17. Canada, in the case before this Tribunal, owed NAFTA Chapter 11 obligations to the investment and to its parent U.S. investor. Canada seeks to escape

⁶ See, e.g., RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (15 Sept. 2011).

⁷ See, e.g., RLA-029, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/0501, Award on Jurisdiction (19 June 2007).

those obligations on grounds that the investment and its investor's claim for breach of Articles 1102 and 1105 were transferred through bankruptcy from a parent company to another wholly-owned subsidiary. Such a result would provide an inequitable windfall to Canada and would undermine the trade and investment policies that NAFTA was intended to promote.

18. WCC mined coal with a major emphasis on "mine-mouth" operations, where mines supply thermal coal under long-term contracts to "mine-mouth" coal-fired units in power plants located adjacent to, and serviced exclusively by, the coal mine (hence the term "mine-mouth").⁸ Prairie owned mine-mouth coal operations in Alberta serving local, Albertan electric utilities ATCO, Capital Power, and TransAlta, which were built deliberately next to the mines. There is no commercially feasible way to use coal from a mine-mouth operation in any other endeavor. No transportation links exist to move Prairie's coal to alternative buyers, nor is the quality of the coal suitable for transportation and use outside of Alberta.⁹

19. WCC acquired Prairie and its mine-mouth coal operations in April 2014.¹⁰ WCC was a U.S. enterprise and, therefore, an investor of the United States, which owned Prairie, a Canadian coal-mining enterprise and, therefore, an investment in Canada. From that point in time, Canada owed obligations to WCC and Prairie, as foreign investor and investment, under NAFTA's Chapter 11. Canada's obligations to provide national treatment under Article 1102 and the minimum standard of treatment

⁸ See Westmoreland Notice of Arbitration and Statement of Claim ("SOC") ¶¶ 40-41 (12 Aug. 2019).

⁹ See SOC ¶ 50.

¹⁰ See SOC ¶¶ 44-49.

under Article 1105 applied to measures adopted or maintained by Alberta relating to WCC and Prairie after April 2014. See NAFTA Article 1101.

20. The Government of Alberta entered into “Off-Coal Agreements” with ATCO, Capital Power, and TransAlta in November 2016, paying them a combined C\$1.36 billion to convert their utilities from the use of coal to natural gas, terminating their use of coal from Prairie’s mine-mouth operations by the year 2030.¹¹ Capital Power and TransAlta owned their own coal mines, in addition to buying coal from Prairie, and received a disproportionate share (over 95%) of the total compensation paid by Alberta under the Off-Coal Agreements, leaving ATCO, which did not own a coal mine, with less than 5%.¹² Prairie received no compensation whatsoever.

21. The timing of the conversion under the Off-Coal Agreements meant that Prairie would lose between 6 and 25 years of coal-mining sales for each of its mines feeding the utilities, and would incur an increase in the costs of reclaiming those mines on a much earlier schedule.¹³ Prairie has no other possible customers for the coal produced from the mine-mouth operations located at the utilities, which deliberately built their facilities to be next to the mines.¹⁴ The Off-Coal Agreements, therefore, “relate to” Prairie under NAFTA Article 1101. They related to WCC while it was Prairie’s parent, and now relate to WMH, Prairie’s current parent, because the life, value and return on investment in Prairie was curtailed without compensation while at the same time Alberta

¹¹ See SOC ¶¶ 72-79.

¹² See SOC ¶¶ 72-79.

¹³ See SOC ¶ 78-81.

¹⁴ See SOC ¶ 95.

had decided to compensate the Albertan electric utilities and mine owners for their conversion from coal.

22. The heart of the issue in cases deciding whether tribunals have had jurisdiction over investor-state claims has been the question of whether the investment existed as a foreign-owned investment when the host government allegedly breached its obligations to the investment and its foreign investor. Foreign ownership of an investment in the respondent state's territory is what activates the state's treaty obligations. Unlike any of the cases that Canada has invoked for its objection, Prairie has existed as a NAFTA-recognized, foreign-owned investment at all times relevant to the NAFTA claim, owned by a U.S. investor qualified to submit a claim to arbitration.

23. Canada tries to obscure these facts by focusing entirely on the January 13, 2019 formation of WMH, Prairie's parent and WCC's former subsidiary, in relation to the November 2016 Off-Coal Agreements. But Prairie was a Canadian enterprise, owned by WMH's former parent, WCC, prior to November 2016; thus, Canada's argument is irrelevant because the existence of the investment and the diversity of nationality that NAFTA requires are satisfied.

24. These facts are material to the legal analysis that follows:¹⁵

- Section III. A. begins, as Article 31 of the VCLT requires, with the text of the treaty itself. Canada's objection has no foundation in the text of Articles 1101, 1116 and 1117.

¹⁵ **Appendix A** (attached hereto) provides a detailed recitation of facts regarding the WCC bankruptcy, which shows a continuity of beneficial interests from WCC to WMH.

- Section III. B. demonstrates that Canada's objection, as applied to this case, is contrary to the object and purpose of NAFTA.
- Section III. C. shows that, even in applying cases that have considered *ratione temporis* objections, the criteria for deciding whether jurisdiction should be retained all indicate that Canada's objection to jurisdiction should be denied.
- Section IV explains why investments and their attendant claims may be assigned, provided that the fundamental treaty requirements of nationality are not disturbed.
- Section V addresses Canada's speculation about the accrual of damages.

III. THE TEXT OF NAFTA DOES NOT REQUIRE, NOR DO THE FACTS OF THIS CASE SUPPORT, CANADA'S *RATIONE TEMPORIS* OBJECTION

A. Canada's *Ratione Temporis* Objection Is Not Found In The NAFTA Texts That Canada Cites

25. Article 31(1) of the VCLT provides that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Canada, citing Articles 1101, 1116 and 1117, argues that the text of NAFTA Chapter 11 requires that "a claimant must be an investor of a Party when an alleged breach occurred,"¹⁶ but there is no temporal limitation in the texts of the provisions that Canada cites.

26. The texts of Articles 1116 and 1117 are as follows:

¹⁶ Canada's Memorial on Jurisdiction ("Canada's Memorial") ¶ 47 (18 Dec. 2020).

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

27. Neither Article 1116 nor 1117 states that a claimant must be an investor of a Party at the time when alleged breaches of Chapter 11 occurred. Articles 1116 and 1117 impose nationality requirements on investors, contemplating that a claim is to be submitted by an “investor of a Party” against “another Party.” An “investor of a Party” is defined in Article 1139, in relevant part, as “a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” But Articles 1116 and 1117 do not specify that the “investor of a Party” submitting the claim must be the same investor that existed at the time of the breach. They contain no temporal requirement as to when the investor made its investment in relation to the date of the breach.

28. Judge James Crawford noted in *Waste Management II* that the NAFTA Parties demonstrated they were perfectly capable of committing to the text of Chapter 11 specific requirements of investors with respect to the submission of claims to arbitration:¹⁷

Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties, they could have done so.¹⁸

29. Claimant, WMH, satisfies the elements of Articles 1116 and 1117. WMH meets the nationality requirement for an investor of a Party because it is a U.S. limited liability company that has made an investment in Canada. WMH owns Prairie, a

¹⁷ For example, Articles 1116(2) and 1117(2) have a three-year statute of limitations. Article 1121 requires the submission of certain waivers.

¹⁸ CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award ¶ 80 (30 April 2004).

Canadian enterprise, qualifying under the definition of “investment” in Article 1139.

WMH may submit to arbitration its claim that Canada has breached an obligation under Section A, which would include Canada’s obligation to Prairie under Article 1102(2) (to “accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors ...”) and Article 1105 (to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment....”).

30. Article 1101 reinforces the nationality requirement in Articles 1116 and 1117 by stating that Chapter 11 “applies to measures adopted or maintained by a Party relating to (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.”

31. Canada interprets this text also to mean that, “[i]f the investor of a Party did not exist or did not have an investment at the time of the challenged measure, then the threshold connection between the challenged measure and the claimant under Article 1101(1) cannot be met, and there are no substantive obligations in Section A that apply with respect to that claimant and its investments.”¹⁹ Yet, the text of Article 1101 does not contain the temporal limitation that Canada asserts. The tribunal in *Apotex v. U.S.* wrote that, “there is no reason to apply NAFTA Article 1101(1) as an unduly narrow gateway to arbitral justice ... None of the legal materials cited by the Parties support such a restrictive interpretation of the phrase ‘relating to’ in NAFTA Article 1101(1).”²⁰

¹⁹ Canada’s Memorial ¶ 51.

²⁰ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶ 6.28 (25 Aug. 2014).

Professor Paulsson writes: “To read the words ‘measures ... relating to’ as necessarily implying that the measures must have impacted the investor *at the time* they were made strikes me as an egregiously ambitious reading with no grammatical support that I perceive, and moreover does not readily yield an *inferred* rationale for denying a claim apart from every respondent’s interest in evading liability.”²¹

32. WCC was, and WMH remains, investors of the United States. Prairie is an investment of investors of the United States in the territory of Canada. The terms of Articles 1101, 1116 and 1117, by their ordinary meaning, apply to WMH’s pending claim and impose no temporal limitation requiring an investor submitting a claim to have existed at the time of the breaches being alleged.

B. The Object And Purpose Of The Treaty, Policy Reasons For The Ratione Temporis Doctrine, Good Faith And Fair And Equitable Treatment All Support The Tribunal’s Jurisdiction In This Case

33. The object and purpose of NAFTA do not support Canada’s interpretation of the treaty text nor its application of *ratione temporis* in this case. NAFTA Article 102 sets out the objectives of the Agreement, which include to “(c) increase substantially investment opportunities in the territories of the Parties.”

34. Subsequent Articles explain how the object and purpose are to be achieved, which also exclude Canada’s interpretation. Article 1105 requires “fair and equitable treatment” be applied to investments of investors of another Party.²² Article

²¹ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 39.

²² Professor Christoph Schreuer argued persuasively in *Jan de Nul v. Egypt* that jurisdiction must lie with a tribunal even after an investment no longer exists because “[p]roviding an effective remedy is part of the duties of fair and equitable treatment and of continuous protection and security for investments. A violation of that duty after the investment has come to an end does not change its nature. The duty to provide redress for a violation of rights persists even if the rights as such have come to an end. Otherwise an expropriating State might argue that it owes no compensation since the investment no longer belongs to the previous owner.” CLA-

1109(1) directs that, "Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include: (a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment, among others; (b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment; [and] (c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement." Article 1109(4) allows a Party to "prevent a transfer through the equitable, non-discriminatory and good faith application of its laws to: (a) bankruptcy, insolvency or the protection of the rights of creditors," but this clause refers to the application of *its* laws (in this case, Canada's bankruptcy laws) and the basis for preventing the transfer must be equitable, non-discriminatory and in good faith.

35. As the Tribunal considers whether the ordinary meaning of the terms in Articles 1101, 1109, 1116 and 1117 prohibits the transfer of an investment between U.S. investors that could mean forfeiture of the investment protection rights applicable to the investment, the Tribunal should ask whether such an interpretation would serve the objects and purposes of the treaty to increase investment opportunities; treat investments fairly and equitably; and permit transfers relating to the amounts derived from the investment, the proceeds of the sale or liquidation of the investment, and

015, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction ¶ 135 (16 June 2006). Here, Canada's objection would deny Prairie and its investors an effective remedy in contravention of fair and equitable treatment.

contractual payments, including payments under a loan agreement. There is no language in these Articles that would suggest such an outcome.

36. Canada's *ratione temporis* argument reflects a static view of investment that conflicts with each of those objects and purposes of the Agreement and the treaty's means for achieving them. Were an investor to forfeit investment protection claims by virtue of transferring an investment to another investor, or by restructuring through bankruptcy, such a policy would chill rather than increase investment opportunities. It would restrict transfers otherwise protected under the Agreement, and it would alter the bargain unfairly between the investor and the state when capital has been committed to a foreign investment: investor-state dispute settlement rights would be removed as to the investment, regardless of when it was formed or owned by a NAFTA-qualifying foreign investor.

37. Canada's broadly applicable *ratione temporis* rule would not be consistent with a good faith interpretation of the ordinary meaning of the treaty. It would punish WMH and Prairie for a restructuring and assignment of claim in the ordinary course of a bankruptcy, while providing Canada a windfall, assuming *pro tem* the merits of the WMH claim.

38. Nowhere does Canada's Memorial on Jurisdiction argue that Canada would suffer unfairness or injustice from the Tribunal accepting jurisdiction of the WMH claim. Canada cannot say, for example, that it had no notice that it owed Prairie or its investors obligations of national treatment and fair and equitable treatment prior to Alberta's adoption of the Off-Coal Agreements. Prairie was a U.S.-owned investment owed Chapter 11 protection prior to the Off-Coal Agreements.

39. Nor could Canada say, in good faith, that an injustice would result from WMH stepping into the shoes of WCC as the investor. WCC owned Prairie before the Off-Coal Agreements and, therefore, was entitled to Chapter 11 protection with respect to those Agreements. WCC transferred its rights to WMH openly and transparently through the U.S. bankruptcy process. WMH operates Prairie in the same manner as did WCC. Moreover, most of the impact of the harm to Prairie (and to its investor, WMH) from the curtailment of the life of the mines to the year 2030, although certain, is yet to come.

40. Prairie would be punished, having to absorb the increased costs of reclaiming the mines on a truncated calendar, were it not possible for WMH to seek an award to recover those costs. Prairie should not be obliged to reclaim the mines where the plan for recovering the costs of reclamation through the investment has been materially altered by a government that has compensated similarly situated domestic companies but not Prairie. Canada's argument that WMH "cannot have it both ways" is ironic.²³ While Canada (for Alberta) disputes that the NAFTA Claim was transferred with Prairie from WCC to WMH, neither Canada nor Alberta has told WMH that, as a new investor, it is relieved of the obligation WCC had assumed, among others, to reclaim the mines.

41. The notion that a legitimate transfer of interests in an investor during the pendency of a claim necessarily would terminate the claim is contrary to the purposes for which Chapter 11 was drafted. Professor Paulsson writes:

We are assuming at this stage that Canada is internationally responsible for a treaty breach which may have caused hundreds of millions of dollars

²³ Canada's Memorial ¶ 7.

of loss. Had the investor been in a stronger financial position, it could have weathered the storm, gone forward in its original state, and recovered its large losses from Canada without a reorganization or the protection of the bankruptcy regime of its home jurisdiction. But under Canada's formalistic reading of NAFTA, the fact of the original investing entity's impecuniosity adds insult to its injury – leaving it bereft of a (presumptively) deserved remedy, thus giving Canada an undeserved free pass: an exemption from the consequences of its treaty breach which it seems to me has no warrant in the text of NAFTA.

Apart from the just outcome in a particular case, consideration should be given to the example that would be set if respondents were rewarded for accentuating the severity of the consequences of their breach, e.g., to drive investors into insolvency with the possible “prize” to the respondent of forcing their dissolution and losing their standing, if not indeed to use local processes to expropriate their “investment” out of existence.²⁴

Other scenarios, such as the death of an investor and transfer of interests to his or her heirs, also would be considered to terminate an otherwise valid claim under Canada's view of *ratione temporis*.

C. Decisions Considering *Ratione Temporis* Jurisdictional Objections Are Fact-Dependent And Do Not Support Canada's Objection

42. Canada depends on expansive readings of *ratione temporis* discussions in investment arbitration cases to imbue its interpretation of the texts of Articles 1101, 1116 and 1117 (Canada does not mention Article 1109) with the strict, *per se* limitation it would like applied here. Under Article 32 of the VCLT, recourse to arbitral awards as “supplementary means of interpretation” should not be necessary because the ordinary meaning given to the text of NAFTA Chapter 11, in the light of its object and purpose, is not ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable.²⁵ The text does not contain the temporal limitation advocated by

²⁴ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶¶ 49-50.

²⁵ See CLA-013, Vienna Convention on the Law of Treaties (1969), Arts. 31, 32.

Canada, and the results of applying Canada's objection would result in an unreasonable windfall for Canada, assuming the validity of WMH's claim *pro tem*.

43. Notwithstanding that resort to supplementary means of interpretation should not be necessary here, Canada has paraded "precedents." A careful examination of cases considering corporate restructurings in the context of investor-state claims, as well as cases applying *ratione temporis* objections, demonstrates that Canada's objection in this case is not supported by the jurisprudence.

44. Professor Paulsson explains, in his expert opinion submitted with this Counter-Memorial, that the *ratio decidendi* of cases applying *ratione temporis* objections are very fact-dependent and must be viewed in their context.²⁶ None of the cases relied upon by Canada presents a factual scenario directly comparable to this case.

45. The common principles emerging from investment arbitral cases considering *ratione temporis* objections indicate that a corporate restructuring of the investor is not, in and of itself, a basis for denying jurisdiction.²⁷ When the factors that tribunals weigh in making that determination are applied to the facts here, this case comfortably is and should remain within the Tribunal's jurisdiction.

1. *Ratione Temporis* Objections Appropriately Deny Jurisdiction Where, Unlike Here, The Restructuring Is A Sham Or Abuse Of Investment Protection Rights

46. Tribunals have sustained *ratione temporis* objections to jurisdiction where the issues giving rise to the claim occurred prior to the effective date of the treaty

²⁶ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶¶ 62-68.

²⁷ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 6.

obligations;²⁸ or, the affected investment was a domestic investment at the time of the breach;²⁹ or, for other reasons where the corporate structure or nationality of the investor was an artifice, constructed purely for the sake of litigation and in derogation of the principles of international investment treaty protections.

47. Professor Paulsson notes that the *Phoenix Action v. Czech Republic* case demonstrates how corporate restructuring transactions undertaken to obtain investment treaty litigation rights not otherwise available represent “the line not to be crossed”:

[T]he claimant had been incorporated in Israel by a former Czech national who caused it to acquire an interest in two Czech companies owned by members of his family. These Czech companies had already been involved in disputes with the Czech government. The Tribunal noted that “all the damages claimed by Phoenix had already occurred and were inflicted on the two Czech companies when the alleged investment was made ... what was really at stake were indeed the pre-investment violations and damages ... no activity was either launched or tried after the alleged investment was made.”³⁰

48. The case of *Mobil (a.k.a. Venezuela Holdings) v. Venezuela* offers another example. Chaired by the former President of the International Court of Justice, Judge Gilbert Guillaume, the tribunal stated that “to restructure investments only in order to

²⁸ CLA-016, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Award ¶¶ 50-61 (7 Feb. 2005) (dismissing claimants’ claim for want of jurisdiction because the alleged breaches—a series of measures by Peru’s governmental organs, including separate but related judgments by Peruvian courts—had crystallized as a composite act before the BIT entered into force); cf. CLA-015, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction ¶¶ 122, 131 (16 June 2006) (upholding jurisdiction where the alleged breach had crystallized after one of the applicable BITs entered into force, and the investment was made after the BIT entered into force).

²⁹ See, e.g., RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016); RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (15 Sept. 2011).

³⁰ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 12.

gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, 'an abusive manipulation of the system of investment protection under the ICSID Convention and the BITs'.³¹

49. Similarly again, in *Philip Morris v. Australia*, the tribunal stated: "the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute."³²

50. Professor Paulsson opines that there are reciprocal policy interests involved in considering whether and when corporate restructuring improperly might affect the jurisdiction of a claim proffered under investment treaties. "States are prepared to give foreigners legal protections that are unavailable to their own nationals [because] [f]oreigners are more exposed than domestic investors to the sovereign risk attached to the investment and to arbitrary actions of the host State" and States seek reciprocal treatment for their own investors from treaty partners.³³ However, "the door should be shut on nationals pretending to be foreigners, and foreigners should not be able to make investments for the sole purpose of replacing a national investor who has

³¹ CLA-017, *Mobil (a.k.a. Venezuela Holdings) v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction ¶¶ 204-205 (10 June 2010); see also CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 13.

³² CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 13; CLA-018, *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility ¶ 588 (17 Dec. 2015).

³³ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 16.

already been exposed to the challenged measure and would be happy – if so allowed, and, one may well surmise, receiving a benefit in return – to let a foreigner who has superior remedies under a treaty step into its shoes.”³⁴

51. The cases upon which Canada most relies are not examples of prohibiting corporate restructuring of foreign investors. Instead they are examples of tribunals “shutting the door” on abusive claims.

52. The tribunal in *Gallo v. Canada* went to great lengths to set out facts in its award reflecting the tribunal’s doubts about the legitimacy of the investment giving rise to the claim. The claimant was “a young American civil servant” with “no track record as investor or as entrepreneur, and no direct knowledge of or experience in the waste management industry,”³⁵ who allegedly bought from the Canadian Notre Development Corporation a mine operating as a waste storage site and held it through a Canadian corporation established in 2002. Mr. Gallo claimed that the mine was purchased for him through an agent, Mr. Cortelluci, an Italian-Canadian businessman acting on Mr. Gallo’s behalf on the basis of “a simple hand shake with people he believes he can trust.”³⁶ There was no written evidence of the agreement for Mr. Cortelluci to buy the mine for Mr. Gallo—not “a single e-mail, fax or letter, any negotiating documents, any drafts of the purchase agreement, any materials on the Adams Mine, or any copy of the actual Purchase Agreement ... [nor] any written instruction to Mr. Cortellucci.”³⁷ Mr. Gallo

³⁴ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 18.

³⁵ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶¶ 149, 155 (15 Sept. 2011).

³⁶ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 161 (15 Sept. 2011).

³⁷ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 166 (15 Sept. 2011).

“admitted that he never visited the Adams Mine, ... that he never did any due diligence, ... never saw any documentation referring to the mine....”³⁸ and “never disclosed [his identity] to the vendor ... who throughout this period believed that it was the Cortellucci group which was purchasing the Adams Mine....”³⁹

53. The *ratione temporis* jurisdictional issue was whether Mr. Gallo had acquired the mine in 2002 before the Ontario legislature passed the Adams Mine Lake Act in 2004 prohibiting the disposal of waste at the mine, or whether the mine in fact had been acquired by the Ontario businessman purportedly acting as his agent. The facts did not appear helpful to Mr. Gallo's claim.

54. The tribunal found that Mr. Gallo was unable to prove the date when he acquired the corporation holding the mine, nor that his acquisition occurred prior to the measures alleged to breach NAFTA.⁴⁰ It also found that the “oral Cortellucci-Gallo Agreement does not fit the pattern of an agency agreement....”⁴¹ Absent such proof, the evidence was that the investment was owned only by Canadian interests, and the elements of a foreign investment owned by a foreign investor had not been satisfied:

Investment treaties confer rights to foreign investors, which are unavailable to nationals of the host country. Legitimate policy reasons justify this differential treatment. But the same policy reasons mandate that the boundaries between foreign and domestic investors be respected, and that the privileged rights conferred to the former are not abused by the latter, in violation of the stated objectives of the international treaty.⁴²

³⁸ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 164 (15 Sept. 2011).

³⁹ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 168 (15 Sept. 2011).

⁴⁰ See RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 312 (15 Sept. 2011).

⁴¹ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 312 (15 Sept. 2011).

⁴² RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 311 (15 Sept. 2011).

55. According to the *Gallo* tribunal, “[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted,”⁴³ but in Professor Paulsson’s opinion, “the sweeping assertion in the paragraph just quoted is entirely open to question, and of course to qualification[.]”⁴⁴ In his view, the *ratio decidendi* of the *Gallo* case was not when the investment was owned or controlled by the investor, but rather was “a sham transaction by which a US party is used as a front by a Canadian party to sue his own State under NAFTA cannot establish ICSID jurisdiction.”⁴⁵ Because the evidence did not support the fact that Mr. Gallo—or any NAFTA-qualifying foreign investor—owned the Canadian investment at the time of the breach, the investment was a domestic one and Canada owed it no treaty obligations before it became a foreign-owned investment subject to NAFTA.

56. Professor Paulsson considers *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*;⁴⁶ *Libananco Holdings Co. Limited v. Republic of Turkey*;⁴⁷ *Renée Rose Levy*

⁴³ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 328 (15 Sept. 2011). The *Gallo* tribunal, perhaps more accurately, might have said it was necessary “that the investment was owned or controlled by an investor at the time when the challenged measure was adopted,” meaning that the investment allegedly harmed by the measures was not a foreign-owned investment and, therefore, not owed any treaty obligations, thus there could be no breach.

⁴⁴ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 66.

⁴⁵ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 66.

⁴⁶ RLA-049, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 Sept. 2009).

⁴⁷ RLA-050, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011).

and *Gremcitel S.A. v. Republic of Peru*;⁴⁸ *Gallo*;⁴⁹ and *Phoenix Action*⁵⁰ to fall in the same category of sham transactions undertaken in abuse of investment treaty rights.⁵¹

57. None of those cases bears any resemblance to this one, nor provides a reasonable basis for the Tribunal to find a lack of jurisdiction. Prairie was a foreign-owned investment entitled to treaty protection prior and subsequent to the breaches alleged. WCC went through a bankruptcy restructuring for ordinary business purposes unrelated to Canada's treatment of Prairie. As WMH emerged from the WCC bankruptcy, the transfer of the ownership of Prairie and all rights to pursue claims for Canada's breaches under NAFTA Chapter 11 was done in an orderly process approved by the U.S. Bankruptcy Court and the Secured Creditors who held first priority rights with respect to their debt investment in WCC. There is no contention of treaty-forum shopping nor of creating or transferring rights better than existed before.

58. Professor Paulsson summarizes that: "the restructuring here was plainly not for the purpose of creating NAFTA jurisdiction where there had been none. WCC was from the outset a US entity which had mobilized US investments into Canada with the assistance of lenders who themselves were US entities. None of this could be described as an attempt—to repeat the phrase used by Judge Guillaume in *Mobil v. Venezuela*—"to restructure investments only in order to gain jurisdiction under a BIT

⁴⁸ RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/7, Award (9 Jan. 2015).

⁴⁹ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (15 Sept. 2011).

⁵⁰ RLA-045, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009).

⁵¹ See CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 68.

[and] ... an abusive manipulation of the system of investment protection under the ICSID Convention and the BITs'.⁵²

2. Provided That The True Investor's Qualifying Nationality Is Preserved, Restructuring That Has An Ordinary Business Purpose Should Not Divest A Tribunal Of Jurisdiction Over A Claim

59. Tribunals have found that corporate restructuring does not interfere with an investor's claim provided that the requisite nationality requirements for standing under the treaty are preserved and the restructuring has an ordinary business purpose. Professor Paulsson cites the decision of the *S.D. Myers v. Canada* tribunal to uphold the claim with respect to Canada's jurisdictional objection that there was no "investment" in Canada:

227. At the relevant time Myers Canada was undoubtedly an 'enterprise', but CANADA submitted that it was not owned or controlled directly or indirectly by SDMI. This is because the shares of Myers Canada were owned not by SDMI, but equally by four members of the Myers family. They also owned the shares in SDMI, but in different proportions....

229. Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above.

230. The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons so that it remained wholly within the family and that he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests.⁵³

⁵² CLA-017, *Mobil (a.k.a. Venezuela Holdings) v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction ¶¶ 204-205 (10 June 2010); CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 13.

⁵³ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 7; see CLA-019, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award ¶¶ 227, 229-230 (13 Nov. 2000).

60. In the case of *Autopista v. Venezuela*, “a Mexican investment in Venezuela was restructured with the effect of transferring 75% of the Mexican investor’s shares to a US entity. Venezuela objected on the grounds that the restructuring was an abuse of corporate form as a means to secure ICSID jurisdiction. The tribunal disagreed, observing that the transferee had been created eight years before the concession agreement that was a central element of the investment, had been notified to Venezuelan authorities and approved by them, and had a business purpose: mobilizing financing in the face of a crisis affecting the Mexican currency.”⁵⁴

61. The tribunal in *CME v. Czech Republic* denied the respondent’s jurisdictional objection that the claimant could “only advance claims in respect of violations of the Treaty that occurred after May 21, 1997” when it had acquired shares of an investment that were transferred by a related Dutch company in connection with the Netherlands-Czech Republic Bilateral Investment Treaty.⁵⁵ The tribunal observed that:

423. The Respondent’s view that the transfer of shares deprived the Claimant of the protection under the Treaty, because the investment changed hands from one (Dutch) shareholder to the other is not convincing. The Memorandum of Association was approved by the Media Council in 1993 and thereafter again, when the new MOA was implemented on November 14, 1996 without providing for any change of the change-of-control clause. Therefore, any claims deriving from the Claimant’s predecessor’s investment (also covered by the Treaty) follow the assigned shares.

⁵⁴ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 9; see CLA-020, *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction ¶¶ 125-128 (27 Sept. 2001).

⁵⁵ CLA-021, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award ¶ 422 (13 Sept. 2001).

424. Article 8 of the Treaty, therefore, does not debar the Claimant's claims on the ground advanced by the Respondent. In accordance with Article 8 of the Treaty, an investment dispute under the Treaty is covered, if the dispute derives from an investment of the investor. As already shown above under the issue of jurisdiction and now, and in respect to the admissibility of the claims, it is the Tribunal's view that the investment need not have been made by the investor himself. This conclusion is supported by Article 1 of the Treaty which defines an investment as "any kind of asset invested either directly or through an investor of a third State". This indicates a broad interpretation of the investment which also allows the (Dutch) parent company's investment to be identified as an investment under the Treaty. If the Treaty allows - as it does - the protection of indirect investments, the more the Treaty must continuously protect the parent company's investment assigned to its daughter company under the same Treaty regime.⁵⁶

62. WCC's bankruptcy was not undertaken to obtain any legal advantage under the treaty. WCC had taken on too much debt and began negotiating with its Secured Creditors in 2018 to see whether it could restructure its debt to preserve liquidity. The bankruptcy process allowed WMH to emerge from WCC in a much better economic condition, carrying on the operation of WCC's coal-mining assets, including Prairie. The restructuring was undertaken for ordinary business purposes. Diversity of nationality for investor and investment was preserved. Prairie remained the investment of a U.S.- owned investor operating for all intents and purposes as the same parent company had operated before. None of these facts suggests that "an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs."⁵⁷

⁵⁶ CLA-021, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award ¶¶ 423-424 (13 Sept. 2001).

⁵⁷ CLA-019, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award ¶ 227 (13 Nov. 2000).

63. The respondent in *Koch Minerals Sarl and Koch Nitrogen International Sarl v. The Bolivarian Republic of Venezuela* questioned the tribunal's jurisdiction over claims raised by KNI pertaining to an "Offtake Agreement" that had been assigned to it by its parent company, KOMSA. The *Koch* tribunal, maintaining jurisdiction of the claims, wrote:

Lastly, does it make a difference to any part of this analysis that KOMSA later assigned (or novated) its interest in the Offtake Agreement to KNI, whereby (so it could be said) the Offtake Agreement ceased to be part of an entire integrated investment? This question too could have raised difficulties here, but for one important factor. The assignment from KOMSA to KNI was an internal reorganization between associated companies within the same Koch group of companies. It did not introduce an unrelated third party or materially change the transaction. Nor could it have done so given Articles 11.4 and 11.5 of the Offtake Agreement. The Respondent does not challenge the efficacy of the assignment under the Offtake Agreement. Hence, although different in form, given the different legal personalities of KOMSA and KNI, the assignment produced no material economic, legal or commercial difference in substance.⁵⁸

WCC's transfer of Prairie and the associated NAFTA claim to WMH similarly was between associated companies without a material change with respect to the claim.⁵⁹

3. A Continuing Beneficial Interest In The Investment Prevails Over Formalistic Objections About The Entity Of The Investor

64. Tribunals have dismissed formalistic objections to jurisdiction pertaining to the nature of a corporate entity pursuing a claim when there has been a continuity or privity in the beneficial interests of the investor entities. According to Professor Paulsson:

Perenco v Ecuador quite precisely illustrates the rejection of a formalistic objection in favor of a purpose-oriented decision to accept jurisdiction. There, a Bahamian corporate claimant sought to invoke the France-

⁵⁸ CLA-022, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award ¶ 6.70 (30 Oct. 2017).

⁵⁹ See Appendix A ¶¶ 31-41.

Ecuador BIT, which grants standing to non-French entities if they are “controlled” by French shareholders. The Claimant entity, however, had another Bahamian “ultimate parent company”, and *the French shareholders did not own shares in that entity when they sought to initiate ICSID arbitration.*⁶⁰

65. The *Perenco* tribunal upheld jurisdiction despite the Bahamian complication, explaining that “international law does not permit formalities to triumph over fundamental realities.”⁶¹

[T]he Tribunal is persuaded by the fact that the formal transfer of the shares of the late Mr. Hubert Perrodo to his heirs was an administrative or ministerial act. It is true that it occurred after the consent to ICSID arbitration was given, but it is also true that it could have occurred at any time after the heirs became the owners of the estate under French law, and that occurred at the time of death, namely, 29 December 2006, over 10 months prior to the giving of consent.⁶²

66. Another example of a continuing beneficial interest being elevated above formalistic objections regarding corporate structure is the NAFTA tribunal award in *Waste Management II v. Mexico*.⁶³ There, the State of Guerrero and the municipality of Acapulco granted a 15-year concession to USA Waste's Mexican subsidiary, Acaverde, in 1995 for public waste management services but failed to comply with payment and other obligations set forth in the concession agreement, despite full performance by Acaverde.⁶⁴ At the time it was incorporated, Acaverde was owned, through a holding

⁶⁰ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 43.

⁶¹ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶¶ 45-47; CLA-023, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Admissibility ¶ 522 (12 Sept. 2014).

⁶² CLA-023, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Admissibility ¶ 528 (12 Sept. 2014).

⁶³ CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award (30 April 2004).

⁶⁴ CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award ¶¶ 40-72 (30 April 2004).

company called AcaVerde Holdings Ltd, by Sun Investment Co., a Cayman Islands company. AcaVerde Holdings Ltd., also a Cayman Islands company, was purchased by Sanifill Inc., a US Company, at about the time the City approved the concession.⁶⁵ In August 1996, Sanifill merged with USA Waste Services Inc. The merged company later adopted the name of "Waste Management Inc."⁶⁶

67. The NAFTA tribunal was confronted by Mexico's objection that there had been no U.S. investment in Mexico "because the US Claimant's share of Acaverde, the Mexican subsidiary which held the concession in which the investment was made, was in fact held indirectly, with the interposition of a controlled intermediary entity incorporated in the Cayman Islands. Yet the Tribunal, presided by Judge ... James Crawford, was not concerned by the fact that qualifying investments may be effected through companies or enterprises of non-NAFTA States, so long as the beneficial ownership at relevant times is with a NAFTA investor."⁶⁷ The tribunal upheld jurisdiction notwithstanding the intermediary companies between the claimant and the investment; the merger of Acaverde's parent companies in 1996 after the concession had been granted in 1995; the claimant's submission of a NAFTA claim in 2000 that was dismissed for want of proper Article 1121 waivers; and the resubmission of the claim in 2002. Judge Crawford explained:

Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the

⁶⁵ CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award ¶ 77 (30 April 2004).

⁶⁶ CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award ¶ 77 (30 April 2004).

⁶⁷ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 8.

NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties, they could have done so. Similarly, they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text. It is not disputed that at the time the actions said to amount to a breach of NAFTA occurred, Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim.⁶⁸

68. NAFTA Chapter 11 does not prohibit claimants from undergoing bankruptcy proceedings, nor does it prohibit transfers of investments and the bundle of rights, including a NAFTA claim, that might accompany such a transfer. Canada's own bankruptcy expert does not say that assets and claims cannot be transferred through bankruptcy. She says only that the issue is to be determined under international law.

69. Continuity of the identity of the parties having a beneficial interest in the investor and investment is not required for the Tribunal to find jurisdiction over WMH's claim. Nevertheless, such continuity exists here—as it did in *Perenco and Waste Management II*—which counsels that the Tribunal's jurisdiction should not be disturbed by WMH's distinct legal entity as it emerged from the WCC bankruptcy.

70. Although not apparently necessary to satisfy the NAFTA criteria for jurisdiction, the facts of the WCC bankruptcy show a continuity of beneficial interests between WCC and WMH. A detailed recitation of these facts is provided in the attached **Appendix A**. A summary of the key facts demonstrating the continuity of beneficial interests in WCC and WMH follows here.

⁶⁸ CLA-014, *Waste Management II v. United Mexican States*, ICSID Case No. ARB/(AF)/00/3, Award ¶ 80 (30 April 2004).

71. WCC's Secured Creditors had significant debt investments in WCC which gave the Secured Creditors a first-tier lien on all of WCC's property, including Prairie. WCC was struggling to manage its debt as early as 2016.⁶⁹ The Secured Creditors provided additional liquidity to facilitate WCC's debt restructuring through the bankruptcy process and exercised *de facto*, if not formal, control over WCC's assets.⁷⁰

72. When WCC entered bankruptcy in October 2018, the Secured Creditors had the first priority interest in WCC and the outcome of the bankruptcy proceedings.⁷¹ WCC filed a Notice of Arbitration and Statement of Claim in November 2018 and owned Prairie at that time.⁷² WCC's Secured Creditors held debt securities in WCC having a maturity of more than three years, which NAFTA Article 1139 defines as an "investment."⁷³

73. WCC's bankruptcy plan and liquidation of debts transferred coal-producing assets such as Prairie and its accompanying rights under NAFTA to WMH.⁷⁴ The Secured Creditors offered the only bid for WMH and exchanged their debt investment for equity investments, making them the shareholders who own and control WMH.⁷⁵

74. To effectuate this transfer through the bankruptcy process, WMH was created as a wholly-owned subsidiary of WCC.⁷⁶ WCC's interests in Prairie and its

⁶⁹ See Appendix A ¶¶ 2-5.

⁷⁰ See Appendix A ¶¶ 8-11.

⁷¹ See Appendix A ¶¶ 14-30.

⁷² See Appendix A ¶ 1.

⁷³ See Appendix A ¶ 1.

⁷⁴ See Appendix A ¶ 28.

⁷⁵ See Appendix A ¶ 30.

⁷⁶ See Appendix A ¶ 31.

claim were transferred to WMH.⁷⁷ The Secured Creditors were then distributed the equity interests in WMH.⁷⁸ Prairie, an established U.S.-owned investment in Canada at the time of the breach, remained unchanged as a U.S.-owned investment in Canada throughout the bankruptcy proceedings.⁷⁹

4. The Right To Assert Investment Claims Is Derived From Claimant Having Made A *Bona Fide* Investment In Accordance With The Treaty's Purposes

75. A claimant must make a *bona fide* investment of a kind contemplated by the treaty in order to invoke investment treaty protections. The tribunal in *Bayview Irrigation District v. Mexico* found that Texans who had invested in farms and irrigation facilities in Texas could not be presumed to have made investments in Mexico:

The Tribunal considers that in order to be an 'investor' within the meaning of NAFTA Art. 1101(a), an enterprise must make an investment in another NAFTA State, and not in its own ... The simple fact that an enterprise in one NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven....⁸⁰

76. The *Gallo* tribunal explained the relationship between *bona fide* investments and the right to invoke arbitration claims under investment treaties:

But for investors to enjoy this additional right, there must be a *quid pro quo*: Given that the stated objective of investment treaties is to stimulate flows of private capital into the economies of contracting states, the claimant in any investment arbitration must prove that he or she is a protected foreign investor, who at the relevant time owns or controls an investment in the host country.⁸¹

⁷⁷ See Appendix A ¶¶ 37-38.

⁷⁸ See Appendix A ¶ 39.

⁷⁹ See Appendix A ¶ 1.

⁸⁰ RLA-029, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/0501, Award on Jurisdiction ¶ 101 (19 June 2007).

⁸¹ RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶ 336 (15 Sept. 2011).

77. Prairie is the kind of investment that was intended to be protected under Chapter 11. WCC paid over US\$320 million when the American company purchased Prairie and its coal mine assets from Sherrit International, a Canadian entity headquartered in Toronto.⁸² WCC also assumed liabilities in excess of US\$420 million as part of the purchase.⁸³ WCC was required to maintain an office in Alberta as well as a certain number of Albertan jobs. The Prairie mines provide jobs for the Albertan economy and fuel the generation of electricity. WCC assumed obligations from Alberta; WMH continues to fulfill them.

78. Professor Paulsson explains that “arbitrators applying international law are disinclined to put form over substance when they ascertain whether claims are timely (rather than based on alleged breaches which had already been known at the time the investment was made) and arise from genuine investments of at-risk capital (rather than artificial transactions designed to put ostensibly protected investors in the place of investors who do not have standing under the relevant treaty).”⁸⁴

5. The Cases Proffered By Canada Do Not Support Denial Of Jurisdiction Here

79. The facts and the *ratio decidendi* in the cases cited by Canada do not apply to the facts of this case, nor can they overcome the ordinary meaning of the terms of Articles 1101, 1109, 1116 and 1117 taken in context and in the light of NAFTA’s object and purpose. Professor Paulsson comments on each of the cases in his opinion, starting at paragraph 61.

⁸² See SOC ¶ 42.

⁸³ See SOC ¶ 42.

⁸⁴ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 61.

80. Canada cites *Mesa Power Group, LLC v. Government of Canada* for the proposition that tribunals “have found that they lacked jurisdiction *ratione temporis* where a claimant sought to make a claim concerning alleged breaches that pre-date its existence as a protected ‘investor of a Party.’”⁸⁵ The issue in *Mesa Power*, however, was not the date of the existence of the investor, nor whether claims had been assigned, nor whether the investor had restructured. The issue, rather, was that there were no existing foreign investments in Canada to have been affected by certain renewable energy measures adopted in or before September 2009.⁸⁶

81. The claimant in *Mesa Power* created four wind farm project enterprises in Ontario starting in November 2009.⁸⁷ Claimant argued that the Canadian investment enterprises were injured by renewable energy measures adopted by Ontario two months earlier, in September 2009.⁸⁸ The tribunal denied the claim as to those measures because the four investment projects were not incorporated until after the alleged breach.⁸⁹ The issue turned on the existence of the investment prior to the alleged breach, not the investor.

82. *Gallo v. Canada* is similar. The tribunal had legitimate doubts about whether Mr. Gallo had an investment as of the date he had claimed and there was no

⁸⁵ Canada's Memorial ¶ 56.

⁸⁶ See RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award ¶ 330 (24 March 2016).

⁸⁷ See RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award ¶ 330 (24 March 2016).

⁸⁸ See RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award ¶ 329 (24 March 2016).

⁸⁹ See RLA-020, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award ¶ 332 (24 March 2016).

prior U.S. investor making the investment a foreign investment subject to NAFTA protection prior to the date of the alleged breach.⁹⁰

83. *B-Mex et al v. Mexico* (2019) “contains no *ratio decidendi* (i.e., holding) that supports Canada’s contention that an investor must own or control the domestic entity at the time of breach and at time of submission of the claim, because the sole claim that was dismissed was one brought on behalf of an entity by the name of Operadora Pesa, S. de R.L. de C.V., in which the claimants had never made an investment. The Tribunal simply did not face a jurisdictional disagreement with respect to an entity which had been controlled or owned by US nationals *at some point, but not at the date of the breach.*”⁹¹

84. *Bayview Irrigation District et al. v. United Mexican States* involved Texan farmers, concerned about water rights, but lacking any investment located in Mexico, which led to dismissal for lack of jurisdiction.⁹²

85. Canada cites two cases—*Cementownia* and *Libananco*—for its assertion that the “claimant must have been a protected investor at the time of the alleged breaches.”⁹³ Canada has provided no additional authority and the facts in the cases it cites do not concern its supposed “widely-accepted principle.”

86. *Cementownia* and *Libananco* do not address jurisdiction *ratione temporis* and, as discussed above, are cases that were dismissed for abuse of process. In

⁹⁰ See RLA-021, *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award ¶¶ 311-312 (15 Sept. 2011).

⁹¹ CER-Paulsson-International Law-Counter-Memorial on Jurisdiction ¶ 71(iii).

⁹² RLA-029, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/0501, Award on Jurisdiction ¶¶ 91, 101, 113 (19 June 2007).

⁹³ Canada’s Memorial ¶ 63.

Cementownia, the claimant, a Polish entity, asserted its standing under the Energy Charter Treaty on the basis of its alleged shareholdings in two Turkish electricity corporations. The tribunal found, however, that a wealthy Turkish family who owned and operated the Turkish entities engaged in a sham transaction to fabricate the tribunal's jurisdiction under the Energy Charter Treaty, attempting to turn a Turkish domestic dispute into an international one.⁹⁴

87. The *Libananco* case was brought by a Cypriot entity in parallel to *Cementownia*, alleging the same breaches and in the interest of the same Turkish family.⁹⁵ Like in *Cementownia*, the claimant in *Libananco* could not prove it held shares in the Turkish electric corporations, resulting in dismissal of the case.⁹⁶

88. Canada cites *Levy* to argue that “tribunals have consistently found that their jurisdiction does not extend to claims alleging breaches that pre-date the claimant’s protection” under the treaty.⁹⁷ Canada selectively quotes the *Levy* tribunal’s analysis out of context and without application to Canada’s objection.⁹⁸ Contrary to Canada’s portrayal of the *Levy* Award, that tribunal found it did have jurisdiction *ratione temporis*, despite a share transfer from a Peruvian entity to Ms. Levy (a French national)

⁹⁴ See RLA-049, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award ¶¶ 116-117, 136, 147 (17 Sept. 2009).

⁹⁵ See RLA-050, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award ¶¶ 1, 88-97, 401 (2 Sept. 2011).

⁹⁶ See RLA-050, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award ¶ 531-536, 570.1 (2 Sept. 2011).

⁹⁷ Canada’s Memorial ¶ 60.

⁹⁸ Canada’s Memorial ¶ 60 (quoting RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/7, Award ¶¶ 146-147 (9 Jan. 2015)).

mere days before Peru's alleged breach.⁹⁹ However, the tribunal proceeded to find that the close proximity of the transaction to the alleged breach lacked any legitimate commercial purpose and was intended merely to take advantage of Ms. Levy's French nationality. Thus, the tribunal dismissed the claim expressly on grounds of abuse of process, not *ratione temporis*.¹⁰⁰

89. Canada's reference to *GEA Group v. Ukraine* has little analytical and precedential value as Canada concedes, in a footnote, that, "[i]n applying the governing principle quoted, the *GEA Group* tribunal found that it had jurisdiction over certain alleged breaches because they occurred after the claimant had made its investment in Ukraine."¹⁰¹

90. Canada cites to *Apotex Holdings Inc. and Apotex Inc. v. United States* for the proposition that a reading of NAFTA Articles 1116(1) and 1117(1) together with the so-called "gateway" to NAFTA Chapter Eleven in Article 1101(1) suggests that the alleged measure must relate to the protected investor or the protected investments.¹⁰² In that case, Apotex Holdings Inc. was a Canadian holding company that indirectly owned Apotex Inc., a Canadian corporation that manufactures generic drugs, and a U.S. affiliate, Apotex Corp.¹⁰³ Apotex Corp. served as the U.S. distributor of Apotex

⁹⁹ RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/7, Award ¶¶ 159-161 (9 Jan. 2015).

¹⁰⁰ RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/7, Award ¶¶ 186, 188, 191, 195 (9 Jan. 2015).

¹⁰¹ Canada's Memorial ¶ 62, fn. 121.

¹⁰² Canada's Memorial ¶ 50; RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 Aug. 2014).

¹⁰³ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶¶ 1.1-1.4 (25 Aug. 2014).

Inc.'s products.¹⁰⁴ Apotex Holdings Inc. and Apotex Inc. brought NAFTA claims on their own behalf and on behalf of Apotex Corp. (the U.S. entity) against the United States in a series of arbitral proceedings due to alleged injuries from the U.S. Food and Drug Administration's import alerts against claimants' products.¹⁰⁵

91. Canada then argues, without citation to any authority (although presumably with reference to *Apotex*): "If the investor of a Party did not exist or did not have an investment at the time of the challenged measure, then the threshold connection between the challenged measure and the claimant under Article 1101(1) cannot be met, and there are no substantive obligations in Section A that apply with respect to that claimant and its investments."¹⁰⁶ But the *Apotex* tribunal expressly dismissed this very argument, finding instead that "there is no reason to interpret or apply NAFTA Article 1101(1) as an unduly narrow gateway to arbitral justice under NAFTA's substantive provisions[.]" and "[n]one of the legal materials cited by the Parties support such a restrictive interpretation of the phrase 'relating to' in NAFTA Article 1101(1)."¹⁰⁷ The tribunal ultimately held that a "sufficient legal connection" was established by claimants "under NAFTA Article 1101(1) for jurisdictional purposes."¹⁰⁸

¹⁰⁴ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶ 2.6 (25 Aug. 2014).

¹⁰⁵ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶¶ 1.45, 2.10-2.15 (25 Aug. 2014).

¹⁰⁶ Canada's Memorial ¶ 51.

¹⁰⁷ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶ 6.28 (25 Aug. 2014).

¹⁰⁸ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶ 6.27 (25 Aug. 2014).

The claimants' case in *Apotex* eventually was dismissed on other grounds, but the tribunal's holding directly contradicts Canada's "widely accepted principle."

92. Apotex Holdings Inc. was not a party in the prior iterations of its dispute against the United States. Although deciding on a different issue of law, the tribunal did find that Apotex Holdings Inc. was to be considered a "privy with Apotex-US, albeit not a named party in the Apotex I & II arbitration."¹⁰⁹

93. The tribunals' conclusion in *Apotex* is analogous to the Claimant's case here. Like in *Apotex*, a new parent entity assumed ownership of the foreign investment. The new entity was the beneficial holder of the claim and owner of the protected investment, for which the *Apotex* tribunal found no jurisdictional issue under NAFTA for the purposes of Articles 1116 and 1117.

IV. PROVIDED DIVERSITY OF NATIONALITY IS MAINTAINED, NAFTA DOES NOT PROHIBIT ASSIGNMENT OF CLAIMS

94. Neither the text of Chapter 11, nor the object and purpose of NAFTA, supports Canada's opposition to the *bona fide* transfer of a claim. Canada disputes that rights to advance the NAFTA Claim could be transferred from WCC to WMH. Canada begins that argument by explaining that "U.S. bankruptcy law is silent on the validity of the transfer of a legal claim."¹¹⁰ Canada then explains that, "[n]otwithstanding how a legal claim might have been treated under U.S. law in the context of a bankruptcy

¹⁰⁹ RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶ 7.40 (25 Aug. 2014).

¹¹⁰ Canada's Memorial ¶ 92. It is common for U.S. bankruptcy courts to approve claims trading as a matter of U.S. bankruptcy law. See CLA-024, *In Re UAL Corp.*, 635 F.3d 312 (7th Cir. 2011); CLA-025, *In Re Wireless Data, Inc.*, 547 F.3d 484 (2d Cir. 2008); CLA-026, *In Re Dorr Pump & Mfg. Co.*, 125 F.2d 610 (7th Cir. 1942).

process, there is no mechanism in NAFTA to allow one 'disputing investor' to transfer or sell its claim to another investor of a Party."¹¹¹ Neither of these contentions demonstrates that there is any prohibition on a parent company of a foreign investment transferring a claim to a subsidiary in the corporate chain who then continues the company's business upon emergence from bankruptcy. Such a prohibition would contradict Article 1109(1) and the object and purpose of the treaty to encourage foreign investment.

95. Canada has identified no prohibition in the NAFTA text because there is none. Canada argues that "consent to arbitrate a claim under NAFTA Chapter Eleven is specific to the 'investor of a Party' who brings the claim. To establish jurisdiction under Articles 1101(1), 1116(1), and 1117(1), a NAFTA claim must be brought by the 'investor of a Party' to whom the measure relates, who was the subject of the alleged breaches of obligations contained within Section A as a protected investor of a Party, and who incurred resulting damages."¹¹²

96. Canada's reading of the treaty text is inconsistent with the interpretive principles enunciated by Judge Crawford. First, Canada's argument is contradicted expressly by Article 1117(1) and (2) because those provisions are for "an investor of a Party" to bring a claim "on behalf of an enterprise of another Party"—the investor brings the claim on behalf of the foreign investment to whom the measure relates, in this case, Prairie.

¹¹¹ Canada's Memorial ¶ 92.

¹¹² Canada's Memorial ¶ 92.

97. Second, Canada gives Article 1101(1) a narrow interpretation that has not been followed by most tribunals. The Off-Coal Agreements in this case related to WCC and Prairie. They continue to relate to WMH as the parent of Prairie who stands to lose money on the Alberta mines and is uncompensated, both as a consequence of the government's actions and in contrast to similarly situated domestic companies.

98. Canada's opposition to the transfer of claims is not rooted in the text of NAFTA Chapter 11, nor is it consistent with the object and purpose of the Agreement. Unwritten prohibitions on the transfer of rights attendant with an investment do not support the NAFTA purpose to "(c) increase substantially investment opportunities in the territories of the Parties." Article 1109(1) promotes "all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay." Nor would Canada's view, if adopted, result in "fair and equitable treatment" for Prairie and its investors.

99. Canada contends that, regardless of whether claims might be transferable, "the claim that was sold in the context of the WCC's bankruptcy process has now been withdrawn," but that contention does not fairly represent the context of the transfer. Canada rejected amendment and requested withdrawal knowing WCC already had transferred Prairie and the rights to the NAFTA claim to WMH, succeeding WCC as the new claimant. Canada proposed and accepted that the proposed amendment be deemed a Notice of Intent to Arbitrate and the Parties agreed there was no need to repeat Article 1118 consultations. Selection of arbitrators continued

seamlessly from the original claim.¹¹³ Canada's objection now, that the claim was withdrawn, terminating its relationship to WMH's claim, is entirely form with no legal grounding and no substance.

V. CANADA'S BREACH CONTINUES AND ITS DAMAGES REMAIN PENDING FOR PRAIRIE AND WMH

100. Canada reformulates its *ratione temporis* objection with its secondary argument that "neither [Claimant, WMH,] nor its enterprises could have incurred any 'loss or damage by reason of, or arising out of,' the alleged breaches, which pre-date the Claimant's existence as an 'investor of a Party.'"¹¹⁴

101. Canada's reformulation again neglects its obligations to foreign investments under Articles 1102 and 1105, among others, where the foreign investment is owned by the investor of another Party. Prairie was owned by WCC, a U.S. enterprise, prior to the Off-Coal Agreements. The Off-Coal Agreements damage Prairie, and its American investor, by removing Prairie's customers prematurely, shortening the time horizon for Prairie's coal mines by 6 to 25 years, and increasing the costs of reclaiming those mines. Alberta recognized the costs being imposed on the Albertan utilities and other mine owners and agreed to compensate them in "fourteen annual payments"¹¹⁵ as part of the 2016 Off-Coal Agreements while providing no compensation to Prairie or its investors. WMH is Prairie's investor now and will be harmed by the curtailment to 2030 of the life and profitability of Prairie's mines.

¹¹³ See Correspondence between Claimant's and Respondent's counsel contained at Exhibits R-075 – R-079.

¹¹⁴ Canada's Memorial ¶ 69.

¹¹⁵ C-019, Off-Coal Agreement between Transalta Corporation *et al.* and Alberta at 2 (24 Nov. 2016).

102. Payments pursuant to the Off-Coal Agreements, and the lack of compensation for Prairie and its U.S. parent, established that Prairie and its investors would be harmed. Consequently, WCC and WMH had to file claims within three years of the November 2016 Off-Coal Agreements in order to comply with the statute of limitations contained in NAFTA Articles 1116(2) and 1117(2), which they both did.¹¹⁶

103. Alberta continues to compensate the electric utilities with annual payments. Alberta and Canada still could compensate WMH and Prairie for their impending losses just as the utilities are being compensated, but Alberta has expended no effort to engage WMH in discussions for a constructive solution to this dispute.

VI. CONCLUSION

104. Canada argues that its idea to apply *ratione temporis* is a “widely-accepted principle,” but Canada’s expansive interpretation of that principle reaches beyond plain meaning of the treaty and all related jurisprudence. The text of Articles 1116 and 1117 require an investor of one nationality to own an investment in the other country when that other country breaches its obligations to the investment. The cases upon which Canada relies are consistent with the treaty text and the facts here. The facts in cases where tribunals have denied jurisdiction do not resemble the facts here, nor does the reasoning of the tribunals Canada invokes resemble Canada’s reasoning.

105. Professor Paulsson observes for this Tribunal that the facts here are unlike the facts in any other investor-state arbitration, and for good reason. Canada can

¹¹⁶ See, e.g., RLA-030, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction ¶ 86 (20 July 2006) (“[T]he Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events.”).

make its case here only by inserting language and requirements for jurisdiction into a treaty where no such language or requirements exist.

106. Claimant requests that the Tribunal deny Canada's objections to jurisdiction and issue an award of costs and fees in Claimant's favor.

Respectfully submitted,



Elliot J. Feldman
Michael S. Snarr
Paul M. Levine
Analia Gonzalez
James J. East
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Eleventh Floor
Washington D.C. 20036
Tel: 202-861-1500
Fax: 202-861-1783
Email: westmoreland@bakerlaw.com

Alexander K. Obrecht
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, CO 80202
Telephone: (303) 861-0600
Fax: (303) 861-7805

Counsel for Claimant Westmoreland Mining
Holdings LLC