

**NAFTA CHAPTER 11 ARBITRATION
(ICSID CASE NO. UNCT/20/3)**

**WESTMORELAND MINING HOLDINGS LLC
v.
GOVERNMENT OF CANADA**

**LEGAL OPINION OF JAN PAULSSON
RELATING TO THE ISSUE OF
JURISDICTION RATIONE TEMPORIS**

PRELIMINARIES

1. I have been asked by the Claimant, through its counsel, to give this opinion with regard to the question of NAFTA jurisdiction *ratione temporis* as it arises in this case. I understand that the Claimant asserts breaches of NAFTA having resulted in large financial losses, and that its substantive claim is to be deemed valid *pro tem*.
2. My *curriculum vitae* is attached hereto. I have no expertise in the US law of bankruptcy and do not take issue with the Expert Report of Ms Kathryn A. Coleman submitted by the Claimant. I take however good note of her statement near the end of her Report to the effect that the US Bankruptcy Code:

“defers to applicable non-bankruptcy law—whether it be state, federal, or international law—as to two important aspects of transferred claims. First, the Bankruptcy Code is silent on the issue of transferability itself. [Footnote omitted.] In other words, if applicable non-bankruptcy law limits the transferability of a particular claim, the fact that the claim is sold as part of an asset sale in chapter 11 does not change that result. Second, the Bankruptcy Code also defers to applicable non-bankruptcy law as to the merits of a claim and who may assert it. Accordingly, the Bankruptcy Code does not alter the applicable non-bankruptcy limitations on who may assert ‘NAFTA Claim,’ and whether the ‘NAFTA Claim’ is transferable.”

3. Whether national law defers to international law is not decisive for a tribunal applying the latter, since national law neither establishes nor neutralizes international obligations. It is nevertheless satisfying to note the absence of conflict in this respect.
4. On the other hand, *the effects* of national law may have a bearing on international obligations *as a factual matter*, including threshold issues. Before addressing the merits of

a case, an international tribunal may thus be faced with the need to determine what is now commonly referred to as “jurisdictional facts” (an expression often credited to Judge Rosalyn Higgins). In the present case, *the issue is whether the Claimant holds entitlements in which a NAFTA-qualifying investment is manifest and exclusively represented by that Claimant.*

5. Echoing parts of Paragraph 7 of Ms Coleman’s Report which also apply to me, I state as follows: I have no personal relationship to, or interest in, either Canada or the Claimant (or its affiliates and lenders). I have never personally been retained to represent either party as a lawyer. I do not believe that my role as an expert witness here gives rise to a conflict of interest. I have been compensated on an hourly basis for my work on this case. My compensation is in no way contingent on the opinions that I express here, or on the outcome of this arbitration. These opinions reflect my independent views and genuine beliefs based on the materials I have reviewed to date. I am prepared to reconsider my analysis in light of further materials.

EXECUTIVE SUMMARY

Corporate restructuring is not in and of itself fatal to jurisdiction ratione temporis (para. 6). The outcome notably depends on the following considerations:

- (a) jurisdiction will not be found where the restructuring is a sham: a disguise designed to give the appearance of protected status (e.g., paras. 12, 68);*
- (b) provided that the true investor’s qualifying nationality is preserved, restructuring with an ordinary business purpose (para. 9) should not divest a tribunal of jurisdiction over a claim;*
- (c) continuity in the beneficial ownership or controlling interest in the investment prevails over formalism; the tribunal should retain jurisdiction over the claim (paras. 8, 46-48, 51-57)*
- (d) the right to assert the claim is derived from the claimant’s having invested in the investment (para. 17); a bona fide investment supports jurisdiction.*

Underpinning these and other factors (the absence of windfall or double recovery) is the international legal principle of good faith.

The texts of NAFTA Articles 1116/1117 do not contain the temporal restriction that Canada has argued (paras. 39-40).

Canada’s ratione temporis objection is not founded on the ratio decendi of any of the 15 cases that it cites.

My opinion proceeds as follows:

Paragraphs 6-19 explain how the issue of temporal jurisdiction raised here may be unprecedented.

Paragraphs 20-30 sets out my understanding of Canada's objection.

Paragraphs 31-50 contain my analysis.

Paragraphs 51-61 review arbitral pronouncements on the assignment of claims that I believe are consistent my analysis.

Paragraphs 62-71 contain my comments on 15 cases cited by Canada.

THIS MAY BE A CASE OF FIRST IMPRESSION

6. Although as will be observed below the question put to me may be one of first impression under NAFTA, the effects of corporate restructuring in relation to establishing jurisdiction under treaties has been faced several times in the BIT context. By now, something of a *jurisprudence constante* has been established in a series of cases which may be highlighted as follows. (I had no involvement in any of them.) They show that restructuring per se is not fatal to jurisdiction, although there is a red line crossed by arrangements revealed to be fraudulent, i.e. shams.
7. But I begin with two NAFTA cases that indicate *a general acceptance of the interposition of controlled holding companies*. *S.D. Myers Inc. v Canada* (2000), a case presided by Professor Martin Hunter, upheld the claim with respect to both jurisdiction and merits against an objection as to the corporate claimant's access to arbitration under NAFTA. (Canada argued that there was no "investment" in Canada) in circumstances that are set out in the following passages:

“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.”¹

“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.”

8. Similarly, in *Waste Management II v Mexico* (2005), the NAFTA Tribunal was confronted by a denial that there has been a US investment 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 (as he now is) 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. To the contrary, the arbitrators found at Paragraph 80 that:

“[w]here 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. 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.”

9. I now turn to cases involving *restructuring per se*. In *Autopista v. Venezuela* (2001), a Mexican investment 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.

¹ The quotation in question, from NAFTA Chapter 11, Section C, reads as follows: “investment of an investor of a Party means an investor other than an investor of a Party, that seeks to make, is making or had made an investment”.

10. In *Tokios Tokékés v Ukraine* (2004), the claimant Lithuanian entity was able to establish jurisdiction although it was owned and controlled by Ukrainian nationals who held 99% of its shares; the tribunal observed that the corporation had been formed eight years before the BIT entered into force and there was no evidence of improper use such as fraud or malfeasance.
11. In *Aguas del Tunari v Bolivia* (2005), the US Bechtel corporation had owned 55% of a Bolivian water concessionaire, but – in the context of combining its water resources projects with Edison S. p. A. of Italy – transferred its shares to a Dutch company which subsequently became the claimant before ICSID. The Tribunal held that this was not simply a corporate shell established to obtain ICSID jurisdiction: “it is not uncommon in practice and – absent a particular limitation – not illegal to locate one’s operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment, for example ... the availability of a BIT.” (Paragraph 330.)
12. The line *not* to be crossed was thereafter delineated in the infamous *Phoenix Action v Czech Republic* (2009) case, where the 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.”
13. This was the background of high-stakes cases brought against Venezuela, beginning with *Mobil* (a.k.a. *Venezuela Holdings*) *v Venezuela*). The fact pattern there involved a series of broad and increasingly invasive measures by the Chávez government. Mobil restructured its investments in the aftermath of measures that had decreased royalties and increased income tax, transferring its interests from US entities to Dutch holding companies. The Tribunal, presided by Gilbert Guillaume, a Judge and former President of the International Court of Justice, made a distinction in the following passage which has become a *Leitmotif* in subsequent cases and commentary (from Paragraphs 204-5 of the Decision on Jurisdiction, 2010):

“As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.

With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to 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’.”

14. I conclude with this quotation from *Phillip Morris v Australia* (2015), not for its conceptual interest (it is merely confirmatory) but because of the notoriety of the case:

“587. The Tribunal’s conclusion is reinforced by a review of the evidence regarding the Claimant’s professed alternative reasons for the restructuring. The record indeed shows that the principal, if not sole, purpose of the restructuring was to gain protection under the Treaty in respect of the very measures that form the subject matter of the present arbitration.... the Plain Packaging Measures was not only foreseeable but actually foreseen by the Claimant when it chose to change its corporate structure.

“588. In light of the foregoing discussion, the Tribunal cannot but conclude that 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.”

15. The just-reviewed cases consider situations in which restructuring was essential to arbitral jurisdiction, and that was indeed the basis of the objections raised. Jurisdiction was nevertheless upheld with respect to measures that took place subsequent to the restructuring. How does this make sense from the standpoint of the policy considerations of States?
16. First, consider why States are prepared to give foreigners legal protections that are unavailable to their own nationals. Foreigners are more exposed than domestic investors to the sovereign risk attached to the investment and to arbitrary actions of the host State, and may thus, as a matter of legitimate policy, be granted a wider scope of protection.
17. Second, consider *the reasons for placing temporal limitations* on those advantages. The matter was well put in *Gallo v. Canada*, a NAFTA case discussed below, where the tribunal wrote as follows in Paragraph 336:

“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. And Mr. Gallo has only

partially succeeded: he has shown that he is a US citizen, but he has failed to marshal convincing evidence that at the time of enactment of the [impugned measure] he was the owner of the Enterprise. In these circumstances access to the additional level of protection afforded by the NAFTA cannot be available, and the Claimant and the Enterprise must resort to the general remedies available to investors under Canadian law in general and under the [impugned measure] in particular.

18. The rationale, of course, is that 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 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.
19. This distinction is interesting as a matter of context, but highlights the irrelevance of the aforementioned line of cases to the present case; 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 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 [and] ... ‘an abusive manipulation of the system of investment protection under the ICSID Convention and the BITS’.”

CANADA’S OBJECTION

20. I understand the situation to be as follows: a US *investor*, qualified as such under NAFTA, made an equally qualifying *investment* in Canada (in the ultimate form of the Canadian corporation Prairie Mines & Royalty ULC). A claim is now brought that certain Canadian measures were taken in breach of NAFTA and adversely affected the value of the investment. Canada will have the opportunity to contest the claim in substance, but *pro tem* it is naturally assumed to be valid. The issue I have been asked to address pertains to the consequences of the fact that the present Claimant is not the original investor, but asks to be recognized as entitled to make this NAFTA claim as a result of a corporate restructuring which liquidated WCC.
21. I understand that the restructuring was carried out for a legitimate business reason. Nothing about it indicates an attempt to enable the Claimant to fabricate NAFTA jurisdiction where there was none at the time of the governmental measures; the simple fact is that WCC was a US entity from the outset.
22. I am generally aware of the meaning of the Climate Plan and the Transition Payments as defined terms. While the Claimant considers that the Climate Plan was an important part of the story, it was merely a statement of intent for which it therefore ultimately does not

seek redress. The Claimant nails its colors to the mast of the inevitability of (allegedly) disparate treatment created by the Government of Alberta's Off-Coal Agreements in November 2016 that six competing coal-fired generating plants in Alberta would receive Transition Payments beyond 2030.

23. When WCC filed for bankruptcy protection on 9 October 2018, it owned Prairie Mines & Royalty ULC. As a part of the ensuing restructuring, the Claimant was created as a wholly owned subsidiary of WCC. WCC thereafter transferred Prairie Mines to the Claimant, and transferred its equity ownership in the Claimant to WCC's first lienholders. In substance—so says the Claimant—the same “US investor” owned the same “US investment” in Canada notwithstanding the restructured entity. There was no material change in the Statement of Claim and Notice of Intent by which WCC had first initiated arbitration; those documents were simply reissued when the Claimant formally took its place.
24. In sum, the Claimant insists that the claim survived the corporate reorganization: it submits (Transcript/Hearing on Bifurcation 93:6-11) that one should not conclude that the drafters of NAFTA “intended to deny fundamental investment protections for foreign investors undergoing restructuring, whether it be an intracompany transfer of assets, bankruptcy, or, as here, both.”
25. The three prongs of Canada's temporal objections, set down by the Tribunal in P.O. No. 3, are the following:
 - (i) **The Claimant was not a protected investor at the time of the alleged breaches**
26. Canada argues that since the Claimant did not acquire the Canadian businesses in question until March 2019 when it purchased them at arms' length as part of the restructuring of WCC, its investor status in Canada could not have commenced before that date. WCC had previously commenced arbitral proceedings and filed its own consent as per NAFTA, but those proceedings are distinct, and now withdrawn.
27. The Claimant answers that the “measure” out of which its claims arise is the Transition Payments effected starting in July 2017. Although it had not been incorporated at that time, “the investor” was at all material times a US national; the entity which went into bankruptcy in 2018 is materially the same one that emerged from restructuring in 2019. The restructuring under US law was intended to preserve assets and rework liabilities in a manner that would allow the Claimant's assets to function as an ongoing concern. The Claimant is but a new manifestation of the investor and the investment, brought forward as the consequence of legitimate recourse to protection under the US bankruptcy laws without thereby creating any detriment to Canada.
 - (ii) **The Claimant has failed to state a prima facie damages claim**
28. Canada argues that the Claimant seeks damages which are in fact those of WCC; the alleged breaches predate the Claimant's existence as a US investor, nor did the Claimant own or control an “enterprise” said to have suffered thereby.

29. The issue is thus the admissibility of a claim (A) for a loss suffered before the Claimant came into existence or (B) on behalf of an enterprise which the Claimant did not own or control at the time of the alleged breach. In other words, as the Tribunal put it in P.O. No. 3, at para. 51: “could the Claimant or its enterprise have incurred the claimed loss or damage by reason of the alleged breach where the Claimant became an investor and acquired the investment in March 2019?”

(iii) The challenged measures do not “relate to” the Claimant or its investments as required by NAFTA

30. The words in this heading are simple enough, though of course the words “relate to” merit amplification and analysis. My comments will follow immediately.

MY ANALYSIS

31. The text of NAFTA is in significant respects open-textured, allowing case-by-case determinations in light of how they align with policy considerations. For example, here is an extract from the Submission of the United States of America as a non-disputing party in *B-Mex et al v Mexico*, dated 28 February 2018:

“15. Article 1117 further authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor “owns or controls directly or indirectly.” The NAFTA does not define “control.” The omission of a definition for “control” accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.” (Citations omitted.)

32. Has the same approach been taken with respect to issues of temporal jurisdiction? It may well be so. Article 1101 (Scope and Coverage) states that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*, “investors of *another Party*” and “investments of investors of *another Party* in the territory of the Party[.]” Article 1117 thereafter provides that an investor of a Party may submit to arbitration a claim that “*the other Party has breached*” an obligation under Section A. “[A]n enterprise is an ‘investment’” as defined in Article 1139. Now NAFTA respondents may well wish that tribunals would make the leap to this conclusion: if the substantive obligations of Section A apply to “investors of *another Party*,” or “investments of investors of *another Party* in the territory of the Party,” it must follow that an investor of another Party, *i.e.*, a Party other than the respondent Party, *must own or control directly or indirectly the investment at the time of the purported breach*. But that is indeed a leap, and not a necessary inference. Such a significant dispositive rule would surely have been spelled out. Leaving it open means that the answer depends on the factual context and its effect on the policies that underlie the treaty.

33. Now Canada argues that NAFTA Article 1101(1) creates a gateway which neither the Claimant nor its investment can traverse, because at the time of the challenged allocation of the Transition Payments (2016) as well as at that of Alberta's Climate Leadership Plan (2015) the Claimant did not exist.
34. Are the legal effects of (A) the restructuring undertaken by WCC and (B) the status of the entity that entered into bankruptcy (and not Westmoreland at the time of its incorporation) such as to allow the conclusion that the challenged measures relate to the Claimant or its investment? When did the Claimant become a US investor and acquire its investment? When did the challenged measures occur?
35. In Paragraph 51 of its Memorial, Canada reads NAFTA Article 1101(1) to have the effect that "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." But is that what Article 1101(1) says?
36. It may be useful to consider precisely what the Claimant seeks to do and then work back to see if it is impermissible by reason of Article 1101(1). Article 1139 defines "investor of a Party" as a "national or an enterprise of such Party, that seeks to make, is making or has made an investment." That is the case with the Claimant: a US company indirectly owning Prairie Mines & Royalty, which in turn, as a Canadian entity, is an "investment" under Article 1139. And so, when Articles 1116 and 1117 contemplate, as they both do, that a claim may be submitted by an "investor of a Party", there is no obstacle to the Claimant.
37. We then immediately return to Article 1101, which provides that the substantive obligations of NAFTA (Chapter 11) "appl[y] 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 [...]." NAFTA Chapter 11, in this case, applies to the measures being challenged, namely the Government of Alberta's destruction of WCC's only market by converting Alberta electric utility companies to natural gas operations. The value destroyed now finds itself in the ownership of the US Claimant.
38. The measures "relate to" the Claimant simply because it owns and enjoys/suffers the fortunes of Prairie as an "investment". It is quite simply, in NAFTA's terms, "an investor of another Party". And the measures relate to the Claimant's investment, Prairie, which owns the coal mines that supply the utilities and faces the obligation to reclaim the mine at the end of the coal producing contracts.
39. Article 1116 does not specify that the "investor" submitting the claim must have had that status at the time of breach. (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.) It does not impede a claim in arbitration 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..."). The breaches, still assumed *pro tem* to be valid, are continuing; the amputated lifecycle of the coal producing mines and the acceleration of the recovery of the mines have made a return on the investment impossible. Moreover, unlike similarly situated companies, the Claimant is uncompensated for that loss.

40. But may the Claimant proceed with a claim under Article 1117 on the footing that it is doing so (on behalf of a non-Canadian enterprise, *i.e.*, WCC) that it owns or controls directly or indirectly? The Claimant asserts that it controlled WCC at the date of its claim because the shareholders in the Claimant, namely the first lienholders, controlled the bankruptcy process. Article 1117(3) provides that if two different "investors" submit claims as to the same investment, the claims are to be consolidated. It seems open to the arbitrators to find that this is indeed what happened with the claims of WCC and the Claimant. Consultations were waived, a new Notice of Intent was not required, and the arbitrators first named by WCC remain as members of the present Tribunal.
41. The situation is not explicitly envisaged by NAFTA, thus apparently presenting a case of first impression. Canada has objected on a formal ground; the Claimant answers with a purposive reading of the treaty. The text as I read it neither requires the former nor of course (since otherwise we would not be speaking of *purposes*) explicitly endorses the latter.
42. In this situation, I find it useful to consider the approach of another ICSID tribunal faced with a novel question and having to make a similar choice between a formal vs. a purposive approach to the threshold question it was facing.
43. *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-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.*
44. The composition of the tribunal in *Perenco* was noteworthy. It was chaired by Peter Tomka, a former President (and still Judge) of the International Court of Justice, and also included Sir Franklin Berman QC, former Legal Adviser to the Foreign and Commonwealth Office, as well as Christopher Thomas QC, a prominent Canadian arbitrator with much NAFTA experience. The case involved high stakes and was comprehensively debated by large teams of lawyers from Covington & Burling on one side and Dechert on the other. After a decade of disputation, an award of some \$503m was rendered in the Claimant's favor. (An annulment application is pending.)

45. Perenco Ecuador Limited (“PIL”) was the Claimant. To assert a right of action under the France-Ecuador BIT notwithstanding its Bahamian nationality, it invoked the fact that at the time when consent to arbitration was given (17 October 2007) and the Request for Arbitration registered by ICSID (17 October 2007), it was controlled by French nationals, namely members (heirs) of the Perrodo family. But in fact *another* Bahamian entity was PEL’s “ultimate parent company”, namely Perenco Ecuador International (“PIL”), and *as to PIL* no Perrodo heir could have exercised control on the two abovementioned dates because its shares had not been transferred to them until 22 December 2011.
46. In its Decision on Jurisdiction (30 June 2011), the Tribunal made these observations (footnotes omitted):
90. The Tribunal approaches the jurisdictional issues mindful of the fact that the only claimant before it is a juridical person incorporated under the law of the Commonwealth of the Bahamas which claims rights of standing under the France-Ecuador BIT. No French national as defined in the Treaty has asserted a claim nor averred that he or she controls the Claimant on his/her own or in concert with other such nationals. As far as the Tribunal is aware, this is the only instance where a juridical person, a national of a third State, has invoked treaty rights held by two other States without there being at least one national of one of the two State parties to the Treaty (or a juridical person incorporated under the law of one of the two States parties) also claiming under the treaty.
91. This is an unusual situation and the Tribunal considers that care must be exercised in determining whether rights of standing exist in fact and in law. It is beyond dispute that ordinarily a Bahamian company could not claim rights under a bilateral treaty to which the Commonwealth of the Bahamas is a stranger.
47. Although other jurisdictional issues were resolved in that Decision, this particular question was deferred and more comprehensively briefed. Ultimately, in the Decision on Remaining Issues of Jurisdiction and on Liability (12 September 2014), the Tribunal said this:
520. Both general international law and the applicable bilateral Treaty lack the specificity and particularity of municipal law (e.g. French law, Ecuadorian law, or Bahamian law) in terms of the ordering of corporate relationships and neither purports to regulate such spheres of corporate activity in detail.
521. As a matter of Bahamian law, the Perrodo heirs did not own the PIL shares as of the date of consent. Ought this not to disentitle them from claiming indirect control over PEL? Should the

Tribunal not accord significant weight to this legal fact?

522. Given the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law. But at the same time, international law does not permit formalities to triumph over fundamental realities. By way of example, in the field of diplomatic protection (which may, depending upon the issue, be relevant to the interpretation of a BIT), when claims commissions and arbitral tribunals have determined whether it is a person who holds the legal interest as opposed to a person who holds the beneficial interest in shares that is entitled to seek diplomatic protection, they have consistently found that it is the beneficial interest which is deserving of protection.
523. The diplomatic protection cases are not directly on point because where claims commissions and tribunals have recognised the owners of beneficial interests, it has been in the context of determining whether such beneficial owners were proper claimants even though they lacked legal title to the assets in respect of which they were making a claim. The present case is different in that the beneficial owners of PIL at the material times are not claimants, but are rather adducing evidence of their legal interest under French law and their beneficial interests under Bahamian law in order to demonstrate the Bahamian company that they ultimately control is a proper claimant under the France-Ecuador Treaty.
524. A similar tension between the choices of proceeding on formalities or the fundamental economic facts is evident in ICSID jurisprudence on the scope of the bare use of the word “controlled” when determining the standing of a juridical person. In *Aguas del Tunari, S.A. v. Republic of Bolivia*, the tribunal considered the definition of the phrase “controlled directly or indirectly.” The issue before it did not centre on the significance of “directly or indirectly”, but whether the term “controlled” referred to formal legal ownership or extended to actual exercise of control. The majority of the tribunal concluded that the “ordinary meaning of ‘control’ would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares.” It added that, as for the legal definition, it “also encompasses both the actual exercise of control and the right to control.” In his dissent, Mr José-Luis Alberro-Semerena suggested that since

the word “controlled” was a part participle, encompassing the effect of an action rather than just the capacity to perform said action, the text ought to be interpreted in the manner that gives it effect – *ut magis valeat quam pereat.*”

525. The tribunal members in *Aguas del Tunari* stood in agreement in one significant respect; that is, the necessity of considering more than the formal capacity to control the juridical entity. They diverged on whether this, in and of itself, can establish standing.
526. In the exceptional circumstances of this case, where except for legal title under Bahamian law, French nationals manifested every indicia of control over the shares of PIL – including legal ownership under the *lex situs* of the estate – the Tribunal is of the view that it cannot take a formalistic approach to the question of control. In this regard, the decision of the NAFTA Tribunal in *International Thunderbird Gaming Corporation v United Mexican States* warrants note. That tribunal found that Article 1117 of the NAFTA which requires that the investor bringing a claim on behalf of an enterprise demonstrate that it “own[s] or control[s]” the enterprise, could be satisfied by a showing of *de facto* control:

“The Tribunal does not follow Mexico’s proposition that Article 1117 of the NAFTA requires a showing of legal control. The term “control” is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or “*de facto*” control is, in the Tribunal’s *view*, sufficient for the purposes of Article 1117 of the NAFTA. In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.

Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of *de facto* control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent

driving force behind EDM's business endeavour in Mexico." [Emphasis added.]

527. In light of the above, it is significant that the evidence is that as of 17 October 2007, the French nationals had legal ownership of the shares under French law, a fact recognised by Bahamian law, and they have established that at that date they had de facto control of PIL and through it the Bahamian subsidiaries.
528. Having regard to the fact that the text of the applicable provision of the Treaty refers simply to "controlled", the 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.
529. Moreover, the evidence of French control is so substantial, so compelling and un-contradicted that it is the Tribunal's view that in the circumstances of this case, it is most consonant with the approach taken by international law to give weight to the fact of Bahamian law's recognition that the heirs owned the shares as a matter of French law and as a result they had beneficial ownership of the shares as a matter of Bahamian law prior to their formal re-registration in the[ir] names.
530. For the foregoing reasons, the Tribunal dismisses the Respondent's objection to the Claimant's standing to bring the claim under the Treaty.
48. As noted, all the footnotes in this long quotation are omitted, but it seems worth making an exception for footnote 827, appearing at the end of para. 522, which reads as follows:

David J. Bederman, *Beneficial Ownership of International Claims* (1989) Int'l & Comp. Law Quarterly, Vol. 38(4) 935 at 936 ("The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law.") and 945; M. Whiteman, *Digest of International Law* (1967), Vol. 8, pp 1261-1262.²

² I particularly commend the article by the late Professor Bederman, who prior to assuming a named chair at Emory University Law School had become well versed in claims under international law during his time as advisor at the Iran-US Claims Tribunal in The Hague, subsequently co-authoring, with Professors Burns Weston (until his death) and Richard B. Lillich, collections of thousands of orders and decisions of the

49. To return to the case at hand: there is no risk of double recovery. To the contrary, there is risk of a windfall. We are assuming at this stage that Canada is internationally responsible for a treaty breach which may have caused hundreds of millions of dollars 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 compounds its injury -- leaving it bereft of a (presumptively) deserved remedy, while giving Canada an undeserved free pass: an exemption from the consequences of its treaty breach which, so it seems to me, has no warrant in the text of NAFTA.
50. 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.

Confirmation of this conclusion in arbitral tribunals' treatment of the assignment of choses in action

51. The three decades that have followed Bederman's conclusion that it is a general principle of international law that "the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court" (see Paragraph 48) have provided occasion for relevant pronouncements of arbitrators in the following treaty-based investor-State disputes.
52. *Gemplus S.A. et al v Mexico* (2010) was a case pursued under two BITs which Mexico had signed with France and Argentina. Although formally distinct, the two cases were heard together with the same sets of lawyers, and a single award was rendered on both jurisdiction and liability. Both sets of investors (French and Argentine) had invested in an entity which as concessionaire operated a national vehicle registry which they said was revoked by the Mexican government in a manner that breached each treaty. Each of the claimants was ultimately awarded damages proportional to its shareholding in the concessionaire.
53. For present purposes the French claim is the interesting one. Three related Gemplus entities presented themselves as claimants. In the end the French parent corporation Gemplus S.A. alone was granted compensation on account of the French investment. The other two were French and Mexican subsidiaries. The Claimants first complained to the Government in October 2001; further complaints followed, and the Claimants lodged Requests for Arbitration in August 2004.

Foreign Claims Settlement Commission. Although Bederman reached only the age of 50 years, David Caron referred to him in a *New York Times* obituary as "a giant, a person seen once in a generation."

54. Mexico contested the “standing” of each of the French claimants to act under the French-Mexican BIT on the grounds that the chain of ownership and nationality of their claims had been broken by corporate transactions prior to and following the Request for Arbitration.
55. The Mexican subsidiary owned 20% of the concessionaire . At the time the concession was granted, it was 99 % owned by Gemplus S.A. In March 2004, however, Gemplus S.A. entered into an agreement to sell its shares in the Mexican subsidiary to a Luxembourgian subsidiary which could have no rights under the France-Mexico BIT. Gemplus S.A., however, explained that it had transferred the totality of the 99% shares of the Mexican subsidiary to a French subsidiary, once an operating corporation by now inactive, five weeks thereafter. This transfer, so Mexico argued, was an impossibility; because of the transfer to the Luxembourgian entity, Gemplus S.A. could not transfer better title than what it had – *nemo dat quod no habet*. The attempt, so said Mexico, had the exclusive but impossible purpose of “resuscitating” standing to bring the international claim.
56. Gemplus S.A. nevertheless saved the day, ending up as the sole (and successful) claimant on the “French” side on two grounds. First, the share purchase agreement with the Luxembourgian subsidiary, which envisaged the transfer of a list of various assets, had expressly contemplated the transferee had the right to designate *other* “affiliates” as transferees of particular parts of the assets on the list; the transfer to the Luxembourgian subsidiary never occurred because there was a prior designation of the French subsidiary as the transferee of the shares in the Mexican concessionaire entity. So there was never a loss of French control. Moreover – secondly -- even the transfer to the French entity was irrelevant due to the fact that in making that transfer Gemplus S.A. required a concomitant assignment of the claim as a holdback of the transfer. This was effected by means of a Memorandum of Understanding signed by all four above-mentioned Gemplus entities, which referred to the claims against Mexico and contained the following paragraph:
- “To the fullest extent permitted by law, GSA [the Gemplus parent] and Gemplus Industrial [the Mexican subsidiary] retain all rights they currently have in relation to the Claims and there shall be no effect on such rights by virtue of the transfer of the Shares to SLP [the French subsidiary]. SLP shall provide all assistance and take all necessary action and sign all documents, including the joining of any legal proceedings, such as any arbitration, brought in connection with the Claims (“Legal Proceedings”) and act jointly and cooperate with GSA and Gemplus Industrial in connection therewith, as may be requested by GSA and Gemplus Industrial.”
57. Given this stipulation, the Tribunal concluded not only that there had never been a transfer of ownership to a non-French entity, but that, even after the transfer to the French subsidiary, the parent company “retained all rights to maintain its existing claims as advanced in these proceedings”. In other words, the assignee of the right to the chose in action (an right not in a party’s possession but enforceable by legal process) was an eligible claimant under the BIT.

58. In *Fedex v Venezuela* (1997), an oft-cited, by now almost venerable case, the Curacao (Netherlands) claimant entity brought an action under the Netherlands-Venezuela BIT seeking compensation for failure to honor debt instruments issued by the Government of Venezuela. The latter objected on the ground that a holder having acquired the promissory notes by endorsement could not be considered to have made an investment for the purposes of the Treaty.

59. The tribunal presided by Professor Francisco Orrego Vicuña held for the claimant, reasoning as follows (in Paragraphs 39 and 40):

“The claimant has rightly argued that promissory notes of this kind have a legal standing of their own, separate and independent from the underlying transaction. It is not disputed in this case that the Government of Venezuela foresaw the possibility that the promissory notes would be transferred and endorsed to subsequent holders, since they explicitly allow for such a possibility. The fact that these notes were denominated in US dollars is further evidence that their eventual international circulation and availability to foreign investors was contemplated from the outset...

“In such a situation, although the identity of the investor will change with every endorsement, the investment itself will remain constant, while the issuer will enjoy a continuous credit benefit until the time the notes become due. To the extent that this credit is provided by a foreign holder of the notes, it constitutes a foreign investment which in this case is encompassed by the terms of the Convention and the [BIT]...”

60. Of course if the assignment of the chose in action (even to an otherwise treaty-qualified entity) takes place after a dispute has been enlivened, as in *African Holding v Democratic Republic of the Congo* (2008) where a jurisdictional objection was upheld on that ground, it cannot expect to suffer a fate different than that reserved for post-dispute transferees of ownership. That case, also presided by Professor Orrego Vicuña, nevertheless contained some obiter dicta of note with respect to the rejection of an objection to a claim brought by the assignee of a claim (my translation from the French original):

“60. ... “The Claimant and the Respondent share the same view of the legal effect of an assignment of claims, which is simply to substitute the assignee for the assignor. All rights of SAFRICAS thus became the rights of African Holding. The Claimants are right to point out that the legal nature of the assignment of the claim, both under Congolese law and the French law on which it is inspired, does not transform the rights in question and does not result in the novation of obligations. The obligations therefore remain the same.”

“62. ... African Holding ‘does not seek to assert a right that SAFRICAS did not have’ and in which the assignment of claims involved a company which had the nationality of a Contracting State (SAFRICAS) and another which also had the nationality of the same Contracting State (African Holding), i.e. the United States. While the situation before 2000 was different, in that SAFRICAS was owned by Belgian investors, at the time of the assignment of claim the only relevant nationality was that of the United States.

“63. The Tribunal therefore concludes on this point that all the rights held by SAFRICAS were assigned to African Holding, including claims and consent to arbitration, given that the State whose nationals benefit from the expressed consent under the bilateral investment treaty has not changed. The situation in this case is clearly different from that of the *Mihaly* and *Banro* cases, in which a Canadian company was attempting to cede rights it did not have.

“78. ... Since the DRC owes money to an investor under the contracts and the right corresponding to this duty has been assigned, the money is still owed, but only to a different beneficiary. In fact, the assignment of the claim is not a simple transfer of debt. It is also the transfer of the economic value of work performed and not compensated. If said payment was due to SAFRICAS as an investor it still remains due to the assignee, and therefore the amount of this economic value linked to an investment remains unpaid. The assignee therefore has exactly the same interest as the original investor and the assignor is for this very reason an investor himself.”

“79. This is particularly true in the context of these proceedings in which the same family retains an interest in the case under a different legal provision. Mr. David Blattner testified in the course of the hearing that “in both situations we own both companies, we are owners of both enterprises, we hold in each case nearly 100% [As] owners of the two companies ... the assignment is an accounting arrangement between one company and another .”

“80. If we faced a situation where a debt hunter was speculating with certificates or other instruments, we might have reason to doubt the contribution of this operation to the economic development of the debtor country. The Respondent spoke, at the hearing, of the concern of developing countries about the actions of “predators,” or “vulture funds” which purchase these debts, assignments of claims, and initiate lawsuits against poor countries....” The situation in the present case is manifestly different because the investment is not speculative, the

owners live and conduct their activities regularly in the DRC and the contract for the executed works was concluded by the State.”

“81. The Tribunal must therefore not accept the outcome of relieving a State of its obligation to discharge its debt whenever there is an assignment of rights. This which would seriously disrupt the international financial markets in which sovereign debt is traded every day between different holders of bonds and other instruments. It is this obligation that explains why most bilateral investment treaties, including the one of relevance in in this case, provide that monetary claims are considered a protected type of investment.”

“...84the assignment between the two companies created a continuum concerning rights and obligations under the contracts and the investment, in particular in that their nature and character are kept unchanged. In fact, the legal nature of these rights and obligations, notably the right to present a claim and the arbitration clause, have not changed in the light of the facts here.... the debt is still the same debt and is still owed by the DRC to the recipient.”

61. The passages quoted from these cases show 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). In the present case, the assignment of rights or its equivalent appears to be inherent – subject to the Tribunal’s assessment of the facts – in the restructuring affected via the investor’s recourse to protection under the relevant bankruptcy law. The reasoning of *African Holding* set forth in the passages just quoted (in paragraph 60) track well with Article 1109 of NAFTA, which ensures free movement of investments and proceeds therefrom. The treaty’s object and purpose is to promote the free movement of capital; it would make no sense to prohibit the sale of unliquidated investments and indeed NAFTA nowhere does so. Why should it be permitted to liquidate an investment and repatriate or transfer the proceeds – but not to sell it? To the contrary, Article 1109 seems to confirm the transferability of investments and claims deriving from them. It seems unacceptable to relieve a State its obligation whenever there is an assignment of rights. This would seriously disrupt the international financial markets in which sovereign debt is traded every day between different holders of bonds and other instruments.

Canada's invocation of arbitral decisions as authorities in support of its jurisdictional objection

62. Canada has cited 15 decisions in support of its temporal objection. I am not persuaded that they are of assistance to Canada for a variety of simple reasons. Below I will explain, taking these decisions in alphabetical order.
63. But first an important digression is necessary concerning the reference of prior decisions in investor-state arbitrations. When their jurisdictional bases are found in investment laws or investment treaties, such investor claims are raised in the absence of a prior arbitration agreement but rather a unilateral offer to arbitrate extended in the law or treaty. The first time this mechanism was used, I had the experience of representing the claimant. The case was *SPP v Egypt* (1988), which I described almost three decades later in “The Tipping Point”, a contribution to a collection of essays published by ICSID on the occasion of its 50th anniversary, Meg Kinnear et al (eds.), *Building International Investment Law: The First 50 Years of ICSID* 85 (Wolters Kluwer 2015).
64. This mechanism, which I have referred by the somewhat imprecise shorthand expression *arbitration without privity* (in an article with that title in 10 *ICSID Review* 232 (1995), has given rise to hundreds of arbitral decisions rendered by a multitude of arbitrators representing a range of legal cultures, often writing lengthy decisions which read more like academic expositions than judgments. In this context, the invocation of prior decisions as would-be precedents is subject to great caution.
65. Concatenations of abstract propositions abound in academic writing, but seldom provide a *ratio decidendi*. Arbitrators with no grounding in the law of jurisdictions which follow the rule of *stare decisis* tend to be undisciplined when they refer to what they conceive of as “precedents”; they have not read the locus classicus, *Precedent in English Law* (Cross & Harris), and have little feeling for the distinction between the holding of a case and an adjudicator’s incidental observations. An example: in the *Gallo* case discussed under (xv) below, the tribunal (presided not by a common lawyer, but a distinguished Spanish arbitrator) asserted in Paragraph 328 that:
- “Investment 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.”
66. But this was not, as we shall see, the *ratio decidendi* of the case, which was rather this: *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*. The sweeping assertion in the paragraph just quoted is entirely open to question, and of course to qualification – like any piece of academic writing. In particular, its use of the categorical adverb “unanimously” is plainly hasty and unreliable; no one could use that word without having examined *all* investor-state decisions, and that is simply not possible because a significant percentage of them are never published.

67. Influenced by Cross & Harris, I have long been attentive to the lack of rigour in this respect – for which, it should be understood, I do not criticize the author of the passage invoked so much as those who seek to rely on it as though it were a reflection of the applicable law. I had the occasion to express myself in this regard in “The Law of Precedent in Investment Arbitration”, an essay that appeared as Chapter 26 in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford, 2010), which includes these observations:

“Arbitrators' opinions are no more or less interesting than opinions of commentators. Of course there have been instances where unique insights offered by way of dictum or academic commentary have commanded great respect and become lodestars for future decision-makers. But in most cases the reader of an alleged precedent is most likely to be influenced by the reasons which arbitrators say led them to the outcome for which they have taken personal responsibility *ex officio*. That is where, one reasonably surmises, they exhibit particular care. *And so while future arbitrators may and do consider everything put before them, it is clear that the greater weight they intend to signify when they refer to "precedents" should be limited to matters of ratio....*

“Awards come in many forms which may affect their degree of persuasiveness. There are awards which have been annulled and awards which have resisted annulment applications. There are awards which have not been tested at all. There are awards by three member tribunals and awards rendered by sole arbitrators... There are awards rendered by a majority and awards rendered unanimously. Some awards record the merest indication of disagreement, while others are rendered over an impressive dissent. Some dissents are powerful and elegant and make the majority look fragile; others are partisan diatribes with quite the opposite effect. Some awards are linguistic horrors; others are textbook models of drafting. Some are highly disciplined texts which avoid any excursions from what is strictly necessary to decide the dispute; others bring to mind Shakespeare's loquacious Polonius. There are awards which seem to be the product of inexorable reasoning, and others which seem nothing but the result of a vote. There are awards signed by arbitrators who maintain impressive consistency from one case to the next, and awards signed by arbitrators who seem not to remember what they put their names to the previous year....” (Emphasis added.)

68. Digression ends, we return to the issue at hand. The treaty language does not explicitly require that the investor's investment was made at the time of the breach. Still, an impressive number of decisions have inferred such a requirement. But they have done so for a variety of reasons, and that variety makes all the difference. The distinguishing

features of the decisions are the true *ratio*. The first category, such as *Cementownia (v)*, *Libananco (viii)*, *Levy (ix)*, *Gallo (x)* and *Phoenix Action* (already discussed) are **sham transactions** which do not actually belong in the category of temporal objections because the alleged investor would not qualify as such even if the asserted investment had been made at the time of the alleged breach.

69. A second category is illustrated by *GEA v Ukraine (vi)*. It concerns **arms'-length transactions in which a new investor acquires the investment**. If that investment has already suffered the effects of the alleged treaty breach, that is a matter which is known to the new investor – or should have been known, unless the matter was concealed in which case the new investor has a complaint against the old one. If the new investor is of a treaty-protected nationality and the old one is not, the value of the investment is obviously greater to the latter and there is a deal to be made which is of no interest or benefit to the host state. (If the acquirer wants to use the acquired claim to offset a debt to the host State there is an actual detriment to the host State.) This logic does not compel disqualification of the new investor, especially if (as in *GEA v Ukraine*) both investors are of the relevant treaty-protected nationality.
70. The present case falls into a third category. (There may be more variants, but I go no further here). It includes cases like *Perenco* (already discussed) where there is no doubt of the origin of fresh capital from a duly treaty-protected investor, no question as to beneficial as opposed to formal ownership.
71. Here are the 15 cases with my brief comments:
- (i) *Apotex Holdings and Apotex Inc. v US* (2014). The Claimants were incorporated in Canada and the US, respectively. The former, a generic drug manufacturer, indirectly held and controlled the latter, a distributor. Apotex Inc had brought two prior arbitral proceedings against the US, but Apotex Holdings was a new disputant. Although the case was dismissed on other jurisdictional grounds, Canada's argument that the breach did not "relate" to the investor or investment failed; the Tribunal affirmed in Paragraph 6.28 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)." But the case tells us nothing about the temporal issue raised here by Canada (i.e. that the alleged breaches pre-date the investment); in effect the Tribunal's conclusion that Apotex Holdings -- although absent in the prior proceedings -- was 'a privy' with Apotex Inc. seems to support the Claimant's position.
 - (ii) *Bayview Irrigation et al v Mexico* (2007). 46 US claimants asserted that Mexico had diverted more water from the Rio Grande than was allowed under a US-Mexico treaty. The Tribunal held that while they had invested in Texas with the expectation of Mexican compliance with the treaty, there was no investment in Mexico and therefore no NAFTA jurisdiction. This holding is irrelevant to the question in this case.

- (iii) *B-Mex et al v Mexico* (2019). This was a case initially involving 39 US entities and individuals, one entity dropping out after the Request for Arbitration had been filed. The Claimants acted directly under NAFTA Article 1116 and indirectly under Article 1117 on behalf of 7 Mexican companies in which they had invested. The outcome does not support Canada's position here. The first thing to observe is that jurisdiction was upheld with regard to all of the Claimants and 6 of the 7 Mexican companies, and that although this was not a final award the Tribunal awarded costs of US\$1.4 million against Mexico.³ *B-Mex* 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 the 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. The Tribunal recites at Paragraph 145 that both sides agreed that the Claimants must have owned or controlled the Mexican companies at the time of the treaty breach, but that is neither here nor there; self-evidently this was not of concern to the Claimants because they were not in that situation in any event. As for the Tribunal's comment in the same Paragraph that *Gallo v Canada* (2011) so "held", see (xv) below. (In *B-Mex* the presiding arbitrator was a law partner of mine at the time of the decision, but I was not aware of it before my retirement from the firm and have never discussed it with him.)
- (iv) *Cargill v Mexico* (2009). Jurisdiction was upheld; although the US claimant entity produced high fructose corn syrup in the US, a Mexican tax discriminated in favor of Mexican producers and affected its Mexican subsidiary, thereby allegedly violating NAFTA in its impact on a NAFTA qualified investment. It does not, as far as I can see, add anything to the discussion of temporal jurisdiction.
- (v) *Cementownia v Turkey* (2009). This claim, nominally brought by a Polish entity, was dismissed with an order of costs in the amount of some \$5.6 million because it was a "sham" designed to create treaty protection and thus advance a wealthy and politically controversial Turkish family's "economic interests and to gain access to international jurisdiction..." (Paragraph 136.) (In this case I represented Turkey.)
- (vi) *GEA v Ukraine* (2011). The narrative of this case involves a bewildering parade of entities and transactions which makes it a challenge to derive any analytical insight from it. The arbitration involved the acquisition by one German industrial group of a Ukrainian investment owned by another German industrial group after the occurrence of the measure alleged to constitute a treaty breach. Canada accepts that the tribunal in *GEA* upheld jurisdiction over breaches that had occurred after the

³ The case was heard in Canada; Mexico unsuccessfully challenged the award before a sole judge of the Ontario Superior Court, and then appealed to the Court of Appeal of Ontario which on 2 February 2021 dismissed the appeal.

claimant had made its investment in Ukraine. Canada's Memorial, para. 62, fn. 121. Moreover, the three cases cited in *GEA* at Paragraph 170 as evidence of a "consistently applied" principle that "the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed" are inapposite; *Saluka* is part of this list, *Phoenix Action* is discussed previously, and *Amto v. Ukraine* involved the timing of a Latvian investor's acquisition of shares previously held by domestic Ukrainians.

- (vii) *Grand River et al v US* (2016). There were four Canadian claimants. Three of them sought to establish jurisdiction on the basis of their interest in a distribution agreement adversely affected by a US regulation said to violate NAFTA; they failed on the grounds that this interest was not a qualifying investment. A fourth claimant owned a substantial business in the US affected by the measure and therefore was entitled to have his claim heard. This case reveals no more than a claimant's burden to demonstrate arbitral jurisdiction.
- (viii) *Libanaco v Turkey* (2011). This claim was nominally brought by a Cypriot entity for the same reason and in the interest of the same family as in *Cementownia*. It was also dismissed with an order of cost in the amount of \$ 15 million. (Here too I represented Turkey.)
- (ix) *Mesa Power v Canada* (2016). Canada's memorial states (at Paragraph 236) that this case shows that "the investor must establish that it was seeking to make the very investment in respect of which it makes its claims" before the alleged breaches, and states that its "jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an investor holding an investment." The US claimant in this case indirectly owned and controlled wind farms in Canada. The tribunal found that some of the measures about which the claimant complained were anterior to its investment and were therefore not protected by NAFTA, while others took place thereafter and could therefore give rise to a cognizable claim on the merits. Unlike the situation in the present case, the alleged breach antedated US ownership of the investment; here, the owner at the time of the breach and the successor owner now appearing as the Claimant were both US entities.

The essential question confronting the present Tribunal is whether the claim here suffers from the same defect as those dismissed for failure of temporal jurisdiction in *Mesa Power*. In the case now at hand, does the claim arise from a decision to invest by an "investor" which antedated the impugned measures because the Claimant is the incorporated manifestation of the very same capital that was plainly mobilized prior to the measures, or does the case fail because the vehicle which now is the receptacle as the result of a bankruptcy is formally distinct? I suggest in light of (a) the discussion of *Perenco* above, (b) the observation of Professor Bederman quoted in Paragraph 48, and (c) the arbitral pronouncements quoted in the section on assignment of claims above, that the answer should be favorable to the Claimant.

- (x) *Methanex v US* (2005). This is a famous case but adds nothing to the present discussion. The Canadian company complained of the prohibition of one of its products (a gasoline additive) by the legislature of California. The US Government raised, as a jurisdictional objection, that Methanex failed to demonstrate that the alleged breach of NAFTA had been the proximate cause of its loss. The objection was dismissed. It is difficult to see how this helps Canada here; even a *contrary* holding in *Methanex* would have done no more than lend support to a hypothetical, irrelevant, and contextually implausible complaint here that there is no demonstration of a specific breach against the interests of WCC, the entity which was the initial formal “investor”.
- (xi) *Renée Rose Levy and Gremcitel S.A. v Peru* (2015). In fact the Tribunal here declared that Ms Levy had made a timely investment and therefore dismissed the temporal jurisdictional objection, but then went on to hold that the suddenness of her investment and its proximity to the timing of the impugned measures were such as to compel the conclusion that “the only reason for the sudden transfer of the majority of the shares to Gremicel to Ms Levy was her nationality”; this was an abuse of process resulting in the dismissal of her claim. In sum, the case belongs to the group that includes *Cementownia*, *Libanaco*, and *Gallo*.
- (xii) *Resolute Forest Products v Canada* (2018). This case tells us that a NAFTA claimant must show that the claim meets jurisdictional criteria, but does not deal with the need for a claim to concern losses to an investment pre-dating the alleged breach.
- (xiii) *Saluka v Czech Republic* (2006). This case, presided by towering figure of Sir Arthur Watts and one of the most-often cited in the literature, resulted in a large recovery by the claimant and one of the most thorough elucidations of the fair and equitable treatment standard. At the outset, the Czech Republic argued that Saluka, a Dutch entity which served as the investment vehicle of the Nomura Group, had no real connection with the Netherlands and should therefore be denied status as investor. This objection obviously failed, but Canada seeks to make something of the fact that the Tribunal observed that damages caused to Nomura itself could not be recovered. This was hardly surprising, as Nomura could not and did not seek to be a party; the case has no present interest that I can see. (In this case I represented Saluka.)
- (xiv) *UPS v Canada* (2007). Canada makes the point that the claimant was able to state a *prima facie* case of damage to get to the merits. If the idea is that the Claimant here, by way of contrast, cannot invoke the damage *caused to WCC*, we do not progress from the stage of considering whether the present Tribunal will adopt a formalistic approach to the definition of the investor and investment, nothing more.
- (xv) *Gallo v Canada* (2011). In *B-Mex* (see (iii) above), the Tribunal referred to Paragraph 332 of this case, which reads as follows:

“This general principle is reflected in Art. 1117 of the NAFTA, which requires that any claimant seeking to successfully file an arbitration on behalf of a domestic 'juridical person', must pass a first hurdle: the plaintiff must prove that at the time when the alleged treaty violations occurred he or she owned or controlled the "juridical person" holding the investment.”

This ostensibly unqualified statement must however be read in conjunction with the arbitrators' understanding of “this general principle”, and that principle is articulated in the immediately following paragraph as follows:

“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.“ (Emphasis added.)

It is clear from the decision that the Tribunal did not believe in the Claimant's bona fides as a US investor, but that he acted as a front man for a wealthy Canadian entrepreneur (a Mr Cortellucci) who negotiated and financed the relevant investment in a waste landfill. Mr Gallo was a 33-year old government employee in Pennsylvania with no industrial experience, but a cousin of Mr Cortellucci's friend Mr Montemarano. The investment “allegedly” made by Mr Gallo was handled by an Ontario lawyer “with a small tax and corporate practice.... There is no evidence at all of any written agreements, communications, instructions or any other document, letter, fax or email exchanged between [the lawyer] and Mr Gallo. And there is no evidence that Mr Gallo ever paid any fees to [him].” Mr Gallo admitted that he never visited the site, and never did the slightest due diligence. The claim that Mr Cortellucci was his agent is not corroborated by any written communications between the two men, nor any disclosure to the vendor that it was Mr Gallo rather than Mr Cortellucci (“a personality well connected to local and provincial government ... the right person to assist in the highly-regulated and politically charged field of waste management.”). The factual section of the award continues at length to describe what was plainly viewed as a wholly fictitious transaction. In the end, the claim is dismissed on jurisdictional grounds and the hapless Mr Gallo indebted to the Government of Canada for US\$ 450,000.

I am unaware of any suggestion of *mala fides* on the part of the present Claimant seeking to create a US investment out of thin air. In my view (although this is naturally for the present Tribunal to judge) this case is radically distinguishable from *Gallo*.

CONCLUSION

In my opinion the circumstances of this case does not merit dismissal for a failure of temporal jurisdiction.

A handwritten signature in blue ink, appearing to read 'Jan Paulsson', with a large, stylized initial 'J' and a long horizontal line extending to the right.

Jan Paulsson
February 26, 2021