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

WESTMORELAND MINING HOLDINGS LLC
v.
GOVERNMENT OF CANADA

SECOND OPINION OF JAN PAULSSON RELATING TO THE ISSUE OF JURISIDICTION RATIONE TEMPORIS

Introduction

1. This second Opinion is responsive to Canada's Reply on Jurisdiction.[1]

2. Before discussing matters of textual analysis and interpretation, it seems useful to consider (A) the broad nature of the corporate ownership of the investment and (B) the effect of the position Canada takes in this case.

3. (A) A large NAFTA-covered US investment was made in Canada by a US entity which had mobilized the requisite financing in the US. The investment was destroyed, as must be presumed at this jurisdictional stage, by measures attributable to Canada which breached international law. Faced with the collapse of the investment, the US creditors and US owners of the US investment vehicle found it expedient to affect a reorganization in the context of which the initial investing entity was replaced by another US entity. No prejudice was thereby caused to Canada. If anything, it seems rational to assume that the reorganization mitigated losses.

4. (B) Canada sees this replacement of one investment vehicle with another as a formal silver bullet: a mistake which unfortunately for the investors enables Canada to elude the consequences of breaching the Treaty. The fact that the restructuring caused no illicit gain to the investors does not in its view matter. Nor does it make a difference that the investors could have conceived a number of alternative restructurings which would have saved the day – and thus disabled this jurisdictional objection. This is Canada's position in sum: a singular example of form over substance, difficult to posit as consonant with the aim of the NAFTA drafters to stimulate investments by protecting them from governmental visitations in the host country.

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[1] I do not engage with Ms Coleman's second Opinion any more than my first Opinion did as I have no expertise in her field. (I note that her footnotes refer to my Opinion as erroneous on a couple of incidental points; whether that is so, and whether it makes a difference, I leave to the appreciation of the arbitrators if they are minded to consider the point in question.)

5. To uphold form over substance in this way seems contrary to the aims stated in NAFTA's preamble, notably to:

> *CREATE an expanded and secure market for the goods and services produced in their territories;*
>
> *REDUCE distortions to trade;*
>
> *ESTABLISH clear and mutually advantageous rules governing their trade;*
>
> *ENSURE a predictable commercial framework for business planning and investment*

6. The text of the Treaty could have been perfectly clear in the formalistic sense which Canada seeks to promote: *if an original investor has transferred title to the investment, the transferee (irrespective of nationality) shall not have standing to claim hereunder,* and would have to be accepted as such. But when there is no such clear stipulation, one should not be quick to infer it.

7. The decisive question is whether Canada is right in asserting that NAFTA Articles 1101(1), 1116(1), and 1117(1) "require a claimant to be an investor of a Party at the time of an alleged breach in order to establish jurisdiction *ratione temporis*." (Reply, para. 44). I do not think so, but that is a matter for argument by counsel and decision by the members of the present Tribunal. All I believe I need to point out is (1) that Canada's position is a matter of inference rather than plain meaning, and (2) that the relevant Ecuador/France treaty in the *Perenco* case did not disqualify indirect control of the investment, and this is also the case under NAFTA.[2]

8. I doubt that it would be of much assistance to the Tribunal if I were to address all of the cases Canada discusses in its Reply and express detailed agreement or disagreement with the Parties' contrasting depictions of the holdings of various awards; ultimately the *factual circumstances* of those cases are matters for submission by the Parties and determination (if relevant) by the Tribunal. I will accordingly content myself by stating what I believe the most prominently discussed precedents stand for, and their relevance or otherwise to this case, *as a matter of principle*.

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[2] I observe that Canada suggests that the very introduction of my Opinion is an abandonment of the principle of *jura novit curia* and evidence of the "frailty" of the Claimant's position. Yet many successful parties have relied on expert opinions. Independent experts unlike advocates do not have an unfettered assignment to make the best possible argument for the party that has engaged them, but are constrained in principle by their declaration of independence and by the realistic constraints of the positions they have taken in the past. Parties who seek my opinion cut short my involvement when I find that the circumstances of their case do not lead me to the conclusions they wish to advance.

Is this a case of first impression?

9. Canada invokes *STEAG v Spain.* I confess to surprise that it is being invoked by this Respondent. I read in paragraph 393 of that award that "*el Tribunal rechaza la objeción* ratione temporis" (the Tribunal dismisses the Respondent's *ratione temporis* objection), which hardly augurs well as support for a party which seeks the opposite result. Canada's point seems to be nothing more than that *STEAG* contradicts the Claimant's position that the cases invoked by Canada do not present "a factual scenario comparable to this case." (Reply, para. 97.) True, *STEAG* is like the present one in that the successive formal owner of the investment in each case came from the same country. (That is the point Canada makes in para. 96.) But Steag GmbH acquired a 26.01 % interest in the Spanish entity which owned the solar plant at the heart of that case *from an unrelated German company*, Solar Millennium AG. Since that investment took place at a time which the Tribunal found to be anterior to the governmental measures that gave rise to the claim, Spain's objection was dismissed. The Tribunal unsurprisingly cites *Renée Rose Levy v Peru* as sufficient authority for the test it was applying (footnote 688).

10. Steag argued that its injection of funds into the venture subsequent to the acquisition of its shareholding from Solar Millennium were a part of the project finance undertakings that accompanied the acquisition, and thus it could not be said that its investment was "*reestructurada trans el nacimiento de la controversia con miras a asegurar la aplicabilidad del tratado*" (restructured following the onset of the dispute to secure applicability of the treaty, para. 350). The Tribunal agreed.

11. In the present case there was indeed a restructuring, but it was plainly not devised in order to secure treaty applicability. (Indeed, it is Canada's position that it unintentionally *defeats* applicability of NAFTA: a self-inflicted wound by the investor.) Canada thus not only fails to show how this case is similar to *STEAG*, but in the process of attempting to do so scores an own goal in calling attention to the fact that restructuring that does not seek to create jurisdiction where there is none is not *per se* objectionable.

12. In *GEA v Ukraine*, the initial holder of rights spun off the business in question before merging into a third-party affiliate, and it was thereafter the case that a subsequent entity entered into the contract with the Ukrainian state-owned *kombinat* which generated the claimed prejudice as a result of governmental measures. As the Tribunal noted in para. 101, "there is no particular document in the record that states outright that [the asserted rights were acquired but] the evidence adduced over the course of the proceedings, taken together, leads to the conclusion that it did indeed acquire such rights." GEA argued that there was no requirement that an investment "exists or is controlled by a national of another contracting state at the time of registration"; the Tribunal agreed, dismissing Ukraine's attempt "to create a standing requirement that does not otherwise exist." The tribunal aligned itself with the award in *CSOB v Slovakia* to the effect that:

> *"absence of beneficial ownership by claimant in a claim or transfer of the economic risk in the outcome of a dispute should not and has not*

> *been deemed to affect the standing of a claimant in an ICSID proceeding."*

13. And so this case, one might say, suggests an exhortation to "follow the money!" – seeking to ensure that the claimant is the rightful holder of the entitlements which flowed from the wrongful destruction of a protected investment. Canada does not find comfort in this case; it falls in the category of the rational respect for the entitlements of beneficial owners. *Koch v Venezuela,* a carefully reasoned decision by a tribunal presided by Johnny Veeder QC, is among the cases that also falls into this category; I will not lengthen this text with a recitation of the circumstances of that case, but note that the claimant successfully argued that the relevant:

> *"assignment, as an essential part of restructuring, is completely acceptable under international investment law and does not undermine the subsequent holder's substantive and procedural protection under a treaty, so long as there is an unbroken continuity in nationality."* (Para. 6.30.)

14. Whether the present case is one of first impression is obviously not decisive. Indeed it might be observed that it belongs to a broader and more diffuse category of cases which resist the exaltation of form over substance when there is no doubt that a qualified investment was effected by a qualified investor and that the capital invested at risk has indeed, assuming (or finding) the claimant's allegations to be correct, been lost by reason of treaty-breaching measures. I maintain that this case appears to be one of first impression, and observe the apparent absence of any decisions the facts of which support Canada's theory that a restructuring might have left the claim with the original investor but not with the successor.

Legitimate restructuring

15. It should surprise no one that investments that lead to treaty-based arbitrations against States tend to be troubled businesses that often require restructuring as a way of mitigating the adverse consequences of the difficulties encountered. Given the goal of promoting the inflow of investments, it should be obvious that restructuring ought to minimize the prejudice suffered, rather than to provide an excuse for denying treaty protection.

16. To the contrary, Canada here seeks *to augment* the investor's travails, so as to take advantage of formal aspects of the restructuring to escape responsibility for its own acts. Because of the circumstance that the restructuring in this case, so Canada reasons, does not involve "affiliated entities, none of the cases the claimant cites in support of its argument that corporate restructuring 'does not interfere with an investor's claim' is apposite." (Reply, para. 107.) Canada continues, in the following paragraph: "international investment law cases confirm that when an investor disposes of its investment after an alleged treaty breach arises, the transfer does not imbue the subsequent owner with a right to advance the treaty claim." More specifically, it rejects my Opinion because (footnote 195) I give weight to "allegedly related cases pertaining to

'the interposition of controlled holding companies' and 'restructuring per se'" and argues that "it is not clear how all of these cases pertain to the Claimant's arguments on 'restructurings'."

17. Canada cannot have it both ways. Either the present case is one of first impression, in which case the distinctions it seeks to make in this respect confirm that conclusion; or else the *ratione temporis* debate should be perceived as encompassing a broad range of circumstances in which formal distinctions of ownership structures give way to the reality of the proper understanding of who has standing (without subterfuge) to seek redress for the harm done to the at-risk investments. Without going over ground amply covered in the written submissions (as well as in my two Opinions), I suggest that it is instructive to consider the pertinence of some isolated points arising from the following cases to which reference has been made in these proceedings:

> *EnCana v Ecuador* (James Crawford, presiding) – The foreign investor's local subsidiary was entitled to a belated VAT refund. While the arbitration was pending, EnCana sold its interests in the subsidiary but reserved the right of recoupment from its purchaser of 70% of any of those refunds paid thereafter to the subsidiary. Ecuador argued that the sale of the subsidiary meant that the claim was invalid because EnCana no longer owned the "investment" at the time of the award.
>
> The tribunal disagreed on the ground that EnCana was suing in its own right, not in that of its former subsidiary, and that was enough to preserve its claim. The Westmoreland restructuring is more complicated, but the principle is the same; the loss is the loss of the investor, and the investor's formal assignment of its entitlement has not – apart from the fact that it has not improperly expanded jurisdiction -- added one cent to the quantum of recovery sought. There is no mischief.
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> *Daimler v Argentina* (Pierre-Marie Dupuy, presiding) – The respondent-State argued for application of the continuous nationality rule which had been applied in *Loewen v United States* but much criticized in scholarly commentary (including by me). Importantly, the *Daimler* tribunal quoted with approval (in para. 141) the following sentence from *EnCana* which has an evident resonance in the present case:
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> > *"Provided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point; retention of the subsidiary (assuming it is within the investor's power to retain it) serves no purpose as a jurisdictional requirement, though it may be relevant to questions of quantum."*
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> *Gemplus v Mexico* – I refer to the comments in my first Opinion.

S.D. Myers v Canada (presided by Martin Hunter) – Canada now ironically relies on a case in which its stance was defeated both with respect to jurisdiction and merits. The claimant was S.D. Myers Inc, a US corporation in which four Myers brothers owned equal one-fourth shares. The problem was that S.D. Myers did not actually own Myers Canada, the entity which made the investment in Canada; the four brothers were equal owners of the latter as well, rather than owning it indirectly but in identical proportions. Canada sought to deny S.D. Myers standing on the formal footing that it had made no investment in Canada. The Tribunal disagreed in the following terms:

> *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 [NAFTA].*

CME v Czech Republic (Wolfgang Kühn, presiding) – The following paragraph speaks for itself:

> *424. … 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.*

Autopista v Venezuela (Gabrielle Kaufmann-Kohler, presiding) – I refer to my comments in my first Opinion but wish to emphasize two important aspects of the decision. The tribunal found that transferring shares in the Venezuelan concessionaire from a Mexican entity to a US investment vehicle was commercially reasonable and not an abuse of corporate form (due to the Mexican entity's inability to secure financing as a result of a financial crisis). The tribunal also found that Venezuela's knowledge of the share transfer to the US entity was determinative for

> jurisdictional purposes. Canada attempts to distinguish this decision as a transaction between a parent company and its subsidiary (Reply, para. 107), but that is irrelevant to the case at hand. The core similarity relevant for jurisdictional purposes is that, like Venezuela, Canada knew that Prairie was held by a US investment vehicle. The *Autopista* tribunal's analysis remains relevant because, in both cases, a legitimate restructuring caused no prejudice to Venezuela and, in this case, to Canada. Here, the new US investment vehicle (WMH) replaced directly a former US investment vehicle (WCC) pursuant to a legitimate restructuring, with the full and manifest knowledge of Canada.

The assignment of claims does not preclude jurisdiction *ratione temporis* provided beneficial ownership is preserved

18. Canada alleges that the Claimant has "fail[ed] to specify the key details of its" beneficial ownership "theory, including the nature of the relevant interest, the identity of the relevant entity over which the continuity of beneficial interest must be established, and the date on which the alleged continuity of beneficial interest must be established." (Reply, para. 114.) I agree that the Tribunal must have a clear perception as to the nature of beneficial ownership if it is to be treated as sufficient to create standing at a particular point in time. The expression "beneficial ownership" is not self-defining and cannot achieve any effect by simple assertion. On the other hand, there is no preordained set of criteria; effective demonstrations may be made under a variety of factual circumstances. What matters is the ultimate economic reality; does the recovery pursued ultimately and legitimately seek *reparation of the harm done to protected investors who put their capital at risk*? Canada does not address the rationale for this proposition, but simply repeats that a claimant who was not an investor when the dispute arose has no standing.

19. In the absence of a rationale, Canada needs to find a mechanical rule. It appears not to have found one in the text of NAFTA, but purports to see the evidence of such a rule in *Mihaly v Sri Lanka* (Reply, para. 132), a non-NAFTA case which arose under the US/Sri Lanka BIT. There were two jurisdictional objections in that case. The first was upheld and resolved the case, rejecting the claimant's contention that the costs of unsuccessful participation in a tender offer which was alleged to have been unfair should be considered an "investment".

20. The other objection, which is the one of interest, pertained to the standing of the US entity Mihaly (USA) and to the alternative possibility that Mihaly (Canada) could claim by dint of an assignment. The objection failed on the grounds that the US entity was not somehow contaminated by the existence of a partnership between Mihaly (USA) and Mihaly (Canada). *En passant*, the tribunal rejected the alternative argument that Mihaly (Canada) could establish jurisdiction through the assignment to it of Mihaly (USA)'s rights. This is an unsurprising and completely uninteresting conclusion in the present context, where there is no non-US Westmoreland affiliate in sight. The tribunal's obiter dictum which Canada cites at paragraph 132 of the Reply to the effect that claims in ICSID are not "a readily assignable chose in action" is the reddest of herrings; the statement is correct as a

general observation but of no relevance here; the absence of a requisite protected nationality simply cannot be overcome by assignment.

21. Canada also argues (in para. 133) that the *African Holding* tribunal declined jurisdiction *ratione temporis*, and therefore provides support for the view that the present Claimant was not qualified as an investor when dispute arose. But in *African Holding* the situation was that *neither* of the putative claimants had been protected under the relevant BIT at the time the dispute arose. Canada's statement that my first Opinion cited three authorities (also including *Gemplus* and *Fedax*) which did not involve transfers between investors is unavailing; the question is the survival of a protected investment by assignment – not its absence *ab initio.*

Conflation of jurisdiction *ratione temporis* with the principle of abuse of process?

22. In North American academic jargon, the expression "to conflate" seems to appear on every page of law journals and form part of the vocabulary required to signify sophisticated disagreement. It is found in para. 11 of Canada's Reply. But as so often it does not seem to lead anywhere. It is hard to *confuse* abuse of process and temporal jurisdiction, and I doubt that any ICSID tribunal is likely to do so.

23. The here relevant spectre of abuse of process is the misappropriation of a right of claim by the manipulation of nationality to achieve investment-treaty protection. It is abusive for the Czech owners of a failing Czech business who find themselves adversely affected by a governmental measure to assign their rights to an Israeli entity for the purpose of achieving the exceptional protections of an international treaty; there is no protected foreign investment at that moment; every Czech business cannot so easily turn itself into a foreign investor. But it is not abusive for Romanian or Egyptian nationals to emigrate to Sweden or Finland, be naturalized there, and thereafter to act as investors in their home country; it is hard to see why the drafters of a BIT would want to exclude the treaty's incentive to investments by their emigrant diaspora.

24. For Canada not to see *Libananco* and *Gallo* as instances of abusive claims suggests an unwillingness to do so. I expect that the Arbitral Tribunal will not have that impediment. *Libananco* and *Gallo* were relied upon by Canada in its Memorial as support for its jurisdiction *ratione temporis* arguments. In light of *Phoenix Action*, those two cases as well as *Renée Rose Levy* and *Cementownia* were fundamentally cases of abuse of process (fabricating treaty protection that otherwise would not have existed) which I do not consider to be apposite to the present case.

25. The remaining question is whether *in the absence of abuse of process* a mechanical rule excludes by reason of a nationality requirement the rights of predecessors in interest or beneficial owners to secure the benefits of their pre-dispute investment because of legitimate *(i.e.*, non-abusive) post-dispute dispositions of those rights. I resile from nothing in my prior Opinion. I certainly acknowledge that different interpretations may be given to the mass of detail found in the typical scenario of investor-State disputes, but having articulated what I consider to be the operative principles I see no purpose in

making the granular distinctions which opposing counsel are certain to debate and which the present Tribunal may or may not find relevant to the solutions it will reach.

Conclusion

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

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Jan Paulsson
21 May 2021

Professor Jan Paulsson
(January 2021)

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AB Harvard
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President, International Council for Commercial Arbitration (2010-2014)

President, London Court of International Arbitration (2004-2010)

Vice President, ICC International Court of Arbitration (2009-2012)

Member, Permanent Court of Arbitration (2008-)

President, World Bank Administrative Tribunal (2006-2010)

President, European Bank (EBRD) Administrative Tribunal (2008-2016)

Judge, International Monetary Fund (IMF) Administrative Tribunal (2011-2020)

President, Organisation for Economic Co-operation and Development (OECD) Administrative Tribunal (2010-2014)

Member, SIAC Court of Arbitration (Singapore) (2013-2019)

Member of the Board, American Arbitration Association (2010-2017)

ICSID Panel of Arbitrators (1998-)

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Lidercón v Perú (ICSID), President

Cascade v Turkey (ICSID)

Indus Waters Kishenganga Arbitration (Pakistan v India) (PCA)

Adem Dogan v Turkmenistan (ICSID), President

Niko v Bangladesh (ICSID)

Renta 4 (Quasar de valores) v Russian Federation (SCC), President

ICM Registry v ICANN (Independent Review Panel considering the refusal to register ".xxx" as an Internet top-level domain)

Pantechniki v Albania (ICSID), sole arbitrator

Desert Line v Yemen (ICSID)

Channel Tunnel v UK and France (PCA)

Lemire v Ukraine (ICSID)

HEP v Slovenia (ICSID)

Econet Wireless v First Bank of Nigeria (UNCITRAL), President

GAMI v Mexico (UNCITRAL/NAFTA), President

Real Madrid v Internazionale Milano (CAS), President

Luchetti v Peru (ICSID)

Generation Ukraine v Ukraine (ICSID), President

Demco v SEB Trygg Liv (SCC), President

Anaconda v Fluor Australia (Commercial Arbitration Act 1984, Victoria), President

Azinian v Mexico (ICSID), President

Himpurna v Indonesia (UNCITRAL), President

Bridas (Yashlar) v Turkmenistan (ICC)

CAS, ad hoc appeals panels at the Olympic Games in Atlanta (1996), Nagano (1998), and Sydney (2000)

Counsel in cases on public record (*inter alia*):

Bank Melli & Bank Saderat v Bahrain (PCA – for Bahrain)

Peru v Chile (ICJ – for Chile)

ConocoPhillips v Venezuela (ICSID – for ConocoPhillips)

Burlington v Ecuador (ICSID – for Burlington)

Chevron v Ecuador (PCA – for Chevron)

Foresti et al v South Africa (ICSID – for South Africa)

Helnan v Egypt (ICSID – for Egypt)

Total v Argentina (ICSID – for Total)

Libananco v Turkey (ICSID – for Turkey)

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SGS v Pakistan (ICSID – for Pakistan)

Soufraki v UAE (ICSID – for Soufraki)

Gruslin v Malaysia II (ICSID – for Malaysia)

Ruhrgas v Marathon Oil (ICC – for Ruhrgas)

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Atlantic Triton v Guinea (ICSID – for Guinea)

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Books

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International Commercial Arbitration, Foundation Press, 2d edition 2015 (with W M Reisman, W L Craig and W W Park)

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