

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,  
DOUGLAS CLAYTON, DANIEL CLAYTON  
and  
BILCON OF DELAWARE**

Investors

**v.**

**GOVERNMENT OF CANADA**

Respondent

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**REPLY MEMORIAL OF THE INVESTORS**

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## PART ONE: OVERVIEW

1. The documents now revealed by Canada disclose that for 6 years the Governments of Canada and Nova Scotia embroiled Bilcon in a charade that, unbeknownst to Bilcon, was wholly unlawful, devoid of due process, and politically motivated.
2. In the fall of 2007, Canada's then Federal Minister of Fisheries, Loyola Hearn, and the Nova Scotia Minister of Environment and Labour, Mark Parent, each made decisions to deny an application for a quarry in Nova Scotia by Bilcon of Nova Scotia ("Bilcon"), a wholly-owned Canadian subsidiary of a United States company, Bilcon of Delaware.
3. The application was initiated in April, 2002, when Nova Stone, a predecessor to Bilcon, applied for a permit to reactivate a 3.9ha quarry at Whites Point, in Digby County, Nova Scotia. There are many quarries in Nova Scotia, and Whites Point was a gravel pit that had been used to excavate aggregate for provincial road building in the 1950s.
4. In Nova Scotia, an application to construct and operate a quarry of less than 4ha does not generally require an environmental assessment.
5. In anticipation of developing a larger quarry for exporting aggregate to the north east United States, Nova Stone entered into an agreement with the Clayton family of New Jersey. The collaboration created a new venture, which was jointly owned by Nova Stone and Bilcon, which, through Bilcon of Delaware, was owned by the Clayton family.
6. The Clayton family owns and operates a consortium of building supply companies in the United States. The companies are major users and suppliers of aggregate.
7. Applications for a larger quarry are not granted automatically in Nova Scotia. Bilcon expected to go through the basic level of environmental assessment known as a screening level assessment.
8. At the time, the Government of Nova Scotia was engaged in a major business development marketing campaign to attract business to Nova Scotia.
9. Gordon Balsler, Digby's representative to the Nova Scotia legislature, was also a Minister in the Nova Scotia Cabinet. He supported the Whites Point Quarry, and encouraged Bilcon to make an investment at Whites Point. He invited the Clayton family to visit with him in Nova Scotia, to see firsthand the business opportunities that were available, how

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desirable the location was for a large quarry, and how their investment would positively impact the local economy, in a way that was also consistent with the overall economic development benefits the Province of Nova Scotia was looking for. In an election held shortly thereafter, the Minister lost his seat to a local lobster fisherman, Harold Thériault, who was personally opposed to the Quarry.

10. The Federal Minister of Fisheries, Robert Thibault, also came from the same local area in Nova Scotia. He too was opposed to the Quarry.
11. The Constitution of Canada gives the federal government only limited jurisdiction over certain environmental issues. Primary jurisdiction over the environment rests with the provinces.
12. In the case of the Bilcon Quarry, the federal government purported to assume some jurisdiction over the environmental assessment process for the 3.9ha quarry, which resulted in Bilcon being subjected to a federal environmental assessment. As a result:
  - a) Blasting restrictions were imposed on Bilcon that it could never fulfill;
  - b) Bilcon was required to devote attention to issues that federal regulators knew were not of genuine concern; and
  - c) The quarry and an adjacent marine terminal were scoped into one joint environmental assessment, although federal government officials knew that it lacked jurisdiction over the quarry.
13. Bilcon's treatment was highly anomalous relative to ordinary regulatory practice, and was substantially different from the treatment afforded to other projects, like Tiverton, which was only 10km from Whites Point. The less favorable treatment imposed on Bilcon was noted in internal governmental records. The difference in treatment was politically motivated, arbitrary, discriminatory and contrary to the rule of law. It clearly fell below the minimum standard of treatment required under NAFTA 1105. The less favorable treatment also violated Canada's obligations of national treatment and most favored nation treatment under the NAFTA.
14. Permits for 3.9ha quarries are routinely granted in Nova Scotia with either no environmental assessment or with minimal environmental assessment, especially since environmental impact can be remediated with mitigation measures.

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15. In Canada, there are essentially four levels of environmental assessment.
    - a) The lowest is the Screening Level – ordinarily used for quarries in Nova Scotia;<sup>1</sup>
    - b) The next is a Comprehensive Assessment;
    - c) The third and highest level of assessment involves the establishment of a Review Panel; and
    - d) The fourth is a Joint Review Panel, which consists of concurrent federal and provincial review panel environmental assessments in one joint process. A Joint Review Panel is a quasi-judicial body of Canada.
  
  16. A Joint Review Panel is an extraordinary process restricted to large industrial projects, like deep sea hydrocarbon drilling. When contrasted with the magnitude of projects that are usually subjected to a Joint Review Panel, the difference in treatment between Bilcon and other similar projects is readily apparent.
  
  17. Despite the federal government’s lack of jurisdiction over the quarry, and although the quarry project at Whites Point did not have the characteristics typical of projects subject to a joint review panel, Bilcon was made subject to this highest and most expensive of processes. This remains the only quarry application in Canada that was ever referred to a Joint Review Panel.
  
  18. The Joint Review Panel process then manifested throughout a pervasive bias against Bilcon, and a failure to accord Bilcon the basic requirements of natural justice. Bilcon prepared an exhaustive professional and scientific Environmental Impact Statement. When the Joint Review Panel hearings finally began, more than five years later they were hostile and dismissive of Bilcon, its experts, and the project’s supporters. The Joint Review Panel conducted the hearings in a manner that was procedurally unfair, and prevented Bilcon from presenting its scientific evidence, while it entertained irrelevant concerns like the implications of the NAFTA and the nationality of the Investors. At the conclusion of the public hearing, the Joint Review Panel Report recommended to the federal and provincial Ministers that they deny Bilcon’s applications. The Report, however, was fundamentally flawed, and confused basic concepts of environmental assessment.

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<sup>1</sup> This could be a Class I or even a Class II environmental assessment under Nova Scotia law.

19. The Joint Review Panel had been constituted with specific Terms of Reference under which it was required to objectively and impartially take into account specified environmental factors to determine if Bilcon's activities would result in "significant adverse environmental effects". Instead, the Joint Review Panel considered other extraneous factors and ignored mitigation measures.
20. When Bilcon asked the federal and provincial Ministers for an opportunity to make representations to them about the fundamental flaws and errors in the Joint Review Panel's hearing process and Report, the Ministers refused. They adopted the JRP's process and Report as a final and definitive disposition of Bilcon's application, and summarily denied it.
21. The entire process to which the governments of Canada and Nova Scotia subjected Bilcon was characterized by fundamental departures from the rule of law, the absence of due process and natural justice, abuse of authority, and lack of jurisdiction. Throughout the process, Bilcon was misled by government regulators, who led Bilcon to believe one thing, while behind the scenes the reality of what they were doing was different, in flagrant violation of Canadian administrative law, international law, and the NAFTA.
22. In the result, Canada is responsible for breaches of the most basic international law principles of fair and equitable treatment, and full protection and security.
23. The same governmental actions also resulted in according less favorable treatment to Bilcon than that given to local Canadian companies, and to companies owned by nationals of non-NAFTA Party states, who received environmental assessment permissions under the same laws and regulations.
24. Bilcon was in like circumstances with numerous other companies that were seeking new or additive economic opportunities, and were also engaged in Canada's environmental assessment regulatory scheme, providing numerous opportunities to compare and contrast treatment.
25. The meaning of the international standard in NAFTA Article 1105 is well known, and has been well canvassed by international tribunals, including NAFTA tribunals. In these proceedings, Canada purports to advance a meaning of the international law standard of treatment that is narrow and simply not in keeping with the text of the Treaty.

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Canada suggests a threshold standard of breach that is also inconsistent with the principles of state responsibility set out by the International Law Commission and by previous international investor-state tribunals. If Canada's approach were to be followed, there would be no effective protection for rule of law and fundamental fairness issues within the NAFTA.

26. In any event, a simple review of the facts of this claim indicates, that by any measure, the treatment imposed by Canada upon the Investors was egregiously unjust and discriminatory and falls below the threshold for fair and equitable treatment, even as argued by Canada.
27. In its Counter-Memorial, Canada proposes constructions of National Treatment and Most-Favoured Nation that are divorced from the relevant sources of international law for interpreting the meaning of these kinds of obligations. Canada's theory is inconsistent with the fundamental principles which underscore the meaning of National Treatment, as well as with the context, meaning and objectives of the Treaty. The Investors definition of the National Treatment obligation based on the negotiating history of the NAFTA, the NAFTA's text, principles, rules, and objectives, and the decisions of other international tribunals.
28. The evidence shows that Bilcon is in "like circumstances" with others who have sought environmental permissions and permits in Canada and in Nova Scotia, and who were treated much more favourably.
29. Indeed, the government measures impugned in this claim are contrary to the core of modern international law, which is reflected in the obligations in Section A of NAFTA Chapter Eleven. The Investors rely on this law, which is the very reason why the NAFTA was put in place, on its signature in December 1992, by the NAFTA Parties.
30. In respect of this Reply Memorial, the Investors rely on and adopts the facts and decisions set out in the followings statements, reports and legal opinions:
  - a) **SUPPLEMENTARY WITNESS STATEMENT OF PAUL BUXTON:** Paul Buxton was at all times the representative of the Investors in Nova Scotia. His Supplementary Statement responds to Canada's Counter-Memorial and documents that were not yet produced at the time of his original Witness Statement.

- b) **SUPPLEMENTARY EXPERT STATEMENT OF DAVID ESTRIN:** David Estrin is a well-known Canadian environmental law expert;
  
- c) **EXPERT STATEMENT OF MURRAY RANKIN Q.C.:** Murray Rankin, Q.C. is a recognized expert on regulatory and administrative law in Canada. Mr. Rankin has reviewed documents disclosed by Canada and the environmental law regulatory process contentions of Canada in its Counter-Memorial.

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## PART TWO: STATEMENT OF FACTS

### I. THE BEGINNING

31. Nova Scotia is no stranger to industry. Owing to an abundant supply of high quality rock, many have sought out a place in Nova Scotia's industrial quarry and mining sector. Rock quarries have a long history in Nova Scotia and are found throughout the Province, from the Leitches Creek Quarry in the northeast to the Tiverton quarry in the southwest.
32. Quarries were in keeping with Nova Scotia's publically announced industrial priorities. Aware that the fishing industry, a long-standing pillar of the Province's economy, was in decline, the Province was actively seeking out means to diversify economic growth.
33. In 2002 and 2003, Nova Scotia launched a publicity campaign declaring the Province to be "Open for Business".<sup>2</sup> Provincial Cabinet Ministers publically promoted the campaign; in private conversations with industry representatives they affirmed their support for increased economic investment and growth in the province as a whole, but also in their specific constituencies.<sup>3</sup> In June 2003, the Nova Scotia Department of Natural Resources (NSDNR) arranged for government experts to fly potential investors in a helicopter to see how they might enhance their industrial-quarry investments in the province.<sup>4</sup>
34. On February 13, 2002 Nova Stone Inc. (Nova Stone), submitted a permit to the Nova Scotia Department of Environment and Labour (NSDEL) to open and operate a new basalt quarry in Nova Scotia at Whites Point in Digby Neck.<sup>5</sup>
35. Nova Stone was a joint-venture between Nova Stone of Nova Scotia and an investor, the Clayton Family of New Jersey.
36. The proposed site of the quarry is in the sparsely populated rural area separated from local communities by a mountain. The quarry site had been clear-cut logged many times, and had been used as a gravel pit to build roads and highways in Nova Scotia.<sup>6</sup>

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<sup>2</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at para. 16.

<sup>3</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 18, 19.

<sup>4</sup> Memorial of the Investors, para. 59.

<sup>5</sup> Nova Stone, Application for Approval to Operate a Quarry, Little River, Digby County, February 18, 2002 (*Government of Canada Counter-Memorial Exhibit R-75*).

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37. The proposed quarry at Whites Point was not the only Nova Scotia quarry to be located near water. Others at the time included the Porcupine Mountain Quarry and the Rhodena Quarry.<sup>7</sup>
  38. As well, Black Bull Resources Ltd., proposed the construction of the White Rock Quartz/Kaolin and Mica Mine in 2002, which was located directly adjacent to the Tobeatic Wilderness Area.<sup>8</sup>
  39. Nova Stone applied for a 3.9 hectare (ha) quarry. The main purpose of the 3.9ha quarry was to conduct test blasts and begin a small scale operation in anticipation of a larger quarry being operated which was expected to go through a more lengthy approval process. In Nova Scotia, the *Nova Scotia Environment Act (NSEA)*, exempted quarries under 4 ha from undergoing an environmental assessment. The larger quarry was to be 152ha to export rock to New Jersey.
  40. A project description was included with Nova Stone's quarry application to NSDEL. It included sections on noise, blasting, effects of blasting on whales, aggregate production, and water issues. With regard to noise, Nova Stone stated that in addition to noise control devices, noise monitoring stations were going to be in place on the property line to continuously monitor noise levels to ensure compliance with the levels set out in the Nova Scotia "Pit and Quarry Guidelines". Blasting was to be limited to once a week, and not on a Sunday, statutory holiday, or between the hours of 6 p.m. and 8 a.m.
  41. Given the presence of whales in the Bay of Fundy, Nova Stone consulted an expert on whales, Dr. Jon Lien of Memorial University, for his advice in advance of submitting the project description. Dr. Lien concluded that the intended blasting would not have an adverse effect on whales.<sup>9</sup>

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<sup>6</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, Chapter 9.3, dated March 2006 (*Investors' Schedule of Documents at Tab C 1*).

<sup>7</sup> Environmental Assessment Registration, Rhodena Rock Quarry Expansion Project (*Investors' Schedule of Documents at Tab C 656*).

<sup>8</sup> Environmental Registration Document for the Proposed White Rock Quartz Mine (*Investors' Schedule of Documents at Tab C 655*).

<sup>9</sup> Supplemental Witness Statement of Paul Buxton, at paras. 15-16.

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42. Despite this conclusion, Nova Stone committed to conducting a survey with the Bedford Institute of Oceanography during the initial blast, which was to take place when whales were not present in the area, to confirm there would be no adverse effect on whales. Mark McLean, an Environmental Assessment Officer with NSDEL, remarked that he was “impressed that the company has taking [*sic*] the time and effort to examine the whale issue and have offered to monitor the blast levels in the bay.”<sup>10</sup>
43. Robert Balcom, the NSDEL Regional Engineer, recommended that the quarry be approved. He suggested that it might be necessary to restrict blasting to when Right Whales were not in the area.<sup>11</sup> The application for the 3.9ha quarry was and approved on April 30, 2002.

## II. THE 3.9HA QUARRY IS APPROVED, WITH CONDITIONS

44. The approved application was made subject to two extraordinary conditions:

10.h) Blasting shall be conducted in accordance with the *Department of Fisheries and Oceans Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters – 1988*.

10.i) A report shall be completed by the proponent in advance of any blasting activity verifying the intended charge size and blast design will not have an adverse effect on marine mammals in the area. This report shall be submitted to the Department of Fisheries and Oceans (DFO), Maritimes Aquatic species at Risk Office and written acceptance of the report shall be received from DFO and forwarded to the Department before blasting commences.<sup>12</sup>

45. Although the quarry application was entirely within the jurisdiction of the Province of Nova Scotia, these conditions were included at the instance of the federal government. It is extraordinary that a federal government department inserted itself into a wholly provincial approval process.

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<sup>10</sup> Email Mark G McLean (NSDEL) to Langille, Brad D; Petrie, Bob D (NSDEL), April 11, 2002, (*Government of Canada Counter-Memorial Exhibit R-76*).

<sup>11</sup> Robert Balcom, Engineering Report on the Nova Stone Exporters, Inc. Quarry, March 21, 2002. (*Government of Canada Counter-Memorial Exhibit R-79*).

<sup>12</sup> NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, April 30, 2002 (*Investors' Schedule of Document at Tab C 31*).

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46. Provincial regulators had contacted the DFO shortly after receiving the application, and conditions 10.h and 10.i were included in the permit approval at the instance of Brian Jollymore, a DFO employee with no experience in blasting.<sup>13</sup>
  47. Nevertheless, the project manager, Paul Buxton, endeavoured in good faith to comply with conditions 10.h and 10.i, and attended meetings with provincial and federal officials to discuss the quarry and how the conditions could be satisfied. On September 17, 2002 a blasting plan was submitted to NSDEL for approval. The DFO then requested additional information, which was submitted on October 15, 2002 and November 20, 2002.
  48. Having reviewed the blasting plan, Jim Ross, the section head of DFO's Habitat Management Division, wrote to Bob Petrie at NSDEL that the blasting plan "seems to be within the *Guidelines*."<sup>14</sup> This conclusion was shared by Dennis Wright, a co-ordinator of Environmental Affairs at DFO's Central and Arctic Region and a co-author of the DFO Guidelines referred to in 10.h.<sup>15</sup>
  49. Mr. Wright also informed Mr. Ross that the DFO *Guidelines* "are designed chiefly to protect fish," adding "When we use them for protection of marine mammals, we are really flying by the seat of our pants."<sup>16</sup> Mr. Wright also informed Mr. Ross of two different companies that have in the past been helpful with monitoring blasting pressures.<sup>17</sup> This information was not passed on to Bilcon.
  50. Jerry Conway, a whale specialist at the DFO, wrote to Mr. Ross saying that "I have no concerns in respect to marine mammal issues in respect to this specific proposal."<sup>18</sup>

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<sup>13</sup> E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL) dated April 26, 2002. (*Investors' Schedule of Documents at Tab C 42*).

<sup>14</sup> Action Log Report re Whites Cover-Quarry Construction at p. 005554 (*Investors' Schedule of Documents at Tab C 299*).

<sup>15</sup> Action Log Report re Whites Cover-Quarry Construction at p. 005553 (*Investors' Schedule of Documents at Tab C 299*).

<sup>16</sup> Action Log Report re Whites Cover-Quarry Construction at p. 005552 (*Investors' Schedule of Documents at Tab C 675*).

<sup>17</sup> Action Log Report re Whites Cover-Quarry Construction at p. 005552 (*Investors' Schedule of Documents at Tab C 675*).

<sup>18</sup> E-mail from Jerry Conway (DFO) to Jim Ross (DFO), dated December 2, 2002, (*Investors' Schedule of Documents at Tab C 605*).

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51. While the blasting plan was being considered, on January 8, 2003 an application was also submitted to the Canadian Coast Guard under the *Navigable Waters Protection Act* (NWPA) for the construction of a related marine terminal, which was an important component of the larger quarry project. The transport ships docking there were to be the sole means for transporting rock from the quarry to New Jersey. Even though this was early in the process to begin an application for the marine terminal, Mr. Buxton expected the terminal would likely trigger an environmental assessment under the *Canadian Environment Assessment Act* (CEAA), and wanted to begin the process as soon as possible to avoid delay in the project.<sup>19</sup>
  52. The application also included a draft project description for the larger quarry.
  53. Derek McDonald, an official with the CEA Agency, said that the project description looked “pretty good”.<sup>20</sup>
  54. Bilcon’s endeavors to begin test blasting on the 3.9ha quarry were frustrated by DFO’s conditions 10.h and 10.i which were impossible to satisfy.
  55. Bilcon received further comments from the DFO on February 17, 2003 requesting more information on the affects of the project on fish habitat.
  56. By April 15, 2003, DFO’s positions led Phil Zamora, an official with DFO’s Habitat Management Division (HMD) to remark to Mark McLean that, “Paul Buxton was, understandably, very upset at our position on the plasting (*sic*) plan”.<sup>21</sup>
  57. In a further letter dated May 29, 2003 Mr. Zamora raised for the first time the subject of Inner Bay of Fundy salmon (iBoF).<sup>22</sup> This was more than one year after the Approval for the 3.9ha quarry.
  58. On October 8, 2003 the DFO concluded, in regard to an area approximately 10km from the Whites Point Quarry, that “Few (if any) diadromous species would be residents of

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<sup>19</sup> Supplemental Witness Statement of Paul Buxton, at para. 11, and Witness Statement of Paul Buxton, para. 36.

<sup>20</sup> E-mail Derek McDonald (CEA Agency) to Bill Coulter (CEA Agency), dated February 4, 2003, stating his opinions on the revised project description submitted by the proponent. (*Investors’ Schedule of Documents at Tab C 57*).

<sup>21</sup> E-mail Phil Zamora (DFO) to Mark McLean (NSDEL), dated April 15, 2003. (*Investors’ Schedule of Documents at Tab C 606*).

<sup>22</sup> *Fisheries Act*, R.S.C., 1985, c. F-14, Section 32. (*Investors’ Schedule of Documents at Tab C 545*).

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the passage during the months in question (I would also doubt it would even be a significant migratory route at other times of the year.)”<sup>23</sup> iBoF salmon are a diadromous species. Despite this conclusion, concerns over iBoF concerns would continue to play a significant factor as Bilcon endeavored to navigate the regulatory processes.<sup>24</sup>

### III. THE IMPOSITION OF AN ENVIRONMENTAL ASSESSMENT

59. By February 17, 2003, the Coast Guard had decided that the Marine Terminal required an environmental assessment (EA). In addition, on April 14, 2003, the DFO informed Bilcon that the Large Quarry required a Harmful Alteration, Disruption, Destruction (HADD) authorization, under Section 35(2) of the *Fisheries Act*, which prohibits the destruction of fish habitat.<sup>25</sup>
60. With the groundwork being laid for the EA process, three governmental decisions needed to be made: (1) how many assessments would be required; (2) what type of assessments they would be; and (3) which government agency would be the Responsible Authority (RA) to coordinated the process.
61. By April 7, 2003 DFO had determined that it would be an RA, and be in charge of coordinating between federal and provincial agencies and regulators.
62. Bilcon was then told that the large quarry and marine terminal were being scoped into one EA.<sup>26</sup>
63. At the time, Bilcon was led to believe that “The type of screening used for the EA will therefore be a Comprehensive Study (CS)”,<sup>27</sup> which was consistent with the CEA Agency

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<sup>23</sup> E-mail from Rod Bradford, (DFO) to Larry Marshall. Larry and Andrew Stewart, Bedford Institute of Oceanography, October 8, 2003. (*Investors’ Schedule of Documents at Tab C 608*).

<sup>24</sup> E-mail from Rod Bradford, (DFO) to Larry Marshall. Larry and Andrew Stewart, Bedford Institute of Oceanography, October 8, 2003. (*Investors’ Schedule of Documents at Tab C 608*).

<sup>25</sup> Letter from Phil Zamora (DFO) to Paul Buxton, Global Quarry Products, April 14, 2003. (*Investors’ Schedule of Documents at Tab C 28*).

<sup>26</sup> Letter from Phil Zamora (DFO) to Paul Buxton, Global Quarry Products, April 14, 2003, stating that the quarry and marine terminal were scoped into one EA. (*Investors’ Schedule of Documents at Tab C 28*).

<sup>27</sup> Letter from Phil Zamora (DFO) to Paul Buxton, Global Quarry Products, April 14, 2003, stating the type of assessment for the project would be a comprehensive study (*Investors’ Schedule of Documents at Tab C 28*).

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internal discussions and a meeting between federal and provincial agencies regarding the appropriate form of EA.<sup>28</sup>

64. In a May 26, 2003 briefing note to its Assistant Deputy Minister (ADM), the DFO continued to maintain that the marine terminal would be subject to a Comprehensive Study. It also advised the ADM that it had “yet to be determined” whether both projects would be scoped together, even though by this time it had already told Bilcon it would do so.<sup>29</sup>
65. Bilcon did not learn that the Project had been referred to a JRP until Mr. Buxton read about it in the Halifax *Chronicle Herald* newspaper on July 7, 2003. It was not until September 10, 2003 that Bilcon was officially notified of the decision.<sup>30</sup>
66. The same day that Bilcon was first informed of the decision to refer the project to a JRP, the CEA Agency released the draft SRP Agreement and Terms of Reference.<sup>31</sup> One week later, on September 17, 2003 DFO wrote to the CEA Agency and officially recommended that the 3.9ha quarry be included in the JRP assessment of the larger quarry.<sup>32</sup>
67. At the same time as it prepared for the JRP, Bilcon was still hopeful that it would obtain a blasting permit so that it could begin its test blasts at the 3.9ha quarry. However, it was still unable to obtain the information it requested from DFO, which DFO deliberately withheld. And while DFO had written to the CEA Agency to request that the 3.9ha be officially scoped into the JRP, on December 3, 2003 the Minister of NSDEL, the Honourable Kerry Morash, wrote to Bilcon assuring it that a blasting permit would be issued upon satisfying conditions 10.h and 10.i.<sup>33</sup>

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<sup>28</sup> E-mail from Bill Coulter, [CEAA] to Derek McDonald [CEAA], dated March 24, 2003. (*Investors’ Schedule of Documents at Tab C 609*) and Handwritten Note, dated March 31, 2003 (*Investors’ Schedule of Documents at Tab C 502*).

<sup>29</sup> Memorandum for the Assistant Deputy Minister of Oceans, “Environmental Assessment of Proposed Quarry” and Shipping Terminal, Whites Cove, Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister” (*Investors’ Schedule of Documents at Tab C 509*).

<sup>30</sup> Letter from Steven Chapman (CEAA) to Paul Buxton, Global Quarry Products Inc. dated September 10, 2003, regarding the environmental assessment process (*Investors’ Schedule of Documents at Tab C 75*).

<sup>31</sup> Letter from Steven Chapman (CEAA) to Paul Buxton, Global Quarry Products Inc. dated September 10, 2003, regarding the environmental assessment process (*Investors’ Schedule of Documents at Tab C 75*).

<sup>32</sup> Letter from Phil Zamora (DFO) to Steve Chapman (CEAA), dated September 17, 2003 (*Investors’ Schedule of Documents at Tab C 490*).

<sup>33</sup> Letter from Kerry Morash, (NSDEL) to Paul Buxton, Nova Stone Exporters Inc., dated December 3, 2003), (*Investors’ Schedule of Documents at Tab C 617*).

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#### IV. POLITICS BEHIND THE SCENES AND UNFAIR TREATMENT

68. As it turns out, during the same period in which Bilcon was led to believe that a Comprehensive Study was going to be the likely form of EA, federal officials were maneuvering behind the scenes to elevate the quarry proposal into a JRP.
69. In retrospect, and with the disclosure of Canada's documents, it is now clear that the determination to send the project to a JRP was made as early as July 2003. And while it was kept secret from Bilcon, the decision was known by, and being shared with, other parties. An internal CEA Agency email dated July 7, 2003 confirms that a lawyer for an environmental activist group, Lisa Mitchell, knew that the DFO was recommending the Whites Point project be referred to a review panel one month before Bilcon was informed.<sup>34</sup>
70. The quarry site was located within the federal riding of Robert Thibault, then the Minister of Fisheries and Oceans. Minister Thibault knew that a powerful group of local fishermen in the Digby Neck area was opposed to the Project. These fishermen were important political supporters of the Minister.<sup>35</sup>
71. It is now clear that political considerations affected the actions of officials involved in what was supposed to be an empirical process. As early as June 26, 2002, Tim Surette, a regional director with the DFO, informed other DFO staff members that the DFO was not to accept a report on the effects of blasting on marine mammals, as required by condition 10.i, until Minister Thibault's office had reviewed the application.<sup>36</sup>
72. On December 9, 2002 Bruce Hood, an official with Habitat Management Division (HMD), recorded in his journal that there had been a "flood of Ministers letters" and "Minister sensitive because it's in his riding".<sup>37</sup> He later recorded in his journal that the DFO needed to "get our Minister off this file".<sup>38</sup> Mr. Hood also later noted in his journal that,

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<sup>34</sup> Email Steve Chapman to Bruce Young re Criticizing Tim Smith of CEAA regarding correspondence with Lisa Mitchell (*Investors' Schedule of Documents at Tab C 678*).

<sup>35</sup> Supplemental Witness Statement of Paul Buxton, at para. 7.

<sup>36</sup> Email from Tim Surette (DFO) to Neil Bellefontaine (DFO), dated June 26, 2002 at 801718-801719. (*Investors' Schedule of Documents at Tab C 256*).

<sup>37</sup> Journal note by Bruce Hood (DFO), dated December 10, 2002, at 801641. (*Investors' Schedule of Documents at Tab C 381*).

<sup>38</sup> Journal note by Bruce Hood (DFO), dated April 25, 2003 at 801610. (*Investors' Schedule of Documents at Tab C 284*).

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“Thibault wants this process dragged out as long as possible.”<sup>39</sup>

73. Joy Dube, another DFO official stated in an April 2, 2003 email to regarding whether a project referred to a comprehensive study could be elevated to a Joint Review Panel: “This is such a politically hot file that I don’t want to make any wrong decisions.”<sup>40</sup>
74. These comments from within DFO, where it is now obvious that Ministerial pressure and political considerations hovered over government officials, are complemented by internal communications within the CEA Agency to the same effect. On June 9, 2003, Derek McDonald wrote to Steve Chapman to reaffirm his view that the Whites Point Quarry ought to undergo a Comprehensive Study, noting that sending the project to a panel “reflects poorly on both governments and is perhaps an undesirable precedent.”<sup>41</sup> Mr. Chapman responded with: “We should communicate via telephone for discussion of this nature.”<sup>42</sup>
75. Even before Bilcon was made aware of the Joint Review Panel referral, the CEA Agency was withholding information from Bilcon, even though some DFO officials thought it would be useful to Bilcon in adjusting its blasting plan, which at that point it was still purporting to officially be considering.
76. At issue were the calculations that had been used by federal regulators to require set back distances for Bilcon’s initial blast on the 3.9ha quarry. Bilcon had used DFO’s own *Blasting Guidelines* to determine that a setback distance of 36.5m was all the *Blasting Guidelines* required.
77. However, on May 29, 2003 a letter from the DFO informed Bilcon that a setback distance of 500m was necessary.<sup>43</sup> As this grossly exceeded DFO’s own *Blasting*

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<sup>39</sup> Journal note by Bruce Hood (DFO), at 801619. (*Investors’ Schedule of Documents at Tab C 370*).

<sup>40</sup> E-mail from Phil Zamora (DFO) to Charlene Mathieu, Charlene and Joy Dube, dated April 3, 2003 (*Investors’ Schedule of Documents at Tab C 463*).

<sup>41</sup> E-mail Derek McDonald (CEAA) to Steve Chapman (CEAA), dated June 9, 2003. (*Investors’ Schedule of Documents at Tab C 520*).

<sup>42</sup> Email from Steve Chapman (CEA Agency) to Derek McDonald (CEA Agency) dated June 11, 2003 (*Investors’ Schedule of Documents at Tab C 404*).

<sup>43</sup> Letter from Phil Zamora (DFO) to Paul Buxton, Global Quarry Products, dated May 29, 2003. (*Investors’ Schedule of Documents at Tab C 129*).

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*Guidelines*, Bilcon requested the calculations used to arrive at this new number.<sup>44</sup> Bilcon would further request these calculations on three separate occasions, but the DFO never provided the information.<sup>45</sup>

78. On July 30, 2003, the DFO determined that the “iBlast” model it used to assess Bilcon’s proposed blasts on land was inappropriate, as it only applied to blasts in open water.<sup>46</sup> It took one year for the DFO to propose a shorter setback distance of 100m.<sup>47</sup>
79. Thus, at the time when the JRP draft Agreement and Terms of Reference were released for public comment on August 11, 2003, Bilcon had yet to be:
- a) officially informed that the Project had been referred to a Joint Review Panel;
  - b) told of why the project had been elevated from a Comprehensive Study to a Joint Review Panel; and
  - c) told how it could comply with conditions that DFO itself had laid down for a separate quarry and that, without consultation, was being merged into the larger quarry.
80. For these reasons, an understandably frustrated Bilcon, on October 9, 2003, wrote to the Minister of NSDEL with voluminous supporting correspondence and documentation, saying:

We have provided more than sufficient information to enable a decision to be made on items 10 h) and 10 i) in the Blasting section of the permit... and we now insist that a decision be made on the information provided.<sup>48</sup>

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<sup>44</sup> Letter from Paul Buxton to Phil Zamora (DFO), dated June 6, 2003 (*Investors’ Schedule of Documents at Tab C 68*); Handwritten Note made by unknown, dated June 6, 2003 (*Investors’ Schedule of Documents at Tab C 607*).

<sup>45</sup> Letter from Paul Buxton, Global Quarry Products to Phil Zamora (DFO), dated June 16, 2003 (*Investors’ Schedule of Documents at Tab C 107*); Letter from Paul Buxton, Nova Stone Exporters Inc., to Phil Zamora (DFO), dated June 21, 2003 (*Investors’ Schedule of Documents at Tab C 611*).

<sup>46</sup> Journal Notes by Derek McDonald (CEAA) at p. 801531 (*Investors’ Schedule of Documents at Tab C 612*).

<sup>47</sup> Email from Phil Zamora to Paul Buxton, dated November 12, 2004 (*Investors’ Schedule of Documents at Tab C 613*).

<sup>48</sup> Letter from Paul Buxton, Nova Stone Exporters Inc. to Kerry Morash, Minister (NSDEL), dated October 9, 2003. (*Investors’ Schedule of Documents at Tab C 560*).

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With the benefit of hindsight, Bilcon said, “We are now of the opinion that we are being unfairly treated in this process.”<sup>49</sup>

## V. DIFFERENT TREATMENT

81. Bilcon’s complaint of unfair treatment was informed not only by its own experience in the regulatory process, but by observing what was happening with nearby projects. The Tiverton quarry, harbour and wharf projects, for example, were located just 10 kilometers from Whites Point. However, the Tiverton Quarry was not burdened with blasting conditions 10.h and 10.i.<sup>50</sup>
82. It was in relation to the quarry at Tiverton that the Bedford Institute of Oceanography had concluded that iBoF salmon were not a concern. On May 28, 2003, Paul Boudreau, Manager of DFO’s Habitat Management Division, suggested modifying the blasting conditions at Tiverton to reflect the conditions imposed at Whites Point, since the two quarries “have similar blasting plans.”<sup>51</sup> Mr. Boudreau’s suggestion was not adopted.
83. Although the different treatment was overt, Bilcon did not know at the time that political considerations were the driver. Like Whites Point, the Tiverton quarry was also in Minister Thibault’s riding. Yet, unlike Whites Point, the Minister was in favor of the Tiverton project. Indeed, the Minister had actively intervened on behalf of the Tiverton project proponents asking if there was anything he could do to speed up the approval process for the Tiverton quarry.<sup>52</sup>
84. Aware of the more favourable treatment accorded to Tiverton, Bilcon made a specific request on October 14, 2003 that the Whites Point blasting plans “be amended to reflect the terms and conditions of the nearby Tiverton Quarry.”<sup>53</sup> Bilcon’s request was never granted.

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<sup>49</sup> Letter from Paul Buxton, Nova Stone Exporters Inc. to Kerry Morash, Minister (NSDEL), dated October 9, 2003. (*Investors’ Schedule of Documents at Tab C 560*).

<sup>50</sup> Letter from Bob Petrie (NSDEL) to M. Lowe, dated May 22, 2002. (*Investors’ Schedule of Documents at Tab C 32*); Supplemental Witness Statement of Paul Buxton, at paras. 26 and 29.

<sup>51</sup> E-mail from Paul Boudreau (DFO) to Peter Winchester (DFO) regarding plans for blasting at WPQ, dated May 28, 2003. (*Investors’ Schedule of Documents at Tab C 306*).

<sup>52</sup> Handwritten Notes, dated March 3, 2003 (*Investors’ Schedule of Documents at Tab C 614*).

<sup>53</sup> Letter from Paul Buxton, Nova Stone Exporters Inc. to Minister (NSDEL), dated October 14, 2003 (*Investors’ Schedule of Documents at Tab C 615*).

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85. Another difference between Tiverton and Whites Point that cannot be reconciled relates to the HADD approval. Although Tiverton destroyed more habitat than the Whites Point Quarry and Terminal could have done, the Tiverton HADD application was approved on February 6, 2004.<sup>54</sup> Bilcon's application, for an area 10km away from Tiverton, was never approved.
86. Ironically, much later in 2007, a DFO official, Tony Henderson, told Mr. Buxton that Bilcon should have never been required to file a HADD or design a compensation plan because of the extremely small area of disruption.<sup>55</sup>
87. With regard to the DFO's professed concern about iBoF salmon, Acadia University biologist M.J. Dadswell, who researched salmon migrations in the Bay of Fundy, had concluded that salmon do not migrate close to the shore along Digby Neck, and therefore quarry operations at Whites Point would have no effect on iBoF salmon.<sup>56</sup>
88. And, across the Bay of Fundy, near Saint John, New Brunswick, the Eider Rock Project, which was located close to the Mispec River, a known habitat for iBoF salmon breeding,<sup>57</sup> was not subjected by the DFO to the same requirements even though the DFO was aware that juvenile salmon did migrate out of the Bay of Fundy along the New Brunswick shoreline.<sup>58</sup>
89. Bilcon also offered to help study the effects of sound on iBoF as well as on North Atlantic Right Whales.

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<sup>54</sup> Letter from Neil A. Bellefontain, (DFO) to Gary Hubbard, (DFO), dated February 6, 2004 (*Investors' Schedule of Documents at Tab C 616*).

<sup>55</sup> Supplemental Witness Statement of Paul Buxton, at para. 31.

<sup>56</sup> Migration of Inner Bay of Fundy Atlantic Salmon in Relation to the Proposed Quarry in the Digby Neck Region of Nova Scotia, prepared by M.J. Dadswell, dated November 2004 (*Investors' Schedule of Documents at Tab C 426*).

<sup>57</sup> See Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, *Recovery Potential Assessment for Inner Bay of Fundy Atlantic Salmon*, Science Advisory Report 2008/050. November 2008 (*Investors' Schedule of Documents at Tab C 621*).

<sup>58</sup> Email from Tana Worcester (Bedford Institute of Oceanography) to Mark G. McLean (DFO), dated July 28, 2006 (*Investors' Schedule of Documents at Tab C 622*).

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## VI. THE JOINT REVIEW PANEL TAKES SHAPE

90. On November 10, 2004 the Joint Review Panel was announced, with Dr. Robert Fournier as chair and Drs. Jill Grant and Gunter Muecke as panel members.<sup>59</sup> On the same day, the draft guidelines for Bilcon's Environmental Impact Statement (EIS) were also released.<sup>60</sup>
91. While the draft EIS guidelines were being considered, Bilcon, through the Community Liaison Committee, engaged in extensive outreach to local communities to understand their concerns and explain the economic and employment benefits the project would bring to those communities.<sup>61</sup>
92. In January 2005, Bilcon submitted its comments on the Draft Guidelines to the panel. Of particular importance to Bilcon was that the Final Guidelines "include the concept of adaptive management":

Adaptive management is an accepted tool for environmental management in the face of uncertainty. In instances where an impact is not likely to result in a harmful alteration, disruption or disruption of habitat, but there is uncertainty as to the effectiveness of mitigation measures to prevent the alteration or disruption, the option of adaptive management could address such a situation. As the scientific knowledge base evolves and is refined over the life of the Project, adaptive management could play an important role in environmental protection as inevitable changes take place.<sup>62</sup>

93. The Final EIS Guidelines were finally released on March 31, 2005.<sup>63</sup> Adaptive management, which was critical to ensure compliance with regulations without adverse

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<sup>59</sup> Joint Canada-Nova Scotia News Release, The Public is Invited to Comment on the Draft Guidelines for the Preparation of the Environmental Impact Statement, dated November 10, 2004. (*Investors' Schedule of Documents at Tab C 405*).

<sup>60</sup> Joint Canada-Nova Scotia News Release, The Public is Invited to Comment on the Draft Guidelines for the Preparation of the Environmental Impact Statement, dated November 10, 2004. (*Investors' Schedule of Documents at Tab C 405*).

<sup>61</sup> CLC Minutes, dated July 18, 2002 to October 8, 2003 at p. 133 (*Government of Canada Counter-Memorial of Exhibit R 299*).

<sup>62</sup> Letter from Paul Buxton (Bilcon of Nova Scotia) to Stephen Chapman (CEAA), dated January 16, 2005 (*Government of Canada Counter-Memorial Exhibit R 243*).

<sup>63</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005, with attached Environmental Impact Statement Guidelines. (*Investors' Schedule of Documents at Tab C 120*).

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environmental effects, received only one mention.<sup>64</sup>

94. The Final EIS Guidelines reaffirmed that the Joint Review Panel was to conduct its review in conformity with its Terms of Reference, the *CEAA*, and the Nova Scotia *Environment Act*,<sup>65</sup> and listed the issues to be addressed by Bilcon in its EIS, including all of the technical and scientific aspects of the project.<sup>66</sup>
95. The Final EIS Guidelines also departed substantially from the expected scientific and technical focus of an EIS, and also required Bilcon to address non-scientific and non-technical questions like “Community Profile”, including the “existing human environment,” and “social and economic information by age, occupation, and community.”<sup>67</sup> Turning even further from scientific assessment, the final guidelines required Bilcon to examine “Socio-Cultural Patterns”. For example:

Describe socio-cultural patterns and social organization in the communities in the area affected by the Project. Describe patterns of family and community life (such as community social organization, the organization of work). Discuss perceptions people have about their quality of life and their sense of place. Describe social relations between residents, among generations, and between seasonal and year-round residents.<sup>68</sup>

96. In the analysis of what was termed the “human environment”, the final guidelines required that Bilcon:

Must recognize not only the complexity and interconnectedness of all the parts that comprise a single environmental entity (e.g., the physical environment), but also the broader, even more complex, interconnectedness between the physical, biological and human components. Awareness of this multi-layered, multi-dimensional inter-connectedness will offer guidance for

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<sup>64</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005, at section 12.1, “Management Criteria” the Guidelines note, “Discuss how programs would be managed over the lifespan of the Project: if adaptive management is proposed, explain how it will operate, and the role of the public in the process.” (*Investors’ Schedule of Documents at Tab C 120*).

<sup>65</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005, at section 1.2 (*Investors’ Schedule of Documents at Tab C 120*).

<sup>66</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005 at section 9.1.1 “Terrain, Geology, and Soils”, 9.1.2.1 “Marine Sediment Quality and Quantity”, 9.1.3.1 “Surface Water”, 9.1.3.2 “Groundwater”, 9.1.4 “Climate”, 9.1.6 “Noise and Vibration”, 9.2.2 “Fish, Invertebrates and Habitat”, and 10.1.5 “Air Quality”. (*Investors’ Schedule of Documents at Tab C 120*).

<sup>67</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005 at section 9.3.1. (*Investors’ Schedule of Documents at Tab C 120*).

<sup>68</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005 at section 9.3.8. (*Investors’ Schedule of Documents at Tab C 120*).

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monitoring and mitigation, for determining significant effects and identifying residual effects (in later sections of the EIS).<sup>69</sup>

97. Bilcon had no notice that these unbounded demands would be placed on it by the Final EIS Guidelines. Nonetheless, Bilcon set out to produce an EIS supported up by the most credible scientific evidence to meet all the questions posed by the final guidelines, in the belief that Joint Review Panel would use scientific data as the foundation of its assessment, as stipulated by the Terms of Reference, the *CEAA*, and the *Nova Scotia Environment Act*.
98. The EIS submitted by Bilcon on April 24, 2006, was comprised of 17 volumes, and an Annex of expert reports. The EIS was over 3000 pages, and engaged 48 experts in its production over a 35-month period. In preparing the EIS, Bilcon commissioned 35 expert reports from leaders in their respective fields.<sup>70</sup>
99. As stipulated by the Guidelines, the EIS also reports canvassed the related environmental, social and economic issues.<sup>71</sup> For ease of reference, Bilcon included a “Concordance Table” that noted each concern raised by the JRP or a speaker at a public meeting, and where it was addressed in the EIS.<sup>72</sup> Bilcon also provided a “Commitments Table”,<sup>73</sup> which showed how, at each phase of the project, Bilcon would comply with every regulatory requirement for each regulatory agency involved. The Commitments Table also contains many examples of commitments Bilcon made voluntarily to go beyond the minimum regulatory requirements.
100. Whales were specifically addressed in the EIS.<sup>74</sup> Bilcon noted that ship traffic on the Bay of Fundy would increase by only 6%, and that its ships would be confined to the

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<sup>69</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005 at section 10. (*Investors’ Schedule of Documents at Tab C 120*).

<sup>70</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006 (*Investors’ Schedule of Documents at Tab C 1*) and Index of Expert Reports included with EIS, listed in Schedule 1.

<sup>71</sup> For a list of expert reports, that were submitted with the EIS see Memorial of the Investors, para. 186.

<sup>72</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006 at Section 5. (*Investors’ Schedule of Documents at Tab C 1*).

<sup>73</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006 at Table CI-1. (*Investors’ Schedule of Documents at Tab C 1*).

<sup>74</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005 at sections 9.2.11 and 9.2.13. (*Investors’ Schedule of Documents at Tab C 120*).

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shipping lanes defined by Transport Canada for use by all the ships moving through Bay of Fundy.<sup>75</sup>

101. Bilcon then received six sets of additional information requests from the panel.<sup>76</sup>
102. The first information request from the Joint Review Panel, on June 28, 2006, asked Bilcon to explain the relevance of the widely known and accepted concept of “adaptive management”, which is what Bilcon had proposed incorporating in detail in the final EIS guidelines.<sup>77</sup> In the end, the concept was criticized and essentially ignored by the Panel.
103. In another June 28, 2006 information request, the Panel noted “elevated copper content” in settling ponds and asked for proposed mitigation measures.<sup>78</sup>
104. In another, on September 22, 2006, the Joint Review Panel requested a revised Project Description.<sup>79</sup> Bilcon was understandably concerned, since the role of the JRP was to assess potential adverse environmental impacts of the proposed project, not to engage in re-structuring the Project.

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<sup>75</sup> Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005 at sections 9.2.11 and 9.2.13. (*Investors’ Schedule of Documents at Tab C 120*).

<sup>76</sup> Letter from Robert Fournier (Joint Review Panel Chair), to Paul Buxton, Bilcon of Nova Scotia, June 28, 2006. (*Investors’ Schedule of Documents at Tab C 150*); Letter from Robert Fournier (Chair, Joint Review Panel), to Paul Buxton, Bilcon of Nova Scotia, dated July 28, 2006 with attached EIS Information Request, dated July 28, 2006 (*Investors’ Schedule of Documents at Tab C 549*); Letter from Robert Fournier to Paul Buxton. September 22, 2006, requesting a revised project description. (*Investors’ Schedule of Documents at Tab C 145*), Letter from Robert Fournier to Paul Buxton, dated December 19, 2006, providing ten information requests on the proponent’s Revised Project Description. (*Investors’ Schedule of Documents at Tab C 433*); Letter from Robert Fournier to Paul Buxton, dated January 8, 2007, providing thirteen information requests. (*Investors’ Schedule of Documents at Tab C 434*); Letter from Robert Fournier to Paul Buxton, providing nine final information requests, dated February 27, 2007 (*Investors’ Schedule of Documents at Tab C 435*).

<sup>77</sup> Letter from Robert Fournier (Joint Review Panel Chair), to Paul Buxton, Bilcon of Nova Scotia, June 28, 2006. (*Investors’ Schedule of Documents at Tab C 150*).

<sup>78</sup> Letter from Robert Fournier (Joint Review Panel Chair), to Paul Buxton, Bilcon of Nova Scotia, June 28, 2006. (*Investors’ Schedule of Documents at Tab C 150*).

<sup>79</sup> Letter from Robert Fournier to Paul Buxton. September 22, 2006, requesting a revised project description. (*Investors’ Schedule of Documents at Tab C 145*).

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105. On February 27, 2007, the Joint Review Panel issued another information request regarding copper, this time asking for “an assessment of the environmental impact of elevated copper levels in the reclamation soil.”<sup>80</sup>
  106. Before these information requests copper had not been a concern. Copper levels in the Bay of Fundy are known to be naturally high through leeching from the rock.<sup>81</sup> Nonetheless, Bilcon treated the information request seriously, as it did all others, and retained a leading American expert, John Schupner, to research the issue at a cost of \$75,000.<sup>82</sup>
  107. In addition to information requests from the Panel, over 250 public comments were submitted during the EIS review period to which Bilcon responded.
  108. Bilcon’s responses to the Panel’s information requests were as professional and detailed as its EIS. Bilcon submitted a total of 18 sets of responses to the information requests, adding over 1,000 additional pages of scientific data to what it had already produced.<sup>83</sup>

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<sup>80</sup> Letter from Robert Fournier to Paul Buxton, providing nine final information requests, dated February 27, 2007. (*Investors’ Schedule of Documents at Tab C 435*).

<sup>81</sup> Supplemental Witness Statement of Paul Buxton, at para. 41.

<sup>82</sup> Supplemental Witness Statement of Paul Buxton, at para. 42; Response to Panel Questions, prepared by John Schupner, Kevin Reinert, AMEC Earth and Environmental Inc., dated October 30, 2006 (*Investors’ Schedule of Documents at Tab C 909*).

<sup>83</sup> Response documents of Bilcon relating to Comments on the EIS, Vol. 4, s. 3.6. (*Investors’ Schedule of Documents at Tab C 572*); Bilcon’s Responses to Comments on the EIS - Vol IV. Comments on the EIS-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 10.0, Cumulative Effects, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 573*); Bilcon’s Responses to Comments on the EIS-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 628*). Bilcon’s Responses to Comments on the EIS - Vol II - Cover Page, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 629*), Bilcon’s Responses to Comments on the EIS - Vol II - 4.0 Standards and Formats, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 630*), Bilcon’s Responses to Comments on the EIS - Vol II - 5.0 Concordance Table, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 631*), Bilcon’s Responses to Comments on the EIS - Vol II - 6.0 Introduction to the EIS, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 632*). Bilcon’s Responses to Comments on the EIS - Vol II - 7.0 Responses to Panel Information Requests on Revised Project Description, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 633*), Bilcon’s Responses to Comments on the EIS - Vol II - 8.0 Responses to Panel Information Requests on Revised Project Description, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 634*), Bilcon’s Responses to Comments on the EIS - Vol III-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 9.1.1- Climate, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 635*), Bilcon’s Responses to Comments on the EIS - Vol III-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 9.2 Terrestrial Ecology, dated February 12, 2007 (*Investors’ Schedule of Documents at Tab C 636*), Bilcon’s Responses to Comments on the EIS - Vol III - Comments

109. For ease of reference, Bilcon presented its responses in a supplemental version of the EIS, pinpointed to precisely where and when the Panel's concern arose. It was these direct and professional responses that the Panel outrageously characterized as "verg[ing] on incompetence" and "lack of responsiveness".<sup>84</sup>
110. Public hearings before the Joint Review Panel took place for two weeks, from June 16, 2007 – June 30, 2007.
111. To ensure transparency and preparedness, all of Bilcon's submissions to the Joint Review Panel were expected to be received 10 days in advance together with the CVs of the presenters. Bilcon complied and expected the same treatment in return but presentations by various government departments were not always made available to Bilcon in advance.<sup>85</sup>
112. Some supporters of the project, including some of the 400 citizens who had applied to work for Bilcon,<sup>86</sup> who wanted time to speak at the public hearings, were told the agenda was full.<sup>87</sup>

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on the EIS-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 9.3 Heritage Resources, dated February 12, 2007 (*Investors' Schedule of Documents at Tab C 637*), Bilcon's Responses to Comments on the EIS - Vol IV-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 11.0 Environmental Management, dated February 12, 2007 (*Investors' Schedule of Documents at Tab C 638*), Bilcon's Responses to Comments on the EIS - Vol IV-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 12.0, dated February 12, 2007, and Reference documents - AMEC-Attitude Surveys, 2005 and 2006; EMEC-Copper, October 2006; Conestoga Rovers & Associates-Domestic Well Survey, November 2006; Conestoga Rovers & Associates-Surface Water Information Summary, February 2007; Conestoga Rovers & Associates-Groundwater Monitoring and Aquifer Testing, February 2007 (*Investors' Schedule of Documents at Tab C 639*), Revised Project Description, Whites Point Quarry and Marine Terminal, dated November 2006 (*Investors' Schedule of Documents at Tab C 640*), Bilcon's Responses to Comments on the EIS - Vol IV-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 9.3.4 - Transportation, dated February 12, 2007 (*Investors' Schedule of Documents at Tab C 641*), Bilcon's Responses to Comments on the EIS - Vol IV-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 9.3.5-Economy, dated February 12, 2007 (*Investors' Schedule of Documents at Tab C 642*), Bilcon's Responses to Comments on the EIS - Vol IV-Whites Point Quarry and Marine Terminal Project, Environmental Impact Statement, 9.3.6-Human Health and Wellness and Socio-Cultural Environment, dated February 12, 2007 (*Investors' Schedule of Documents at Tab C 643*).

<sup>84</sup> Email from Debra Myles, (CEAA) to Adrian MacDonald, (CEAA), Helen F. MacPhail, Deborah Hendriksen, dated February 13, 2007, at page 2 (*Investors' Schedule of Documents at Tab 627*).

<sup>85</sup> Supplemental Witness Statement of Paul Buxton, at para. 45.

<sup>86</sup> Supplemental Witness Statement of Paul Buxton, at para. 49-50.

<sup>87</sup> Supplemental Witness Statement of Paul Buxton, at para. 49.

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113. 23 of the 48 experts Bilcon had retained attended some or all of the hearings, to answer questions related to their areas of expertise.
  114. Despite the presence of all these experts at the hearings, Bilcon received less than 6% of the hearing time to present its date.<sup>88</sup> Its experts received approximately 90 minutes over the course of 90 hours of hearings.<sup>89</sup> The Panel gave little, if any, attention to a substantive scientific discussion of the relevant issues. For example, despite the Panel's stated concern about copper, and Bilcon's endeavor to meticulously answer those concerns, copper was never raised at the hearings.<sup>90</sup>
  115. Indeed, any significant consideration of the science was largely absent from the two weeks of hearings. Instead, the hearings were turned into a soap box for activist groups to proclaim opposition to the Quarry for reasons unrelated to science or the actual impact on the environment.
  116. The attitude towards Bilcon was hostile and offensive from the beginning.<sup>91</sup>
  117. Although it had no bearing on adverse environmental effects, the Panel allowed and even fostered a focus on Bilcon being an American company, and the prospects that the North American Free Trade Agreement (NAFTA) would have for future projects.
  118. On the very first day of the hearings, Dr. Muecke asked Mr. Buxton why Bilcon was looking at Nova Scotia rock instead of American rock.<sup>92</sup>
  119. The presentation by DFAIT, the first of its kind at a review panel hearing, given by Gilles Gauthier, Director of DFAIT International Trade Policy Division, provided a general overview of the NAFTA and its obligations.
  120. When Dr. Fournier questioned Mr. Gauthier if approval of the Whites Point Quarry would require the Canadian government to approve similar projects under the NAFTA,

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<sup>88</sup> Memorial of the Investors, para. 206.

<sup>89</sup> Witness Statement of Hugh Fraser, dated July 6, 2011 at para. 14.

<sup>90</sup> Supplemental Witness Statement of Paul Buxton, at para. 42.

<sup>91</sup> Supplemental Witness Statement of Paul Buxton, at para. 46.

<sup>92</sup> Witness Statement of Hugh Fraser, dated July 6, 2011 at para. 20.

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Mr. Gauthier answered in the negative.<sup>93</sup>

121. Not once did Dr. Fournier attempt to dissuade members of the public from delivering rants against the NAFTA, although he knew or should have known that the nationality of the investor as that of a state that is a party to the NAFTA was a completely inappropriate consideration. Nor, as noted, did Dr. Fournier in any way seek to curb, or distance himself or the JRP as a whole from, other expressions of anti-foreigner or anti-American bias and prejudice before the Panel, which were entirely inappropriate before a body charged with a task of making an objective scientific assessment.
122. When members of the public referred to Bilcon's US parentage, the level of animosity exhibited was high. This is documented in the witness statement of Hugh Fraser, a communications and public relations professional who attended the hearings in their entirety. Mr. Fraser recounts, for example how at the hearings members of the public accused Bilcon of neo-colonialism, behaving like an oligarchy, being "foreign-based pirates stealing our resources", through "rape and pillage".<sup>94</sup>
123. Moreover, federal and provincial officials were aware that the hearings were being held in a manner tainted by expressions of anti-American and anti-foreigner bias and prejudice and did nothing to counter this situation; indeed, as outlined below, a federal official responded to a request to address the Panel concerning NAFTA, thereby fostering the perception that the Panel viewed investor's nationality as that of a state to which Canada owed obligations under NAFTA could be relevant to a decision concerning its project.
124. The NAFTA, and free trade with the United States more generally, were topics that received attention during the hearings, despite this subject being beyond the scope of consideration for the JRP, as stipulated by the Terms of Reference and the EIS Guidelines.<sup>95</sup>

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<sup>93</sup> Memorial of the Investors, paras. 227-228; Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007. (*Investors' Schedule of Documents at Tab C 156*).

<sup>94</sup> Witness Statement of Hugh Fraser, dated July 6, 2011 at para, 22.

<sup>95</sup> *Agreement concerning the Establishment of a Joint Review Panel*, November 3, 2004. (*Investors' Schedule of Documents at Tab C 114*); Letter from Robert Fournier, Chair, Joint Review Panel, Whites Point Quarry and Marine Terminal Project to Paul Buxton, dated March 31, 2005, with attached Environmental Impact Statement Guidelines. (*Investors' Schedule of Documents at Tab C 120*).

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125. Dr. Fournier actually requested a representative from Canada's Department of Foreign Affairs and International Trade (DFAIT) to appear before the Panel to discuss issues related to the NAFTA, including its role in "siting of future coastal quarry projects".<sup>96</sup> Keith Christie, DFAIT's Director-General of the Environmental, Energy and Sustainable Development Bureau, advised "...It is beyond the scope of this Department's participation in the hearing proceedings to take a position on the potential environmental effects associated with the Whites Point Quarry and Marine Terminal Project or the siting of any future coastal quarry projects."<sup>97</sup>
126. Much like the preoccupation over Bilcon's American parentage, when the issue of the NAFTA was turned over to the public, the levels of hostility and antagonism rose markedly.
127. The NAFTA was described at the hearings as a means for facilitating Bilcon to "rape our land" and "sue our Canadian Government billions of dollars", that it "allow[ed] for coastal and rural communities to be decimated in the name of so-called free trade," and that it could end up in mining "everywhere along North Mountain" towards an "apparently insatiable market for basalt."<sup>98</sup>
128. In addition to responding to multiple information requests, Bilcon provided the Panel with the 29 undertakings it demanded. It believed throughout that science would prevail. From a scientific and technical perspective, its data was irrefutable. The science demonstrated without any doubt that the Quarry and Marine Terminal at Whites Point would not lead to significant adverse environmental effects that could not be mitigated.

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<sup>96</sup> E-mail from Adrian MacDonald (CEA Agency) to Debra Myles (CEA Agency), dated June 6, 2007 (*Investors' Schedule of Documents at Tab C 389*).

<sup>97</sup> Letter from Keith Christie (DFAIT) to Robert Fournier, dated June 5, 2007 (*Investors' Schedule of Documents at Tab C 178*).

<sup>98</sup> Witness Statement of Hugh Fraser, dated July 6, 2011 at paras. 29-37.

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## VII. THE JOINT REVIEW PANEL REPORT

129. The JRP released its Report on October 23, 2007.<sup>99</sup> The photograph it used for the cover of its Report is not of Whites Point.<sup>100</sup>
130. The JRP was tasked with a legally prescribed mandate of recommending to the federal and provincial environmental ministers whether Bilcon's proposed quarry and marine terminal would have a significant adverse environmental effect. The CEA Agency's *Reference Guide for the Canadian Environmental Assessment Act* states that for an adverse environmental effect to meet the threshold of "significant", it must be "major or catastrophic."<sup>101</sup>
131. Disregarding that test, the Panel recommended that the provincial and federal ministers deny Bilcon's application.<sup>102</sup>
132. The Panel went beyond its Terms of Reference, the EIS Guidelines and the governing legislation, and injected itself into a public policy debate wholly outside the scope of its review. It made six recommendations wholly unrelated to the Bilcon project. It went beyond its role of conducting an environmental assessment of a specific project. It's application to Bilcon of a non-existent legal standard, and its obvious attempt to advance its own view of environmental law reform, amounted to a fundamental contravention of the rule of law.
133. The recommendations made by the Joint Review Panel were:
- a) That the Province of Nova Scotia develop and implement a comprehensive coastal zone management policy or plan for the Province.
  - b) A moratorium on new approvals for development along the North Mountain until the Province of Nova Scotia has thoroughly reviewed this type of initiative within the context of a comprehensive provincial coastal zone management policy and established appropriate guidelines to

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<sup>99</sup> News Article, headed *Governments of Canada and Nova Scotia Release Findings of the Joint Review Panel for the Whites Point Quarry and Marine Terminal Project*, dated October 23, 2007 (*Investors' Schedule of Documents at Tab C 651*).

<sup>100</sup> Supplemental Witness Statement of Paul Buxton, at para. 54.

<sup>101</sup> *SAEE Reference Guide*, November 1994, at 188. (*Investors' Schedule of Documents at Tab C 384*).

<sup>102</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 4 (*Investors' Schedule of Documents at Tab C 34*).

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facilitate decision-making.

- c) That the Province of Nova Scotia develop and implement more effective mechanisms than those currently in place for consultation with local governments, communities and proponents in considering applications for quarry developments.
  - d) That the Province of Nova Scotia modify its regulations to require an environmental assessment of quarry projects of any size.
  - e) That the Canadian Environmental Assessment Agency develop a guidance document on the application of adaptive management in environmental assessments and in environmental management following approvals.
  - f) That Transport Canada revise its ballast water regulations to ensure that ships transporting goods from waters with known risks take appropriate measures to significantly reduce the risk of transmission of unwanted species.<sup>103</sup>
134. There is no plausible connection between the Bilcon project and these recommendations. They clearly demonstrate the JRP's disregard of its legal duty and misunderstanding of its role in the EA process.
135. The Report's recommendations are also in themselves fundamentally flawed.
136. First and foremost is the Panel's creation of a new concept that it used, without notice, as the main standard for its recommendation: that Bilcon's project was in conflict with "community core values".<sup>104</sup>
137. The term "community core values" is not in the JRP's Terms of Reference in the EIS Guidelines, or the related legislation. Before seeing it in the JRP's Report, Bilcon could have had no idea that in the Panel's view: "core values are shared beliefs by individuals

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<sup>103</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 4-5 (*Investors' Schedule of Documents at Tab C 34*).

<sup>104</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 14 (*Investors' Schedule of Documents at Tab C 34*).

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within groups, and constitute defining features of communities.”<sup>105</sup>

138. Bilcon had focused its EIS on scientific data and expert analysis, which confirmed that its project would not have a significant adverse environmental effect. That was the legal standard the Panel was legally obligated to apply. Instead the Panel concluded, “The Project does not reflect serious consideration of community planning activities and policy outcomes, such as community identified priorities, core values, vision statements or future goals.”<sup>106</sup>
139. The socioeconomic effects of the project, was a factor the JRP was expected to consider. Accordingly, Bilcon participated in Community Liaison Council meetings, conducted surveys of the local population, and had retained an expert on this factor. Ms. Susan Sherk was present at the hearings. Bilcon had comprehensively examined the socio-economic effects of the project on the entire community, and its analysis was informed by no less than five expert reports,<sup>107</sup> and included “quality of life” and “social cohesion”.<sup>108</sup>
140. In section 5 of the EIS Concordance Table Bilcon affirmed:

There is also no evidence that communities in the area of the quarry operation will suffer damages or losses due to the operation of the project. To the contrary, there is evidence that family sustaining jobs will be gained in local communities which will in part counter recent outmigration. However, it is the Proponent's corporate policy to support local communities and local organizations. This has been demonstrated over the past four years and will continue throughout the life of the project.<sup>109</sup>

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<sup>105</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 14 (*Investors' Schedule of Documents at Tab C 34*).

<sup>106</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 95 (*Investors' Schedule of Documents at Tab C 34*).

<sup>107</sup> *Economic Profile for Digby Neck/Islands*, Robert Fraser of Garner Pinfold Consulting Economists Ltd., February 2006 at 7. (*Investors' Schedule of Documents at Tab C 395*); *Human Health Community Wellness Assessment for the Whites Point Quarry and Marine Terminal*, by AMEC Earth & Environmental, dated January 13, 2006. (*Investors' Schedule of Documents at Tab C 431*); *Digby Neck and Islands Individual Business Consultation Report*, Elgin Consulting Research, August 2005. (*Investors' Schedule of Documents at Tab C 601*); *Whites Point Quarry and Marine Terminal Traditional Knowledge Consultation Report*, Elgin Consulting Research, July 2005. (*Investors' Schedule of Documents at Tab C 425*); *Whites Point Quarry and Marine Terminal Individual Consultation Report*, Elgin Consulting Research, August 2005. (*Investors' Schedule of Documents at Tab C 424*).

<sup>108</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, at 9.3.22. (*Investors' Schedule of Documents at Tab C 1*).

<sup>109</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, at 11.8. (*Investors' Schedule of Documents at Tab C 1*).

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141. In the process, Bilcon addressed the concerns of fishermen<sup>110</sup>, historical Loyalist communities<sup>111</sup>, and potential health effects on the community,<sup>112</sup> among others.

142. Another consideration, which was totally outside the scope of the Panel's legal mandate was public interest. The JRP's Report says:

The Panel's mandate was to determine whether the Project presented by Bilcon would result in significant adverse or beneficial physical, biological or socioeconomic environmental effects and would be in the public interest...

Based on an analysis of the benefits and burdens of the Project, the Panel has concluded that the burdens outweigh the benefits and that it would not be in the public interest to proceed with the Whites Point Quarry and Marine Terminal development.<sup>113</sup>

143. This sophistry does not disguise the fact that the JRP's Terms of Reference do not extend to what the JRP considered to be in the public interest.

144. And it surely did not extend to setting public policy. Yet, the JRP's chair, Dr. Fournier made no attempt to hide what the Panel attempted. Speaking to a Canadian news outlet on December 19, 2007, after the project had been rejected by the federal and provincial ministers, Dr. Fournier proudly proclaimed: "What we built into the process is an out-and-out rejection that says this is not any good for this environment under any circumstances. And that hasn't been done before."<sup>114</sup>

145. In a radio interview the next day, Dr. Fournier again acknowledged the Panel's departure from a legal and fact based environmental assessment: "Yes, there were people who said this was inappropriate, but I think it was only inappropriate if you judged it against previous reports, because previous reports hadn't done this."<sup>115</sup>

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<sup>110</sup> Concordance Table, Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Ch.5 at p. 17. (*Investors' Schedule of Documents at Tab C 1*).

<sup>111</sup> Concordance Table, Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Ch.5 at p. 16. (*Investors' Schedule of Documents at Tab C 1*).

<sup>112</sup> Concordance Table, Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Ch.5 at p. 13. (*Investors' Schedule of Documents at Tab C 1*).

<sup>113</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 4 (*Investors' Schedule of Documents Tab C 34*).

<sup>114</sup> CBC News, "Digby quarry rejection on environmental grounds could set precedent panel chair". (*Investors' Schedule of Documents at Tab C 652*).

<sup>115</sup> Transcription of CBC radio interview of Robert Fournier (JRP), dated December 20, 2007. (*Investors' Schedule of Documents at Tab C 180*).

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146. The Halifax *Chronicle-Herald* had earlier recognized what went wrong. In an article on the JRP report, October 25, 2007, the headline said: “Bob Fournier sets public policy.”<sup>116</sup>
147. The Report is also filled with stated conclusions and consideration, and without any basis, proceeds on the worst-case scenario assumptions. For example:
- a) Using the high-end estimates of explosive demand and acknowledging the risk of residual ammonium nitrate, the Panel predicts that adverse effects could result from blasting;<sup>117</sup>
  - b) Although perhaps infrequent, the transit of harlequin ducks through the property cannot be precluded;<sup>118</sup>
  - c) The Panel recognized that limited data about salmon responses, along with the inability to adequately predict blasting impacts, results in a high degree of uncertainty about possible behavioural effects on this endangered population.<sup>119</sup>
148. Another fundamental error relates to the precautionary principle, regard to which the Panel said:
- The application of the precautionary principle requires: that the onus of proof rest with the Proponent to show that a proposed action will not lead to serious or irreversible environmental damage; verifiable scientific research and high-quality information; and access to information, public participation, and open and transparent decision-making.<sup>120</sup>
149. The actual legal standard, in the Nova Scotia *Environment Act*, is the exact opposite, “The precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.”<sup>121</sup>

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<sup>116</sup> E-mail enclosing an article from Chronicle Herald “*In which Bob Fournier sets public policy*”, dated October 25, 2007 (*Investors’ Schedule of Documents at Tab C 653*).

<sup>117</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 31 (*Investors’ Schedule of Documents Tab C 34*).

<sup>118</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 62 (*Investors’ Schedule of Documents Tab C 34*).

<sup>119</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 63 (*Investors’ Schedule of Documents Tab C 34*).

<sup>120</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 92 (*Investors’ Schedule of Documents Tab C 34*).

<sup>121</sup> *Nova Scotia Environment Act*, 1994-95, s. 2(b)(ii). (*Investors’ Schedule of Documents at Tab C 258*).

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150. Related to the precautionary principle was the Report's dismissal of Bilcon's commitment to adaptive management. Bilcon viewed adaptive management as a vital component of the project. It was central to mitigation, and was the recognized regulatory means to set a verifiable commitment to mitigate potential adverse effects in the ordinary context of uncertainty at the early stage of an environmental assessment.<sup>122</sup>
151. The Panel said: "The Panel found little evidence from the EIS, information requests or the hearings to indicate that the Proponent appreciates the difference between the precautionary principle and adaptive management."<sup>123</sup> The comment reveals that it was the Panel who misunderstood the two concepts. Bilcon's application of the precautionary principle to the project was complemented by Bilcon's commitment to adaptive management, as a means of mitigating any adverse effects that might arise.
152. By being dismissive of adaptive management, the Panel also revealed that it did not understand the difference between the planning stage of a project, and the design stage, which begins after a project is approved.
153. Environmental assessment takes place at the planning stage of a project before specific designs are created and permitted. The distinction is confirmed in the Canadian Environmental Assessment Agency's Operational Policy Working Group manual *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members*, which acknowledges that the purpose of the Canadian Environmental Assessment Act is "to establish a balanced process that brings a degree of certainty to the environmental assessment process and helps federal departments and agencies determine the environmental effects of projects early in their planning stage".<sup>124</sup>
154. As Mr. Buxton explained in his testimony to the Panel:

I could not tell you at the present time whether the pipe piles need to be 42 inches in diameter or 39 inches in diameter, nor could I tell you in fact what the thickness of the steel is required for a pipe pile, but we can determine what the effects of putting that pipe pile down into water are

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<sup>122</sup> Expert Report of David Estrin, dated July 8, 2011, paras. 321, 408.

<sup>123</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 92 (*Investors' Schedule of Documents Tab C 34*).

<sup>124</sup> Canadian Environmental Assessment Agency, *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members*, July 2001 (*Government of Canada Counter-Memorial Exhibit R-32*).

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and how much habitat is going to be destroyed, et cetera, and whether or not it will generally affect currents or tides or marine environment.<sup>125</sup>

155. Another basic interpretative error made by the Panel relates to the concept of baseline data. The Panel Report purports to criticize the lack of baseline data Bilcon provided.<sup>126</sup> However, baseline data simply does not exist at a preliminary planning stage.
156. The Panel also misunderstood Bilcon's use of Ammonium Nitrate Fuel Oil (ANFO), for blasting. Bilcon's use of ANFO was governed by a policy that the DFO provided to Bilcon on the subject, *Practical Methods to Reduce Ammonia and Nitrate Levels in Mine Water* by Gordon Revey.<sup>127</sup>
157. In response to a question from the Panel during the hearings about Bilcon's use of ANFO, the DFO, in undertaking #29, Bilcon affirmed that there would be "little in the way of residual impacts" from the mitigation strategy Bilcon was proposing on ANFO.<sup>128</sup> Despite this clear assurance from Bilcon and the reassurance from DFO, the Panel still chose to conclude, "Using the high-end estimates of explosive demand and acknowledging the risk of residual ammonium nitrate, the Panel predicts that adverse effects could result from blasting."<sup>129</sup>
158. This was the personal view of Ashraf Mahtab, a retired engineer who publicly opposed the quarry and admitted to having no experience in blasting.<sup>130</sup>
159. The Panel's preconceived bias against the NAFTA was also confirmed in its Report. Even though the NAFTA had absolutely no relation to the mandate of the Panel, it concluded contrary to the objective evidence, that "There is an obvious fear that establishment of

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<sup>125</sup> Whites Point Quarry and Marine Terminal JRP Public Hearing Transcript, Day 1, Volume 1 at 76/77 (*Government of Canada Counter-Memorial R 327*).

<sup>126</sup> See, for example, Joint Review Panel Final Report, dated October 23, 2007, at pp. 7, 8, 9, 35, and 65 (*Investors' Schedule of Documents Tab C 34*).

<sup>127</sup> *Practical Methods to Reduce Ammonia and Nitrate Levels in Mine Water*, Gordon Revey (1996). (*Investors' Schedule of Documents at Tab C 399*).

<sup>128</sup> Undertaking No. 29 for the Joint Review Panel: to provide, following collaboration with Environment Canada, an assessment of the ecological risks associated the ammonia residuals resulting from blasting and episodic and controlled releases from the project's settling ponds, undated. (*Investors' Schedule of Documents at Tab C 437*).

<sup>129</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 31 (*Investors' Schedule of Documents Tab C 34*).

<sup>130</sup> Joint Review Panel Public Hearing Transcript, Vol. 10, dated June 27, 2007, at 2425. (*Investors' Schedule of Documents Tab C 109*).

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the proposed quarry could lead to similar projects along the Fundy shore of Nova Scotia and possible other locations along Canada's coasts."<sup>131</sup>

160. And just as shockingly, the Panel conducted an unannounced private visit to the proposed quarry site, without informing Bilcon or giving it any indication of its observations.

## **VIII. THE MINISTERS' DECISIONS**

161. After the Panel issued its Report, Bilcon sought to meet with the provincial and federal environment ministers to apprise them of the numerous serious flaws in the Report. The Ministers refused to give them that opportunity.
162. An internal NSDEL power-point presentation on November 13, 2007, to the Nova Scotia Executive Council, reveals that when the Joint Review Panel's Report was assessed, it was understood that six of its seven recommendations were outside the scope of the Panel's Terms of Reference.<sup>132</sup>
163. Nevertheless, based on the patently flawed conclusions in the Joint Review Panel Report, on November 20, 2007 Minister Parent wrote to Bilcon stating, "I have determined that the proposed Project poses the threat of unacceptable and significant adverse effects to the existing and future environmental, social and cultural conditions influencing the lives of individuals and families in the adjacent communities."<sup>133</sup>
164. As it had earlier done with Provincial Minister Parent, Bilcon also sought an opportunity to meet with the Honourable John Baird, Minister of the Environment for the Government of Canada, because:

The Joint Review Panel Report is fundamentally flawed and is not based on sound science and facts. The Report does not apply the analytical framework established by the applicable legislation and guidelines, and makes far reaching recommendations that are well beyond the

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<sup>131</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 128 (*Investors' Schedule of Documents Tab C 34*).

<sup>132</sup> NSDEL Power Point Presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated November 13, 2007 (*Investors' Schedule of Documents at Tab C 654*).

<sup>133</sup> Letter from Mark Parent (Minister, Nova Scotia Department of Labour and Environment) to Paul Buxton, dated November 20, 2007. (*Investors' Schedule of Documents Tab C 541*).

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Panel's mandate. The Report ignores important information provided by Bilcon and adopts new rules and standards without providing any opportunity for Bilcon to respond.<sup>134</sup>

165. Bilcon never received a response. Instead on December 17, 2007 the Government of Canada accepted also the Panel's flawed recommendation to reject the Whites Point Quarry and Marine Terminal.<sup>135</sup>

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<sup>134</sup> Letter from Paul Buxton, to John Baird, Minister of the Environment, dated November 21, 2007, requesting that a meeting be convened to address the flaws in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 204*).

<sup>135</sup> "The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project (the Project)", dated December 17, 2007 (*Investors' Schedule of Documents at Tab C 589*).

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### PART THREE: LEGAL ISSUES

#### I. NAFTA ARTICLE 1105 – FAIR AND EQUITABLE TREATMENT

166. Canada has violated its obligation under NAFTA Article 1105(1) to accord Bilcon treatment in accordance with the international law standard of treatment, including “fair and equitable treatment”<sup>136</sup> and full protection and security.

##### A. Overview

167. Canada has advanced a meaning to the international law standard of treatment in NAFTA Article 1105 that is narrow and not in keeping with the text of the Treaty. The meaning of the international standard is well known and has been well canvassed by many international tribunals, including NAFTA tribunals.

168. Canada proposes a threshold standard of breach that is inconsistent with the principles of state responsibility set out by the International Law Commission and adapted by international investor-state tribunals.

169. Nevertheless many elements of the governmental conduct toward Bilcon in this case fall below even the minimum standard of treatment Canada purports to apply. Canada has failed to meet its obligation to provide fair and equitable treatment to Bilcon by any measure. For example, in the adoption of a fundamentally flawed JRP Report, the manipulation of the regulatory process for political purposes, and the application of non-existent legal standards to Bilcon’s proposal.

##### B. “Fair and Equitable Treatment” is an Autonomous Standard

170. NAFTA Article 1105(1) prescribes Canada’s duty to accord investments of foreign investors a “minimum standard of treatment.” This ensures a standard of treatment, regardless of how Canada treats investments of its own investors. NAFTA Article 1105(1) says:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

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<sup>136</sup> The Investor continues to rely on the arguments made in the Memorial of Investors of July 25, 2011.

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Thus, the meaning of NAFTA Article 1105(1) is clear: Canada must provide investments of foreign investors “treatment in accordance with international law.”

171. Article 38(1) of the *Statute of the International Court of Justice (“ICJ Statute”)* outlines the sources of international law:

- a) International conventions;
- b) International custom, as evidence of a general practice accepted as law;
- c) General principles of law; and
- d) Judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

172. NAFTA Article 1105(1) therefore makes clear that Canada is obligated to provide investments of other NAFTA Parties treatment in accord with the rules and principles established by these four sources of international law.

173. NAFTA Article 1131 sets out the governing law of a NAFTA Chapter 11 dispute. It confirms that the sources of international law are to be applied in interpreting the obligations contained in the Treaty:

A Tribunal established under this Section shall decide the issues in dispute with this Agreement and applicable rules of international law.

174. NAFTA Article 1131(2) further directs a tribunal to apply the Interpretation of the Free Trade Commission to a dispute. As Canada rightly points out,<sup>137</sup> on July 31, 2001, the Free Trade Commission issued Notes of Interpretation (“Interpretation”) with respect to NAFTA Article 1105(1). It provides:

1. Article 1105(1) prescribes the customary international law standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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<sup>137</sup> Government of Canada Counter-Memorial at para. 307.

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According to the wording of NAFTA Article 1131(2), the Interpretation is binding on a tribunal. However, nothing in Article 1131(2) suggests the NAFTA parties' intent to contract out of the customary rules of international law regarding treaty interpretation as expressed in Articles 31 and 32 of the Vienna Convention of the Law of Treaties. Thus 1131(2) is to be read in manner compatible with the customary law rules, and not as requiring an interpretation that would override or exclude the normal application of these rules. Articles 31 of the *Vienna Convention on the Law of Treaties* explicitly contemplates the kind of interpretation intended by 1131(2) in listing subsequent agreements between the parties concerning interpretation of the treaty as *one* source of interpretation that a treaty interpreter is required to take into account, along with the others in Article 31. While an interpretation under 1131(2) is binding upon the *parties* to NAFTA as a subsequent *agreement* (to the extent that the effects are interpretation and not adding to or subtracting from the law of the treaty), the obligations that it imposes on a *treaty interpreter* such as an independent arbitral tribunal are defined by the customary rules of treaty interpretation embodied in Articles 31 and 32 of the *Vienna Convention*, again absent any specific intent to contract out of those rules.

175. Canada contends that the Interpretation restricts the meaning of NAFTA Article 1105(1) by requiring treatment only in accordance with customary international law.<sup>138</sup> Canada also contends that as a result of the Interpretation, this Tribunal may not apply the other normal sources of international law in interpreting Canada's obligation to provide investments of foreign investors "fair and equitable treatment." Canada's contention is nonsense.
176. This Tribunal is not only allowed to apply the normal sources of international law, but it is required the NAFTA to do so.
177. First, the Interpretation leaves unaltered NAFTA Article 1131(1), which directs a tribunal to apply "applicable rules of international law" to NAFTA Chapter 11 disputes. These rules include all the sources enumerated in Article 38(1) of the *ICJ Statute* – not just the rules of customary international law.

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<sup>138</sup> Government of Canada Counter-Memorial at para. 309.

178. The primary source of treaty interpretation is the wording of the treaty itself, and NAFTA Article 1131(1) is clear: a tribunal shall apply “applicable rules of international law.” A tribunal cannot, on the one hand, be directed to apply all the applicable rules of international law, and, on the other, be restricted to applying only the rules of customary international law. The Interpretation said nothing about discontinuing the applicability of NAFTA Article 1131(1) with respect to NAFTA Article 1105(1). As a result, NAFTA Article 1131(1) continues to apply to the entirety of NAFTA Chapter 11.
179. The second reason why Canada’s position on the Interpretation is wrong is that it runs counter to the plain and ordinary meaning of NAFTA Article 1105(1). The general rule of treaty interpretation requires that a treaty be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>139</sup> NAFTA Article 1105(1) clearly states that Canada must “accord investments of investors of another Party treatment in accordance with *international law*” – not *customary* international law. The ordinary meaning of “international law” refers to all sources of international law enumerated in Article 38(1) of the *ICJ Statute* – not only customary international law.<sup>140</sup> Professor Schreuer puts it quite plainly:

As a matter of textual interpretation, it is inherently implausible that a treaty would use an expression such as “fair and equitable treatment” to denote a well-known concept such as the “minimum standard of treatment in customary international law.” If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.<sup>141</sup>

180. In their treatise on bilateral investment treaties, Dolzer and Stevens confirm the implausibility of the drafters of the NAFTA intending to confine the scope of the “fair and equitable treatment” standard only to customary international law:

[S]ome treaties [like the NAFTA] refer to international law in addition to the fair and equitable

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<sup>139</sup> *Vienna Convention on the Law of Treaties* (1969), Article 31(1), (*Investor’s Book of Authorities at Tab CA 44*).

<sup>140</sup> In the *Anglo-Iranian Oil Co. Case* the court accepted the principle that a legal text should be interpreted to give effect to every word in the text. See *Anglo Iranian Oil Case (United Kingdom v. Iran)*, [1952] ICJ Rep, Preliminary Objection, 22 July 1952. (*Investors’ Book of Authorities at Tab CA 179*).

<sup>141</sup> Schreuer, C., “Fair and Equitable Treatment in Arbitral Practice”, 6:3, *The Journal of World Investment & Trade*, June 2005, at p. 360, (*Investors’ Book of Authorities at Tab CA 180*); See also Schreuer, C., “Fair and Equitable Treatment (FET): Interactions with Other Standards”, 4:5 *Transnational Dispute Management*, 2007, at pp. 9-10, (*Investors’ Book of Authorities at Tab CA 181*).

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treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provisions of the [treaty].<sup>142</sup>

181. In the recently released second edition of *Principles of International Investment Law* by Professors Dolzer and Schreuer, they recognize the link between fair and equitable treatment and customary international law. They also note the evolution of the standard with case law:

Depending on the specific wording of a particular treaty, it may overlap with or even be identical to the minimum standard required by international law. The fact that the host state has breached a rule of international law may be evidence of violation of the fair and equitable standard, but this is not the only conceivable form of breach.

The emphasis on linkages between FET and customary international law is unlikely to restrain the evolution of the FET standard. On the contrary, this may have the effect of accelerating the development of customary law through the rapidly expanding practice on FET clauses in treaties. The Tribunal in *Chemtura v Canada* said in this respect:

the Tribunal notes that it is not disputed that the scope of Article 1105 of NAFTA must be determined by reference to customary international law. Such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution.... [I]n determining the standard of treatment set by Article 1105 of NAFTA, the Tribunal has taken into account the evolution of international customary law as a result *inter alia* of the conclusion of numerous BITs providing for fair and equitable treatment.<sup>143</sup>

182. UNCTAD provides another explanation of the implausibility of equating fair and equitable treatment with the international law standard:

Some items of State practice also support the view that the fair and equitable standard does not necessarily amount to the international minimum standard. In a number of BITs involving the United States, and in its model BIT, the fair and equitable standard is combined with full protection and security, and this combined standard is reinforced by the rule that each party to the agreement “shall in no case accord treatment less favorable than that required by international law” (Article II(3)(a)). At the same time, however, the United States has consistently maintained that customary international law assures the international minimum standard for all foreign investments. This approach – fair and equitable treatment with full protection and security on the one hand, and treatment no less favourable than that required by

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<sup>142</sup> Dolzer, R. & Stevens, M., *Bilateral Investment Treaties* (London: Martinus Nihoff Publishers, 1995) at p. 60, (*Investors’ Book of Authorities at Tab CA 10*).

<sup>143</sup> Dolzer, Rudolf and Schreuer, Christoph, *Principles of International Investment Law*, 2nd Ed. (London: Oxford University Press, 2012), at p. 138 (*Investors’ Book of Authorities at Tab CA 199*).

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international law on the other – suggests that the two sets of standards are not necessarily the same.<sup>144</sup>

183. In the end, Canada’s contention would deprive the words “fair and equitable treatment” in NAFTA Article 1105(1) of any meaning. It runs counter to another basic tenet of treaty interpretation, which is that no words in a treaty are to be deprived of their meaning, or interpreted so as to render them superfluous.
184. This Tribunal also needs to take into account approximately 2580 bilateral investment treaties which contain fair and equitable treatment provisions, and make clear the widespread recognition and acceptance of this obligation by state parties.<sup>145</sup>
185. In short, this Tribunal should interpret NAFTA Article 1105(1) in accordance with its actual wording, and give the words “fair and equitable treatment” their ordinary meaning. As UNCTAD aptly put it:

Where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable.<sup>146</sup>

186. The objects and purpose of the NAFTA are also inconsistent with the Parties having intended to restrict the meaning of NAFTA Article 1105(1) to just customary international law. NAFTA Article 102(1) sets out the objectives of the NAFTA:
- a) Promoting transparency;
  - b) Eliminating barriers to trade in, and facilitating the cross-border movement of, goods and services; and
  - c) Promoting conditions of fair competition.

Interpreting the protections of NAFTA Article 1105(1) to be limited to those recognized only by customary international law would not serve to achieve these objectives.

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<sup>144</sup> *Fair and Equitable Treatment* - UNCTAD Series on Issues in International Investment Agreements (United Nations: New York and Geneva: 1999) at p. 39. (*Investors’ Book of Authorities at Tab CA 11*).

<sup>145</sup> Publicly available copies of bilateral investment treaties can be found on Westlaw’s bilateral investment treaty service (ICA-BITREATIES).

<sup>146</sup> *Fair and Equitable Treatment* - UNCTAD Series on Issues in International Investment Agreements (United Nations: New York and Geneva: 1999) at p. 40. (*Investors’ Book of Authorities at Tab CA 11*).

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187. The *travaux préparatoires* of the NAFTA, which are a supplementary means of treaty interpretation, also confirm that NAFTA Article 1105(1) was never intended to exclude general principles of law. Shortly after the Interpretation was issued, the *Pope & Talbot* Tribunal requested Canada to produce all drafting history materials that might support an intention of the Parties' to limit the reference to "international law" in NAFTA Article 1105(1) to "customary international law." In response, Canada produced some 1,500 pages of documents from 43 drafts of the NAFTA. In all those pages and drafts, the Tribunal was unable to find a single intention by the Parties to restrict the meaning of "international law" in NAFTA Article 1105 to "customary international law."<sup>147</sup>
188. This gives rise to the third key reason why Canada's interpretation of the Interpretation is not binding on this Tribunal: they do not constitute a valid "interpretation" of NAFTA Article 1105, but, as Professor Charles Brower II lays out clearly, are instead a purported "amendment".<sup>148</sup>
189. Canada's contention cannot be sustained is that an "Interpretation" is not an "amendment". NAFTA Article 2202 makes clear, the Parties may agree to amend any of its provisions at any time. An actual amendment, however, is required. All of the Parties need to agree, and to go through their respective processes to give legal effect to the amended agreement. An "interpretation" by the Free Trade Commission cannot constitute an amendment to the NAFTA. To amend the NAFTA is *ultra vires* the powers of the Free Trade Commission, and can therefore be of no legal force or effect.
190. In accordance with the rules on interpretation codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, this Tribunal should give the words "fair and equitable treatment" and "international law" in NAFTA Article 1105(1) their ordinary meaning, considering especially that customary law should inform, but must not defeat or frustrate, the ordinary meaning of these words in light of *all* the normal and well-accepted sources of international law.
191. Nevertheless, the investor recognizes that the Interpretation is *one* source of interpretation for 1105 and cannot be ignored. It constitutes a subsequent agreement between the parties concerning the interpretation of the treaty within the meaning of

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<sup>147</sup> For public version of the negotiating history see Appleton, B. (ed) NAFTA: Legal Text and Interpretative Materials, Vol III, Thompson West (2007). (*Investors' Book of Authorities at Tab CA 182*).

<sup>148</sup> Brower, C. H., "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105", International Arbitration News, Summer 2005. (*Investors' Book of Authorities at Tab CA 183*).

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Article 31 3 (a) of the *Vienna Convention on the Law of Treaties*, and thus must be considered *in addition to* (and thus not to the exclusion of) the ordinary meaning of the terms in their context and in light of object and purpose. Hence, a tribunal could not for example give an interpretation of NAFTA Article 1105 that is divorced from, ignores or is in a strict sense incompatible with current norms of customary international law. At the same time, as indicated above, the tribunal is still charged with interpreting and applying the ordinary meaning of the words in 1105 and the Interpretation cannot have the legal effect of requiring willful blindness to other sources of international law in Article 38 of the ICJ Statute or other interpretative sources in Article 31 of the *Vienna Convention on the Law of Treaties*.

**C. It is Customary to Interpret Treaties in Accordance with All Sources of International Law**

192. The established practice of deciding international legal disputes with reference to all the sources of international law is in-and-of-itself customary international legal practice.
193. As is well settled, customary international law is comprised of two essential elements: consistent state practice, and *opinio juris*. That is, customary international law is formed by the consistent practice of states acting in respect of behaviour they consider legally required.<sup>149</sup> Absent either of these two elements, a practice will not obtain the status of customary international law.
194. Article 38(1) of the *ICJ Statute* specifically states that disputes shall be interpreted with reference to all the sources of international law. As a result, the necessary elements of consistent state practice and *opinio juris* are both reflected in the practice of international legal dispute resolution. Resolving international legal disputes in accordance with all the rules and principles of international law is thus a part of customary international law.
195. Thus, even if the Interpretation is valid and binding, and the Tribunal is required only to interpret NAFTA Article 1105(1) in accordance with customary international law, it may nonetheless do so with reference to the full array of sources of international law, as is customary.

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<sup>149</sup> Greig, D. W. *International Law* (London: Butterworks, 1976) at p. 26. (*Investors' Book of Authorities at Tab CA 184*).

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#### D. The “Fair and Equitable Treatment” Standard May Be Inferred from International Jurisprudence

196. Since it is customary to resolve international legal disputes in accordance with all the rules and principles laid out in Article 38(1) of the *ICJ Statute*, this Tribunal is not – as Canada contends<sup>150</sup> – precluded from discerning the content of the fair and equitable treatment standard in light of the other international tribunal decisions.
197. While customary international law is comprised of both state practice and *opinio juris*, nothing in international law suggests – as Canada does – that the decisions of international tribunals may not be used to ascertain what these elements are. As the ICJ famously proclaimed in the *North Sea Continental Shelf* cases:

That Judgment, while well known to have attributed more marked importance to the link between the legal institution of the continental shelf and the physical fact of the natural prolongation that has subsequently been given to it, is nonetheless the judicial decision which has made the greatest contribution to the *formation* of customary international law in this field.

Subsequently, the Court of Arbitration’s Decision of 30 June 1977 on the elimination of the continental shelf between France and the United Kingdom confirms on this point the Court’s conclusion in the *North Sea Continental Shelf* cases and *enunciates* as follows the general rule of customary international law on the matter: “failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles.”<sup>151</sup>

The International Court of Justice therefore recognizes not only may international jurisprudence be considered to “enunciate” customary international law, it may itself contribute to the actual “formation” of customary international law.

198. Drawing from international jurisprudence to ascertain the scope of the “fair and equitable treatment” standard contained in NAFTA Article 1105(1) has also been affirmed by NAFTA Tribunals. As the Tribunal in *ADF* noted:

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<sup>150</sup> See, for example, Canada submits that decisions rendered in the context of non-NAFTA investor-State arbitration are not relevant for this Tribunal in determining the content of NAFTA Article 1105. As a result of the *Glamis* and *Cargill* decisions, Canada’s Counter-Memorial at Footnote 609.

<sup>151</sup> *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Case (Canada v. United States of America)*, [1984], ICJ Rep., Judgement of 12 October 1984, at paras. 91 & 92. [emphasis added], (*Investors’ Book of Authorities at Tab CA 185*).

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[A]ny general requirement to accord ‘fair and equitable treatment’ must be disciplined by being based upon State practice *and judicial or arbitral case law* or other sources of customary or general international law.<sup>152</sup>

199. The Tribunal in *ADF* determines that it is not only *permissible* to inform the meaning of the customary “fair and equitable treatment” in NAFTA Article 1105(1) with reference to international jurisprudence, but it is in fact *required*. The *ADF* Tribunal also confirmed the requirement to interpret NAFTA Article 1105(1) in accordance with the other sources of international law contained in Article 38(1) of the *ICJ Statute*.
200. NAFTA Article 1105(1), like most investment protection treaties,<sup>153</sup> provides for “fair and equitable treatment”, which, as NAFTA Article 1105(1) itself makes clear, is part of customary international law. This standard has been the subject of numerous disputes, and has been developed by a wide array of international tribunals in what has become a rich history of case law jurisprudence, yet Canada would have this Tribunal turn a blind eye to this history.
201. Canada appears to contend that the “fair and equitable treatment” standard in the NAFTA context is somehow narrower than the same standard contained in non-NAFTA investment treaties. But, Canada does not specify in any way how the standards might differ. Canada appears to further suggest that, unlike the fair and equitable treatment standard contained in NAFTA Article 1105(1), the inexplicably different standard contained in non-NAFTA investment treaties has somehow not yet crystallized into a rule of customary international law.<sup>154</sup> Canada is ostensibly only prepared to concede the relevance of the fair and equitable treatment standard contained in non-NAFTA investment treaties if Bilcon is able to specifically prove that it has achieved the status of customary international law – but only without referring to international jurisprudence. Canada offers no hint as to how this onus of proof might be satisfied.

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<sup>152</sup> *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, 2003 WL 24083234 (January 9, 2003) at para. 184 [emphasis added]. (*Investors’ Book of Authorities at Tab CA 9*).

<sup>153</sup> Schreuer, C., “Fair and Equitable Treatment in Arbitral Practice”, 6:3, *The Journal of World Investment & Trade*, June 2005, at p. 357, (*Investors’ Book of Authorities at Tab CA 180*); Organization for Economic Cooperation and Development (OECD), *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment Law No. 2004/3, OECD Paris, September 2004, at p. 5. (*Investors’ Book of Authorities at Tab CA 186*).

<sup>154</sup> Government of Canada’s Counter-Memorial at footnotes 606 and 609.

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202. Specifically proving that the “fair and equitable treatment” standard in non-NAFTA investment treaties has crystallized into a rule of customary international law without reference to international jurisprudence is not only nonsensical, but also highly impractical. To deny that there is any useful overlap between the two supposedly different standards is to engage in an act of willful blindness. To insist that it would be improper to admit any useful overlap between the two only after an investor has specifically proven the elements of consistent state practice and *opinio juris* without making reference to international jurisprudence is to accept a formalistic view of investor-state arbitration that would place an unduly onerous burden of proof upon any wronged investor. There is nothing fair or equitable about such an approach.
203. In any event, specifically proving that the “fair and equitable treatment” standard in non-NAFTA investment treaties has crystallized into a rule of customary international law is in fact not even necessary. There can be no doubt that the “fair and equitable treatment” standard – and the principle of “good faith” it embodies – at least qualifies as a general principle of law.<sup>155</sup> Since the resolution of international disputes in accordance with all the sources of international law – including both general principles of law and decisions of international tribunals – is in-and-of-itself a rule of customary international law, there is nothing that precludes this Tribunal from drawing from this general principle – as interpreted by international jurisprudence – to inform the content of the “fair and equitable treatment” standard in the NAFTA context.
204. As a result, regardless of the relationship between the “fair and equitable treatment” standard in NAFTA Article 1105(1) and the “fair and equitable treatment” standard in other investment protection treaties, it is entirely permissible for this Tribunal to draw from international jurisprudence on the latter to inform the meaning and content of the former. In fact, it can do so without even having to determine the relationship between the two. This is a permissible, legally sound and practical approach.

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<sup>155</sup> Organization for Economic Cooperation and Development (OECD), *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment Law No. 2004/3, OECD Paris, September 2004, at p. 2: “The fair and equitable treatment standard] became established as a principle mainly through the increasing network of bilateral investment treaties.” (*Investors’ Book of Authorities at Tab CA 186*); See also Juillard, P., “L’Evolution des Sources du Droit des Investissements” in *Recueil des Cours* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1994), pp. 132-134. (*Investors’ Book of Authorities at Tab CA 187*).

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### **E. The Autonomous “Fair and Equitable Treatment” Standard and the International Law Standard Have Converged**

205. NAFTA Tribunals have determined that for the purposes of NAFTA Article 1105(1), to the extent that customary law is to be applied, it is to be applied as it stands today.<sup>156</sup> Recent jurisprudence on the “fair and equitable treatment” standard indicates that, while it is possible that there may still be some residual difference between the autonomous standard and customary law standard,<sup>157</sup> this difference is fast disappearing.

206. The *Azurix* Tribunal explained the convergence:

...the minimum requirement to satisfy the [fair and equitable treatment] standard has evolved...and its content is substantially similar whether the terms are interpreted in their ordinary meaning...or in accordance with customary international law.<sup>158</sup>

...The question whether fair and equitable treatment is or is not additional to the minimum treatment required under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.<sup>159</sup>

207. The Tribunal in *CMS Gas* took it further, and concluded that there is no difference between the autonomous “fair and equitable treatment” standard and the international minimum standard:

...the treaty standard of fair and equitable treatment...is not different from the international law minimum standard and its evolution under customary law.<sup>160</sup>

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<sup>156</sup> *ADF* at para. 179, (*Investors’ Book of Authorities at Tab CA 9*); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 2003 WI 24065653, June 26, 2003 (*Investors’ Book of Authorities at Tab CA 13*).

<sup>157</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007 at para. 302, (*Respondent’s Book of Authorities at Tab RA 66*); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID No. ARB/01/3, Award, May 22, 2007 at para. 258, (*Respondent’s Book of Authorities at Tab RA 24*).

<sup>158</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 2006 WL 2095870 (July 14, 2006) at para. 361. (*Investors’ Book of Authorities at Tab CA 1*).

<sup>159</sup> *Azurix* at para. 364, (*Investors’ Book of Authorities at Tab CA 1*).

<sup>160</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 2005 WL 1201002, May 12, 2005, at para. 284, (*Investors’ Book of Authorities at Tab CA 20*).

208. The same view was adopted by the Tribunal in the *Rumeli* case, which, after noting that the parties agreed that “fair and equitable” encompasses such concepts as transparency, arbitrary or discriminatory treatment, good faith, and procedural due process,<sup>161</sup> concluded:

The only aspect [of the fair and equitable treatment obligation] is that for Respondent, the concept does not raise the obligation on Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.<sup>162</sup>

209. Since it is clear that customary international law may be inferred by international jurisprudence, and contemporary jurisprudence confirms there is now a convergence between the “fair and equitable treatment” standard and the international law standard, any question about the impact of the Interpretation is purely academic. Regardless of how “fair and equitable treatment” is to be interpreted in accordance with all the sources of international law, or whether it is to be understood as restricted to only customary international law, the end result appears to be the same: NAFTA Article 1105(1) requires Canada to accord foreign investors “fair and equitable treatment” in accordance with the established plain and ordinary meaning of the term.

#### **F. The Content and Scope of “Fair and Equitable Treatment”**

210. The scope and content of the “fair and equitable treatment” standard is canvassed in the Investors’ Memorial. It sets out the jurisprudence that in NAFTA Article 1105(1) is guided by the overarching principle of “good faith”, which requires that Canada:

- a) Act in accordance with basic fairness and fundamental justice;
- b) Act in a non-arbitrary and non-discriminatory manner;
- c) Respect foreign investors’ legitimate expectations;
- d) Deal with foreign investors according to basic principles of openness and transparency;
- e) Ensure that it not abuse its rights in regulating foreign investors; and

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<sup>161</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 2008 WL 4819868 (July 29, 2008) at para. 609, (*Investors’ Book of Authorities at Tab CA 59*).

<sup>162</sup> *Rumeli*, at para. 611. (*Investors’ Book of Authorities at Tab CA 59*).

- f) Provide foreign investors with a basic level of security of the legal and business environment.

211. A recent UNCTAD study summarizes these elements:

...the overall result of the arbitral decisions to date is that the fair and equitable treatment standard no longer prohibits solely egregious abuses of government power, or disguised uses of government powers for untoward purposes, but any open and deliberate use of government powers that fails to meet the requirements of good governance, such as transparency, protection of the investor's legitimate expectations, freedom from coercion and harassment, due process and procedural propriety, and good faith.<sup>163</sup>

212. Canada contends that none of the recognized elements of "fair and equitable treatment" are included in NAFTA Article 1105(1). Canada purports to deny that "fair and equitable treatment" in NAFTA Article 1105(1) provides foreign investors with any protection from arbitrary or discriminatory state conduct, that it protects the expectations foreign investors may legitimately have,<sup>164</sup> that it requires Canada to abide by any standards of transparency in its dealings with foreign investors,<sup>165</sup> that it obliges Canada in any way to ensure that foreign investors are free to operate in a secure legal and business environment, or that it prevents Canada from engaging in behavior that is an abuse of rights. Canada even goes so far as to suggest that NAFTA Article 1105(1) does not require Canada to respect the overarching principle of "good faith".

213. The result is a preposterous contention that NAFTA Article 1105(1) is devoid of any meaning at all.

*i. Duration and Delay*

214. It is well settled that duration and undue delay can constitute a breach of international law. The ICJ has stated that the "the right to have the case heard and determined within a reasonable time" is one of the elements, which if lacking constitutes a "fundamental errors in procedure which have occasioned a failure of justice."<sup>166</sup> The issue of delay is

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<sup>163</sup> United Nations Conference on Trade and Development, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, New York and Geneva, 2007, at 46, (*Respondent's Book of Authorities at Tab RA 8*).

<sup>164</sup> Government of Canada Counter-Memorial at para. 304.

<sup>165</sup> Government of Canada Counter-Memorial at para. 779.

<sup>166</sup> *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, [1973] ICJ Reports at para 92 (*Investors' Book of Authorities at Tab CA 225*); Recently reaffirmed in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization*, Advisory Opinion of 1 February 2012, para 30. (*Investors' Book of Authorities at Tab CA 227*).

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not restricted to the judicial branch of government but extends to any “other organ of the state.”<sup>167</sup>

215. The conclusion that delays by officials are actionable was also reached in the *Interoceanic Railroad of Mexico* case. In that decision the Tribunal was considering whether a delay of a commission tasked with reviewing a claim for monetary reparations it stated:

They are undoubtedly aware that denial of justice or its undue delay will, in a majority of cases, be an act or an omission of a tribunal, but cases in which administrative, or rather non-judicial authorities, can be blamed for such acts or omissions are equally existent.

...

If a foreigner, in the pursuit of his private interests, needs a document, which can only be delivered by one of the administrative authorities in the country where he transacts his affairs, and if this document is improperly withheld or delivered too late to be of any use, this will again constitute the same breach of international law, without any judicial authority being blamable.<sup>168</sup>

216. In *Chevron*, the Tribunal found that Ecuador was guilty of an undue delay they had been subject to before the Ecuadorian courts. It stated:

... once delay has become unreasonable and a breach of the BIT has been completed, a decision issued after that date cannot affect the liability of the State for the undue delay<sup>169</sup>

217. In *Oostergetel v the Slovak Republic*, the Tribunal accepted as a matter of law that undue procedural delays, in that case a delayed court process, would constitute a denial of justice.<sup>170</sup> The Tribunal in *Roberts* also found that undue delay constitutes a wrong in criminal proceedings.<sup>171</sup> A similar conclusion was reached in *Chattin*.<sup>172</sup> The UN Human

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<sup>167</sup> G Fitzmaurice, "The Meaning of the Term 'Denial of Justice'" 13 *British Year Book of International Law* 93 (1932) at p 94, as cited in Paulsson, J. "Denial of Justice in International Law", (Cambridge University Press: 2006) p. 53, footnote 39. (*Investors' Book of Authorities at Tab CA 241*).

<sup>168</sup> *Interoceanic Ry. of Mexico Case, (Gr. Brit. v. Mex.)*, 5 R. International Arbitration Awards 178, 185 (1931). (*Investors' Book of Authorities at Tab CA 228*).

<sup>169</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, of 30 March 2010. (*Investors' Book of Authorities at Tab CA 230*).

<sup>170</sup> *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, para. 290 (Although the Tribunal found that the facts demonstrated that the delay was justified). (*Investors' Book of Authorities at Tab CA 231*).

<sup>171</sup> *Harry Roberts (U.S.A.) v. United Mexican States (Roberts Case)*, 4 R. International Arbitration Awards 77, 80 (1926) (*Investors' Book of Authorities at Tab CA 232*).

<sup>172</sup> *B. E. Chattin (United States.) v. United Mexican States*, 23 July 1927 VOLUME IV pp. 282-312. (*Investors' Book of Authorities at Tab CA 233*).

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Rights Committee found Canada had been in breach over undue delay with respect to addressing a complaint of an Indian band in *Lovelace*.<sup>173</sup>

### **G. Canada Need Not Act in Bad Faith to Breach its Duty to Act in Good Faith**

218. “Good Faith”, as an overarching principle of international law, is so well settled that any suggestion to the contrary cannot be honest. The principle of “good faith” is expressed in many international obligations.<sup>174</sup> One is the duty of a host State to provide foreign investors “fair and equitable treatment.” This direct connection between the principle of “good faith” and the “fair and equitable treatment” standard has been recognized by many Tribunals.<sup>175</sup>
219. While bad faith may indicate a breach of “fair and equitable treatment”, it is not necessary for a state to act in bad faith to violate its obligation of good faith.
220. Thus, even if Canada were found to have not acted in bad faith, its conduct still leads to the unavoidable conclusion that it violated its obligation to provide Bilcon with “fair and equitable treatment.” Nevertheless, there are a number of examples of bad faith in Canada’s treatment of Bilcon.

### **H. Breach of Any One of the Elements of “Fair and Equitable Treatment” is Sufficient but not Necessary for a Violation of NAFTA Article 1105(1)**

221. Although the “fair and equitable treatment standard” is comprised of all the above-noted elements, a violation does not require a breach of every element. Rather, breach of any one of the elements is sufficient.

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<sup>173</sup> *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990). (*Investors’ Book of Authorities at Tab CA 234*).

<sup>174</sup> For example, under Article 26 of the *Vienna Convention*, Canada is required to perform its obligations under NAFTA in good faith. (*Investor’s Book of Authorities at Tab CA 44*)

<sup>175</sup> *S.D. Myers; Inc. v. Government of Canada*, First Partial Award, 2000 WL 34510032, November 13, 2000, at para. 134. (*Investors’ Book of Authorities at Tab CA 6*); *Tecnicas Medioambientales, TECMED s.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 2003 WL 24038436, May 29, 2003, at para. 153, (*Investors’ Book of Authorities at Tab CA 7*); *Eureko B.V. v. Republic of Poland*, Partial Award, 2005 WL 2166281, August 19, 2005, at para. 235, (*Investors’ Book of Authorities at Tab CA 8*); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 2004 WL 3249805, August 3, 2004, at para. 308, (*Investors’ Book of Authorities at Tab CA 54*); *Rumeli v. Kazakhstan* at para. 609 (*Investors’ Book of Authorities at Tab CA 59*).

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222. In support of its implausible contention that none of the obligations Bilcon refers to in its Memorial are part of the “fair and equitable treatment” standard contained in NAFTA Article 1105(1), Canada prefers that none of the elements that comprise the standards are “stand alone” obligations amounting to customary rules of international law.<sup>176</sup>
223. Canada’s logic here is backwards. Since the “fair and equitable treatment” standard has the status of customary international law, it is the entire “fair and equitable treatment” standard – not its component parts – that forms the customary international law. The failure to act in accordance with any one of the elements of “fair and equitable treatment” may not of itself trigger a violation of NAFTA Article 1105(1), but that is not the test.
224. For example, in discussing the relationship between “arbitrariness” and the “fair and equitable treatment” standard, the *LG&E* Tribunal noted:
- ...characterizing the measures as not arbitrary does not mean that such measures are characterized as fair and equitable... it was not arbitrary, though unfair and inequitable, not to restore the Gas Law or the other guarantees related to the gas distribution sector and to implement the contract renegotiation policy.<sup>177</sup>
225. The *Petrobart* Tribunal approached the “fair and equitable treatment” analysis in a similar way. That case involved a claim under Article 10(1) of the Energy Charter Treaty, which provides:
- Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment...<sup>178</sup>
226. Rather than scrutinize the Kyrgyz Republic’s actions under each obligation mentioned in Energy Charter Treaty Article 10(1) separately, the Tribunal considered all of them in its analysis of “fair and equitable treatment”:

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<sup>176</sup> Government of Canada Counter-Memorial at para. 315 and footnote 609.

<sup>177</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 Decision on Liability, September 26, 2006, at paras. 162-163. (*Respondent’s Book of Authorities at Tab RA 34*).

<sup>178</sup> *Energy Charter Treaty*, [1994], Article 10(1), (*Investors’ Book of Authorities at Tab CA 188*).

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The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic's action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.<sup>179</sup>

227. The Tribunal in *Noble Ventures v. Romania* followed a similar approach. In determining whether Romania had violated the "fair and equitable treatment" provision of the Romania-US BIT, the Tribunal noted the fair and equitable treatment standard is breached, where one or more elements of that standard are not met, even if other elements are not in issue.<sup>180</sup>

#### **I. The Threshold for a Breach is Not What Canada Contends**

228. Canada requires that a breach of NAFTA Article 1105(1) requires that the impugned behaviour displays a willful disregard of due process of law...which shocks, or at least surprises, a sense of judicial propriety.<sup>181</sup> What Canada ignores is that tribunals have adopted this as a standard for "arbitrariness", not for "fair and equitable treatment".
229. For example, Canada relies on the *Mondev* Tribunal which used the *ELSI* case as a backdrop against which it adopted a much different threshold.<sup>182</sup> The Tribunal actually said:

The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome...In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.<sup>183</sup>

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<sup>179</sup> *Petrobart Limited v. Kyrgyz Republic*, Arbitration Number 126/2003, Arbitral Award, March 29, 2005, at p. 76, (*Investors' Book of Authorities at Tab CA 189*).

<sup>180</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, at para. 182, (*Investors' Book of Authorities at Tab CA 190*).

<sup>181</sup> Government of Canada Counter-Memorial at paras. 321-325.

<sup>182</sup> Government of Canada Counter-Memorial at footnote 622.

<sup>183</sup> *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2002 WL 32841359, October 11, 2002, at para. 127. (*Investors' Book of Authorities at Tab at CA 40*); *Loewen*, Award on Jurisdiction at para. 131, (*Investors' Book of Authorities at Tab CA 13*).

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Indeed, the *Mondev* Tribunal, rejected the proposition that a violation of “fair and equitable treatment” required conduct that is “outrageous” or even “egregious”.<sup>184</sup>

230. *Mobil Oil*, another NAFTA Tribunal has considered that the *Neer* standard constitutes a test for NAFTA Article 1105. The *Mobil* Tribunal did appreciate that the international law standard of treatment has evolved to reflect the international community’s perceptions as to what measures are considered not in conformity with that treatment. The Tribunal acknowledged that the gravity or severity of the breach need not be “egregious”, “shocking”<sup>185</sup> or which is the precondition associated with the law of diplomatic protection of aliens, as espoused in *Neer*.
231. Indeed, the *Mobil* Tribunal stated that the standard is a “flexible one which must be adapted to the circumstances of each case”.<sup>186</sup> The nature of Mobil’s claim was limited to a claim of protection of legitimate expectations. The tribunal found, on the facts, that Canada had not made the kind of specific representations or commitments to the investor in *Mobil* the non-fulfillment of which would constitute a violation of 1105. By contrast, the present claim is largely based on violations of 1105 unconnected to expectations but rather due to conduct that is inherently or intrinsically unfair, inequitable and discriminatory. In the present claim, to the extent that there is an issue of expectations, it relates to specific instances where officials knowingly misrepresented to the investor their legal authority, or material facts about the regulatory process. The *Mobil* tribunal acknowledged that conduct of that nature could indeed fall below the standard required by 1105.
232. In any event, in the *Mobil v Canada* Award, Mobil and Canada made an agreement that the standard of NAFTA Article 1105 would be *solely* determined by minimum standard of treatment under customary international law.<sup>187</sup> The Tribunal’s determination that NAFTA Article 1105 was not breached,<sup>188</sup> was in reference to that agreement between the parties.

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<sup>184</sup> *Mondev*, Award, at para. 116, (*Investors’ Book of Authorities at Tab CA 40*).

<sup>185</sup> *Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada*, Decision on Liability and on Principles of Quantum, ICSID Case No ARB/07/4; IIC 566 (2012), May 22, 2012, Paras 126, 152 (*Investors’ Book of Authorities at Tab 194*).

<sup>186</sup> *Mobil*, Para 141 (*Investors’ Book of Authorities at Tab 194*).

<sup>187</sup> *Mobil*, Para 13 (*Investors’ Book of Authorities at Tab 194*).

<sup>188</sup> *Mobil*, Para 135 (*Investors’ Book of Authorities at Tab 194*).

233. Canada also ignores that many other Tribunals – NAFTA and non-NAFTA– have confirmed that a violation of “fair and equitable treatment” need not be triggered by an act that is in and of itself “outrageous” or “egregious”.<sup>189</sup> Canada also ignores that various tribunals have determined that a violation of “fair and equitable treatment” may be triggered by behaviour that is simply “unreasonable”.<sup>190</sup> Indeed, Canada neglects to mention that in the context of “fair and equitable treatment”, the Tribunal in *Saluka* drew a close relationship between “reasonableness” and “fair and equitable treatment”:

The standard of “reasonableness” has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is associated; and the same is true with regard to the standard of “non-discrimination”. The standard of “reasonableness” therefore requires...a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor.”<sup>191</sup>

234. The nexus between “fair and equitable treatment” and the duty to act “reasonably” was affirmed by the Tribunal in *Continental Casualty*, which said:

...the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.<sup>192</sup>

235. Canada also ignores that the Tribunals in *MTD Equity*, *Azurix*, and *Siemens* all affirmed that, in the context of “fair and equitable treatment” analysis, what is required is “treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.”<sup>193</sup> Where the treatment in question is seen to be unjust or not even-handed, there may be a violation of “fair and equitable treatment.”

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<sup>189</sup> *Pope & Talbot*, (*Investors’ Book of Authorities at Tab CA 12*); *ADF*, (*Investors’ Book of Authorities at Tab CA 9*); *GAMI*, (*Investors’ Book of Authorities at Tab CA 15*).

<sup>190</sup> *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia and JSC v Republic of Moldova*, SCC Arbitration, Arbitral Award, 2004 WL 235957, September 22, 2005, at p. 10. (*Investors’ Book of Authorities at Tab CA 106*); *Eureko* at para. 234, (*Investor’s Book of Authorities at Tab CA 8*).

<sup>191</sup> *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 2006 WL 1342817, March 17, 2006, para. 460. (*Investors’ Book of Authorities at Tab CA 101*).

<sup>192</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, at para. 254, (*Investors’ Book of Authorities at Tab CA 191*).

<sup>193</sup> *MTD Equity Sdn. Bhd. & MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award, WL 3254661, May 25, 2004, at para. 17, (*Investors’ Book of Authorities at Tab CA 21*); *Azurix* at para. 360, (*Investors’ Book of Authorities at Tab CA 1*); and *Siemens* at para. 290, (*Investors’ Book of Authorities at Tab CA 54*).

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236. The conclusions of Tribunals such as in *Azurix* and *CMS Gas* reflect a merging of the treaty standard of “fair and equitable treatment” and the international minimum standard. Not only does the obligation to accord foreign investors “fair and equitable treatment” require Canada to act in a non-arbitrary and non-discriminatory manner, it also requires Canada to act reasonably. Where there was no reasonable relationship between Canada’s actions and a rational policy, it manifestly failed to act reasonably, thereby violating its duty to provide “fair and equitable treatment”.
237. In any event, many aspects, individually and cumulatively, of the governmental treatment of Bilcon are plainly egregious, and fall below even the threshold contended for Canada. At the same time, Canada’s reference to cases which rely upon *ELSI* as a *locus classicus* for the relevant customary international law seems in direct contradiction to its other pleadings addressed above, which, incorrectly eschew resort to the judgments of international courts and tribunals to determine the content of customary international law.
238. In the case of *SS Lotus*, the majority opinion of the Permanent Court of International Justice held that a state should be assumed to have complete latitude of action unless the Claimant can prove the existence of a specific rule of international law restraining its conduct and engaging international legal responsibility.<sup>194</sup> On the basis of the theory of *SS Lotus*, what is not prohibited to a state is generally permitted. International courts and tribunals have generally required that the existence of a rule of international law be clearly established or proven before state responsibility is engaged.
239. The rules of law on which the Investors rely on to engage the international responsibility of Canada are provisions of a valid, in-force treaty, the North American Free Trade Agreement. Canada nevertheless asserts that, despite NAFTA Article 1105 being a valid provision of an in-force treaty, there is a further condition precedent for its invocation in

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<sup>194</sup> *S.S. Lotus (France v. Turkey)*, (1927) P.C.I.J. (Ser. A) No. 10 (September 7, 1927) (*Investors’ Book of Authorities at Tab CA 229*), p. 19. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

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the proof of the *existence of additional* rules of international law.<sup>195</sup> Canada appears to view NAFTA Article 1105 as in the nature of a compromissary or jurisdictional clause, which creates no primary obligation but gives a right of action to enforce rules of customary international law, but only where the Investors can establish their existence. However, the ordinary meaning of NAFTA Article 1105 in light of its context, object and purpose, is that it constitutes a primary obligation of “fair and equitable treatment”, which engages state responsibility in accordance with the provisions of dispute settlement and damages that constitute the relevant *lex specialis* of state responsibility in the NAFTA.

240. Canada’s submissions therefore confuse a situation such as *Lotus* where it is thought that state responsibility can only be engaged if the claimant can prove the existence of a rule constraining the presumed complete latitude of action of a state, with the situation under the NAFTA, where state responsibility is clearly engaged through a primary obligation in a valid treaty, and where customary international law only becomes relevant as a matter of interpretation of the primary obligation that engages responsibility in the first place. In this latter situation, where the threshold question is not *whether* there is any international responsibility but rather the content of the *primary* obligation in the treaty, no particular burden of proof is required. Each party makes its submissions to the tribunal about the meaning of the applicable law and the governing principle is *iura novit curiam*.
241. The text of NAFTA Article 1105 itself makes it clear that parties to the NAFTA agree that a minimum standard of treatment of investors already exists in international law, and that it constitutes the floor or minimum content of the primary obligation in NAFTA Article 1105. This further shows that the drafters of NAFTA never intended the proof of the *existence* of rules of customary international law as a condition precedent for the invocation of the primary obligation in Article 1105.
242. Whatever its legal effect, a matter which the Investors have addressed at length elsewhere in this Reply and in its Memorial, Free Trade Commission Notes of Interpretation also discloses the understanding of the NAFTA parties that the proof of discrete rules of customary international law by the Investors is not required for reliance on NAFTA Article 1105. On the contrary, the Interpretation purports to establish customary international law as a *ceiling* or *cap* on the liability of the host state under

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<sup>195</sup> Government of Canada Counter-Memorial, para. 318., fn. 602

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NAFTA Article 1105. Thus, the Interpretation contemplates that, having made an interpretation of the primary obligation in NAFTA Article 1105, and applied that interpretation to the facts, the tribunal will then check customary international law to ensure that its interpretation of NAFTA Article 1105 as applied to the facts does not lead to liability on the part of the host state for actions or omissions that are not *also* violations of custom.<sup>196</sup> The logic of this structure implies, if anything, that it is up to the host state to invoke customary law as a *shield* or *defense*, and thus to establish that its conduct does not violate any existing customary rule.

243. Canada misreads the decision of the *Glamis* Tribunal. The *Glamis* Tribunal never put in question the acceptance by the NAFTA parties of the *existence* of a long-standing *acquis* of customary law that creates legal restraint on the treatment of investors by host states. The *Glamis* Tribunal never suggested that the investor found themselves in a “*Lotus*-like” world where international responsibility could not be engaged unless the investor first of all proved the very existence of a regime of legal restraint. Rather, the *Glamis* Tribunal understood the *content* of the *existing* regime as fixed by a particular generation of arbitrations concerning diplomatic protection of aliens. Since the *Glamis* Tribunal viewed the Investor’s claim under Article 1105 as implying a content that went *beyond* the standard evoked by that generation of arbitrations, the *Glamis* Tribunal held that the Investor, in those circumstances, would have to prove the existence of a new or changed rule of custom, through establishing both state practice and *opinio juris*. Furthermore, contrary to Canada’s suggestion, the *Glamis* Tribunal did not suggest that decisions of courts and tribunals are not valid sources of the content of customary international law. Rather the tribunal held that these rulings are not a means of creating custom *ex nihilo*, where it does not already exist.<sup>197</sup> Thus, the weight of these precedents depends ultimately on the *foundation* of their holdings concerning custom on state practice and *opinion juris*. Arguably, this is formally correct, but it may abstract from the increasing extent to which binding international dispute settlement is *the very context* in which state practice and *opinio juris* evolve.

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<sup>196</sup> Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, 31 July 2001), Extract from Appleton, B. NAFTA: Legal Text and Interpretative Materials (West Publishing, 2007) Vol 3, 1-3 (*Investors’ Book of Authorities at Tab CA 43*).

<sup>197</sup> *Glamis Gold, Ltd v. United States of America*, UNCITRAL Arbitration, Award, 2009 WL 2389802, June 8, 2009 at paras. 606-607 (*Investors’ Book of Authorities at Tab CA 116*).

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244. The approach of the *Glamis* and *Cargill* Tribunals purports to create a strong presumption against the evolution of customary international law at least as it concerns the treatment of investors by host states. Interference with a state's sovereignty over persons, juridical or natural, within its own territory is to be regarded as something exceptional, and should be assumed to only apply in cases of egregious and grave misfeasance. These tribunals explicitly contemplate that what kinds of acts and omissions approach this level of misfeasance has evolved and is evolving as the norms of the international community evolve. They accept that the *practice* of deference to state sovereignty has changed but not the *principle* of deference. But if the *practice* of deference has changed, and that practice is connected to a sense of the extent of international *legal obligation*, is not one really saying that custom itself has evolved?
245. In any case, Bilcon's claim is that the content of the "minimum standard of treatment in international law", affirmed by the NAFTA Parties in Article 1105, is more than sufficient to establish, on the facts, the alleged breaches of NAFTA Article 1105.<sup>198</sup> What Bilcon disputes is Canada's view of the *content* of the international standard that the drafters had in mind, and its interpretation of case law, none of which puts in question the existence of a standard of treatment in international law. In sum, Bilcon does not have to prove the existence of any customary rule of international law the existence of which has not already been affirmed by the Parties in NAFTA Article 1105 and indeed in the Interpretation as well.
246. Canada's submissions persistently confuse the issue of the content of the standard of treatment required by NAFTA Article 1105 with the burden of proof in investment arbitration.<sup>199</sup> Neither NAFTA Article 1105 nor for that matter the Interpretation establish any special burden of proof on the Investors. Canada argues that only particularly egregious or shocking conduct violates the standard in Article 1105.<sup>200</sup> Assuming this were correct (and the Investors argue otherwise) it would merely mean that Investors would have to prove, on the balance of probabilities, those facts that establish egregious or shocking conduct on the part of the host state.

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<sup>198</sup> Memorial of Investors, para. 290.

<sup>199</sup> Government of Canada Counter Memorial at para 316.

<sup>200</sup> Government of Canada Counter-Memorial, paras. 323-325.

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247. Canada wrongly insinuates that the Investors are challenging the legitimate regulatory authority of Canada over the environment.<sup>201</sup> The Investors do not challenge any environmental law or regulation of Canada. Instead, the Investors' claim under NAFTA Article 1105 rests upon facts establishing that officials exercised their discretion under this legal and regulatory framework in a manner that was exceedingly unfair and inequitable. A finding that particular officials acted in a manner that is unfair and inequitable, thus under NAFTA Article 1105, in no way would constrain the legitimate regulatory authority of Canada. It does not in the least impair the Canadian democracy's right to pass as strict or onerous environmental laws regulations as it pleases. There is no country in the world where officials do not sometimes act inappropriately and act from motivations other than the public interest. But for treaties such as NAFTA and customary international law, these matters would indeed be left to domestic courts along the lines that Canada suggests in paragraph 320, where it refers to the *Glamis* Tribunal. But we are long past that point and it is well established that where officials cause harm to aliens, such behaviors by officials can engage international responsibility
248. Canada as a general matter rejects the authoritative value of any particular decision of an international court or tribunal in establishing the content of the standard of treatment in NAFTA Article 1105. Yet Canada's sole basis for rejecting the Investors' submissions concerning the content of the relevant international law is the restatement of the law in two relatively recent decisions by NAFTA tribunals.<sup>202</sup> In a diametric opposition to its general assertions downgrading international precedent, Canada presents these particular decisions as if they were the last, and therefore binding or authoritative precedents of a national high court. But in fact Canada offers no reason why the statements of the content of the law by these particular tribunals should be preferred to the many other and different statements cited by the Investors in their pleadings, as well as other sources such as academic authorities, reports of international organizations such as UNCTAD and codification exercises such as those of the International Law Commission. The Investors have no doubt that the *Glamis* and *Cargill* decisions represent views of distinguished jurists, but so do many other decisions that do not presuppose that misfeasance must be egregious or shocking to become a matter of international concern under contemporary international law, including provisions such as NAFTA Article 1105. Ultimately, it is for this tribunal to weigh all of this material

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<sup>201</sup> Government of Canada Counter Memorial at para 328.

<sup>202</sup> Government of Canada Counter-Memorial, paras. 323-325.

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in a considered manner, on the basis that it is applying a treaty in accordance with the customary international law rules of treaty interpretation.

249. On several occasions in its memorial, Canada suggests that there should be some form of inference drawn from the failure of the Investors to seek redress in the domestic courts of Canada.<sup>203</sup> However, rightly, Canada has *not* asserted that exhaustion of local remedies is a condition precedent to the invocation of dispute settlement under Chapter 11 of NAFTA. Where a special international dispute settlement provision gives an Investor direct access to redress at the international level, without the need to exhaust local remedies, it is up to the that Investor to assess the strategy that best serves its needs and that is likely to be most fruitful.

**J. The Test is Flexible and Applied to All Circumstances**

250. The *Waste Management* Tribunal noted, “the standard is to some extent a flexible one which must be adapted to the circumstances of each case.”<sup>204</sup> Nonetheless, what the jurisprudence does make certain is that the more grievous and numerous the violations of the various indicia, the more likely there is to be a violation of the duty to provide “fair and equitable treatment”.
251. Bearing all this in mind, the simple question for this Tribunal is: in light of all the circumstances of this case, and with a view to all the sources of international law, with the jurisprudential convergence between the autonomous treaty standard of “fair and equitable treatment” and the customary international law standard, has Canada violated its obligation to accord Bilcon the type of “fair and equitable treatment” guaranteed by NAFTA Article 1105(1)? That, of course, depends on the facts. And the facts are clear and compelling.

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<sup>203</sup> Government of Canada Counter-Memorial, paras. 5, 305, 320-321, 325.

<sup>204</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 2004 WL 3249803, April 30, 2004 at para. 99, (*Investors’ Book of Authorities at Tab CA 14*).

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## II. ARTICLE 1102 - NATIONAL TREATMENT

### A. Overview

252. The purpose of national treatment is to ensure that investors and the investments of investors from the United States or Mexico receive treatment equivalent to that provided to the most favorably treated Canadian investor or its investment. The purpose of the obligation is clear: it is to ensure that Canadian governments do not provide better treatment to locals than that provided to foreigners. Similarly, NAFTA Article 1103 provides a similar obligation to provide the best treatment provided to investors of a third state. Through NAFTA Article 1104, it is clear that the NAFTA's intent is to provide the investments of an investor from another NAFTA party with the best treatment provided in like circumstances in the jurisdiction, whether it be national treatment or most favoured nation treatment.
253. National treatment is one of three interpretative principles informing the meaning of the entire NAFTA.<sup>205</sup> National treatment is a fundamental principle supporting the NAFTA, which is used to fulfill its objective to liberalize trade and investment. In addition to its use in NAFTA Article 1102, several other NAFTA provisions oblige the Parties to accord national treatment.<sup>206</sup>
254. In its Counter-Memorial Canada has advanced an artificial construction of national treatment that is inconsistent with the fundamental principles which underscore the meaning of national treatment, as well as the context, meaning and objectives of the Treaty.

### B. GATT/WTO Experience is Important in Interpreting Article 1102

255. While appearing several times throughout the NAFTA, the term "national treatment" is not further defined. It is a term of art. Although the obligation originated over a century ago, the main influences on NAFTA Article 1102 are equivalent provisions in the WTO's GATT and GATS.<sup>207</sup> The relationship between the NAFTA and the GATT is

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<sup>205</sup> NAFTA Article 102(1).

<sup>206</sup> For example, there are national treatment obligations for goods (Article 301), for energy (Article 602), for services (Article 1202) and for financial services (Article 1405).

<sup>207</sup> The interpretive principle of Most-Favoured Nation Treatment contained in NAFTA Article 102 would also strongly support a relationship between these agreements and NAFTA. So does Article 103 which specifically addresses that relationship.

expressed in the preamble of the NAFTA, in which the NAFTA Parties recognized that the NAFTA is built on “their respective rights and obligations under the General Agreement on Tariffs and Trade.”<sup>208</sup> The NAFTA and WTO national treatment provisions are virtually identical. GATT Article III:4 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Similarly, Article XII of the GATS says:

... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and service suppliers...

Both articles contain similar elements to those contained in NAFTA Article 1102.<sup>209</sup> The requirement of “no less favorable” treatment is the same. Both articles limit the measures in which they apply, albeit in different ways. Finally, NAFTA Article 1102 applies to investors and investments in “like circumstances,” whereas the GATT and GATS articles apply respectively to “like products” and “like services”.<sup>210</sup>

256. NAFTA Article 1102’s application to all investors and investments in like circumstances means that it is a broader obligation than the GATT and GATS articles. In recognizing this broader application, the UNCTAD has said:

The scope of national treatment in the investment field goes well beyond its use in trade agreements. In particular, the reference to “products” in article III of the GATT is inadequate for investment agreements in that it restricts national treatment to trade in goods. The activities of foreign investors in their host countries encompass a wide array of operations, including international trade in products, trade in components, know-how and technology, local production and distribution, the raising of finance capital and the provision of services, not to mention the range of transactions involved in the creation and administration of a business

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<sup>208</sup> Memorial of Investors at para. 389. The preamble forms an integral part of the NAFTA and it must be given meaning in the interpretation of the NAFTA pursuant to NAFTA Article 102 and the *Vienna Convention*.

<sup>209</sup> Indeed, the *Pope & Talbot* Tribunal described Article 12 of the GATS as “identical” to NAFTA Article 1102(2): *Pope & Talbot*, Award on the Merits of Phase 2, 10 April 2001 at para. 52, (*Investors’ Book of Authorities at Tab CA 12*).

<sup>210</sup> These GATT and GATS obligations are subject to WTO public policy exceptions which permit public policy exceptions for certain specified reasons if such measures are the least trade restrictive possible and do not constitute an arbitrary means of discrimination (for example, see GATT Article XX), (*Investors’ Book of Authorities at Tab 48*).

enterprise. Hence, wider categories of economic transactions may be subjected to national treatment disciplines under investment agreements than under trade agreements.<sup>211</sup>

257. NAFTA Article 1102 also fulfills a similar purpose to its equivalent GATT and GATS articles. The GATT *US - Petroleum* Panel recognized that the purpose of Article III is to protect expectations of equality and of competitive opportunity. The Panel said the purpose of the Article is:

to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties[,] ... to protect current trade [and] to create the predictability needed to plan future trade.<sup>212</sup>

258. Canada's own *Statement of Implementation* acknowledges the influence of the GATT/WTO on the NAFTA:

The NAFTA and the Uruguay Round agreements cover much of the same ground and the two sets of rules are largely complementary and mutually reinforcing. In many respects, the NAFTA built on progress that had been made in the Uruguay Round while the Round in turn profited from the experience of Canada, the United States and Mexico in negotiating the NAFTA.<sup>213</sup>

It is clear from Canada's own statements on the NAFTA, made in connection with the implementation of the NAFTA, that GATT and the NAFTA negotiations were interconnected and inter-dependent.

259. The origins of NAFTA Article 1102 in GATT Article III, the similar wording in the provisions, the equivalent purposes, and Canada's acknowledgement of the influence of the WTO provisions on the NAFTA, ensures that GATT/WTO national treatment jurisprudence informs the meaning of the three elements of NAFTA Article 1102. It is for this reason that several NAFTA tribunals have drawn from GATT/WTO jurisprudence to interpret the elements of NAFTA Article 1102.<sup>214</sup>

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<sup>211</sup> *National Treatment* - UNCTAD Series on Issues in International Investment Agreements at p. 9 (United Nations: New York and Geneva: 1999) [Emphasis added] (*Investors' Book of Authorities at Tab CA 192*).

<sup>212</sup> *United States - Taxes in Petroleum and Certain Imported Substances*, General Agreement on Tariffs and Trade, Report of the Panel 1987 WL 421960 (G.A.T.T.) (June 17, 1987) at para. 5.2.2., (*Investors' Book of Authorities at Tab CA 49*).

<sup>213</sup> *Canadian Statement on Implementation*, North American Free Trade Agreement, Canada Gazette Part 1, January 1, 1994 at 75. (*Investors' Book of Authorities at Tab CA 45*).

<sup>214</sup> *S.D. Myers*, First Partial Award, 12 November 2000 at para. 244, (*Investors' Book of Authorities at Tab CA 158*). *Pope & Talbot*, Award on the Merits of Phase 2, 10 April 2001 at para. 68 - 69, footnote 68, (*Investors' Book of Authorities at Tab CA 12*). *Feldman v. Mexico*, Award at para. 165: "The national treatment/non-discrimination provision is a fundamental obligation of Chapter 11. The concept is not new with NAFTA. Analogous language in

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260. At the time of the negotiation of the GATT, the GATS and the NAFTA, Canada was applying similar principles, including national treatment, to the central areas of economic activity, including trade in goods, trade in services and national treatment to investment. It is clear that the principle of national treatment was well-known to Canada at this time and that this treatment was best expressed around international trade law concepts.
261. In any event, the National Treatment experience in the GATT/WTO context is relevant to the interpretation of NAFTA Article 1102's underscored by Article 31(3)(c) of the *Vienna Convention*. That provision requires that a treaty be interpreted in light of "any relevant rules of international law applicable in the relations between the parties." If this provision were to be construed to permit consideration of other relevant rules of international law in the interpretation of treaties only where those other rules were expressed in *identical* language, it would be rendered largely inutile, since the only situations in which it would apply would be ones of actual direct *incorporation*. In such situations, however, Article 31(3)(c) of the *Vienna Convention* would be inapplicable, since the intent of the parties to import one legal regime into another would be manifestly clear.
262. For the foregoing reasons, there can be no doubt that this Tribunal can legitimately draw from the GATT/WTO experience with National Treatment to interpret the content and scope of NAFTA Article 1102.

### C. NAFTA Article 1102 - The Analytical Steps

263. NAFTA Article 1102(1) and (2) read as follows:
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
  2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

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Article III of the GATT has applied between Canada and the United States since 1947 and with Mexico since 1985, with regard to trade in goods." (*Investors' Book of Authorities (Tab CA 51)*).

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264. As is evident from the express wording of these provisions, there are three key aspects to the national treatment obligation. First, Canada must accord foreign investors and/or their investments treatment that is “no less favorable” than that which it accords to its own investors and investments. Second, the differential treatment must be with respect to investors and/or investments “in like circumstances”. Third, the differential treatment must be “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.” For an investor to establish a successful claim based on Article 1102, it must satisfy each of these three elements.
265. While NAFTA Article 1102 makes the three elements of national treatment analysis abundantly clear, it is less clear about the order in which the analysis must proceed. Bilcon has suggested that the order should be as follows:<sup>215</sup>
- a) Determine whether the Investor and/or its investments are in “like circumstances” to certain domestic investors and/or their investments;
  - b) If so, determine whether the Investor and/or its investments has been accorded “less favorable treatment” than those investors and/or investments; and
  - b) If so, determine whether the “less favorable treatment” is “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”
266. National treatment is a “term of art” in international trade and investment law.<sup>216</sup> Bilcon’s Memorial has demonstrated how the term was used in international treaty practice for decades before the NAFTA was negotiated.<sup>217</sup>
267. In its Counter-Memorial, Canada proposes a subjective and narrow construction of national treatment. Canada reads into 1102 of NAFTA, without any textual support, a

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<sup>215</sup> Memorial of Investors at para. 373.

<sup>216</sup> Indeed, the *Methanex* tribunal accepted that the term “like products” used in the GATT national treatment obligation for goods constituted a “term of art” under the *Vienna Convention*. See *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits, 2005 WL 1950817, August 3, 2005, at para. 29. (*Investors’ Book of Authorities at Tab CA 94*). If the “like products” sub-test is a term of art, then certainly it stands to reason that the term “national treatment” must also be considered to be a term of art as well under the *Vienna Convention*.

<sup>217</sup> Memorial of the Investors at para. 372-415.

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carve out that would allow the pursuit of otherwise non-even handed or even discriminatory policies provided that some public policy objective can be asserted to be advanced by the action in question. This interpretation is contrary not only to NAFTA Chapter 11 jurisprudence, but also to that of the GATT and WTO as well.

268. Canada contends by stating that NAFTA Article 1102 must be interpreted according to the rules set out in Article 31 of the *Vienna Convention*.<sup>218</sup> Canada then ignores each of these rules:

- a) **Interpretation in Good Faith in Accordance with Ordinary Meaning:** Canada suggests meanings of the words "treatment" and "like circumstances". That are contrary to the repeated decisions of international tribunals to the contrary.
- b) **Context:** Canada ignores the fact that the national treatment obligation appears throughout the NAFTA and the WTO agreements, which were negotiated concurrently with NAFTA. It purports to distinguish the applicability of the WTO jurisprudence on the basis that the words "like circumstances" have a different meaning from the WTO language of "like goods", "like services" and "like service providers". As discussed in Bilcon's Memorial, Canada's approach is contrary to the representations of all three NAFTA Parties made to the Panel in the NAFTA Chapter 20 state-to-state arbitration, *In the Matter of Cross Border Trucking Services*.<sup>219</sup>
- c) **Object and Purpose:** Nowhere in Canada's discussion of national treatment is there any mention of the objects and purpose of the NAFTA, including the objective of promoting "conditions of fair competition in the free trade area".<sup>220</sup> Canada's contention that the national treatment obligation only prevents nationality-based discrimination is simply wrong. Measures can violate the national treatment obligation even if motivated by legitimate non-discriminatory public policy purposes.<sup>221</sup>

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<sup>218</sup> Government of Canada Counter-Memorial at Fn. 795.

<sup>219</sup> *In the Matter of Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel (February 6, 2001) at para. 249. (*Investors' Book of Authorities at Tab CA 46*).

<sup>220</sup> NAFTA Article 102(b).

<sup>221</sup> Government of Canada Counter-Memorial at para. 401.

269. Starting with the consideration of likeness immediately focuses the analysis on what the comparator group should be. It makes little practical sense to determine whether "less favourable treatment" has been accorded without deciding this matter first. It is simply impossible to make a meaningful determination of "less favourable treatment" until the comparator group by which to measure differential treatment has already been established. It is for this reason that most NAFTA Tribunals have made this the first step of their NAFTA Article 1102 analyses,<sup>222</sup> with the *Methanex* Tribunal stating that the "like circumstances" inquiry is the "very threshold" of the Article 1102 analysis.<sup>223</sup>
270. It makes little practical sense to first enquire as to whether there is simply "treatment". The existence of "treatment" flows naturally from the existence of a "measure". The question of whether there is a "measure" in dispute is a question to be considered as a matter of jurisdiction. The question is not whether there has simply been "treatment", but rather whether the treatment is "less favorable" than that accorded to domestic investors and/or their investments. This question properly forms the second step of NAFTA Article 1102 analysis.

#### **D. Step 1: "Like Circumstances" Analysis**

271. The method for determining when a foreign investor is in "like circumstances" with domestic investors for the purposes of NAFTA Article 1102 is not expressly laid out in the NAFTA. While there has been some jurisprudence on this matter, this jurisprudence displays multiple not always consistent directions. As a result, this issue remains unsettled. This is reflected in the disputing parties' vastly different positions in the context of this dispute.

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<sup>222</sup> See, for example, *Methanex*, Final Award, (*Investors' Book of Authorities at Tab CA 94*). *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, November 21, 2007 (*Respondent's Book of Authorities at Tab RA 3*), and *Feldman v. Mexico*, (*Investors' Book of Authorities at Tab CA 51*). Also see the carefully reasoned analysis of the specific issue by Dean Ronald A. Cass in *UPS v. Canada*, (*Investors' Book of Authorities at Tab CA 89*).

<sup>223</sup> *Methanex*, Final Award, at para. 29, (*Investors' Book of Authorities at Tab CA 94*).

i. *“Like Circumstances” Requires a Comparison Between the Investor Claimant and Domestic Investors Engaged in Similar Economic Activities and/or Regulated by the same General Legal Framework*

272. The Investors have set out the appropriate basis for likeness to be applied in the case of regulatory measures of general applicability in Paragraphs 400-415 of their Memorial. The case that is most applicable in considering this exact circumstance is *Occidental Oil Exploration and Production Company v. Republic of Ecuador*.
273. In the *Occidental Exploration and Production Company v. Republic of Ecuador* Award, the Tribunal commented on the discussion of the meaning “like products” in respect of national treatment under GATT/WTO law. The Tribunal noted that in GATT/WTO context, “the concept has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products.”<sup>224</sup> The *Occidental* tribunal observed that in GATT/WTO law, “no exporter ought to be put in a disadvantageous position as compared to other exporters,” whereas, under bilateral investment treaties, “the comparison needs to be made with the treatment of the ‘like’ product and not generally.”<sup>225</sup> The Tribunal observed that “the reference to ‘in like situations’ used in the Treaty seems to be different from that to ‘like products’ in the GATT/WTO” because “the ‘situation’ can relate to all exporters that share such condition, while the ‘product’ necessarily relates to competitive and substitutable products.”<sup>226</sup>
274. The effect of an overly narrow interpretation of “in like circumstances” weakens the provision by unduly eliminating useful comparators. An example of an overly narrow approach may be seen in the *Methanex* Award. The *Methanex* Tribunal held, “it would be ... perverse to ignore identical comparators if they [are] available and ... use comparators that [are] less ‘like’.” NAFTA Article 1102, however, does not specify that “identical comparators” will be required before any comparison may be made.<sup>227</sup> The use of the term “identical” is, in fact, not found in NAFTA Article 1102.

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<sup>224</sup> *Occidental*, Final Award, at para. of 174 (*Investors’ Book Authorities Tab CA 18*); citing Appellate Body Report, *Korea-Taxes on Alcoholic Beverages*, WT/DS84/AB/R, adopted on February 17, 1999, at para. 118. (*Investors’ Book of Authorities Tab CA 160*).

<sup>225</sup> *Occidental*, Final Award, at para. 176. (*Investors’ Book of Authorities Tab CA 18*).

<sup>226</sup> *Occidental*, Final Award, at para. 176. (*Investors’ Book of Authorities Tab CA 18*).

<sup>227</sup> *Methanex*, Final Award, at para. 17. (*Investors’ Book of Authorities at Tab CA 94*).

275. Prof. Vandeveldel noted that a narrow approach to identifying a comparator presents difficulties and stated that “ensuring competitive equality does not exhaust the purpose of a non-discrimination provision.”<sup>228</sup>
276. Based upon a review of several investment tribunal’s approaches, Prof. Vandeveldel noted that the “purpose of the like circumstances requirement is not to permit the host state to engage in discriminatory action whenever no sufficiently close comparator exists.”<sup>229</sup> Rather, Prof. Vandeveldel observed that the “purpose is to prevent unjustified discriminations, the assumption being that treating unlike investments differently is justifiable.”<sup>230</sup> With this in mind, he proposed that investments may be “like” if “none of the differences [are] relevant to legitimate nondiscriminatory policies of the host state.”<sup>231</sup> Prof. Vandeveldel added:

The like circumstances test supports the policy behind the nondiscrimination provisions by attempting to remove from consideration comparators whose different treatment was based on legitimate, nondiscriminatory policies, but it was not intended to provide a technical defense for adverse treatment resulting from a discriminatory motive. Thus, ... even where no plausible comparator exists, the tribunal should find a violation *if the treatment of the covered investment was the result of a discriminatory motive, that is, was not in furtherance of a legitimate host-state regulatory interest.*<sup>232</sup>

277. The *Occidental* dispute exemplifies the application of the objective standard by an investment tribunal. In this dispute, the investor submitted a claim rising under the United States-Ecuador BIT. The Tribunal compared the investor, a petroleum exporter, with domestic companies that exported other products that were not in the same economic sector. The Republic of Ecuador argued “that ‘in like situations’ can only mean that all companies in the same sector are to be treated alike and this happens in respect of all oil producers.”<sup>233</sup> Furthermore, the Republic of Ecuador argued that a comparison cannot be extended to other sectors because the purpose of the government policy was “to ensure that the conditions of competition are not changed, a scrutiny that is relevant only in the same sector.”<sup>234</sup>

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<sup>228</sup> Kenneth J. Vandeveldel, *Bilateral Investment Treaties, History, Policy, and Interpretation* (Oxford: Oxford University Press, 2010) at 341, (*Investors’ Book of Authorities* at Tab CA 151).

<sup>229</sup> Vandeveldel, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities* Tab CA 151).

<sup>230</sup> Vandeveldel, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities* Tab CA 151).

<sup>231</sup> Vandeveldel, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities* Tab CA 151).

<sup>232</sup> Vandeveldel, *Bilateral Investment Treaties*, at 385. (*Investors’ Book of Authorities* Tab CA 151).

<sup>233</sup> *Occidental*, Final Award, at para. 171. (*Investors’ Book of Authorities* Tab CA 18).

<sup>234</sup> *Occidental*, Final Award, at para. 171. (*Investors’ Book of Authorities* Tab CA 18).

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278. The *Occidental* Tribunal observed that “the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.”<sup>235</sup> NAFTA Article 1102 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1102 would be by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.
279. With respect to the operations of Bilcon, it is appropriate to consider all enterprises affected by the environmental assessment regulatory process to be in like circumstances with Bilcon. The environmental regulatory scheme is with respect to the establishment, acquisition, expansion and conduct of the investment.
280. In some cases, the nature of the regulatory intervention has been such that it was directed towards those aspects of economic activity that concern the investor’s access to markets for the sale of its goods and or services. To that extent, in national treatment cases, the like circumstances analysis has centered on the consideration of production of like products or goods. This focuses on how the regulatory intervention affects the terms of how the investor is affected by the governmental measures.
281. The impact of the measures then leads to defining what needs to be considered. So if the measure addresses access to resources, this creates a different analysis than that which may occur with another type of measure concerning access to consumer markets.
282. Thus, in the *Pope & Talbot* claim, the Tribunal had to consider market access for the export of softwood lumber. The Tribunal looked at competitors in that particular marketplace in its consideration of likeness.<sup>236</sup>
283. By contrast, the governmental measure involved in the case of Bilcon was in connection to the establishment, acquisition, expansion and conduct of the investment as the environmental regulatory scheme looks at proposed new activity and its expansion of existing activity. Accordingly, all those who are subject to the consideration of such expansion related activities, including involved in environmental assessment would be in the same position as Bilcon and thus would be in like circumstances.
284. In its Counter-Memorial, Canada misconstrues *Occidental*. In *Occidental*, Ecuador advanced a reading of the “likeness” test, the purpose of which was to narrow the

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<sup>235</sup> *Occidental*, Final Award, at para. 173. (*Investors’ Book of Authorities Tab CA 18*).

<sup>236</sup> *Pope & Talbot*, Award on the Merits of Phase 2, at para. 78. (*Investors’ Book of Authorities Tab CA 12*).

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meaning of “like circumstances.” The Tribunal in *Occidental* would not accept a narrowing interpretation, since it ran counter to the objects and purposes of the treaty in question. In explaining its decision, the Tribunal stated:

...the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken...the purpose of national treatment...is to avoid exporters being placed at a disadvantage in foreign markets...no exporter ought to be put in a disadvantageous position as compared to other exporters.<sup>237</sup>

On this view of national treatment, the Tribunal concluded that the foreign exporter in that case was in fact put in a disadvantaged position compared to a domestic exporter. In light of the objects and purposes of the treaty in question, the Tribunal then went on to find that Ecuador had violated its duty to accord the foreign investor national treatment.

285. Applying the approach adopted by the Tribunal in *Occidental* to “like circumstances” analysis to this case yields a markedly different result than Canada suggests. As laid out in NAFTA Article 102, the objectives of the NAFTA, “as elaborated through its principles and rules, including national treatment”, include:

- a) Eliminating barriers to trade in, and facilitating the cross-border movement of, goods and services between the territories of the Parties; and
- b) Promoting conditions of fair competition in the free trade area.<sup>238</sup>

Like the objectives of the treaty in *Occidental*, the objectives of the Treaty in the NAFTA support a purposive interpretation of “like circumstances”, which leads to a regulatory framework applied to the investors being compared. This purposive interpretation is natural, reasonable and supported by the context and the purposes of the NAFTA.

286. In addition to investment tribunals, the objective approach may be seen in GATT/WTO case law, as well as European Court of Justice case law. Earlier GATT 1947 jurisprudence highlights the objective approach, as several reports relied on different tariff classifications, in addition to physical differences between products to evaluate

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<sup>237</sup> *Occidental*, Final Award, at paras. 173, 175 and 176, (*Investors’ Book of Authorities at Tab CA 18*).

<sup>238</sup> NAFTA, Article 102(1)(a) & (b).

“likeness”.<sup>239</sup> The European Court of Justice jurisprudence also reflects an objective approach that also took into account economic considerations when interpreting ‘similar products’ under Article 110(1) of the *Treaty on the Functioning of the EU* developed parallel to NAFTA and WTO jurisprudence.<sup>240</sup>

287. When analyzing “likeness” based upon the objective standard, the *tertium comparationis*, the basic common comparator, may consist of factors such as physical characteristics, tariff classification, end-uses or even the act of exportation.<sup>241</sup> Thus, the objective standard is dependent upon the criteria applied by the tribunal.
288. In addition to the objective approach to non-discrimination provisions, WTO panels and the Appellate Body have also interpreted “likeness” using a subjective approach. The rationale behind the subjective standard of “likeness” is “to argue that the *tertium comparationis* is defined by the regulatory purpose of the measure under scrutiny”.<sup>242</sup> The subjective approach in GATT/WTO case law has also been addressed as an “aim and effects” approach.<sup>243</sup>
289. The Appellate Body has stated that a formal distinction between imports and domestic products is not necessary to find a violation of GATT Article III:4 because the treatment must be “less favorable.”<sup>244</sup> “Likeness” analysis is commonly considered in GATT and

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<sup>239</sup> See GATT Panel Report, *Treatment by Germany of Imports of Sardines (Germany – Sardines)*, G/26, adopted 31 October 1952, BISD 1S/53, at para 13 (*Investors’ Book of Authorities at Tab CA 152*); GATT Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber (Japan – SPF Dimension Lumber)*, L/6470, adopted 19 July 1989, BISD 36S/167, at paras 5.13 ff (*Investors’ Book of Authorities at Tab CA 153*); GATT Working Party Report, *The Australian Subsidy on Ammonium Sulphate (EEC – Animal Feed Proteins)*, GATT/CP.4/39, adopted 3 April 1950, BISD II/188, at para 4.2 (*Investors’ Book of Authorities at Tab CA 154*).

<sup>240</sup> See *Commission v Denmark* [1986] ECR 833, Case 106/84: “the Court held, ‘it is necessary first to consider certain objective characteristics ..., and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers’.” (*Investors’ Book of Authorities Tab CA 177*).

<sup>241</sup> Nicolas Diebold, “Non-Discrimination and the Pillars of International Economic Law - Comparative Analysis and Building Coherency”, *Society of International Economic Law*, June 30, 2010, 23., at 5. (*Investors’ Book of Authorities Tab CA 150*).

<sup>242</sup> N. Diebold, “Non-Discrimination and the Pillars of International Economic Law”, at para 7, noting that in GATT 1947 jurisprudence this subjective standard was implemented with the “so called ‘aim and effects’ test as part of the ‘like products’ analysis (*Investors’ Book of Authorities at Tab CA 150*).”; citing to GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages (US-Malt Beverages)*, DS23/R, adopted 19 June 1992, BISD 39S/206, at paras. 5.23-5.26. (*Investors’ Book of Authorities Tab CA 155*). Notably, subsequent WTO panels and the Appellate Body have rejected the “aim and effects” test for purposes of both GATT and GATS).

<sup>243</sup> N. Diebold, “Non-Discrimination and the Pillars of International Economic Law”, at para 7 (*Investors’ Book of Authorities at Tab CA 150*).

<sup>244</sup> *Appellate Body Report, Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 at paras. 135-137 (*Investors’ Book of Authorities Tab CA 156*); referencing *United States - Section 337 of the Tariff Act of 1930, General Agreement on Tariffs and Trade*, Report of the Panel (7 November 1989) at para. 5.11 (*Investors’ Book of Authorities Tab CA 52*).

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WTO jurisprudence. The Investors draw from a rich history of GATT law to guide its argument. In its Counter Memorial, Canada ignored the relevance of GATT law to the analysis of like circumstances.

290. Arbitrator, Professor Ronald Cass' analysis in the *UPS* case considers:

The most natural reading of NAFTA Article 1102...gives substantial weight to a showing of competition between a complaining investor and an investor of the respondent Party in respect of the matters at issue in dispute under Article 1102...A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a prima facie case of like circumstances.<sup>245</sup>

This reading clearly does not suggest that GATT law is devoid of any instructive value in the context of NAFTA Article 1102, as Canada contends.

291. Canada has also not addressed the "likeness" language used in the General Agreement on Trade in Services "GATS", as interpreted in the NAFTA context. The GATS national treatment obligation also uses the phrase "like circumstances", which is not only mirrored in the "likeness" test used in NAFTA Article 1102, but also in NAFTA Article 1202(1).<sup>246</sup> The GATS Parties confirmed that the GATS national treatment obligation is to be taken to require equality of competitive opportunities.<sup>247</sup> The GATS Parties are under a legal obligation not to enter into other agreements that offer a standard of protection lower than that offered by the GATS.<sup>248</sup> The GATS was negotiated concurrently with the NAFTA, and, as such, the protections offered in the NAFTA must be interpreted to provide at least the same level of protection as to that offered in the GATS<sup>249</sup> – a level of protection that extends to Chapter 11 of the NAFTA.<sup>250</sup>

ii. *"Like Circumstances" Does Not Mean "Identical" or "Most Like" Circumstances*

292. Canada's approach simply ignores the plain and ordinary wording of NAFTA Article 1102. This provision clearly states that foreign investors are to be accorded "treatment no less

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<sup>245</sup> *UPS*, Separate Statement of Dean Ronald A. Cass, May 24, 2007 at para. 17, (*Investors' Book of Authorities at Tab CA 89*).

<sup>246</sup> Memorial of Investors at para. 385.

<sup>247</sup> Memorial of Investors at para. 384.

<sup>248</sup> Memorial of Investors at para. 387.

<sup>249</sup> Memorial of Investors at para. 385.

<sup>250</sup> Memorial of Investors at para. 387.

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favorable” than domestic investors “in like circumstances”. Had the drafters of the NAFTA intended national treatment in NAFTA Article 1102 to protect only foreign investors or investments in "identical" or "most like" circumstances, they could easily have said so.

293. This ordinary reading is supported by the overall context in which the words “like circumstances” in NAFTA Article 1102 appear. NAFTA Article 1102 affords protection “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.” From the broad circumstances of the application of this national treatment obligation, it is clear that the protections of NAFTA Article 1102 are meant to be extended to foreign investors from host government measures that adversely impact them. This suggests that the protections of NAFTA Article 1102 were meant to be broad indeed. Restricting these protections by reading in a highly restrictive meaning to “like circumstances” where “like” really means “identical” or the “most like” certainly must run counter to the specific context of the entire obligation as worded in NAFTA Article 1102.
294. Canada’s restrictive interpretation of NAFTA Article 1102 would greatly reduce the protection it is meant to provide foreign investors, and conflicts with the objectives of the NAFTA:
- a) Eliminating barriers to trade in, and facilitating the cross-border movement of, goods and services between the territories of the Parties; and
  - b) Promoting conditions of fair competition in the free trade area.<sup>251</sup>
295. Canada’s approach would lead to ambiguous, absurd and unreasonable results. It provides no guidance as to what “identical” or “most like” investors actually means, and would render inutile the Treaty’s protections. For example, assume that there are two potential domestic investors by which to compare the treatment accorded to the foreign investor. Assume further that the first candidate is somehow deemed to be “more like” the foreign investor than the second candidate, even though both are clearly in the same business and economic sector as the investor, as well as in a directly competitive relationship. Under Canada’s approach, NAFTA Article 1102 would offer the foreign investor no protection if the first domestic investor received the same treatment, even though the second domestic investor clearly received more favorable

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<sup>251</sup> NAFTA, Article 102(1)(a) & (b)

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treatment. Such a result would be inconsistent with the underlying principle of national treatment, and would be capable of undermining the fundamental free trade purposes of the NAFTA.

296. On its face, Canada's approach simply makes no sense. It is futile to look for investors in "identical" circumstances. As Arbitrator Cass noted in his consideration of this NAFTA obligation in the *UPS* case:

NAFTA does not require the sort of near identity of circumstances urged by Canada, a test that if adopted would substantially undermine the efficacy of Article 1102. Canada's approach would require an excessively close *fit* between the complaining investor or investment and the compared domestic investment. National treatment protection would be dramatically reduced under that approach, as it would eliminate any right to protection whenever there were differences between the complaining party and the compared investment or investor even if those differences were slight enough not to affect the competitive relationship that Article 1102 was designed to protect.<sup>252</sup>

297. Focussing NAFTA Article 1102 analysis on the competitive relationship between investors is not only consistent with the context and purposes of the NAFTA, but it also provides a principled approach to provide much needed clarity both to investors and governments alike.

*iii. "Like Circumstances" Analysis Should Not Factor In Policy Objectives*

298. Canada further contends that policy objectives are a relevant factor for the purposes of "like circumstances" analysis.<sup>253</sup> Again, Canada's position is not untenable.
299. Canada points to an OECD publication, and to an UNCTAD study that refers to the same publication.<sup>254</sup> However, far from endorsing Canada's view, this publication merely says that policy objectives "could" be taken into consideration in "like circumstances" analysis – not that policy objectives "must" or even "should" be taken into consideration.<sup>255</sup>

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<sup>252</sup> *UPS v. Canada*, Separate Statement of Dean Ronald A. Cass at para. 14. (*Investors' Book of Authorities at Tab CA 89*).

<sup>253</sup> Government of Canada Counter-Memorial at para. 424.

<sup>254</sup> Government of Canada Counter-Memorial at Fn. 831.

<sup>255</sup> *Organization for Economic Co-Operation and Development (OECD), National Treatment for Foreign-Controlled Enterprises*, OECD: 1993, at 22. (*Respondent's Book of Authorities at Tab RA 53*).

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300. Similarly, Canada's contention that "like circumstances" means "identical" or "most like" circumstances, and that non-specified public policy objectives are a relevant consideration to "like circumstances" runs counter to the express wording of NAFTA Article 1102 itself. Nowhere in NAFTA Article 1102 did the Parties make any suggestion that the national treatment obligation is conditioned by the policy objectives of the host state. Had that been the intention, the Parties could have easily achieved this result.
301. Instead, the NAFTA Parties actually decided *against* allowing broad categories of public policy exceptions from applying to the NAFTA Investment Chapter's obligations. The NAFTA Parties knew how to make such exceptions. Such broad exemptions are contained in GATT Chapter XX and were specifically applied to other parts of the NAFTA through the NAFTA's Exemptions in NAFTA Chapter 21. They specifically do not apply to the Investment or Services Chapters in the NAFTA.
302. Instead, the NAFTA drafters applied a different mechanism to allow public policies to be exempted. NAFTA Article 1102 is already subject to exceptions permitted by NAFTA Article 1108. Because the NAFTA Parties rejected general public policy exceptions for the Investment Chapter in the NAFTA, they created specific listed exemptions. The Parties were also able to express reservations to be filed in their respective Schedules to Annexes I and II of the NAFTA. Canada made numerous reservations to the application of NAFTA Article 1102 to sectors of its economy, each of which was based on an underlying policy rationale. For example, Canada reserved whole swathes of its economy from the future application of NAFTA Article 1102, including the following sectors:
- a) Telecommunications;<sup>256</sup>
  - b) Government finance;<sup>257</sup>
  - c) Minority affairs;<sup>258</sup>
  - d) Social services;<sup>259</sup>
  - e) Air transportation;<sup>260</sup> and
  - f) Water transportation.<sup>261</sup>

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<sup>256</sup> Reservation at II-C-3 and II-C-5, (*Investors' Book of Authorities at Tab CA 193*).

<sup>257</sup> Reservation at II-C-7, (*Investors' Book of Authorities at Tab CA 193*).

<sup>258</sup> Reservation at II-C-8, (*Investors' Book of Authorities at Tab CA 193*).

<sup>259</sup> Reservation at II-C-9, (*Investors' Book of Authorities at Tab CA 193*).

<sup>260</sup> Reservation at II-C-10, (*Investors' Book of Authorities at Tab CA 193*).

<sup>261</sup> Reservation at II-C-11, (*Investors' Book of Authorities at Tab CA 193*).

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303. It is therefore clear that the Parties turned their minds to the need to reserve various economic sectors from the application of NAFTA Article 1102. It is equally clear that Canada made able use of its ability to do so. These reservations are all fundamentally predicated on Canada's desire to pursue particular social and economic policies but were subject to negotiation with all the NAFTA parties. Thus, to introduce a new unwritten public policy exception into the "likeness" analysis runs counter to the express wording of NAFTA Article 1102, and is inconsistent with the clear intention of the Parties at the time they negotiated and signed the NAFTA.
304. This commonsense reading is also supported by the overall wording of NAFTA Article 1102, which evinces a context that supports an expansive – not a restrictive – interpretation of national treatment protections. NAFTA Article 1102 affords protection "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments." This demonstrates that the drafters intended the protections of NAFTA Article 1102 to protect foreign investors from measures that have almost any sort of negative impact on them. The protections of NAFTA Article 1102 were always meant to be broad. Restricting these protections by reading in an unbridled new policy exception runs counter to this intention, as evinced in the context of the overall wording of NAFTA Article 1102.
305. That policy considerations do not properly belong in "like circumstances" analysis is further evidenced by the fact that such an approach would run counter to the objectives of the NAFTA itself. These objectives include:
- a) Eliminating barriers to trade in, and facilitating the cross-border movement of, goods and services between the territories of the Parties; and
  - b) Promoting conditions of fair competition in the free trade area.<sup>262</sup>

NAFTA Article 102 expressly calls for national treatment to be interpreted in accordance with these objectives. Nowhere does NAFTA Article 102 say that national treatment is to be interpreted in accordance with policy considerations. Room for such considerations for Chapter 11 obligations was amply provided for in NAFTA Article 1108 exceptions and in the reservations made in the Parties' respective Schedules to Annexes I and II.

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<sup>262</sup> NAFTA, Article 102(1)(a) & (b).

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306. Allowing policy objectives to play a role in “like circumstances” analysis would further lead to absurd or unreasonable results. If Canada could invoke the very policy under scrutiny as a basis for a finding of unlike circumstances, it could therefore entirely escape the applicability of the national treatment obligation to that policy. Generally, international law does not accept “self-judging” of justifications for nullification or impairment of benefits set out in a treaty. Furthermore, the *ILC Articles* do not permit Canada to rely on municipal law obligations to justify failure to comply with its international law obligations.<sup>263</sup>
307. Canada’s proposition, in essence, is that what places two investors in “like circumstances” or not is the way in which Canada treats them. If Canada treats them the same, then they are in “like circumstances.” If Canada treats them differently, then they are not in “like circumstances.” This approach improperly conflates the “likeness” analysis with “treatment” analysis, and conveniently creates a standard whereby Canada could never be in violation of NAFTA Article 1102. On the one hand, any differential treatment would render the investors “unlike”, and, on the other hand, any investors in “like circumstances” could not possibly be subject to differential treatment. This would lead to the absurd result of allowing a mistaken and discriminatory policy to absolve Canada of liability for that very same policy. The end result would be to deprive NAFTA Article 1102 of any meaning whatsoever.
308. As Canada’s suggested inclusion of a policy exception to NAFTA Article 1102 runs counter to the express wording of Article 1102, and also the objects and purposes of the NAFTA, it is clear that what Canada seeks to do is to introduce a “special meaning” to the term “like circumstances”. As mentioned, under Article 31(4) of the Vienna Convention, a “special meaning” may only be applied where the party advancing it can demonstrate that it reflects the intention of the Parties. Unlike Bilcon, Canada has access to the whole *travaux préparatoires* and drafting history of the NAFTA – yet it has demonstrated no such evidence in support of the “special meaning” for “like circumstances” it proposes.

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<sup>263</sup> *ILC Article 32* provides that a state may not rely on the provisions of its own internal law as justification for its failure to comply with its obligations. See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (*Investors’ Book of Authorities at Tab CA 76*). This obligation is also set out in Article 27 of the *Vienna Convention of the Law of Treaties (Investors’ Book of Authorities at Tab CA 44)*.

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309. A close examination of the text of the public policy exceptions in the GATT also makes clear that these exceptions, whatever their effects on other operative provisions of the GATT, were never designed as a carve out to exempt public policies from scrutiny as to their even handedness, or to permit unjustified or arbitrary differential treatment in the *application* of policies that otherwise in themselves serve legitimate objectives. Thus, all of the exceptions in Article XX of the GATT are governed by a preambular paragraph (“chapeau”) that requires that policies not be *applied* in a manner that constitutes arbitrary or unjustifiable discrimination. There is simply no need to assume that either NAFTA or the GATT were based on a notion that member states need to be able to operate public policies that are not even-handed or entail discrimination that is not justifiable.
310. Canada relies on the ICSID decision in *Parkerings-Compagniet A.S. v. Lithuania*<sup>264</sup> to support its position that public policy concerns form part of the “likeness” analysis.<sup>265</sup> In *Parkerings*, the ICSID Tribunal had to address national treatment with respect to government measures in connection to the environment. However, any possible similarity with the Bilcon claim ends at this point.
311. The *Parkerings* Tribunal decision is very unusual and generally should not be relied upon because of obvious errors within its analysis. The Tribunal made a decision that less favourable treatment is acceptable if a state's legitimate objective justifies such different treatment. Canada contends that the relevant factors for “like circumstance” analysis should include the size of a project, its proximity to the culturally sensitive area, and the any opposition over archeological and environmental concerns”.<sup>266</sup>
312. The *Parkerings* Tribunal simply ignored the terms of the governing Norway - Lithuania bilateral investment treaty which formed the basis for this claim.<sup>267</sup> This entire treaty was eight pages long. Article IV contained a most favoured nation treatment obligation which stated:

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<sup>264</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007 (*Respondent’s Book of Authorities at Tab RA 54*).

<sup>265</sup> Government of Canada Counter-Memorial at para. 425.

<sup>266</sup> Government of Canada Counter-Memorial at para. 425.

<sup>267</sup> Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments, dated June 16, 1992. (*Investors’ Book of Authorities at Tab CA 198*).

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Investments made by Investors of one Contracting Party in the territory of the other Contracting party, ..... shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state.

313. The Tribunal analysed the MFN obligation in the Lithuania - Norway Treaty by looking at national treatment decisions, but did not consider any MFN decisions in its analysis. It simply relied on national treatment decisions based on different national treatment obligations. Astonishingly, the *Parkerings* Tribunal then decided to read a like circumstances requirement into the Lithuania-Norway MFN obligation when none existed in the treaty.
314. By comparison, the NAFTA contains detailed treaty provisions and this provision does not permit public policy to form a part of the likeness analysis.
315. Furthermore, the drafters of the NAFTA explicitly set out areas where environmental policy was superior to the obligations contained within the NAFTA. Article 104 of the NAFTA contains a list of environmental treaties whose provisions are superior to that in the NAFTA. Furthermore, the NAFTA Parties, could, and in fact, did, increase the listing of these treaties through an exchange of letters after the NAFTA had been signed.<sup>268</sup>
316. In addition, the Investors have already made reference to the hundreds of NAFTA reservations and the many exceptions that applied generally to the national treatment and MFN treatment obligations in Chapter 11 of the NAFTA. These specific reservations and exceptions were selected to replace general public policy exceptions contained in NAFTA Chapter 21 (like those in GATT Article XX) that apply to obligations in other chapters of the NAFTA .
317. If Canada's view of the *Parkerings* award were to be followed, then this Tribunal would have to specifically ignore all of the careful drafting within the NAFTA with the highly attenuated reservations, exceptions and scoping language that had been negotiated by the NAFTA Parties.
318. A determination of like circumstances also does not result in an automatic determination that National Treatment has been violated. Instead, what is required is treatment no less favourable. Objective and impartially applied regulatory distinctions between enterprises that are like may be compatible with national treatment if those

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<sup>268</sup> NAFTA Annex 104.1 allowed for the scheduling of additional environmental treaties to be given priority over NAFTA obligations.

distinctions do not result in treatment less favourable, an expression that must be interpreted in the light of the context, object and purpose of NAFTA as well the jurisprudence of National Treatment in the GATT and WTO<sup>269</sup>. Thus there is no reason why the application of an approach to likeness based primarily on market-based considerations would unduly impair the capacity to conduct legitimate non-discriminatory public policies. Similarly, as noted above with respect to the “chapeau” of Article XX of the GATT, neither the GATT nor related agreements such as GATS renders permissible treatment that is not even-handed, regardless of the importance of the public policy objective.

319. The economic competitive relationship between public policy objectives and the principle of national treatment has been considered by WTO panels and the Appellate Body in several WTO cases.<sup>270</sup> Recently, the WTO Appellate Body concluded on an approach that balanced a State’s right to regulate and its concern to avoid the trade restrictiveness that is found both in the preamble of the *Agreement on Technical Barriers to Trade* (TBT Agreement) and in the operation of Article XX of the GATT in relation to GATT Article III:4 (National Treatment).<sup>271</sup>

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<sup>269</sup> See particularly World Trade Organization (WTO) report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, March 12, 2001 (*Investors’ Book of Authorities at Tab CA 50*); World Trade Organization (WTO) report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, April 12, 2012. (*Investors’ Book of Authorities at Tab CA 196*); World Trade Organization (WTO), Report of the Appellate Body, *Dominion Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, April 25, 2005 (*Investors’ Book of Authorities at Tab CA 197*).

<sup>270</sup> For instance, see World Trade Organization (WTO) report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distributing of Bananas*, September 9, 1997. (*Investors’ Book of Authorities at Tab CA 201*); World Trade Organization (WTO) Panel Body Report, *European Communities – Regime for the Importation, Sale and Distributing of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM; WT/DS27/R/HND, 22 May 1997. (*Investors’ Book of Authorities at Tab CA 215*); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243 (“*EC-Asbestos*” (*Investors’ Book of Authorities at Tab CA 50*); Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367 (“*DR-Cigarettes*”) (*Investors’ Book of Authorities at Tab CA 197*); and most recently, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, circulated 4 April 12, 2012 (“*US-Clove Cigarettes*”) (*Investors’ Book of Authorities at Tab CA 196*).

<sup>271</sup> World Trade Organization (WTO) report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 12 April 2012. (*Investors’ Book of Authorities at Tab CA 196*).

320. The Appellate Body's analysis explains each of the authorities cited by Canada in its Counter-Memorial as evidence of Tribunals examining public policy objectives in National Treatment claims.<sup>272</sup> The tools developed by the Appellate Body in a recent *US-Cloves Cigarettes* case demonstrate how the Appellate Body' Report examines the implications of public policy control.

**E. NAFTA Jurisprudence Interpreting Likeness in 1102**

321. Canada presents public policy factors as matters that automatically render two otherwise competing entities "unlike", thereby immunizing their comparative treatment from scrutiny.<sup>273</sup> It thereby seeks to rely on its own public policy objectives to excuse it from liability under NAFTA Article 1102. Canada in fact has argued that these policies can be seen in its explanation for distinguishing Bilcon and the Whites Point Quarry environmental assessment from all other environmental assessments.<sup>274</sup> In fact Canada has not shown that the basis of its worse treatment of Bilcon than these other investors regulated under the same law concerning environmental protection were public policy considerations. Indeed Canada has failed to produce documentary evidence showing the actual considerations that animated decisions to treat Bilcon in a vastly different manner from these other investors. Canada has sought support from several NAFTA Tribunals who have considered Respondent' States policy objectives in the course of their "like circumstances" analysis.<sup>275</sup> These Tribunals, unfortunately, were not in a position to do so. Neither the wording of NAFTA Article 1102, nor the objects and purposes of the NAFTA suggest that this approach is appropriate or consistent with the treaty. Canada however has looked to these NAFTA Awards to explain the "unique" policy factors that must inform any likeness assessment for NAFTA Article 1102.<sup>276</sup>

322. Canada relies on the *Pope & Talbot* decision to contend that public policy considerations are required in the likeness test of National Treatment.<sup>277</sup>

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<sup>272</sup> Government of Canada Counter-Memorial, at paras. 424-426.

<sup>273</sup> Government of Canada Counter-Memorial, at paras. 423-424.

<sup>274</sup> Government of Canada Counter-Memorial, at para. 427.

<sup>275</sup> Government of Canada Counter-Memorial, at paras. 424-425.

<sup>276</sup> Government of Canada Counter-Memorial, at 423.

<sup>277</sup> Government of Canada Counter-Memorial, at para. 424.

323. However, Canada misapprehends the conclusion drawn by the Tribunal. Tribunal said:

Differences in treatment will *presumptively* violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic-owned firms, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

324. The Tribunal's reference to a *presumption* of a violation demonstrates that, as in the WTO cases, differences in treatment between firms in the same economic sector shift the burden on the respondents to show the treatment is no less favourable.<sup>278</sup> Thus, the burden is not, as Canada suggests, simply establishing a "reasonable relationship to rational policies".<sup>279</sup>

325. To analyze Pope & Talbot's NAFTA Article 1102 claim, the Tribunal examined the "like circumstances" based on its assessment of the governments' rationale to justify any differential treatment. In essence, the *Pope & Talbot* Tribunal had determined that, if the foreign investor could make a showing that two entities equally competing in the same business sector had received different treatment, then the Respondent Party could justify differences in treatment through some sort of legitimate government objective. In doing so, the *Pope & Talbot* Tribunal, held that a "reasonable nexus" to government purpose could explain the differences in treatment and demonstrate that the two compared investors were not really in like circumstances.<sup>280</sup>

326. When reconciled, the findings from the *Pope & Talbot* Award and the fact that Chapter 11 does not contain substantive general exceptions provision present a key point – likeness informs less favourable treatment, but differential treatment, irrespective of subjective intent, cannot inform likeness.

327. Canada also refers to the role of public policy in the *S.D. Myers* Tribunal's analysis of National Treatment.<sup>281</sup> In *S.D. Myers*, the Tribunal's referenced an OECD document that stated that an evaluation of "like situations" should "*take into account* policy objectives."<sup>282</sup> However, Canada has ignored that the *S.D. Myers* Tribunal qualified this observation. The OECD referenced by the *S.D. Myers* Tribunal implied how policy

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<sup>278</sup> See, for example, Appellate Body Report in *EC-Asbestos*. (*Investors' Book of Authorities at Tab CA 50*); Appellate Body Report in *US-Cloves Cigarettes*. (*Investors' Book of Authorities at Tab CA 196*).

<sup>279</sup> Government of Canada Counter-Memorial, at para. 424.

<sup>280</sup> *Pope & Talbot*, Award on Merits, Phase 2, at para. 78. (*Investors' Book of Authorities at Tab CA 12*).

<sup>281</sup> Government of Canada Counter-Memorial, at para. 424.

<sup>282</sup> Government of Canada Counter-Memorial, at para. 424, note 831.

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objectives should be taken into account, namely, “*inasmuch as those objectives are not contrary to the principle of national treatment.*”<sup>283</sup>

328. Canada also refers to the decision from the *GAMI* arbitration. In its NAFTA National Treatment claim, the investors had alleged that under the Mexican government program, as designed to address a crisis in the sugar industry, three of the investor’s sugar mills were expropriated, while other mills not owned by foreign investors, were not. *GAMI*, the investors, were found to not have presented evidence that the difference in outcomes was attributable to less favourable treatment.<sup>284</sup> Ultimately, the *GAMI* Tribunal had held that a *prima facie* case must involve at least some evidence that the commercially disadvantageous outcome resulted from less favourable treatment. In other words, the Tribunal was not referencing likeness, but rather, the meaning of treatment no less favourable.
329. None of the NAFTA jurisprudence cited by Canada excuses non-even-handedness simply because the government is acting to pursue a *bona fide* objective.<sup>285</sup> The authorities Canada relies on its Counter-Memorial only identify public policy as a factor in the evaluation of the competitive relationship between the interests involved. In this case, the Investors do not contest the legal and regulatory framework for environmental assessment in Canada and Nova Scotia. The public policy objectives informing these laws and regulations are legitimate. The issue is that the application by Canada of these laws and regulations to Bilcon was vastly and inexplicably less favourable than to other investors to whom the same laws and regulations apply. Canada has presented no evidence that its officials were compelled in the exercise of their discretion to do that by the legitimate public policy objectives of those laws and regulations. Indeed, the evidence reveals that political considerations, bias, and anti-Americanism were involved in the differential treatment of Bilcon.

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<sup>283</sup> Government of Canada Counter-Memorial, at para. 424, note 831.

<sup>284</sup> Moreover, *GAMI* had not framed its argument in terms of a denial of equality of competitive opportunities, for example, a distortion of the competitive relationship between investors competing in the same market. In particular, the Investors’ claim is very different. In *GAMI*, *GAMI* did not present evidence that the Mexican government regulatory decision-making had led to less favourable treatment, nor did *GAMI* present evidence that discrimination in the manner in which the Mexican government had made in the criteria used in its decision-making. This is not the case in this arbitration. (*Investors’ Book of Authorities at Tab CA 15*).

<sup>285</sup> Canada’s Counter-Memorial, at paras. 424, 425. See *Pope & Talbot*, Award on Merits, Phase 2 (*Investors’ Book of Authorities at Tab CA 12*); *Merrill & Ring*- Award (*Investors’ Book of Authorities at Tab CA 41*); *S.D. Myers*, First Partial Award. (*Investors’ Book of Authorities at Tab CA 6*).

330. Regardless of whether such public policy considerations are treated as part of the analysis of “like circumstances” or “of treatment less favourable”, such considerations are only one factor to be weighed in the assessment the competitive relationship that offers a more salient assessment for like comparators under the NAFTA.

i. *The Analogous National Treatment Obligations in the TBT Agreement and the NAFTA Confirms That Equality of Competitive Opportunities Applies to National Treatment*

331. The economic competitive relationship between public policy objectives and the principle of National Treatment has been considered by WTO panels and the Appellate Body.<sup>286</sup> As the Investors’ have explained, the experience of WTO Members under the WTO Agreements is important in interpreting NAFTA Article 1102. The relationship between the NAFTA and the GATT is expressed in the preamble of the NAFTA, in which the NAFTA Parties recognized that the NAFTA is built on “their respective rights and obligations under the General Agreement on Tariffs and Trade.”<sup>287</sup>

332. Within their respective treaties, the NAFTA Article 1102 and Article 2.1 of the TBT Agreement are similar in very important ways.

333. Article 2.1 of the TBT Agreement prohibits discriminatory technical regulations and is not subject to any exceptions. Article 2.1 of the TBT Agreement states:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

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<sup>286</sup> For instance, see World Trade Organization (WTO) report of the Appellate Body, *European Communities - Regime for the Importation, Sale and Distributing of Bananas*, September 9, 1997. (*Investors’ Book of Authorities at Tab CA 201*); World Trade Organization (WTO) Panel Body Report, *European Communities - Regime for the Importation, Sale and Distributing of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM; WT/DS27/R/HND, 22 May 1997. (*Investors’ Book of Authorities at Tab CA 215*); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243 (“*EC-Asbestos*” (*Investors’ Book of Authorities at Tab CA 50*); Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367 (“*DR-Cigarettes*”) (*Investors’ Book of Authorities at Tab CA 197*); and most recently, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, circulated 4 April 12, 2012 (“*US-Clove Cigarettes*”) (*Investors’ Book of Authorities at Tab CA 196*).

<sup>287</sup> The preamble forms an integral part of the NAFTA, and it must be given meaning in the interpretation of the NAFTA pursuant to NAFTA Article 102 and the *Vienna Convention*.

334. With regard to this provision, the WTO panel in *EC-Trademarks/GIs (Australia)* stated:

[T]he essential elements of an inconsistency with Article 2.1 of the TBT Agreement are, as a minimum, [i] that the measure at issue is a ‘technical regulation’; [ii] that the imported and domestic products at issue are ‘like products’ within the meaning of that provision; and [iii] that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.<sup>288</sup>

335. The language of NAFTA Article 1102 resembles the language contained in TBT Article 2.1. Each contains the requirement of “treatment no less favourable”. Both articles also focus on specific types of measures that must provide treatment no less favourable.<sup>289</sup>

336. Consistent throughout the WTO Agreements, the purpose of National Treatment is to ensure even-handed domestic regulatory treatment of domestic and like imported products and services.<sup>290</sup> Importantly, WTO Members drafted the TBT Agreement without a similarly worded Article XX GATT 1994 provision. Thus, there is no exception to Members’ National Treatment obligations under the TBT Agreement.<sup>291</sup>

337. Within the preamble of the TBT Agreement, the WTO Members included a trade-liberalization objective by expressing the “desire” that technical regulations, technical standards, and conformity assessment procedures do not create “unnecessary obstacles to international trade”.<sup>292</sup> In analyzing the objects and purpose of the TBT Agreement, the Appellate Body has opined on this recital as evidence that TBT provisions “aim at

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<sup>288</sup> Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, (EC - Trademarks and Geographical Indications (US)), WT/DS174/R, adopted April 20, 2005, DSR 2005:VIII, at para. 7.444. (*Investors’ Book of Authorities at Tab CA 134*) The COOL Panel considered these three elements “constitutes the essence of the legal test under Article 2.1”, at paras. 7.218-220. See World Trade Organization (WTO) Panel Body Report, *United States - Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/R; WT/DS386/R, November 18, 2011. (*Investors’ Book of Authorities at Tab CA 204*).

<sup>289</sup> The Investors further note that technical regulations are, in principle, subject not only to Article 2.1 of the TBT Agreement, but also to the National Treatment obligation of Article III:4 of the GATT 1994, as “laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use” of products.

<sup>290</sup> See, for example, Appellate Body Report, *US Cloves Cigarettes*, at para. 95 (*Investors’ Book of Authorities at Tab CA 196*).

<sup>291</sup> Appellate Body Report, *US Cloves Cigarettes*, at para. 101 (*Investors’ Book of Authorities at Tab CA 196*).

<sup>292</sup> Agreement on Technical Barriers to Trade, fifth recital: “Desiring however to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;” (*Investors’ Book of Authorities at Tab CA 195*).

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reducing obstacles to international trade and that limit Members' right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1)".<sup>293</sup>

338. The absence of general exceptions in TBT Article 2.1 suggests that some aspects of the case law arising from the Appellate Body's understanding of similar language and concepts can offer the Tribunal assistance in their interpretation of of NAFTA Article 1102 in this instant dispute.

ii. *The Appellate Body Confirms the Competitive-based Approach for Likeness in the Clove-Cigarettes Dispute*

339. Recently, the Appellate Body released a report considering a complaint brought by Indonesia concerning prohibitions on certain flavoured tobacco products (other than non- flavoured tobacco and menthol flavoured) implemented by the US.<sup>294</sup> Indonesia based its claim on the fact that clove cigarettes consumed by Americans were predominantly of Indonesian-origin, whereas the other flavoured tobacco exemption, menthol cigarettes consumed in the US, was predominantly domestic in origin. The US argued that its law was not discriminatory and distinguished between clove and menthol cigarettes on the basis that clove cigarettes were a "starter" product, more attractive to youth, as opposed to menthols, which were attractive to youth and adult smokers in similar proportions.<sup>295</sup>

340. The WTO panel had concluded that the US violated WTO law, breaching Article 2.1 of the TBT Agreement, and recommended that the US be asked to bring its laws into

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<sup>293</sup> Appellate Body Report, *US Clove Cigarettes*, at paras. 92-93 (*Investors' Book of Authorities at Tab CA 196*).

<sup>294</sup> For instance, see World Trade Organization (WTO) report of the Appellate Body, *European Communities - Regime for the Importation, Sale and Distributing of Bananas*, September 9, 1997. (*Investors' Book of Authorities at Tab CA 201*); World Trade Organization (WTO) Panel Body Report, *European Communities - Regime for the Importation, Sale and Distributing of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM; WT/DS27/R/HND, 22 May 1997. (*Investors' Book of Authorities at Tab CA 215*); Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243 ("*EC-Asbestos*") (*Investors' Book of Authorities at Tab CA 50*); Appellate Body Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367 ("*DR-Cigarettes*") (*Investors' Book of Authorities at Tab CA 197*); and most recently, Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, circulated 4 April 12, 2012 ("*US-Clove Cigarettes*") (*Investors' Book of Authorities at Tab CA 196*).

<sup>295</sup> See Appellate Body Report, *US Cloves Cigarettes*, at para. 225 (*Investors' Book of Authorities at Tab CA 196*); See also World Trade Organization (WTO) Panel Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, September 2, 2011. (*Investors' Book of Authorities at Tab CA 216*).

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conformity with WTO law.<sup>296</sup> The panel also had analyzed whether clove and menthol cigarettes were “like” in the US market. To assess this, the WTO panel departed from the approach used in several GATT 1994 disputes. As discussed above, the GATT 1994 approach had focused its likeness test on the equality of competitive opportunities of competing products in the marketplace. On the facts, the WTO panel found that clove and menthol cigarettes were “like” in the US, but did so by focusing on whether the two product types were “like” in terms of their effect on youth smoking in the US, (the regulatory objective pursued by the US).<sup>297</sup> In doing so, the panel had shifted from the established “competition” approach towards a “regulatory objective” approach, thereby narrowing TBT Article 2.1 to a likeness test based on “regulatory concern”. The WTO panel’s approach mirrors the approach presented by Canada in this dispute.

341. The US appealed the panel’s decision. On April 4, 2012, the Appellate Body upheld the panel’s finding that the US breached the TBT Agreement, but rejected the WTO panel’s “regulatory” context test for likeness. As such, the Appellate Body set out the proper approach to TBT Article 2.1 and the relevance of regulatory purpose in this analysis.
342. Prior to its assessment of the US’ regulatory purpose, the Appellate Body observed that the interpretation of the concept of “likeness” in Article 2.1 was based on the text of that provision, as read in the context of the TBT Agreement and of Article III:4 of the GATT 1994.<sup>298</sup> Drawing the context and the object and purpose of the TBT Agreement, as expressed in its preamble, the Appellate Body held that the determination of likeness under both National Treatment obligations “is a determination about the nature and extent of a competitive relationship between and among the products at issue.”<sup>299</sup>
343. Thus, the Appellate Body found that the panel’s “regulatory concern” approach in determining “likeness” was an incorrect one. Specifically, the Appellate Body observed: “If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure’s regulatory

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<sup>296</sup> See World Trade Organization (WTO) Panel Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, September 2, 2011. (*Investors’ Book of Authorities at Tab CA 216*).

<sup>297</sup> Panel Report, *US Cloves Cigarettes*, September at paras. 7.231 and 7.247. (*Investors’ Book of Authorities at Tab CA 216*).

<sup>298</sup> Appellate Body Report, *US Cloves Cigarettes*, at para. 100. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>299</sup> Appellate Body Report, *US Cloves Cigarettes*, at paras. 117, 120. The Appellate Body relied upon the *EC-Asbestos* Appellate Body Report, where it had found that regulatory concerns and consideration “may play a role in applying certain of the “likeness criteria”. (*Investors’ Book of Authorities at Tab CA 196*).

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purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products.”<sup>300</sup>

344. In doing so, the Appellate Body affirms the “competition” test as developed in *EC-Asbestos*.<sup>301</sup> The Appellate Body explains an approach based on “regulatory concern” could not properly determine likeness. The Appellate Body notes:

Measures, such as technical regulations, may have more than one objective. However, a panel that is tasked with determining whether two products are like may not be able to reach a coherent result if, in determining likeness, it has to rely on various possible regulatory objectives of the measure. If a panel were to focus on one of the objectives of a measure to the exclusion of all others that are equally important, it may reach a somewhat arbitrary result in the determination of what are the like products at issue which, in turn, has implications for the determination of whether less favourable treatment has been accorded. Moreover, we note that a purpose-based approach to the determination of likeness does not, necessarily, leave more regulatory autonomy for Members, because it almost invariably puts panels into the position of having to determine which of the various objectives purportedly pursued by Members are more important, or which of these objectives should prevail in determining likeness or less favourable treatment in the event of conflicting objectives.<sup>302</sup>

With the *Cloves Cigarettes* decision, the Appellate Body consolidates earlier jurisprudence with respect to the determination of likeness.<sup>303</sup> Similar to “like” in the context of the NAFTA, the Appellate Body concluded that “like” means similarities between the products or services.

345. While policy justifications, in the trade context, might reflect differences in the products being compared, the Appellate Body found that the policy justification was not what made the products different. Rather, the difference was in the risks that set the policy in motion.<sup>304</sup> And, in this way, the “manner” or “method” a government handles risks (such as health or environmental), suggests that the notion of government purpose can be part of the concept of “treatment”.<sup>305</sup>

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<sup>300</sup> Appellate Body Report, *US Cloves Cigarettes*, at para. 116. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>301</sup> Appellate Body Report, *US Cloves Cigarettes*, at paras. 156-160. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>302</sup> Appellate Body Report, *US Cloves Cigarettes*, para. 115. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>303</sup> Appellate Body Report, *US Cloves Cigarettes*, at paras. 117-120. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>304</sup> Appellate Body Report, *US Cloves Cigarettes*, para. 118. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>305</sup> Appellate Body Report, *US Cloves Cigarettes*, para. 181-182. (*Investors’ Book of Authorities at Tab CA 196*).

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346. With this reasoning in mind, the Appellate Body held that regulatory purpose was relevant for determining whether there was less favourable treatment accorded to foreign “like” products, as opposed to the assessment of “likeness”.<sup>306</sup>
347. The Appellate Body proposed a test of whether detrimental effects on imports can be exclusively attributed to a legitimate regulatory distinction once it has been found that there is a significant disparate impact on imports. In the case of *US-Cloves Cigarettes*, the Appellate Body did not find that the distinction that the US drew between clove and menthol cigarettes was exclusively due to a “legitimate regulatory distinction”.
348. According to the Appellate Body if the “detrimental impact” on the “competitive opportunities of imports” stems exclusively from a legitimate regulatory distinction”, then there will be no finding of “less favourable treatment”.<sup>307</sup> Thus, there will be no finding of the National Treatment obligation. To determine whether this is the case, the WTO panels must evaluate “the design, architecture, revealing structure, operation and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed.”<sup>308</sup>
349. In this regard the Appellate Body explained an approach that sought to balance the right to regulate with the obligation not to discriminate.<sup>309</sup> Thus, the Appellate Body accepted that the overall purpose of the legislation was the protection of public health. The question was, whether the US regulatory scheme was even-handed in the achievement of its public health goals.
350. For the Appellate Body, the concept stems from the balance between the right to regulate and the concern to avoid unduly trade restrictiveness that is found in the preamble to the TBT Agreement and the operation of Article XX of the GATT 1994 in relation to Article III:4.

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<sup>306</sup> Appellate Body Report, *US Cloves Cigarettes*, para. 179 (*Investors’ Book of Authorities at Tab CA 196*), referring to the Appellate Body Report in *Dominican Republic – Import and Sale of Cigarettes*, para. 96. (*Investors’ Book of Authorities at Tab CA 197*).

<sup>307</sup> Appellate Body Report, *US Cloves Cigarettes*, paras. 174, 181, 182, 215. Para. 192 reads: “Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports stems exclusively from legitimate regulatory distinctions.” (*Investors’ Book of Authorities at Tab CA 196*).

<sup>308</sup> Appellate Body Report, *US Cloves Cigarettes*, at para. 215. (*Investors’ Book of Authorities at Tab CA 196*).

<sup>309</sup> Appellate Body Report, *US Cloves Cigarettes*, at para. 96. (*Investors’ Book of Authorities at Tab CA 196*).

*iii. "Like Circumstances" as applied to cases of joint and overlapping regulatory authority in a federal system of government*

351. Canada relies on the *Merrill & Ring* Award to limit the range of situations that may be compared in determining treatment no less favorable.<sup>310</sup>
352. In *Merrill & Ring*, the tribunal interpreted the operation of the relevant legal and regulatory frameworks in Canada in such a manner that it distinguished between the investor claimant as an entity regulated under federal Canadian law and certain other investors regulated under provincial laws. The *Merrill & Ring* tribunal held that federally-regulated entities should only be compared to other federally-regulated entities.<sup>311</sup> The Merrill tribunal's findings about "like circumstances" in this respect were based upon a unique interpretation of the relevant Canadian municipal law as a fact.
353. The instant case engages a different area of Canadian law and different provisions of the Canadian constitution. The division of powers between governments in Canada concerning natural resources, at issue in Merrill is governed by a *sui generis* constitutional regime, contained in a specific constitutional amendment.<sup>312</sup> The division of powers in the case of the environment is governed by a range of diverse constitutional considerations and an evolving case law, which has led to overlapping and/or jointly exercised regulatory authority, with some aspects being subject to provincial regulation and others to federal regulation, and with significant elements of federal/provincial cooperation and jointly exercised jurisdiction. The environmental impacts of economic activity thus are a matter of concurrent federal and provincial jurisdiction. All of the entities Bilcon is asserting as being "in like circumstances" are subject to the same concurrent federal and provincial jurisdiction under the Canadian constitution. The extent to which a particular federal or provincial law or regulation is engaged depends on character of the environmental effects not the nature of the regulated. The extent to which a particular federal or provincial law or regulation is engaged depends on character of the environmental effects not the nature of the regulated investor.<sup>313</sup>

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<sup>310</sup> Canada's Counter-Memorial at para. 409.

<sup>311</sup> Government of Canada Counter-Memorial at para. 400.

<sup>312</sup> *The Constitution Act, 1867*, Sections 92A. (*Investors' Book of Authorities at Tab CA 217*).

<sup>313</sup> Expert Report of Murray Rankin, Q.C., paras. 46 and 49.

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354. The regulatory environmental regime shapes the competition among projects that require environmental assessments to gain efficient use of resources in Canada. The case law that the Investors examined have all suggested that the competitive opportunities are a necessary condition for finding “like” comparators.<sup>314</sup>
355. In *Merrill & Ring*, the *removal of logs* was regulated by the province of British Columbia, established in the *British Columbia Forest Act*, but the *export of logs* was pursuant to Canada’s federal legislation, as provided in Notice 102, enacted under the *Export and Import Permits Act*. Therefore, the dispute concerned measures governing separate regulatory functions. Unlike environmental jurisdiction, which is overlapping or concurrent, jurisdiction over international trade and commerce is exclusively federal under the Canadian constitution. Thus, the control of exports is a distinct federal regime, on which provincial authority may not trench.
356. The *Merrill & Ring* Tribunal relied on these separate regulatory functions to find that the provincial and federal regime controlled two different but occasionally overlapping objectives.<sup>315</sup> The Tribunal concluded that the application of the provincial and federal laws were different enough so as to prevent a finding of likeness.<sup>316</sup>
357. The correct comparators for a finding of “like circumstances” are the general class of applicants applying for consideration under the environmental assessment scheme in Canada.<sup>317</sup> All applicants come before the governmental authorities in similar situations seeking the same treatment, and in relation to this treatment, must be considered to be in like circumstances.
358. As the evidence clearly demonstrates, in the constitutional context of overlapping or concurrent jurisdiction over different aspects of environment, federal and provincial officials collaborate closely in the exercise of their discretion under the various legal and regulatory frameworks. In Bilcon’s case this even went to the extreme that federal officials became involved without Bilcon’s proposal triggering the kind of concern that would trigger federal jurisdiction. It is a basic norm of the international law of state

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<sup>314</sup> See *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, at paras. 120, 136 (*Investors’ Book of Authorities at Tab CA 200*); see also *S.D. Myers*, at para. 250. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>315</sup> *Merrill & Ring*, UNCITRAL Arbitration, Award, March 31, 2010, at para. 81, 82. (*Investors’ Book of Authorities at Tab CA 41*).

<sup>316</sup> *Merrill & Ring*, at para. 81, 82. (*Investors’ Book of Authorities at Tab CA 41*).

<sup>317</sup> See *Occidental*, at paras. 168, 173, 176 (*Investors’ Book of Authorities at Tab CA 18*); see also, *Grand River*, Award, at para. 167 (*Investors’ Book of Authorities at Tab CA 202*).

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responsibility that the acts *and omissions* of all levels of government in a federal system are attributable to the state. A failure of a particular level of government to take a specific regulatory action with regard to particular domestic investor while deciding to take that action with respect to a foreign investor in like circumstances could well constitute discrimination in favour of the domestic investors. Canada's interpretation of like circumstances, based on its misreading of the *Merrill* award, would make it impossible to apply the national treatment obligation in such a situation, because in Canada's view the omission of a particular level of government to take a specific regulatory action means that the entity is not subject to the *authority* of that level of government, and thus cannot be compared to the foreign entity that has triggered a particular regulatory action of that same level of government.. This is why it is essential to recognize that in the case of environment, all the entities in question are subject, as a matter of constitutional and statutory law, to the overlapping and jointly exercised regulatory authority of both federal and provincial levels of government, even if a particular level of government may omit to regulate an entity in certain respects.

359. What is relevant is that both provincial and federal levels of government were involved only as *a direct result of* Canada's unfair actions throughout the environmental assessment process. That is, it was Canada's unfair action of scoping the project components jointly that caused a joint review process with the involvement of two levels of government. Canada cannot escape international responsibility by limiting "like" comparators to the same level of government, when its own actions caused there to be two levels of government. Such an argument cannot be sustained.

#### **F. The Element of 'Less Favourable Treatment'**

360. The second element of NAFTA Article 1102 is the obligation to accord a foreign investor and its investments with "treatment no less favourable" than that provided to domestic investors in like circumstances.
361. In its Memorial, the Investors reviewed NAFTA Awards, Non-NAFTA Awards and WTO jurisprudence to explain that the essence of the National Treatment obligation to accord "treatment no less favourable" meant a Party cannot modify the "competitive opportunities" to the detriment of another Parties' investors and its investments.<sup>318</sup> The Investors also reviewed GATT/ WTO case law demonstrating that this was an objective

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<sup>318</sup> Memorial of Investors, at paras. 415-426.

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test, applicable to both *de jure* and *de facto* measures,<sup>319</sup> and served to guarantee that foreign economic interests received the best treatment given to domestic interests. It also showed how previous NAFTA Tribunals had adopted the same approach.<sup>320</sup>

362. The third step of NAFTA Article 1102 analysis, namely, that the treatment Canada has accorded to Bilcon is “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”
363. The treatment provided to Bilcon was in connection with its operation of its investment. It is simply incontrovertible that the “less favorable treatment” Canada accords Bilcon is in fact “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” As a result, Bilcon has satisfied the third and final step of national treatment analysis under NAFTA Article 1102 and under NAFTA Article 1103.
364. In the case of *Bayinder v. Pakistan*, the ICSID tribunal found in interpreting the National Treatment and MFN obligation in the treaty that “treatment” includes all dealings between the host state and the investor. Thus, the tribunal held that even though all investors are subject to the same legal and regulatory framework, the obligation may be violated by treatment that involves the exercise of discretion by officials within that framework in a manner that favours some investors in “similar situations” over others.<sup>321</sup>
365. In *Bayinder v. Pakistan*, the Tribunal also noted the requirement that the investor provide “sufficiently specific data” to allow comparison of the situations being alleged to constitute more favourable treatment than that provided to the investor.<sup>322</sup> Accordingly, the investor has provided a detailed examination of the investments in like circumstances with the investor, their relevant characteristics, and the very specific differences of treatment.

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<sup>319</sup> For clarity, “*de jure*” means by law, whereas “*de facto*” means while not law, there is evidence in practice.

<sup>320</sup> Memorial of Investors, at paras. 415-426.

<sup>321</sup> *Bayindir Insaat Turzım Ticaret Ve Sanayi, AS. v. Islamic Republic of Pakistan*, ICSID Case No. ARB./03/29, Decision on Jurisdiction, 2005 WL 3598900, November 14, 2005, at para. 206. (*Investors’ Book of Authorities at Tab CA 149*).

<sup>322</sup> *Bayindir*, at para. 417. (*Investors’ Book of Authorities at Tab CA 149*).

i. *“Treatment No Less Favorable” Means Equality of Competitive Opportunities*

366. Canada’s obligation to provide “no less favorable treatment” to foreign Investors as compared to domestic investors amounts to an obligation to provide the investors with equality of competitive opportunities.<sup>323</sup> This is clearly supported by the plain and ordinary meaning of the phrase “treatment no less favorable.” If a domestic investor receives one type of favorable treatment, a foreign investor should receive “treatment no less favorable” than that – plain and simple.

ii. *“Treatment No Less Favorable” Means “Best” Treatment*

367. Canada’s obligation to provide Bilcon with “treatment no less favorable” requires that Canada accord Bilcon treatment that is the same as the best treatment received by domestic investors that are in direct competition with Bilcon. This is not only supported by the jurisprudence,<sup>324</sup> but by the plain wording of NAFTA Article 1102(3) itself:

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than *the most favorable treatment* accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.<sup>325</sup>

368. As the Tribunal in *Pope & Talbot* noted, while this obligation on its face applies only to the actions of states and provinces, it actually provides the interpretive basis for the conclusion that the national governments are also required to accord the best treatment to foreign investors and their investments under NAFTA Articles 1102(1) & (2). In the words of that Tribunal:

...like states and provinces, national governments cannot comply with NAFTA by according foreign investments less than the most favorable treatment they accord their own investors.<sup>326</sup>

iii. *“Less Favorable Treatment” Does not Require Discriminatory Intent*

369. Canada seeks to introduce another element to NAFTA Article 1102 analysis, namely, that any “less favorable” treatment accorded to foreign investors in like circumstances to domestic investors must be motivated by discriminatory intent based on nationality.<sup>327</sup> This is what Canada calls NAFTA Article 1102’s “overriding purpose”. Neither the plain

<sup>323</sup> Memorial of Investors at para. 373.

<sup>324</sup> Memorial of Investors at paras. 416-425.

<sup>325</sup> NAFTA, Article 1102(3). [emphasis added]

<sup>326</sup> *Pope & Talbot*, Award on the Merit of Phase 2, at paras. 39-42. (*Investors’ Book of Authorities at Tab CA 12*).

<sup>327</sup> Government of Canada Counter-Memorial at para. 401.

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wording, nor the context of NAFTA Article 1102, evince any such requirement or purpose.

370. It is plain on its face that NAFTA Article 1102 is not worded so as only to protect foreign investors from discriminatory treatment based upon- and motivated by their foreign nationality.
371. That “less favorable treatment” need not be motivated by discriminatory intent based on nationality is not only supported by a plain reading of the term, it is also buttressed by the overall wording of NAFTA Article 1102, which provides a context that supports an expansive – not a restrictive – interpretation of national treatment protections. NAFTA Article 1102 grants protection “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.” Thus, it is obvious that the drafters had in mind a vision of NAFTA Article 1102 that protects foreign investors from any sort of differential and adverse government interference. Curtailing that protection by reading in a requirement that “treatment” may only be considered to be “less favorable” if it is motivated by discriminatory intent based on nationality flies in the face of that intention.
372. Restricting the protections of NAFTA Article 1102 only to discriminatory treatment motivated by the nationality of the foreign investor also runs counter to the objectives of the NAFTA since it would allow for trade barriers and unfair conditions of competition provided that these were not specifically motivated by discriminatory intent based on nationality. Indeed, this would amount to nothing short of an absurd result, since a NAFTA Party would be absolved of liability for taking measures that – while perhaps not apparent on its face *de jure* discrimination – are discriminatory on a *de facto* basis.
373. In the *Corn Products v Mexico* dispute, the NAFTA Tribunal addressed Mexico’s argument that it had not violated its Article 1102 obligations because its measure, a tax on HFCS was a measure “taken to address a crisis in the Mexican sugar industry.”<sup>328</sup> In response to this argument, the Tribunal stated:

The problem with this argument is that it confuses the nature of the measure taken with the motive for which it was taken. The Tribunal does not doubt either that there was a crisis in the Mexican sugar industry, or that the motive for imposing the HFCS tax was to address that crisis. That does not alter the fact that the nature of the measure which Mexico took was one which treated producers of HFCS in a markedly less favourable way than Mexican producers of sugar. *Discrimination does not cease to be discrimination, nor to attract the international liability*

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<sup>328</sup> *Corn Products*, Award, at para. 141. (*Investors’ Book of Authorities at Tab CA 200*).

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*stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary.*<sup>329</sup>

374. Pursuant to NAFTA 1131 and the *Vienna Convention*, a Tribunal must interpret the non-discrimination NAFTA provision based on its actual text and consciously make a decision as to the appropriate standards of interpretation.<sup>330</sup>
375. Canada's opposition to the equality of competitive opportunities approach appears to be rested in fears about constraining the flexibility of NAFTA governments to preserve the public welfare. The arguments confuse the notion of equality of competitive opportunities with equality of results.
376. The *Feldman* Tribunal suggested that the question of nationality-based discrimination is an "interpretive hurdle" in the general context of Article 1102. In dealing with this question concretely, it concluded that:

...it is not self-evident, as the Respondent argues, that any departure from national treatment must be...shown to be a result of the investor's nationality. There is no such language in Article 1102.<sup>331</sup>

This view was confirmed by the Tribunal in *Thunderbird*, which stated:

It is not expected from *Thunderbird* that it show...that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such a showing.<sup>332</sup>

iv. *Demonstrating Treatment Does Not Require Proof of Nationality-Based Intent*

377. The emphasis on "nationality" presumably stems from the title of the non-discrimination provision – National Treatment. NAFTA Article 1102 does not expressly require the difference in treatment must be motivated by the nationality of the investor or investment. Based on the term "less favourable treatment" – the emphasis is on the manner and method of the government actions. The Tribunal in *S.D. Myers* also concluded that the word "treatment" suggests that practical impact is required to

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<sup>329</sup> *Corn Products*, Award, at para. 142 [emphasis added]. (*Investors' Book of Authorities at Tab CA 200*).

<sup>330</sup> In contrast, WTO jurisprudence regarding disputes that raised public policy concerns have abided by the Appellate Body's traditional textual approach to treaty interpretation, where only public policy concerns identified in the GATT Article XX exceptions are considered.

<sup>331</sup> *Feldman*, at para. 181, (*Respondent's Book of Authorities at Tab CA 51*).

<sup>332</sup> *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 2006 WL 247692 January 26, 2006, para. 177, (*Investors' Book of Authorities at Tab CA 19*).

- produce a breach of Article 1102, not merely a motive or intent.”<sup>333</sup> The Tribunal in *Siemens v Argentina* concurred, finding that intent is “not decisive or essential for a finding of discrimination.”<sup>334</sup>
378. Canada’s contention that the National Treatment obligation requires discrimination based on nationality means adopting an approach whereby an investor would have to prove that any difference in treatment is motivated by its nationality.<sup>335</sup> But the NAFTA is about much more than nationality.
379. One reason why the Parties left this intent requirement out of NAFTA Article 1102 is because as a practical matter it is virtually impossible to establish that a government entity, which might be comprised of many different actors with different motivations, actually had “intent” to discriminate.<sup>336</sup>
380. The *Feldman* Tribunal was quick to point out that NAFTA Article 1102 does not require an Investor to demonstrate explicitly that a distinction is a result of their foreign nationality.<sup>337</sup> In support, the *Feldman* Tribunal recalled the *Pope & Talbot* Tribunal’s observation that requiring proof of intent would effectively limit NAFTA Article 1102 to *de jure* violations, thereby severely limiting the effectiveness of the National Treatment concept in protecting foreign investors.<sup>338</sup>
381. Accordingly, when assessing compliance of a measure with the National Treatment concept, the *S.D. Myers* Tribunal found the following factors to be: “whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals; whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.”<sup>339</sup>

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<sup>333</sup> *S.D. Myers*, First Partial Award, para. 254. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>334</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, at para. 321. (*Investors’ Book of Authorities at Tab CA 218*).

<sup>335</sup> Government of Canada Counter-Memorial, at para. 401.

<sup>336</sup> Andrea Bjorklund, “National Treatment” in *Standards of Investment Protection*, August Reinisch (ed). (Oxford University Press, 2008) at p. 49. (*Investors’ Book of Authorities at Tab CA 226*).

<sup>337</sup> *Feldman*, Award, at para. 181. (*Investors’ Book of Authorities at Tab CA 51*).

<sup>338</sup> *Feldman*, Award, at para. 183, 184, (*Investors’ Book of Authorities at Tab CA 51*), citing to *Pope & Talbot*, Award on the Merits of Phase 2, April 10, 2001, paras. 78 and 79. According to the *Pope & Talbot* Tribunal, was that showing discrimination based on nationality would “tend to excuse discrimination that is not facially directed at foreign owned investments.” (*Investors’ Book of Authorities at Tab CA 12*).

<sup>339</sup> *S.D. Myers*, Award, at para. 252. (*Investors’ Book of Authorities at Tab CA 6*).

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382. This aligns with the view that a literal interpretation of the NAFTA National Treatment provision prohibits less favourable treatment unrelated to nationality-based discrimination. Accordingly, the findings of the *Occidental* Tribunal serve as a reasonable example of how national treatment provisions must apply to a broader range of disparate impacts than nationality-based discrimination alone.<sup>340</sup>
383. These findings have been echoed in the non-NAFTA context as well. In *Occidental*, in examining the requirements of a similarly worded national treatment provision, the Tribunal found that the Claimant had received less favourable treatment than that accorded to investors of the Respondent State. In reaching its conclusion, the Tribunal held that Ecuador had taken measures in breach of its national treatment obligation even though the Tribunal was “convinced that this has not been done with the intent of discriminating against foreign-owned companies.”<sup>341</sup>
384. Rejecting the notion that NAFTA Article 1102 offers foreign investors protection only from invidious discrimination – that is, discrimination an Investor could actually prove was motivated by discriminatory intent based on nationality – Arbitrator Cass, in his Separate Opinion in *UPS*, held that such an interpretation of NAFTA Article 1102 “would be of little value to investors.”<sup>342</sup> Professor Cass then went on to say that the requirements of Article 1102 “plainly extend beyond formal parity” and instead “commands an effective parity of foreign and domestic investors and investments.”<sup>343</sup> The Majority Decision in *UPS* said nothing to the contrary.
385. Canada’s position does not fit with the overall architecture of the NAFTA. Specifically, if NAFTA Article 1102 were to be reduced to an obligation not to treat foreign investors less favourably only on the basis of nationality, this provision would become redundant. This is because such an obligation already exists under the customary international law standard of “fair and equitable treatment”. It is clear that Article 1102 is not worded so as to be a simple affirmation of customary international law with respect to discrimination towards aliens. That obligation is properly found in NAFTA Article 1105 – not Article 1102.

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<sup>340</sup> *Occidental*, First Partial Award, at paras. 176 ff. (*Investors’ Book of Authorities at Tab CA 18*).

<sup>341</sup> *Occidental*, at para. 177, (*Investors’ Book of Authorities at Tab CA 18*).

<sup>342</sup> *UPS*, Separate Opinion of Dean Ronald A. Cass at para. 58, (*Investors’ Book of Authorities at Tab CA 89*).

<sup>343</sup> *UPS*, Separate Opinion of Dean Ronald A. Cass at para. 59, (*Investors’ Book of Authorities at Tab CA 89*).

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386. In addition, there are also good policy reasons that Article 1102 ought not be restricted in the way Canada contends. As the Tribunal in *Feldman* noted:

... requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.<sup>344</sup>

387. In the end, the protections of NAFTA Article 1102 are not limited to state actions that are motivated by discriminatory intent based on the nationality of the foreign investor. Such a reading is not only contrary to the plain wording of NAFTA Article 1102, but also runs counter to the objects and purposes, as well as the architecture of the NAFTA. In addition to the good policy grounds for refusing such an interpretation, it is for these reasons that NAFTA tribunals have rightly refused to interpret Article NAFTA 1102 in this way.

388. It so happens, however, that the facts in Bilcon do establish a strong presumption of nationality-based discrimination. Considerations of the investor's nationality pervaded the JRP hearings and the members of the panel themselves did nothing to distance themselves from anti-American and anti-foreigner invectives presented before the JRP. In turn, the provincial and federal ministers adopted this very process as the definitive disposition of Bilcon's proposal. The reference in the JRP Report to "shared beliefs" as a basis for the "community values" that were the ground of Bilcon's rejection, combined with the failure of the JRP to distance itself from or in any way disavow the numerous anti-American and anti-foreigner bias and prejudice in the hearings, and the fact that members of the JRP themselves raised considerations of the investor's nationality give rise to the inference that the disposition of the investor's claim on the basis of "community values" was tainted with invidious discrimination.

389. Subsequent practice of states can be relevant to the interpretation of treaties. Canada's approach to the meaning of the interpretative technique of subsequent practice however simply mischaracterizes the process of treaty interpretation.

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<sup>344</sup> *Feldman*, at para. 183, (*Respondent's Book of Authorities at Tab CA 51*).

390. The International Court of Justice has had to consider the meaning of subsequent state practice under Article 31(3)(b) of the *Vienna Convention* in the *Namibia Advisory Opinion*.<sup>345</sup> In this case, the International Court of Justice had to consider whether the longstanding U.N. practice with respect to concurring votes cast by Permanent Members of the Security Council applied to abstentions. The International Court looked at the longstanding consistent application of the practice, and the lack of any clear difference of opinion between the parties, to be necessary to establish subsequent practice.
391. The WTO Appellate Body has held that subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* requires a "sequence" of acts or statements sufficient to establish a "discernible pattern".<sup>346</sup> In *US—Gambling*, the Appellate Body established that subsequent practice had two elements:
- ... (i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision.<sup>347</sup>
392. The international tribunal considering *the Heathrow Airport User Charges* arbitration had to consider the meaning of subsequent practice under a bilateral agreement<sup>348</sup>. The Tribunal found that subsequent practice had to be consistent and commonly accepted by the parties. In this particular case, the terms of a UK - US Memorandum of Understanding demonstrated consensual subsequent practice by the parties because each state party had clearly intended that its obligations would be honoured, and would continue to be honoured.<sup>349</sup>

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<sup>345</sup> *Legal Consequences for States of Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of June 21, 1971, 1971 I.C.J. 16. at para 22 (*Investors' Book of Authorities at Tab CA 243*).

<sup>346</sup> See World Trade Organization (WTO) Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages* at p. 13 (*Investors' Book of Authorities at Tab CA 178*); World Trade Organization (WTO) Report of the Appellate Body, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* at para. 256 (*Investors' Book of Authorities at Tab CA 223*); World Trade Organization (WTO) Report of the Appellate Body, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* at para. 192 (*Investors' Book of Authorities at Tab CA 224*).

<sup>347</sup> *United States - Gambling (AB)* at para. 7.251 ( *Investors' Book of Authorities at Tab CA 224*).

<sup>348</sup> *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*: Award on the First Question (revised 18 June 1993) 102 ILR 261 at 131 at para 6.7 - 6.8 (*Investors' Book of Authorities at Tab CA 242*).

<sup>349</sup> *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)* 102 ILR 261 at 131 at para 6.6 - 6.8 (*Investors' Book of Authorities at Tab CA 242*).

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393. Canada's mere assertion of instances where other NAFTA parties have agreed on a common litigation position as that being advocated by Canada is insufficient to establish a "sequence" of acts showing a "discernible pattern."<sup>350</sup> In no way does this demonstrate the longstanding nature of the state practice. The fact of an alignment of litigation positions by disputants to address a specific interpretation advanced in a particular case may illustrate merely the view certain officials of those other parties as to how that particular case ought to be disposed. A "discernible pattern" by contrast indicates that the interpretation is the considered position of the states in question and that it should continue to follow this position in future and that it had followed this position for some time. One instance does not make a "discernible pattern."
394. Canada has made this Tribunal well aware that the NAFTA contains a process whereby the members of the Free Trade Commission are able to issue binding interpretations of the NAFTA on behalf of the Treaty Parties. Such a process demonstrates the type of certainty and specificity that would similarly be required to establish a discernible pattern. No matter what the exact test that the Tribunal wishes to apply, the simple fact is that Canada has not met the requirement to establish that a discernible pattern has occurred, and thus the purported "state practice" advanced by Canada arising from the temporary alignment of various litigation positions does not rise that necessary to meet the requirements of Article 31 of the *Vienna Convention*.

#### **G. Duration**

395. The NAFTA takes a very broad view of a measure. NAFTA article 201(1) defines the term "measure" as including "any law, regulation, procedure, requirement or practice." Canada's environmental assessment process, or regime, is a law that is accompanied by regulations and procedures. Duration is itself a form of treatment and therefore capable of being a measure under the NAFTA. To disconnect the duration of the procedure, mandated by the regulations and laws, from the procedure itself, such that its duration is not something capable of assessment, is to separate a piece of the procedure from the overall procedure. The duration of Canada's environmental assessment regime is very much a measure that Bilcon was subjected to. It was required to follow Canada's environmental assessment regime, over which it had no control.

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<sup>350</sup> For example, Canada states that there is a subsequent state practice with respect to the meaning of NAFTA Article 1116 (Canada's Counter Memorial at para. 230) and, in fn 511 to para 246. Canada also asserts this with respect to the contention that nationality-based discrimination is necessary for a violation of NAFTA Article 1107 because of litigation defences advanced in various claims in fn 795 and with respect to how the existence of a broad customary law would be created by thousands of bilateral investment treaties in footnote 614.

396. A broad scope of the ordinary meaning of the term “measure” has been confirmed time and again in international jurisprudence. In the *Fisheries Jurisdiction Case*, Canada itself argued that the term “measure” is a “generic term”.<sup>351</sup> In its decision, the International Court of Justice held:

...in its ordinary sense the word [measure] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.<sup>352</sup>

397. Other NAFTA Tribunals have confirmed that delay is a measure under the NAFTA. For example, the *Glamis* Tribunal stated that delays must be more than “a little slow” if they are to constitute a breach.<sup>353</sup> Duration is clearly a measure and this constitutes a form of treatment to the Investors and their Investment.

398. The context provided by the various provisions of the NAFTA demonstrate that a measure need not be singular and distinct in-and-of-itself; rather one measure can relate to and derive from another measure. For example, in laying out the scope and coverage of the NAFTA’s Chapter 9 on standards related measures, Article 901(1) states:

This Chapter applies to standards-related measures of a Party...that may, directly or indirectly, affect trade in goods or services between the Parties, *and to measures of the Parties relating to such measures.*<sup>354</sup>

399. Therefore, the duration of the environmental assessment regime, as applied to Bilcon, is part and parcel of the overall imposition of that regime and is, in the words of the NAFTA, a measure relating to such a measure.

400. The understanding that particular administrative applications of a regulatory regime can and do constitute “measures” for the purposes of Article 201(1) is further supported by the *International Law Commission’s Articles on State Responsibility* (“ILC Articles”). Article 1 of the ILC Articles states:

*Every internationally wrongful act of a State entails the international responsibility of that State.*<sup>355</sup>

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<sup>351</sup> *Fisheries Jurisdiction Case (Spain v. Canada)*, [1998] ICJ Rep., Jurisdiction of the Court, December 4, 1998, at para. 65. (*Investors’ Book of Authorities at Tab 203*).

<sup>352</sup> *Fisheries Jurisdiction Case*, at para.66 (*Investors’ Book of Authorities at Tab 203*).

<sup>353</sup> *Glamis Gold, Ltd v. United States of America*, UNCITRAL Arbitration, Award, 2009 WL 2389802, June 8, 2009 at para. 774. (*Investors’ Book of Authorities, Tab CA 116*).

<sup>354</sup> NAFTA Article 901(1). [emphasis added]

<sup>355</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with*

401. As Article 1 makes clear, it is not just *some* wrongful acts that give rise to State responsibility – as Canada contends– but rather *every* wrongful act. This includes not only the legislative and policy framework of the environmental assessment process, but also *every* administrative application of that framework to Bilcon.

402. Article 2 of the *ILC Articles* lends further support to this view:

There is an internationally wrongful act of a State when *conduct* consisting of an action or omission:

- a) is attributable to the State under international law; and
- b) constitutes a breach of an international obligation of the State.<sup>356</sup>

403. That international responsibility flows from State “conduct” implies that such responsibility does not just stem from the existence of a regulatory regime, but also from the application of that regime in concrete circumstances such that the duration of the regime imposed, is a measure attributable to Canada.

404. Measures that nullify and impair benefits under a treaty are not only comprised of laws and policies *per se*, but also the individual application of those laws and policies in particular circumstances. Just because a “law” may be in conformity with the NAFTA does not mean that a regulation or administrative decision taken pursuant to that law is also in conformity with the NAFTA. Each is a distinct measure that needs to be taken on its own terms.

**H. Step 3: “With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments”**

405. Once a tribunal has disposed of the questions relating first to “like circumstances”, and next to “less favorable treatment”, then, consistent with the plain wording of NAFTA Article 1102, it must then ensure that the treatment in question is “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

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*Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. , Article 1. [emphasis added] (*Investors’ Book of Authorities*, Tab CA 76).

<sup>356</sup> *ILC Articles*, Article 2. [emphasis added] (*Investors’ Book of Authorities*, Tab CA 76).

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## I. Likeness

406. One of the central issues surrounding the legal interpretation of the Most Favored Nation principle in Article I:1 of the GATT 1994 is the interpretation of the concept of “like products”. The Most Favored Nation principle requires that any advantage, favor, privilege or immunity granted by an exporting country shall be accorded to the “like product” of all other exporting countries.<sup>357</sup>
407. The meaning of likeness has to be related to the aspect of the economic activity that has been regulated. The meaning of likeness needs to be considered in the face of the activities that have been regulated and those other enterprises that would also be affected by the regulatory intervention in question.
408. As was pointed out in the Memorial, much of the attention at the JRP hearings focused on the American nationality of Bilcon.<sup>358</sup> For example, some of the comments heard at the hearings include:

In turn, Bilcon or any other large company that you should let rape our land and natural resources can then sue our Canadian Government billions of dollars, nor can our Government stop the process.<sup>359</sup>

For foreign business interests and far away governments to force such an industry upon a population against their will has the air-about-it of rule by a self-interested oligarchy.<sup>360</sup> Also, for a foreign company to enter this magnificent area, this province, this country to freely, and I mean freely, rape it and remove the very material of which it is made and give nothing in return but a few paltry low-paying jobs is an abomination.<sup>361</sup>

Regarding the proposed destruction of our Fundy Shore communities by foreign-based pirates stealing our resources, contaminating our environment and threatening our livelihoods and well being for future generations... We are outraged with the deceptive tactics used by this invader,

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<sup>357</sup> *Canada - Certain Measures Affecting the Automotive Industry* WT/DS139/AB/R, WT/DS142/AB/R, May 31, 2000, at 26. (*Investors' Book of Authorities at Tab CA 165*).

<sup>358</sup> Memorial of Investors at paras. 211-214; Witness Statement of Hugh Fraser at para. 17

<sup>359</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at 22:612. (*Investors' Schedule of Documents Tab C 156*).

<sup>360</sup> Joint Review Panel Public Hearing Transcript, Vol. 7, dated June 23, 2007, at 1521. (*Investors' Schedule of Documents Tab C 160*).

<sup>361</sup> Joint Review Panel Public Hearing Transcript, Vol. 7, dated June 23, 2007, at 1525. (*Investors' Schedule of Documents Tab C 160*).

its local hirelings and the complicit elected officials.<sup>362</sup>

Will outside interest be enabled to enter our Province at will to rape and pillage our land, and we will not be able to stop them?<sup>363</sup>

409. NAFTA Article 1103 requires that the treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. An environmental assessment is a gateway to the evaluation of new or additive economic activity by an investment. In the context of environmental regulatory measures, the aspects of an investment affected by NAFTA Article 1103 would be by definition have to address the establishment, expansion, conduct or operation of economic activity proposed by the investor.
410. The interpretation of likeness with respect to Most Favored Nation treatment must always bear in mind the object and purpose of Most Favored Nation obligation. On the Most Favored Nation obligation in the GATT, the Appellate Body has noted that the object and purpose of Most Favored Nation treatment is not exclusively to prohibit discrimination based on national origin.<sup>364</sup>
411. The Article 21.5 Panel in the *United States – Tax Treatment for “Foreign Sales Corporations”* examined the first element of a claim under Article III:4 of the GATT 1994, namely whether the imported and domestic products at issue are “like products”. The Panel noted that the purpose of the “like product” inquiry under Article III:4 of the GATT 1994 is to ascertain “whether any formal differentiation in treatment between an imported and a domestic product could be based upon the fact that the products are different – i.e. not like – rather than on the origin of the products involved.”<sup>365</sup>
412. The Article 21.5 Panel examined the facts of the case, where the United States’ Act was a “measure of general application”, which applied horizontally to a range of possible products that could be used for the production of goods that might eventually be

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<sup>362</sup> Joint Review Panel Public Hearing Transcript, Vol. 13, dated June 30, 2007, at 16:3146. (*Investors’ Schedule of Documents Tab C 165*).

<sup>363</sup> Joint Review Panel Public Hearing Transcript, Vol. 13, dated June 30, 2007, at 10:3177. (*Investors’ Schedule of Documents Tab C 165*).

<sup>364</sup> *Canada - Automotive*, at para. 84. (*Investors’ Book of Authorities at Tab CA 165*).

<sup>365</sup> *United States - Tax Treatment for “Foreign Sales Corporations”* Recourse to Article 21.5 of the DSU by the.

European Communities WT/DS108/RW, August 20, 2001) at para. 8.132, at p. 51 (*Investors’ Book of Authorities at Tab CA 163*); citing to *EC - Measures Affecting Asbestos*, Report of AB, at paras. 39-40. (*Investors’ Book of Authorities at Tab CA 50*).

qualifying foreign trade property.<sup>366</sup> In observing the general applicability of the United States' measure, the Article 21.5 Panel found that there was "no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4."<sup>367</sup> The Article 21.5 Panel concluded that with respect to likeness of products, evidence is not required to show a comparison between any particular classes of imported or domestic goods.<sup>368</sup> Thus, the Article 21.5 Panel concluded that in the case where a generally applicable measure is at issue, a complaining country need not establish a "meaningful nexus" between the measure and adverse effects on competitive conditions for a like class of imported goods.<sup>369</sup>

413. The WTO Panel in *Colombia - Ports* considered the meaning of likeness under Article GATT Article I:1. The Panel addressed whether advance customs entry clearance procedures available to goods originating from some WTO Members but not others constituted an advantage for importers from those WTO Members that allegedly were provided with the more favourable treatment. With regard to the meaning of "like products" in the GATT MFN obligation, the Panel concluded that when examining generally applicable regulation, it was *not* necessary to examine whether the better treatment was provided to the *same or similar specific goods* when coming from other WTO Members but instead whether better customs treatment was provided *generally* to goods from those Members. The Panel found that the more favourable treatment provided under the regulatory scheme was afforded not on the basis of a distinction between products as such but "*rather [based] on the territory from which the product arrives.*"<sup>370</sup> Thus, the WTO Panel found that it was appropriate to compare the treatment provided to "hypothetical" imports arriving from Panama or the Caribbean Free Trade Zone under the customs regime with "like products" from other Members. On this basis, the Panel held that the products originating in Panama were "like products" as compared to products from other Members.<sup>371</sup> In sum, the meaning of "likeness" was understood in terms of the need to compare the treatment of products from the complaining WTO Member that could be affected by the regulation with the

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<sup>366</sup> *United States - FSC*, at para. 8.133, at p. 51 (*Investors' Book of Authorities at Tab CA 163*).

<sup>367</sup> *United States - FSC*, at para. 8.133, at p. 51 (*Investors' Book of Authorities at Tab CA 163*).

<sup>368</sup> *United States - FSC*, at p. 52. (*Investors' Book of Authorities at Tab CA 163*).

<sup>369</sup> *United States - FSC*, at para. 8.134, at p. 52. (*Investors' Book of Authorities at Tab CA 163*).

<sup>370</sup> *Colombia - Indicative Prices and Restrictions on Ports of Entry*, Report of the Panel, WT /DS366/R (April 27, 2009) at para 7.355 (*Investors' Book of Authorities at Tab CA 172*).

<sup>371</sup> *Colombia - Ports* at paras. 7.356-357 (*Investors' Book of Authorities at Tab CA 172*).

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treatment of those products from certain other WTO Members that were also reached by the regulation, i.e. as one of general application.

### III. **ARTICLE 1103 OF THE NAFTA**

#### **A. Canada has acted inconsistently with its Most-Favoured-Nation Treatment obligation in NAFTA Article 1103**

##### *i. The Law of Most-Favoured-Nation Treatment*

414. NAFTA Article 1103 requires that the NAFTA Parties provide Most-Favoured-Nation (“MFN”) Treatment to the investors of the other Party and to their investments:

##### **Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

415. There are certain elements which an investor or investment must establish to prove that a NAFTA Party has breached NAFTA Article 1103:

- a) The foreign investor or investment must be in like circumstances to other investors or investments of any other Party or non-NAFTA party;
- b) The NAFTA Party treats the foreign investor or investment less favorably than it treats third party investors or investments; and
- c) The treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>372</sup>

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<sup>372</sup> Memorial of Investors, at paras. 434-436.

416. Examining each of these elements demonstrates that a NAFTA Party breaches Article 1103 when it fails to provide equality of competitive opportunities to investors and investments from any other Party or non-NAFTA party.<sup>373</sup>
417. The scope of the NAFTA 1103 MFN obligation extends to a broad range of economic activities, including the establishment, acquisition, expansion, management, conduct operation and sale or other disposition of investments. The NAFTA Parties, as they did for Article 1102 National Treatment, provided for a wide range of reservations and exceptions to permit a very broad number of public policy exceptions. The Treaty itself also contains a supremacy clause in Article 104 (and Annex 104.1) which provides that a variety of environmental treaties prevail over the NAFTA in the event of conflict. The drafters of the NAFTA never intended to exclude environmental regulatory assessment from the general principles of the NAFTA, such as MFN, national treatment or the international law standard of treatment.
418. In *Bayindir v. Pakistan*, an ICSID tribunal had to consider that treaty's MFN obligation. The *Bayindir* Tribunal found in interpreting the MFN obligation that “treatment” includes all dealings between the host state and the investor. The Tribunal held that even though all investors are subject to the same legal and regulatory framework, MFN was violated by treatment that involves the exercise of discretion within that framework in a manner that favours some investors in “similar situations” over others.<sup>374</sup> The Tribunal also noted the requirement that an investor provide “sufficiently specific data” to allow for the comparison of the more favourably treatment.<sup>375</sup>
419. NAFTA Article 1104 also needs to be considered. It provides:

**Standard of Treatment**

Each Party shall accord to investors of another Party and to investments of investors of another Party *the better of the treatment required by Articles 1102 and 1103* (emphasis added).

NAFTA Article 1104 maintains that an investor of another NAFTA Party is entitled to claim the benefit of the best standard of treatment which the NAFTA Party affords to its

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<sup>373</sup> United Nations Conference on Trade and Development (UNCTAD), *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements 1999, at 8. (*Investors’ Book of Authorities at Tab CA 238*).

<sup>374</sup> *Bayindir Insaat Turzım Ticaret Ve Sanayi, AS. v. Islamic Republic of Pakistan*, ICSID Case No. ARB./03/29, Decision on Jurisdiction, 2005 WL 3598900, November 14, 2005, at para. 206. (*Investors’ Book of Authorities at Tab CA 149*).

<sup>375</sup> *Bayindir v. Pakistan*, at para 417 (*Respondent’s Book of Authorities at Tab RA 7*).

own nationals under NAFTA Article 1102 and even to another Party or a non-party under Article 1103.

420. In its *Canadian Statement of Implementation*, Canada affirmed, “[t]he treatment required by article 1104 is the better of national treatment and most-favoured-nation treatment.”<sup>376</sup> Thus, the Investors are entitled to the benefit of the “better treatment” by virtue of NAFTA Article 1104 without having to allege and prove breach by Canada of its obligations under both Articles 1102 and 1103.

#### **B. Clarifying the Analytical Steps of NAFTA Article 1103**

421. The proper application and interpretation of NAFTA Article 1103 requires a careful examination of the NAFTA Article 1103 test in accordance with the treaty interpretation rules as set out in the *Vienna Convention*. In particular, the MFN Treatment standard set out in NAFTA Article 1103 must be interpreted according to the ordinary meaning of the terms in their context and in light of the treaty’s object and purpose.<sup>377</sup>
422. The non-discrimination obligations set out in NAFTA Article 1102 and 1103 contain parallel elements which impose a similar analytical approach. For instance, the use of the phrase “less favourable” and “like circumstances” in NAFTA Articles 1102 and 1103 suggest that an interpretation of both articles requires a comparison between different treatment and between the two “circumstances”, the comparators, to which different treatment is accorded. So to establish “likeness” for both provisions, the crux of the comparative analysis is identifying the proper comparator.<sup>378</sup>
423. The recommendations of the Joint Review Panel, and the Federal Government’s determination of Bilcon’s environmental assessment, constitute “treatment” under NAFTA Article 1103. As a result of this “treatment”, the Investors hereafter will demonstrate significant *differences* in treatment as required under NAFTA Article 1103, and the evidence clearly shows that Canada accorded “better treatment” to other Party or non-Party investors and investments of investors.

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<sup>376</sup> *Canada’s Statement of Implementation*, at 149. (*Investors’ Book of Authorities at Tab CA 45*).

<sup>377</sup> NAFTA, article 1131(1).

<sup>378</sup> Memorial of Investors, at paras. 374, 434.

424. Notwithstanding the similar legal elements of NAFTA Article 1102 and 1103, the Investors submitted separate claims to acknowledge that these provisions involve two distinct comparisons that coexist in the NAFTA non-discrimination obligations.<sup>379</sup>
425. In this NAFTA arbitration, the Investors bear the burden of proof for their NAFTA Article 1103 claim, and accordingly, demonstrated likeness and *prima facie* treatment in their Memorial.<sup>380</sup> Having established the elements of their NAFTA Article 1103 claim, the burden shifts to Canada to prove that it has provided MFN Treatment to the Investors.<sup>381</sup>

### C. The Meaning of Most-Favoured-Nation Treatment

426. MFN Treatment forms one of the most basic standards of international law. The United Nations International Law Commission (ILC) studied MFN in 1967 and adopted final Draft Articles in 1978, which provide a useful definition of MFN Treatment:

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.<sup>382</sup>

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<sup>379</sup> In particular, the comparison centres upon either the host-Party's investors and investments, or that or other Party or non-Party investors and investments; see Memorial of Investors, at paras. 372 – 425 (National Treatment) and at paras. 426 – 442 (MFN Treatment).

<sup>380</sup> Memorial of Investors, at paras. 606-639; see UNCITRAL Rules, art. 24 (1), "Each party shall have the burden of proving the facts relied on to support his claim or defence."; see Bin Cheng, *General Principles of Law applied by International Courts and Tribunals*, at 302 *et seq.*, (1987). (*Investors' Book of Authorities at Tab CA 235*)

<sup>381</sup> See *International Thunderbird Gaming, Award*, para. 95 (*Investors' Book of Authorities at Tab CA 19*); see *Feldman*, para. 177 (*Investors' Book of Authorities at Tab CA 51*), which quoted the Appellate Body Report, *United States Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 14, (*Investors' Book of Authorities at Tab CA 254*) where the Appellate Body stated:

[...] various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

<sup>382</sup> As provided in the Memorial of Investors at para. 430, the ILC has since established a Study Group in 2009, co-chaired by Mr. Donald M. McRae and Mr. A Rohan Perera, at its 3012<sup>th</sup> meeting, on 29 May 2009, *Report of the International Law Commission, Sixty First session, A/64.10, 2009, chp. XI, at para. 209* (*Investors' Book of Authorities at Tab CA 244*); see *Draft Articles on Most-Favoured-Nation Clauses of the UN International Law*

427. The MFN Treatment clause is a commitment between the treaty parties that none of the parties will give preferential treatment to a third State against the beneficiaries of the treaty.

*i. The Overriding Economic Considerations of MFN Treatment*

428. Consistent amongst commentators, lawyers, and economists, the concept of MFN is central from a legal point of view, and is rooted in strong economic rationales.<sup>383</sup> Viewed as a “central pillar of the international trading system”, the MFN Treatment obligation has served as an important tool in multilateral trade negotiations:

[B]y giving the investors of all parties benefitting from a country’s MFN clause the right, in similar circumstances, to treatment no less favourable than a country’s closest or most influential partners can negotiate on the matters the clause covers, *MFN avoids economic distortions* that would occur through more selective country-by-country liberalisation.<sup>384</sup>

429. The goal of avoiding economic distortions amongst parties to a treaty has often been linked to policy makers seeking to favour liberal trade.<sup>385</sup> MFN Treatment is also favourably equated with the concept of “multilateralism”. Particularly in the multilateral trade context, MFN has also served an important economic purpose that is connected to the principle of comparative advantage. In this vein, economists observe that MFN mitigates the danger of organizing relationship with foreign governments by offering a “standard of equal treatment of foreign nations”.<sup>386</sup> Thus, in addition to the concept of National Treatment, the concept of MFN Treatment has been a foundational principle in the context of trade in goods.<sup>387</sup>

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*Commission*, in Report of the International Law Commission on its Thirteenth Session, 2 Y.B. Int’L Comm. 11 (1978), U.N. Doc. A/CN-4/Ser. A. 1978/Add. 1. at p. 3. (*Investors’ Book of Authorities at Tab CA 245*).

<sup>383</sup> Horn, Henrik and Petros C Mavroidis, “*Economic and legal aspects of the Most-Favored Nation Clause*”, European Journal of Political Economics Volume 17, 2001, at 234. (*Investors’ Book of Authorities at Tab CA 219*)

<sup>384</sup> Organization for Economic Cooperation and Development (OECD), “*Most-Favoured-Nation Treatment in International Investment Law*”, Working Papers on International Investment Law No. 2004/2, OECD Paris, September 2004, at 3 (“MFN Treatment has been a central pillar of trade policy for centuries.”) (*Investors’ Book of Authorities at Tab CA 220*)

<sup>385</sup> Jackson, J.H. “*The World Trading System - Law and Policy of International Economic Relations*”, Second Edition, The MIT Press, 1997, at 134. (*Investors’ Book of Authorities at Tab CA 221*).

<sup>386</sup> Jackson, “*The World Trading System*”, at 134. (*Investors’ Book of Authorities at Tab CA 221*).

<sup>387</sup> Horn, “*Economic and legal aspects of the Most-Favored Nation Clause*”, at 234. (*Investors’ Book of Authorities at Tab CA 219*).

430. In addition to similar purposes between National Treatment and MFN, the MFN obligation also appears throughout the NAFTA and the WTO agreements, which were negotiated concurrently with the NAFTA.<sup>388</sup> Moreover, although the MFN Treatment obligation originated over a century ago, the main influence on NAFTA Article 1103 were the equivalent provisions in the GATT and GATS.<sup>389</sup>
431. The MFN Treatment standard has also had a major impact on economic liberalization in the field of international investment law.<sup>390</sup> In both legal regimes, the MFN Treatment standard seeks to ensure uniform treatment without discrimination.<sup>391</sup> Through MFN Treatment agreement, governments have ensured that the content of their bilateral investment treaty is always maintained at the best and highest level of investment protection. Thus, the MFN Treatment clause seeks to ensure a “level playing field between all trading partners.”<sup>392</sup>
432. In light of the foregoing, the economic rationale underlying the obligation to provide MFN Treatment – the goal of avoiding economic distortions amongst countries - is reaffirmed in several parts of the NAFTA, including the preamble of the NAFTA and its objects and purposes under NAFTA Article 102.<sup>393</sup> These references to the MFN concept stress general rules applicable to all Parties, which can minimize the costs of rule formation that restrains attempts by any Party to engage in “exploitative” behaviour.<sup>394</sup>

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<sup>388</sup> For example, there are most-favoured-nation obligations for goods (Article 308), for services (Article 1203) and for financial services (Article 1406).

<sup>389</sup> Both Articles 103 and 1103 strongly support a relationship between these WTO agreements and the NAFTA. In addition the impact of the GATT upon the most-favoured-nation non-discrimination provision is evidenced by the early drafting stages of NAFTA Article 1103, which centred upon the Mexican-US proposal for additional “GATT exception”-type language; See Kinnear, M., Andrea K. Bjorklund, John F.G. Hannaford, “*Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*”, June 2006, Article 1103 Most-Favoured Nation Treatment, (Kluwer 2006). at 2-1103. (*Investors’ Book of Authorities at Tab CA 237*).

<sup>390</sup> OECD, “*Most-Favoured-Nation Treatment in International Investment Law*”, at p. 3 (*Investors’ Book of Authorities at Tab CA 220*); Dolzer, Rudolf and Schreuer, Christoph, “*Principles of International Investment Law*”, 2nd Ed. (London: Oxford University Press, 2012).. (*Investors’ Book of Authorities at Tab CA 199*).

<sup>391</sup> See Tony Cole, “*The Boundaries of Most-Favoured Nation Treatment in International Investment Law*”, at 3. (*Investors’ Book of Authorities at Tab CA 239*).

<sup>392</sup> UNCTAD, *Most-Favoured-Nation Treatment*, at 13. (*Investors’ Book of Authorities at Tab CA 238*).

<sup>393</sup> Most-favoured-nation treatment is a fundamental principle supporting the NAFTA, which is used to fulfill its objective to liberalize trade and investment.

<sup>394</sup> Jackson, *The World Trading System*, at 135. (*Investors’ Book of Authorities at Tab CA 221*).

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*ii. The Influence of Most-Favoured-Nation Treatment from the International Trade Regime upon the NAFTA*

433. The development of MFN Treatment in international trade has especially contributed to the NAFTA context.<sup>395</sup> The GATT/WTO jurisprudence has also been recognized by NAFTA Tribunals as a valuable tool towards the nature, scope and effect of obligations to provide non-discriminatory treatment in the NAFTA generally.<sup>396</sup>
434. A binding regional initiative, the NAFTA is an effort to liberalize economic transactions amongst the Parties beyond what is available at the multilateral level through the World Trade Organization (WTO). The relationship between the NAFTA and the GATT is expressed in the preamble of the NAFTA, in which the NAFTA Parties recognised that the NAFTA is built on “their respective rights and obligations under the General Agreement on Tariffs and Trade.” Thus, like the WTO, the non-discrimination obligations to afford National Treatment and MFN Treatment are at the heart of the NAFTA.
435. As such, the larger purpose of the NAFTA, such as the commitment of the Parties to free trade, the removal of trade barriers to the free movement of goods and services between them, the promotion of competition, the enhancement of investment opportunities, and the creation of institutions to resolve disputes, reflects how the MFN Treatment extends to the areas of trade in goods, services, investment, and financial services.<sup>397</sup>

*iii. Determining the Competitive Relationship*

436. In addition to the several economic arguments in favour of MFN, NAFTA Article 1103 plays a direct role of ensuring equality of treatment and conditions between foreign investors. It also helps to establish equality of competitive opportunities between investors for different countries.<sup>398</sup>

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<sup>395</sup> Memorial of Investors, at para. 426 *et seq.*

<sup>396</sup> See *S.D. Myers*, Partial Award, at paras. 244 *et seq.* (*Investors’ Book of Authorities at Tab CA 6*); See *Pope & Talbot*, Award on the Merits of Phase 2, at para. 77 (*Investors’ Book of Authorities at Tab CA 12*); *Feldman*, Award, at para. 165, where the Tribunal described the “analogous language” in WTO law and the NAFTA (*Investors’ Book of Authorities at Tab CA 51*).

<sup>397</sup> NAFTA, preamble and art. 102.

<sup>398</sup> United Nations Conference on Trade and Development (UNCTAD), *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2010, at 13. (*Investors’ Book of Authorities at Tab CA 253*).

437. Equality of competitive opportunities requires a judgment as to how the measures complained of affect a *competitive relationship* in the marketplace. Therefore, the first step in the analysis is to determine the existence of a competitive relationship. The Investors submit that similarities between the NAFTA and the GATT/WTO jurisprudence can provide further guidance on how to examine the competitive relationship of the parties.

438. GATT Article I:1, entitled “General Most-Favoured-Nation Treatment” provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like* product originating in or destined for the *territories of all other Members*.<sup>399</sup>

439. Similarly, Article II:1 GATS says:

With respect to any measure covered by the Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment *no less favourable* than that it accords to *like* services and service suppliers of any other country.

440. Both articles contain similar elements to those contained in Article 1103. The requirement of “no less favourable” treatment is the same. Both articles limit the measures in which they apply, albeit in different ways. Finally, NAFTA Article 1103 applies to investors and investments in “like circumstances”, whereas the GATT and GATS articles respectively to “like products” and “like services”.<sup>400</sup>

441. The broader language in NAFTA Article 1103 appears to follow the logic that investment is with respect to “the establishment, acquisition, expansion, management, conduct,

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<sup>399</sup> General Agreement on Tariffs and Trade 1994, April 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization, Annex IA*, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S., 33 I.L.M. 1153 (1994), (*Investors’ Book of Authorities at Tab CA 252*); In addition, the GATT 1994 contains a number of minor provisions that require MFN Treatment, such as Articles III:7; V; IX:1, XIII, and XVII. (*Investors’ Book of Authorities at Tab CA 47*).

<sup>400</sup> These GATT and GATS obligations are subject to WTO public policy exceptions that permit public policy exceptions for certain specified reasons if such measures are the least trade restrictive possible and do not constitute an arbitrary means of discrimination, for example, in GATT Article XX.

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operation, and sale or other disposition of investments.” Thus, the treatment of investors and investment is comparable to the treatment accorded to services, which also provides for broader language that includes service providers as well.

442. In addition to the explicitly stated standards of treatment set out in NAFTA Article 1103, the concept of MFN Treatment, as representing an economic non-discrimination obligation, is created by several NAFTA Chapter 11 provisions.<sup>401</sup>
443. Other chapters of NAFTA also contain obligations to accord MFN Treatment. Article 1203 extends MFN Treatment to service providers from another Party. Article 1406 contains MFN Treatment with respect to financial services. Collectively, these provisions emphasize the suggestion that MFN Treatment is a term of art in the NAFTA emphasizing non-discrimination amongst competing goods, sectors, services, and investors.
444. The fact that the MFN Treatment obligation appears throughout the NAFTA and WTO agreements, which were negotiated concurrently, emphasizes the applicability of WTO jurisprudence to the interpretation of NAFTA provisions.<sup>402</sup>
445. Canada’s purported approach to NAFTA Article 1103 attempts to avoid the context of competitive relationships. Yet, notwithstanding Canada’s resistance to incorporating the weight of the GATT and WTO practice in the NAFTA Article 1103 context, Canada’s own *Statement of Implementation* acknowledges the influence of the GATT/WTO on the NAFTA:

The NAFTA and the Uruguay Round agreements cover much of the same ground and the two sets of rules are largely complementary and mutually reinforcing. In many respects, the NAFTA built on progress that had been made in the Uruguay Round while the Round in turn profited from the experience of Canada, the United States and Mexico in negotiating the NAFTA.<sup>403</sup>

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<sup>401</sup> In addition to NAFTA Article 1103, the Chapter 11 investor-State provisions reference most-favoured-nation treatment in NAFTA Articles 1104, 1106, 1112, 1114 and 1138.2.

<sup>402</sup> See the Article 1103 discussion of “like circumstances” in the context of the United States’ Most-Favoured-Nation obligation under Chapter 12 of the NAFTA, which was at issue in the NAFTA Chapter 20 *Cross-Border Trucking Services* brought by Mexico against the United States, *In the Matter of Cross-Border Trucking Svcs (Mex. V US)* (Arbitration Panel Report), dated February 6, 2001. (*Investors’ Book of Authorities at Tab CA 46*).

<sup>403</sup> *Canadian Statement of Implementation*, at 75. (*Investors’ Book of Authorities at Tab CA 45*).

446. Thus, it is clear from Canada's own statements on the NAFTA, made in connection with the implementation of the NAFTA, that GATT and the NAFTA negotiations were interconnected and inter-dependent.

#### **D. NAFTA ARTICLE 1103 – THE ANALYTICAL STEPS**

##### *i. Likeness*

447. As already noted, the JRP did nothing to prevent persons appearing before the JRP from making vitriolic statements of national bias and prejudice-anti-American, anti-foreigner, and anti-NAFTA nor did it ever make clear that such views are irrelevant and inappropriate in a quasi-judicial process of environmental assessment. The JRP's reference to "shared beliefs" as a basis for "community values" as the ground for its rejection of Bilcon, carries the inference that discrimination may have been carried into the JRP's disposition of Bilcon's proposal, given that nowhere in its report does it distance itself from the repeated and relentless statements of national prejudice and bias that were made before it, and suggest that these kinds of "beliefs" are not a permissible part of the content of "community values."

448. Similar to the likeness test under NAFTA Article 1102, the likeness test under NAFTA Article 1103 compares the "like circumstances" between Canadian proponents and the Investor and its Investment. However, a likeness test under Article 1103 differs from NAFTA Article 1102 in that it requires a comparison between the "like circumstances" of Investors and their Investment and the general class of applicants from any other NAFTA Party or non-Party.

449. In order to compare subject matters that are reasonably comparable, a MFN obligation must be applied in similar objective situations. Providing MFN Treatment does not require that all foreign investors have to be treated equally regardless of their business activities or circumstances. Pursuant to NAFTA Article 1103, a host Party cannot discriminate – *de jure* or *de facto* – amongst comparable investors seeking a non-discriminatory regulatory environment.

450. Assessing a possible violation of MFN Treatment may be done by borrowing from arbitral tribunal awards evaluating claims of National Treatment violations. In this connection, several NAFTA Awards have established that an assessment of an alleged NAFTA Article 1102 breach requires an identification of comparators and a consideration of the treatment each of them received. In evaluating National Treatment, these Tribunals relied on a variety of criteria for comparison depending on

the facts and circumstances of each case. These include: same business or economic sector,<sup>404</sup> same economic activity,<sup>405</sup> less like but available comparators,<sup>406</sup> and direct competitors.<sup>407</sup> In these National Treatment assessments, the Tribunals considered all of the relevant factors to decide on a flexible and appropriate interpretation of likeness.

451. These NAFTA Awards demonstrate that a meaning of likeness has to be related to the aspect of the economic activity that has been regulated. Moreover, these Tribunals have emphasized the fact that when the same legal regime is applicable to both a domestic investor and the foreign investor, this is an indication of the investors being in like circumstances.<sup>408</sup>
452. As explained in its Memorial, one of the central issues surrounding the legal interpretation of the MFN principle in Article I:1 of the GATT 1994 is the interpretation of the concept of “like products”.
453. The interpretation of likeness with respect to the MFN obligation in the GATT varies in the particular context of the case. In the second *Japan-Taxes on Alcoholic Beverages* dispute, the WTO panel argued that cross-price elasticity is the essential means for

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<sup>404</sup> *S.D. Myers*, 2002. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>405</sup> In *Feldman*, the Tribunal assessed producers and resellers of cigarettes (*Investors’ Book of Authorities at Tab CA 51*); In *UPS*, the Tribunal assessed postal and courier services. (*Investors’ Book of Authorities at Tab CA 89*).

<sup>406</sup> In *Methanex*, the Tribunal stated, “... it would be as perverse to ignore identical comparators if they were available and use comparators that were less like, as it would be perverse to refuse to find and apply less like comparators when no identical comparators exist.” (*Investors’ Book of Authorities at Tab CA 94*).

<sup>407</sup> In *ADM*, the Tribunal concluded that competitors in the sugar industry for supplying sweeteners to the soft drink and processed food markets were “like”. See *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 (*Respondent’s Book of Authorities at Tab RA 3*).

<sup>408</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, 12 January 2011., at paras. 166 and 167 (*Investors’ Book of Authorities at Tab CA 202*); the *Grand River* Tribunal assessed a series of NAFTA cases, such as the *ADF Award*, the *Pope & Talbot Award* and the *Feldman Award* to observe that “the reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103; see *ADF Group, Inc. v United States*, Case No. ARB/AF/00/1, Award, dated January 9, 2003, at para. 156 (*Investors’ Book of Authorities at Tab CA 9*); *Pope & Talbot*, Award on the Merits of Phase 2, paras. 78 *et seq.*, especially para. 88 (*Investors’ Book of Authorities at Tab CA 12*); *Feldman Award*, at paras. 171-172 (*Investors’ Book of Authorities at Tab CA 51*); *Methanex*, Part IV-Chapter B, paras. 18-19 (*Investors’ Book of Authorities at Tab CA 94*); *UPS Award*, at paras. 117-118 (*Investors’ Book of Authorities at Tab CA 89*).

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defining whether two products are in a directly competitive relationship.<sup>409</sup> Upholding the panel's findings, the Appellate Body in *Japan-Alcoholic Beverages* held:

[There] can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes *the image of an accordion*. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied.

454. The *Columbia-Ports* panel also considered the meaning of likeness under GATT Article I:1, and rejected the argument that likeness must be evaluated for same or similar specific goods when coming from other WTO Members but instead whether better customs treatment was provided generally to goods from those Members.<sup>410</sup>

*ii. Treatment*

455. The MFN Treatment is "essential for ensuring a level playing field between all trading partners" and is meant "to ensure an equality of competitive conditions between foreign investors of different nationalities."<sup>411</sup> The GATT Article I:1 does not explicitly refer to whether the MFN obligation applies to *de facto* or *de jure discrimination*.

456. The only case to discuss *de facto* discrimination has been discussed in the *Canada-Auto Pact* case.<sup>412</sup> Japan had argued that Canada violated its MFN obligation by limiting the duty free exemption to some manufacturers only. Canada claimed that it did not impose requirements on manufacturers regarding origin of cars they should privilege, and hence, private purchasers had the choice of eligible manufacturers. According to Canadian regulation, however, the eligibility for duty-free exemption was limited to some manufacturers only. The WTO panel found that the limitation of eligibility to only some manufacturers and particular sources of US origin constituted evidence that

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<sup>409</sup> World Trade Organization (WTO) Panel Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/R; WT/DS10/R; WT/DS11/R, 11 July 1996, at p. 144 (*Investors' Book of Authorities at Tab CA 250*).

<sup>410</sup> *Columbia - Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, dated April 27, 2009, at para. 7.355. (*Investors' Book of Authorities at Tab CA 172*).

<sup>411</sup> United Nations Conference on Trade and Development (UNCTAD), *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment 1999, at 14. (*Investors' Book of Authorities at Tab CA 238*).

<sup>412</sup> Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139, 142/AB/R, adopted June 19, 2000, at para. 78, at 25, *citing to* Panel Report, *Canada - Certain Measures Affecting the motive Industry*, WT/DS139, 142/R, circulated February 11, 2000. (*Investors' Book of Authorities at Tab CA 165*).

Canada failed to accord MFN Treatment to Japan.<sup>413</sup> This finding was upheld by the Appellate Body.<sup>414</sup>

iii. *Government Intent is Not a Primary Element of "Likeness" under NAFTA Article 1103*

457. In its Counter-Memorial, Canada promotes its regulatory objectives as the crux of an interpretive approach to an interpretation for both NAFTA Articles 1102 and 1103.<sup>415</sup> With respect to these provisions, Canada contends that any differential treatment is permissible, unless the Investors can demonstrate protectionist government policies requiring regulatory distinctions, which would be based on other criteria.<sup>416</sup>

458. Canada's purported approach would allow it to treat two investors differently because the regulation which distinguishes between them has neither the aim nor the effect of affording protection to domestic investors.<sup>417</sup> Such an approach, as explained by the WTO panel in *Malt Beverages* would give unintended deference to the regulating State.<sup>418</sup>

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<sup>413</sup> Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139, 142/R, circulated February 11, 2000, at para. 10.48-10.50. (*Investors' Book of Authorities at Tab CA 248*).

<sup>414</sup> Appellate Body Report, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139, 142/AB/R, adopted June 19, 2000, at para. 70-86. (*Investors' Book of Authorities at Tab CA 248*).

<sup>415</sup> Based upon GATT/WTO jurisprudence, an 'aims and effect' approach seeks to evaluate whether a Member's measures are discriminatory based on a determination of likeness, if, and when, the regulation at issue has the intent (aim) and effect of affording protection.

<sup>416</sup> Government of Canada Counter-Memorial at para. 424. It is unclear to the Investors whether Canada has also pleaded this approach regarding NAFTA Article 1102, but shall also address regulatory intent in their Reply for Article 1102 claim.

<sup>417</sup> Panel Report, *US-Taxes on Automobiles*, DS31/R, dated 11 October 1994, at para. 5.10, "A measure could be said to have the *aim* of affording protection if an analysis of the circumstances in which it was adopted, in particular an analysis of the instruments available to the contracting party to achieve the declared domestic policy goal, demonstrated that a change in competitive opportunities in favour of domestic products was a desired outcome and not merely an incidental consequence of the pursuit of a legitimate policy goal". The Panel stated, "a measure could be said to have the *effect* of affording protection to domestic production if it accorded greater competitive opportunities to domestic products than to imported products. (*Investors' Book of Authorities at Tab CA 247*).

<sup>418</sup> *GAIT Panel Report, United States - Measures Affecting Alcoholic and Malt Beverages (US-Malt Beverages)*, DS23/R, adopted 19 June 1992, BISD 395/206, at para. 5.25. Assessed in the context of Article III, National Treatment, the Panel considered that an analysis of "like products" must take into account the objective of Article III, which was to prevent contracting parties from using their fiscal and regulatory powers for discriminatory purposes. (*Investors' Book of Authorities at Tab CA 155*).

459. In *S.D. Myers*, the Tribunal analyzed whether intent is an indispensable element in establishing whether a measure affords “less favourable treatment” to foreign investors. In this claim, the Tribunal was required to analyze the Investors’ claims regarding Canada’s measures with respect to cross-border trade in PCBs. The *SD Myers* Tribunal stated: The word “treatment” suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.<sup>419</sup>
460. The relevance of this statement by the majority in *S.D. Myers* is emphasized in light of the separate opinion submitted by Arbitrator Prof. Bryan Schwartz, and his assessment of protectionist intent.<sup>420</sup> In his Separate Opinion, Arbitrator Schwartz observed that both *effects* and the *motive or intent* of a Party must play a role when assessing violations of discriminatory effects.<sup>421</sup>
461. Prof. Bryan Schwartz found that expressions of protectionist intent can, on occasion, be intensely relevant.<sup>422</sup> However, he highlighted how difficult the ascertainment of government intent can be in an investigation:
- [T]he intent of government is a complex and multifaceted manner. Government decisions are shaped by different politicians and bureaucrats with differing philosophies and perspectives. Every person involved may tailor his or her recommendation or vote to address a variety of different policy objectives and may sometimes take into account partisan political factors or career concerns.<sup>423</sup>
462. In particular, Prof. Bryan Schwartz was not assessing innocent purposes, but rather, emphasized how *protectionist intent* plays a role in assessing whether government actions are contrary to the NAFTA objectives under NAFTA Article 102.<sup>424</sup> Following this

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<sup>419</sup> *S.D. Myers*, Partial Award, at para 254. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>420</sup> See Separate Opinion of Dr. Bryan Schwartz on November 12, 2000. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>421</sup> Memorial of Investors, at para. 419, citing Separate Opinion of Dr. Bryan Schwartz on November 12, 2000, at para. 144. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>422</sup> See Separate Opinion of Dr. Bryan Schwartz on November 12, 2000, at para. 144. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>423</sup> See Separate Opinion of Dr. Bryan Schwartz on November 12, 2000, at para. 147. (*Investors’ Book of Authorities at Tab CA 6*).

<sup>424</sup> Memorial of Investors at para. 419, citing to Dr. Schwartz, who noted that protectionist motive or intent may be relevant when assessing the objective of reducing barriers to trade between the Parties; See Separate Opinion of Dr. Bryan Schwartz on November 12, 2000, at para. 144. (*Investors’ Book of Authorities at Tab CA 6*).

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methodology, the *S.D. Myers* Tribunal examined the evidence on the whole, and ruled that protectionism was the controlling purpose underlying the ban on PCBs.<sup>425</sup>

463. The non-NAFTA Tribunal in *AES v Hungary* adopted a similar approach to the *SD Myers* Tribunal. In this dispute, Hungary had attempted to defend its legislation that capped electricity prices sold by private generator. This legislation triggered a claim for loss of profits brought by a foreign investor, AES, under the Energy Charter Treaty. In response to AES' claims, Hungary had argued that the legislation was motivated by a legitimate justification of complying with its obligations as a European Union member.<sup>426</sup> The Tribunal analyzed various pieces of evidence and found that the legislation was not tied to the European Commission's rules.<sup>427</sup> In doing so, the Tribunal, like the *SD Myers* Tribunal, examined the statement of government ministers that revealed protectionist intent.<sup>428</sup> In light of the legislative record, the majority of the *AES* Tribunal refused to endorse Hungary's "rational" objective for its intervention with electricity prices. It considered that Hungary had tried to "use its governmental powers" with the objective "to force a private party to change or give up its contractual rights."<sup>429</sup>
464. There are other reasons to discount *intent* when analyzing the non-discrimination obligations of a host State. An approach requiring the Investors to present evidence of government motivations also causes the Investors to "second-guess" the motivation of a host State regulator; and, imposing this requirement on the Investors creates a novel element for demonstrating a violation of either NAFTA Article 1102 or Article 1103.
465. Moreover, the Appellate Body and WTO panels have similarly observed that demonstrating intent places the complainant in an unfair position. For Article I, based on GATT/WTO practice, it does not appear that intent plays any role. Furthermore, the WTO panel in *Japan-Alcoholic Beverages* noted that the 'aims and effects' test would circumvent the burden of proof, whereby "it would be up to the complainant to

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<sup>425</sup> *S.D. Myers*, Partial Award, at paras. 162, 164, 168. (*Investors' Book of Authorities at Tab CA 6*).

<sup>426</sup> *AES Summit Generation Limited, AES-Tisza Erömu KFT v. The Republic of Hungary*, Award, Case No. ARB/07/22, September 23, 2010., at paras. 7.2.1-7.2.5. (*Investors' Book of Authorities at Tab CA 249*).

<sup>427</sup> *AES v Hungary*, at paras. 10.3.12 - 10.3.32. (*Investors' Book of Authorities at Tab CA 249*).

<sup>428</sup> *AES v Hungary*, at paras. 10.3.12-10.3.32 (*Investors' Book of Authorities at Tab CA 249*).

<sup>429</sup> *AES v Hungary*, at paras. 10.3.12. (*Investors' Book of Authorities at Tab CA 249*).

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produce a prima facie case that a measure has both the aim and effect of affording protection to domestic production”.<sup>430</sup>

466. In the Appellate Body’s view, the inclusion of intent would require a responding Member to look for justification, for instance, as those found in the general exceptions embodied in GATT Article XX. Accordingly, the use of a subjective “intent”-based approach for evaluating likeness would require the Appellate Body to focus on determining discrimination in the abstract before focusing on the specific law or regulation that is at issue.

467. The WTO panel in *Japan- Alcoholic Beverages* addressed this issue and found:

[V]ery often there is a multiplicity of aims that are sought through enactment of legislation and it would be a difficult exercise to determine which aim or aims should be determinative for applying the aim-and-effect test. ... Moreover... [e]ven if the complete legislative history is available, it would be difficult to assess which kinds of legislative history (statements in legislation, in official legislative reports, by individual legislators, or in hearings by interested parties) should be primarily determinative of the aims of the legislation.<sup>431</sup>

Accordingly, the Appellate Body concluded that a finding of discrimination could be based on the existence of either one of these two elements, or on the existence of both elements.<sup>432</sup>

468. In the *United States – Clove Cigarettes* case, the Appellate Body affirmed the panel’s findings in *Japan-Taxes on Alcoholic Beverages II*.<sup>433</sup> In this dispute, the Appellate Body analyzed whether the Panel could rely on the United States’ innocent purposes, which it identified as reducing youth smoking, to determine the likeness of the products, as defense to alleged National Treatment violations under the TBT Agreement. In rejecting this approach, Appellate Body held:

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<sup>430</sup> Panel Report, *Japan-Taxes on Alcoholic Beverages II*, WT/DS8, 10, 11/R, adopted on November 1, 1996, at para. 6.17. In this case, the Appellate Body found that a more compelling assessment was based upon objective criteria – as evidenced by the protective application of the measure. Thus, the only issue is how to evaluate the effect of the measure. (*Investors’ Book of Authorities at Tab CA 250*).

<sup>431</sup> Panel Report, *Japan-Taxes on Alcoholic Beverages II*, WT/DS8, 10, 11/R, adopted on November 1, 1996, at para. 6.16. (*Investors’ Book of Authorities at Tab CA 250*).

<sup>432</sup> Appellate Body report, *Japan-Taxes on Alcoholic Beverages II*. (*Investors’ Book of Authorities at Tab CA 178*).

<sup>433</sup> World Trade Organization (WTO) report of the Appellate Body, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 12 April 2012., at para. 114. (*Investors’ Book of Authorities at Tab CA 196*).

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We further observe that measures often pursue a multiplicity of objectives, which are not always easily discernible from the text or even from the design, architecture, and structure of the measure. Determining likeness on the basis of the regulatory objectives of the measure, rather than on the products' competitive relationship, would require the identification of all the relevant objectives of a measure, as well as an assessment of which objectives among others are relevant or should prevail in determining whether the products are like. It seems to us that it would not always be possible for a complainant or a panel to identify all the objectives of a measure and/or be in a position to determine which among multiple objectives are relevant to the determination of whether two products are like, or not.<sup>434</sup>

469. The application of MFN protection in the context of an environmental assessment cannot create a gateway to the evaluation of new or additive economic activity by an investment. In the trade context, a WTO Member can attempt to justify better than MFN Treatment to goods and services pursuant to Article XX and XXI of the GATT.<sup>435</sup> These provisions have profound implications with regard to review of a Member's domestic regulatory regimes because the GATT permits a Member to present non-protectionist purposes (for instance, the environment), or the absence of a discriminatory effect, as evidence to rebut the complaining Member's claim of protectionism.<sup>436</sup> In the NAFTA, there is no such justification for failing to accord MFN Treatment.
470. Treaty Parties commonly include exceptions to the scope of Most Favored Nation clauses within their treaties. The NAFTA Parties have included their limitations to the scope of Article 1103 as follows:
- a) in Annex IV of the NAFTA, where Canada has excluded international agreements, which were signed or came into force before the NAFTA (1 January 1994);
  - b) Canada has also excluded specific sectors of its economy from the scope of Article 1103;
  - c) Through Article 1108 and accompanying reservations in Annex I and II of the NAFTA

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<sup>434</sup> Appellate Body Report, *US Clove Cigarettes*, at para. 113, citing to Panel Report, *Japan – Alcoholic Beverages II*, para. 6.16. (*Investors' Book of Authorities at Tab CA 196*).

<sup>435</sup> Article XX allows for exceptions from MFN for health, environment, public morals, etc. whereas Article XXI ensures the same right with regard to national security.

<sup>436</sup> In addition to this exception, the WTO Members have greater opportunity to justify regulatory behavior – the panel's decision may be subjected to an appeal to the WTO Appellate Body, and can be (theoretically) overruled by negative consensus by the WTO Dispute Settlement Body.

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471. Canada contends that public policy considerations need to be taken into account for the establishment of “like circumstances”.<sup>437</sup> Environmental regulatory assessment, however, is not excluded from the operation of NAFTA Article 1103, and there are no reservations in Annex I or II addressing it. By excluding these treaties, sectors and policies from the scope of Article 1103, Canada has also agreed that Article 1103 gives investors the benefit of better protection offered to non-NAFTA Party investments or investments for other NAFTA Parties.<sup>438</sup>
472. In any case, the treatment of Bilcon involved discrimination based on the company’s nationality as American and belonging to a state to which Canada has NAFTA obligations.
473. Tribunals considering Most Favored Nation clauses similar to NAFTA Article 1103 have also interpreted these clauses to ensure they fulfill their purpose. In *Asian Agricultural Products v Sri Lanka*, the Tribunal held that the *Sri Lanka-UK BIT* equivalent of Article 1103:

...may be invoked to increase the host State’s liability in case a higher standard of international protection becomes granted to investments pertaining to nationals of a Third state.<sup>439</sup>

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<sup>437</sup> Government of Canada Counter-Memorial at para 424. In fact, Canada offers no evidence of any finding to this effect with respect to NAFTA Article 1103 or an MFN obligation in any bilateral investment Treaty.

<sup>438</sup> Memorial of Investors at para 432.

<sup>439</sup> *Asian Agricultural Products v. Sri Lanka*, ICSID Case ARB/87/3, Award, 4 ICSID Reports 246, 1990 WL10089584, June 27, 1990, at para. 43. (*Investors’ Book of Authorities at Tab CA 36*).

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**PART FOUR: THE LAW APPLIED TO THE FACTS**

474. In contravention of its obligation under NAFTA Article 1105, Canada did not accord the international law standard of treatment to Bilcon:
- i) Federal jurisdiction over Bilcon’s proposal lacked a basis in Canadian constitutional and administrative law, the Joint Review Panel exceeded its jurisdiction as defined by its Terms of Reference and its enabling legislation;
  - ii) The Ministerial decisions resulting from the Joint Review Panel report adapted the fundamental legal flaws of the Report without proving Bilcon with an opportunity to make representations about the decisions.
475. Canada acted in an unfair and unreasonable manner toward Bilcon:
- ii) Canada imposed biased, needless and unfair procedures and obligations on Bilcon which caused economic harm, deprivation and delay;
  - iii) The Joint Review Panel ignored relevant facts, and relied upon arbitrary, biased, capricious, and irrelevant considerations in regard to:
    - 1. “community core values”;
    - 2. “cumulative effects”;
    - 3. “adaptive management” principles; and
    - 4. Bilcon’s expert evidence and its mitigation measures,
476. Canada treated Bilcon in a discriminatory manner by allowing political motivations to pervert the environmental assessment process.
477. Canada engaged in a non-transparent course of conduct which caused delay, economic harm, and deprivation to Bilcon and its Investors, contrary to its obligation of good faith, by misrepresenting the regulatory state of play to the Investors, not informing the Investors of regulatory decisions that had been made, and misrepresenting to the Investors that it possessed legal authority that it did not have.

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478. Canada contravened its Most Favored Nation Treatment obligation in NAFTA Article 1103:

- a) Canada provided treatment that was less favorable to Bilcon and its Investors than was provided to companies owned by Investors from other NAFTA Parties as well as to Investors from Non-Parties, in like circumstances; and
- b) The measures interfered with the conduct, management, operation and expansion of the Investment.

479. NAFTA Article 1104 entitles an investor from the United States, and its investments, to receive from Canada the best treatment provided in the jurisdiction under either NAFTA 1102 or 1103.

480. As a result, the Investors suffered loss, injury and damage.

#### **I. INTERNATIONAL LAW STANDARD OF TREATMENT**

##### **A. Lack of Due Process, Natural Justice and Fairness and Reasonableness Before the Joint Review Panel Process**

481. Before the establishment of the Joint Review Panel, the Department of Fisheries and Oceans, on its own and in collaboration with the Nova Scotia Department of the Environment:

- a) Imposed blasting conditions that it had no authority to impose;
- b) Imposed blasting conditions that Bilcon had no realistic prospect of being able to fulfill;
- c) Refused to approve Bilcon's blast plan;
- d) Imposed blast setback distances using models it knew were inappropriate;
- e) Refused, on six occasions, to explain or justify the setback distances;
- f) Scoped the quarry and marine terminal into one project despite knowing that it lacked any lawful basis for doing so;
- g) Scoped the quarry and marine terminal into one project without consulting Bilcon;
- h) Misled Bilcon over concerns related to whales and iBoF salmon;
- i) Concealed material facts and policy positions from Bilcon.

*i. Imposition of Blasting Conditions and Setback Distances*

482. DFO and NSDEL were fully aware of the necessity of blasting at the 3.9ha quarry as the purpose of blasting was to conduct test blasts in advance of Bilcon's larger operations. Mr. Balcom stated in December 2002, "DFO should understand that the blast design is for a test blast."<sup>440</sup> NSDEL district manager Mr. Petrie noted, "This blast is intended to be a "test" blast."<sup>441</sup> This had been earlier confirmed by Mr. Buxton when he stated publicly at a Community Liaison Committee meeting that a "test blast would gather all data to ensure that all guidelines are met."<sup>442</sup>
483. The DFO had no lawful authority to bring itself into the process of overseeing Bilcon's efforts to test blast at its 3.9ha quarry.
484. Condition 10.h required blasting to conform to the DFO's blasting *Guidelines*, and 10.i required Bilcon to submit a report in advance that there would not be any adverse effects on marine mammals.<sup>443</sup> The imposition of conditions 10.h and 10.i into the process was beyond legislative jurisdiction of the federal government.<sup>444</sup> Tiverton Harbour, only 10km away, did not have similar conditions, blasting there was directly in the water.<sup>445</sup> As noted by Environmental Law expert David Estrin, Canada has not provided a "single example of another Nova Scotia quarry permit" aside from the Whites Point Quarry that included a condition requiring the proponent to obtain the agreement of DFO for its blasting plan.<sup>446</sup>
485. Conditions 10.h and 10.i were also written in a manner that made it impossible for Bilcon to fulfill them, as each was required to be fulfilled before the other. Bilcon was

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<sup>440</sup> Email from Robert Balcom (NSDEL) to Bob Petrie, (NSDEL), dated December 16, 2002 (*Investors' Schedule of Documents at Tab C 916*)

<sup>441</sup> Email Bob Petrie, (NSDEL) to Kim MacNeil, (NSDEL), dated February 7, 2003 (*Investors' Schedule of Documents at Tab C 917*)

<sup>442</sup> Minutes of Meeting Community Liaison Committee, dated August 25, 2002 at bate 013435. (*Investors' Schedule of Documents at Tab C 919*).

<sup>443</sup> NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, April 30, 2002 (*Investors' Schedule of Document at Tab C 31*).

<sup>444</sup> NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, April 30, 2002 (*Investors' Schedule of Document at Tab C 31*).

<sup>445</sup> Expert Report of Murray Rankin, Q.C., para. 84.

<sup>446</sup> Reply Expert Report of David Estrin, para. 7.

denied three requested meetings to discuss its blasting plan and to understand how it should navigate through this practically impossible situation.<sup>447</sup>

486. The DFO unilaterally adopted an interpretation of the condition, that required the DFO to acknowledge that Bilcon's blasting conformed to the DFO Blasting Guidelines.
487. The DFO never told Bilcon that its regulator, Mr. Conway, had "no concerns in respect to marine mammal issues in respect to this specific proposal".
488. One year after agreeing to a blasting setback distance of 35.6m from the ocean, based on its Blasting *Guidelines*, the DFO changed the distance to 500m, based on the use of an "iBlast" model.<sup>448</sup> When the DFO was informed that the "iBlast" model was the wrong model to use, as it was for open water and not for land-based blasting, DFO officials withheld this information from Bilcon, and refused to adjust the setback distance. For 14 months DFO maintained a setback distance it knew to be inapplicable before it to another arbitrary setback distance of 100m.
489. On six occasions Bilcon requested to understand how the DFO had arrived at its setback distance and on each occasion the request was turned down.<sup>449</sup>

*ii. The DFO's Decision to Scope in Land Based Quarry*

490. The DFO had no legal basis to assume jurisdiction over a 3.9ha quarry in Nova Scotia and its decision to scope the land quarry and the marine terminal into one project was outside of its legislative and regulatory authority.

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<sup>447</sup> Letter from Paul Buxton to Phil Zamora, Fisheries and Oceans Canada, November 22, 2004. (*Investors' Schedule of Documents at Tab C 619*). Letter from Paul Buxton to Phil Zamora (DFO), dated June 6, 2003, requesting the calculations used by the DFO to determine setback distance. (*Investors' Schedule of Documents at Tab C 68*); Handwritten Note made by unknown, dated June 6, 2003 (*Investors' Schedule of Documents at Tab C 607*).

<sup>448</sup> Letter from Phil Zamora (DFO) to Paul Buxton requiring the proponent to obtain authorization under S. 32 of the *Fisheries Act*, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 249*); Journal Notes by Derek McDonald (CEAA) discussing blasting at the Whites Point Quarry at p. 801531 (*Investors' Schedule of Documents at Tab C 612*).

<sup>449</sup> Letter from Paul Buxton to Phil Zamora (DFO), dated June 6, 2003, requesting the calculations used by the DFO to determine setback distance. (*Investors' Schedule of Documents at Tab C 68*); Letter from Paul Buxton, Global Quarry Products to Phil Zamora (DFO), dated June 16, 2003, requesting that, prior to meeting with the DFO, if the calculations used by the DFO could be examined. (*Investors' Schedule of Documents at Tab C 107*); Notes from Meeting between the Habitat Management Division of the DFO and Bilcon of Nova Scotia, dated December 10, 2004. (*Investors' Schedule of Documents Tab C 131*); Letter from Paul Buxton, Nova Stone Exporters Inc., to Phil Zamora (DFO), dated June 21, 2003. (*Investors' Schedule of Documents at Tab C 611*); Handwritten Note, June 6, 2003. (*Investors' Schedule of Documents at Tab C 607*). Letter from Bob Petrie (NSDEL) to Paul Buxton, dated July 23, 2003 re seeking verification on blasting guidelines. (*Investors' Schedule of Documents at Tab C 489*).

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491. Environmental law expert David Estrin notes in his Reply Expert Report that Robert Thibault had no authority as Minister of Fisheries and Oceans over the land based quarry.<sup>450</sup> He states that Minister Thibault scoped the quarry and marine terminal “despite being advised one day earlier by his Deputy Minister that DFO ‘may not have a legislative trigger to include the quarry’,” nevertheless, “DFO did nothing to stop the panel review of the quarry from proceeding.”<sup>451</sup>
492. Mr. Estrin also emphasizes that the decision to scope in the quarry failed to conform to standard practice. “It was DFO’s practice from 1999 through 2004 that the project component included in the CEAA assessment would be only the immediate activity for which a DFO permit was required.”<sup>452</sup>
493. This was confirmed by Minister Thibault himself, who later acknowledged, after his Party was defeated in a federal election, that:

The federal government had no jurisdiction over the quarry itself – only its possible impact on marine life and habitat.<sup>453</sup>

The DFO also acted without any consultation with Bilcon.

*iii. Whales*

494. The DFO needlessly imposed requirements on Bilcon based on purported concerns about the safety of various species of whales, despite the fact that its own officials had expressly stated they did not have concerns over whales in regard to the proposed blasting at Whites Point.<sup>454</sup>
495. Transport Canada acknowledges that the Bay of Fundy is a highly trafficked industrial waterway, and that Bilcon’s activities would have added only one ship per week to the entire waterway.<sup>455</sup> Combined with the fact that Bilcon’s ships would conform to Transport Canada’s shipping lanes, the DFO should have had no more concern for the

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<sup>450</sup> Reply Expert Report of David Estrin at para. 51

<sup>451</sup> Reply Expert Report of David Estrin at para. 51

<sup>452</sup> Reply Expert Report of David Estrin at para. 57

<sup>453</sup> Robert Thibault, “Thibault rejects proposed quarry”, *Digby Courier*, May 26, 2004 (*Investors’ Schedule of Documents at Tab C 511*) (emphasis added).

<sup>454</sup> E-mail from Jerry Conway (DFO) to Jim Ross (DFO), dated December 2, 2002, (*Investors’ Schedule of Documents at Tab C 605*).

<sup>455</sup> Letter from the Honourable Lawrence Cannon (TC) to Ashraf Mahtab, dated February 21, 2007 re Environmental Petition #178 (*Investors’ Schedule of Documents at Tab C 658*).

project at Whites Point than for other projects that were approved and added more shipping traffic to the Bay of Fundy than Bilcon was slated to.

496. The following chart provides examples of shipping traffic on the Bay of Fundy.

Project	Frequency of shipping	Weight of the Ships	Level of Environmental Assessment
Whites Point Quarry	44-50 times per year <sup>456</sup>	70,000 tonnes <sup>457</sup>	Joint Review Panel
Eider Rock Project, Marine Terminal, Saint John Harbour	310 ships per year <sup>458</sup>	320,000 tonnes <sup>459</sup>	Comprehensive Study
Canaport LNG Terminal in Saint John	96 – 144 ships per year <sup>460</sup>	106,897 tonnes <sup>461</sup>	Comprehensive Study
Fundy Gypsum Loading Terminal at Hantsport	72 ships per year <sup>462</sup>	38,800 tonnes <sup>463</sup>	Nova Scotia Class I Screening and Focus Report

497. Although the DFO demanded that Bilcon address issues pertaining to whales, during the JRP hearing, the DFO conceded that there were no whales in the area.<sup>464</sup>

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<sup>456</sup> WPQ, JRP Report, dated October 2007, at p.1 (*Investors' Schedule of Documents, Tab C 34*).

<sup>457</sup> WPQ, JRP Report, dated October 2007, at p.1 (*Investors' Schedule of Documents, Tab C 34*).

<sup>458</sup> Shipping included approximately 280 product tankers and 22-30 coke vessels per year. Eider Rock Project, Marine Terminal, Saint John Harbour, Comprehensive Study Report, dated September 10, 2009 at p.58 (*Investors' Schedule of Documents at Tab C 794*).

<sup>459</sup> Very Large Crude Carrier will be used at the Project. See Eider Rock Project, Marine Terminal, Saint John Harbour, Comprehensive Study Report, dated September 10, 2009 at p.58. (*Investors' Schedule of Documents at Tab C 794*).

<sup>460</sup> Frequency of shipping is 2-3 ships per week. Summary of Public Participation, EIA, dated July 2004 (*Investors' Schedule of Documents at Tab C 795*).

<sup>461</sup> Auke Visser's Historical Tankers Site (*Investors' Schedule of Documents at Tab C 722*). Q-Flex LNG Super Tanker is being used at the Canaport LNG Facility (*Investors' Schedule of Documents at Tab C 796*).

<sup>462</sup> Frequency of shipping is 4 to 6 ships from May to December and 6 to 12 ships from December to May. FINAL Technical Memorandum – Marine Transportation Study – Phase 1, dated May 9, 2008 (*Investors' Schedule of Documents at Tab C 797*).

<sup>463</sup> Gypsum Centennial – Vessel's Details (*Investors' Schedule of Documents at Tab C 723*). Gypsum Centennial Bulk Carrier is being used at the Hantsport Facility (*Investors' Schedule of Documents at Tab C 797*).

*iv. Inner Bay of Fundy Salmon*

498. Bilcon was also subjected to dealing with another spurious aquatic issue: iBoF salmon. And although the DFO was advised by independent government-funded experts that its concerns about iBoF salmon at Whites Point were unwarranted, this information was never communicated to Bilcon.<sup>465</sup>
499. The DFO also chose to only burden Bilcon with its concerns about iBoF salmon, and did not impose the same regulatory burdens on other industrial projects located close to actual iBoF spawning grounds.
500. The DFO also expressed no concern about iBoF salmon to the proponents of the nearby Tiverton quarry when approving its blasting activities directly in the water.<sup>466</sup> Neil Bellefontaine stated in his witness statement filed by Canada that “young inner Bay of Fundy Atlantic Salmon (also an endangered species) migrate along the Neck after leaving rivers in the upper reaches of the Bay.” Canada did not provide any evidence to support this statement.<sup>467</sup>

**B. Lack of Due Process, Natural Justice and Fairness and Reasonableness During the Joint Review Panel Process Before the Joint Review Panel Report**

501. During the JRP process Bilcon was subjected to numerous wrongs:
- a) The JRP failed to afford Bilcon an opportunity to prepare for the hearings by failing to ensure that it would be provided with the regulatory agencies presentations and expert CVs within a reasonable time prior to the commencement of the hearings;

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<sup>464</sup> Response to Undertaking 31 by the Department of Fisheries and Oceans. (*Investors’ Schedule of Documents at Tab C 417*); Memorial of the Investors, para. 495

<sup>465</sup> E-mail from Rod Bradford, (DFO) to Larry Marshall and Andrew Stewart, Bedford Institute of Oceanography, October 8, 2003. (*Investors’ Schedule of Documents at Tab C 608*), Email from Rod Bradford, (DFO), to Tammy Lee Anne Rose, Bedford Institute of Oceanography, dated December 9, 2003 (*Investors’ Schedule of Documents at Tab C 663*), Email from Paul Boudreau (DFO) to Peter Winchester (DFO) regarding plans for blasting at WPQ, dated May 28, 2003. (*Investors’ Schedule of Documents Tab C 306*), Letter from Thomas Wheaton, Fisheries and Oceans Canada to NSDEL, dated March 15, 2004 re Quarry Development, Tiverton, "Proposed Blast Design Plan" (*Government of Canada Counter-Memorial Exhibit R-341*); *Migration of Inner Bay of Fundy Atlantic Salmon in Relation to the Proposed Quarry in the Digby Neck Region of Nova Scotia*, Professor M.J. Dadswell, November 2004. (*Investors’ Schedule of Documents at Tab C 426*).

<sup>466</sup> E-mail from Phil Zamora to Bruce Hood, et al, dated December 16, 2003 re Tiverton Quarry and Blasting Plan (*Investors’ Schedule of Documents at Tab C 475*).

<sup>467</sup> Affidavit of Neil Bellefontaine, para. 26.

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- b) The hearings were conducted in a biased and prejudicial manner towards Bilcon, from the tone of the hearings to the fact that Bilcon's experts were not afforded a fair opportunity to present their evidence;
  - c) Bilcon did not have the opportunity to address the concept of "community core values" despite its obvious import to the JRP's view of the Project;
  - d) The JRP members were dismissive of Bilcon's EIS and made a series of information requests, many on issues with no relevance to whether the Whites Point Quarry would have significant adverse environmental effects.
502. Bilcon prepared and submitted an EIS, totalling 3,000 pages, including reports from leading Canadian scientists.<sup>468</sup> The EIS canvassed all of the appropriate subjects that needed to be addressed based on the proposed activities at Whites Point.
503. Instead of directing its analysis to the critical issues addressed in the EIS, the JRP used the period following the submission of the EIS to demand information on issues that had no reasonable bearing on its ability to assess the potential for significant adverse environmental effects of the Whites Point Quarry, distracting Bilcon from the relevant issues, causing it to expend time, money and resources on extraneous issues
504. The JRP was also wrong and unreasonable in its demands for a revised Project Description in September 2006, over four years after Bilcon began dealing with regulators for its proposed project and three and a half years since the Project Description was accepted by the CEA Agency.<sup>469</sup>
505. During the JRP hearings themselves, Bilcon was denied a proper opportunity to know the case it had to meet. Neither the CEA Agency nor the JRP ensured that all government agencies made their JRP hearing presentations available to Bilcon sufficiently in advance the hearings for Bilcon to properly prepare.<sup>470</sup> Knowing the case that must be met is a fundamental tenet of "basic procedural fairness".<sup>471</sup>

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<sup>468</sup> Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006 (*Investors' Schedule of Documents at Tab C 1*) and Index of Expert Reports included with EIS, listed in Schedule 1.

<sup>469</sup> Letter from Robert Fournier to Paul Buxton, dated September 22, 2006, requesting a revised project description. (*Investors' Schedule of Documents at Tab C 145*).

<sup>470</sup> Supplemental Witness Statement of Paul Buxton, at para. 45.

<sup>471</sup> Expert Report of Murray Rankin, Q.C., para. 100

506. The hearings were not neutral or objective and was prejudicial to Bilcon. The CEEA and the JRP denied Bilcon a fair and impartial environment with which it could present its evidence. The Panel displayed distain for Bilcon.<sup>472</sup> Mr. Rankin suggests the type of antagonism can “constitute disqualifying bias.”<sup>473</sup> An example is where the JRP questioned Bilcon on its owner’s motives, and reason for locating its aggregate business in Canada, asking, “Are they involved in anything else internationally,” and “Why Nova Scotia as opposed to the U.S. coast?”<sup>474</sup>

507. Bilcon was not once asked to comment on the then unknown concept of “community core values,” which it would learn, was to form the basis of the JRP’s decision to reject the proposed project.<sup>475</sup>

**C. Lack of Due Process, Natural Justice and Fairness and Reasonableness in the Joint Review Panel Report**

508. The JRP Report is replete with errors, misstatements, and inconsistencies which Bilcon specifically pointed out to NSDEL Minister Parent following receipt of the Report:<sup>476</sup>

- a) The recommendations made by the Joint Review Panel were not in accordance with the information including expert information, provided to the Panel;
- b) The Panel ignored important scientific and other information provided by Bilcon;
- c) The Panel’s recommendations went far beyond the Panel’s mandate;
- d) The Panel did not apply the legal and regulatory requirements of the environmental scheme for an assessment;
- e) The Panel’s conclusions were not based on science or fact;<sup>477</sup>

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<sup>472</sup> Joint Review Panel Public Hearing Transcript, Vol. 2, dated June 18, 2007 at p. 261, line 12 (*Investors’ Schedule of Documents Tab C 155*).

<sup>473</sup> Expert Report of Murray Rankin, Q.C., para. 104

<sup>474</sup> Witness Statement of Hugh Fraser, dated July 6, 2011 at paras. 19-20

<sup>475</sup> Joint Review Panel Public Hearing Transcripts, Volume 1 – 13 dated June 16 – June 30, 2007. (*Investors’ Schedule of Documents at Tab C 154, C 155, C 156, C 109, C 157, C 158, C 159, C 160, C 161, C 162, C 163, C 164 and C165*).

<sup>476</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated October 29, 2007, requesting a meeting to discuss the recommendations in the Joint Review Panel Report. (*Investors’ Schedule of Documents at Tab C 195*).

<sup>477</sup> Letter from David and Linda Graham, Graham’s Pioneer Retreat to Debra Myles, (CEA Agency), July 16, 2006. The Panel assumed that region was untouched, yet there were other quarries in the Digby neck area, such as the Tiverton Quarry and the Roxbille Quarry (*Investors’ Schedule of Documents at Tab C 197*). Further, the inbound Bay of Fundy Shipping Lanes are close to Digby Neck; See also Letter from Paul Buxton, to The Hon. Mark Parent, Nova Scotia Minister of the Environment, November 16, 2007. (*Investors’ Schedule of Documents at Tab C 2*).

- f) The Panel used and applied unknown rules and standards without giving Bilcon any opportunity to address them. In particular, the Panel artificially concocted a concept of ‘community core values’;
  - g) The Panel demonstrated no interest in considering how the project would work, and was only interested in reasons why it might not work;
  - h) The Panel’s lack of impartiality was reflected in the content and tone of its Report, which demonstrated that the Panel went out of its way to emphasize any possible shortcomings of the project and downplayed the benefits;
  - i) That six of the seven recommendations made by the Panel had nothing to do with the Whites Point Quarry, but sought to recommend government policy, completely beyond its Terms of Reference;
  - j) The Panel chose to rule on the assessment, thereby removing the responsible and ministerial authorities’ obligation to consider and rule on the Project;<sup>478</sup>
  - k) While the legal and functional role of the Panel was to propose mitigation measures none were recommended. It just dismissed the project completely which was not the Panel’s role;
  - l) None of the panel members had qualifications in economics, business, finance or industrial organizations, yet they drew the unsupported conclusion that the project was not economically viable;<sup>479</sup> and
  - m) The Panel ignored the fact that 30 percent of the local population personally petitioned the Minister in favor of the project.
509. The JRP failed to assert how its conclusions conformed the CEA Agency’s *Guidelines* for Reference Panels.
510. Mr. Rankin points out that the ability of the JRP to make recommendations is statutorily circumscribed “by the specific terms of its statutory jurisdiction, the sources of which are the CEAA, the Nova Scotia Environment Act and the Terms of Reference.”<sup>480</sup> Mr. Rankin also notes that “the Panel had no inherent authority.”<sup>481</sup>
511. The JRP had no jurisdiction or authority to recommend the rejection of the project at Whites Point based on the notion of core community values. Such does not exist under the Constitution of Canada, the administrative law framework, or the environmental

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<sup>478</sup> As Bilcon was required, in any event, to obtain approval from those authorities before a project can commence: Letter from Paul Buxton, to The Hon. Mark Parent, Nova Scotia Minister of the Environment, dated November 16, 2007. (*Investors’ Schedule of Documents at Tab C 2*).

<sup>479</sup> Further, the Joint Review Panel made conclusions as the viability of the project, without having retained any such specialists; Joint Review Panel Final Report, dated October 23, 2007, at 13, 24, 25, 82, 96, 102. (*Investors’ Schedule of Documents at Tab C 34*).

<sup>480</sup> Expert Report of Murray Rankin, Q.C., para. 123.

<sup>481</sup> Expert Report of Murray Rankin, Q.C., para. 123.

legislation. The concept of overriding the normal legal criteria or standards for regulatory approval of economic activity by a “core community values” determination was a fabrication of the JRP. Environmental expert David Estrin points out, “The community core values concept as applied by the WPQ Panel has no basis in law whatsoever.”<sup>482</sup> Core community values was not one of the permitted VECs listed in the EIS Guidelines or any of the numerous information requests to which Bilcon had to attend.<sup>483</sup> If the JRP wanted Bilcon to address concerns over what it describes as “core community values”, as distinct from general socioeconomic concerns, which Bilcon addressed at length, the JRP could have requested Bilcon to do so. The JRP failed to make that request. However, at each juncture when presented with an opportunity ask Bilcon to address this issue of prime concern, it failed to do so. Bilcon could not have reasonably foreseen that the environmental assessment would turn on this irrelevant consideration.

512. Attempts by the JRP to subsume opposition to the quarry within certain segments of the community into the concept of core community values highlight the JRP’s determination to give a preferential voice to those in the community who opposed the project. David Estrin cautions that this approach fails to accord with the legal test for approving a proposal stating it “is not whether supporters outnumber opponents.”<sup>484</sup> Dr. Fournier was incorrect to suggest at the hearings:

In some small way this is a kind of referendum, isn’t it, in that, on one hand, you have people arguing for a traditional way of life that goes back more than a century, and you have others

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<sup>482</sup> Reply Expert Report of David Estrin at para. 183

<sup>483</sup> Expert Report of David Estrin, paras 247, 248, *Agreement concerning the Establishment of a Joint Review Panel*, November 3, 2004. (*Investors’ Schedule of Documents at Tab C 114*); Letter from Robert Fournier to Paul Buxton, providing ten information requests, pursuant to section 7 of Part II of the Terms of Reference, dated June 28, 2006. (*Investors’ Schedule of Documents at Tab C 383*); Letter from Robert Fournier (Chair, JRP), to Paul Buxton, Bilcon of Nova Scotia, dated July 28, 2006 with attached EIS Information Request, dated July 28, 2006 (*Investors’ Schedule of Documents at Tab C 549*); Letter from Robert Fournier to Paul Buxton. September 22, 2006, requesting a revised project description. (*Investors’ Schedule of Documents at Tab C 145*); Letter from Robert Fournier to Paul Buxton, dated December 19, 2006, providing ten information requests on the proponent’s Revised Project Description. (*Investors’ Schedule of Documents at Tab C 433*); Letter from Robert Fournier to Paul Buxton, dated January 8, 2007, providing thirteen information requests. (*Investors’ Schedule of Documents at Tab C 434*); Letter from Robert Fournier to Paul Buxton, providing nine final information requests, dated February 27, 2007. (*Investors’ Schedule of Documents at Tab C 435*); Email from Josephine Lowry, Bilcon of Nova Scotia, to Debra Myles (CEA Agency), dated April 13, 2007, providing final responses to the Joint Review Panel’s information requests. (*Investors’ Schedule of Documents at Tab C 151*).

<sup>484</sup> Reply Expert Report of David Estrin at para. 193

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arguing that the future rests with industrialization or commercialization and so forth.<sup>485</sup>

513. The JRP manifestly misunderstood the role of the JRP. The JRP is engaged in the planning stage of a project, not at the detailed design stage.<sup>486</sup> The JRP unfairly demanded that Bilcon provide detailed designs, purporting to assume the role of an industrial regulator.<sup>487</sup>
514. This important distinction is recognized by Mr. Rankin who states “The EA process is not the same as the licensing process.”<sup>488</sup> An example of this is seen by the JRP’s criticisms of the baseline data that Bilcon had provided. The baseline data that Bilcon provided was as complete as could have been at that preliminary stage. The JRP’s refusal to accept Bilcon’s baseline data was prejudicial; the JRP demanded a standard that was unattainable at such a preliminary phase.<sup>489</sup>
515. The Panel was also incorrect in its applications of two critical concepts: adaptive management and the precautionary principle. Bilcon’s request for adaptive management to play a more prominent role in the process was ignored by the JRP by only giving the concept cursory mention in the EIS Guidelines.<sup>490</sup> Instead, Bilcon was criticized in the JRP Report for its reliance on adaptive management notwithstanding the fact that its interpretation and application of the concept was correct and had been used in environmental assessments of three other contemporaneous projects: Elmsdale, Glenholme and Lovett Road and Miller's Creek Gypsum Mine Expansion.<sup>491</sup>

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<sup>485</sup> Reply Expert Report of David Estrin at para. 190; Joint Review Panel Public Hearing Transcripts, Volume 11, dated June 28, 2007 at p. 2669. (*Investors’ Schedule of Documents at Tab C 163*).

<sup>486</sup> Supplemental Witness Statement of Paul Buxton, at paras 55 - 60

<sup>487</sup> Supplemental Witness Statement of Paul Buxton, at para. 58.

<sup>488</sup> Expert Report of Murray Rankin, Q.C., para. 61

<sup>489</sup> Supplemental Witness Statement of Paul Buxton, at para. 59.

<sup>490</sup> *Environmental Impact Study Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project*, dated March 31, 2005 at p. 031491 (*Government of Canada Counter-Memorial Exhibit R-210*).

<sup>491</sup> Letter from Joe Crocker (DFO) to Vanessa Margueratt (NSDEL, dated ) re DRAFT REPORT, Environmental Assessment Registration, Elmsdale Quarry Expansion Project (*Investors’ Schedule of Documents at Tab C 667*), Letter from Joe Crocker (DFO) to Peter Geddes (NSDEL) re Proposed Glenholme Gravel Pit Expansion Development, M.S.D. Enterprises, Glenholme, Colchester County, NS (*Investors’ Schedule of Documents at Tab C 668*), Letter from Joe Crocker (DFO) to Vanessa Margueratt (NSDEL) re SHAW RESOURCES- A Member of the Shaw Group Limited- Proposed Lovett Road Aggregate Pit Expansion, February 5, 2007 (*Investors’ Schedule of Documents at Tab C 664*). Environmental Assessment Approval, Miller's Creek Mine Extension, February 4, 2010. (*Investors’ Schedule of Documents at Tab C 866*).

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516. Mr. Estrin re-emphasizes that adaptive management “is a commonly used tool to address uncertainty in the environmental assessment process.”<sup>492</sup> He adds that adaptive management does not obviate a proponent’s “duty to identify possible adverse effects and to propose ways to avoid or mitigate them.”<sup>493</sup> Therefore, Bilcon’s reliance on adaptive management cannot reasonably be seen as an attempt to avoid confronting possible adverse effects, but was in fact a reasonable reliance on an accepted practise and principle in the environmental assessment process.
517. The JRP’s response to Bilcon’s submissions on adaptive management reveals what Mr. Rankin refers to as the JRP’s “patently dismissive arrogance”. Mr. Rankin concludes, “The JRP did not afford Bilcon an opportunity to have its case heard and considered honestly, reasonably, and fairly.”<sup>494</sup>
518. With regards to the precautionary principle, the Panel applied a patently incorrect definition notwithstanding the fact that this principle is defined in the *Nova Scotia Environment Act*, and had been correctly applied previously by Dr. Fournier when he chaired the JRP in the Sable Gas Review. The proper application reflects the fact that the precautionary principle does not require scientific certainty. The Whites Point JRP did not recognize this and interpreted the principle as requiring “that a proposed action will not lead to serious or irreversible environmental damage; verifiable scientific research and high-quality information.”<sup>495</sup>
519. As Mr. Estrin pointed out in considering this difference in interpretation: “In contrast to the WPQ Panel, the Sable Gas panel was willing to accept a significant degree of uncertainty.”<sup>496</sup>
520. The JRP report also fails to consider mitigation measures. Mitigation measures are listed in the *CEAA* as a factor to be considered when a Panel makes recommendations. Section 16(d) of the *CEAA* requires a panel to consider “measures that are technically

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<sup>492</sup> Reply Expert Report of David Estrin at para. 231

<sup>493</sup> Reply Expert Report of David Estrin at para. 233

<sup>494</sup> Expert Report of Murray Rankin, Q.C., para. 111.

<sup>495</sup> Reply Expert Report of David Estrin at paras. 218-219; *Nova Scotia Environment Act*, 1994-95, c. 1. (*Investors’ Schedule of Documents at Tab C 258*); The Joint Public Review Panel Report: Sable Gas Projects, dated October 1997 at p. 31. (*Investors’ Schedule of Documents at Tab C 258*) and Joint Review Panel Final Report, dated October 23, 2007, at p. 92 (*Investors’ Schedule of Documents Tab C 34*).

<sup>496</sup> Reply Expert Report of David Estrin at para. 226

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and economically feasible and that would mitigate any significant adverse environmental effects of the project.”<sup>497</sup>

521. Mr. Estrin suggests that the refusal to consider mitigation measures was “a deliberate effort to tie the hands of the governments whose statutory role was to decide whether to approve the project or not,” by removing it as an available factor for their consideration.<sup>498</sup> Mr. Rankin describes how this created an incomplete picture upon which the Ministers based their decisions as they “had no advice about whether mitigation measures were available.”<sup>499</sup> The failure to consider mitigation measures, in Mr. Rankin’s opinion, violates the letter, as well as the spirit of the law.”<sup>500</sup>
522. The JRP Report also ignores evidence that was plainly before it. A key omission is the failure to take note of the Concordance Table produced by Bilcon in its EIS. A review of the concordance by the JRP would have allowed it to see where and how bilcon responded to each concern expressed, whether by a regulator, the JRP, or an individual citizen.<sup>501</sup> Had the JRP given the Concordance Table any reasonable consideration, it would have seen that numerous expressed or apparent community concerns were thoroughly addressed by Bilcon. Also not acknowledged was Bilcon’s Commitment Table that demonstrated Bilcon’s commitment to exceed regulators’ requirements in order to mitigate the potential for any significant adverse environmental effects.<sup>502</sup>
523. Bilcon was unfairly criticized for its use of ANFO in blasting,<sup>503</sup> despite DFO’s admission that blasting with ANFO could be permitted. Blasting with ANFO was not uncommon

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<sup>497</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c.37. (*Investors’ Schedule of Documents at Tab C 255*) Section 5(1)(d) of the *CEAA* reads: “under a provision prescribed pursuant to paragraph 59(f), issues a permit or license, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.”

<sup>498</sup> Reply Expert Report of David Estrin at para. 297

<sup>499</sup> Expert Report of Murray Rankin, Q.C., para. 84.

<sup>500</sup> Expert Report of Murray Rankin, Q.C., para. 136.

<sup>501</sup> Concordance Table, Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Ch.5 (*Investors’ Schedule of Documents at Tab C 1*).

<sup>502</sup> Concordance Table, Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006, Ch.5 (*Investors’ Schedule of Documents at Tab C 1*).

<sup>503</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 5, 34 and 34 (*Investors’ Schedule of Documents Tab C 34*).

and was employed at various other industrial projects, such as Belleoram, East Kempville Mine and White Rock Quartz Project.<sup>504</sup>

Project	Location	Decision Date	Use of ANFO
Whites Point Quarry and Marine Terminal Project	Whites Point, Digby County, NS	November 20, 2007	Use ANFO explosives
Aguathuna Quarry and Marine Terminal (Newfoundland and Labrador) <sup>505</sup>	Aguathuna, NL	November 5, 1999	Use ANFO explosives <sup>506</sup>
Bayside Quarry (New Brunswick)	Bayside, Charlotte County, NB	Began operation in 1997	Use ANFO explosives <sup>507</sup>
Belleoram Quarry and Marine Terminal (NL) <sup>508</sup>	Belleoram, NL	January 26, 2007	Use ANFO explosives
Miller's Creek Gypsum Mine Extension Project	Miller's Creek, Hants County, Nova Scotia	Feb 4, 2010	Use ANFO explosives <sup>509</sup>
Surface Gold Mine at Moose River Gold Mines <sup>510</sup>	Moose River Gold Mine, Halifax County, NS	February 1, 2008	Use ANFO explosives <sup>511</sup>

<sup>504</sup> *Practical Methods to Reduce Ammonia and Nitrate Levels in Mine Water*, Gordon Revey (1996). (*Investors' Schedule of Documents at Tab C 399*); Belleoram Comprehensive Study Report, August 23, 2007. (*Investors' Schedule of Documents Tab C 190*); Article, Patrick Whiteway, East Kempville, the Northern Miner. November 1, 1989 (*Investors' Schedule of Documents Tab C 669*); Environmental Registration Document for the proposed White Rock Quartz Mine, dated August 2002 (*Investors' Schedule of Documents Tab C655*).

<sup>505</sup> Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, p. 12-13, Figure 2.1 (*Investors' Schedule of Documents Tab C 798*).

<sup>506</sup> Letter from Barry Jeffrey, Environment Canada to John Appleby, Public Works And Government Services Canada, dated March 29, 1999, page 7 (*Investors' Schedule of Documents Tab C 799*).

<sup>507</sup> E-mail from Ted Currie to Mark McLean, Tony Henderson, Ted Potter, dated June 19, 2007 (*Investors' Schedule of Documents Tab C 800*).

<sup>508</sup> Belleoram Quarry and Marine Terminal Environmental Impact Comprehensive Study Report, at p. 6 (*Investors' Schedule of Documents Tab C 190*).

<sup>509</sup> Letter from Seam Steller, Environment Canada to Helen MacPhail (NSDEL), dated November 13, 2007 (*Investors' Schedule of Documents Tab C 716*).

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Victor Diamond Mine (Ontario) <sup>512</sup>	90 kilometres west of the Community of Attawapiskat, northeastern Ontario	August 26, 2004	Uses ANFO explosives <sup>513</sup>
Voisey's Bay Nickel Mine (Newfoundland)	North side of the former US Naval base at Argentia.	April 1, 1999	Use ANFO explosives <sup>514</sup>
White Rock Quartz Mine <sup>515</sup>	Flintstone Rock, Yarmouth County	Sept 6, 2002	Use ANFO explosives

524. The JRP report also ignored numerous government regulators who praised Bilcon for the thoroughness and detailed nature of the evidence it provided, as well as specific evidence and assurances Bilcon itself put forward. For example:

- a) Natural Resources Canada told the review panel that Bilcon's ecosystem approach was of a "very high calibre expertise".<sup>516</sup> However, the Joint Review Panel disregarded these comments and said Bilcon's ecosystem approach was "rarely in evidence."<sup>517</sup>
- b) Health Canada, an expert agency in noise related issues, stated that Bilcon's noise measures are "protective of human health", but the Joint Review Panel alleged Bilcon did not fully consider issues related to noise.

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<sup>510</sup> Environmental Assessment Registration Document For The Touquoy Gold Project, dated November 2007 (*Investors' Schedule of Documents Tab C 802*).

<sup>511</sup> Environmental Assessment Registration Document for The Touquoy Gold Project, Appendix Q Blasting Impact Assessment (*Investors' Schedule of Documents Tab C 802*).

<sup>512</sup> Comprehensive Study Report Victor Diamond Mine (Ontario), P. 10-5 (*Investors' Schedule of Documents Tab C 803*).

<sup>513</sup> Comprehensive Study Report Victor Diamond Mine (Ontario), P. 19-20 (*Investors' Schedule of Documents Tab C 803*).

<sup>514</sup> Letter from Ian McCracken, Environment Canada to Brian Torrie (CEAA), dated April 28, 1997 (*Investors' Schedule of Documents Tab C 805*).

<sup>515</sup> Environmental Registration Document For White Rock Quartz Mine dated August 2002. (*Investors' Schedule of Documents Tab C 655*).

<sup>516</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at p. 537-8. (*Investors' Schedule of Documents Tab C 156*).

<sup>517</sup> Joint Review Panel Final Report, dated October 23, 2007, at 90. (*Investors' Schedule of Documents at Tab C 34*).

- c) The JRP alleged Bilcon did not have “meaningful consultation” with the local community. However, Bilcon engaged in significant community outreach, which included maintaining a public information office, organizing general public meetings and meetings of ground and lobster fishermen as well as conducting research into local traditional knowledge.<sup>518</sup> The JRP requested insignificant undertakings on this issue, such as refusal rates for survey calls<sup>519</sup> which Bilcon provided.
- d) The JRP alleged the quarry had the potential to adversely impact migratory birds because of night lighting requirement. Bilcon noted that it had already agreed to comply with lighting standards at night requested by government to protect migrating birds.<sup>520</sup>

525. Another piece of evidence ignored by the JRP relates to its understanding of the NAFTA and how that factored into its assessment. Mr. Rankin points out that the JRP ignored the evidence of its own NAFTA expert Professor Gil Winham “and then made conclusions about [the NAFTA] that were both inaccurate and clearly discriminatory of Bilcon.”<sup>521</sup> The JRP was free to invite any number of scientific and environmental experts to testify. Instead they invited A NAFTA expert, whose field of expertise was not in environmental assessment.

526. Finally, the JRP made no attempt in its report to demonstrate, that in concluding the likelihood of significant adverse environmental effects, the adverse environmental effects it believed to be likely rose to the CEA Agency mandated level of “major or catastrophic” in order for an effect to be labelled “significant”.<sup>522</sup> To determine that an effect is either major or catastrophic is a significant determination. That the JRP report is completely silent on how the supposed adverse environmental effects meet this high threshold is deeply troubling considering that its finding of significant adverse environmental effects form the basis for its recommendation that the project be rejected.

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<sup>518</sup> Buxton Supplemental Witness Statement at para 52.

<sup>519</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 8, dated June 25, 2007 at p. 1699, lines 11-13 (*Investors’ Schedule of Documents at Tab C 161*) .

<sup>520</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, dated June 19, 2007, at p.503, lines 15-21. (*Investors’ Schedule of Documents Tab C 156*).

<sup>521</sup> Expert Report of Murray Rankin, Q.C., paras. 106 and 107.

<sup>522</sup> *SAEE Reference Guide*, November 1994, at 188. (*Investors’ Schedule of Documents at Tab C 384*).

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#### **D. Lack of Due Process, Natural Justice and Fairness and Reasonableness After the Issuance of the Joint Review Panel Report**

527. After the issuance of the JRP's report, Bilcon was denied the due process owed to it by those decision makers – the federal and provincial ministers, in whose hands the decision to approve or reject their project rested. Bilcon made multiple attempts to secure meetings with the ministers and present them with information that was crucial to their determination and it was incumbent upon those ministers to meet with Bilcon so that their decisions were based on all of the evidence available.<sup>523</sup> Instead, there is no evidence to suggest that the ministers considered the evidence Bilcon tried to convey of the JRP's numerous flaws and were quick to accept the Panel's recommendations. The refusal to hear from Bilcon "is itself a denial of natural justice and therefore a fundamental jurisdictional error."<sup>524</sup>
528. The refusal to hear from Bilcon is made all the more problematic because as pointed out by Mr. Estrin, "community core values are not recognized under CEAA and indeed lies outside the federal jurisdiction," making community core values "not a sufficient basis for the federal government's rejection of the WPQ project."<sup>525</sup>
529. Mr. Rankin stresses that the federal government "can only address matters over which it has constitutional jurisdiction, and only in accordance with its statutory mandate, as set out in the CEAA."<sup>526</sup>
530. This places the decision of the federal minister, which relied upon community core values, as outside his jurisdiction and statutory mandate. Relying upon this fact, and the sum of errors leading up to it, Mr. Rankin concludes, "The entire basis of the Ministerial decision was therefore flawed."<sup>527</sup>

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<sup>523</sup> Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated October 29, 2007, requesting a meeting to discuss the recommendations in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 195*), Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated November 8, 2007, stating the fundamental flaws contained in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 196*), Letter from Paul Buxton, to Mark Parent, Minister (NSDEL), dated November 16, 2007, providing the proponent's opinions on several aspects of the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 2*), Letter from Paul Buxton, to John Baird, Minister of the Environment, dated November 21, 2007, requesting that a meeting be convened to address the flaws in the Joint Review Panel Report. (*Investors' Schedule of Documents at Tab C 204*)

<sup>524</sup> Expert Report of Murray Rankin, Q.C., para. 157.

<sup>525</sup> Reply Expert Report of David Estrin at para. 299

<sup>526</sup> Expert Report of Murray Rankin, Q.C., at para. 49.

<sup>527</sup> Expert Report of Murray Rankin, Q.C., at para. 167.

531. Neither minister had a proper basis upon which to make his decision.

**E. Two Track Process/Lack of Full Transparency, Fairness and Honesty Toward Bilcon**

532. Actions by regulators and government officials who dealt with Bilcon demonstrate a pronounced absence of good faith and due process in how Bilcon was treated. In public Bilcon was told one thing, but in private, regulators knew the reality was otherwise. Bilcon's legitimate and reasonable expectations that it would be dealt with transparently and honestly were not met:

- a) DFO and provincial regulators misled Bilcon to believe that it would be possible to conduct test blasting at the 3.9ha quarry when this was not so;
- b) DFO continued to lead Bilcon into believing that the 3.9ha quarry could become operational on its own when it knew this was not so;
- c) DFO misled Bilcon to believe that the environmental assessment would take the form of a Comprehensive Study and kept Bilcon in the dark about the decision to have a JRP instead.

533. By August 2003 the CEA Agency was causing information to be deliberately withheld from Bilcon that it needed to properly prepare for its test blast.<sup>528</sup> Had DFO officials had any intention of permitting Bilcon to blast, it would have informed Bilcon of the assessments of its own staff members that the first blasting proposal appeared to conform to the *Guidelines*, as required by condition 10.h.<sup>529</sup> The DFO and the CEA Agency withheld for 14 months the fact that the 500 meter setback devised with the "iBlast" model was incorrect and based on an inapplicable model.<sup>530</sup>

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<sup>528</sup> Email from Phil Zamora (DFO) to Bruce Hood (DFO) re Whites Point Quarry - 3.9 Hectare Blasting Plan (*Investors' Schedule of Documents at Tab C 673*).

<sup>529</sup> Action Log Report re Whites Cover-Quarry Construction at p. 005553 and 005554 (*Investors' Schedule of Documents at Tab C 675*).

<sup>530</sup> Journal Notes by Derek McDonald (CEAA) discussing blasting at the Whites Point Quarry at p. 801531 (*Investors' Schedule of Documents at Tab C 612*).

534. Bilcon was lead to believe that the highest level of assessment the Whites Point Quarry was likely to attract was a Comprehensive Study. The DFO told Bilcon that the environmental assessment would be a Comprehensive Study.<sup>531</sup> Internal CEAA statements suggested a comprehensive study.<sup>532</sup> What Bilcon did not know was that as early as February 17, 2003 Phil Zamora of the DFO gave Bill Coulter, of CEA Agency's Halifax office a "heads up that DFO is intending to refer this project to the Minister for referral to a Panel."<sup>533</sup> Not only was Bilcon not provided a 'heads up', it was continuously led to believe otherwise.
535. The decision to elevate the assessment to a JRP was made in precisely the time period during which officials were withholding information from Bilcon. In July 2003 regulators were giving advanced notice to a lawyer for a citizens group opposed to Bilcon that the review would be a JRP, only informing Bilcon in September.<sup>534</sup>
536. Mr. Estrin concludes, "There was in my view no compelling reason to refer [the Whites Point Quarry] to a Panel."<sup>535</sup> Thus, the lack of transparency in shifting the environmental assessment from a comprehensive study to a joint review panel is all the more troubling. Referring the project to a joint review panel was a decision Mr. Estrin calls "entirely unexpected."<sup>536</sup>

#### **F. Abuse of Process**

537. Bilcon was subjected to abuses of process by regulators and the JRP, all of which failed to respect the regulatory process in Nova Scotia and Canada for environmental assessments.

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<sup>531</sup> Letter from Phil Zamora (DFO) to Paul Buxton, Global Quarry Products, dated April 14, 2003. (*Investors' Schedule of Documents at Tab C 28*).

<sup>532</sup> E-mail from Bill Coulter, (CEAA) to Derek McDonald [CEAA], March 24, 2003. (*Investors' Schedule of Documents at Tab C 677*).

<sup>533</sup> Email from Bill Coulter, (CEAA) to Bruce Young, Steve Burgess, Paul Bernier, Derek McDonald, (CEAA), dated February 17, 2003 (*Investors' Schedule of Documents at Tab C 813*).

<sup>534</sup> Email Steve Chapman to Bruce Young re Criticizing Tim Smith of CEAA regarding correspondence with Lisa Mitchell (*Investors' Schedule of Documents at Tab C 678*); Letter from Steven Chapman (CEA Agency) to Paul Buxton, dated September 10, 2003, regarding the environmental assessment process. (*Investors' Schedule of Documents at Tab C 75*).

<sup>535</sup> Reply Expert Report of David Estrin at para. 142

<sup>536</sup> Reply Expert Report of David Estrin at pars. 170

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538. The DFO had no basis to involve itself into the regulatory process dealing with the quarry.<sup>537</sup> It itself concluded that there was no basis for a trigger pursuant to Section 32 of the *Fisheries Act*.<sup>538</sup> By the time the DFO had scoped the quarry and marine terminal into one environmental assessment it was known that Bilcon intended to develop a larger quarry; however, unlike with the 3.9ha quarry, the DFO did not require the larger quarry to undergo an authorization process pursuant to Section 32 of the *Fisheries Act* precisely because it had no legislative basis to assess the quarry. However, by that time in the process it was too late, the projects were scoped together and the JRP was announced.<sup>539</sup>
539. Mr. Estrin concludes on this point, “DFO’s scoping decisions in the Federal Minister of Fisheries riding were not made in a principled, predictable and consistent manner” and that “statutorily irrelevant political considerations (i.e. whether the project enjoyed the DFO Minister’s support) appear to have been a determining factor.”<sup>540</sup>
540. DFO Minister Thibault’s office abused its power when it took actions to prevent regulators from approving blasting plans before its office approved them.<sup>541</sup> It did not have the authority to inject itself into the regulatory process.
541. The JRP engaged in an abuse of process by failing to adhere to its role as an assessor of the Project and instead unilaterally purported to act as an assessor of the entire environmental assessment and environmental development process in Nova Scotia. This is evidenced from discussions within the federal and provincial governments that specifically acknowledged that the recommendations of the JRP Report exceeded the Panel’s scope and mandate.<sup>542</sup>
542. Subsequent statements by Dr. Fournier confirm that he perceived himself to be in a greater role than the chair of the Bilcon JRP; he was trying to be a reformer – something not permitted by the legislation and JRP Terms of Reference. In this capacity he

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<sup>537</sup> Reply Expert Report of David Estrin, at para. 51

<sup>538</sup> Reply Expert Report of David Estrin, at para. 51

<sup>539</sup> Reply Expert Report of David Estrin, at para. 51

<sup>540</sup> Reply Expert Report of David Estrin at para. 98

<sup>541</sup> E-mail from Wayne Stobo (DFO) to Faith Scattolon (DFO), dated June 27, 2002 at 801717-801718. (*Investors’ Schedule of Documents at Tab C 256*).

<sup>542</sup> NSDEL Power Point Presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated November 13, 2007 (*Investors’ Schedule of Documents at Tab C 654*) and Email from Mike Murphy to Mark G. McLean, dated November 14, 2007 (*Investors Schedule of Documents at Tab C 849*).

knowingly drafted the report in manner that had never been done before and was a marked deviation from the standard practise.<sup>543</sup> Knowing that Dr. Fournier approached and led the JRP in this direction, it is not surprising that Nova Scotia's government recognized that six of the seven recommendations made by the JRP Report went beyond the JRP's Terms of Reference.<sup>544</sup>

543. All seven of the JRP recommendations exceeded the JRP's Terms of Reference.<sup>545</sup>

544. The Federal Minister of the Environment abused and exceeded his jurisdiction by rejecting the project based on the JRP's recommendation that there would significant adverse environmental effects on core community values. While core community values does not exist in the provincial or federal legislation, only Nova Scotia's *Environment Act* permitted a decision that incorporated considerations of socioeconomic conditions, which presumably the Federal Minister was alluding to when he said core community values.<sup>546</sup>

#### **G. Arbitrariness and Discrimination**

545. Many decisions that affected Bilcon, both by regulators and the JRP, were arbitrary and discriminatory and Bilcon suffered prejudice as a result.

546. The Provincial government ostensibly granted Bilcon permission to operate a quarry. Provincial and Federal regulators then imposed impossible conditions on Bilcon, requiring it to meet unreasonable standards, all in a highly politicized process.

547. There is no justification for the arbitrary actions taken by officials over setting blasting setback distances. The DFO would and did not provide Bilcon with an adequate explanation as to why the numbers kept changing.<sup>547</sup> When the DFO was told that it

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<sup>543</sup> CBC News, "Digby quarry rejection on environmental grounds could set precedent panel chair". (*Investors' Schedule of Documents at Tab C 652*); Transcription of CBC radio interview of Robert Fournier (JRP), dated December 20, 2007. (*Investors' Schedule of Documents at Tab C 180*) .

<sup>544</sup> NSDEL Power Point Presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated November 13, 2007 (*Investors' Schedule of Documents at Tab C 654*).

<sup>545</sup> NSDEL Power Point Presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated November 13, 2007 (*Investors' Schedule of Documents at Tab C 654*); and Reply Expert Report of David Estrin at para. 311.

<sup>546</sup> Expert Report of Murray Rankin, Q.C. at para. 117.

<sup>547</sup> Letter from Phil Zamora (DFO) to Paul Buxton requiring the proponent to obtain authorization under S. 32 of the *Fisheries Act*, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 249*); Letter from Phil Zamora, (DFO), to Paul Buxton, Bilcon of Nova Scotia, dated November 10, 2004. (*Investors' Schedule of Documents at Tab*

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relied on an incorrect model to change the setback from 35.6m to 500m, the government officials failed to take any corrective or remedial action with Bilcon.<sup>548</sup>

548. DFO also set arbitrary setback distances without having the proper on-site conditions to plug into its computer simulations to make its calculations.<sup>549</sup> Mr. Rankin notes that DFO's conduct around blasting is precisely the type of conduct that Canadian courts have ruled against as being arbitrary, and therefore inappropriate.<sup>550</sup>

549. The JRP's contrived concerns over copper were an arbitrary distraction causing Bilcon having to expend considerable effort to satisfy the JRP's requests. Yet the JRP failed to deal with copper in any material way during the JRP hearings.<sup>551</sup>

#### H. Delay

550. It was clear to officials that the Federal Minister's desire was to delay the regulatory process as long as possible.<sup>552</sup>

551. In November 2004, two and a half years after the Province had approved the 3.9ha quarry, DFO was still switching blasting setback distances.<sup>553</sup> After learning that their

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C 670); Letter from Paul Buxton to Phil Zamora (DFO), dated June 6, 2003, requesting the calculations used by the DFO to determine setback distance. (*Investors' Schedule of Documents at Tab C 68*); Handwritten Note made by unknown, dated June 6, 2003 (*Investors' Schedule of Documents at Tab C 607*); Letter from Paul Buxton, Global Quarry Products to Phil Zamora (DFO), dated June 16, 2003, requesting that, prior to meeting with the DFO, if the calculations used by the DFO could be examined. (*Investors' Schedule of Documents at Tab C 107*); Letter from Paul Buxton, Nova Stone Exporters Inc., to Phil Zamora (DFO), dated June 21, 2003 (*Investors' Schedule of Documents at Tab C 611*).

<sup>548</sup> Notes made by Derek McDonald (CEAA) dated July 30, 2003 at p. 801531 (*Investors' Schedule of Documents at Tab C 612*).

<sup>549</sup> Email from Dennis Wright (DFO) to Phil Zamora (DFO) dated July 29, 2003 re Whites Point 3.9 hectare quarry (*Investors' Schedule of Documents at Tab C 671*).

<sup>550</sup> Expert Report of Murray Rankin, Q.C., para. 97.

<sup>551</sup> Letter from Robert Fournier to Paul Buxton, providing nine final information requests, dated February 27, 2007. (*Investors' Schedule of Documents at Tab C 435*); Supplemental Witness Statement of Paul Buxton, at para. 42 (taken from facts) Joint Review Panel Public Hearing Transcripts, Volume 1 – 13 dated June 16 – June 30, 2007. (*Investors' Schedule of Documents at Tab C 154, C 155, C 156, C 109, C 157, C 158, C 159, C 160, C 161, C 162, C 163, C 164 and C165*).

<sup>552</sup> Journal note by Bruce Hood (DFO), undated, disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry at 801619. (*Investors' Schedule of Documents at Tab C 370*).

<sup>553</sup> Letter from Phil Zamora (DFO) to Paul Buxton, discussing changing blasting set-back requirements, dated November 10, 2004. (*Investors' Schedule of Documents Tab C 289*).

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500m setback distance was calculated with the inappropriate “iBlast” model, it took the DFO 14 months to correct its mistake, while Bilcon waited for information, unable to blast, losing money and uncertain about the future of its investment. These bureaucratic machinations placed Bilcon in such a precarious position that it wrote to the DFO in February 2004 to express its frustration with the delays and the toll it was taking on the company.<sup>554</sup>

552. The delay that Bilcon was subjected to when it first started with the regulatory process is in marked contrast to the treatment afforded to the proponents of the Tiverton quarry where Minister Thibault’s office assured them it would do all it could to speed up the process.<sup>555</sup> Mr. Rankin opines that, “The treatment of Tiverton and the WPQ project may have been politically motivated.”<sup>556</sup>

#### **I. Full Protection and Security and Stable Legal Environment**

553. Bilcon was denied the full protection and security of its investment, which had been encouraged by the Province of Nova Scotia by way of direct assertions by government officials, an Open for Business campaign in the province, and efforts undertaken by officials at the Nova Scotia Department of Natural Resources to explore potential for investments with Bilcon’s officials.<sup>557</sup>

554. The regulatory treatment that ensued after Bilcon proceeded with its investment was a marked departure from the invitations it had received to invest.

555. Bilcon’s approach to the regulatory process throughout was scientific. This was how it wrote its proposals, its EIS, responded to the JRP’s information requests, and prepared for the JRP hearings.<sup>558</sup> Unable to fault Bilcon on empirical grounds, the JRP resorted to an unscientific reason, “core community values,” to recommend rejecting the Project. There is no doubt that the JRP’s decision was a marked departure from normal,

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<sup>554</sup> E-mail from Nova Stone Exporters Inc. to Jean Crépault (CEAA), dated February 5, 2004 (*Investors’ Schedule of Documents at Tab C 624*).

<sup>555</sup> Handwritten notes of J. Cook re Tiverton Quarry, dated March 3, 2003 (*Investors’ Schedule of Documents at Tab C 672*); Supplemental Witness Statement at para. 73.

<sup>556</sup> Expert Report of Murray Rankin, Q.C., para. 86.

<sup>557</sup> Memorial of Investors, para 48-52

<sup>558</sup> Supplemental Witness Statement of Paul Buxton, at para. 60.

regulatory process in Canada and was confirmed by Dr. Fournier's own statements after the JRP Report that they had done something that had never been done before.<sup>559</sup>

556. Bilcon should have been entitled to expect that its progression through the regulatory process would have been free from political interference and political considerations. However, politics derailed a typically smooth regulatory process.<sup>560</sup> Officials acted on a concern that a JRP politically benefitted Minister Thibault and the Provincial government.<sup>561</sup> What should have been paramount was a respect for the integrity of the regulatory process and an arm's-length relationship with the political process, not concerns such as "[t]his is such a politically hot file that I don't want to make any wrong decisions."<sup>562</sup>
557. A regulatory environment in which public servants do not feel at liberty to have frank discussions about their work is not a stable and secure legal environment. However, when Mr. McDonald of the CEA Agency wrote to his colleague Mr. Chapman to express his concerns about the Project, Mr. Chapman responded, "We should communicate via telephone for discussion of this nature."<sup>563</sup> This is not a stable environment free from political interference.

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<sup>559</sup> CBC News, "Digby quarry rejection on environmental grounds could set precedent panel chair" dated Dec. 20, 2007. (*Investors' Schedule of Documents at Tab C 652*); Transcription of CBC radio interview of Robert Fournier (JRP), dated December 20, 2007. (*Investors' Schedule of Documents at Tab C 180*), E-mail enclosing an article from Chronicle Herald "In which Bob Fournier sets public policy", dated October 25, 2007 (*Investors' Schedule of Documents at Tab C 653*).

<sup>560</sup> Email from Tim Surette (DFO) to Neil Bellefontaine (DFO), dated June 26, 2002 at 801718-801719. (*Investors' Schedule of Documents at Tab C 256*), Journal note by Bruce Hood (DFO), dated December 10, 2002, at 801641. (*Investors' Schedule of Documents at Tab C 381*), Journal note by Bruce Hood (DFO), dated April 25, 2003 at 801610. (*Investors' Schedule of Documents at Tab C 284*), Journal note by Bruce Hood (DFO), Fall 2007 disclosing a statement made by Minister Robert Thibault evidencing his use of powers to lengthen the environmental assessment of the Whites Point Quarry at 801619. (*Investors' Schedule of Documents at Tab C 370*). E-mail from Phil Zamora (DFO) to Charlene Mathieu, Charlene and Joy Dube, April 3, 2003 (*Government of Canada Counter-Memorial Exhibit R 146*), E-mail from Bill Coulter [CEAA to Bruce Young [CEAA], February 17, 2003 (*Government of Canada Counter-Memorial Exhibit R 222*); Email from Paul Stone (NSDTW) to Elizabeth Pugh, dated March 2, 2005 re update on the Whites Cove Road matter (*Investors' Schedule of Documents at Tab C 610*); Email from Paul Stone (NSDTW) to Elizabeth Pugh (NSDTW), dated May 10, 2007 re WPQ Public Hearing (*Investors' Schedule of Documents at Tab C 679*).

<sup>561</sup> Email Richard Nadeau (DFO) to Kaye Love (CEAA), dated June 25, 2003 re Whites Point Referral Letter from Thibault (DFO) to Minister Anderson. (*Investors' Schedule of Documents at Tab C 680*).

<sup>562</sup> E-mail from Phil Zamora (DFO) to Charlene Mathieu, Charlene and Joy Dube, April 3, 2003 (*Investors' Schedule of Documents at Tab C 463*).

<sup>563</sup> Email from Steve Chapman (CEA Agency) to Derek McDonald (CEA Agency) dated June 11, 2003, stating that Whites Point Quarry related issues should not be documented. (*Investors' Schedule of Documents at Tab C 404*).

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558. The Investors were welcomed to Nova Scotia. Elected official, including Minister Balser and the Premier of Nova Scotia encouraged the Investors to invest in the Province.<sup>564</sup> Indeed, the Investors were even invited on a helicopter tour and provided with government assistance from the Nova Scotia Department of Natural Resources.<sup>565</sup> Minister Balser encouraged the Investors to invest in the area and promoted the job possibilities.<sup>566</sup>
559. There were no municipal zoning regulations on Digby Neck that would have signaled to Investors that the area was not suitable for quarrying. To the contrary, other quarries were located in the area.
560. Bilcon's Joint Venture agreement with Nova Stone specified that if the Digby site prove unfeasible on account of a failure to obtain regulatory permits, they would explore a "similarly structured transaction for a quarry at a site located in Victoria Beach, Nova Scotia and presently controlled by NSE".<sup>567</sup> The Victoria Beach area, also on the Bay of Fundy was about 50km away from Digby Neck, next to an inter-provincial ferry route.
561. The Victoria Beach site was in a different political riding than that of Minister Balser – that of Annapolis. Unlike Junior Theriault, the MLA who replaced Minister Balser, and who campaigned against the quarry, the new MLA in Annapolis, while personally against the development of quarries for export purposes, also acknowledged that:
- The issue is has that company followed the regulations in front of them," explains McNeil. "If they have, you can't stop them. "You can't say one company can [operate a quarry] and another can't."<sup>568</sup>
562. Indeed, the first quarry approved in Nova Scotia following the rejection of the Investor's project was in Annapolis – about 25km away from the Investor's alternate Victoria Beach site.<sup>569</sup>

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<sup>564</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 16-18.

<sup>565</sup> Witness Statement of John Lizak dated July 8, 2011, at paras. 18-20.

<sup>566</sup> Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 16-18.

<sup>567</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., dated March 28, 2002. (*Investors' Schedule of Documents at Tab C 5*).

<sup>568</sup> Carolyn Sloan, "Quarry queries in Granville Centre", *The Annapolis County Spectator*, dated July 11, 2007. (*Investors' Schedule of Documents at Tab C 906*).

<sup>569</sup> Carolyn Sloan, "Spicer quarry in Upper Granville approved", *The Annapolis County Spectator*, dated February 5, 2008. (*Investors' Schedule of Documents at Tab C 907*).

563. Having been granted the Approval for “construction and operation of a Quarry at or near Little River. Digby County” in the Province of Nova Scotia,” the Investors had a legitimate expectation that they would be able to do exactly that – construct and operate a quarry at that site subject to fair and reasonable interpretation and application of the conditions contained therein.<sup>570</sup> The initial 4.05ha Approval was granted in April 2002, a mere month after the Joint Venture agreement was signed and well within their expected time frame.<sup>571</sup> The Investors had no reason to think that an approval permit signified anything other than approval and hence reasonably expected that a quarry development at Whites Point would go forward.
564. The invitations of Nova Scotia Ministers such as Balser and the Premier to invest were part of a government policy initiatives to make the region and Nova Scotia not only “open for business” but open to the mining and quarrying business.<sup>572</sup>
565. The Government of Nova Scotia was committed to maximizing the use of these resources, and strongly encouraged their exploration and development. To this end, the Department of Natural Resources had available a broad range of assistance to investors, including geotechnical data and staff experience.<sup>573</sup>

**J. This Treatment Passes the Test of Legitimate Expectations Under Article 1105**

566. These events meet the test for a NAFTA Article 1105 breach of the Investor’s legitimate expectations as outlined by the recent award in Mobil.<sup>574</sup> In Mobil, the Tribunal undertook an extensive consideration of how NAFTA tribunals and international law considers legitimate expectations under Article 1105.<sup>575</sup> It held that the determination of whether legitimate expectations have been breached under Article 1105 is a question

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<sup>570</sup> NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, dated April 30, 2002 (*Investors’ Schedule of Document at Tab C 31*).

<sup>571</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., Article 6(a), dated March 28, 2002. (*Investors’ Schedule of Documents at Tab C 5*).

<sup>572</sup> Witness Statement of John Lizak dated July 8, 2011, at paras. 20-23; Memorial of Investors, at paras. 48-54.

<sup>573</sup> NSDNR Information Circular ME 24, “*Industrial Minerals in Nova Scotia*” (1992) (emphasis added). (*Investors’ Schedule of Documents at Tab C 10*).

<sup>574</sup> *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada, Decision on Liability and on Principles of Quantum, ICSID Case No ARB/07/4; IIC 566 (2012), 22 May 2012.* (*Investors’ Book of Authorities at Tab CA 194*).

<sup>575</sup> *Mobil*, at paras. 127-153, considering *Cargill v. Mexico; Metalclad; Waste Management (No. 2); International Thunderbird and Glamis.* (*Investors’ Book of Authorities at Tab CA 194*).

of fact. Factors to consider, include:

(3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of

- (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
- (ii) were, by reference to an objective standard, reasonably relied on by the investor, and
- (iii) were subsequently repudiated by the NAFTA host State.<sup>576</sup>

The Investors meet this test.

*i. A Permit is a Clear and Explicit Representation to Induce Investment*

567. Nova Scotia represented to the Investors that Whites Point was an appropriate site to develop and operate a quarry by granting an approval to construct and operate a quarry.

568. Indeed, the NAFTA Tribunal in *Metalclad* found, in its Article 1105 analysis, that:

The Government of Mexico issued federal construction and operating permits for the landfill prior to Metalclad's purchase, and the Government of SLP likewise **issued a state operating permit which implied its political support for the landfill project.** (emphasis added)<sup>577</sup>

569. The permit grant implies political support and is an explicit representation that something will be permitted.

570. The Investors were induced to commit to developing Whites Point after the permit was granted. Had Nova Scotia not granted the Permit, they would have invested in their alternate site.

*ii. An Investor Can Reasonably and Objectively Rely Upon a Permit*

571. The Joint Venture Agreement shows that the Investors relied on Nova Stone obtaining this permit as a pre-condition to invest in the Project. Had no permit been granted, the

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<sup>576</sup> *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada, Decision on Liability and on Principles of Quantum, ICSID Case No ARB/07/4; IIC 566 (2012), 22 May 2012 at para. 152. (Investors' Book of Authorities at Tab CA 194).*

<sup>577</sup> *Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 2000 WL 34514285, August 30, 2000, at para. 78. (Investors' Book of Authorities at Tab CA 16).*

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Joint Venture agreement specified that either the specific Annapolis alternative site would be targeted or different alternatives pursued by the Investor.<sup>578</sup> Indeed, obtaining the permit was a pre-condition for capital contributions by the Investor.<sup>579</sup>

*iii. Nova Scotia and Canada Repudiated the Permit by Refusing to Allow its Conditions to be Met*

572. Nova Scotia and Canada repudiated the conditional grant of its permit in two steps. First, they interpreted the conditions in a manner that made them impossible to fulfil.<sup>580</sup> Second, they refused to allow the 3.9 ha quarry to operate once the Project was referred to a JRP because it had somehow been subsumed by the larger project (for which no satisfactory justification has ever been provided).

*iv. The Repudiation Violated the Investor's Legitimate Expectations*

573. The Federal and Provincial governments' repudiation meets the factors set out in *Mobil*.<sup>581</sup>

574. Had Nova Scotia and Canada not wanted Bilcon to open a quarry, they could have simply said so and not have created a legitimate expectation on which further capital was expended.

**II. NATIONAL TREATMENT**

575. Canada has acted inconsistently with its National Treatment obligation in NAFTA Article 1102:

- a) There are Canadian investors and investments in like circumstances with Bilcon and its Investors;
- b) Canada accorded Bilcon and its Investors treatment that was less favorable than the treatment accorded to Canadian companies in like circumstances;

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<sup>578</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., Article 6(a) & (b), dated March 28, 2002. (*Investors' Schedule of Documents at Tab C 5*).

<sup>579</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., Article 4(b), dated March 28, 2002. (*Investors' Schedule of Documents at Tab C 5*).

<sup>580</sup> Reply Memorial of Investors, paras. 629-630.

<sup>581</sup> *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada, Decision on Liability and on Principles of Quantum, ICSID Case No ARB/07/4; IIC 566 (2012), 22 May 2012*, at para. 152. (*Investors' Book of Authorities at Tab CA 194*).

- c) The impugned measures interfered with the conduct, management, operation and expansion of Bilcon.

576. All proponents and their projects seeking regulatory approval under Canada's environmental assessment scheme are in like circumstances with the Investors and the Whites Point Quarry. Likeness requires an evaluation of new or additive economic activity by an investment and those other enterprises that would also be affected by the regulatory scheme in question, in this case, Canada's environmental assessment scheme.

577. Canadian-owned projects and Canadian investors received better treatment than the Investors and Whites Point Quarry with respect to the Environmental Assessment process and standards including:

- a) Cumulative Effects;
- b) Precautionary Principle;
- c) Adaptive Management;
- d) Mitigation Measures and Contingent Approval;
- e) Information Requests;
- f) Blasting; and
- g) Scoping and Level of EA.

578. These standards impact the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of the projects.

#### **A. Cumulative Effects**

579. Environmental assessments in Canada must factor in the cumulative environmental effects of other projects "that have been or will be carried out."<sup>582</sup> This does not permit hypothetical projects, or those that might proceed, to be considered; there must be reasonable certainty that a project will proceed.<sup>583</sup> The EIS Guidelines for WPQ required a "reasonable degree of certainty" that projects would occur.<sup>584</sup>

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<sup>582</sup> Expert Report of David Estrin, para. 423.

<sup>583</sup> Expert Report of David Estrin, para. 423.

<sup>584</sup> Reply Expert Report of David Estrin at para. 276

580. The imposition of a more stringent, and incorrect, cumulative effects standard compared to other projects going through the same regulatory process constitutes less favourable treatment.<sup>585</sup>
581. The Joint Review Panel for Whites Point Quarry applied an incorrect standard, which Mr. Estrin states was inappropriate.<sup>586</sup> The Panel viewed the Investors' cumulative effects assessment as inadequate<sup>587</sup> because the Investors did not assess projects that did not exist, were not proposed, and which the Investors, had no knowledge of.<sup>588</sup> The imposition of this incorrect and prejudicial standard contributed to the rejection of Whites Point Quarry.
582. In contrast, the cumulative effects standard that was applied in the assessments of Voisey's Bay, Eider Rock LNG Project, and Belleoram Coastal Quarry was the appropriate standard under Canadian law, and did not require onerous speculation based on factors then unknown.
- a) Voisey's Bay:<sup>589</sup> The Panel applied the correct cumulative effects standard, examining "imminent projects or activities occurring over a certain period of time and distance...only those projects and activities that are imminent at the time of the assessment be considered."<sup>590</sup>
  - b) Eider Rock LNG Project:<sup>591</sup> The Comprehensive Study Report for the project, whose location is opposite Whites Point on the Bay of Fundy, confirmed that

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<sup>585</sup> Canada has identified projects where hypothetical projects were considered during the assessment. The Investor is not required to show that all other projects received better treatment, or even that every Canadian project received treatment. The standard under Article 1102 is whether there were Canadian projects that received better treatment.

<sup>586</sup> Reply Expert Report of David Estrin at para 273

<sup>587</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 11 (*Investors' Schedule of Documents Tab C 34*).

<sup>588</sup> Reply Expert Report of David Estrin at para 274. There was also no information as to where these projects would be located, as confirmed by one Government of Nova Scotia official: "I was not dealing specifically with any proposals or any projects that I'm aware of that have been proposed. That was simply companies that have expressed some interest in business development within the Province."<sup>588</sup> Joint Review Panel Public Hearing Transcript, Vol. 3, June 19, 2007 at 576 (*Investors' Schedule of Documents at Tab C 156*).

<sup>589</sup> Government of Canada Counter Memorial Paras. 417; 455-456.

<sup>590</sup> Letter from Ian McCracken (EC) to Brian Torrie (CEAA), dated April 28, 1997. (*Investors' Schedule of Documents Tab C 378*).

<sup>591</sup> Government of Canada Counter Memorial paras. 453-454.

only “reasonable foreseeable projects” were included in the cumulative effects assessment.<sup>592</sup>

- c) Belleoram Coastal Quarry:<sup>593</sup> Government regulators admitted to similarity between this quarry and the Whites Point Quarry<sup>594</sup> and its cumulative effects assessment was limited to “other activities in the area as well as those activities that will occur in the foreseeable future”.<sup>595</sup>

583. The Deltaport Third Berth Project serves as a further example. The proponent for Deltaport,<sup>596</sup> the Vancouver Port Authority (which is a branch of the government of Canada) benefitted from a cumulative effects standard that was more lenient than the appropriate legal standard.
584. An expansion to the Deltaport project known as “Terminal 2” was openly discussed with federal authorities, however the Vancouver Port Authority was not required to include this expansion in its cumulative effects assessment.<sup>597</sup>
585. The rationale for excluding Terminal 2 was that the Port Authority had “only” identified the location and capacity of the terminal,<sup>598</sup> and that information was deemed insufficient for inclusion in the cumulative effects assessment.
586. This conclusion was vehemently opposed by a local opposition group that obtained internal documents stating that Terminal 2 should be included in the assessment.<sup>599</sup>

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<sup>592</sup> “Environmental effects from reasonable foreseeable projects (Future Case) include those future projects, activities or actions that will occur with certainty, including projects that are in some form of regulatory approval process or have made a public announcement to seek regulatory approvals.” Eider Rock Environmental Impact Assessment Report, Chapter 10 – Freshwater Aquatic Environment, dated August 24, 2009. (*Investors’ Schedule of Documents at Tab C 374*).

<sup>593</sup> Government of Canada Counter Memorial, paras 462-463.

<sup>594</sup> E-mail from Kevin Blair (Environment Canada) to Jeanette Goulet (Environment Canada), dated December 6, 2006. (*Investors’ Schedule of Documents Tab C 189*).

<sup>595</sup> Belleoram Comprehensive Study Report, dated August 23, 2007. (*Investors’ Schedule of Documents Tab C 190*).

<sup>596</sup> Government of Canada Counter Memorial, paras. 466-467.

<sup>597</sup> Deltaport Third Berth Expansion – Scope of the Cumulative Effects Assessment, undated (*Investors’ Schedule of Documents Tab C 321*).

<sup>598</sup> Letter from Susan Jones, (Director of the Boundary Bay Conservation Committee) to the Office of the Auditor General, exposing the DFO’s advisement of the proponent to circumvent parts of the cumulative effects analysis required by the CEAA, dated May 25, 2006. (*Investors’ Schedule of Documents Tab C 322*).

<sup>599</sup> Letter from Susan Jones (Director of the Boundary Bay Conservation Committee) to the Office of the Auditor General, exposing the DFO’s advisement of the proponent to circumvent parts of the cumulative effects analysis required by the CEAA, dated May 25, 2006 (*Investors’ Schedule of Documents Tab C 322*).

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The group alleged that “DFO lawyers advised [the Port Authority] how to circumvent CEEA cumulative effects.”<sup>600</sup>

587. The standard applied to the Canadian government proponent was easier to meet than the standard applied to Whites Point Quarry, and circumvented the proper legal standard.

## **B. Precautionary Principle**

588. The Whites Point project was not afforded like treatment in the application of the precautionary principle when contrasted to the application of the principle to other, like projects.<sup>601</sup>

589. The JRP applied a definition of the precautionary principle that failed to recognize that the absence of full-scientific certainty, “shall not be used as a reason for postponing measures to prevent environmental degradation.”<sup>602</sup>

590. This is in marked contrast to the application of the precautionary principle in other projects.<sup>603</sup> Mr. Estrin points out that in both the Voisey’s Bay and Sable Gas projects, the absence of scientific certainty was not used to prevent the projects from proceeding.

591. The Voisey’s Bay project was approved with 106 conditions, which Mr. Estrin cites as proof “that the precautionary principle, properly interpreted, is not incompatible with uncertainty at the EA stage for which the WPQ Panel criticized Bilcon.”<sup>604</sup>

592. The Sable Gas panel (chaired by Dr. Fournier) correctly applied the precautionary principle in a manner that when contrasted with the Whites Point panel Mr. Estrin calls “striking”;<sup>605</sup> the former “was willing to accept a significant degree of uncertainty”.<sup>606</sup>

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<sup>600</sup> Letter from Susan Jones (Director of the Boundary Bay Conservation Committee) to the Office of the Auditor General, exposing the DFO’s advisement of the proponent to circumvent parts of the cumulative effects analysis required by the CEEA, dated May 25, 2006 (*Investors’ Schedule of Documents Tab C 322*). Canada has acknowledged that there was public opposition to the project, but has not referenced the allegations of procedural unfairness that arose in connection with the assessment. See Government of Canada Canada’s Counter Memorial Para. 466.

<sup>601</sup> Government of Canada Counter Memorial, para. 416.

<sup>602</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 92 (*Investors’ Schedule of Documents Tab C 34*) and *Nova Scotia Environment Act, 1994-95*, s. 2(b)(ii). (*Investors’ Schedule of Documents at Tab C 258*).

<sup>603</sup> Government of Canada Counter Memorial, para. 419.

<sup>604</sup> Reply Expert Report of David Estrin at para. 221

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### C. Adaptive Management

593. The Joint Review Panel exhibited hostility towards the adaptive management concept, which the Investors sought to include in the EIS Guidelines.<sup>607</sup>
594. Adaptive management was a critical concept that would have permitted Bilcon to adapt its activities in an appropriate fashion in order to mitigate the possibility of significant adverse environmental effects as the project evolved. It was particularly important given the fact that the environmental assessment takes place at a preliminary planning stage, thereby precluding Bilcon from relying on detailed designs and observations that would come later in the project's lifespan. It is precisely for this reason that adaptive management "is a commonly used tool to address uncertainty in the environmental assessment process."<sup>608</sup> The Joint Review Panel refused to accept adaptive management as a legitimate mechanism through which Bilcon could assess and continue to assess the potential for significant adverse environmental effects.
595. Numerous Canadian-owned projects received better treatment than the Investors because adaptive management was incorporated in the approval of those projects. In 2007 three quarries were approved in the Province of Nova Scotia and DFO recommended the use of adaptive management for those projects.
596. Canadian company Gallant Aggregates Ltd. received approval from Nova Scotia for the expansion of the Elmsdale Quarry, which involves blasting in proximity to fish habitats. The DFO confirmed that a number of fish species were present in the waterways located near the quarry expansion site.<sup>609</sup>
597. As a result, the conditional approval of the project in July 2007 required the proponent to employ adaptive management.<sup>610</sup>

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<sup>605</sup> Reply Expert Report of David Estrin at para. 225

<sup>606</sup> Reply Expert Report of David Estrin at para 226

<sup>607</sup> Letter from Paul Buxton to Steve Chapman, dated January 16, 2005 re Draft Guidelines for the Preparation of the Environmental Impact Statement. (*Investors' Schedule of Documents at Tab C 867*).

<sup>608</sup> Reply Expert Report of David Estrin at para. 231

<sup>609</sup> Email from Attila Potter (DFO) to Vanessa Margueratt (NSDEL), dated July 10, 2007 (*Investors' Schedule of Documents at Tab C 665*).

<sup>610</sup> Letter from Minister Mark Parent, (NSDEL) to Fred Benere, (Gallant Aggregates Limited), dated July 24, 2007 (*Investors' Schedule of Documents at Tab C 810*).

598. The Glenholme Gravel Pit Expansion, which was proposed by MSD Enterprises Ltd, a Canadian Company, was similarly proximate to habitat for a number of fish species. DFO requested that an adaptive management strategy be implemented as a way to mitigate any prospective environmental effects,<sup>611</sup> and the expansion of the pit was approved on August 3, 2007.
599. The Lovett Road Aggregate Pit Expansion was proposed by Canadian company Shaw Resources. There were concerns related to the proximity of the project to fish habitat, and adaptive management was incorporated in the conditional approval of the project.<sup>612</sup>
600. The Whites Point Quarry Review Panel did not view adaptive management as an effective mitigation tool, and largely dismissed it in the assessment process. Instead, the Panel's Final Report broadly recommended that the CEA Agency prepare a guidance document on the application of adaptive management in Environmental Assessments. Adaptive management was not a controversial or unusual concept. It was not "trial and error" as the Whites Point Quarry Panel observed.<sup>613</sup> It is a sensible concept included at the DFO's suggestion in contemporaneous assessments in Nova Scotia.

#### **D. Mitigation Measures and Conditional Approval**

601. Mitigation measures are planning tools for review panels and must be considered before findings on significant adverse environmental effects can be made.<sup>614</sup> The Panel for Whites Point Quarry was required to follow the *Reference Guide: Determining Whether a Project is Likely to Cause SAEE*, which provides that

...in **all** cases significance and the related matters are determined only after taking into account any mitigation measures the RA considers appropriate. In other words, no final determination can be made about the significance of the likely adverse environmental effects or the related matters unless the implementation of any appropriate mitigation measures has been considered. [emphasis in original]<sup>615</sup>

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<sup>611</sup> Letter from Joe Crocker (DFO) to Peter Geddes (NSDEL), dated July 26, 2007 (*Investors' Schedule of Documents at Tab C 668*).

<sup>612</sup> Letter from Joe Crocker (DFO) to Vanessa Margueratt (NSDEL), dated April 10, 2007 (*Investors' Schedule of Documents at Tab C 664*).

<sup>613</sup> Whites Point Quarry Joint Review Panel Hearing Transcript, Vol. 1, dated June 16, 2007 at 120. (*Investors' Schedule of Documents at Tab C 154*).

<sup>614</sup> Expert Report of Murray Rankin, Q.C., paras. 136.

<sup>615</sup> *SAEE Reference Guide*, November 1994, at 186. (*Investors' Schedule of Documents at Tab C 384*).

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Under this standard, the Panel should not have made any findings on significant adverse environmental effects without considering prospective mitigations measures.<sup>616</sup> Mr. Estrin points out just how critical mitigation measures are to an assessment: “CEAA s. 16 required the Panel to make recommendations about mitigation measures even if the Panel concluded that the project should not proceed.”<sup>617</sup> Failure of a Review Panel to provide any mitigation measures “ties the hands” of government, as it does not provide any ways to mitigate potentially harmful effects in the case that a project is approved.<sup>618</sup>

602. The Kemess panel identified 32 mitigation measures in the event that the project was approved, even though the panel recommended that the project be rejected.<sup>619</sup> Canada, however, has argued that the Kemess Joint Review Panel recommended “outright rejection”<sup>620</sup> of the project.
603. As the Investor has noted, the Comprehensive Study report for Deltaport Third Berth identified a number of mitigation measures.<sup>621</sup> A number of other Canadian proponents received better treatment than Whites Point Quarry regarding mitigation measures.
604. The Lower Churchill project, owned by Nalcor, a Crown corporation,<sup>622</sup> consists of two hydroelectric generation facilities with significant environmental impacts. This was confirmed by the review panel, which found that significant adverse environmental effects would occur to:
- a) fish habitat;
  - b) terrestrial, riparian and wetland habitat;
  - c) a local caribou herd;
  - d) fishing and seal hunting; and

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<sup>616</sup> Expert Report of David Estrin at para. 241.

<sup>617</sup> Reply Expert Report of David Estrin at para. 286

<sup>618</sup> Reply Expert Report of David Estrin at para. 286.

<sup>619</sup> Reply Expert Report of David Estrin at para. 292.

<sup>620</sup> Government of Canada Counter Memorial Para. 418.

<sup>621</sup> Memorial of Investors at para. 563

<sup>622</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011 (*Investors’ Schedule of Documents at Collected Tabs C 681*).

- e) aboriginal culture and heritage.<sup>623</sup>
605. The Project would flood 126 square kilometers,<sup>624</sup> an area approximately 83 times larger than the entire Whites Point Quarry. Massive reservoirs would be created,<sup>625</sup> resulting in the loss of “161 square kilometers [of terrestrial environment]...”<sup>626</sup> including significant loss of habitat for the Red Mountain caribou, which is identified by the Newfoundland *Endangered Species Act* and Canadian *Species at Risk Act*.<sup>627</sup>
606. In addition to these significant adverse environmental effects, there was a large amount of uncertainty associated with the project. For example, there was the threat of catastrophic dam failure resulting in mortality,<sup>628</sup> and mercury contamination with especially adverse effects on young children in neighboring communities.<sup>629</sup>
607. The Joint Review Panel for the project recommended 83 mitigation measures despite the many significant adverse environmental effects. The Government ultimately approved the project, adopting many of those recommended mitigation measures.<sup>630</sup>

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<sup>623</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. 269 (*Investors’ Schedule of Documents at Collected Tabs C 681*).

<sup>624</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. 7 (*Investors’ Schedule of Documents at Collected Tabs C 681*)

<sup>625</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. xviii (*Investors’ Schedule of Documents at Collected Tabs C 681*)

<sup>626</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. xviii (*Investors’ Schedule of Documents at Collected Tabs C 681*)

<sup>627</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. xix-xx (*Investors’ Schedule of Documents at Collected Tabs C 681*)

<sup>628</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. 251 (*Investors’ Schedule of Documents at Collected Tabs C 681*)

<sup>629</sup> Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, dated August, 2011, at p. xxix (*Investors’ Schedule of Documents at Collected Tabs C 681*)

<sup>630</sup> Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor’s Lower Churchill Generation Project in Newfoundland and Labrador. (*Investors’ Schedule of Documents at Collected Tabs C 900*)

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608. The Keltic Petrochemical Project had environmental impacts that would “significantly alter the socio-economic and bio-physical environment of the proposed project location and surroundings.”<sup>631</sup> The project involved some of the same environmental issues as Whites Point Quarry, including wetlands, terrestrial habitat, ground water issues and buffer zones. However, the Keltic environmental assessment utilized mitigation measures to address these concerns.<sup>632</sup> Keltic was “accorded treatment by the same government actors that accorded treatment to Bilcon.”<sup>633</sup>
609. The Nova Scotia Environmental Assessment Board, understanding that environmental assessment is a planning tool, accepted the Keltic project<sup>634</sup> subject to mitigation and follow up studies that would allow the project to proceed.<sup>635</sup>
610. 68 conditions and mitigation measures were included in the approval. For example, the assessment board suggested that a dispute resolution procedure be developed between the proponent and stakeholders, and the proponent was allowed to seek further data on contaminants associated with the project.<sup>636</sup> On the issue of fish, which proved so important for the review of Whites Point Quarry, the Keltic proponent was allowed to complete “a more detailed examination” of salmon migration as a mitigation measure.<sup>637</sup>
611. The Rabaska Joint Review Panel<sup>638</sup> identified numerous concerns, including social concerns. The level of community involvement for the Rabaska project was said by the

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<sup>631</sup> Environmental Impact Assessment Final Report by Nova Scotia Environmental Assessment Board Report re Keltic Petrochemicals Inc. Proposed LNG and Petrochemical Plant Facilities, dated February 21, 2007 at p. 3 (*Investors’ Schedule of Documents at Collected Tabs C 811*). The concerns with the Keltic project arose due to both social and environmental concerns, and there was a large amount of information missing and uncertainty as to project design and characteristics. Expert Report of David Estrin at para. 387.

<sup>632</sup> Expert Report of David Estrin at paras. 398-402 .

<sup>633</sup> Government of Canada Counter Memorial para. 430.

<sup>634</sup> Expert Report of David Estrin at para. 390.

<sup>635</sup> Expert Report of David Estrin at paras. 387-391.

<sup>636</sup> Expert Report of David Estrin at para. 395.

<sup>637</sup> Expert Report of David Estrin at para. 404.

<sup>638</sup> Government of Canada Counter Memorial para. 418

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panel to be “without precedent.”<sup>639</sup> The local municipal government had even sought to prevent the Rabaska project from approval in Quebec Superior Court.<sup>640</sup>

612. The Rabaska review panel still recommended approval of the project subject to mitigation measures. Mitigation measures included the use of an “oversight committee” during the operation of the LNG terminal, and twice annual “crisis simulations”<sup>641</sup> in the event of a catastrophic accident. The panel also identified annual procedures to allow the public to obtain information on security and disaster prevention at the Rabaska project.<sup>642</sup>
613. Similar mechanisms could have been used by the Whites Point Quarry review panel. However, the Review Panel merely stated that Bilcon was not trusted and that, accordingly, there could be no cooperation between local opposition and Bilcon.<sup>643</sup>
614. The Canadian proponents for Lower Churchill, Keltic, Rabaska and Kemess received better treatment than the Investors because each panel considered mitigation measures *before* making a determination on significant adverse environmental effects.

#### **E. Information Requests**

615. During the EA process, Bilcon was subjected to unreasonable, arbitrary and highly burdensome information requests after the submission of its EIS. Spurious issues, such as copper, bristletail insects and terrestrial mollusks were injected into the process.<sup>644</sup> In contrast, the review panel for the GSX Pipeline intervened when information requests submitted by the public were unduly burdensome or irrelevant to the process.

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<sup>639</sup> Joint Review Panel Report Rabaska Project: Implementation of an LNG Terminal and Related Infrastructure, dated May 2007 at 11 (*Investors’ Schedule of Documents at Collected Tabs C 530*).

<sup>640</sup> Joint Review Panel Report Rabaska Project: Implementation of an LNG Terminal and Related Infrastructure, dated May 2007, at 31 and 103. (*Investors’ Schedule of Documents at Collected Tabs C 530*).

<sup>641</sup> Joint Review Panel Report Rabaska Project: Implementation of an LNG Terminal and Related Infrastructure, dated May 2007 at 178. (*Investors’ Schedule of Documents at Collected Tabs C 530*).

<sup>642</sup> Joint Review Panel Report Rabaska Project: Implementation of an LNG Terminal and Related Infrastructure, dated May 2007p. xix. (*Investors’ Schedule of Documents at Collected Tabs C 530*).

<sup>643</sup> Joint Review Panel Final Report, dated October 23, 2007, at p. 88 (*Investors’ Schedule of Documents Tab C 34*).

<sup>644</sup> Letter from Robert Fournier (JRP Chair), to Paul Buxton, Bilcon of Nova Scotia, dated June 28, 2006. (*Investors’ Schedule of Documents at Tab C 150*); Letter from Robert Fournier to Paul Buxton, providing nine final information requests, dated February 27, 2007. (*Investors’ Schedule of Documents at Tab C 435*); Supplemental Witness Statement of Paul Buxton, at para. 42.

616. The GSX Pipeline Project is located in a marine environment in British Columbia. The project was initially reviewed through a comprehensive study before being escalated to a panel review. The GSX Panel struck down a number of information requests from the public and First Nations groups because those requests were too onerous.<sup>645</sup> This treatment was not afforded to Bilcon, which was subject to indiscriminate demands for information.

#### **F. Blasting**

617. Blasting was a crucial component of the Whites Point project. Test blasting at the 3.9ha quarry was to be used to gather important data and scientific information that would have played a key role in operation of the quarry and particularly in demonstrating that with appropriate mitigation and adaptive management blasting at the larger quarry would not have any significant adverse environmental effects.<sup>646</sup>
618. Test blasts were prevented by the imposition of unachievable blasting conditions and the DFO's subsequent refusal to provide information regarding blasting setback calculations.<sup>647</sup> Mr. Estrin writes that the DFO was not permitted to act in this manner:

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<sup>645</sup> Information Request re GHG emissions, climate change and global warming impacts on FN groups (*Investors' Schedule of Documents at Tab C 682*); Letter from Michael L. Mantha (Secretary to the JRP, GSX Canada Pipeline Project) to Parties to the GH-4-2001 Proceeding re Attached List of Attorneys-General re Georgia Strait Crossing Pipeline Limited (GSX PL), GSX Canada Pipeline Project - Hearing Order GH-4-2001, Oral Argument on Motion, dated May 31, 2002 (*Investors' Schedule of Documents at Tab C 683*); Letter from Michel L. Mantha, National Energy Board to All Parties to Hearing Order GH-4-2001, dated October 18, 2002 (*Investors' Schedule of Documents at Tab C 684*).

<sup>646</sup> Letter from Phil Zamora (DFO) to Paul Buxton, dated April 14, 2003, stating that the DFO would manage the assessment as an RA under the CEAA. (*Investors' Schedule of Documents at Tab C 28*); Reply Expert Report of David Estrin at para. 6.

<sup>647</sup> NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, April 30, 2002 (*Investors' Schedule of Document at Tab C 31*); Letter from Phil Zamora (DFO) to Paul Buxton requiring the proponent to obtain authorization under S. 32 of the *Fisheries Act*, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 249*); Letter from Phil Zamora, (DFO), to Paul Buxton, Bilcon of Nova Scotia, dated November 10, 2004. (*Investors' Schedule of Document at Tab C 670*); Letter from Paul Buxton to Phil Zamora (DFO), dated June 6, 2003, requesting the calculations used by the DFO to determine setback distance. (*Investors' Schedule of Documents at Tab C 68*); Handwritten Note made by unknown, dated June 6, 2003 (*Investors' Schedule of Documents at Tab C 607*); Letter from Paul Buxton, Global Quarry Products to Phil Zamora (DFO), dated June 16, 2003, requesting that, prior to meeting with the DFO, if the calculations used by the DFO could be examined. (*Investors' Schedule of Documents at Tab C 107*); Letter from Paul Buxton, Nova Stone Exporters Inc., to Phil Zamora (DFO), dated June 21, 2003. (*Investors' Schedule of Documents at Tab C 611*).

“DFO had no authority under its parent statute, the *Fisheries Act*, to prohibit the blasting at the test quarry.”<sup>648</sup>

619. Proponents for Tiverton Harbour, Tiverton Quarry and Belleoram received better treatment than Bilcon with regards to blasting, which is reflected in the following table:

Project	Blasting Charge	Minimum Setback
Whites Point Quarry	45 kg <sup>649</sup>	106.8 metres <sup>650</sup>
Tiverton Quarry	86.67 kg <sup>651</sup>	150 metres <sup>652</sup>
Belleoram Marine Terminal	294 kg <sup>653</sup>	86 metres <sup>654</sup>
Tiverton Harbour	31 kg <sup>655</sup>	0 metres

620. The Tiverton Harbour, which is owned by a Canadian government agency, is 10 km away from the Whites Point Quarry on the same body of water. The same regulators gave preferential treatment to Tiverton through their discretionary actions despite the presence of directly comparable environmental concerns.<sup>656</sup>

<sup>648</sup> Reply Expert Report of David Estrin at para. 9

<sup>649</sup> Email from Phil Zamora, (DFO) to Bruce Hood, Laurie Wood, Ted Potter, Thomas Wheaton, dated December 16, 2003 (*Investors' Schedule of Documents at Tab C 807*).

<sup>650</sup> Email from Phil Zamora, (DFO) to Bruce Hood, Laurie Wood, Ted Potter, Thomas Wheaton, dated December 16, 2003 (*Investors' Schedule of Documents at Tab C 807*). The setback is initially listed as 35.6m, but Zamora writes that “Dennis Wright (our explosive expert)” suggested tripling that minimum setback distance to 106.8m.

<sup>651</sup> Email from Phil Zamora, (DFO) to Bruce Hood, Laurie Wood, Ted Potter, Thomas Wheaton, dated December 16, 2003 (*Investors' Schedule of Documents at Tab C 807*).

<sup>652</sup> Email from Phil Zamora, (DFO) to Bruce Hood, Laurie Wood, Ted Potter, Thomas Wheaton, dated December 16, 2003 (*Investors' Schedule of Documents at Tab C 807*) On the question of blast distance from Tiverton quarry, Canada cited a “Statement of Frances MacKinnon” (Authority R-100) which claims the Western blast point is 399.27 m from the Bay of Fundy. By contrast, NSDEL engineer Robert Balcom stated that “the nearest surface water is the ocean at a distance of 160 meters” (*Government of Canada Exhibit R-101*).

<sup>653</sup> Belleoram Comprehensive Study report, dated August 23, 2007, at para 90. (*Investors' Schedule of Documents at Tab C 190*). The Report also states that they use ammonium-based explosives for the charge.

<sup>654</sup> Belleoram Comprehensive Study report, dated August 23, 2007, at para 90. (*Investors' Schedule of Documents at Tab C 190*). The Report estimates the minimum distance from fish habitat must be 86 m, noting that the closest fish farm is 2.2 km away.

<sup>655</sup> Tiverton Harbour Screening Report (*Government of Canada Counter Memorial Exhibit R 342*).

<sup>656</sup> Expert Report of Murray Rankin, Q.C., paras. 87. “The federal officials involved in the WPQ project even expressly recognized the similarity between the projects... Yet, the same federal officials followed a different process.”

621. Because the blasting at Tiverton Harbour was in the water<sup>657</sup> there was far greater potential for disruption and destruction of fish and fish habitat than at the Whites Point Quarry.<sup>658</sup>
622. In the assessment of the Whites Point Quarry, iBoF salmon became an issue in May 2003 following a letter sent by DFO to the Investors.<sup>659</sup> Despite its proximity, the Tiverton Harbour habitat study that DFO conducted in September 2003 did not even mention iBoF salmon.<sup>660</sup> It was not until October 2003 that DFO began to consider iBoF in relation to Tiverton Harbour.<sup>661</sup>
623. The sequence of events is important, because it was only as a result questions Bilcon raised<sup>662</sup> that DFO engaged in a consideration of the impact of iBoF salmon on Tiverton.<sup>663</sup> Once Bilcon started to raise concerns about the speedy blasting approvals that the Tiverton project received,<sup>664</sup> DFO suddenly realized that there were “many issues that were not addressed” with the Tiverton Harbour screening report, and that there are “significant concerns pertaining to the effects the project may impose on oceanography.”<sup>665</sup> These “significant concerns” only “came to light during the review of the Blasting Plan for the 3.9ha quarry”<sup>666</sup> after Whites Point Quarry raised the issue with the regulatory authorities.

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<sup>657</sup> Expert Report of Murray Rankin, Q.C., para. 84.

<sup>658</sup> Expert Report of Murray Rankin, Q.C., para. 83.

<sup>659</sup> Letter from Phil Zamora, (DFO) to Paul Buxton, Global Quarry Products, dated May 29, 2003. (*Investors’ Schedule of Documents at Tab C 687*).

<sup>660</sup> Habitat Characterization of Tiverton, Digby County, Nova Scotia, dated September 8, 2003. (*Investors’ Schedule of Documents Tab C 311*).

<sup>661</sup> Email from Rod Bradford, (DFO) to Larry Marshall, Andrew R.J. Stewart, (DFO), dated October 8, 2003 (*Investors’ Schedule of Documents Tab C 608*).

<sup>662</sup> Handwritten Note made by unknown, dated March 26, 2003. (*Investors’ Schedule of Documents Tab C 688*); Handwritten Note made by unknown, dated March 26, 2003. (*Investors’ Schedule of Documents Tab C 689*); Handwritten Note made by unknown, dated March 26, 2003. (*Investors’ Schedule of Documents Tab C 690*).

<sup>663</sup> E-mail from Paul R. Boudreau, (DFO) to Peter Winchester, dated May 28, 2003. (*Investors’ Schedule of Documents Tab C 694*).

<sup>664</sup> HRTS Action Log List Report. (*Investors’ Schedule of Documents Tab C 691*); The Honourable Gordon Balsler to Honourable Rod Russell, Minister of Environment and Labour, dated May 6, 2003. *Investors’ Schedule of Documents Tab C 838*

<sup>665</sup> Fax from Faith Scattolon,(DFO) to Neil Bellefontaine, and Briefing Note, dated January 7, 2004 (*Investors’ Schedule of Documents Tab C 692*).

<sup>666</sup> E-mail from Phil Zamora (DFO) to Bruce Hood (DFO), dated December 16, 2003 (*Investors’ Schedule of Documents Tab C 807*).

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624. A senior DFO Manager, Faith Scattolon, drafted a Briefing Note to Neil Bellefontaine, conceding that Tiverton Harbour Development had serious deficiencies and had negative effects on oceanography.<sup>667</sup> Ms. Scattolon's sentiments echoed those of a local DFO-HMD official, in charge of overseeing the Tiverton Harbour EA.<sup>668</sup>
625. The EA reviewing department, DFO then assisted the proponent, in revising the Screening Report on multiple occasions so that the concerns could be met.<sup>669</sup> On February 3 2004, a DFO representative, advised the proponent of changes she would make to the Screening Report and received instructions from the proponent on formatting and other administrative matters.<sup>670</sup> A day later, the DFO-HMD employee advised the proponent that substantive changes would be made to the Screening Report.<sup>671</sup>
626. The DFO-HMD interventions in the drafting of the Tiverton Screening, purportedly addressed blasting concerns and ultimately led to the issuance of a HADD Permit from Neil Bellefontaine just one month after Faith Scattolon's dismal assessment of the Tiverton development and the review of the project.<sup>672</sup>
627. The preferential treatment afforded to the Tiverton Harbour also extended to the effects of blasting on whales. DFO-HMD sought assistance from DFO-Science, which provided a one page memo concluding that DFO-Science had not actually looked into the effects of blasting at Tiverton on marine mammals, but that it was probable that negative effects would occur.<sup>673</sup> In contrast, DFO-Science provided a 17-page report for the WPQ Project on the impact of blasting and marine mammals.<sup>674</sup>

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<sup>667</sup> Fax from Faith Scattolon,(DFO) to Neil Bellefontaine, and Briefing Note, dated January 7, 2004 (*Investors' Schedule of Documents Tab C 692*).

<sup>668</sup> Briefing Note for Neil Bellefontaine dated January 7, 2004. (*Investors' Schedule of Documents Tab C 696*).

<sup>669</sup> Email from Tammy Rose, Bedford Institute of Oceanography to Ted Potter, and Thomas Wheaton, dated January 16, 2004. (*Investors' Schedule of Documents Tab C 697*).

<sup>670</sup> Email from Rosalia Galante, (PWGSC) to Tammy Rose, Bedford Institute of Oceanography, dated February 3, 2004. (*Investors' Schedule of Documents Tab C 698*).

<sup>671</sup> Email from Tammy Rose, Bedford Institute of Oceanography to Rosalia Galante, (PWGSC), dated February 4, 2004. (*Investors' Schedule of Documents Tab C 699*).

<sup>672</sup> Letter from Neil A. Bellefontaine, (DFO) to Gary Hubbard, (DFO), dated February 6, 2004. (*Investors' Schedule of Documents Tab C 616*).

<sup>673</sup> DFO Science Response to Habitat Request RE: Environmental Screening for Harbour Development (Breakwater, Floating Docks, Dredging And Service Area) at Tiverton, Digby County, Nova Scotia, dated June 4, 2004. (*Investors' Schedule of Documents Tab C 660*); Email from Lei E. Harris, (DFO) to Robert OBoyle, dated June 4, 2004, (*Investors' Schedule of Documents Tab C 700*); Email from Tana Worcester, Bedford Institute of Oceanography to Lei E. Harris

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628. While Bilcon was forced to invest a vast amount of time and money on the blasting issue, and was subject to delays, and prohibited to conduct test blasts to obtain data, the Tiverton Harbour blasting plan was approved apparently based at least in part on the advice of a local tour operator.
629. From the outset, the proponent for Tiverton Quarry, Parker Mountain Aggregates (PMA), a Nova Scotia company, was afforded better treatment than Bilcon. According to the quarry application, the purpose of Tiverton Quarry was to supply armourstone for two PWGSC projects at Tiverton – wharf repairs and harbour development.<sup>675</sup>
630. Although DFO at one point circulated a memorandum which stressed the “need to apply a consistent approach” between the Tiverton and Whites Point in light of the “proximity and similarity” of the two open pit rock quarries,<sup>676</sup> Tiverton routinely received better treatment than Whites Point Quarry, particularly with respect to blasting.
631. Days after the quarry application was submitted for Tiverton, Minister Thibault asked the DFO if he could do anything to “speed up process.”<sup>677</sup> Minister Thibault then met with PMA to discuss its quarry at Tiverton.<sup>678</sup> It is difficult to know what was said between Minister Thibault and Parker Mountain Aggregates because Canada has not produced any documents to shed light on this event.<sup>679</sup> Minister Thibault never met with Bilcon or the Clayton family even though their investment into the region, and his riding, would have been millions of dollars.
632. Following assurances from the most powerful man at DFO, NSDEL also made a direct request to local DFO-HMD staff to speed up the regulatory process for PMA and DFO-

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(DFO), dated June 4, 2004. (*Investors’ Schedule of Documents Tab C 701*); Email from Lei E. Harris, (DFO) to Tana Worcester, Bedford Institute of Oceanography, dated June 4, 2004 (*Investors’ Schedule of Documents Tab C 702*); Email from Tana Worcester, (Bedford Institute of Oceanography) to Lei E. Harris (DFO), dated June 4, 2004. (*Investors’ Schedule of Documents Tab C 703*).

<sup>674</sup> DFO Science Expert Opinion on Whites Point Quarry & Marine Terminal Environmental Impact Statement, dated July 5, 2006 (*Government of Canada Counter Memorial Exhibit R-158*).

<sup>675</sup> Letter from Parker Mountain Aggregates Limited to Jacqueline Cook (NSDEL), dated February 27, 2003. (*Investors’ Schedule of Documents Tab C 705*).

<sup>676</sup> Environment and Labour Briefing Note, Nova Stone Exporters Inc. - Whites Cove quarry, Parker Mountain Aggregates - Tiverton quarry, dated November 5, 2003. (*Investors’ Schedule of Documents at Tab C 305*).

<sup>677</sup> Handwritten notes by Joan Cooke, (NSDEL), dated March 3, 2003. (*Investors’ Schedule of Documents Tab C 614*)

<sup>678</sup> Email from Lee Geddes, (DFO) to Carol Ann Rose, dated April 17, 2003. (*Investors’ Schedule of Documents Tab C 706*).

<sup>679</sup> Email from Lee Geddes, (DFO) to Carol Ann Rose, dated April 17, 2003. (*Investors’ Schedule of Documents Tab C 706*).

- HMD obliged.<sup>680</sup> The favours shown to PMA by regulators culminated in the approval of the quarry on March 24, 2003, less than a month after PMA had submitted its Quarry Application.<sup>681</sup> DFO accepted a 150m setback from water for blasting at Tiverton Quarry, and during the same period required at least a 500m setback for Whites Point Quarry.<sup>682</sup>
633. NSDEL conceded that PMA had begun blasting at the quarry site, even prior to an Approval being issued. At the time, Bob Petrie, in charge of NSDEL EAs for the region, noted that since the blasting was for building an access road, NSDEL had no authority.<sup>683</sup> In contrast, NSDEL inserted two conditions on blasting at the Whites Point Quarry, 10.h and 10.i, which were taken close to verbatim from the comments DFO had made on the 3.9ha quarry application.<sup>684</sup> Both conditions exceeded Nova Scotia's "standard terms and conditions" -- 10.i effectively placed NSDEL's approval authority in the hands of DFO.<sup>685</sup> It is striking that DFO did not use the same authority at Tiverton related to potential effects of blasting on fish and fish habitat that it utilized to insert conditions 10.h and 10.i in Nova Stone's Quarry Approval.
634. One of the clearest examples of beneficial treatment being afforded to the proponent of the Tiverton Quarry was the fact that blasting, not just to build an access road, was allowed to occur even before an actual Approval had been given.<sup>686</sup> It is evident that the government had knowledge that blasting started at Tiverton before the project received approval.<sup>687</sup>

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<sup>680</sup> NSDEL Communication Form, dated March 10, 2003. (*Investors' Schedule of Documents Tab C 707*).

<sup>681</sup> Letter from Bob Petrie (NSDEL) to Parker Mountain Aggregates, dated March 24, 2003. (*Investors' Schedule of Documents Tab C 708*).

<sup>682</sup> NSDEL Communication Form, dated March 18, 2003. (*Investors' Schedule of Documents Tab C 709*); Government of Canada Counter Memorial, para. 447; Email from Phil Zamora, (DFO) to Bruce Hood, Laurie Wood, Ted Potter, Thomas Wheaton, dated December 16, 2003. (*Investors' Schedule of Documents Tab C 807*).

<sup>683</sup> Letter from Parker Mountain Aggregates to Mr. Balcom (NSDEL), dated March 13, 2003. (*Investors' Schedule of Documents Tab C 710*).

<sup>684</sup> Expert Report of David Estrin, paras. 115-117.

<sup>685</sup> Expert Report of David Estrin, at para 117.

<sup>686</sup> Note by Bob Petrie (NSDEL), dated November 3, 2003 discussing policy and procedures for pit and quarry guidelines. May be a useful document, needs to be deciphered. Nova Stone representatives even contacted NSDEL to voice that blasting in order to construct the access road was very close to water. (*Investors' Schedule of Documents Tab C 931*); Note prepared by unknown, dated March 26, 2003. (*Investors' Schedule of Documents Tab C 688*)

<sup>687</sup> On March 18 and March 20, days before the Tiverton Quarry Approval was issued, two blasts were conducted and two Blasting Reports were sent to NSDEL. See Consbec Inc. Blast Report (Parker Mountain Aggregates), March

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635. Unlike, Bilcon, who met every obligation and went above and beyond the letter of the law to ensure that safety was of paramount importance, PMA violated its Terms and Conditions of Approval, yet documents do not show that they had to stop blasting.<sup>688</sup>
636. Further still, PMA was afforded better treatment when it came to assessing effects of blasting on iBoF salmon, an issue that stalled Bilcon's attempts to conduct test blasts. Documents show that, despite the fact that the same DFO regulators were involved in the WPQ EA and the Tiverton Quarry environmental assessment, iBoF salmon was never an issue at the Tiverton Quarry.<sup>689</sup>
637. Towards the end of May 2003, DFO-HMD sought advice on whether salmon were present near Whites Point. The response culminated in a letter to the investors on May 29, 2003 advising of DFO's concerns regarding iBoF salmon.<sup>690</sup>
638. According to DFO, iBoF salmon came to light following the review of the Whites Point Quarry. Because WPQ and Tiverton were located in the same environment, DFO-HMD needed to reassess the Tiverton Quarry Application that had already been approved.<sup>691</sup>
639. This different approach for the two similar projects manifested in the blasting conditions.<sup>692</sup> Belatedly, DFO recognized their different treatment to the Tiverton Quarry proponent from the WPQ, writing:<sup>693</sup>

It has been brought to our attention that the assessment of the Tiverton Quarry project did not fully consider potential impacts of blasting on inner Bay of Fundy (iBoF) Atlantic salmon.... DFO

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18, 2003 (*Investors' Schedule of Documents Tab C 741*) and Consbec Inc. Blast Report (Parker Mountain Aggregates), March 20, 2003 (*Investors' Schedule of Documents Tab C 742*).

<sup>688</sup> Letter from Jacqueline Cook, (NSDEL) to Parker Mountain Aggregates, dated November 10, 2003. (*Investors' Schedule of Documents Tab C 713*); Letter from Parker Mountain Aggregates to Jacqueline Cook (NSDEL), dated November 27, 2003. (*Investors' Schedule of Documents Tab C 808*); Letter from Jacqueline Cook (NSDEL), to Parker Mountain Aggregates, dated August 8, 2003. (*Investors' Schedule of Documents Tab C 809*).

<sup>689</sup> Expert Report of Murray Rankin, Q.C., para. 83.

<sup>690</sup> Letter from Phil Zamora, (DFO) to Paul Buxton, Global Quarry Products, dated May 29, 2003. (*Investors' Schedule of Documents at Tab C 687*).

<sup>691</sup> E-mail from Paul R. Boudreau, (DFO) to Peter Winchester, dated May 28, 2003. (*Investors' Schedule of Documents at Tab C 694*).

<sup>692</sup> Expert Report of David Estrin, para 118.

<sup>693</sup> Expert Report of David Estrin, para 119.

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recommends that the blasting plan for this quarry operation be reviewed with full consideration given to iBoF Atlantic salmon.<sup>694</sup>

640. The Belleoram Quarry involved many of the same government officials and environmental issues as Whites Point Quarry,<sup>695</sup> including blasting impacts on marine life, ballast water pollution, dust control and ammonia based explosives.<sup>696</sup> Blasting at Belleoram would occur closer to water than at Whites Point Quarry.<sup>697</sup>
641. Blasting at the Belleoram Quarry was to occur twice a week at full operation for the 50 year life of the project.<sup>698</sup> Each proposed blast was 290 kilograms<sup>699</sup> compared to a 45kg charge at the Whites Point Quarry.<sup>700</sup> As such, the blasting charges were six times larger at Belleoram than at Whites Point Quarry. Blasting at Belleoram occurred both right “at the marine terminal site” and “at the shore”.<sup>701</sup>
642. Despite these similarities with the Whites Point Quarry, the Belleoram proponent needed to only undertake “video and photographic surveys” and “visual inspections” prior to blasting,<sup>702</sup> something that the Joint Review Panel did not view as sufficient for the Whites Point Quarry. This resulted in a process that, as described by environmental law expert David Estrin, was “much more limited and much less onerous” than the process given to the Whites Point Quarry.<sup>703</sup>
643. The North Head Harbour project, a DFO-SCH concern, consisted of the improvements of an already existing harbour facility. The harbour is located at Grand Manan Island, New

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<sup>694</sup> Letter from Thomas Wheaton (DFO) to Bob Petrie (NSDEL), undated, at 779732. (*Investors’ Schedule of Documents at Tab C 559*).

<sup>695</sup> Expert Report of David Estrin at para. 46

<sup>696</sup> Belleoram Marine Terminal Project, Comprehensive Study Report, dated August 23, 2007 at 4. (*Investors’ Schedule of Documents Tab C 190*).

<sup>697</sup> Reply Expert Report of David Estrin at para. 45.

<sup>698</sup> Belleoram Comprehensive Study Report, August 23, 2007, at p. 25 (*Investors’ Schedule of Documents Tab C 190*);

<sup>699</sup> Belleoram Comprehensive Study Report, August 23, 2007, at p. 25 (*Investors’ Schedule of Documents Tab C 190*);

<sup>700</sup> E-mail from Phil Zamora (DFO) to Bruce Hood (DFO), dated December 16, 2003. (*Investors’ Schedule of Documents Tab C 475*).

<sup>701</sup> Belleoram Comprehensive Study Report, August 23, 2007, at p. vi (*Investors’ Schedule of Documents Tab C 190*);

<sup>702</sup> Belleoram Comprehensive Study Report, August 23, 2007, at p. 85 (*Investors’ Schedule of Documents Tab C 190*);

<sup>703</sup> Expert Report of David Estrin at para. 38.

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Brunswick, at the mouth of the Bay of Fundy - an area closer to traditional Right Whale spawning areas than Whites Point.

644. The harbour expansion required the dredging of rock, either through blasting or with a jackhammer. In the case that blasting would be used, environmental procedures were outlined:

Blasting had to be conducted according to DFO Guidelines;  
Blasting should be conducted during periods of low biological activity;  
Pre-blast visual survey should be conducted to ensure that there are no marine mammals present within 300m of the blasting zone.<sup>704</sup>

645. This constitutes better treatment than Bilcon received, because, even though the blasting was to occur in a marine environment and would have an impact on marine life, a procedure was identified in order to allow blasting to occur. In contrast, Bilcon was never permitted to conduct any blasting, all of which was to take place on land.
646. The Miller's Creek Gypsum Mine is located in the Bay of Fundy, and, like the Whites Point Quarry, Miller's Creek also uses ANFO for blasting.<sup>705</sup>
647. The project received significant opposition from the public and demand for a Panel Review of the entire Annapolis River Basin.<sup>706</sup> The proposed project was located in a highly unique biosphere, with many rare plant species present.<sup>707</sup>
648. In response to these concerns, the proponent was required by NSDEL to employ an adaptive management plan and the project was approved.

### **G. Scoping**

649. At the Whites Point Quarry, DFO illegally scoped the land component of the Whites Point Quarry into the environmental assessment despite its not having a legislative trigger and the DFO's own well-established policy to solely scope marine areas.<sup>708</sup>

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<sup>704</sup> Environmental Protection Plan (EPP) North Head Harbour Improvements North Head, Charlotte County, N.B. (*Investors' Schedule of Documents Tab C 715*).

<sup>705</sup> Letter from Seam Steller, Environment Canada to Helen MacPhail (NSDEL), re Miller's Creek Mine Explosion, dated November 13, 2007. (*Investors' Schedule of Documents Tab C 716*).

<sup>706</sup> Email from Sonja Wood (Friends of Avon River, Chair) to David Morse, (MLA), dated March 10, 2009. (*Investors' Schedule of Documents Tab C 666*).

<sup>707</sup> Memorandum from Sarah MacKay (NSDNR) to Helen MacPhail (NSDEL), dated November 23, 2009. (*Investors' Schedule of Documents Tab C 717*)

650. At the Whites Point Quarry, DFO officials privately acknowledged that they “shouldn’t be scoping things in to satisfy public or other agency pressure”,<sup>709</sup> however also noted the “[p]ublic will likely be mad if [the] DFO doesn’t scope in [the] quarry.”<sup>710</sup> These notes make clear that DFO knew it “had no trigger for [the] quarry”<sup>711</sup> and that it had no legal authority to scope the quarry. Mr. Estrin concludes on this point, “It seems that DFO inserted itself into the provincial process in order to accomplish what it could not accomplish under the *Fisheries Act*, namely to have the final say on whether blasting could occur at the test quarry.”<sup>712</sup>
651. DFO’s scoping actions at the Whites Point Quarry deviate in inexplicable ways from its actions in other environmental assessments where projects were not subjected to scoping of separate components, that went beyond what was permitted by the legislation.<sup>713</sup> Canadian proponents for the Tiverton Quarry, Belleoram, and Keltic received better treatment than Bilcon, as DFO did not scope in the land based aspects of these projects, resulting in a far less onerous environmental assessment process.

*i. Tiverton Quarry*

652. When Parker Mountain Aggregates made its Application for the Tiverton Quarry, it specifically noted that the purpose of the project was to supply armourstone for two PWGSC projects in Tiverton, meaning the wharf repairs and harbour development.<sup>714</sup> On the face of it, the PMA quarry at Tiverton was directly linked to the two projects at the Tiverton Harbour, given that the quarry’s sole purpose was to supply stone for two related projects.

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<sup>708</sup> Reply Expert Report of David Estrin at paras. 51 & 57; Email from Cheryl Benjamin (CEA Agency) to Melanie MacLean (DFO) dated November 26, 2004, discussing the DFO’s policy to always scope to their trigger (*Investors’ Schedule of Documents at Tab C 438*).

<sup>709</sup> Journal note by Bruce Hood (DFO), noting that the DFO did not possess a valid legislative trigger which would provide jurisdiction to include the quarry within the federal environmental assessment at 801603. (*Investors’ Schedule of Documents at Tab C 365*).

<sup>710</sup> Journal note by Bruce Hood (DFO), Fall 2007, noting that the public would be upset if the quarry was not included in the scope of the DFO’s assessment at 801604. (*Investors’ Schedule of Documents at Tab C 366*).

<sup>711</sup> Journal note by Bruce Hood (DFO), noting that the DFO did not possess a valid legislative trigger which would provide jurisdiction to include the quarry within the federal environmental assessment at 801603. (*Investors’ Schedule of Documents at Tab C 365*).

<sup>712</sup> Reply Expert Report of David Estrin at para. 9

<sup>713</sup> Canada acknowledges that the decisions of government authorities on the scope of project and type of assessment” are treatment. Government of Canada Counter Memorial, para. 408.

<sup>714</sup> Letter from Parker Mountain Aggregates Limited to Jacqueline Cook, Department of Environment & Labour, dated February 27, 2003. (*Investors’ Schedule of Documents at Tab C 705*).

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653. It was obvious that there was an issue regarding scoping between the Tiverton Quarry and the wharf repair and harbour development projects. In response to inquiries from DFO-HMD to DFO-SCH and PWGSC regarding the origins of armourstone used for the wharf repairs, PWGSC responded that armourstone was to have come from an existing quarry, but that tight supplies necessitated the construction of the Tiverton Quarry. However, because the Tiverton Quarry, had supplied stone to another project, other than the wharf repairs, it did not appear that the wharf repair project enabled the Tiverton Quarry.<sup>715</sup>
654. This is an incredible statement, considering that, as has been described above, the actual PMA Quarry Application noted that stone was to be used to supply only 2 projects being conducted by PWGSC at Tiverton. What is more, no evidence has been produced, by Canada during these proceedings, nor PWGSC in April 2003, to show that the Tiverton Quarry supplied rock to another unrelated project.
655. The scoping issues related to the Tiverton Quarry caused Bruce Hood to try and determine why a quarry would be scoped in with a wharf repair and harbour development project, when it clearly had no associated navigation, fish or fish habitat issues.<sup>716</sup> Clearly the same sort of questions were not asked related to the WPQ Project, because there the quarry, despite it having no bearing on navigation, fish or fish habitat issues, was scoped in with the marine terminal component of Bilcon's project.

*ii. Belleoram Coastal Quarry*

656. The Belleoram Quarry was "remarkably similar" to Whites Point Quarry.<sup>717</sup> The rate of shipping for Belleoram, at once every 5-7 days, was also similar to the shipping rate for WPQ. The Comprehensive Study Report for Belleoram called this shipping rate "infrequent."<sup>718</sup>
657. While Canada alleges that the Belleoram super coastal quarry is not an appropriate comparator because Placentia Bay in Newfoundland "is populated with heavy industrial activity" "unlike Digby Neck"<sup>719</sup>, Canada again ignores that Digby Neck is on the Bay of

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<sup>715</sup> Letter from Donald R. Maynard (PWGSC) to Gary Hubbard (DFO), dated April 4, 2004. (*Investors' Schedule of Documents at Tab C 718*).

<sup>716</sup> Email from Bruce Hood to Laurie Wood, dated April 3, 2003. (*Investors' Schedule of Documents at Tab C 719*).

<sup>717</sup> Expert Report of David Estrin at 1.

<sup>718</sup> Draft Comprehensive Study Report for Belleoram Crushed Rock Export Quarry, dated June 29, 2007. (*Investors' Schedule of Documents Tab C 313*).

<sup>719</sup> Government of Canada Counter-Memorial at paragraph 465.

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Fundy, an area roughly equal in size to Placentia Bay that is industrialized and highly trafficked, with large Liquefied Natural Gas terminals, other coastal quarries and the Point Lepreau Nuclear Power Facility located directly across Digby Neck.

658. DFO excluded itself from the quarry component of Belleoram,<sup>720</sup> despite the fact that blasting would occur near the shore throughout the duration of Belleoram's fifty year life span.<sup>721</sup> More troubling is that the Belleoram proponent convinced the federal Government to not include the quarry in the scope of the project.<sup>722</sup>
659. Throughout the EA process and until a late stage, the Responsible Authority, DFO, was to scope the entire project, both the marine and terrestrial (quarry) components. There is evidence that government advised the Belleoram proponent that the length of its assessment could be limited if the proponent submitted a new funding application that stated ACOA funds would only be used for the marine aspects of Belleoram, and not the quarry<sup>723</sup>
660. Concern was expressed about limiting the scope to only the marine terminal:
- I would have thought that the train had already left the station with a fully scoped project on federal side...In my view, narrowing the scope at this late stage in [the] process does not necessarily follow from the rationale described by TC.<sup>724</sup>
661. Ultimately, the quarry was not scoped with the marine facilities, and the provincial government was the only regular to assess the quarry. The review of the quarry took just two months. By contrast, DFO's actions in scoping in the land based quarry at Whites Point resulted in an environmental assessment lasting several years.

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<sup>720</sup> Expert Report of David Estrin at para. 41.

<sup>721</sup> Belleoram Comprehensive Study Report, August 23, 2007 (*Investors' Schedule of Documents Tab C 190*); This favorable treatment to Belleoram can be simply explained: a federal government agency, the Atlantic Canada Opportunities Agency, provided funding for the Belleoram project; Email from Randy Decker (Transport Canada) discussing the comprehensive study for Belleoram Rock Quarry, dated August 30, 2006. (*Investors' Schedule of Documents Tab C 314*).

<sup>722</sup> Email from Randy Decker (Transport Canada) updating members of CEA Agency, DFO, ACOA and NF/LAB about the assessment for Belleoram Rock Quarry, May 31, 2007. (*Investors' Schedule of Documents Tab C 315*).

<sup>723</sup> Email from Vanessa Rodrigues (CEAA) to Marvin Barnes, (DFO), dated May 22, 2007. (*Investors' Schedule of Documents Tab C 720*).

<sup>724</sup> E-mail from Barry Jeffrey (EC) to Glenn Troke (EC) regarding the change in scoping for the Belleoram project, dated June 1, 2007. (*Investors' Schedule of Documents at Tab C 246*).

662. DFO also excluded itself from the land-based aspects of Keltic project,<sup>725</sup> a large and contentious project located on the coast of Nova Scotia. The DFO sought to limit its role and even advised the Keltic proponent how to avoid a referral to a review panel.<sup>726</sup>

#### H. Level of Assessment

663. Bilcon had no say at all in what type of environmental assessment it was to undergo. Furthermore, it was misled, through the spring and summer of 2003, to believe that it would undergo a comprehensive study, a level much less onerous than a panel review, despite the fact that the DFO knew by February 2002 that it intended to refer the project to a joint review panel.<sup>727</sup>

664. In his Reply Report, Mr. Estrin emphasizes that when compared to other projects, Bilcon's does not come across as unique. "WPQ was hardly unique or unprecedented in terms of its scope."<sup>728</sup> As such, given the representations made to it, and its knowledge about other quarries, Bilcon never seriously considered that it would be subjected to a joint review panel, a level of assessment that Mr. Estrin concludes there was "no compelling reason for."<sup>729</sup> This is buttressed by the reality that Bilcon's quarry at Whites Point remains, of the 33 proposed quarries assessed under the 2000 Nova Scotia *Environment Act*, the only quarry in Nova Scotia sent to a panel review.<sup>730</sup> The table below, listing projects that were referred to a review panel illustrates why Bilcon, with its 152ha quarry, was not at all expecting to be referred to a joint review panel.

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<sup>725</sup> Environmental Assessment Track Report For The Petrochemical and Liquefied Natural Gas Facilities at Goldboro, Nova Scotia, dated October 14, 2005 (*Investors' Schedule of Documents Tab C 327*); Briefing Note for the Director General Habitat Management (DFO) regarding the Keltic Liquefied Natural Gas Terminal at Goldboro, Nova Scotia, undated (*Investors' Schedule of Documents Tab C 328*).

<sup>726</sup> Memorandum for the Minister (DFO) regarding Keltic Petrochemicals Inc. Proposal (*Investors' Schedule of Documents Tab C 329*).

<sup>727</sup> Letter from Phil Zamora (DFO) to Paul Buxton, Global Quarry Products, dated April 14, 2003. (*Investors' Schedule of Documents at Tab C 28*); Email from Bill Coulter, (CEAA) to Bruce Young, Steve Burgess, Paul Bernier, Derek McDonald, (CEAA), dated February 17, 2003. (*Investors' Schedule of Documents at Tab C 813*).

<sup>728</sup> Reply Expert Report of David Estrin at para. 142

<sup>729</sup> Reply Expert Report of David Estrin at para. 142

<sup>730</sup> Reply Expert Report of David Estrin at para. 145

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<b>Project</b>	<b>Size of the Project</b>
Frontier Oil Sands Mine	29,000 hectares <sup>731</sup>
Jackpine Mine Expansion Project	2,700 hectares <sup>732</sup>
Joslyn North Mine Project	5,400 hectares <sup>733</sup>
Kearl Lake Oil Sands Development Project	23,000 hectares <sup>734</sup>
Muskeg River Mine Expansion	4,970 hectares expansion area
Whites Point Quarry	152 hectares <sup>735</sup>

*i. Prosperity Gold-Copper Project*

665. The Prosperity Gold-Copper Project, which was proposed by Taskeo, a Canadian company, required authorization from the DFO under both s.35(2) and s. 32. In addition, the project required approval under the *NWPA*.
666. The Canadian proponent was able to assert influence over the level of review and insisted it would not accept a Panel Review where the panel had the ability to make a “go/no go” decision. The Canadian proponent placed pressure on provincial and federal regulators to leave the determination of the level of review in the hands of politicians.

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<sup>731</sup> Article headed “*Frontier Oil Sands Mine Project - Environmental Assessment Referral to Review Panel and Availability of Funding*”, Canada Newswire, dated January 19, 2012 (*Investors’ Schedule of Documents at Tab C 724*).

<sup>732</sup> Jackpine Expansion & Pierre River Mining Areas Project Description (*Investors’ Schedule of Documents at Tab C 725*).

<sup>733</sup> Joslyn North Mine Project, Joslyn North Mine Project, Dated February 2006 (*Investors’ Schedule of Documents at Tab C 726*).

<sup>734</sup> Kearl Oil Sands Project – Mine Development, Responses to OSEC Statement of Concern, dated August 2006 (*Investors’ Schedule of Documents at Tab C 727*).

<sup>735</sup> Joint Review Panel Report, dated October 23, 2007, where the Panel notes “The Proponent was unable to provide empirical evidence to support its assertion that ANFO residues could be eliminated” at 1. (*Investors’ Schedule of Documents at Tab C 34*)

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### III. MOST FAVOURED NATION TREATMENT

667. Canada provided better treatment to investors from Non-NAFTA parties than Bilcon received. As Canada noted, Article 1103 of NAFTA “prescribes a similar obligation” to Article 1102 but on a Most Favored Nation basis, and identifies the same requirements to show MFN Treatment as National Treatment.<sup>736</sup>
668. Industrial projects in Canada owned by non-parties received treatment far more favourable than Bilcon with regards to cumulative effects and the level assessment.
- i. Victor Diamond Mine*
669. The proponent of the Victor Diamond Mine in Ontario was DeBeers Canada, a wholly owned subsidiary of the Luxembourg-based DeBeers Family of Companies.<sup>737</sup> The mine had significant public opposition that expressed concern about environmental impacts of the mine and the need for a panel review.<sup>738</sup>
670. Despite the likelihood of future projects in the area, cumulative effects were limited at the Victor Diamond Mine to known projects, “within the regulatory process on the day these guidelines are issued.”<sup>739</sup>
671. The Victor Diamond Mine<sup>740</sup> was the “first development in a pristine region of northern Ontario”<sup>741</sup>, where endangered species were present.<sup>742</sup> The area of the project was viewed by environmental groups as “globally significant”<sup>743</sup> due to the fact that it was

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<sup>736</sup> Government of Government of Canada Counter Memorial, para. 399 -340.

<sup>737</sup> Living Up To Diamonds, Report to Society of 2010 Summary Review (*Investors’ Schedule of Documents at Tab C 583*).

<sup>738</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003 (*Investors’ Schedule of Documents Tab C 193*).

<sup>739</sup> Comprehensive Study Report for Victor Diamond Project, Undated. (*Investors’ Schedule of Documents Tab C 803*).

<sup>740</sup> Government of Government of Canada Counter Memorial, paras. 470-472.

<sup>741</sup> Memorandum for the Director General from Richard Nadeau, (DFO), Undated (*Investors’ Schedule of Documents Tab C 192*).

<sup>742</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003. (*Investors’ Schedule of Documents Tab C 193*).

<sup>743</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003 (*Investors’ Schedule of Documents Tab C 193*).

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“one of the largest, intact ecosystems remaining in the world.”<sup>744</sup> Environmental groups were clear in their belief that the project would have “significant adverse environmental impacts”<sup>745</sup> on a regional scale and sought a panel review of the project. Canada has noted that the project included multiple components including a mine, a processing plant, an airstrip and shipping facilities.<sup>746</sup>

672. Despite these social and environmental concerns,<sup>747</sup> the Victor Diamond Mine was assessed by a comprehensive study, not a review panel. Canada’s explanation is that the Victor Diamond Mine was “isolated”<sup>748</sup> and the area lacked an eco-tourism industry.<sup>749</sup> The explanation is contrary to the facts.

673. Canada also asserts that the post-2003 *CEAA* amendments made a Joint Review Panel unnecessary for the Victor Diamond Mine project.<sup>750</sup> The assertion is clearly wrong, as the Comprehensive Study Report for the Victor Diamond Project expressly notes that the post-2003 *CEAA* amendments did not apply:

Within this context, it is important to note that the VDP falls under CEA Act 1992 and subsequent amendments prior to those that came into force on October 30, 2003.<sup>751</sup>

674. Accordingly, Canada has advanced no plausible explanation as to why a review panel was necessary for Whites Point Quarry, or why Bilcon received less favourable treatment than the Victor Diamond Mine.

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<sup>744</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003 (*Investors’ Schedule of Documents Tab C 193*).

<sup>745</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003 (*Investors’ Schedule of Documents Tab C 193*).

<sup>746</sup> Government of Government of Canada Counter Memorial, para. 470

<sup>747</sup> Letter from the Wildlands League to federal Minister of the Environment Stéphane Dion, dated July 21, 2005 discussing environmental impacts of Victor Diamond Mine 2003, in which at least 928 letters from the public expressed concern about the large-scale environmental impacts of the mine and the need for Joint Panel Review (*Investors’ Schedule of Documents Tab C 193*).

<sup>748</sup> Government of Canada Counter-Memorial at para. 471.

<sup>749</sup> Government of Canada Counter-Memorial at para. 471.

<sup>750</sup> Government of Canada Counter-Memorial at para. 472.

<sup>751</sup> Comprehensive Study Report for Victor Diamond Project, Undated. (*Investors’ Schedule of Documents Tab C 803*).

*ii. Diavik Diamond Project*

675. The significant industrial activity at the Diavik mine is even more pronounced. In addition to quarrying facilities,<sup>752</sup> the project included power generation facilities, a two kilometre long purpose built air strip, haul and access roads. There was also significant public opposition at the Diavik Diamond project with calls for a review panel.<sup>753</sup>
676. However, despite the project being located in a sensitive environment<sup>754</sup> it was not referred to a review panel, and was assessed by a comprehensive study.

*iii. Surface Gold Mine*

677. Perhaps most striking is the Australian-owned Surface Gold Mine project, which is also in Nova Scotia. It was assessed at the lowest and most common level of environmental assessment: a Class 1 Screening.<sup>755</sup>
678. Canada says that the project did not require a review panel because the area had been the site of "historical gold mining operations".<sup>756</sup>
679. By comparison, Whites Cove was the site of historical quarry activities.<sup>757</sup>
680. In the result, Canada has provided no justifications for the level of assessment that was used for various large-scale projects owned by Non-NAFTA parties. Those projects were

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<sup>752</sup> Comprehensive Study Report for Diavik Diamonds Project, dated June 1999 at 28. (*Investors' Schedule of Documents Tab C 352*).

<sup>753</sup> Letter from NDP MP Rick Laliberte to Minister David Anderson requesting that the Diavik Diamond Project be referred to panel review, dated September 28, 1999. (*Investors' Schedule of Documents Tab C 355*); Letter from John Crump (Executive Director of the Canadian Arctic Resources Committee) to MP Dennis Miller requesting that the Diavik Diamond Project be referred to panel review, dated September 16, 1999. (*Investors' Schedule of Documents Tab C 356*); Letter from MP Dennis Miller to Minister David Anderson, forwarding John Crump's letter requesting the Diavik Diamond Project be referred to panel review, dated September 22, 1999. (*Investors' Schedule of Documents Tab C 357*).

<sup>754</sup> Letter from NDP MP Rick Laliberte to Minister David Anderson requesting that the Diavik Diamond Project be referred to panel review, dated September 28, 1999. (*Investors' Schedule of Documents Tab C 355*); Letter from John Crump, Executive Director of the Canadian Arctic Resources Committee to MP Dennis Miller requesting that the Diavik Diamond Project be referred to panel review, dated September 16, 1999. (*Investors' Schedule of Documents Tab C 356*); Letter from MP Dennis Miller to Minister David Anderson, forwarding John Crump's letter requesting the Diavik Diamond Project be referred to panel review, dated September 22, 1999. (*Investors' Schedule of Documents Tab C 357*).

<sup>755</sup> Letter from Mark Parent (Minister of NSDEL) to DDV Gold Limited regarding the level of assessment of the Surface Gold Mine project, dated April 10, 2007. (*Investors' Schedule of Documents Tab C 344*).

<sup>756</sup> Government of Canada Counter-Memorial at para. 444.

<sup>757</sup> Memorial of Investors at para. 4.

subject to a more efficient and less costly review process thereby demonstrably receiving far better treatment than Bilcon.

681. In addition, the Southern Head Project,<sup>758</sup> Sechelt Carbonate Project,<sup>759</sup> and NWT Diamonds Project,<sup>760</sup> which are Investments of Investors from another Non-Party, received better treatment than Bilcon, which is described in the Investors' Memorial.

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<sup>758</sup> Memorial of Investors, paras. 617-621.

<sup>759</sup> Memorial of Investors, paras. 624-626

<sup>760</sup> Memorial of Investors, paras. 630-633.

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## PART FIVE: DEFICIENCIES IN CANADA'S DOCUMENT PRODUCTION

682. In *Procedural Order No. 10*, the Tribunal ordered Canada to confirm in writing when it completed its production of "Category A" documents.<sup>761</sup> On March 8, 2011, Canada confirmed it had completed production of "Category A" documents.<sup>762</sup> Notwithstanding Canada's confirmation, the Investors are still without key documents that fall under "Category A" documents, these include:
- a) Documents in the possession of DFO, CEAA and TC related to projects under Document Requests 3 and 4, particularly 4bis. It is obvious that more documents must exist.
  - b) Internal documents belonging to provincial authorities in Nova Scotia related to Document Request 4 project, particularly 4bis projects. Again, it is obvious that more documents must exist.
683. In their Memorial, the Investors provided the Tribunal with a recounting of the various classes and categories of documents that have not been produced by Canada. The Investors know that these types of documents must exist, not only on the advice of David Estrin,<sup>763</sup> but also from documents that have been produced by Canada which allude to the existence of further documents that have not been produced.
684. The Investors provided examples of the types of document categories that have not been produced.<sup>764</sup> The Investors also brought to issue the case of the Tiverton Projects file, of which Canada only produced 23 documents. In response to that minimal production of documents, the Investors made an application under the Nova Scotia *Freedom of Information and Protection of Privacy Act* and recovered approximately 300 more documents that were responsive to our document request.<sup>765</sup>
685. Canada has argued, specifically related to the Tiverton Quarry, that Canada was never obligated to produce documents related to that quarry because it was never subject to an environmental process.<sup>766</sup> That is precisely the point. Canada is obligated to produce

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<sup>761</sup> "Category A" and "Category B" documents were specified in the Tribunal's *Procedural Order No. 9* on July 16, 2010.

<sup>762</sup> Letter DFAIT to Tribunal, March 8, 2011.

<sup>763</sup> Expert Report of David Estrin, page 10.

<sup>764</sup> Memorial of Investors at para. 657.

<sup>765</sup> Memorial of Investors at para. 654.

<sup>766</sup> Government of Canada Counter-Memorial at para. 484.

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Tiverton Quarry documents because events unfolding at Whites Point, led the same regulators, such as Thomas Wheaton and Bruce Hood, for whom documents were specifically requested, to make inquiries into the Tiverton Quarry approval process, and at issue in this arbitration is the different treatment accorded by the regulators to Tiverton. Moreover, several documents, related to the Tiverton Project, were recovered through the Freedom of Information Request that specifically referred to Bilcon's project.<sup>767</sup>

**A. Classes of Documents Missing**

686. In addition, David Estrin has explained that entire categories and classes of documents are missing. Those include:
- a) Considerations on why Nova Scotia and the Federal government determined to subject the Whites Point Quarry to a Joint Review Panel;
  - b) Considerations related to the drafting of the Terms of Reference that guided the Joint Review Panel;
  - c) Considerations related to the formulation of the government response to the JRP Report; and
  - d) Documents related to communications between Ministers and Deputy Ministers and their advisor and support staff.<sup>768</sup>
687. Very few documents have been produced from individuals at DFO-HQ during 2003, when the ultimate decision to refer the Project to a Panel Review was made.
688. Very few documents have been made available related to panel selection, despite Canada's insistence that the search for candidates was exhaustive. No documents were produced related to why Jill Grant was chosen to be on the JRP.
689. Canada takes the position that both levels of government carefully considered the Report and the associated submissions.<sup>769</sup>

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<sup>767</sup> Email from Laurie Wood, (DFO) to Claudette Rotondo, Bruce Hood, dated April 24, 2003 and Briefing Note to the Minister (*Investors' Schedule of Documents Tab C 731*).

<sup>768</sup> Expert Report of David Estrin, page 10.

<sup>769</sup> Government of Canada Counter-Memorial, para. 363.

690. Canada has provided the Investors with few documents that would confirm that Canada and Nova Scotia gave careful consideration of the JRP Report before a final determination was made. For example:
- a. *Decision Making Documents*: The Investors have only received three documents that reflect some analysis of the JRP Report before a decision was made. One of these documents is a PowerPoint presentation prepared for the Minister of NSDEL, and another is a Cabinet Memorandum marked "Secret."<sup>770</sup> If Nova Scotia and the federal government conducted a diligent review of the Panel Report, it would be reasonable to see more than 3 documents.
  - b. *NSDEL Memorandum*: The last of these three documents is a memorandum prepared by Helen MacPhail, an NSDEL official, one day following the announcement of the Panel Report. The memorandum takes the position that the Minister of NSDEL should accept the Panel's recommendation and reject the quarry.<sup>771</sup> Canada has not produced any documents to indicate that a reasoned and considered analysis took place in the days following the publication of the Panel Report that led to the determination that the Minister should reject the project. Either there are documents not produced, or this memorandum suggests that NSDEL accepted the recommendations of the Panel without doing analysis.
  - c. *Air Quality Findings*: Canada failed to provide the Investors with documents showing that any level of government (i.e. DFO, TC or NSDEL) considered Health Canada's concerns about the Panel's findings regarding air quality. Health Canada officials noted that the Panel had determined that Bilcon's project would have adverse effects on air quality despite the fact that Health Canada

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<sup>770</sup> A presentation prepared for the Minister of NSDEL advising possible responses to the Panel Report. This document also notes that 6 of the Recommendations made were actually beyond the scope of the Terms of Reference for the Panel. There is a Secret Cabinet Document providing analysis from DFO's perspective on the WPQ EA process and also the conclusions of the Panel Report (*Investors' Schedule of Documents at Tab C 871*); Beyond these two documents, very little has been produced. See NSDEL power-point presentation titled Response to Panel Report on Whites Point Quarry and Marine Terminal, dated November 13, 2007, (Redacted) (*Investors' Schedule of Documents at Tab C 654*).

<sup>771</sup> Helen MacPhail Brief Notice, (NSDEL), dated October 23, 2007 (*Investors' Schedule of Documents at Tab C 924*).

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specifically said that there would be no such adverse effects.<sup>772</sup>

- d. *Health Canada Documents*: Other Health Canada documents provide insight into inter-departmental meeting where it was noted that NSDEL was probably going to reject Bilcon's project. This meeting occurred on October 25, 2007. No documents have been produced indicating why NSDEL would reject the project and its reasons for doing so.<sup>773</sup>
- e. *Transport Canada Analysis*: No documents have been produced to show how Transport Canada came to a decision to recommend rejection of Whites Point Quarry. On October 25, 2007, 3 days following the publication of the Panel Report, TC issued an email noting that Transport Canada supported the Panel's recommendation to reject the project,<sup>774</sup> without any analysis of the report. These associated documents are probative and relevant to this dispute as they would shed light on whether the federal government did indeed conduct a balanced and considered analysis of the Panel report.
- f. *DFO Briefing Notes*: Correspondence produced by DFO staff in preparation for a meeting indicate that Briefing Notes were prepared, yet Canada has not produced any of these Briefing Notes.<sup>775</sup>

691. Very few documents have been produced in relation to Minister Thibault's Constituency Office or Minister's Office, despite the fact that there are documents that point to there being many other documents.<sup>776</sup>

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<sup>772</sup> Email from James Van Loon to Jane MacDonald, dated October 24, 2007 (*Investors' Schedule of Documents at Tab C 925*).

<sup>773</sup> Email from Carolyn Dunn to Deborah Clements (Redacted), dated October 25, 2007. (*Investors' Schedule of Documents at Tab C 926*).

<sup>774</sup> Email from Mihai Balaban to Kevin LeBlanc, Ozzie Auffrey, dated October 25, 2007. (*Investors' Schedule of Documents at Tab C 927*).

<sup>775</sup> Email from Stuart Dean to Jennifer Penney, dated October 25, 2007. (*Investors' Schedule of Documents at Tab C 928*).

<sup>776</sup> Email from Jim Ross (DFO) to Paul Boudreau (DFO), dated December 10, 2002. This document describes the involvement of Minister Thibault's Constituency Office. The email describes how the Constituency Office is in regular contact with Thomas Wheaton, a regional official with DFO-HMD. The document notes that communication is conducted often, yet the Claimants have not seen any documents. (*Investors' Schedule of Documents at Tab C 843*). See also an email thread involving several DFO officials, dated January 7, 2003 also

692. The full complement of documents related to Document Request 4bis has not been disclosed. The Investors know that Canada has not produced the full complement of documents, because they obtained more documents through the Freedom of Information process. In particular, Canada has not produced the full complement of documents for projects such as Miller's Creek Gypsum Mine Expansion. It is obvious that more documents have to exist: Canada initially produced 23 documents related to the Tiverton Harbour and 22 related to the Tiverton Quarry.<sup>777</sup> Later, Canada produced a further 28 documents related to the Tiverton Projects.<sup>778</sup> It was again through the insistence of the Investors that Canada produced a further 147 documents related to the Tiverton Projects.<sup>779</sup> Yet even these 230 documents cannot possibly be the full complement of documents that exist. Through the FOIPOP process the Investors have obtained more than 230 additional documents.<sup>780</sup> By correlation it must be assumed that, at the least, there must be hundreds of more documents for each of the 4bis projects that the Investors have made documents requests.

#### **B. Specific Documents that Have Not Been Produced**

693. The Investors are not conducting a "fishing expedition" as Canada claims in its Counter Memorial,<sup>781</sup> but are simply following where the documents lead. For instance:

- a) Canada produced a Memorandum that was drafted for Minister Thibault prior to his meeting with an anti-quarry group where he would discuss his referral decision.<sup>782</sup> From this document, the Investors know that a meeting between Minister Thibault and the anti-quarry group took place, however no documents have been produced related to the minutes of this meeting. These documents

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describing the "information flow" to the Minister's Constituency Office. (*Investors' Schedule of Documents at Tab C 923*); Email from Bruce Hood to Jim Ross and Thomas Wheaton, dated December 9, 2002 also describes the involvement of Minister Thibault's Constituency Office and the need for local DFO-HMD staff to keep local Constituency staff in the loop. This particular document notes that Gregory Peacock and Stephanie Tan should be informed of developments at Whites Point. (*Investors' Schedule of Documents at Tab C 922*).

<sup>777</sup> Memorial of the Investors, para. 654.

<sup>778</sup> Production XXIX of February 16, 2011.

<sup>779</sup> See Canada's Response to Investors' Interrogatories, August 31, 2012.

<sup>780</sup> The Investors received 746 documents related to the Tiverton Projects, meaning that 516 documents have not been accounted for by Canada.

<sup>781</sup> Government of Canada Counter-Memorial, para. 482.

<sup>782</sup> Memorandum for the Minister from Larry Murray (DFO), dated June 23, 2003 (*Investors' Schedule of Documents at Tab C 841*).

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would be clearly relevant because it took months for DFO to inform Bilcon that a Panel had been called, yet Minister Thibault met with an anti-quarry group on the day of his referral.

- b) Canada produced a rare document from one of the Panel Members, in this instance Robert Fournier. Mr. Fournier sent an email to the Panel Coordinator at CEAA, Debra Myers, seeking clarification on what the status was of a letter sent to DFO regarding the possibility of test blasts.<sup>783</sup> The Investors have not received any documents related to this letter, or DFO's responses.
- c) Through the Freedom of Information process, the Investors have procured documents that show Minister Thibault met with Parker Mountain Aggregates (PMA),<sup>784</sup> the proponent for the Tiverton Quarry, and also that he assured PMA that he would speed up the regulatory process.<sup>785</sup> The Investors have not received any documents related to the meeting Minister Thibault had with PMA, nor any briefing notes that would have been prepared prior to or after that meeting.
- d) Canada, through the Affidavit of Neil Bellefontaine, brought to the Investors' attention the existence of the Blue Mountain Quarry. Mr. Bellefontaine noted that he was involved in the hearings related to that quarry.<sup>786</sup> While Mr. Bellefontaine quoted directly from the Panel Report for that Project, Canada never produced Mr. Bellefontaine's testimony. It was again through the Freedom of Information Request process that the Investors have been able to learn that DFO-Maritimes, over which, at the time, Neil Bellefontaine had charge, did not note any fisheries or science concerns related to the project. Mr. Bellefontaine and Canada acknowledge that Mr. Bellefontaine made a submission to the Blue Mountain Panel, yet this document was not produced.
- e) In relation to the Tiverton Wharf Repairs project, the department acting on behalf of DFO-SCH, PWGSC, advised DFO-HMD staff that the Tiverton Quarry and Wharf Repair projects were not tied together, as the Tiverton Quarry supplied

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<sup>783</sup> Email from Robert Fournier to Debra Myles, dated January 22, 2007 (*Investors' Schedule of Documents at Tab C 842*).

<sup>784</sup> Email from Lee Geddes, (DFO) to Carol Ann Rose, dated April 17, 2003 (*Investors' Schedule of Documents Tab C 706*).

<sup>785</sup> Handwritten note made by Jacqueline Cook (NSDEL), March 3, 2003 (*Investors' Schedule of Documents Tab C 614*).

<sup>786</sup> Affidavit of Neil Bellefontaine, paras. 19-20.

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stone for another project.<sup>787</sup> No documents have been produced by Canada to indicate what this other project was.

694. The above examples demonstrate that Canada's document production has been grossly incomplete.

### **C. Canada's Projects**

695. In its Counter-Memorial Canada referred to the GSX Pipeline Project, while only selectively providing a few documents. This has been prejudicial to the Investors and has led to further costs and time-waste, in that the Investors, in order to obtain proper context on these projects, had to obtain documents through Freedom of Information Requests.

696. Canada's careless approach to document production recently led to a production of over 5000 documents with less than two months before the time for the Investors' Reply Memorial. The documents the Investors have requested are all relevant and probative.

697. In light of the above, the Investors will urge the Tribunal to draw an adverse inference from Canada's lack of document production.

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<sup>787</sup> Letter from Donald R. Maynard, Public Works and Government Services Canada to Gary Hubbard, (DFO), dated April 4, 2004 (*Investors' Schedule of Documents Tab C 718*).

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## PART SIX: JURISDICTION

### I. MEASURES AND BREACHES ASSERTED BY BILCON

698. Bilcon has been subjected to numerous continuous breaches that originated after the completion of its joint venture agreement with Nova Stone on April 26, 2002.<sup>788</sup> These breaches include:

a) The conduct of the federal Department of Fisheries and Oceans, the Nova Scotia Department of Environment and Labour, jointly and separately, in relation to Bilcon's attempt to operate a quarry at Whites Point, which was set in motion by the industrial approval of its application on April 30, 2002.<sup>789</sup> This measure includes:

- i) The ongoing effect of the imposition, interpretation and application of blasting conditions on the Investment such that they were never able to be satisfied;*
- ii) The taking of jurisdiction by the Department of Fisheries and Oceans to address questions outside of the purported marine issues when it lacked said jurisdiction;*
- iii) The ongoing effect of the requirement to subject the Investment to a Comprehensive Study.*

b) The actions of the federal government and government of Nova Scotia, jointly and separately, to compel the Investors and the Investment to seek approval from the Joint Review Panel, which resulted in ongoing harm and damage to the Investors beginning on September 10, 2003 and continued through the Joint Review Panel process until the final Ministerial decisions. This measure includes:

- i) Continuous unlawful and unilateral actions of the Department of Fisheries and Oceans*
- ii) The ongoing impact of the requirement that the Investment be referred to the Joint Review Panel;*
- iii) The application of the relevant domestic rules by failing to apply the binding transitional provisions of the Canadian Environmental Assessment*

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<sup>788</sup> E-mail from Brian Jollymore (DFO) to Bob Petrie (NSDEL) dated April 26, 2002. (*Investors' Schedule of Documents at Tab C 42*).

<sup>789</sup> NSDEL Approval to Nova Stone Exporters, Inc., Construction and operation of a Quarry, April 30, 2002 (*Investors' Schedule of Document at Tab C 31*).

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*Act to the Investment's permit application.*

699. Canada's actions had an ongoing and direct effect on the Investment which lasted until the ministerial decision to not provide the required permissions to the Investment by the Minister of Fisheries and Oceans on December 17, 2007.

**A. Unlawful imposition of blasting conditions**

700. The DFO's unlawful imposition of blasting conditions had an ongoing and prejudicial effect on the Investment, as the blasting conditions allowed the DFO to continue to refuse permission to Bilcon to undergo test blasting throughout the remainder of the Environmental Assessment. This also prevented Bilcon from being able to begin accumulating the necessary data it needed to begin the full operation of its quarry. The lack of test blasting was relied on by the Joint Review Panel as a reason to recommend against the approval of the Investment's quarry<sup>790</sup> on October 23, 2007, and this recommendation was adopted by the relevant ministers in their respective decisions in November<sup>791</sup> and December of 2007.<sup>792</sup>

**B. Unlawful determination to scope**

701. The Minister of Fisheries and Oceans was advised by his officials that the Department did not have the legislative authority to carry out the minister's desire to control this environmental review.<sup>793</sup> Notwithstanding this knowledge, the Minister subjected Bilcon to the JRP process. This ongoing measure continuously prejudiced Bilcon throughout the environmental assessment process, as it was subjected to an onerous and costly process it should have never have had to go through, and which ultimately prevented it from obtaining the requisite approvals to operate the Whites Point Quarry.

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<sup>790</sup> Joint Review Panel Report, dated October 23, 2007, where the Panel notes "The Proponent was unable to provide empirical evidence to support its assertion that ANFO residues could be eliminated" at 31. (*Investors' Schedule of Documents at Tab C 34*).

<sup>791</sup> Letter from Mark Parent (Minister, Nova Scotia Department of Labour and Environment) to Paul Buxton, dated November 20, 2007. (*Investors' Schedule of Documents Tab C 541*).

<sup>792</sup> "The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project (the Project)", dated December 17, 2007. (*Investors' Schedule of Documents at Tab C 589*).

<sup>793</sup> DFO Briefing Note to Minister Robert Thibault, recommended the referral of the WPQ to a panel review assessment, dated June 2003. (*Investors' Schedule of Documents at Tab C 251*).

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### C. Unlawful DFO Decision to subject Quarry to Comprehensive Study

702. The International Law Commission has recognized that omissions are a form of continuing breach. The 1988 ILC Preliminary Report on State Responsibility states:

As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an *obligation de faire* is a wrongful act of a continuing character.<sup>794</sup>

703. The DFO's unlawful assumption of jurisdiction purportedly enabled the DFO to refuse to apply the exemptions contained in the *Comprehensive Study List*, to which Bilcon was entitled as a matter of domestic law, had a continuing and ongoing effect as it manifested itself at every stage of the Environmental Assessment process thereafter, through the entirety of the Joint Review Panel process to the ultimate refusal of the Investment's application by Canada.<sup>795</sup>

### D. Unlawful measures of the Joint Review Panel

704. The unlawful referral of the Whites Point Quarry to a Joint Review Panel created a continuous measure that lasted until the project's final denial in 2007.

705. Every act or omission of Canada after the date related to the referral, through the entire Joint Review Panel process to Canada's rejection of Whites Point Quarry in December 2007 would not have occurred without the Joint Review Panel Final Report, and constitutes a continuous breach of the Investors' NAFTA rights.

706. Throughout the entire process, Bilcon was required to address irrelevant and inapplicable standards and was subjected to the Joint Review Panel's misinterpretation or failure to apply the right standards. This constitutes a continuous breach of the Investors' right to be assessed on the applicable law and regulatory framework. The application of this scheme was all directly related to, and formed a foundation for the ultimate denial of the Whites Point Quarry by the Joint Review Panel, and by Canada in 2007.

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<sup>794</sup> *Preliminary Report on State Responsibility* (1988), Mr. Gaetano Arangio-Ruiz, ILC Special Rapporteur UN Doc A/CN.4/416 at para. 42: "The Special Rapporteur is inclined to believe that omissive wrongful acts may well fall (as well as, and perhaps more frequently than commissive wrongful acts) into the category of wrongful acts having a continuing character. As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an obligation de faire is a wrongful act of a continuing character." (*Investors' Book of Authorities at Tab CA 97*).

<sup>795</sup> Reply Expert Report of David Estrin at para. 65-66.

707. By adopting the Joint Review Panel in 2007 as a definitive disposition of Bilcon's project and refusing to consider any of the Investor's appeals for an opportunity to review or reconsider that disposition by the JRP, as well as by declining to conduct on their own initiative any review or consideration of the disposition regarding Bilcon and/or of the process that produced that disposition, the federal and provincial Ministers engaged anew, separately, and additionally to any previous independent internationally wrongful acts, the responsibility of the Canadian state for all the acts and omissions of an internationally wrongful character that culminated in, and on which rested, the Ministers' decisions to reject Bilcon's proposal. The Ministers' adoption of the JRP Panel's disposition of Bilcon's proposal constitutes in and of itself a violation of fair and equitable treatment and established, in 2007, the JRP Panel's dispositions on Bilcon, both procedural and substantive, as final acts of the Canadian state.
708. Canada contends that Bilcon has not brought this claim forth on a timely basis. The facts make it clear that Canada's contention is completely without merit.

**II. MEASURES TAKEN REGARDING NOVA STONE'S INDUSTRIAL APPROVAL RELATE TO THE INVESTOR AND SATISFY THE REQUIREMENTS OF ARTICLE 1101.**

709. The Investors demonstrated their intention to be an investor in Canada through their March 28, 2002 joint venture offer to Nova Stone<sup>796</sup> which was integrated into the April 24, 2002 Partnership agreement<sup>797</sup>. At that point, their investment was to consist of a contribution of \$8.5 million in start-up capital to obtain licenses and to operate a quarry and marine terminal<sup>798</sup>.
710. The Joint Venture Agreement is an investment under the NAFTA Article 1139 definition:

**Investment** means:

- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory...

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<sup>796</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002. (*Investors' Schedule of Documents at Tab C 5*).

<sup>797</sup> Partnership Agreement between Bilcon of Nova Scotia and Nova Stone Exporters Inc. (*Investors' Schedule of Documents at Tab C 22*)

<sup>798</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002. (*Investors' Schedule of Documents at Tab C 5*).

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Bilcon of Delaware and the Claytons meet the definition of an investor under NAFTA Article 1139 as follows:

**Investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment

711. The requirements of NAFTA Article 1101 are also met. The failure to grant the license to operate a 3.9 quarry to Nova Stone on April 30, 2002 constitutes a measure which directly relates to the Investor and its Investment. The joint-venture agreement called for the initial operation of a 10 acre quarry<sup>799</sup>. This direct inclusion in the agreement satisfies the test for a “legally significant connection between the Investors and measure established in *Methanex*.<sup>800</sup> Furthermore, the industrial approvals to operate a quarry were the contribution that Nova Stone was making to the joint venture<sup>801</sup>. The failure to obtain licenses hence directly and specifically relates to the Investment the Investor was seeking to make. Bilcon was directly involved in this project from the beginning.

### III. THE CLAIM IS TIMELY

#### A. There are Several Continuing Measures in Dispute

712. Bilcon has brought a timely claim. Canada contends that Bilcon has not brought this claim forth on a timely basis. The facts of this claim make clear that Canada’s arguments are not well-taken. Canada’s objection to jurisdiction is therefore completely without merits, and should be summarily dismissed.

713. As Bilcon has pointed out, continuing measures are well recognized under international law.<sup>802</sup> This is recognized by Article 14(2) of the ILC Articles:

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<sup>799</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002, Article 4(b) (*Investors’ Schedule of Documents at Tab C 5*).

<sup>800</sup> *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Rules, First Partial Award, 2002 WL 32824210, August 7, 2002, at para. 147. (*Investors’ Book of Authorities at Tab CA 164*).

<sup>801</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002, Article 3(c) (*Investors’ Schedule of Documents at Tab C 5*).

<sup>802</sup> Memorial of Investors at paras. 725-733.

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The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.<sup>803</sup>

714. That the drafters of the NAFTA intended for it to apply to continuing measures is also evident in specific provisions of the NAFTA itself. In particular, NAFTA Article 1101 specifies that Chapter 11 applies to measures that are “maintained” by a Party. These are measures that a Party initiates at one point in time, and maintains over a longer period of time. Continuing measures relate to the existence of certain laws, regulations, procedures, requirements and practices *per se*. In the context of the present dispute, continuing measures are those that were brought into existence before December 27, 2003, but that Canada maintained beyond that date.
715. Despite all evidence to the contrary, Canada denies that the law of continuing breach applies in the NAFTA context. This stands in stark contrast to Canada’s admission that the NAFTA “authorises investors to make Chapter Eleven claims based on continuing measures.”<sup>804</sup> As we have seen, it is also at odds with the plain wording of NAFTA Article 1101 – which recognizes measures that are “maintained” by a Party – as well as with the treaty drafting practices of the NAFTA Parties themselves.

**B. Bilcon's Claim is Not Time-Barred by NAFTA Article 1116(2)**

716. NAFTA Article 1116(2) places a limitation period on claims brought forth under NAFTA Chapter 11. It states:

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

717. There are two prerequisite conditions for the timing to commence on the three year limitation period in NAFTA Article 1116(2). First, the investor must have acquired actual or constructive knowledge of the breach at issue. Second, the investor must have acquired knowledge that it has incurred loss or damage as a result of that breach. It is only the point in time when the investor has acquired knowledge in both of these

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<sup>803</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Art. 14(2), (*Investors’ Book of Authorities at Tab CA 76*).

<sup>804</sup> Government of Canada Counter-Memorial at para. 253-54.

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respects that the limitation period begins to run.

718. According to Canada, the plain wording of NAFTA Article 1116(2) indicates that under no circumstance may an investor bring forth a claim three years after first acquiring actual or constructive knowledge of both the alleged breach, and loss flowing from that breach.<sup>805</sup>
719. Canada also relies on the decision of the Tribunal in *Grand River*.<sup>806</sup> While timing was a key issue before the *Grand River* Tribunal, that Tribunal's decision was based on facts and arguments that are significantly different than those at issue in the present case. Accordingly, the decision in *Grand River* is of only limited persuasive value for the issues raised in the present arbitration.
720. *Grand River* was a case in which a Canadian company that – together in association with various First Nations groups – manufactured and traded in cigarettes in the US. The basic measure in *Grand River* was a 1998 agreement entered into between various US states and cigarette manufacturers to settle a Tobacco litigation dispute. This agreement required the signatory companies to pay into a central account a certain amount of money for each cigarette sold, the sum of which would be divided between the participating US states.<sup>807</sup> The claimants were not a party to the agreement.<sup>808</sup> The agreement further stipulated that participating US states would adopt escrow legislation that would require non-participating companies to pay an amount roughly equal to what they would have had to pay if they were parties to the agreement.<sup>809</sup> All of the participating US states adopted this escrow legislation in 1999 and 2000.<sup>810</sup> Thereafter, in 2001 and 2002 participating states enacted complementary legislation to strengthen enforcement of the escrow laws,<sup>811</sup> which were then amended in 2003 and 2004.<sup>812</sup> These all constituted subsequent measures taken pursuant to the original agreement and the escrow laws. The claimants brought forth their claim under NAFTA Chapter 11

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<sup>805</sup> Government of Canada Counter-Memorial at para. 225.

<sup>806</sup> Government of Canada Counter-Memorial at paras. 231-234.

<sup>807</sup> *Grand River Enterprises Six Nations Ltd. v. The United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 at para. 8. (*Respondent's Book of Authorities at Tab 30*).

<sup>808</sup> *Grand River*, Jurisdiction Decision at para. 10, (*Respondent's Book of Authorities at Tab 30*).

<sup>809</sup> *Grand River*, Jurisdiction Decision at para. 12, (*Respondent's Book of Authorities at Tab 30*).

<sup>810</sup> *Grand River*, Jurisdiction Decision at para. 12, (*Respondent's Book of Authorities at Tab 30*).

<sup>811</sup> *Grand River*, Jurisdiction Decision at para. 15, (*Respondent's Book of Authorities at Tab 30*).

<sup>812</sup> *Grand River*, Jurisdiction Decision at para. 16, (*Respondent's Book of Authorities at Tab 30*).

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in March 2004, some six years after the original agreement, and some four to five years after the escrow laws.<sup>813</sup>

721. As Canada points out, the Tribunal in *Grand River* ruled that the claimant was time-barred from seeking recourse to a number of the measures in dispute.<sup>814</sup> What Canada neglects to mention, however, is that the *Grand River* Tribunal did not strike out those measures that were taken within three years of the initiation of the claim, even though those measures were inextricably linked to the previous measures the Tribunal did strike out.<sup>815</sup>

722. Canada also ignores the importance of the quantifiability of the loss suffered by the investor in *Grand River*. In deciding that the investor's challenge to the escrow statutes was time-barred, the Tribunal:

The Tribunal believes that becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years...is to incur loss or damage as those terms are ordinarily understood.<sup>816</sup>

723. While the investor in *Grand River* may not have been able to quantify in exact terms what the extent of its loss would be at the time the escrow statutes were passed, it was – as the Tribunal put it – subject to a “clear and precisely quantified statutory obligation”. This stands in stark contrast to the facts of the present dispute.

724. Yet perhaps the most crucial distinction between *Grand River* and the present claim has to do with the particular measures at issue in each case. Specifically, all the measures impugned by the investor in *Grand River* were the various statutes and laws themselves.<sup>817</sup> Unlike Bilcon, the investor in that case made no attempt to challenge the specific application of those statutes and laws to it in particular circumstances as separate measures in-and-of-themselves. That is, unlike the present case, none of the measures at issue in *Grand River* involved administrative decisions or procedures taken pursuant to laws and regulations; rather, the only measures at issue were the laws and regulations themselves. As a result, Canada's assertion that *Grand River* fully answers Bilcon's claim about non-continuing measures is patently wrong.

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<sup>813</sup> *Grand River*, Jurisdiction Decision at paras. 1 & 4, (*Respondent's Book of Authorities at Tab 30*).

<sup>814</sup> *Grand River*, Jurisdiction Decision at para. 83, (*Respondent's Book of Authorities at Tab 30*).

<sup>815</sup> *Grand River*, Jurisdiction Decision at para. 87, (*Respondent's Book of Authorities at Tab 30*).

<sup>816</sup> *Grand River*, Jurisdiction Decision at para. 82, (*Respondent's Book of Authorities at Tab 30*).

<sup>817</sup> *Grand River*, Jurisdiction Decision at paras. 89 & 90, (*Respondent's Book of Authorities at Tab 30*).

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725. In contrast to its reliance on *Grand River*, Canada seeks to have this Tribunal turn a blind-eye to the more recent finding by the *UPS* Tribunal that recognizes that Article 1116(2) does not place an absolute limit on claims. The *UPS* Tribunal rendered its decision after *Grand River*, and the Tribunal in *UPS* made it abundantly clear that “continuing courses of conduct constitute continuing breaches of legal obligations and *renew* the limitation period accordingly.”<sup>818</sup>
726. In the context of NAFTA Article 1116(2), this Tribunal needs to pay attention to all the measures at issue in this case. It is important to keep in mind the basic distinction between the continuing and non-continuing measures at play.
727. The issue with the continuing measures in this dispute is not when Bilcon became aware of the measures themselves, but rather when it became aware of the loss flowing from these measures. The question here is: what type of knowledge of loss flowing from the continuing measures is Bilcon required to have? Is it sufficient for the purposes of Article 1116(2) that Bilcon knew that it incurred loss in some abstract sense? Or must Bilcon instead have concrete knowledge of the actual loss it has incurred as a result? As the decision in *Grand River* suggests, Article 1116(2) must be interpreted to mean that Bilcon must have concrete knowledge of actual loss, or at least be able to predict with some degree of certainty what its loss flowing from a continuous measure will be. Such was not the case.
728. The *Mobil v Canada* Tribunal determined that it was difficult to quantify damages while the measure, namely Newfoundland's research and development expenditure requirements (known as the 2004 Guidelines), was continuing. *Mobil*, referring to the Tribunal award in *UPS v Canada*, concluded that the particular breach continued while the measure was on-going.<sup>819</sup> The Tribunal determined that “such breach continues with the on-going implementation of the 2004 Guidelines”.<sup>820</sup>

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<sup>818</sup> *United Parcel Service v. Canada*, UNCITRAL Arbitration Rules, Award, 2007 WL 5366485 (May 24, 2007) & Separate Opinion of Dean Ronald A. Cass, at para. 28 [emphasis added], (*Investors’ Book of Authorities at Tab CA 89*).

<sup>819</sup> *Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada*, Decision on Liability and on Principles of Quantum, ICSID Case No ARB/07/4; IIC 566 (2012), 22 May 2012, para. 421 (*Investors’ Book of Authorities at Tab 194*).

<sup>820</sup> *Mobil*, para. 487 (*Investors’ Book of Authorities at Tab 194*).

729. NAFTA Article 1116(2) appears on its face only to require that Bilcon have acquired knowledge of loss in an abstract sense. However, when viewed in light of the objects and purposes of the NAFTA – as required by Article 31(1) of the *Vienna Convention* – it becomes evident that concrete knowledge of actual loss *is* what is required. This is because one of the basic objectives of the NAFTA – as set out in Article 102 – is “to create effective procedures...for the resolution of disputes.” If it were true that the limitation period envisaged by Article 1116(2) could begin to run once a foreign investor had only an abstract sense that it was incurring loss from a certain measure, this would run counter to the objective of creating effective procedures for the resolution of disputes. Without actual knowledge of quantifiable loss, a foreign investor would not be able to specify the damages it seeks to recover in any given claim. Without being able to specify damages, any claim an investor might bring forth would be pointless. Accordingly, if the limitation period of NAFTA Article 1116(2) were to commence before the foreign investor had actual knowledge of the quantifiable loss, the dispute resolution provisions of Chapter 11 would be ineffective. This would not only run counter to the basic objectives of the NAFTA, but would indeed give rise to an absurd result.
730. It is precisely at this point where the concept of continuing breach dovetails with that of non-continuing breach. Bilcon could not know of the loss it incurred from Canada’s continuing measures until those measures were actually applied to it in concrete situations. That is, the time-bar on continuing measures could not possibly start to run until those measures were applied to Bilcon in particular circumstances.
731. As such, Bilcon has brought forth this claim within the limitation period envisaged by NAFTA Article 1116(2).

**C. The Claim is Within the Limitation Period Contemplated by Article 1116(2)**

732. Not only does Bilcon's interpretation of the limitation period contemplated by Article 1116(2) stay true to the wording of the provision in light of its objects and purpose, but it also makes practical sense. Indeed, this interpretation strikes a careful and appropriate balance between the rights and responsibilities of the NAFTA Parties, on the one hand, and, on the other, those of foreign investors.

733. NAFTA Article 1116(2) balances two sets of competing interests. On the one hand, it recognizes the interest of foreign investors to seek recourse to Chapter 11 arbitration for wrongs they have suffered at the hands of a NAFTA host state. On the other hand, Article 1116(2) recognizes the interest of the NAFTA Parties not to be subject to potentially limitless claims by foreign investors for measures taken too far back in the past – particularly those taken prior to the entry into force of the NAFTA. Article 1116(2) strikes a balance between these competing interests by establishing a three year limitation period for foreign investors to bring forth their claims.
734. Bilcon acknowledges that this balance does not allow a foreign investor to reach back in time more than three years from the time it first acquired, or should have acquired knowledge of the alleged breach, and first acquired knowledge that it had incurred damage as a result. Nothing in Bilcon's arguments suggest that a foreign investor could seek compensation for losses it suffered as a result of measures taken more than three years prior to initiating a claim, provided that it was also able to quantify the damage that flowed therefrom more than three years prior to that claim. Thus, nothing in Bilcon's argument would render NAFTA Article 1116(2) ineffective, or otherwise open up the floodgates to Chapter 11 claims and potentially limitless liability.
735. Indeed, Bilcon's approach fully acknowledges that NAFTA Article 1116(2) *does* provide boundaries to the potential liability faced by NAFTA Parties for their otherwise unlawful acts – namely, three years of damages. This is reflected on the very facts of this claim: Bilcon is only seeking compensation for the damages it suffered after April 30, 2002.
736. By contrast, Canada argues for an asymmetrical approach to NAFTA Article 1116(2) that would absolve it of any and all liability for any future NAFTA violations it perpetrates against Bilcon. According to Canada, if a foreign investor fails to bring forth a claim within three years – regardless of whether or not the investor was actually able to quantify the loss it suffered – a Party should be excused from liability for any and all actions taken pursuant to that measure *ad infinitum* into the future. Canada contends there can be no measures taken pursuant to other measures. For Canada, it makes no difference if it maintains a measure beyond the three year limitation period, and continues to inflict damage upon a foreign investor by adopting other distinct measures pursuant to the original and continuing measure. If a foreign investor does not bring forth its claim within three years of the original measure, it forever loses its right to seek recourse in Chapter 11 arbitration even for related measures taken at a later time. For Canada, once the three year window on the original measure closes, it is free to

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continue to violate its NAFTA obligations forever with impunity, irrespective of any further measures it may take pursuant to the original measure. Canada's approach cannot and does not represent the balance between state and investor rights sought by NAFTA Article 1116(2), nor is this view consistent with the objects and purposes of the NAFTA.

**D. Article 1116(2) is not a bar to the Investor's claim for measures pre-dating June 2005 as the loss and damages only occurred once Canada accepted the JRP Report**

737. Should this Tribunal does not consider the pre-2005 measures to be part of a continuous breach, Article 1116(2) is still not a bar to the Investors' claims as the Investors only acquired knowledge that they incurred loss or damage by Canada's acceptance of the JRP Report.
738. Prior to that decision, the Investors were willingly investing capital into development of the Whites Point Quarry. In its original joint venture agreement of March 2002<sup>821</sup>, the Investors were prepared to commit capital in an amount of up to 8.5 million dollars (Article 4) and forgo initial profits (Article 5). This capital outlay is part of any large-scale investment.
739. Canada suggests that the Investors had initial knowledge of their loss in June 2003, when DFO unlawfully refused to authorize blasting" such that the 3 year prescription period of article 1116(2) started to run.<sup>822</sup> This would perhaps be correct had DFO's determination of May 29, 2003 regarding blasting put an end to the matter. However, As Mark McLean states, "DFO did not "close the door" on its consideration of a blasting plan" DFO invited the Investors to amend their plans to continue the approval process.<sup>823</sup> As the process continued, no loss or damage - under the NAFTA, had occurred as the Investors were merely faced with increased costs in their efforts to seek regulatory approval.

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<sup>821</sup> Letter of Intent from Bilcon of Delaware, Inc. to Nova Stone Exporters, Inc., March 28, 2002, Article 4(b) (*Investors' Schedule of Documents at Tab C 5*).

<sup>822</sup> Government of Canada Counter-Memorial, para 251.

<sup>823</sup> Affidavit of Mark McLean, paras. 44; Letter from Phil Zamora to Paul Buxton, May 29, 2003 (*Government of Government of Canada Counter Memorial Exhibit R-55*).

740. It is also wrong to suggest that Bilcon had any knowledge of loss in June 2003 because while there may have been an outstanding application to operate the 3.9ha quarry, there was also an ongoing environmental assessment for the larger quarry, and it was not until August 7, 2003 that the project was officially referred to a Joint Review Panel.<sup>824</sup> Therefore, it was impossible in June 2003 to suggest that Bilcon had knowledge of its losses. In June 2003 Bilcon had yet to even begin the environmental assessment that was to be the first step in a determinative process on whether or not Bilcon's investment in Nova Scotia would be permitted to move forward. The second, and final step of the process did not happen until December 2007 when it became official that the federal and provincial governments accepted the Joint Review Panel's recommendation to reject Bilcon's application; thereby, making it official, for the first time, that Bilcon would not be able to move forward in its planned investment, for which it had been preparing and laying the groundwork with the concurrence of the governments involved for over five years.

741. This position is supported by decisions of NAFTA tribunals. In the absence of a definition contained within the NAFTA itself, various Tribunals have defined "loss or damage" under the NAFTA. In interpreting loss or damages under Article 1116(2), the *Mondev* Tribunal concluded:

the words "loss or damage" refer to the loss or damage suffered by the investor as a result of the breach<sup>825</sup>.

Similarly, in *S.D. Myers*, the Tribunal stated:

[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.<sup>826</sup>

742. The NAFTA breach that caused the harm and subsequently the loss and damage to the Investors was the approval by Canada of the JRP Report. Prior earlier breaches,

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<sup>824</sup> Letter from David Anderson, Federal Minister of Environment, to Robert Thibault, Minister (DFO), dated August 7, 2003, stating that it had been determined that the environmental assessment of the Whites Point Quarry had been referred to Panel Review. (*Investors' Schedule of Documents at Tab C 26*).

<sup>825</sup> *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2002 WL 32841359, October 11, 2002, at para 87) (emphasis added). (*Investors' Book of Authorities at Tab CA 40*).

<sup>826</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, at para. 140 (emphasis added) (*Investors' Book of Authorities at Tab CA 205*).

certainly led to extra cost and expense, but they did not lead to loss or damages, under the NAFTA, as the quarry approval process continued and the Investors had every reason to believe would be carried out in good faith and lead to the issuance of a permit to operate.

In essence, the 1116(2) clock only started to run in December 2007, some seven months later, the Investors filled their Statement of Arbitration.

743. For all the foregoing reasons, Bilcon has brought forth its claim in a timely manner that is not barred by NAFTA Article 1116(2). The Tribunal therefore had the rightful jurisdiction to consider and determine the merits of this claim.

#### IV. THE ACTIONS OF THE JOINT REVIEW PANEL ARE ATTRIBUTABLE TO CANADA

##### A. Canada's Internal Law Recognizes the Joint Review Panel as an Organ of Canada

744. The JRP is clearly an organ as it exercises government functions, and has the status of a state organ under the internal law of the state. Indeed, Canada admits that the JRP exercised governmental powers.<sup>827</sup>

745. The actions of the Whites Point Quarry Joint Review Panel are therefore attributable to Canada. Had the Investors been subjected to a less onerous environmental review process under the *Canadian Environmental Agency Act*, such as a screening or a comprehensive review, there would be no question that those reviews, fully undertaken by civil servants would be attributable to the government of Canada:

###### ENVIRONMENTAL ASSESSMENT PROCESS

14. The environmental assessment process includes, where applicable,

- (a) a **screening or comprehensive study** and the preparation of a screening report or a comprehensive study report;
- (b) a mediation or assessment by a **review panel** as provided in section 29 and the preparation of a report; and (emphasis added)

746. There is simply no basis to conclude that because the Investor was subject to the higher standard, by decisions of the government, that the government can avoid responsibility for its actions.

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<sup>827</sup> Government of Canada Counter-Memorial, para. 169.

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747. Canadian law limits the meaning of “federal board, commission or other tribunal” to entities of a “public character.”<sup>828</sup>
748. Canada’s own expert, Lawrence Smith, acknowledges that the Whites Point Quarry review panel was carrying out a “joint federal and provincial *mandate*”,<sup>829</sup> and that the Whites Point Quarry review panel had “two masters, one master in Ottawa, one master in Halifax.”<sup>830</sup>
749. Review panels have been recognized by Canada’s own courts as a “federal board, commission or other tribunal”. There can therefore be no doubt that a Joint Review Panel’s status is an organ of Canada.
750. Canadian Federal Courts have frequently reviewed joint review environmental assessment processes. In *Pembina v. Canada*, the Federal Court of Canada exercised the remedy of sending a report back to a JRP for further consideration. The Federal Court’s constitutional authority is strictly limited and the Court could only do so if a JRP met the requirements of Article 18.1 of the *Federal Courts Act* that it be a “federal board, commission or other Tribunal” - in essence, an organ of Canada under the *Federal Courts Act*.<sup>831</sup>
751. Canada appears to suggest that certain characteristics of the JRP’s conduct, such as fair and reasonable allocations of time, or ensuring the hearing is conducted in accordance with principles of procedural fairness are somehow not attributable to Canada.<sup>832</sup> However, the *Canadian Environmental Assessment Act* expressly provides for the existence, powers and duties of review panels.<sup>833</sup> For example, the *CEAA* expressly provides that a review panel is charged to assess environmental effects<sup>834</sup>, and the *CEAA* vests in a review panel the powers of a court of record to summon and order any witness to attend at a hearing, and give evidence and produce documents on matters the Panel deems necessary.<sup>835</sup>

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<sup>828</sup> *Pontbriand v. Federal Public Service Health Care Plan Administration Authority*, 2011 FC 1029, Reasons for Judgment and Judgment, 31 August 2011, at para. 4. (*Investors’ Book of Authorities at Tab CA 206*)

<sup>829</sup> Expert Report of Lawrence Smith, at para. 226

<sup>830</sup> Expert Report of Lawrence Smith at para. 226

<sup>831</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(1)-(5) (*Investors’ Schedule of Documents at Tab C 254*).

<sup>832</sup> Government of Canada Counter-Memorial at para. 294.

<sup>833</sup> *CEAA*, s. 33 (*Investors’ Schedule of Documents at Tab C 255*).

<sup>834</sup> *CEAA*, s. 16(1)(a) (*Investors’ Schedule of Documents at Tab C 255*).

<sup>835</sup> *CEAA*, section 35(1).

752. As the Rankin Report demonstrates, procedural fairness is a basic requirement of government actions<sup>836</sup>. It does not need to be specified in a statute, and is part of the common law that governs all state action.
753. Canadian Courts have long characterized environmental joint review panels as actions of the government.<sup>837</sup> Recently, the Alberta Court of Appeal reasoned that:

The decision of such a Joint Review Panel is, *inter alia*, a decision of the Energy Resources Conservation Board on the particular issue referred to it.<sup>838</sup>

Judicial review is available to supervise the exercise of statutory powers. ... Parliament has seen fit to grant statutory powers to an entity [the Joint Review Panel] that is not a legal person<sup>839</sup>

All aspects of the Joint Review Panel's jurisdiction arguably are rooted in the statute, but flow through to the Joint Review Panel via the [Joint Review Panel] Agreement<sup>840</sup>

754. Similarly, the Canadian Federal Court has also recently held:

The ultimate authority to approve the Gateway Project and to authorize the issuance of a Certificate of Public Convenience and Necessity rests with the GIC acting on the advice of the National Energy Board (NEB). The task of assessing these considerations at first instance has been assigned to the Gateway JRP.<sup>841</sup>

755. A Newfoundland court also explained that a JRP conducts its reviews "on behalf of both governments":

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<sup>836</sup> Expert Report of Murray Rankin, Q.C., para. 38.

<sup>837</sup> *Alberta Wilderness Assn. v. Canada* at 7 (F.C.A.) (*Investors' Schedule of Documents at Tab C 261*). Para. 17 reads: "The view that the panel report is an essential statutory prerequisite to the issuance of approvals is supported by previous case law. I agree with the decisions of *Bowen v. Canada (Attorney General)*, [1998] 2 F.C. 395 (T.D.); *Friends of the West Country, supra*; and *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325 (T.D.) which hold that an environmental assessment carried out in accordance with the Act is required before a decision such as the Minister's authorization in the present case can be issued. This view is reinforced by the decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 which confirmed that the guidelines that were a pre-cursor to CEAA (the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467) were mandatory rather than directory in nature and, thus, failure to comply with them would deny the responsible authority the jurisdiction to proceed." (*Investors' Book of Authorities at Tab CA 207*).

<sup>838</sup> *Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352, 26 November 2012., para 4. (*Investors' Book of Authorities at Tab CA 211*).

<sup>839</sup> *Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352, 26 November 2012., para 11. (*Investors' Book of Authorities at Tab CA 211*)

<sup>840</sup> *Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)*, 2012 ABCA 352, 26 November 2012., para 16. (*Investors' Book of Authorities at Tab CA 211*)

<sup>841</sup> *Gitxaala Nation v. Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336, Reasons for Judgment and Judgment, 19 November 2012, para 26. (*Investors' Book of Authorities at Tab CA 212*)

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The provincial Minister of Environment and Conservation announced that the project was subject to an environmental assessment under Part X of the EPA on January 26, 2007 and the federal Minister of Environment announced on June 5, 2007 that the project was also subject to an environmental assessment by an independent review panel. The same ministers signed an agreement on January 8, 2009 to **establish the JRP to conduct the environmental assessment on behalf of both governments**. They established the Terms of Reference for the Panel at the same time and set the Guidelines for the environmental assessment. (emphasis added)<sup>842</sup>

756. State organs include, but are not limited to those entities that have status under the law of that State. Responsibility is not avoided simply because the entity is not expressly classed as a state organ under the law of that state. Thus, one must consider how the entity functions in practice and its relation to the state. The consistent judicial determination that Joint Review Panels are organs of the state, despite the lack of explicit statutory statement, accords with the ILC Article 4 (commentary paragraph 11):

Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. ....

In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4

...

Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. (emphasis added)

757. Canada contends that the mere fact that statutes govern the actions of an entity does not automatically mean it is a state organ. While this may or may not be the case, the legislative framework and judicial treatment by Canadian courts, has uncontrovertibly decided that the JRP is a state organ.
758. Canada relies on the Supreme Court's determination in *McKinney v University of Guelph*.<sup>843</sup> However, the Supreme Court revisited that case seven years later, and clarified when an entity is or is not a government actor:

44 Perhaps the fullest discussion of the issue of *Charter* application is found in *McKinney v. University of Guelph*, , [1990] 3 S.C.R. 229, and in its companion cases, *Harrison v. University of British Columbia*,, [1990] 3 S.C.R. 451, *Douglas/Kwantlen Faculty Assn. v. DouglasCollege*, [1990]

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<sup>842</sup> *Nunatukavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD (G) 44, Correction of Judgment, 24 March 2011., para 10. (*Investors' Book of Authorities at Tab CA 213*).

<sup>843</sup> Government of Canada Counter-Memorial, para. 278.

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3 S.C.R. 570, and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483. There, this Court was asked to decide, *inter alia*, whether mandatory retirement policies adopted by certain universities and colleges (in *McKinney*, *Harrison* and *Douglas*) and by a hospital (in *Stoffman*) could be subjected to *Charter* review. In reiterating and elaborating upon the view taken by McIntyre J. in the seminal case of *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (*viz.*, that the Canadian *Charter* applies to Parliament, to the provincial legislatures, and to entities that carry out executive (or “administrative”) functions of government, but not to private parties), the majority in *McKinney*, *Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not themselves governmental in nature; **nor were they putting into place a government programme or acting in a governmental capacity in adopting those policies.**

45 In *Douglas*, by contrast, the same majority found that the Canadian *Charter* did apply to the mandatory retirement policy at issue, on the ground that Douglas College was, **in light of its constituent statute, simply an emanation of government.** I described the differences between *McKinney* and *Harrison*, on the one hand, and *Douglas*, on the other, at pp. 584-85 of the latter case:

As its constituent Act makes clear, the college is a Crown agency **established by the government to implement government policy.** Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In **carrying out its functions, therefore, the college is performing acts of government,** and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of *McKinney* . . . and *Harrison* . . . which, though extensively regulated and funded by government, are essentially autonomous bodies. Accordingly, the actions of the college in the negotiation and administration of the collective agreement between the college and the association are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities. (emphasis added)<sup>844</sup>

759. The principles established by the Supreme Court are clear, and confirm that the JRP is an organ of Canada. The JRP is established by the government to implement government policy under merged federal and provincial environmental protection legislation. In carrying out its functions, therefore, the JRP is performing acts of government delegated to it by an agreement of Federal and Provincial ministers and as outlined under the CEAA.

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<sup>844</sup> *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, 31 October 1997., paras. 44-45. (*Investors’ Book of Authorities at Tab CA 214*).

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760. Consequently, there can be no doubt that a review panel is an organ of state under the internal laws of Canada, and that its actions are attributable to Canada.
761. The JRP has no function, purpose or activity other than being an integral part of the machinery of government with respect to the application of environmental law and policy. It is not a market actor, it has no role in industry self-regulation, or any scientific, academic, charitable or advisory function distinct from the quasi-judicial role of making findings that are a basis for a particular decision by the Cabinet.
762. Canada relies on the approach of the tribunal in *Jan de Nul v. Egypt* and contends that because the JRP was engaged in the gathering and weighing of evidence and the making of recommendations, rather than “decision making”, it was not exercising governmental authority. This is a misrepresentation of the *Jan de Nul* case: in *Jan de Nul*, the tribunal actually recognized that a Panel of Experts appointed by a government ministry “to issue a report” was either an organ of the state within the meaning of Article 4 or exercised governmental authority under Article 5. According to the tribunal:

“Indeed, the acts of the Second Panel of Experts *are in any event attributable to the State, whether they are considered as acts of an organ or as acts of a public entity performing judicial functions vis à vis the Claimants.*”<sup>845</sup>

763. In any case, the process and report of the JRP was under the instruction of Canada, within the meaning of ILC Article 8. The JRP had no inherent authority. Its sole function was to do what was delegated to it.
764. The choice of JRP panel members, combined with the political interference in the regulatory process, and the rapid rubber-stamping of the JRP’s Report despite its patent flaws, create a presumption that the federal and Nova Scotia governments sought to procure a specific result from the JRP, namely the rejection of the Investors’ proposal. In this context, the refusals of Canada to produce all relevant documents makes it all the more apparent that adverse inferences are warranted.<sup>846</sup>

## **B. Canada Acknowledged and Adopted the Joint Review Panel Report**

765. Article 11 of the ILC also attributes the JRP’s action to Canada when the Canadian Cabinet adopted its Report. Neither Cabinet nor the Minister can issue an authorization without a Panel Report:

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<sup>845</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008 (*Respondent’s Book of Authority at Tab 33*).

<sup>846</sup> *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009. (*Respondent Book of Authorities at Tab RA 23*).

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Section 5 of CEEA requires that an environmental assessment be completed before the Minister can issue authorizations. The relevant portion states:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project<sup>847</sup>

766. As the Federal Court of Canada recently affirmed:

The ultimate authority to approve the Gateway Project and to authorize the issuance of a Certificate of Public Convenience and Necessity rests with the GIC acting on the advice of the National Energy Board (NEB). **The task of assessing these considerations at first instance has been assigned to the Gateway JRP.** (emphasis added)<sup>848</sup>

767. The Canadian Cabinet had full authority to adopt measures that differed from the JRP Report. The Cabinet, however, accepted the JRP report as a final disposition of the Investors' proposal, without comment on or modification, albeit without giving the Investors an opportunity make representations about the fundamental flaws in the Report and the process that gave rise to it. Nor was any review conducted on the Cabinet's own initiative. This is a clear, unambiguous example of "adoption" within the meaning of ILC Article 11, "acknowledging and adopting the conduct in questions as its own".<sup>849</sup>

768. On June 19, 2007 Mr. Gilles Gauthier, a director from DFAIT, made a presentation to the JRP on the NAFTA. His presentation gave an overview of the NAFTA and indicated the NAFTA's requirements with respect to Chapter 11. Mr. Gauthier discusses the prohibition on nationality-based discrimination. In his discussion of NAFTA, he drew on Article 1105 paying specific attention to the prohibition on conduct that is harmful, "grossly unfair, capricious, [or] arbitrary".<sup>850</sup>

769. Canada's presentation on the NAFTA demonstrates another example of its direct involvement in the JRP Process.

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<sup>847</sup> *Alberta Wilderness Assn., (Investors' Schedule of Documents at Tab C 207).*

<sup>848</sup> *Gitxaala Nation v. Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336, Reasons for Judgment and Judgment, 19 November 2012, para 26. (*Investors' Book of Authorities at Tab CA 212*).

<sup>849</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 Article 11. (*Investors' Book of Authorities at Tab CA 76*)

<sup>850</sup> Presentation before the Whites Point Quarry & Marine Terminal Project Hearing prepared by Department of foreign Affairs and International Trade, dated June 19, slides #4 and #6 (*Investors' Schedule of Documents at Tab C 929*).

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770. In its Report, the JRP did not adhere to the NAFTA standard set out in Article 1105, of which it had been appraised at the hearings.
771. While the JRP may have said in its Report that the NAFTA “would not influence the establishment of new coast quarries,” it conducted an analysis of cumulative effects that was rooted in nationality, which the JRP knew from Canada’s own presentation, was contrary to the NAFTA.<sup>851</sup> The Panel then relied on these perceived cumulative effects accruing to American investors under treaties like the NAFTA as a reason for criticizing Bilcon, and finding recommending approval of the project.<sup>852</sup>
772. When Canadian Environment Minister Baird accepted the recommendation in the JRP Report, Canada thereby adopted the JRP’s flawed understanding and application of the NAFTA as its own – a conclusion whose roots can be traced directly back to Canada’s intervention in the JRP process through the presentation of DFAIT, another state organ.
773. In his Reply Expert Statement, David Estrin also notes that:

Canada and Nova Scotia worked behind the scenes to ensure that their responses would be consistent, and that each knew in advance what the other’s response would be.<sup>853</sup>

Mr. Estrin observes that Bruce Young of the CEA Agency sent an email to colleagues that “the Fisheries Minister’s office had given direction to DFO staff to move quickly on the next steps in the process, and ‘link our decision making process with the province’”.<sup>854</sup>

774. In this regard, Mr. Estrin notes:

It would be unseemly for different levels of government to reach opposite conclusions on the same project following a joint panel review, and in fact that has never happened. To avoid such an outcome, efforts are normally made to harmonize not only the timing but also the content of the response.<sup>855</sup>

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<sup>851</sup> Joint Review Panel Report, dated October 23, 2007, p. 83. (*Investors’ Schedule of Documents at Tab C 34* )

<sup>852</sup> Joint Review Panel Report, dated October 23, 2007, p. 83. (*Investors’ Schedule of Documents at Tab C 34* )

<sup>853</sup> Reply Expert Report of David Estrin, para. 329

<sup>854</sup> Reply Expert Report of David Estrin, para. 333

<sup>855</sup> Reply Expert Report of David Estrin, para. 328

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775. In advance of Nova Scotia releasing its decision, the DFO was also going to “call Nancy [Vanstone, acting Deputy Minister of NSDEL] and confirm our agreement with the province on the decision on the Panel Report”.<sup>856</sup>
776. These discussions form the basis for Mr. Estrin’s conclusion that “Canada and Nova Scotia did not formulate their respective responses in isolation.”<sup>857</sup> Therefore, the decision to deny Bilcon’s quarry at Whites Point was as much Canada’s as it was Nova Scotia’s. The fact that Nova Scotia happened to announce its decision first does not obviate Canada’s responsibility for its decision.
777. Mr. Rankin also dismisses this argument in his Expert Report pointing out that Canada’s argument that all the damage was caused by Nova Scotia “would deny Bilcon the opportunity to attempt to persuade the Federal Minister that his provincial counterpart ought to reconsider his decision.”<sup>858</sup> To Mr. Rankin the issue is very clear, “Under the scheme of the two statutes, each Minister has a separate decision to reach.”<sup>859</sup>
778. Canada cannot ignore the statutory requirements of Canada’s environmental legislation and hide behind the fact that Nova Scotia was the first of the two jurisdictions to make the exercise its statutory requirement public knowledge.
779. Nova Scotia’s acceptance of the JRP’s first recommendation to reject Bilcon’s application was not dispositive of the application. Provincial rejection hurt the investment; however, it was the joint federal and provincial rejection, following the Joint Review Panel and the joint failure to address the legitimate concerns of the Investors with respect to the obvious errors in the JRP recommendation process, and thus in the JRP itself, that resulted in the project’s rejection.
780. A review by the federal government of the irregularities and errors in the JRP report and process could have led to a reconsideration of the Nova Scotia decision. Also a difference of view between the governments could have been addressed through mitigation measures or even the situation where a change of government minister could

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<sup>856</sup> Email from M. McLean to M. Murphy, dated November 15, 2007 (*Investors’ Schedule of Documents at Tab C 786*).

<sup>857</sup> Reply Expert Report of David Estrin, para. 346.

<sup>858</sup> Expert Report of Murray Rankin, Q.C., para. 163.

<sup>859</sup> Expert Report of Murray Rankin, Q.C., para. 164.

result in a project going forward.

781. Canada is fully responsible for internationally wrongful conduct of both the federal government and the Nova Scotia government as a matter of international law and by the terms of NAFTA Article 105.<sup>860</sup> Whichever government first adopted the JRP report irrelevant; Canada's international legal responsibility extends to cover Nova Scotia's decision.
782. Canada's decision to accept and adopt the JRP's recommendation to reject Bilcon's quarry at Whites Point is a measure that caused additional damage to Bilcon.

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<sup>860</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 Article 4(1). (*Investors' Book of Authorities at Tab CA 76*)

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## PART SEVEN: DAMAGES AND RELIEF REQUESTED

### V. DAMAGES

783. The Tribunal has ordered the bifurcation of damage from the merits of the claim, in paragraph 1.2 of *Procedural Order No. 3*. As a result, it is not necessary for damage to be assessed in this phase of the arbitration.
784. However, the Investors and their Investment have clearly been caused extensive harm and loss directly as a result of Canada's measures, which prevented the Investors from being able to operate and expand a quarry at Whites Point, Nova Scotia.
785. The evidence of William Richard Clayton sets out that the Investors sought to obtain a stable and secure supply of aggregates from the Whites Point Quarry to supply their business operations in the United States.<sup>861</sup> The unlawful prevention of their Investment caused harm and loss to the Investors.<sup>862</sup> As a result of Canada's measures which resulted in a denial of approvals to permit the Whites Point Quarry to operate, the Investors lost the value of their investment in Nova Scotia, as well as related losses naturally accruing to their related corporate interests in the United States.<sup>863</sup>
786. The impact of the discrimination, irrelevant political considerations and the failure to provide full protection and security to the Investment and its Investors has also resulted in a total loss of goodwill and in moral damage for Bilcon of Delaware, the Investors and their Investment in Canada.
787. The Investors were forced to endure a needlessly long, unfair, arbitrary and abusive environmental regulatory process that exceeded the authority of the government and its regulators, where the scientific evidence required from the Investors was ignored, and where government ministers acted beyond their legal authority. The excessive cost of the process conducted in violation of the Investors' entitlement to fairness and due process has directly resulted in loss, harm, injury, and damage to the Investors and its Investment.

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<sup>861</sup> Witness Statement of William Richard Clayton, at para.4.

<sup>862</sup> Witness Statement of William Richard Clayton, at paras. 31-34.

<sup>863</sup> Witness Statement of William Richard Clayton, at paras 31-33.

788. When examining Canada's less favorable and unfair treatment of Bilcon during the environmental assessment, Canadian environmental law expert David Estrin concluded that "this approach resulted in a more lengthy and expensive process for the proponent than was necessary."<sup>864</sup>

789. David Estrin examined the treatment of Bilcon by Canada in the environmental assessment and concluded:

Our examination of government records prior to the referral of the WPQ to a Review Panel indicates that in exercising statutory powers, officials often made choices that were least advantageous to the proponent.<sup>865</sup>

790. Mr. Estrin also noted specific examples of less favorable treatment of Bilcon:

This is illustrated by various decisions made by the federal Department of Fisheries and Oceans ("DFO") in the lead-up to the referral of the project to a Panel. In particular, there are four decisions that stand out as being unusual and unfair, particularly in relation to similar projects:

- a) DFO's decision to become involved with imposing blasting conditions in Bilcon's provincial quarry permit
- b) DFO's refusal to authorize Bilcon's blasting plan
- c) DFO's imposition of a "comprehensive study" level of environmental assessment when this was not legally authorized (before ultimately referring the project to a Joint Review Panel)
- d) DFO's decision to "scope in" the quarry in the environmental assessment, despite there being no credible scientific link between quarry activities and potential harm to fish.<sup>866</sup>

791. The witness statement of William Richard Clayton sets out that the cost of this needless and exercise was in excess of USD\$ 4.25 million dollars.<sup>867</sup>

792. The Investors have, in addition, been subjected to even more damage and loss as a result of the conduct of the Government of Canada in this arbitration, unreasonable delays, non-disclosure of relevant evidence, and the non-production, partial production, and late production of documents.

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<sup>864</sup> Expert Report of David Estrin at para. 421.

<sup>865</sup> Expert Report of David Estrin at 2.

<sup>866</sup> Expert Report of David Estrin at 2-3.

<sup>867</sup> Witness Statement of William Richard Clayton, at paras. 29 and 33.

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**VI. RELIEF SOUGHT**

793. The Investors respectfully request the following relief:

- a) A declaration that Canada has acted in a manner inconsistent with its Chapter 11 obligations of national treatment, most favored nation treatment, and international law standards of treatment, in breach of its obligations under NAFTA Articles 1102, 1103 and 1105;
- b) A declaration dismissing Canada's jurisdictional objections;
- c) Damages as determined in the Quantification of Damages phase of the hearing;
- d) Damages arising from the delays, non-disclosure of relevant evidence, and non-production of documents by Canada; and
- e) An award in favor of the Investors' for all costs, disbursements and expenses incurred in the merits phase of the arbitration for legal representation and assistance, plus interest, and costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

  
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Appleton & Associates International Lawyers

Date: December 21, 2011