

PCA Case No. 2016-13

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

between

RESOLUTE FOREST PRODUCTS INC.

and

GOVERNMENT OF CANADA

FINAL AWARD

July 25, 2022

Arbitral Tribunal:

Professor Bernard Hanotiau (Presiding Arbitrator)

Dean Ronald A. Cass

Professor Céline Lévesque

Registry:

Permanent Court of Arbitration

Ms. Ashwita Ambast, Tribunal Secretary

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LIST OF DEFINED TERMS

	(Exhibit R-161)
2020 Hearing	Hearing on the Merits and Damages held from November 9-14, 2020
2021 Hearing	Hearing on the Merits and Damages held from October 18-19, 2021
Arbitration Costs	The costs for this arbitration, fixed in accordance with Article 38 of the UNCITRAL Rules
Assistance Measures	The series of measures implemented by Nova Scotia in 2012
ATR	Advance tax ruling from the CRA
	(Exhibit C-182)
Biomass Plant Issue	Issue pertaining to the operation of the Biomass Plant at the PHP Mill raised in relation to PWCC and NSPI's application for approval of an LRR
Bowater Mersey	The Bowater Mersey paper mill in Nova Scotia owned by Resolute
Canada	The Government of Canada (or "the Respondent")
CCAA	<i>Companies' Creditor Arrangement Act</i> , R.S.C. 1985, c-36 (Exhibit R-025)
Catalyst	Catalyst Paper Corporation
Claimant's Memorial	Memorial on Merits and Damages filed by the Claimant on December 28, 2018
Claimant's Pre-Hearing Memorial	Resolute's pre-hearing memorial submission of October 14, 2021
Claimant's Reply Memorial	Reply Memorial on Merits and Damages filed by the Claimant on December 6, 2019
Claimant's Reply to Article 1128 Submissions	The Claimant's submissions in reply to the Non-Disputing Parties' Article 1128 Submissions, filed by the Claimant on May 8, 2020
Claimant's Revised Cost Submission	The Claimant's revised submission on costs, filed on December 15, 2021
Claimant's Statement of Claim	Statement of Claim filed by the Claimant on December 30, 2015
Confidentiality Order	Confidentiality Order dated October 27, 2016
Court	The Supreme Court of Nova Scotia
CRA	Canada Revenue Agency
CVD Investigation	Countervailing duty investigation initiated by the US Department of Commerce
EBITDA	Earnings before interest, tax, depreciation and amortization

EGSPA	<i>Environmental Goals and Sustainable Prosperity Act</i> , SNS 2007, c.7 (Exhibit R-194)
ERDT	Department of Economic and Rural Development and Tourism of the Government of Nova Scotia
EY	Ernst & Young, in their capacity as expert witness to the Claimant
FIF	Forestry Infrastructure Fund
Four Exhibits	Respondent's four exhibits pursuant to which the Claimant sought a re-designation from Restricted Access to Confidential Information during the document production phase of this arbitration
FTC	NAFTA Free Trade Commission
FULA	Forest Utilization License Agreement
GDP	Gross Domestic Product
GNS	The Government of Nova Scotia
HFCS	High fructose corn syrup, as mentioned in <i>Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, Corn Products International Inc. v. United Mexican States</i> and <i>Cargill, Inc. v. United Mexican States</i>
ICJ	International Court of Justice
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
Irving	Irving Limited
JDCA	Joint Defense and Confidentiality Agreement concluded by the Respondent and PHP, Irving, and Catalyst during the US DOC's CVD investigation
JRP	Joint Review Panel, referred to in <i>Bilcon v. Canada</i>
July 2012 Letter	Letter submitted to the NSUARB by GNS in support of PWCC's application for an LRR
Jurisdiction Decision	Decision on Jurisdiction and Admissibility, January 30, 2018
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Laurentide Mill	The Laurentide SC Paper mill owned by the Claimant located in Shawinigan, Québec
Legal Costs	The costs for legal representation and assistance of the successful party, fixed by the Tribunal in accordance with Article 38 of the UNCITRAL Rules
LRR	Load retention rate
LRT	Load retention tariff
Mexico	The United Mexican States
Mexico Submission	Mexico's Second Article 1128 Submission dated April 23, 2020

Monitor	Ernst & Young, as appointed by the Supreme Court of Nova Scotia to monitor the business and financial affairs of NPPH during the CCAA proceedings and the sales process of NPPH
MT	Metric tonne
NAFTA	North American Free Trade Agreement
Natural Resources Strategy	The Government of Nova Scotia's Natural Resources Strategy for Nova Scotia 2011-2020 (Exhibit R-202)
NHA	National Highway Authority, referred to in <i>Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan</i>
Non-Disputing Parties	The United States of America and the United Mexican States
Notice of Arbitration	Notice of Arbitration dated December 30, 2015
Notice of Intent to Arbitrate	Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, February 24, 2015
Nova Scotia	The Government of Nova Scotia (or "the Province" or "GNS")
Nova Scotia Measures	The series of measures implemented by Nova Scotia in 2012 (or "Assistance Measures")
NPPH	NewPage Port Hawkesbury Corp.
NSPI	Nova Scotia Power Inc.
NSUARB	Nova Scotia Utility and Review Board
Outreach Agreement	Sustainable Forest Management and Outreach Program Agreement
Parties	The Claimant and the Respondent
PCA	The Permanent Court of Arbitration
PHP	Port Hawkesbury Paper Inc.
PHP Mill	The Port Hawkesbury mill (or generally the "Mill", or "NPPH", or "PHP" depending on the time period and under whose ownership it operated), a SC Paper mill located in Port Hawkesbury, Nova Scotia
Plan Sponsorship Agreement	The Plan Sponsorship Agreement entered into by PWCC and NPPH on July 6, 2012
Plan of Arrangement	The Plan of Compromise and Arrangement of NPPH under the CCAA
Preparatory Activities Agreement	Preparatory Activities Agreement, August 27, 2012 or the "Ramp-Up Agreement"
Provincial Treatment Objection	Respondent's objection to admissibility based on NAFTA Article 1102(3)
PWCC	Pacific West Commercial Corporation
Ramp-Up Agreement	Ramp-Up Agreement, August 27, 2012 or the "Preparatory Activities Agreement"
Registry	A registry of CCAA cases maintained by the Office of Superintendent in

	Bankruptcy and Monitors' reports
RES Regulations	Renewable energy standard regulations, enacted by the GNS in October 2007 (Exhibit R-171) and amended in 2010 (Exhibit R-179)
RES Regulations Issue	Issue pertaining to the cost of meeting the renewable energy requirements prescribed by the RES Regulations raised in relation with PWCC and NSPI's application for approval of an LRR
Resolute	Resolute Forest Products Inc. (or "the Claimant")
Respondent	The Government of Canada (or "Canada")
Respondent's Counter-Memorial	Counter-Memorial on Merits and Damages filed by the Respondent on April 17, 2019
Respondent's Pre-Hearing Memorial	Respondent's Pre-Hearing Memorial of October 14, 2021
Respondent's Rejoinder Memorial	Rejoinder Memorial on Merits and Damages filed by the Respondent on March 4, 2020
Respondent's Reply to Article 1128 Submissions	The Respondent's submissions in reply to the Non-Disputing Parties' Article 1128 Submissions, filed by the Respondent on May 8, 2020
Respondent's Revised Cost Submission	The Respondent's revised submission on costs, submitted on December 15, 2021
Respondent's Statement of Defence	Statement of Defence filed by the Respondent on September 1, 2016
Revised Cost Submissions	The Claimant and Respondent's revised submissions on costs, exchanged on December 15, 2021
Sanabe	Sanabe & Associates LLC
SC Paper	Supercalendered paper
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Scope Objection	Respondent's objection to jurisdiction based on NAFTA Article 1101(1)
	(Exhibit C-195)
Taxation Measures Objection	Respondent's objection to jurisdiction in relation to taxation measures implemented by Nova Scotia based on NAFTA Article 2103
Time-Bar Objection	Respondent's objection to jurisdiction based on NAFTA Articles 1116(2) and 1117(2)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)
United States	The United States of America
United States Submission	The United States' Second Article 1128 Submission dated April 20, 2020

US DOC	The United States Department of Commerce
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
Verso	Verso Corporation
WACC	Weighted Average Cost of Capital
WTO	World Trade Organization
\$	Canadian Dollars, the lawful currency of Canada

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in this arbitration is Resolute Forest Products Inc., a corporation incorporated in the State of Delaware, United States of America (the “**Claimant**” or “**Resolute**”). The Claimant’s address is 1209 Orange Street, Wilmington, Delaware 19801, United States of America.
2. The Claimant brings this arbitration as an investor on its own behalf and on behalf of Resolute FP Canada Inc., a corporation incorporated in Canada that is directly owned and controlled by the Claimant. The address of Resolute FP Canada Inc. is 1010 Rue De La Gauchetière O Suite 400, Montréal, QC H3B 2N2, Canada.
3. The Claimant is represented in these proceedings by:

Mr. Elliot J. Feldman
Mr. Michael S. Snarr
Mr. Paul M. Levine
BAKER & HOSTETLER LLP
Mr. Martin J. Valasek
Ms. Jenna Anne de Jong
NORTON ROSE FULBRIGHT CANADA LLP
Ms. Stéphanie Leclaire, Senior Vice President, Corporate Affairs and
Chief Legal Officer
Mr. Jacques Vachon, Special Advisor to the President and CEO
Mr. Jean-Christophe Martel, Senior Legal Counsel
RESOLUTE FOREST PRODUCTS INC.
4. The Respondent in this arbitration is the Government of Canada (“**Canada**” or the “**Respondent**”). The Respondent is represented in these proceedings by:

Mr. Mark A. Luz, General Counsel
Mr. Rodney Neufeld, Senior Counsel
Mr. Azeem Manghat, Counsel
Mr. Stefan Kuuskne, Counsel
Mr. Dmytro Galagan, Counsel
Ms. Annie Ouellet, Counsel (until July 2021)
Ms. Michelle Hoffmann, Counsel (until November 2019)
Canada was also assisted in this arbitration by the following paralegals:
Ms. Karolina Grzanka, Ms. Shawna Lesaux (until December 2021) and

Ms. Darian Bakelaar (until December 2021).

B. OVERVIEW OF THE DISPUTE

5. A dispute has arisen between the Claimant and Canada in respect of which the Claimant commenced arbitration pursuant to Chapter 11 of the North American Free Trade Agreement (“NAFTA”).
6. This dispute concerns the Claimant’s investment in the following supercalendered paper (“**SC Paper**”) mills in Québec, Canada: the Laurentide mill, the Dolbeau Mill, and the Kénogami Mill. The Claimant argues that the Government of Nova Scotia (“**GNS**”) granted Pacific West Commercial Corporation (“**PWCC**”) (the new owner of the Port Hawkesbury mill (the “**PHP Mill**”), following a court-sanctioned process of arrangement with creditors) a package of assistance measures in 2012 (the “**Nova Scotia Measures**” or “**Assistance Measures**”) “to assure the reopening of PHP as ‘the lowest cost producer’ in North America”.¹ According to the Claimant, the Assistance Measures are attributable to GNS (and, therefore, to Canada) under international law and constitute a violation of the national treatment standard (NAFTA Article 1102) and the minimum standard of treatment (NAFTA Article 1105).² The Claimant argues that, with the benefit of the Assistance Measures, the PHP Mill was able to restart operations and add significant capacity to an SC Paper market in secular decline, which had negative effects on Resolute’s prices and shipments.³ According to the Claimant, GNS thereby knowingly caused Resolute “substantial, accelerated economic damages”.⁴
7. The Claimant claims compensation in the amount of at least US\$121.4 million for profits lost due to price erosion (the Claimant arrives at US\$126 million using a forecasting approach and US\$121.4 million using a price-elasticity approach, and asks to be awarded the lower sum, “consistent with Resolute’s overall conservative approach to damages”).⁵ It also requests an award “for its costs and fees of this arbitration”.⁶
8. In the first phase of this arbitration, the Respondent argued that the Claimant’s allegations in respect of the measures taken by GNS were time-barred under NAFTA Articles 1116(2) and

¹ Claimant’s Pre-Hearing Memorial, at para 2 [emphasis in original].

² A claim for breach of Article 1110 (Expropriation and Compensation) was abandoned by the Claimant in its Memorial at para. 14. See also Jurisdiction Decision, at paras 312-314.

³ Claimant’s Pre-Hearing Memorial, at para 92.

⁴ Claimant’s Pre-Hearing Memorial, at para 1.

⁵ Claimant’s Pre-Hearing Memorial, at para 109. The Claimant’s original request was for US\$163,695,000 (Claimant’s Memorial, at para 310), modified to US\$ 103,967,000 in its Reply (Claimant’s Reply Memorial, at para 397).

⁶ Hearing on the Merits and Damages, October 18, 2021, Claimant’s Opening Argument, at 104.

1117(2) (the “**Time-Bar Objection**”). Alternatively, the Respondent argued that the Nova Scotia-related claims fell outside the scope of application of NAFTA under Article 1101(1) (the “**Scope Objection**”) and that the Claimant’s national treatment claims were inadmissible under NAFTA Article 1102(3) (the “**Provincial Treatment Objection**”). The Tribunal also considered whether it had jurisdiction over the Article 1110 claim of expropriation of the Laurentide Mill under the *Oil Platforms* test. Finally, the Respondent also submitted that the Tribunal lacked jurisdiction in respect of the Nova Scotia Measures insofar as they relate to taxation measures implemented by GNS (the “**Taxation Measures Objection**”).

9. The Tribunal issued its Decision on Jurisdiction and Admissibility on January 30, 2018 (the “**Jurisdiction Decision**”). In the Jurisdiction Decision, the Tribunal rejected the Time-Bar Objection.⁷ The Tribunal also rejected the Scope Objection, except with respect to interim measures taken by the Respondent to keep the PHP Mill in operation prior to its sale in September 2012, which the Tribunal found it had no jurisdiction over.⁸ The Tribunal rejected the Provincial Treatment Objection based on Article 1102(3), while at the same time noting that in the first phase of the proceedings the Tribunal was not called upon to discuss the application of the “like circumstances” test, nor the meaning of “treatment” in Article 1102.⁹ In the Jurisdiction Decision, the Tribunal expressed the view that the Claimant’s Article 1110 claim for expropriation of the Laurentide Mill faced “considerable difficulties, even assuming the facts as pleaded”, but nevertheless considered that the claim should not be dismissed at the preliminary stage.¹⁰ The Article 1110 claim was later abandoned by the Claimant.¹¹ Finally, with respect to the Taxation Measures Objection, the Tribunal found that taxation measures are “simply not covered by NAFTA except as provided in Article 2103, and there is no relevant exception here”.¹² Thus, even if the present claim fell within the jurisdiction of the Tribunal and was otherwise admissible, “it could not include any aspect of Nova Scotia’s conduct covered by the taxation measures exemption in Article 2103”.¹³
10. In addition to the arguments on jurisdiction and admissibility dealt with in the first phase of the arbitration, the Respondent has also raised objections to the Tribunal’s jurisdiction relating to the measures taken by Canada in respect to the investigation by the United States Department of Commerce (“**US DOC**”) in relation to the Canadian SC Paper industry. The Parties had agreed

⁷ Jurisdiction Decision, at para 179.

⁸ Jurisdiction Decision, at paras 243-248, 330.

⁹ Jurisdiction Decision, at paras 290-292.

¹⁰ Jurisdiction Decision, at para 312-314.

¹¹ Claimant’s Memorial, at para 14.

¹² Jurisdiction Decision, at para 328.

¹³ Jurisdiction Decision, at para 329.

that those objections would be dealt with in this merits phase of the arbitration.¹⁴ The Claimant has abandoned this claim at the merits phase of this arbitration.¹⁵

¹⁴ Jurisdiction Decision, at para 10.

¹⁵ Claimant's Memorial, at para 152.

II. PROCEDURAL HISTORY

11. Part II of the Jurisdiction Decision recounts in detail the procedural history of this arbitration up until January 30, 2018. The Procedural History in the present Award recalls only the key details from the first phase of the case and sets out relevant procedural developments since the issuance of the Jurisdiction Decision.

A. SUMMARY OF THE FIRST PHASE OF THE ARBITRATION

12. On December 30, 2015, the Claimant served on Canada its Notice of Arbitration (“**Notice of Arbitration**”) and Statement of Claim (“**Statement of Claim**”) under NAFTA Chapter 11. Pursuant to NAFTA Article 1120(1)(c), the Claimant also indicated its election to proceed with the arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law Arbitration Rules of 1976 (“**UNCITRAL Rules**”).
13. Pursuant to UNCITRAL Rules Article 7 and NAFTA Article 1123, the Tribunal was constituted in May 2016. The Tribunal was originally composed of Dean Ronald A. Cass, Dean Emeritus of Boston University School of Law and a national of the United States of America, appointed by the Claimant in December 2015; Professor Céline Lévesque, Full Professor, Faculty of Law, Civil Law Section, at the University of Ottawa and a national of Canada, appointed by the Respondent in March 2016; and H.E. Judge James R. Crawford, AC, a judge of the International Court of Justice (“**ICJ**”) and a national of Australia, appointed as the presiding arbitrator by mutual agreement of the Parties in May 2016.
14. On June 29, 2016, the Tribunal issued Procedural Order No. 1, recording the Parties’ confirmation that the Tribunal had been duly constituted in accordance with NAFTA Article 1123, and their agreement that the 1976 version of the UNCITRAL Rules would apply to this arbitration; that the place of arbitration would be Toronto, Ontario; that the languages of the arbitration would be English and French; and that the Permanent Court of Arbitration (“**PCA**”) would act as registry in relation to this arbitration. Procedural Order No. 1 also set out procedural rules and a date for Canada to file its Statement of Defence (“**Statement of Defence**”).
15. In accordance with the schedule set in Procedural Order No. 1, on September 1, 2016, the Respondent filed its Statement of Defence and accompanying documents, followed by a request for bifurcation on September 29, 2016.
16. On October 14, 2016, the Tribunal issued Procedural Order No. 2 dealing with document production. On the same date, the Tribunal issued a Confidentiality Order (“**Confidentiality**”).

Order”), which the Parties signed on October 27, 2016. The Confidentiality Order established a procedure by which a Party could designate as Restricted Access Information and Confidential Information documents exchanged in document production, written submissions, transcripts, orders, and awards.

17. On November 3, 2016, the Tribunal issued Procedural Order No. 3, setting out alternative schedules for submissions with respect to the Respondent’s motion for bifurcation and subsequent pleadings, with Schedule A reflecting bifurcated proceedings and Schedule B reflecting non-bifurcated proceedings. The Tribunal set an oral hearing on bifurcation by teleconference for November 7, 2016.
18. On November 18, 2016, the Tribunal issued Procedural Order No. 4, by which the Tribunal decided to bifurcate these proceedings for the purpose of hearing the Respondent’s objections to jurisdiction and admissibility under NAFTA Articles 1116(2), 1117(2), 1101(1), 1102(3) and 2103(6) as preliminary questions. Having decided to bifurcate the proceedings, the Tribunal also adopted Schedule A of Procedural Order No. 3.
19. On December 12, 2016, the Tribunal issued Procedural Order No. 5 setting out a revised schedule for the jurisdictional phase of the proceedings.
20. From December 2016 to May 2017, the Parties exchanged written memorials on jurisdiction and admissibility. The Respondent submitted the Memorial on Jurisdiction on December 22, 2016, and the Reply Memorial on Jurisdiction on March 29, 2017. The Claimant submitted the Counter-Memorial on Jurisdiction on February 22, 2017 and the Rejoinder Memorial on Jurisdiction on May 3, 2017.
21. The United States of America (“**United States**”) and the United Mexican States (“**Mexico**”) submitted Non-Disputing Party Submissions on June 14, 2017, pursuant to NAFTA Article 1128, as to which both Parties filed comments.
22. On June 29, 2017, the Tribunal issued Procedural Order No. 6 rejecting an *amici curiae* application.
23. Pursuant to Paragraph 22.2 of Procedural Order No. 1, on July 21, 2017, the Tribunal provided a number of questions in writing for the Parties to address in their oral submissions during the Hearing on Jurisdiction and Admissibility.
24. The Hearing on Jurisdiction and Admissibility was held at Arbitration Place in Toronto, Canada

from August 15 to August 17, 2017. As agreed by the Parties, it was live-streamed on the PCA's website. No post-hearing briefs were deemed necessary.

25. As noted above, the Tribunal issued its Jurisdiction Decision on January 30, 2018.

B. MERITS PHASE

26. In accordance with Procedural Order No. 3 and the Jurisdiction Decision,¹⁶ the Tribunal invited the Parties to confer regarding a schedule for the merits phase.
27. On March 16, 2018, the Parties communicated to the Tribunal that they had agreed on a schedule for the merits and damages phase incorporating two rounds of simultaneous document production. The Parties informed the Tribunal that they had agreed to this procedure with the understanding that the second document production should be narrow and tailored. They further agreed that each request should be the consequence of the pleadings and should identify with precision a statement, claim, or argument in the other Party's pleading that warrants further discovery or additional documents.
28. The Tribunal agreed to the schedule proposed by the Parties in Procedural Order No. 7 of March 23, 2018. On the joint proposal of the Parties submitted on July 24, 2018, the Tribunal approved a revised procedural schedule in Procedural Order No. 8 of August 15, 2018. The revised schedule only amended the previous timeframes for the submission of written memorials and documents, but not the principles underlying their production.

C. FIRST ROUND OF DOCUMENT PRODUCTION AND EXCHANGE OF WRITTEN PLEADINGS

29. On July 20, 2018, in accordance with the timeline set out in Procedural Order No. 7, the Parties exchanged the requested undisputed documents.
30. On July 27, 2018, the Parties submitted their Redfern Schedules for disputed requests. The Redfern Schedules included 17 disputed requests of the Claimant and 30 disputed requests of the Respondent.
31. In Procedural Order No. 9 of August 21, 2018, the Tribunal granted 8 requests made by the Claimant¹⁷ and 8 requests made by the Respondent¹⁸ for disclosure of certain documents and

¹⁶ Jurisdiction Decision, at para 330.

¹⁷ Procedural Order No. 9, Claimant's Redfern Schedule, Documents No. 7, 9, 10, 16, 18, 19, 21, 31.

¹⁸ Procedural Order No. 9, Respondent's Redfern Schedule, Documents No. 2(b), 2(c), 6, 17, 30, 31, 32, 33.

information, ordering the Parties to produce the indicated documents to the other Party by September 28, 2018. The Tribunal also rejected on various grounds 8 document requests of the Claimant¹⁹ and 7 on the part of the Respondent.²⁰ These requests and objections were rejected for being insufficiently specific. The Tribunal clarified that, in the following round of document production, the Parties could amend and resubmit these requests to meet the specificity requirements.

32. In Procedural Order No. 9, the Tribunal also noted that the Respondent had indicated possible objections to the production of certain documents the Claimant could ultimately request on the ground of cabinet privilege or institutional sensitivity, as protected under Article 9.2 of the IBA Rules on the Taking of Evidence in International Arbitration. The Tribunal did not make any findings as to these possible objections, determining that it would assess such requests individually should they manifest.

D. SECOND ROUND OF DOCUMENT PRODUCTION AND EXCHANGE OF WRITTEN PLEADINGS

33. According to the schedule set out in Procedural Order No. 8, the Claimant was to file its Memorial on Merits and Damages by November 29, 2018. However, the Parties agreed and received authorization by the Tribunal to extend this deadline by one month. The Claimant submitted its Memorial (“**Claimant’s Memorial**”) on December 28, 2018.
34. Thereafter, the Tribunal invited the Parties to consult on a revised schedule for submission of subsequent pleadings and for document production. On February 14, 2019, the Parties informed the Tribunal of their agreement on a revised schedule for the remainder of the proceedings. On February 19, 2019, the Tribunal approved the revised schedule in Procedural Order No. 10.
35. In accordance with the schedule set in Procedural Order No. 10, on April 17, 2019, the Respondent submitted its Counter-Memorial on the Merits and Damages (“**Respondent’s Counter-Memorial**”).
36. Following this submission, on April 30, 2019, the Parties exchanged additional requests for document production. In accordance with the Tribunal’s order in Procedural Order No. 10, the Parties were permitted only to submit requests arising directly out of statements or claims presented in the submitted pleadings. In the months that followed, the Parties filed their objections

¹⁹ Procedural Order No. 9, Claimant’s Redfern Schedule, Documents No. 4, 12, 13, 14, 17, 22, 25, 33.

²⁰ Procedural Order No. 9, Respondent’s Redfern Schedule, Documents No. 7, 8, 9, 15, 16, 16(b), 16(c).

and exchanged undisputed documents.

37. On June 18, 2019, the Parties submitted their Redfern Schedules for disputed document requests, in accordance with the schedule set in Procedural Order No. 10.
38. On July 9, 2019, the Tribunal issued Procedural Order No. 11, directing the Parties to produce certain requested documents or information by July 31, 2019. The Tribunal denied 5,²¹ partially granted 2,²² and granted 5 requests by the Claimant,²³ but for some²⁴ permitted the Respondent to redact information that it could show required protection. The Tribunal denied 1 request by the Respondent.²⁵ The Tribunal reserved its decision on 2 document requests by the Claimant²⁶ and 2 document requests by the Respondent until July 17, 2019.²⁷ Additionally, the Tribunal invited the Claimant to amend 1 request²⁸ and the Respondent to amend 1 request²⁹ by July 17, 2019, as it considered these overbroad.
39. On December 6, 2019, the Claimant filed its Reply Memorial on Merits and Damages (“**Claimant’s Reply Memorial**”). On the same date, by letter to the Respondent, the Claimant raised objections to the Respondent’s determination of numerous documents as Restricted Access Information pursuant to the mechanism provided in the Confidentiality Order. The Restricted Access designation permits only the Parties’ counsel, and not the Parties themselves, to see such documents, which, the Claimant contended, impeded its ability to direct or advise its counsel with respect to arguments before the Tribunal.
40. On January 17, 2020, by letter to the Tribunal, the Claimant sought a re-designation of exhibits C-182, C-195, R-146, and R-161 (the “**Four Exhibits**”) as Confidential, rather than Restricted Access. On January 23, 2020, the Respondent submitted its response to the Claimant’s objections, to which the Claimant further commented on January 28, 2020.
41. On February 17, 2020, the Tribunal issued Procedural Order No. 13, deciding not to amend the Restricted Access designation of the Four Exhibits. The Tribunal noted that the Claimant’s application for the change was belated and determined that the Claimant’s ability to direct the

²¹ Procedural Order No. 11, Claimant’s Redfern Schedule, Documents No. 16, 17, 18, 21, 22.

²² Procedural Order No. 11, Claimant’s Redfern Schedule, Documents No. 24, 28.

²³ Procedural Order No. 11, Claimant’s Redfern Schedule, Documents No. 5, 23, 25, 26, 27.

²⁴ Procedural Order No. 11, Claimant’s Redfern Schedule, Documents No. 5, 26, 27.

²⁵ Procedural Order No. 11, Respondent’s Redfern Schedule, Document No. 14.

²⁶ Procedural Order No. 11, Claimant’s Redfern Schedule, Documents No. 1, 2.

²⁷ Procedural Order No. 11, Respondent’s Redfern Schedule, Documents No. 15, 19.

²⁸ Procedural Order No. 11, Claimant’s Redfern Schedule, Document No. 14.

²⁹ Procedural Order No. 11, Respondent’s Redfern Schedule, Document No. 10.

arguments of its case was not unduly impeded by the Restricted Access designation.

42. The Respondent submitted its Rejoinder Memorial on the Merits and Damages (“**Respondent’s Rejoinder Memorial**”) on March 4, 2020.

E. ARTICLE 1128 SUBMISSIONS

43. On March 9, 2020, the PCA published a Notification to Non-Disputing Parties for Article 1128 Submissions and potential *Amici Curiae* Submissions.
44. On April 1, 2020, the PCA published an amended Notification to Non-Disputing Parties for Article 1128 Submissions and potential *Amici Curiae* Submissions, extending the filing deadline to April 24, 2020.
45. In accordance with the amended Notification, on April 20, 2020 the Government of the United States submitted its Second Article 1128 Submission (“**United States Submission**”). On April 23, 2020, the Government of Mexico filed its Second Article 1128 Submission (“**Mexico Submission**”).
46. On May 8, 2020, the Parties filed their replies to the Non-Disputing Parties’ Article 1128 Submissions (“**Claimant’s Reply to Article 1128 Submissions**” and “**Respondent’s Reply to Article 1128 Submissions**”).

F. HEARING ON THE MERITS AND DAMAGES

47. On March 31, 2020, the Parties informed the Tribunal of their intention to reschedule the Hearing on the Merits and Damages (then scheduled for the week of May 18, 2020) in light of prevailing global health and travel restrictions. On April 9, 2020, the Tribunal proposed that the hearing take place from July 26-30, 2020. Upon being advised that the Claimant was unavailable on the proposed dates, on April 21, 2020, the Tribunal proposed that the hearing take place from November 2-6, 2020, the next window during which all Tribunal members were available. By letter dated April 24, 2020, the Respondent shared its reservations with the November 2020 dates. On April 30, 2020, the Tribunal sought the Parties’ availability for a hearing during revised dates in July 2020. On April 30, 2020, the Claimant stated that it was unavailable in the entire month of July. On May 3, 2020, the Tribunal decided to hold the hearing from November 2-6, 2020. On May 7, 2020, the Tribunal issued Procedural Order No. 14 containing a Further Revised Schedule for Merits and Damages Phase. A Further Revised Schedule on the Merits and Damages Phase was issued again on August 24, 2020, in Procedural Order No. 15. In this order, the hearing dates

were fixed as November 9-13, 2020 and it was noted that the Parties agreed that the hearing be held by video-conference on account of global health circumstances and restrictions on travel and gatherings.

48. On October 16, 2020, further to Paragraph 22.2 of Procedural Order No. 1, the Tribunal provided the Parties with a list of questions to address in oral submission at the hearing.
49. On October 21, 2020, a pre-hearing video-conference took place, in which representatives of each Party, the Tribunal, and representatives of Arbitration Place and the PCA participated.
50. At the instruction of the Tribunal and having consulted with the Parties, the PCA issued a Press Release on November 4, 2020 with information for the public live-streaming of the forthcoming hearing.
51. A hearing was held from November 9-14, 2020 (the “**2020 Hearing**”). The following individuals attended the hearing:

Tribunal

Judge James Crawford
Dean Ron Cass
Professor Céline Lévesque

Claimant’s Counsel

Mr. Elliot Feldman
Mr. Michael Snarr
Mr. Paul Levine
Ms. Analia Gonzalez
Mr. James East
Mr. Ricky Dyer
BakerHostetler

Mr. Martin Valasek
Mr. Jean-Christophe Martel
Ms. Jenna Anne de Jong
Norton Rose Fulbright

Mr. Jacques Vachon
Mr. Richard Garneau
Resolute

Dr. Seth Kaplan

Dr. Jerry Hausman

Mr. Andrew Szamosszegi

Mr. Alex Morrison
Mr. Greg Adams

Ernst & Young

Respondent

Mr. Mark Luz
Mr. Rodney Neufeld
Ms. Annie Ouellet
Mr. Stefan Kuuskne
Mr. Azeem Manghat
Mr. Dmytro Galagan
Ms. Sylvie Tabet
Ms. Darian Bakelaar
Ms. Karolina Grzanka
Ms. Shamali Gupta
Mr. Vincent Boulanger
Trade Law Bureau

Mr. Thomas Beline
Mr. Andrew Lanouette
Cassidy Levy Kent

Ms. Sara Mahaney
Mr. Ali Galal
Mr. Duff Montgomerie
Ms. Jeannie Chow
Mr. Murray Coolican
Government of Nova Scotia

Mr. Timo Suhonen
Ms. Lauri Tenhunen
AFRY/Pöyry

Mr. Peter Steger
Mr. Dan Ross
Cohen Hamilton Steger

Mr. Dan Ross
Mr. Chris Reynolds
Mr. Jeff Chabot
Mr. Alex Miller
Core Legal

Tribunal Assistant

Professor Freya Baetens

PCA

Ms. Ashwita Ambast
Ms. Gaëlle Chevalier
Mr. Scott Falls
Ms. Emilie de Haas

52. Oral submissions were made on behalf of the Claimant by Mr. Elliot Feldman, Mr. Michael Snarr, Mr. Paul Levine, Mr. Martin Valasek, and Mr. Jean-Christophe Martel and on behalf of the Respondent by Mr. Mark Luz, Mr. Rodney Neufeld, Ms. Annie Ouellet, Mr. Stefan Kuuskne,

Mr. Azeem Manghat, and Mr. Dmytro Galagan.

53. By letter dated November 22, 2020, the Tribunal *inter alia* established a schedule for the correction of transcripts and for costs submissions and invited the Parties to provide comments on the necessity, timing, and form of any post-hearing briefs. On November 25, 2020, the Parties confirmed that post-hearing briefs were not necessary.
54. On January 7, 2021, the Parties jointly submitted their corrections to the transcript of the 2020 Hearing, which corrections the Tribunal approved on January 13, 2021.
55. On February 3, 2021, the Parties submitted their costs submissions.

G. RECONSTITUTION OF THE TRIBUNAL AND REPEATED HEARING

56. On May 31, 2021, Judge James R. Crawford passed away.
57. On August 10, 2021, pursuant to an appointment procedure agreed by the Parties, Professor Bernard Hanotiau was appointed as the Presiding Arbitrator.
58. On September 23, 2021, a case management conference was organised, which was attended by the reconstituted Tribunal, the Parties, and the PCA.
59. On October 14, 2021, the Parties exchanged Pre-Hearing Memorials (the “**Claimant’s Pre-Hearing Memorial**” and “**Respondent’s Pre-Hearing Memorial**”).
60. Pursuant to UNCITRAL Rules Article 14 and the agreement of the Parties, a hearing on the merits and damages was held by video-conference on October 18-19, 2021 (the “**2021 Hearing**”). The following individuals attended the hearing:

Tribunal

Professor Bernard Hanotiau
Dean Ron Cass
Professor Céline Lévesque

Claimant’s Counsel

Mr. Elliot Feldman
Mr. Michael Snarr
Mr. Paul Levine
Mr. Ricky Dyer
Mr. Eric Hart
BakerHostetler

Mr. Martin Valasek

Ms. Jenna Anne de Jong
Norton Rose Fulbright

Mr. Jacques Vachon
Mr. Jean-Christophe Martel
Resolute

Dr. Seth Kaplan

Respondent

Mr. Mark Luz
Mr. Rodney Neufeld
Mr. Stefan Kuuskne
Mr. Azeem Manghat
Mr. Dmytro Galagan
Ms. Sylvie Tabet
Ms. Karolina Grzanka
Mr. Sangwa Bavon Lupika
Mr. Vincent Boulanger
Mr. Ivan Barkar
Trade Law Bureau

Ms. Sara Mahaney
Mr. Ali Galal
Government of Nova Scotia

Ms. Thomas Beline
Mr. Andrew Lanouette
Cassidy Levy

Mr. Timo Suhonen
Ms. Lauri Tenhunen
AFRY/Pöyry

Mr. Peter Steger
Mr. Dan Ross
Cohen Hamilton Steger

Mr. Dan Ross
Mr. John Morales
Mr. Alex Miller
Core Legal

President's Assistant

Mr. Shyam Balakrishnan

PCA

Ms. Ashwita Ambast
Ms. Gaëlle Chevalier

61. On December 15, 2021, the Parties shared their revised costs submissions (the “**Claimant’s Revised Costs Submission**” and “**Respondent’s Revised Costs Submission**”, and together the “**Revised Cost Submissions**”).

III. FACTUAL BACKGROUND

A. THE SC PAPER INDUSTRY IN NORTH AMERICA

1. SC Paper Producers in Canada and the United States

62. SC Paper is an “uncoated mechanical paper, which is smoothed and compacted by calender rolls”.³⁰ It is a better grade of paper than newsprint and standard uncoated mechanical paper, yet it is considered lower quality than coated mechanical paper. SC Paper is comprised of the following paper grades: SNC, SCB, SCA, SCA+, SCA++, and SCA+++.³¹
63. Competition amongst SC Paper producers in North America is robust.³² There are four SC Paper producers in Canada: Catalyst Paper Corporation (“**Catalyst**”), Irving Limited (“**Irving**”), PHP, and Resolute (the only United States-based company in the Canadian SC Paper market).³³ Verso Corporation (“**Verso**”) and Madison only produced paper in the United States.³⁴ Since the beginning of the proceedings, both Madison and Verso closed, respectively in 2016 and in 2020.³⁵
64. The Parties agree that there has been a secular decline in the demand for SC Paper in North America caused by increased digitalisation.³⁶

(a) Port Hawkesbury Paper

65. PHP, located in the province of Nova Scotia, Canada, produces SC Paper and competes with Resolute in the North American SC Paper market.
66. In 2007, the Mill at Port Hawkesbury was acquired by a United States-based paper company,

³⁰ Claimant’s Memorial, at para 17; Respondent’s Counter-Memorial, at para 140.

³¹ Expert Report of Pöyry, April 16, 2019, at paras 4, 5, 19.

³² Claimant’s Memorial, at para 130, referring to *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion, United States International Trade Commission, December 2015, at 15, 16, 19 (**C-237**).

³³ Claimant’s Memorial, at paras 17, 127.

³⁴ Claimant’s Memorial, at para 127.

³⁵ Claimant’s Memorial, at para 127; Hearing on the Merits and Damages, October 18, 2021, at 14:8-12; UPM, News Release, “UPM closes Madison Paper Industries and plans to sell related hydro power assets in the U.S.”, March 14, 2016, available at: <http://www.upm.com/About-us/Newsroom/Releases/Pages/UPM-closes-Madison-Paper-Industries-and-plans-to-sell-related-hydro-power-assets-001-Mon-14-Mar-2016-16-03.aspx> (**R-001**).

³⁶ Claimant’s Memorial, at paras 128-129; Respondent’s Counter-Memorial, at para 19; Hearing on the Merits and Damages, November 14, 2020, at 1104:14-18; Hearing on the Merits and Damages, October 18, 2021, at 13:23-19:14.

NewPage Corporation and was then operated by the latter's wholly-owned Canadian subsidiary NewPage Port Hawkesbury ("NPPH"), incorporated in Nova Scotia.³⁷ During the Mill's ownership by NPPH, it operated under this name.³⁸ NPPH operated two paper machines: a newsprint paper line and a SC Paper machine.³⁹

67. The SC Paper machine at PHP is considered the best quality and most modern SC Paper machine in North America.⁴⁰ It has an annual production capacity that is disputed,⁴¹ but is considered in the range between [REDACTED] metric tonnes ("MT") and 360,000 MT.
68. As of August 2011, the Mill was operating both the newsprint and SC Paper machines with an annual combined production capacity of 545,000 MT.⁴² It directly employed approximately 650 employees,⁴³ and indirectly created many other jobs.⁴⁴
69. In 2012, ownership of the Port Hawkesbury Mill passed to the PWCC, a Canadian company.⁴⁵ Since 2013, under PWCC's management, the PHP Mill has concentrated its production on higher grades of SC Paper, such as SCA and above.⁴⁶ It also produces SCB Paper.⁴⁷

(b) Resolute Forest Products Inc.

70. Resolute is a company incorporated under the laws of the State of Delaware, United States, created in 2007 through the merger of two forest product companies, the Canadian

³⁷ *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Pre-Filed Evidence of NewPage Port Hawkesbury, NSUARB, June 22, 2011, at 1 (**R-165**).

³⁸ The Mill is referred to in this Award as "NPPH" when making reference to the Mill during the time it was under NPPH's ownership. Reference to the Mill as "PHP" pertains to the period of time after ownership passed from NPPH to Pacific West Commercial Corporation in 2012. The Mill is still known as PHP today.

³⁹ Claimant's Memorial, at para 22.

⁴⁰ CBC News, News Release, "NewPage Port Hawkesbury mill to be sold", September 7, 2011 (**C-115**); Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector", August 20, 2012 (**C-183**). See also Respondent's Counter-Memorial, at paras 69, 144; Claimant's Memorial, at para 22.

⁴¹ Claimant's Memorial, at para 22, referring to *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Tor. E. Suther, September 6, 2011, at para 24 (**C-112**); Respondent's Counter-Memorial, at para 144, referring to Expert Witness Report of Peter Steger, April 17, 2019, at para 116.

⁴² *In re An Application by NewPage Port Hawkesbury Corporation and Bowater Mersey Paper Co.*, Pre-Filed Evidence of NewPage Port Hawkesbury, NSUARB, June 22, 2011, at 1 (**R-165**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Tor. E. Suther, September 6, 2011, at paras 14-15 (**C-112**; **R-024**).

⁴³ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Tor. E. Suther, September 6, 2011, at para 45 (**C-112**; **R-024**).

⁴⁴ CBC News, News Release, "NewPage Port Hawkesbury to close indefinitely", August 22, 2011 (**R-423**).

⁴⁵ Claimant's Memorial, at para 19.

⁴⁶ Respondent's Counter-Memorial, at para 146; First Expert Report of Peter Steger, April 18, 2018, at 5.

⁴⁷ Claimant's Memorial, at para 116.

Abitibi-Consolidated Inc., and the US Bowater Inc.⁴⁸ The Claimant describes itself as “an integrated forest products company that manufactures a diverse range of wood and paper products, including SC paper”.⁴⁹

71. Resolute’s subsidiary in Canada, Resolute FP Canada, owns three SC Paper mills located in the Canadian province of Québec: the Dolbeau and Kénogami Mills, and the now-defunct Laurentide Mill.⁵⁰ Resolute used to own the Bowater Mersey mill (“**Bowater Mersey**”), a newsprint mill in the province of Nova Scotia.⁵¹ Bowater Mersey also owned a power plant in Brooklyn, Nova Scotia.⁵² The mill was idled indefinitely in June 2012 due to economic difficulties.⁵³ It was shut down and eventually purchased by GNS in December 2012.⁵⁴

72. [REDACTED]
[REDACTED]⁵⁵ [REDACTED]
[REDACTED]⁵⁶

This [REDACTED] was due to Resolute’s more efficient Dolbeau Mill, which reopened in October 2012 (after being idled in June 2009)⁵⁷ with a capacity of approximately 143,000 MT.⁵⁸ The Dolbeau Mill had a larger capacity than the Laurentide Mill, which had a capacity of approximately 125,000 MT.⁵⁹ The SC Paper machine #10 at the Laurentide Mill closed in

⁴⁸ Claimant’s Notice of Arbitration, at para 21; Respondent’s Counter-Memorial, at fn. 25, referring to Resolute Forest Products, “Our History” (**R-311**).

⁴⁹ Claimant’s Memorial, at para 15, referring to Jurisdiction Decision, at paras 1, 50.

⁵⁰ Claimant’s Memorial, at para 16, referring to Jurisdiction Decision, at para 51.

⁵¹ Respondent’s Counter-Memorial, at para 37, referring to Nova Scotia Department of Economic and Rural Development, “Province Invests in Innovation at Nova Scotia Paper Plant”, September 22, 2009 (**R-314**); CBC News, News Release, “Mill gets \$2.5M for upgrade from N.S. government”, September 22, 2009 (**R-315**).

⁵² AbitibiBowater Inc., Annual Report for the Fiscal Year Ended December 31, 2011, at 4, 5 & Exhibit 21.1 (**R-241**); AbitibiBowater Inc., Annual Report for the Fiscal Year Ended December 31, 2010, at 7-8 (**R-313**); *In re An Application by NewPage-Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, NSUARB, June 22, 2011, at 1 (**R-166**).

⁵³ Resolute Forest Products, News Release, “Resolute to Indefinitely Idle Mersey Mill in Nova Scotia”, June 15, 2012 (**R-153**).

⁵⁴ Nova Scotia Premier’s Office, “Province Takes Crucial Step to Build Forestry of Future”, December 10, 2012 (**R-155**).

⁵⁵ [REDACTED]
[REDACTED] (**C-215**).

⁵⁶ [REDACTED]
[REDACTED] (**C-215**).

⁵⁷ The Canadian Press, “AbitibiBowater may restart Dolbeau Mill after workers endorse contract changes”, September 23, 2011 (**C-023**).

⁵⁸ Claimant’s Memorial, at fn. 200.

⁵⁹ Claimant’s Memorial, at fn. 200.

November 2012.⁶⁰ The entire Laurentide Mill shut down in October 2014.⁶¹ The Claimant reports that Dolbeau’s reopening “was part of its strategy to lower overall costs in order to retain market share”.⁶²

73. Resolute’s mills produce mainly lower grades of SC Paper, including SNC and SCB.⁶³ The

[REDACTED]⁶⁴

(c) Other North American Paper Mills

74. In addition to PHP and Resolute, the North American SC Paper market was comprised, at relevant times, of Catalyst, Irving, Verso, formerly NewPage (until 2020),⁶⁵ and Madison (until 2016).⁶⁶ Both Verso and Madison produced SC Paper in the United States.⁶⁷

75. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁸

2. Economic Impact of the Forest Industry in Nova Scotia

76. The province of Nova Scotia is Canada’s second smallest, 75% of which is covered by forests.⁶⁹ The province has developed a pulp and paper mill industry since the early 20th century, which employs residents of Nova Scotia directly and indirectly through harvesting, silviculture, trucking, and road building.⁷⁰
77. Despite being impacted by the general decline in demand for paper products, in 2015 the forest industry was worth \$2.1 billion to Nova Scotia, contributing \$800 million to its gross domestic

⁶⁰ Resolute Forest Products, News Release, “Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill”, November 6, 2012 (**R-014**).

⁶¹ Resolute Forest Products, News Release, “Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec”, September 2, 2014 (**R-016**).

⁶² Claimant’s Memorial, at para 144.

⁶³ Respondent’s Counter-Memorial, at para 147.

⁶⁴ [REDACTED] (**R-373**).

⁶⁵ Claimant’s Memorial, at para 127.

⁶⁶ Claimant’s Memorial, at para 127, referring to Respondent’s Statement of Defence, at para 17.

⁶⁷ Claimant’s Memorial, at para 127.

⁶⁸ Claimant’s Memorial, at para 131, referring to [REDACTED] (**C-215**).

⁶⁹ Respondent’s Counter-Memorial, at para 18.

⁷⁰ Respondent’s Counter-Memorial, at para 18.

product (“**GDP**”) and accounting for 11,500 jobs.⁷¹

3. Nova Scotia’s Legislative and Regulatory Framework on Forestry and Environment

78. In 2007, GNS passed the *Environmental Goals and Sustainable Prosperity Act* (“**EGSPA**”).⁷² The EGSPA sought to integrate environmental sustainability with economic prosperity in the province.⁷³ The EGSPA mandated that 18.5% of the total electricity needs of the province be obtained from renewable energy sources by 2013.⁷⁴
79. In 2007, along with the EGSPA, Nova Scotia enacted renewable energy standard regulations (the “**RES Regulations**”) requiring that in 2011-2012, 5% of Nova Scotia Power Inc.’s (“**NSPI**”) total sales of energy be renewable energy supplied by independent power producers.⁷⁵ This requirement increased to 10% in 2013 and 25% in 2015, but allowed NSPI to acquire additional renewable energy from its own generation facilities as well.⁷⁶
80. In 2009, the province released its Climate Change Action Plan⁷⁷ and its Energy Strategy.⁷⁸ In 2010, GNS produced its Renewable Electricity Plan.⁷⁹ These policies were intended to reduce the province’s dependence on coal⁸⁰ and transition towards renewable energy sources such as biomass and wind.⁸¹
81. In 2011, the province published *A Natural Resources Strategy for Nova Scotia 2011-2020* (“**Natural Resources Strategy**”).⁸² In moving the province towards “an ecosystem-based approach to forest management”, the Natural Resources Strategy identified changes to the

⁷¹ Gardiner Pinfold, “Nova Scotia’s Forest Industry Economic Impact”, December 2016, at 14 (**R-205**).

⁷² Environmental Goals and Sustainable Prosperity Act, SNS 2007, c. 7 (**R-194**).

⁷³ Respondent’s Counter-Memorial, at para 20.

⁷⁴ Environmental Goals and Sustainable Prosperity Act, SNS 2007, c. 7, at s. 4(2)(b)(i) (**R-194**).

⁷⁵ *Renewable Energy Standard Regulations*, N.S. Reg. 35/2007, at ss. 5(1), 5(3), 6(1), 6(3), 7(2)(d) (**R-171**).

⁷⁶ *Renewable Energy Standard Regulations*, N.S. Reg. 155/2010, at ss. 4-6 (**R-179**).

⁷⁷ Nova Scotia Department of Energy, “Toward a Greener Future, Climate Change Action Plan”, January 2009 (**R-424**).

⁷⁸ Nova Scotia Department of Energy, “Toward a Greener Future, Nova Scotia’s 2009 Energy Strategy”, January 2009 (**R-180**).

⁷⁹ Nova Scotia Department of Energy, “Renewable Electricity Plan: A path to good jobs, stable prices, and a cleaner environment”, April 2010 (**R-181**).

⁸⁰ Nova Scotia Department of Energy, “Toward a Greener Future, Nova Scotia’s Climate Change Action Plan”, January 2009, at 13, 17 (**R-424**); Nova Scotia Department of Energy, “Toward a Greener Future, Nova Scotia’s 2009 Energy Strategy”, January 2009, at 8, 14, 16 (**R-180**); Nova Scotia Department of Energy, “Renewable Electricity Plan: A path to good jobs, stable prices, and a cleaner environment”, April 2010, at 2, 4, 17 (**R-181**).

⁸¹ Respondent’s Counter-Memorial, at para 203.

⁸² Nova Scotia Department of Natural Resources, “The Path We Share: A Natural Resources Strategy for Nova Scotia 2011-2020”, August 2011 (**R-202**).

province's forest management to ensure environmental sustainability, such as revising the management and allocation of forest resources on Crown land, changing harvesting practices, creating rules for whole-tree harvesting and establishing a Code of Forest Practice.⁸³

82. To alleviate hurdles imposed by the dearth of Crown land ownership in Nova Scotia,⁸⁴ the Natural Resources Strategy set a goal of legally protecting 12% of the land mass of Nova Scotia.⁸⁵ The province created the Large Land Acquisition Fund valued at \$75 million, which allowed it to purchase more than 140,000 acres of land from private owners,⁸⁶ and the Forestry Transition Land Purchase Program, which also gave forestry companies in Nova Scotia the opportunity to sell some of their "non-essential land assets" to the province.⁸⁷
83. NSPI is the main utility provider in Nova Scotia.⁸⁸ NSPI is a private company that is a wholly owned subsidiary of Emera Incorporated, a for-profit company that is publicly traded on the Toronto Stock Exchange.⁸⁹ NSPI was privatized in 1992 pursuant to the *Nova Scotia Power Privatization Act*.⁹⁰
84. NSPI offers two different kinds of electricity rates. The first kind comprises "above-the-line" rates that are calculated by dividing NSPI's total revenue requirements fairly among customer classes.⁹¹ The second kind of rates is termed "below-the-line" and is offered to certain customer classes, calculated on a cost-based formula.⁹² These rates are referred to as load retention rates ("**LRR**").⁹³
85. NSPI is regulated by the Nova Scotia Utility and Review Board ("**NSUARB**"), a quasi-judicial body that supervises and approves electricity rate applications for the provision of electricity by NSPI to its customers,⁹⁴ which must be just and economically sound for both the customers and

⁸³ Report of the Steering Panel Phase II, Natural Resource Strategy, "A Natural Balance: Working Toward Nova Scotia's Natural Resources Strategy", April 2012, at 22-23 (**R-201**).

⁸⁴ Respondent's Counter-Memorial, at para 22.

⁸⁵ Nova Scotia Department of Natural Resources, "The Path We Share: A Natural Resources Strategy for Nova Scotia 2011-2020", August 2011, at 9 (**R-202**).

⁸⁶ Nova Scotia, Press Release, "March 2010 Land Purchase", March 2010 (**R-206**).

⁸⁷ Nova Scotia Department of Natural Resources, "Forestry Transition Land Acquisition Program: Guidelines for Applicants", April 2008 (**R-207**).

⁸⁸ Claimant's Memorial, at para 20; Respondent's Counter-Memorial, at para 159.

⁸⁹ Witness Statement of Murray Coolican, April 17, 2019, at para 3.

⁹⁰ *Nova Scotia Power Privatization Act*, SNS 1992, c. 8. (**C-103**). See also Witness Statement of Murray Coolican, April 17, 2019, at para 3.

⁹¹ Respondent's Counter-Memorial, at para 160.

⁹² Respondent's Counter-Memorial, at para 160.

⁹³ Claimant's Memorial, at para 60; Respondent's Counter-Memorial, at para 11.

⁹⁴ *Public Utilities Act*, RSNS 1989, c. 380 (**C-101**; **R-164**).

the utility.⁹⁵ Rate applications are adversarial and subject to the NSUARB’s review process.⁹⁶

86. NSPI maintains a Loan Retention Tariff (“**LRT**”), which provides that it can negotiate “below-the-line” LRRs with certain customers under specific conditions.⁹⁷ Originally, NSPI’s LRT was only available to customers who had potential alternative power and energy suppliers and could successfully demonstrate that (i) retaining the customer’s load was better for NSPI’s other customers than losing the customer’s load in question, and (ii) the revenue from providing energy to the customer was both greater than the applicable incremental cost to serve such customer and made a significant positive contribution to fixed costs.⁹⁸
87. In June 2011, Bowater Mersey and NPPH submitted a joint request to the NSUARB to amend the LRT in order to allow NSPI to negotiate individual LRRs with its largest customers in economic distress.⁹⁹ On November 29, 2011, the NSUARB approved the requested amendment to the LRT.¹⁰⁰

B. NPPH’S CREDITOR PROTECTION PROCEEDINGS UNDER THE CCAA

1. NPPH Enters Creditor Protection

88. On September 6, 2011, after losing nearly \$50 million in operating losses in the previous year,¹⁰¹ NPPH sought protection under the *Companies’ Creditor Arrangement Act* (“**CCAA**”).¹⁰² Under

⁹⁵ United States – Countervailing Measures on Supercalendered Paper from Canada: Report of the Panel, WTO, July 5, 2018, at para 7.63 (**R-238**) (‘United States – WTO Panel Report – *Supercalendered Paper*’); *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.*, (1976) 75 D.L.R. (3rd) 72 (N.S.C.A.), at 77 (**RL-111**).

⁹⁶ United States – WTO Panel Report – *Supercalendered Paper*, July 5, 2018, at para 7.10 (**R-238**); *Public Utilities Act*, RSNS 1989, c. 380, at ss. 86, 91, 92 (**C-101**; **R-164**).

⁹⁷ *In re An Application by Nova Scotia Power Inc.*, Decision, NSUARB, May 24, 2000, at para 52 (**R-163**).

⁹⁸ Respondent’s Counter-Memorial, para 161, referring to *In re An Application by Nova Scotia Power Inc.*, Decision, NSUARB, May 24, 2000, at Schedule “A”, s. “Availability”, para 1 (**R-163**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, NSUARB Order, December 21, 2011, at Schedule “B”, Load Retention Tariff, s. “Availability”, para 1 (**R-164**); United States – WTO Panel Report – *Supercalendered Paper*, July 5, 2018, at paras 7.12-7.14, 7.63 (**R-238**).
⁹⁹ Respondent’s Counter-Memorial, at paras 7, 162.

¹⁰⁰ *In re An Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, Decision, NSUARB, November 29, 2011, at paras 281-288 (**C-138**).

¹⁰¹ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther, September 6, 2011, at para 6 (**C-112**; **R-024**).

¹⁰² *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers, Supreme Court of Nova Scotia, September 6, 2011 (**R-026**); *NewPage Port Hawkesbury Corp. Application for an Initial Order pursuant to the Companies’ Creditors Arrangement Act*, Supreme Court of Nova Scotia, September 6, 2011, at 2 (**C-113**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther, September 6, 2011, at para 24 (**C-112**; **R-024**).

the CCAA, the Mill would be sold as part of a court supervised sale process.¹⁰³

89. On September 9, 2011, the Supreme Court of Nova Scotia (the “**Court**”) granted NPPH’s application and appointed Ernst & Young (the “**Monitor**” or “**EY**”) to “monitor the business and financial affairs of [NPPH]” during the CCAA proceedings and monitor the sales process of NPPH.¹⁰⁴ The Monitor and NPPH hired United States-based investment bankers Sanabe & Associates LLC (“**Sanabe**”) to help with the sale of the Mill.¹⁰⁵
90. The Claimant alleges that GNS recommended to NPPH that it place the Mill into creditor protection to find a new owner to operate it as a going concern.¹⁰⁶ The Respondent disputes this contention, stating that GNS did not control the CCAA proceedings; rather, NPPH decided to “market [the Mill] as a going concern”.¹⁰⁷
91. The Monitor published public notices of the sales process and directly contacted 110 parties who might have been interested in acquiring the Mill, including the Claimant.¹⁰⁸ On September 28, 2011, the Monitor and Sanabe received 21 submissions and designated 14 interested parties as “Qualified Bidders”.¹⁰⁹
92. On October 28, 2011, the Monitor received eight offers to purchase NPPH’s assets.¹¹⁰ Among the eight offerors, four were invited to continue with the bid and submitted final offers in December 2011, two intending to acquire the Mill as a going concern with the other two proposing liquidation.¹¹¹ Pacific West Commercial Corporation (“**PWCC**”), a Vancouver-based corporation, was among one of the two bidders to offer to purchase the Mill as a going concern.¹¹² On January 4, 2012, on the recommendation of the Monitor, NPPH accepted the bid for the

¹⁰³ Respondent’s Memorial on Jurisdiction, at paras 12-14.

¹⁰⁴ Claimant’s Statement of Claim, at para 27; *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Initial Order, September 9, 2011, at paras 17-19, 26-34 (**R-028**).

¹⁰⁵ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Twelfth report of the Monitor, August 8, 2012, Supreme Court of Nova Scotia, at para 56(a)(i) (**R-159**).

¹⁰⁶ Claimant’s Memorial, at paras 24, 26.

¹⁰⁷ Respondent’s Counter-Memorial, para 73, referring to *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Twelfth report of the Monitor, August 8, 2012, Supreme Court of Nova Scotia, at para 43 (**R-159**).

¹⁰⁸ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Second Report of the Monitor, Supreme Court of Nova Scotia, October 3, 2011, at para 15 (**C-120; R-030**).

¹⁰⁹ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Third Report of the Monitor, Supreme Court of Nova Scotia, October 26, 2011, at para 45(a) (**R-362**).

¹¹⁰ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Third Report of the Monitor, Supreme Court of Nova Scotia, October 26, 2011, at para 45 (c)-(f) (**R-362**).

¹¹¹ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor, January 13, 2012, at paras 17-19 (**C-150; R-031**).

¹¹² *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor, January 13, 2012, at para 19 (**C-150; R-031**).

acquisition of the Mill put forward by PWCC.¹¹³

93. When NPPH entered creditor protection, GNS announced that it would provide \$5 million in funding for the Mill¹¹⁴ to remain in “hot idle” – an expression signifying that its closing had been carried out “in a way that the plant has been taken out of active production in such a way as to permit a smooth resumption of production when circumstances permit”.¹¹⁵ In this way, the Mill could be sold as a going concern once NPPH’s cash ran out and it was no longer able to maintain the Mill in hot idle on its own.¹¹⁶ On March 16, 2012, GNS announced a further \$5.8 million in hot idle funding for the Mill.¹¹⁷
94. Further, GNS also created a \$14-million Forestry Infrastructure Fund (“**FIF**”) to facilitate forest management activities through NPPH as the intermediary between the province and independent contractors providing forestry services to the province.¹¹⁸ The agreement was declaredly part of an action plan to employ woodworkers, provide training programs and “keep the NewPage mill in Port Hawkesbury ready for a quick re-sale”.¹¹⁹ When GNS announced additional hot idle funding on March 16, 2012, it also announced an additional \$12 million in funding to the FIF.¹²⁰

95. [REDACTED]
[REDACTED]
[REDACTED] ¹²¹

¹¹³ Nova Scotia, Press Release, “Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready”, January 4, 2012 (**C-149**). See also *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor, January 13, 2012, at para 19 (**C-150; R-031**). *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Twelfth Report of the Monitor, August 9, 2012, at para 48 (**R-159**).

¹¹⁴ Nova Scotia, Press Release, “Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready”, January 4, 2012 (**R-048**). This funding was subject to “partial recourse to the assets of NPPH in certain limited circumstances and only if no going concern outcome is achieved”. See *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Seventh Report of the Monitor, Supreme Court of Nova Scotia, February 27, 2012, at paras 32-45 (**R-049**).

¹¹⁵ Respondent’s Statement of Defence, at para 45, referring to *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Report of the Proposed Monitor, Supreme Court of Nova Scotia, September 7, 2011, at para 32 (**R-046**).

¹¹⁶ Respondent’s Statement of Defence, at paras 44-46.

¹¹⁷ Nova Scotia, Press Release, “Province Protects Jobs, Keeps Mill Re-Sale Ready”, March 16, 2012 (**R-042**); Province of Nova Scotia, Backgrounder, “Provincial Support to former NewPage Port Hawkesbury Paper Mill”, March 16, 2012, at 2 (**R-043**).

¹¹⁸ Nova Scotia, Press Release, “Province Presents Forestry Infrastructure Plan”, September 20, 2011 (**R-039**).

¹¹⁹ Nova Scotia, Press Release, “Seven-point Woodlands Plan Keeps Plant Resale Ready”, September 9, 2011 (**C-116; R-038**).

¹²⁰ Nova Scotia, Press Release, “Province Protects Jobs, Keeps Mill Re-Sale Ready”, March 16, 2012 (**R-043**).

¹²¹ [REDACTED] (**R-146**).

2. Resolute's Decision not to Bid on the Mill

96. Along with PWCC and other interested parties, Resolute considered bidding on the Mill, but ultimately decided not to do so.¹²²

97. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹²³

98. [REDACTED]
[REDACTED]
[REDACTED]¹²⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹²⁶ [REDACTED]
[REDACTED]¹²⁷ [REDACTED]
[REDACTED]⁸

99. Non-binding proposals for the purchase of the Mill were due by September 28, 2011.¹²⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹³⁰ [REDACTED]
[REDACTED]

¹²² Respondent's Counter-Memorial, at para 77. See also Claimant's Memorial, at paras 28-33.

¹²³ [REDACTED] (C-107). See also, Claimant's Pre-Hearing Memorial, at para 13.

¹²⁴ [REDACTED] September 13, 2011 (R-358).

¹²⁵ [REDACTED] September 25-26, 2011 (R-359); see also generally [REDACTED] (C-119).

¹²⁶ [REDACTED] (C-119).

¹²⁷ [REDACTED] (C-118); [REDACTED] (C-119).

¹²⁸ [REDACTED] (C-118); [REDACTED] (C-119).

¹²⁹ Respondent's Counter-Memorial, at paras 85-86.

¹³⁰ [REDACTED] September 26, 2011 (R-360).

100. The Claimant alleges that GNS did not offer Resolute any of the benefits PWCC ultimately received when it was invited to bid on the Mill.¹³³ In response, the Respondent states that no potential purchaser of the Mill was offered financial assistance by GNS at that time.¹³⁴ Nonetheless, the Respondent notes that [REDACTED]

[REDACTED]¹³⁵

3. Negotiations between PWCC and GNS Prior to January 4, 2012

101. On October 24, 2011, PWCC submitted its letter of offer to pursue its acquisition of the Mill.¹³⁶ On October 28, 2011, once PWCC had been identified as one of the two final bidders for the Mill, it began discussions with GNS.¹³⁷ PWCC's letter of offer was subsequently sent to GNS and NSPI representatives.¹³⁸ GNS and PWCC also held a series of calls in November 2011 regarding the Mill's electricity rate, among other issues.¹³⁹ GNS also met with the other interested bidder (Paper Excellence) in November and December 2011.¹⁴⁰

102. On November 10, 2011, PWCC provided GNS and NSPI representatives with PWCC's October 24, 2011 offer letter, a September 2011 Confidential Information Memorandum, and an

¹³¹ [REDACTED] (R-360).

¹³² Claimant's Memorial, at para 2; Respondent's Counter-Memorial, at para 86; Claimant's Pre-Hearing Memorial, at paras 14-18.

¹³³ Claimant's Memorial, at para 220.

¹³⁴ Respondent's Counter-Memorial, at para 79.

¹³⁵ [REDACTED] (C-107); NewPage Port Hawkesbury Mill Confidential Information Memorandum, September 2011, at 50 (R-361).

¹³⁶ Email from R. Stern (Stern Partners) to R. Bennett and R. McAdam, re: NewPage Port Hawkesbury Mill, November 10, 2011, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1, at page 2912 of 3014 (C-127).

¹³⁷ Witness Statement of Duff Montgomerie, April 17, 2019, at para 23.

¹³⁸ Email from R. Stern (Stern Partners) to R. Bennett and R. McAdam, re: NewPage Port Hawkesbury Mill November 10, 2011, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1, at page 2912 of 3014 (C-127).

¹³⁹ Email from W. M. Nystrom to M. Coolican, R. Bennett and R. McAdam, Update re: Woodroom @ Port Hawkesbury, November 17, 2011, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1 pages 2899-2900 of 3014 (C-131); Email from W. M. Nystrom to M. Coolican, R. Bennett and R. McAdam, re: Port Hawkesbury Update re: 23 Nov. Call @ 4:00 pm, November 23, 2011, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1, at pages 2897-98 of 3014 (C-132); Email from W. M. Nystrom to R. McAdam, re: Port Hawkesbury Co-Gen Cost estimates, November 26, 2011, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1, at 2901-2903 (C-135).

¹⁴⁰ Witness Statement of Duff Montgomerie, April 17, 2019, at para 21.

October 2011 Investor/Management Presentation.¹⁴¹

103. On November 28, 2011, GNS and PWCC entered into an Indemnity Agreement, which [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴² [REDACTED]
[REDACTED]¹⁴³

104. [REDACTED]¹⁴⁴ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁵

105. In the Claimant's view, these interactions between PWCC and GNS demonstrate that "GNS negotiated with PWCC even before PWCC was declared the winning bidder".¹⁴⁶ The Respondent refutes this claim, noting that the "[REDACTED]"

[REDACTED]¹⁴⁷
[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁸

C. NEGOTIATIONS FOR THE PURCHASE OF THE MILL

1. The Plan Sponsorship Agreement and the Plan of Compromise and Arrangement

106. Once PWCC was selected as the preferred bidder in January 2012, PWCC also began discussions

¹⁴¹ Email from R. Stern (Stern Partners) to R. Bennett and R. McAdam, re: NewPage Port Hawkesbury Mill, November 10, 2011, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 1, at page 2912 of 3014 (C-127).

¹⁴² [REDACTED] at CAN000020_0001 (C-136).

¹⁴³ [REDACTED] at CAN000020_0004 (C-136).

¹⁴⁴ [REDACTED] (C-139).

¹⁴⁵ [REDACTED] at CAN 000019_0001 (C-139).

¹⁴⁶ Claimant's Memorial, at para 39.

¹⁴⁷ Respondent's Counter-Memorial, at para 98.

¹⁴⁸ Respondent's Counter-Memorial, at para 98, referring to Witness Statement of Duff Montgomerie, April 17, 2019, at para 25; [REDACTED] December 1, 2011 (R-149).

with various stakeholders including NPPH, the Mill's employees, NSPI, and GNS.¹⁴⁹

107. The negotiations between NPPH and PWCC culminated in an agreement (the “**Plan Sponsorship Agreement**”) whereby PWCC would act as the sponsor of a Plan of Compromise and Arrangement (the “**Plan of Arrangement**”) for NPPH under the CCAA.¹⁵⁰ The purpose of the Plan of Arrangement was to “complete a reorganization of [NPPH], by implementing [r]estructuring [t]ransactions [...] in order to enable [NPPH] to continue as a going concern”.¹⁵¹ Under the Plan Sponsorship Agreement, PWCC agreed to purchase the shares of NPPH for \$33 million subject to the conditions in the Plan of Arrangement being met.¹⁵² [REDACTED] Port Hawkesbury Paper Inc. (i.e. “PHP”, as defined above).¹⁵³
108. Under the Plan Sponsorship Agreement, the purchase of the Mill was contingent upon the fulfilment of certain conditions in the Plan of Arrangement.¹⁵⁴ For example, under the Plan of Arrangement, PWCC was required to: enter into “Provincial Agreements” with GNS, including a Sustainable Forest Management and Outreach Program Agreement (“**Outreach Agreement**”) and a Forest Utilization License Agreement (“**FULA**”); obtain the NSUARB’s approval of a negotiated LRR; and obtain an advance tax ruling (“**ATR**”) on the tax structure proposed pursuant to the limited partnership it intended to create with NSPI for ownership of the Mill.¹⁵⁵
109. On July 17, 2012, NPPH obtained the Court’s approval of the Plan Sponsorship Agreement.¹⁵⁶

¹⁴⁹ Respondent’s Counter-Memorial, at paras 99-103.

¹⁵⁰ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp. (**R-032**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 2), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit B: Plan Sponsorship Agreement (**R-033**).

¹⁵¹ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp., at s. 2.1 (**R-032**).

¹⁵² *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 2), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit B: Plan Sponsorship Agreement, at s. 9 (**R-033**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp., at s. 9.2 (**R-032**).

¹⁵³ [REDACTED] at CAN000013_0007 (**C-220**).

¹⁵⁴ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 2), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit B: Plan Sponsorship Agreement, at s. 9(1) (**R-033**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp., at s. 9.2 (**R-032**).

¹⁵⁵ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp., at s. 9.2 (e), (i) and (j) (**R-032**).

¹⁵⁶ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Meeting Order, Supreme Court of Nova Scotia, July 17, 2012 (**R-034**).

On August 15, 2012, NPPH's creditors voted in favour of the Plan of Arrangement.¹⁵⁷ On September 25, 2012, the Plan of Arrangement was sanctioned by the Court following certain amendments.¹⁵⁸

110. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

111. [REDACTED]
[REDACTED]¹⁶⁰

112. The Parties disagree as to whether the conditions under the Plan of Arrangement qualify as assistance measures that PWCC requested and GNS granted.¹⁶¹ Their interpretations as to the elements of GNS's [REDACTED] also differ. The following subsections detail the Parties' respective positions.

113. Notably, the Parties also disagree as to whether the LRR that PWCC obtained from NSPI should be included as an assistance measure that GNS provided to PWCC. The Claimant argues that the LRR was "integrally connected" to the overall set of measures PWCC received (and is therefore attributable to GNS),¹⁶² whereas the Respondent qualifies the LRR as the product of independent negotiations between PWCC and NSPI.¹⁶³ The Parties' positions specific to the LRR are set out in Section III.C.3.(b) of this Award.

2. GNS's [REDACTED] and Other Alleged Assistance Measures

(a) The Claimant's Position

114. The Claimant contends that PWCC's "demands" for assistance from GNS were based on its

¹⁵⁷ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order, Supreme Court of Nova Scotia, September 25, 2012, at (b), (c) (**R-035**).

¹⁵⁸ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order, Supreme Court of Nova Scotia, September 25, 2012 (**R-035**).

¹⁵⁹ [REDACTED] at 5-10 (**R-161**).

¹⁶⁰ [REDACTED] at CAN000002_0001 (**C-182**).

¹⁶¹ Claimant's Memorial, at para 50; Respondent's Counter-Memorial, at para 106.

¹⁶² Claimant's Memorial, at paras 71, 74, 168, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Notice of Application for Approval Of A Load Retention Rate, NSUARB, April 27, 2012, at para 8 (**C-164**).

¹⁶³ Respondent's Counter-Memorial, at paras 183-184.

ambition [REDACTED],¹⁶⁴ [REDACTED] GNS when it announced its assistance to PWCC for the PHP Mill.¹⁶⁵ The Claimant suggests that PWCC specifically sought: a \$40 million credit facility; a \$24 million forgivable loan; a \$1.5 million workforce training grant; a \$1 million marketing grant; \$38 million for forestry management through an Outreach Agreement; a twenty-year FULA; \$20 million for the purchase of more than 50,000 acres of land; and relief from all pension liabilities.¹⁶⁶ The Claimant also takes into account the hot idle funding that GNS provided beyond “the originally-planned three months”,¹⁶⁷ the “[REDACTED]”¹⁶⁸ as well as the favourable LRR that PWCC obtained for PHP.¹⁶⁹ The Claimant considers these measures collectively to be “Assistance Measures” that GNS provided PWCC. The Claimant addresses these Assistance Measures individually in turn.

i. The [REDACTED]

115. The Claimant notes that pursuant to [REDACTED]
[REDACTED]¹⁷⁰ [REDACTED]
[REDACTED]
[REDACTED]¹⁷²

116. The Claimant notes [REDACTED]
[REDACTED]¹⁷³ [REDACTED]
[REDACTED]

¹⁶⁴ Claimant’s Memorial, at para 50, referring to [REDACTED] at CAN000004_0009 (C-163). See also, Claimant’s Memorial, at paras 52-54.

¹⁶⁵ Claimant’s Memorial, at para 89, referring to Nova Scotia Premier’s Office, Press Release, “Province Invests in Jobs, Training and Renewing the Forestry Sector”, August 20, 2012 (C-183).

¹⁶⁶ Claimant’s Memorial, at paras 71, 91.

¹⁶⁷ Claimant’s Memorial, at paras 72-73. The Claimant states “Resolute understands that the Tribunal has determined that the Hot Idle and Forestry Infrastructure funding cannot form part of Resolute’s claim. Hot Idle and Forestry Infrastructure funding are discussed here as part of the facts and circumstances giving rise to the claim, particularly for the millions in funding that GNS provided beyond the time when it might have benefited NewPage as the seller because the buyer and ultimate beneficiary had been chosen”. See Claimant’s Memorial, at para 97, referring to PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2 (2011-12), at 70 (C-147).

¹⁶⁸ Claimant’s Memorial, at para 99, referring to Preparatory Activities Agreement, August 27, 2012, at CAN000120_0013 (C-190).

¹⁶⁹ The LRR is described in further detail in Part III.C.(3)(b).

¹⁷⁰ [REDACTED] at CAN000002_0001 (C-182).

¹⁷¹ [REDACTED] at CAN000002_0002 (C-182).

¹⁷² [REDACTED] at CAN000002_0002 (C-182).

¹⁷³ [REDACTED] at CAN000002_0001 (C-182).

174 [REDACTED]

ii. Outreach Agreement

117. The Claimant notes that GNS and PWCC entered into an agreement under which GNS would reimburse PHP up to \$3.8 million per year for ten years to fund compensable activities related to sustainable harvesting and forest land management by PHP.¹⁷⁵ The Claimant highlights that under the agreement [REDACTED]

[REDACTED]¹⁷⁶ and that the agreement [REDACTED]

[REDACTED]¹⁷⁷

iii. Forest Utilization License Agreement

118. According to the Claimant, GNS and PHP also entered into a 20-year FULA allowing PHP to harvest 400,000 GMT/year¹⁷⁸ from Crown land and an additional 175,000 tons per year to fuel the Biomass Plant from Crown land.¹⁷⁹ This right was conditional upon PHP purchasing 200,000 GMT/year of pulpwood from private suppliers.¹⁸⁰

119. The Claimant takes issue with the provision under which GNS would pay PHP a “silviculture fee” of \$3 per cubic meter for all harvested softwood and Biomass Fuel, and \$0.60 per cubic meter for all harvested hardwood product other than Biomass Fuel, subject to change.¹⁸¹ It claims that according to this “deal”, “PHP could receive more in silviculture payments than it was paying for stumpage, which happened in 2017, essentially making the Crown timber free”.¹⁸²

iv. Land Purchase Agreement

120. Through PWCC’s purchase of NPPH’s assets, the Claimant states that PWCC would acquire

¹⁷⁴ [REDACTED] (C-182).

¹⁷⁵ [REDACTED] (C-206). See also Nova Scotia Premier’s Office, Press Release, “Province Invests in Jobs, Training and Renewing the Forestry Sector”, August 20, 2012 (C-183).

¹⁷⁶ Claimant’s Memorial, at para 94, referring to [REDACTED] (C-206).

¹⁷⁷ Claimant’s Memorial, at para 94.

¹⁷⁸ “GMT” refers to “green metric tonne”. See Forest Utilization License Agreement (Redacted), September 27, 2012, at 2 (C-207).

¹⁷⁹ Forest Utilization License Agreement (Redacted), September 27, 2012, at ss. 4.5 and 5.1 (C-207).

¹⁸⁰ Forest Utilization License Agreement (Redacted), September 27, 2012, at 1 (C-207).

¹⁸¹ Forest Utilization License Agreement (Redacted), September 27, 2012, at 3 (C-207).

¹⁸² Claimant’s Memorial, at para 96. The Claimant specifies that there was no “prescribed monitoring” of the silviculture expenditures. See The Chronicle Herald, News Release, “Port Hawkesbury mill’s deal with province raises concern”, May 28, 2018 (C-170).

“roughly” 50,000 acres of land.¹⁸³ [REDACTED]

[REDACTED]¹⁸⁴ The Claimant asserts that GNS’s purchase “effectively reduced PWCC’s purchase price for the mill and related assets (such as the \$1 billion in tax losses)” to \$13 million.¹⁸⁵ It also contrasts the \$20 million purchase price to the [REDACTED] GNS had allegedly previously agreed to pay NPPH “for essentially the same land” [REDACTED]¹⁸⁶

v. Relief from pension liabilities

121. The Claimant suggests that “PWCC refused to assume the unfunded pension liability of over \$100 million”.¹⁸⁷ To this end, it proposes that the GNS’s Natural Resources Minister was quoted as stating that “[e]verything is being considered”, indicating that GNS would comply with PWCC’s demands.¹⁸⁸

vi. Hot idle and forestry infrastructure funding

122. On January 4, 2012, GNS announced that it would provide an expected \$5 million in hot idle funding to keep the Mill re-sale ready through February and March while negotiations took place with PWCC as the successful bidder.¹⁸⁹ This funding was subsequently confirmed, subject to “partial recourse to the assets of NPPH in certain limited circumstances and only if no going concern outcome is achieved”.¹⁹⁰ On March 16, 2012, GNS also announced that it would provide an additional \$5.8 million in hot idle funding to support the sale of the Mill until the end of September 2012.¹⁹¹
123. As set out in Paragraph 94 above, when NPPH was placed under creditor protection in September 2011, the province created a \$14 million FIF to facilitate forest management activities through

¹⁸³ Claimant’s Memorial, at para 97.

¹⁸⁴ [REDACTED]
[REDACTED] (C-209).

¹⁸⁵ Claimant’s Memorial, at para 97.

¹⁸⁶ Claimant’s Memorial, at para 98, referring to [REDACTED]
[REDACTED] (C-155).

¹⁸⁷ Claimant’s Memorial, at para 49.

¹⁸⁸ Claimant’s Memorial, at para 49, citing The Canadian Press, News Release, “Pacific West now lone bidder for idled NewPage paper mill in Cape Breton”, January 4, 2012 (C-148).

¹⁸⁹ Nova Scotia Department of Natural Resources, Press Release, “Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready”, January 4, 2012 (R-048).

¹⁹⁰ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Seventh Report of the Monitor, Supreme Court of Nova Scotia, February 27, 2012, at para 38 (R-049).

¹⁹¹ Nova Scotia Premier’s Office, Press Release, “Province Protects Jobs, Keeps Mill Re-Sale Ready”, March 16, 2012 (R-042); Province of Nova Scotia, Backgrounder, “Provincial Support to former NewPage Port Hawkesbury Paper Mill”, March 16, 2012, at 2 (R-043).

NPPH as the intermediary between the province and independent contractors providing forestry services to the province.¹⁹² On March 16, 2012, GNS announced an additional \$12 million in funding to the FIF.¹⁹³ Also in March 2012, GNS amended the FIF Agreement.¹⁹⁴

124. The Claimant argues that the funds GNS initially supplied to keep the Mill “in hot idle with a supply chain intact”¹⁹⁵ when NPPH began CCAA proceedings were meant to last three months but were extended for more than a year, with “most of it—\$22.8 million of the total \$36.8 million [...] coming after the Monitor declared PWCC was the winning bidder”.¹⁹⁶ As such, it contends that this additional funding constitutes an Assistance Measure among the others GNS provided to PWCC.¹⁹⁷

vii. Municipal property tax reduction

125. The Claimant pleads that GNS “provided municipal tax breaks reducing Port Hawkesbury property taxes from \$2.6 million annually to \$1.3 million”¹⁹⁸ by way of targeted legislation.¹⁹⁹ It claims that pursuant to NPPH’s existing agreement with Richmond County, PWCC would have been responsible for \$2.6 million per year from 2013-2016 once it purchased the Mill.²⁰⁰ However, PWCC allegedly reached a new tax agreement with the county that reduced its property tax in half, which ultimately received legislative approval by the province.²⁰¹

¹⁹² Nova Scotia Department of Natural Resources, Press Release, “Province Presents Forestry Infrastructure Plan”, September 20, 2011 (**R-039**).

¹⁹³ Nova Scotia Premier’s Office, Press Release, “Province Protects Jobs, Keeps Mill Re-Sale Ready”, March 16, 2012 (**R-043**).

¹⁹⁴ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Eight Report of the Monitor, Supreme Court of Nova Scotia, March 26, 2012, at paras 56-57 (**R-044**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Ninth Report of the Monitor, Supreme Court of Nova Scotia, May 28, 2012, at para 46 (**R-045**).

¹⁹⁵ Claimant’s Memorial, at para 72, citing Nova Scotia Premier’s Office, Press Release, “Seven-point Woodlands Plan Keeps Plant Resale Ready”, September 9, 2011 (**C-116**).

¹⁹⁶ Claimant’s Memorial, at para 73, referring to Respondent’s Statement of Defence, at paras 42, 46; Truro Daily News, News Release, “Dexter under fire after agreement reached to open mill”, September 24, 2012 (**C-201**).

¹⁹⁷ Claimant’s Memorial, at paras 72-74.

¹⁹⁸ Claimant’s Memorial, at paras 115, 219.

¹⁹⁹ Claimant’s Reply Memorial, at para 176.

²⁰⁰ Claimant’s Reply Memorial, at para 176, referring to *An Act Respecting the Taxation of Port Hawkesbury Paper GP Ltd. by the Municipality of the County of Richmond*, SNS 2006, c. 51 (2006) (**C-303**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Sixteenth Report of the Monitor, Supreme Court of Nova Scotia, September 25, 2012, at para 28 (**C-204**).

²⁰¹ Claimant’s Reply Memorial, at para 179, referring to *An Act Respecting the Taxation of Port Hawkesbury Paper GP Ltd. by the Municipality of the County of Richmond*, SNS 2006, c. 51 (amended in 2012) (**C-303**).

viii. Indemnity Agreement

126. According to the Claimant, GNS's assistance must be considered in addition to the Indemnity Agreement [REDACTED]

[REDACTED]
[REDACTED]²⁰² According to the Claimant, [REDACTED]
[REDACTED]
[REDACTED]²⁰³

ix. Preparatory Activities Agreement

127. [REDACTED]
[REDACTED] (the "**Preparatory Activities Agreement**" or the "**Ramp-Up Agreement**").²⁰⁴ [REDACTED]
[REDACTED]²⁰⁵ The Claimant argues that [REDACTED]
[REDACTED]²⁰⁶

(b) The Respondent's Position

128. Contrary to the Claimant, the Respondent does not consider the aforementioned measures as an ensemble. Rather, it distinguishes GNS's [REDACTED] as the only offer of financial assistance PWCC received. In the Respondent's view, the other agreements and measures challenged by the Claimant were not assistance provided by GNS to PWCC's benefit.²⁰⁷ The Respondent notes that the [REDACTED]

[REDACTED]²⁰⁸ [REDACTED]
[REDACTED]
[REDACTED]²⁰⁹

²⁰² Claimant's Memorial, at para 42, referring to [REDACTED] (C-136).

²⁰³ Claimant's Reply Memorial, at para 181.

²⁰⁴ Preparatory Activities Agreement, August 27, 2012, at CAN000120_0013 (C-190).

²⁰⁵ Preparatory Activities Agreement, August 27, 2012, at CAN000120_0013 (C-190).

²⁰⁶ Claimant's Memorial, at para 99.

²⁰⁷ Respondent's Counter-Memorial, at paras 111-139.

²⁰⁸ Hearing on the Merits and Damages, November 9, 2020, at 192:14-193:12.

²⁰⁹ Hearing on the Merits and Damages, November 9, 2020, at 193:13-184:2.

i.

129. The Respondent contends that GNS and PWCC agreed to the terms of a financial assistance package [REDACTED] which consisted of:

[illegible]

130. T [REDACTED] 211

ii. Outreach Agreement

131. The Respondent submits that the purpose of the Outreach Agreement was to pursue the province's Natural Resource Strategy.²¹² The Respondent explains that it acquired these services for public purposes.²¹³

132. The Respondent clarifies that the [REDACTED]
[REDACTED] 214

133. The Respondent also highlights the distinction between the Outreach Agreement and the FULA

[REDACTED]

[REDACTED]

[REDACTED] 215

²¹⁰ Respondent's Counter-Memorial, at para 111.

²¹¹ Respondent's Counter-Memorial, at para 112, referring to [REDACTED] (C-182).

212 Respondent's Counter-Memorial, at para 131, referring to Witness Statement of Julie Towers, April 17, 2019, at para 39.

²¹³ Hearing on the Merits and Damages, November 9, 2020, at 191:9-11.

214 Respondent's Counter-Memorial, at para 131, referring to [REDACTED] (C-206).

215 Respondent's Counter-Memorial, at para 132.

iii. Forest Utilization License Agreement

134. Contrary to what the Claimant suggests, the Respondent explains that the FULA was not concluded at PWCC's request or for PWCC's benefit.²¹⁶ According to the Respondent, the FULA is the result of GNS's initiative to modernize the province's forest licensing system from the pre-existing Stora Act regime.²¹⁷ It provides GNS with greater authority to manage forests on Crown land and aligns with its Natural Resources Strategy.²¹⁸
135. Furthermore, the Respondent maintains that the Claimant misunderstands the alleged benefits PWCC received from the FULA.²¹⁹ According to the Respondent, the point of the FULA was to place a cap on how much Crown timber could be used for PHP's operations and to encourage greater use of timber from private woodlots than the previous regime did.²²⁰
136. The Respondent also clarifies the difference between the stumpage fees and the silviculture payments, explaining that PWCC did not receive its Crown timber for free (but had to pay for it at the rate prescribed in the FULA) and that the FULA required the PHP Mill to incur additional expenses for silviculture activities (which expenditures were audited annually).²²¹ The Respondent emphasises that [REDACTED]
[REDACTED]²²²

iv. Land Purchase Agreement

137. The Respondent takes issue with the Claimant's characterization of the Land Purchase Agreement, which allegedly "reduced PWCC's effective price for the mill to \$13 million".²²³ The Respondent argues that the purchase aligned with the province's "long-standing goal of increasing its share of forest ownership in the Province",²²⁴ and [REDACTED] 0

²¹⁶ Respondent's Counter-Memorial, at para 130, referring to Claimant's Memorial, at paras 95-96.

²¹⁷ Respondent's Counter-Memorial, at para 121; Hearing on the Merits and Damages, November 9, 2020, at 191:17-192:3; Hearing on the Merits and Damages, October 19, 2021, at 452:9-453:9.

²¹⁸ Respondent's Counter-Memorial, at paras 121, 129. See also Nova Scotia Department of Natural Resources, "The Path We Share: A Natural Resources Strategy for Nova Scotia 2011-2020", August 2011 (R-202).

²¹⁹ Respondent's Counter-Memorial, at para 124.

²²⁰ Respondent's Counter-Memorial, at para 126; Hearing on the Merits and Damages, October 19, 2021, at 453:18-21.

²²¹ Respondent's Counter-Memorial, at para 128, referring to [REDACTED] (R-192).

²²² Respondent's Counter-Memorial, at para 128; Hearing on the Merits and Damages, October 19, 2021, at 454:5-455:6.

²²³ Respondent's Counter-Memorial, at para 118, citing Claimant's Memorial, at paras 93, 115.

²²⁴ Respondent's Counter-Memorial, at para 119; Hearing on the Merits and Damages, October 18, 2021, at 181:11-182:6.

225 [REDACTED]

138. With respect to [REDACTED] GNS agreed to pay PWCC in comparison to its previous agreement with NPPH for the same land,²²⁶ the Respondent specifies that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 227 [REDACTED]

[REDACTED] 228

v. Relief from pension liabilities

139. Referencing the Claimant's reliance on newspaper articles to allege that PWCC "refused to assume the unfunded pension liability of over \$100 million",²²⁹ the Respondent argues that the Claimant's failure to plead with specificity is enough for the Tribunal to disregard this alleged measure.²³⁰ Later, the Respondent clarified that GNS never took on the pension liability, but proposed legislation "in order to help the workers and pensioners avoid an immediate windup hit of up to 30 percent or more of their pensions".²³¹

vi. Municipal property tax reduction

140. The Respondent argues that the new municipal property tax rate for the Mill was a "readjustment to account for reduced operations and asset use at the mill that conferred no benefit on PWCC".²³² Nonetheless, the Respondent contends that it was still an amount that was approximately twice what provincial law would have otherwise required PWCC to pay.²³³ Moreover, it refers to Resolute's negotiations for a reduced municipal property tax rate for Bowater Mersey as evidence

225 Respondent's Counter-Memorial, at para 119, referring to [REDACTED]
[REDACTED]
[REDACTED] (R-149).

226 Respondent's Counter-Memorial, at para 120, referring to Claimant's Memorial, at para 98.

227 Respondent's Counter-Memorial, at para 120, referring to [REDACTED]
[REDACTED] (R-216).

228 [REDACTED]
[REDACTED] (C-209).

229 Respondent's Counter-Memorial, at para 138, referring to Claimant's Memorial, at para 49; Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 26.

230 Respondent's Counter-Memorial, at para 138.

231 Hearing on the Merits and Damages, October 19, 2021, at 446:16-447:4.

232 Respondent's Counter-Memorial, at para 134.

233 Respondent's Counter-Memorial, at para 135, referring to US DOC, Supercalendered Paper from Canada, Issues and Decision Memorandum, October 13, 2015, at 54 (R-368).

that these negotiations are not uncommon.²³⁴

vii. Indemnity Agreement

141. With respect to the Indemnity Agreement, the Respondent underscores that [REDACTED]
[REDACTED]²³⁵ Accordingly,
[REDACTED]
[REDACTED]²³⁶ It argues that the Claimant fails to demonstrate [REDACTED]
[REDACTED]⁷

viii. Preparatory Activities Agreement

142. The Respondent [REDACTED]
[REDACTED]²³⁹ The Respondent explains that [REDACTED]
[REDACTED]²⁴⁰ It explains that [REDACTED]
[REDACTED]
[REDACTED]²⁴¹ [REDACTED]²⁴²

3. [REDACTED] and the Negotiations for a Load
Retention Rate

143. On April 27, 2012, PWCC and NSPI filed an application for approval of their negotiated LRR to the NSUARB.²⁴³ PWCC and NSPI intended on creating a new limited partnership that would own

²³⁴ Respondent's Counter-Memorial, at para 135, referring to [REDACTED]
[REDACTED] (R-149).

²³⁵ [REDACTED] at ss. 1.1, 1.7 (C-136).

²³⁶ Respondent's Counter-Memorial, at para 136, referring to [REDACTED]
[REDACTED] at CAN000015_0011 (C-238).

²³⁷ Respondent's Counter-Memorial, at para 136.

²³⁸ Respondent's Counter-Memorial, at para 137, referring to Preparatory Activities Agreement, August 27, 2012, at s. 2(b) (C-190). [REDACTED]
[REDACTED] See Respondent's
Counter-Memorial, at fn. 259, referring to [REDACTED]
[REDACTED] (R-269).

²³⁹ Claimant's Memorial, at para 99.

²⁴⁰ Respondent's Counter-Memorial, at para 137.

²⁴¹ Respondent's Counter-Memorial, at para 137, referring to Preparatory Activities Agreement, August 27, 2012, at 1-2 (definitions of "Additional Financial Assistance" and "Remaining Financial Assistance") (C-190). See also Preparatory Activities Agreement, August 27, 2012, at CAN0000120_21 (C-190).

²⁴² Respondent's Counter-Memorial, at para 137, referring to Claimant's Memorial, at para 219.

²⁴³ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Application, NSUARB, April 27, 2012 (C-012; C-166; R-167); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 9 (C-184; R-062). See Section III.C.3.(b) for the facts pertaining to the LRR Application.

- the PHP Mill.²⁴⁴ NSPI would contribute certain assets for the use of the partnership and would receive dividends to recover the incremental cost of power to the Mill and contribute to NSPI's fixed costs.²⁴⁵ This tax structure allowed the partnership to self-supply electricity from NSPI, so that NSPI would receive inter-corporate dividends, which would not be subject to income tax.²⁴⁶
144. Sanction by the Court of the Plan of Arrangement was contingent on a favourable ATR of PWCC and NSPI's proposed tax structure by the Canada Revenue Agency ("CRA").²⁴⁷
145. On September 12, 2012, the CRA informed PWCC and NSPI that it denied the application for approval of this tax structure.²⁴⁸
146. Following the CRA's rejection of the proposed tax structure, PWCC and NSPI amended their application to the NSUARB,²⁴⁹ and [REDACTED]
[REDACTED].²⁵⁰
147. As stated above, the Plan of Arrangement was subsequently amended and approved by the Court on September 25, 2012.²⁵¹ The sale of the Mill came into effect on September 28, 2012²⁵² and PHP resumed operations in early October 2012.²⁵³ However, the Claimant contends that PHP did not start producing at full capacity until later in 2013.²⁵⁴
148. The following sub-section details the Parties' positions with respect to certain elements of the
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- ²⁴⁴ Claimant's Memorial, at para 76; Respondent's Counter-Memorial, at para 167.
- ²⁴⁵ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 17-20, 34, 53 (**C-184; R-062**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Pre-filed Evidence of Pacific West Commercial Corporation, April 27, 2012, at 5-8 (**C-165**).
- ²⁴⁶ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 17 (**C-184; R-062**).
- ²⁴⁷ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1), Supreme Court of Nova Scotia, July 6, 2012, at Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp, s. 9.2 (i) (**R-032**).
- ²⁴⁸ Claimant's Memorial, at para 100.
- ²⁴⁹ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Amended Decision, NSUARB, September 27, 2012 (**C-208; R-063**). See Section III.C.3.(b) for the facts pertaining to the LRR Application.
- ²⁵⁰ [REDACTED] (**C-195**).
- ²⁵¹ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order, Supreme Court of Nova Scotia, September 25, 2012, at paras (a)-(h), 3 (**R-035**).
- ²⁵² *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order, Supreme Court of Nova Scotia, September 25, 2012, at Schedule A: Amended and Restated Plan of Compromise and Arrangement, at art. 1.1 (**R-035**); *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Monitor's Certificate, Supreme Court of Nova Scotia, September 28, 2012 (**R-036**).
- ²⁵³ Truro Daily News, News Release, "Paper rolling off line at mill", October 4, 2012 (**R-098**); Cape Breton Post, News Release, "Paper rolling off line at mill", October 3, 2012 (**R-099**).
- ²⁵⁴ Claimant's Memorial, at para 138, citing Respondent's Reply Memorial on Jurisdiction, at para 93.

██████████ The next sub-section details the negotiations of and the NSUARB's subsequent approval of the LRR, as well as the Parties' positions with respect to whether the LRR should be considered a GNS Assistance Measure.

(a) The ██████████

i. The Claimant's Position

149. In its ██████████ GNS amended two aspects of its original offer: (i) the \$40 million credit facility and the (ii) income tax losses.²⁵⁵

a. \$40 million credit facility

150. The Claimant notes that the ██████████
 ██████████²⁵⁶ ██████████
 ██████████
 ██████████²⁵⁷ ██████████
 ██████████²⁵⁸ ██████████
 ██████████
 ██████████⁹

b. Income tax losses

151. ██████████
 ██████████
 ██████████²⁶⁰ ██████████
 ██████████²⁶¹ Additionally, ██████████
 ██████████
 ██████████⁶² ██████████
 ██████████²⁶³ According to the Claimant, this ability to “garner tax savings in Nova Scotia for assets in other provinces” was a benefit accorded by GNS to PWCC.²⁶⁴

²⁵⁵ Claimant's Memorial, at para 103.

²⁵⁶ ██████████ at CAN000003_0002-0004 (C-195).
²⁵⁷ ██████████ at CAN000003_0003 (C-195). See also Claimant's Memorial, at para 104.

²⁵⁸ ██████████ at CAN000003_0003 (C-195).

²⁵⁹ ██████████ at CAN000003_0003-0004 (C-195).

²⁶⁰ ██████████ at CAN000002_0005-0006 (C-182).

²⁶¹ ██████████ at CAN000003_0006 (C-195).

²⁶² ██████████ at CAN000003_0006 (C-195).

²⁶³ ██████████ at CAN000003_0006 (C-195).

²⁶⁴ Claimant's Memorial, at paras 115, 219.

ii. The Respondent's Position

152. The Respondent argues that the factual details of the changes to the [REDACTED] are “immaterial to the merits of this arbitration since the specific terms of the revised financing agreement do not change the assessment of whether there is a violation of NAFTA Articles 1102 or 1105”.²⁶⁵ Nevertheless, it proceeds to clarify the Claimant's alleged misrepresentations with respect to the [REDACTED]

a. \$40 million credit facility

153. According to the Respondent, the rationale for the changes to the terms of the loan was the following: “[REDACTED]
[REDACTED]
[REDACTED]”.²⁶⁶ GNS was of the opinion that the additional tax revenues from NSPI placed it in a “roughly equivalent situation as it would have been by waiting for full reimbursement from PWCC”.²⁶⁷

b. Income tax losses

154. The Respondent pleads that the revised income tax losses provisions [REDACTED]⁸ rather than as a benefit handed to PWCC.²⁶⁹ [REDACTED]
[REDACTED]
[REDACTED]²⁷⁰ In the Respondent's opinion, this [REDACTED]²⁷¹

(b) PWCC's Negotiations for a Load Retention Rate

155. Once PWCC was selected as one of the two going-concern bidders for the Mill, PWCC began negotiations with NSPI for an LRR.²⁷²

156. The Department of Energy of GNS engaged Mr. Todd Williams of Navigant Consulting to assist PWCC and NSPI in their negotiations.²⁷³ The Parties disagree as to Mr. Williams' role in the

²⁶⁵ Respondent's Counter-Memorial, at para 114.

²⁶⁶ Respondent's Counter-Memorial, at para 117, referring to Witness Statement of Jeannie Chow, April 17, 2019, at para 9.

²⁶⁷ Respondent's Counter-Memorial, at para 117.

²⁶⁸ Respondent's Counter-Memorial, at para 116, referring to Witness Statement of Jeannie Chow, April 17, 2019, at paras 10, 16.

²⁶⁹ Respondent's Counter-Memorial, at para 116, referring to Claimant's Memorial, at paras 219, 253.

²⁷⁰ [REDACTED] at CAN000003_0005 (C-195).

²⁷¹ Respondent's Counter-Memorial, at para 116.

²⁷² Witness Statement of Murray Coolican, April 17, 2019, at para 11.

²⁷³ Witness Statement of Murray Coolican, April 17, 2019, at paras 14-16.

negotiations. Their positions are developed in Section V of this Award.

157. To recall, PWCC and NSPI proposed to create a limited partnership that would own the Mill.²⁷⁴ Under this partnership, NSPI would provide certain assets to the use of the partnership, and would receive dividends to recover the incremental cost of supplying the power to the Mill and contribute to its fixed costs.²⁷⁵ This tax structure allowed the partnership to self-supply electricity from NSPI, so that NSPI would receive inter-corporate dividends, which would not be subject to income tax.²⁷⁶ It was ultimately denied by the CRA in September 2012.²⁷⁷
158. On April 27, 2012, PWCC and NSPI filed an application with the NSUARB for approval of their negotiated LRR and dividend calculation.²⁷⁸
159. The NSUARB expressed concern over two issues prior to approving the LRR. The first was the concern that other ratepayers would bear the cost of obtaining additional renewable energy to meet the standards set by the RES Regulations due to the PHP Mill returning to the grid (the “**RES Regulations Issue**”).²⁷⁹ To recall, the RES Regulations required that in 2011-2012, 5% of NSPI’s total sales of energy be renewable energy supplied by independent power producers.²⁸⁰ This requirement increased to 10% in 2013 and 25% in 2015, but allowed NSPI to acquire additional renewable energy from its own generation facilities as well.²⁸¹
160. The second of the NSUARB’s concerns related to the operation of a Biomass Plant (the “**Biomass Plant Issue**”) at the PHP Mill.²⁸² While the Mill was still under NPPH’s ownership, NSPI negotiated an agreement with NPPH to build a cogeneration power plant around the biomass-

²⁷⁴ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Application, NSUARB, April 27, 2012, at 1 (**C-012; C-166; R-167**).

²⁷⁵ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 17-20, 34, 53 (**C-184; R-062**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Pre-filed Evidence of Pacific West Commercial Corporation, April 27, 2012, at 5-8 (**C-165**). See also Claimant’s Memorial, at para 76; Respondent’s Counter-Memorial, at para 167.

²⁷⁶ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 17 (**C-184; R-062**).

²⁷⁷ Claimant’s Memorial, at para 100.

²⁷⁸ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Application, NSUARB, April 27, 2012 (**C-012; C-166; R-167**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 9 (**C-184; R-062**).

²⁷⁹ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Excerpts from Transcript of NSUARB Hearing, July 16, 2012 at 159-161 (**C-177**).

²⁸⁰ *Renewable Energy Standard Regulations*, N.S. Reg. 35/2007, at ss. 5(1), 5(3), 6(1), 6(3), 7(2)(d) (**R-171**).

²⁸¹ *Renewable Energy Standard Regulations*, N.S. Reg. 155/2010, at ss. 4-6 (**R-179**).

²⁸² *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 181-183 (**C-184; R-062**).

fired boiler at the Mill.²⁸³ According to the project, NSPI would own the Biomass Plant and the renewable energy it produced, and NPPH would use the steam it generated for the Mill's operations.²⁸⁴ This agreement allowed NSPI "to meet its RES commitments in a planned and cost-effective manner which is in the interests of NSPI customers and our Province".²⁸⁵ The project was approved on October 14, 2010.²⁸⁶

161. When ownership of the Mill transferred to PWCC, NSPI negotiated an agreement with PWCC whereby NSPI would continue to own the Biomass Plant and deliver steam to PHP.²⁸⁷ The latter would also pay for the fuel necessary to generate the steam it needed.²⁸⁸
162. The Claimant asserts that the Biomass Plant would need to run full-time for the sole purpose of producing steam for PHP.²⁸⁹ The NSUARB stated that it would not approve the LRR without controls on additional costs to ratepayers arising from the Biomass Plant operations.²⁹⁰
163. On July 20, 2012, GNS sent a letter to the NSUARB (the "**July 2012 Letter**") addressing the two issues:

Incremental RES issue

Government Policy

The Government created the Renewable Electricity Standards to achieve a number of objectives: the obligation to meet a number of targets and the requirement that the provision of electricity come from specific technologies, and come from both Independent Power Producers as well as NSPI. Accordingly the Government has enabled the procurement of new sources to enable all of these objectives to be met. The Government is confident that there is enough RES supply coming on-line that the mill-load will not trigger an incremental RES cost over the term of the proposed mechanism.

Government Commitment

The Government commits to ensuring that if the mill load does trigger an additional RES obligation during the term of the proposed

²⁸³ *In re An Application by Nova Scotia Power Inc.*, Application (Redacted) for Approval of Capital Work Order CI 39029, Port Hawkesbury Biomass Project, NSUARB, April 9, 2011, at 1 (**R-182**).

²⁸⁴ *In re An Application by Nova Scotia Power Inc.*, Decision, NSUARB, October 14, 2010, at para 9 (**R-184**).

²⁸⁵ *In re An Application by Nova Scotia Power Inc.*, Application (Redacted) for Approval of Capital Work Order CI 39029, Port Hawkesbury Biomass Project, NSUARB, April 9, 2011, at 35:21-22 (**R-182**).

²⁸⁶ *In re An Application by Nova Scotia Power Inc.*, Decision, NSUARB, October 14, 2010, at paras 112, 164 (**R-184**).

²⁸⁷ *Re Pacific West Commercial Corporation*, Shared Services Agreement, M04862 P-8, at Preamble, para 5.2.2 (**R-412**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 34(1), 156 (**C-184**; **R-062**).

²⁸⁸ *Re Pacific West Commercial Corporation*, Shared Services Agreement, M04862 P-8, at para 7.1 and Schedules 9 & 10 (**R-412**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 34(1), 156 (**C-184**; **R-062**).

²⁸⁹ Claimant's Memorial, at para 84.

²⁹⁰ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 181-183 (**C-184**; **R-062**).

mechanism, and if this results in incremental costs, then the Province guarantees that neither PWCC nor other ratepayers will be required to pay these incremental costs.²⁹¹

Biomass Plant issue

Government Policy

Government policy has always been supportive of using biomass for combined heat and power. In 2011, the Government conducted a public consultation on changes to the Renewable Energy Standard Regulations. One of the proposed amendments to the regulations creates a requirement that a portion of the renewable electricity purchased to meet the standards be firm. Firm renewable generation enhances system reliability and facilitates the balancing of non-firm intermittent wind generation. This requirement would result in the obligation to run the biomass plant to achieve this objective, whether the mill is in operation or not. The policy intention has not changed.

Government Commitment

The Government commits to ensuring that PWCC receives the full benefit of the proposed arrangement it reached with Nova Scotia Power Inc. This will be accomplished as planned, through finalization of amendments to the Renewable Energy Standard Regulations so that the Port Hawkesbury CHP [sic] plant is operated as a base load and is deemed must run or we will address the issue through an equivalent solution that meets the objectives of the proposed arrangement.²⁹²

164. The Parties' positions regarding the purpose and influence of this letter on the NSUARB's approval of the LRR are developed in forthcoming sections.²⁹³
165. On August 20, 2012, the NSUARB approved the LRR, subject to receiving an ATR from the CRA.²⁹⁴
166. As mentioned above,²⁹⁵ the CRA subsequently refused the ATR, denying the proposed dividend tax structure.²⁹⁶ Accordingly, on September 22, 2012, PWCC and NSPI filed an application to

²⁹¹ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing, NSUARB, July 20, 2012 (C-179); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 178 (C-184; R-062).

²⁹² *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing, NSUARB, July 20, 2012 (C-179); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 178-179 (C-184; R-062).

²⁹³ Claimant's Memorial, at paras 84-85; Respondent's Counter-Memorial, at para 217.

²⁹⁴ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 133 (C-184; R-062).

²⁹⁵ See *supra*, at Paragraph 145 of this Award.

²⁹⁶ Claimant's Memorial, at para 100; Respondent's Counter-Memorial, at para 168.

amend the NSUARB's order by removing NSPI's ownership interest and right to dividends.²⁹⁷

167. On September 27, 2012, the NSUARB approved the amended LRR mechanism, pursuant to which the PHP Mill would pay the variable incremental costs of service and contribute to NSPI's fixed costs.²⁹⁸ PHP would also pay its electricity invoices in advance, and NSPI acquired the right to interrupt PHP's entire load on a ten-minute notice.²⁹⁹ Lastly, PWCC assumed all of NSPI's risk of fuel cost fluctuations in relation to its provision of electricity to the Mill.³⁰⁰
168. In January 2013, GNS amended the RES Regulations to add provisions with respect to the generation of electricity using biomass. In particular, NSPI was required to produce certain amounts of "firm" renewable energy, with the Biomass Plant as the "base-load" unit.³⁰¹
169. The Parties' positions with respect to certain disputed facts are laid out below.

i. The Claimant's position

170. In the Claimant's view, the LRR obtained by PWCC for the PHP Mill is a component of the ensemble of Assistance Measures GNS provided.³⁰² It considers the LRR a "package" of measures itself, including the fix cost of service, a tax-efficient structure for payments to NSPI, incremental costs of service, favorable amendments to the province's RES Regulations, the Biomass Plant onsite at the Mill, and a long-term rate structure.³⁰³

a. The July 2012 Letter

²⁹⁷ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Application for Amendments to the Order Approving the Load Retention Rate Mechanism, September 22, 2012 (**C-197**).

²⁹⁸ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Amended Decision, NSUARB, September 27, 2012 (**C-208; R-063**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Order, NSUARB, September 28, 2012, Appendix A, at 1-2 (**R-170**).

²⁹⁹ *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Order, NSUARB, September 28, 2012, Appendix A, at 4 (**R-170**); United States – WTO Panel Report – *Supercalendered Paper*, July 5, 2018, at para 7.16 (**R-238**).

³⁰⁰ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Order, NSUARB, September 28, 2012, Appendix A, at 2 (**R-170**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Pre-filed Evidence of Pacific West Commercial Corporation, April 27, 2012, at 2, 6 (**C-165**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Inc.*, NSPI Responses – Avon, May 30, 2012, at Request IR-2 1-2, Request IR-5 1-2 (**R-239**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Inc.*, NSPI Responses to Synapse Information Requests, May 30, 2012, at Request IR-6 1-2 (**R-240**).

³⁰¹ Amendments to the *Renewable Energy Regulations*, N.S. Reg. 155/2010, January 17, 2013, at s. 4 (**C-217**); Order in Council, No. 2013-12, January 17, 2013, at s 4 (**R-225**). See also Respondent's Counter-Memorial, at para 212; Hearing on the Merits and Damages, October 18, 2021, at 38:14-22.

³⁰² Claimant's Memorial, at paras 71, 219.

³⁰³ Claimant's Memorial, at para 74.

171. The Claimant characterizes the July 2012 Letter as an “intervention” by GNS into the NSUARB proceedings,³⁰⁴ which ultimately led the NSUARB to approve the LRR.³⁰⁵ It claims that GNS “changed the law for PWCC’s benefit”³⁰⁶ and [REDACTED] [REDACTED] that neither PWCC nor other ratepayers would need to absorb additional costs.³⁰⁷

b. The value of the LRR

172. The Claimant believes that PWCC’s LRR was “worth millions” in comparison to the standard tariff applicable to all large customers and the prior LRR granted to the Mill under NPPH’s ownership.³⁰⁸ It states that in 2013, PHP’s total expenditure pursuant to its LRR was [REDACTED]³⁰⁹ It argues that this figure represents approximately [REDACTED] in savings in comparison to the price of energy NPPH would have paid pursuant to its rate in the same year.³¹⁰ According to the same calculations, the Claimant finds that PHP saved a further approximate [REDACTED] in 2014³¹¹ and [REDACTED] in 2015.³¹² The Claimant argues that it is irrelevant whether Resolute pays for less expensive hydropower in Québec than PHP pays as a result of the GNS discount, noting that the electricity rate was only one part of a larger costs savings that PHP benefited from in Nova Scotia.³¹³

173. The Claimant adds that GNS’s designation of the Biomass Plant as a “must-run” facility (meaning it ran full-time) cost ratepayers nearly \$20 million in “benefits”³¹⁴ between July 2013, when the Biomass Plant became fully-operational,³¹⁵ and April 2016, when GNS amended its RES

³⁰⁴ Claimant’s Memorial, at para 82.

³⁰⁵ Claimant’s Memorial, at para 82, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 180-183 (**C-184; R-062**).

³⁰⁶ Claimant’s Memorial, at paras 82. See also Claimant’s Memorial, at para 126.

³⁰⁷ Claimant’s Memorial, at para 172, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing, NSUARB, July 20, 2012, at 1-2 (**C-179**); [REDACTED] (C-210).

³⁰⁸ Claimant’s Memorial, at para 117.

³⁰⁹ Claimant’s Memorial, at para 118, referring to [REDACTED] at CAN000005_0003 (**C-222**). The Claimant explains PHP’s savings in 2014 and 2015 in Claimant’s Memorial, at paras 119-120.

³¹⁰ Claimant’s Memorial, at para 118, referring to *In re An Application by NewPage-Port Hawkesbury and Bowater Mersey Paper Company*, Decision, NSUARB, November 29, 2011, at para 287 (**C-138**).

³¹¹ Claimant’s Memorial, at para 119.

³¹² Claimant’s Memorial, at para 120.

³¹³ Hearing on the Merits and Damages, November 9, 2020, at 29:17-30:4.

³¹⁴ Claimant’s Memorial, at para 124; Hearing on the Merits and Damages, October 18, 2021, at 34:8-25.

³¹⁵ Claimant’s Memorial, at para 123, referring to Pulp and Paper World, News Release, “Biomass Plant Humming at Full Capacity”, July 3, 2013 (**C-219**).

Regulations to remove the “must-run” designation.³¹⁶

ii. The Respondent’s position

174. In the Respondent’s view, the LRR is not a benefit conferred on PWCC because it was negotiated between two private parties, NSPI and PWCC, over which GNS had no control.³¹⁷ Moreover, the LRR that PWCC ultimately obtained was [REDACTED]

[REDACTED]³¹⁸

a. The July 2012 Letter

175. The Respondent argues that the Claimant exaggerates the significance of the July 2012 Letter³¹⁹ and disputes the Claimant’s characterization of it as a “waiver” by GNS of the RES obligations to enable the NSUARB’s approval of the LRR.³²⁰

176. Concerning the amendments to the RES Regulations, the Respondent shows that the amendments were prepared and released for public consultation in June 2011,³²¹ “months before PWCC was even in the picture”.³²² It claims that approval of the RES Regulations was delayed due to the risk of shutdown of both the Port Hawkesbury and Bowater Mersey mills, because the shutdowns would impact renewable energy policy more broadly.³²³ As mentioned above, the amendments were passed in January 2013, after it was clear to GNS in the summer of 2012 that NSPI had decided to finish construction of its Port Hawkesbury Biomass Plant and “take a stake in the Port Hawkesbury mill under new ownership”.³²⁴ In the Respondent’s view, the July 2012 Letter merely confirmed that “because there was enough [renewable energy] supply coming on-line and the return of the mill-load would not otherwise increase the total system load from what had been planned for in prior years, the Port Hawkesbury mill returning to the grid would not trigger an

³¹⁶ Claimant’s Memorial, at para 123, referring to Government of Nova Scotia, Press Release, “Government Ends Must-Run Regulation, Reduces Biomass Use”, April 8, 2016 (**C-240**).

³¹⁷ Respondent’s Counter-Memorial, at para 183.

³¹⁸ Respondent’s Counter-Memorial, at para 170, referring to [REDACTED] (**C-125**).

³¹⁹ Respondent’s Counter-Memorial, at para 201.

³²⁰ Respondent’s Counter-Memorial, at para 217.

³²¹ Respondent’s Counter-Memorial, at para 211, referring to Proposed Amendments to *Renewable Energy Regulations*, June 27, 2011 (**R-185**).

³²² Respondent’s Counter-Memorial, at para 211.

³²³ Respondent’s Counter-Memorial, at para 211, citing Witness Statement of Murray Coolican, April 17, 2019, at para 38.

³²⁴ Respondent’s Counter-Memorial, at para 211, citing Witness Statement of Murray Coolican, April 17, 2019, at para 38.

incremental [renewable energy] cost over the term of the proposed LRR pricing mechanism”.³²⁵

177. With respect to the Biomass Plant, the Respondent reports that NSPI had begun construction and operation of the Biomass Plant by the time NPPH filed for creditor protection in September 2011.³²⁶ When ownership of the Mill transferred to PWCC, NSPI negotiated an agreement with PWCC whereby NSPI would continue to own the Biomass Plant and deliver steam to PHP.³²⁷ It claims that NSPI wanted to continue operating the Biomass Plant in order to keep profiting from its investment and in order to help it meet its RES obligations.³²⁸ The Respondent contends that the NSUARB approved their agreement, determining that the prices for the steam supply and shared services “appeared reasonable and not subsidized by ratepayers”.³²⁹ It adds that PHP pays nearly \$4 million annually for the steam supplied by NSPI and PHP shoulders the cost of fuel necessary to the production of steam.³³⁰ Moreover, it claims that even if NSPI did not operate the Biomass Plant, PHP could still procure steam from its own gas-fired boiler.³³¹
178. Ultimately, the Respondent asserts that the return of the PHP Mill to the grid never did in fact trigger additional RES obligations.³³²

b. The value of the LRR

179. In the Respondent’s opinion, the LRR that PWCC obtained for operations at the PHP Mill was significantly higher than what it had originally sought from NSPI (\$30/MWh).³³³ PWCC agreed

³²⁵ Respondent’s Counter-Memorial, at para 217, citing Witness Statement of Murray Coolican, April 17, 2019, at para 26; *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Non-Confidential Government of Nova Scotia Amended Response to Consumer Advocate, July 18, 2012, at 8 (**R-177**).

³²⁶ Respondent’s Counter-Memorial, at para 207, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Evidence of Nova Scotia Power Inc., NSUARB, April 27, 2012, at 8 (**R-167**); Hearing on the Merits and Damages, October 19, 2021, at 448:15-22.

³²⁷ Re Pacific West Commercial Corporation, Shared Services Agreement, M04862 P-8, at Preamble, para 5.2.2 (**R-412**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 34(1), 156 (**C-184; R-062**).

³²⁸ Respondent’s Counter-Memorial, at para 210, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Transcript of Oral Hearing, NSUARB, July 17, 2012, at 439 (**R-399**).

³²⁹ Respondent’s Counter-Memorial, at para 208, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 158 (**C-184; R-062**).

³³⁰ Respondent’s Counter-Memorial, at para 213.

³³¹ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 156 (**C-184; R-062**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Redacted Pacific West Commercial Corporation Responses to Information Requests from the Small Business Advocate, May 30, 2012, at 25 (**R-417**).

³³² Respondent’s Counter-Memorial, at para 220, referring to Witness Statement of Murray Coolican, April 17, 2019, at para 31.

³³³ Respondent’s Counter-Memorial, at para 170, Respondent’s Rejoinder Memorial, at para 28, referring to [REDACTED] at 1 (**C-125**).

for PHP to assume all of NSPI's fuel risk, which resulted in PHP's electricity price [REDACTED] [REDACTED]³³⁴ This is attributable to the fact that "PHP's hourly electricity costs are calculated based on PHP consuming the electricity generated from the conventional fuel with the highest cost used by NSPI in any given hour".³³⁵ The Respondent contends that these higher electricity costs have prevented the Mill from operating at full capacity.³³⁶

D. RESOLUTE'S SIMULTANEOUS NEGOTIATIONS WITH GNS FOR FINANCIAL ASSISTANCE

1. Decline of Bowater Mersey

180. Shortly before NPPH filed for creditor protection under the CCAA in September 2011, Resolute informed the premier of Nova Scotia that it intended to announce the permanent closure of Bowater Mersey.³³⁷ At this time, B [REDACTED] [REDACTED]³³⁸
181. Resolute and GNS officials began meeting in September 2011 to discuss financial assistance that GNS could offer to keep Bowater Mersey operational.³³⁹ The Respondent notes that GNS sought to provide financial assistance to Resolute due to the adverse economic impact that the shutdown of Bowater Mersey would have had on Nova Scotia's economy.³⁴⁰
182. On November 1, 2011, Resolute announced the idling of Bowater Mersey for a week starting on November 14, 2011 and potentially two more weeks in December 2011.³⁴¹

³³⁴ [REDACTED] at 3 (C-222).
³³⁵ Respondent's Counter-Memorial, at para 170. See also, *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Order, NSUARB, September 28, 2012, Appendix A, at 2 (R-170); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Pre-filed Evidence of Pacific West Commercial Corporation, April 27, 2012, at 2 (C-165); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Incorporated*, NSPI Responses – Avon, May 30, 2012, at 1-2 (R-239); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Inc.*, NSPI Responses to Synapse Information Requests, May 30, 2012, at 1 (R-240).
³³⁶ Respondent's Counter-Memorial, at para 170, referring to Transcript of Proceedings before US International Trade Commission in re Supercalendered Paper from Canada, Inv. No. 701-TA-530, October 22, 2015, at 163:19-164:2 (C-236).
³³⁷ Witness Statement of Duff Montgomerie, April 17, 2019, at para 9.
³³⁸ [REDACTED] (R-145); *In re An Application by NewPage Port Hawkesbury Corp.*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, June 22, 2011, at 1 (R-166).
³³⁹ Witness Statement of Duff Montgomerie, April 17, 2019, at paras 10, 20.
³⁴⁰ Respondent's Counter-Memorial, at para 43.
³⁴¹ CBC News, News Release, "Bowater mill to close for one week", November 1, 2011 (R-321); The Chronicle Herald, News Release, "Bowater Mersey on brink of closure", November 1, 2011 (R-320); The Canadian Press, News Release, "Bowater Mersey paper mill in Nova Scotia to close for a week amid weak market", November 1, 2011 (R-322).

183. A number of steps were taken to reduce costs at Bowater Mersey. First, on November 16, 2011, Bowater Mersey’s unionized workers voted to accept contract concessions that included cutting 80 full-time and 30 casual positions.³⁴²
184. Second, on November 17, 2011, Resolute obtained a 15% property tax reduction for 10 years for Bowater Mersey.³⁴³
185. Third, earlier on June 6, 2011, Bowater Mersey and NPPH (prior to it becoming PHP) filed a joint application to the NSUARB for a discounted electricity rate “in order for their businesses to remain sustainable”.³⁴⁴ The Respondent reports that one third of Bowater Mersey’s manufacturing costs were electricity, with the mill consuming approximately 4-5% of the electricity generated in Nova Scotia.³⁴⁵ On November 29, 2011, the NSUARB approved a reduced electricity rate for a 3-year term for Bowater Mersey, but deferred its decision on NPPH until a potential buyer was found.³⁴⁶
186. Finally, [REDACTED]
[REDACTED]³⁴⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁴⁸

2. Bowater Mersey’s Financial Assistance Package

(a) \$25 million capital loan

187. The \$25 million capital loan was intended to fund projects that “[REDACTED]

³⁴² The Canadian Press, News Release, “Bowater Mersey workers accept contract concessions in bid to save N.S. mill”, November 16, 2011 (**R-325**); Nova Scotia Premier’s Office, News Release, “Premier Re-Affirms Commitment to Help Find Solution for Bowater Mersey”, November 17, 2011 (**R-326**); The Canadian Press, News Release, “Nova Scotia premier says job cuts one step on road to saving paper mill”, November 17, 2011 (**R-327**).

³⁴³ Bowater Mersey Pulp and Paper Investment (2011) Act, SNS 2011, c. 32, at preamble, ss. 3, 9 (**R-151**).

³⁴⁴ *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Letter re: Proposed Amendments to Nova Scotia Power Inc.’s Load Retention Tariff, June 6, 2011 (**R-162**).

³⁴⁵ *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, June 22, 2011, at 1-2 (**R-166**).

³⁴⁶ *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Decision, NSUARB, November 29, 2011, at paras 223-224 (**C-138**).

³⁴⁷ [REDACTED]
[REDACTED] December 1, 2011, at 1-2 (**R-149**).

³⁴⁸ [REDACTED]
[REDACTED] December 1, 2011, at 1-2 (**R-149**).

[REDACTED]

[REDACTED] 9 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 350

(b) \$23.75 million land purchase

188. GNS committed to purchasing [REDACTED]

[REDACTED] 351 [REDACTED]

[REDACTED] 352 According to the Respondent, this element of the package served “a dual purpose of achieving the GNS’s goal of protecting land, while providing some cash liquidity that the mill needed for its operations”.³⁵³

(c) \$1.5 million workforce training grant

189. This \$1.5 million workforce training grant to be received in 2012-2014 was intended to provide training to employees for the use of new equipment and technology improvements made possible by GNS financial assistance.³⁵⁴

(d) Reduced property taxes

190. The Nova Scotia legislature authorised reduced municipal property taxes for Bowater Mersey and Brooklyn Power Company that were intended to last 10 years and would result in annual savings of approximately \$135,000.³⁵⁵

349 [REDACTED]

350 [REDACTED] December 1, 2011, at 2 (**R-149**).

351 [REDACTED] December 1, 2011, at 3 (**R-149**).

352 [REDACTED] December 1, 2011, at 4 (**R-149**).

353 [REDACTED] December 1, 2011, at 5 (**R-149**).

354 Respondent’s Counter-Memorial, at para 58.
Respondent’s Counter-Memorial, at para 60, referring to [REDACTED] (**R-149**); Nova Scotia House of Assembly Debates and Proceedings, No. 11-64, December 12, 2011, at 5221 (**R-212**).

355 Bowater Mersey Pulp and Paper Investment (2011) Act, SNS 2011, c. 32, at s. 9 (**R-151**).

191.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],³⁵⁷

3. Closure of Bowater Mersey

192. Despite the financial assistance package granted to it,³⁵⁸ on June 17, 2012, Resolute announced that Bowater Mersey would be idled indefinitely.³⁵⁹

193. On December 10, 2012, GNS and Resolute concluded an agreement under which GNS purchased Bowater Mersey's shares for \$1; in exchange, GNS assumed all of the mill's liabilities (which were estimated at \$136.4 million).³⁶⁰ The mill's assets included approximately 555,000 acres of woodlands³⁶¹ and the Brooklyn power plant, which was later sold.³⁶²

E. US INVESTIGATIONS INTO CANADA'S ALLEGED SUBSIDIZATION OF SC PAPER EXPORTS

1. United States Trade Representative's Questions to Canada

194. Following the Court's approval for the sale of the Mill to PWCC on September 25, 2012,³⁶³ the United States Trade Representative ("USTR") opened an investigation into whether the

³⁵⁶ Respondent's Counter-Memorial, at para 62, referring to [REDACTED] December 1, 2011, at 6 (**R-149**).

³⁵⁷ [REDACTED] December 1, 2011, at 6 (**R-149**).

³⁵⁸ Respondent's Counter-Memorial, at paras 63-64.

³⁵⁹ Resolute Forest Products, News Release, "Resolute to Indefinitely Idle Mersey Mill in Nova Scotia", June 15, 2012 (**R-153**).

³⁶⁰ Nova Scotia Premier's Office, News Release, "Province Takes Crucial Step to Build Forestry of Future", December 10, 2012 (**R-155**);

³⁶¹ Cortex Consultants Inc., Valuation Summary, "Valuation of the Bowater Mersey Woodlands: Valuation Summary", November 18, 2012, at v-vi (**R-353**); Nova Scotia Executive Council Office, Order-in-Council, No. 2012-381, December 10, 2012 (**R-352**); Nova Scotia Premier's Office, News Release, "Province Takes Crucial Step to Build Forestry of Future", December 10, 2012 (**R-155**); Nova Scotia Department of Lands and Forestry, "Bowater Land Purchase – Announced December 2012", December 10, 2012 (**R-214**).

³⁶² Nova Scotia Executive Council Office, Order-in-Council, No. 2012-375, December 7, 2012 (**R-347**); *In re An Application by NewPage Port Hawkesbury Corporation*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, June 22, 2011, at 1 (**R-166**); Nova Scotia Department of Lands and Forestry, "Bowater Land Purchase – Announced December 2012", December 10, 2012 (**R-214**); Resolute Forest Products, "Resolute Announces Sale of Mersey Assets", December 10, 2012 (**R-348**); The Chronicle Herald, "Province buys Bowater lands", December 10, 2012 (**R-349**).

³⁶³ *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order, Supreme Court of Nova Scotia, September 25, 2012 (**R-035**).

Assistance Measures provided by GNS to PWCC and the PHP Mill were consistent with Canada's World Trade Organization ("WTO") and NAFTA commitments.³⁶⁴

195. [REDACTED]
[REDACTED]³⁶⁵ It also raised the issue at a meeting of the WTO Committee on Subsidies and Countervailing Measures on October 23, 2012.³⁶⁶ At the WTO Committee meeting, Canada stated that it would provide replies in November 2012 to the questions the USTR had sent.³⁶⁷
196. [REDACTED]
[REDACTED]³⁶⁸
197. The issue was raised again at another meeting of the WTO Committee on Subsidies and Countervailing Measures on April 22, 2013, to which Canada replied that it had already responded to the USTR's questions and had provided as much information as possible while respecting the business confidentiality of the information.³⁶⁹
198. In July 2013, Canada submitted its New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* to the WTO ("**SCM Agreement**").³⁷⁰ The Claimant advances that Canada denied before the WTO that GNS provided any subsidies (including grants, loans, and procurement) to PWCC for the Mill.³⁷¹ The Respondent allegedly failed to report any subsidies from GNS to PWCC in its 2015 and 2017 notifications to the WTO as well,³⁷² despite reporting subsidies in other provinces and from the

³⁶⁴ Respondent's Statement of Defence, at paras 56-57.

³⁶⁵ [REDACTED] (C-037).

³⁶⁶ WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 23 October 2012, WTO Doc. G/SCM/M/83, January 10, 2013, at para 61 (R-078).

³⁶⁷ WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 23 October 2012, WTO Doc. G/SCM/M/83, January 10, 2013, at para 63 (R-078).

³⁶⁸ [REDACTED] C-212).

³⁶⁹ WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 22 April, 2013, WTO Doc. G/SCM/M/85, August 5, 2013, at paras 128-132 (C-353; R-079).

³⁷⁰ WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/253/CAN, July 1, 2013 (C-021).

³⁷¹ Claimant's Reply Memorial, at para 277, referring to WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/253/CAN, July 1, 2013, at s. 12 (C-021). See also Claimant's Reply Memorial, at para 282, referring to [REDACTED] (C-212).

³⁷² Claimant's Reply Memorial, at para 285, referring to WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/284/CAN, July 9, 2015, at s. 12 (C-359); WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/315/CAN, July 3, 2017, at s. 12 (C-361).

federal government in Nova Scotia.³⁷³ The Respondent disputes the relevance of Canada's notifications to the WTO Committee on Subsidies and Countervailing Measures to the determination of whether a measure qualifies under NAFTA Article 1108(7)(b).³⁷⁴ The Parties' positions on this matter are further developed in Section VI.A of this Award.

2. US Department of Commerce's Countervailing Duties Investigation

199. The Claimant submits that it warned Canadian officials in July 2014 that it had "knowledge of steps being taken in the United States leading to a countervailing duty investigation of Canadian exports of SC paper".³⁷⁵ It also wrote to the Canadian Minister of International Trade to raise concerns about both the harm GNS's assistance to PHP was causing Resolute and the potential US trade remedy case.³⁷⁶
200. On February 26, 2015, two US producers of SC Paper petitioned the US DOC and the US International Trade Commission to launch a countervailing duty investigation (the "**CVD Investigation**") into SC Paper imports from Canada.³⁷⁷ The petitioners alleged that Canada and certain Canadian provinces were providing countervailable subsidies to imports of SC Paper from Canada, which were materially injuring or threatening to materially injure the domestic industry in the United States.³⁷⁸ The US DOC formally launched its investigation on March 18, 2015.³⁷⁹
201. The Claimant was required to pay US\$60 million in duty deposits pending final resolution of the investigation and appeal.³⁸⁰
202. The Respondent entered into a Joint Defense and Confidentiality Agreement ("**JDCA**") with all producers of SC Paper in Canada (PHP, Irving, and Catalyst), excluding Resolute.³⁸¹ The

³⁷³ Claimant's Reply Memorial, at para 286, referring to WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/253/CAN, July 1, 2013, at s. 7.2 (**C-021**); WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/284/CAN, July 9, 2015, at ss. 2.1, 7.1 (**C-359**); WTO, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/315/CAN, July 3, 2017, at ss. 2.2, 2.3 (**C-361**).

³⁷⁴ Respondent's Counter-Memorial, at para 239.

³⁷⁵ Claimant's Statement of Claim, at para 58; Claimant's Memorial, at para 146.

³⁷⁶ Claimant's Statement of Claim, at para 64; Claimant's Memorial, at para 146.

³⁷⁷ US DOC, Supercalendered Paper From Canada: Initiation of Countervailing Duty Investigation, Federal Register, Vol. 80, No. 58, March 26, 2015, at 15981-15983 (**R-080**).

³⁷⁸ US DOC, Supercalendered Paper From Canada: Initiation of Countervailing Duty Investigation, Federal Register, Vol. 80, No. 58, March 26, 2015, at 15981 (**R-080**).

³⁷⁹ Respondent's Statement of Defence, at para 60.

³⁸⁰ Claimant's Memorial, at paras 134, 150.

³⁸¹ Claimant's Memorial, at para 149; Respondent's Statement of Defence, at para 66.

Respondent explains that the purpose of a JDCA was to “enable the sharing of privileged and confidential information in relation to the measures at issue [...] including the Nova Scotia Measures”,³⁸² and that Resolute’s exclusion from the JDCA was due to the latter giving notice of its intention to begin arbitral proceedings under NAFTA Chapter 11 for GNS’s assistance to PWCC and the Mill on February 24, 2015.³⁸³ The Claimant responds that this notice was then private and unofficial.³⁸⁴

203. The Claimant alleges that Canada and GNS “vigorously defended themselves and PHP against any and all subsidy allegations”.³⁸⁵ The Respondent refutes this claim, stating instead, “Canada and the GNS did not dispute certain elements of the subsidy findings with respect to the FULA, the credit facility, the capital loan, the workforce training grant, the marketing contribution, and the Indemnity Agreement”.³⁸⁶ Moreover, the Respondent pleads that during the investigation, it cooperated with all four producers of SC Paper in Canada, including the Claimant, despite the latter giving notice of its intention to begin arbitral proceedings under NAFTA Chapter 11 for GNS’s assistance to PWCC and the Mill.³⁸⁷
204. On October 13, 2015, the US DOC issued its Final Determination in the CVD Investigation.³⁸⁸ It concluded that the following measures constituted countervailing subsidies to PHP: the \$40 million credit facility, the \$24 million capital loan, the \$1.5 million training grant, the \$1 million marketing contribution, the provision of stumpage under the FULA, the Outreach Agreement, the Indemnity Agreement, the provision of electricity, and the Land Purchase Agreement.³⁸⁹ The US DOC also found that GNS, through the NSUARB, entrusted or directed NSPI to make a financial contribution to PHP by providing electricity.³⁹⁰
205. Following the results of the CVD Investigation, Canada initiated dispute settlement proceedings before a NAFTA Panel and a WTO Panel.³⁹¹ The NAFTA Panel issued its decision in April 2017

³⁸² Respondent’s Statement of Defence, at para 66.

³⁸³ Respondent’s Statement of Defence, at para 66. See also Notice of Intent to Arbitrate, February 24, 2015 (**R-081**).

³⁸⁴ Claimant’s Memorial, at para 149.

³⁸⁵ Claimant’s Memorial, at para 229.

³⁸⁶ Respondent’s Counter-Memorial, at para 238, referring to Respondent’s Statement of Defence, at para 75.

³⁸⁷ Respondent’s Statement of Defence, at para 62, referring to Notice of Intent to Arbitrate, February 24, 2015 (**R-081**).

³⁸⁸ US DOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada, October 13, 2015 (**R-395**).

³⁸⁹ US DOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada, October 13, 2015, at 13-16, 24-26, 30-53 (**R-395**).

³⁹⁰ NAFTA Article 1904 Binational Panel Review, Supercalendered Paper from Canada: Final Affirmative Duty Determination, Memorandum Opinion and Order, April 13, 2017, at 31 (**R-270**).

³⁹¹ Respondent’s Counter-Memorial, at para 154.

and remanded the US DOC's conclusions pertaining to GNS's involvement in the LRR negotiations between PWCC and NSPI, as well as the Outreach Agreement, noting that the US DOC had not identified substantial evidence to support GNS's involvement.³⁹² The WTO Panel issued its report in July 2018. It concluded that the US DOC acted inconsistently with the SCM Agreement when it found entrustment or direction by GNS in relation to NSPI's provision of electricity.³⁹³ The Claimant contests the relevance of these findings to this arbitration, suggesting that it makes arguments that are different from those the WTO Panel considered to reach its conclusion with respect to entrustment and direction by GNS.³⁹⁴

206. On March 21, 2018, Verso, one of the US petitioners, concluded a settlement agreement with PHP and Irving Paper to dismiss the proceedings.³⁹⁵
207. In July 2018, the US DOC ended the CVD Investigation and refunded Resolute's deposit, with interest.³⁹⁶

IV. RELIEF SOUGHT

208. In its Memorial, the Claimant requests this Tribunal to issue:

- i. a finding that the Measures are attributable to GNS, and therefore to Canada;
- ii. a finding that Canada has violated its obligations to Resolute under Article 1102;
- iii. a finding that Canada has violated its obligations to Resolute under Article 1105;
- iv. a finding that Canada's breaches of its obligations under NAFTA Chapter 11 caused Resolute to incur damages;
- v. an award of damages in the amount of at least \$US163,695,000 or such other amount to be determined by the Tribunal;
- vi. an award to Resolute for its costs and fees of this arbitration; and
- vii. such other relief as the Tribunal may determine to be lawful and appropriate under the circumstances.³⁹⁷

209. In its Reply, the Claimant requests this Tribunal to issue:

- i. a finding that the Measures are attributable to GNS, and therefore to Canada;
- ii. a finding that Canada has violated its obligations to Resolute under Article 1102;

³⁹² NAFTA Article 1904 Binational Panel Review, Supercalendered Paper from Canada: Final Affirmative Duty Determination, Memorandum Opinion and Order, April 13, 2017, at 31-36, 44-50 (**R-270**).

³⁹³ United States – WTO Panel Report – *Supercalendered Paper*, July 5, 2018, at paras 7.68, 7.78 (**R-238**).

³⁹⁴ Claimant's Reply Memorial, at para 80.

³⁹⁵ Settlement Agreement between Verso, Port Hawkesbury Paper, and Irving Paper, March 21, 2018 (**C-242**).

³⁹⁶ Supercalendered Paper from Canada: Notice of Rescission of Countervailing Duty Administrative Review, Federal Register, Vol. 83, No. 134, July 12, 2018, at part 2 (**C-246**).

³⁹⁷ Claimant's Memorial, at para 310.

- iii. a finding that Canada has violated its obligations to Resolute under Article 1105;
- iv. a finding that Canada's breaches of its obligations under NAFTA Chapter 11 caused Resolute to incur damages;
- v. an award of damages in the amount of at least \$US103,967,000 or such other amount to be determined by the Tribunal;
- vi. an award to Resolute for its costs and fees of this arbitration; and
- vii. such other relief as the Tribunal may determine to be lawful and appropriate under the circumstances.³⁹⁸

210. In its Pre-Hearing Memorial, the Claimant revises its damages estimate, requesting that: "the Tribunal accept the midpoint for each range (\$126 million for the forecast; \$121.4 million for the price-elasticity approach), and asks that, consistent with Resolute's overall conservative approach to damages (using the [REDACTED] MT for increased capacity; limiting losses to price erosion), the Tribunal award the more conservative \$121.4 million in addition to costs and fees".³⁹⁹

211. In its Counter-Memorial, the Respondent requests this Tribunal to issue an award:

- i. dismissing the Claimant's claims that Canada has violated its obligations under Articles 1102 and 1105 of NAFTA in their entirety;
- ii. dismissing the Claimant's claim that it incurred damages as the result of Canada violating its obligations under Chapter 11 of NAFTA;
- iii. ordering the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- iv. granting any further relief it deems just and appropriate under the circumstances.⁴⁰⁰

212. In its Rejoinder, the Respondent requests this Tribunal to issue an award:

- i. finding that the Claimant's claims relating to the Port Hawkesbury electricity rate are outside the Tribunal's jurisdiction;
- ii. dismissing the Claimant's claims that Canada has violated its obligations under Articles 1102 and 1105 of NAFTA in their entirety;
- iii. dismissing the Claimant's claim that it incurred damages as the result of Canada violating its obligations under Chapter 11 of NAFTA;
- iv. ordering the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- v. granting any further relief it deems just and appropriate under the circumstances.⁴⁰¹

213. In its Pre-Hearing Memorial, Canada requests the Tribunal to "reject all claims by the Claimant and order it to bear the costs of the arbitration and indemnify Canada its incurred legal fees and costs".⁴⁰²

³⁹⁸ Claimant's Reply Memorial, at para 397.

³⁹⁹ Claimant's Pre-Hearing Memorial, at para 109.

⁴⁰⁰ Respondent's Counter-Memorial, at para 397.

⁴⁰¹ Respondent's Rejoinder Memorial, at para 259.

⁴⁰² Respondent's Pre-Hearing Memorial, at para 73.

V. ATTRIBUTION

A. INTRODUCTION

214. As a matter of attribution, the main point of contention between the Parties concerns the LRR. The Claimant submits that the Tribunal should consider the LRR as part of the Assistance Measures that PWCC obtained from GNS because the LRR was necessary for PWCC's purchase of the Mill.⁴⁰³ The Claimant argues that GNS played an integral role in negotiating and obtaining the NSUARB's approval of the "electricity deal" from which PWCC allegedly benefited.⁴⁰⁴ On this basis, the Claimant contends that the negotiation of PWCC's LRR is attributable to Canada under NAFTA Article 1101(1), and Articles 4, 8, and 11 of the International Law Commission's Articles on State Responsibility (the "**ILC Articles**"), which brings it within the jurisdiction of the Tribunal.
215. ILC Article 4 provides that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercised legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".⁴⁰⁵ Under Article 4, a State organ is defined as "any person or entity which has that status in accordance with the internal law of the State".⁴⁰⁶
216. ILC Article 8 states that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".⁴⁰⁷
217. Lastly, pursuant to ILC Article 11, "[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".⁴⁰⁸
218. The Respondent disputes the attribution of the LRR to GNS. According to the Respondent, the

⁴⁰³ Claimant's Memorial, at paras 161-163.

⁴⁰⁴ Claimant's Memorial, at para 168.

⁴⁰⁵ Claimant's Reply Memorial, at para 41, citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), at Article 4(1) (**CL-145**).

⁴⁰⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), at Article 4(2) (**CL-145**).

⁴⁰⁷ Claimant's Memorial, at para 176, citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), at Article 8 (**CL-145**).

⁴⁰⁸ Claimant's Reply Memorial, at para 69, citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), at Article 11 (**CL-145**).

LRR was an agreement between two private companies, PWCC and NSPI, “over which the GNS had no control or ability to instruct to do anything”.⁴⁰⁹ The Respondent proposes a different interpretation of ILC Articles 4, 8, and 11, which when applied to the facts, in the Respondent’s view, fails to justify a finding of attribution of the LRR to GNS. As such, the Respondent argues that the LRR is not a measure that can form the basis of a claim under NAFTA Chapter 11.⁴¹⁰

B. THE CLAIMANT’S ARGUMENTS

1. Whether GNS’s Assistance Measures Should be Considered as a Whole

219. The Claimant notes that Canada does not contest that the remainder of the Assistance Measures, but for the LRR, are attributable to Canada.⁴¹¹ The Claimant argues that the Tribunal should consider GNS’s Assistance Measures as a whole as being attributable to Canada, without singling out the LRR.⁴¹²
220. The Claimant’s argument for considering the Assistance Measures as a single package is premised on the assertion that PWCC conditioned its purchase and operation of the Mill on receiving assistance that would make it the “lowest cost producer” in the market.⁴¹³ According to the Claimant, GNS agreed to PWCC’s purchase and operation conditions by providing a “package of measures” that “jointly and severally, were intended to [...] place the [Mill] in a competitively advantageous position in relation to other producers in the SC paper market”.⁴¹⁴ In other words, but for the ensemble of measures as a whole, PWCC would not have purchased and reopened the Mill, which, in turn, would not have caused damage to the Claimant.⁴¹⁵
221. According to the Claimant, the package of measures included, among others: “forgivable loans; training and marketing grants; a renegotiated electricity deal with a modified rate; agreement on operation of a biomass plant; acquisition of land; fiber access guarantees; tax breaks; and relief

⁴⁰⁹ Respondent’s Counter-Memorial, at para 157.

⁴¹⁰ Respondent’s Counter-Memorial, at para 221.

⁴¹¹ Claimant’s Reply Memorial, at para 29.

⁴¹² Claimant’s Memorial, at paras 157-159; Claimant’s Reply Memorial, para 30; Hearing on the Merits and Damages, November 9, 2020, at 28:8-11, 29:3-9.

⁴¹³ Claimant’s Memorial, at para 154; Claimant’s Reply Memorial, at para 31.

⁴¹⁴ Claimant’s Memorial, at para 153; Claimant’s Reply Memorial, at para 32.

⁴¹⁵ Claimant’s Memorial, at paras 159, 161. See also, at paras 107-109, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Pacific West Commercial Corporation Application for Amendments to Load Retention Tariff, PWCC Evidence, NSUARB, 22 September, 2012, at 6-8 (C-197), *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Redacted Pacific West Commercial Corporation Responses To Information Requests From Small Business Advocate, NSUARB, 27 September, 2012, at 9 (C-203); Hearing on the Merits and Damages, November 9, 2020, at 25:24-26:3, 26:23-27:3.

from the costs and obligations of renewable energy standards”.⁴¹⁶ The Claimant acknowledges that governments do offer these kinds of benefits to other companies in other industries, but it argues that the amount of benefits offered by GNS to PWCC was unprecedented.⁴¹⁷ Citing discussions among PWCC, the Monitor, and GNS officials, the Claimant submits that securing an LRR that was more beneficial than the level necessary to operate competitively was crucial to the ensemble of measures.⁴¹⁸ Had such an LRR not been secured, GNS’s finance plan to PWCC would have fallen through and PWCC would not have purchased the Mill.⁴¹⁹ The Claimant also notes that PWCC only accepted the revised electricity measures because amendments favorable to it were made to other parts of GNS’s finance plan (e.g. the \$40 million credit facility was made forgivable and PWCC was allowed to harvest \$1 billion in tax losses for assets located outside the province).⁴²⁰ These facts, according to the Claimant, support a finding that the Assistance Measures were an interconnected whole.⁴²¹

222. The Claimant relies on prior NAFTA awards, which have considered “the record as a whole – not dramatic incidents in isolation”,⁴²² to argue that the Tribunal should consider the collective effect of the GNS’s Assistance Measures as a single ensemble of measures attributable to GNS and therefore to Canada.⁴²³
223. Finally, the Claimant specifies that there is no direct link between the total value of the GNS’s Assistance Measures, nor of the value of any single Measure, and the harm sustained by Resolute.⁴²⁴ Rather, the cause of the damages to the Claimant was the Mill’s re-entry onto the

⁴¹⁶ Claimant’s Memorial, at para 155.

⁴¹⁷ Claimant’s Memorial, at para 156.

⁴¹⁸ Claimant’s Reply Memorial, at paras 33-34.

⁴¹⁹ Claimant’s Reply Memorial, at paras 35-36.

⁴²⁰ Claimant’s Reply Memorial, at para 37; Hearing on the Merits and Damages, October 18, 2021, at 49:2-50:13.

⁴²¹ Claimant’s Reply Memorial, at paras 37-38.

⁴²² Claimant’s Memorial, at para 157, citing *GAMI Investments Inc. (U.S.) v. Mexico*, UNCITRAL, Award, November 15, 2004, para 103 (**CL-100**). See also *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 144 (“[T]he business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect, particularly if this aspect does not have a stand-alone character”) (**CL-101**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 161 (“The Tribunal can only characterize CANADA’s motivation or intent fairly by examining the record of the evidence as a whole”) (**CL-102**); W. Michael Reisman and Robert D. Sloane, “Indirect Expropriation and its Valuation in the BIT Generation”, (2003) 75 *British Yearbook of International Law* 115, at 123-124 (“Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation [...] Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor’s property rights”) (**CL-103**).

⁴²³ Claimant’s Memorial, at para 159.

⁴²⁴ Claimant’s Memorial, at para 161.

market on such advantageous terms, facilitated by GNS's assistance.⁴²⁵

2. Whether the Load Retention Rate is Attributable to Canada Pursuant to ILC Article 4

224. The Claimant argues that even if the LRR must be disaggregated from the remainder of the Assistance Measures, it should be regarded as “adopted or maintained” by the GNS under NAFTA Article 1101(1) through the actions of the NSUARB and the [REDACTED] and is attributable to Canada pursuant to ILC Article 4.⁴²⁶
225. In accordance with the text of Article 4 set out above,⁴²⁷ the Claimant submits that attribution under Article 4 extends to government officials acting in their official capacity.⁴²⁸ The Claimant invokes the tribunal's words in *von Pezold v. Zimbabwe*, stating that “organs of State include, for the purposes of attribution, the President, Ministers, provincial governments, legislature [...]” and that “[r]esponsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity”.⁴²⁹
226. The Claimant further relies on *Bilcon v. Canada*, in which the NAFTA tribunal found that an independent regulatory body, such as the Joint Review Panel (“JRP”) operating under the Canadian Environmental Assessment Act, “that exercises impartial judgment [...] can well be an organ of the state; [A]rticle 4 of the ILC Articles [...] specifically includes those exercising ‘judicial’ functions”.⁴³⁰ With respect to the role of the Canadian federal government in *Bilcon*, the tribunal found that the disputed measures could be attributed to Canada because “the JRP was *de jure* an organ of Canada, equipped with a clear statutory role that included making formal and public recommendations to state authorities which the latter were obliged by law to consider – and indeed ended up accepting”.⁴³¹
227. Applying the above principles to the present case, the Claimant argues that the LRR is attributable

⁴²⁵ Claimant's Memorial, at para 161.

⁴²⁶ Claimant's Reply Memorial, at para 27; Hearing on the Merits and Damages, November 9, 2020, 31:22-32:3.

⁴²⁷ See *supra*, at Paragraph 215 of this Award.

⁴²⁸ Claimant's Reply Memorial, at para 41.

⁴²⁹ Claimant's Reply Memorial, at para 42, citing *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, at paras 443-445 (**RL-121**); Hearing on the Merits and Damages, October 18, 2021, at 42:18-43:20.

⁴³⁰ Claimant's Reply Memorial, para 50, citing *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 308 (**CL-104**) (*'Bilcon v. Government of Canada'*); Hearing on the Merits and Damages, October 18, 2021, at 47:5-48:25.

⁴³¹ Claimant's Reply Memorial, at para 52, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at paras 308, 319 (**CL-104**).

to GNS because: (i) the NSUARB, which ultimately approved the LRR, is a State organ of the province; (ii) GNS [REDACTED]
[REDACTED]⁴³² and (iii) GNS's commitment to solve the RES Regulations Issue and the Biomass Plant Issue to facilitate approval for the LRR constituted an action by a State organ for the purpose of ILC Article 4.⁴³³

228. First, the Claimant submits that the NSUARB, “a body that exercises regulatory and judicial functions”,⁴³⁴ qualifies as an organ of the State for the purpose of ILC Article 4 even if it may be formally independent from the executive and legislative branches.⁴³⁵ In the Claimant's opinion, some of the reasons for this qualification include the fact that the NSUARB is created by statute,⁴³⁶ its members are appointed by GNS,⁴³⁷ its board members are considered GNS employees,⁴³⁸ GNS determines the Board members' salaries,⁴³⁹ and the NSUARB Board reports to GNS annually on all activities.⁴⁴⁰ The Claimant notes that GNS may approve or reject the NSUARB's changes to its own rules and regulations.⁴⁴¹ In the Claimant's view, the NSUARB's approval of the LRR “gave force and effect to [the Assistance Measures]” rather than any private deal between NSPI and PWCC.⁴⁴² The Claimant submits that the role of the NSUARB in this case is indistinguishable from that of the JRP in *Bilcon*, which was found to be attributable to Canada.⁴⁴³
229. Second, the Claimant suggests that the sale of the Mill and GNS's Assistance Measures to PWCC were contingent on GNS's approval of the LRR.⁴⁴⁴ To recall, the Claimant suggests that [REDACTED]

⁴³² Claimant's Reply Memorial, at para 43.

⁴³³ Claimant's Reply Memorial, at para 66; Hearing on the Merits and Damages, November 9, 2020, at 32:11-24.

⁴³⁴ Claimant's Reply Memorial, at para 44.

⁴³⁵ Claimant's Reply Memorial, at para 44; Hearing on the Merits and Damages, November 14, 2020, at 1105:19-23; Claimant's Pre-Hearing Memorial, paras 32, at 36-37; Hearing on the Merits and Damages, October 18, 2021, at 44:1-45:1.

⁴³⁶ Claimant's Reply Memorial, at para 45, referring to *Public Utilities Act*, R.S.N.S. 1989, c. 380, at s. 64(1) (**C-101**).

⁴³⁷ Claimant's Reply Memorial, at para 45, referring to *Utility and Review Board Act*, R.S.N.S. 1992, c. 11, at s. 5(1) (**R-386**).

⁴³⁸ Claimant's Reply Memorial, at para 45, referring to *Utility and Review Board Act*, R.S.N.S. 1992, c. 11, at s. 10 (**R-386**).

⁴³⁹ Claimant's Reply Memorial, at para 45, referring to *Utility and Review Board Act*, R.S.N.S. 1992, c. 11, at s. 7 (**R-386**).

⁴⁴⁰ Claimant's Reply Memorial, at para 45, referring to *Utility and Review Board Act*, R.S.N.S. 1992, c. 11, at s. 33 (**R-386**).

⁴⁴¹ Claimant's Reply Memorial, at para 45.

⁴⁴² Claimant's Reply Memorial, at para 46.

⁴⁴³ Claimant's Reply Memorial, at para 53, referring to *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015 (**CL-104**).

⁴⁴⁴ Claimant's Reply Memorial, at para 47; Hearing on the Merits and Damages, October 18, 2021, at 27:11-16.

[REDACTED] The Claimant notes that [REDACTED]
[REDACTED]
[REDACTED] 446 [REDACTED]
[REDACTED] 47 illustrates that the LRR was inextricable from the other Assistance Measures and attributable to GNS.⁴⁴⁸

230. In response to the Respondent's contention that [REDACTED]
[REDACTED]
[REDACTED]⁴⁴⁹ the Claimant submits that [REDACTED]
[REDACTED]⁰
As such, the Claimant concludes, [REDACTED]⁴⁵¹

231. Third, the Claimant reiterates that “but for” GNS’s resolution of the RES Regulations Issue and the Biomass Plant Issue, which allegedly resulted in approval of the LRR, the loan agreement between GNS and PWCC would not have been concluded and the Mill would not have reopened.⁴⁵²

232. With respect to the RES Regulations Issue, in 2010, GNS enacted the RES Regulations that committed 25% of the province's electricity supply to renewable energy sources beginning in 2015.⁴⁵³ [REDACTED]

[REDACTED]⁴⁵⁴ The Claimant submits that the additional energy needed by PHP could have required an increase in renewable energy production to comply with the renewable energy targets provided in the regulations.⁴⁵⁵ The Claimant adds that [REDACTED]

⁴⁴⁵ Claimant' Reply Memorial, at para 47; Hearing on the Merits and Damages, November 14, 2020, at 1329:10-1330:10.

446 Claimant's Memorial, at para 165, citing [REDACTED] at
CAN000002_0004 (**C-182**); Hearing on the Merits and Damages, November 9, 2020, at 33:16-25;
November 10, 2020, at 459:4-22; November 14, 2020, at 1105:23-24; Hearing on the Merits and Damages,
October 18, 2021, at 45:14-20.

⁴⁴⁷ Claimant's Memorial, at paras 164-165.

448 Claimant's Memorial, at para 165.

⁴⁴⁹ Claimant's Reply Memorial, at para 48, citing Respondent's Counter-Memorial, at para 197.

450 Claimant's Reply Memorial, at para 48; Hearing on the Merits and Damages, October 18, 2021, at 45:11-20.

451 Claimant's Reply Memorial, at para 53.

452 Claimant's Memorial, at para 168; Claimant's Reply Memorial, at para 66; Hearing on the Merits and Damages, November 9, 2020, at 36:19-37:8; November 14, 2020, at 1325:21-1326:5; Claimant's Pre-Hearing Memorial, at paras 33-34.

453 *Renewable Energy Regulations*, NS Reg 155/2010 (**C-106; R-179**).

454 [REDACTED] at CAN000004_0030 (C-163); Audit of Port
Hawkesbury Paper Load Retention Tariff, Synapse, February 28, 2014, at 6 (C-221).

455 Claimant's Memorial, at para 81, referring to [REDACTED] (C-153).

██████████⁴⁵⁶ According to the Claimant, PWCC and GNS disputed who would pay for additional renewable energy costs, with PWCC being adamant that PHP could not handle any increase in renewable energy costs.⁴⁵⁷ The Claimant explains that GNS did not address this matter before the NSUARB hearing.⁴⁵⁸ It is the Claimant's contention that GNS intervened during the proceedings "to moot the issue" days after the NSUARB hearing by way of the July 2012 Letter, which guaranteed that neither PWCC nor other ratepayers would be required to absorb any additional costs of renewable energy production.⁴⁵⁹

233. Concerning the Biomass Plant Issue, the Claimant recalls that PHP needed steam from the Biomass Plant, but that it required only 24% of the Plant's capacity.⁴⁶⁰ However, the Claimant alleges that the Biomass Plant had to operate full-time for the sole purpose of producing steam for PHP, even when it was not economically viable to do so.⁴⁶¹ According to the Claimant, this would result in a greater cost to Nova Scotian ratepayers, "paying to keep the [Biomass] Plant running 'overtime' for PHP's benefit",⁴⁶² amounting to approximately \$7 million annually.⁴⁶³ The issue of who would pay for the operation of the Biomass Plant was also unresolved as at the date of the NSUARB hearing.⁴⁶⁴ In response to the NSUARB's reluctance to approve the electricity deal without controls on additional costs to ratepayers related to the operation of the Biomass Plant, the Claimant asserts that GNS addressed this issue in the July 2012 Letter by stating that GNS would amend the RES Regulations to ensure that the Biomass Plant would be deemed a must run by operation of law.⁴⁶⁵

234. The Claimant characterizes the actions taken by GNS with respect to the RES Regulations Issue

⁴⁵⁶ Claimant's Memorial, at para 81, referring to ██████████ (C-153).

⁴⁵⁷ Claimant's Reply Memorial, at para 58.

⁴⁵⁸ Claimant's Memorial, at para 81, Excerpts from Transcript of NSUARB Hearing, July 16, 2012, at 159-161 (C-177); Claimant's Reply Memorial, at para 59.

⁴⁵⁹ Claimant's Memorial, at paras 82, 172, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 9 (C-184; R-062).

⁴⁶⁰ Claimant's Memorial, at para 173.

⁴⁶¹ Claimant's Memorial, at paras 83, 173, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 156, 173-176 (C-184).

⁴⁶² Claimant's Memorial, at para 84.

⁴⁶³ Claimant's Memorial, at para 84, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 173-175 (C-184); Hearing on the Merits and Damages, November 10, 2020, 527:21-530:3; Hearing on the Merits and Damages, October 18, 2021, at 40:11-41:11.

⁴⁶⁴ Claimant's Reply Memorial, at para 60.

⁴⁶⁵ Claimant's Memorial, at paras 85, 174, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing, NSUARB, July 20, 2012, at 1 (C-179); Hearing on the Merits and Damages, October 18, 2021, at 36:10-37:16.

and the Biomass Plant Issue as “elements of the electricity deal between PWCC and NSPT” as they were both “necessary for passage and approval of the entire electricity deal”.⁴⁶⁶ The Claimant argues that GNS’s July 2012 Letter resulted in the NSUARB’s approval of the LRR, claiming that GNS “changed the law for PWCC’s benefit”.⁴⁶⁷ The Claimant notes that the Respondent may have had other reasons for amending the regulations at issue,⁴⁶⁸ however, maintains that the other reasons have no bearing on the LRR’s attribution to GNS.⁴⁶⁹

3. Whether Canada’s Actions Attract State Responsibility under ILC Article 8

235. With respect to ILC Article 8, the Claimant’s position is that GNS “instructed” the approval of the LRR, which, pursuant to Article 8, triggers State responsibility.⁴⁷⁰
236. The Claimant specifies that it need only demonstrate instructions, as the terms “instructions”, “directions”, and “control” are disjunctive;⁴⁷¹ acting on “instructions” depends on factual circumstances and does not depend on control.⁴⁷²
237. On the definition of State “instruction”, the Claimant suggests that, in the context of ambiguous or open-ended instructions, acts that are incidental to the task in question or conceivably within its expressed ambit may be attributable to that State.⁴⁷³
238. The Claimant also relies on *Bayindir v. Pakistan* to argue that the demonstrable standard for instruction is “clearance” and “guidance” by the State in question.⁴⁷⁴ In *Bayindir*, the tribunal found that the illegal termination of a contract between the investor and the National Highway Authority (“NHA”) were deemed attributable to the State because the State “provided clearance and guidance” to the NHA,⁴⁷⁵ over which it had control as an entity.⁴⁷⁶ The Government of

⁴⁶⁶ Claimant’s Memorial, at para 175.

⁴⁶⁷ Claimant’s Memorial, at para 82; Claimant’s Reply Memorial, at para 67.

⁴⁶⁸ Claimant’s Reply Memorial, at para 66, referring to Respondent’s Counter-Memorial, at paras 201-221.

⁴⁶⁹ Claimant’s Reply Memorial, at para 66.

⁴⁷⁰ Claimant’s Memorial, at para 186; Hearing on the Merits and Damages, October 18, 2021, at 27:17-23.

⁴⁷¹ Claimant’s Memorial, at para 176, citing James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002) at 113, Commentary (7) of Article 8 (CL-109). See also *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, March 10, 2014, at para 303 (CL-110); Claimant’s Reply Memorial, at para 74; Hearing on the Merits and Damages, November 14, 2020, at 1334:14-1336:2.

⁴⁷² Hearing on the Merits and Damages, November 14, 2020, at 1350:2-10.

⁴⁷³ Claimant’s Memorial, at para 176, citing James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) at 145 (CL-111); Claimant’s Reply Memorial, at para 75.

⁴⁷⁴ Claimant’s Memorial, at paras 177-178.

⁴⁷⁵ Claimant’s Memorial, at para 177.

⁴⁷⁶ Claimant’s Memorial, at para 177.

Pakistan did not attract liability under ILC Article 5 because the NHA was not exercising its governmental authority when it wrongfully terminated the contract.⁴⁷⁷ However, the tribunal found that termination of the contract in that case could be attributed to Pakistan under ILC Article 8 because the government provided guidance and clearance to do so.⁴⁷⁸ The Claimant contests the Respondent's argument that distinguishes *Bayindir v. Pakistan* from the present case.⁴⁷⁹

239. Further, the Claimant distinguishes the decisions cited by the Respondent – *von Pezold v. Zimbabwe*, *Electrabel v. Hungary*, and *Tulip Real Estate v. Turkey* – on the basis that the facts in those cases did not involve State instruction or direction sufficient to attribute the measure in question to State conduct.⁴⁸⁰
240. The Claimant notes that the WTO Panel's ruling regarding whether GNS "entrusted and directed" the LRR cannot be applied to the present case because the WTO Panel was applying standards different from those applicable in this investor-State arbitration and the WTO Panel Report is not binding upon Resolute (a non-State, private party).⁴⁸¹
241. Applying the aforementioned principles to the case, for the below reasons, the Claimant submits that GNS instructed NSPI, within the meaning of Article 8, to ensure an appropriate LRR.⁴⁸²
242. The Claimant notes that GNS recognized the importance of the LRR once the Mill closed and requested that NSPI initiate discussions with PWCC soon after it was selected as the successful bidder.⁴⁸³
243. The Claimant argues that GNS took an active role in negotiating the LRR by providing and reviewing work product associated with the negotiations.⁴⁸⁴ The Claimant further argues that the GNS retained Mr. Todd Williams "to advocate for the approval of the electricity deal before the NSUARB", under the instructions of the GNS Department of Energy.⁴⁸⁵ In the Claimant's words,

⁴⁷⁷ Claimant's Memorial, at para 177, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, at para 123 (CL-112).

⁴⁷⁸ Claimant's Memorial, at para 178, citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, at para 128 (CL-112).

⁴⁷⁹ Claimant's Reply Memorial, at para 76, referring to Respondent's Counter-Memorial, at para 178.

⁴⁸⁰ Claimant's Reply Memorial, at para 78.

⁴⁸¹ Claimant's Reply Memorial, at paras 79-80.

⁴⁸² Claimant's Reply Memorial, at para 77.

⁴⁸³ Claimant's Reply Memorial, at para 77; Hearing on the Merits and Damages, November 14, 2020, at 1336:8-12.

⁴⁸⁴ Claimant's Reply Memorial, at para 77; Hearing on the Merits and Damages, November 10, 2020, at 403:17-21.

⁴⁸⁵ Claimant's Memorial, at para 180; Claimant's Reply Memorial, at para 77; Hearing on the Merits and Damages, November 14, 2020, at 1105:24-1106:1, 1336:12-15.

“Mr. Williams was an emissary of GNS and an indispensable architect of the energy agreement that made possible the resurrection of the PHP mill”.⁴⁸⁶

244. The Claimant enumerates the particular instances in which GNS and Mr. Williams worked with PWCC and NSPI, namely:

(1) delivering comments regarding ‘the variable Capex {capital expenditure} figures’; (2) working with NSPI to develop a protocol for delivering energy to the mill; (3) reviewing feedback from the NSPI Board of Directors on the LRT; (4) reviewing computer simulations used to calculate the power rate; (5) participating in the scheduling and process for obtaining regulatory approval for the power rate with the NSUARB and (6) determining GNS’s role in the NSUARB proceeding, including whether to sponsor Mr. Williams as a witness.⁴⁸⁷

245. Lastly, the Claimant highlights that Mr. Williams provided “expert advice” to PHP with respect to fuel and electricity costs.⁴⁸⁸

246. The Claimant alleges that GNS promised to support PWCC’s “story” before the NSUARB proceeding.⁴⁸⁹ It cites GNS’s opening statement at the proceeding to illustrate “[GNS’s] purpose and objectives helping negotiate the electricity deal”.⁴⁹⁰ As part of its statement, GNS reported that it “has been working closely with both NSPI and PWCC to address the issue of high electricity costs to serve the [Mill]”, and that:

as part of [GNS’s] involvement in negotiations relating to the re-opening of the [Mill], the province engaged the services of Todd Williams [...] to help facilitate the discussions between PWCC, represented by Stern Partners and NSPI and to identify opportunities to operate the facility differently in order to generate savings for the [Mill] and NSPI ratepayers.⁴⁹¹

247. The Claimant notes that Mr. Williams testified before the NSUARB knowing the importance of the Mill to GNS and noting to the NSUARB that the resumption of Mill operations would benefit

⁴⁸⁶ Claimant’s Memorial, at para 181; Hearing on the Merits and Damages, October 18, 2021, at 53:1-54:23.
⁴⁸⁷ Claimant’s Memorial, at para 181, referring to PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2, 2011-2012, at 78-80 (C-147); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding Amended PWCC Load Retention Rate, NSUARB, September 27, 2012 (C-205). See also *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Direct Evidence of Todd Williams, NSUARB, May 2012, at 3, 5 (C-168).

⁴⁸⁸ Claimant’s Memorial, at para 181, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Redacted Responses of Pacific West Commercial Corporation to Information Requests from the Avon Group, NSUARB, May 30, 2012, at 14, 18 (C-171).

⁴⁸⁹ Claimant’s Memorial, at para 183, referring to PWCC Meeting Notes, Redacted PWCC LRT Application NSI (Avon) IR-1 Attachment 2, 2011-2012, at 135-136 (C-147).

⁴⁹⁰ Claimant’s Memorial, at para 183.

⁴⁹¹ Claimant’s Memorial, at para 183, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Opening Statement of the Government of Nova Scotia, NSUARB, July 16, 2012 (C-178).

the province.⁴⁹²

248. The Claimant notes that GNS linked the Assistance Measures to the LRR (see Paragraphs 241 onwards of this Award)⁴⁹³ and that [REDACTED]⁴⁹⁴
249. Finally, the Claimant reports that the Premier of Nova Scotia, Mr. Darrell Dexter, personally intervened in the negotiations between PWCC and NSPI, stating that he had “spoken with the CEO of Nova Scotia Power”.⁴⁹⁵
250. In light of the above, the Claimant argues that the Tribunal should find that GNS instructed the passage of the LRR, resulting in a breach of ILC Article 8 attributable to Canada.⁴⁹⁶

4. Whether Canada’s Actions Attract State Responsibility under ILC Article 11

251. Lastly, the Claimant argues that if the Tribunal finds the LRR to be the result of private negotiations, GNS’s actions are still impugned pursuant to ILC Article 11, noting that Article 11 is attracted by a State’s mere acknowledgement of the factual existence of conduct or by its expression of approval of the conduct in question.⁴⁹⁷
252. The Claimant relies on three authorities to this effect, beginning with the *Tehran Hostages* case, in which the ICJ concluded that governmental approval of a situation resulting from private acts could be established by the State’s “decision to perpetuate” the situation.⁴⁹⁸ Additionally, it cites *Ampal-American Israel Corp. v. Egypt*⁴⁹⁹ and *Bilcon v. Canada*⁵⁰⁰ for the proposition that ministerial approval of a private entity’s decision or findings could be attributable to the State under Article 11.

⁴⁹² Claimant’s Memorial, at para 184.

⁴⁹³ Claimant’s Reply Memorial, at para 77.

⁴⁹⁴ Claimant’s Reply Memorial, at para 47; Hearing on the Merits and Damages, November 14, 2020, at 1336:16-21.

⁴⁹⁵ Claimant’s Memorial, at para 185, citing Nova Scotia Legislature House of Assembly Debates and Proceedings, Fourth Session, April 25, 2012, at 1000-01 (C-162).

⁴⁹⁶ Claimant’s Memorial, at para 186.

⁴⁹⁷ Claimant’s Reply Memorial, at para 70; Hearing on the Merits and Damages, November 9, 2020, at 36:10-17; November 14, 2020, at 1333:9-1334:13; Hearing on the Merits and Damages, October 18, 2021, at 27:17-13.

⁴⁹⁸ Claimant’s Reply Memorial, at para 70, citing *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, May 24, 1980, ICJ Reports 1980, 3, at paras 73-74 (CL-210).

⁴⁹⁹ Claimant’s Reply Memorial, at para 71, referring to *Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017, at paras 145-146 (CL-234).

⁵⁰⁰ Claimant’s Reply Memorial, at para 72, referring to *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at paras 322, 324 (CL-104).

253. The Claimant submits that GNS's actions in relation to the LRR were more than acknowledgment of the LRR's factual existence.⁵⁰¹ Rather, it claims the GNS "ratified" the LRR and "took the final action to ensure their passage", not unlike the government ministers' approvals in *Ampal* and *Bilcon*.⁵⁰²

C. THE RESPONDENT'S ARGUMENTS

1. Whether GNS's Assistance Measures Should be Considered as a Whole

254. The Respondent disagrees with the Claimant's suggestion that the LRR is inseparable from GNS's financial assistance to PWCC.⁵⁰³

255. The Respondent argues that a tribunal constituted under NAFTA Chapter 11 must base its jurisdiction on impugned measures "adopted or maintained by a Party relating to" an investor and its investment.⁵⁰⁴ This requirement, the Respondent explains, cannot be avoided by taking the "ensemble" approach suggested by the Claimant.⁵⁰⁵

256. The Respondent further notes that the inquiry prescribed by ILC Article 2⁵⁰⁶ first requires a determination of whether an act or omission is attributable to the State, then whether the act or omission in question constitutes a breach of international law.⁵⁰⁷ The Respondent submits that "the inquiries are distinct and cannot be conflated even if there are other measures over which the State does not contest attribution".⁵⁰⁸ The Respondent concludes that the Claimant cannot circumvent the requirements of Article 2 by alleging that the PWCC's LRR is "vicariously attributable" to GNS on account of the other Assistance Measures.⁵⁰⁹

257. Finally, as is discussed below, the Respondent argues that the LRR is not attributable to GNS and it is factually incorrect for the Claimant to do so on the basis that it is inseparable from the other

⁵⁰¹ Claimant's Reply Memorial, at para 73.

⁵⁰² Claimant's Reply Memorial, at para 73.

⁵⁰³ Respondent's Rejoinder Memorial, at para 23, referring to Claimant's Memorial, at para 159; Claimant's Reply Memorial, at para 30.

⁵⁰⁴ Respondent's Rejoinder Memorial, at para 24.

⁵⁰⁵ Respondent's Rejoinder Memorial, at paras 24-25.

⁵⁰⁶ ILC Article 2 provides: "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". See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), at Article 2 (**CL-145**).

⁵⁰⁷ Respondent's Rejoinder Memorial, at para 25, citing International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), at Article 2 (**RL-032**).

⁵⁰⁸ Respondent's Rejoinder Memorial, at para 26.

⁵⁰⁹ Respondent's Rejoinder Memorial, at para 26.

measures.⁵¹⁰ Therefore, it pleads that the LRR cannot constitute an impugned measure for the Tribunal to consider by simply claiming that it was part of an “ensemble” of measures provided by GNS.⁵¹¹

2. Whether the Load Retention Rate is Attributable to Canada Pursuant to ILC Article 4

258. The Respondent denies that the conduct of the NSUARB in approving the LRR makes the LRR attributable to Canada.⁵¹²
259. With respect to ILC Article 4, the Respondent does not dispute the claim that the NSUARB is a State organ,⁵¹³ but contends that the Claimant fails to establish the wrongfulness of the NSUARB’s conduct.⁵¹⁴ In the Respondent’s view, this is due to the Claimant’s conflation of NSPI and PWCC’s conduct with that of the NSUARB when they are clearly distinguishable.⁵¹⁵
260. The Respondent submits that the LRR was the result of “a vigorous six-month negotiation” between PWCC and NSPI, which the NSUARB and WTO Panel already acknowledged.⁵¹⁶ It maintains that the NSUARB’s role was to “adjudicate [...] whether the proposed LRR would leave ratepayers better off than they would be otherwise”.⁵¹⁷ The Respondent notes that the NSUARB applied the same test as it did in the context of PWCC’s application, as it did to Bowater Mersey and PHP’s proposed rate in November 2011.⁵¹⁸ As such, it argues “[t]hat conduct [the application of the test] by the [NSUARB] is not alleged to be internationally wrongful, which is why Resolute’s reliance on ILC Article 4 is flawed”.⁵¹⁹
261. The Respondent distinguishes the facts of *Bilcon* from this case, arguing that in *Bilcon*, the actual conduct of the JRP was the alleged internationally wrongful act, whereas the NSUARB merely

⁵¹⁰ Respondent’s Rejoinder Memorial, at para 27.

⁵¹¹ Respondent’s Rejoinder Memorial, at para 28.

⁵¹² Respondent’s Rejoinder Memorial, at para 37.

⁵¹³ Respondent’s Rejoinder Memorial, at para 39.

⁵¹⁴ Respondent’s Rejoinder Memorial, at para 40.

⁵¹⁵ Respondent’s Rejoinder Memorial, at paras 40-41; Respondent’s Pre-Hearing Memorial, at paras 14, 16.

⁵¹⁶ Respondent’s Rejoinder Memorial, at para 41, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at paras 36-41 (**R-062**); United States – WTO Panel Report – *Supercalendered Paper*, July 5, 2018, at para 7.77 (**R-238**); Hearing on the Merits and Damages, November 9, 2020, at 204:13-206:5; Respondent’s Pre-Hearing Memorial, at para 15.

⁵¹⁷ Respondent’s Rejoinder Memorial, at para 43.

⁵¹⁸ Hearing on the Merits and Damages, November 9, 2020, at 206:19-207:25; Hearing on the Merits and Damages, October 18, 2021, at 202:17-24.

⁵¹⁹ Respondent’s Rejoinder Memorial, at para 43 [emphasis in original].

fulfilled its statutory mandate, which cannot be the basis of the alleged injury.⁵²⁰ Accordingly, the Respondent summarizes its position as follows: “If Resolute cannot demonstrate that the latter conduct is attributable to GNS through ILC Article 8, it cannot create vicarious attribution for the same alleged wrongful private conduct simply by switching its focus to the conduct of the [NSUARB] through ILC Article 4”.⁵²¹

262. The Respondent argues that the Claimant’s allegation that [REDACTED] [REDACTED]⁵²² proves the opposite of what it intends.⁵²³ Relying on Ms. Jeannie Chow’s testimony, the Respondent explains that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵²⁴ In other words [REDACTED]
[REDACTED]⁵²⁵

263. The Respondent also contends that the Claimant’s argument with respect to GNS’s financial interest in the electricity deal is meritless.⁵²⁶ The Respondent argues that it was sound to link the loan forgiveness to the taxes paid by NSPI: [REDACTED]

[REDACTED]

[REDACTED]⁷ Therefore, the Respondent argues that by pegging the terms of the loan to tax revenues, the actions of PWCC and NSPI in negotiating the LRR do not become attributable to GNS under international law.⁵²⁸ The Respondent points out that the Claimant did not explain how making “a revenue-neutral change to a loan agreement”⁵²⁹ could qualify as an instruction by GNS to NSPI and PWCC, the latter two having already negotiated a deal approved by the NSUARB. It also states that the Claimant did not explain how any “financial interest” in the outcome of the negotiations amounted to an “instruction”.⁵³⁰

264. The Respondent denies that [REDACTED]

⁵²⁰ Respondent’s Rejoinder Memorial, at para 44; Hearing on the Merits and Damages, November 9, 2020, at 208:3-208:20; Hearing on the Merits and Damages, October 18, 2021, at 203:18-23.

⁵²¹ Respondent’s Rejoinder Memorial, at para 45.

⁵²² Respondent’s Counter-Memorial, at para 196, citing Claimant’s Memorial, at paras 45, 164-165, 179, 186.

⁵²³ Respondent’s Counter-Memorial, at para 197.

⁵²⁴ Respondent’s Counter-Memorial, at para 197.

⁵²⁵ Respondent’s Counter-Memorial, at para 197, citing Witness Statement of Jeannie Chow, April 17, 2019, at para 17.

⁵²⁶ Respondent’s Counter-Memorial, at paras 198-199.

⁵²⁷ Respondent’s Counter-Memorial, at para 199, citing Witness Statement of Jeannie Chow, April 17, 2019, at para 10.

⁵²⁸ Respondent’s Counter-Memorial, at para 198.

⁵²⁹ Respondent’s Counter-Memorial, at para 200.

⁵³⁰ Respondent’s Counter-Memorial, at para 200.

██████████⁵³¹ and disagrees with the Claimant’s use of ██████████
 ██████████⁵³² It states
 “Resolute is wrongly conflating two different measures (loan versus LRR), two unrelated State
 organs (██████████ versus [NSUAR]) and two distinct processes (approval of loan versus approval
 of proposed electricity rate)”.⁵³³

265. Whereas the NSUAR’s approval of a proposed LRR is an “independent and statutorily mandated
 process”, the Respondent contends that “██████████
 ██████████
 ██████████
 ██████████”.⁵³⁴ The Respondent maintains that this
 condition precedent is distinguishable from the actions taken *Bilcon*.⁵³⁵ In that case, the
 government officials used their discretion to deny approval of a quarry project based on wrongful
 recommendations of the JRP,⁵³⁶ whereas in the current dispute, ██████████ had
 no authority to direct the negotiations or approval of the LRR.⁵³⁷ The Respondent limits ██████████
 ██████████⁵³⁸

266. The Respondent denies that GNS took specific and extraordinary actions to ensure that the
 NSUAR would approve the LRR and that GNS guaranteed that neither PWCC nor the other
 taxpayers would be required to pay the incremental costs of additional renewable electricity
 triggered by PHP’s return to the grid.⁵³⁹ The Respondent also considers the allegation that GNS
 “‘waived’ environmental regulations and changed laws on biomass to authorize the agreement
 between PWCC and NSPI” to be factually incorrect and based on a misunderstanding of GNS’s
 environmental policies that predated the LRR negotiations.⁵⁴⁰

267. Regarding the Biomass Plant Issue, the Respondent submits that GNS’s regulatory conduct
 concerning the Biomass Plant is “separate and distinct” from negotiations between PWCC and

⁵³¹ Respondent’s Rejoinder Memorial, at para 51, referring to Claimant’s Reply Memorial, at para 49.

⁵³² Respondent’s Rejoinder Memorial, at para 51, referring to ██████████
 ██████████ at CAN000002_0004 (C-182).

⁵³³ Respondent’s Rejoinder Memorial, at para 52.

⁵³⁴ Respondent’s Rejoinder Memorial, at para 53, referring to Rejoinder Witness Statement of Jeannie Chow,
 March 4, 2020, at paras 2-4.

⁵³⁵ Respondent’s Rejoinder Memorial, at para 54.

⁵³⁶ Respondent’s Rejoinder Memorial, at para 54, referring to *Bilcon v. Government of Canada*, PCA Case No.
 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 311 (RL-025).

⁵³⁷ Respondent’s Rejoinder Memorial, at para 54.

⁵³⁸ Respondent’s Rejoinder Memorial, at para 54.

⁵³⁹ Respondent’s Counter-Memorial, at para 215.

⁵⁴⁰ Respondent’s Counter-Memorial, at para 157.

NSPI resulting in the LRR.⁵⁴¹ The NSUARB's confirmation of the privately-negotiated LRR and the GNS's conduct in confirming pre-existing policy intentions are separate and distinct from the alleged internationally wrongful act, the negotiation of the LRR.⁵⁴²

268. The Respondent argues that the steps taken by GNS regarding the Biomass Plant were merely a continuation of GNS's long standing policies favoring the use of clean energy.⁵⁴³ The Respondent explains that NSPI saw biomass as an important hedge against overreliance on wind power, which was less reliable and had costly operational challenges.⁵⁴⁴ The NSPI, according to the Respondent, viewed biomass as crucial in meeting the province's renewable energy targets under the RES Regulations.⁵⁴⁵ Accordingly, the Respondent explains, NSPI diversified its renewable energy portfolio by negotiating an agreement with NPPH in 2010 to build the Biomass Plant at the Mill, with NSPI owning the plant and the renewable energy it produces and NPPH using the steam from the Biomass Plant.⁵⁴⁶ At the time that NPPH filed for creditor protection in September 2011, NSPI had already decided to take over the construction and operation of the Biomass Plant.⁵⁴⁷ After the Mill was sold to PWCC, NSPI wanted to continue operating the Biomass Plant and therefore PWCC and NSPI entered an agreement (later approved by the NSUARB) that NSPI would continue to own the Biomass Plant and deliver steam to PWCC, while PWCC would pay for the fuel necessary to generate the steam required for its paper operations.⁵⁴⁸
269. The Respondent denies that the Biomass Plant would be running full-time only to serve PWCC's needs.⁵⁴⁹ It explains that GNS supported NSPI's efforts to operate the Biomass Plant as a means through which it could fulfill its minimum supply of renewable energy during shortfalls of other renewable energy sources,⁵⁵⁰ and this, before PWCC sought to purchase the Mill.⁵⁵¹ The Respondent points out that the amendments to the RES Regulations were prepared and released for public consultation as early as June 27, 2011.⁵⁵² The Respondent explains that the amendments

⁵⁴¹ Respondent's Rejoinder Memorial, at para 49.

⁵⁴² Respondent's Rejoinder Memorial, at para 50; Hearing on the Merits and Damages, November 14, 2020, at 1357:13-1358:9.

⁵⁴³ Respondent's Counter-Memorial, at para 202; Respondent's Rejoinder Memorial, at para 49.

⁵⁴⁴ Respondent's Counter-Memorial, at paras 203, 205.

⁵⁴⁵ Respondent's Counter-Memorial, at para 205.

⁵⁴⁶ Respondent's Counter-Memorial, at para 206.

⁵⁴⁷ Respondent's Counter-Memorial, at para 207.

⁵⁴⁸ Respondent's Counter-Memorial, at para 208; Hearing on the Merits and Damages, October 19, 2021, at 450:8-20.

⁵⁴⁹ Respondent's Counter-Memorial, at para 209.

⁵⁵⁰ Respondent's Counter-Memorial, at para 210, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Transcript – Part B, NSUARB, July 17, 2012, at 439 (**R-399**).

⁵⁵¹ Respondent's Counter-Memorial, at para 210, referring to *In re An Application by Nova Scotia Power Inc.*, Application (Redacted) for Approval of Capital Work Order in respect of the Port Hawkesbury Biomass Project, Closing Submissions, September 20, 2010 at paras 24, 26, 30, 34 (**R-183**).

⁵⁵² Respondent's Counter-Memorial, at para 211.

to the RES Regulations were passed on January 17, 2013, after the developments relating to the closures of Bowater Mersey and the Mill were assessed.⁵⁵³ The Respondent notes that, under the amended framework, PHP does not benefit from any reduced or subsidized rate for steam supplied by NSPI;⁵⁵⁴ PHP had to pay nearly \$4 million per year for the steam from the Biomass Plant and bears the cost for the fuel necessary to produce its portion of the steam;⁵⁵⁵ and lastly, PHP could obtain the necessary steam from its own gas-fired boiler if NSPI decided not to operate the Biomass Plant.⁵⁵⁶ Ultimately, the Respondent argues that NSPI and its customers were better off as a result of the electricity and steam supply agreements.⁵⁵⁷

270. Moreover, the Respondent argues that the alleged [REDACTED] in savings that PHP received between 2013-2015 is not attributable to GNS's RES Regulations.⁵⁵⁸ According to the Respondent, this claim is supported by the fact that the Biomass Plant regulation was amended in 2016 without changing PHP's LRR, which evidences a "clear divide" between the private conduct of PWCC and NSPI, on the one hand, and GNS on the other.⁵⁵⁹
271. Regarding the RES Regulations Issue, the Respondent argues that the measures taken by GNS in clarifying its intent regarding RES-related eventuality is not part of the LRR negotiated between PWCC and NSPI.⁵⁶⁰
272. The Respondent rejects the claim that the July 2012 Letter waived the RES obligations upon the LRR.⁵⁶¹ According to the Respondent, GNS merely confirmed that the re-opening of the Mill would not result in incremental costs to meet RES requirements.⁵⁶² The Respondent explains that this confirmation was reasonable given that the province had already planned its compliance with the RES Regulations up until 2015 by the time the Mill went into "hot idle" in September 2011.⁵⁶³

⁵⁵³ Respondent's Counter-Memorial, at paras 211-212.

⁵⁵⁴ Respondent's Counter-Memorial, at para 213.

⁵⁵⁵ Respondent's Counter-Memorial, at para 213.

⁵⁵⁶ Respondent's Counter-Memorial, at para 213, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012 at para 156 (**R-062**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Redacted Pacific West Commercial Corporation Responses to Information Requests from the Small Business Advocate, May 30, 2012, M04862 P-18 IR-24, at 25 (**R-417**).

⁵⁵⁷ Respondent's Counter-Memorial, at para 214.

⁵⁵⁸ Respondent's Rejoinder Memorial, at para 49.

⁵⁵⁹ Respondent's Rejoinder Memorial, at para 49.

⁵⁶⁰ Respondent's Counter-Memorial, at para 221; Respondent's Pre-Hearing Memorial, at para 17.

⁵⁶¹ Respondent's Counter-Memorial, at para 217.

⁵⁶² Respondent's Counter-Memorial, at para 216; Respondent's Pre-Hearing Memorial, at para 17.

⁵⁶³ Respondent's Counter-Memorial, at para 218, referring to Witness Statement of Murray Coolican, April 17, 2019, at paras 25-26; See also, *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Non-Confidential Government of Nova Scotia Amended Response to Consumer Advocate IR-41(a), NSUARB, July 18, 2012, at 8 (**R-177**).

Moreover, there was a decrease in the overall system load because Resolute’s Bowater Mersey mill had shut down in June 2012. PWCC also planned to close the Mill’s newsprint line, which would reduce the overall load by approximately 450,000 MWh per year.⁵⁶⁴ Finally, GNS was planning to import renewable energy from the provinces of Newfoundland and Labrador to help it meet its 2020 RES targets.⁵⁶⁵ The Respondent contends that GNS’s conduct in “clarifying its intent regarding RES-related eventualities is distinct from the negotiated commercial terms of how much NSPI would be paid for its electricity”.⁵⁶⁶

273. The Respondent underscores that the PHP Mill’s load “has never triggered an additional RES obligation and has never resulted in additional incremental costs”,⁵⁶⁷ thereby arguing that GNS’s expectation was realized.⁵⁶⁸ According to the Respondent, the fact that the Claimant does not allege any benefit to PHP from not having to pay RES-related costs renders the RES Regulations Issue moot.⁵⁶⁹

3. Whether Canada’s Actions Attract State Responsibility under ILC Article 8

274. The Respondent recalls that a measure is only “adopted and maintained” for the purposes of NAFTA Article 1101(1), if it is attributable to the State under international law, as described in the ILC Articles.⁵⁷⁰ The Respondent argues that the threshold for attributing conduct to a State under ILC Article 8 is one of “effective control” rather than one of “clearance and guidance” as suggested by the Claimant.⁵⁷¹
275. The Respondent argues that State responsibility pursuant to Article 8 only arises “where a state instructs a private person or entity to do something *on its behalf*”.⁵⁷² The Respondent acknowledges that Article 8 refers to “instructions”, “direction”, and “control” disjunctively, but

⁵⁶⁴ Respondent’s Counter-Memorial, at para 218, referring to Witness Statement of Murray Coolican, April 17, 2019, paras 25-26; *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Non-Confidential Government of Nova Scotia Amended Response to Consumer Advocate IR-41(a), NSUARB, July 18, 2012, at 8 (**R-177**).

⁵⁶⁵ Respondent’s Counter-Memorial, at para 218, referring to Witness Statement of Murray Coolican, April 17, 2019, at paras 25-26; See also, *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Non-Confidential Government of Nova Scotia Amended Response to Consumer Advocate IR-41(a), NSUARB, July 18, 2012, at 8 (**R-177**).

⁵⁶⁶ Respondent’s Rejoinder Memorial, at para 48.

⁵⁶⁷ Respondent’s Counter-Memorial, at para 220, citing Witness Statement of Murray Coolican, April 17, 2019, at para 31; Hearing on the Merits and Damages, October 19, 2021, at 450:34:451:5.

⁵⁶⁸ Respondent’s Counter-Memorial, at para 220.

⁵⁶⁹ Respondent’s Rejoinder Memorial, at para 48.

⁵⁷⁰ Respondent’s Counter-Memorial, at para 172.

⁵⁷¹ Respondent’s Counter-Memorial, at para 178, referring to Claimant’s Memorial, at paras 177-178.

⁵⁷² Respondent’s Counter-Memorial, at para 174, citing James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) at 144 (**CL-111**).

maintains that “instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act”.⁵⁷³ Therefore, the Respondent submits that an abstract argument that a State gave an instruction is necessarily incomplete.⁵⁷⁴

276. Further, relying on the ICJ’s decision in the *Bosnian Genocide* case, the Respondent argues that the instructions given by a State must have been “in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations”.⁵⁷⁵ According to the Respondent, the threshold for State attribution is high because of the dual requirement of “general control of the State over the person or entity and specific control of the State over the act the attribution of which is in question”.⁵⁷⁶
277. The Respondent notes that investor-State tribunals have required claimants to demonstrate a close link between the impugned act and the State through “effective control”, “direct command”, “direct order”, or “direct control”.⁵⁷⁷ The Respondent invokes, for example, *von Pezold v Zimbabwe*, where the tribunal held that Zimbabwe could not be found responsible under ILC Article 8 for the actions of certain individuals despite “ample evidence of [g]overnment involvement and encouragement” once the actions in question had begun, because such actions were not “based on a *direct order or under the direct control of the Government*”.⁵⁷⁸ The Respondent also relies upon the findings in *Electrabel v. Hungary* for the proposition that the actions of a State-owned entity cannot be attributed to a State merely because the latter exercises

⁵⁷³ Respondent’s Counter-Memorial, at para 175, citing International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), at 48 (RL-032).

⁵⁷⁴ Respondent’s Counter-Memorial, at para 175.

⁵⁷⁵ Respondent’s Counter-Memorial, at para 176, citing *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, February 26, 2007, ICJ Reports 2007, 43, at para 400 (RL-115).

⁵⁷⁶ Respondent’s Counter-Memorial, at para 177, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, at para 173 (CL-105); *Gustav F.W. Hamster GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, at para 179 (RL-069); *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, November 30, 2011, at para 8.1.18 (RL-116); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, at para 7.69 (RL-113); *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 25, 2018, at para 828. See also Respondent’s Rejoinder Memorial, at para 30; Hearing on the Merits and Damages, November 14, 2020, at 1356:5-18.

⁵⁷⁷ Respondent’s Counter-Memorial, at para 177, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, at para 157 (CL-105).

⁵⁷⁸ Respondent’s Counter-Memorial, at para 180, citing *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, at para 448 [emphasis in original] (RL-121).

some influence over the former.⁵⁷⁹

278. The Respondent argues that the Claimant’s position is weak because it applies the wrong standard for State attribution, “clearance and guidance”, by exclusively relying on *Bayindir v. Pakistan*.⁵⁸⁰ The Respondent contests the Claimant’s exclusive reliance on the attribution test upheld in *Bayindir v Pakistan*, on the basis that this case (i) is a departure from the deeply-entrenched effective control test and (ii) constitutes a “highly fact-specific finding of attribution”.⁵⁸¹ The Respondent instead relies upon the findings of various tribunals that have endorsed the two-part effective control test making both general and specific control by a State the prerequisites to attribution.⁵⁸²
279. The Respondent argues that GNS did not exercise effective control over PWCC and NSPI when the terms and conditions of the LRR were negotiated. The Respondent argues that GNS did not instruct PWCC and NSPI in any way, nor was the independent consultant advocating on GNS’s behalf.⁵⁸³ Accordingly, the Respondent maintains that the Claimant has failed to establish that Canada meets the Article 8 standard with respect to the LRR.
280. The Respondent draws a distinction between the present case and other international cases in which State-owned entities allegedly terminated contracts through the State’s voting shares or board of director appointees.⁵⁸⁴ The Respondent argues that GNS did not own shares in either PWCC or NSPI, nor did it appoint any members of their boards.⁵⁸⁵ The Respondent contends that the LRR was the result of negotiations between two private parties, PWCC and NSPI, over which GNS had no control.⁵⁸⁶
281. The Respondent clarifies that GNS’s request that NSPI initiate discussions with PWCC as soon

⁵⁷⁹ Respondent’s Counter-Memorial, at para 181, citing *Electrabel S.A v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, at para 7.95 (RL-113).

⁵⁸⁰ Respondent’s Counter-Memorial, at para 182; Respondent’s Rejoinder Memorial, at para 30.

⁵⁸¹ Respondent’s Counter-Memorial, at para 178.

⁵⁸² Respondent’s Counter-Memorial, at para 179, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, para 173 (CL-105). See also *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, UNCITRAL, Award, June 27, 2016, at paras 268-269 (RL-120).

⁵⁸³ Respondent’s Counter-Memorial, at para 183; Hearing on the Merits and Damages, October 18, 2021, at 197:25-198:3.

⁵⁸⁴ Respondent’s Counter-Memorial, at para 184, referring to Claimant’s Memorial at paras 176-178 and footnotes 263-270, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009 (CL-112); *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, March 10, 2014, at paras 37, 63, 307, 326 (RL-118).

⁵⁸⁵ Respondent’s Counter-Memorial, at para 184.

⁵⁸⁶ Respondent’s Counter-Memorial, at para 183.

as they were selected as the winning bidder does not suggest that GNS exercised effective control over NSPI.⁵⁸⁷ The Respondent submits that GNS's introduction of PWCC to NSPI cannot be considered as an instruction to establish effective control under the terms of Article 8.⁵⁸⁸ The Respondent emphasizes that the NSUARB is a quasi-judicial independent tribunal and operates as an independent regulator to adjudicate utility matters in the best interests of ratepayers.⁵⁸⁹ Given this framework, the Respondent submits that Resolute does not and cannot argue that GNS instructed the NSUARB to approve the LRR.⁵⁹⁰ The Respondent maintains that PWCC and NSPI, in negotiating the LRR, were working to advance their own commercial interests.⁵⁹¹ The Respondent recalls that NSPI had an interest in ensuring that its largest customer remained operational: (i) the closure of the Mill would have deprived NSPI of the Mill's contributions to fixed costs and reduced the load requirements of the system; (ii) the closure of the Mill would have reduced employment in the area and would have adversely affected NSPI's revenues from the local residential and commercial customer load; (iii) the Mill allowed NSPI to operate the Biomass Plant as a co-generational facility which improved economics over time and (iv) the Mill would have operated during lower load periods, and thus reduced overall system losses for NSPI.⁵⁹² The Respondent notes that the WTO Panel recognized the interest of NSPI in accommodating the needs of its largest customer.⁵⁹³

282. Contrary to the Claimant's allegation that GNS participated in numerous meetings and that the Premier of Nova Scotia intervened personally in the negotiations,⁵⁹⁴ the Respondent asserts that the role of GNS representatives during the meetings was to "observe and report on progress", not to "instruct" the parties.⁵⁹⁵ The Respondent notes that GNS did not want to be a co-applicant to the NSUARB with PWCC and NSPI for the LRR application.⁵⁹⁶ Moreover, it suggests that the public record of the negotiations disproves any claim that PWCC and NSPI were "in fact acting on the instructions of" the GNS "in carrying out" their LRR negotiations.⁵⁹⁷

⁵⁸⁷ Respondent's Rejoinder Memorial, at para 32.

⁵⁸⁸ Respondent's Rejoinder Memorial, at para 32.

⁵⁸⁹ Respondent's Counter-Memorial, at para 188; Hearing on the Merits and Damages, October 18, 2021, at 199:13-18.

⁵⁹⁰ Respondent's Counter-Memorial, at para 188; Hearing on the Merits and Damages, November 14, 2020, at 1357:13-23.

⁵⁹¹ Respondent's Counter-Memorial, at para 193.

⁵⁹² Respondent's Counter-Memorial, at para 194.

⁵⁹³ Respondent's Counter-Memorial, at para 195.

⁵⁹⁴ Respondent's Counter-Memorial, at para 185, referring to Claimant's Memorial at paras 42, 59, 185.

⁵⁹⁵ Respondent's Counter-Memorial, at para 186.

⁵⁹⁶ Respondent's Counter-Memorial, at para 186.

⁵⁹⁷ Respondent's Counter-Memorial, at para 186, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Inc.*, NSPI Responses – Avon, May 30, 2012, at 1 (**R-239**); PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon), IR-1 Attachment 2, May 30, 2011 (**C-147**); PWCC Documents, Redacted PWCC LRT Application NSPI (Avon), Attachment 3, M04862, P-39(c) (**R-406**); *In*

283. The Respondent also qualifies the Claimant's allegation with respect to the Premier of Nova Scotia's intervention in the negotiations as a highly inappropriate misrepresentation of the record⁵⁹⁸ and emphasizes that regardless of the outcome, any agreement was in the hands of NSPI and PWCC and would require approval from the NSUARB.⁵⁹⁹ The Respondent notes that the Premier of Nova Scotia had made clear that GNS would not intervene in the NSUARB process.⁶⁰⁰
284. The Respondent submits that GNS did not issue instructions through Mr. Williams and had no effective control over NSPI or PWCC in their LRR negotiations.⁶⁰¹ The Respondent qualifies Mr. Williams as an independent electricity expert retained to facilitate the LRR negotiations between NSPI and PWCC.⁶⁰² Seeing as PWCC and NSPI encountered challenges because of their experience in different jurisdictions,⁶⁰³ the Respondent contends that Mr. Williams was hired due to his "breadth of experience in different jurisdictions with varying electricity regimes".⁶⁰⁴ According to the Respondent, Mr. Williams had worked with NSPI and the Port Hawkesbury Mill under a previous retainer by NPPH and Resolute with respect to another electricity rate application to the NSUARB in 2009, which meant he was familiar with the negotiating parties.⁶⁰⁵ The Respondent denies that Mr. Williams was "an emissary of GNS",⁶⁰⁶ relying on his contract, which states that he was "not the agent of the Province" and had "no authority [...] to bind the

re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc., Decision, NSUARB, August 20, 2012, at para 41 (**R-062**).

- ⁵⁹⁸ Respondent's Rejoinder Memorial, at para 35; Respondent's Counter-Memorial, at para 187, citing the Premier's statement in full: "I have spoken with the CEO of Nova Scotia Power and I am confident that the utility and Pacific West are working together to build a plan in the best interest of Nova Scotians. Once that plan is finalized, it will go before the Nova Scotia Utility and Review Board for approval". See Nova Scotia Legislature House of Assembly Debates and Proceedings, Fourth Session, April 25, 2012, at 1000 (**C-162**).
- ⁵⁹⁹ Respondent's Counter-Memorial, at para 187. See also Nova Scotia House of Assembly Debates and Proceedings, No. 12-29, May 10, 2012, at 1967 (**R-396**).
- ⁶⁰⁰ Respondent's Counter-Memorial, at para 187.
- ⁶⁰¹ Respondent's Counter-Memorial, at para 189; Hearing on the Merits and Damages, October 18, 2021, at 197:15-22.
- ⁶⁰² Respondent's Counter-Memorial, at paras 189-190; Respondent's Rejoinder Memorial, at para 33; Hearing on the Merits and Damages, November 9, 2020, at 199:23-200:19.
- ⁶⁰³ Respondent's Counter-Memorial, at para 190, referring to Witness Statement of Murray Coolican, April 17, 2019, at para 14; Witness Statement of Duff Montgomerie, April 17, 2019, at para 36.
- ⁶⁰⁴ Respondent's Counter-Memorial, at para 190, referring to Witness Statement of Murray Coolican, April 17, 2019, at para 14; Witness Statement of Duff Montgomerie, April 17, 2019, at para 36.
- ⁶⁰⁵ Respondent's Counter-Memorial, at para 190, referring to Witness Statement of Murray Coolican, April 17, 2019, at para 14; Witness Statement of Duff Montgomerie, April 17, 2019, at para 36. See also *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Direct Evidence of Todd Williams, NSUARB, May 2012, at 2, 4 (**C-168**); *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, GNS Responses to Information Requests from Consumer Advocate, NSUARB, June 29, 2012, at 2-3 (**C-173**); NSPI DSM Cost Allocation and Rate Recovery, NSUARB P-888 N-24, August 7, 2008, at 1 (**R-407**).
- ⁶⁰⁶ Respondent's Counter-Memorial, at para 191, referring to Claimant's Memorial, at para 181.

province by contract or otherwise”.⁶⁰⁷ Further, the Respondent notes that in Mr. Williams’s testimony before the NSUARB, he stated that his role was to “provide advice and technical support to both parties on matters related to the design of the [LRR] mechanism” and “to identify opportunities to operate the facility differently in order to generate savings for the [Mill] and [NSPI] ratepayers”.⁶⁰⁸ The Respondent notes that Mr. Williams had no power to instruct PWCC or NSPI.⁶⁰⁹ As such, the Respondent maintains that GNS did not instruct PWCC and NSPI via Mr. Williams, nor could Mr. Williams ensure that their negotiations would lead to an agreement on a particular electricity rate or on specific terms and conditions.⁶¹⁰

285. As explained above,⁶¹¹ the Respondent denies that GNS’s loan agreement with PWCC was linked to the LRR and denies that this establishes GNS’s effective control over PWCC and NSPI.⁶¹²

4. Whether Canada’s Actions Attract State Responsibility under ILC Article 11

286. The Respondent argues that the Claimant’s reliance on ILC Article 11 to attribute the LRR to GNS does not support its position⁶¹³ because none of GNS’s conduct with respect to the LRR constitutes “an express or implied acknowledgment and adoption of the impugned conduct as its own”.⁶¹⁴

287. First, the Respondent advances that the NSUARB did not seek to make the conduct of PWCC or NSPI its own and that its role was limited to determining whether the proposed LRR satisfied the statutory requirement that all other ratepayers be better off than they would be without PHP’s LRR.⁶¹⁵ Therefore, it claims that Resolute is incorrect to suggest that “a State organ that adjudicates a regulatory process to review a proposed private transaction [...] acknowledges and adopts the conduct of the private parties appearing before it”.⁶¹⁶

288. Second, the Respondent denies that GNS adopted the LRR as its own through the loan

⁶⁰⁷ Respondent’s Counter-Memorial, at para 191, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, GNS Responses to Information Requests from Consumer Advocate, Exhibit 1 (Agreement dated February 13, 2012), at Schedule A, para 9 (C-173).

⁶⁰⁸ Respondent’s Counter-Memorial, para 192, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Opening Statement of the Government of Nova Scotia, NSUARB, July 16, 2012, at 1 (C-178).

⁶⁰⁹ Respondent’s Counter-Memorial, at para 191.

⁶¹⁰ Respondent’s Counter-Memorial, at para 192.

⁶¹¹ See *supra*, at Paragraph 263 of this Award.

⁶¹² Respondent’s Rejoinder Memorial, at para 34.

⁶¹³ Respondent’s Rejoinder Memorial, at para 55.

⁶¹⁴ Respondent’s Rejoinder Memorial, at para 58.

⁶¹⁵ Respondent’s Rejoinder Memorial, at para 59.

⁶¹⁶ Respondent’s Rejoinder Memorial, at para 59.

agreement.⁶¹⁷ Rather, GNS assessed the LRR and “believed it to be sufficiently sound to justify making a loan”.⁶¹⁸ Consequently, the Respondent asserts that “Resolute’s suggestion that a State organ lending money to a private party automatically means that under international law the State has ‘adopted as its own’ that private party’s contractual rights and obligations vis-à-vis third parties is untenable”.⁶¹⁹

289. Third, the Respondent refers back to GNS’s “long-standing and pre-existing governmental policies” with regard to transitioning to renewable energy as the explanation for its regulatory behavior with respect to the RES Regulations and Biomass Plant Issues.⁶²⁰ As such, the regulatory actions lack the “requisite nexus” to the LRR for them to constitute “acknowledgment and adoption” of the LRR by GNS pursuant to ILC Article 11.⁶²¹ Once again, contrary to *Bilcon*, the Respondent emphasizes that GNS did not acknowledge or adopt the LRR (as the alleged wrongful conduct) as its own, which is what a claim of attribution under ILC Article 11 requires.⁶²²

D. THE TRIBUNAL’S ANALYSIS

1. Whether GNS’s Assistance Measures Should be Considered as a Whole

290. As the Claimant notes, the Respondent does not contest that the Assistance Measures, but for the LRR, can be attributed to Canada.⁶²³ However, this does not suffice to render the LRR attributable to Canada, too. It may well be correct that, absent the ensemble of measures as a whole, PWCC would not have purchased and reopened the Mill, which, in turn, arguably would not have caused damage to the Claimant.⁶²⁴ This consideration may be relevant for the determination of a breach of Canada’s international obligations under NAFTA but it cannot affect the determination whether the conduct—allegedly in breach of Canada’s international obligations—is attributable to Canada. While attribution and breach are both required for the establishment of an internationally wrongful act, they constitute separate enquiries: “[a]s a normative operation,

⁶¹⁷ Respondent’s Rejoinder Memorial, at para 60.

⁶¹⁸ Respondent’s Rejoinder Memorial, at para 60, referring to Rejoinder Witness Statement of Jeannie Chow, March 4, 2020, at paras 2-4.

⁶¹⁹ Respondent’s Rejoinder Memorial, at para 60.

⁶²⁰ Respondent’s Rejoinder Memorial, at para 61.

⁶²¹ Respondent’s Rejoinder Memorial, at paras 61-62.

⁶²² Respondent’s Rejoinder Memorial, at paras 62-63.

⁶²³ Claimant’s Reply Memorial, at para 29.

⁶²⁴ Claimant’s Memorial, at paras 159, 161. See also paras 107-109, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Pacific West Commercial Corporation Application for Amendments to Load Retention Tariff, PWCC Evidence, NSUARB, 22 September, 2012, at 6-8 (C-197); and *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Redacted Pacific West Commercial Corporation Responses To Information Requests From Small Business Advocate, NSUARB, 27 September, 2012, at 9 (C-203).

attribution must be clearly distinguished from the characterization of conduct as internationally wrongful”.⁶²⁵ The rules of attribution, in turn, are founded on “the fundamental principle governing the law of international responsibility: [that] a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf”.⁶²⁶

291. The Tribunal will now assess whether there are any grounds why factually distinguishable conduct must be treated “as an ensemble” for the purposes of attribution, as the Claimant contends.
292. The Tribunal notes from the outset that a significant part of the authority relied on by the Claimant has treated distinct instances of conduct as elements of a whole for the purposes of establishing a breach but not for the purposes of attribution. For example, the tribunal in *GAMI* explained that “[i]t is the record [of measures] as a whole—not dramatic incidents in isolation—which determines whether a breach of international law has occurred”.⁶²⁷ The tribunal in *S.D. Myers* “examin[ed] the record of the evidence as a whole” for the purpose of “characteriz[ing] CANADA’s motivation or intent fairly”,⁶²⁸ namely for establishing whether conduct *already attributed to Canada* amounted to a breach of its obligations—not for the purpose of attribution. Furthermore, the tribunal in *Merrill & Ring* held that “the business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect”⁶²⁹ with a view to examining whether State conduct amounted to indirect expropriation; this, too, is a rather distinct issue which does not concern allegedly wrongful conduct being considered “as a whole” for the purposes of attribution.⁶³⁰ Consequently, such instances are not helpful in determining whether allegedly wrongful conduct should be considered “as a whole” for the purpose of its attribution to a State—in this case, Canada.
293. Moreover, the Tribunal is not persuaded by the Claimant’s arguments as to why the measures should be attributed to the Respondent “as a whole”. In this regard, whether measures are to be

⁶²⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Commentary to Part One, Chapter II, at para 4 (**CL-145**).

⁶²⁶ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, February 26, 2007, ICJ Reports 2007, 43, at 210, at para 406 (**RL-115**).

⁶²⁷ Claimant’s Memorial, at para 157, citing *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004, at para 103 [emphasis added].

⁶²⁸ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 12, 2000, at para 161 (**CL-102**).

⁶²⁹ *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 144 (**CL-101**) [emphasis added].

⁶³⁰ The same is true for W. Michael Reisman and Robert D. Sloane, “Indirect Expropriation and its Valuation in the BIT Generation”, (2003) 75 *British Yearbook of International Law* 115 (**CL-103**), which is also relied on by the Claimant.

considered as a whole, in the Tribunal's view, does not depend on whether the Claimant regarded them as such. Equally, whether the amount of benefits offered was unprecedented or not,⁶³¹ does not affect a decision as to whether attribution should be examined in individual instances or in aggregate. Securing an LRR that was allegedly more beneficial than the level necessary to operate competitively may well have been crucial to the ensemble of measures (this will be further assessed in the examination of the claims on the merits below),⁶³² but again, it is not determinative for attribution.

294. Similar to the Tribunal's finding in Paragraph 290 of this Award, it may well be that PWCC only accepted the revised electricity measures (after the CRA denial) because amendments favorable to it were made to other parts of GNS's finance plan,⁶³³ but this merely demonstrates that the Assistance Measures were interconnected, not that they are to be regarded as such as a matter of law.
295. The Tribunal agrees with the Claimant that there need not be a direct link between the total value of the GNS's Assistance Measures, nor of the value of any single Measure, and the harm allegedly sustained by Resolute.⁶³⁴ But even if the cause of the alleged damages to the Claimant was the Mill's re-entry onto the market on such advantageous terms, facilitated by GNS's assistance,⁶³⁵ this is not decisive for the question as to whether GNS's Assistance Measures should be considered in their entirety for the purpose of attribution.
296. The Tribunal agrees with the Respondent that a tribunal constituted under NAFTA Chapter 11 must base its jurisdiction on impugned measures "adopted or maintained by a Party relating to" an investor and its investment.⁶³⁶ This does not necessarily mean that taking an "ensemble" approach contravenes this requirement. Attribution is to be assessed separately from breach: finding attribution does not imply finding a breach. The Claimant would seem to be conflating the two by seeking to transpose a question relevant for breach (whether measures, taken together, violated the Respondent's obligations or imposed harm on the investor) to the enquiry about attribution (whether the measures in questions were taken on the State's behalf or not).
297. Overall, the Tribunal considers that the Claimant's arguments to the effect of treating the impugned measures as an ensemble may well inform the question whether these measures,

⁶³¹ Claimant's Memorial, at para 156.

⁶³² See *infra*, from Paragraph 307 of this Award.

⁶³³ Claimant's Reply Memorial, at para 37.

⁶³⁴ Claimant's Memorial, at para 161.

⁶³⁵ Claimant's Memorial, at para 161.

⁶³⁶ Respondent's Rejoinder Memorial, at para 24.

considered as a whole, amounted to a breach of the Respondent's obligations under NAFTA. This, however, does not dispense of the question whether these measures amount to State conduct in the first place. The Tribunal must therefore rely on the principles of attribution, as reflected in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, to determine whether the measures in question, and in particular the electricity benefits, constitute conduct on behalf of the State.

2. Whether Canada's Actions Attract State Responsibility under ILC Article 4

298. It is undisputed that the conduct of GNS proper (including the Premier and Cabinet, Ministries and Ministers) is attributable to Canada under ILC Article 4. It is also undisputed that the NSUARB is a State organ and that its conduct is attributable to Canada.⁶³⁷ In this manner, the Tribunal agrees with the Claimant that "provincial subdivisions" and "judicial independence" are irrelevant to state attribution under ILC Article 4.⁶³⁸
299. One question that arises in this case is whether actions of State organs must be coherent (or in line with each other) to be attributable to the State. The Tribunal finds that they do not. Finding State responsibility is a black-or-white decision, but attributable conduct is not: State organs, whose conduct is equally attributable, may well act in contradiction (or at cross purposes) with each other. For example, in the present case, when the partnership and tax formula negotiated between PWCC and NSPI was denied by one State organ, the CRA, GNS stepped in to adjust its financial support package as a result.⁶³⁹ Another example is presented by the refusal of the NSUARB to approve the LRR negotiated between PWCC and NSPI without GNS providing certain assurances related to the potential RES and biomass costs.⁶⁴⁰
300. In sum, what is needed for the purpose of attribution is that conduct can be identified that is attributable to the State; in this regard, consistency between the conduct in question and other conduct attributable to the State is irrelevant. Similarly, prior consultation with other State organs, or a concerted plan or policy among State organs, may well be relevant for the determination of a breach of an international obligation, depending on the content of such obligation, but is irrelevant for the purposes of attribution under ILC Article 4.
301. The Tribunal therefore turns to the question whether the acts complained of in relation to the

⁶³⁷ Respondent's Rejoinder Memorial, at para 39.

⁶³⁸ See Claimant's Closing Argument on State Attribution of the Electricity Benefits, November 14, 2020, at 2-5.

⁶³⁹ Claimant's Memorial, at paras 100-1; Claimant's Reply Memorial, at para 256.

⁶⁴⁰ Claimant's Memorial, at paras 83-85, 125-26.

electricity benefits are attributable to the Respondent (as the other measures are not contested). At the 2020 Hearing, the Claimant made clear its argument that GNS brought the electricity benefits into existence by actions of many state actors: the Premier and Cabinet, the Department of Natural Resources & the Department of Energy, [REDACTED] and the NSUARB.⁶⁴¹ At one level, the conduct of these State actors does not have to be disaggregated, as the State is responsible for them all as a matter of attribution.

302. Yet, a specific question arises regarding the role of the NSUARB and its approval of the LRR negotiated between PWCC and NSPI. Ultimately, the NSUARB approval of electricity rates or subsequent adjustments, were acts of State. In other words, the Tribunal agrees with the Claimant⁶⁴² that decisions concerning electricity rates are attributable to the Respondent. The State conduct in question consisted of the approval of the rate as part of the package of actions that allowed PHP to operate.
303. This conclusion, however, does not mean that the rate itself, or the price paid for electricity by PHP, is attributable to the Respondent. Indeed, the electricity contract itself and the price it includes were negotiated for months between two private parties.⁶⁴³ The NSUARB's task was essentially to determine whether other ratepayers would be better off with the proposed LRR than if PHP left the electricity system.⁶⁴⁴ If the electricity contract or price itself were attributable to the State, it would mean many run-of-the-mill private conduct (e.g. the purchase of real property) would be rendered State acts simply because it is rubberstamped by the State (e.g. the registration in the land register). The same principle would apply to government approvals done for instance under competition laws, utility laws, or bankruptcy laws (which are closer in nature to the NSUARB's determination).
304. The Respondent has argued that since the Claimant has not alleged any wrongdoing related to the conduct of the NSUARB in the approval of the LRR, that it means its case must fail on this ground. In other words, the Respondent argues that all the NSUARB was doing is fulfilling its statutory duty.⁶⁴⁵ In response, the Claimant has argued notably at the 2020 Hearing that

⁶⁴¹ See Claimant's Closing Argument on State Attribution of the Electricity Benefits, November 14, 2020, at 9, 13-14; Hearing on the Merits and Damages, November 14, 2020, at 1326:24-1337:7.

⁶⁴² See *supra*, at Paragraph 224 of this Award, referring to Claimant's Reply Memorial, at para 27.

⁶⁴³ Respondent's Counter-Memorial, at para 157; Respondent's Rejoinder Memorial, para 41; United States – WTO Panel Report – *Supercalendered Paper*, July 5, 2018, at para 7.77 (**R-238**).

⁶⁴⁴ Respondent's Rejoinder Memorial, at para 43.

⁶⁴⁵ Respondent's Rejoinder Memorial, at para 40; Hearing on the Merits and Damages, November 9, 2020, at 201:19-203:4.

“lawfulness under national law is irrelevant” basing itself on ILC Article 3.⁶⁴⁶ The Tribunal notes, however, that this article relates to wrongfulness of State action and not attribution. As such, whether anything in the conduct of the NSUARB constituted a breach of NAFTA Article 1102 or 1105 vis-a-vis the Claimant is a question for the merits.

305. For the sake of completeness, the Tribunal also mentions that [REDACTED]

[REDACTED]

[REDACTED]⁶⁴⁷ [REDACTED]

[REDACTED]⁴⁸ Arguments relating to the amendments of the RES Regulations and the Biomass Plant Issue suffer the same fate. While the actions of GNS related to these matters are attributable to the Respondent, they did not have a direct effect on the rate or the price of electricity paid by PHP as such. Indeed, the RES regulations were changed in 2016 without the need to change the LRR.⁶⁴⁹ As for the risk of future incremental RES costs, it never materialized (as the GNS predicted). Again, this question was independent of the negotiation of the LRR itself.⁶⁵⁰

306. Having determined that all acts in question by GNS organs can individually be attributed to Canada under ILC Article 4, the Tribunal does not need to further analyse the Claimant’s argument with regard to Article 8 or Article 11. Ultimately, the Tribunal is of the opinion that all measures were offered or signed off by a State organ, so they can be attributed to the State, bearing in mind that this attribution as such does not imply any wrongfulness. For the avoidance of doubt, the Tribunal’s conclusion regarding the non-attribution to Respondent of the LRR itself (at Paragraph 303) would not have been different whether considered under ILC Article 8 or 11.

⁶⁴⁶ Claimant’s Closing Argument on State Attribution of the Electricity Benefits, November 14, 2020, at 6-7; Hearing on the Merits and Damages, November 9, 2020, at 35:16-36:9; November 14, 2020, at 1348:16-1349:25.

⁶⁴⁷ Claimant’s Reply Memorial, at para 49; Hearing on the Merits and Damages, November 14, 2020, at 1325:21-1326:2, 1329:23-1330:10.

⁶⁴⁸ Respondent’s Closing Argument, November 14, 2020, at 88; Hearing on the Merits and Damages, November 10, 2020, at 473:5-15, 473:24-474:7.

⁶⁴⁹ Respondent’s Rejoinder Memorial, at para 49.

⁶⁵⁰ Respondent’s Counter-Memorial, at para 220; Hearing on the Merits and Damages, November 9, 2020, at 209:8-210:11.

VI. LIABILITY**A. NAFTA ARTICLE 1108(7)****1. Introduction**

307. NAFTA Article 1108(7) provides that Article 1102 does not apply to:

- (a) procurement by a Party or a state enterprise; or
- (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.⁶⁵¹

308. The Parties disagree as to whether the Respondent can avail of the above provision pertaining to procurement, subsidies and grants.

2. The Respondent's Arguments

309. The Respondent argues that the Tribunal should assess the application of Article 1108(7) before entering the Article 1102 analysis.⁶⁵² The Respondent submits that Article 1108(7) operates as a “carve-out” rule that excludes all procurement activity and subsidies from the scope of some obligations in Chapter 11.⁶⁵³ For its position, the Respondent relies on *Mesa*, *Mercer*, and *UPS* in which cases the Article 1102 analysis was not conducted after it was found that the measures in question were procurements under Article 1108(7).⁶⁵⁴

310. The Respondent's primary argument is that, by the Claimant's own characterization, all the Assistance Measures (with the exception of the LRR) are either procurement, subsidies, or grants within the meaning of Article 1108(7).⁶⁵⁵ Given that there are no qualifications to the text of Article 1108, the Respondent submits that “if a measure falls within the ordinary meaning of its terms, the exclusion from the national treatment obligation in Article 1102 is decisive”.⁶⁵⁶ The Respondent contests the Claimant's argument that the Assistance Measures comprise “a single

⁶⁵¹ NAFTA Article 1108(7).

⁶⁵² Hearing on the Merits and Damages, November 9, 2020, at 227:3-6; November 14, 2020, at 1242:17-19; Respondent's Pre-Hearing Memorial, at para 38.

⁶⁵³ Hearing on the Merits and Damages, October 18, 2021, at 227:4-9.

⁶⁵⁴ Respondent's Pre-Hearing Memorial, at paras 38-40, referring to *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March, 2016, at paras 427, 465 (**CL-005**); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March, 2018, at paras 6.34, 6.50-6.51 (**RL-122**); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Merits, 24 May, 2007, at para 134 (**CL-113**). See also Hearing on the Merits and Damages, October 18, 2021, at 227:10-228:7.

⁶⁵⁵ Respondent's Counter-Memorial, at para 224; Respondent's Rejoinder Memorial, at para 64; Hearing on the Merits and Damages, November 9, 2020, at 227:23-228:19; Respondent's Pre-Hearing Memorial, at para 41.

⁶⁵⁶ Respondent's Counter-Memorial, at para 236; Respondent's Pre-Hearing Memorial, at para 42.

non-exempted measure”, noting that the Assistance Measures should be assessed individually against the language of Article 1108(7).⁶⁵⁷

311. The Respondent submits that the *Mercer* tribunal stated that the ordinary meaning of “procurement” is “the general act of buying goods and services”.⁶⁵⁸ It notes that the *Mesa* tribunal referred to “procurement” as being a “broad notion” “commonly understood to refer to a formal acquisition, without a requirement that the acquisition be for the government’s own use [...] it would make no difference at all whether such goods and services, once purchased, are used solely by the Government, or by any other entity”.⁶⁵⁹ The Respondent submits that, as confirmed in *Mesa*, the definition of procurement from NAFTA Chapter 10 cannot be used in NAFTA Chapter 11.⁶⁶⁰
312. The Respondent notes that “subsidy” is not defined in Chapter 11, which suggests that the NAFTA parties did not want to attribute a narrow meaning to the term.⁶⁶¹ The Respondent also seeks to apply the *Mesa* tribunal’s reasoning regarding the broad interpretation of “procurement” to the term “subsidy”.⁶⁶² The Respondent argues that the use of the words “grants” and “government supported loans” after “subsidy” in Article 1108(7) suggests that the meaning of the latter term is broad.⁶⁶³ Referring to the *Vienna Convention on the Law of Treaties* (“VCLT”), the Respondent stated at the 2021 Hearing that: “the Oxford Dictionary definition, which Resolute, I believe, referred to [...] is that it’s a sum of money granted by the state or a public body to help keep an industry or business, keep the price of a commodity or service low”, while noting that not all definitions refer to the last segment (i.e. keeping prices low).⁶⁶⁴
313. The Respondent clarifies that the definition of subsidy under the SCM Agreement has a specific and particular meaning and cannot be imported into NAFTA.⁶⁶⁵ The Respondent points out that under the framework of the SCM Agreement, actions can only be taken against subsidies that are specific, unlike under NAFTA, where NAFTA parties “purposely left the definition

⁶⁵⁷ Hearing on the Merits and Damages, November 14, 2020, at 1250:21-1251:12; Hearing on the Merits and Damages, October 18, 2021, at 232:3-18.

⁶⁵⁸ Respondent’s Pre-Hearing Memorial, at para 40, citing *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March, 2018, at para 34 (**RL-122**); Hearing on the Merits and Damages, October 18, 2021, 229:9-18.

⁶⁵⁹ Respondent’s Pre-Hearing Memorial, at para 40, citing *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, at paras 424, 437 (**CL-005**).

⁶⁶⁰ Hearing on the Merits and Damages, October 19, 2021, at 483:10-25.

⁶⁶¹ Hearing on the Merits and Damages, October 19, 2021, at 471:3-14.

⁶⁶² Hearing on the Merits and Damages, October 19, 2021, at 479:19-22.

⁶⁶³ Hearing on the Merits and Damages, October 19, 2021, at 472:15-473:8.

⁶⁶⁴ Hearing on the Merits and Damages, October 19, 2021, at 472:5-10.

⁶⁶⁵ Hearing on the Merits and Damages, October 19, 2021, at 473:20-22.

undefined”.⁶⁶⁶

314. The Respondent submits that Chapter 11 was never intended to discipline subsidies (no matter their scale).⁶⁶⁷ To support this view, the Respondent refers to NAFTA Article 1907(2), which states that “[t]he Parties further agree to consult on [...] the potential to develop more effective rules and disciplines concerning the use of government subsidies; and the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization”.⁶⁶⁸ The Respondent highlights that the *Mesa* tribunal held that the purpose of Article 1108(7) is for the NAFTA parties to protect their ability to exercise nationality-based preferences, in a manner that yields maximum benefit for the local economy.⁶⁶⁹ The Respondent submits that when considering the objectives of NAFTA, the object and purpose of each chapter and each provision must be considered; it was the NAFTA parties’ intention in NAFTA Chapter 11 that subsidies not be disciplined by NAFTA.⁶⁷⁰
315. The Respondent submits that the following of the measures comprise “procurement” by GNS:⁶⁷¹
316. The Land Purchase Agreement: The Respondent recalls that the Land Purchase Agreement took place at fair market value pursuant to a pre-existing government program and would have happened regardless of the reopening of the Mill.⁶⁷² The Respondent argues that this agreement qualifies as procurement because GNS “paid money and received land in return”.⁶⁷³ The Respondent denies that the Land Purchase Agreement could be a subsidy because the transaction was at fair market value.⁶⁷⁴
317. The Outreach Agreement: Under this agreement, PHP was reimbursed for [REDACTED] and other public interest activities on Crown land.⁶⁷⁵ The Respondent notes that this agreement comprised services that were not unique, but were commonly procured by GNS from private companies to maintain and develop government

⁶⁶⁶ Hearing on the Merits and Damages, October 19, 2021, at 473:23-474:4.

⁶⁶⁷ Hearing on the Merits and Damages, October 19, 2021, at 475:15-476:3.

⁶⁶⁸ Hearing on the Merits and Damages, October 19, 2021, at 476:8-477:23.

⁶⁶⁹ Hearing on the Merits and Damages, October 18, 2021, at 229:25-230:10; October 19, 2021, at 480:6-481:4.

⁶⁷⁰ Hearing on the Merits and Damages, October 19, 2021, at 484:15-485:8.

⁶⁷¹ Hearing on the Merits and Damages, October 18, 2021, at 230:11-23.

⁶⁷² Respondent’s Counter-Memorial, at paras 230-231; Respondent’s Pre-Hearing Memorial, at paras 19, 41; Hearing on the Merits and Damages, October 18, 2021, at 182:17-25; October 19, 2021, at 457:25-458:1.

⁶⁷³ Respondent’s Counter-Memorial, at para 230; Respondent’s Pre-Hearing Memorial, at para 41.

⁶⁷⁴ Hearing on the Merits and Damages, October 19, 2021, at 458:2-12.

⁶⁷⁵ Respondent’s Counter-Memorial, at paras 230-231; Respondent’s Pre-Hearing Memorial, at para 41; Hearing on the Merits and Damages, October 18, 2021, at 183:8-17.

property,⁶⁷⁶ and that PHP would not otherwise perform this work in the course of its operations.⁶⁷⁷

318. The Respondent adds that even if the Tribunal considers the Outreach Agreement a “grant”, as it was described by the Claimant,⁶⁷⁸ it would still benefit from the exceptions in Article 1108(7)(b).⁶⁷⁹
319. The Respondent submits that the Claimant’s allegation that it has refused to produce documents itemizing the monetary sums attributable to the different cost categories under the Outreach Agreement is irrelevant.⁶⁸⁰ The Respondent contends that it complied with the Tribunal’s Procedural Order No. 9 on document production and clarifies that it has only redacted payments or reimbursements after October 15, 2014, which is when the Claimant closed its Laurentide Mill.⁶⁸¹ Above all, the Respondent argues that the Claimant fails to explain the relevance of the redacted information to the application of Article 1108(7).⁶⁸²
320. The FULA: The Respondent recalls that the FULA is a modernized forestry license that ensures that any cutting of timber on Crown land would be done in accordance with the Government policy.⁶⁸³ This measure was not requested by PWCC, but is an agreement that GNS regularly enters into for cutting timber on Crown land.⁶⁸⁴ The Respondent clarifies that PHP paid for the trees that it harvested on Crown land at the same stumpage rate as others in the province.⁶⁸⁵ Regarding the payments made by GNS for PHP’s silviculture activities, the Respondent argues that they qualify as “procurement” and are exempted by virtue of Article 1108(7)(a).⁶⁸⁶ It adds that agreements like the FULA are habitual in Nova Scotia and that if PHP was not responsible for silviculture activities, GNS would have to engage independent contractors to perform that function.⁶⁸⁷ The Respondent highlights that “it is to the advantage of the Province as most of the

⁶⁷⁶ Respondent’s Pre-Hearing Memorial, at para 19; Hearing on the Merits and Damages, October 18, 2021, at 183:18-25.

⁶⁷⁷ Respondent’s Counter-Memorial, at para 232; Respondent’s Rejoinder Memorial, at paras 68, 87; Respondent’s Pre-Hearing Memorial, at para 41.

⁶⁷⁸ Respondent’s Counter-Memorial, at para 232; Respondent’s Rejoinder Memorial, para 68, referring to Claimant’s Memorial, at paras 71, 219, 253; Canada’s Reply Memorial, at para 264.

⁶⁷⁹ Respondent’s Counter-Memorial, at para 232; Respondent’s Rejoinder Memorial, at para 87; Hearing on the Merits and Damages, October 19, 2021, 457:13-23.

⁶⁸⁰ Respondent’s Rejoinder Memorial, at para 69, referring to Claimant’s Reply Memorial, at para 310.

⁶⁸¹ Respondent’s Rejoinder Memorial, at para 69, referring to Resolute Forest Products, News Release, “Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec”, September 2, 2014 (**R-061**).

⁶⁸² Respondent’s Rejoinder Memorial, at para 69, referring to Claimant’s Reply Memorial, at para 310.

⁶⁸³ Hearing on the Merits and Damages, October 18, 2021, at 184:9-19.

⁶⁸⁴ Respondent’s Pre-Hearing Memorial, at para 19; Hearing on the Merits and Damages, October 18, 2021, at 185:8-23.

⁶⁸⁵ Hearing on the Merits and Damages, October 18, 2021, at 184:25-185:3; October 19, 2021, at 460:6-11.

⁶⁸⁶ Respondent’s Counter-Memorial, at para 234; Respondent’s Rejoinder Memorial, at para 67.

⁶⁸⁷ Respondent’s Rejoinder Memorial, at para 67.

activities will yield benefits for decades after they have been performed”.⁶⁸⁸

321. In response to the Claimant’s contention that the FULA confers benefits on PHP such as (i) the ability to harvest fiber for paper and biomass for fuel and (ii) reimbursement for silviculture payments,⁶⁸⁹ the Respondent submits that it cannot fully respond to the Claimant’s assertions due to their lack of clarity and specificity.⁶⁹⁰ The Respondent also alleges that the Claimant misrepresents the operation of the FULA.⁶⁹¹ However, to the extent that the Claimant pleads that PHP got Crown timber “for free”, the Respondent maintains that the “subsidy” exception under Article 1108(7)(b) applies.⁶⁹²
322. The Respondent submits that the following measures were “government supported loans” and “grants” to assist PWCC with the purchase of the Mill.⁶⁹³
323. The \$24 million forgivable capital loan and the \$40 million credit facility: The Respondent argues that these measures are “government supported loans” from GNS to PWCC because “[REDACTED]”
[REDACTED]
[REDACTED]⁶⁹⁴ Moreover, it adds that if GNS forgave any of the loan amount, this amount would then qualify as “grants” under the same exception.⁶⁹⁵ The Respondent notes that the Claimant has itself referred to the two measures as loans.⁶⁹⁶
324. The \$1.5 million workforce training grant and the \$1 million marketing grant: The Respondent identifies these measures as “grants” because “GNS transferred these funds to PHP for training

⁶⁸⁸ Respondent’s Rejoinder Memorial, at para 67, citing Rejoinder Witness Statement of Julie Towers, March 4, 2020, at para 3.

⁶⁸⁹ Respondent’s Counter-Memorial at para 233, referring to Claimant’s Memorial, at para 219.

⁶⁹⁰ Respondent’s Counter-Memorial, at para 234; Respondent’s Rejoinder Memorial, para 67, referring to *inter alia*, Claimant’s Memorial, at para 96; Claimant’s Reply Memorial, at para 309.

⁶⁹¹ Respondent’s Counter-Memorial, at para 234.

⁶⁹² Respondent’s Counter-Memorial, at para 234; Respondent’s Rejoinder Memorial, at para 67, referring to Claimant’s Memorial, at para 96; Claimant’s Reply Memorial, at para 309; Hearing on the Merits and Damages, October 19, 2021, at 455:10-21.

⁶⁹³ Respondent’s Counter-Memorial, at paras 225-226, 228, 229; Respondent’s Pre-Hearing Memorial, at paras 19-22, 41; Hearing on the Merits and Damages, October 19, 2021, at 456:22-457:5.

⁶⁹⁴ Respondent’s Counter-Memorial, at para 225, referring to [REDACTED]

[REDACTED] (R-269) [REDACTED]
[REDACTED] Hearing on the Merits and Damages, October 18, 2021, at 231:2-9.

⁶⁹⁵ Respondent’s Counter-Memorial, at para 225, referring to the Canadian Oxford Dictionary (Oxford University Press, 2019) (R-420), which describes the ordinary meaning of “grant” as “[a]n authoritative bestowal or conferment of a privilege, right, or possession; a gift or assignment of money, etc. by the act of an administrative body or of a person in control of a fund of the like”.

⁶⁹⁶ Respondent’s Counter-Memorial, at para 225, referring to Claimant’s Memorial, at para 64.

and marketing purposes and they are non-repayable”.⁶⁹⁷ It also points out that the Claimant has itself qualified these two measures as grants.⁶⁹⁸

325. The Respondent disputes the Claimant’s characterization of the ability to use tax losses to offset gains from PWCC’s investments outside Nova Scotia as a distinct measure, arguing that this is an integral part of the credit facility and the capital loan.⁶⁹⁹ The Respondent submits that the ability to offset tax losses is a right stipulated in the Income Tax Act and, if anything, would be a “subsidy” since it is [REDACTED]⁷⁰⁰ The Respondent explains:

[REDACTED]
[REDACTED]
[REDACTED]⁷⁰¹
[REDACTED]
[REDACTED]⁷⁰²

326. Indemnity Agreement: The Respondent considers that [REDACTED] constitutes a government supported loan because [REDACTED]
[REDACTED]⁷⁰³ [REDACTED]
[REDACTED]⁷⁰⁴

327. The Ramp-Up Agreement: The Respondent argues that this measure is also a government supported loan because [REDACTED]
[REDACTED]⁷⁰⁵ The Respondent contends that the Ramp-Up Agreement could also qualify as a “grant” and that regardless of its label, it falls within the Article 1108(7)(b) exception.⁷⁰⁶

328. The Respondent explains that the following were not beneficial measures taken by GNS in favour of PHP or were private transactions that did not involve Canada:

⁶⁹⁷ Respondent’s Counter-Memorial, at para 227; Respondent’s Pre-Hearing Memorial, at para 41; Hearing on the Merits and Damages, October 18, 2021, at 230:24-231:1.

⁶⁹⁸ Respondent’s Counter-Memorial, at para 227, referring to Claimant’s Memorial, at para 64.

⁶⁹⁹ Respondent’s Counter-Memorial, at para 226, referring to Claimant’s Memorial, at para 219.

⁷⁰⁰ Hearing on the Merits and Damages, October 19, 2021, at 459:14-25.

⁷⁰¹ Respondent’s Counter-Memorial, at para 226, referring to [REDACTED]
[REDACTED] at 5-6 (C-182); [REDACTED], at 5-6 (C-195).

⁷⁰² Respondent’s Counter-Memorial, at para 226, referring to [REDACTED] at 6 (C-195).

⁷⁰³ Respondent’s Counter-Memorial, at para 228.

⁷⁰⁴ Respondent’s Counter-Memorial, at para 228, referring to [REDACTED]
[REDACTED] (R-269).

⁷⁰⁵ Respondent’s Counter-Memorial, at para 229.

⁷⁰⁶ Respondent’s Counter-Memorial, at para 229.

329. Pension Liability: The Respondent argues that GNS never took on PHP's pension liability; GNS negotiated arrangements directly with the workers without PHP's involvement.⁷⁰⁷ The Respondent explains that GNS proposed legislation that would directly help the workers and pensioners avoid an "immediate windup hit of up to 30 percent or more of their pensions".⁷⁰⁸
330. The LRR: The Respondent submits that the LRR is a private transaction at a market rate that cannot be attributed to Canada.⁷⁰⁹
331. Biomass Plant savings: The Respondent explains that any Biomass Plant savings (which the Respondent denies were in the range of \$6-8 million) were the result of a private deal and that the rate PHP pays for steam was not subsidized by other ratepayers.⁷¹⁰
332. Renewable energy savings: The Respondent reiterates that GNS never paid any money that resulted in renewable energy savings for PHP.⁷¹¹
333. Property Tax Relief: The Respondent explains that the property tax relief that PHP received was commensurate with the change in its property holdings and therefore there was no beneficial measure provided pertaining to property tax.⁷¹² In the event that "the Claimant maintains this argument or the Tribunal finds that the tax agreement provided a benefit to PWCC or PHP, Canada submits that the measure would fall within the scope of the exclusion for subsidies and grants set out in Article 1108(7)(b)".⁷¹³
334. The Respondent submits that the "debtor in possession finances hot idle and forestry infrastructure" were ruled by the Tribunal as being outside its jurisdiction.⁷¹⁴
335. In response to the Claimant's first prong of argumentation, the Respondent denies that its current stance in this Arbitration with respect to subsidies contradicts the position it took previously in other fora.⁷¹⁵
336. With respect to the CVD Investigation, the Respondent recalls that Canada and GNS did not dispute some elements that the US DOC ultimately determined as countervailable subsidies under

⁷⁰⁷ Hearing on the Merits and Damages, October 19, 2021, at 446:14-447:15, 460:4-5.

⁷⁰⁸ Hearing on the Merits and Damages, October 19, 2021, at 447:1-4.

⁷⁰⁹ Hearing on the Merits and Damages, October 19, 2021, at 458:13-21.

⁷¹⁰ Hearing on the Merits and Damages, October 19, 2021, at 458:22-459:11.

⁷¹¹ Hearing on the Merits and Damages, October 19, 2021, at 450:24-25.

⁷¹² Hearing on the Merits and Damages, October 19, 2021, at 463:17-464:18.

⁷¹³ Respondent's Counter-Memorial, at para 224, fn. 472.

⁷¹⁴ Hearing on the Merits and Damages, October 19, 2021, at 460:8-11.

⁷¹⁵ Respondent's Counter-Memorial, at para 238; Hearing on the Merits and Damages, November 9, 2020, at 230:2-10; November 14, 2020, at 1243:15-1244:20.

US domestic law.⁷¹⁶

337. As for the subsequent NAFTA and WTO proceedings, the Respondent specifies that they dealt with select issues, such as the LRR, the provision of stumpage and biomass to PHP, and GNS's payments to PHP under the Outreach Agreement.⁷¹⁷ The Respondent further recalls that by the time Canada submitted its 2013 Subsidies Notification to the WTO on July 1, 2013, the issue had already been brought up at two meetings of the WTO Committee on Subsidies and Countervailing Measures in addition to [REDACTED].⁷¹⁸ The Respondent points out that, at those proceedings, Canada never denied that GNS had provided subsidies to PHP.⁷¹⁹ The Respondent explains that the declaration of "nil" subsidies is not a denial of subsidies.⁷²⁰ The Respondent further recalls Article 25.7 of the WTO's SCM Agreement, which states that "[m]embers recognize that notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself".⁷²¹ The Respondent argues that "if the notification of a measure does not prejudice its nature, the lack of notification cannot have that effect either".⁷²²
338. In any event, the Respondent asserts that notifications of measures as subsidies at the WTO Committee on Subsidies and Countervailing Measures are not relevant to an Article 1108(7)(b) analysis.⁷²³ It claims that "Resolute does not even attempt to explain how an alleged lack of notification pursuant to a different treaty deprives a NAFTA [p]arty of the right to rely on an explicit provision of the NAFTA".⁷²⁴ Therefore, the Respondent argues that regardless of the veracity of the Claimant's allegations concerning the Respondent's alleged self-contradiction, this Tribunal must still assess whether the Assistance Measures constitute "subsidies" or "grants" under Article 1108(7)(b) in accordance with NAFTA and the applicable rules of international

⁷¹⁶ Respondent's Counter-Memorial, at para 238; Respondent's Rejoinder Memorial, at para 83.

⁷¹⁷ Respondent's Rejoinder Memorial, at para 83, referring to Respondent's Counter-Memorial, at paras 154-155.

⁷¹⁸ Respondent's Rejoinder Memorial, at para 85, referring to [REDACTED]

(C-037); [REDACTED]

(C-212).

⁷¹⁹ Respondent's Rejoinder Memorial, at para 85.

⁷²⁰ Hearing on the Merits and Damages, October 19, 2021, at 489:5-12.

⁷²¹ Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 84, citing WTO, *Agreement on Subsidies and Countervailing Measures*, at Article 25.7 (**RL-193**); Respondent's Pre-Hearing Memorial, at para 43; Hearing on the Merits and Damages, October 18, 2021, at 233:23-234:9.

⁷²² Respondent's Counter-Memorial, at para 239; Hearing on the Merits and Damages, October 19, 2021, at 485:23-486:6.

⁷²³ Hearing on the Merits and Damages, October 18, 2021, at 233:13-22.

⁷²⁴ Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 71; Hearing on the Merits and Damages, November 9, 2020, at 229:12-25; Respondent's Pre-Hearing Memorial, at para 43.

law.⁷²⁵

339. The Respondent contests the Claimant's estoppel argument, suggesting that it is based on a misunderstanding of the applicable legal test.⁷²⁶ According to the Respondent, in international law, detrimental reliance is a pre-condition to invoking estoppel:⁷²⁷ estoppel is triggered by demonstrating (i) a clear and unambiguous statement of fact; (ii) which is made voluntarily, unconditionally, and is authorized; and (iii) which is relied on in good faith either to the detriment of the party relying on the statement or to the advantage of the party making the statement.⁷²⁸ The Respondent maintains that this legal test has been applied in investor-State disputes⁷²⁹ as well as

⁷²⁵ Respondent's Counter-Memorial, at para 238, referring to NAFTA Article 1131(1) (Governing Law), which states that "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". See also Respondent's Rejoinder Memorial, at para 84; Hearing on the Merits and Damages, November 14, 2020, at 1244:23-1245:13, 1247:8-15; Hearing on the Merits and Damages, October 19, 2021, at 486:7-487:10.

⁷²⁶ Respondent's Counter-Memorial, at para 240.

⁷²⁷ Respondent's Counter-Memorial, at para 240, referring to James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 8th ed., 2012) at 420 (**RL-124**); Derek W. Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence", (1958) 33 *British Yearbook of International Law* 176, at 201 (**RL-125**).

⁷²⁸ Respondent's Counter-Memorial, para 240, referring to James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 8th ed., 2012) at 420 (**RL-124**); Derek W. Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence", (1958) 33 *British Yearbook of International Law* 176, at 202 (**RL-125**).

⁷²⁹ Respondent's Counter-Memorial, at para 240, referring to *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge LLC*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, at para 261 (**RL-126**); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, October 14, 2016, at para 8.47 (**RL-127**); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, March 30, 2010, at para 353 (**RL-128**); *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, at paras 159-160 (**RL-129**); *Canfor Corporation v. United States of America*; *Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, September 7, 2005, at para 168 (**RL-130**); *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, November 27, 2000, at para 20.2 (**RL-131**); *Československa obchodní Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, at para 47 (**RL-132**).

by the ICJ,⁷³⁰ the International Tribunal for the Law of the Sea,⁷³¹ and State-to-State tribunals.⁷³² The Respondent argues that estoppel is unavailable to the Claimant because (i) the Respondent never “clearly” and “unambiguously” stated that all the Assistance Measures were not “procurement” or “subsidies or grants, including government supported loans, guarantees and insurance” as provided for in Article 1108(7)(a) and (b) and (ii) the Claimant does not demonstrate that it relied to its detriment on statements made by the Respondent.⁷³³ The Respondent adds that the Claimant cannot relabel “estoppel” as “self-contradiction” to bypass the test for estoppel.⁷³⁴

340. The Respondent disagrees with the Claimant’s reliance on the Separate Statement of Dean Cass in *UPS* to suggest that Canada should have declared its measures as subsidies elsewhere than before this Tribunal in order to invoke the subsidy exclusion under Article 1108(7).⁷³⁵ The Respondent recalls that Canada did not deny the nature of some of the Assistance Measures as subsidies before the US DOC, NAFTA, and WTO panels.⁷³⁶ The Respondent further notes that Dean Cass found Article 1108(7)(b) to cover “only self-conscious and overt decisions by government to expressly convey cash benefits to a particular business, enterprise, or activity”⁷³⁷ rather than a “broad sweep of government activity that might reduce the costs or increase the benefits of a particular business”.⁷³⁸ The Respondent likens the Assistance Measures to the former

⁷³⁰ Respondent’s Counter-Memorial, at para 240, referring to *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgement, May 23, 2008, ICJ Reports 2008, 12, at para 228 (**RL-133**); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, June 11, 1998, ICJ Reports 1998, at para 275 (**RL-134**); *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, Judgment, September 13, 1990, ICJ Reports 1990, 92, at para 63 (**RL-135**); *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. the Netherlands)*, Judgment, February 20, 1969, ICJ Reports 1969, 3, at para 30 (**RL-136**); *Payment of Various Serbian Loans Issued in France (France v. Serbia)*, July 12, 1929 PCIJ Series A, No. 20, 4, at 39, para 80 (**RL-137**).

⁷³¹ Respondent’s Counter-Memorial, at para 240, referring to *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, ITLOS Case No. 16, Judgment, March 14, 2012, at para 124 (**RL-138**); *The “ARA Libertad” Case (Argentina v. Ghana)*, ITLOS Case No. 20, Joint Separate Opinion of Judges Rüdiger Wolfrum and Jean-Pierre Cot, December 15, 2012, at paras 60-69 (**RL-139**).

⁷³² Respondent’s Counter-Memorial, at para 240, referring to *Railway Land Arbitration (Malaysia v. Singapore)*, PCA Case No. 2012-01, Award, October 30, 2014, at para 199 (**RL-140**); *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, March 18, 2015, at para 438 (**RL-141**).

⁷³³ Respondent’s Counter-Memorial, at para 241.

⁷³⁴ Respondent’s Rejoinder Memorial, at para 79.

⁷³⁵ Respondent’s Rejoinder Memorial, at paras 88-89, referring to Claimant’s Reply Memorial, at para 303.

⁷³⁶ Respondent’s Rejoinder Memorial, at para 88. See also *supra*, at Paragraph 336 of this Award.

⁷³⁷ Respondent’s Rejoinder Memorial, para 89, citing *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, at para 159 (**CL-113**).

⁷³⁸ Respondent’s Rejoinder Memorial, para 89, citing *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, at para 159 (**CL-113**).

scenario and therefore argues that Dean Cass's concerns in *UPS* are not applicable in this case.⁷³⁹

341. The Respondent further argues that the Claimant's "reliance in a footnote on a single phrase from the 1962 Separate Concurring Opinion of Vice-President Alfaro in the *Temple of Preah Vihear* case evidences the weakness of its argument".⁷⁴⁰ It contends that this case serves the Respondent's purposes rather than the Claimant's, because the underlying principle of Vice-President Alfaro's Separate Concurring Opinion was that "a State must not be permitted to benefit by its own inconsistency to the prejudice of another State" and that "the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it".⁷⁴¹ The Respondent denies that *Temple of Preah Vihear* stands for the principle of good faith, as the Claimant suggests,⁷⁴² because that case concerned a border dispute between two States and the application of the principle of good faith was merited in the interest of finality and to avoid detrimental reliance by one State.⁷⁴³ The Respondent considers to be irrelevant the other case law cited by the Claimant, stating that both ICC Case No. 6474 and *ADC v. Hungary* deal with situations in which a party attempted to deny the existence (or the legality) of a contract with the other party despite benefiting from the same contract.⁷⁴⁴
342. The Respondent distinguishes this Arbitration from *Chevron*; the *Chevron* tribunal had jurisdiction over both the investment treaty and the arbitration agreement derived from the treaty, whereas in this case, the Tribunal does not have jurisdiction over the SCM Agreement and therefore cannot consider Canada's behavior pursuant to it in determining whether it should be precluded from invoking Article 1108(7).⁷⁴⁵
343. Moreover, the Respondent argues that the principle of good faith does not "exist separately from estoppel";⁷⁴⁶ it "does not constitute a separate source of obligation where none would otherwise

⁷³⁹ Respondent's Rejoinder Memorial, at para 89.

⁷⁴⁰ Respondent's Counter-Memorial, at para 242, referring to Claimant's Memorial, at para 230, fn. 325.

⁷⁴¹ Respondent's Counter-Memorial, para 242, citing *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, Separate Opinion of Vice-President Alfaro, June 15, 1962, ICJ Reports 1962, 39, at 40 (**CL-136**).

⁷⁴² Respondent's Rejoinder Memorial, at para 77, referring to Claimant's Reply Memorial, at paras 293-295.

⁷⁴³ Respondent's Rejoinder Memorial, at para 77, referring to *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, June 15, 1962, ICJ Reports 1962, 6, at 32, 34-35 (**RL-203**).

⁷⁴⁴ Respondent's Counter-Memorial, at para 243, referring to Claimant's Memorial, at para 325.

⁷⁴⁵ Respondent's Rejoinder Memorial, at para 80, referring to *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018 (**CL-239**).

⁷⁴⁶ Respondent's Rejoinder Memorial, at para 76.

exist”.⁷⁴⁷ The Respondent pleads that none of the authorities upon which the Claimant relies⁷⁴⁸ shows how a general principle of good faith stands as a separate source of obligation. The Respondent submits that “while the principle of good faith is an overarching principle to be applied to the interpretation and application of a specific legal rule, it does not permit this Tribunal to refuse to apply an explicit provision of a treaty (namely NAFTA Article 1108(7)) because of the alleged non-compliance of Canada with a different provision of another treaty (namely Article 25 of the SCM Agreement)”.⁷⁴⁹

344. As to the Claimant’s reliance on the principle of consistency, the Respondent notes that this principle derives from international relations and has largely been applied in an inter-State context.⁷⁵⁰
345. With respect to the Claimant’s contention that the Respondent failed to raise its Article 1108(7) defense earlier in the proceedings, the Respondent notes that its Statement of Defence specifically indicated that it would rely on the exclusions set out in Article 1108(7)(a) and (b).⁷⁵¹ Moreover, it maintains that it is common for NAFTA tribunals to address Articles 1102 and 1108(7) together with the merits.⁷⁵²

3. The Claimant’s Arguments

346. The Claimant’s position as regards Article 1108(7) is two-fold: first, Canada cannot rely on

⁷⁴⁷ Respondent’s Rejoinder Memorial, at para 73, referring to *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, December 20, 1999, ICJ Reports 1988, 69, at para 94 (**RL-202**); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, June 11, 1998, ICJ Reports 1998, 275, at 297 (**RL-134**).

⁷⁴⁸ Claimant’s Reply Memorial, paras 296, 298-299, 301, referring to *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, November 18, 1960, ICJ Reports 1960, 192, at 192 (**CL-207**); *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April, 1933, PCIJ Series A/B, No. 53, at 69 (**CL-208**); *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, Interlocutory Award, Iran-US CTR, Case No. 43, December 9, 1982, at 24-25 (**CL-211**); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, at para 7.106 (**CL-239**).

⁷⁴⁹ Respondent’s Rejoinder Memorial, at para 75.

⁷⁵⁰ Respondent’s Rejoinder Memorial, at para 78.

⁷⁵¹ Respondent’s Counter-Memorial, at para 237; Respondent’s Rejoinder Memorial, at para 81, referring to Respondent’s Statement of Defence, at paras 12, 88-99.

⁷⁵² Respondent’s Rejoinder Memorial, at para 81, referring to *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.27 (**RL-122**); *Windstream Energy LLC v. Government of Canada*, PCA Case 2013-22, Award, September 27, 2016, at para 391 (**CL-123**); *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 214 (**RL-052**); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, at para 125 (**CL-113**); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 4, 2003, at para 86 (**CL-130**).

Article 1108(7) because of its prior statements outside this Arbitration denying that the Assistance Measures are subsidies (the self-contradiction argument), and second, if Canada can rely on Article 1108(7), not all of the Assistance Measures are covered by Article 1108(7).⁷⁵³ Without prejudice to its primary arguments, the Claimant answered questions from the Tribunal at the 2021 Hearing seeking to clarify its positions on the application of Article 1108(7) to the Assistance Measures. Its submissions are also outlined below.

347. The Claimant argues that Article 1108(7) is an exception, rather than a derogation, and should be turned to only after considering whether there has been a breach of Article 1102.⁷⁵⁴ The Claimant notes that Canada's position on this issue has been unclear, that both Parties have presented extensive arguments on Article 1102, and that the international community would benefit from a determination on the merits of Article 1102 (which is "virtually identical[ly]" reflected in Article 14.4 of the USMCA and similarly worded in many treaties).⁷⁵⁵
348. As to its primary argument, the Claimant submits that Canada and GNS's current position that the Assistance Measures are covered by Article 1108(7) contradicts their earlier positions before the WTO during the period between July 14, 2011 and July 19, 2013, whereby Canada declared "nil" subsidies for the purposes of the *Agreement on Subsidies and Countervailing Measures*.⁷⁵⁶ The Claimant highlights that by "nil", Canada meant that it did not grant or maintain within its territory any subsidy within the meaning of Article 1.1 of the Agreement.⁷⁵⁷ The Claimant further notes that Canada did not characterize the Assistance Measures as subsidies during the CVD Investigation in the United States.⁷⁵⁸ The Claimant additionally highlights that Canada did not

⁷⁵³ Claimant's Memorial, at paras 228-230, referring to Respondent's Statement of Defence, at para 88; Claimant's Reply Memorial, at paras 276-277; Hearing on the Merits and Damages, October 18, 2021, at 114:1-9.

⁷⁵⁴ Hearing on the Merits and Damages, November 9, 2020, at 152:12-21.

⁷⁵⁵ Hearing on the Merits and Damages, November 9, 2020, at 152:22-153:23.

⁷⁵⁶ Claimant's Memorial, at para 229; Claimant's Reply Memorial, para 277, referring to World Trade Organization, New and Full Notification Pursuant to Article XIV:1 of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/253/CAN, July 1, 2013, at 35, section 12 (C-021), World Trade Organization, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/284/CAN, July 9, 2015, at 37, section 12 (C-359); World Trade Organization, New and Full Notification Pursuant to Article XVI:I of the GATT 1994 and Article 25 of the *Agreement on Subsidies and Countervailing Measures* – Canada, WTO Doc. G/SCM/N/315/CAN July 3, 2017, at 32, section 12 (C-361); World Trade Organization, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 22 April 2013", WTO Doc. G/SCM/M/85, August 5, 2013, at paras 128-132 (C-353). See also Claimant's Reply Memorial, at para 285, in which the Claimant reports that the total period during which Canada reported "Nil" for GNS subsidies spanned between April 1, 2010 and March 21, 2016; Hearing on the Merits and Damages, November 9, 2020, at 154:12-155:20; Claimant's Pre-Hearing Memorial, at para 73; Hearing on the Merits and Damages, October 18, 2021, at 114:15-25.

⁷⁵⁷ Hearing on the Merits and Damages, October 18, 2021, at 116:8-13.

⁷⁵⁸ Claimant's Memorial, at para 229; Hearing on the Merits and Damages, October 18, 2021, at 115:1-4.

characterise the Assistance Measures as subsidies in [REDACTED]⁷⁵⁹ In all these instances, the Claimant submits, Canada denied providing subsidies to PWCC.⁷⁶⁰ The Claimant argues that Canada cannot now alter its stance on subsidies in order to benefit from the Article 1108(7) exception.⁷⁶¹

349. The Claimant invokes the principle of good faith, which it argues protects against self-contradiction.⁷⁶² The Claimant submits that Canada may not “blow hot and cold”⁷⁶³ in different proceedings: the central aspect of estoppel “is the requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions”.⁷⁶⁴ The Claimant notes that this principle has been applied in numerous international decisions, such as *Temple of Preah*, in which Vice-President Ricardo J. Alfaro stated in his concurring opinion that “a state party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation”.⁷⁶⁵

350. The Claimant contends that a claim against self-contradiction does not require evidence of detrimental reliance to succeed.⁷⁶⁶ The Claimant relies on the *Arbitral Award by the King of Spain*, in which “the ICJ did not analyze whether Honduras relied upon Nicaragua’s statements or

⁷⁵⁹ Claimant’s Reply Memorial, at para 282, citing [REDACTED] (C-212); Hearing on the Merits and Damages, November 9, 2020, 155:8-11; Hearing on the Merits and Damages, October 18, 2021, at 16:22-17:6.

⁷⁶⁰ Claimant’s Reply Memorial, at paras 281-286; Hearing on the Merits and Damages, November 14, 2020, at 1209:11-1210:9.

⁷⁶¹ Claimant’s Memorial, at para 230; Claimant’s Reply Memorial, at para 278; Hearing on the Merits and Damages, November 14, 2020, at 1344:7-18; Claimant’s Pre-Hearing Memorial, at para 73.

⁷⁶² Hearing on the Merits and Damages, November 9, 2020, at 160:3-9; Claimant’s Pre-Hearing Memorial, at para 73; Hearing on the Merits and Damages, October 19, 2021, at 398:25-399:8.

⁷⁶³ Claimant’s Reply Memorial, at para 278; Claimant’s Pre-Hearing Memorial, at para 73.

⁷⁶⁴ Claimant’s Reply Memorial, at para 292, citing Iain C. MacGibbon, “Estoppel in International Law”, (1958) 7 International and Comparative Law Quarterly 468, at 45 (CL-204).

⁷⁶⁵ Claimant’s Reply Memorial, para 293, citing *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, Separate Opinion of Vice-President Alfaro, June 15, 1962, ICJ Reports 1962, 39, at 39 (CL-136); Claimant’s Reply Memorial, para 296, referring to *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, 18 November, 1960, ICJ Reports 1960, 192, at 192 (CL-207); Claimant’s Reply Memorial, para 296, citing James Crawford, *Brownlie’s Principles of International Law* (Oxford University Press, 9th ed., 2019) at 407 (CL-244). Further to this argument, see Claimant’s Reply Memorial, paras 294-295, citing *The S.S. Lisman (United States of America v. United Kingdom)*, Award, October 5, 1937, 3 R.I.A.A. 1767, 1790 (CL-202); *Award between the United States and the United Kingdom relating to the rights of jurisdiction of the United States in the Bering’s sea and the preservation of fur seals*, Ad hoc, Award, XXVII R.I.A.A. 263, August 15, 1893 (‘Rights in the Bering Sea’) (CL-200).

⁷⁶⁶ Claimant’s Reply Memorial, at para 294, referring to *The S.S. Lisman (United States of America v. United Kingdom)*, Award, October 5, 1937, 3 R.I.A.A. 1767, 1790 (CL-202); Claimant’s Reply Memorial, at para 298, citing *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April, 1933, PCIJ Series A/B, No. 53, at 69-69 (CL-208).

conduct”.⁷⁶⁷ The Claimant also relies on *Chevron v. Ecuador*, in which it submits that the tribunal relied on “the broad principle against self-contradiction” to deny Ecuador’s jurisdictional objection that Chevron had not made an investment in Ecuador on the basis that Ecuador’s own courts had ruled that there was an investment.⁷⁶⁸

351. The Claimant submits that none of the Respondent’s authorities on estoppel contradict the broader principle against self-contradiction.⁷⁶⁹ For example, in *Pope & Talbot*, the tribunal remained unconvinced that the investor’s participation and acquiescence of the Softwood Lumber Agreement was sufficient representation to estop it from arguing that the agreement caused it injury.⁷⁷⁰ However, according to the Claimant, nowhere in the award does the tribunal address the broader principle against self-contradiction.⁷⁷¹

352. The Claimant invokes the Separate Statement of Dean Ronald Cass in *UPS* to lend weight to its observation:

It is, at a minimum, reasonable to ask a NAFTA Party seeking to avail itself of the subsidy exclusion from Chapter 11 to clearly designate its conduct as a subsidy somewhere other than in defense of its conduct before a tribunal seeking to resolve a dispute.⁷⁷²

353. The Claimant criticizes the Respondent’s failure to raise its Article 1108 defense during the bifurcated first phase of this Arbitration.⁷⁷³ It contends that the Respondent only advanced the Article 1108 defense in March 2019, after the CVD Investigation was settled,⁷⁷⁴ at which point “neither Canada nor PHP would suffer any adverse consequence arising from Canada’s failure to comply with its WTO reporting obligations”.⁷⁷⁵ Further to this point, the Claimant recalls that in NAFTA Article 103, Canada and other NAFTA parties reaffirmed “their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and

⁷⁶⁷ Claimant’s Reply Memorial, at para 297; Hearing on the Merits and Damages, October 18, 2021, at 119:13-17.

⁷⁶⁸ Hearing on the Merits and Damages, October 18, 2021, at 119:18-24; October 19, 2021, at 400:23-401:14.

⁷⁶⁹ Claimant’s Reply Memorial, at paras 305-307, referring to Respondent’s Counter-Memorial, at para 240.

⁷⁷⁰ Claimant’s Reply Memorial, at para 305, referring to *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, June 26, 2000, at paras 110, 112 (CL-116).

⁷⁷¹ Claimant’s Reply Memorial, at para 306.

⁷⁷² Claimant’s Reply Memorial, at para 303, citing *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 163 (CL-113); Hearing on the Merits and Damages, November 9, 2020, at 157:4-158:19; Claimant’s Pre-Hearing Memorial, at para 74; Hearing on the Merits and Damages, October 18, 2021, at 117:9-118:5.

⁷⁷³ Claimant’s Reply Memorial, at para 287; Hearing on the Merits and Damages, October 19, 2021, at 343:15-23, 344:3-12.

⁷⁷⁴ Claimant’s Reply Memorial, at para 290, referring to Settlement Agreement Between Verso, Port Hawkesbury Paper, and Irving Paper, March 21, 2018 (C-242).

⁷⁷⁵ Claimant’s Reply Memorial, at para 290.

other agreements to which such Parties are party”.⁷⁷⁶

354. As to its secondary argument, if the Tribunal were to find that Canada may rely on Article 1108(7), the Claimant submits that the Assistance Measures are not totally covered by Article 1108(7).⁷⁷⁷
355. At the outset the Claimant clarifies that it is not considering the Assistance Measures in isolation, but the cumulative effect of the measures, which would not be covered by Article 1108(7).⁷⁷⁸ The Claimant submits that Article 1108(7) does not exempt a “broader government initiative”, even if its components may qualify as a subsidy or a procurement.⁷⁷⁹ The Claimant clarifies that the measure under examination in this Arbitration is GNS’s decision to make PHP the lowest cost producer of SC Paper; the Assistance Measures cannot be studied in isolation.⁷⁸⁰
356. Asked by the Tribunal to clarify some of its positions ahead of the 2021 Hearing and at this Hearing, the Claimant notes that “subsidy” and “procurement” are not defined in the NAFTA and highlights the following dictionary definitions of procurement as being “the action of obtaining or procuring something” and a subsidy as being “a sum of money granted by the government or a public body to assist an industry or business so that the price of a commodity or service may remain low or competitive”.⁷⁸¹ The Claimant explains that the terms “loans, guarantees and insurance” in Article 1108(7) are “subsumed” within the definition of subsidies.⁷⁸²
357. The Claimant, relying on Dean Cass’ Separate Statement in *UPS* and basic “canons of construction” regarding exceptions, argues that Article 1108(7) should not be interpreted broadly.⁷⁸³ The Claimant submits that it is reasonable to interpret Article 1108(7) as aiming to exclude from NAFTA scrutiny those measures that the NAFTA parties knew would be subject to the WTO discipline and other trade remedies.⁷⁸⁴
358. Drawing on NAFTA Article 1001(5), which refers to procurement for the purposes of NAFTA

⁷⁷⁶ Claimant’s Reply Memorial, at para 302.

⁷⁷⁷ Claimant’s Memorial, at para 230; Hearing on the Merits and Damages, November 9, 2020, 162:18-163:1.

⁷⁷⁸ Hearing on the Merits and Damages, November 14, 2020, at 1211:19-1212:14; Claimant’s Pre-Hearing Memorial, at paras 77-78; Hearing on the Merits and Damages, October 18, 2021, at 114:10-14.

⁷⁷⁹ Hearing on the Merits and Damages, October 18, 2021, at 122:12-24; October 19, 2021, at 309:4-15.

⁷⁸⁰ Hearing on the Merits and Damages, October 18, 2021, at 123:6-124:3.

⁷⁸¹ Claimant’s Pre-Hearing Memorial, para 70, citing <https://www.lexico.com/en/definition/subsidy>; Hearing on the Merits and Damages, October 18, 2021, at 109:22-110:11; October 19, 2021, at 405:10-22.

⁷⁸² Hearing on the Merits and Damages, October 19, 2021, at 406:23-407:6.

⁷⁸³ Hearing on the Merits and Damages, November 14, 2020, at 1350:12-1351:2; Claimant’s Pre-Hearing Memorial, at para 71; Hearing on the Merits and Damages, October 18, 2021, at 110:12-113:2; October 19, 2021, at 406:1-8.

⁷⁸⁴ Hearing on the Merits and Damages, October 18, 2021, at 113:3-12.

Chapter 10, the Claimant submits that assistance possessing a subsidy element would not be considered procurement.⁷⁸⁵ To support its ability to draw on a NAFTA chapter other than Chapter 11, the Claimant notes that the tribunal in *Canfor* also looked outside NAFTA Chapter 11 and imported a provision from Chapter 19 (NAFTA Article 1901(3)) to hold that antidumping and countervailing duty measures should be excluded from the NAFTA Chapter 11 challenge.⁷⁸⁶ The Claimant also relies on NAFTA Article 1112(1) which states that in case of inconsistency between Chapter 11 and another chapter, the latter will prevail.⁷⁸⁷

359. In response to Canada's argument to the contrary, the Claimant argues that NAFTA Article 1907(2), by stipulating that the NAFTA parties agreed to consult on the potential to develop more effective rules and disciplines concerning the use of government subsidies, indicates that Chapter 11 does discipline subsidies to some extent.⁷⁸⁸
360. Having set out its position on the meaning of the terms in Article 1108(7), the Claimant maintains that not all of the Assistance Measures individually qualify as financial contributions, despite resulting in financial outcomes for PWCC and PHP.⁷⁸⁹ According to the Claimant, even with a few remaining measures, GNS' policy of favoring one domestic investor and causing a necessary negative impact on the foreign investor "is still a fact".⁷⁹⁰
361. The Claimant argues that the term "procurement" does not apply to the entirety of the Outreach Agreement, which is rather a subsidy.⁷⁹¹ The Claimant notes that the government is not purchasing anything under the Outreach Agreement, but is rather providing an incentive to PHP for deciding to carry out certain activities.⁷⁹² The Claimant submits that the Outreach Agreement states that PHP may receive reimbursements from GNS for [REDACTED] which, the Claimant argues, does not fall within the definition of "procurement".⁷⁹³ The Claimant recalls that the U.S. DOC found the Outreach Agreement to be a countervailable subsidy and Canada did not contest

⁷⁸⁵ Hearing on the Merits and Damages, October 19, 2021, at 407:19-409:5.

⁷⁸⁶ Hearing on the Merits and Damages, October 19, 2021, at 409:6-410:2, referring to *Canfor Corporation and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006 (**RL-07**).

⁷⁸⁷ Hearing on the Merits and Damages, October 19, 2021, at 410:3-7.

⁷⁸⁸ Hearing on the Merits and Damages, October 19, 2021, at 534:19-535:6.

⁷⁸⁹ Claimant's Memorial, at para 230; Hearing on the Merits and Damages, November 14, 2020, at 1211:11-18; Hearing on the Merits and Damages, October 19, 2021, at 402:5-13.

⁷⁹⁰ Hearing on the Merits and Damages, October 19, 2021, at 402:14-25.

⁷⁹¹ Claimant's Reply Memorial, at para 309; Hearing on the Merits and Damages, October 19, 2021, at 412:15-413:14.

⁷⁹² Hearing on the Merits and Damages, October 19, 2021, at 412:22-24, 413:3-8; Claimant's Reply Memorial, at para 309.

⁷⁹³ Hearing on the Merits and Damages, October 19, 2021, at 412:15-24.

this finding.⁷⁹⁴

362. At the 2021 Hearing and in response to questions from the Tribunal, the Claimant submitted that the following measures are “subsidies” because they are either “government supported loans” or “grants”:
363. The \$24 million forgivable loan and \$40 million credit facility: The Claimant submits that these measures are loans and fall within the definition of a subsidy.⁷⁹⁵
364. The \$1.5 million workforce training grant and the \$1 million marketing grant: The Claimant submits that these are grants that fall within the definition of a subsidy. The Claimant did not make a specific argument in relation to the Ramp-Up Agreement.
365. The Land Purchase Agreement: The Claimant notes that this agreement for the purchase of land was concluded with the other Assistance Measures, therefore, taken in context, the Land Purchase Agreement was “a form of government assistance that would provide PWCC with cash to start up its operations”.⁷⁹⁶ Relying on the distinction between subsidies and procurement in Article 1001(5), the Claimant submits that the Land Purchase Agreement should be considered a subsidy.⁷⁹⁷ The Claimant adds that procurements can generally be challenged through a bid protest, which could not have been done in the case of the Land Purchase Agreement.⁷⁹⁸
366. The Claimant explains that the FULA is a 20-year license for the purchase and harvest of timber.⁷⁹⁹ It argues that this is neither a procurement nor a subsidy, rather, it is a “very generous beneficial agreement for PHP” for the purchase of goods from the government and for the payment to PHP for silviculture activities.⁸⁰⁰
367. The Claimant submits that PHP’s ability to harvest tax losses is not procurement, but a tax incentive that could be considered as a subsidy providing a financial contribution.⁸⁰¹ The Claimant submits that the pension relief received by PHP was neither procurement nor a subsidy.⁸⁰²
368. The Claimant did not make specific arguments about the Indemnity Agreement at the 2021

⁷⁹⁴ Hearing on the Merits and Damages, October 19, 2021, at 413:9-14.

⁷⁹⁵ Hearing on the Merits and Damages, October 19, 2021, at 412:2-9.

⁷⁹⁶ Hearing on the Merits and Damages, October 19, 2021, at 413:15-414:9.

⁷⁹⁷ Hearing on the Merits and Damages, October 19, 2021, at 414:10-16.

⁷⁹⁸ Hearing on the Merits and Damages, October 19, 2021, at 414:17-24.

⁷⁹⁹ Hearing on the Merits and Damages, October 19, 2021, at 416:5-12.

⁸⁰⁰ Claimant’s Reply Memorial, at paras 310-311, referring to [REDACTED] (C-360).

⁸⁰¹ Hearing on the Merits and Damages, October 19, 2021, at 415:12-18.

⁸⁰² Hearing on the Merits and Damages, October 19, 2021, at 416:1-4.

Hearing, but has previously noted that [REDACTED]

[REDACTED],⁸⁰³

369. The Claimant argues that it is agreed between the Parties that the LRR, Biomass Regulations, RES Regulations are not covered by Article 1108(7).⁸⁰⁴

4. The Tribunal's Analysis

370. The Tribunal begins its analysis with the derogations (or exceptions) provided for in NAFTA Article 1108(7), before turning to Article 1102(3) in the next Section.
371. The Tribunal notes that nearly all the paragraphs of Article 1108 start with the same formulation, listing Chapter 11 Articles that “do not apply” to certain measures or treatment listed therein or provided in Annexes I to III to NAFTA. In the case of Article 1108(7), it means that if the Tribunal were to find that some of the Assistance Measures are “procurement”, “subsidies” or “grants”, the obligations provided under NAFTA Article 1102 would “not apply” to them. As such, the Tribunal deems it appropriate to start with the analysis of Article 1108(7), before turning to the analysis under Article 1102(3) as applicable. This is also the approach adopted by other NAFTA Chapter 11 tribunals, including in *Mesa* and *Mercer*.⁸⁰⁵
372. Two issues of interpretation may be resolved as a preliminary matter. First, one of the Claimant's primary arguments relating to Article 1108 is that the exemption is limited to *individual* subsidies, grants, or loans: “[t]hese provisions do not exempt a broader government initiative that is alleged to violate [Article] 1102 even if the broader initiative might include, among its components, measures that could qualify as a subsidy or a procurement if viewed in isolation”.⁸⁰⁶ While the Claimant does not complain of individual Assistance Measures separately, this does not relieve the Tribunal of its duty to proceed on the basis provided for in Article 1108(7). In this respect, the text is unambiguous: the parties to NAFTA explicitly provided that the discipline against nationality-based discrimination at Article 1102 would not apply to procurement by a party and to subsidies or grants provided by a party. There is no exception in case such measures are joined or used together. As a result, the Tribunal will assess each measure complained of individually. This approach is consistent with the approach taken by the Tribunal to attribution: such

⁸⁰³ Claimant's Reply Memorial, at para 181.

⁸⁰⁴ Hearing on the Merits and Damages, October 18, 2021, at 124:6-20; October 19, 2021, at 415:6-11.

⁸⁰⁵ See *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 465 (**CL-005**); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.50 (**RL-122**).

⁸⁰⁶ Hearing on the Merits and Damages, November 9, 2020, at 162:21-163:1; November 14, 2020, at 1211:19-1212:11.

determinations cannot proceed on an “ensemble” basis but must be made on an individual basis.⁸⁰⁷

373. Second, during the course of the proceedings, the Parties disagreed on the approach to the interpretation of exceptions provided at Article 1108(7). For the Respondent, “the exception is broad”.⁸⁰⁸ It argues for the application of ordinary rules of interpretation: for instance, if something falls under the term “procurement by a party”, then it qualifies for the exception. For its part, the Claimant argues that “the [Article] 1108(7) exception should not be interpreted broadly. This is consistent with the object and purpose of Chapter 11, which is investment protection. And it’s also consistent with basic canons of construction, which suggest that exceptions should be construed narrowly”.⁸⁰⁹ As held by other NAFTA Chapter 11 tribunals in relation to Article 1108 (including *Mobil* and *Mesa*), this Tribunal is of the view that exceptions and reservations should be interpreted like other provisions of the treaty: not restrictively as a matter of principle, but in accordance with their ordinary meaning under the VCLT.⁸¹⁰ As a reminder, VCLT Article 31(1) provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁸¹¹
374. Having set the stage, the Tribunal will first interpret the terms “procurement by a Party” used in Article 1108(7)(a) and the terms “subsidies or grants provided by a Party” used in Article 1108(7)(b) and apply them, respectively, to the facts of this case. Second, the Tribunal will rule on the Claimant’s argument that the Respondent is prevented from relying on Article 1108(7) because of the doctrine of estoppel or the broader prohibition on self-contradiction.

(a) Interpretation and application of Article 1108(7)

i. Article 1108(7)(a): procurement

375. The Tribunal notes that NAFTA Chapter 11 does not provide a definition of “procurement”; neither does Chapter 2 under General Definitions, nor Chapter 10 “Government Procurement”.

⁸⁰⁷ See *supra*, at Paragraph 297 of this Award.

⁸⁰⁸ Hearing on the Merits and Damages, November 14, 2020, at 1254:19-21; Respondent’s Pre-Hearing Memorial, at para 40.

⁸⁰⁹ Hearing on the Merits and Damages, November 14, 2020, at 1350:22-1351:2.

⁸¹⁰ See e.g. *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 405 (**CL-005**); *Mobil Investments Canada Inc. and Murphy Oil Company v. Government of Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, May 22, 2012, at paras 251-255 (**RL-170**).

⁸¹¹ VCLT Article 31(1).

As with other NAFTA Chapter 11 tribunals faced with this issue, including *ADF*,⁸¹² *UPS*,⁸¹³ *Mesa*,⁸¹⁴ and *Mercer*,⁸¹⁵ the Tribunal will have recourse to VCLT Article 31(1).

376. In *Mercer*, similar to prior tribunals, the majority of the tribunal held that the ordinary meaning of “procurement by a Party or a state enterprise” was broad. In this case, the tribunal had to decide whether the claimant’s claims relating to the 2009 Power Service Agreement brought under NAFTA Articles 1102 and 1103 concerned “procurement” by a state enterprise (i.e. BC Hydro), such that they were precluded by NAFTA Article 1108(7)(a).⁸¹⁶ In holding that the claims concerned procurement (at least in part), the majority of the tribunal held that:

6.34 In the Tribunal’s view, the English word “procurement”, as a matter of ordinary English language, is the general act of buying goods and services. It is a broad term. The Tribunal does not consider that the Spanish (or French) wording cited by the Parties and Non-Disputing Parties introduces any materially different meaning. Nor, in the Tribunal’s view, does the word “procurement” require a restricted meaning in NAFTA Article 1108(7), because it operates as an exception to the grant of protection to investors and investments under NAFTA Articles 1102 and 1103. To the contrary, its ordinary meaning is broad and not restrictive.

6.35 As to its ordinary meaning in NAFTA Article 1108(7)(a), the Tribunal decides that the phrase “procurement by a Party or a state enterprise”, in its context and in the light of NAFTA’s object and purpose, signifies the buying of goods or services for or by a State or a state enterprise (as defined in NAFTA Annex 1505) owned or controlled through ownership interests by that State.⁸¹⁷

377. In its analysis, the majority of the tribunal cited in support the ordinary, broad interpretation given

⁸¹² *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 (**CL-130**).

⁸¹³ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007 (**CL-113**).

⁸¹⁴ *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016 (**CL-005**).

⁸¹⁵ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018 (**RL-122**).

⁸¹⁶ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.27-6.31 (**RL-122**).

⁸¹⁷ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.34-6.35 (**RL-122**).

in *ADF*⁸¹⁸ and *UPS*⁸¹⁹ as well as the definition of “government procurement” included in the US Model BIT.⁸²⁰

378. The majority of the tribunal in *Mesa* similarly held that the notion of procurement was broad: “In its ordinary meaning, ‘procure’ [...] means ‘to get; to gain; to come into possession of.’ The French and Spanish texts of the NAFTA use the generic term for ‘purchases’ in Article 1108”.⁸²¹ In this case, the tribunal decided that the Ontario FIT program, under which power purchase agreements were awarded by the Ontario Power Authority, constituted “procurement” under NAFTA Article 1108(7)(a).⁸²²
379. In the present case, the Claimant only provided a definition of the term “procurement” in its Pre-Hearing Memorial dated October 14, 2021, in response to questions from the Tribunal. After noting that the term was not defined in NAFTA, the Claimant provided the following dictionary definition of “procurement”: “the action of obtaining or procuring something”.⁸²³ The Claimant only engages with the case-law on Article 1108(7)(a) to a limited extent, for instance noting that the *Mesa* tribunal’s caution against incorporating provisions from other NAFTA Chapters (here Chapter 10 on Government Procurement) into Chapter 11 was unwarranted.⁸²⁴

⁸¹⁸ As a reminder, in *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 (**CL-130**), the tribunal had to decide whether US measures that required that steel materials used in the construction of an interchange project be 100% produced and fabricated in the US constituted a breach of NAFTA (at para 155). In its analysis of Article 1108(7)(a), the tribunal found that: “[i]n its ordinary or dictionary connotation, ‘procurement’ refers to the act of obtaining, as by effort, labor or purchase. To procure means to ‘get; to gain; to come into possession of’. [...] Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery” (at para 161 [internal footnotes omitted]). Ultimately, the tribunal ruled that “[p]rocurement by the Commonwealth of Virginia for, or in connection with, the Springfield Interchange Project, constitutes procurement by a Party within the meaning of Article 1108(7)(a). The Investor’s claim concerning Article 1102 is, accordingly, denied”, para 199(3).

⁸¹⁹ At issue in *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Merits, 24 May, 2007 (**CL-113**) was whether the “Postal Imports Agreement” (PIA), under which Canada Customs procured three services (material handling, data entry, duty collection) from Canada Post for a fee fell under the Article 1108(7) exemption. The majority of the tribunal, after a brief analysis, concluded that: “Having analysed the PIA and being informed by the decisions of the *ADF* and *Dussault* Tribunals [A domestic court decision having determined that the PIA was a commercial, fee-for-service contract], we are of the view that the PIA is clearly a procurement contract under which Canada Post performs services for Customs for a fee” (at para 135). As such, the tribunal concluded that the PIA fell within Article 1108(7)(a).

⁸²⁰ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.39-6.41 (**RL-122**).

⁸²¹ *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 407 (**CL-005**).

⁸²² *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 448 (**CL-005**).

⁸²³ Claimant’s Pre-Hearing Memorial, at para 70, citing <https://www.lexico.com/en/definition/procurement>.

⁸²⁴ See Hearing on the Merits and Damages, October 19, 2021, at 409:6-17.

380. For its part, the Respondent argues that the ordinary meaning of procurement in Article 1108(7)(a) is broad, citing in support past NAFTA Chapter 11 cases, including *ADF*, *Mercer*, and *Mesa*.⁸²⁵ Pressed by Dean Cass at the closing of the 2020 Hearing on the usually formal nature of procurement, the Respondent argued that the meaning of “procurement” in Article 1108(7) was broad: “[i]t’s procurement by a party. It’s not covered by other chapters in the NAFTA which deal with procurement or WTO rules on procurement and so on”.⁸²⁶

381. This Tribunal agrees with the Respondent and past tribunals that the ordinary meaning of procurement is broad. It will now turn to specific arguments by the Claimant related to the interaction between NAFTA Chapters 10 and 11 and its impact on interpretation. In particular, the Claimant submitted at the 2021 Hearing that Article 1001(5) of Chapter 10 should be relied upon by this Tribunal as guidance to differentiate between “procurement” at Article 1108(7)(a) and “subsidies” at Article 1108(7)(b).⁸²⁷ Article 1001(5) provides as follows:

5. Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:

- (a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments; and
- (b) the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.⁸²⁸

382. Specifically, the Claimant argued that “any transaction with a subsidy element to it, a financial contribution from the government providing assistance to the recipient, couldn’t be considered procurement. That exception in the language in [Article] 1001(5) says that if it looks like a subsidy, it would not be considered procurement here”.⁸²⁹ The Claimant then submits two arguments in support of its reliance on another NAFTA Chapter to interpret a provision of Chapter 11: (i) not sharing the *Mesa* tribunal’s caution, it submits that other tribunals have done so (citing to *Canfor* in relation to NAFTA Chapter 19) and (ii) it further submits that in case of inconsistency between Chapter 11 and any other chapter, Article 1112(1) provides that the other chapter will prevail (to the extent of the inconsistency).⁸³⁰

383. First, the Tribunal agrees with the reasoning of the *Mesa* tribunal that concluded that other

⁸²⁵ See e.g. Respondent’s Counter-Memorial, fn. 486; Respondent’s Pre-Hearing Memorial, at paras 38-42.

⁸²⁶ Hearing on the Merits and Damages, November 14, 2020, at 1254:19-24.

⁸²⁷ Hearing on the Merits and Damages, October 19, 2021, at 407:17-409:5.

⁸²⁸ NAFTA Article 1001(5).

⁸²⁹ Hearing on the Merits and Damages, October 19, 2021, at 408:24-409:5.

⁸³⁰ Hearing on the Merits and Damages, October 19, 2021, at 409:6-409:17.

chapters of NAFTA provide only limited context and guidance to understand the meaning of the terms in Article 1108(7)(a). Specifically, the *Mesa* tribunal held that:

Further, in Chapters 11, 12 and 15, the term is used as a ‘carve-out’, precluding the application of substantive provisions, while in Chapter 10 the term is used as a ‘carve-in’, allowing for and regulating the application of substantive provisions. In other words, the term ‘procurement’ is used in different contexts in the NAFTA, serving different functions and for different purposes, and to regulate different subject areas.⁸³¹

384. On Chapter 10, the *Mesa* tribunal added:

If the NAFTA Parties had intended to incorporate the limitations found in Article 1001(5) into Article 1108(7)(a), they could easily have done so. Indeed, other provisions of Article 1108 contain express references to provisions of other chapters of the NAFTA.⁸³²

385. The Tribunal finds this reasoning apposite, even in the case of the narrower argument submitted by the Claimant, that does not seek to import (wholesale) into Chapter 11 the limitations of Chapter 10 (as the claimants in other cases had sought to do). The context and purposes of these provisions do differ.

386. Relatedly, the Tribunal also agrees with the reasoning of the *Mesa* tribunal that when considering object and purpose under the VCLT, the Tribunal not only has to consider the overall objectives of NAFTA (which operate at a high level of generality), but must “also focus on the objects and purposes of the particular provision in which the term appears. And for this, the Tribunal must consider the text of the provision itself (here Article 1108)”.⁸³³ On this point, the *Mesa* tribunal concluded that “through the exception carved-out by Article 1108(7)(a), the NAFTA Contracting Parties sought to protect their ability to exercise nationality-based preferences in cases of procurement”.⁸³⁴

387. Second, the Tribunal finds that there is no inconsistency between Chapter 11 and Chapter 10 that would make the latter prevail in defining procurement. Again, the Tribunal agrees with the reasoning of the tribunal in *Mesa*, which held that:

subparagraphs (a) and (b) of Article 1001(5) are not found in Article

⁸³¹ *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, para 417 [internal footnote omitted] (CL-005).

⁸³² *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, para 425 [internal footnote omitted] (CL-005).

⁸³³ *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, para 418 (CL-005) citing *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003 (CL-130).

⁸³⁴ *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 419 (CL-005).

1108(7)(a), and therefore, the question of inconsistency cannot arise. What the Claimant is seeking is not a finding of inconsistency between Articles 1001(5) and 1108(7)(a) but rather an importation of the limitations in paragraphs (a) and (b) of Article 1001(5) into Article 1108(7)(a), for which there is no justification, [...] ⁸³⁵

388. Third, the Tribunal cannot accept the argument of the Claimant which implies that if a government program seeks to attain more than one objective in a single vehicle or transaction and one of those components meets the ordinary definition of procurement while another is a grant, the government could not avail itself of the exclusion provided at Article 1108(7)(a), but only of that under Article 1108(7)(b). In usual circumstances this differentiation would not matter, as both would be excluded under Article 1108(7). But in this case, the Claimant seeks to prevent the Tribunal from applying the Article 1108(7)(b) exclusion on the ground that the Respondent allegedly contradicted itself in other legal proceedings by claiming that GNS did not provide subsidies to PHP. ⁸³⁶ Consistent with this position, the Claimant has submitted (when asked by the Tribunal at the 2021 Hearing) that the Outreach Agreement and the Land Purchase Agreement should be considered subsidies and not procurement under Article 1108(7).
389. As a general matter, the Tribunal is of the view that nothing in the text of Article 1108(7) prevents it from applying the exclusion in a case where a government program serves more than one purpose and amalgamates different components. To hold otherwise would result in form prevailing over substance, as held by the tribunal in *Mercer*. ⁸³⁷ Although in a different context, the tribunal in that case differentiated between components of a contract, holding some terms to fall within the procurement exception, but not others. ⁸³⁸
390. In sum, the Tribunal will apply the ordinary meaning of the term procurement at Article 1108(7)(a) as formulated in *Mercer*: “the phrase ‘procurement by a Party or a state enterprise’, in its context and in the light of NAFTA’s object and purpose, signifies the buying of goods or services for or by a State or a state enterprise”. ⁸³⁹
391. The Respondent argues that the following measures fall within the scope of Article 1108(7)(a): the Land Purchase Agreement, the Outreach Agreement and the Forest Utilization Licence

⁸³⁵ *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 439 (**CL-005**).

⁸³⁶ See Paragraphs 349 *et seq.*

⁸³⁷ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.45 (**RL-122**).

⁸³⁸ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at paras 6.45-6.47 (**RL-122**).

⁸³⁹ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.35 (**RL-122**).

Agreement (or FULA).

a. Land Purchase Agreement

392. As described earlier, [REDACTED] GNS purchased 51,500 acres of land from PWCC for \$20 million dollars.⁸⁴⁰ This purchase took place in the context of the implementation of the Natural Resources Strategy, which sought to increase Crown ownership of land in the province.⁸⁴¹ In order to meet the goal set in pre-existing legislation to protect 12% of Nova Scotia's land mass, GNS had recourse to two programs: the Large Land Purchase Program and the Forestry Transition Land Acquisition Program.⁸⁴² The latter program stipulates a process that includes amongst others items: the review of letters of request which then get prioritized by a steering committee, the appraisal of land and its sale at fair market value. The evaluation covers both a DNR staff preliminary Integrated Resource Management (IRM) assessment and an appraisal by an accredited appraiser.⁸⁴³
393. Over the years, GNS purchased land from several mills, including Northern Pulp and NPPH in 2010, Bowater Mersey in 2011, and PWCC in 2012.⁸⁴⁴
394. During the proceedings, the Respondent argued that the land purchase in this case “falls within the scope of the Article 1108(7)(a) exclusion for ‘procurement’: the GNS paid money and received land in return”.⁸⁴⁵
395. For its part, at the 2021 Hearing following questions from the Tribunal, the Claimant submitted that the land purchase was a subsidy and not procurement because it “was intended to be a form of government assistance that would provide PWCC with cash to start up its operations”.⁸⁴⁶ The Claimant tied the argument back to NAFTA Chapter 10: “And so per the distinction in NAFTA Article 1001(5), and perhaps also Article 1112(1), that should be considered a subsidy because 1001(5), if you were to look to that for guidance, this would be financial assistance and that would tip the balance for it to be a subsidy rather than treated as procurement”.⁸⁴⁷
396. As held above, the Tribunal is not persuaded by the Claimant's argument related to NAFTA

⁸⁴⁰ Respondent's Counter-Memorial, at para 230; Witness Statement of Julie Towers, April 17, 2019, at para 28.

⁸⁴¹ See Witness Statement of Julie Towers, April 17, 2019, at paras 11-13.

⁸⁴² See Witness Statement of Julie Towers, April 17, 2019, at paras 7, 14.

⁸⁴³ See Nova Scotia Natural Resources, “Forestry Transition Land Acquisition Program: Guidelines for Applicants”, April 2008, at 1 (**R-207**).

⁸⁴⁴ See Witness Statement of Julie Towers, April 17, 2019, at paras 23-30.

⁸⁴⁵ Respondent's Counter-Memorial, at para 230.

⁸⁴⁶ Hearing on the Merits and Damages, October 19, 2021, at 414:6-9.

⁸⁴⁷ Hearing on the Merits and Damages, October 19, 2021, at 414:10-16.

Chapter 10 and its impact on the interpretation of NAFTA Article 1108(7)(a). In any case, the fact that the money obtained from the sale of the land may have helped PWCC relaunch the activities of the Mill does not disqualify the transaction from being a procurement. Furthermore, it is uncontroverted that the land purchase was done at fair market value.⁸⁴⁸ On this point, the Tribunal agrees with the Respondent: “it was a fair market value transaction whereby the government bought a valuable asset for use for public purposes. It’s not a subsidy”.⁸⁴⁹

397. As a result, the Tribunal finds that the Land Purchase Agreement falls under the Article 1108(7)(a) exclusion as constituting “the buying of goods [...] by a State”.

398. Even if the Tribunal had adopted a more formal definition of procurement (discussed further below), the Land Purchase Agreement in this case would still fall under the Article 1108(7)(a) exclusion. First, land, as real property, is typically not subject to open competitive bidding procedures when being purchased by governments. Chapter 10 itself reflects the limits of competitive bidding in certain cases by providing for limited tendering procedures at Article 1016.⁸⁵⁰ Second, the programs described above include their own procedures for GNS land purchases, such as requests, evaluations, appraisals, and award.

b. Outreach Agreement

399. The Outreach Agreement was concluded between PHP and GNS on [REDACTED]⁸⁵¹ As explained by Julie Towers in her witness statement: “[REDACTED]
[REDACTED]
[REDACTED]”.⁸⁵² GNS reimburses PHP for its costs under the agreement up to a cap of \$3.8 million per year, for a duration of 10 years.

400. In its Reply, the Claimant argued that the exception for procurement does not apply to all parts of the Outreach Agreement, [REDACTED]
[REDACTED].⁸⁵³ Julie Towers, in her Rejoinder witness statement, clarified that: “all of the expenses that are reimbursed by the GNS under the Outreach Agreement (the

⁸⁴⁸ See Witness Statement of Julie Towers, April 17, 2019, at para 30.

⁸⁴⁹ Hearing on the Merits and Damages, October 18, 2021, at 182:21-25.

⁸⁵⁰ It is noteworthy that not all procurement covered by Chapter 10 is subject to competitive bidding. Indeed, Article 1016 allows for the use of limited tendering procedures in appropriate circumstances. This would be the case where e.g. “for reasons connected with the protection of patents, copyrights or other exclusive rights, or [...] where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists”.

⁸⁵¹ See [REDACTED] (C-206).

⁸⁵² See Witness Statement of Julie Towers, April 17, 2019, at para 38.

⁸⁵³ Claimant’s Reply Memorial, at paras 309-310.

‘eligible costs’) are related to services provided to, and approved by, the GNS”.⁸⁵⁴

401. Also in its Reply, the Claimant criticizes the Respondent for not producing documents that would have enabled it to determine whether GNS paid fair market value prices for different cost categories under the Outreach Agreement.⁸⁵⁵ The Respondent denied this claim in its Rejoinder, noting that relevant documents have been produced and that only the amounts for payments past October 15, 2014 have been redacted since they are not relevant to the dispute. For the Respondent, whether as a “procurement” or as a “grant” (the term used by the Claimant on occasion to refer to the program),⁸⁵⁶ the payments by GNS for activities performed would fall within Article 1108(7).⁸⁵⁷

402. At the 2021 Hearing, the Claimant further argued that:

The government is not buying something, there is no price for services. The amount -- the way that the agreement works is that there's \$3.8 million available for these reimbursements over a ten-year period. So what that agreement is doing is it's providing a fiscal incentive of reimbursement up to annual limits for PHP as it decides to undertake the types of activities that would be eligible as costs to be reimbursed within the amounts of the annual limits. I will note that the Department of Commerce found the outreach agreement to be a countervailing subsidy and Canada did not challenge that finding at the WTO, and you can see that in the panel report that they have provided at R-238.⁸⁵⁸

In sum, the Outreach Agreement was not procurement under Article 1108(7)(a).

403. It appears to the Tribunal, after reviewing the Outreach Agreement itself, that some of the provisions clearly meet the definition of “buying services for or by a State”, for example, [REDACTED]
[REDACTED]⁸⁵⁹ Other provisions of the Outreach Agreement (e.g. [REDACTED]) could alternatively be seen as grants.⁸⁶⁰

404. Even if the Tribunal were to hold that the Outreach Agreement had a dual purpose, this would not prevent the Tribunal from concluding that parts of the agreement could be excluded as procurement under Article 1108(7)(a) and other parts as grants under Article 1108(7)(b). As

⁸⁵⁴ Rejoinder Witness Statement of Julie Towers, March 4, 2020, at para 7.

⁸⁵⁵ Claimant's Reply Memorial, at para 310.

⁸⁵⁶ See Claimant's Memorial, at paras 71, 219, 253.

⁸⁵⁷ Respondent's Rejoinder, at para 69; Hearing on the Merits and Damages, October 19, 2021, at 457:13-20.

⁸⁵⁸ Hearing on the Merits and Damages, October 19, 2021, at 412:22-413:14.

⁸⁵⁹ See [REDACTED] at CAN000001_0004-0006 (C-206).

⁸⁶⁰ See [REDACTED] at CAN000001_0004, CAN000001_0007 (C-206).

discussed above, in the Tribunal’s view, the question is one of substance and not form. As also held in *Mercer*, “it is not possible to have one purpose extinguish the other”.⁸⁶¹

405. On the issue of formality, the Tribunal adds that while procurement may often be associated with formal procedures for the acquisition of goods and services by governments and is sometimes subject to disciplines under trade agreements, that does not mean that such limitations must be implied where the text does not provide so, such as in the case of NAFTA Article 1108(7)(a). As held by the tribunal in *Mesa*, the notion of procurement as a “formal” acquisition is neither confirmed nor contradicted by the context in which the term is used.⁸⁶²

406. In sum, the Tribunal concludes that the Outreach Agreement falls under the NAFTA Article 1108(7)(a) exclusion.

c. Forest Utilization License Agreement

407. As described earlier, the FULA binds PHP and GNS to a modernized forest management licencing regime and was executed on September 27, 2012. Julie Towers summarized two key elements of the FULA, alleged by the Claimant to provide “benefits” to PHP:⁸⁶³

[T]he FULA is intended to contractually bind PHP to act in a manner consistent with the Province’s Natural Resources Strategy. With respect to the timber it needs for its mill, PHP pays for all stumpage harvested from Crown lands at the price and quantity prescribed in the FULA. Separate from this, PHP has an obligation to undertake specific silviculture activities for which it incurs expenses. These silviculture expenses are audited annually, and reimbursement is capped at [REDACTED]. In this regard, the Province compensates PHP for taking care of Crown lands. Without PHP or another licensee conducting those silviculture activities, it would fall to the Crown to pay contractors to do so.⁸⁶⁴

408. As with the Outreach Agreement, the Claimant argued in its Reply that the exception for procurement under Article 1108(7) does not apply to all parts of the FULA. The Claimant’s case was limited to one sentence: “GNS ‘procures’ nothing in these agreements—it is not buying goods or services—when PHP pays for stumpage under the FULA”.⁸⁶⁵ At the 2021 Hearing, the Claimant clarified its position that the FULA constituted neither procurement nor a subsidy “because it’s a purchase of goods from the government. It’s not the government purchasing goods

⁸⁶¹ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 6.45 (**RL-122**).

⁸⁶² *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, March 24, 2016, at para 415 (**CL-005**).

⁸⁶³ Claimant’s Memorial, at paras 219, 253.

⁸⁶⁴ Rejoinder Witness Statement of Julie Towers, March 4, 2020, at para 3.

⁸⁶⁵ Claimant’s Reply Memorial, at para 309.

from the company”.⁸⁶⁶ Given that, on at least one occasion, PHP is alleged to have received more in silviculture fees than it paid in stumpage fees, the Claimant argued that this circumstance “demonstrates a very generous beneficial agreement for PHP and a reduction of its fibre cost which is one of the four cost considerations for paper mills”.⁸⁶⁷

409. At the 2021 Hearing, the Respondent also clarified its position that the silviculture work aspect of the FULA fell under the Article 1108(7)(a) exclusion as procurement, while the stumpage fees

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410. Consistent with its earlier finding that an agreement (or specifically, here, a license) could serve more than one purpose and have some parts only fall within Article 1108(7)(a), the Tribunal concludes that the silviculture work aspect of the FULA meets the definition of procurement as “the buying of [...] services for or by a State”. As such, it is excluded from the analysis under NAFTA Article 1102(3).

411. However, the Tribunal finds that no exclusion under Article 1108(7) applies to the stumpage fee aspect of the FULA and as such it will be analyzed in particular under Article 1102(3) below.

ii. Article 1108(7)(b): subsidies or grants

412. NAFTA Article 1108(7)(b) provides that Article 1102 does not apply to “subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance”.

413. Again here, as with procurement, the Tribunal must interpret terms, including “subsidies”, that have not been defined by the NAFTA parties in Chapter 11 or elsewhere in NAFTA. After being asked by the Tribunal to clarify their positions on the interpretation of subsidy,⁸⁶⁹ both Parties addressed it at the 2021 Hearing, using the Oxford dictionary definition as a starting point. The

⁸⁶⁶ Hearing on the Merits and Damages, October 19, 2021, at 416:9-12.

867 Hearing on the Merits and Damages, October 19, 2021, at 417:12-15.

868 See Hearing on the Merits and Damages, October 19, 2021, at 454:5-17: “Now, again, Resolute confuses the FULA’s stumpage fees aspect and the silviculture payments as Ms. Towers explained and as is in the FULA. PHP pays for all Crown stumpage harvested at the rates prescribed in the FULA and [REDACTED]”

869 See E-mail from the Tribunal to the Parties dated September 13, 2021, which stated that “[...] the Tribunal would like the Parties to specifically address in more detail in their submissions and the [2021 Hearing] how the Tribunal should interpret the notions of ‘treatment’ & ‘in like circumstances’ (at NAFTA Art. 1102(3)), and ‘procurement’ & ‘subsidies’ (at Art. 1108(7))”.

Claimant read the definition of subsidy as targeting a narrow category of government support,⁸⁷⁰ while the Respondent argued that the definition was broad.⁸⁷¹

414. The Tribunal is of the view that some of the principles adopted to interpret the term procurement at Article 1108(7)(a) apply similarly to the definition of subsidies at Article 1108(7)(b).
415. First, the NAFTA parties left the term subsidy undefined, presumably knowing that a NAFTA Chapter 11 tribunal would turn to VCLT Article 31 for its interpretation. It is not for the Tribunal to import limitations found in other chapters of NAFTA or, more relevant here, in other international agreements absent any indication to that effect in NAFTA. The NAFTA parties made explicit cross-references when they so intended, as seen in the reference in Article 1108 to other NAFTA Chapters (e.g. in Article 1108(5)), or in other parts of NAFTA to GATT provisions (e.g. in Article 2101).
416. Second, as to object and purpose, through the derogation (or exception carved-out) by Article 1108(7)(b), the NAFTA parties sought to protect their ability to exercise nationality-based preferences in relation to subsidies and grants. NAFTA specifically does not include disciplines on subsidies, and the derogation at Article 1108(7)(b) should be interpreted in that light.⁸⁷²
417. The Tribunal notes that the dictionary definitions of subsidy proposed by the Parties are not narrow on their face. The Claimant has submitted that a subsidy is “a sum of money granted by the government or a public body to assist an industry or business so that the price of a commodity or service may remain low or competitive”.⁸⁷³ As noted by the Respondent, other definitions do not include the reference to keeping prices low.⁸⁷⁴ The Oxford English Dictionary (as compared to Lexico.com cited by the Claimant) includes the following, more comprehensive definition of subsidy: “Money or a sum of money granted by the state or a public body to help keep down the price of a commodity or service, or to support something held to be in the public interest. Also: the granting of money for these purposes”.⁸⁷⁵ The Merriam Webster dictionary provides similarly that a subsidy is: “a grant or gift of money: such as [...] c: a grant by a government to a private

⁸⁷⁰ See Hearing on the Merits and Damages, October 18, 2021, at 110:5-8; Claimant’s Pre-Hearing Memorial, at paras 70-71.

⁸⁷¹ See Hearing on the Merits and Damages, October 19, 2021, at 471:10-473:8.

⁸⁷² Under NAFTA Chapter 19, each party reserves the right to apply its own countervailing duty law but agrees to replace judicial review of final determinations with binational panel review. Article 1907(2) provides that “The Parties further agree to consult on: (a) the potential to develop more effective rules and disciplines concerning the use of government subsidies”.

⁸⁷³ Claimant’s Pre-Hearing Memorial, at para 70, citing <https://www.lexico.com/en/definition/subsidy>; Hearing on the Merits and Damages, October 18, 2021, at 110:5-11.

⁸⁷⁴ Hearing on the Merits and Damages, October 19, 2021, at 472:11-14.

⁸⁷⁵ Oxford English Dictionary.

person or company to assist an enterprise deemed advantageous to the public”.⁸⁷⁶

418. One element of the definition of subsidy the Parties agree on is that there must be a financial contribution by the government. As stated by the Respondent, “not every advantageous treatment of an enterprise of a party is a subsidy. There must be some kind of financial contribution”.⁸⁷⁷ The Tribunal agrees with this basic requirement. As noted by the Respondent, however, subsidies are not limited to direct transfers of funds. The inclusion at Article 1108(7)(b) of government-supported “guarantees and insurance” indicates that much.⁸⁷⁸

419. To support its narrow interpretation of the term subsidy, the Claimant draws on the WTO SCM Agreement and Dean Cass’ Separate Statement in *UPS*. In particular, the Claimant submits that:

[...], it seems reasonable to interpret Article 1108(7) as being aimed at excluding from NAFTA scrutiny under Article 1102 those specific measures that the NAFTA Parties knew would be subject to WTO discipline and other trade remedies. Such exclusion would require the definition of “subsidy” under the WTO system to be consistent with the measures that fall within Article 1108(7), and it is. “Subsidy” is defined in Article 1 of the WTO ASCM and refers to narrow categories of overt decisions by government to expressly convey a “financial contribution” or “income or price support” to particular enterprises.⁸⁷⁹

420. As already alluded to, this Tribunal does not find it appropriate to import limitations from a different international agreement without any indication to that effect from the NAFTA parties. In particular, the Tribunal does not find convincing the Claimant’s reliance on the NAFTA preamble for this purpose.⁸⁸⁰ What may appear “reasonable” to the Claimant is not what the VCLT calls for as a matter of interpretation. The WTO SCM Agreement details what constitutes subsidies (including financial contribution by a government or any public body within the territory of a member which confers a benefit) and requirements as to specificity.⁸⁸¹ In turn, concepts such as “benefit” and “specificity” have been interpreted by WTO panels and the Appellate Body considering the particular context and object and purpose of the agreement. In other words, the regulation of subsidies at the WTO comes with “baggage”, one that cannot properly be imported

⁸⁷⁶ <https://www.merriam-webster.com/dictionary/subsidy>

⁸⁷⁷ See Hearing on the Merits and Damages, October 19, 2021, at 473:14-17. See also Claimant’s Memorial, at para 230: “subsidies require financial contributions, and whereas there are financial consequences in all the Nova Scotia Measures, they do not all involve financial contributions”; Claimant’s Pre-Hearing Memorial, at para 72.

⁸⁷⁸ Hearing on the Merits and Damages, October 19, 2021, at 473:2-8.

⁸⁷⁹ Claimant’s Pre-Hearing Memorial, at para 72 [internal footnotes omitted]. See also Claimant’s Reply Memorial, at paras 281, 311, which make reference to the SCM Agreement.

⁸⁸⁰ The NAFTA preamble provides that its parties resolve to “BUILD on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation. See Claimant’s Pre-Hearing Memorial, fn. 66.

⁸⁸¹ See World Trade Organization, *Agreement on Subsidies and Countervailing Measures*, at Articles 1-2 (C-367).

into the interpretation of NAFTA Article 1108(7)(b). Further, references to “overt decisions” and the “express” conveying of financial contributions that are subject to political processes as well as public debate and scrutiny do not match the reality of the many methods that different levels of government use to provide financial support to enterprises, which methods meet the ordinary meaning of “subsidies”. Furthermore, the object and purpose of Article 1108(7)(b), as discussed above, is to permit nationality-based preferences in relation to subsidies and grants; which is the opposite of seeking to discipline subsidies. Finally, it is unrealistic to require governments to label different programs as “subsidies” in advance of potential future litigation in which such measures are contested under international trade agreements. What definitions should a government use when labelling the measures in advance? Should governments use the definitions under the WTO SCM Agreement? This suggestion is neither appropriate nor practical.

421. Turning back to the wording of Article 1108(7)(b), the Tribunal notes that there are other elements that differentiate the text of NAFTA from that of the WTO SCM Agreement. As also noted by the Respondent, the NAFTA parties use subsidies *or* grants as distinct elements under Article 1108(7)(b), while under the SCM Agreement, a “grant” can fall under the definition of subsidies.⁸⁸² As such, the Respondent provided a dictionary definition of the term “grant” as: “[a]n authoritative bestowal or conferment of a privilege, right, or possession; a gift or assignment of money, etc. by the act of an administrative body or of a person in control of a fund or the like”.⁸⁸³
422. Additionally, Article 1108(7)(b) provides examples of government “subsidies or grants” that are excluded from the purview of Article 1102: “including government-supported loans, guarantees and insurance”.⁸⁸⁴ While the use of “including” means the list is illustrative and not exhaustive, the Tribunal considers these examples to be very informative as to the kind of measures the NAFTA parties meant to cover. In the particular circumstances of this case, they also prove to be determinative.
423. Consequently, the Tribunal will consider next the Parties’ arguments related to “government supported loans” before ruling on whether the related Assistance Measures fall within the exclusion in Article 1108(7)(b) under subsidies or grants.

a. Government supported loans

424. The ordinary meaning of loan, as suggested by the Respondent, is: “[a] thing lent: something the

⁸⁸² Respondent’s Rejoinder, at fn. 156.

⁸⁸³ Respondent’s Counter-Memorial, at fn. 476.

⁸⁸⁴ NAFTA Article 1108(7)(b).

use of which is allowed for a time, on the understanding that it shall be returned or an equivalent given; *esp.* a sum of money lent on these conditions, and usually at interest”.⁸⁸⁵

425. The Respondent argues that the following measures are government supported loans:

- the \$40 million credit facility: as described earlier, [REDACTED]
[REDACTED]
[REDACTED]
- the \$24 million capital loan: [REDACTED]
[REDACTED]
[REDACTED]⁸⁸⁶
[REDACTED]
- the Indemnity Agreement: as described earlier [REDACTED]
[REDACTED]⁸⁸⁷

426. While contesting that the “harvesting” of \$1 billion in tax losses was a GNS measure providing a benefit to PHP,⁸⁸⁸ the Respondent also argues that it falls under the exclusion at Article 1108(7)(b) as [REDACTED]⁸⁸⁹

427. The Claimant was asked at the 2021 Hearing to clarify its position (without prejudice to its primary arguments) on whether different GNS Assistance Measures constituted procurement, subsidies or grants under Article 1108(7). The Claimant submitted that the \$40 million forgivable credit facility and the \$24 million forgivable loan, as loans, would seem to fit with the definition of subsidy.⁸⁹⁰ The Claimant did not mention the Indemnity Agreement at the time, but had earlier referred to it as [REDACTED]⁸⁹¹ Regarding the harvesting of tax losses, the Claimant at the 2021 Hearing submitted that it was a tax incentive that could be considered a subsidy, as it provided a financial contribution. The Claimant further linked the harvesting of tax losses to the government loans,⁸⁹² as the Respondent did.

⁸⁸⁵ Respondent’s Counter-Memorial, at fn. 473.

⁸⁸⁶ Respondent’s Counter-Memorial, at para 111.

⁸⁸⁷ Respondent’s Counter-Memorial, at paras 136, 225, 228.

⁸⁸⁸ Respondent’s Counter-Memorial, at paras 226, 318; Respondent’s Pre-Hearing Memorial, at fn. 74.

⁸⁸⁹ Hearing on the Merits and Damages, October 19, 2021, at 459:14-25.

⁸⁹⁰ Hearing on the Merits and Damages, October 19, 2021, at 412:2-9. Before the 2021 Hearing the Claimant had not provided arguments as to whether the Assistance Measures fell under “government supported loans” under Article 1108(7)(b) but did refer to these programs as loans in its written memorials. See e.g. Claimant’s Reply Memorial, at para 264 (re \$64 million in in forgivable loans).

⁸⁹¹ See Claimant’s Reply Memorial, at para 181.

⁸⁹² The Claimant highlighted that: “And particularly is the way that it was restructured at the last minute because PHP had been disappointed about not getting the tax ruling from federal Canada the way that it wanted to, and so there were changes to allow them to apply those tax losses that were for the mill and carried over previously”. Hearing on the Merits and Damages, October 19, 2021, at 415:19-25.

428. The Tribunal finds that the \$40 million credit facility, \$24 million capital loan and the Indemnity Agreement are “government supported loans” that meet the basic definition of subsidy (or grant if forgiven) at NAFTA Article 1108(7)(b) because they provide some “financial contribution” to assist an enterprise.⁸⁹³ Whether seen through the Claimant’s eyes as assistance that allowed PHP to dramatically reduce its costs, or through the Respondent’s eyes as assistance in the public interest related to the economic impact of the Mill in the province of Nova Scotia, the result is the same. The Tribunal does not find it necessary to explore further the confines of the term subsidy to make its ruling: whether considered as subsidies (when repayable) or as grant (if/when forgiven), the government supported loans in this case fall under the Article 1108(7)(b) exclusion.

b. (Other) Grants

429. As mentioned above, the Respondent proposed the following definition of “grant” as: “[a]n authoritative bestowal or conferment of a privilege, right, or possession; a gift or assignment of money, etc. by the act of an administrative body or of a person in control of a fund or the like”.

430. The Respondent argues that the following Assistance Measures are grants:

- the workforce training grant (\$ 1.5 million): d [REDACTED]
[REDACTED]
[REDACTED]⁸⁹⁴
- the marketing grant (\$1 million): [REDACTED]
[REDACTED]⁸⁹⁵
- the Ramp-Up Agreement (up to \$1.5 million): a separate agreement between NPPH, PWCC and GNS dealing with activities necessary for the mill to restart its operations and qualify paper. Funds drawn from “the Province’s commitment with respect to marketing to PWCC” (\$300,000) and remaining funds, as of 24 July 2012, of the hot idle funding.⁸⁹⁶

431. Asked to clarify its position at the 2021 Hearing, the Claimant provided the following response (as before, without prejudice to its primary arguments): “With respect to the two grants, the \$1.5 million productivity grant and the \$1 million marketing grant, as grants and the description of grants there falls under subsidies as well, that’s where they would be”.⁸⁹⁷ The Claimant did not address the Ramp-Up Agreement.

432. In the Tribunal’s view, the \$1.5 million workforce training grant, the \$1 million marketing grant

⁸⁹³ The Tribunal does not find it necessary to [REDACTED]
[REDACTED] See [REDACTED], at 5-6 (C-195).

⁸⁹⁴ See [REDACTED] at 4 (C-182).

⁸⁹⁵ See [REDACTED] at 4 (C-182).

⁸⁹⁶ Respondent’s Counter-Memorial, at para 137.

⁸⁹⁷ Hearing on the Merits and Damages, October 19, 2021, at 412:10-14.

and [REDACTED] Ramp-Up Agreement [REDACTED] conform to the ordinary meaning of “grant” in NAFTA Article 1108(7)(b), read in its context and in light of its object and purpose. As such, these measures are excluded from the purview of Article 1102. Since the term “grant” appears alongside “subsidy” at Article 1108(7)(b), the Tribunal finds there is no need to also conclude they are subsidies.

c. Remaining measure: the municipal property tax reduction

433. The Respondent’s primary argument is that the new municipal tax rate did not constitute a “benefit” to PWCC. As described above, the Respondent submits that the readjustment accounted for reduced operations and asset use at the Mill.⁸⁹⁸ In support of its arguments, the Respondent referred to the U.S. DOC finding, as of October 2015, that “the property tax that Port Hawkesbury paid during the POI under the amended tax agreement exceeds the property tax otherwise due. As a result, we find that there is no revenue forgone [...] without forgone revenue, Port Hawkesbury did not receive a benefit”.⁸⁹⁹ However, the Respondent also submits as an alternative argument that: “in the event that the Claimant maintains this argument or the Tribunal finds that the tax agreement provided a benefit to PWCC or PHP, Canada submits that the measure would fall within the scope of the exclusion for subsidies and grants set out in Article 1108(7)(b)”.⁹⁰⁰
434. The Claimant has argued that GNS “provided municipal tax breaks reducing Port Hawkesbury property taxes from \$2.6 million annually to \$1.3 million”⁹⁰¹ by way of targeted legislation.⁹⁰² However, the municipal tax break does not appear in the Claimant’s pre-hearing memorial, even where a list of the ensemble of contested measures is offered.⁹⁰³ Further, when asked by the Tribunal at the 2021 Hearing to qualify the measures at issue according to whether they constituted procurement or subsidies (or neither) under Article 1108(7), the Claimant failed to list the municipal tax measure.⁹⁰⁴
435. In the circumstances, the Tribunal does not find it necessary to decide whether the municipal tax reduction constituted a subsidy or grant under NAFTA Article 1108(7)(b). As such, the Tribunal will return to the municipal tax reduction under Article 1102(3) below.

⁸⁹⁸ Respondent’s Counter-Memorial, at para 134.

⁸⁹⁹ Respondent’s Counter-Memorial, at para 135, referring to US DOC, Supercalendered Paper from Canada, Issues and Decision Memorandum, October 13, 2015, at 54 (**R-368**).

⁹⁰⁰ Respondent’s Counter-Memorial, at fn. 472; Respondent’s Rejoinder, at fn. 361.

⁹⁰¹ Claimant’s Memorial, at paras 115, 219.

⁹⁰² Claimant’s Reply Memorial, at para 176.

⁹⁰³ Claimant’s Pre-Hearing Memorial, at para 22.

⁹⁰⁴ Hearing on the Merits and Damages, October 19, 2021, at 411-417.

(b) Claimant’s argument that some of the Assistance Measures are not excluded by Article 1108(7) by virtue of the prohibition against self-contradiction

436. The Tribunal now turns to the remaining primary argument submitted by the Claimant in relation to Article 1108(7)(b): that Canada should not be allowed to rely on the exclusion because it (allegedly) denied the existence of “subsidies” in other dispute settlement fora.
437. In its Memorial, the Claimant’s arguments were very brief (less than two pages) and focused on the fact that Canada allegedly reported to the WTO that Nova Scotia provided no subsidies between 2011 and 2013. It also alleged that Canada and Nova Scotia “vigorously defended themselves and PHP against any and all subsidy allegations” in the CVD Investigation.⁹⁰⁵ As to the legal standard to be applied, the Claimant argued that “Canada should be estopped from reversing its position in order to obtain a benefit of the exception in Article 1108(7). Governments are not permitted to contradict themselves in search of defenses”.⁹⁰⁶
438. In its Counter-Memorial, the Respondent provided responses on the facts and the law, denying in particular the Claimant’s argument regarding estoppel because of the absence of detrimental reliance on the part of the Claimant.⁹⁰⁷
439. In its Reply, and faced with the Respondent’s argument regarding the absence of detrimental reliance, the Claimant put new emphasis on the “broader prohibition on self-contradiction”⁹⁰⁸ and presented almost 17 pages of arguments (on the law and the facts).
440. As for investment treaty arbitration precedent, the Claimant relied on the decision of the tribunal in *Chevron*.⁹⁰⁹ In its Pre-Hearing Memorial and during the 2021 Hearing, the Claimant similarly emphasized the *Chevron* tribunal’s holding on this point. At the 2021 Hearing, the Claimant cited the last two sentences of the following passage from *Chevron* at paragraph 7.106, which the Tribunal cites here is full:⁹¹⁰

Applying Article 26 of the VCLT and customary international law, the Tribunal decides that the Parties are bound to act in good faith in the exercise of their rights and the performance of their respective obligations under the Arbitration Agreement derived from Article VI of the Treaty. That duty of good faith precludes clearly inconsistent statements, deliberately made for one party’s material advantage or to the

⁹⁰⁵ Claimant’s Memorial, at para 229.

⁹⁰⁶ Claimant’s Memorial, at para 230.

⁹⁰⁷ Respondent’s Counter-Memorial, at paras 235-244.

⁹⁰⁸ Claimant’s Reply Memorial, at para 279.

⁹⁰⁹ Claimant’s Reply Memorial, at para 301.

⁹¹⁰ Claimant’s Pre-Hearing Memorial, at para 73; Hearing on the Merits and Damages, October 18, 2021, at 119:18-120:20; October 19, 2021, at 39:17-40:6.

other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.⁹¹¹

441. The *Chevron* tribunal, on the facts of that case, drew on the impossibility of reconciling the different statements made by the respondent, noting that the respondent's position in the arbitration was "manifestly inconsistent" with the "unequivocal statements" made by its own judicial branch.⁹¹² Ultimately, the tribunal ruled that it had jurisdiction over Chevron's claims, holding that the principle of good faith under international law and the underlying arbitration agreement required the respondent "to treat Chevron as 'standing in the shoes' of TexPet (with Texaco), consistently with the statements made and acted upon by the [r]espondent's judicial branch in the Lago Agrio Litigation".⁹¹³ In other words, Ecuador could not successfully challenge the tribunal's jurisdiction for there being no investment, when its own courts had taken a contrary approach. As noted by the Respondent, *Chevron* is very different from the case at hand.⁹¹⁴
442. In the circumstances of the present case, the Tribunal considers that *even if* it recognized as a matter of law the general principle against self-contradiction as argued by the Claimant, it would not find it applicable as a matter of fact. As a result, the Tribunal does not find it necessary to rule on the legal foundation that could justify the recognition of this principle in the current context. Thus, the Tribunal's analysis focuses on whether the Respondent denied the existence of "subsidies" in other dispute settlement fora, therefore making clearly or manifestly inconsistent statements to its advantage and to the prejudice of the Claimant in this case.
443. During its closing argument at the 2020 Hearing and again at the 2021 Hearing, the Claimant put its best foot forward by providing three examples of "direct evidence" of the Respondent's alleged denial of subsidies in relation to PHP. The Respondent rebutted each example. The Tribunal addresses each example in turn.

i. [REDACTED]

444. On October 10, 2012 (shortly after the sale of the Mill came into effect), the USTR submitted a

⁹¹¹ *Chevron Corp. v. Republic of Ecuador*, UNCITRAL, Second Partial Award on Track II, August 30, 2018, at para 7.106 (CL-239).

⁹¹² *Chevron Corp. v. Republic of Ecuador*, UNCITRAL, Second Partial Award on Track II, August 30, 2018, at para 7.111 (CL-239).

⁹¹³ *Chevron Corp. v. Republic of Ecuador*, UNCITRAL, Second Partial Award on Track II, August 30, 2018, at para 7.112 (CL-239).

⁹¹⁴ Respondent's Rejoinder Memorial, at para 80.

four-page list of detailed questions to Canada regarding the financial assistance provided to PHP. The questions covered a range of issues, including the loans, grants, land purchase, CRA ruling, LRR and property tax breaks.⁹¹⁵ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹¹⁶

445. The Claimant argues that [REDACTED]
[REDACTED]¹⁷

446. The Tribunal notes that the USTR did not ask whether the Assistance Measures constituted subsidies; indeed, the questions do not even mention the word “subsidy”. As such, Canada’s responses cannot be equated to [REDACTED]. Further, it would be surprising in this context (where the issue may be litigated) for a potential respondent to volunteer in advance which aspects of the assistance would fall under, say, the WTO SCM Agreement as prohibited “subsidies”.

ii. [REDACTED]
[REDACTED]

447. The minutes of a regular meeting of the Committee on Subsidies and Countervailing Measures dated August 5, 2013 relate exchanges notably between the US, EU, and Canada regarding the government assistance provided to PHP in Nova Scotia. The US noted its continued serious concern over the assistance package and urged Canada and GNS to re-consider their support. The EU requested information on the package. The minutes add that “[t]he EU presumed that this scheme would be notified in Canada’s 2013 new and full subsidy notification”.⁹¹⁸

448. In response, Canada stated that it took the concerns seriously and referred to the public record regarding the sale of the Mill. It added that:

the Federal Government and the Government of Nova Scotia had worked with the US and the EU to resolve this issue and had already provided responses to the US government’s first set of questions in November, and

⁹¹⁵ See [REDACTED] (C-037).

⁹¹⁶ See [REDACTED] (C-212).

⁹¹⁷ See Hearing on the Merits and Damages, October 19, 2021; Claimant’s Closing Argument, at 75; See also Hearing on the Merits and Damages, October 18, 2021, at 115; Claimant’s Pre-Hearing Memorial, at para 73.

⁹¹⁸ See WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 22 April, 2013, August 5, 2013, WTO Doc. G/SCM/M/85, at 18 (C-353; R-079).

to a second set of questions in February. It had provided as much information as possible while respecting the business confidentiality of the information.⁹¹⁹

449. The Claimant characterizes Canada's above response as "Canada's disagreement regarding the need to notify the PH measures"⁹²⁰ during that meeting.
450. Again here, the Tribunal finds that the minutes do not contain any denial by Canada regarding the provision of subsidies. Nor do the minutes include a direct answer to the EU's query. Whether the information provided by Canada constituted "constructive notification" as briefly alluded to by the Respondent at the 2021 Hearing does not need to be decided by the Tribunal.⁹²¹ In the final analysis, compliance (or lack thereof) with an obligation to notify "subsidies" under a different international agreement cannot be taken as decisive under NAFTA Article 1108(7)(b).

iii. Canada's WTO reporting of 'nil' subsidies for GNS in 2013, 2015, and 2017

451. Under Article 25 of the SCM Agreement, "Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories".⁹²²
452. The Claimant argues that Canada's Notifications in 2013, 2015, and 2017 indicate the word "*nil*" for Nova Scotia, which is an affirmative denial that subsidies were granted by GNS. The Claimant also questions the timing of Canada's submissions on the existence of subsidies in the present case (i.e. after the settlement that put an end to the US DOC proceedings).⁹²³
453. The Respondent provides at least three responses, two of which are unconvincing or somewhat unsatisfactory.
454. First, the Tribunal is not convinced by the argument that under the SCM Agreement rules notifications do not prejudice the legal status, effects or the nature of the measure under the Agreement.⁹²⁴ The point here is not that a notification made could be taken as an admission, but rather that a denial (i.e. "*nil*") could be considered as such.
455. Second, the Tribunal finds wanting the inability of the Respondent to answer questions regarding

⁹¹⁹ WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 22 April, 2013, August 5, 2013, WTO Doc. G/SCM/M/85, at para 131 (C-353; R-079).

⁹²⁰ Claimant's Reply Memorial, at paras 283-284. See also Claimant's Pre-Hearing Memorial, at para 73.

⁹²¹ Hearing on the Merits and Damages, October 19, 2021, at 489:19-20.

⁹²² World Trade Organization, *Agreement on Subsidies and Countervailing Measures*, at Article 25.2 (C-367).

⁹²³ Claimant's Reply Memorial, at paras 285-290.

⁹²⁴ Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 84.

the reasons for the “*nil*” notification concerning Nova Scotia and the process followed to make such notifications. While the Tribunal has some sympathy for the difficulties presented by Federal States when complying with notification requirements under complex international agreements,⁹²⁵ the questions asked by the Tribunal at the 2020 Hearing (and followed up on at the 2021 Hearing) could not have come as a surprise to the Respondent.⁹²⁶

456. In the Tribunal’s view, however, the third argument presented by the Respondent suffices to undermine the impact of the “*nil*” notifications. As noted in the above-cited passage from Article 25 of the SCM Agreement, the notifications of subsidies are not made in the abstract. They are made in respect of definitions and requirements that are set out in detailed provisions of the SCM Agreement. A statement made by the Respondent at the 2020 Hearing encapsulates this point: “what is said in other proceedings under different treaties, different domestic laws, different texts, different parties, different circumstances does not release the NAFTA Tribunal from its responsibility to apply the text as written”.⁹²⁷ The Tribunal agrees with the Respondent on this point.

457. In the final analysis, the following statements made by the Respondent remain uncontradicted:

Canada and Nova Scotia’s positions before the [DOC], as well as before the NAFTA Chapter Nineteen and WTO Panels, have been consistent. Canada and Nova Scotia did not dispute a number of the elements that led to the DOC’s Final Determination that some of the measures at issue in this case were countervailable subsidies under U.S. domestic law. As for subsequent NAFTA Chapter Nineteen and WTO Proceedings, they dealt with a narrower range of issues, namely the electricity rate negotiated by NSPI and PWCC, the provision of stumpage and biomass to PHP and payments made by GNS under the Outreach Agreement. It is thus incorrect to allege that Canada’s past positions are somehow contradictory to the arguments it is now making under Article 1108(7).⁹²⁸

458. Indeed, the Tribunal notes that the Claimant made a point at the 2021 Hearing that supports to some degree the Respondent’s position. While discussing whether the Outreach Agreement could constitute procurement or a subsidy, the Claimant noted that: “the Department of Commerce

⁹²⁵ At the closing of the 2020 Hearing, the Respondent pointed the Tribunal to its Rejoinder, fn. 155 and to WTO, Committee on Subsidies and Countervailing Measures, Subsidies - Replies to Questions Posed by The United States Regarding the New and Full Notification of Canada, G/SCM/Q2/CAN/62, October 31, 2014 (**R-433**).

⁹²⁶ See Hearing on the Merits and Damages, November 14, 2020, at 1245:17-1248:11; Hearing on the Merits and Damages, October 19, 2021, at 488:15-490:3, where the Respondent stated: “The point is that ‘nil’ is not a denial of a subsidy. It’s a complex procedure for a federal state to gather information from provinces and so on, and no one is saying that the reporting mechanism of the WTO is perfect by Canada or any other state”.

⁹²⁷ Hearing on the Merits and Damages, November 9, 2020, at 231:22-232:2.

⁹²⁸ Respondent’s Rejoinder Memorial, at para 83 [internal footnotes omitted]. See also Respondent’s Counter-Memorial, at para 238; Respondent’s Pre-Hearing Memorial, at para 44.

found the outreach agreement to be a countervailing subsidy and Canada did not challenge that finding at the WTO, and you can see that in the panel report that they have provided at R-238”.⁹²⁹ By implication, the Claimant appears to admit that in some instances Canada did not deny that subsidies were awarded, contrary to its own argument that the Respondent “took every opportunity over a span of more than five years [...] to expressly deny that these measures individually or collectively were a subsidy”.⁹³⁰

459. Finally, the Tribunal finds that the arguments submitted by the Claimant regarding the delay in the Respondent’s invocation of Article 1108(7) are also unavailing. Canada’s Statement of Defence already signaled that it would claim the application of Article 1108(7) to some of the Assistance Measures: “Any of the Nova Scotia Measures which fall within this exception (for example, the loans for working capital and productivity improvement, and the grants for worker training and marketing) are unimpeachable under Article 1102”.⁹³¹ Also, there was no obligation upon the Tribunal to decide on issues relating to Article 1108(7) at the jurisdictional phase of the arbitration, as their resolution required the production of documents that had not been planned for that phase of proceedings.
460. In conclusion, the Tribunal is not persuaded, as a matter of fact and assuming *arguendo* the Claimant’s “best case” on the law, that the Respondent made clearly or manifestly inconsistent statements regarding the existence of “subsidies” in other dispute settlement fora. Further, as noted above, such an analysis cannot be done in the abstract and must consider the specificities of the legal instruments under scrutiny. As a result, the Tribunal will apply the exclusion in Article 1108(7)(b) to the measures listed at Paragraphs 428 and 432 above.

B. NAFTA ARTICLE 1102(3)

1. Introduction

461. NAFTA Article 1102 provides that:

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

⁹²⁹ Hearing on the Merits and Damages, October 19, 2021, at 413:9-14.

⁹³⁰ Hearing on the Merits and Damages, October 18, 2021, at 117-118. See also Claimant’s Memorial, at para 229: “[...] but Canada and GNS vigorously defended themselves and PHP against any and all subsidies allegations, consistent with what Canada reported to the WTO”.

⁹³¹ Respondent’s Statement of Defence, at paras 88-89.

investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. 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.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.⁹³²

462. NAFTA Article 1102(3) is most relevant to this case, which concerns the measures taken by a Canadian province, Nova Scotia.

463. The Parties disagree as to the applicable standard of treatment under Article 1102(3), whether Canada, via GNS, breached its obligation to provide national treatment to Resolute and its investment.

2. The Claimant's Arguments

(a) The Applicable Standard under Article 1102(3)

464. The Claimant notes that *UPS v. Canada* found that a breach of Article 1102(3) is established when:

- a. the foreign investor or its investment has been accorded treatment by a province with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;
- b. the foreign investor or its investment is in like circumstances with the local investor or investment (*i.e.*, the investor or investment of the Party of which the province forms a part) that has been accorded the most favorable treatment by that province; and
- c. that province has treated the foreign investor or investment less favorably than it treats the investor or investment accorded the most favorable treatment.⁹³³

465. According to the *Pope & Talbot* tribunal:

[d]ifferences in treatment will presumptively violate Article 1102(2)

⁹³² NAFTA Article 1102(1) and (2).

⁹³³ Claimant's Memorial, at para 189; Claimant's Reply Memorial, at para 212, referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 83 (CL-113).

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 companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.⁹³⁴

466. Based on the above, the Claimant submits that it is only required to establish that as a foreign national, it has received treatment less favourable than the most favourable treatment accorded to a domestic investor in like circumstances.⁹³⁵ It is then for the Respondent to show that the differential treatment was not nationality-based and that the measures do not undermine the objectives of NAFTA.⁹³⁶ The Claimant argues that the Respondent acknowledges its burden “to justify the measures if Resolute satisfied the three-part test”.⁹³⁷
467. The Claimant argues that NAFTA Article 1102 should be interpreted in light of NAFTA Article 102, which contains the overall purpose of the treaty, which includes the promotion of conditions of fair competition in the free trade area (as referred to in *Pope & Talbot*).⁹³⁸ The Claimant contests the Respondent’s position that because Article 1108(7) is a carve-out to Article 1102, the latter provision cannot be interpreted in light of the general objectives of NAFTA as set out in Article 102.⁹³⁹
468. The Claimant adds that although it has the burden of proving the three elements of the *UPS* test, it is not required to demonstrate discriminatory intent⁹⁴⁰ nor show nationality-based discrimination.⁹⁴¹
469. The Claimant notes that NAFTA tribunals have confirmed that an Article 1102 claim does not require proof of discriminatory intent or discrimination based on nationality.⁹⁴² With respect to discriminatory intent, the Claimant relies on *Bilcon*, which stated that “the UPS test [...] does not

⁹³⁴ Claimant’s Memorial, at para 224; Claimant’s Reply Memorial, at para 272, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78 (**CL-114**).

⁹³⁵ Hearing on the Merits and Damages, November 9, 2020, at 124:11-17.

⁹³⁶ Hearing on the Merits and Damages, November 9, 2020, at 124:18-24; November 14, 2020, at 1158:15-25; Claimant’s Pre-Hearing Memorial, at paras 45-46; Hearing on the Merits and Damages, October 18, 2021, at 57:12-17, 60:11-61:6.

⁹³⁷ Hearing on the Merits and Damages, October 18, 2021, at 60:6-10; Hearing on the Merits and Damages, October 19, 2021, at 370:8-13, citing Respondent’s Pre-Hearing Memorial, at para 49.

⁹³⁸ Hearing on the Merits and Damages, October 19, 2021, at 533:16-25.

⁹³⁹ Hearing on the Merits and Damages, October 19, 2021, at 532:21-533:7.

⁹⁴⁰ Claimant’s Memorial, para 190, referring to *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at paras 717-719 (**CL-104**).

⁹⁴¹ Claimant’s Memorial, at para 226; Claimant’s Reply Memorial, at paras 214-215; Hearing on the Merits and Damages, November 9, 2020, at 116:8-19; November 14, 2020, at 1159:1-8.

⁹⁴² Claimant’s Reply Memorial, at para 226, referring to *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at para 177 (**CL-131**); Claimant’s Pre-Hearing Memorial, at paras 49-50.

require a demonstration of discriminatory intent”.⁹⁴³ The Claimant further notes that other international tribunals, as well as academic commentators relied upon by the Respondent,⁹⁴⁴ have concluded that discriminatory intent is not required to breach national treatment obligations.⁹⁴⁵

470. On nationality-based discrimination, the Claimant points to the tribunal in *Thunderbird v. Mexico*, which held that the claimant: “is not expected [...] to show separately that the less favourable treatment was motivated because of nationality. The text of NAFTA Article 1102 does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favourably than a national investor”.⁹⁴⁶ The Claimant also refers *inter alia* to the tribunals in *Bilcon*,⁹⁴⁷ *S.D. Myers*,⁹⁴⁸ *ADM*,⁹⁴⁹ and *Merrill & Ring*⁹⁵⁰ as examples of NAFTA cases in which a focus on the adverse effects of the impugned measures sufficed to sustain an Article 1102 claim.⁹⁵¹
471. With respect to evidence of nationality-based discrimination, the Claimant suggests that the tribunal must pay attention to the specific terms of Article 1102(3) in contrast to Articles 1102(1) and (2) to determine the scope and content of the national treatment obligation in respect of

⁹⁴³ Claimant’s Reply Memorial, at para 227, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 719 (CL-104); Hearing on the Merits and Damages, November 9, 2020, at 112:1-11.

⁹⁴⁴ Claimant’s Reply Memorial, at para 234, referring to Respondent’s Counter-Memorial, at para 250; Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, January 2000), at s. 4.12 (CL-117). See also Claimant’s Reply Memorial, at paras 235-237, citing Christoph Schreuer, “Protection against Arbitrary or Discriminatory Measures”, December 22, 2007, at 16-18 (CL-219); Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed., September 2015) at 486, (CL-229); Sabina S. Sacco and Mónica C. Fernández-Foncesca, “Chapter 8B: National Treatment in Investment Arbitration”, in Jorge Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer, 2013), at 258 (CL-226).

⁹⁴⁵ Claimant’s Reply Memorial, at para 232, referring to *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania II*, ICSID Case No. ARB/15/41, Award of the Tribunal, October 11, 2019, at paras 407-408 (CL-243); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, at para 321 (CL-217); *Cargill, Inc. v. Republic of Poland*, UNCITRAL, Award, March 5, 2008, at paras 343-345 (CL-221); *Bayindir Insaat Turizm Ticaret Ve Sanayi v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, at para 390 (CL-112).

⁹⁴⁶ Claimant’s Reply Memorial, at para 226, citing *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at para 177 (CL-131); Hearing on the Merits and Damages, November 9, 2020, at 113:15-20.

⁹⁴⁷ Claimant’s Reply Memorial, at para 227, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 719 (CL-104).

⁹⁴⁸ Claimant’s Reply Memorial, at para 228, citing *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 254 (CL-102).

⁹⁴⁹ Claimant’s Reply Memorial, at para 229, citing *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at para 209 (RL-092).

⁹⁵⁰ Claimant’s Reply Memorial, at para 230, citing *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/01, Award, March 31, 2010, at para 80 (CL-101).

⁹⁵¹ Claimant’s Memorial, at paras 227-230.

subnational measures.⁹⁵² Specifically, the Claimant contends that under Article 1102(3), the foreign investor is entitled to the “most favorable treatment” that the provincial government accords to any domestic investor, acknowledging that a provincial government may discriminate among domestic investors of the NAFTA party of which it forms a part.⁹⁵³ The Claimant argues that tribunals have considered the impugned treatment’s “practical impact”⁹⁵⁴ and “adverse effects”⁹⁵⁵ on the investors and their investments. Relying again on *Pope & Talbot*, it adds that grounding a national treatment claim under Article 1102(3) on the foreign investor’s nationality “would tend to excuse discrimination that is not facially directed at foreign owned investments”.⁹⁵⁶ The Claimant submits that it is sufficient for it to demonstrate that GNS intended to favor its own investor, causing “probable and foreseeable harm” to the foreign investor; a demonstration of intent to disadvantage the foreign investment is not necessary.⁹⁵⁷

472. In other words, the Claimant maintains that nationality cannot be the basis for inconsistent treatment by GNS, because differential treatment by a province of domestic investors from other provinces within a NAFTA party is permitted. A provision that would allow relief for discrimination only on a nationality basis would imply that all domestic investors were treated equally.⁹⁵⁸ As the Claimant puts it, “a province must accord to the foreign investor the ‘most favorable treatment’ that province has accorded to any domestic investor, regardless of how some other domestic investors may have been treated”.⁹⁵⁹ This interpretation, according to the Claimant, aligns with the object and purpose of NAFTA; if a different interpretation were adopted, there would be a “loophole” for sub-national protectionism adopted by a provincial or state government.⁹⁶⁰ Relying on *Pope & Talbot*, the Claimant emphasizes that “the language of Article 1102(3) was intended simply to make clear that the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords *any* investment of

⁹⁵² Claimant’s Memorial, at para 216.

⁹⁵³ Claimant’s Reply Memorial, at para 218; Hearing on the Merits and Damages, October 19, 2021, at 377:19-24.

⁹⁵⁴ Claimant’s Reply Memorial, at para 228, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 254 (**RL-059**).

⁹⁵⁵ Claimant’s Reply Memorial, at para 229, referring to *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, at para 209 (**RL-092**). See also Claimant’s Reply Memorial, at para 230, referring to *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 80 (**CL-101**).

⁹⁵⁶ Claimant’s Reply Memorial, at para 231, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 79 (**CL-114**).

⁹⁵⁷ Hearing on the Merits and Damages, November 14, 2020, at 1168:19-1169:19, 1174:1-1175:5.

⁹⁵⁸ Claimant’s Reply Memorial, at para 219.

⁹⁵⁹ Claimant’s Reply Memorial, at para 222.

⁹⁶⁰ Claimant’s Reply Memorial, at para 223.

its country, not just the best treatment it accords to investments of *its* investors”.⁹⁶¹

473. The Claimant argues that Canada has not presented a clear and consistent definition of nationality-based discrimination, oscillating between arguing (in its Counter-Memorial) that Resolute must establish that it was accorded less favourable treatment because it is an investor from another NAFTA party and arguing (in its Rejoinder) that Resolute must demonstrate the nationality is the basis for the less favourable treatment it received.⁹⁶²
474. Moreover, the Claimant suggests that if the NAFTA parties had wanted to limit the scope of Article 1102(3) to nationality-based discrimination, they could have included specific language to that effect, as they did for Article 1102(4).⁹⁶³
475. The Claimant submits that the Respondent’s focus on Articles 1102(1) and (2) is a distraction and is flawed.⁹⁶⁴ The Claimant disputes the Respondent’s contention that the NAFTA parties “have consistently agreed” that Article 1102 is limited to nationality-based discrimination⁹⁶⁵ on the basis that the positions of Non-Disputing Parties presented in the context of litigation should not amount to state practice.⁹⁶⁶ The Claimant also denies the relevance of the Respondent’s argument regarding subsequent practice pursuant to VCLT Article 31(3)(b),⁹⁶⁷ stating that subsequent practice, even if established, is not binding on a tribunal.⁹⁶⁸ In the Claimant’s opinion, the Tribunal need not identify a subsequent practice to follow, but rather must determine how much weight to accord to any subsequent practice the NAFTA parties may have established.⁹⁶⁹ With this background, the Claimant argues that the Tribunal should disregard the Respondent’s argument on subsequent practice because the NAFTA parties have not interpreted Article 1102(3) as to

⁹⁶¹ Claimant’s Reply Memorial, at para 224, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 41 (**CL-114**) [emphasis in original].

⁹⁶² Hearing on the Merits and Damages, November 14, 2020, at 1161:13-1165:11; Hearing on the Merits and Damages, October 19, 2021, at 367:1-11.

⁹⁶³ Claimant’s Reply Memorial, at para 225. NAFTA Article 1102(4) reads: “For greater certainty, no Party may: (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party”.

⁹⁶⁴ Claimant’s Reply Memorial, at paras 238-239.

⁹⁶⁵ Claimant’s Reply Memorial, at para 239, referring to Respondent’s Counter-Memorial, at para 250.

⁹⁶⁶ Hearing on the Merits and Damages, November 9, 2020, at 129:9-131:1; November 14, 2020, at 1165:22-1166:23.

⁹⁶⁷ Claimant’s Reply Memorial, at para 242, referring to Respondent’s Counter-Memorial, at para 250; Hearing on the Merits and Damages, November 9, 2020, at 125:18-128:8.

⁹⁶⁸ Claimant’s Reply Memorial, at para 242.

⁹⁶⁹ Claimant’s Reply Memorial, at para 242, referring to *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, at para 160 (**CL-237**); *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, at para 379 (**CL-241**); Hearing on the Merits and Damages, November 9, 2020, at 131:2-13.

nationality-based discrimination⁹⁷⁰ and have not agreed to the content of the nationality-based discrimination requirement.⁹⁷¹ The Tribunal, in the Claimant’s view, should instead turn to the NAFTA Free Trade Commission (“FTC”), which is tasked with resolving any dispute that may arise with respect to the interpretation and application of NAFTA,⁹⁷² as the binding authority.⁹⁷³

(b) Whether Canada Breached its Obligation under Article 1102

i. Whether GNS accorded “treatment” to Resolute and its investments

476. The Claimant argues that the effect of GNS’s financial assistance to PHP on Resolute and its investments constitutes “treatment” for the purpose of Article 1102.⁹⁷⁴

477. First, the Claimant recalls that the Tribunal in the Jurisdiction Decision rejected the Respondent’s contention that the scope of the national treatment obligation with respect to provincial measures did not extend to investments located beyond the province’s borders, thereby accepting that the impugned measures were sufficiently proximate to the Claimant and its investment to satisfy the “relating to” requirement under NAFTA Article 1101.⁹⁷⁵

478. Relying on the approach taken by the tribunals adjudicating disputes arising out of the high-fructose corn syrup (“HFCS”) tax on bottlers, the Claimant proposes that “[a] government accords treatment to a foreign investor or its investment where it adopts a policy favouring its own investor or investment whose objectives can only be achieved when it produces an effect on the foreign investor or its investment”.⁹⁷⁶ The Claimant highlights that the test is intended to capture “probable and foreseeable adverse effects”.⁹⁷⁷ The Claimant emphasises that even if the Assistance Measures did not target Resolute or its investments directly, the measures “were intended to put the purchaser [of the Mill] in a favourable position, and in a small and saturated

⁹⁷⁰ Claimant’s Reply Memorial, at para 242, referring to *United Mexican States v. Cargill*, 2011 ONCA 622, Judgment of the Ontario Court of Appeal on Application to Set Aside Award, October 4, 2011, at paras 80-84; Hearing on the Merits and Damages, November 9, 2020, at 131:19-25; November 14, 2020, at 1167:2-9.

⁹⁷¹ Hearing on the Merits and Damages, November 9, 2020, at 132:1-12, November 14, 2020, at 1167:10-1168:8.

⁹⁷² Claimant’s Reply Memorial, at para 243.

⁹⁷³ Claimant’s Reply Memorial, at para 243, referring to NAFTA Article 1131(2).

⁹⁷⁴ Claimant’s Memorial, at paras 203, 207; Claimant’s Reply Memorial, at para 244; Hearing on the Merits and Damages, November 9, 2020, at 133:21-135:14.

⁹⁷⁵ Claimant’s Memorial, at para 198, referring to Jurisdiction Decision, at para 248; Claimant’s Reply Memorial, at para 245; Hearing on the Merits and Damages, November 9, 2020, at 135:15-136:5; Claimant’s Pre-Hearing Memorial, at para 54.

⁹⁷⁶ Hearing on the Merits and Damages, October 18, 2021, at 62:14-63:6.

⁹⁷⁷ Hearing on the Merits and Damages, October 18, 2021, at 64:1-3.

market it was to be expected that competitors would be affected”.⁹⁷⁸

479. In response to the Respondent’s reliance on *Methanex* to argue that a tribunal’s holding on jurisdiction does not necessarily demonstrate “treatment” under Article 1102,⁹⁷⁹ the Claimant contends that *Methanex* should have no bearing in this case. The Claimant explains that the *Methanex* tribunal decided the Article 1102 claim before determining it lacked jurisdiction, finding that the measures did not have a “legally significant connection” to Methanex under Article 1101(1).⁹⁸⁰ In this case, the Claimant clarifies that it relies on the Tribunal’s findings pursuant to Article 1101 in its Jurisdiction Decision to argue that the Claimant was accorded treatment for the purposes of Article 1102, rather than to contend that the Tribunal’s Article 1101 findings result in an automatic conclusion that Resolute received treatment under Article 1102.⁹⁸¹
480. The Claimant reproduces extracts from Dr. Kaplan’s expert testimony that support the Tribunal’s reasoning as to the effects of GNS’s financial assistance to PHP on competitors.⁹⁸² The Claimant notes that Dr. Kaplan confirms that (i) the benefits granted to PHP enabled it to produce at a lower cost than its competitors;⁹⁸³ (ii) prices for SC Paper were reduced as a consequence of PHP’s full entry into the market;⁹⁸⁴ (iii) the integrated nature of the North American market for SC Paper affected the limited number of producers operating in it;⁹⁸⁵ and (iv) Resolute’s SC Paper losses in Québec were the direct consequence of the Assistance Measures.⁹⁸⁶ According to Dr. Kaplan, the losses suffered by Resolute in Québec were directly caused by PHP’s advantageous position in the paper market, enabled by GNS’s assistance.⁹⁸⁷
481. The Claimant also [REDACTED]
[REDACTED]⁸⁸ The Claimant

⁹⁷⁸ Claimant’s Memorial, at para 198, Claimant’s Reply Memorial, at para 245, citing Jurisdiction Decision, at para 248.

⁹⁷⁹ Claimant’s Reply Memorial, at para 246, referring to Respondent’s Counter-Memorial, at paras 256-257.

⁹⁸⁰ Claimant’s Reply Memorial, at para 246, referring to *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005, Part IV, Chapters B and E, August 3, 2005 (**RL-054**).

⁹⁸¹ Claimant’s Memorial, at paras 196-198; Claimant’s Reply Memorial, at paras 245-247.

⁹⁸² Claimant’s Memorial, at paras 199-202; Claimant’s Reply Memorial, at para 248, referring to Expert Witness Report of Seth Kaplan, Ph.D., December 28, 2018, at paras 17, 18, 35, 41; Hearing on the Merits and Damages, October 18, 2021, at 66:7-22.

⁹⁸³ Claimant’s Memorial, at para 199.

⁹⁸⁴ Claimant’s Memorial, at para 200.

⁹⁸⁵ Claimant’s Memorial, at para 201.

⁹⁸⁶ Claimant’s Memorial, at para 202.

⁹⁸⁷ Claimant’s Memorial, at para 202; Claimant’s Reply Memorial, at para 248, citing Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 37, 47, 17.

⁹⁸⁸ Hearing on the Merits and Damages, November 9, 2020, at 140:3-141:1, November 10, 2020, at 385:16-386:1; November 14, 2020, at 1086:3-22, 1138:2-16, 1177:1-17, 1189:13-22; Claimant’s Pre-Hearing Memorial, at para 23 *et seq*; Hearing on the Merits and Damages, October 18, 2021, at 67:7-16.

emphasizes *inter alia* [REDACTED]

[REDACTED]⁹⁸⁹

[REDACTED]⁹⁹⁰

[REDACTED]⁹⁹¹

[REDACTED]⁹⁹² and

[REDACTED]⁹⁹³

482. The Claimant further alleges that [REDACTED]
[REDACTED]⁹⁴ The Claimant submits
that [REDACTED]
[REDACTED]
[REDACTED]⁹⁹⁵ The Claimant notes that Canada's witnesses at the 2020 Hearing [REDACTED]
[REDACTED]⁹⁹⁶ The Claimant notes that Mr.
Duff Montgomerie at the 2020 Hearing confirmed that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹⁹⁷

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- ⁹⁸⁹ Claimant's Reply Memorial, at para 249, citing [REDACTED]
[REDACTED] (R-161).
⁹⁹⁰ Claimant's Reply Memorial, at para 249, citing [REDACTED]
[REDACTED] (R-161).
⁹⁹¹ Claimant's Reply Memorial, at para 249, citing [REDACTED]
[REDACTED] (R-161).
⁹⁹² Claimant's Reply Memorial, at para 249, citing [REDACTED]
[REDACTED] (R-161).
⁹⁹³ Claimant's Reply Memorial, at para 249, citing [REDACTED]
[REDACTED] (R-161).
⁹⁹⁴ Claimant's Reply Memorial, at para 249, referring to [REDACTED]
[REDACTED] (R-161); Hearing on the Merits and Damages, November 10, at 428:18-429:8; November 14,
2020, at 1138:17-19.
⁹⁹⁵ Hearing on the Merits and Damages, October 18, 2021, at 80:11-24.
⁹⁹⁶ Hearing on the Merits and Damages, November 14, 2020, at 1177:18-1180:7, 1188:12-18; Hearing on the
Merits and Damages, October 18, 2021, at 67:17-80:6.
⁹⁹⁷ Hearing on the Merits and Damages, November 14, 2020, at 1180:9-1184:17.

483. The Claimant acknowledges that [REDACTED] but notes that [REDACTED]⁹⁹⁸
484. The Claimant argues that NAFTA “do[es] not provide that investors must be given identical treatment; rather, the requirement is to ensure that the treatment is no less favourable”.⁹⁹⁹ The Claimant adds that NAFTA tribunals have considered the practical effects of the impugned measures on competitors when determining what constitutes “treatment”.¹⁰⁰⁰ By way of example, it relies on *Corn Products*, a NAFTA case in which a claim was brought by producers and importers of HFCS against Mexico, alleging that a tax Mexico imposed on bottlers who used HFCS in soft drinks unfairly favored its domestic cane sugar industry at the expense of the claimants, who were largely foreign-owned enterprises.¹⁰⁰¹ The tribunal in that case found that the tax constituted treatment for the purposes of Article 1102 because the tax “produced an effect upon HFCS producers and suppliers” even if the tax was imposed on the bottlers rather than the claimants, the former of which were pressured to switch from HFCS to sugar as a sweetener.¹⁰⁰² The tribunal stated that “it would be a triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of sweeteners, precluded it from amounting to treatment of the latter for the purposes of Article 1102”.¹⁰⁰³ In the words of the Claimant, “the economic effect of the tax on the claimants – not the tax itself – constituted the treatment”.¹⁰⁰⁴
485. The Claimant submits that, as in *Corn Products*, if the objective of making PHP the lowest-cost producer of SC Paper in North America were to be achieved, the financial support that GNS provided to PHP would need to produce an effect on other SC Paper producers in the market,

⁹⁹⁸ Hearing on the Merits and Damages, November 10, 2020, at 419:14-428:2; November 14, 2020, at 1192:1-20; Hearing on the Merits and Damages, October 18, 2021, at 83:23-84:9.

⁹⁹⁹ Claimant’s Memorial, at para 204.

¹⁰⁰⁰ Claimant’s Memorial, at para 204, referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 85 (CL-113); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 254 (CL-102); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, at para 55 (CL-144); Hearing on the Merits and Damages, November 14, 2020, at 1176:18-23; Claimant’s Pre-Hearing Memorial, at paras 51-52.

¹⁰⁰¹ Claimant’s Memorial, at para 205; Claimant’s Reply Memorial, at para 251.

¹⁰⁰² Claimant’s Memorial, at para 206, citing *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (CL-107).

¹⁰⁰³ Claimant’s Memorial, at para 206, citing *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (CL-107).

¹⁰⁰⁴ Claimant’s Reply Memorial, at para 252; Hearing on the Merits and Damages, November 14, 2020, at 1192:21-1193:12.

including Resolute and its investments outside the province of Nova Scotia.¹⁰⁰⁵ According to the Claimant, GNS's financial assistance to PHP led to this exact outcome: the market was distorted in favor of PHP to the disadvantage of foreign investments, including Resolute's foreign investments outside the province.¹⁰⁰⁶ This adverse effect, the Claimant argues, constitutes treatment under Article 1102.¹⁰⁰⁷ The Claimant contests the Respondent's argument that *Corn Products* can be distinguished because the discrimination in that case was nationality-based.¹⁰⁰⁸ The Claimant maintains that discrimination based on nationality is not the standard it must meet under international law. The Claimant argues that *Corn Products* is unhelpful to the Respondent because the measures in that case originated from the Mexican federal government rather than a sub-national measure governed by Article 1102(3).¹⁰⁰⁹

486. The Claimant contests Canada's position that Resolute received no "treatment" under Canada's definition of "treatment" as being "behavior in respect of an entity or person".¹⁰¹⁰ According to the Claimant, the NAFTA parties chose not to define the term "treatment".¹⁰¹¹ Referencing the tribunal in *UPS*,¹⁰¹² the Claimant suggests that a financial gain or loss associated with a measure, such as is allegedly the case here, is sufficient to constitute treatment.¹⁰¹³

487. Finally, although the Claimant maintains that evidence of discriminatory intent is not necessary to its claim under Article 1102(3), it argues that Canada nevertheless meets this standard.¹⁰¹⁴ It contends that [REDACTED]

[REDACTED] Therefore, according to the Claimant, "Resolute was a known and anticipated victim of GNS's parochial policy favoring PHP, GNS's national champion".¹⁰¹⁵

¹⁰⁰⁵ Claimant's Memorial, at para 207.

¹⁰⁰⁶ Claimant's Reply Memorial, at para 251.

¹⁰⁰⁷ Claimant's Memorial, at para 207.

¹⁰⁰⁸ Claimant's Reply Memorial, at para 253, referring to Respondent's Counter-Memorial, at para 261.

¹⁰⁰⁹ Claimant's Reply Memorial, at para 253, referring to Claimant's Reply Memorial, at paras 214-243.

¹⁰¹⁰ Claimant's Reply Memorial, at para 250.

¹⁰¹¹ Claimant's Reply Memorial, at para 250.

¹⁰¹² Claimant's Reply Memorial, at para 250, citing *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 86 (**CL-113**). See also *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, at para 85 (**RL-165**).

¹⁰¹³ Claimant's Reply Memorial, at para 250.

¹⁰¹⁴ Claimant's Reply Memorial, at para 254.

¹⁰¹⁵ Claimant's Reply Memorial, at para 254.

ii. Whether Resolute and its investments were accorded treatment in “like circumstances” to PWCC and PHP

488. The Claimant argues that Resolute and its investments are in “like circumstances” to PHP because they are competitors in the same sector.¹⁰¹⁶ It argues that “where a government measure aims squarely to discriminate in favor of one competitor in a particular economic or business sector over another, the competitors in that same sector are in ‘like circumstances’ for purposes of Article 1102”.¹⁰¹⁷
489. The Claimant refers to *Pope & Talbot*, where the tribunal found that “[i]n evaluating the implications of the legal context [of Article 1102], the [t]ribunal believes that, as a first step, the treatment accorded to foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector”.¹⁰¹⁸ The Claimant notes that this approach was upheld in later cases.¹⁰¹⁹ The Claimant initially disagreed with the Respondent’s contention that the “like circumstances” analysis should focus on the circumstances in which treatment was accorded, rather than on the investors and their investments.¹⁰²⁰ In the Claimant’s view, Resolute meets the “like circumstances” test because it is a comparable investor and has comparable investments, which were allegedly intentionally harmed by the Assistance Measures.¹⁰²¹ The Claimant adds that its “like circumstances” analysis

¹⁰¹⁶ Claimant’s Memorial, at paras 210, 215; Claimant’s Reply Memorial, at para 255.

¹⁰¹⁷ Claimant’s Memorial, at para 210; Claimant’s Reply Memorial, at para 256 citing *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 120 (CL-107).

¹⁰¹⁸ Claimant’s Memorial, at para 212, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78 (CL-114).

¹⁰¹⁹ Claimant’s Memorial, at paras 213-214, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 250 (CL-102); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at para 199-201 (CL-106); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, Separate Statement of Dean Cass, May 24, 2007, para 17 (CL-113); *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 120 (CL-107). See also Claimant’s Reply Memorial, at paras 256, 258.

¹⁰²⁰ Claimant’s Reply Memorial, at para 257, referring to Respondent’s Counter-Memorial, at para 210.

¹⁰²¹ Claimant’s Reply Memorial, at para 257.

follows that of previous NAFTA¹⁰²² and non-NAFTA awards.¹⁰²³

490. In its Pre-Hearing Memorial and at the 2021 Hearing, the Claimant identified six factors that are relevant to the “like circumstances” analysis: (i) Market: Are the foreign investor and domestic investor operating in the same market?; (ii) Product: How similar are the products or services being offered by the foreign investor and domestic investor?; (iii) Policy: What is the Government’s goal in adopting and implementing the measures?; (iv) Jurisdictional: Is it relevant that the foreign and domestic investor are located in the same jurisdiction?; (v) Implementation: Are the measures a law or regulation of general application in the territory, or are the measures targeted and specific in scope or effect?; (vi) Temporal: Is there a timing issue as regards the investors and investments being compared?¹⁰²⁴
491. On the “market” and “product” factors, the Claimant argues that Resolute’s Canadian SC Paper mills were direct competitors of PHP because “Resolute’s SC paper was substitutable with PHP’s product”¹⁰²⁵ and was sold “in the very market that GNS chose to distort when it threw its support uniquely behind PHP”.¹⁰²⁶ As described at Paragraph 489 of this Award, in the Claimant’s view, this assertion suffices to establish that Resolute and its investments were in “like circumstances” with PHP.¹⁰²⁷
492. On the “policy” and “implementation” factors, the Claimant contests the Respondent’s contention that there are no “like circumstances” in this case because GNS could not have extended the same type of treatment to Resolute’s mills in Québec.¹⁰²⁸ Rather, the Claimant submits, this arbitration is about the impact of GNS’s financial assistance on PHP in contrast to Resolute – an impact that

¹⁰²² Claimant’s Reply Memorial, at para 258, referring to *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 120, 143, 191-192 (**CL-107**); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at paras 75-76 (**CL-114**); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, November 21, 2007, at para 197 (**RL-092**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 250 (**RL-059**).

¹⁰²³ Claimant’s Reply Memorial, at para 259, referring to *Cargill, Inc. v. Republic of Poland*, UNCITRAL, Award, March 5, 2008, at para 312 (**CL-221**); *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, May 25, 2018, at paras 205-207 (**CL-236**).

¹⁰²⁴ Hearing on the Merits and Damages, November 9, 2020, at 143:2-144:5; Claimant’s Pre-Hearing Memorial, at para 59; Hearing on the Merits and Damages, October 18, 2021, at 88:5-90:24.

¹⁰²⁵ Claimant’s Reply Memorial, at para 259, referring to Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 17, 34; Claimant’s Pre-Hearing Memorial, at para 60.

¹⁰²⁶ Claimant’s Memorial, at para 215; Hearing on the Merits and Damages, November 14, 2020, at 1198:7-21; Hearing on the Merits and Damages, October 18, 2021, at 91:15-93:8; Hearing on the Merits and Damages, October 19, 2021, at 393:15-394:9.

¹⁰²⁷ Claimant’s Memorial, at para 215.

¹⁰²⁸ Claimant’s Reply Memorial, at para 262; Hearing on the Merits and Damages, October 18, 2021, at 93:16-25.

[REDACTED]¹⁰²⁹ The Claimant clarifies that the intended effects of the Assistance Measures were extra-provincial and therefore, from a jurisdictional perspective, the analysis should not be limited to investors in Nova Scotia.¹⁰³⁰ The Claimant argues that GNS could have refrained from providing financial assistance to PHP, thereby sparing Resolute the treatment it received.¹⁰³¹ Further, the Claimant asserts that the Respondent cannot argue that PHP operated under a different regulatory regime from that of Resolute's investments, because this is not a regulatory dispute.¹⁰³²

493. On the “temporal” factor, Resolute submits that the revival of the Mill by GNS occurred “at the very time” when Resolute was hoping for better times at its SC paper mills.¹⁰³³

494. Resolute clarifies that Bowater Mersey is not in “like circumstances” with PHP because:

- Bowater Mersey was not in the same market as PHP. Bowater Mersey produced newsprint paper rather than SC Paper;
- Temporally, Resolute had already decided to close Bowater Mersey when the Assistance Measures were adopted; and
- On the “policy”, “jurisdiction”, and “implementation” front, none of the measures adopted for PHP were of general application in Nova Scotia and could be applied to Bowater Mersey. Further, the objectives of the measures for both mills were different; the Claimant alleges that the Bowater Mersey policy was aimed at an “orderly transition” whereas the Assistance Measures aimed to make PHP “a competitive success”.¹⁰³⁴

495. [REDACTED]
[REDACTED]¹⁰³⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁰³⁶ The Claimant recalls that only 8 of the 110 invited bidders made an offer, noting that (without the Assistance Measures), the Mill was simply not very attractive.¹⁰³⁷

¹⁰²⁹ Claimant's Reply Memorial, at para 261; Hearing on the Merits and Damages, October 19, 2021, at 395:15-24, 396:14-397:397:25.

¹⁰³⁰ Hearing on the Merits and Damages, October 19, 2021, at 395:15-396:4.

¹⁰³¹ Claimant's Reply Memorial, at para 263; Hearing on the Merits and Damages, November 14, 2020, at 1200:19-1201:4.

¹⁰³² Claimant's Reply Memorial, at para 260; Hearing on the Merits and Damages, November 9, 2020, at 145:1-22.

¹⁰³³ Hearing on the Merits and Damages, October 18, 2021, at 94:4-9.

¹⁰³⁴ Hearing on the Merits and Damages, October 18, 2021, at 2021, 94:17-97:15; Hearing on the Merits and Damages, October 19, 2021, at 347:23-351:8, 352:8-19.

¹⁰³⁵ Hearing on the Merits and Damages, October 19, 2021, at 355:2-6.

¹⁰³⁶ Hearing on the Merits and Damages, October 19, 2021, at 355:18-23.

¹⁰³⁷ Hearing on the Merits and Damages, October 19, 2021, at 358:14-25.

iii. Whether Resolute and its investments received less favorable treatment

496. The Claimant emphasizes its interpretation of the comparative treatment assessed under Article 1102(3), being the “‘most favorable treatment’ accorded by GNS to any such competitor” rather than treatment accorded to some competitors (which could amount to the same treatment received by Resolute).¹⁰³⁸

497. According to the Claimant, the most favorable treatment at issue was the Assistance Measures PWCC received from GNS, which included:

- a \$24 million forgivable loan
- a \$40 million credit facility
- a \$1.5 million workforce training grant
- a \$1 million marketing grant
- a \$38 million Outreach Grant [under the Outreach Agreement]
- \$1.5 million in additional funding to prepare for the restart of the mill
- \$20 million to purchase land from the mill
- the ability to use tax losses to offset gains from PWCC investments outside of Nova Scotia
- a 50% reduction on property taxes, from \$2.6 million to \$1.3 million
- a 20-year forest license [FULA] that: (1) permitted PHP to harvest fiber for paper and biomass for fuel; and (2) reimbursed PHP for silviculture payments
- indemnification of costs were PWCC not to complete purchase of the mill
- pension liability relief
- statutory rights to run the Biomass Plant 24/7
- regulatory protection from the costs and obligations of renewable energy standards
- the demand and receipt of advantageous electricity terms.¹⁰³⁹

498. The Claimant alleges that Resolute’s operations were not offered these benefits, nor was Resolute offered these benefits when it was invited to bid on the Mill.¹⁰⁴⁰ It stresses, “the nature of the treatment accorded to Port Hawkesbury – market intervention to make it the ‘most competitive’ producer of SC paper in North America –¹⁰⁴¹ meant that no other producer could receive equivalent treatment, for only one could be the ‘most competitive’”.¹⁰⁴² The Claimant argues that

¹⁰³⁸ Claimant’s Memorial, at para 218.

¹⁰³⁹ Claimant’s Memorial, at para 219.

¹⁰⁴⁰ Claimant’s Memorial, at para 220.

¹⁰⁴¹ Claimant’s Memorial, at para 220, citing Nova Scotia Press Release, “Province Invests in Jobs, Training and Renewing the Forestry Sector”, August 20, 2012 (**C-183**).

¹⁰⁴² Claimant’s Memorial, at para 220; Claimant’s Reply Memorial, at para 265.

its assertion of having received less favourable treatment is compounded by its experience with Bowater Mersey, to which GNS did not offer generous financial assistance nor help in obtaining a reduced electricity rate from the NSUARB.¹⁰⁴³

499. The Claimant submits that, contrary to the Respondent's position,¹⁰⁴⁴ a breach of Article 1102(3) may be established in ways other than demonstrating that a protective measure was taken (i) for the benefit of local investors "while effectively keeping NAFTA investors or their investments out" or (ii) specifically targeting out-of-province investors to cause them loss.¹⁰⁴⁵ It adds that the Tribunal's reference to these two scenarios in the Jurisdiction Decision were "just examples" of possible Article 1102 violations.¹⁰⁴⁶ In any case, the Claimant argues that Resolute has established that it was the victim of "*Methanex*-style" targeting.¹⁰⁴⁷
500. Lastly, the Claimant contends that the benefits Resolute received in Québec are irrelevant to its present claim because treatment under different regulatory regimes cannot be compared.¹⁰⁴⁸ On the relevance of the electricity rates paid by Resolute in Québec, the Claimant argues that Resolute's costs structure is not on trial, rather, what is on trial is the difference between PHP's costs structures with and without the Assistance Measures.¹⁰⁴⁹

(c) Whether it falls to Canada to justify the discrimination against Resolute's investments

501. The Claimant contends that, having met each element of the *UPS* test, the burden shifts to Canada to justify its discrimination of Resolute and its investments by showing that nationality was not a factor in the adoption of the measures and that the measures do not undermine the NAFTA objectives, the two conditions listed in *Pope & Talbot* (see Paragraph 465 above), i.e., that the measures have a reasonable nexus to government policies that (i) do not distinguish on their face or *de facto* between foreign-owned and domestic companies and (ii) do not otherwise unduly undermine the investment liberalising objectives of NAFTA.¹⁰⁵⁰

¹⁰⁴³ Claimant's Reply Memorial, at para 268, referring to Witness Statement of Richard Garneau, December 6, 2019, at para 19; Hearing on the Merits and Damages, November 9, 2020, at 37:15-38:5.

¹⁰⁴⁴ Claimant's Reply Memorial, at para 269, referring to Respondent's Counter-Memorial, at para 277 (citing Jurisdiction Decision, at para 290).

¹⁰⁴⁵ Claimant's Reply Memorial, at para 269.

¹⁰⁴⁶ Claimant's Reply Memorial, at para 270.

¹⁰⁴⁷ Claimant's Reply Memorial, at para 270, referring to Claimant's Reply Memorial, at para 254.

¹⁰⁴⁸ Claimant's Reply Memorial, at para 266, citing Respondent's Counter-Memorial, at para 268.

¹⁰⁴⁹ Hearing on the Merits and Damages, November 9, 2020, at 151:2-24.

¹⁰⁵⁰ Claimant's Memorial, at para 223; Claimant's Reply Memorial, at para 271; Hearing on the Merits and Damages, November 14, 2020, at 1159:9-17.

502. The Claimant submits that GNS's financial assistance to PHP was unreasonable, had a *de facto* effect on Resolute as a foreign investor and was counter-productive to NAFTA's core objective of promoting "conditions of fair competition in the free trade area".¹⁰⁵¹ The Claimant contends that the Respondent was "heaping largesse" on PHP knowing that they were creating a "national champion".¹⁰⁵² The Claimant contends that the Respondent "ignores entirely" the second leg of the *Pope & Talbot* test in its submissions.¹⁰⁵³
503. The Claimant argues that the Respondent cannot justify the differential treatment under the *Pope & Talbot* test by referring to Article 1108(7), which the Claimant contends is "a separate analysis".¹⁰⁵⁴

3. The Respondent's Arguments

(a) The Applicable Standard under Article 1102(3)

504. The Respondent argues that it is the Claimant's burden to prove nationality-based discrimination; the burden does not shift to the Respondent once a presumptive violation has been shown, as the Claimant suggests.¹⁰⁵⁵
505. The Respondent submits that the objective of Article 1102 is to protect against discrimination on the basis of nationality.¹⁰⁵⁶ In the Respondent's view, "[t]he purpose of that provision is not to prohibit all differential treatment among investors and investments, but to ensure that NAFTA [p]arties do not treat investors and investments that are 'in like circumstances' differently based on their nationality".¹⁰⁵⁷ According to the Respondent, this view has been espoused by NAFTA

¹⁰⁵¹ Claimant's Memorial, at para 226; Claimant's Reply Memorial, at paras 274-275; Hearing on the Merits and Damages, November 14, 2020, at 1193:21-25, 1205:5-15; Claimant's Pre-Hearing Memorial, at paras 63-64; Hearing on the Merits and Damages, October 18, 2021, at 103:16-104:16.

¹⁰⁵² Hearing on the Merits and Damages, October 18, 2021, at 107:22-108:4.

¹⁰⁵³ Hearing on the Merits and Damages, October 18, 2021, at 105:24-106:4; Hearing on the Merits and Damages, October 19, 2021, at 371:15-372:3.

¹⁰⁵⁴ Hearing on the Merits and Damages, November 14, 2020, at 1205:22-1207:2.

¹⁰⁵⁵ Hearing on the Merits and Damages, November 14, 2020, at 1262:23-1263:16.

¹⁰⁵⁶ Respondent's Counter-Memorial, at para 250; Respondent's Rejoinder Memorial, at para 90; Hearing on the Merits and Damages, November 9, 2020, at 234:10-14; Respondent's Pre-Hearing Memorial, at para 46.

¹⁰⁵⁷ Respondent's Rejoinder Memorial, at para 90.

tribunals in *Loewen*,¹⁰⁵⁸ *ADM*,¹⁰⁵⁹ and *Mercer*.¹⁰⁶⁰ The Respondent notes that even *UPS*, which the Claimant heavily relies on, also analysed whether there was nationality-based discrimination.¹⁰⁶¹

506. The Respondent considers the second part of the *Pope & Talbot* test to be inapposite —the objectives of NAFTA set out in Article 102 cannot apply to Article 1108(7), whose purpose is to remove subsidies and procurement from national treatment.¹⁰⁶²
507. The Respondent clarifies that it does not propose that nationality-based discrimination requires proof of discriminatory intent.¹⁰⁶³ It suggests that the Claimant must show evidence of nationality-based discrimination, that is, that Resolute was accorded less favorable treatment than PWCC (a Canadian company) because it was an investor of another NAFTA party (the United States).¹⁰⁶⁴
508. The Respondent argues that the Claimant’s interpretation of Article 1102(3) is misplaced.¹⁰⁶⁵ Relying on *Pope & Talbot* and the use of the term “[f]or greater certainty” in Article 1102(4), the Respondent argues that the legal test under Article 1102(3) is no different from the one under Articles 1102(1) and (2).¹⁰⁶⁶ The *Pope & Talbot* tribunal explained that Article 1102(3) “expressly states that it is *defining* the meaning of the requirements of Article 1102(1) and 1102(2) when

¹⁰⁵⁸ Respondent’s Counter-Memorial, at para 251, citing *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. UNCT/02/1, Award, June 26, 2003, at para 139 (**RL-057**).

¹⁰⁵⁹ Respondent’s Counter-Memorial, at para 251, citing *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, at paras 193, 205 (**RL-092**). In its Rejoinder, the Respondent elaborates on this case further, stating that the tribunal found that “[t]he national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality, including both *de jure* and *de facto* discrimination” and that “Article 1102 prohibits treatment which discriminates on the basis of the foreign investor’s nationality”. See Respondent’s Rejoinder Memorial, at para 91, citing *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, at paras 193, 205 (**RL-092**). The Respondent also refers to *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 217 (**RL-050**).

¹⁰⁶⁰ Respondent’s Counter-Memorial, at para 251, referring to *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Counter-Memorial, August 22, 2014, at paras 7.7-7.9 (**RL-150**); Hearing on the Merits and Damages, November 9, 2020, at 235:9-22; Hearing on the Merits and Damages, October 18, 2021, at 240:20-241:8.

¹⁰⁶¹ Hearing on the Merits and Damages, October 19, 2021, at 494:20-496:5.

¹⁰⁶² Hearing on the Merits and Damages, October 19, 2021, at 482:8-483:2.

¹⁰⁶³ Respondent’s Rejoinder Memorial, at para 92.

¹⁰⁶⁴ Respondent’s Counter-Memorial, at para 252; Hearing on the Merits and Damages, November 9, 2020, at 236:16-22.

¹⁰⁶⁵ Respondent’s Rejoinder Memorial, at para 95; Hearing on the Merits and Damages, November 9, 2020, at 235:23-236:6.

¹⁰⁶⁶ Respondent’s Rejoinder Memorial, at paras 95, 102, referring to *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at paras 41-42 (**RL-058**).

those provisions are applied to states and provinces”.¹⁰⁶⁷ Accordingly, the Respondent maintains that nationality must still be the chief consideration of a less favorable treatment claim under Article 1102(3).¹⁰⁶⁸ The Respondent argues that its position does not create a “loophole for sub-national protectionism”, as suggested by the Claimant.¹⁰⁶⁹

509. The Respondent maintains that its position aligns with that of the NAFTA parties, who agree that Article 1102 intends to protect against nationality-based discrimination.¹⁰⁷⁰ Accordingly, the Respondent argues that the Tribunal should give “considerable weight” to this view, as it constitutes “subsequent practice” pursuant to VCLT Article 31(3)(b).¹⁰⁷¹ The Respondent acknowledges that the NAFTA parties have opined on nationality-based discrimination only with respect to Articles 1102(1) and (2), but clarifies that this poses no obstacle to the application of this interpretation in regards to Article 1102(3) because the latter does not establish a different standard as to nationality-based discrimination.¹⁰⁷² Relying on *Mobil*¹⁰⁷³ and *Bilcon*,¹⁰⁷⁴ the Respondent concludes that the absence of an FTC interpretation of Article 1102(3) does not preclude the Respondent from drawing upon other sources to pursue the rule in VCLT Article 31(3)(b), noting that the ILC recognises that positions taken by States in disputes can constitute subsequent practice under the VCLT.¹⁰⁷⁵
510. The Respondent states that the Claimant has presented no evidence of nationality-based discrimination.¹⁰⁷⁶ The Respondent denies that it is sufficient for the Claimant to show government knowledge of a measure having a potential negative impact on foreign investors, stating that this standard would paralyse government action.¹⁰⁷⁷
511. The Respondent argues that the Claimant does not meet the Article 1102 standard; the Claimant

¹⁰⁶⁷ Respondent’s Rejoinder Memorial, at para 96, citing *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 40 [Respondent’s emphasis] (**RL-058**).

¹⁰⁶⁸ Respondent’s Rejoinder Memorial, at para 97.

¹⁰⁶⁹ Respondent’s Rejoinder Memorial, at para 98, citing Claimant’s Reply Memorial, at para 223.

¹⁰⁷⁰ Respondent’s Rejoinder Memorial, at para 99, referring to Respondent’s Counter-Memorial, at para 250 and fns. 523-525; Hearing on the Merits and Damages, November 9, 2020, at 234:21-235:8; Hearing on the Merits and Damages, October 18, 2021, at 240:4-12.

¹⁰⁷¹ Respondent’s Rejoinder Memorial, at para 100, referring to VCLT Article 31(3)(b).

¹⁰⁷² Respondent’s Rejoinder Memorial, at para 100.

¹⁰⁷³ Respondent’s Rejoinder Memorial, at para 101, citing *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, at para 160 (**RL-208**).

¹⁰⁷⁴ Respondent’s Rejoinder Memorial, at para 101, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, at para 377 (**RL-209**).

¹⁰⁷⁵ Respondent’s Rejoinder Memorial, at para 101; Hearing on the Merits and Damages, November 14, 2020, at 1257:10-17.

¹⁰⁷⁶ Respondent’s Rejoinder Memorial, at para 93.

¹⁰⁷⁷ Hearing on the Merits and Damages, November 14, 2020, at 1259:25-1260:6.

itself expressed that it is not alleging that GNS “had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only [...] We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA”.¹⁰⁷⁸ Moreover, the Respondent highlights that, rather than GNS, it was the Monitor and NPPH who chose the successful bidder “based on the potential for obtaining maximum value for the mill’s creditors, not its Canadian nationality”.¹⁰⁷⁹ It argues that GNS would have discussed financial assistance with Resolute had it been chosen as the successful bidder.¹⁰⁸⁰ Lastly, the fact that GNS offered a similar financial package to Resolute for its Bowater Mersey mill, in the Respondent’s view, deprives the Claimant’s nationality-based discrimination argument of any merit.¹⁰⁸¹

(b) Whether Canada Breached its Obligation under Article 1102

i. Whether GNS accorded “treatment” to Resolute and its investments

512. The Respondent disagrees with the Claimant’s reliance on the Tribunal’s findings in its Jurisdiction Decision pursuant to Article 1101 to demonstrate that Resolute received treatment under Article 1102.¹⁰⁸² It claims that, according to the *Methanex* tribunal, “[a]n affirmative finding of the requisite ‘relation’ under NAFTA Article 1101 [...] does not necessarily establish that there has been a corresponding violation of NAFTA Article 1102”.¹⁰⁸³

513. Drawing on customary international law and the findings of the tribunal in *Siemens*, the Respondent provides the following definition of “treatment”:

[I]n light of Article 1101, any complained of “treatment” must be a “measure”,¹⁰⁸⁴ i.e., a “law, regulation, procedure, requirement, or practice”¹⁰⁸⁵ that is “adopted or maintained” by some person or entity for which Canada is responsible at international law. Consistent with these requirements and the ordinary meaning of the term,¹⁰⁸⁶ treatment requires “behaviour in respect of an entity or a person”.¹⁰⁸⁷

¹⁰⁷⁸ Respondent’s Counter-Memorial, at para 252, citing Hearing on Jurisdiction and Admissibility, August 15, 2017, at paras 350-351.

¹⁰⁷⁹ Respondent’s Counter-Memorial, at para 253; Respondent’s Rejoinder Memorial, at para 93.

¹⁰⁸⁰ Respondent’s Counter-Memorial, at para 253.

¹⁰⁸¹ Respondent’s Counter-Memorial, at para 253.

¹⁰⁸² Respondent’s Rejoinder Memorial, at para 104.

¹⁰⁸³ Respondent’s Counter-Memorial, at para 256; Respondent’s Rejoinder Memorial, at para 103, citing *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005, Part IV – Chapter B – Page 9, at para 1 (**RL-054**).

¹⁰⁸⁴ Respondent’s Counter-Memorial, at para 257, citing NAFTA Article 1101(1).

¹⁰⁸⁵ Respondent’s Counter-Memorial, at para 257, citing NAFTA Article 201.

¹⁰⁸⁶ Respondent’s Counter-Memorial, at para 257, citing the Canadian Oxford Dictionary (**RL-421**).

¹⁰⁸⁷ Respondent’s Counter-Memorial, at para 257, citing *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, at para 85.

514. Relying upon the above definition, the Respondent contends that the Claimant cannot point to any treatment that it received from GNS that would satisfy the requirements under Article 1102. The Respondent contends that the Claimant does not complain of “actual” treatment it received, either by GNS with respect to Bowater Mersey, or by the government of Québec where its other mills are located.¹⁰⁸⁸ The Respondent further argues that GNS was precluded from granting treatment to the Claimant when the latter decided not to bid on the Mill.¹⁰⁸⁹ So too was NSPI, whose reach did not extend beyond Nova Scotia’s jurisdiction, and Richmond County, who could not negotiate a tax rate with a company operating outside its territory.¹⁰⁹⁰
515. The Respondent notes that the Claimant at the 2021 Hearing appeared to be contesting anticompetitive effects, and argues that anticompetitive effects are not national treatment claims.¹⁰⁹¹
516. The Respondent also disputes the Claimant’s argument that NAFTA tribunals have considered practical effects of measures as treatment under Article 1102.¹⁰⁹² The Respondent notes that the cases cited by the Claimant involved treatment as defined by the Respondent, rather than simply adverse effects.¹⁰⁹³ In particular, the Respondent notes that *Corn Products*, *ADM*, and *Cargill*, which are relied upon by the Claimant for its definition of treatment, can be distinguished because the claimants in those cases had made investments in Mexico, the jurisdiction that imposed the tax measures at issue.¹⁰⁹⁴ The Respondent notes that, by contrast, the Claimant has no SC Paper investment in Nova Scotia.¹⁰⁹⁵ As the Respondent puts it, “[t]he Claimant has not cited a single case in which a national treatment claim was allowed when the investor or its investment was not in some way subject to the authority of the government ‘according treatment’ or the investor did not have an investment in the relevant jurisdiction”.¹⁰⁹⁶

¹⁰⁸⁸ Respondent’s Counter-Memorial, at para 258; Respondent’s Pre-Hearing Memorial, at para 47.

¹⁰⁸⁹ Respondent’s Counter-Memorial, at para 259.

¹⁰⁹⁰ Respondent’s Counter-Memorial, at para 259.

¹⁰⁹¹ Hearing on the Merits and Damages, October 19, 2021, at 493:7-14.

¹⁰⁹² Respondent’s Counter-Memorial, at para 260; Hearing on the Merits and Damages, October 18, 2021, 243:15-22.

¹⁰⁹³ Respondent’s Counter-Memorial, at para 260; Respondent’s Rejoinder Memorial, at para 106, referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 85 (**CL-113**). The Respondent’s Counter-Memorial also refers to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at paras 162-193, 241 (**RL-059**); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, at paras 52, 55 (**CL-144**); Respondent’s Pre-Hearing Memorial, at para 47.

¹⁰⁹⁴ Respondent’s Counter-Memorial, at para 261; Hearing on the Merits and Damages, October 18, 2021, at 244:14-25.

¹⁰⁹⁵ Respondent’s Counter-Memorial, at para 261.

¹⁰⁹⁶ Respondent’s Counter-Memorial, at para 262.

517. The Respondent contests the opinion of Dr. Kaplan (set out in Paragraph 480 of this Award), including the recourse to a “but for” analysis based on the Port Hawkesbury’s Mill’s re-entry into the market in an effort to demonstrate that Resolute’s SC Paper losses in Québec were the direct consequence of the Assistance Measures.¹⁰⁹⁷ In particular, the Respondent takes issue with the Claimant’s reliance on Dr. Kaplan’s testimony and the [REDACTED] to demonstrate that GNS accorded “treatment” to Resolute, arguing that “these documents discuss the potential impact of the Mill’s reopening on the SC paper industry writ large”.¹⁰⁹⁸ Furthermore, it claims that the predictions contained therein were speculative.¹⁰⁹⁹

ii. Whether Resolute and its investments were accorded treatment in “like circumstances” to PWCC and PHP

518. The Respondent disagrees with the Claimant’s analysis with respect to the term “like circumstances”. The Respondent argues that rather than focusing on the circumstances of the Claimant and its investment, the analysis should instead center on the circumstances in which the treatment was accorded.¹¹⁰⁰ The Respondent supports its argument by citing *Mercer*, in which the tribunal found that the “like circumstances” consideration concerned the treatment, rather than the investors or investments.¹¹⁰¹ The Respondent therefore argues that a competitive relationship is insufficient to satisfy the “in like circumstances” requirement; an investor must establish that the *treatment* accorded to those investments was “in like circumstances” such that all of the relevant context and circumstances in which the treatment is accorded are taken into account including public policy objectives.¹¹⁰²

519. The Respondent submits that the Claimant cannot succeed in proving that the treatment accorded to its investments was in “like circumstances” because its argument falls short of considering “all of the relevant circumstances in which treatment was accorded”.¹¹⁰³ In the Respondent’s opinion,

¹⁰⁹⁷ Respondent’s Rejoinder Memorial, at para 107, referring to Claimant’s Reply Memorial, at para 248.

¹⁰⁹⁸ Respondent’s Rejoinder Memorial, at para 107.

¹⁰⁹⁹ Respondent’s Rejoinder Memorial, at paras 108-109; Hearing on the Merits and Damages, November 9, 2020, at 243:7-25; Hearing on the Merits and Damages, October 18, 2021, at 254:12-24.

¹¹⁰⁰ Respondent’s Counter-Memorial, at para 265 [Respondent’s emphasis removed]. See also Respondent’s Counter-Memorial, at fn. 553; Hearing on the Merits and Damages, November 9, 2020, at 244:19-23; Hearing on the Merits and Damages, October 18, 2021, at 246:13-22.

¹¹⁰¹ Respondent’s Counter-Memorial, at para 265, referring to *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.18-7.21 (**RL-122**); Hearing on the Merits and Damages, October 18, 2021, at 246:23-247:19.

¹¹⁰² Respondent’s Pre-Hearing Memorial, at para 48.

¹¹⁰³ Respondent’s Counter-Memorial, at para 267, referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 87 (**CL-113**). See also *Sergei Paushok, CJSC Godlen East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, April 28, 2011, at para 475 (**RL-166**).

a common business or economic sector is only one of many factors to be considered by a tribunal in an analysis of like circumstances.¹¹⁰⁴ Other factors include public policy considerations¹¹⁰⁵ and the differences in legal and regulatory frameworks applicable to the foreign and domestic investor.¹¹⁰⁶ With respect to regulatory regimes, the Respondent contends that treatment accorded under different legal and regulatory frameworks cannot be compared.¹¹⁰⁷

520. The Respondent maintains that the consideration of public policy is necessary to the “like circumstances” analysis. According to the Respondent, public policy may justify differential treatment by demonstrating that the treatment in question bears a “reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments”.¹¹⁰⁸ The Respondent opines that GNS’s motives behind its financial assistance to PHP and PWCC were not protectionist in nature—rather, they helped achieve “a number of legitimate public policy objectives”.¹¹⁰⁹ The Respondent notes that international law usually extends a high level of deference to the rights of a domestic government to regulate matters within its borders.¹¹¹⁰
521. In summary, the Respondent asserts that a difference in treatment can be justified if its underlying reasons are not discriminatory on the basis of nationality.¹¹¹¹
522. Based on the factors above, the Respondent argues that “Resolute had no SC paper mill in Nova Scotia, that the paper mill Resolute did have in the province was offered assistance to make it a

¹¹⁰⁴ Respondent’s Counter-Memorial, at para 266; Respondent’s Rejoinder Memorial, at para 111, referring to *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78 (**RL-058**).

¹¹⁰⁵ Respondent’s Counter-Memorial, at para 267, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 250.

¹¹⁰⁶ Respondent’s Counter-Memorial, at para 267, referring to *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, at para 166 (**RL-019**); *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005, Part IV – Chapter B – Page 9, at paras 18-19 (**RL-054**); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, paras 117-119 (**CL-113**); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para 156 (**CL-130**); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, paras 84-88 (**RL-058**); *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at paras 171-172 (**RL-021**); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, at paras 8.15, 8.42 (**RL-051**); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF/04/5), Award, November 21, 2007, at para 197 (**RL-092**); Hearing on the Merits and Damages, November 9, 2020, at 246:13-20.

¹¹⁰⁷ Respondent’s Counter-Memorial, at para 268, citing *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, at para 167 (**RL-019**).

¹¹⁰⁸ Respondent’s Counter-Memorial, at para 269, citing *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 79 (**RL-058**); Hearing on the Merits and Damages, October 18, 2021, at 248:4-9.

¹¹⁰⁹ Respondent’s Counter-Memorial, at para 270; Respondent’s Rejoinder Memorial, at para 113.

¹¹¹⁰ Respondent’s Rejoinder Memorial, at para 113.

¹¹¹¹ Respondent’s Counter-Memorial, at para 272.

‘low cost’ producer, and that the GNS was pursuing rational objectives”.¹¹¹² Moreover, according to the Respondent, it has presented public policy considerations showing a rational connection of the Assistance Measures to rational social and economic policies.¹¹¹³ Therefore, the Claimant cannot claim a breach of Article 1102.¹¹¹⁴

iii. Whether Resolute and its investments received less favorable treatment

523. Should the Tribunal find that GNS accorded Resolute “treatment” and that such treatment was accorded in “like circumstances” to those of PHP, the Respondent argues that Resolute and its investments were not accorded less favorable treatment than PHP.

524. In response to what the Claimant alleges,¹¹¹⁵ the Respondent submits that Resolute did not receive similar financial assistance from GNS simply because its investments were outside the province. GNS has no Crown land in Québec and it could not reimburse Resolute for services to maintain roads and forests on land owned by others in a different province. Further, GNS could not implement renewable energy regulations that apply to Resolute or offer Resolute relief from municipal taxes.¹¹¹⁶ Moreover, the Respondent submits that NSPI (which GNS does not own or control) cannot supply electricity to the Claimant’s mills in Québec, noting in any event that Resolute’s mills in Québec pay less for electricity than PHP.¹¹¹⁷

525. Moreover, the Respondent maintains that GNS did not offer financial assistance to any of the bidders in the CCAA process—rather, it only entered into negotiations with PWCC after it had been chosen as the successful bidder.¹¹¹⁸ The Respondent argues that there is no evidence that GNS would have refused to offer assistance to Resolute if it had decided to bid on the PHP Mill.¹¹¹⁹ Therefore, it argues that PWCC and Resolute were “exactly in the same situation in that regard, but PWCC decided to submit a bid while [REDACTED]”

¹¹¹² Respondent’s Counter-Memorial, at para 272; Hearing on the Merits and Damages, November 9, 2020, at 246:2-12; November 14, 2020, at 1261:19-25; Hearing on the Merits and Damages, October 18, 2021, at 249:12-250:1.

¹¹¹³ Hearing on the Merits and Damages, November 9, 2020, at 247:14-248:8.

¹¹¹⁴ Respondent’s Counter-Memorial, at para 272.

¹¹¹⁵ Respondent’s Counter-Memorial, at para 274, referring to Claimant’s Memorial, at para 220. See also *supra*, at Section VI.B(b)iii of this Award.

¹¹¹⁶ Respondent’s Counter-Memorial, at para 275; Respondent’s Rejoinder Memorial, at para 115; Respondent’s Pre-Hearing Memorial, at para 49.

¹¹¹⁷ Hearing on the Merits and Damages, November 9, 2020, at 248:9-18; Respondent’s Pre-Hearing Memorial, at para 49.

¹¹¹⁸ Respondent’s Counter-Memorial, at para 276, referring to Witness Statement of Duff Montgomerie, March 4, 2020, at para 21.

¹¹¹⁹ Respondent’s Rejoinder Memorial, at para 117.

██████████¹¹²⁰ In other words, “Resolute kept itself out by deciding not to bid for the Port Hawkesbury mill”.¹¹²¹

(c) Whether it falls to Canada to justify the discrimination against Resolute’s investments

526. The Respondent argues that, according to *UPS*, the onus remains with the Claimant to establish a breach of Article 1102.¹¹²² Moreover, it argues that the second part of the *Pope & Talbot* test on presumptive violations, which provides that differences in treatment will presumptively violate Article 1102(2) unless they “do not otherwise unduly undermine the investment liberalizing objectives of NAFTA”, is too broad and therefore has not been frequently applied.¹¹²³
527. The Respondent argues that the Claimant does not satisfy its own test that the Assistance Measures presumptively violate Article 1102. According to the Respondent, the measures taken had a reasonable nexus to government policy and the measures were not taken on the basis of nationality.¹¹²⁴

4. The Non-Disputing Parties’ Submissions

(a) Submissions of the United States and Mexico

528. The Non-Disputing Parties agree with the Respondent’s submission that Article 1102 in its entirety protects against discrimination based on nationality.¹¹²⁵
529. With respect to Article 1102(3), the Non-Disputing Parties agree that where a state or province accords different treatment to in-state or in-province investors or their investments as compared to domestic out-of-state or out-of-province investors or their investments, investors from another NAFTA party in like circumstances, or their investments, are entitled to receive the better of the

¹¹²⁰ Respondent’s Counter-Memorial, at para 276, citing ██████████
██████████ September 26, 2011, at 11 (C-119).

¹¹²¹ Respondent’s Counter-Memorial, at para 278; Respondent’s Rejoinder Memorial, at para 118; Hearing on the Merits and Damages, November 9, 2020, at 247:5-13; Hearing on the Merits and Damages, October 18, 2021, at 241:12-22.

¹¹²² Respondent’s Counter-Memorial, at para 248, referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, at para 84 (CL-113); Hearing on the Merits and Damages, November 9, 2020, at 238:15-239:10.

¹¹²³ Hearing on the Merits and Damages, November 14, 2020, at 1265:16-21. See also Hearing on the Merits and Damages, October 19, 2021, at 482:5-483:2.

¹¹²⁴ Hearing on the Merits and Damages, November 9, 2020, at 239:19-240:21.

¹¹²⁵ United States Submission, at para 4; Mexico Submission, at para 3.

treatment accorded by that state or province.¹¹²⁶ Mexico explains that the obligation of treatment in Article 1102(3) does not modify the purpose of Article 1102, which is to prohibit discrimination on the basis of nationality because nationality must still form the basis of the least favourable treatment for Article 1102 to be breached.¹¹²⁷ Mexico agrees with the Respondent that:

[I]n a situation where a Canadian province (for instance, Nova Scotia) would treat more favorably investors from another Canadian province (for instance, British Columbia) than its own local investors, a foreign investor from another NAFTA Party could still bring a claim alleging a breach of Article 1102 based on the fact that it did not receive the treatment accorded by Nova Scotia to investors from British Columbia. There would still be a nationality element to such a claim.¹¹²⁸

530. Mexico does not consider that *only* Articles 1102(1) and (2) are designed to protect against nationality-based discrimination.¹¹²⁹ Mexico also denies that the term “nationality” in Article 1102(4), in contrast to the absence of such term in Article 1102(3), supports the argument that when NAFTA parties intended to prohibit nationality-based discrimination, they did so explicitly.¹¹³⁰ Rather, it agrees with the Respondent’s position that the phrase “for greater certainty” contained in Article 1102(4) confirms that the existing prohibition on nationality-based discrimination in Article 1102 also applies to Article 1102(4).¹¹³¹

531. The United States submits that discriminatory intent is not required to establish a breach of Article 1102.¹¹³² The United States notes that it is incumbent upon the Claimant¹¹³³ to properly identify domestic investors or investments in like circumstances as comparators, pursuant to a fact-specific inquiry.¹¹³⁴ The United States adds that the term “circumstances” denotes “conditions or facts that accompany treatment as opposed to the treatment itself”.¹¹³⁵ It notes that the “like circumstances” analysis requires more than a consideration of a comparable business or economic sector and includes consideration of the regulatory framework and policy objectives, among other characteristics.¹¹³⁶ In other words, the United States suggests that the “like circumstances” analysis should find that a claimant was in like circumstances with the

¹¹²⁶ United States Submission, at para 11, referring to North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 1993, at 140-141; Mexico Submission, at para 5, citing United States Submission pursuant to Article 1128, June 14, 2017, at para 16.

¹¹²⁷ Mexico Submission, at para 6.

¹¹²⁸ Mexico Submission, at para 7.

¹¹²⁹ Mexico Submission, at para 6.

¹¹³⁰ Mexico Submission, at para 8.

¹¹³¹ Mexico Submission, at para 8, citing Respondent’s Rejoinder Memorial, at para 102.

¹¹³² United States Submission, at para 6.

¹¹³³ United States Submission, at para 7.

¹¹³⁴ United States Submission, at para 8.

¹¹³⁵ United States Submission, at para 8.

¹¹³⁶ United States Submission, at para 8.

comparators or their investments “in all relevant respects *but for* nationality of ownership”.¹¹³⁷

532. The United States argues that the NAFTA parties are all geographically, politically and economically diverse nations¹¹³⁸ that did not intend for Article 1102 to prohibit them from adopting measures specific to a part of their national territories.¹¹³⁹ The United States cautions that Article 1102(3) does not stand for the proposition that a state or province is prohibited from adopting or maintaining measures that apply only to investors or their investments in that state or province.¹¹⁴⁰ A foreign investor complaining of discriminatory treatment must still show that it or its investment is in like circumstances with a domestic comparator in that state or province to invoke the protection of Article 1102(3).¹¹⁴¹

533. The Non-Disputing Parties submit that the NAFTA parties are in consensus that Article 1102 is designed to protect against nationality-based discrimination.¹¹⁴² The Non-Disputing Parties¹¹⁴³ contend that this Tribunal must consider this shared interpretation as a subsequent agreement and subsequent practice pursuant to VCLT Article 31(3)(a) and (b).¹¹⁴⁴ Mexico cites the ILC’s comments with respect to Articles 31(3)(a) and (b) in support of its position,¹¹⁴⁵ and specifies that while the FTC’s notes of interpretation may constitute “agreement” as to the meaning of NAFTA, such agreements need not adopt this format to fall within the meaning of VCLT Article 31(3).¹¹⁴⁶

(b) The Disputing Parties’ Comments

534. In response to the Non-Disputing Parties’ submissions, relying on awards by NAFTA and non-NAFTA tribunals, the Claimant reiterates that an Article 1102 claim does not require proof of nationality-based discrimination (to the extent that the discrimination “based on nationality”

¹¹³⁷ United States Submission, at para 8.

¹¹³⁸ United States Submission, at para 10.

¹¹³⁹ United States Submission, at para 10.

¹¹⁴⁰ United States Submission, at para 12.

¹¹⁴¹ United States Submission, at para 12.

¹¹⁴² United States Submission, at para 5; Mexico Submission, at para 9.

¹¹⁴³ Respondent’s Reply to Article 1128 Submissions, at para 6.

¹¹⁴⁴ United States Submission, at para 5, referring to *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, at para 379; *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, at paras 103-104, 158, 160; *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, January 28, 2008, at paras 188-189; International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 4, Comment. 18, UN DOC. A/73/10 (2018); Mexico Submission, at para 15.

¹¹⁴⁵ Mexico Submission, at paras 11-12, citing United Nations, *Yearbook of the International Law Commission 1966*, Doc. A/CN.4/SEA.A/1966/Add.1, UN General Assembly, Vol. II, 1967, at 221, paras 14-15.

¹¹⁴⁶ Mexico Submission, at para 13, referring to *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005, Part II, Chapter B, at paras 19-20; *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Final Award, January 28, 2008, at para 207.

means proving something more than different treatment of investors of different nationalities in like circumstances).¹¹⁴⁷

535. The Claimant notes, relying upon the scenario outlined in Paragraph 529 above, that the present case falls within the scope of what Mexico considers could be remedied by Article 1102: GNS treated Resolute, a foreign investor, less favorably than the investor who received the most favorable treatment among Canadian investors.¹¹⁴⁸ In the Claimant's view, Mexico's "concession"¹¹⁴⁹ removes any doubt that Resolute's claim meets the nationality element to satisfy this element of the three-part *UPS* test.¹¹⁵⁰
536. The Claimant disputes the argument that the NAFTA parties' alleged consensus on the interpretation of Article 1102, evidenced by their prior submissions in other arbitrations, constitutes "subsequent agreement" or "subsequent practice" pursuant to VCLT Article 31(3). The Claimant argues that governments' defenses are not the law itself.¹¹⁵¹ The Claimant explains that even if the alleged consensus of the Non-Disputing Parties was probative, its weight would be limited because: (i) the NAFTA parties did not agree on the requirements of nationality-based discrimination specific to Article 1102(3) claims; and (ii) the NAFTA parties have not agreed on what constitutes nationality-based discrimination more broadly.¹¹⁵² The Claimant concludes that even if the alleged consensus of the Non-Disputing Parties on the interpretation of Article 1102(3) constitutes subsequent practice pursuant to the VCLT, they would be "but one factor" under the VCLT.¹¹⁵³
537. With respect to the "like circumstances" analysis, the Claimant argues that the United States' submission on this issue is inconclusive absent a consideration of the facts¹¹⁵⁴ (which the United States acknowledges).¹¹⁵⁵ The Claimant emphasises that its investments were in like circumstances with PWCC/PHP.¹¹⁵⁶ The Claimant disagrees with the United States' defense of

¹¹⁴⁷ Claimant's Reply to Article 1128 Submissions, at paras 5, 8.

¹¹⁴⁸ Claimant's Reply to Article 1128 Submissions, at para 7.

¹¹⁴⁹ Claimant's Reply to Article 1128 Submissions, at para 6.

¹¹⁵⁰ Claimant's Reply to Article 1128 Submissions, at para 7, referring to Claimant's Reply Memorial, at para 212.

¹¹⁵¹ Claimant's Reply to Article 1128 Submissions, at para 9, referring to United States Submission, at para 5, and Mexico Submission, at paras 9-15. See also Claimant's Reply Memorial, at paras 238-243.

¹¹⁵² Claimant's Reply to Article 1128 Submissions, at para 10.

¹¹⁵³ Claimant's Reply to Article 1128 Submissions, at para 10, referring to *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, at para 160 (CL-237).

¹¹⁵⁴ Claimant's Reply to Article 1128 Submissions, at para 12.

¹¹⁵⁵ Claimant's Reply to Article 1128 Submissions, at para 11, referring to United States Submission, at para 1.

¹¹⁵⁶ Claimant's Reply to Article 1128 Submissions, at para 13.

“location-based measures to achieve regulatory objectives”,¹¹⁵⁷ stating that the Assistance Measures were not location-based, but rather were “company-specific”, favoring PWCC.¹¹⁵⁸ The Claimant clarifies that it does not advocate for “nationally uniform treatment” nor a limit on a state or province’s ability to adopt or maintain measures that apply only to investors or investments operating in that state or province.¹¹⁵⁹ Rather, the Claimant reiterates that it seeks remedy for harm to Resolute allegedly consciously inflicted by GNS beyond its provincial borders.¹¹⁶⁰ The Claimant concludes, “Nova Scotia (and Canada) cannot hide behind those very same borders to shield themselves from scrutiny for discrimination under Article 1102(3)”.¹¹⁶¹

538. The Respondent concurs with the Non-Disputing Parties on the interpretation of Article 1102(3) as preventing nationality-based discrimination, stating that the mere fact that there is less favorable treatment between a domestic investor and a foreign investor in like circumstances does not establish a breach of Article 1102 (including subparagraph 3).¹¹⁶² Rather, according to the Respondent, for a breach of the national treatment obligation to be found, evidence of discrimination on the basis of nationality is required.¹¹⁶³
539. The Respondent disagrees with the Claimant’s “nationally uniform treatment” analysis (as set out in Paragraph 537) by recalling the Tribunal’s findings in the Jurisdiction Decision with respect to Article 1102(3), namely that this Article “should not be read so as to impose, vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to NAFTA”.¹¹⁶⁴ The Respondent argues that Resolute’s mills in Québec were not entitled to the same treatment the PHP Mill received in Nova Scotia, which must be considered in the context of the “treatment” and “like circumstances” analyses under Article 1102.¹¹⁶⁵

5. The Tribunal’s Analysis

540. Following the Tribunal’s conclusions on attribution (especially the non-attribution to GNS of the LRR) and on Article 1108(7) derogations, the Tribunal proceeds to the Article 1102(3) analysis

¹¹⁵⁷ Claimant’s Reply to Article 1128 Submissions, at para 14, citing United States Submission, fn. 7.

¹¹⁵⁸ Claimant’s Reply to Article 1128 Submissions, at para 14.

¹¹⁵⁹ Claimant’s Reply to Article 1128 Submissions, at para 14, referring to United States Submission, at para 12.

¹¹⁶⁰ Claimant’s Reply to Article 1128 Submissions, at para 14.

¹¹⁶¹ Claimant’s Reply to Article 1128 Submissions, at para 14.

¹¹⁶² Respondent’s Reply to Article 1128 Submissions, at para 2.

¹¹⁶³ Respondent’s Reply to Article 1128 Submissions, at para 2.

¹¹⁶⁴ Respondent’s Reply to Article 1128 Submissions, at para 3, referring to Jurisdiction Decision, at para 290; United States Submission, at paras 10-12; Mexico Submission, at paras 3-9.

¹¹⁶⁵ Respondent’s Reply to Article 1128 Submissions, at para 3.

in relation to the following remaining measures:

- The RES Regulations Issue and the Biomass Plant Issue
- The stumpage (fee) regulation aspect of the FULA
- The employee pension protection act and regulations
- The municipal property taxation

541. The heart of the Claimant’s case is that GNS adopted an “indivisible ensemble of coordinated measures” to the benefit of PHP that breached NAFTA Chapter 11.¹¹⁶⁶ The Claimant argues that PWCC asked for and got everything it wanted: “Port Hawkesbury would not have emerged as North America’s low-cost producer without all of [the measures]. They all played their part”.¹¹⁶⁷ As the Tribunal concluded earlier, however, determinations on matters of attribution and specific exclusions from NAFTA Chapter 11 disciplines (as in Article 1108(7)) have to proceed on a disaggregated basis.

542. Yet, when considering the breach of substantive obligations, it is open to the Tribunal to consider the impact of measures taken together (as noted at Paragraph 293 on attribution). Indeed, some international investment law concepts, such as “creeping expropriation”, are by definition dependent on the existence of a series of measures that have an effect equivalent to that of a direct expropriation.

543. Nonetheless, the Tribunal is of the view that the Claimant’s Article 1102(3) claim faces considerable difficulties in relation to its “ensemble approach” to breach and its arguments on the role of nationality to breach. Both elements in turn having an impact on the interpretation of “treatment” and treatment accorded “in like circumstances”. The Tribunal will analyze these difficulties in the context of the NAFTA Article 1102 legal framework first, before turning to the application of the law to the remaining measures at issue.

(a) The Article 1102 framework and difficulties with the Claimant’s arguments

544. First, the Claimant’s case builds on a list (or ensemble) of at least 15 alleged GNS Assistance Measures constituting an extraordinary assistance package to PHP.¹¹⁶⁸ As a result of the Tribunal’s analysis thus far, however, only a few, somewhat disparate measures remain to be analyzed under Article 1102(3). Asked by a member of the Tribunal at the 2021 Hearing what the

¹¹⁶⁶ Hearing on the Merits and Damages, October 18, 2021, at 123:15-24; Hearing on the Merits and Damages, November 9, 2020, at 163:2-16.

¹¹⁶⁷ Hearing on the Merits and Damages, November 9, 2020, at 29:7-9.

¹¹⁶⁸ Hearing on the Merits and Damages, October 18, 2021, Claimant’s Opening Argument, at 81.

impact on its claim would be if some of the alleged measures were excluded as a matter of attribution or under Article 1108(7) and, as a result, only one or two were to remain, the Claimant responded that its claim stood, undisturbed; that each measure was essential to the restart of Port Hawkesbury. The Claimant argued that:

The record is clear. That PWCC was going to walk away unless it got everything it wanted. And, therefore, we say the Article 1102 analysis precedes [sic] even with the remaining measures and it is essentially unaffected by it because our definition of treatment is the adoption of a policy by the government to favour its own investor in a way that can only be achieved with a foreseeable negative impact on the foreign investor. And we say that even with one or two remaining measures, the policy is still a fact.¹¹⁶⁹

545. Putting aside for now the issue of accuracy to the record and the definition of “treatment” under Article 1102(3), the Tribunal cannot accept that labelling individual measures as being part of a “policy” allows the analysis to proceed undisturbed. This would render meaningless the conclusions reached by the Tribunal on attribution and on the Article 1108(7) exclusions. Rather, the Tribunal will proceed to a measure-by-measure analysis. Of course, the Tribunal could recognize, after scrutinizing the remaining measures, a pattern of discrimination that would run afoul of Article 1102(3) (or a pattern of unfair and inequitable treatment that would breach Article 1105), but labels are no substitute for analysis.
546. Second, the affirmed and widely recognized aim of NAFTA Article 1102 is to prevent nationality-based discrimination. This aim has been consistently affirmed for many years by the three NAFTA parties, including in the current case.¹¹⁷⁰ Numerous NAFTA Chapter 11 tribunals have also interpreted and applied Article 1102 as such.¹¹⁷¹ It should be stressed, however, that a

¹¹⁶⁹ Hearing on the Merits and Damages, October 19, 2021, at 402:14-25.

¹¹⁷⁰ See the list of submissions in Respondent’s Counter-Memorial, at para 250; see United States Submission, at paras 4-5, Mexico Submission, at para 3. For an early instance, see the NAFTA Parties’ submissions in *Pope & Talbot Inc. v. Canada*, UNCITRAL, Submission of the United States of America, April 7, 2000 at para 3 (**RL-152**); *Pope & Talbot v. Government of Canada*, UNCITRAL, Submission of the United Mexican States, April 3, 2000 at paras 66-69 (**RL-157**).

¹¹⁷¹ See e.g. *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at paras 193, 205 (**RL-092**); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at paras 217, 220 (**RL-050**); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at paras 7.7-7.9 (**RL-122**); *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at para 181 (**RL-021**); *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. UNCT/02/1, Award, June 26, 2003, at para 139 (**RL-057**). In other cases, the tribunals were less direct in their statements, but still relied on the concept of nationality-based discrimination. For instance, see *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at paras 78-79, 87, 103, fn. 86 (**CL-114**); *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at paras 118, 137, 138 (**CL-107**); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on

claimant does not have to provide proof positive of discriminatory intent to prevail in a claim under Article 1102. This is agreed to by the Parties to this case¹¹⁷² as well as by the United States and Mexico.¹¹⁷³ As held by past tribunals, in some cases, short of a smoking-gun, such proof of discriminatory intent may be impossible to provide.¹¹⁷⁴ That being said, *nationality*-based discrimination is still at the heart of NAFTA Article 1102 (including its paragraph 3).¹¹⁷⁵ Thus, the Tribunal cannot agree with the Claimant when it asserts that: “Even if Canada were to convince the Tribunal that the Nova Scotia Measures were neutral as to nationality, they cannot pass the second part of the *Pope & Talbot* test as ‘not otherwise unduly undermin[ing] the investment liberalizing objectives of NAFTA’”.¹¹⁷⁶ Indeed, if the Tribunal were to find that the GNS “policy decision was neutral from a nationality perspective”,¹¹⁷⁷ meaning that it had nothing to do with the nationality of the Claimant, then it could not conclude that there is a breach of NAFTA Article 1102(3).

547. This Tribunal is of the view that the so-called “second-part” of the test cannot stand alone. The *Pope & Talbot* tribunal itself stated that the “latter test will rarely apply and [that it did] not think it useful [...] to speculate on the kind of fact situations that would bring it into play. Nonetheless, it is important to recognize that the fundamental purposes of NAFTA, as expressed in Article 102, may need to supplement the former test”.¹¹⁷⁸ As a matter of fact, the two tribunals that refer to this dictum, in *Feldman* and *Bilcon*, did so without much or any analysis and in each case, the tribunal had concluded *first* that the respondent State had *not* provided sufficient justifications for the measures to account for the less favorable treatment of the foreign investor.¹¹⁷⁹ (Further

the Merits, May 24, 2007, paras 177, 181 (**CL-113**); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, at para 856 (**RL-051**).

¹¹⁷² See e.g. Claimant’s Reply Memorial, at paras 226-231; Respondent’s Rejoinder Memorial, at para 92.

¹¹⁷³ See United States Submission, at para 4; Mexico Submission, at para 3.

¹¹⁷⁴ See e.g. *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at paras 181-183 (**RL-021**). See also *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 79 (**CL-114**). There are also issues regarding the identification of a government’s “intent”. See e.g. *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 137 (**CL-107**).

¹¹⁷⁵ The Tribunal notes that the aim of Article 1102(3) is no different than the rest of the article: paragraph 3 confirms the meaning of the provision in the case a province or state is providing treatment. The explicit reference in paragraph 4(b) to requiring disposal of an investment by a foreign investor “by reason of its nationality” reinforces this interpretation as opposed to undermining it (as argued in the Claimant’s Reply Memorial, at paras 221-222 & 225). The paragraph opens with the indication “for greater clarity”, which leaves, in the Tribunal’s view, no doubt.

¹¹⁷⁶ Claimant’s Pre-Hearing Memorial, at para 66.

¹¹⁷⁷ Hearing on the Merits and Damages, October 18, 2021, at 108:8-12.

¹¹⁷⁸ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78, fn. 74 (**CL-114**).

¹¹⁷⁹ *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at paras 182-184 (**RL-021**); *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 724 (**RL-025**).

analysis on the justification point is conducted by the Tribunal below under treatment accorded “in like circumstances”).

548. Third, and because of the first two difficulties, the definition provided by the Claimant of the concept of “treatment” in Article 1102(3) raises significant issues. In many NAFTA Chapter 11 cases, “treatment” of the investor by the government is not an issue and often tribunals dispense with its analysis (independently of “in like circumstances”). But in this case, a key question is whether GNS accorded “treatment” to Resolute and its investments in the province of Québec. In its Jurisdiction Decision on, the Tribunal already analyzed aspects of this question under Article 1102(3), but also made relevant holdings under Article 1101(1).
549. As a reminder, in its Jurisdiction Decision, the Tribunal first had to determine whether GNS adopted or maintained “measures” “relating to” Resolute and its investments in Québec under NAFTA Article 1101(1). Taking at face value the facts as argued by the Claimant (including the existence of a five-company, saturated SC Paper market), the Tribunal concluded that the GNS Assistance Measures were sufficiently proximate to the Claimant and its investments to satisfy the “relating to” requirement of Article 1101.¹¹⁸⁰ The Tribunal regarded the case as “close to the line”, but on balance gave the benefit of the doubt to the Claimant.¹¹⁸¹ In its analysis, the Tribunal noted that “a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice”¹¹⁸² to establish a relationship of apparent proximity under Article 1101(1).
550. Turning to Article 1102(3) as a matter of admissibility, the Tribunal had to determine whether a NAFTA investor or its investment must already be present or intend to be present in the province for the Article to apply. The Tribunal decided in the negative, giving as an example two scenarios where an out-of-province investor (or its investment) could receive “treatment” by a province: one was the adoption of protective measures to the benefit of local investors while effectively keeping NAFTA investors (or their investments) out; another was a *Methanex*-type scenario where the out-of-province investor had been the specific target of a provincial campaign to cause it loss.¹¹⁸³ The Tribunal added: “While the Claimant does not suggest that it was specifically targeted by the Nova Scotia measures, it is open to it to establish on the merits a breach of Article 1102 on some other basis”.¹¹⁸⁴ In its reasoning, the Tribunal stated that it agreed “with the

¹¹⁸⁰ Jurisdiction Decision, at paras 246-248.

¹¹⁸¹ Jurisdiction Decision, at para 248.

¹¹⁸² Jurisdiction Decision, at para 242.

¹¹⁸³ Jurisdiction Decision, at para 290.

¹¹⁸⁴ Jurisdiction Decision, at para 290.

NAFTA Parties that Article 1102(3) should not be read so as to impose, vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to NAFTA”.¹¹⁸⁵ The Tribunal added that it agreed with the tribunal in *Merrill & Ring* that Article 1102(3) only applies to “the same regulatory measures under the same jurisdictional authority”.¹¹⁸⁶ The latter holding will prove determinative in the present case.

551. One of the difficulties with the Claimant’s Article 1102(3) case on the merits is that it relies on an economic approach to define “treatment” more so than a legal one. This approach reflects the “ensemble” or policy-based approach used more generally. At the 2020 and 2021 Hearings, the Claimant provided the following definition of treatment: “a government accords treatment to a foreign investor or its investment where it adopts a policy favouring its own investor or investment whose objectives can only be achieved when it produces an effect on the foreign investor or its investment”.¹¹⁸⁷

552. The Claimant had previously built its “treatment” case on “effect”, relying on the expert testimony of Dr. Kaplan,¹¹⁸⁸ an economist who employed a comparative static framework to compare market equilibria with and without PHP’s re-entry.¹¹⁸⁹ Dr. Kaplan concluded that:

The Port Hawkesbury SCP mill was restarted only because it received a benefits package that assured the new owner it would be [REDACTED]. The mill’s full re-entry in 2013 added significant capacity to the North American SCP market. Given the conditions of competition for SCP – [...] – the significant increase in SCP supply from PHP depressed SCP prices below the levels that would have otherwise occurred. As a consequence, and directly attributable to the benefits package that enabled PHP to fully re-enter the market, Resolute suffered lost profits through lower prices and lower shipments than it otherwise would have enjoyed. This is the simplest of economic stories: “but for” the increased SCP supply from PHP, Resolute’s SCP operations would have experienced higher prices and shipments, and enjoyed a concomitant increase in profits.¹¹⁹⁰

553. Having relied on a “but for” framework of analysis focused on the Port Hawkesbury Mill’s *re-entry* into the SC Paper market, and not on the GNS Assistance Measures themselves, the

¹¹⁸⁵ Jurisdiction Decision, at para 290.

¹¹⁸⁶ Jurisdiction Decision, at para 290; see *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at paras 26-28 (**CL-101**).

¹¹⁸⁷ Hearing on the Merits and Damages, November 14, 2020, at 1176:18-23; Hearing on the Merits and Damages, October 18, 2021, Claimant’s Opening Argument, at 38; Hearing on the Merits and Damages, October 18, 2021, at 62:19-63:6; Claimant’s Pre-Hearing Memorial, at para 51.

¹¹⁸⁸ Claimant’s Memorial, at paras 194-203; Claimant’s Reply Memorial, at paras 244-250.

¹¹⁸⁹ Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 17; Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at para 5.

¹¹⁹⁰ Expert Witness Report of Seth Kaplan, Ph.D., December 28, 2018, at para 17 [internal footnotes omitted].

Claimant fails to address the legal question to be determined by the Tribunal at this juncture: whether GNS—by adopting the remaining measures at issue—accorded “treatment” to Resolute and its investments in the province of Québec.

554. While the Tribunal, taking the Claimant’s case at face value, concluded at the jurisdictional phase that the assistance measures met the “relating to” requirement of Article 1101(1), it does not mean that the measures meet the “treatment” requirement of Article 1102(3).¹¹⁹¹ To argue, as the Claimant does, that the facts relied upon by the Tribunal in its reasoning under Article 1101 are also evidence of treatment under Article 1102(3) falls short in this case.¹¹⁹² Furthermore, as also noted by the Tribunal in its Jurisdiction Decision, “a measure which adversely affected the claimant in a tangential or merely consequential way” will not suffice to meet the requirement of Article 1101(1).¹¹⁹³ Therefore, such a measure would not meet the requirement of “treatment” at Article 1102(3) either. Reading Article 1102(3) informed by the gateway of Article 1101 and the definitions at Article 201 provides the right framework of analysis for the Tribunal. NAFTA Chapter 11 applies to “measures”, defined broadly as including “any law, regulation, procedure, requirement or practice” adopted (or maintained) by a Party.¹¹⁹⁴ Thus, when Article 1102 obliges NAFTA parties to “accord” investors of another party (or their investments) “treatment” exempt from nationality-based discrimination, it disciplines the measures adopted.
555. The Tribunal is of the view that the definition of “treatment” provided by the Claimant, with its emphasis on a government policy to favor a domestic in-province investor and its effects outside the province, is at odds with the above framework of analysis.¹¹⁹⁵ As a general matter, arguments

¹¹⁹¹ As held in *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005 (**RL-054**), a favorable finding under Article 1101 does not prejudice the outcome of the interpretation of “treatment” under Article 1102 (see Part IV, Ch B, p. 1, para 1).

¹¹⁹² Claimant’s Reply Memorial, at paras 245-247.

¹¹⁹³ Jurisdiction Decision, at para 242.

¹¹⁹⁴ NAFTA Chapter 2, Article 201 (Definitions of General Application).

¹¹⁹⁵ The Claimant relied on the Mexican sweetener cases in support of the proposition that: “In determining what constitutes ‘treatment,’ NAFTA Tribunals have looked beyond the individual impugned measures in order to assess the practical effect of those measures on affected competitors”. (e.g. Claimant’s Memorial, at para 204) However, the *ADM*, *CPI* and *Cargill* awards were decided in circumstances much different than the current ones and as a result should be differentiated. In all cases, the tribunals recognized that nationality-based discrimination was present and that the very design of the IEPS Tax was to bring pressure on the United States government. *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at para 208 (**RL-092**); *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 137 (**CL-107**); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 209 (**RL-050**). For instance, under the heading “discriminatory treatment”, the *ADM* (**RL-092**, at para 209) tribunal noted “In the present case, both the intent and effects of the Tax show the discriminatory nature of the measure”. The tribunal noted elsewhere that the Tax targeted the HFCS industry, largely owned by US investors (**RL-092**, at para 212). Under its analysis of “treatment no less favorable”, the *Cargill* (**RL-050**, at para 220) tribunal similarly concluded that: “the discrimination was based on nationality both in intent

based on sole “adverse effect” or “detrimental effect” on a foreign investor operating in a different province than the one adopting the “measures” (and as a result not subject to that province’s jurisdiction) cannot be accepted without more. Indeed, such arguments could lead to a breach of NAFTA Article 1102(3) without the relevant government even knowing that foreign investors are impacted. This goes against the aim of Article 1102 to prevent nationality-based discrimination and would make government regulation impossible without creating (unlimited) liability for damages. In other words, simply “affecting adversely” a foreign national (not subject to the province’s jurisdiction), cannot be the standard for “treatment” under Article 1102(3).

556. In this instance, the Claimant makes a more refined case, arguing first that “treatment” just requires probable and foreseeable harm to Resolute; and alternatively, that even if effects on Resolute had to be known to GNS, they were as a matter of fact. In sum, the Claimant argues the following:

Again, the test for treatment is not meant to capture mere incidental effects, but rather, probable and foreseeable harm. Here, we more than satisfy the test for treatment.

[REDACTED]

[REDACTED]

To break this down further, [REDACTED]

[REDACTED]

[REDACTED]

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and effect”. The *CPI* (CL-107, at para 137) tribunal also held that because Mexico put forward a countermeasure defense, this fact amounted to a recognition that “HFCS producers and suppliers were targeted, in part at least, because of the extent of their links to the United States”. This fact was also relevant to the “less favorable treatment” part of the rest, as the tribunal held: “It demonstrates an intention on the part of Mexico to treat CPI differently because of its nationality” (CL-107, at para 138). The Respondent has also noted that in the sweetener cases, all the investors had investments in Mexico, the jurisdiction responsible for the measures. See e.g. Respondent’s Counter-Memorial, at para 261.

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Hearing on the Merits and Damages, October 18, 2021, at 65:16-67:6.

557. However, the Tribunal’s focus in defining “treatment” is *not* on the alleged anti-competitive policy of GNS nor on its effects (probable and foreseeable or most likely to occur), but on the remaining measures at issue, which the Tribunal will turn to below.
558. The final difficulty facing the Claimant’s case relates to the analysis of treatment “in like circumstances” in the framework of Article 1102(3). Relying on past cases, both Parties argued for an analysis of all relevant circumstances in which the treatment was accorded.¹¹⁹⁷ The Tribunal agrees with this approach. Under NAFTA Chapter 11, a claimant will typically first attempt to provide evidence that it is in the same business sector or in competition with a domestic investor of the defending party that benefits from more favorable treatment, i.e. the comparator. In the present case, the Tribunal does not have much difficulty concluding that at least one of Resolute’s mills and the PHP Mill were in a competitive relationship (to a more or less high degree).¹¹⁹⁸ However, the analysis does not stop there. The Tribunal considers that the identity of the legal and regulatory framework applicable can be highly relevant, as held by many other NAFTA Chapter 11 tribunals.
559. Citing the tribunals in *ADF, Pope & Talbot, Feldman, Methanex* and *UPS*, the tribunal in *Grand River* held that “[t]he 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”.¹¹⁹⁹ Relying on this approach, the *Apotex* tribunal similarly found that in circumstances where the proposed comparators were in the same sector as the claimants, sold like products and were direct competitors, “the question of whether the Claimants and their investments were subject to the same legal regime or regulatory requirements [...] becomes an important potential differentiator”.¹²⁰⁰
560. From the beginning of the proceedings, the Claimant has contested the description or label that

¹¹⁹⁷ See Hearing on the Merits and Damages, November 14, 2020, Claimant’s Closing Argument on Article 1102, at p 7; Claimant’s Pre-Hearing Memorial, at para 59; Respondent’s Counter-Memorial, at paras 266-269; Respondent’s Rejoinder Memorial, at paras 110-112; Hearing on the Merits and Damages, October 18, 2021, at 246:15-22.

¹¹⁹⁸ Much evidence was presented on the degree of competition that existed between Resolute and PHP: was it mostly direct or indirect (because of the grades and quality of SC Paper produced), how much grade substitution was there in the market and its impact, etc., but in the end, the Tribunal does not need to resolve these issues.

¹¹⁹⁹ *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, at paras 166-167 (**RL-019**).

¹²⁰⁰ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, at paras 8.43, 8.53 (**RL-051**).

the present case is a “regulatory” one.¹²⁰¹ Yet, the Claimant has acknowledged the relevance of the “jurisdictional factor” as well as the “implementation factor” to the like circumstances analysis. At the 2021 Hearing, the Claimant listed relevant factors before providing its reading of the situation:

Also important is the jurisdictional factor. Is it relevant that the foreign and domestic investor are located in the same jurisdiction? This is important in certain cases, notably where a complainant is complaining about a regulatory measure of general application. [...] And then, finally, this brings up the related implementation factor. [...] Are the measures a law or regulation of general application in the territory, or are they measures targeted and specific in scope or effect?¹²⁰²

561. Further, the Claimant submitted that:

[...] it does not matter that the relevant Quebec mills were not in Nova Scotia. Since Nova Scotia’s main policy goal was to ensure Port Hawkesbury’s long-term success by making it a national champion in the SC market -- in the market for SC paper, a goal it achieved through a combination of targeted and specific regulatory and spending measures whose main objective was to make Port Hawkesbury the lowest-cost producer of the relevant products.¹²⁰³

562. In the Tribunal’s view, the Claimant’s attempt to draw a strict distinction between, on the one hand, regulatory measures of “general application” and, on the other hand, “targeted and specific” regulatory measures is unconvincing. Resolute’s own experience in the province of Nova Scotia, where it was operating the Bowater Mersey Mill and in particular when it received financial and other forms of assistance from the province to reduce its costs, demonstrates that the application of a general program, such as the Nova Scotia Jobs Fund or the Large Land Purchase Program, to a specific company does not change its nature. More to the point is the example of the FULA.

[REDACTED]

[REDACTED]¹²⁰⁴ In other words, the regulatory licensing regime required the signature of individual licences, but the regime itself was not “targeted and specific” to any one company. Thus, the Tribunal does not follow the Claimant’s argument that each and every measure constituting the “ensemble” of measures complained of

¹²⁰¹ Claimant’s Counter-Memorial on Jurisdiction, para 204; Hearing on Jurisdiction and Admissibility, August 15, 2017, at 398:14-20; see also Claimant’s Reply Memorial, at para 260.

¹²⁰² Hearing on the Merits and Damages, October 18, 2021, at 89:18-90:13; Claimant’s Pre-Hearing Memorial, at para 59.

¹²⁰³ Hearing on the Merits and Damages, October 18, 2021, at 93:16-25; Claimant’s Pre-Hearing Memorial, at para 60.

¹²⁰⁴ [REDACTED] (R-149).

had a “scope of application” limited to “PHP only” and did not apply “across Nova Scotia”.¹²⁰⁵ Many of the measures could have applied and did apply to other companies, including Resolute’s own Bowater Mersey.

563. Yet, the Tribunal is cognizant that the Claimant's case is not that Bowater Mersey and PHP received treatment "in like circumstances", but that Resolute's mills in Québec producing SC Paper are the proper comparator.¹²⁰⁶ As will be analyzed further in the next section, however, most of the measures that remain at issue under Article 1102(3) are of a regulatory nature and whether the Claimant was subjected to or could have benefited from (as the case may be) such measures is relevant to the comparison of circumstances in which the treatment was accorded. In sum, the Tribunal does not follow the Claimant's argument that "it does not matter that the relevant Ouebec mills were not in Nova Scotia".¹²⁰⁷

564. This leads the Tribunal to the impact, on the treatment “in like circumstances” analysis, of Resolute’s decision not to submit a bid for the Port Hawkesbury Mill. At the 2021 Hearing, the Claimant submitted the following: “That Resolute was a potential bidder for Port Hawkesbury just reinforces the like circumstances analysis. It was a player in this market and in this product but because it was, it had no interest in being part of a scheme that would cannibalize its own sales through price erosion”.¹²⁰⁸ The Tribunal is not persuaded by this argument, as a matter of fact or law.

[illegible]

¹²⁰⁵ Hearing on the Merits and Damages, October 18, 2021, Claimant's Opening Argument, at 70; see also Hearing on the Merits and Damages, October 18, 2021, at 97:3-9.

1206 Claimant's Pre-Hearing Memorial, at para 60; Hearing on the Merits and Damages, October 18, 2021, at 90:25-91:6.

¹²⁰⁷ Hearing on the Merits and Damages, October 18, 2021, at 93:16-25; Claimant's Pre-Hearing Memorial, at para 60.

1208 Hearing on the Merits and Damages, October 18, 2021, at 94:10-16; to the same effect, see Hearing on the Merits and Damages, October 19, 2021, at 355:2-356:1.

1209 See [REDACTED] August 11, 2011, at RFP0004991 (C-109).

[REDACTED]

[REDACTED]¹²¹⁰ [REDACTED]

[REDACTED]

[REDACTED]¹²¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²¹² In sum, as was confirmed by the Claimant at the 2021 Hearing, Resolute considered financial assistance by GNS as part of its decision on whether to bid for the Mill:

And obviously if you're in this market, you understand that you could get some government support, [REDACTED]

And this claim is all about the extent of the support. I mean that's the nature of our complaint. [...] But I think the evidence from the bidders shows that most of the bidders, in thinking about what the government would likely do in a reasonable scenario, would simply not be sufficient. And so they walked away.¹²¹³

566. [REDACTED]

[REDACTED]

567. As a matter of law, the fact that Resolute was a potential bidder for the Mill does not “reinforce” the like circumstances analysis, rather, it is to the contrary. In the Tribunal’s view, what matters in the end is that Resolute was repeatedly encouraged to submit a bid but chose not to. In doing so, it closed itself from the possibility of purchasing the Mill and of negotiating with GNS for some assistance measures, financial or regulatory in nature. At the 2021 Hearing, the Claimant confirmed its claim was not about being excluded from bidding or from the province, but rather about the allegedly “anti-competitive” measures that GNS adopted.¹²¹⁴ But this is not what treatment in “like circumstances” is about – nor the Article 1102 discipline for that matter. The Claimant has not provided any evidence either that GNS would not have been open (as a matter of nationality or otherwise) to provide Resolute financial assistance if it had been the bid winner. On this point, the witness statement of Mr. Montgomery stands:

Had Resolute submitted a bid to purchase the mill within the deadlines set by the Monitor (which I had encouraged Resolute to do) and had the

¹²¹⁰ See [REDACTED] September 2011 (R-359).

¹²¹¹ See [REDACTED] September 26, 2011 (C-118); [REDACTED] September 26, 2011 (C-119).

¹²¹² [REDACTED] September 26, 2011 at RFP0011526 (C-119).

¹²¹³ Hearing on the Merits and Damages, October 19, 2021, at 362:1-18.

¹²¹⁴ Hearing on the Merits and Damages, October 19, 2021, at 355:18-23.

Monitor selected Resolute as a qualified bidder, I can confirm that the GNS would have been ready to discuss reasonable requests for financial assistance, just as we did with PWCC and Paper Excellence once they were chosen by the Monitor. Resolute had direct access to me and other senior government officials at the time the Monitor was seeking bidders for the Port Hawkesbury mill and it could have made inquiries as to government support if it wanted. I believe the December 2011 financial support of Resolute's Bowater Mersey mill by the GNS demonstrates that the Province was willing to engage constructively and in good faith with respect to reasonable requests for financial assistance.¹²¹⁵

568. The Tribunal will consider the question of treatment accorded “in like circumstances” further when analysing each of the remaining measures below.

(b) The Application of Article 1102 to the remaining measures at issue

569. Having laid out several difficulties raised by the Claimant's arguments in general, the Tribunal now turns to the more specific application of Article 1102(3) to the remaining measures at issue. While both Parties generally agree on the three-part *UPS* test¹²¹⁶ and on the *Pope & Talbot* approach to the “like circumstances” analysis,¹²¹⁷ they disagree on the question of burden of proof and the role played by nationality. According to the Claimant, “[t]he proper approach to Article 1102 proceeds through 2 stages: a. Has the claimant investor discharged its burden of establishing *prima facie* differential treatment in like circumstances? b. If so, has the respondent State discharged its burden of justifying the differential treatment?”¹²¹⁸ For the Respondent, following the holding in *UPS*, the burden “never shifts”.¹²¹⁹ The United States and Mexico agree with Canada on this point.¹²²⁰ However, the Respondent seemed to admit that it is for governments to provide an explanation of reasons or evidence to establish a “reasonable nexus to rational government policies” if that is their case.¹²²¹
570. On this point, the Tribunal finds it is useful to draw the difference between “legal burden of proof” and “evidential burden”. As held in *Mercer*, “[t]he Tribunal agrees with these Article 1128 submissions [that the burden does not shift]. However, the Tribunal must also take account of the distinction between the legal burden of proof (which never shifts) and the evidential burden of

¹²¹⁵ Witness Statement of Duff Montgomerie, April 17, 2019, at para 24.

¹²¹⁶ Claimant's Memorial, at paras 189-190; Claimant's Reply Memorial, at para 212; Respondent's Counter-Memorial, at para 246.

¹²¹⁷ Claimant's Memorial, at paras 212, 224-226; Claimant's Reply Memorial, at para 272; Respondent's Counter-Memorial, at para 269; Respondent's Rejoinder Memorial, at para 112.

¹²¹⁸ Hearing on the Merits and Damages, October 18, 2021, Claimant's Opening Argument, at 35; Claimant's Pre-Hearing Memorial, at para 45.

¹²¹⁹ Respondent's Counter-Memorial, at para 248.

¹²²⁰ Mexico Submission, at fn. 4; United States Submission, at para 3.

¹²²¹ Hearing on the Merits and Damages, November 14, 2020, at 1261:19-1263:16.

proof (which can shift from one party to another, depending upon the state of the evidence). Moreover, every party bears the burden of proving its positive allegations, whether claimant or respondent”.¹²²²

571. In response to a question from the Tribunal at the 2020 Hearing, the Respondent appeared to agree on this distinction, while qualifying its position:

[...] if there is, you know, a reasonable nexus to rational government policies, well, obviously, that is for the government to come forward and say there are reason -- there was a reasonable nexus to rational government policies. If the government doesn't want to put forward that kind of explanation, well, that's its choice. But the burden of proving that there has to be some kind of a nationality basis on which the discrimination is occurring, that has to be the burden on the claimant because then otherwise, again, any measure which impacts a foreign investor in more than a tangential way, negatively, will then presumptively violate the, violate the provision.¹²²³

572. The distinction (legal vs. evidential burden) is also in line with this Tribunal's holding in its Jurisdiction Decision:

The Tribunal would however add that too much importance should not be attached to the onus of proof in international arbitration. In the end, the question is whether one or the other party has done enough to persuade the tribunal of its case. It is relevant that the fact in question is one which is peculiarly within the knowledge of one or the other party.¹²²⁴

573. The Tribunal will take as a starting point that, to meet its burden of proving nationality-based discrimination, it is not sufficient for the Claimant to demonstrate that the GNS Assistance Measures had an adverse effect on Resolute's Mills in Québec without more (as discussed above at Paragraph 546). Put differently, it is not enough that Resolute: “just happened to be the only foreign participant with an investment in Canada, so [it] qualified for protection under NAFTA”.¹²²⁵

574. Thus, since the Claimant has confirmed that its claim under Article 1102(3) stood even if only a limited number of measures are under scrutiny, the Tribunal will apply the test as suggested by

¹²²² *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.14 (**RL-122**). See also *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, at para 8.8 (citing to *Pulp Mills and Feldman*) (**RL-051**).

¹²²³ Hearing on the Merits and Damages, November 14, 2020, at 1263:3-16.

¹²²⁴ Jurisdiction Decision, at para 86.

¹²²⁵ See Hearing on Jurisdiction, August 15, 2017, at 88:19-89:4. The substance of this statement made during the jurisdiction phase of this arbitration was confirmed at the 2021 Hearing, see Hearing on the Merits and Damages, October 19, 2021, at 373:25-374:16, 378:2-22. Similarly, see also Hearing on the Merits and Damages, October 18, 2021, Claimant's Opening Argument, at 35.

the Claimant to the measures at issue, starting with the following question: Has Resolute discharged its burden of establishing *prima facie* differential treatment in like circumstances in this case?

575. As to the ultimate way to distinguish between *nationality*-based discrimination and other differences in treatment that do not relate to nationality, the Tribunal will follow the approach adopted by many other NAFTA Chapter 11 tribunals which have relied on the concept of treatment accorded “in like circumstances” for this purpose. The tribunals had recourse to a proxy: for instance, the *Pope & Talbot* tribunal looked for “a reasonable nexus to rational government policies”,¹²²⁶ the *SD Myers* tribunal for “legitimate public policy measures that are pursued in a reasonable manner”,¹²²⁷ the *Feldman* tribunal for “a rational justification” or reasonable distinction,¹²²⁸ the *GAMI* tribunal for “a plausible connection with a legitimate goal of policy”,¹²²⁹ the *Cargill* tribunal searched for a link between the alleged difference and the “rationale and objective of the measure in question”.¹²³⁰ While the tribunals have varied in their formulations, the bottom line is the same. Using the *Pope & Talbot* formulation as an illustration: a tribunal will conclude the less favorable treatment proven *prima facie* by the Claimant was not provided “in like circumstances” where the Respondent can provide evidence that the differences in treatment have a “reasonable nexus to rational government policies” that do not distinguish on their face or *de facto* between foreign and domestic investors or investments.¹²³¹ Conversely, if the Respondent cannot provide such evidence, the tribunal will assume that nationality was the reason for the differential treatment (see e.g. *Feldman*).¹²³²

¹²²⁶ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78 (**CL-114**).

¹²²⁷ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, November 13, 2000, at para 246 (**RL-059**).

¹²²⁸ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at paras 170, 182 (**RL-021**).

¹²²⁹ *GAMI Investments Inc. v. United Mexican States*, UNCITRAL Final Award, November 15, 2004, at para 114 (**CL-100**).

¹²³⁰ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at paras 206, 209 (referring to both *Pope & Talbot* and *GAMI*) (**CL-118**).

¹²³¹ See *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at paras 78-79 (**CL-114**). See also *Mercer*, endorsing *Cargill* on this point: “Thus, in both *GAMI* and *Pope & Talbot*, ‘like circumstances’ was determined by reference to the rationale for the measure that was being challenged. It was not a determination of ‘like circumstances’ in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in *GAMI* and the lumber producers in *Pope & Talbot* could have been found in ‘like circumstances’”. *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.20 (**RL-122**), citing *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 206 (**CL-118**).

¹²³² See e.g. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at paras 180-182 (**RL-021**).

576. In this framework, the Tribunal wishes to stress that the point of the “like circumstances” analysis at Article 1102 is not to judge the substantive merit of the Respondent’s measures (for instance, telling a Respondent the government could have provided different kinds of support to its industry, etc.). In *Mercer*, similarly looking into “like circumstances”, the Tribunal stated that it “accepts as a general legal principle, in the absence of bad faith that a measure of deference is owed to a State’s regulatory policies”.¹²³³ In sum, the point of the analysis is to allow the Tribunal to ascertain whether a less favorable treatment accorded to an investor/investment from another Party was provided by reason of the Claimant’s nationality (or not). And that is why previous tribunals have focused on “nexus”, “connection”, or links between the differential treatment and the objectives that are rational or legitimate (and not on the policies in and of themselves).¹²³⁴
577. The Tribunal will now ascertain whether the Respondent breached its Article 1102(3) obligations in relation to the remaining measures at issue.

i. The RES Regulations Issue and the Biomass Plant Issue

578. As described earlier in this Award, in the process of approving the LRR for the PHP Mill, the NSUARB expressed concern over two issues. The first was the concern that other ratepayers would bear the cost of obtaining additional renewable energy to meet the standards set by the RES Regulations due to the Mill returning to the grid (previously defined as the “RES Regulations Issue”). The second concern related to the operation of a Biomass Plant at the PHP Mill, which eventually led GNS to amend its RES Regulations in 2013, in part designating the Biomass Plant at the PHP Mill as a “must run” (previously defined as the “Biomass Plant Issue”). In July 2012, GNS provided a comfort letter to the NSUARB related to these two concerns.¹²³⁵
579. Both Parties have described such interventions as regulatory in nature. For instance, at the 2021 Hearing, the Claimant, in reference to the measures related to electricity, stated that “[...] not all the measures could be construed to be subsidies or procurement. Critical measures were regulatory”.¹²³⁶

¹²³³ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.41-7.42 (**RL-122**).

¹²³⁴ See *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018 at para 7.20 (**RL-122**), citing *Cargill* in support (in turn making reference to *GAMI* and *Pope & Talbot* in its reasoning).

¹²³⁵ *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing, NSUARB, July 20, 2012 (**C-179**).

¹²³⁶ See Hearing on the Merits and Damages, October 18, 2021, 20:12-14; See also: “Instead, Resolute is complaining about Nova Scotia’s decision [...] involved an indivisible ensemble of coordinated measures, some of which Canada does not even claim qualify under 1108(7), like the adoption of the load retention

580. In the context of attribution, the Claimant argued that the actions taken by GNS with respect to the RES Regulations Issue and the Biomass Plant Issue were “elements of the electricity deal between PWCC and NSPI” as they were both “necessary for passage and approval of the entire electricity deal”.¹²³⁷ Further, the Claimant argued that GNS’s July 2012 Letter resulted in the NSUARB’s approval of the LRR, claiming that GNS “changed the law for PWCC’s benefit”.¹²³⁸
581. At Paragraph 303 of this Award, the Tribunal already determined that the LRR itself is not attributable to the Respondent and that the RES Regulations Issue and the Biomass Plant Issue did not have a direct effect on the rate or the price of electricity paid by PHP as such.
582. Yet, the question remains whether the conduct of GNS, when it provided comfort to the NSUARB or specifically when it later amended the RES Regulations, constitutes a breach of NAFTA Article 1102(3). Indeed, as submitted by the Claimant at the 2021 Hearing:

[...], even assuming a disaggregation of the ensemble were factually plausible and conceptually appropriate, some of the specific measures, each of which was indispensable to PWCC’s plan, do not qualify for the exemption. These measures alone are sufficient to expose Canada to responsibility for a violation of 1102. These measures include the 24/7 must-run order for the biomass boiler and the protection from the application of the renewable energy standard.

No matter how broad Canada would like the definition of subsidy, grant or procurement to be, these measures do not qualify and Canada has not taken a contrary position.

For these reasons, members of the Tribunal, we submit that Resolute makes out a valid and compensable claim for breach of Article 1102.¹²³⁹

583. Turning to the facts, the record demonstrates that the amendments to the RES Regulations were prepared and released for public consultation in June 2011, “months before PWCC was even in

rate and the related regulatory measures for electricity”. (Hearing on the Merits and Damages, October 18, 2021, 123:15-24); “The government shifted the costs of the biomass plant to Nova Scotia ratepayers by a special regulation for PHP so the electricity package could be approved”. (Hearing on the Merits and Damages, October 18, 2021, at 135:8-11). See also Hearing on the Merits and Damages, October 19, 2021, at 310:7-15; 415:6-11.

For its part, Respondent states that the Biomass Plant Issue and RES Regulations issue were “all part of a regulatory plan that had been there for quite some time to be able to make sure that the biomass plant was designated as must run in order to fulfil renewable energy targets”. (Hearing on the Merits and Damages, October 19, 2021, at 449:21-25.)

¹²³⁷ Claimant’s Memorial, at para 175.

¹²³⁸ Claimant’s Memorial, at paras 82, 126; Claimant’s Reply Memorial, at para 67.

¹²³⁹ Hearing on the Merits and Damages, October 18, 2021, at 124:6-24. See also Hearing on the Merits and Damages, October 19, 2021, at 402:5-13: “But even if the Tribunal decides to apply Article 1108 on a measure by measure basis, some will necessarily survive, in our submission. For example, the measures adopted to ensure that the electricity package could be implemented [...] And the record shows that each measure was essential for the restart of Port Hawkesbury”.

the picture”.¹²⁴⁰ As such, the US or Canadian ownership of the Mill could not have been a factor. The Respondent explained that the approval of the RES Regulations was delayed due to the risk of shutdown of both the Port Hawkesbury and Bowater Mersey mills, because the shutdowns would impact renewable energy policy more broadly.¹²⁴¹ Ultimately, the confirmation from the Respondent to the NSUARB in July 2012 that the Port Hawkesbury Mill’s return to the grid would not trigger additional RES obligations proved accurate. No costs had to be absorbed by GNS on this account.¹²⁴²

584. With respect to the Biomass Plant, the arrangement in existence between NSPI and NPPH (a US owned company) was replaced by one between NSPI and PWCC, whereby NSPI would continue to own the Biomass Plant and deliver steam to PHP. When the NSUARB approved the latter agreement, it decided that the prices for the steam supply and shared services “appeared reasonable and not subsidized by ratepayers”.¹²⁴³ As mentioned above, in January 2013, GNS amended the RES Regulations in conformity with its July 2012 comfort letter.
585. In these circumstances, the Tribunal finds that the Claimant’s argument that GNS “changed the law for PWCC’s benefit” (under a policy by GNS to favour its own investor) is not matched by evidence that Resolute was accorded less favorable treatment by GNS. Indeed, Resolute could not receive treatment “in like circumstances”, because Resolute’s SC Paper mills are not located in the province of Nova Scotia, but in the province of Québec where GNS does not have jurisdiction to regulate electricity matters. Further, the Tribunal notes that nothing on the record points to nationality having played any role in the RES Regulations Issue and the Biomass Plant Issue.
586. Thus, using the test as formulated by the Claimant, the Tribunal concludes that Resolute has not discharged its burden of establishing *prima facie* differential treatment in like circumstances as relates to the RES Regulations Issue and Biomass Plant Issue.

¹²⁴⁰ See *supra*, at Paragraph 176 of this Award; Proposed Amendments to Renewable Energy Regulations, June 27, 2011 (**R-185**).

¹²⁴¹ See Paragraph 176 of this Award; Respondent’s Counter-Memorial, at para 211, citing Witness Statement of Murray Coolican, April 17, 2019, at para 38.

¹²⁴² See e.g. Hearing on the Merits and Damages, October 18, 2021, at 204:18-205:5; Witness Statement of Murray Coolican, April 17, 2019, at para 21 onwards.

¹²⁴³ Respondent’s Counter-Memorial, para 208, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Decision, NSUARB, August 20, 2012, at para 158 (**C-148; R-062**).

ii. The stumpage (fee) regulation aspect of the FULA

587. In its decision on Article 1108(7), the Tribunal concluded that the silviculture work aspect of the FULA met the definition of procurement and as such is excluded from the analysis under NAFTA Article 1102(3). However, the Tribunal found that no exclusion under Article 1108(7) applies to the stumpage fee aspect of the FULA.

588. In her witness statement, Ms. Towers explained that under the FULA, PHP pays for all Crown stumpage harvested at the rates prescribed therein. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²⁴⁴ The Tribunal accepts the Respondent's argument that the price for stumpage

[REDACTED]¹²⁴⁵

589. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²⁴⁶

[REDACTED]

[REDACTED]¹²⁴⁷ Also at the 2020 Hearing, Mr. Morrison acknowledged it was

standard practice for forestry companies to enter into this type of licensing agreement for cutting

timber on Crown Land.¹²⁴⁸

590. At the 2021 Hearing, the Claimant argued that the FULA (encompassing both the stumpage and the silviculture payments) was a "very generous beneficial agreement for PHP".¹²⁴⁹ However, Resolute did not provide evidence that it was accorded less favorable treatment by GNS regarding stumpage fees. First, Resolute could not receive treatment "in like circumstances", because Resolute's SC Paper mills are not located in the province of Nova Scotia, but in the province of Québec where GNS does not have jurisdiction to regulate the price of stumpage on Crown Land. Second, since the stumpage fees [REDACTED] for the operators wanting to access

¹²⁴⁴ Witness Statement of Julie Towers, April 17, 2019, at para 36.

¹²⁴⁵ [REDACTED] (R-192).

¹²⁴⁶ Hearing on the Merits and Damages, November 10, 2020, at 330:6-331:10; See also [REDACTED] December 1, 2011, at 3 (R-149); Hearing on the Merits and Damages, October 19, 2021, at 430:14-431:9.

¹²⁴⁷ Hearing on the Merits and Damages, November 10, 2020, at 331:2-10.

¹²⁴⁸ Hearing on the Merits and Damages, November 11, 2020, at 582:14-25.

¹²⁴⁹ Hearing on the Merits and Damages, October 19, 2021, at 417:7-15; see also Claimant's Reply Memorial, at paras 309-311.

timber on Crown Land, the “less favorable treatment” would have to be otherwise established. Third, the evidence on the record, including the fact that Bowater Mersey and other companies could be or are subject to the same licensing regime, indicates to the Tribunal that nationality was not a factor in the FULA.

591. Thus, using the test as formulated by the Claimant, the Tribunal concludes that Resolute has not discharged its burden of establishing *prima facie* differential treatment in like circumstances as relates to the stumpage (fee) regulation aspect of the FULA.

iii. The employee pension protection act and regulations

592. Originally, the Claimant argued that GNS provided PWCC with relief from all pension liabilities.¹²⁵⁰ With time, and in response to questions from the Tribunal, the Parties clarified that (i) GNS did not assume pension liabilities for the employees of the Mill¹²⁵¹ and (ii) that PHP was not required by law to assume the pension liabilities.¹²⁵² Further, it was clarified that as of May 2012, GNS had “tabled legislation to delay the windup of underfunded pension plans at the former NewPage Port Hawkesbury paper mill in Nova Scotia”.¹²⁵³ Premier Darrell Dexter was reported saying that his government had “decided to table legislation in order to help workers and pensioners avoid an immediate windup hit of up to 30 per cent or more to their pensions”.¹²⁵⁴ The date for the windup and other matters would be set by regulations at a later time.

593. At the 2021 Hearing, the Respondent further explained that:

Now, the legislation that had been proposed was in order to help the workers and pensioners avoid an immediate windup hit of up to 30 percent or more of their pensions.

¹²⁵⁰ See e.g. Claimant’s Memorial, at para 71.

¹²⁵¹ See Hearing on the Merits and Damages, October 19, 2021, at 311:9-11, where the Claimant stated “[a]ccording to reports, no money was spent but the legislative fix helped pensioners [...]”. See also Hearing on the Merits and Damages, October 19, 2021, at 416:3-4: “[t]here is no provision of money with respect to the handling of the pensions”; the Respondent stated at Hearing on the Merits and Damages, October 19, 2021, at 446:20-25: “what Canada has always explained is that Premier Dexter had explained that the Port Hawkesbury pension liability cannot be transferred to the taxpayers and the province never took on any liability or topped up the pensions. That is Exhibit R-364”. See also Hearing on the Merits and Damages, November 14, 2020, at 1360:8-1362:23.

¹²⁵² Hearing on the Merits and Damages, October 19, 2021, at 311:2-3 (Claimant), 447:7-15 (Respondent).

¹²⁵³ Canadian HRReporter, News Release, “Legislation to delay N.S. paper mill pension windup”, May 10, 2012 (**R-466**). This is consistent with [REDACTED] submitted by the Claimant, see [REDACTED] (**C-329**).

¹²⁵⁴ Canadian HRReporter, News Release, “Legislation to delay N.S. paper mill pension windup”, May 10, 2012 (**R-466**). See the Claimant’s statement at the 2021 Hearing: “The Nova Scotia government enacted a legislative change permitting the pension windup to be delayed, thereby improving payouts over time to pensioners. According to reports, no money was spent but the legislative fix helped pensioners whom PWCC was not prepared to help” (Hearing on the Merits and Damages, October 19, at 2021, 311:6-11).

So workers at the mill, they had [...] negotiated a new contract with PWCC. There were obviously substantial job cuts. And the idea was that instead of having the workers suffer the impact of a new contract, the government just simply extended the time for the windup of the plan. So, as Canada has always said, there's no benefit to the mill. It was something that was for the workers specifically.¹²⁵⁵

594. The Claimant, for its part, never made a clear argument at the 2021 Hearing (or prior¹²⁵⁶) as to the nature of its claim as relates to pensions. It did contrast the behavior of PWCC with that of Bowater Mersey in relation to honoring pensions in terms of what a “good citizen letting go half its workforce when shutting down the newsprint machine might have done [...]”.¹²⁵⁷ The Respondent, in turn, challenged this assertion, stating that “it’s kind of paradoxical to, again, complain about pensions at Port Hawkesbury when it was the [GNS] that took over [REDACTED] of pension liability at Bowater Mersey”.¹²⁵⁸
595. Either way, the Tribunal is not tasked with deciding which of the two private companies is a better corporate citizen, but with determining whether GNS breached its NAFTA Article 1102(3) obligations. As the record stands, the Claimant has not established that GNS accorded PWCC any “treatment” as relates to pensions, since the measures benefitted the pensioners and not the company itself. It follows that Resolute was not accorded any “treatment” vis-à-vis the pension’s protection measures. In such circumstances, the Tribunal does not need to pursue its analysis any further, as there is no treatment to compare, and as a result, no possibility for the Claimant to prove it was accorded less favorable treatment by GNS as relates to the employee pension protection act and regulations.

iv. The municipal property taxation

596. In its Jurisdiction Decision, the Tribunal held that taxation measures are not covered by NAFTA except as provided in Article 2103.¹²⁵⁹ As a result, the claims under Article 1105 and Article 1110 (for lack of a reference to the competent authorities) did not fall within the Tribunal’s jurisdiction. However, under Article 2103(4)(b) the disciplines of Article 1102 apply to certain taxation measures. The Claimant has submitted that the “municipal tax portion of the package is only

¹²⁵⁵ Hearing on the Merits and Damages, October 19, 2021, at 447:1-15.

¹²⁵⁶ For instance, see Claimant’s Reply Memorial, at para 182: “PWCC, through the CCAA process, did not inherit the mill’s outstanding pension liability of approximately \$130 million. That relief (which was predicated on ‘Provincial support for legislative change to provide for time for a Plan wind up if requested by’ various parties with an interest in the pension) was a necessary requirement to ensure that PHP would be the lowest-cost producer of SC Paper” [internal footnotes omitted].

¹²⁵⁷ Hearing on the Merits and Damages, October 19, 2021, at 311:3-6.

¹²⁵⁸ Hearing on the Merits and Damages, October 19, 2021, at 447:23-448:2.

¹²⁵⁹ Jurisdiction Decision, at para 329.

applicable to Resolute's claim under Article 1102".¹²⁶⁰

597. The Respondent has not contested this point. Rather, as related above, it questioned whether the taxation measures provided a benefit to PWCC or PHP. Further, it noted that Bowater Mersey also negotiated a different municipal tax rate with the Region of Queens municipality as part of its efforts to reduce costs.¹²⁶¹
598. The Tribunal finds that the Claimant did not provide evidence that it was accorded less favorable treatment by the Richmond County or by GNS. First, Resolute could not receive treatment "in like circumstances", because Resolute's SC Paper mills are not located in the province of Nova Scotia, but in the province of Québec where neither GNS nor its municipalities have jurisdiction over property taxes. Second, since the reassessment of the property taxes is argued to have been a consequence of the reduced activities at the Mill, it is unclear what would be the source of the "less favorable treatment" of Resolute's Mills in Québec.
599. Thus, using the test as formulated by the Claimant, the Tribunal concludes that Resolute has not discharged its burden of establishing *prima facie* differential treatment in like circumstances as relates to the municipal property taxation measure at issue.
600. In sum, the Tribunal concludes that the Claimant has not discharged its burden to prove a breach of NAFTA Article 1102(3) as relates to: the RES Regulations Issue and the Biomass Plant Issue; the stumpage (fee) regulation aspect of the FULA; the employee pension protection act and regulations; and the municipal property taxation measure at issue.
601. For the sake of completeness, the Tribunal wishes to add that *even if* it had accepted the "ensemble of measures" argument submitted by the Claimant and *even if* it had concluded that the Claimant was accorded "treatment" by GNS in this case, the Tribunal would not have found a breach of NAFTA Article 1102(3) in any event, because it has not been established that GNS accorded Resolute treatment that was less favorable than accorded "in like circumstances" to PHP. As mentioned at Paragraph 575 above, in order to distinguish between *nationality*-based discrimination and other differences of treatment that do not relate to nationality, tribunals have recourse to the concept of "like circumstances". While it was not under a legal burden to do so, the Respondent provided much evidence of legitimate reasons for the GNS Assistance Measures that had nothing to do with nationality. For instance, the Respondent submitted that:

[t]he GNS implemented those measures to further a number of legitimate

¹²⁶⁰ Claimant's Memorial, at fn. 176.

¹²⁶¹ Respondent Counter-Memorial, at para 135.

public policy objectives: to avoid a potential [REDACTED] to the Province's economy, to avoid significant increases in electricity prices because of the loss of NSPI's largest customer, to support continued employment in a rural part of the Province with few alternative employment opportunities and to support the Province's sustainable forestry management goals, just to name a few.¹²⁶²

602. Specifically, the Tribunal would have found that the difference in treatment had a reasonable nexus with the rational economic, environmental, and social policy of GNS and it had no element of discrimination against foreign investors or investments.

603. Thus, the Claimant's claim of breach of NAFTA Article 1102(3) is dismissed.

C. NAFTA ARTICLE 1105

1. Introduction

604. NAFTA Article 1105(1) provides that "[e]ach 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".¹²⁶³

605. In a 2001 Note on Interpretation of Certain Chapter 11 Provisions, the FTC stated that:

Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum 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.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

606. The Parties disagree as to the content of the customary international law minimum standard of treatment, as well as to whether the Respondent breached its obligation under Article 1105.

¹²⁶² Respondent's Rejoinder Memorial, at para 113; See also Hearing on the Merits and Damages, October 18, 2021, at 191:16-22.

¹²⁶³ NAFTA Article 1105(1).

2. The Claimant's Arguments

(a) The Applicable Standard under Article 1105

607. The Claimant argues that the content of the minimum standard of treatment under Article 1105 is shaped by the fair and equitable standard of treatment at customary international law.¹²⁶⁴ It cites the FTC,¹²⁶⁵ in its clarification of Article 1105(1) as explaining that “Article 1105(1) does not require that the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ be ignored, but rather that they be considered as part of the minimum standard of treatment that [it] prescribes”.¹²⁶⁶
608. Next, the Claimant refers to VCLT Article 31¹²⁶⁷ to suggest that “while keeping in mind that the standard set out in the provision is the customary international law minimum standard of treatment, the Tribunal must also take into account the express language of the provision, which refers to ‘fair and equitable treatment’ and ‘full protection and security’”.¹²⁶⁸ Thus, in the Claimant’s view, the Tribunal should interpret Article 1105 in its context and in light of the object and purpose of NAFTA, which is to “eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties” and to “[p]romote conditions of fair competition in the free trade area”.¹²⁶⁹
609. The Claimant defines the “fair and equitable treatment” standard under Article 1105 as “an ‘umbrella concept’ that protects investments of investors of another Party from different types of government misconduct that infringe a sense of fairness, equity and reasonableness”.¹²⁷⁰

¹²⁶⁴ Claimant’s Memorial, at paras 237-248; Hearing on the Merits and Damages, November 9, 2020, at 66:23-67:3.

¹²⁶⁵ Claimant’s Memorial, at para 232, citing NAFTA Free Trade Commission, North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001 (CL-120).

¹²⁶⁶ Claimant’s Memorial, at para 234, referring to *Pope & Talbot Inc. v. Canada*, Interim Award, June 26, 2000, at 26 (CL-116); *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award, September 27, 2016, at para 359 (CL-123).

¹²⁶⁷ Claimant’s Memorial, at para 235, referring to VCLT Article 31, which states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

¹²⁶⁸ Claimant’s Memorial, at para 235, citing *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award, September 27, 2016, at para 356 (CL-123).

¹²⁶⁹ Claimant’s Memorial, at para 236, citing NAFTA Article 102. See also *Cargill, Inc. v. Mexico*, C52737, Factum of the Intervenor United States of America, Ontario Court of Appeal, January 31, 2011, at paras 16-18 (citing the VCLT and NAFTA Article 102 as guides for interpretation of “ordinary meaning of NAFTA”).

¹²⁷⁰ Claimant’s Memorial, at para 237, referring to *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, Post Hearing Submission of the Respondent United States of America on Article 1105(1); *Pope & Talbot v. Government of Canada*, ICSID Case No. ARB(AF)/00/1, June 27, 2002, at 2-3 (CL-125); *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Article 1128 Submission of the United States,

610. First, the Claimant advocates for an evolving, rather than a static, construction of the standard of fair and equitable treatment, urging a more significant measure of protection under the fair and equitable treatment standard than was originally conceived under Article 1105.¹²⁷¹ It submits that NAFTA and other investment tribunals agree that the standard has evolved since the 1926 *Neer* decision (as was later affirmed in *Glamis Gold*). Relying on *Bilcon* and *Merrill & Ring*, the Claimant argues that:

[T]he applicable minimum standard of treatment of investors is found in customary international law and [...] except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically, this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness.¹²⁷²

611. The Claimant also refers to the *Cargill* tribunal, which suggested that “[t]he parties and the other two NAFTA State parties also agree that this standard may evolve and, indeed, may have evolved since 1926”.¹²⁷³

612. The Claimant submits that the minimum standard of treatment test has evolved in such a way that the impugned conduct need no longer be “egregious” or “outrageous” to invoke protection under Article 1105.¹²⁷⁴ Rather, it argues that the fair and equitable treatment standard “has emerged to make possible the consideration of inappropriate behavior of a sort, which is difficult to define, may still be regarded as unfair, inequitable or unreasonable”.¹²⁷⁵ According to the Claimant,

April 19, 2013, at para 4 (**CL-126**); *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Article 1128 Submission of Mexico, January 12, 2016, at para 19 (**CL-127**).

¹²⁷¹ Claimant's Memorial, at paras 238-240.

¹²⁷² Claimant's Memorial, at para 238, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 435 (**CL-104**), citing *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 213 (**CL-101**).

¹²⁷³ Claimant's Memorial, at para 238, citing *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 213 (**CL-101**), *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 272 (**CL-118**); *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at para 194 (**CL-272**). See also *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 440 (**CL-104**); *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, Award, January 4, 2003, at para 179 (**CL-130**). See also Claimant's Reply Memorial, at para 91, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at paras 433, 435 (**CL-104**); Hearing on the Merits and Damages, November 9, at 2020, 78:7-18.

¹²⁷⁴ Claimant's Memorial, at para 239, citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at para 116 (**CL-122**); Hearing on the Merits and Damages, November 9, 2020, at 72:24-73:3; Claimant's Pre-Hearing Memorial, at para 79; Hearing on the Merits and Damages, October 18, 2021, at 127:19-128:2.

¹²⁷⁵ Claimant's Memorial, at para 240, citing *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at paras 207, 208, 210, and 213 (**CL-101**). See also Claimant's Reply Memorial, at para 93, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 435 (**CL-104**); Hearing on the Merits and Damages, November 14, 2020, at 1110:22-1111:4.

“[s]tate conduct which is unjust, arbitrary, unfair, inequitable or discriminatory, that infringes a sense of fairness, equity and reasonableness to a degree that is more than imprudent discretion or outright mistakes but less than egregious, shocking, or outrageous, is cognizable as a breach of fair and equitable treatment”.¹²⁷⁶ The Claimant enumerates types of possible infringements under the “umbrella” of Article 1105, including conduct that is “egregious, arbitrary, unfair, unjust or idiosyncratic, discriminatory, or exposes a claimant to sectional prejudice”.¹²⁷⁷ The Claimant relies on *Cargill* as an example of a case in which these standards were applied.¹²⁷⁸ In *Cargill*, the tribunal found that Mexico’s imposition of a permit requirement and tariffs on importers of HFCS made by foreign producers was done with the intention of reducing these imports to the benefit of local sugar producers breached Article 1105.¹²⁷⁹ The tribunal adopted the following standards to assess Mexico’s conduct:

Whether the complained of measures were grossly unfair, unjust or idiosyncratic, arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.¹²⁸⁰

613. Despite the conclusion that the “most determinative” finding in *Cargill* was that the import permit was put into effect by Mexico with the express intention of damaging the Claimant’s HFCS investment to the greatest extent possible, which “surpass[ed] the standard of gross misconduct akin to bad faith”,¹²⁸¹ the Claimant argues that “bad faith”, “willful neglect” and “outrageousness” are not required for a fair and equitable treatment claim under Article 1105.¹²⁸² It maintains that several tribunals have upheld the position that “covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be ‘egregious’, ‘outrageous’ or

¹²⁷⁶ Hearing on the Merits and Damages, November 9, 2020, at 76:20-77:2.

¹²⁷⁷ Claimant’s Memorial, referring to *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, at para 98 (CL-134); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at paras 283-284 (CL-118); *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/10/23, Award, December 19, 2013, at para 450 (CL-132); *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, at para 290 (CL-133).

¹²⁷⁸ Claimant’s Memorial, at para 242.

¹²⁷⁹ Claimant’s Memorial, at para 245.

¹²⁸⁰ Claimant’s Memorial, at para 244, citing *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 296 (CL-118).

¹²⁸¹ Claimant’s Memorial, citing *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at paras 299-300, 303 (CL-118).

¹²⁸² Claimant’s Memorial, at para 246.

‘shocking’, or otherwise extraordinary”.¹²⁸³

614. The Claimant emphasises that determining a breach of Article 1105 is case-specific and that it is not necessary to establish a rule of customary international law that prohibits the impugned actions of the respondent State.¹²⁸⁴
615. On the issue of whether the doctrine of proportionality forms part of the minimum standard of treatment, the Claimant notes that some scholars view the doctrine of proportionality as an emerging principle of customary international law.¹²⁸⁵ If the principle of proportionality is not yet a customary norm, the Claimant argues in the alternative that “proportionality should be considered a general principle of law that informs a determination of whether fair and equitable treatment has been provided”¹²⁸⁶ and “as an analytical tool in the fair and equitable treatment analysis to weigh and balance competing interests”.¹²⁸⁷
616. The Claimant stresses that, contrary to the Respondent’s position, discrimination is relevant to a fair and equitable treatment claim under Article 1105 even if the conduct in question is “not otherwise cognizable by Article 1102”.¹²⁸⁸ In other words, the Claimant argues that the Respondent cannot claim that subsidies excluded from the obligation under Article 1102 are automatically excluded from the minimum treatment obligation under Article 1105 as well.¹²⁸⁹ The Claimant explains that “the breadth of actions that would constitute a violation of Article 1105 is much wider than that of Article 1102”, “[u]nder Article 1105, a higher degree of seriousness must be recognised in order for the state actions to be a cognizable breach, but the range of action that may constitute this breach is not limited to nationality-based discrimination”.¹²⁹⁰
617. In support of its position, the Claimant observes that the NAFTA parties made no procurement or subsidies exceptions to Article 1105.¹²⁹¹ It lists a number of exceptions under Article 1108,

¹²⁸³ Claimant’s Memorial, at para 246, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 118 (CL-114). See also *Pope & Talbot Inc. v. Government of Canada*, Award in Respect of Damages, May 31, 2002, at para 64 (CL-135); *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, August 2, 2010, at para 215 (CL-121); Hearing on the Merits and Damages, November 14, 2020, at 1112:20-1113:9.

¹²⁸⁴ Hearing on the Merits and Damages, November 14, 2020, at 1111:5-1112:19.

¹²⁸⁵ Hearing on the Merits and Damages, November 9, 2020, at 82:12-85:8; November 14, 2020, at 1127:8-1128:22.

¹²⁸⁶ Hearing on the Merits and Damages, November 9, 2020, at 85:9-19.

¹²⁸⁷ Hearing on the Merits and Damages, November 9, 2020, at 88:1-12; November 14, 2020, at 1130:10-1131:16, 1132:8-1133:6.

¹²⁸⁸ Claimant’s Reply Memorial, at para 136.

¹²⁸⁹ Claimant’s Reply Memorial, at paras 124-139.

¹²⁹⁰ Hearing on the Merits and Damages, November 9, 2020, at 78:23-79:5, 79:13-18.

¹²⁹¹ Claimant’s Reply Memorial, at para 125.

emphasizing their deliberate designations,¹²⁹² and noting that the exceptions under Article 1108(7) for procurement and subsidies only apply to Articles 1102, 1103, and 1107.¹²⁹³ The Claimant maintains that if the NAFTA parties had intended to make exceptions to Article 1105, they would have done so explicitly¹²⁹⁴ and that it would be “odd and illogical” for a government to condone conduct that breaches the fair and equitable standard of treatment “when cloaked as measures taken in the name of procurement or subsidies”.¹²⁹⁵

618. Moreover, the Claimant relies on NAFTA tribunals that have identified “discriminatory conduct” as grounds for a violation of the minimum standard of treatment under Article 1105: for example, the tribunal in *Merrill & Ring v. Canada* defined a breach of the minimum standard of treatment as “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process”, observing that such conduct “has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intentions”.¹²⁹⁶ The Claimant points to other NAFTA¹²⁹⁷ and non-NAFTA¹²⁹⁸ cases that reached the same conclusion.
619. Lastly, the Claimant believes that the Respondent misunderstands its Article 1102 and Article 1105 claims when it states that a claimant cannot avoid the subsidies exception to Article 1102 by advancing the same discrimination claims as a breach of the minimum standard of treatment in NAFTA Article 1105(1).¹²⁹⁹ According to the Claimant, its Article 1102 claim disputes GNS’s treatment of PHP’s owners and the PHP Mill that was more favorable than the treatment Resolute and its SC Paper mills received.¹³⁰⁰ Under Article 1105, the Claimant “goes beyond the differential treatment identified in the Article 1102 claim” by referring to the alleged excessive measures that “propped [PHP] up as [the] national champion” despite knowing that it would cause

¹²⁹² Claimant’s Reply Memorial, at para 127.

¹²⁹³ Claimant’s Reply Memorial, at para 126.

¹²⁹⁴ Claimant’s Reply Memorial, at para 127.

¹²⁹⁵ Claimant’s Reply Memorial, at para 128.

¹²⁹⁶ Claimant’s Reply Memorial, at para 137, citing *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 208 (**CL-101**).

¹²⁹⁷ Claimant’s Reply Memorial, at para 137, referring to *Mobil Investments Canada Inc. and Murphy Oil Company v. Government of Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, May 22, 2012, at para 152 (**RL-170**); *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. UNCT/02/1, Award, June 26, 2003, at paras 135-137 (**RL-057**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at paras 169-171, 265-269 (**RL-059**).

¹²⁹⁸ Claimant’s Reply Memorial, at para 138, referring to *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, at paras 237, 293-295 (**CL-213**); *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, at para 290 (**CL-133**); *Saluka Investments BV v. Czech Republic*, UNCITRAL, PCA Case No. 2001-04, Partial Award, March 17, 2006, at paras 307, 460 (**CL-216**); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, at paras 280, 287 (**RL-168**).

¹²⁹⁹ Claimant’s Reply Memorial, at para 130, referring to Respondent’s Counter-Memorial, at paras 288-290.

¹³⁰⁰ Claimant’s Reply Memorial, at para 131.

Resolute harm.¹³⁰¹ The Claimant believes these actions, even if not “discriminatory”, were egregious, unjust, inequitable and a violation of the minimum standard of treatment under Article 1105, “that exists independent of Resolute’s claim that Nova Scotia provided more favorable treatment to a domestic investor in violation of Article 1102”.¹³⁰²

620. On the weight to be given to the submissions of Non-Disputing Parties regarding the interpretation of Article 1105 and 1102, the Claimant argues that these submissions should be given less weight than an amendment to the treaty or a statement by the FTC.¹³⁰³

(b) Whether Canada Breached its Obligation under Article 1105

621. The Claimant submits that the Respondent failed to accord fair and equitable treatment to Resolute’s SC Paper investments in Canada by ensuring that the PHP Mill would be the “national champion” by “making and keeping it the lowest cost producer of SC paper”.¹³⁰⁴ According to the Claimant, GNS’s Assistance Measures to PHP were “unfair, unjust, and demonstrated a sectional prejudice to put PHP in a market leading position above Resolute”.¹³⁰⁵

i. Whether GNS’s conduct merits deference

622. Relying on *Mesa* and *Bilcon*, the Claimant agrees that the minimum standard of treatment under customary international law “does not apply strict liability for policy imperfections”.¹³⁰⁶ Yet, the Claimant highlights that deference to primary decision makers is not unlimited, particularly when measures are taken “deliberately and rationally by the government when it knew and apparently intended that those measures would harm Resolute for the benefit of its own provincial champion”, as is the case in the present Arbitration.¹³⁰⁷ Furthermore, the Claimant suggests that deference is owed to measures taken within the geographical and jurisdictional authority of the government,¹³⁰⁸ which is not the case here because the impugned measures distorted the SC Paper

¹³⁰¹ Claimant’s Reply Memorial, at para 133.

¹³⁰² Claimant’s Reply Memorial, at para 134.

¹³⁰³ Hearing on the Merits and Damages, November 9, 2020, at 81:17-20.

¹³⁰⁴ Claimant’s Memorial, at para 249; Hearing on the Merits and Damages, November 14, 2020, at 1113:18-1114:1.

¹³⁰⁵ Claimant’s Memorial, at para 249.

¹³⁰⁶ Claimant’s Reply Memorial, at para 99.

¹³⁰⁷ Claimant’s Reply Memorial, at para 102; Hearing on the Merits and Damages, November 9, 2020, at 13:2-16; 87:3-16; Hearing on the Merits and Damages, October 18, 2021, at 138:9-20.

¹³⁰⁸ Claimant’s Reply Memorial, at paras 105, 107-109, referring to *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, at para 505 (**CL-108**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 263 (**RL-059**); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.33 (**RL-122**); Hearing on the Merits and Damages, November 9, 2020, at 92:3-24.

market extending beyond the province's borders and intended to help a Nova Scotian mill against foreign competition elsewhere in Canada and the United States.¹³⁰⁹

623. Further, the Claimant submits that no deference is warranted for the Assistance Measures because they were not taken in the public interest. It advances that parochial self-interest does not amount to a legitimate public interest, especially when that interest is prioritized at the expense of Resolute's operations outside the province and the forest industry beyond Nova Scotia (among other interests).¹³¹⁰ As the Claimant puts it, "[r]obbing Resolute's SC Paper mills in Québec to pay PHP's mill in Nova Scotia should not be considered policy in the public interest merely because such opportunistic behavior benefits GNS and its own constituents".¹³¹¹ The Claimant adds that in international law more broadly, a State cannot defend the interest of one of its constituent elements at the expense of the interests of the greater whole.¹³¹²
624. According to the Claimant, even if the Tribunal finds that the Assistance Measures were led by legitimate public interest, it should find that the means taken to accomplish those interests were unfair and inequitable.¹³¹³

ii. Whether GNS knew that the Assistance Measures could cause Resolute harm

625. The Claimant argues that GNS's actions were "unfair" and "unjust"¹³¹⁴ because of what GNS knew when it agreed to assist PWCC financially. For example, the Claimant alleges that GNS knew back in 2011 that the Mill, "operating in an industry in secular decline" was experiencing financial difficulty.¹³¹⁵ The Claimant notes that [REDACTED]
[REDACTED]
[REDACTED]¹³¹⁶ [REDACTED]
[REDACTED]¹³¹⁷ In light of this information, the Claimant argues that GNS knew about the

¹³⁰⁹ Claimant's Reply Memorial, at para 113; Hearing on the Merits and Damages, November 9, 2020, at 14:4-24.

¹³¹⁰ Claimant's Reply Memorial, at para 121.

¹³¹¹ Claimant's Reply Memorial, at para 122.

¹³¹² Claimant's Reply Memorial, at para 123.

¹³¹³ Hearing on the Merits and Damages, November 9, 2020, at 91:6-9.

¹³¹⁴ Claimant's Memorial, at para 263.

¹³¹⁵ Claimant's Memorial, at para 260, citing Nova Scotia Legislature Proceedings, November 2, 2011, at 3009 (C-123); Hearing on the Merits and Damages, November 9, 2020, at 99:3-15.

¹³¹⁶ Claimant's Reply Memorial, at para 103, referring to [REDACTED]
[REDACTED] (R-161); Hearing on the Merits and Damages, November 9, 2020, at 99:16-25; 105:6-14.

¹³¹⁷ Claimant's Reply Memorial, at para 103, referring to [REDACTED]
[REDACTED] (R-161); Hearing on the Merits and Damages, November 9, 2020, at 100:13-25;

potential effects of PHP's reopening on Resolute but nevertheless chose to provide the PHP Mill with the full and complete "bailout package".¹³¹⁸ Moreover, the Claimant suggests that [REDACTED]

[REDACTED]
[REDACTED]¹³¹⁹

626. Informed by Mr. Peter Steger's analysis (the Respondent's damages expert),¹³²⁰ the Claimant argues that GNS knew that but for the Assistance Measures, the PHP Mill would not reopen.¹³²¹ The Claimant argues that Mr. Steger's analysis shows that without the Assistance Measures, which Mr. Steger values at [REDACTED]¹³²² [REDACTED]
[REDACTED]¹³²³

627. The Claimant also argues that GNS knew that "only the lowest cost producers of SC paper would survive",¹³²⁴ referring to [REDACTED]
[REDACTED]¹³²⁵
The Claimant contends that GNS knew that the Mill produced SC Paper for a market beyond Nova Scotia,¹³²⁶ and that the Assistance Measures it provided to PWCC "[were] intended to give PHP a permanent competitive advantage over every other producer in a market that extended beyond the GNS borders".¹³²⁷

628. The Claimant highlights that GNS has a financial interest in the PHP Mill, placing itself as an investor that was "directly adverse" to Resolute.¹³²⁸

629. Finally, the Claimant recalls that Resolute notified the Canadian Ambassador to the United States and the Canadian Minister for International Trade about the harm that GNS's support to PHP would cause, which did not prevent GNS from following through, to Resolute's alleged

Claimant's Pre-Hearing Memorial, at paras 82-83; Hearing on the Merits and Damages, October 18, 2021, at 132:19-133:6, 134:20-135:7.
¹³¹⁸ Claimant's Reply Memorial, at para 148.
¹³¹⁹ Claimant's Reply Memorial, at para 149.
¹³²⁰ Claimant's Reply Memorial, at para 152, referring to Expert Report of Peter Steger, April 18, 2018, at paras 106-109.
¹³²¹ Claimant's Reply Memorial, at para 151; Hearing on the Merits and Damages, November 9, 2020, at 101:20-102:1.
¹³²² Claimant's Reply Memorial, at para 155.
¹³²³ Claimant's Reply Memorial, at para 159.
¹³²⁴ Claimant's Memorial, at para 261.
¹³²⁵ Claimant's Memorial, at para 261, citing [REDACTED] at CAN0000087_0004 (C-158); Hearing on the Merits and Damages, November 10, 2020, at 407:19-411:18.
¹³²⁶ Claimant's Memorial, at para 264, referring to Expert Witness Report of Seth T. Kaplan, Ph.D, December 28, 2018, at paras 17, 35.
¹³²⁷ Claimant's Memorial, at para 264, referring to Expert Witness Report of Seth T. Kaplan, Ph.D, December 28, 2018, at paras 30-32.
¹³²⁸ Hearing on the Merits and Damages, November 9, 2020, at 106:18-107:14.

detriment.¹³²⁹

- iii. Whether the Assistance Measures helped PHP allegedly become the “lowest-cost producer” of SC Paper

630. First, the Claimant recalls that PWCC’s alleged intention was to make PHP “the lowest-cost producer of SC paper” and that GNS ensured that PWCC’s wish would materialize.¹³³⁰ For example, it points to statements of PWCC’s CEO, indicating that the “story to the regulator” would be that “Stern can turn this into a profitable mill” if it is the “lowest cost SC mill in North America”.¹³³¹

631. The Claimant also mentions [REDACTED] which stated that “[REDACTED]
[REDACTED]
[REDACTED]”,¹³³² [REDACTED]¹³³³

632. The Claimant asserts that GNS assisted PHP in its ambition when it stated that its goal was “to help the mill become the lowest cost and most competitive producer of super calendar paper”.¹³³⁴ To do so, GNS allegedly offered PWCC the “benefits and concessions” listed in Paragraph 497 of this Award.¹³³⁵

633. The Claimant states that in return, PWCC disbursed \$33 million (net \$13 million) for assets it valued at \$[REDACTED]¹³³⁶

634. With respect to the LRR, the Claimant submits that the rate PWCC negotiated with NSPI was an “integrally connected” set of its own measures, which PWCC insisted on receiving to restart the Mill.¹³³⁷ The Claimant contends that PWCC’s LRR ultimately saved it [REDACTED] from 2013-

¹³²⁹ Claimant’s Memorial, at para 269, referring to Claimant’s Memorial, at paras 146-147; Claimant’s Statement of Claim, at paras 77-82.

¹³³⁰ Claimant’s Memorial, at para 251.

¹³³¹ Claimant’s Memorial, at para 251, citing PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2, 2011-2012, at 135 (C-147).

¹³³² Claimant’s Memorial, at para 251, citing [REDACTED] at CAN000121_0043 (C-159).

¹³³³ Claimant’s Memorial, at para 251, citing [REDACTED] at CAN000121_0059 (C-159).

¹³³⁴ Claimant’s Memorial, at para 252, citing Nova Scotia Press Release, August 20, 2012 (C-183); Hearing on the Merits and Damages, November 10, 2020, at 394:1-396:25.

¹³³⁵ Claimant’s Memorial, at para 253.

¹³³⁶ Claimant’s Memorial, at para 253.

¹³³⁷ Claimant’s Memorial, at para 254, referring to *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Notice of Application for Approval Of A Load Retention Rate, NSUARB, April 27, 2012, at para 8 (C-164); Hearing on the Merits and Damages, October 18, 2021, at 29:3-7.

2015, in comparison to what NPPH would have paid for the same period.¹³³⁸ Moreover, it advances that GNS satisfied Mr. Stern's specific demand that PHP would never have to pay for any additional costs for renewable energy caused by PHP's return to the grid¹³³⁹ by passing regulation to cover these additional costs.¹³⁴⁰ The Claimant recalls that PHP needed the Biomass Plant to run at 24% of its capacity to generate steam for the Mill.¹³⁴¹ Accordingly, it alleges, "GNS had to pick up the cost of the other 76 percent".¹³⁴²

635. Regarding the \$40 million forgivable loan, the Claimant maintains that when the CRA denied PHP's proposed tax structure, "GNS sweetened the deal by converting the \$40 million loan from an [REDACTED] facility into a forgivable one".¹³⁴³ Finally, it criticizes PHP's ability to use NPPH's \$1 billion in tax losses to offset gains on PWCC's assets outside of Nova Scotia, which it describes as "further evidence of a GNS awareness that its policies could have (and sometimes were intended to have) extraterritorial effects".¹³⁴⁴ The Claimant emphasizes that PWCC would not have purchased the Mill without GNS granting each of PWCC's requested benefits, to which GNS acceded.¹³⁴⁵

iv. Whether GNS should have let the Mill fail

636. The Claimant argues that GNS's financial assistance to PWCC is all the more reprehensible because the PHP Mill was a non-profitable company that should have been allowed to fail.
637. The Claimant argues that the Mill lost \$50 million in the year before NPPH sought creditor protection, with \$ [REDACTED] 2009, \$ [REDACTED] in 2012, and [REDACTED] from January to August 2011.¹³⁴⁶ In light of these numbers, the Claimant contends, "GNS's intervention in the SC paper commercial marketplace altered the competitive field and made PHP

¹³³⁸ Claimant's Reply Memorial, at para 162, referring to Claimant's Memorial, at paras 118-120.
¹³³⁹ Claimant's Memorial, at para 255, referring to PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2, 2011-2012, at 91 (C-147).
¹³⁴⁰ Claimant's Memorial, at para 255. See also Claimant's Reply Memorial, at paras 166-167.
¹³⁴¹ Claimant's Memorial, at para 255.
¹³⁴² Claimant's Memorial, at para 255.
¹³⁴³ Claimant's Memorial, at para 255; Hearing on the Merits and Damages, November 10, 2020, at 477:24-478:480:2.
¹³⁴⁴ Claimant's Memorial, at para 256, referring to Claimant's Memorial, at paras 104-105. See also Claimant's Reply Memorial, at para 183; Hearing on the Merits and Damages, November 10, 2020, at 480:3-7.
¹³⁴⁵ Claimant's Memorial, at paras 257-258.
¹³⁴⁶ Claimant's Memorial, at para 259, referring to *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Thor E. Suther, September 6, 2011, at para 6 (C-112); [REDACTED] at CAN000004_0035 (C-163).

the winner for reasons that inherently were not founded in competitive market principles”.¹³⁴⁷ It alleges that GNS acted with sectional prejudice by “subverting the competition of the SC paper market in order to put its own sectional interests ahead of all others”.¹³⁴⁸ The Claimant contends that governments can protect their own interests, but cannot intentionally inflict damage on competitors beyond their borders.¹³⁴⁹

638. Having reviewed CCAA filings in search of instances in which a government offered enough financial assistance to a company to convert it from a “dying business” to a “national champion” using criteria developed by the Claimant based on the measures it considers governmental assistance from GNS in this case,¹³⁵⁰ the Claimant reports that it found examples of the government providing some level of assistance to companies in need, but did not find any other example of what was done for PHP.¹³⁵¹ The Claimant explains that the PHP Mill was unique because GNS specifically provided what it needed, rather than offering a standard package for which all companies were eligible.¹³⁵²
639. To bolster its claim, the Claimant enlisted the assistance of EY to review publicly available information in other CCAA cases starting in mid-2009 to determine whether there were other instances of Canadian government assistance being provided to insolvent debtors who filed for CCAA protection similar to that provided to PHP.¹³⁵³ EY reviewed 174 CCAA cases from May 2009 to May 30, 2019, and found that among the cases surveyed, 117 had received no apparent form of government assistance,¹³⁵⁴ and none of the remaining cases received assistance comparable to what PHP received.¹³⁵⁵ Based on this analysis, EY concluded:

the PHP case was unique in the context of other CCAA cases in that [...] i) the stated goal of the government [...] was not only to assist in making PHP competitive, but to help the mill become the lowest cost and most competitive producer of supercalendered paper; and ii) the comprehensiveness of government assistance: interim funding with

¹³⁴⁷ Claimant’s Memorial, at para 271, referring to Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 50.

¹³⁴⁸ Claimant’s Memorial, at para 272.

¹³⁴⁹ Claimant’s Memorial, at para 272.

¹³⁵⁰ See Claimant’s Memorial, at para 276.

¹³⁵¹ Claimant’s Memorial, at para 277; Hearing on the Merits and Damages, November 14, 2020, at 1080:25-1081:7.

¹³⁵² Hearing on the Merits and Damages, November 14, 2020, at 1120:6-1121:8; Claimant’s Pre-Hearing Memorial, at para 21.

¹³⁵³ Claimant’s Reply Memorial, at para 188, referring to Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at para 3; Hearing on the Merits and Damages, November 9, 2020, at 42:6-43:17.

¹³⁵⁴ Claimant’s Reply Memorial, at para 189, referring to Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at para 47; Hearing on the Merits and Damages, November 11, 2020, at 554:11-20.

¹³⁵⁵ Claimant’s Reply Memorial, at para 189, referring to Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at paras 49-50, 87; Hearing on the Merits and Damages, November 14, 2020, at 1114:2-1116:21, 1340:19-1341:14.

limited recourse while searching for a going concern buyer; forgivable loans and grants for operations and mill improvements; and a favourable reduction in electricity rates through regulatory changes, all to assist the mill in obtaining a competitive advantage.¹³⁵⁶

640. At the 2020 Hearing, Mr. Morrison confirmed that he would reach the same conclusion about the Assistance Measures even if the hot idle and transitional elements were removed.¹³⁵⁷
641. In light of its observations, the Claimant emphasizes, “PHP was elevated not by the nature of its competitiveness in the market, but out of GNS’s own pleasure and prejudice for favoring one of its own”.¹³⁵⁸ The Claimant argues that the Respondent “crossed the line” by making a bankrupt company *the* lowest cost producer in the market through a diverse and extensive assistance package, with the knowledge that this was at Resolute’s expense.¹³⁵⁹ This conduct, it concludes, was egregious and continues to violate the minimum standard of treatment under Article 1105.¹³⁶⁰

v. Whether GNS’s conduct violated the principle of proportionality

642. Finally, the Claimant suggests that GNS’s actions violate the customary international law principle of proportionality. In the Claimant’s view, the principle of proportionality “requires that actions taken by the host state that adversely affect a foreign investment must be reasonable, necessary, and not disproportionate in response to the state’s necessity”.¹³⁶¹ It relies on several cases to support its position, such as *RREEF v. Spain*,¹³⁶² *Occidental v. Ecuador*,¹³⁶³ *PL Holdings*

¹³⁵⁶ Claimant’s Reply Memorial, at para 189, referring to Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at para 89; Hearing on the Merits and Damages, November 11, 2020, at 560:2-561:14; November 14, 2020, at 1081:9-21; Hearing on the Merits and Damages, October 18, 2021, at 140:7-18.

¹³⁵⁷ Hearing on the Merits and Damages, November 11, 2020, at 604:13-605:7.

¹³⁵⁸ Claimant’s Memorial, at para 278.

¹³⁵⁹ Hearing on the Merits and Damages, November 9, 2020, at 90:2-18; November 14, 2020, at 1118:11-1119:6, 1149:9-21.

¹³⁶⁰ Claimant’s Memorial, at para 279.

¹³⁶¹ Claimant’s Reply Memorial, at para 197.

¹³⁶² *RREEF Infrastructure (G.P.) Ltd. & RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30/, Decision on Responsibility and on the Principles of Quantum, at para 465 (**CL-240**).

¹³⁶³ *Occidental Petroleum Corp. and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para 471 (**CL-225**).

v. Poland,¹³⁶⁴ *Azurix v. Argentina*,¹³⁶⁵ *Tecmed v. Mexico*,¹³⁶⁶ *S.D. Myers*,¹³⁶⁷ and *ADM*.¹³⁶⁸

643. The Claimant recognizes that GNS's first objective was to save local jobs and the forestry industry, but it argues that the "\$124 million" or more it spent on PWCC could have been spent investing elsewhere, such as "manufacturing sectors that were not in secular decline".¹³⁶⁹ Informed by its experience with Bowater Mersey, the Claimant alleges that GNS's determination to keep the SC Paper industry alive by supporting PWCC's ambition to revive the Mill made it necessary to go "beyond what might have been reasonable and proportionate to accomplish the first objective".¹³⁷⁰ In this case, the Claimant submits that the means by which GNS chose to support jobs and the forest industry was not reasonable, suggesting that there were "numerous other ways to pursue those goals without discriminating against a small, finite number of vulnerable companies".¹³⁷¹ It adds that the disproportionality of GNS's actions is compounded by the fact that it was "fully aware" that its support to PWCC was "indispensable" yet it would harm the Claimant.¹³⁷²

vi. Whether Resolute's decision to shut down Bowater Mersey despite accepting financial assistance from GNS affects its claim under Article 1105

644. The Claimant argues that its decision to shut down Bowater Mersey despite receiving financial assistance from GNS has no bearing on whether Canada, through GNS, breached its obligation under Article 1105.¹³⁷³ In other words, the Respondent cannot use the fact that it financially supported Bowater Mersey to defend itself against a claim of unfair and inequitable treatment against Resolute.

645. The Claimant contends that it was only a matter of time before Bowater Mersey would close

¹³⁶⁴ *PL Holdings S.à.r.l. v. Republic of Poland*, Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award, June 28, 2017, at para 354 (**CL-235**).

¹³⁶⁵ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, at paras 50, 63 (**CL-233**).

¹³⁶⁶ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, May 29, 2003, at paras 121-122.

¹³⁶⁷ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, November 13, 2000, at para 255 (**RL-059**).

¹³⁶⁸ Claimant's Reply Memorial, at para 302, referring to *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at paras 153, 158-159 (**RL-092**).

¹³⁶⁹ Claimant's Reply Memorial, at paras 191-192.

¹³⁷⁰ Claimant's Reply Memorial, at para 193.

¹³⁷¹ Claimant's Reply Memorial, at para 206.

¹³⁷² Claimant's Reply Memorial, at para 207.

¹³⁷³ Claimant's Reply Memorial, at paras 318-340; Hearing on the Merits and Damages, October 18, 2021, at 141:14-18.

because it was an old and inefficient newsprint mill.¹³⁷⁴ Therefore, the Respondent cannot assert that it accorded Bowater Mersey and PHP similar treatment in like circumstances.¹³⁷⁵ It notes that Mr. Duff Montgomerie confirmed at the 2020 Hearing that the objective behind GNS support offered to Bowater Mersey was “to achieve a more orderly closure” rather than long term success.¹³⁷⁶

646. First, the Claimant points out that Bowater Mersey and the PHP Mill produced different grades of paper, with Bowater Mersey producing newsprint rather than SC Paper.¹³⁷⁷ It claims that newsprint paper was and is still suffering from “an even steeper secular decline than SC Paper”.¹³⁷⁸ According to the Claimant, Bowater Mersey suffered from additional impediments, such as “the old age of the facility, high production costs, distance from markets, and sensitivity to foreign currency fluctuations”,¹³⁷⁹ which all guaranteed that the mill would eventually close.¹³⁸⁰
647. Second, the Claimant contends that GNS was made aware of the declining state of the newsprint industry through [REDACTED]¹³⁸¹ [REDACTED]¹³⁸² It was also allegedly cognizant of Bowater Mersey’s sensitivity to overseas currency fluctuations, a characteristic of newsprint manufacturers like Resolute.¹³⁸³ According to the Claimant, GNS Premier Dexter confirmed that GNS was aware of the difficulties Resolute was facing when he stated: “[T]hey’re dealing with increased fibre costs, increased electricity costs, labour costs that are not consistent with what they’re getting in other places. All of these things completely through the supply chain are creating a problem for the mill”.¹³⁸⁴
648. Third, the Claimant pleads that GNS took months to make Resolute an offer of financial assistance

¹³⁷⁴ Claimant’s Reply Memorial, at paras 320, 326; Hearing on the Merits and Damages, November 9, 2020, at 147:11-22; November 10, 2020, at 390:24-393:13; November 14, 2020, at 1109:10-17.

¹³⁷⁵ Claimant’s Reply Memorial, at para 318; Hearing on the Merits and Damages, November 9, 2020, at 147:11-22, November 14, 2020, at 1109:10-17.

¹³⁷⁶ Hearing on the Merits and Damages, November 14, 2020, at 1201:10-1203:10; Claimant’s Pre-Hearing Memorial, at para 26.

¹³⁷⁷ Claimant’s Reply Memorial, at para 318; Hearing on the Merits and Damages, November 14, 2020, at 1124:5-20.

¹³⁷⁸ Claimant’s Reply Memorial, at para 320.

¹³⁷⁹ Claimant’s Reply Memorial, at para 320.

¹³⁸⁰ Claimant’s Reply Memorial, at para 320.

¹³⁸¹ Claimant’s Reply Memorial, at para 321, referring to [REDACTED] (R-146).

¹³⁸² Claimant’s Reply Memorial, at para 322, referring to [REDACTED] (R-147).

¹³⁸³ Claimant’s Reply Memorial, at para 323, referring to [REDACTED] (R-146).

¹³⁸⁴ Claimant’s Reply Memorial, at para 325, citing Nova Scotia Legislature House of Assembly Debates and Proceedings, Third Session, November 2, 2011, at 3009 (C-123).

once it learned that Resolute planned to permanently shut down Bowater Mersey.¹³⁸⁵ Resolute had allegedly determined that its newsprint operations were no longer financially feasible in the spring of 2011,¹³⁸⁶ and planned to announce the permanent closure of Bowater Mersey in August 2011.¹³⁸⁷ According to the Claimant, Bowater Mersey delayed announcing the closure at GNS's request, "so that GNS would have an opportunity to consider how the mill might remain open". Yet, the Claimant states that GNS took months to confirm financial support for Bowater Mersey, with GNS and Resolute concluding an agreement on December 1, 2011.¹³⁸⁸

649. To recall, the terms of the financial support for Bowater Mersey consisted of a \$25 million loan, \$23.75 million (which Resolute needed to spend at Bowater Mersey) for the purchase of 25,000 acres of land, and a \$1.5 million workforce training grant.¹³⁸⁹ The Claimant takes issue with the terms of the agreement, describing it not as an agreement that would keep Resolute in business in Nova Scotia, but that would rather "return coveted land to the province".¹³⁹⁰ Its position is informed by a statement by Mr. Duff Montgomerie, GNS's former Deputy Minister of Natural Resources, who stated that GNS made a "good deal" because the province paid approximately \$200 less per acre than it had in a similar purchase of land from Resolute in 2007,¹³⁹¹ and that the value of the 25,000 acres it bought would be higher than the \$900 per acre it paid.¹³⁹² In the Claimant's opinion, the fact that the mill was idled four times during the period starting immediately after the agreement was concluded in December 2011 until June 2012 is further evidence that the financial assistance was insufficient to keep Bowater Mersey running for long.¹³⁹³ It also specifies that even if the loan and land purchase had been sufficient to sustain Bowater Mersey's full operations, it would only have enabled the mill to run for approximately

¹³⁸⁵ Claimant's Reply Memorial, at paras 326-329.

¹³⁸⁶ Claimant's Reply Memorial, at para 326, referring to Witness Statement of Richard Garneau, December 6, 2019, at para 6.

¹³⁸⁷ Claimant's Reply Memorial, at para 326, referring to Montgomerie Witness Statement, at para 9.

¹³⁸⁸ Claimant's Reply Memorial, at paras 327-329, referring to Witness Statement of Duff Montgomerie, April 17, 2019, at para 12; [REDACTED] (R-149); Witness Statement of Richard

Garneau, December 6, 2019, at para 11.

¹³⁸⁹ Claimant's Reply Memorial at para 329, referring to [REDACTED] (R-149).

¹³⁹⁰ Claimant's Reply Memorial, at para 330; Hearing on the Merits and Damages, November 10, 2020, at 328:4-23; November 14, 2020, at 1133:9-18.

¹³⁹¹ Claimant's Reply Memorial, at para 330.

¹³⁹² Claimant's Reply Memorial, at para 330, referring to Nova Scotia House of Assembly, Committee on Public Accounts, October 3, 2012, at 7-9 (R-152).

¹³⁹³ Claimant's Reply Memorial, at para 331, referring to Bridgewater, NS, Canada, News Release, "Breaking: Shut Down at Bowater Mersey Extended", January 6, 2012 (C-327); Bridgewater, NS, Canada, News Release, "More Downtime Expected at Bowater Mersey", April 25, 2012 (C-330).

five more years, a timeframe to which Resolute did not commit.¹³⁹⁴

650. The Claimant also singles out GNS's lack of assistance in obtaining a favorable LRR for Resolute, in comparison to the help it allegedly offered PWCC in the same endeavour (including providing a witness such as Mr. Todd Williams at the NSUARB hearing).¹³⁹⁵ It emphasizes that Resolute obtained a three-year term LRR despite having requested an LRR for five years, whereas PWCC obtained a seven-year term LRR at more favorable rates.¹³⁹⁶ The Claimant also recalls GNS's "additional rate support" amounting to a "\$7 million per year benefit to PHP" between July 2013 and April 2016 as the result of the "must-run" Biomass Plant regulations, which it claims GNS amended in PHP's interest.¹³⁹⁷
651. Finally, the Claimant recalls that Resolute announced Bowater Mersey's permanent closure in June 2012, emphasizing that it had not spent GNS's \$25 million loan (which was later returned to GNS) because "[w]e have not been able to identify a project within the assigned budget which would help sustain [the mill] long term [...] especially considering today's export market conditions".¹³⁹⁸
652. In essence, the Claimant contends that GNS did not do everything in its power to make Bowater Mersey the lowest cost producer of newsprint, as it did with PHP.¹³⁹⁹

vii. Whether Resolute's decision not to bid on the Mill affects its claim under Article 1105

653. The Claimant pleads that its decision not to bid on the Mill does not diminish its claim of unfair and inequitable treatment under Article 1105.¹⁴⁰⁰ The Claimant argues that the Respondent cannot

¹³⁹⁴ Claimant's Reply Memorial, at para 332, referring to Witness Statement of Duff Montgomerie, at paras 12-13; [REDACTED]

[REDACTED] (R-149); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Redacted Bowater Mersey Responses to Information Requests from the Avon Group, NSUARB, August 2, 2011, at 12 (R-144).

¹³⁹⁵ Claimant's Reply Memorial, at para 335, referring to Claimant's Reply Memorial, at paras 30-38, 54-67; Hearing on the Merits and Damages, November 10, 2020, at 530:4-533:16; Claimant's Pre-Hearing Memorial, at para 27.

¹³⁹⁶ Claimant's Reply Memorial, at paras 336-337.

¹³⁹⁷ Claimant's Reply Memorial, at para 337; Hearing on the Merits and Damages, November 10, 2020, at 519:16-552:7.

¹³⁹⁸ Claimant's Reply Memorial, at para 333, citing CBC, News Release, "Bowater mill postpones upgrades", June 14, 2012 (C-331). The Claimant also notes that GNS's loan had been returned to the province. See Claimant's Reply Memorial, at para 333, referring to [REDACTED]

[REDACTED] (R-149).

¹³⁹⁹ Hearing on the Merits and Damages, November 10, 2020, at 417:24-419:5.

¹⁴⁰⁰ Claimant's Reply Memorial, at para 341.

use the fact that Resolute did not bid on the Mill as a defense to the Claimant's Article 1105 arguments.

654. [REDACTED]
[REDACTED]
[REDACTED] 1401 [REDACTED]
[REDACTED] 1402 [REDACTED]
[REDACTED] 1403 [REDACTED]
[REDACTED] 1404 [REDACTED]
[REDACTED]
[REDACTED] 1405 [REDACTED]
[REDACTED]
[REDACTED] 1406 [REDACTED]

655. [REDACTED]
[REDACTED]
[REDACTED] 1407 [REDACTED]
[REDACTED]
[REDACTED] 08 [REDACTED]
[REDACTED] 1409 [REDACTED]
[REDACTED]
[REDACTED] 1410 [REDACTED]
[REDACTED]
[REDACTED] 1411 [REDACTED]

1401 Claimant's Reply Memorial, at para 345.
1402 Claimant's Reply Memorial, at para 345.
1403 Claimant's Reply Memorial, at para 345. [REDACTED] See Claimant's Memorial, at para 28, citing [REDACTED] June 2, 2011, at RFP0004950 (C-108).
1404 Claimant's Reply Memorial, at para 345, referring to [REDACTED] June 2011, at RFP0005610 (C-107).
1405 Claimant's Reply Memorial, at para 346, referring to [REDACTED], July 26, 2011 (C-315).
1406 Claimant's Reply Memorial, at para 346, referring to [REDACTED] August 11, 2011, at RFP0004988 (C-109).
1407 Claimant's Reply Memorial, at para 347, citing Claimant's Memorial, at para 29; [REDACTED] August 11, 2011, at RFP0004989 (C-109).
1408 Claimant's Reply Memorial, at para 348.
1409 Claimant's Reply Memorial, at para 348, referring to [REDACTED] August 11, 2011, at RFP0004982 (C-109).
1410 Claimant's Reply Memorial, at para 348.
1411 Claimant's Reply Memorial, at para 348, citing Witness Statement of Richard Garneau, December 6, 2019, at para 14.

656. Once the CCAA proceedings for the sale of the Mill were underway in September 2011, the Claimant reports that Sanabe [REDACTED] on the Mill's profitability and stated that the EBITDA was a negative \$12.0 million for the first six months of 2011.¹⁴¹² The Claimant further details that [REDACTED]
[REDACTED]¹⁴¹³ as it lost \$50 million in the year prior its CCAA filing.¹⁴¹⁴

657. The Claimant recalls that despite Sanabe and the Monitor contacting 110 potentially interested parties¹⁴¹⁵ and publishing notices in local newspapers,¹⁴¹⁶ only 27 potential bidders decided to partake in the process.¹⁴¹⁷ Moreover, it maintains that [REDACTED]
[REDACTED]
[REDACTED]¹⁴¹⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴²¹ It states that [REDACTED] by its own experience with Bowater Mersey.¹⁴²²

658. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴²⁴ [REDACTED]

¹⁴¹² Claimant's Reply Memorial, at para 350, referring to Sanabe Confidential Information Memorandum for Sale of Port Hawkesbury Mill, September 2011, at 39 (**R-361**).

¹⁴¹³ Claimant's Reply Memorial, at para 351.

¹⁴¹⁴ Claimant's Reply Memorial, at para 351, referring to Claimant's Memorial, at para 26.

¹⁴¹⁵ Claimant's Reply Memorial, at para 352, referring to the Respondent's Counter-Memorial, at para 75.

¹⁴¹⁶ Claimant's Reply Memorial, at para 352, referring to *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Second Report of the Monitor, October 3, 2011, at para 14 (**C-120**).

¹⁴¹⁷ Claimant's Reply Memorial, at para 352, referring to the Respondent's Counter-Memorial, at para 76.

¹⁴¹⁸ Claimant's Reply Memorial, at para 353, referring to the Respondent's Counter-Memorial, at para 87, citing Sanabe Confidential Information Memorandum for Sale of Port Hawkesbury Mill, September 2011, at 47, 49 (**R-361**).

¹⁴¹⁹ Claimant's Reply Memorial, at para 356, referring to Claimant's Reply Memorial, at para 353.

¹⁴²⁰ Claimant's Reply Memorial, at paras 353, 356.

¹⁴²¹ Claimant's Reply Memorial, at para 357, referring to note 204, at RFP0011524 (**C-119**).

¹⁴²² Claimant's Reply Memorial, at para 357, referring to Claimant's Reply Memorial, at paras 320-325.

¹⁴²³ Claimant's Reply Memorial, at para 355, referring to [REDACTED]
[REDACTED] September 2011, at RFP0009571 (**R-359**).

¹⁴²⁴ Claimant's Reply Memorial, at para 358.

[REDACTED] when it exaggerates the importance of a “cherry-picked statement”¹⁴²⁵ ([REDACTED]
[REDACTED]²⁶).

659. The Claimant acknowledges that [REDACTED]
[REDACTED]¹⁴²⁷ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴²⁸ Ultimately, the Claimant contends, [REDACTED]
[REDACTED]¹⁴²⁹

660. In addition to the argument on due diligence, the Claimant submits that it never expected GNS to provide sufficient financial assistance to the successful bidder to make it “the lowest cost and most competitive producer of super calendar [sic] paper”.¹⁴³⁰ It refutes the Respondent’s proposition that Resolute’s failure to anticipate the measures¹⁴³¹ GNS would offer PWCC was a business decision.¹⁴³² The Claimant posits that nothing or no one indicated that GNS would provide “anything close”¹⁴³³ to the Assistance Measures PWCC received.¹⁴³⁴ In the Claimant’s opinion, its argument is supported by the fact that only one bidder ultimately manifested interest in purchasing the Mill.¹⁴³⁵

661. Moreover, the Claimant suggests that its own experience with GNS with respect to Bowater Mersey informed its expectations of the scale of the assistance GNS would have provided Resolute had it decided to bid on the Mill.¹⁴³⁶ For example, the Claimant submits [REDACTED]
[REDACTED]

¹⁴²⁵ Claimant’s Reply Memorial, at para 358.

¹⁴²⁶ Claimant’s Reply Memorial, at para 358, referring to the Respondent’s Counter-Memorial, at para 299, citing [REDACTED] September 26, 2011, at RFP0011526 (C-119).

¹⁴²⁷ Claimant’s Reply Memorial, at para 358, referring to [REDACTED]
[REDACTED] September 2011, at RFP0009571 (R-359).

¹⁴²⁸ Claimant’s Reply Memorial, at para 358, citing [REDACTED]
[REDACTED] at RFP0011520 (C-119).

¹⁴²⁹ Claimant’s Reply Memorial, at para 358, citing Witness Statement of Richard Garneau, December 6, 2019, at paras 16-17.

¹⁴³⁰ Claimant’s Reply Memorial, at para 359, referring to Nova Scotia Press Release, “Province Invests in Jobs, Training and Renewing the Forestry Sector”, August 20, 2012 (C-183).

¹⁴³¹ Claimant’s Reply Memorial, at para 359.

¹⁴³² Claimant’s Reply Memorial, at para 359, citing the Respondent’s Counter-Memorial, at para 300.

¹⁴³³ Claimant’s Reply Memorial, at para 359.

¹⁴³⁴ Claimant’s Reply Memorial, at para 359.

¹⁴³⁵ Claimant’s Reply Memorial, at para 359.

¹⁴³⁶ Claimant’s Reply Memorial, at para 359.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴³⁸ In contrast, as the Claimant points out, “once Bowater Mersey was no longer in play, however, GNS acted to ensure PWCC would receive a much more favorable electricity rate, exclusively for PHP”.¹⁴³⁹ In sum, the Claimant contends that Resolute had no reason to expect that GNS would provide adequate assistance to Resolute if it were to purchase the Mill.¹⁴⁴⁰ [REDACTED]

[REDACTED] “Resolute, [REDACTED]

[REDACTED]

[REDACTED] a choice it was not willing to make”.¹⁴⁴¹

662. The Claimant suggests that the asymmetry between the assistance provided to Bowater Mersey and the assistance PHP accepted contradicts Canada’s argument that the Claimant accepted GNS assistance and therefore received fair and equitable treatment when compared to PHP. The Claimant places particular emphasis on GNS’s alleged lack of assistance during Bowater Mersey’s proceedings before the NSUARB for the approval of its electricity rate: “it did not make a statement in support of an electricity rate, hire a consultant, present an expert witness, introduce evidence, answer information requests, make representations to the NSUARB regarding Government action, or enact legislation to ensure passage of an LRR”.¹⁴⁴² The Claimant reports that the NSUARB only approved a three-year term, in contrast to PHP’s approved seven-year term,¹⁴⁴³ and that the rates were approximately \$2-5/MWh higher than the rates it had initially sought.¹⁴⁴⁴ These rates were also higher than what PHP obtained, and did not include additional GNS support, like the “\$7 million per year benefit PHP received from July 2013 – April 2016 through the ‘must-run’ Biomass Plant regulations that GNS instituted for PHP’s steam requirements”.¹⁴⁴⁵ According to the Claimant, GNS claimed it passed these regulations to ensure

¹⁴³⁷ Claimant’s Reply Memorial, at paras 360-361.

¹⁴³⁸ Claimant’s Reply Memorial, at para 362, referring to *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Exhibit List, NSUARB, November 4, 2011 (C-320).

¹⁴³⁹ Claimant’s Reply Memorial, at para 362, referring to Claimant’s Reply Memorial, at paras 54-57.

¹⁴⁴⁰ Claimant’s Reply Memorial, at para 364.

¹⁴⁴¹ Claimant’s Reply Memorial, at para 365, referring to Claimant’s Reply Memorial, fn. 204, at RFP0011524 (C-119).

¹⁴⁴² Claimant’s Reply Memorial, at para 335, referring to *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Exhibit List, NSUARB, November 4, 2011 (C-320).

¹⁴⁴³ Claimant’s Reply Memorial, referring to Claimant’s Memorial, at paras 118-120.

¹⁴⁴⁴ Claimant’s Reply Memorial, at para 336. See also *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Application, NSUARB, June 22, 2011, at 2 (C-314).

¹⁴⁴⁵ Claimant’s Reply Memorial, at para 337, referring to Claimant’s Memorial, at paras 121-126.

PHP “receive[d] the full benefit of the proposed arrangement it reached with” NSPI.¹⁴⁴⁶

663. Beyond the LRR, the Claimant reiterates that the assistance GNS provided to Resolute was not intended – neither by GNS nor by Resolute – to keep Bowater Mersey open very long.¹⁴⁴⁷ It highlights that “[d]espite its attempt to reduce costs at the mill, Bowater Mersey was not *the* low cost – nor even *a* low cost – *Resolute* newsprint mill”.¹⁴⁴⁸ It maintains that GNS’s offer of assistance was not sufficient to make Bowater Mersey competitive, nor to transform it into a “national champion”.¹⁴⁴⁹ Bowater Mersey’s per ton costs remained higher than production costs at Resolute’s other mills despite GNS’s loan and land purchase.¹⁴⁵⁰
664. Lastly, the Claimant states that the agreement between GNS and Resolute for the sale of Bowater Mersey benefited GNS.¹⁴⁵¹ It sold Bowater Mersey’s shares to the province for \$1.00, recalling the terms of the sale as follows:

555,000 acres of land that an independent evaluator appraised at \$117.7 million;

An onsite biomass generation station known as Brooklyn Power Corp. that GNS resold to NSPI’s parent (Emera) for \$25 million;

[REDACTED]

The mill itself, which was valued at \$5 million;

Cash for equipment, inventory, and accounts receivable owned by the mill.¹⁴⁵²

665. For its part, GNS took on: (i) pension and severance liabilities and (ii) an intracompany loan Resolute had made to Bowater Mersey.¹⁴⁵³ Overall, the Claimant calculates that GNS received assets worth approximately \$150.4 million and assumed liabilities worth \$136.4 million, which resulted in a net gain of approximately \$14 million to the province.¹⁴⁵⁴

¹⁴⁴⁶ Claimant’s Reply Memorial, at para 337, citing *In re An Application by Pacific West Commercial Corporation and Nova Scotia Power Inc.*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing, NSUARB, July 20, 2012 at 1 (C-179).

¹⁴⁴⁷ Claimant’s Reply Memorial, at para 339.

¹⁴⁴⁸ Claimant’s Reply Memorial, at para 338 [Claimant’s emphasis].

¹⁴⁴⁹ Claimant’s Reply Memorial, at para 339.

¹⁴⁵⁰ Claimant’s Reply Memorial, at para 338, referring to Resolute Forest Products Inc. Second Quarter 2012 Earning Call, August 1, 2012, at 11 (C-335).

¹⁴⁵¹ Claimant’s Reply Memorial, at para 340.

¹⁴⁵² Claimant’s Reply Memorial, at para 340, referring to Nova Scotia Premier’s Office, News Release, “Province Takes Crucial Step to Build Forestry of Future”, December 10, 2012 (R-155).

¹⁴⁵³ Claimant’s Reply Memorial, at para 340.

¹⁴⁵⁴ Claimant’s Reply Memorial, at para 340. The Claimant specifies that “GNS’s original analysis stated that it netted \$14 million. However, Resolute repaid GNS nearly [REDACTED] an audit of the intercompany loan between Resolute and Bowater Mersey”. See [REDACTED] November 12, 2013 (C-356).

3. The Respondent's Arguments

(a) The Applicable Standard under Article 1105

666. The Respondent agrees with the Claimant's reliance on the FTC's Note of Interpretation, which, to recall, provides that Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the applicable standard.¹⁴⁵⁵ NAFTA Article 1131(2) and NAFTA tribunals alike acknowledge the binding nature of the FTC Note.¹⁴⁵⁶
667. Furthermore, the Respondent highlights that the FTC Note specifies that Article 1105(1) does not create an open-ended obligation but rather "a minimum standard of treatment for investors as determined by the rules of customary international law",¹⁴⁵⁷ which the Claimant does not dispute.¹⁴⁵⁸
668. To establish a rule of customary international law, the Respondent underlines that State practice and *opinio juris* (an understanding that such practice is required by law) are both required.¹⁴⁵⁹ Lastly, it adds that the party who bears the burden of proving a norm of customary international

¹⁴⁵⁵ Respondent's Counter-Memorial, at para 281, citing NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter Eleven Provisions", July 31, 2001 (**RL-001**); Respondent's Pre-Hearing Memorial, at para 24.

¹⁴⁵⁶ Respondent's Counter-Memorial, at para 282, referring to *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 599 (**CL-025**); *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at para 192 (**CL-131**); *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005, Part IV – Chapter C, at 9-10 (**RL-054**); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at paras 100-101 (**RL-092**); *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/98/3, Award on Merits, June 26, 2003 at para 126 (**RL-057**); *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, at paras 90-97 (**CL-016**); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at paras 135, 267-268 (**RL-050**); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para 176 (**CL-130**); *Eli Lilly and Company v. Government of Canada*, UNCITRAL, Final Award, March 16, 2017, at paras 105-106 (**RL-169**); *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, Award, March 24, 2016, at paras 478-480 (**RL-052**).

¹⁴⁵⁷ Respondent's Counter-Memorial, para 283, referring to *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at para 120 (**RL-092**); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 268 (**RL-050**); *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, August 2, 2010, at para 121 (**CL-026**); *Mobil Investments Canada Inc. and Murphy Oil Company v. Government of Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, May 22, 2012, at para 153 (**RL-170**).

¹⁴⁵⁸ Respondent's Counter-Memorial, at para 284.

¹⁴⁵⁹ Respondent's Counter-Memorial, at para 283, referring to *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, June 27, 1986, ICJ Reports 1986, at para 207 (**RL-114**); Hearing on the Merits and Damages, November 9, 2020, at 212:24-213:12.

law is the one alleging its existence.¹⁴⁶⁰ The Respondent considers inapposite the Claimant's reliance on the VCLT for its broad interpretation of Article 1105, and points to the latter's lack of reference to State practice and *opinio juris* for its proposed standard.¹⁴⁶¹ It argues that "[p]aying lip service to the legal rule in Article 1105(1) is insufficient: Resolute must establish that the measures of the GNS violate the norms of customary international law that have been created by a consistent practice of States".¹⁴⁶²

669. Contrary to the Claimant's position,¹⁴⁶³ the Respondent advances that the threshold for a violation of the minimum standard of treatment under customary international law requires "an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards".¹⁴⁶⁴ The Respondent references the tribunal in *Cargill* which stated that "[i]f the conduct of the government toward the investment amounts to gross misconduct, manifest injustice, or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, [...] then such conduct will be a violation of the customary obligation of fair and equitable treatment".¹⁴⁶⁵ The Respondent suggests that the Claimant has accepted this

¹⁴⁶⁰ Respondent's Counter-Memorial, at para 283, referring to *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, August 27, 1952, ICJ Reports 1952, 176, at 200, citing *Colombian-Peruvian Asylum Case*, Judgment, November 20, 1950, ICJ Reports 1950, 266, at 276 (**RL-171**); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para 176,185 (**CL-130**); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, November 22, 2002, at para 84 (**RL-172**).

¹⁴⁶¹ Respondent's Counter-Memorial, at para 284, referring to Claimant's Memorial, at paras 235-236. The Respondent adds that "[i]nterpreting 'fair and equitable treatment' in Article 1105(1) as if it were an autonomous standard of treatment is not appropriate in the NAFTA context where the FTC firmly established that customary international law is the standard to be applied. This is now beyond debate in light of the position of the NAFTA Parties and NAFTA tribunal decisions. See *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 608 (**CL-025**); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 276 (**RL-050**) [...]". See Respondent's Counter-Memorial, at fn. 583.

¹⁴⁶² Respondent's Counter-Memorial, at para 284.

¹⁴⁶³ Claimant's Memorial, at para 239.

¹⁴⁶⁴ Respondent's Counter-Memorial, at para 285, citing *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 627 (**CL-025**); *Eli Lilly and Company v. Government of Canada*, UNCITRAL, Final Award, March 16, 2017, at para 222 (**RL-169**); *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, UNCITRAL, Interim Award, October 25, 2016, at para 282 (**RL-028**); *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, at para 98 (**CL-016**); *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, May 22, 2012, at para 152 (**RL-170**); *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at paras 194, 197 (**CL-131**). See also Respondent's Rejoinder Memorial, at paras 122, 124; Hearing on the Merits and Damages, November 9, 2020, at 212:4-15; Hearing on the Merits and Damages, October 18, 2021, at 207:11-21.

¹⁴⁶⁵ Respondent's Counter-Memorial, at para 286, citing *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 286 (**RL-050**).

standard.¹⁴⁶⁶ The Respondent adds that the Claimant's own reliance on *Cargill*¹⁴⁶⁷ is mistaken because the impugned measures in that case were expressly intended by Mexico to damage the claimants' investments "to the greatest extent possible",¹⁴⁶⁸ whereas it claims there is no evidence in this case to suggest that GNS expressly intended to impair Resolute's investment.¹⁴⁶⁹ The Respondent argues that the Claimant conceded at the jurisdictional hearing that it was "not saying necessarily that Nova Scotia had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only [...] We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA".¹⁴⁷⁰ As a result, it argues that this "admission" dismisses any contention that Canada breached the customary international law minimum standard of treatment.¹⁴⁷¹

670. The Respondent also disagrees with the relevance of *Merrill & Ring* and *Bilcon* cited by the Claimant,¹⁴⁷² suggesting that in *Merrill & Ring*, the tribunal was split on how to define the minimum standard of treatment in customary international law, and ultimately dismissed the claimant's Article 1105 claims,¹⁴⁷³ while the *Bilcon* tribunal approved the standard of treatment in *Waste Management II*,¹⁴⁷⁴ which stood for the standard of egregious conduct to establish a claim under Article 1105.¹⁴⁷⁵
671. The Respondent notes that Resolute fails to explain the legal significance in international law of the terms it uses to describe GNS's conduct¹⁴⁷⁶ and their relevance to the facts of the case.¹⁴⁷⁷ For example, it contends that the term "arbitrary"¹⁴⁷⁸ is inapplicable to GNS's actions because "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. [...] It is wilful disregard of due process of law, an act which shocks, or at least

¹⁴⁶⁶ Respondent's Counter-Memorial, at para 286, referring to Claimant's Memorial, at para 241.

¹⁴⁶⁷ Respondent's Counter-Memorial, at para 295, referring to Claimant's Memorial, at para 242.

¹⁴⁶⁸ Respondent's Counter-Memorial, at para 295, referring to *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 298 (**RL-050**).

¹⁴⁶⁹ Respondent's Counter-Memorial, at para 295.

¹⁴⁷⁰ Respondent's Counter-Memorial, at para 295, citing Hearing on Jurisdiction, August 15, 2017, at 350-351.

¹⁴⁷¹ Respondent's Counter-Memorial, at para 295.

¹⁴⁷² Claimant's Memorial, at para 238.

¹⁴⁷³ Respondent's Rejoinder Memorial, at para 126, referring to *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, March 31, 2010, at paras 219-246, 256-266 (**RL-060**).

¹⁴⁷⁴ Respondent's Rejoinder Memorial, at para 126, referring to *Bilcon v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, at paras 442-443 (**RL-025**); *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, March 10, 2015, at para 32 (**RL-212**).

¹⁴⁷⁵ Respondent's Rejoinder Memorial, at para 126, referring to *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, at para 98 (**CL-016**).

¹⁴⁷⁶ Respondent's Counter-Memorial, at para 293, referring to Claimant's Memorial, at paras 249, 263, 265, 270, 272.

¹⁴⁷⁷ Respondent's Counter-Memorial, at para 294.

¹⁴⁷⁸ Respondent's Counter-Memorial, at para 294, referring to Claimant's Memorial, at para 241.

surprises, a sense of judicial propriety”.¹⁴⁷⁹ The Respondent argues that the Claimant makes no effort to demonstrate that GNS’s actions were arbitrary.¹⁴⁸⁰ According to the Respondent, the term “sectional prejudice”¹⁴⁸¹ relates to discriminatory behavior against a foreign litigant in the national courts of the host State,¹⁴⁸² which is not an issue here. The Respondent notes that two Canadian SC Paper producers were also impacted by the Mill’s reopening, which shows that Resolute’s foreign nationality was not a factor in GNS’s decision making.¹⁴⁸³ Finally, in response to the Claimant’s use of the term “parochial self-interest”¹⁴⁸⁴ when describing GNS’s behaviour, the Respondent reports that the Claimant has not cited any authority to support its underlying claim that the minimum standard of treatment of aliens in customary international law “requires a sub-national government to put the interests of foreign investors located in a different province or state above those of the investors located on its territory”.¹⁴⁸⁵

672. Furthermore, the Respondent advances that under customary international law, a State is not precluded from favoring its own investors over foreign investors.¹⁴⁸⁶ According to the Respondent, this position was endorsed by the *Grand River*,¹⁴⁸⁷ *Methanex*,¹⁴⁸⁸ and *Mercer*¹⁴⁸⁹ tribunals.

673. It also suggests that all three NAFTA parties agree that Article 1105(1) does not prohibit less favorable treatment between domestic and foreign investors.¹⁴⁹⁰ The Respondent makes the case for this “favoritism” by contrasting Article 1102, which prohibits nationality-based

¹⁴⁷⁹ Respondent’s Counter-Memorial, at para 294, citing *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, July 20, 1989, ICJ Reports 1989, 15, at para 128 (**RL-178**).

¹⁴⁸⁰ Respondent’s Rejoinder Memorial, at para 127.

¹⁴⁸¹ Respondent’s Counter-Memorial, at para 294, referring to Claimant’s Memorial, at para 249.

¹⁴⁸² Respondent’s Counter-Memorial, at para 294, referring to *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/98/3, Award on Merits, June 26, 2003, at para 123 (**RL-057**).

¹⁴⁸³ Respondent’s Rejoinder Memorial, at para 127.

¹⁴⁸⁴ Respondent’s Rejoinder Memorial, at para 151, citing Claimant’s Reply Memorial, at para 123.

¹⁴⁸⁵ Respondent’s Rejoinder Memorial, at paras 151-152.

¹⁴⁸⁶ Respondent’s Counter-Memorial, at para 288; Hearing on the Merits and Damages, November 9, 2020, at 214:12-16; Hearing on the Merits and Damages, October 18, 2021, at 208:21-25.

¹⁴⁸⁷ Respondent’s Counter-Memorial, at para 288, citing *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, at para 209 (**RL-019**).

¹⁴⁸⁸ Respondent’s Counter-Memorial, at para 288, citing *Methanex Corp. v. United States of America*, UNCITRAL, Final Award, August 3, 2005, Part IV – Chapter, at 7, para 14 (**RL-054**). See also *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at fn. 1087 (**CL-025**).

¹⁴⁸⁹ Respondent’s Counter-Memorial, at para 288, citing *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.60 (**RL-122**).

¹⁴⁹⁰ Respondent’s Counter-Memorial, at para 288, referring to *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, May 8, 2015, at paras 21-23 (**RL-040**); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Submission of Mexico, May 8, 2015, at para 20 (**RL-162**); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3; Government of Canada Reply to 1128 Submissions, June 12, 2015, at paras 43-46 (**RL-176**); Respondent’s Pre-Hearing Memorial, at para 27.

discrimination, to Article 1108(7)(a) and (b), which allows favoritism of domestic investors with respect to procurement and subsidies or grants,¹⁴⁹¹ *even when they are in like circumstances*.¹⁴⁹²

674. The Respondent clarifies that it does not argue that Article 1108(7) is a blanket exclusion from the minimum standard of treatment.¹⁴⁹³ The Respondent refers to the findings of the *Mercer* tribunal, which stated that a claimant cannot avoid Article 1108(7) exceptions “simply by advancing the same discrimination claims as a breach of the minimum standard of treatment in NAFTA Article 1105(1)”.¹⁴⁹⁴ In the Respondent’s view, the *Mercer* tribunal “confirmed that there is no basis to complain under Article 1105(1) that nationals were treated more favorably than a foreign investor when it comes to a procurement exercise”.¹⁴⁹⁵ Against this backdrop, the Respondent argues that the Claimant has failed to explain how subsidies or grants provided to a domestic investor, but not to a foreign investor, are permitted under Article 1102, but prohibited under customary international law and Article 1105(1).¹⁴⁹⁶
675. The Respondent further submits that the Claimant has not met its burden of demonstrating substantial State practice and *opinio juris* with respect to the crystallization of the customary international law rules that domestic and foreign investors are to be treated equally regarding procurement, subsidies and grants, nor has it provided any international legal precedent or other subsidiary source of international law that supports its position.¹⁴⁹⁷ It argues that this failure is fatal to the Claimant’s Article 1105 claim.¹⁴⁹⁸
676. The Respondent’s position is summarized as follows:

[I]n the absence of a rule of customary international law that requires equal treatment between foreign and domestic investors for procurement, subsidies and grants, the starting point for this Tribunal must be that it was perfectly consistent with Article 1105(1) for the GNS to provide subsidies and grants exclusively to PWCC for the Port Hawkesbury mill

¹⁴⁹¹ Respondent’s Counter-Memorial, at para 298. The Respondent reproduces Article 1108(7) in its entirety, which states that “Articles 1102, 1103 and 1107 do not apply to (a) procurement by a Party or a state enterprise; or (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance”.

¹⁴⁹² Respondent’s Rejoinder Memorial, at para 128, referring NAFTA Articles 1102 and 1108(7)(b). See also Agreement between Canada, the United States of America, the United Mexican States, signed November 30, 2018, Article 14.12(5) [Respondent’s emphasis] (**RL-211**).

¹⁴⁹³ Respondent’s Rejoinder Memorial, at para 128.

¹⁴⁹⁴ Respondent’s Counter-Memorial, at para 289, citing *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 7.61 (**RL-122**).

¹⁴⁹⁵ Respondent’s Counter-Memorial, at para 289, referring to *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018., at para 7.61 (**RL-122**).

¹⁴⁹⁶ Respondent’s Counter-Memorial, at para 289.

¹⁴⁹⁷ Respondent’s Counter-Memorial, at para 290, referring to Article 38(1)(d) of the *Statute of the International Court of Justice* (**RL-177**).

¹⁴⁹⁸ Respondent’s Rejoinder Memorial, at para 120, referring to *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 273 (**RL-050**).

and not to give anything to Resolute for its three SC paper mills in Québec.¹⁴⁹⁹

677. The Respondent emphasizes that Resolute’s only recourse to support its Article 1105(1) claim is to demonstrate that GNS’s financial assistance measures were “sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards”.¹⁵⁰⁰ As is shown below, the Respondent argues that the Claimant does not meet this burden.

(b) Whether Canada Breached its Obligation under Article 1105

678. In the Respondent’s opinion, Canada did not violate Article 1105 because GNS’s conduct did not breach the minimum standard of treatment under customary international law.¹⁵⁰¹

679. In the Respondent’s view, the crux of the Claimant’s complaint is the nature of the financial assistance package offered to PHP and its principle that failing companies should be left to fail.¹⁵⁰² These arguments, in the Respondent’s view, have no basis in international law.¹⁵⁰³ The Respondent highlights that [REDACTED]

[REDACTED]¹⁵⁰⁴

i. Whether GNS’s conduct merits deference

680. The Respondent submits that under international law, States’ policy decisions within their own territories are owed deference.¹⁵⁰⁵ According to the Respondent, the *Mercer* tribunal accepted that “as a general legal principle, in the absence of bad faith, a measure of deference is owed to a

¹⁴⁹⁹ Respondent’s Counter-Memorial, at para 292.

¹⁵⁰⁰ Respondent’s Counter-Memorial, at para 292.

¹⁵⁰¹ Respondent’s Counter-Memorial, at para 293.

¹⁵⁰² Respondent’s Counter-Memorial, at para 296.

¹⁵⁰³ Respondent’s Counter-Memorial, at para 296.

¹⁵⁰⁴ Hearing on the Merits and Damages, November 14, 2020, at 1288:19-21; Hearing on the Merits and Damages, October 18, 2021, at 186:19-187:8.

¹⁵⁰⁵ Respondent’s Counter-Memorial, at para 287, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, November 13, 2000, at paras 261-263 (**RL-059**); *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 762 (**CL-025**); *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, August 2, 2010, at para 123 (**CL-026**); *Gemplus, S.A., et al. v. Mexico*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010, at paras 6-26 (**RL-173**); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, November 25, 2015, at para 181 (**RL-113**); Hearing on the Merits and Damages, November 9, 2020, at 195:16-24; Respondent’s Pre-Hearing Memorial, at paras 25-26.

State’s regulatory policies”.¹⁵⁰⁶ In this case, the Respondent urges the Tribunal to consider the factors leading GNS to offer PWCC assistance, such as the fact that GNS also provided Resolute assistance for Bowater Mersey to become “a low-cost mill”, that Resolute was invited to bid on the Mill, that PWCC presented innovative and cost-friendly solutions for the Mill (and that its Canadian nationality was a “coincidence”), and the possible “devastating” impacts of the Mill’s closure on the provincial economy.¹⁵⁰⁷ Borrowing words from the *Electrabel* tribunal, the Respondent suggests that “the host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance”.¹⁵⁰⁸ Neither may the Claimant substitute the Tribunal’s objective assessment of the reasonableness of GNS’s conduct for its own “subjective beliefs as to what would have been the ‘better’ decision when faced with the choice of letting Port Hawkesbury close or giving it a chance to re-enter the market”.¹⁵⁰⁹

681. Contrary to the Claimant’s argument that GNS’s actions went beyond the needs of policy goals, the Respondent contends that GNS acted on the basis of rational and legitimate policy goals.¹⁵¹⁰ The Respondent recalls that NPPH, not GNS, initiated the CCAA proceedings to “preserve the greatest benefit and value for its creditors, employees, and other stakeholders and for the local community as a whole”.¹⁵¹¹ It reiterates that GNS did not guarantee that it would provide financial assistance to the successful bidder,¹⁵¹² but all potential purchasers knew that GNS was willing to be constructive in providing support to the Mill.¹⁵¹³ When GNS decided to offer support to PWCC for the Mill, it sought to prevent a serious impact on the Nova Scotia economy:¹⁵¹⁴ 1000 people were directly employed through the Mill’s operation at the time it went into creditor protection,¹⁵¹⁵

¹⁵⁰⁶ Respondent’s Counter-Memorial, at para 287, citing *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at paras 7.42, 7.33 (**RL-122**); *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, at para 418 (**RL-174**); Hearing on the Merits and Damages, November 9, 2020, at 216:18-217:3.

¹⁵⁰⁷ Respondent’s Rejoinder Memorial, at para 129.

¹⁵⁰⁸ Respondent’s Rejoinder Memorial, at para 130, citing *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, November 25, 2015, at para 165 (**CL-230**).

¹⁵⁰⁹ Respondent’s Rejoinder Memorial, at para 132.

¹⁵¹⁰ Respondent’s Counter-Memorial, at para 304; Respondent’s Rejoinder Memorial, at para 153; Hearing on the Merits and Damages, October 18, 2021, at 210:17-20.

¹⁵¹¹ Respondent’s Counter-Memorial, at para 305, citing *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Thor E. Suther, September 6, 2011, at paras 8, 89-92, 104 (**C-112**).

¹⁵¹² Respondent’s Counter-Memorial, at para 305, referring to Witness Statement of Duff Montgomerie, April 17, 2019, at paras 8, 22.

¹⁵¹³ Respondent’s Counter-Memorial, at para 305, referring to [REDACTED] June 2011, at 50 (**C-107**); NewPage Port Hawkesbury Mill Confidential Information Memorandum, September 2011, at 50 (**R-361**).

¹⁵¹⁴ Respondent’s Rejoinder Memorial, at paras 153-154.

¹⁵¹⁵ Respondent’s Counter-Memorial, at para 305, referring to *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Affidavit of Thor E. Suther, September 6, 2011, at para 45 (**C-112**).

and a total shutdown of the Mill would have impacted the province's GDP immediately.¹⁵¹⁶ The Respondent alleges that by [REDACTED] the Mill's closure could have reduced Nova Scotia's nominal GDP by [REDACTED].¹⁵¹⁷ It also states that the Mill's shutdown would have had "negative spin-off effects for the entire forest sector".¹⁵¹⁸

682. The Respondent also notes that the liquidation of NPPH would have jeopardized GNS's environmental objectives, if it had resulted in the sale of the land and the transfer of its pre-existing Crown land license to a third party with no interest in conservation and responsible forest practices.¹⁵¹⁹ According to the Respondent, a purchase of land from NPPH ensured that GNS would be able to "meet its conservation targets, implement its Natural Resources Strategy and engage with the Mi'kmaq First Nations on land issues".¹⁵²⁰ It also highlights that the FULA served the province's Natural Resources Strategy and renewable energy targets,¹⁵²¹ and that the Outreach Agreement enabled PHP to undertake environmental work and research on behalf of GNS.¹⁵²²

683. Next, the Respondent submits that GNS sought to support the continued operation of the Mill's SC Paper machine, as it was "a unique asset in North America given its efficiency and the fact that it was relatively new".¹⁵²³ The Respondent notes that GNS was justified [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁵²⁴

684. Additionally, the Respondent mentions that without the Mill, NSPI's ratepayers would have been

¹⁵¹⁶ Respondent's Counter-Memorial, at para 306. See also Respondent's Rejoinder Memorial, at para 153.

¹⁵¹⁷ Respondent's Counter-Memorial, at para 306, referring to [REDACTED] (R-160). See also [REDACTED] (R-157); [REDACTED] (R-148); [REDACTED] (C-158).

¹⁵¹⁸ Respondent's Counter-Memorial, at para 306, referring to Witness Statement of Julie Towers, April 17, 2019, at para 18.

¹⁵¹⁹ Respondent's Counter-Memorial, at para 307.

¹⁵²⁰ Respondent's Counter-Memorial, at para 307, referring to Witness Statement of Julie Towers, April 17, 2019, at paras 22-30; [REDACTED] (R-216); [REDACTED] (C-209).

¹⁵²¹ Respondent's Counter-Memorial, at para 307, referring to Witness Statement of Julie Towers, April 17, 2019, at paras 31-34.

¹⁵²² Respondent's Counter-Memorial, at para 307, referring to Witness Statement of Julie Towers, April 17, 2019, at paras 38-39.

¹⁵²³ Respondent's Counter-Memorial, at para 308, referring to Expert Report of Pöyry, April 16, 2019, at 57.

¹⁵²⁴ Respondent's Counter-Memorial, at para 308, referring to [REDACTED] (C-163); Expert Witness Report of Peter Steger, April 17, 2019, at 109.

left “without the benefits of NSPI’s largest customer contributing to its fixed costs”.¹⁵²⁵ The Respondent notes that Resolute argued the same during its own proceedings before the NSUARB in 2011,¹⁵²⁶ stating that “the public interest is far better served if [NPPH and Bowater Mersey] can remain in operation”.¹⁵²⁷ The Respondent specifies that although GNS could not dictate the outcome of negotiations between NSPI and PWCC nor instruct that the NSUARB approve the proposed LRR, “the fact that their deal did meet the legal requirements to qualify for a LRT was a net positive outcome”.¹⁵²⁸

685. Lastly, the Respondent highlights that the Court also affirmed that PWCC’s plan for the Mill was in the public interest, because it was “fair and reasonable” and “greater benefit will be derived from the continued operation of [the] business that would result from the forced liquidation of the Company’s assets”.¹⁵²⁹

ii. Whether GNS knew that the Assistance Measures could cause Resolute harm

686. The Respondent takes issue with the claim that GNS knew of the likely harm caused to Resolute by PHP’s re-entry on the market.¹⁵³⁰

687. First, the Respondent sets out the context in which [REDACTED]

¹⁵²⁵ Respondent’s Counter-Memorial, at para 309.

¹⁵²⁶ Respondent’s Rejoinder Memorial, at para 155, referring to *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Letter re: Proposed Amendments to Nova Scotia Power Inc.’s Load Retention Tariff, June 6, 2011 (**R-162**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Pre-Filed Evidence of NewPage Port Hawkesbury, NSUARB, June 22, 2011 (**R-165**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, NSUARB, June 22, 2011 (**R-166**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, NSUARB Order, December 21, 2011 (**R-164**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Direct Evidence and Exhibits of Dr. Alan Rosenberg, M04175 NPB-3, June 22, 2011, at 3:11-15 (**R-383**); Opening Statement of Alan Rosenberg, at 1 (**R-429**).

¹⁵²⁷ Respondent’s Rejoinder Memorial, at para 155, citing *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, M04175, Closing Submissions of NewPage Port Hawkesbury Corp. and Bowater Mersey Company Limited, November 9, 2011, at 68 (**R-319**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, Opening Statement of Bowater Mersey Paper Company Ltd., M04175 NPB-53, October 24, 2011, at 4 (**R-318**); *In re An Application by NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Co.*, NSUARB Decision, November 29, 2011 [Respondent’s emphasis] (**C-138**).

¹⁵²⁸ Respondent’s Counter-Memorial, at para 309. See also Respondent’s Rejoinder Memorial, at paras 155-157.

¹⁵²⁹ Respondent’s Rejoinder Memorial, at para 158, citing *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order, September 25, 2012, at 2 (**C-347**).

¹⁵³⁰ Respondent’s Rejoinder Memorial, at para 171, referring to Claimant’s Reply Memorial, at paras 3-4, 102-103.

- 1531 [REDACTED]
- 1532 [REDACTED]
- 1533 [REDACTED]
688. The Respondent explains that [REDACTED]
- 1534 [REDACTED]
- 1535 [REDACTED]
689. The Respondent remarks that [REDACTED]
- 1536 [REDACTED]
- 1537 [REDACTED]
690. Additionally, [REDACTED]

1531 Respondent's Rejoinder Memorial, at para 171, referring to Nova Scotia Department of Natural Resources, "Seven-point Woodlands Plan Keeps Plant Resale Ready", September 9, 2011 (**C-116**); [REDACTED] (**R-148**); Hearing on the Merits and Damages, November 9, 2020, at 215:22-220:4; Respondent's Pre-Hearing Memorial, at para 33.

1532 Respondent's Rejoinder, at para 172, referring to [REDACTED] (**R-146**); Hearing on the Merits and Damages, November 9, 2020, at 220:5-221:11; Hearing on the Merits and Damages, October 18, 2021, at 219:4-16.

1533 Respondent's Rejoinder, at para 172.

1534 Respondent's Rejoinder, at para 173, referring to Expert Report of Pöyry, April 16, 2019, at para 42.

1535 Respondent's Rejoinder, at para 173, referring to Rejoinder Expert Report of AFRY/Pöyry, March 4, 2020, at Section 4; Hearing on the Merits and Damages, November 12, 2020, at 881:24-884:24.

1536 Respondent's Rejoinder Memorial, at para 174, referring to [REDACTED] (**R-161**); Hearing on the Merits and Damages, November 9, 2020, at 222:11-223:19; Hearing on the Merits and Damages, October 18, 2021, at 221:13-20.

1537 Respondent's Rejoinder Memorial, at para 175, referring to [REDACTED] (**R-161**); Respondent's Pre-Hearing Memorial, at para 31.

1538 [REDACTED]
 [REDACTED] 1539 [REDACTED]
 [REDACTED]
 [REDACTED] 1540

691. In the Respondent's opinion, [REDACTED]
 [REDACTED]
 [REDACTED] PWCC had already been selected by the Monitor because it was the highest bidder but also because its plan to revive the Mill brought "new thinking and efficiencies to [its] operations",¹⁵⁴¹ the NSUARB's approval of PWCC's requested LRR was impending, and PWCC and NPPH had entered into the Plan of Arrangement, approved by the Court and close to securing creditor approval.¹⁵⁴² [REDACTED]
 [REDACTED]
 [REDACTED] 1543

692. The Respondent notes that [REDACTED]
 [REDACTED] 1544 [REDACTED]
 [REDACTED] 1545

693. The Respondent concludes:

Resolute cannot reasonably argue that, because [REDACTED]
 [REDACTED]
 [REDACTED] the
 minimum standard of treatment of aliens in customary international law
 required that GNS walk away and allow Port Hawkesbury to be
 liquidated.¹⁵⁴⁶

¹⁵³⁸ Respondent's Rejoinder Memorial, at para 176, referring to Rejoinder Expert Report of AFRY/Pöyry, March 4, 2020, at s. 4; Respondent's Pre-Hearing Memorial, at para 33; Hearing on the Merits and Damages, October 18, 2021, at 221:21-222:4.

¹⁵³⁹ Respondent's Rejoinder Memorial, at para 177, referring to Claimant's Rejoinder Memorial on Jurisdiction, May 3, 2017, at paras 61-62; Hearing on the Merits and Damages, October 18, 2021, at 222:17-223:4.

¹⁵⁴⁰ Respondent's Rejoinder Memorial, at para 177, citing [REDACTED]
 [REDACTED] [Respondent's emphasis] (C-163).

¹⁵⁴¹ Respondent's Rejoinder Memorial, at para 180.

¹⁵⁴² Respondent's Rejoinder Memorial, at para 180.

¹⁵⁴³ Respondent's Rejoinder Memorial, at para 181; Hearing on the Merits and Damages, November 14, 2020, at 1290:21-1291:12; Respondent's Pre-Hearing Memorial, at para 34.

¹⁵⁴⁴ Hearing on the Merits and Damages, November 10, 2020, at 454:12-458:18, 489:6-15; November 14, 2020, at 1231:13-1232:1.

¹⁵⁴⁵ Hearing on the Merits and Damages, November 10, 2020, at 493:23-497:25.

¹⁵⁴⁶ Respondent's Rejoinder Memorial, at para 181; Hearing on the Merits and Damages, November 10, 2020, at 438:20-440:13; November 14, 2020, at 1291:13-1292:6.

iii. Whether the Assistance Measures helped PHP allegedly become the “lowest-cost producer” of SC Paper

694. The Respondent argues that Resolute exaggerates the quantum and nature of GNS’s financial assistance so as to portray GNS’s actions as “egregious enough to breach its own interpretation of what is fair and equitable treatment”.¹⁵⁴⁷ The Respondent maintains that in reality, the Assistance Measures GNS provided PHP are worth far less than the \$1.164 billion alleged by the Claimant, according to the latter’s “long bullet point list of ‘benefits’”.¹⁵⁴⁸ Rather, it submits that

[REDACTED]
[REDACTED]¹⁵⁴⁹ and [REDACTED]¹⁵⁵⁰

695. With respect to the Outreach Agreement, the Respondent states that the project for which PHP could receive up to \$3.8 million per year until 2022 were for [REDACTED]
[REDACTED]’ to further
[REDACTED]¹⁵⁵¹ [REDACTED] Therefore,
the Respondent states that [REDACTED]
[REDACTED]¹⁵⁵² As such, [REDACTED]
[REDACTED]¹⁵⁵³

696. Overall, the Respondent repeats that GNS’s financial assistance to PHP since 2012 amounts to \$64 million, excluding the Outreach Agreement.¹⁵⁵⁴ If funds under the Outreach Agreement are considered, plus other “minor amounts”, the Respondent estimates GNS’s entire amount of support for the 2012-2022 decade at \$104.4 million [REDACTED]
[REDACTED]¹⁵⁵⁵ It notes that this figure does not take into account PHP’s commitments in return, such as “profit sharing, workforce

¹⁵⁴⁷ Respondent’s Counter-Memorial, at paras 311-312; Respondent’s Pre-Hearing Memorial, at para 31.

¹⁵⁴⁸ Respondent’s Counter-Memorial, at para 313, referring to Claimant’s Memorial, at para 219, 253.

¹⁵⁴⁹ Respondent’s Counter-Memorial, at para 313, referring to [REDACTED]
[REDACTED] (C-182).

¹⁵⁵⁰ Respondent’s Counter-Memorial, at para 313, referring to Preparatory Activities Agreement, August 27, 2012 (C-190). The Respondent clarifies that [REDACTED]
[REDACTED]
[REDACTED]

¹⁵⁵¹ Respondent’s Counter-Memorial, at para 314, citing [REDACTED]
[REDACTED] (C-206).

¹⁵⁵² Respondent’s Counter-Memorial, at para 314, referring to [REDACTED]
[REDACTED] (R-222).

¹⁵⁵³ Respondent’s Counter-Memorial, at para 314.

¹⁵⁵⁴ Respondent’s Counter-Memorial, at para 315, referring to Expert Witness Report of Peter Steger, April 17, 2019, at para 106.

¹⁵⁵⁵ Respondent’s Counter-Memorial, at para 315, referring to Expert Witness Report of Peter Steger, April 17, 2019, at para 24; Hearing on the Merits and Damages, November 13, 2020, at 969:6-970:20.

training and minimum levels of pulpwood purchases from private suppliers”.¹⁵⁵⁶ In light of the potential [REDACTED] on the province of the Mill’s closure, and given the forest, energy and other policy goals furthered by GNS’s support of the Mill, the Respondent argues that “Resolute’s vociferous condemnations that the GNS has acted in a way that is ‘so extraordinary as to be unique’ are clearly exaggerated”.¹⁵⁵⁷

697. In reply to the Claimant’s arguments concerning the LRR,¹⁵⁵⁸ the Respondent submits that it was Resolute’s “own efforts” that allowed NSPI to negotiate lower electricity rates with its largest customers when economic circumstances warrant it.¹⁵⁵⁹ In addition, it claims that PWCC’s savings as a result of the LRR are much less than what Resolute alleges it had previously sought.¹⁵⁶⁰ Even if PWCC received a “benefit” from GNS (which, according to the Respondent, it did not), the Respondent argues that it was not close to what the Claimant advances.¹⁵⁶¹

698. The Respondent also disputes the Claimant’s contentions that PWCC received “benefits” from the statutory rights to run the Biomass Plant 24/7 and regulatory protection from environmental standards.¹⁵⁶² The Respondent underlines that NSPI owned the plant and had “economic and technical reasons to operate [it]” in order to meet the province’s pre-existing regulatory renewable energy targets.¹⁵⁶³ It argues that the fact that PHP was required to pay nearly \$4 million per year to NSPI for the cost of fuel to produce steam for the Mill (produced by the Biomass Plant) disproves the claim that a “benefit” was conferred by GNS to PWCC.¹⁵⁶⁴ The Respondent clarifies that NSPI and PWCC were not exempted from environmental regulations and that PWCC has never received any money from the GNS [REDACTED]

[REDACTED]¹⁵⁶⁵

699. With respect to the remaining “benefits” alleged by the Claimant,¹⁵⁶⁶ the Respondent responds

¹⁵⁵⁶ Respondent’s Counter-Memorial, at para 315, referring to Expert Witness Report of Peter Steger, April 17, 2019, at para 649.

¹⁵⁵⁷ Respondent’s Counter-Memorial, at para 315, citing Claimant’s Memorial, at para 277.

¹⁵⁵⁸ Respondent’s Counter-Memorial, at para 316, referring to Claimant’s Memorial, at paras 253-254.

¹⁵⁵⁹ Respondent’s Counter-Memorial, at para 316, referring to Witness Statement of Murray Coolican, April 17, 2019, at paras 7-10; Respondent’s Pre-Hearing Memorial, at para 32.

¹⁵⁶⁰ Respondent’s Counter-Memorial, at para 316, referring to Expert Witness Report of Peter Steger, at para 100; Hearing on the Merits and Damages, October 19, 2021, at 443:19-25.

¹⁵⁶¹ Respondent’s Counter-Memorial, at para 316.

¹⁵⁶² Respondent’s Counter-Memorial, at para 317, referring to Claimant’s Memorial, at para 253.

¹⁵⁶³ Respondent’s Counter-Memorial, at para 317.

¹⁵⁶⁴ Respondent’s Counter-Memorial, at para 317.

¹⁵⁶⁵ Respondent’s Counter-Memorial, at para 317, referring to [REDACTED] (C-210); Witness Statement of Murray Coolican, April 17, 2019, at paras 25-31.

¹⁵⁶⁶ Respondent’s Counter-Memorial, at para 318, referring to Claimant’s Memorial, at para 253.

with the following:

- The \$20 million land purchase cannot be a “benefit” because it was a “fair market value transaction between the GNS and PHP”;¹⁵⁶⁷
- [REDACTED]
[REDACTED]
[REDACTED]¹⁵⁶⁸ The Respondent adds that the [REDACTED]
[REDACTED]
[REDACTED]¹⁵⁶⁹;
- The FULA’s purpose was to “rebalance the rights in favour of the Province compared to the outdated license under the *Stora Act*”.¹⁵⁷⁰ Rather than a benefit, the FULA put “reasonable restrictions” on PHP’s harvest of timber on Crown land, and “[s]ilviculture payments are the same as they would be for timber harvested on Crown land by any licensee for GNS-approved silviculture conducted by that licensee on the Crown land, with the exception that silviculture reimbursement to PHP was otherwise capped pursuant to the terms of the FULA”;¹⁵⁷¹
- [REDACTED]
[REDACTED]¹⁵⁷²
- The alleged “benefit” concerning “pension liability relief” can be dismissed because the Claimant has not pled with specificity.¹⁵⁷³ In any case, the province never took on any pension liabilities;¹⁵⁷⁴
- the Richmond County taxation measure has already been deemed outside the scope the Tribunal’s jurisdiction with respect to Article 1105, and should therefore be disregarded;¹⁵⁷⁵ and

¹⁵⁶⁷ Respondent’s Counter-Memorial, at para 318; Respondent’s Rejoinder Memorial, at para 185, referring to Rejoinder Statement of Julie Towers, March 4, 2020, at para 11.

¹⁵⁶⁸ Respondent’s Counter-Memorial, at para 318, referring to *Income Tax Act*, RSC 1985, c.1 (5th Supp.), s. 111; Witness Statement of Jeannie Chow, April 17, 2019, at para 16. See also Respondent’s Rejoinder Memorial, at para 186; Hearing on the Merits and Damages, October 18, 2021, at 189:6-12.

¹⁵⁶⁹ Respondent’s Counter-Memorial, at para 318, referring to [REDACTED] (C-195).

¹⁵⁷⁰ Respondent’s Counter-Memorial, at para 318, referring to Witness Statement of Julie Towers, April 17, 2019, at paras 32-34; [REDACTED] (R-192).

¹⁵⁷¹ Respondent’s Counter-Memorial, at para 318.

¹⁵⁷² Respondent’s Counter-Memorial, at para 318. The Respondent specifies that [REDACTED]
[REDACTED] See Respondent’s Counter-Memorial, fn. 661, referring to [REDACTED] (C-136); [REDACTED] (C-238).

¹⁵⁷³ Respondent’s Counter-Memorial, at para 318. The Respondent claims that “[a]t para 49 of its Memorial, Resolute inappropriately characterizes the statement of Natural Resources Minister Charlie Parker in a newspaper article as evidence that the “GNS would provide the [pension liability] assistance PWCC requested”. This is an inaccurate reflection of what the article is reporting”. See Respondent’s Counter-Memorial, fn. 662, referring to “Pacific West now lone bidder for idled NewPage paper mill in Cape Breton”, January 4, 2012 (C-148).

¹⁵⁷⁴ Respondent’s Rejoinder Memorial, at para 184, referring to CBC, News Release, “Underfunded NewPage pensions plans to be abandoned”, April 13, 2012 (R-464); CTW, News Release, “N.S. won’t bail out pension plan for NewPage workers: Dexter”, January 5, 2012 (R-465); Hearing on the Merits and Damages, November 14, 2020, at 1361:16-1362:7.

¹⁵⁷⁵ Respondent’s Rejoinder Memorial, at para 183, referring to Jurisdiction Decision, at para 329.

- the additional [REDACTED] GNS paid PWCC for the land purchase¹⁵⁷⁶ is explained by the fact that the lands ultimately purchased were “different and more valuable parcels with a corresponding higher fair market value”¹⁵⁷⁷ than the land it would have bought from NPPH.

700. The Respondent also argues that the Claimant exaggerates the impact of the Mill’s reopening on its Québec mills.¹⁵⁷⁸ The Respondent denies GNS’s contribution to the damages claimed by the Claimant.¹⁵⁷⁹ The Respondent explains that despite a short-term price impact caused by perceptions of the Mill coming back into operation, the market adjusted to and absorbed PHP’s production, which, the Respondent specifies, was composed of different paper grades from what Resolute did produce and still produces.¹⁵⁸⁰ Likewise, the Respondent recalls the Claimant’s concession that the closure of its paper machine #10 at the Laurentide Mill was not due to PHP’s reopening, but was rather the result of Resolute’s Dolbeau Mill, which reopened in October 2012.¹⁵⁸¹ The Respondent also underscores the fact that high costs at the Laurentide and Kénogami Mills were caused by reasons beyond GNS and PHP’s control.¹⁵⁸² Ultimately, the Respondent maintains that the Claimant’s allegations regarding the impacts of the Mill’s reopening on Resolute’s mills are due to the latter’s own business decisions.¹⁵⁸³

iv. Whether GNS should have let the Mill fail

701. The Respondent takes issue with the Claimant’s use of a bankruptcy yearbook in support of its claim that “customary practice among NAFTA parties, and in market-oriented economies generally, is for companies that are not commercially viable to be allowed to fail”, arguing that such source has no probative value.¹⁵⁸⁴ It also disputes the evidentiary value of the Claimant’s

¹⁵⁷⁶ Respondent’s Rejoinder Memorial, at para 185, referring to Claimant’s Reply Memorial, at para 183.

¹⁵⁷⁷ Respondent’s Rejoinder Memorial, at para 185, referring to Rejoinder Witness Statement of Julie Towers, March 4, 2020, at para 11; Witness Statement of Julie Towers, April 17, 2019, at paras 14, 30; Nova Scotia Natural Resources, “Forestry Transition Land Acquisition Program: Guidelines for Applicants”, April 2008, at 1 (R-207); [REDACTED] (R-216); [REDACTED] (C-209).

¹⁵⁷⁸ Respondent’s Counter-Memorial, at para 321.

¹⁵⁷⁹ Respondent’s Counter-Memorial, at para 321.

¹⁵⁸⁰ Respondent’s Counter-Memorial, at para 322.

¹⁵⁸¹ Respondent’s Counter-Memorial, at para 323, referring to Claimant’s Counter-Memorial on Jurisdiction, February 22, 2017, at paras 42-51; Respondent’s Reply Memorial on Jurisdiction, May 3, 2017, at paras 64, 66-83.

¹⁵⁸² Respondent’s Counter-Memorial, at para 323, referring to Expert Report of Peter Steger, April 17, 2019, at para 19, Schedule 12K, 12L.

¹⁵⁸³ Respondent’s Counter-Memorial, at para 324.

¹⁵⁸⁴ Respondent’s Counter-Memorial, at para 291, referring to Claimant’s Memorial, at para 274. The Respondent adds that “[e]ven if Resolute’s assertion had any evidentiary support (it does not), its acceptance that ‘non-market oriented economies’ (which are undefined and unspecified) do not always allow commercially unviable companies to fail demonstrates there is insufficient State practice and *opinio*

review of public CCAA filings.¹⁵⁸⁵

702. The Respondent denies that the Mill's bankruptcy was a foregone conclusion at the time of its sale, noting that financial advisors had identified EBITDA recovery plans in which the PHP Mill could have become profitable, primarily by marketing SCA+++ paper as a lower cost alternative to coated grades.¹⁵⁸⁶
703. The Respondent discredits the EY Report as "self-serving" to the Claimant's case as not being based on objective materials.¹⁵⁸⁷ EY submits that the PHP case was unique because of GNS' goal to make the Mill the lowest cost producer and due to the comprehensiveness of the government assistance, but the Respondent notes that this assertion is based on the Claimant's own written pleadings and a press release.¹⁵⁸⁸ The Respondent notes that Mr. Alex Morrison was unaware of the context of the electricity rate, the FIF, and the mechanics of the outreach agreement.¹⁵⁸⁹
704. The Respondent also argues that the EY Report is methodologically flawed for several reasons.¹⁵⁹⁰ First, it claims that the report is limited to Canada, which cannot count as evidence of substantial State practice to establish that GNS's support to PWCC breaches the minimum standard of treatment of aliens in customary international law.¹⁵⁹¹ The Respondent notes that EY did not evaluate the practice of any other State, "let alone that of the other two NAFTA Parties".¹⁵⁹²
705. Second, the Respondent contends that EY fails to assess whether the Claimant's characterization of the Assistance Measures is accurate, resulting in a failure to identify the actual quantum of GNS's financial assistance.¹⁵⁹³ For example, EY includes the hot idle funding and the FIF amounts in its analysis, which are measures that the Tribunal has already excluded from its

juris to form a rule of customary international law". See Respondent's Counter-Memorial, fn. 600, referring to Almanac & Directory, Excerpts from the 2018 Bankruptcy Handbook (C-241); Hearing on the Merits and Damages, October 18, 2021, at 209:9-14.

¹⁵⁸⁵ Respondent's Counter-Memorial, at para 291, referring to Claimant's Memorial, at para 276.

¹⁵⁸⁶ Hearing on the Merits and Damages, November 14, 2020, at 1267:3-1270:20.

¹⁵⁸⁷ Respondent's Rejoinder Memorial, at para 187; Hearing on the Merits and Damages, November 11, 2020, at 569:5-570:14; November 14, 2020, 1232:2-23.

¹⁵⁸⁸ Hearing on the Merits and Damages, November 11, 2020, at 567:3-569:4; November 14, 2020, at 1231:3-12.

¹⁵⁸⁹ Hearing on the Merits and Damages, November 11, 2020, at 574:18-576:18; November 14, 2020, at 1232:29, 1233:14-19, 1234:16-23.

¹⁵⁹⁰ Respondent's Rejoinder Memorial, at para 187.

¹⁵⁹¹ Respondent's Rejoinder Memorial, at para 188.

¹⁵⁹² Respondent's Rejoinder Memorial, at para 188.

¹⁵⁹³ Respondent's Rejoinder Memorial, at paras 189-191; Hearing on the Merits and Damages, November 14, 2020, at 1232:25-1233:9.

jurisdiction.¹⁵⁹⁴

706. Third, pursuant to the Claimant's instructions, EY limits its scope of analysis to CCAA situations, to the exclusion of relevant scenarios under informal restructuring processes,¹⁵⁹⁵ including "the most comparable example", Resolute receiving \$50.25 million of government support for Bowater Mersey (which did not follow a CCAA procedure).¹⁵⁹⁶ In the Respondent's opinion, this "arbitrary approach" is problematic because it ignores relevant cases, including precedents where companies have received billions of dollars in government funding to keep them from having to seek protection from their creditors or file for bankruptcy.¹⁵⁹⁷ The Respondent invokes the example of the North American automotive industry, in which the Canadian and US governments upheld the industry with financial support far more significant than what was provided to PHP by GNS.¹⁵⁹⁸
707. The Respondent also takes issue with the restrictive parameters on which EY relied in its analysis of CCAA cases, thereby creating artificial distinctions between cases it considered comparable to the PHP Mill and other cases.¹⁵⁹⁹ Among these various parameters, EY started its analysis from October 2009, thereby omitting more than half of the 363 cases listed on the Office of the Superintendent of Bankruptcy's website.¹⁶⁰⁰ EY also excluded CCAA cases pertaining to a number of industry classifications, justifying its decision by stating, "it was unlikely such companies would obtain government assistance while in insolvency proceedings".¹⁶⁰¹
708. Yet, the Respondent points out that the EY Report identifies instances in which governments provided assistance in the form of "incentives, grants and/or loans to assist in making the business more successful to satisfy conditions of a prospective purchaser for the business",¹⁶⁰² which, in the Respondent's opinion, matches *exactly* GNS's motivations with respect to the Mill.¹⁶⁰³

¹⁵⁹⁴ Respondent's Rejoinder Memorial, at para 189, referring to Jurisdiction Decision, at para 244; Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at paras 18-21, 61-63. See also Respondent's Rejoinder Memorial, at paras 190-191; Hearing on the Merits and Damages, November 11, 2020, at 570:15-574:17.

¹⁵⁹⁵ Respondent's Rejoinder Memorial, at para 192.

¹⁵⁹⁶ Respondent's Rejoinder Memorial, at para 193; Hearing on the Merits and Damages, November 14, 2020, at 1230:13-23.

¹⁵⁹⁷ Respondent's Rejoinder Memorial, at para 192.

¹⁵⁹⁸ Respondent's Rejoinder Memorial, at para 192.

¹⁵⁹⁹ Respondent's Rejoinder Memorial, at paras 194-195.

¹⁶⁰⁰ Respondent's Rejoinder Memorial, at para 194, referring to CCAA records list on the website of the Office of the Superintendent of Bankruptcy.

¹⁶⁰¹ Respondent's Rejoinder Memorial, at para 194, citing Expert Witness Statement of Ernst & Young Inc., December 6, 2012, at paras 38-39.

¹⁶⁰² Respondent's Rejoinder Memorial, at para 197, citing Expert Witness Statement of Ernst & Young Inc., December 6, 2012, at para 64.

¹⁶⁰³ Respondent's Rejoinder Memorial, at para 197 [Respondent's emphasis].

709. Ultimately, the Respondent argues that “[i]f EY can come to the conclusion that PHP’s case is ‘unique’, it is only because of the questionable parameters that it chose and which led to the exclusion of relevant comparators”.¹⁶⁰⁴

v. Whether GNS’s conduct violated the principle of proportionality

710. The Respondent contends that the Claimant’s proportionality argument is unsound with respect to the law. At law, the Respondent submits that in the context of an Article 1105 analysis, the minimum standard of treatment of aliens in customary international law does not include a proportionality test. The Respondent observes that “[t]he proportionality test presupposes that the objective behind a consented measure taken by a State is legitimate”.¹⁶⁰⁵ As such, in the Respondent’s opinion, it is inconceivable that measures accused of being “sufficiently egregious or shocking” could be simultaneously deemed legitimate. Therefore, it concludes, “[w]hen faced with an egregious and shocking measure, a NAFTA tribunal need not apply the proportionality test”.¹⁶⁰⁶ The Respondent notes that, in any case, the Claimant has not provided any State practice and *opinio juris* nor any relevant NAFTA award in support of its contention respecting the nature and application of a proportionality test.¹⁶⁰⁷

711. Moreover, the Respondent disputes the relevance of the cases cited by the Claimant.¹⁶⁰⁸ For example, in *ADM*, the tribunal applied the proportionality test to countermeasures, an area of law in which proportionality is a requirement at customary international law.¹⁶⁰⁹ In *S.D. Myers*, the proportionality analysis was not applied in the context of an Article 1105 claim.¹⁶¹⁰ Lastly, the Respondent denies the relevance of the other cases cited by the Claimant¹⁶¹¹ because those tribunals applied fair and equitable treatment provisions from different treaties, which differ from

¹⁶⁰⁴ Respondent’s Rejoinder Memorial, at para 199.

¹⁶⁰⁵ Respondent’s Rejoinder Memorial, at para 134, citing Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer, 2013) at 264 [Respondent’s emphasis] (**CL-141**); Hearing on the Merits and Damages, November 9, 2020, at 214:23-215:21; November 14, 2020, at 1237:18-24.

¹⁶⁰⁶ Respondent’s Rejoinder Memorial, at para 134, citing Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer, 2013) at 264 [Respondent’s emphasis] (**CL-141**); Respondent’s Pre-Hearing Memorial, at para 28.

¹⁶⁰⁷ Respondent’s Rejoinder Memorial, at para 134.

¹⁶⁰⁸ Respondent’s Rejoinder Memorial, at para 135.

¹⁶⁰⁹ Respondent’s Rejoinder Memorial, at para 135, referring to *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at paras 124-126, 133 (**RL-092**).

¹⁶¹⁰ Respondent’s Rejoinder Memorial, at para 136, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 255 (**RL-059**).

¹⁶¹¹ Respondent’s Rejoinder Memorial, at para 137, referring to Claimant’s Reply Memorial, at paras 197, 199-205.

the minimum standard of treatment in customary international law pursuant to Article 1105(1).¹⁶¹²

712. Next, the Respondent points to the Claimant's apparent concession that it would have been reasonable for GNS to provide PWCC with assistance to keep the Mill open in contrast to its earlier position that advocated for its permanent closure.¹⁶¹³ The Respondent interprets this "shift" in the Claimant's position as one whereby the Claimant believes assistance akin to what was provided to Bowater Mersey would have been "proportional" but the volume of assistance the PHP Mill received was not.¹⁶¹⁴

713. The Respondent explains why, in any case, it views the Claimant's claims of disproportionality as flawed with respect to the facts: first, this Tribunal would be misplaced to evaluate the underlying merits of GNS's policy,¹⁶¹⁵ including how much assistance to offer and for how long;¹⁶¹⁶ second, the motives underlying GNS's assistance to Bowater Mersey are the same as they were for PWCC and the Mill, which were to keep it open and lower its production costs;¹⁶¹⁷ third, factual differences between the two mills, like Bowater Mersey being smaller and producing different grades of paper, explain why the actual assistance provided to each one differed;¹⁶¹⁸ fourth, contrary to what the Claimant alleges, GNS did not give in to PWCC's alleged demands, evidenced in part by PWCC's LRR which was not as economically advantageous as PWCC had hoped;¹⁶¹⁹ fifth, the fact that the Claimant withdrew its allegation that GNS enabled PHP to engage in predatory pricing due to an alleged lack of evidence discredits the disproportionality argument;¹⁶²⁰ and sixth, [REDACTED]

[REDACTED] 1621

714. In light of the above, the Respondent maintains that there is no legal or factual basis to entertain

¹⁶¹² Respondent's Rejoinder Memorial, at para 137.

¹⁶¹³ Respondent's Rejoinder Memorial, at para 142, referring to Claimant's Memorial, at paras 274-275. See also Jurisdictional Hearing Transcript, Day 1, at 372:3-13.

¹⁶¹⁴ Respondent's Rejoinder Memorial, at para 142.

¹⁶¹⁵ Respondent's Rejoinder Memorial, at paras 140, 142.

¹⁶¹⁶ Respondent's Rejoinder Memorial, at para 143.

¹⁶¹⁷ Respondent's Rejoinder Memorial, at para 144, referring to [REDACTED]

[REDACTED] December 1, 2011,

at 2 (**R-149**).

¹⁶¹⁸ Respondent's Rejoinder Memorial, at para 145.

¹⁶¹⁹ Respondent's Rejoinder Memorial, at para 146, referring to *In re An Application by Pacific West Commercial Corp. and Nova Scotia Power Inc.*, Amended Decision, NSUARB, September 27, 2012, at para 19 (**R-063**).

¹⁶²⁰ Respondent's Rejoinder Memorial, at para 148, referring to Claimant's Statement of Claim, at paras 55, 96.

¹⁶²¹ Respondent's Rejoinder Memorial, at para 149, referring to Expert Witness Report of Peter Steger, April 17, 2019, at para 116 and Schedule 29.

a claim of disproportionate assistance in international law.¹⁶²²

- vi. Whether Resolute's decision to shut down Bowater Mersey despite accepting financial assistance from GNS affects its claim under Article 1105

715. The Respondent argues that it is “disingenuous” for the Claimant to denounce GNS’s financial support to PHP when it contemporaneously accepted a \$50 million financial package from GNS ([REDACTED]) under similar circumstances.¹⁶²³ In the Respondent’s words, “Resolute’s own actions confirm that the GNS’ assistance to Port Hawkesbury was not a breach of Article 1105(1)”.¹⁶²⁴ The Respondent underlines that GNS’s offer was made to Resolute even though “market prospects were bleaker for newsprint than SC paper, and even though Bowater Mersey was a smaller operation than Port Hawkesbury”.¹⁶²⁵
716. In the Respondent’s view, this argument is especially significant given the motivations driving Resolute to accept financial assistance from GNS, which were no different from those of PWCC (and were not affected by its decision to shut down Bowater Mersey),¹⁶²⁶ and GNS’s motivations for offering this financial assistance to Resolute,¹⁶²⁷ which provide “critical context” on GNS’s “good faith decision-making [...], essential to an Article 1105 analysis”.¹⁶²⁸ Just like PWCC, the Respondent suggests that Resolute wanted to “lower its cost structure and remain a viable economic enterprise”.¹⁶²⁹
717. On this point, the Respondent disagrees with the Claimant’s contention that GNS’s motives for financially assisting Bowater Mersey differed from its drive to help PHP, whereby GNS sought to make PHP a low-cost producer but only intended Bowater Mersey to be “temporarily competitive”.¹⁶³⁰ It points to the December 2011 agreement between GNS and Resolute, which

¹⁶²² Respondent’s Rejoinder Memorial, at para 150.

¹⁶²³ Respondent’s Counter-Memorial, at para 302, referring to Claimant’s Memorial, at para 241; Witness Statement of Duff Montgomerie, April 17, 2019, at paras 9-12; Hearing on the Merits and Damages, November 10, 2020, at 320:18-331:10; Respondent’s Pre-Hearing Memorial, at para 30; Hearing on the Merits and Damages, October 19, 2021, at 421:14-24, 428:16-429:8, 423:12-428:11, 434:4-436:14.

¹⁶²⁴ Respondent’s Counter-Memorial, at para 303.

¹⁶²⁵ Respondent’s Counter-Memorial, at para 319.

¹⁶²⁶ Respondent’s Counter-Memorial, at para 303.

¹⁶²⁷ Respondent’s Counter-Memorial, at para 302, referring to Witness Statement of Duff Montgomerie, April 17, 2019, at paras 4-8, 14, 17, 22 and 29. See also Respondent’s Rejoinder Memorial, at para 168, referring to [REDACTED] December 1, 2011, at 2 (**R-149**); Respondent’s Rejoinder Memorial, at para 169, referring to Nova Scotia House of Assembly Debates and Proceedings, No. 11-62, December 8, 2011, at 5015 (**R-211**); Nova Scotia House of Assembly Debates and Proceedings, No. 11-64, December 12, 2011, at 5220, 5222 (**R-212**).

¹⁶²⁸ Respondent’s Rejoinder Memorial, at para 166.

¹⁶²⁹ Respondent’s Counter-Memorial, at para 319.

¹⁶³⁰ Respondent’s Rejoinder Memorial, at para 167, referring to Claimant’s Reply Memorial, at para 193.

stated the explicit goal that Bowater Mersey stay open [REDACTED]

[REDACTED]¹⁶³¹ Moreover, the Respondent emphasizes that GNS wanted Bowater Mersey to become a low-cost and competitive newsprint mill, as evidenced by the Premier's address when the *Bowater Mersey Pulp and Paper Investment (2011) Act* was adopted by the Nova Scotia legislature:¹⁶³² "[W]e went through every single part of the cost chain with Bowater and removed costs so that they would be a *low-cost, highly competitive mill in the market that exists*".¹⁶³³ The Respondent notes that Mr. Garneau had publicly acknowledged that the deal with GNS guaranteed Bowater Mersey's operation for 5 years or longer.¹⁶³⁴

718. The Respondent notes that there was no undue delay in GNS presenting assistance in respect of Bowater Mersey; in September 2011, when Mr. Garneau thought that the government had no plans to reduce costs at Bowater Mersey, the government was merely considering its next steps in light of ongoing discussions with the unions and regarding the electricity rate.¹⁶³⁵

vii. Whether Resolute's decision not to bid on the Mill affects its claim under Article 1105

719. The Respondent submits that the Claimant's Article 1105 claim is unconvincing because it was invited and encouraged to bid on the Mill but ultimately chose not to do so.¹⁶³⁶

720. In response to the Claimant's complaint of not being offered any benefits and financial assistance when it was invited to participate in the bidding process, the Respondent specifies that no potential bidders were offered benefits when they were contacted by the Monitor and Sanabe in September 2011.¹⁶³⁷ All negotiations happened after the Claimant decided not to partake in the bidding process and after PWCC was selected as one of two going-concern bidders.¹⁶³⁸ However, the Respondent claims that Resolute was aware of this possibility because [REDACTED]

¹⁶³¹ Respondent's Rejoinder Memorial, at para 168, referring to [REDACTED]

[REDACTED] (**R-149**); Hearing on the Merits and Damages, November 10, 2020, at 315:5-319:3.

¹⁶³² Respondent's Rejoinder Memorial, at para 169, referring to *Bowater Mersey Pulp and Paper Investment Act*, SNS 2011, c. 32 (**R-151**); [REDACTED] (**R-149**).

¹⁶³³ Respondent's Rejoinder Memorial, at para 169, citing Nova Scotia House of Assembly Debates and Proceedings, No. 11-62, December 8, 2011, at 5015 (**R-211**).

¹⁶³⁴ Hearing on the Merits and Damages, November at 10, 2020, 333:23-334:4.

¹⁶³⁵ Hearing on the Merits and Damages, November at 10, 2020, 303:13-307:22.

¹⁶³⁶ Respondent's Counter-Memorial, at para 297, referring to Claimant's Statement of Claim, at para 26; Claimant's Memorial, at para 220.

¹⁶³⁷ Respondent's Counter-Memorial, at para 298, referring to Witness Statement of Duff Montgomerie, April 17, 2019, at para 23.

¹⁶³⁸ Respondent's Rejoinder Memorial, at para 165.

[REDACTED]¹⁶³⁹ In any case, it states that the Claimant never asked for GNS’s assistance because it did not engage in the bidding process.¹⁶⁴⁰

721. Further to this point, the Respondent states that [REDACTED]
[REDACTED]
[REDACTED]¹⁶⁴¹ So too, was [REDACTED]
[REDACTED]¹⁶⁴² and t [REDACTED]¹⁶⁴³

722. The Respondent argues that PWCC, unlike Resolute, [REDACTED]
[REDACTED]
[REDACTED]¹⁶⁴⁴ The Respondent explains that
[REDACTED]
[REDACTED]¹⁶⁴⁵

723. In light of the foregoing, the Respondent argues that there is no customary international law protection for foreign investors from “the consequences of their own business decisions”.¹⁶⁴⁶ Furthermore, it contends that the fact that GNS encouraged Resolute to bid on the Mill and provided financial assistance to Bowater Mersey “demonstrates that there was no animus against Resolute, nationality-based or otherwise”.¹⁶⁴⁷ As such, the Respondent maintains that the Claimant’s Article 1105 claim must fail.¹⁶⁴⁸

4. The Non-Disputing Parties’ Comments

(a) Submissions of the United States and Mexico

724. Relying on the FTC’s interpretation of NAFTA, the United States submits that the standard of

¹⁶³⁹ Respondent’s Counter-Memorial, at para 298; Respondent’s Rejoinder Memorial, at para 162, referring to [REDACTED] June 2011, at 50 (C-107); NewPage Port Hawkesbury Mill Confidential Information Memorandum, September 2011, at 50 (R-361).
¹⁶⁴⁰ Respondent’s Rejoinder Memorial, at para 160 [Respondent’s emphasis]; Hearing on the Merits and Damages, November 10, 2020, at 339:12-348:20.
¹⁶⁴¹ Respondent’s Counter-Memorial, at para 299, citing Port Hawkesbury Bidding Proposal With Notes, September 26, 2011, at 11 (C-119); Hearing on the Merits and Damages, November 10, 2020, at 349:3-23.
¹⁶⁴² Respondent’s Rejoinder Memorial, at para 161.
¹⁶⁴³ Respondent’s Counter-Memorial, at para 299.
¹⁶⁴⁴ Hearing on the Merits and Damages, November 10, 2020, at 350:23-352:17; November 14, 2020, at 1277:23-1278:10.
¹⁶⁴⁵ Hearing on the Merits and Damages, November 10, at 2020, 352:23-353-23; November 14, 2020, at 1279:12-1285:6; Hearing on the Merits and Damages, October 18, 2021, at 179:17-180:18.
¹⁶⁴⁶ Respondent’s Counter-Memorial, at para 300.
¹⁶⁴⁷ Respondent’s Counter-Memorial, at para 300.
¹⁶⁴⁸ Respondent’s Counter-Memorial, at para 300.

treatment under Article 1105 is the minimum standard of treatment at customary international law.¹⁶⁴⁹ Accordingly, it submits that the obligations of “fair and equitable treatment” and “full protection and security” do not require treatment beyond what is prescribed in the customary international law minimum standard of treatment,¹⁶⁵⁰ nor does a breach of another NAFTA provision or of a different international agreement establish a breach of Article 1105(1).¹⁶⁵¹ The United States also recalls the binding nature of the FTC’s interpretation.¹⁶⁵²

725. The United States argues that customary international law is created by consistent State practice and *opinio juris*.¹⁶⁵³ It contends that current customary international law has crystallized to establish the minimum standard of treatment as a “floor below which treatment of foreign investors must not fall”.¹⁶⁵⁴ The United States demonstrates how the concepts of good faith, proportionality and non-discrimination have not crystallized into customary international law as components of the fair and equitable treatment obligation.¹⁶⁵⁵
726. With respect to good faith, the United States acknowledges that the performance of binding treaty obligations in good faith is part of customary international law, but argues that claims alleging breach of the good faith principle are not within the limited jurisdictional grant of Section B of NAFTA Chapter 11.¹⁶⁵⁶ The United States notes that good faith does not impose a “free-standing, substantive obligation [...] that, if breached, can result in State liability”.¹⁶⁵⁷ Seeing as Section A of NAFTA Chapter 11 does not comprise such an obligation, the United States concludes that reliance on good faith alone cannot support an Article 1105 claim.¹⁶⁵⁸
727. The United States posits that the obligation of proportionality does not form part of the minimum standard of treatment under customary international law: to the contrary, pursuant to the minimum

¹⁶⁴⁹ United States Submission, at para 14, citing NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, at para B.1.

¹⁶⁵⁰ United States Submission, at para 14, citing NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, at para B.2.

¹⁶⁵¹ United States Submission, at para 14, citing NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, at para B.3.

¹⁶⁵² United States Submission, at para 14, referring to NAFTA Article 1131(2).

¹⁶⁵³ United States Submission, at paras 17-18.

¹⁶⁵⁴ United States Submission, at para 15.

¹⁶⁵⁵ United States Submission, at para 20.

¹⁶⁵⁶ United States Submission, at para 21, referring to VCLT Article 26.

¹⁶⁵⁷ United States Submission, at paras 21-22, referring to *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America, July 25, 2014, at para 7; *Bilcon v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America, April 19, 2013, at para 6; *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Counter-Memorial of Respondent United States of America, December 22, 2008, at 94; *Canfor Corp. v. United States of America*, UNCITRAL, Reply on Jurisdiction of Respondent United States of America, August 6, 2004, at 29, fn. 93.

¹⁶⁵⁸ United States Submission, at para 22.

standard of treatment, States' policies enjoy wide discretion¹⁶⁵⁹ and tribunals may not question government decision-making at will.¹⁶⁶⁰

728. On non-discrimination, the United States maintains that the minimum standard of treatment under Article 1105 does not prohibit States from treating foreigners and nationals differently, or treating foreigners from different States differently.¹⁶⁶¹ It submits that the prohibition against discrimination contained in Article 1105 is limited to the context of other established rules of customary international law, such as the prohibitions against discriminatory takings,¹⁶⁶² access to judicial remedies or treatment by the courts,¹⁶⁶³ full protection and security, and the obligation to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict, or strife.¹⁶⁶⁴
729. The United States further submits that a claimant seeking to rely on standards of protection not included in the treaty must demonstrate that they have crystallized into an obligation under customary international law.¹⁶⁶⁵ It relies on *Cargill* to suggest that this burden lies clearly with the claimant, and that proof of change in a custom is not easily established.¹⁶⁶⁶ The United States adds that arbitral decisions interpreting "autonomous" fair and equitable treatment standards set out in other treaties, outside the context of customary international law, cannot constitute evidence

¹⁶⁵⁹ United States Submission, at para 23, referring to *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at para 127.

¹⁶⁶⁰ United States Submission, at para 23, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, November 13, 2000, at para 261.

¹⁶⁶¹ United States Submission, at para 24, referring to *Methanex Corp. v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Chapter C, August 3, 2005, at paras 25-26; Robert Jennings & Arthur Watts, *Oppenheim's International Law: Peace* (Oxford University Press, 9th ed., 1992), at 932; Edwin Borchard, "The 'Minimum Standard' of the Treatment of Aliens" (1939), Proceedings of the American Society of International Law, 51, 56; Andreas Roth, *Minimum Standard of International Law Applied to Aliens* (Sijthoff, 1949) at 83.

¹⁶⁶² United States Submission, at para 24, referring to *BP Exploration Co. (Libya) Ltd. v. Libya*, 53 I.L.R. 297, 1974, at 329; *Libyan American Oil Co. (LIAMCO) v. Libya*, 62 I.L.R. 140, 1977, at 194; *Kuwait v. American Independent Oil Co. (AMINOIL)*, 66 I.L.R. 528, 1982, at 585; Restatement (Third) of Foreign Relations Law (1987), at para 712.

¹⁶⁶³ United States Submission, at para 24, referring to C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press, 1967), at 243; Edwin Borchard, *The Diplomatic Protection of Citizens Abroad: or the Law of International Claims* (The Banks Law Publishing Company, 1919), at 334; Report of the Guerrero Sub-Committee of the Committee of the League of Nations on Progressive Codification 1, League of Nations Doc. C.196M.70 (1927), at 100; *Ambatielos (Greece v. United Kingdom)*, 12 R.I.A.A. 83, March 6, 1956, at 111.

¹⁶⁶⁴ United States Submission, at para 24, referring to *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, United States, Reparation Commission, 2 R.I.A.A. 777, 1926, at 794-95; League of Nations, *Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.75.M.69.1929.V, 1929, at 107.

¹⁶⁶⁵ United States Submission, at para 26.

¹⁶⁶⁶ United States Submission, at para 27, citing *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 273.

of the content of the standard required under Article 1105.¹⁶⁶⁷ Nor can decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law be of assistance because these decisions do not constitute evidence of State practice, although they can assist in determining State practice when such practice is discussed.¹⁶⁶⁸

730. Mexico did not provide any comments regarding Article 1105 in its submission.

(b) The Disputing Parties’ Comments

731. The Claimant disagrees with the United States on the issue of burden of proof, suggesting that arbitral awards reflect State practice and *opinio juris* and are “ample evidence” of the standard of fair and equitable treatment at customary international law.¹⁶⁶⁹ The Claimant cites the tribunals in *Merrill & Ring, Chemtura*, and *Windstream* for this proposition.¹⁶⁷⁰ The Claimant adds that a party to a dispute need not prove State practice and *opinio juris* every time it claims a breach of Article 1105, but only when that party seeks to rely on a new norm of customary international law.¹⁶⁷¹ The Claimant specifies that it is not arguing for a more expansive standard of fair and equitable treatment than what has already been recognized in previous arbitral awards.¹⁶⁷²

732. The Claimant takes further issue with the substantive content of the fair and equitable standard of treatment as put forward by the United States.¹⁶⁷³ Citing *Bilcon*, the Claimant suggests that the standard is not limited to conduct that is outrageous.¹⁶⁷⁴ Rather, “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith

¹⁶⁶⁷ United States Submission, at para 25, referring to *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 608; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 278.

¹⁶⁶⁸ United States Submission, para 25, referring to *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 605; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, October 1, 2018, ICJ Reports 2018, 507, at para 162; *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, Second Submission of the United States of America, June 12, 2015, at para 14; *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, Second Submission of Mexico, at para 10; *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, Canada’s Response to 1128 Submissions, June 26, 2015, at para 11.

¹⁶⁶⁹ Claimant’s Reply to Article 1128 Submissions, at paras 17, 22.

¹⁶⁷⁰ Claimant’s Reply to Article 1128 Submissions, at paras 22-23, citing *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/01, Canada’s Rejoinder, March 27, 2009, at paras 160-161, 188; *Chemtura Corp. v. Government of Canada*, UNCITRAL, Canada’s Counter-Memorial, October 20, 2008, at para 744; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016, at para 352 (CL-123).

¹⁶⁷¹ Claimant’s Reply to Article 1128 Submissions, at para 18.

¹⁶⁷² Claimant’s Reply to Article 1128 Submissions, at para 19.

¹⁶⁷³ Claimant’s Reply to Article 1128 Submissions, at para 25, referring to United States Submission, at para 16.

¹⁶⁷⁴ Claimant’s Reply to Article 1128 Submissions, at para 25.

or malicious intention”.¹⁶⁷⁵

733. The Claimant further disputes the United States’ “overly simplistic” interpretation of the minimum standard of treatment that excludes the concepts of good faith, non-discrimination, and proportionality.¹⁶⁷⁶ The Claimant agrees with the United States that good faith is not a freestanding obligation, but claims that it is a “guiding principle” for applying the fair and equitable standard of treatment under Article 1105¹⁶⁷⁷ and that evidence of bad faith suffices to establish a violation of this obligation.¹⁶⁷⁸ With respect to non-discrimination, the Claimant acknowledges that Article 1105 does not require governments to treat domestic and foreign investments identically, but maintains that they may not impede foreign investments to the benefit of their national and provincial interests.¹⁶⁷⁹ According to the Claimant, this position is supported by prior NAFTA decisions, which the United States ignores.¹⁶⁸⁰ As regards proportionality, the Claimant argues that NAFTA and other international tribunals have included considerations of proportionality in their assessments of alleged violations of the fair and equitable treatment obligation.¹⁶⁸¹ The Claimant does not dispute the claim that government policy-making merits discretion, but suggests that this discretion is not unlimited and that its limits are determined by the facts of a case.¹⁶⁸²
734. Lastly, the Claimant submits that GNS’s conduct breached the aforementioned principles: its plan to make PHP the lowest-cost producer despite the foreseen harm to Resolute is evidence of bad faith and wilful neglect for the latter’s interests;¹⁶⁸³ and the facts of this case require a conclusion

¹⁶⁷⁵ Claimant’s Reply to Article 1128 Submissions, at para 25, citing *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para 435 (**CL-104**).

¹⁶⁷⁶ Claimant’s Reply to Article 1128 Submissions, at para 27, referring to United States Submission, at para 20.

¹⁶⁷⁷ Claimant’s Reply to Article 1128 Submissions, at para 28, referring to *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, December 1, 2005, at para 25.

¹⁶⁷⁸ Claimant’s Reply to Article 1128 Submissions, at para 28.

¹⁶⁷⁹ Claimant’s Reply to Article 1128 Submissions, at para 30, referring to Claimant’s Reply Memorial, at para 139.

¹⁶⁸⁰ Claimant’s Reply to Article 1128 Submissions, at para 31, referring to Claimant’s Reply Memorial, at para 137; *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 208 (**CL-101**); *Mobil Investments Canada Inc. and Murphy Oil Company v. Government of Canada*, ICSID Case No. ARB(AF)/07/04, Decision on Liability and Principles of Quantum, May 22, 2012, at para 152 (**RL-170**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at paras 169-171 (**RL-059**).

¹⁶⁸¹ Claimant’s Reply to Article 1128 Submissions, at para 33, referring to Claimant’s Reply Memorial, paras 191-208; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 255 (**RL-059**); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at paras 153, 158-159 (**RL-092**).

¹⁶⁸² Claimant’s Reply to Article 1128 Submissions, at para 34.

¹⁶⁸³ Claimant’s Reply to Article 1128 Submissions, at para 29.

that GNS breached the limits of discretion to which it is entitled with respect to its decision making.¹⁶⁸⁴

735. For its part, the Respondent notes that the United States' submission on the minimum standard of treatment is "fully concordant" with its own.¹⁶⁸⁵ It reiterates that neither NAFTA Chapter 11 nor customary international law provides a basis to claim a breach of good faith as a standalone obligation.¹⁶⁸⁶ It suggests that to do so in this case would allow the Claimant to avoid the application of an explicit NAFTA provision (Article 1108(7)(b)).¹⁶⁸⁷ The Respondent also agrees with the United States' position with respect to non-discrimination and proportionality.¹⁶⁸⁸

5. The Tribunal's Analysis

(a) The Applicable Standard under Article 1105

736. Under NAFTA Article 1105, the fair and equitable treatment standard is restricted to the minimum standard of treatment as recognized under customary international law. This was explicitly affirmed by the FTC in its 2001 Note of Interpretation which as cited earlier provided, among others, that:

1. Article 1105(1) prescribes the customary international law minimum 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.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).¹⁶⁸⁹

737. As has been recognized by multiple arbitral tribunals constituted under Chapter 11,¹⁶⁹⁰ the

¹⁶⁸⁴ Claimant's Reply to Article 1128 Submissions, at para 34, referring to Claimant's Reply Memorial, at paras 96-106, 197-198, 208.

¹⁶⁸⁵ Respondent's Reply to Article 1128 Submissions, at para 4, referring to United States Submission, at paras 20-24; Respondent's Counter-Memorial, at para 288; Respondent's Rejoinder Memorial, at paras 73-75, 134-138.

¹⁶⁸⁶ Respondent's Reply to Article 1128 Submissions, at para 4, referring to United States Submission, at paras 21-22.

¹⁶⁸⁷ Respondent's Reply to Article 1128 Submissions, at para 4.

¹⁶⁸⁸ Respondent's Reply to Article 1128 Submissions, at para 4.

¹⁶⁸⁹ NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter Eleven Provisions", July 31, 2001 (**RL-001**).

¹⁶⁹⁰ See, among others, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para 176; *Methanex Corp. v. United States of America*, Final Award, August 3, 2005, Part IV, Chapter C, para 20; *Cargill, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, September 18, 2009, at para 268; *Mesa Power Group LLC v. Government of Canada*, PCA Case

interpretation by the FTC is legally binding on this Tribunal pursuant to NAFTA Article 1131(2), which reads: “An interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section” and must be followed by this Tribunal.

738. Multiple tribunals under NAFTA Chapter 11 have confirmed that the minimum standard of treatment of aliens must take into account the dynamic character of customary international law.¹⁶⁹¹ As a result, evolution of that standard has to be confirmed by customary international law developments. As the tribunal in the *ADF* case affirmed, “both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development”.¹⁶⁹²
739. The applicable international minimum standard of treatment of aliens under customary international law has been discussed by multiple arbitral tribunals under NAFTA. Even before the FTC Note of Interpretation, the tribunal in *S.D. Myers* had interpreted Article 1105 as violated only when the claimant “has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”.¹⁶⁹³ In the context of a claim concerning denial of justice, the tribunal in *Mondev* held that the applicable standard “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”.¹⁶⁹⁴ As the tribunal in *Waste Management (II)* explained,

the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural

No. 2012-17, Award, March 24, 2016, at para 479; *Elli Lilly and Company v. Government of Canada*, Case No UNCT/14/2, Final Award, March 16, 2017, at para 105.

¹⁶⁹¹ See, e.g., *Mondev International Ltd v. United States of America*, Case No ARB(AF)/99/2, Award, October 11, 2002, at para 125; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, para 178; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, January 26, 2006, at para 194; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, paras 495-500; *Glamis Gold v. United States of America*, UNCITRAL, Award, June 8, 2009, at para 613; *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, August 2, 2010, at para 122; *Merrill & Ring L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 192.

¹⁶⁹² *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para 178.

¹⁶⁹³ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000 (**CL-102**), at para 263.

¹⁶⁹⁴ *Mondev International Ltd v. United States of America*, ICSID Case No ARB(AF)/99/2, Award, October 11, 2002, at para 127; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No ARB(F)/98/3, Award, June 26, 2003, at para 133.

justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.¹⁶⁹⁵

740. Article 1105 entails a “basic obligation of the State [...] to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means”.¹⁶⁹⁶ Even if measures are shown to be ‘ultra vires’ under domestic law, that “by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodies in Article 1105(1)”.¹⁶⁹⁷ Something “more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)”.¹⁶⁹⁸ Relying on *Waste Management II*, the *GAMI* tribunal stated that:

A claim of maladministration would likely violate Article 1105 if it amounted to an ‘outright and unjustified repudiation’ of the relevant regulations. There may be situations where even lesser failures would suffice to trigger Article 1105. It is the record as a whole—not dramatic incidents in isolation—which determines whether a breach of international law has occurred.¹⁶⁹⁹

741. Similarly, relying on *S.D. Myers*, the *Cargill* tribunal found that: “arbitrariness may lead to a violation of a State’s duties under Article 1105, but only when the State’s actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive”.¹⁷⁰⁰
742. Further, the fair and equitable treatment standard is not part of the non-discrimination standards of investment law, such as MFN or national treatment clauses – it does not hinge on a comparison between the investor and third parties but “is an absolute standard that provides a fixed reference point”.¹⁷⁰¹ This reference point is not domestic law or the treatment of third parties, but the

¹⁶⁹⁵ *Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No ARB(AF)/00/3, Award, April 30, 2004, at para 98.

¹⁶⁹⁶ *Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No ARB(AF)/00/3, Award, April 30, 2004, at para 138.

¹⁶⁹⁷ *ADF Group Inc v. United States of America*, ICSID Case No ARB(AF)/00/1, Award, January 9, 2003, at para 190.

¹⁶⁹⁸ *ADF Group Inc v. United States of America*, ICSID Case No ARB(AF)/00/1, Award, January 9, 2003, at para 190.

¹⁶⁹⁹ *GAMI Investments Inc. v. Mexico*, UNCITRAL Final Award, November 15, 2004, at para 103.

¹⁷⁰⁰ *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/02, September 18, 2009, at paras 293, 293 (summation of standard).

¹⁷⁰¹ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, December 19, 2016, at para 380, citing Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice”, (2005) *Journal of World Investment and Trade* 6, at 367.

minimum standard of treatment of aliens under customary international law.¹⁷⁰²

(b) Whether Canada Breached its Obligation under Article 1105

743. At the outset, the Tribunal restates that it does not have jurisdiction to rule on the claim for breach of Article 1105 in relation to the LRR, as it held earlier that the LRR was not attributable to the Respondent.¹⁷⁰³ As a reminder, the alleged municipal “property tax relief” is excluded as well by virtue of the Tribunal’s Jurisdiction Decision regarding taxation measures.¹⁷⁰⁴ That being said, the Tribunal will proceed to the analysis of the remaining measures.

i. Whether GNS’s conduct merits deference

744. Arbitral tribunals adjudicating fair and equitable treatment claims, whether under Article 1105 or under similar investment treaty provisions, have consistently exercised caution in approaching claims of violation of minimum treatment standards, especially in respect of State actions on matters of domestic policy that generally are treated with deference. For example, the tribunal in *S.D. Myers* explained that the determination whether there is a breach of the standard of fair and equitable treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”;¹⁷⁰⁵ this approach was affirmed by the *Saluka* tribunal.¹⁷⁰⁶ As a result, the Respondent’s actions fall within the present Tribunal’s purview but to establish a breach of the minimum standard of treatment requires finding grossly unfair or unreasonable treatment, precisely because this claim concerns actions that generally merit deference.

745. The evidence on record does demonstrate that, to some extent, GNS sought to support the continued operation of the Mill’s SC Paper machine, as its closure would have negatively affected the public interest at large. As demonstrated by the Respondent (and not contradicted by the Claimant), the permanent closure of the Mill would have had a serious impact on the Nova Scotia economy, including job losses in a rural part of the province and a significant reduction of Nova Scotia’s GDP. It would seem credible that the financial support provided to PWCC at least partly helped the company preserve an efficient and relatively new and local SC Paper machine, which

¹⁷⁰² *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, at para 367.

¹⁷⁰³ See *supra*, at Paragraph 303 of this Award.

¹⁷⁰⁴ See Jurisdiction Decision, at para 325 *et seq.*

¹⁷⁰⁵ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 263 (CL-102).

¹⁷⁰⁶ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, at para 305.

continued operation arguably had positive spill-over effects through the economy. Further, the closure of the Mill would have resulted in NSPI losing its largest customer, entailing the risk of a negative impact on ratepayers.¹⁷⁰⁷

746. In sum, States' policy decisions within their own jurisdiction merit deference. They do not, solely for that reason, gain immunity from international obligations. In order to find a breach of the State's obligations under the international minimum standard of treatment, a positive showing must be made that the purpose or character of the challenged actions violated this standard of treatment. On the basis of the evidence presented to the Tribunal, it cannot be established that GNS acted on anything but rational and legitimate policy goals through measures falling within the scope of government prerogatives. Equally, it has not been demonstrated that the Respondent has conducted itself in a manner that exceeded the ambit of decisions that ought to receive deference insofar as the minimum standard of treatment is concerned.

ii. Whether GNS knew that the Assistance Measures could cause Resolute harm

747. The Parties disagreed whether GNS knew that its Assistance Measures would harm the Claimant's investment in Québec. Fair and equitable treatment is an 'objective' standard. For example, a violation of Article 1105 does not require proof of bad faith: "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith".¹⁷⁰⁸ The subjective standard of knowledge—just like bad faith—is not required to establish a violation of the fair and equitable treatment standard.

748. Nevertheless, a showing of bad faith constitutes strong evidence of a violation of the fair and equitable treatment standard.¹⁷⁰⁹ The same cannot be said of knowledge: in contrast to bad faith, mere knowledge is a neutral state of mind. Whether or not the Respondent knew that the Assistance Measures could cause harm to the Claimant is immaterial as long as the Respondent did not violate the minimum standard of treatment under customary international law. Furthermore, as the Tribunal is of the opinion that GNS's conduct merited deference, the alleged knowledge of the likely harm caused by PHP's re-entry into the market did not, by itself, make the Respondent's conduct manifestly unfair or unreasonable.

¹⁷⁰⁷ See Respondent's Counter-Memorial, at paras 306-309; Respondent's Rejoinder Memorial, at paras 153-154; Hearing on the Merits and Damages, November 9, 2020, at 173:8-175:25.

¹⁷⁰⁸ *Mondev International Ltd v. United States of America*, ICSID Case No ARB(AF)/99/2, Award, October 11, 2002, at para 116.

¹⁷⁰⁹ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, at para 296.

749. Consequently, the Tribunal does not need to determine for application of this standard whether the Respondent knew about the detrimental effects its Assistance Measures could cause to the Claimant.

iii. Whether the Assistance Measures helped PHP allegedly become the “lowest-cost producer” of SC Paper

750. The Claimant stressed that the Assistance Measures made PHP the lowest-cost producer of SC Paper. Whether or not this was the case, putting a third party in an advantageous position does not *per se* give rise to a breach of Article 1105, which provides for an absolute standard. Thus, the reference point to appraise fair and equitable treatment cannot be the treatment PWCC received, but the minimum standard of treatment afforded to aliens under customary international law.

751. The tribunal in *Methanex* dealt with the question whether Article 1105 barred a host State from differential treatment of nationals and aliens and found that customary international law—and thus Article 1105—did not prohibit such differentiation.¹⁷¹⁰ The Claimant failed to convince this Tribunal that it should come to a different conclusion than the *Methanex* tribunal. More specifically, the Claimant did not prove that customary international law prohibits a State from assisting a third party in cutting its costs to become one of the most competitive businesses in the industry. In the absence of such a prohibition under customary international law, the alleged “better treatment” of PWCC is not *per se* a violation of Article 1105.

752. Thus, for the purpose of Article 1105, the Tribunal does not need to compare the treatment of the Claimant to the treatment of PWCC. As a result, the Tribunal does not need to enter into the discussion as to the specific value of the Assistance Measures provided to PHP by GNS, nor the question as to the Claimant’s contentions regarding the benefits PWCC received or the impact of the Mill’s reopening on its Québec mills.

iv. Whether GNS was under an obligation to let the Mill fail

753. The Tribunal finds that the EY Report is not necessarily flawed in its focus on Canada, as this is the relevant jurisdiction at issue. Furthermore, the EY Report may be valuable to establish the relevant facts, even if the report’s purpose was not to identify customary international law through an assessment of State practice and *opinio juris*. It is also clear, however, that the persuasive force of the EY Report is affected by the parameters set by Claimant, which were capable of steering

¹⁷¹⁰ *Methanex Corp. v. United States of America*, Final Award, August 3, 2005, Part IV, Chapter C, at para 25.

the conclusions.

754. Even if taken at face value, the EY Report would only prove the preferential treatment of PWCC. It does not show that the distinction between PWCC and all other businesses was unjust, let alone a violation of the minimum standard of treatment under customary international law.
755. The Tribunal does not share the Respondent’s criticism to the Claimant’s use of the registry kept of CCAA cases by the Office of Superintendent in Bankruptcy and Monitors’ reports (the “**Registry**”) as proof of State practice with regard to financial assistance provided to unviable corporations. There is no reason why the Registry could not carry some evidentiary value. However, the Registry only provides limited and inconclusive evidence: the Claimant itself received assistance measures by GNS, which is a clear instance of countervailing practice. Furthermore, the Registry can neither show widespread State practice nor does it prove any *opinio juris*.
756. In sum, the Tribunal comes to the conclusion that the Respondent was under no obligation under the minimum standard of treatment as defined by customary international law to let the PHP Mill fail. The evidence of highly favorable treatment of PWCC and PHP does not suffice to demonstrate a violation of this standard on its own.

v. Whether GNS’s conduct violated the principle of proportionality

757. Proportionality is a fluid concept, it does not enable investors to second guess acts of governments in a way that was not intended by the NAFTA drafters. With one tenuous exception,¹⁷¹¹ tribunals have not accepted proportionality as a stand-alone criterion to assess whether the host State has afforded fair and equitable treatment. Instead, investment tribunals—including those referred to by the Claimant—apply a proportionality test as part of their appraisal of other manifestations of the fair and equitable treatment standard, such as due process or arbitrariness.¹⁷¹²
758. The Tribunal does not follow the Respondent’s argument that there is no legal or factual basis to entertain a claim of disproportionate assistance in international law.¹⁷¹³ However, even if the Tribunal agreed that such a line of inquiry was appropriate under the customary minimum standard of treatment, it would not find a breach in this case in light of the high measure of

¹⁷¹¹ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, at para 109.

¹⁷¹² August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge University Press, 2020) at 447, para 980.

¹⁷¹³ Respondent’s Rejoinder Memorial, at para 150.

deference afforded to the Respondent to attain its legitimate policy objectives.

- vi. Whether Resolute's decision to shut down Bowater Mersey despite accepting financial assistance from GNS affects its claim under Article 1105

759. The Respondent argues that it would be disingenuous for the Claimant to denounce GNS's financial support to PHP when it accepted a \$50 million financial package from GNS (plus the potential for an additional \$40 million) under similar circumstances.¹⁷¹⁴ The Claimant has given its explanation of the difference between its position and the Respondent's, describing its return to GNS of funds referenced by the Respondent with the aim to undermine the factual basis for the argument advanced by the Respondent. Putting that aside, however, the Tribunal notes that disingenuity may be a moral but not a legal qualification and does not affect the existence of a legal claim.

760. Although neither Party invokes the clean hands doctrine explicitly, it constitutes a possible argument why Resolute's acceptance of financial assistance might be of legal relevance to the case. However, multiple reasons speak against this: first, the clean hands doctrine typically affects the admissibility of a claim, whereas the Respondent's invocation of the Claimant's own conduct was an argument on the merits of the fair and equitable treatment claim. Second, the clean hands doctrine has generally been rejected in investment arbitration.¹⁷¹⁵ Finally, the clean hands doctrine requires that the "claim itself [be] based upon the unlawful act"¹⁷¹⁶ of the claimant. As stated above, the Claimant's acceptance of financial assistance for a mill it subsequently shut down may raise question whether its complaint about assistance to PWCC should be viewed as "disingenuous", but that would not make its behavior unlawful. Accordingly, there is no basis to argue that the Claimant resorted to investment arbitration with unclean hands.

- vii. Whether Resolute's decision not to bid on the Mill affects its claim under Article 1105

761. In its pleadings, the Respondent stressed that the Claimant had been given the same opportunity to bid for the PHP Mill as the ultimate winner of the bid, PWCC. However, [REDACTED] the Claimant decided not to participate in the bidding.

¹⁷¹⁴ Respondent's Counter-Memorial, at para 302, referring to Claimant's Memorial, at para 241; Witness Statement of Duff Montgomerie, April 17, 2019, at paras 9-12.

¹⁷¹⁵ *Hulley Enterprises (Cyprus) Limited v. Russia*, PCA Case No. AA-226, Final Award, July 18, 2014, at paras 1358-59; more generally, see *Guyana v. Suriname*, PCA Case No. 2004-04, Award, September 17, 2007, at paras 417-422.

¹⁷¹⁶ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953), at 156.

762. The Tribunal is of the view that Resolute’s decision not to bid on the Mill could in principle affect its claim under Article 1105. Multiple investment tribunals have found that there was no breach of fair and equitable treatment if an investor was harmed by the economic consequences that emanated from the risk of its own business decisions: “investment tribunals have held that the investor would in principle have to take the consequences following from its own failure in this respect”.¹⁷¹⁷
763. Under the circumstances of the case at hand, the Claimant was aware of the economic outlook of the declining SC paper industry. Against the backdrop of this economic environment, the Claimant took the business decision not to bid on the PHP Mill and thus accepted the risk that another corporation might take over the Mill and enter into competition with the Claimant. In this connection, the Tribunal considers that it would have been reasonable for the Claimant to anticipate that the Respondent would offer financial assistance to corporations in the SC paper industry—the Claimant itself was in discussions with GNS at the time for such assistance for Bowater Mersey.¹⁷¹⁸ As held above under Article 1102(3) at Paragraph 565, the Claimant confirmed at the 2021 Hearing that Resolute considered financial assistance by GNS as part of its decision whether to put in a bid for the Port Hawkesbury Mill. It might not have been reasonable for the Claimant to anticipate that the Respondent’s financial assistance would be as extensive as it turned out to be; the Tribunal does not need to decide the matter conclusively. Even if the extent of the Respondent’s financial assistance was not foreseeable, the Respondent’s actions would not be considered manifestly unfair or unreasonable *ipso facto*.
764. In sum, the Tribunal finds that Resolute’s decision not to bid on the Mill does not change the Tribunal’s finding that the treatment accorded by the Respondent was not manifestly unfair or unreasonable.

viii. Conclusion

765. Whether or not the Claimant’s own business decision respecting bidding on PHP led to the

¹⁷¹⁷ *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, at para 837; see also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, at para 336; *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, March 8, 2008, at para 510; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, at para 374.

¹⁷¹⁸ See Witness Statement of Duff Montgomerie, April 17, 2019, at paras 9, 20, where he states: “at the time NPPH entered CCAA creditor protection in early September 2011, we were already engaged in discussions with Resolute regarding financial support for its Bowater Mersey mill. During meetings with Resolute in September 2011, I encouraged Resolute to consider submitting a bid for the Port Hawkesbury mill. Mr. Garneau was non-committal”.

damage allegedly sustained by it, the Claimant failed to show that the GNS's Assistance Measures to PWCC violated the minimum standard of treatment owed to the Claimant under customary international law. As a result, the Tribunal concludes that Canada has not breached its obligations under Article 1105.

VII. COSTS

A. RELEVANT LEGAL PROVISIONS

766. NAFTA Article 1135(1) permits the Tribunal to “award costs in accordance with the applicable arbitration rules”.

767. UNCITRAL Rules Article 38 states:

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

768. UNCITRAL Rules Article 39 states in relevant part:

(1) The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

769. UNCITRAL Rules Article 40 states in relevant part:

(1) Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

(2) With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

B. FIXING OF THE COSTS UNDER ARTICLE 38

770. UNCITRAL Rules Article 38 requires the Tribunal to “fix the costs of arbitration”. The Tribunal

will begin by fixing the costs under Article 38(a), (b), (c), (d), and (f) (the “**Arbitration Costs**”). It will then fix the “costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable” (the “**Legal Costs**”) as described in Article 38(e).

1. Arbitration Costs

(a) The Claimant’s Arguments

771. The Claimant notes that as at the date of the Revised Costs Submissions, it has deposited with the PCA US\$ 950,000 to cover the fees, travel, and other expenses of the Tribunal and the fees and expenses incurred by the PCA.¹⁷¹⁹ Referring to UNCITRAL Rules Article 40(1), Resolute submits that it incurred travel and lodging expenses for witnesses that travelled to Toronto for the hearing on jurisdiction.¹⁷²⁰

(b) The Respondent’s Arguments

772. The Respondent notes that as at the date of the Revised Costs Submissions, it has deposited with the PCA \$1,031,363.00 to cover the fees and expenses of the Tribunal and the cost of other assistance required by the Tribunal.¹⁷²¹

(c) The Tribunal’s Analysis

773. In accordance with UNCITRAL Rules Article 39, “the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case”.

774. In Paragraph 19.1 of Procedural Order No. 1, the Parties agreed that:

Each member of the Tribunal shall receive:

19.1.1 a fee of USD 3,000, or such other fee as may be set forth from time to time in the ICSID Schedule of Fees, for each day of participation in meetings of the Tribunal or 8 hours of other work performed in connection with the proceeding or pro rata;

19.1.2 subsistence allowances and reimbursement of travel (in business class) and other expenses within the limits set forth in Regulation 14 of the ICSID Administrative and Financial Regulations and the

¹⁷¹⁹ Claimant’s Revised Costs Submission, Annex, Tab: “Summary”.

¹⁷²⁰ Claimant’s Costs Submission, at para 27.

¹⁷²¹ Respondent’s Revised Costs Submission, at 1.

Memorandum on the Fees and Expenses of ICSID Arbitrators.

775. By correspondence dated November 30, 2021 and December 3, 2021, and upon the invitation of the Tribunal, the Parties each agreed to modify Procedural Order No. 1 going forward such that the arbitrators may claim reimbursement at cost of all their reasonable travel and other expenses in connection with case-related matters.
776. In the course of these proceedings, the Parties have made advance payments with the PCA of a total of US\$ 1,900,000, that is, US\$ 950,000 each.
777. The Tribunal fixes its fees and expenses, as per UNCITRAL Rules Articles 38(a) and (b), as follows:
778. Judge James Crawford (until May 31, 2021): US\$ 279,281.00 in fees and US\$ 9,888.80 in expenses.
779. Professor Bernard Hanotiau (from August 10, 2021): US\$ 170,625.00 in fees and US\$ 10,629.36 in expenses.
780. Professor Céline Lévesque: US\$ 430,312.50 in fees and US\$ 3,882.37 in expenses.
781. Dean Emeritus Ronald A. Cass: US\$ 551,059.50 in fees and US\$ 5,135.26 in expenses.
782. In accordance with UNCITRAL Rules Article 38(c), and Paragraph 20 of Procedural Order No. 1, the PCA's fees and expenses for registry services in assistance of the Tribunal amount to US\$ 195,283.04 and US\$ 24,299.08 respectively.
783. By correspondence dated April 24, 2020, the Parties agreed, upon Judge Crawford's invitation, to the appointment of Professor Freya Baetens as Judge Crawford's assistant in these proceedings. The Parties agreed that Professor Baetens would be remunerated at EUR 235 per hour and would be able to claim back reasonable expenses. In accordance with UNCITRAL Rules Article 38(c), Professor Baetens' fees for assisting Judge Crawford whilst he was the Presiding Arbitrator amount to US\$ 61,320.15.
784. Other arbitration costs incurred pursuant to UNCITRAL Rules Article 38 and approved by the Tribunal in the course of these proceedings, including costs associated with the reservation of meeting and hearing facilities, the organisation of virtual proceedings, court reporting, IT support, courier costs, bank costs, communications, and supplies amounts to US\$ 158,283.79.
785. Accordingly, the total Arbitration Costs per UNCITRAL Rules Article 38 (excluding Legal

Costs) are fixed in the amount of US\$ 1,900,000.

2. Legal Costs

786. UNCITRAL Rules Article 38(e) requires the Tribunal to fix the “costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable”.
787. The Tribunal sets out below the amounts of costs for legal representation and assistance that are claimed by each of the Parties. The figures below are drawn from the Parties’ Revised Costs Submissions. Each Party maintains that the costs it incurred are reasonable, given the novelty, seriousness, and complexity of the claim.¹⁷²²

(a) The Claimant’s Arguments

788. Resolute submits that it incurred the following legal costs, amounting to \$ 2,824,388.49 and US\$ 6,440,293.59:

Fees and expenses of BakerHostetler	US\$ 4,955,287.35
Fees and expenses of NortonRoseFulbright	\$ 2,402,355.51
Fees of KPMG	\$ 154,666.04
Fees of GLM	\$ 50,319.00
Fees and expenses of CapitalTrade, Dr. Jerry Hausman, and Mr. Seth Kaplan	US\$ 1,485,006.24
Fees and expenses of Ernst & Young	\$ 217,047.95

(b) The Respondent’s Arguments

789. The Respondent submits that it has incurred the following legal costs, amounting to \$ 5,843,868.03:

Fees of legal representatives at the Trade Law Bureau	\$ 4,496,880.11
Fees of Cohen Hamilton Steger, AFRY/Pöyry, and Core Legal	\$ 1,545,456.39
Additional expenses (including travel costs of legal representatives, costs of administrative services and supplies, purchase of a collection of RISI price forecasts).	\$ 84,502.78

(c) The Tribunal’s Analysis

790. The first step that is required by UNCITRAL Rules Article 38 is the identification of the

¹⁷²² Claimant’s Costs Submission, at para 2; Respondent’s Costs Submission, at para 18.

“successful party”. Having prevailed in the merits and damages phase of this arbitration, the Respondent is to be considered the “successful party” for the purposes of fixing costs. It is therefore unnecessary to fix the costs of the Claimant’s legal representation and assistance. The degree of the Respondent’s success, and the extent to which it should be taken into account in the apportionment of costs under UNCITRAL Rules Article 40, is dealt with in the subsequent section.

791. No objection has been raised by the Claimant regarding the quantum of Legal Costs that have been calculated by the Respondent. Indeed, the Tribunal notes that the Legal Costs of the Respondent are lower than those of the Claimant.
792. In the circumstances, the Tribunal considers it reasonable to fix, for the purposes of UNCITRAL Rules Article 38(e), the Respondent’s reasonable costs for legal representation and assistance at \$ 5,843,868.03.

C. APPORTIONMENT OF COSTS

1. The Claimant’s Arguments

793. The Claimant argues that the Respondent should bear the Claimant’s arbitration and legal costs.
794. Referring to NAFTA Article 1135(1) and UNCITRAL Rules Article 38, the Claimant submits that the Tribunal may determine the reasonableness of any costs claimed and apportion these depending on the circumstances of the case.¹⁷²³ According to the Claimant, the factors relevant to determining the allocation of costs include the relative success of the parties, whether the claims were serious, and whether unnecessary costs or delays were attributable to either party.¹⁷²⁴
795. The Claimant argues that should it be wholly successful in the arbitration, Canada should pay all of Resolute’s legal and arbitration costs.¹⁷²⁵ Should it be partially successful, Resolute contends that Canada should be ordered to pay part of Resolute’s arbitration and legal costs.¹⁷²⁶
796. Should it not be successful, Resolute argues that the Tribunal should not award costs in Canada’s favour for the following reasons.¹⁷²⁷ First, Resolute notes that it prevailed in the jurisdictional phase and therefore the Tribunal should award Resolute its costs incurred in opposing Canada’s

¹⁷²³ Claimant’s Costs Submission, at paras 3-4.

¹⁷²⁴ Claimant’s Costs Submission, at para 7.

¹⁷²⁵ Claimant’s Costs Submission, at para 8.

¹⁷²⁶ Claimant’s Costs Submission, at para 8.

¹⁷²⁷ Claimant’s Costs Submission, at para 8.

motions on jurisdiction and admissibility.¹⁷²⁸ Second, Resolute contends that its claims were serious, presented novel issues, and were compelled by underlying unfairness.¹⁷²⁹ According to Resolute, the fact that it prevailed in the jurisdictional phase is evidence of the seriousness of its claims.¹⁷³⁰ To demonstrate the seriousness of its claims, Resolute also recalls its arguments regarding the losses it suffered due to GNS's enrichment of PHP, noting that this outcome was foreseen by GNS and prompted a countervailing duty investigation.¹⁷³¹ Resolute argues that it was compelled to bring this case due to the unfairness of the actions of GNS and Canada.¹⁷³² It submits that Canada displayed "reckless disregard" for the Claimant's investments.¹⁷³³ Further, Resolute argues that its efforts at seeking amicable resolution of this dispute were unreciprocated by Canada.¹⁷³⁴ Resolute notes that Canada "invited" this NAFTA litigation by not declaring that the measures taken by GNS were subsidies before the WTO.¹⁷³⁵ Resolute further submits that its claims present novel and complex issues regarding the interpretation of NAFTA Article 1102, the impact of "self-contradiction" in international fora, the ability of a State to invoke public interest as a "complete defense", and methods of calculating damages.¹⁷³⁶ Resolute recalls that this arbitration also required a complex factual and damages analysis.¹⁷³⁷

797. Resolute submits that costs should be allocated to Canada for causing delays, noting that Canada delayed the production of a key document, Exhibit R-161.¹⁷³⁸

2. The Respondent's Arguments

798. The Respondent argues that Resolute should bear all of Canada's costs of arbitration. Canada submits that it should in no circumstances bear any of Resolute's costs, even if a breach of NAFTA is found.¹⁷³⁹
799. The Respondent argues that Resolute's claims lack merit.¹⁷⁴⁰ It reiterates that the Claimant's national treatment argument must fail because Article 1102 is not applicable in light of Article 1108(7) and because Resolute cannot prevail on the treatment "in like circumstances"

¹⁷²⁸ Claimant's Costs Submission, at para 9.

¹⁷²⁹ Claimant's Costs Submission, at Part III.B.

¹⁷³⁰ Claimant's Costs Submission, at para 10.

¹⁷³¹ Claimant's Costs Submission, at para 12.

¹⁷³² Claimant's Costs Submission, at para 13.

¹⁷³³ Claimant's Costs Submission, at para 14.

¹⁷³⁴ Claimant's Costs Submission, at paras. 15-17.

¹⁷³⁵ Claimant's Costs Submission, at para 19.

¹⁷³⁶ Claimant's Costs Submission, at para 20.

¹⁷³⁷ Claimant's Costs Submission, at para 22.

¹⁷³⁸ Claimant's Costs Submission, at paras 23-24.

¹⁷³⁹ Respondent's Costs Submission, at para 1.

¹⁷⁴⁰ Respondent's Costs Submission, at para 2.

test.¹⁷⁴¹ The Respondent submits that Resolute relies on factual misrepresentations in support of its argument that Canada breached the minimum standard of treatment under customary international law.¹⁷⁴² The Respondent recalls that Resolute itself has benefited from a \$50 million financial assistance package from GNS and chose not to bid on PHP.¹⁷⁴³

800. The Respondent argues that it should be awarded the full amount of its costs even though it did not prevail on jurisdiction.¹⁷⁴⁴ The Respondent highlights that the claims nearly violated the three-year limitation period and were “close to the line” on the “legally significant connection” test.¹⁷⁴⁵ The Respondent notes that the Claimant included at the merits stage claims that were ruled to be outside the Tribunal’s jurisdiction in the jurisdictional phase.¹⁷⁴⁶
801. The Respondent argues that the same problems concerning attribution that plagued the Claimant’s Article 1110 claim (which was eventually abandoned), continue to affect its claim under Article 1105.¹⁷⁴⁷ The Respondent notes that Resolute refused Canada’s proposal that Resolute withdraw its claim and share costs equally.¹⁷⁴⁸
802. The Respondent argues that the Claimant’s approach to damages justifies an order of costs in Canada’s favor.¹⁷⁴⁹ The Respondent argues that the Claimant made it difficult to assess the basis of its damages claim and produced “multiple and significantly fluctuating numbers” with every submission.¹⁷⁵⁰
803. The Respondent argues that the Claimant should bear its own costs even the Tribunal finds a breach of NAFTA.¹⁷⁵¹ The Respondent argues that it was Canada, rather than Resolute, that proposed a “reasonable and coherent approach” to quantifying damages.¹⁷⁵² The Respondent characterizes the Claimant’s approach to damages as being “manifestly untenable and confused”; the Claimant did not follow the advice of its expert and eventually abandoned the damages request in its Reply Memorial altogether.¹⁷⁵³

¹⁷⁴¹ Respondent’s Costs Submission, at para 7.

¹⁷⁴² Respondent’s Costs Submission, at para 8.

¹⁷⁴³ Respondent’s Costs Submission, at para 9.

¹⁷⁴⁴ Respondent’s Costs Submission, at para 10.

¹⁷⁴⁵ Respondents Costs Submission, at para 10.

¹⁷⁴⁶ Respondent’s Costs Submission, at para 10.

¹⁷⁴⁷ Respondent’s Costs Submission, at para 11.

¹⁷⁴⁸ Respondent’s Costs Submission, at para 11.

¹⁷⁴⁹ Respondent’s Costs Submission, at para 12.

¹⁷⁵⁰ Respondent’s Costs Submission, at para 12.

¹⁷⁵¹ Respondent’s Costs Submission, at para 14.

¹⁷⁵² Respondent’s Costs Submission, at para 15.

¹⁷⁵³ Respondent’s Costs Submission, at para 16.

3. The Tribunal's Analysis

804. After fixing the costs of the arbitration, the UNCITRAL Rules require the Tribunal to exercise its discretion in apportioning the costs of arbitration.
805. Under the UNCITRAL Rules Article 40(1), there is a presumption that the unsuccessful party bears the Arbitration Costs, subject to any determination by the Tribunal as to what apportionment may be reasonable in the circumstances of the case.
806. In the present matter, the Claimant is the unsuccessful party overall. However, as the Claimant has pointed out, the Respondent had raised objections to the Tribunal's jurisdiction in the first, bifurcated phase of these proceedings that were not successful. The Tribunal affirmed in the Jurisdiction Decision its jurisdiction to decide the Claimant's claims concerning the Assistance Measures, excluding only the interim measures that were taken to keep the Port Hawkesbury Mill in operation and certain claims concerning taxation measures.¹⁷⁵⁴ Therefore, the Respondent was the unsuccessful party overall in the jurisdiction phase of this Arbitration.
807. In the circumstances, the Tribunal considers it appropriate to depart from the general presumption in UNCITRAL Rules Article 40(1) and to apportion the Arbitration Costs between the Parties, as follows: one third to be paid by the Respondent and two thirds to be paid by the Claimant. Given that the Arbitration Costs total US\$ 1,900,000.00, the above apportionment means that the Respondent must bear US\$ 633,333.33 and the Claimant US\$ 1,266,666.67 of the total Arbitration Costs.
808. The Tribunal directs that, in addition to bearing its share of the Arbitration Costs, the Claimant shall reimburse the Respondent for that part of the Respondent's deposit in excess of the Respondent's apportioned share of the Arbitration Costs, i.e., US\$ 316,666.67.
809. The Tribunal recalls that the UNCITRAL Rules Article 41(5) states that "[a]fter the award has been made, the arbitral tribunal shall [...] return any unexpended balance to the Parties". The Tribunal notes that there is no unexpended balance to return to the Parties.
810. Under the UNCITRAL Rules Article 40(2), there is no presumption as to where the Legal Costs should lie. The Tribunal is free to determine which party shall reasonably bear those costs in the circumstances of the case.
811. The Tribunal considers it apposite to make the following observations in connection with the

¹⁷⁵⁴ Jurisdiction Decision, at para 330.

allocation of Legal Costs.

812. First, the Tribunal notes that the present case raised serious and difficult legal issues for the Parties and the Tribunal. In its Costs Submission, the Claimant highlighted the complexity of the issues surrounding the interpretation of NAFTA Article 1102, the arguments on “self-contradiction”, and the methods of calculating damages. The Tribunal adds to this list the interaction between NAFTA Article 1102 and Article 1108 and the navigation of NAFTA language that was not defined by the NAFTA parties.
813. Second, the Tribunal notes that, through the course of the proceedings, neither Party distracted the Tribunal from its analysis of the core issues in this case, by withholding relevant information or by forwarding unnecessary or frivolous arguments. The Tribunal’s conclusion is not altered by the Claimant’s criticism of the Respondent’s alleged delay in producing the [REDACTED] nor the Respondent’s arguments concerning the Claimant abandoning its NAFTA Article 1110 claim and its alleged delay in bringing this Arbitration.
814. Third, both Parties conducted themselves with good faith and congeniality through the proceedings. No undue costs or delay was introduced to the proceedings due to the conduct of either Party. The Tribunal is grateful to the Parties for their collaboration in the smooth organisation of two significant virtual hearings on the merits and damages. The Tribunal is also grateful for the Parties’ cooperation and patience in ensuring that the reconstituted Tribunal was fully briefed on this matter in the most efficient manner possible.
815. For the reasons outlined above, and exercising its discretionary powers under the UNCITRAL Rules Article 40(2), the Tribunal orders that the Claimant and the Respondent shall each bear their own legal costs in full, without any recourse to the other.

VIII. AWARD

816. For the foregoing reasons, the Tribunal:

- A. Finds that the Assistance Measures, but for the LRR, are attributable to Canada;
- B. Dismisses the Claimant's request for a finding that Canada has violated its obligations to Resolute under NAFTA Article 1102;
- C. Dismisses the Claimant's request for a finding that Canada has violated its obligations to Resolute under NAFTA Article 1105;
- D. Dismisses the Claimant's request for a finding that Canada's breaches of its obligations under NAFTA Chapter 11 caused Resolute to incur damages;
- E. Dismisses the Claimant's request for an award of damages;
- F. Orders Resolute to pay Canada US\$ 316,666.67 representing the Arbitration Costs incurred by the Respondent in excess of its share as fixed and apportioned by the Tribunal; and
- G. Save as aforesaid, dismisses all other claims made by the Parties.

Place of Arbitration: Toronto, Ontario



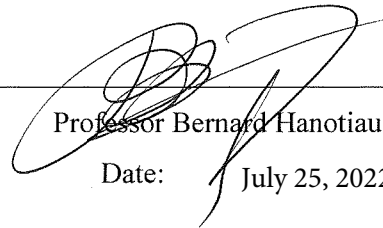
Dean Ronald A. Cass

Date: July 25, 2022



Professor Céline Lévesque

Date: July 25, 2022



Professor Bernard Hanotiau

Date: July 25, 2022