

PUBLIC VERSION

**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.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA CASE No. 2016-13

**GOVERNMENT OF CANADA
REQUEST FOR BIFURCATION**

September 29, 2016

Government of Canada
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I. INTRODUCTION

1. In accordance with the procedure agreed to by the disputing parties and confirmed by the Tribunal,¹ Canada respectfully requests that the Tribunal bifurcate these proceedings and hear the jurisdictional and admissibility objections set out in Canada's Statement of Defence in a preliminary phase.²

2. These proceedings should be bifurcated for reasons of fairness, efficiency and economy. A NAFTA Party's consent to arbitrate under Chapter Eleven is not unconditional and Canada should not be required to spend potentially millions of dollars and thousands of hours of lawyer, expert and witness time litigating claims over which the Tribunal has no jurisdiction and which are, as a matter of law, inadmissible. Preliminary consideration of Canada's objections will eliminate the entirety of the Claimant's challenge to the measures allegedly adopted by the Province of Nova Scotia (the "Nova Scotia Measures"), which are the Claimant's primary target and represent by far the most complicated aspect of its claim. The Claimant should be equally interested in avoiding unnecessary costs and expenses pursuing a claim over which the Tribunal has no authority or that it deems inadmissible, and it will suffer no prejudice by having Canada's objections heard in a preliminary phase.

3. As proposed in Canada's Statement of Defence, Canada requests that the Tribunal hear Canada's jurisdictional objections under NAFTA Articles 1101(1), 1116(2), 1117(2) and 2103 in a preliminary phase of the arbitration, along with Canada's admissibility objection under Article 1102(3).³ These objections are discrete, succinct and ripe for determination without need for expert or witness testimony or delving into the merits of the Claimant's Article 1102, 1105 or

¹ See Letters from the Tribunal to the Disputing Parties dated August 25, 2016, and September 19, 2016. The disputing parties agreed that subsequent to filing its Statement of Defence on September 1, 2016, Canada would submit a motion to have its jurisdictional and admissibility objections heard in a preliminary phase in the event the Claimant objected to bifurcation. The Claimant did so on September 14, 2016, by letter to the Tribunal.

² *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Statement of Defence, 1 September 2016, ("Statement of Defence"), ¶¶ 98-105. In this Motion to Bifurcate, Canada's uses the same defined terms as in its Statement of Defence.

³ Canada does not propose that the Tribunal hear in a preliminary phase Canada's jurisdictional objection with respect to the electricity rate paid by the Port Hawkesbury mill as non-attributable to Canada pursuant to Article 1101(1). See Statement of Defence, ¶ 104.

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1110 claims against the Nova Scotia Measures. Bifurcation is not appropriate in every case, but in this dispute, there is every reason to bifurcate.

II. JURISDICTIONAL OBJECTIONS SHOULD BE CONSIDERED AS A PRELIMINARY MATTER IF DOING SO WILL INCREASE THE EFFICIENCY OF THE PROCEEDINGS

4. Article 21(4) of the *UNCITRAL Arbitration Rules, 1976* (the “UNCITRAL Rules”) provides, in relevant part, that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”⁴ While this rule does not compel an arbitral tribunal to rule on jurisdictional objections in a preliminary phase, it does create a presumption in favour of bifurcating jurisdictional questions that should be declined only if, in the circumstances of the particular case, the Tribunal determines that it would be inefficient or would cause prejudice to a disputing party.

5. Holding a preliminary phase to hear jurisdictional objections “enables the parties to know where they stand at an early stage; and it will save them spending time and money on arbitral proceedings that prove to be invalid.”⁵ It also helps to ensure that the Tribunal only hears and decides a dispute where the conditions on consent to arbitrate have been met. This is particularly salient in investment treaty arbitration and in NAFTA Chapter Eleven since it is a “basic rule of international law and a principle of international relations that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not been established.”⁶ NAFTA and other international arbitral tribunals

⁴ UNCITRAL Arbitration Rules, 1976, Article 21(4), available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

⁵ **RL-002**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004), pp. 257-258. See also **RL-003**, Gary Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2009), Volume I, p. 994 (“Although no absolute rules can be prescribed, the more appropriate course for the arbitral tribunal is generally to conduct a preliminary proceeding on credible good faith jurisdictional challenges. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on merits. It also avoids forcing a party, who may not be subject to a tribunal’s jurisdiction, to litigate the merits of its claims in what may be an illegitimate forum.”).

⁶ **RL-004**, Shabtai Rosenne, *The World Court: What It Is And How It Works*, 5th ed. (Dordrecht: Martinus Nijhoff, 1995), p. 99.

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frequently decide questions of jurisdiction as a preliminary matter separate from the merits,⁷ a practice described as “standard procedure” in ICSID arbitrations.⁸

6. The tribunal in *Philip Morris v. Australia*, an arbitration governed by the 2010 *UNCITRAL Arbitration Rules*, considered bifurcation to be appropriate when: (i) the objection is *prima facie* serious and substantial, (ii) the objection can be examined without prejudging or entering the merits, and (iii) the objection, if successful, could dispose of all or an essential part of the claims raised.⁹ NAFTA and other investment treaty arbitration tribunals have adopted a similar approach.¹⁰ These three questions provide a useful framework of analysis with respect to both Canada's jurisdictional and admissibility objections.

⁷ See, e.g., **RL-005**, *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award on Jurisdiction, 19 June 2007, (“*Bayview – Award*”), ¶ 10; **RL-006**, *Canfor Corp. v. United States of America* (UNCITRAL) Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, ¶ 55 (NAFTA Chapter Eleven tribunal deciding to treat the respondent's jurisdictional objection as a preliminary question); **RL-007**, *Canfor Corp. and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 2 (NAFTA Chapter Eleven tribunal deciding as a preliminary question that it had no jurisdiction to decide on the claimant's claims to the extent that they concerned United States antidumping and countervailing duty law); **RL-008**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 2, 22 May 2003, ¶ 1 (NAFTA Chapter Eleven tribunal deciding to address preliminary issues separate from proceeding on the merits); **RL-009**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, ¶ 16 (“[Jurisdictional issues] are ... frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter.”); **RL-010**, *Loewen Group, Inc. v. United States of America* (ICSID Case No. ARB(AF)/98/3) Decision on hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001 (NAFTA Chapter Eleven tribunal addressing the respondent's objections to competence and jurisdiction as a question separate from the merits); **RL-011**, *Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998 (NAFTA Chapter Eleven tribunal directing parties to brief and argue preliminary issues separate from proceeding on the merits); **RL-012**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (106 I.L.R. 531) Decision on Jurisdiction, 14 April 1988, ¶ 63 (in bifurcating, the tribunal confirmed “there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the tribunal must examine [a sovereign's] objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties”).

⁸ **RL-013**, Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2009), pp. 534 (“ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.”), 537 (“In the practice of ICSID tribunals, treatment of jurisdictional issues as preliminary questions is standard procedure.”).

⁹ **RL-014**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, (“*Philip Morris – Proc. Order No. 8*”), ¶ 109.

¹⁰ See, e.g., **RL-015**, *Emmis International Holding et al. v. Hungary* (ICSID Case No. ARB/12/2) Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37 (“The overarching question is one of procedural efficiency. Factors that may be relevant in this regard are: (a) whether the request is substantial or frivolous, (b) whether the request, if granted, would lead to a material reduction in the proceedings at the next stage, (c) whether

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III. BIFURCATION IS THE MOST FAIR, EFFICIENT AND ECONOMICAL METHOD OF PROCEEDING IN THIS ARBITRATION

7. Each of Canada's jurisdictional and admissibility objections are *prima facie* serious and substantial, do not require prejudging or entering into the merits and will, if accepted, dispose of nearly all of the Claimant's case.

A. Canada's Objection Pursuant to Article 1101(1)

8. In its Statement of Defence, Canada submits that the Tribunal has no jurisdiction with respect to the Nova Scotia Measures because they do not fall within the scope and coverage of NAFTA Chapter Eleven as required by Article 1101(1).¹¹ This objection should be heard in a preliminary phase.

9. First, Canada's objection that the Nova Scotia Measures are not "relating to" the Claimant or its investment in Québec and thus not within the scope of NAFTA Chapter Eleven is *prima facie* serious and substantial. Article 1101(1) has been described as the "gateway" to NAFTA Chapter Eleven arbitration, and tribunals have explained that "the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met..."¹² As the *Methanex* tribunal determined, Article 1101(1) requires that a "legally significant connection" be demonstrated between the measure and the investor and its investment.¹³ In other words, a measure which merely affects an investor or its investment is insufficient to create the

bifurcation is impractical in the sense that the issues are too intertwined with the merits."); **RL-016**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey* (ICSID Case No. ARB/11/28), Decision on the Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, ¶ 30 ("Three considerations have been identified as relevant to the exercise of the Tribunal's discretion. These are (i) whether it is desirable to bifurcate for reasons of procedural economy; and (ii) whether the preliminary objection is intimately linked to the merits; and (iii) whether a determination of the preliminary objection is capable of resulting in the dismissal of the entire case or reducing significantly its scope and complexity."); **RL-017**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005, ¶¶ 12, 13(c).

¹¹ Statement of Defence, ¶¶ 73-74.

¹² **RL-018**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ("Methanex Partial Award"), ¶ 106. See also **RL-019**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶¶ 76-80; **RL-020**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 118-133; **RL-005**, *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award on Jurisdiction, 19 June 2007, ¶ 85.

¹³ **RL-018**, *Methanex Partial Award*, ¶ 147.

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legal nexus required to fall within Article 1101.¹⁴ This is precisely the situation before this Tribunal. The Nova Scotia Measures were aimed solely at facilitating the sale of the Port Hawkesbury mill in Nova Scotia, then in creditor protection proceedings, as a going-concern to a private buyer. Indeed, some of the impugned Nova Scotia Measures were intended to simply keep the mill in working order and purchase forestry services from the mill's supply chain while a buyer (foreign or domestic) was sought out, and were completed before the Port Hawkesbury mill even re-opened in September 2012.¹⁵ On the face of the Claimant's allegations, its Laurentide mill in Québec was, at most, "affected" in an indirect and remote manner. Whether, as a matter of law, that passes the threshold set out by Article 1101(1) amounts to a serious and substantial objection.

10. Second, Canada's objection can be determined without prejudging or entering the merits. The Claimant alleges that "Resolute was forced to close its Laurentide mill permanently in October 2014 due principally to the added production capacity of Port Hawkesbury, which has driven prices down while producing at lower costs because of the measures taken by Nova Scotia."¹⁶ Even if the Tribunal accepts this allegation to be true *pro tem*, it still does not meet the "legally significant connection" test that the *Methanex* tribunal described when considering the threshold set by NAFTA Article 1101(1).¹⁷ Contrary to the Claimant's position, this matter is not fact-dependent or bound up with the merits.¹⁸ Indeed, there is no need to prejudge or delve into the extremely complex question of what actually caused the Claimant's decision to close its Laurentide mill and whether any of the Nova Scotia measures could constitute an expropriation under NAFTA Article 1110 or violate the national treatment and minimum standard of treatment obligations under Articles 1102 and 1105.

¹⁴ **RL-018**, *Methanex Partial Award*, ¶¶ 137, 147. See also **RL-P**, *Bayview – Award*, ¶ 101.

¹⁵ Statement of Defence, ¶¶ 38-52.

¹⁶ *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Notice of Arbitration and Statement of Claim, 30 December 2015, ("Notice of Arbitration" or "NOA"), ¶ 53.

¹⁷ **RL-018**, *Methanex Partial Award*, ¶ 147.

¹⁸ Letter from Claimant to the Tribunal dated September 14, 2016.

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11. Third, if accepted, Canada's objection would dispose of all of the claims based on the Nova Scotia Measures. All that would remain for the Tribunal to consider are the Claimant's allegations against the Government of Canada in the context of the United States' countervailing duties investigation into supercalendered ("SC") paper (the "Federal Measures"), a distinct and far more limited set of allegations focused on events starting almost two years after the last of the impugned Nova Scotia Measures.¹⁹ There would be no need to engage in an intrusive, expensive and complicated analysis of what truly led to the closure of the Claimant's Laurentide mill, including its financial status and the conditions prevailing in the North American and global SC paper market. If Canada's objection is accepted by the Tribunal, there would be a substantial reduction in the issues to be argued by the disputing parties in the next phase of the arbitration.

B. Canada's Objection Pursuant to Articles 1116(2) and 1117(2)

12. In its Statement of Defence, Canada submits that the Tribunal has no jurisdiction *ratione temporis* with respect to the Nova Scotia Measures as they were all adopted more than three years prior to the date on which the Claimant filed its Notice of Arbitration (December 30, 2015) and are hence time-barred pursuant to Articles 1116(2) and 1117(2).²⁰ This objection is a discrete and preliminary issue which is suitable for consideration in a separate phase from merits and damages.

13. First, Canada's objection to jurisdiction on the basis of Articles 1116(2) and 1117(2) is *prima facie* serious and substantial. These provisions impose a three-year time limit for a Claimant to submit a claim to arbitration on its own behalf or on behalf of its enterprise.²¹ A claimant may not bring a claim if more than three years have elapsed since it first acquired knowledge, or should have first acquired knowledge, of the fact that the alleged breach occurred and the fact that the alleged breach caused the claimant to incur loss or damage. In this dispute,

¹⁹ Notice of Arbitration, ¶¶ 58-85.

²⁰ Statement of Defence, ¶¶ 76-77.

²¹ Specifically, NAFTA Article 1116 provides that "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." Similarly, Article 1117(2) provides that "[a]n investor may not make a claim on behalf of an enterprise [...] if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

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all measures occurred between three and fifteen months before the cut-off date of December 30, 2012, more than three years prior to the Claimant's Notice of Arbitration. They are therefore time-barred by Articles 1116(2) and 1117(2), which have been described as a "clear and rigid limitation defence which, as such, is not subject to any suspension [...], prolongation or other qualification."²² Numerous NAFTA tribunals have applied the time-bar limitation strictly.²³

14. Second, there will be no need to consider the merits of the claim against the Nova Scotia Measures. All that is required for the Tribunal to rule on Canada's time-bar objection is for it to determine the dates on which the Claimant first had knowledge of the measures alleged to violate NAFTA Chapter Eleven and that it had suffered some cognizable loss. This will not be a complicated analysis: on the face of the Claimant's pleadings, all of the alleged Nova Scotia "hot idle" measures and the alleged "grants, loans, cash to purchase land, reduced electricity rates and property taxes" were all adopted between September 2011 and September 2012.²⁴ Examining this objection does not require to the Tribunal to prejudge or even consider the merits of the Claimant's allegation that the Nova Scotia Measures constituted an expropriation of the Claimant's Laurentide Mill in October 2014, treatment falling below the minimum standard of treatment in customary international law, or a breach of national treatment.

15. The Claimant states in its letter dated September 14, 2016, that Canada "neglected to identify what is characterizing as 'the factual issues...not in dispute'" and claims to not know

²² **RL-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ("*Feldman – Award*"), ¶ 63. See also **RL-022**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ("*Grand River – Decision on Objections to Jurisdiction*"), ¶ 29; **RL-023**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ("*Apotex – Award on Jurisdiction and Admissibility*"), ¶ 327; **RL-024**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ("*Corona – Award on Preliminary Objections*"), ¶¶ 192, 199 (citing *Feldman – Award* with approval in interpreting the equivalent three-year limitations period in the DR-CAFTA as "strict" and not susceptible to suspension or tolling).

²³ See, e.g., **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 24, 29, 103-104; **RL-023**, *Apotex – Award on Jurisdiction and Admissibility*, ¶¶ 314-335; **RL-025**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 258-282.

²⁴ Notice of Arbitration, ¶ 36.

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“what Canada considers those facts to be.”²⁵ But the Tribunal need look no further than the exhibits the Claimant itself filed along with its Statement of Claim to see that the underlying factual issues are straightforward and ripe for a determination as to whether the claim is in compliance with the NAFTA time-bar under Articles 1116(2) and 1117(2). Of the seventeen exhibits the Claimant submitted with its Statement of Claim describing the Nova Scotia Measures, sixteen of them are dated prior to December 30, 2012.²⁶ One of the Claimant's exhibits even provides a summary description and timeline of the Nova Scotia Measures that the Claimant alleges are a violation of NAFTA, all dated between August 22, 2011 and September 27, 2012.²⁷ As the exhibits the Claimant itself relies upon in support of its claim all demonstrate on their face that the impugned measures were adopted more than three years before the Claimant filed its NOA, the Claimant cannot credibly argue that Canada's time-bar objection should not be heard as a preliminary question pursuant to UNCITRAL Rule 21(4).

16. Third, if accepted, Canada's objection would dispose of the entirety of the claim against the Nova Scotia Measures. This would drastically reduce the scope of the arbitration and eliminate any need to delve into any of the highly complex questions that will be involved in determining the merits of the Claimant's national treatment, minimum standard of treatment and expropriation claims.

C. Canada's Objection Pursuant to Article 2103

17. Canada has submitted that the Tribunal does not have jurisdiction over the Claimant's allegations that “discounted property taxes”²⁸ allegedly provided to the owner of the Port

²⁵ Letter from Claimant to the Tribunal dated September 14, 2016, p. 1.

²⁶ See Exhibits 3-18 to the Claimant's Notice of Arbitration. The single exception is a newspaper article dated August 26, 2013, which discusses the progress of the Port Hawkesbury mill since it reopened in September 2012 (Exhibit 2 to the Claimant's Notice of Arbitration, Aaron Beswick, The Chronicle Herald “Paper Plant Turns Profit Page” (Aug. 26, 2013)).

²⁷ **R-064**, Canadian Press, The Chronicle Herald, “Paper Mill Sale Finalized” (Sep. 28, 2012) (also filed as Exhibit 3 to the Claimant's Notice of Arbitration).

²⁸ Notice of Arbitration, ¶ 112. Canada understands that the Claimant's allegations of “discounted property taxes” relate to a Property Tax Agreement between the Municipality of Richmond County and the *Richmond-NewPage Port Hawkesbury Tax Agreement Act* enacted by the Nova Scotia Legislature (see Statement of Defence, ¶¶ 53, 77-78).

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Hawkesbury mill breach Articles 1110 and 1105.²⁹ The Claimant did not raise any specific concern in its September 14, 2016 letter with the appropriateness of hearing this objection in a preliminary phase, which Canada submits it should be.

18. First, Canada's objection is *prima facie* serious and substantial. NAFTA Article 2103 clearly stipulates that "nothing in this Agreement shall apply to taxation matters," except as set out in that Article. Article 2103 makes no mention of Article 1105, and the plain wording of Article 2103(6) requires that any claim that a taxation measure constitutes an expropriation must be submitted to the competent taxation authorities of the NAFTA Parties at the time of filing the Notice of Intent to Submit a Claim to Arbitration.³⁰ Therefore, the Claimant may not bring an Article 1105 claim challenging any allegedly discounted property taxes, and, having failed to comply with Article 2103(6), it is precluded from including allegedly discounted property taxes as part of its expropriation claim.

19. Second, Canada's Article 2103 objection can be examined without prejudging or entering into a significant consideration of merits issues. There is no need to consider at all whether the Port Hawkesbury mill actually benefited from discounted property taxes, whether the allegedly discounted property taxes constitute treatment below the minimum standard, or what role they may have had in the Claimant's decision to close its Laurentide mill in October 2014, if any. The only issues of relevance are whether Article 2103 allows Article 1105 claims challenging discounted property taxes (which it does not), and, with respect to Article 1110, whether the Claimant submitted the measure to the NAFTA Parties' taxation authorities at the time of its NOI (which it did not).

²⁹ See Notice of Arbitration, ¶¶ 88-98, 106.

³⁰ NAFTA Article 2103(6) states: "Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration)."

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20. Third, Canada's Article 2103 objection, if successful, could dispose of an essential part of the claim. Eliminating the allegedly discounted property taxes from the scope of the Claimant's Article 1105 and 1110 claims will render it unnecessary to delve into the difficult terrain of whether, how and to what extent the taxation measure at issue provided a financial benefit to Port Hawkesbury at all and whether or not it played any cognizable role in the Claimant's decision to close its Laurentide mill in October 2014. While the Claimant could still include the taxation measure within the rubric of its Article 1102 claim,³¹ the reduction in the complexity of the arbitration justifies hearing this objection as a preliminary matter.

D. Canada's Objection Pursuant to Article 1102(3)

21. In its Statement of Defence, Canada submits that the Tribunal should make a preliminary determination as to whether the Claimant's Article 1102 national treatment claim regarding the Nova Scotia Measures can, as a matter of law, proceed.³² Article 15(1) of the UNCITRAL Rules gives the Tribunal the discretion to consider other matters as preliminary questions even if they do not fall within the ambit of UNCITRAL Rule 24(1), as long as the disputing parties are treated with equality and have full opportunity to present their case.³³ Indeed, this was exactly what the tribunal decided in *Philip Morris v. Australia* when it agreed "at least for the issue of bifurcation, it does not matter whether the Temporal Objection is characterized as going to jurisdiction or admissibility," since the Tribunal has the power to rule on such an objection as a preliminary matter under its general powers.³⁴ The requirement of "procedural efficiency may be used to bifurcate in order to end the procedure at the phase of preliminary objections if that saves the very considerable work and time that would be needed for a procedure on the merits."³⁵

³¹ NAFTA Article 2103 does not exclude taxation measures from national treatment with certain exceptions that do not apply here. See Article 2103(4)(b).

³² Statement of Defence, ¶¶ 79-80.

³³ Article 15(1) of the UNCITRAL Rules states: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity of presenting its case."

³⁴ **RL-014**, *Philip Morris – Proc. Order No. 8*, ¶ 118. The Philip Morris tribunal made this observation with respect to Article 17(1) of the 2010 UNCITRAL Rules, which were applicable in that arbitration.

³⁵ **RL-014**, *Philip Morris – Proc. Order No. 8*, ¶ 118.

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22. A ruling on Canada's objection to the admissibility of the Claimant's Article 1102(3) claim in the preliminary phase of the arbitration would be efficient, economical and fair to both disputing parties because it will confirm at an early stage whether or not the Claimant's national treatment claim and Canada's defences thereto will even be necessary. In deciding whether to consider Canada's objection on Article 1102(3) grounds as a preliminary matter, the Tribunal should apply the same criteria that tribunals have considered with respect to jurisdictional objections described above.

23. First, Canada's objection to the Claimant's Article 1102 national treatment claim is *prima facie* serious and substantial. The national treatment provision is predicated on comparing treatment in like circumstances, and Article 1102(3) specifically defines "treatment" in the context of treatment accorded by a province or state. It makes clear the NAFTA Parties' intention that national treatment claims, with respect to a state or province, must be based on in-jurisdiction treatment, not treatment accorded across multiple jurisdictions. The Claimant purposely overlooks this limitation contained in Article 1102(3), a clear and explicit limitation articulated by the NAFTA Parties, in its attempt to inappropriately broaden the scope of Article 1102.

24. Second, Canada's Article 1102(3) objection can be examined without prejudging or entering the merits, such as whether or not the Claimant was or was not "in like circumstances" with Port Hawkesbury. Contrary to the Claimant's suggestion in its September 14, 2016 letter, there is no need whatsoever to engage in "analysis subject to the facts and circumstances of the case" when it comes to Canada's Article 1102(3) objection. There is one fact and one fact only which is central to Canada's Article 1102(3) objection and it is not in dispute: the Claimant does not have an SC paper investment within the jurisdiction of Nova Scotia.³⁶ That fact alone means, in Canada's submission, that the Claimant cannot bring a national treatment claim against measures adopted by the Government of Nova Scotia because of Article 1102(3). The Claimant is free to offer an alternative legal interpretation of Article 1102(3) that allows a national treatment claim against measures adopted by a province in which the investor has no investment,

³⁶ Notice of Arbitration, ¶ 23.

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but doing so will not require delving into any other factual issues since the only salient fact is not in dispute: the challenged measures were adopted by the Government of Nova Scotia, while the Claimant's investments were all located in Québec. No witnesses, experts or document production will be required for the disputing parties to argue and the Tribunal to decide on that fact.

25. Third, Canada's objection, if successful, could dispose of an essential part of the claim. Indeed, the entire purpose of Canada's objection is to save the Tribunal and disputing parties from any need to enter into the merits of the Claimant's Article 1102 claim. If the Tribunal accepts Canada's argument that, as a matter of law, Article 1102(3) precludes the Claimant from alleging that the Nova Scotia measures violated Canada's national treatment obligation, then there will be no need to consider Canada's procurement and subsidies defences based on Articles 1108(7)(a) and (b). Nor will there be any need to engage in the complicated, time-consuming and expensive analysis of whether the Claimant's Laurentide mill and the Port Hawkesbury mill were "in like circumstances" as required by Article 1102(3). The Claimant's entire Article 1102 challenge to the Nova Scotia Measures will be moot if Canada's interpretation of Article 1102(3) is accepted by the Tribunal.

26. If Canada's Articles 1101(1), 1116(2) and 1117(2) objections are not accepted by the Tribunal in whole or in part, an early ruling on the Article 1102(3) interpretation advanced by Canada would still save both disputing parties significant time and cost of presenting extensive factual arguments and evidence in support or defence of the national treatment claim on the merits. The Claimant will suffer no prejudice if Canada's objection is heard in a preliminary phase – to the contrary, it will benefit from knowing whether it can or cannot proceed with its national treatment claim at all.

IV. BIFURCATION DOES NOT PREJUDICE THE CLAIMANT'S ABILITY TO ARGUE ITS CLAIMS AGAINST THE FEDERAL MEASURES

27. Canada has not raised any jurisdictional objection against the Federal Measures (although it has reserved its right to raise such objections at the time the Claimant provides more detail on

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the specific nature of this aspect of its claim)³⁷ and does not propose to have the Tribunal hear these claims in a phase separate from the merits and damages. But for avoidance of doubt, there is no prejudice to the Claimant's ability to argue that the Government of Canada violated its NAFTA obligations by its actions during the countervailing duties investigation by the United States Government.

28. The claim against the Federal Measures is separate and factually distinct from the Claimant's challenge to the Nova Scotia Measures. As is evident from the Statement of Claim, there is no intrinsic overlap between the facts necessary to dispose of the Nova Scotia Measures as against the Federal Measures. The allegations against Canada's treatment of the Claimant during the countervailing duties investigation by the United States into SC Paper from Canada only concern measures that commence in July 2014.³⁸ The only allegation the Claimant makes is that Canada has defended the Nova Scotia measures in the context of that investigation to the Claimant's detriment.³⁹ The Federal Measures are not even part of the Claimant's Article 1110 expropriation claim, which confirms that the Claimant does not allege that the Federal Measures resulted in the closure of its Laurentide Mill in October 2014.

29. Furthermore, the Claimant apparently had no NAFTA claim with respect to the Federal Measures as of February 24, 2015. It was on that date that the Claimant first threatened Canada's Minister of International Trade that it would be launching a NAFTA Chapter Eleven arbitration against Canada with respect to the Nova Scotia Measures. There was no allegation at that time with respect to the Federal Measures, which only appeared in the Claimant's Notice of Intent filed on September 30, 2015.⁴⁰ This confirms the straightforward severability of the Nova Scotia Measures from the Federal Measures for the purposes of determining whether to hear Canada's jurisdiction and admissibility objections with respect to the former in a preliminary phase.

³⁷ Statement of Defence, ¶ 91, fn. 129.

³⁸ Notice of Arbitration, ¶ 61.

³⁹ Notice of Arbitration, ¶ 109.

⁴⁰ See **R-081**, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (February 24, 2015). The Claimant formally filed its Notice of Intent ("NOI") on September 30, 2015.

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V. CONCLUSION

30. Canada's proposal to bifurcate does not prejudice the Claimant's case and, in fact, will be advantageous to both parties.

31. Canada had proposed that written pleadings in a preliminary phase on jurisdiction and admissibility be completed in only eight months with an oral hearing held shortly thereafter.⁴¹ Despite the Claimant's refusal to consent to a preliminary phase, which has delayed the schedule by a few months, it is still entirely feasible to complete the preliminary phase within one year of the Tribunal's decision to bifurcate. This is the most efficient and fair procedure compared to the prospect of spending several years and potentially millions of dollars on a consolidated proceeding only for the Tribunal to later conclude that it has no jurisdiction over the Nova Scotia measures or that certain claims were inadmissible. Indeed, the Tribunal and the disputing parties should seek to avoid finding themselves in the circumstances which caused another tribunal to lament that "[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided" had the proceedings been bifurcated and the respondent's jurisdictional objection been heard in a preliminary phase.⁴²

32. It is evident from the Claimant's Statement of Claim and Canada's Statement of Defence that if this case proceeds to the merits, it will cost both disputing parties many millions of dollars in legal and expert fees and expenses and years of complicated argument. The spectre of voluminous document production already looms large over the dispute, as does the potential for disagreement and delay in terms of designating confidential and restricted access information given the highly competitive market in which the Claimant and the Port Hawkesbury mill operate. But if Canada's jurisdictional objections are successful, there will be no need for either disputing party to seek out and retain witnesses or experts on damages or on the global and North

⁴¹ Letter from Canada to the Tribunal dated August 9, 2016, Annex A.

⁴² **RL-026**, *Caratube International Oil Company v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award, 5 June 2012, ¶ 487 ("In the result Claimant has failed on the first hurdle of jurisdiction. With the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation and the preliminary determination of its equivalent of Rule 41(1) objections under the Rules.").

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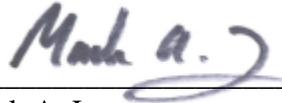
American pulp and paper market generally and the SC paper market specifically, and the scope of required document discovery will be significantly diminished.

33. If Canada's jurisdictional and admissibility objections are not accepted by the Tribunal, Canada has agreed that merits and damages should be heard together in a single phase. As is the case with Canada's bifurcation proposal, Canada's position is based on fairness, efficiency and economy for both disputing parties.

34. Accordingly, Canada respectfully requests that the Tribunal bifurcate these proceedings and hear Canada's jurisdictional and admissibility objections in a preliminary phase.

September 29, 2016

Respectfully submitted
on behalf of the Government of Canada,



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