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

BETWEEN:

ST. MARYS VCNA, LLC

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA
BRIEF OUTLINE OF JURISDICTIONAL AND SUBSTANTIVE DEFENCES

AUGUST 31, 2012

Departments of Justice and of
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I. INTRODUCTION

1. This submission responds to the Tribunal's directions of July 25, 2012 and August 24, 2012, that Canada provide a brief outline of its jurisdictional and substantive defences prior to the preliminary conference.[1]

2. Canada submits that the Tribunal does not have jurisdiction over this claim, and in any event, there has been no violation of any NAFTA Chapter Eleven obligation.

3. St. Marys VCNA, LLC ('SMVCNA') is a Delaware Limited Liability Company constituted on October 18, 2010.[2] SMVCNA admits that it is ultimately owned and controlled by the Votorantim Group of Brazil ('Votorantim').[3] SMVCNA alleges that it owns and controls an investment in Canada: St. Marys Cement Inc. (Canada) ('SMC'), an Ontario corporation.[4] SMVCNA has provided no evidence of its ownership or control of SMC, which in any event cannot predate October 18, 2010.

4. On June 20, 2006 SMC acquired agricultural lands in Flamborough, Ontario, a rural and residential district of the City of Hamilton (the 'Site'). Since 2004, the previous owner had sought but failed to obtain approvals from relevant Ontario and municipal authorities to transform the Site into a major quarry. SMC pursued this process, but as of 2010 had still failed to satisfy the authorities it should be granted any of the relevant approvals.

5. On April 12, 2010, the Ontario Minister of Municipal Affairs and Housing ('MAH'), responding to environmental, public health and land-use concerns raised by the application processes and by the affected municipalities, exercised his statutory discretion

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[1] Canada attaches to this submission as **Appendix A** a Glossary of Relevant Terms and as **Appendix B** a Chronology of Measures and Related Events.

[2] Notice of Arbitration, September 14, 2011 ('NOA'), Schedule of Documents, Tab 2.

[3] NOA, paras 2, 4.

[4] NOA, Schedule of Documents, Tab 1.

under subsection 47(1) of the *Planning Act* to sign a Minister's Zoning Order ('MZO') in respect of the Site. The MZO took effect the next day.[5] The MZO effectively froze the zoning on the Site to existing permitted uses under the applicable by-laws (Agricultural and Conservation Management), thereby prohibiting use of the Site as a quarry.

6. On April 14, 2010, Erik Madsen, the CEO of SMC, wrote to the office of the Premier of Ontario, as follows:

> I am following up my telephone conversation today with your assistant, Mr. Aaron Freeman, in response to the government's unilateral minister's zoning order that permanently restricts the proposed quarry site in the City of Hamilton formerly in the Town of Flamborough.
>
> (...)
>
> Given the government's action, we are ready to initiate immediate negotiations with the Premier on the following:
>
> 1. The recovery of the well over $20 million we have invested to satisfy regulatory requirements through tests mandated by the province and municipalities since 2006;
>
> 2. Compensation to St. Marys of $250 million in foregone profit from the Flamborough Quarry over its lifespan.[6]

7. The dispute failed to be resolved. The MZO was maintained, and SMC as of April 2010 launched an application to the relevant statutory authority to revoke or amend the MZO.

8. Votorantim thereafter incorporated SMVCNA on October 18, 2010, and allegedly transferred to SMVCNA ownership of SMC, though SMVCNA has failed to provide any proof of that transfer. SMVCNA proceeded to file a Notice of Intent to Submit a Claim to Arbitration under NAFTA ('NOI'). In its NOI, SMVCNA makes the very same allegations made by SMC on April 14, 2010. SMVCNA relies on events almost exclusively predating October 18, 2010, notably the MZO of April 2010. Its NOI claims

[5] *Planning Act*, R.S.O. 1990, c.P.13. The MZO was filed with the Registrar of Regulations on April 13, 2012 as O.Reg. 138/10.

[6] Letter from Erik Madsen, CEO, St. Marys Cement and Votorantim Cement North America to Peter Wilkinson, Chief of Staff, Office of the Premier, April 14, 2010 , (**Annex 1**) (emphasis added)

$275 million, i.e. virtually the same amount SMC had claimed in its April, 2010 letter to Ontario.[7] At the time it filed its claim SMVCNA was and remains a shell company, with no substantial business activities in the United States.[8]

9. Based on the above facts and those further set out below, Canada submits that the Tribunal should reject this claim, for at least the following reasons:

- SMVCNA has failed to confirm *prima facie* jurisdiction, having failed to demonstrate that it owns or controls its alleged investment, SMC;
- Canada is in any event entitled to deny SMVCNA the benefits of NAFTA Chapter Eleven, as SMVCNA is owned and controlled by a non-NAFTA investor, and is a shell company lacking substantial business activities within the meaning of NAFTA Article 1113(2);
- The claim is in any event an abuse of jurisdiction (*abus de droit*), as Votorantim caused ownership of SMC to be transferred to its newly-created US corporate vehicle SMVCNA in order to acquire NAFTA jurisdiction over an existing dispute;
- The claim in any event fails *ratione temporis*, as SMVCNA acquired the investment after the disputed measures, including after assertion of claims and alleged damages in respect of such measures;
- In any event, the NAFTA Chapter 11 conditions with respect to timing of the NOA have not been met and therefore Canada does not consent to arbitration; and
- The Claimant has in any event made out no substantive violation of any provision of NAFTA.

[7] NOI, para. 32

[8] *See* paras. 41-45, *infra*

II. FACTUAL OVERVIEW

10. This dispute arises out of SMC's failure from 2006 to 2010 to convince relevant provincial and municipal authorities that it should be allowed to have agricultural land in close proximity to residential communities and a school, incorporating two Provincially Significant Wetlands, and wedged into an area designated as Environmentally Significant, transformed into a 66-hectare rock quarry, and extract from it up to 3 million tonnes of aggregate a year for a period of 20 years.

11. The proposed extraction was to take place below the water table, requiring pumping and re-insertion into the subsurface of an estimated 33,039,070 cubic metres of groundwater a year (more than 200 times the annual water use of surrounding communities), with undetermined impacts on local residential water use and quality.[9] A further 748,558 cubic metres of water would also be discharged annually into an environmentally sensitive local creek, complicating flooding controls operated by the local Conservation Authority. Failure of SMC's proposed groundwater recirculation system risked causing significant and potentially irreparable damage.

12. The proposed quarry was set to operate from Monday to Saturday, requiring truck traffic of up to a thousand in-and-outbound trucks a day.

13. It would leave in its wake an enormous pit, into which groundwater would seep and form an open lake, transforming local water treatment requirements.

14. To develop and operate a quarry on the Site, SMC required (1) re-designation of the Site under the local Official Plan and (2) an amendment of the applicable zoning by-law (both actions to be undertaken by the City of Hamilton, with the involvement of other municipalities, the local Conservation Authority and other agencies)[10]; (3) a licence

[9] For example, the adjacent community of Carlisle, with roughly 2,500 inhabitants, uses 144,021 cubic metres of water a year.

[10] Section 34 of the *Planning Act* enables zoning by-laws to be passed by councils of local municipalities, which control and restrict the use of lands.

under the Ontario *Aggregate Resources Act*[11] ('*ARA*'), issued by the Ministry of Natural Resources ('MNR'); and (4) related hydrological approvals from the Ministry of the Environment ('MOE').

15. Moreover, MAH retained a residual power to issue a MZO fixing the use of the Site, and to issue a Declaration of Provincial Interest ('DPI') in respect of the Site.[12] In matters of particular sensitivity involving provincial land use planning interests, the legislature maintains the provincial government's ultimate authority over the decision-making process, on the understanding that such discretionary power in all events is not 'unfettered' but must be exercised consistent with the object and purpose of the statute, and remains subject to review by Canadian courts.

16. Among the statutory criteria for relevant approvals were a) the effect of the quarry on the environment and nearby communities; b) the views of surrounding municipalities; c) possible effects on ground and surface water resources; and d) main haulage routes and proposed truck traffic to and from the Site.[13] The process involves significant public input.

17. SMC had obtained none of the required approvals as of April 2010. As of that time many significant questions dating from the outset of SMC's application remained unanswered by SMC, and indeed had been outstanding (and controversial) since the initial launch of the application process by SMC's predecessor, in 2004.

18. In June 2008 SMC was granted an initial permit by MOE to conduct water testing. First phase testing in July 2008 was affected by heavy rains, producing unusable

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[11] *Aggregate Resources Act*, R.S.O. 1990, c. A-8.

[12] Under s. 47(1) of the *Planning Act*, the Minister of Municipal Affairs and Housing may exercise any of the powers conferred upon councils of local municipalities, by issuing a Minister's Zoning Order, which prevails over any applicable municipal zoning by-law. The Minister may also issue a Declaration of Provincial Interest pursuant to s. 47(13.1) of the *Planning Act*, directing that any order in respect of a MZO will be subject to review by the Lieutenant Governor in Council. These powers were initially enacted in 1968 and 1983, respectively. Ontario has issued several hundred MZOs in respect of various sites in the Province, and eight DPIs.

[13] *Aggregate Resources Act*, s. 12(1).

results. MOE therefore required SMC to re-conduct first phase testing before permitting subsequent test phases to proceed. SMC disputed MOE's conclusion, and indeed suddenly rejected the need to conduct water testing at all at this stage.

19. In the absence of basic water testing, on January 22, 2009 SMC submitted its *ARA* quarry licence application to MNR.

20. Between April 2009 and March 2010, in connection with the statutory consultation process, SMC received hundreds of formal objections to its *ARA* application from local residents, organizations, and municipalities. Both MOE and MNR took the position they could not support SMC's application. Hamilton City Council and Halton Regional Council passed resolutions asking that Ontario disallow the proposal.

21. On April 12, 2010, responding to environmental, public health and land-use concerns raised in the various application processes and by affected municipalities, MAH issued the MZO in respect of the Site. The MZO took effect the next day.[14] The MZO effectively froze the zoning on the Site to existing permitted uses under the applicable by-laws (Agricultural and Conservation Management), thereby prohibiting use of the Site as a quarry.

22. On April 14, 2010, the CEO of SMC wrote to the office of the Premier of Ontario protesting the 'permanent restriction' imposed by the MZO, claiming $250 million in lost profits and $20 million in sunk costs (*see* paragraph 5, above).

23. Consultations between SMC representatives and MAH took place on April 26, 2010, but failed to resolve the dispute.

24. On May 10, 2010 SMC's counsel therefore wrote to MAH, seeking revocation or amendment of the MZO and requesting a hearing before the Ontario Municipal Board ('OMB') to decide the issue. On the same date SMC issued a press release, noting that it was challenging the MZO.

[14] *Planning Act*, R.S.O. 1990, c.P.13. The MZO was filed with the Registrar of Regulations on April 13, 2012 as O.Reg. 138/10.

25. Under the *Planning Act*, the OMB is empowered to hold a hearing on the merits of an applicant's request for revocation or amendment of a MZO. The OMB is a specialized tribunal subject to the *Statutory Powers and Procedures Act*[15] and has its own detailed *Rules of Practice and Procedure* providing for *viva voce* evidence, expert evidence, documents, submissions, and participation by parties and interested participants. A decision of the OMB is reviewable in Ontario court.[16]

26. Between April and October 2010, *prior* to SMVCNA's incorporation, SMC received confirmation that various related approvals process would be suspended, pending resolution of the dispute concerning the MZO:

- On April 30, 2010 the City of Hamilton ('Hamilton') wrote to SMC, advising that in light of the MZO, its review of *Planning Act* applications submitted in respect of the Site and other related actions would be suspended.

- On May 26, 2010 SMC requested permission to undertake water tests on the Site, in support of its proposed quarry plan. On June 3, 2010 MOE declined the request, given the MZO's prohibition on 'use' of the Site as a quarry. On June 11, 2010 SMC filed an administrative appeal of MOE's decision, but withdrew its appeal without explanation on October 12, 2010.

- On August 27, 2010 SMC submitted a draft Haul Route Study for review by affected municipalities and agencies. As of September 30, 2010 the Regional Municipality of Halton ('Halton') confirmed that it would not review the Haul Route Study, in light of the MZO. As of October 6, 2010 the Town of Milton ('Milton') confirmed the same.

27. Despite that these confirmations predated SMVCNA's incorporation on October 18, 2010, SMC took the following steps only *after* SMVCNA's creation, in an awkward attempt to 'post-date' the dispute, for purposes of NAFTA Chapter Eleven jurisdiction:

[15] *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.92

[16] *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28

- On February 25, 2011 SMC presented to MOE the same request for permission to undertake water tests on the Site that it had filed on May 26, 2010. On April 8, 2011 MOE sent the same response (the test request was refused, in light of the MZO). SMC thereafter re-filed the request for administrative review that it had abandoned on October 12, 2010, in respect of the prior refusal. MOE's response has since been upheld through two levels of administrative and judicial appeal.[17]

- On March 1, 2011, SMC's counsel wrote to Hamilton, Halton and Milton, objecting to the suspensions of process the latter had notified in April, September and early October 2010.

28. On February 4, 2011, SMC's counsel also wrote to counsel for MAH, arguing that Ontario had to issue a DPI in respect of the MZO no later than 30 days prior to April 1, 2011.[18]

29. As of April 13, 2011, the OMB had confirmed that the hearing on the request to revoke or amend the MZO would take place from September 26, 2011 to October 7, 2011, and would involve eight concerned parties. [19]

30. On April 20, 2011, MAH issued a DPI pursuant to s. 47(13.1) of the *Planning Act.*[20] The *Planning Act* allows for such Declarations where a request to revoke or amend a MZO has been referred to the OMB for hearing.[21] The Minister advised that he was of the opinion that a matter of provincial interest was, or was likely to be, adversely affected

[17] The Environmental Review Tribunal in a decision of January 13, 2012 supported MOE's decision, and was in turn upheld in the subsequent appeal to the Divisional Court (a branch of the Superior Court of Justice of Ontario) in a decision issued August 20, 2012.

[18] Letter from counsel to SMC to counsel for MAH, February 4, 2011 (**Annex 2**). Under the *Planning Act*, a DPI is issued through notice by the Minister under subsections 47(13.1) and (13.2), the sections referenced in the cited letter.

[19] Those named as parties were SMC, MAH, Hamilton, Friends of Rural Communities and the Environment ('FORCE', a local residents' group), Halton, Milton, City of Burlington ('Burlington'), and Conservation Halton, the local Conservation Authority.

[20] *Planning Act*, s. 47(13.1).

[21] *Planning Act*, s. 47(13.1).

by the request to revoke or amend the MZO. The stated grounds for issuance of the DPI were the protection of ecological systems, including natural areas, features and functions; the supply, efficient use and conservation of water; the resolution of planning conflicts involving public and private interests; the protection of public health and safety; and the appropriate location of growth and development.

31. A DPI makes an OMB decision subject to confirmation, variation or rescission by the Lieutenant Governor in Council.[22] Under the *Planning Act*, the Lieutenant Governor in Council has a reviewing role in a number of matters: policy statements, approval of OMB decisions concerning official plans, amendments to official plans, zoning by-laws, approval of agreements for community improvement grants, exempting energy undertakings from the Act, and establishing a development permit system, along with additional planning powers under the *Ontario Municipal Board Act*.

32. A decision taken by the Lieutenant Governor in Council confirming, varying or revoking an OMB decision is itself reviewable in Canadian courts. Its decision is not unfettered, and remains subject to review in accordance with applicable law.

33. On May 13, 2011, *i.e.* within a few weeks of the April 20, 2011 DPI, SMVCNA filed its NOI. On the same day, SMC requested that the OMB hearing be adjourned *sine die* pending its application for judicial review of both the MZO and the DPI before the Divisional Court. On May 27, 2011 SMC filed the latter application to Divisional Court, which remains pending.

34. In light of SMC's withdrawal from the OMB process, the OMB has been unable to exercise any power of review over the MZO, and the Lieutenant Governor in Counsel has issued no corresponding decision pursuant to the DPI.

35. Had the MZO been revoked or amended further to the OMB process or any subsequent administrative or judicial review, the Site still at that point could not have

[22] *Planning Act*, s. 47(13.4), (13.5). A decision taken by the Ontario Premier and the provincial Cabinet and approved by the Lieutenant Governor is 'taken by the Lieutenant Governor in Council'. The Lieutenant Governor is the representative of Her Majesty The Queen in Ontario.

been used as a quarry. SMC thereafter would have been required to obtain all relevant approvals outstanding and not granted as of 2010, notably an amendment to the Official Plan, rezoning, a quarry license under the *ARA*, and related hydrological approvals.

III. JURISDICTIONAL DEFENCES

36. Canada hereby raises and asks the Tribunal to consider as a preliminary matter in this arbitration, the following objections to jurisdiction and/or admissibility under Articles 15(1) and 21(4) of the 1976 UNCITRAL Arbitration Rules (the 'Rules'):

- Claimant has failed to establish that it owns or controls the alleged investment SMC, and therefore has no standing to bring a claim under NAFTA Article 1116 (lack of jurisdiction *ratione materiae*).

- The conditions for denying Claimant the benefits of NAFTA Chapter Eleven, set out in NAFTA Article 1113(2) (Denial of Benefits), are met. Canada therefore has not consented and does not consent to jurisdiction.

- Claimant's alleged acquisition of the investment was an abuse of jurisdiction (lack of jurisdiction *ratione materiae*).

- The Tribunal lacks jurisdiction in respect of events occurring prior to the investment (lack of jurisdiction *ratione temporis*).

- Claimant has failed to respect the conditions precedent for submitting a claim to arbitration under NAFTA Article 1120(1). Canada therefore has not consented and does not consent to jurisdiction.

A. Failure to Establish *Prima Facie* Status as Investor

37. Despite Canada's repeated requests, Claimant has failed to establish ownership or control of its alleged investment SMC at the time of the events referenced in its claim, or at all. Publicly-available information suggests that as of the date of creation of SMVCNA on October 18, 2010 and for an undetermined time thereafter, SMC was owned or controlled by the Ontario corporation VCNA.

38. Based on the requirements of NAFTA Articles 1101(1) and 1116, read together with the definitions of 'investor of a Party' and 'investment of an investor of a Party' in Article 1139, an investor of a Party must own or control an investment in the territory of another Party, as a *prima facie* condition for jurisdiction under NAFTA Chapter Eleven.

B. Denial of Benefits

39. Canada has invoked Article 1113(2) of the NAFTA to deny Claimant the benefits of Chapter Eleven, on the following basis: 1) SMVCNA is a Delaware company owned by a Brazilian investor and 2) SMVCNA lacks substantial business activities in the United States within the meaning of Article 1113(2), or at all. This fundamental jurisdictional objection by its nature requires consideration by the Tribunal as a preliminary issue.

40. Canada's decision to invoke Article 1113(2) was taken after extensive due diligence, including with the assistance of an external expert firm, and repeated requests for information from the Claimant; and was adopted after providing prior notice to the Claimant's alleged home jurisdiction, the U.S., in accordance with NAFTA.[23]

41. The Claimant has already conceded the first condition for denying benefits under NAFTA Article 1113(2), by its admission that it is 'owned by a foreign entity and is part of the Votorantim Group of Brazil.'[24]

42. As for the second issue, Canada's extensive due diligence as of the summer of 2011 generated no evidence in publicly available records of any business activities by

[23] *See* letter from Canada to counsel to SMVCNA, December 22, 2011 (**Annex 3**); letter from Canada to the United States of America, December 22, 2011 (**Annex 4**); letter from counsel to SMVCNA to Canada dated December 23, 2011 (**Annex 5**); letter from Canada to counsel to SMVCNA dated December 23, 2011 (**Annex 6**); letter from counsel to SMVCNA to Canada dated January 10, 2012 (**Annex 7**); letter from Canada to counsel to SMVCNA dated January 26, 2012 (**Annex 8**); letter from counsel to SMVCNA to Canada dated January 27, 2012 (**Annex 9**); letter from Canada to counsel to SMVCNA dated January 30, 2012 (**Annex 10**); letter from counsel to SMVCNA to Canada dated February 8, 2012 (**Annex 11**); letter from Canada to SMVCNA dated March 1, 2012 (**Annex 12**); letter from Canada to the United States of America, March 1, 2012 (**Annex 13**).

[24] NOI, para. 3; NOA, para. 4.

SMVCNA in the United States, beyond the bare fact of its incorporation and registration, and reference to the entity in one UCC financing statement.[25]

43. Canada notably found no mention of SMVCNA in searches on public databases and news services of any date, relating to any of the following: corporation filings; professional licences; real property records; motor vehicle registrations, FAA aircraft registrations; U.S. patents and patent applications; company information derived from business sources and directories; federal civil and criminal dockets; bankruptcy petitions; state civil and criminal dockets; judgment and lien filings; available case law; all available Nevada and Delaware public records; federal agency decisions and opinions; SEC filings; securities-related actions and orders; state securities administrative records and decisions and letters; available case law related to securities and commodities matters; and media reports derived from hundreds of commercial and government publications.

44. Canada notified Claimant of its concerns as of December 22, 2011, offering to it the opportunity to put forward evidence establishing that it had substantial business activities in the United States, in particular requesting evidence of ownership structure, assets, holdings, and other business activities.[26]

45. The documents Claimant produced in its subsequent exchanges with Canada failed to establish any substantial business activity. Instead, together with the results of its own due diligence, Canada established that:

- SMVCNA was constituted well after all but one of the measures complained of in its NOI and NOA.[27] It therefore necessarily lacked substantial business activities

[25] On further investigation by Canada, this UCC Financing Statement was most likely no more than subsidiary security provided in respect of a main transaction that was already fully secured against properties and assets in Canada, and that was undertaken by Votorantim's Canadian companies in respect of their own activities. Despite requests by Canada for clarification, SMVCNA has failed to produce any evidence that SMVCNA itself has drawn on any credit facility, or any evidence that any US property of SMVNCA was secured pursuant to this financing.

[26] Letter from Canada to counsel to SMVCNA, December 22, 2011 (**Annex 3**)

[27] SMVCNA was constituted on October 18, 2010. *See* attached **Appendix B**, providing a chronology of

at the time of the measures at issue and alleged breach of NAFTA, notably at the time the dispute concerning the MZO arose in April 2010.

- While SMVCNA in its NOI and NOA cited measures post-dating its creation, with one exception all evidence on which it relied to establish its US business activities post-dated by several weeks even the latest measure of which it complains.[28]

- SMVCNA failed to produce any records substantiating its corporate and ownership structure, shareholdings, corporate meetings, meetings of SMVCNA shareholders, registered real and/or personal property, assets, purchases, transactions, obligations, office space leases, direction by SMVCNA of any existing Votorantim entities and their related activities, receipt by SMVCNA of any revenues, or reference to SMVCNA in any media reports or legal or information databases.

- SMVCNA failed to appear in Votorantim's publicly-available financial statements, as a holding company for its North American operations or at all. Votorantim's Financial Statements for the Third Quarter of 2011, reporting events as recent as November 29, 2011, make no mention of SMVCNA.[29] Canada has since obtained Votorantim financial statements as of March 2012. SMVCNA still fails to be listed.[30]

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the measures on which SMVCNA relies in relation to the date of incorporation of VCNA. The Declaration of Provincial Interest ('DPI') was adopted after the creation of SMVCNA, in April 2011. The DPI merely provided an additional layer of review in respect of the existing dispute concerning the MZO, issued in April 2010.

[28] The DPI was issued by Ontario on April 20, 2011 (NOI, para. 24). In its submissions of January and February 2012 to Canada, SMVCNA provided evidence that it had undertaken 'paper' transfers of employees within the Votorantim Group to SMVCNA no earlier than May 2011. Apart from the UCC Financing Statement referenced above, this was the earliest evidence of any activity by SMVCNA.

[29] Votorantim Participaçoes S.A., Consolidated Interim Financial Statements at September 30, 2011, and Independent Auditor's Report (including addendum letter dated November 29, 2011), pp. 16-17 (**Annex 14**)

[30] Votorantim Participaçoes S.A., Consolidated Interim Financial Statements at March, 31, 2012, pp. 12-13

- As evidence of its financial presence in the United States, SMVCNA produced a single banking statement dated November 2011, referencing a total of five transactions in undisclosed amounts, failing to confirm when the account was created, nor the size or purpose of the few listed transactions.

- SMVCNA's alleged Nevada place of business is a virtual address, unstaffed by any employees. SMVCNA filed an application for registration as a foreign limited liability company in Nevada, its alleged US place of business, on March 18, 2011. In that filing it affirmed its place of business to be Toronto, Ontario. SMVCNA was only issued a licence to do business in Nevada on July 5, 2011. SMVCNA only changed its registered place of business from Toronto to Henderson, Nevada as of January 30, 2012.

- In response to Canada's request for information regarding its employees, SMVCNA provided evidence of partial 'paper' transfers of a few existing employees within the Votorantim Group, none of whom were put on the SMVCNA payroll, and all of whom retain responsibilities for other Votorantim companies.

- As for business transactions, SMVCNA provided only evidence of alleged 'potential' transactions, along with two *de minimis* consulting contracts, each for only a few days' work.

46. A summary of Canada's findings regarding the Claimant's activities in the US are set out in Canada's formal notification of Denial of Benefits, sent on March 1, 2012 to the United States. [31]

47. In sum, based on Canada's extensive due diligence to date, SMVCNA is simply a shell company, set up as a vehicle for Votorantim to after the fact manufacture jurisdiction under NAFTA Chapter Eleven. Accordingly, the conditions of NAFTA

(Annex 15)

[31] *See* Letter from Canada to the United States of America dated March 1, 2012 (**Annex 13**).

Article 1113(2) are fulfilled, and the Tribunal upon review of Canada's submissions should declare itself without jurisdiction in this matter.

C. Abuse of Jurisdiction

48. In the alternative, this claim should be dismissed for lack of jurisdiction *ratione materiae*, because it constitutes an abuse of jurisdiction (*abus de droit*). The creation of SMVCNA and its alleged acquisition of SMC was a *pro-forma* reorganization, undertaken for the sole purpose of manufacturing investment treaty jurisdiction, after a substantial dispute had already materialized.

49. The Ontario Government issued the MZO on April 12, 2010 and made it effective the next day, freezing the zoning on the Site to permitted uses on that date ('Agricultural' and 'Conservation Management'), effectively preventing use of the Site as a quarry. The Canadian company SMC immediately protested, claiming $270 million in damages, and launched an application for revocation or amendment of the MZO.[32]

50. On October 18, 2010, more than six months after the dispute had materialized, and for no apparent business reason, Votorantim established SMVCNA, a Delaware limited liability company, and purported to transfer to it shareholding in SMC. As noted above, Canada currently does not know when after October 18, 2010, if at all, Votorantim caused SMVCNA to acquire SMC. Moreover, through its substantial due diligence Canada has confirmed that SMVCNA was and remained a mere shell company, maintaining a Toronto registered address through January 2012 (i.e., only after Canada began inquiring about the extent of SMVCNA's business activities in the United States).

51. Following its creation SMVCNA proceeded to launch a NAFTA Chapter Eleven Claim, claiming virtually the same amount SMC had invoked in its April 14, 2010 domestic notice of claim to Ontario, and relying on events that nearly all predated its existence - notably the April 12, 2010 MZO.[33]

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[32] *See* Letter from Erik Madsen to Peter Wilkinson dated April 14, 2010 (**Annex 1**).

[33] *See* **Appendix B**, Chronology of Measures Cited in NOI and NOA.

52. On its face, the evidence fully supports a conclusion that SMVCNA was formed and caused to be transferred SMC's shares (which is not demonstrated), to create after the fact jurisdiction, abusing rights designed for legitimate investors under NAFTA Chapter Eleven.

D. Lack of jurisdiction *ratione temporis*

53. Canada asserts in the alternative that the tribunal in any event lacks jurisdiction over nearly all of the events raised by the Claimant in its claim, as they predate the Claimant's investment.

54. Nearly all of the events complained of occurred and alleged related damages were claimed prior to October 18, 2010, the date SMVCNA was created by Votorantim.[34] As noted, it is not yet established on what date Votorantim thereafter caused to be transferred to SMVCNA share ownership in SMC. Even assuming the latter share transfer occurred (which is not established), all claims related to these events should therefore be struck for lack of jurisdiction *ratione temporis*.

E. Violation of timing requirements in NAFTA Article 1120(1)

55. In the further alternative, should the Tribunal decline Canada's jurisdictional challenges in respect of Denial of Benefits, abuse of jurisdiction, or jurisdiction *ratione temporis*, the claim is in any event outside the tribunal's jurisdiction, as it was filed in violation of the timing requirements of NAFTA Chapter Eleven.

56. In its claim, Claimant relies *inter alia* on the following two measures:

- MOE's decision dated April 8, 2011, not to issue a water permit in respect of the Site, on the basis that the MZO of April 2010 rendered the application inadmissible;[35] and

[34] *See* **Appendix B**, Chronology of Measures Cited in NOI and NOA.

[35] NOA, Schedule of Documents, Tab 24.

- The DPI of April 20, 2011, confirming that the administrative decision of the OMB in respect of the April 12, 2010 MZO, could be subject to potential revision by the Lieutenant Governor in Council.[36]

57. The purported NOA was submitted on September 14, 2011, less than six months after the two cited measures.

58. Article 1120(1) of the NAFTA provides that a claim to arbitration may be submitted 'provided that six months have elapsed since the events giving rise to the claim'. NAFTA Article 1122 provides that the six month cooling-off period under NAFTA Article 1120(1), among other requirements, constitutes a pre-condition for a Party's consent to arbitration.

59. The Tribunal must ensure that Claimant has complied with the specific timing requirements set out in NAFTA and that are conditions precedent to Canada's consent to arbitration. These timing requirements form part of the structure of proceedings under NAFTA Chapter Eleven, and it is improper for Claimant to ignore them.

IV. SUBSTANTIVE DEFENCES

60. Canada in any event denies that any of the measures mentioned in the NOI, NOA or Statement of Claim breach Canada's obligations under NAFTA Chapter Eleven. In deciding to issue the MZO and DPI in respect of the Site, the Government of Ontario acted in a non-discriminatory manner consistent with all of Canada's obligations under NAFTA. As with any approvals process raising complex issues concerning the environment, human health, and the appropriate balance of community and development interests, approval is not guaranteed in advance, and if refused will result in disappointment on the applicant's part. However, such disappointment is not grounds for a claim under NAFTA.

61. First, none of the measures of the Government of Ontario or of relevant municipal authorities in administering their authority under the *Planning Act* and related statutes,

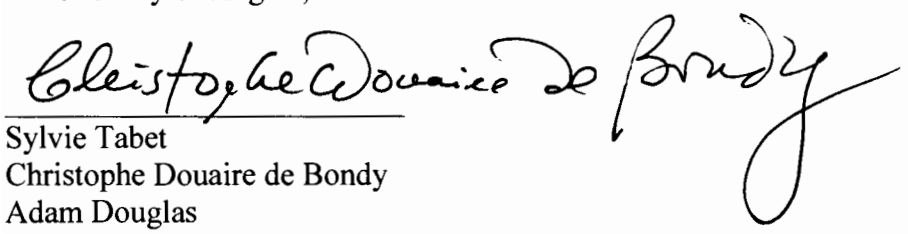
[36] NOA, Schedule of Documents, Tab 52.

violated Articles 1102 or 1103. SMC was accorded no less favourable treatment than that accorded to Canadian or other non-NAFTA party investors or investments of such investors in like circumstances.

62. Second, all of the measures identified in the NOI, NOA and Statement of Claim are consistent with Canada's obligations under Article 1105. The treatment accorded to SMC was consistent with the customary international law minimum standard of treatment of investors.

63. Third, there has been no expropriation of any investment. In particular, no 'rights to vary [the] land use designation' were expropriated, as no such right exists.

Respectfully submitted on behalf of
the Government of Canada
this 31st day of August, 2012



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Appendix A GLOSSARY OF RELEVANT TERMS		
Short Form	**Term**	**Brief Description**
ARA	*Aggregate Resources Act*	Ontario provincial legislation pursuant to which quarry authorizations are issued.
Conservation Halton	Halton Region Conservation Authority	The watershed management agency for the area including the Site. Mandated by the *Conservation Authorities Act* to deliver services and programs protecting and managing issues relating to water and other natural resources, in partnership with governments, landowners and other organizations.
Divisional Court	Divisional Court	A branch of the Superior Court of Justice in the Province of Ontario
DPI	Declaration of Provincial Interest	Issued by Minister of MAH under subsection 47(13.1) of the *Planning Act*, making any order in respect of a MZO subject to subsequent review by the Lieutenant Governor in Council.
ERT	Environmental Review Tribunal	Specialized Tribunal subject to the *Statutory Powers and Procedures Act* with its own detailed *Rules of Practice and Procedure* empowered to hold a hearing on the merits of an appeal of a MOE decision relating to water test permits.
FORCE	Friends of Rural Communities and the Environment	Local residents' group opposed to the proposed quarry.
Halton	Regional Municipality of Halton	Municipality (Region) within the Province of Ontario.
Hamilton	City of Hamilton	Municipality (City) within the Province of Ontario.
Lieutenant Governor in Council	Lieutenant Governor in Council	A decision taken by the Ontario Premier and the provincial Cabinet and approved by the Lieutenant Governor is 'taken by the LGIC'. The Lieutenant Governor is the representative of Her Majesty The Queen in Ontario.
MAH	Ministry of Municipal Affairs	Ontario Provincial Government

Appendix A GLOSSARY OF RELEVANT TERMS		
Short Form	**Term**	**Brief Description**
	and Housing (Ontario)	Ministry (responsible for zoning issues).
Milton	Town of Milton	Municipality (Town) within the Province of Ontario.
MNR	Municipality of Natural Resources (Ontario)	Ontario Provincial Government Ministry (responsible for aggregates issues).
MOE	Municipality of the Environment (Ontario)	Ontario Provincial Government Ministry (responsible for water and other environmental issues)
MZO	Minister's Zoning Order	Order issued by the Minister of MAH pursuant to subsection 47(1) of the *Planning Act*, regulating land use.
NAFTA	North American Free Trade Agreement	n/a
NOA	Notice of Arbitration	Claimant's NAFTA Chapter Eleven Notice of Arbitration dated September 14, 2011.
NOI	Notice of Intent	Claimant's NAFTA Chapter Eleven Notice of Intent dated May 13, 2011.
OMB	Ontario Municipal Board	Specialized Tribunal subject to the *Statutory Powers and Procedures Act* with its own detailed *Rules of Practice and Procedure*, empowered among other things to hold a hearing on the merits of an applicant's request for revocation or amendment of a MZO.
PTTW	Permit to Take Water	Permit issued by MOE to conduct water testing on a site.
Rules	1976 UNCITRAL Arbitration Rules	One of the applicable arbitration rules under which a disputing investor may submit a NAFTA Chapter Eleven claim (NAFTA Art. 1120(1)).
Site	Claimant's proposed quarry site	Agricultural lands owned by SMC in a rural district of the City of Hamilton, which SMC sought to transform into a Quarry.
SMC	St. Marys Cement Inc. (Canada)	Claimant's alleged investment in Canada, an Ontario corporation.
SMVCNA	St. Marys VCNA, LLC	Claimant, a Delaware limited liability company constituted on October 18,

Appendix A GLOSSARY OF RELEVANT TERMS		
Short Form	**Term**	**Brief Description**
		2010.
VCNA	Votorantim Cement North America	Ontario corporation, head of Votorantim's North American cement, ready mix and aggregate operations and presumed owner of SMC as of October 18, 2010.
Votorantim	Votorantim Group of Brazil	Brazilian conglomerate that ultimately owns and controls VCNA, SMVCNA and SMC.

Appendix B

Chronology of Measures and Related Events Cited in NOI and NOA

Date	Event
Events PREDATING Incorporation of St. Marys VCNA, LLC ('SMVCNA')	
June, 2006	St. Marys Cement Inc. (Canada) ('SMC') acquires agriculturally-zoned land in a rural district of Hamilton, Ontario (the 'Site') and takes over an existing application to transform the Site into an aggregates quarry [NOI - para. 4]; [NOA – para. 5]
'2006 onwards'	Affected municipalities express concerns about the effect of the proposed quarry on local water quality [NOA – para. 10]
September, 28 2006	SMC applies to conduct three phases of water pumping tests at the Site in support of its application [NOA – para. 11, Tab 10]
July 8, 2008	Ministry of the Environment ('MOE') permits SMC to commence phased water pumping tests at the Site [NOA – para. 14, Tab 13]
August, 27 2008	SMC provides Phase 1 water pumping results to MOE [NOA – para. 15, Tab 14]
September 24, 2008	SMC asks MOE to authorize Phase 2 water pumping testing at the Site [NOA – para. 15, Tab 15]
October 30, 2008	As heavy rainfall rendered testing Phase 1 test results unreliable, MOE declines to permit Phase 2 water testing and directs SMC to repeat Phase 1 [NOI – para. 26(b)]; [NOA – para. 16, Tab 18]
November 27, 2008	Meeting between SMC and MOE to discuss MOE's decision [NOA – para. 17, Tab 19]
January 22, 2009	SMC submits an application under the *Aggregate Resources Act* ('*ARA*') to Ministry of Natural Resources ('MNR'), seeking permission to operate a quarry at the Site [NOA – para. 23, Tab 25]
March 3, 2009	MNR deems SMC's *ARA* application complete for purposes of next step in the process (filing of objections) [NOA – para. 24, Tab 26]
April 15, 2009	City of Hamilton Council passes resolution calling for rejection of *ARA* Application [NOA – para. 25, Tab 27]
May 20, 2009	City of Hamilton formally objects to *ARA* Application [NOA – para. 26, Tab 29]
May, 21 2009	MOE formally objects to *ARA* Application [NOA – para. 28]
May 21, 2009	MNR formally objects to *ARA* Application [NOA – para. 29, Tab 32]
June 24, 2009	SMC writes City of Hamilton objecting to its resolution of April 15, 2009 [NOA – para. 25, Tab 28]
June 30, 2009	Expiry of SMC's initial water testing permit for the Site [NOA – para. 19]
July 7, 2009	City of Hamilton objects to Haul Route Study submitted by SMC in support of the proposed quarry [NOA – Tab 31]
October 21, 2009	*Hamilton Spectator* Newspaper Article refers to funding of quarry opponents (FORCE) [NOA – para. 36, Tab 34]
December 18, 2009	SMC submits application to carry out water testing at the Site [NOA – para. 30, Tab 33]

Date	Event
December 19, 2009	Regional Director of MOE contacts SMC to requesting that water testing application be withdrawn in favour of prior consultations with stakeholders [NOA – para. 31]
December 21, 2009 to March, 2010	Stakeholder meetings conducted in respect of renewed water testing, raising extensive objections.[NOA – para. 31]
April 12, 2010	**Minister's Zoning Order (MZO) signed by the Ministry of Municipal Affairs and Housing ('MAH'), becoming effective the next day [NOI – para. 18]; [NOA – para. 44, Tab 47]**
April 14, 2010	**SMC sends Letter to Office of the Premier of Ontario, protesting the MZO, and claiming $270,000,000 in damages.**
April 26, 2010	Consultations between MAH and SMC take place but fail to resolve the dispute concerning the MZO.
April 30, 2010	City of Hamilton writes to SMC to confirm suspension of process to consider Official Plan amendment and rezoning of the Site, in light of the MZO. [NOA – Tab 8]
May 10, 2010	SMC writes to MAH requesting that the MZO be revoked or amended and that its request be referred to the OMB for a hearing. [NOA – para. 45, Tab 48]
May 25, 2010	SMC files new water testing permit application to MOE for the Site [NOA – para. 20, Tab 21]
June 3, 2010	MOE declines new water testing permit application in light of the MZO [NOA – para. 20, Tab 23]
June 11, 2010	SMC appeal MOE's decision of June 3, 2010 to the Environmental Review Tribunal ('ERT') [NOA – Tab 51]
August 27, 2010	SMC sends draft Haul Route Study to adjacent municipalities (Halton Region and Town of Milton) requesting review.
September 30, 2010	Halton Region notifies SMC that its consideration of the Haul Route Study will be suspended in light of the MZO [NOI – para. 23 and 26(c)]; [NOA – para. 60, Tab 54]
October 1, 2010	St. Marys Cement Inc. and St. Marys Cement Inc. (Canada), both Canadian (Ontario) corporations, amalgamate to form St. Marys Cement Inc. (Canada) ('SMC') (the alleged Investment) [NOA – para. 2, Tab 1]
October 6, 2010	Town of Milton notifies SMC that its consideration of the Haul Route study will be suspended in light of the MZO [NOA – Tab 20]
October 18, 2010	**Incorporation of SMVCNA [NOA – para. 2, Tab 2]**
Events POST-DATING Incorporation of St. Marys VCNA, LLC ('SMVCNA')	
October 21, 2010	Conservation Halton confirms the same point already confirmed by the City of Hamilton, Halton Region, and Town of Milton, i.e. that it will not consider the Haul Route study pending a decision on the MZO [NOA – para. 61, Tab 58]
February 4, 2011	SMC's counsel writes to counsel to MAH, asserting that a Declaration of Provincial Interest ('DPI') in respect of the OMB's consideration of the MZO must be filed by the Province no later than 30 days prior to

Date	Event
	April 1, 2011.
February 25, 2011	SMC resubmits to MOE the same water testing permit application it had filed on May 25, 2010 and that MOE had refused on June 3, 2010 [NOA – para. 21, Tab 22]
March 1, 2011	SMC writes to the City of Hamilton, Halton Region, Town of Milton, and Conservation Halton, objecting to their notices of suspension of process in light of the MZO, that these authorities had communicated by letters dated April 30, 2010, September 30, 2010, October 6 and October 21, 2010, respectively [NOA – para. 62, Tabs 56, 57, 8 and 20]
April 8, 2011	MOE reiterates its decision of June 3, 2010 in respect of SMC's water testing permit i.e. declining to issue the permit in light of the MZO. [NOA – para. 21, Tab 24]
April 20, 2011	DPI issued by MAH [NOI – para. 24 and 26(a)]; [NOA – para. 54, Tab 52]
May 13, 2011	SMC requests adjournment *sine die* of the OMB hearing in respect of the MZO, pending an application for judicial review of the MZO and DPI by the Divisional Court.
May 13, 2011	SMVCNA submits a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven, claiming SMC as its investment in Canada.
July 5, 2011	Nevada State Business Licence granted to SMVCNA