

**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**

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**RESOLUTE FOREST PRODUCTS INC.**

**COUNTER-MEMORIAL ON JURISDICTION**

**FEBRUARY 22, 2017**

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## I. INTRODUCTION

1. The Government of Canada (“Canada”) moves for dismissal of Resolute Forest Products Inc.’s and Resolute FP Canada Inc.’s (collectively, “Resolute”) claims by making three arguments: (1) that Resolute knew or should have known that it had incurred damages or loss from the Nova Scotia Measures before December 30, 2012; (2) that Resolute’s claims must be rejected because the Nova Scotia Measures cannot possibly “relate to” Resolute’s Canadian investments outside of Nova Scotia under Article 1101, nor could Nova Scotia deny national treatment, under Article 1102, to Canadian investments located in other provinces; and (3) Resolute’s complaint about favorable tax treatment for Port Hawkesbury Paper (“PHP”) has not satisfied NAFTA’s procedural requirements according to Article 2103 (6). Canada concedes that its motion does not seek to dismiss claims against the Government of Canada.<sup>1</sup> Consequently, this motion cannot dispose of all of Resolute’s claims.

2. Resolute did not know, and could not have known, it had incurred damages from the Nova Scotia Measures before December 30, 2012 because there were no discernible damages prior to that date. MIT Economics Professor Jerry Hausman supports this conclusion with an econometric analysis demonstrating that prices for supercalendered paper ( “SC paper”) during the fourth quarter of 2012, when the Nova Scotia Measures first took effect, held steady and showed no impact from the reopening of PHP. He finds, as well, that Resolute suffered no volume effects in the fourth quarter of 2012.

3. Prof. Hausman’s econometric analysis confirms the contents of Resolute’s contemporary public statements, publicly available and published data from reputable

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<sup>1</sup> Canada Mem’l on Jurisdiction ¶ 1 n.2 (Dec. 22, 2016) (“Canada Mem’l”).

sources such as RISI, and PHP's own sworn statements before the United States International Trade Commission ("ITC") – all demonstrating that no SC paper producers were injured in 2012 by PHP's October revival. Canada has introduced no contrary evidence.

4. Instead, Canada argues speculatively, that damage was inevitable and therefore Resolute should have known it was coming, even if by December 30, 2012 it had not yet come. But the legal requirement is not that a foreign investor or its investment might incur loss or damage. It is that the foreign investor or its investment "has incurred loss or damage." Canada argues that the damaging consequences of PHP's resuscitation should have been obvious to Resolute before December 30, 2012. That argument still would not satisfy the legal standard – that Resolute must have incurred loss or damage before that date – but it does seem to concede that, at some point, Resolute must have incurred loss. Eventually, Resolute did, particularly with the constructive expropriation of the Laurentide SC paper mill in 2014, but neither that loss nor any other loss caused by PHP occurred in 2012. The losses Resolute did incur, and when exactly, are for the Merits Phase.

5. For this phase of the arbitration, all that matters is that Resolute did not incur loss or damage from the Nova Scotia Measures, the NAFTA breaches, before December 30, 2012. The evidence – the Hausman econometric analysis; the RISI data; the public statements; PHP's own sworn testimony – all prove that Resolute did not incur loss or damage before December 30, 2012. Canada has offered no evidence to the contrary.

6. The premise of Canada's Articles 1101 and 1102 objections is that Nova Scotia was assisting PHP to compete exclusively in Nova Scotia. Prof. Hausman characterizes this argument, from the perspective of economics, as "very far-fetched." Nor does it reconcile with the facts. Nova Scotia, and PHP, both intended the measures to make PHP the lowest cost producer of SC paper in North America, which necessarily meant a lower cost producer than Resolute. Because SC paper is a commodity competing on price,<sup>2</sup> in a diminishing market, the intent was always to take business away from Resolute and the other very few producers and deliver it to PHP.

7. Although Canada seeks to apply a more stringent jurisdictional threshold, Article 1101 requires only that measures "relate to" an investor and/or its investment. It is unavoidable that the Nova Scotia Measures "relate to" Resolute, but Resolute would satisfy Canada's proffered and incorrect standard, as well.

8. Nova Scotia never considered itself, when intervening in the North American market for SC paper, as limited to its own borders. To the contrary, in order to persuade British Columbia's Pacific Western Commercial Corporation ("PWCC") to buy the defunct NewPage facility, Nova Scotia offered tax advantages to PWCC and its parent (Stern Holdings) for their assets outside Nova Scotia. And when the United States questioned Canada about the PWCC purchase, fearing potential adverse impact to the SC paper industry in the United States, Nova Scotia collaborated with Canada on answers that Canada has kept secret, invoking the "national security" of Canada.

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<sup>2</sup> The ITC found that "relatively small price differences are sufficient to lead a purchaser to switch to an adjacent grade of SC paper." Moreover, "{p}urchasers generally contacted two to five suppliers before making a purchase, indicating robust competition among suppliers for sales. . . . We therefore find that price is an important consideration in purchasing decisions." C-054, *In Re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion at 15, 16, 19 (U.S.I.T.C. Dec. 2015).

9. The facts square with the law when considering comparisons for “national treatment.” Article 1102 does not require a foreign investor to invest in the state or province where a domestic favorite is afforded preferential treatment in order to have a claim about treatment less favorable. Instead, a line of arbitrations invoked by Canada reveals that the complaining foreign investor’s investment must be in the same business or commercial sector as the allegedly favored enterprise, and the treatment for comparison of “like circumstances” must be by the same government actor. Here, the business or commercial sector is identical: PHP, a Canadian company, and Resolute, an American company, are both producing SC paper in Canada and selling it in North America, and the treatment in question for comparison is by the same government actors, the Governments of Nova Scotia and Canada.

10. Canada’s argument about taxes presumes a Resolute claim that taxes were used to expropriate Resolute’s property. Resolute has made no such claim. The tax advantages extended to PHP, and that continue to be extended to PHP, are among a galaxy of measures that, collectively, have harmed Resolute – not by taxing Resolute, which is the point of NAFTA Article 2103 invoked by Canada, but by relieving PHP of taxes for commercial advantage. Canada’s argument is immaterial to Resolute’s claims, and Canada concedes that this argument could have no impact at all on Resolute’s Article 1102 claim.

11. Canada’s motion objecting to the jurisdiction and admissibility of Resolute’s claims should be rejected in all three of its domains. Resolute’s Statement of Claim was timely. The Nova Scotia Measures relate to Resolute’s investments and are not immune to a claim for breach of national treatment merely because Resolute’s Canadian



investments are located outside of Nova Scotia. The tax references, at a minimum, provide context for Resolute's claims against the Nova Scotia Measures adopted to afford PHP unfair competitive advantages in the North American marketplace.

## II. FACTUAL BACKGROUND

12. NewPage Corporation sought protection under the Companies' Creditor Arrangement Act in Canada ("CCAA") for its Port Hawkesbury mill on September 6, 2011.<sup>3</sup> At that time, NewPage-Port Hawkesbury was losing millions of dollars every month.<sup>4</sup> The Government of Nova Scotia, when NewPage declared bankruptcy, promised that the province would work to find a new buyer.<sup>5</sup> Nova Scotia would also keep the mill re-sale ready by keeping it in "hot-idle" and paying for a "forestry infrastructure fund" to ensure the supply chain remained open.<sup>6</sup> This plan was supposed to cover the mill for three months pending a quick sale, but ended up stretching out over a year.<sup>7</sup>

13. The CCAA Monitor overseeing the sale contacted one hundred and ten potentially interested parties, including Resolute.<sup>8</sup> Resolute determined that operating and transportation costs made a purchase economically impossible.<sup>9</sup>

14. Despite the large number of inquiries from the Monitor, only eight parties eventually submitted offers, and only four were invited to continue bidding.<sup>10</sup> Those final

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<sup>3</sup> R-024, Affidavit of Tor. E. Suther, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* (Sep. 6, 2011) ("Suther Aff.").

<sup>4</sup> R-024, Suther Aff. ¶ 6.

<sup>5</sup> R-038, Nova Scotia Press Release, *Seven-point Woodlands Plan Keeps Plant Resale Ready* (Sep. 9, 2011) ("Sep. 9, 2011 Nova Scotia Press Release").

<sup>6</sup> R-038, Sep. 9, 2011 Nova Scotia Press Release.

<sup>7</sup> See R-038, Sep. 9, 2011 Nova Scotia Press Release.

<sup>8</sup> See R-030, Second Monitor Report, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* ¶ 15 (Oct. 3, 2011) ("Second Monitor Report").

<sup>9</sup> See Resolute Statement of Claim ¶ 26 (Dec. 30, 2015) ("SOC").

four bids were submitted on December 16, 2011.<sup>11</sup> Two of the bids came from liquidators who were going to scrap the mill, and two (including PWCC) sought to keep the mill open as a going concern.<sup>12</sup> PWCC submitted a bid for C\$33 million, but demanded “a number of significant conditions that must be satisfied” before the sale, as PWCC wanted to make the mill “the lowest-cost operator in North America.”<sup>13</sup> On January 4, 2012, the Nova Scotia Government announced that PWCC was the winning bidder.<sup>14</sup>

**A. The Port Hawkesbury Sale Continued To Be In Jeopardy Until At Least September 22, 2012**

15. In July 2012, NewPage and PWCC entered into a conditional contract, subject to court approval and the fulfillment of numerous conditions.<sup>15</sup> The court-appointed Monitor overseeing the process, on July 12, 2012, “noted its concern regarding the ongoing conditionality of the Plan and has asked that any conditions within the control” of the applicable parties be resolved by August 7, 2012.<sup>16</sup> Port Hawkesbury later admitted, in sworn statements before the U.S. ITC, that PWCC corporate “officials themselves did not know whether the Port Hawkesbury mill deal was going to go through”

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<sup>10</sup> R-031, Sixth Monitor Report, *In re A plan of Compromise or Arrangement of NewPage Port Hawkesbury* (Jan. 13, 2012) (“Sixth Monitor Report”) ¶¶ 17-19; R-047, Fifth Monitor Report, *In re A plan of Compromise or Arrangement of NewPage Port Hawkesbury* (Nov. 24, 2011) (“Fifth Monitor Report”) ¶ 16.

<sup>11</sup> R-031, Sixth Monitor Report ¶ 18.

<sup>12</sup> R-031, Sixth Monitor Report ¶ 18.

<sup>13</sup> R-031, Sixth Monitor Report ¶ 20; C-013, Tenth Monitor Report, *In Re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.* (July 12, 2012) (“Tenth Monitor Report”) ¶ 31; C-012, Evidence of Nova Scotia Power, Inc., *In the Matter of an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Nova Scotia Utility and Review Board (Apr. 2012) (“Apr. 2012 Nova Scotia Power Evid.”) at 9.

<sup>14</sup> R-048, Nova Scotia Press Release, *Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready* (Jan. 4, 2012) (“Jan. 4, 2012 Nova Scotia Press Release”).

<sup>15</sup> C-013, Tenth Monitor Report ¶¶ 31-33, 55.

<sup>16</sup> C-013, Tenth Monitor Report ¶ 56.

in August 2012.<sup>17</sup> And many in Nova Scotia, including the main opposition political parties, the Port Hawkesbury mayor, and the Nova Scotia consumer advocate, criticized the deal.<sup>18</sup>

16. One of the conditions demanded by PWCC for purchasing Port Hawkesbury was a lower electricity rate. PWCC needed to ensure that its electricity rate was “either the lowest or among the lowest on a North American basis” because electricity is the largest cost of a paper mill.<sup>19</sup> Nova Scotia Power recognized that “{f}rom the beginning of {its} discussions {about the power rate}, PWCC has been clear that . . . {its} objective is to be the lowest cost operator in North America.”<sup>20</sup> Absent approval of a special Load Retention Tariff for more than seven years, PWCC “would abandon its \$33-million purchase of the shuttered Point Tupper paper mill.”<sup>21</sup> Despite opposition, Port Hawkesbury’s power rate application ultimately was granted.<sup>22</sup>

17. Before the sale could be completed, PWCC wanted to use tax losses previously generated by NewPage to pay for Port Hawkesbury’s electricity.<sup>23</sup> PWCC

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<sup>17</sup> C-044, Post Conference Br. of Port Hawkesbury Paper LP, *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, U.S. International Trade Commission (March 25, 2015), at Attachment A (“PHP Post Conf. Br.”).

<sup>18</sup> C-029, *New Page rescue plan “too risky for ratepayers,” Canadian Manufacturing* (July 16, 2012); C-033, *N.S. announces \$124.5 in incentives for NewPage, The Canadian Press* (Aug. 20, 2012); R-068, *Mill gets millions in N.S. cash, The Chronicle Herald* (Aug. 21, 2012); C-034, *Port Hawkesbury mayor on NewPage mill tax break: ‘Enough is enough,’ Canadian Press* (Aug. 22, 2012).

<sup>19</sup> R-062, *In the Matter of an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Nova Scotia Utility and Review Board (Aug. 20, 2012) (“Aug. 20, 2012 NSURB Dec.”) ¶¶ 56-57.

<sup>20</sup> C-012, Apr. 2012 Nova Scotia Power Evid. at 9.

<sup>21</sup> C-008, *UARB approves paper mill power deal, Cape Breton Post* (Aug. 20, 2012).

<sup>22</sup> R-062, Aug. 20, 2012 NSURB Dec.

<sup>23</sup> R-062, Aug. 20, 2012 NSURB Dec. ¶ 8 (stating that the ultimate electricity rate deal “hinged on the acceptability to Canada Revenue Agency (“CRA”) of the use of non-capital losses

stated that, absent a favorable advance ruling on this tax treatment from the federal government, it would not purchase the mill.<sup>24</sup>

18. The tax proposal failed to obtain the necessary approval.<sup>25</sup> On September 14, 2012, the Nova Scotia Government presented an alternative offer: to forgive, subject to certain conditions, a \$40 million loan that previously was repayable. PWCC nevertheless still sought to apply the tax benefits to other operations of its parent entity, Stern Partners.<sup>26</sup>

19. PWCC's purchase of Port Hawkesbury seemed to fall apart on September 21, 2012. Nova Scotia issued a press release that day stating:

Premier Darrell Dexter today, Sept. 21, responded with great disappointment on behalf of the people and businesses in Port Hawkesbury and the entire Strait region that Pacific West Commercial Corporation will not proceed with reopening the mill in that community.

"I know this news will be devastating to the workers and their families," said Premier Dexter. "The province fought as hard as it could for those jobs because this government knows good jobs are the lifeblood of rural communities. . . .

The premier said that following the Canada Revenue Agency ruling, the province and Pacific West Commercial Corporation tried their best to find a way forward within the financial framework already announced.

"The negotiators have worked extremely hard this week to tie down those details," Premier Dexter said. "But in the end the Canada Revenue Agency ruling made this an impossible situation to overcome. Every option identified exposed Nova Scotia taxpayers to too much risk and the province was not prepared to accept that."

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accumulated by {NewPage Port Hawkesbury} and tax-free payment of dividends.").

<sup>24</sup> See C-028, Pre-Filed Evidence of Pacific West Commercial Corp., *In re An Application by Pacific West Commercial Corporation for a Load Retention Rate* at 16 (Apr. 27, 2012) ("A favourable Advance Tax Ruling is a prerequisite to PWCC's investment in the Mill and obviously integral to the overall electricity and steam self-supply arrangements discussed above.").

<sup>25</sup> R-069, *Nova Scotia paper mill revived in 11<sup>th</sup>-hour twist*, *CBC News* (Sept. 22, 2012).

<sup>26</sup> C-036, *Mill deal revived: Still in game but not out of woods*, *The Chronicle Herald* (Sept. 23, 2012).

Premier Dexter noted that the employees took significant steps to set the mill up for restart on a competitive basis, and that Richmond County worked hard to arrive at a fair agreement on property taxes.

"Everyone had a role to play if this mill was going to reopen and be successful. The province took every reasonable step to keep this mill resale ready and facilitate the reopening.

"The key for Nova Scotia was that this mill operates for the long term and that the jobs be there for decades to come, not just a year or two. . . ."

Since it was announced in August, 2011 that the NewPage Corporation would idle the mill, the province has focused its efforts on ensuring the mill remained ready for resale and a quick restart by maintaining the supply chain and keeping the necessary forestry infrastructure in place.<sup>27</sup>

PWCC also issued a press release on September 21, 2012 declaring that the deal had collapsed.<sup>28</sup>

20. The next day, September 22, the deal was revived. To help PWCC use the tax benefits, Nova Scotia agreed that profitable Stern Group assets from other provinces could be included with the mill's tax returns, thus allowing the Stern Group to use more of the offsetting tax losses. In return, Nova Scotia would be paid a percentage of these tax savings.<sup>29</sup> Premier Dexter touted the deal, stating that "{t}his government has worked for a year now to restart that mill" and "{t}he new operation will run a super calendared {sic}

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<sup>27</sup> C-035, Nova Scotia Press Release, *Province Standing with Strait after Announcement Mill Will Not Reopen* (Sep. 21, 2012).

<sup>28</sup> C-044, PHP Post. Conf. Br. at Attachment A (September 21, 2012 Pacific West Commercial Corporation Press Release).

<sup>29</sup> C-036, *Mill deal revived: Still in game but not out of woods*, *The Chronicle Herald*; R-090, Nova Scotia Statement and Backgrounder (Sep. 22, 2012) ("Sep. 22, 2012 Nova Scotia Backgrounder") ("{T}he deal ensures a significant amount of tax savings that may be claimed by Pacific West in other provinces will be shared with Nova Scotia."). According to its website, Stern Partners currently has investments in a number of Canadian provinces, including British Columbia, Ontario, Manitoba, and Alberta. See generally <http://sternpartners.com/index.php/investments/manufacturing/>.

machine that is the envy of the world. It provides the mill with a key niche market that will keep it competitive and profitable.”<sup>30</sup>

21. PWCC paid C\$33 million to purchase the mill. In return, Nova Scotia: (1) spent C\$36.8 million to keep the mill in hot idle and ensure the supply chain remained open to Port Hawkesbury via the forestry infrastructure fund;<sup>31</sup> (2) gave PHP C\$124.5 million in loans – some forgivable and interest free – and other Government payments; (3) enabled PHP to garner tax savings in Nova Scotia for assets in other provinces; (4) provided municipal tax breaks; and (5) provided PHP with an electricity discount.<sup>32</sup>

**B. Resolute Reasonably Believed In 2012 That It Would Compete Successfully Against Port Hawkesbury**

22. Resolute believed it could compete successfully against the Port Hawkesbury mill when (and if) it came back online, even though the reemergence of Port Hawkesbury was not welcome. In August 2012, when Port Hawkesbury’s eventual revival was still in question, Resolute CEO Richard Garneau stated that the company would “continue to compete head on and continue to work on our costs and make sure that we’re going to certainly, I believe, be able to serve our customers with the same dedication than, let’s say, before the restart.”<sup>33</sup>

23. In November 2012, after Port Hawkesbury resumed operations, Resolute expressed even more confidence. Far from indicating that it would be harmed, Resolute believed at that time it would succeed. M. Garneau stated in his quarterly conference call

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<sup>30</sup> R-056, Nova Scotia Press Release, *Province Negotiates New, Better Deal to Reopen Mill, Support the Strait* (Sep. 22, 2012) (“Sep. 22, 2012 Nova Scotia Press Release”).

<sup>31</sup> R-056, Sep. 22, 2012 Nova Scotia Press Release.

<sup>32</sup> R-056, Sep. 22, 2012 Nova Scotia Press Release.

<sup>33</sup> R-097, Resolute Forest Products Inc. Form 8-K (Aug. 7, 2012) at Ex. 99.2, p. 10 (Transcript of Resolute 2nd Quarter 2012 Earnings Conference Call) (“Resolute Aug. 2012 Earnings Call Tr.”).

that Resolute's recently-opened Dolbeau mill was "well positioned" with "a very small crew running this mill with 135 people. So, I think that this new (inaudible) model is going to certainly provide an advantage on the cost side that I believe is very difficult. I will not say impossible, but very difficult to replicate. So, we have this kind of advantage that I believe that is going to allow company and our mills to compete efficiently."<sup>34</sup>

24. Later in the same call, M. Garneau reiterated his confidence: "Dolbeau has an advantage, a smaller machine in the market that is consuming less, provides a lot of flexibility and I think that this flexibility is going to be an advantage. I don't want to compare with anybody else, but I think that it's certainly a benefit that we have on top of having this co-gen and the power agreement, that we can sell power and have the adjacent sawmills. It's all a condition, the whole element of -- almost impossible to replicate."<sup>35</sup>

**C. Port Hawkesbury's Resuscitation Was Not Immediate**

25. Even with the substantial assistance from Nova Scotia, Port Hawkesbury needed time "to go through the whole process of requalifying {its} paper with major buyers."<sup>36</sup> As Prof. Hausman testifies, that process normally would take "a couple of months."<sup>37</sup> Consistent with his experience, Port Hawkesbury stated that "the first months {or} two were . . . dealing with teething problems in the plant . . . ."<sup>38</sup>

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<sup>34</sup> R-096, Resolute Forest Products Inc. 3rd Quarter 2012 Earnings Conference Call (Nov. 2, 2012) at 9 ("Resolute Nov. 2012 Earnings Call Tr.").

<sup>35</sup> R-096, Resolute Nov. 2012 Earnings Call Tr. at 9.

<sup>36</sup> C-052, Transcript of Proceedings before U.S. International Trade Commission in *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015) at 239:22-240:6 ("Oct. 22, 2015 U.S. ITC Tr.").

<sup>37</sup> See Witness Statement of Jerry Hausman, Ph.D. ¶ 10 (Feb. 22, 2017) ("Hausman Statement").

<sup>38</sup> C-052, Oct. 22, 2015 U.S. ITC Tr. at 239:22-240:6.

26. PHP also provided sworn statements to the ITC that its “reentry into the market” was not “disruptive” in 2012. Citing an analyst’s report, Port Hawkesbury claimed that it moved “seamlessly into the market” and that it “consciously chose not to disrupt the market” by “export{ing} product to third countries.”<sup>39</sup> Moreover, according to the March 2013 report quoted by Port Hawkesbury, “Port Hawkesbury did not initially make great inroads with the large retailers in 2013, but the company has developed a lot more retail business {in 2013} than it appeared would be the case early on.”<sup>40</sup>

27. Given Port Hawkesbury’s location on the western edge of Cape Breton Island, transportation costs would obviously be an issue. Freight costs are relatively high for SC paper, and Port Hawkesbury is located far from its North American markets.<sup>41</sup> To ship via truck direct to a customer in the United States (representing 30 percent of Port Hawkesbury’s shipments), paper from Port Hawkesbury had to travel over 600 km to the nearest border crossing at Houlton, Maine, before travelling on to its final destination.<sup>42</sup> Rail shipments (representing the remaining 70 percent of Port Hawkesbury’s shipments) would go either directly to a customer in the United States (again, at least 600 km just to enter the United States) or to Brampton, Ontario, which is approximately 1900 km away.

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<sup>39</sup> C-044, PHP Post. Conf. Br. at Attachment D (citing C-026, Verle Sutton, *The Reel Time Report* at 5 (Mar. 4, 2013) (“March 2013 *Reel Time Report*”).

<sup>40</sup> C-026, March 2013 *Reel Time Report* at 4.

<sup>41</sup> R-083, Transcript of Proceedings before U.S. International Trade Commission in *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Mar. 19, 2015) at 111:16-117:5 (testimony from PHP expert) (“Mar. 19, 2015 U.S. ITC Tr.”).

<sup>42</sup> C-047, First Supp. Questionnaire for Port Hawkesbury Paper In *In re Supercalendered Paper from Canada*, C-122-854 (July 6, 2015) at 3-4 (“July 6, 2015 PHP Supp. Quest. Resp.”); R-083, Mar. 19, 2015 U.S. ITC Tr. at 159:10-16 (PHP witness testifying that “north of 70%” of PHP’s shipments are via rail).



From Brampton, paper would then be shipped another 350 km to Detroit, Michigan, via truck.<sup>43</sup>

28. The operational costs inherent to the mill, even with the assistance of the Nova Scotia Government, prohibited the newsprint machine at the mill from ever restarting.<sup>44</sup>

29. Given the mill's high transportation costs and the limited impact of sales into the existing market in 2012, Port Hawkesbury itself was uncertain in 2012 as to whether the operation would be successful. One of PHP's competitors even testified at the ITC that "{t}he first year, our feedback from customers was that we're not so sure that this {PHP} machine will survive. It shut down before; what's to stop it from doing that again?"<sup>45</sup> Resolute had powerful reasons to expect it could compete successfully with PHP and had no reason to believe throughout 2012 that it had suffered any actual loss.

**D. The Market For Port Hawkesbury's Paper Is North America**

30. Nova Scotia always intended for Port Hawkesbury to market its SC paper to the North American market, as it had done in the past, but this time with the additional provincial assistance necessary to sustain it and make it more competitive against other North American producers. The SC paper market consisted of four producers in Canada (Resolute Forest Products, Irving Paper, Catalyst Paper and Port Hawkesbury) and three in the U.S. (Madison Paper, Verso (formerly New Page), and Resolute for minor

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<sup>43</sup> C-047, July 6, 2015 PHP Supp. Quest. Resp. at 3-4

<sup>44</sup> C-050, *Port Hawkesbury Paper to diversify as newsprint mill demolished*, CBC News (Oct. 2, 2015).

<sup>45</sup> R-083, Mar. 19, 2015 U.S. ITC Tr. at 76:4-10.

production in Catawba, South Carolina).<sup>46</sup> Like other paper industry sectors, demand for SC paper has been shrinking due to the increase in digital media.<sup>47</sup>

31. Port Hawkesbury explained, “{m}ost of {its} sales are exported, the majority to the United States.” In 2013, 325,000 tons out of 330,000 tons of total sales (not just exported sales) were exported to the United States. In 2014, 300,000 tons out of 375,000 tons of total sales were exported to the United States, with an additional 50,000 tons sold in Canada.<sup>48</sup>

32. These results are consistent with Nova Scotia’s public statements about its desire for Port Hawkesbury to dominate in the North American market. Nova Scotia’s ultimate goal was to make PHP “the lowest cost and most competitive producer of super calendar {sic} paper.”<sup>49</sup> To be successful, Nova Scotia also needed to ensure that Port Hawkesbury’s electricity rate was “either the lowest or among the lowest on a North American basis” because electricity is the largest cost of a paper mill.<sup>50</sup> Nova Scotia Power explained that, “{f}rom the beginning of {its} discussions {about the power rate}, PWCC has been clear that . . . {its} objective is to be the lowest cost operator in North America.”<sup>51</sup> The operation, Nova Scotia’s Premier boasted, was to be “the envy of the world.”<sup>52</sup>

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<sup>46</sup> SOC ¶ 59; see SOC ¶¶ 46, 57 (detailing two other U.S. supercalendered paper producers).

<sup>47</sup> SOC ¶ 46.

<sup>48</sup> C-046, Port Hawkesbury Paper Initial Questionnaire Resp. in *In Re Supercalendered Paper from Canada*, C-122-854 (May 27, 2015) at 13-14 (“May 27, 2015 PHP Quest. Resp.”). These are approximate figures provided by PHP.

<sup>49</sup> R-055, Nova Scotia Press Release, *Province Invests in Jobs, Training and Renewing the Forestry Sector* (Aug. 20, 2012) (“Aug. 20, 2012 Nova Scotia Press Release”).

<sup>50</sup> R-062, Aug. 20, 2012 NSURB Dec. ¶¶ 56-57.

<sup>51</sup> C-012, Apr. 2012 Nova Scotia Power Evid. at 9.

<sup>52</sup> R-090, Sep. 22, 2012 Nova Scotia Backgrounder at 3.

33. PWCC CEO, Ron Stern, stated, “{w}e’re hoping that there is going to be a bottom in the declining use of paper and that we will be, hopefully, the most competitive mill. We will certainly be the highest quality. Our goal is to be the lowest cost mill.”<sup>53</sup> The Nova Scotia Government echoed this statement, explaining that its measures were designed “to help the mill become the lowest cost and most competitive producer of super calendar {sic] paper.”<sup>54</sup>

34. Nova Scotia did not restrict the favors it extended PWCC to its own jurisdiction. Just as the terrain in which PHP was to compete was intended to be all of North America, if not all of the world, the tax benefits extended to PWCC reached beyond Nova Scotia to PWCC assets located outside the province.<sup>55</sup>

35. Premier Dexter recognized the importance of providing sufficient assistance to help Port Hawkesbury reenter a highly competitive North American market consisting of a very small number of producers. He stated that “{w}ith these commitments, the province is doing everything reasonable to support the re-start of the mill” and “{w}e are confident that Pacific West is well-positioned to be the most competitive and best supercalendered paper mill in the world. The mill has the most modern machine in North America and we’re helping position it to take advantage of this and become a leader.”<sup>56</sup>

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<sup>53</sup> C-016, *Nova Scotia mill revived in 11th hour twist*, *CBC News* (Sep. 23, 2012).

<sup>54</sup> R-055, Aug. 20, 2012 Nova Scotia Press Release.

<sup>55</sup> C-036, *Mill deal revived: Still in game but not out of woods*, *The Chronicle Herald*; R-090, Sep. 22, 2012 Nova Scotia Backgrounder; *supra* ¶ 20.

<sup>56</sup> R-055, Aug. 20, 2012 Nova Scotia Press Release; R-068, *Mill gets millions in N.S. cash*, *The Chronicle Herald*.

**E. Canada Was On Notice That It Was Distorting Trade And Discouraging Foreign Investment**

36. Underscoring the importance of the North American market, the United States sought information from the Canadian government under the auspices of the World Trade Organization (“WTO”) regarding the re-opening of PHP. The United States’ questions sought information concerning: (1) the bankruptcy proceeding and resale of the mill; (2) repayment of the hot idle and forestry infrastructure funding used to keep the mill resale ready; (3) the terms and conditions of the loans provided by Nova Scotia to PWCC; (4) PWCC’s land sale to Nova Scotia; (5) Nova Scotia’s C\$38 million grant paid out over ten years to PHP; (6) PHP’s ability to incorporate additional assets into the mill to use in conjunction with the tax losses it purchased; and (7) PHP’s electricity rate. Despite Resolute’s repeated requests, Canada has refused to provide Resolute with the answers Canada sent to the United States.<sup>57</sup>

37. The United States began to hold Canada accountable for the potential trade distortions that would arise from Nova Scotia’s market interventions on behalf of PHP long before PHP reopened. The United States challenged Canada under the auspices of the WTO in 2012 in a confidential exchange.<sup>58</sup>

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<sup>57</sup> C-037, Questions Regarding Reports of Assistance to Port Hawkesbury (Oct. 12, 2012). The United States told Resolute it was willing to share Canada’s answers subject to Canada’s agreement. Canada refused, invoking “national security.” SOC ¶¶ 64-67, 72-75; C-045, Email from U.S. Trade Representative (Apr. 30, 2015) (withholding Canadian answers because disclosure supposedly could cause “identifiable or describable damage to the national security” of Canada); C-049, Letter from Warren Mucci, Director, Access to Information and Privacy Protection, Foreign Affairs, Trade and Development, Canada (Sept. 17, 2015) (claiming that responses were exempted pursuant to Section 15(1) of the Canadian Access to Information Act, which permits Canada to refuse disclosure because of “the defence of Canada . . . or the detection, prevention or suppression of subversive or hostile activities.”). A copy of the then-current Canadian access to information act can be found at CL-033.

<sup>58</sup> See R-078, *Minutes of the Regular Meeting Held on 23 October 2012*, World Trade Organization at 11 (Jan. 10, 2013).

38. Resolute, too, put Canada on notice that the investments at Port Hawkesbury could become trade distorting and could discourage foreign investment by making it commercially better to be invested in the United States. By fall 2014, Resolute recognized that the United States may initiate a trade proceeding to rectify the harm now (in 2014) known to be caused by the Nova Scotia measures. The United States was focused on the substantial provincial assistance to PHP, but a U.S. trade remedy proceeding to offset that assistance necessarily would involve all producers in Canada, including Resolute.<sup>59</sup>

39. Resolute warned Canada in 2015 that a U.S. trade proceeding could compound the challenges that Resolute was facing as a result of Nova Scotia's trade distortions in the market. But Resolute's requests that Canada take some action to avoid the institution of such proceedings were ignored and rejected repeatedly. Canada refused to provide Resolute with its answers to the United States' questions about Nova Scotia's measures in WTO proceedings, and did not take any conciliatory action toward the United States to ameliorate the PHP concerns before it was too late.<sup>60</sup>

40. The competing U.S. industry approached Members of Congress requesting intervention to head off the investments that they said were threatening the market. Resolute, learning of these political initiatives, began bringing them to Canada's attention during the summer of 2014, asking Canada to intervene to protect Resolute's investment in Canada against unfair competition from PHP.<sup>61</sup> Resolute also urged Canada to protect

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<sup>59</sup> See SOC ¶¶ 59-65.

<sup>60</sup> See SOC ¶¶ 65-68, 73-75.

<sup>61</sup> See SOC ¶¶ 61-80.

Resolute from a trade remedy action the U.S. industry was likely to bring against all SC paper from Canada.<sup>62</sup>

41. Resolute's warnings were to no avail. In March 2015, a countervailing duty investigation was initiated in the United States against the Canadian SC paper industry, almost entirely because of the Nova Scotia Measures.<sup>63</sup>

**F. Resolute's Closure Of Its Laurentide #10 Line Was Not Related To The Port Hawkesbury Restart**

42. Even before Port Hawkesbury entered into creditor protection, Resolute was taking steps to reopen the Dolbeau mill that had produced and would again produce SC paper. That mill, built in 1999, was idled indefinitely in 2009 and closed in 2010. But in September 2011, Resolute announced publicly that it would seek to reopen the Dolbeau facility after having reached an agreement with the Dolbeau workforce to change labor contracts.<sup>64</sup>

43. In a conference call, Resolute's new CEO, Richard Garneau, stated that Dolbeau would not reopen without the closure of other SC paper capacity:

PAUL QUINN, ANALYST, RBC CAPITAL MARKETS: Just a couple of questions. One on -- you reference a declining fiber supply available in Quebec, and you've got two idled mills at Gatineau and Dolbeau. Maybe you can give us an update on the status of those two mills.

RICHARD GARNEAU: Well, I think that the intent here at Gatineau and Dolbeau, we are still looking at how to optimize and solidify our asset base

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<sup>62</sup> SOC ¶ 68; *see also* SOC ¶¶ 69-82. The trade remedy law does not permit a petition to discriminate among foreign companies. In 2014, there was no doubt that the likely U.S. industry complaint would be occasioned entirely by PHP, but there was also no doubt that all producers in Canada would be caught up in it. It was apparent that the market being distorted was the entire continent. *See* SOC ¶ 59.

<sup>63</sup> *E.g.* R-083, Mar. 19, 2015 U.S. ITC Tr. at 10:17-22 (Petitioners in U.S. countervailing duty presentation detailing disruption of U.S. market by Port Hawkesbury Paper).

<sup>64</sup> C-023, *AbitibiBowater may restart Dolbeau Mill after workers endorse changes*, *The Canadian Press* (Sep. 23, 2011).

in Quebec. So if those two mills were to restart I think that capacity will have to be closed elsewhere. So it is not going to be a net increase in terms of production.<sup>65</sup>

44. About six weeks later, on December 13, 2011, Resolute closed an inefficient and old (dating back to the 1920's) line at its Kénogami facility. That line was largely dedicated to rotogravure paper, which made “advertising inserts” for newspapers (such as the Sunday coupons). Press reports at that time explained that “Resolute says that shutting down one of the two machines at its Kénogami mill is part of its business plan, all aspects of which are known. It involves starting up operations again in Gatineau and Dolbeau and shutting down one of the two machines in Shawinigan {i.e., Laurentide}.” That same article reported a quotation from a Resolute spokesman concerning the future of the #10 line at Laurentide: “Analyses are being performed on Machine No. 10 in Laurentide where the same issue is being faced as in Kénogami – a low-yield machine and obsolete technology for which a major investment would not be a sound long-term investment”<sup>66</sup>

45. Resolute knew in 2011 that the Laurentide #10 line had a limited remaining shelf-life – even before the Port Hawkesbury reopening was reasonably contemplated, let alone likely to occur.<sup>67</sup> At that point, in December 2011, whether the Port Hawkesbury mill would be liquidated or reopened was still an open question.<sup>68</sup>

46. In February 2012, Resolute acquired a co-generation electricity plant near the Dolbeau mill; once Resolute reached an agreement for Hydro-Québec to purchase

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<sup>65</sup> C-024, Q3 2011 AbitibiBowater Inc. Earnings Conference Call at 11 (Oct. 31, 2011).

<sup>66</sup> C-025, *C'est terminé la 6 à Kénogami*, *Le Quotiden du jour* (Dec. 13, 2011). A courtesy translation is provided with the exhibit.

<sup>67</sup> C-025, *C'est terminé la 6 à Kénogami*, *Le Quotiden du jour* (Dec. 13, 2011).

<sup>68</sup> R-031, Sixth Monitor Report ¶ 20.; see also R-048, Jan 4, 2012 Nova Scotia Press Release.

electricity from Resolute, Dolbeau would be able to reopen.<sup>69</sup> On July 18, 2012, the press reported that the restart of Resolute's Dolbeau facility was imminent and that workers were preparing to put the facility's equipment in working order.<sup>70</sup>

47. Meanwhile, Resolute was investing in Line #11 at its Laurentide mill. During the summer of 2012, Resolute undertook a multi-million dollar capital improvement to replace the dilution flow head box at Laurentide #11 in order to improve uniform paper production, reduce waste and improve efficiency.<sup>71</sup>

48. Resolute was aware that Port Hawkesbury might reopen, but Resolute's own plans for SC paper production, including important investments, proceeded with confidence that Resolute could and would compete.<sup>72</sup> The Port Hawkesbury revival remained speculative and its market impact unknown and unknowable.<sup>73</sup>

49. An August 8, 2012 local news article reported that the impending reopening of Resolute's Dolbeau mill would impact line #10 at Laurentide:

The future of the Laurentide mill could take a real blow in the coming weeks or even days as the reopening of Resolute Forest Products' Dolbeau-Mistassini plant seems imminent. . . .

In Shawinigan, they have been awaiting developments regarding the Dolbeau-Mistassini mill for several months, as the jobs of 160 workers could be compromised if a mill reopens in Saguenay-Lac-Saint-Jean.

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<sup>69</sup> C-027, *Resolute Forest Products buys Boralex cogeneration plant in Dolbeau, Que.*, *The Canadian Press* (Apr. 7, 2012).

<sup>70</sup> C-030, *Papeterie de Dolbeau-Mistassini : la réouverture serait imminente selon le président du syndicat*, ICI Radio-Canada (July 18, 2012). A courtesy translation is provided with the exhibit.

<sup>71</sup> Funds for installation of the equipment were appropriated in 2011. R-010, Resolute 2011 Annual Report at 2 (Apr. 4, 2012). The equipment was moved from British Columbia and installed in 2012.

<sup>72</sup> See R-097, Resolute Aug. 2012 Earnings Call Tr. at 10; R-096, Resolute Nov. 2012 Earnings Call Tr. at 9.

<sup>73</sup> See *supra* ¶¶ 15-21, 25-29.



However, during a telephone interview with the newspaper *Le Nouvelliste*, Mr. Choquette did not want to venture too much information about the future of the Shawinigan mill.

"I don't want to jump to conclusions. We've been talking for some months now about reopening the Dolbeau mill, but we're not there yet. It's hard therefore to jump too quickly to conclusions. We will see, when there are any developments regarding Dolbeau, what the impact might be on other mills," he said.

The spokesperson nonetheless reminded everyone that the equipment at the Laurentide mill, particularly machine number 10, is getting older.

"It's the usual issue. We have two machines at the Laurentide mill. We know one is obsolete and at the end of its useful life. We are going to be keeping an eye on market conditions, as well. There has to always be a balance between supply and demand. There are, however, no new developments in the case of the Laurentide mill."<sup>74</sup>

50. On August 24, 2012, Resolute announced the restart of its Dolbeau facility, re-opening after a \$20 million investment to improve the efficiency of the mill:

Production of soft nip calendered (SNC and SCB) commercial printing paper will resume as soon as the recall of employees is completed. The restart of the mill will provide direct employment for approximately 135 workers.

"We spared no effort to relaunch the Dolbeau mill because it is a good investment," stated Richard Garneau, President and Chief Executive Officer of Resolute, who was in the Lac Saint-Jean region to confirm the news. "With today's announcement, Resolute will be more competitive than ever."

The Company is currently assessing its network of paper mills to ensure that production continues to be balanced.<sup>75</sup>

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<sup>74</sup> C-031, *Dur coup à venir pour l'usine Laurentide?*, *Le Nouvelliste* (Aug. 8, 2012). A courtesy translation is provided with the exhibit. See also C-032, *Les rumeurs de réouverture de la papeterie de Dolbeau-Mistassini inquiètent à Shawinigan*, *Radio-Canada* (Aug. 10, 2012) (explaining potential for shutdown at Laurentide Line #10). A courtesy translation is also provided with this exhibit.

<sup>75</sup> R-011, *Resolute Forest Products Announces Restart of its Dolbeau (Quebec) Paper Mill*, Resolute News Releases (Aug. 24, 2012); see also Hausman Statement ¶ 10.

51. Subsequent statements by Resolute explained that Dolbeau was a replacement for Machine #10 at Laurentide. For example, Resolute's February 12, 2013 Fourth-Quarter Earnings presentation explained that Dolbeau was an "integrated, state-of-the-art mill" that "replace higher cost machines at Kénogami and Laurentide."<sup>76</sup> Similarly, M. Garneau explained in Resolute's April 30, 2013 Earnings Conference Call that "we benefited from more cost-efficient operations on the restart of the Dolbeau machine, which replaced permanently closed machines at Kénogami and Laurentide."<sup>77</sup>

### **III. RESOLUTE'S CLAIMS ARE TIMELY UNDER ARTICLES 1116(2) AND 1117(2)**

52. Canada has not proven facts to show that any of Resolute's claims under Articles 1102, 1105 or 1110 are out of time. To the contrary, the facts show that Resolute submitted its Notice of Arbitration/Statement of Claim within three years of having knowledge of Canada's breaches of Article 1102, 1105 and 1110 and of having incurred damages as a result of those breaches.

53. Canada's statute of limitations objection depends on (a) the incorrect presumption that Resolute should have known it incurred damages as a result of the breaches before it actually incurred any damages; and (b) an incorrect assumption that the breaches of Articles 1102, 1105 and 1110 all are evaluated in the same way vis-à-vis Articles 1116 and 1117.

54. Canada bears the burden of proving facts sufficient to justify its affirmative defenses. Article 24(1) of the 1976 UNCITRAL Arbitration Rules provides that "each

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<sup>76</sup> C-040, Resolute Forest Products Q4 2012 Results at 7 (Feb. 12, 2013).

<sup>77</sup> C-042, Resolute Forest Products Q1 2013 Earnings Call Tr. at 3 (Apr. 30, 2013).

party shall have the burden of proving the facts relied on to support its claim or defence.”<sup>78</sup>

NAFTA arbitration tribunals, such as in *Pope & Talbot*, have thus required Respondent States to bear “the burden of proof of showing {a} factual predicate” to “an affirmative defense.”<sup>79</sup>

**A. Damages Must Be “Incurred” And Known To Have Been Incurred To Start the Limitations Clock Under Articles 1116(2) and 1117(2)**

55. NAFTA Articles 1116(2) and 1117(2) are statutes of limitations for the timing of submitting a claim to arbitration under Articles 1116(1) and 1117(1). Article 1116(2) states: “An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” Article 1117(2) applies the same language to claims brought by investors on behalf of their foreign enterprise investments.<sup>80</sup>

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<sup>78</sup> CL-031, 1976 UNCITRAL Rules. Per ¶ 5.1 of Procedural Order No. 1, the 1976 UNCITRAL Arbitration Rules govern this arbitration. The most recent versions of the UNCITRAL Rules contain identical language in Article 27(1).

<sup>79</sup> CL-002, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record ¶ 11 (Feb. 24, 2000) (“*Pope & Talbot*”). See also RL-007, *Canfor Corp. v. United States of America* (“*Consolidated Lumber*”), Decision on Preliminary Question ¶ 176 (June 6, 2006) (“{W}here a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the tribunal from deciding on the merits of the claims, the respondent has the burden of proof that the provision has the effect which it alleges.”). Tribunals outside the NAFTA context have applied the burden of proof similarly. CL-027, *Teinver v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction ¶ 324 n. 67 (Dec. 21, 2012) (“A number of tribunals have held that a respondent bears the burden of proof with respect to the facts alleged in its jurisdictional objections.”); CL-024, *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award ¶¶ 315, 318 (June 1, 2009) (“As to the burden of proof, the general rule, well established in international arbitrations, is that . . . the Respondent carries the burden of proof with respect to its defences.”).

<sup>80</sup> “An investor may not make a claim on behalf of an enterprise described in paragraph 1 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.”

56. The three-year limitation period is initiated when all of the following elements have been met: (a) there is knowledge (actual or constructive) of both (b) a breach and of (c) loss or damage that has been incurred as a result. When any of those elements has not been met, the three-year period has not begun. The knowledge requirement applies both to the breach and to the suffering of damage. Knowledge of one, without the other, is insufficient to trigger commencement of the three-year period.

57. The three-year period does not begin to run until there is knowledge that losses or damages have been “incurred.”<sup>81</sup> Even a reasonable belief that damages are probable or likely would be insufficient to trigger the commencement of the three-year period because the damages would not yet have been “incurred” or suffered. This requirement of knowledge of damages “incurred” is coextensive with the requirement in Articles 1116(1) and 1117(1) that a claim may be submitted for arbitration when the host government “has breached an obligation” under Chapter 11 and the investor (or enterprise) “has incurred loss or damage by reason of, or arising out of, the breach.” Government measures may constitute a breach, but the three-year period does not run, nor could any claim be made, until the investor has knowledge of damages actually incurred. As the tribunal in *Pope & Talbot v. Canada* held, “{t}he critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur.”<sup>82</sup>

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<sup>81</sup> The French and Spanish translations similarly refer to the suffering of damages in the past tense. Article 1116(2) in French: “*Un investisseur ne pourra soumettre une plainte à l'arbitrage si plus de trois ans se sont écoulés depuis la date à laquelle l'investisseur a eu ou aurait dû avoir connaissance du manquement allégué et de la perte ou du dommage subi.*” Article 1116(2) in Spanish: “*El inversionista no podrá presentar una reclamación si han transcurrido más de tres años a partir de la fecha en la cual tuvo conocimiento por primera vez o debió haber tenido conocimiento de la presunta violación, así como conocimiento de que sufrió pérdidas o daños.*”

<sup>82</sup> CL-002, *Pope & Talbot* ¶ 12.

58. Canada ignores this basic principle, which Resolute cited in its opposition to Canada's bifurcation motion.<sup>83</sup> Instead, Canada obfuscates that damages must be incurred by arguing that the limitation period runs even if a claimant had yet "to acquire knowledge of the full extent of the loss or damage resulting from the alleged breaches."<sup>84</sup> The obfuscation is in the implication that the investor may know, or should have known, of at least some loss or damage, without necessarily knowing its "full extent." But loss or damage still definitively has to have been incurred and not be speculative or possible to occur.

59. Canada relies upon three NAFTA decisions, *Mondev*, *Grand River*, and *Bilcon*, which are all distinguishable and do not contradict the texts of Articles 1116(2)/1117(2) nor *Pope & Talbot's* essential holding.<sup>85</sup> There must be cognizable loss or damage incurred. The "full extent," language borrowed from *Bilcon*, is not at issue here.<sup>86</sup>

60. The investor in *Mondev* contended that its loss was not known "until the decisions of the United States courts which finally failed to give it any redress"; those U.S. court proceedings started in 1992 and concluded in 1998.<sup>87</sup> The United States argued that the investor knew it was damaged no later than January 1, 1994 (when NAFTA

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<sup>83</sup> Resolute Opp'n to Canada Motion for Bifurcation ¶¶ 39-43 (Oct. 13, 2016).

<sup>84</sup> Canada Mem'l ¶ 42.

<sup>85</sup> Canada Mem'l ¶¶ 37-40; CL-002, *Pope & Talbot* ¶ 12.

<sup>86</sup> CL-007, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability ¶ 281 (Mar. 17, 2015) ("*Bilcon*").

<sup>87</sup> RL-029, *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶¶ 39, 52, 139 n.76 (Oct. 11, 2002) ("*Mondev*"). The investor was allowed to proceed on its denial of justice claims premised on adverse U.S. court decisions that were decided within three years of the start of the arbitration. See *Mondev* ¶ 51.

entered into force), if not earlier.<sup>88</sup> The investor did not commence arbitration until 1999.<sup>89</sup>

61. The *Mondev* Tribunal rejected the investor's contentions, reasoning that damages were known on its claims prior to 1994 because the investor brought suit in U.S. courts in 1992 to remedy the damages allegedly caused by the breaches: "Courts award compensation because loss or damage has been suffered, and this is the normal sense of the term 'loss or damage' in Articles 1116 and 1117."<sup>90</sup> Otherwise, the investor would not have initiated suit in U.S. courts. The investor evidently had incurred damage more than three years before bringing its NAFTA claim because the damage from the breaches was the basis for the lawsuits commenced in 1992, seven years before the NAFTA claim was filed.

62. Canada's reliance on *Grand River* similarly is misplaced. There, the tribunal held "that becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance, is to incur loss or damage as those terms are ordinarily understood. A party that becomes subject to such an obligation, even if actual payment into escrow is not required until the following spring, has incurred 'loss or damage' for purposes of NAFTA Articles 1116 and 1117."<sup>91</sup> Thus, while there was no "immediate outlay of funds" and "obligations {were} to be met through future conduct," the investor clearly had suffered some type of loss or damage by virtue of

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<sup>88</sup> See RL-029, *Mondev* ¶¶ 47, 51.

<sup>89</sup> See RL-029, *Mondev* ¶ 12.

<sup>90</sup> See RL-029, *Mondev* ¶ 87.

<sup>91</sup> RL-022, *Grand River Enters. Six Nations, Ltd., et al. v. United States*, UNCITRAL, Decision on Objections to Jurisdiction ¶ 82. (July 20, 2006) ("*Grand River*").

the regulatory scheme – a guaranteed outlay of funds for twenty-five years, even if payments were not immediately due.<sup>92</sup>

63. *Bilcon* also is distinguishable. In that case, the investors commenced arbitration in June 2008 for, *inter alia*: (1) the loss of quarry operations that originally were granted by an “industrial approval”; and (2) having been compelled by Canada to participate in a costly and time-intensive Joint Review Panel to evaluate the potential project.<sup>93</sup> It was undisputed that the industrial approval was null and void as of May 2004.<sup>94</sup> Nonetheless, the investors claimed that the damage did not occur before December 2007, when a Canadian federal minister accepted the results of the Joint Review Panel and finalized the decision to end the quarry operations.<sup>95</sup> But the investors explicitly recognized that “serious financial consequences {arose} from our inability to operate in accordance with the {industrial approval}” and that the Joint Review Panel would cause “expense and delay.”<sup>96</sup> The tribunal determined that damage from these breaches was admitted to be certain even though the precise quantification of damages was yet to be known.<sup>97</sup>

64. *Pope & Talbot*, by contrast to the three inapposite cases relied upon by Canada, is factually similar to the instant dispute. The investor claimed that a Canadian regulatory régime (the Softwood Lumber Agreement) eventually required the investor to

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<sup>92</sup> RL-022, *Grand River* ¶ 77 (cited in Canada Mem'l ¶ 37).

<sup>93</sup> CL-007, *Bilcon* ¶ 251.

<sup>94</sup> CL-007, *Bilcon* ¶ 244.

<sup>95</sup> CL-007, *Bilcon* ¶ 256.

<sup>96</sup> CL-007, *Bilcon* ¶¶ 247, 279-80.

<sup>97</sup> The investor was still allowed to proceed with other breaches occurring within three years of initiating arbitration, including meritorious claims based upon how the Joint Review Panel evaluated the investor’s project. *E.g.*, CL-007, *Bilcon* ¶¶ 604, 731.

purchase wood chips at an increasingly expensive rate.<sup>98</sup> Canada contended that the investor knew or should have known a loss occurred in 1996 upon enactment of the Softwood Lumber Agreement, nearly four years before the investor perfected its right to submit this claim to arbitration and in violation of Article 1116(2).<sup>99</sup> The tribunal, in ruling against Canada, explained that “[i]t is not clear to the Tribunal at what stage this loss of production resulted in a necessity to purchase expensive wood chips, except that it can only have arisen at some stage after implementation of the Export Control Regime.”<sup>100</sup> Whether loss and damage would even be incurred was thus based upon future events not known at the time the challenged measures were put into place.

65. Canada, as detailed more fully below, is relying on the same speculative market effects at issue in *Pope & Talbot*. Canada attempts to demonstrate that Resolute knew or should have known that it would incur lower pricing after Port Hawkesbury restarted. But unlike *Mondev*, *Grand River*, and *Bilcon*, where tribunals found that losses were certain to be (or already had been) incurred, Canada relies upon uncertain market responses – predictions about how the market would adjust to Port Hawkesbury’s revival.

66. Canada’s retrospective speculation is insufficient to prove that Resolute knew or should have known that it incurred damages in 2012. Absent affirmative evidence that Resolute knew it had incurred losses in 2012 (*i.e.*, “the critical requirement”), Canada improperly bases its Article 1116(2) and 1117(2) defense on whether “it was or should have been known that loss could or would occur” in the future.

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<sup>98</sup> CL-002, *Pope & Talbot* ¶¶ 1, 12.

<sup>99</sup> CL-002, *Pope & Talbot* ¶ 9. Canada contended that the investor’s claim was not perfected until January 2000, when the investor waived its right to initiate other proceedings pursuant to NAFTA Article 1121(1)(b). CL-002, *Pope & Talbot* ¶ 5.

<sup>100</sup> CL-002, *Pope & Talbot* ¶ 12.



**B. Resolute Did Not Know And Should Not Have Known It Incurred Damages in 2012**

67. Canada has failed to meet its burden of proving that Resolute knew or should have known it had incurred losses prior to December 30, 2012. Canada argues that Resolute knew or should have known that it had incurred losses or damages caused by the Nova Scotia Measures prior to December 30, 2012, the date the Tribunal has accepted as “the relevant 3-year cut off” for the statute of limitations provision in Articles 1116(2) and 1117(2). Canada claims that Resolute must have anticipated or feared losses from the resuscitation of the Port Hawkesbury mill, which would not have been possible but for the Nova Scotia Measures.<sup>101</sup> However, there was great uncertainty as to the immediate likely effects of Port Hawkesbury’s reentry into the market, and the statute of limitations is not triggered by probability, anticipation, fear or speculation.

68. Resolute did not reasonably know, nor should it have known, of any losses arising from the Nova Scotia Measures before the first quarter of 2013. PHP itself argued before the ITC that no damage occurred to its competitors in 2012. This fact is confirmed by Prof. Hausman, who has found that Resolute suffered no damage in 2012. Even then, the evidence is that the damaging impact of the Nova Scotia Measures did not result in the expropriation of Laurentide until 2014.

69. Canada, in an attempt to show Resolute knew or should have known it incurred damages prior to December 30, 2012, relies on incomplete snippets of Resolute’s public statements, speculative market forecasts, a misleading interpretation of the draft Resolute arbitration notice provided in confidence to Canada, and the unrelated

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<sup>101</sup> E.g., Canada Mem’l ¶¶ 22, 52.

closure of one paper line.<sup>102</sup> But Resolute's public statements and corporate financial filings demonstrate that the company believed it would be profitable even though Port Hawkesbury would be a new competitor.

70. Canada's market forecasts, largely consisting of unsubstantiated and often inaccurate prognostications, all predicted that SC paper pricing would eventually rebound, which Canada's own evidence confirms. Other forecasts, including some relied upon by PHP in USITC proceedings, showed PHP moved "seamlessly into the market" in 2012.<sup>103</sup> The draft arbitration notice Canada relies upon was prepared in 2015 and does not indicate when Resolute learned it had incurred damages as a result of Port Hawkesbury's reopening. And far from being attributable to Port Hawkesbury, the closure of Line #10 at Laurentide had been the subject of press reports and industry forecasts for more than a year once Resolute opened its more efficient and cost-effective Dolbeau facility.

1. Port Hawkesbury Argued That No Damage Was Incurred Prior To 2013

71. The most powerful expressions of uncertainty about losses inflicted on competing companies have been articulated by Port Hawkesbury's own officials in sworn testimony before the ITC. Counsel for PHP argued before the ITC, "PHP didn't really get into the market until 2013. As such, it's impossible for PHP to cause any injury in 2012."<sup>104</sup> In its Post-Conference Brief, PHP argued, "PHP's entry into the market in late

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<sup>102</sup> E.g., Canada Mem'l ¶¶ 53-71.

<sup>103</sup> C-044, PHP Post. Conf. Br. at Attachment D; C-026, March 2013 *Reel Time Report* at 4-5.

<sup>104</sup> R-083, Mar. 19, 2015 U.S. ITC Tr. at 14:7-9.

2012 did not cause a significant disruption in the market and could not have caused any injury in 2012.”<sup>105</sup>

72. The American petitioner, eager to argue it had been injured by PHP’s reopening, nonetheless largely admitted to this question of timing, testifying, “The first year, our feedback from customers was that we’re not so sure that this {PHP} machine will survive. It shut down before; what’s to stop it from doing that again?”<sup>106</sup>

73. Petitioner’s potential expectation was justified, as explained by PHP: “[W]e had to go through the whole process of requalifying our paper with major buyers.”<sup>107</sup> Consequently, after reopening, PHP had few sales and much uncertainty as it had to qualify and re-establish itself in the market. PHP itself, therefore, did not consider itself “in the market” in any significant way before 2013, nor did its competitors. PHP reported to the ITC that its 2012 production was minimal.<sup>108</sup>

2. Expert Analyses Confirm That Resolute Did Not Know Until 2013 That it Had Suffered Damages

74. Resolute did not know before 2013, and could not have known, that Port Hawkesbury’s reopening had caused it any damages. According to the expert analysis of MIT Economics Professor Jerry Hausman, “Resolute could not have concluded that the firm’s SCP operation had been financially harmed by the reopening of the PHP mill prior to the first quarter of 2013.”<sup>109</sup> Resolute’s 2012 results – which were not known until 2013 when financial reports were completed – showed no harm caused by Port Hawkesbury.

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<sup>105</sup> C-044, PHP Post Conf. Br. at 2.

<sup>106</sup> R-083, Mar. 19, 2015 U.S. ITC Tr. at 76:4-10.

<sup>107</sup> C-052, Oct. 22, 2015 U.S. ITC Tr. at 239:22-240:6.

<sup>108</sup> See C-046, May 27, 2015 PHP Quest. Resp. at 13-14.

<sup>109</sup> Hausman Statement ¶ 14.

“Based on volumes, Resolute would not have been able to determine the negative effects of PHP’s reopening until at least Q2 2013.”<sup>110</sup>

75. Industry pricing data from 2012 show that prices for SC paper remained stable during the fourth quarter of 2012.<sup>111</sup> These results are consistent with Resolute’s own pricing data for the fourth quarter of 2012, which also show that prices were stable.<sup>112</sup> This direct analysis of pricing data alone was confirmed by Prof. Hausman, who performed an econometric analysis to determine whether an effect of Port Hawkesbury’s reopening exists in observed prices.<sup>113</sup> Based on his analysis, there was no effect on prices in the fourth quarter of 2012 caused by Port Hawkesbury’s reopening.<sup>114</sup>

76. Prof. Hausman’s finding is confirmed by Port Hawkesbury’s own statements (cited above), indicating that the mill caused no damage in 2012.<sup>115</sup> And, as cited below, Canada’s own pricing evidence shows that SC paper prices remained static during the last half of 2012.<sup>116</sup>

77. Nor were Resolute sales quantities affected during the fourth quarter of 2012. Resolute’s sales during October-November 2012 were strong.<sup>117</sup>

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<sup>110</sup> Hausman Statement ¶ 27.

<sup>111</sup> Hausman Statement ¶ 17.

<sup>112</sup> Hausman Statement ¶ 18.

<sup>113</sup> An econometric analysis attempts to examine the relationships between different variables; in this instance, it is used to isolate whether Port Hawkesbury’s reopening was the cause of any price decrease in 2012. See Hausman Statement ¶ 1.

<sup>114</sup> Hausman Statement ¶¶ 19-22.

<sup>115</sup> Hausman Statement ¶¶ 23-24; *supra* ¶¶ 71-73.

<sup>116</sup> *Supra* ¶¶ 91-93.

<sup>117</sup> Hausman Statement ¶ 26. The seasonal December drop-off in supercalendered paper meant December 2012 sales were lower.

78. Those same economic indicators, however, started to change in 2013. Industry reports demonstrated a pricing decrease in the first quarter of 2013, with a later rebound.<sup>118</sup> Resolute's pricing data confirm this price decrease.<sup>119</sup>

79. Port Hawkesbury's effects on Resolute's sales quantities became more pronounced during 2013, but only after the first quarter. Resolute's first quarter SC paper sales in 2013 were consistent with sales in 2012 Q1.<sup>120</sup>

80. Resolute's financial performance was positive and followed demand trends throughout 2012 and 2013. Resolute's contribution margin for its SC paper mills was positive on a quarterly basis for all of 2012 and 2013, and while December 2012 had a negative contribution margin, that datum would not have been known to Resolute until January 2013 and would not have been meaningful.<sup>121</sup>

81. Prof. Hausman's analysis confirms that Resolute suffered no damage in 2012 (let alone knew it had suffered damage in 2012), just as Canada's analysis and Port Hawkesbury's admissions show. Equally important, Prof. Hausman's analysis shows Resolute was unable to attribute damage to Port Hawkesbury until after 2012, and then only after careful analysis of multiple months of pricing, sales volumes, and financial performance.

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<sup>118</sup> Hausman Statement ¶¶ 17-20, 25.

<sup>119</sup> Hausman Statement ¶ 18.

<sup>120</sup> Hausman Statement ¶ 27.

<sup>121</sup> Hausman Statement ¶¶ 26, 28. The December results would not have been meaningful because they were entirely consistent with the seasonality typical of December, the consequences of an advertising rush that precedes Christmas. See Hausman Statement ¶ 8.

3. Canada's Reliance On Potential Market Effects Does Not Sufficiently Demonstrate Resolute Incurred Damages

82. Notwithstanding that Canada bears the evidentiary burden for its motion to dismiss, Canada's factual defense about when Resolute knew or should have known loss or damage in this case is premised on the same type of uncertain market effects rejected by the tribunal in *Pope & Talbot* as insufficient to trigger Articles 1116(2) and 1117(2). Without any evidence, Canada summarily states that Resolute's "suggestion that it did not and could not know that it was negatively impacted as soon as the Port Hawkesbury mill reopened lacks credibility."<sup>122</sup> This naked assertion does not meet Canada's burden to demonstrate facts sufficient to justify its jurisdictional defense.

83. Paragraphs 56-57 of Canada's Memorial, with a limited excerpt from an August 2012 conference call with Resolute's CEO (Richard Garneau) is illustrative of the factual inadequacy of Canada's defense. It relies on a limited and misleading excerpt from that conference call where it incorrectly equates an "impact on the market" with loss or damage. An impact on the market does not guarantee that Resolute will ever incur losses or damages, including losses or damages that trigger a ripe claim under NAFTA.

84. The full question and answer from that conference call is re-printed below:

Sean Steuart, TD Securities

Thanks. Good morning, everyone. A few questions. Richard, I'm wondering if you can speak to North American uncoated groundwood markets, and I guess my question is, assuming Port Hawkesbury restarts, I guess either later this quarter or early in Q4, I know you don't have machines that compete in that SC grade specifically, but can you speak to expectations of substitution across the grade spectrum and how that might impact markets for some of the other uncoated groundwood grades you produce?

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<sup>122</sup> Canada Mem'l ¶ 56.

Richard Garneau, President and Chief Executive Officer

Well, I think that—let’s start first. We have—our machines at Kénogami produces the same grade; that’s SCA and we are also producing, well, SCB plus and I would say SCA minus at Laurentide, so obviously, the restart of Port Hawkesbury would certainly have an impact on the market. When you look at the decline in demand, 24 percent compared to last year, and 26 percent, obviously, there is this grade shifting that we have seen in the first two quarters. But I think that when you look at the third quarter, it’s seasonally stronger, as you know, and fourth quarter also, so we expect to see some improvement on this side. But, quite frankly, restart of the 350 or 400,000 tonnes machine, well it’s impossible not to have an impact on the market. So we’re going to monitor the situation and it is the reason, frankly, that we are working on our costs to be really competitive on that side, so—and we will continue to address it; and, unfortunately, we don’t know when it’s going to restart but we are certainly going to continue to compete head on and continue to work on our costs and make sure that we’re going to certainly, I believe, be able to serve our customers with the same dedication than, let’s say, before the restart.”

In the portion of the response omitted from Canada’s Memorial, Resolute pushed back against the notion that it was going to incur loss or damages. Resolute states that it would compete “head on” with Port Hawkesbury (if it was going to restart, still uncertain in August 2012) and “serve {its} customers with the same dedication than . . . before the restart.” Resolute even foresaw “some improvement” in the fourth quarter when Canada claims Resolute should have known it had incurred loss or damage.<sup>123</sup>

85. Canada cites to Resolute’s November 2, 2012 Third Quarter 2012 Earnings Call Transcript, but conspicuously omits the portion of an answer to a question that expressed Resolute’s confidence in its SC paper future:

{RICHARD GARNEAU} What we're concerned, obviously, it's the large capacity addition that could have an impact. But, I think that I mentioned Dolbeau, how well positioned we are and I think that we have exactly the same approach than the one in Catawba. At Dolbeau we have a very small crew running this mill with 135 people. So, I think that this new (inaudible) model is going to certainly provide an advantage on the cost side that I

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<sup>123</sup> Compare R-097, Resolute Aug. 2012 Earnings Call Tr. at 10, with Canada Mem'l ¶ 56.

believe is very difficult. I will not say impossible, but very difficult to replicate. So, we have this kind of advantage that I believe that is going to allow company and our mills to compete efficiently.

JOE VON MEISTER: What have you seen in terms of market activity related to Port Hawkesbury's restart?

RICHARD GARNEAU: Well, the only thing that I can say, that it's a large capacity and you see the stats. And it is a concern, but they'll have to compete. We have to compete and we'll see what the end result is going to be. I think that Dolbeau has an advantage, a smaller machine in the market that is consuming less, provides a lot of flexibility and I think that this flexibility is going to be an advantage. I don't want to compare with anybody else, but I think that it's certainly a benefit that we have on top of having this co-gen and the power agreement, that we can sell power and have the adjacent sawmills. It's all a condition, the whole element of -- almost impossible to replicate.<sup>124</sup>

86. Resolute, thus, planned to compete and believed it was well positioned to succeed even though the Port Hawkesbury mill was a new competitor with a large volume capacity. Based even on the limited passages it cites, Canada cannot demonstrate Resolute knew it would incur loss or damages, nor that it had incurred any loss or damages. At most, Canada shows that Resolute was in the same position as the *Pope & Talbot* investors: a future and speculative loss or damage might, or might not, be incurred, an insufficient basis to trigger the three-year clock of Articles 1116(2) and 1117(2).

4. Canada Relies On Speculative Market Predictions In Lieu Of Demonstrating That Resolute Actually Incurred Damages

87. Canada contends Resolute should have known it was harmed in Q4 2012 by relying on market forecasts instead of facts. Those market prognostications are speculative, sometimes even requiring the “forecasters” to admit they badly missed the mark.

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<sup>124</sup> Compare R-096, Resolute Nov. 2012 Earnings Call Tr. at 9, with Canada Mem'l ¶ 49 n. 108 (citing R-096, Resolute Nov. 12 Earnings Call Tr.).



88. Canada cites to the November 2012 *Reel Time Report*, but that document admits that the forecasters' prior analysis of SC paper for 2012 was erroneous: "When Port Hawkesbury closed, we expected a shortage of SCA and a surge in imports. Neither situation developed. Pricing fell by about \$45/ton during the first half of 2012, but pricing has been firm in the second half."<sup>125</sup> A later report by the same "forecaster" confirms how wrong he was, when the report claimed that PHP moved "seamlessly into the market."<sup>126</sup>

89. These speculative market forecasts provide no insight as to what did happen in Q4 2012. They are legally irrelevant with respect to the standard in Article 1116(2)/1117(2).<sup>127</sup> The three-year statute of limitations is not triggered by what market forecasters or an investor predicted might happen, but rather by when the investor knew or should have known of the breach and of damages incurred.

90. Canada's citation of the forecasts is misleading, too. Relying on one forecast, Canada proclaims that "Resolute's {SCA} market share would fall from 20.1 per cent at the end of 2011 to 13.5 per cent at the end of 2012."<sup>128</sup> Those percentages, however, merely represent Resolute's total SC paper production capacity in relation to the total production in the market. The forecast does not present data showing actual losses of SC paper sales, profit, or revenue in Q4 2012, nor any other financial figure adversely impacting Resolute's bottom line. Resolute's overall percentage of market capacity provides no support in evaluating whether Resolute incurred losses or damages.

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<sup>125</sup> R-102, Verle Sutton, *The Reel Time Report*, Special Edition at 5 (Nov. 8, 2012).

<sup>126</sup> C-044, PHP Post. Conf. Br. at Attachment D; C-026, March 2013 *Reel Time Report* at 4-5.

<sup>127</sup> *Supra* ¶¶ 57, 64 (citing CL-002, *Pope & Talbot* ¶ 12).

<sup>128</sup> Canada Mem'l ¶ 64 (citing R-102, *The Reel Time Report*, Special Edition at 5 (Nov. 8, 2012)).

91. Continuing a pattern of selective citations, Canada omits that these “market forecasts” from 2012 ultimately predicted a later surge in pricing. For example, ERA Forest Products Research’s December 2012 newsletter guessed that SC paper prices would increase in 2014 to US\$840 (SCA) and US\$810 (SCB) from 2012 pricing of \$825 (SCA) and \$792 (SCB), with prices beginning to “rally through late 2013 and into 2014.”<sup>129</sup> Another forecast done by *Reel Time* in November 2012 made similar predictions, speculating that SCA prices initially would fall but would start to rebound by the end of the year. As *Reel Time* stated, even “{d}eeply depressed pricing does not usually last for more than six months.”<sup>130</sup>

92. Canada’s “confirmatory” evidence presented in paragraph 66 (relying on Industry Intelligence reports supposedly presenting monthly prices for SC paper) shows the prices for SCA and SCB both rebounding to 2012 levels by July 2013. SCA prices returned to \$815 by July 1 (the same price as in December 2012) and remained there for nearly the remainder of the year. SCB prices returned to \$790 (the same price as in June 2012) and remained there for nearly the remainder of the year.<sup>131</sup> Only in 2014 does the SCA and SCB paper pricing drop precipitously and not rebound.

93. Canada skews these pricing data in another significant way. It ignores that the SC paper prices it cites for both SCA and SCB paper remained relatively static during

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<sup>129</sup> R-110, ERA Forest Products Research, *ERA Forest Products Monthly* at 26 (Dec. 18, 2012).

<sup>130</sup> R-102, Verle Sutton, *The Reel Time Report*, Special Edition at 12.

<sup>131</sup> R-108, Industry Intelligence, report, “Industry Intelligence i2dashboard - 35 lb SC-A”; R-109, Industry Intelligence, report, “Industry Intelligence i2dashboard - 35 lb SC-B.” Resolute had different experiences with its pricing than reflected in these exhibits. So, too, did other forecasters, demonstrating the inherent unreliability of forecasts for predicting injury. See Hausman Statement ¶ 17. Resolute’s reliance on these figures should, thus, not be interpreted as an endorsement of the exhibits but, rather, a demonstration that Canada cannot bear its burden of proof on its jurisdictional defense. See *UNCITRAL* Arbitration Rules, Article 24(1) (1976).

the latter half of 2012. For example, from July 2012 until December 2012, the SCA price remained fixed at \$815. Similarly, the SCB price cited by Canada remained fixed at \$780 from August through November.<sup>132</sup> There is no discernible impact from PHP.

5. Canada Reads Wrong Resolute's Draft Arbitration Notice

94. Canada, lacking affirmative evidence to meet its UNCITRAL burden under Article 24(1), relies on Resolute's February 2015 Draft Notice of Intent to submit its claim to arbitration to show that Resolute knew in 2012 that it had incurred losses. Yet Canada fails to identify any statement in the Draft Notice where Resolute says it knew in 2012 about incurred losses. There is no such admission because there were no incurred losses.<sup>133</sup>

95. Canada misreads and misconstrues the language in the Draft Notice. The Draft Notice states that "Resolute's market share for all SC Paper has declined from 2012 to 2014."<sup>134</sup> The plain meaning of the words is that Resolute's market share for SC paper was less in 2014 than it was in 2012. Resolute neither claims nor admits it lost market share – or more importantly, any losses or damages – prior to December 30, 2012.

96. Canada also misuses and misconstrues the purpose of the Draft Notice—a document marked "Draft Only" and "Strictly Confidential." A personal letter from CEO

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<sup>132</sup> R-108, Industry Intelligence, report, "Industry Intelligence i2dashboard - 35 lb SC-A"; R-109, Industry Intelligence, report, "Industry Intelligence i2dashboard - 35 lb SC-B." As discussed in more detail above, the market in July and August 2012 could hardly assume the Port Hawkesbury mill would become operational as a going concern. *Supra* ¶¶ 15-21, 25-29, 100-102. And, as cited earlier, these figures do not account for the annual seasonality associated with the supercalendered paper industry. See Hausman Statement ¶¶ 8, 26.

<sup>133</sup> Canada Mem'l ¶ 54; R-081, Draft Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Feb. 24, 2015) ("Resolute Draft Notice of Arbitration").

<sup>134</sup> R-081, Resolute Draft Notice of Arbitration ¶ 19. Of course, Canada's receipt of the Draft Notice and the subsequent negotiations that followed demonstrate that Canada was hardly at risk of a "loss of institutional memory or documents." Canada Mem'l ¶ 40.

Garneau to Minister Ed Fast indicated that Garneau had offered the Draft Notice during a “cordial discussion” regarding potential relief from the Nova Scotia Measures and the impending countervailing duty investigation in the United States. As also stated in that letter, Resolute “anticipated that {Minister Fast} would consider carefully our draft Notice of Intent to Arbitration and in due course would initiate a conversation that might lead to compensation for Resolute . . . .”<sup>135</sup>

97. Resolute sought to engage in a dialogue with the Government of Canada through private consultations and negotiations. Resolute explained that the unfair assistance to Port Hawkesbury presented a serious problem for Resolute’s SC paper investments and its companies’ workers, and pled for the protection to which it was entitled under NAFTA Chapter 11 as a foreign investor. Resolute made every effort to seek a mutually agreeable solution with the government, but ultimately was compelled to commence this arbitration.

6. Resolute Did Not Shut Its Line #10 At Laurentide Because Of The Port Hawkesbury Restart

98. Canada attributes the closure of Line #10 at Laurentide to Port Hawkesbury, but PHP’s potential reopening was not even announced until January 2012, remained uncertain throughout the summer of 2012, and publicly was reported to be dead – until a last minute resuscitation – in September 2012. In contrast, Resolute’s and other press statements repeatedly indicated that Laurentide Line #10 likely would be shut down when the more modern and efficient Dolbeau plant would restart.

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<sup>135</sup> R-082, Letter from Richard Garneau to Minister Ed Fast (Mar. 2, 2015). Despite Resolute’s warnings, the countervailing duty investigation forecast by Resolute led to the imposition of a nearly 20% tariff on Canadian supercalendered paper imports into the United States, victimizing all Canadian producers. SOC ¶ 83 (detailing duties levied on Canadian supercalendered paper manufacturers).

99. Resolute, throughout 2011 and 2012, publicly linked closure of Line #10 at Laurentide to the reopening of Dolbeau. Port Hawkesbury's reopening remained entirely speculative until September 2012.

a. Port Hawkesbury Was Not Certain To Restart Until September 22, 2012

100. As Canada details in its Memorial, NewPage–Port Hawkesbury sought and obtained creditor protection in September 2011 for its Port Hawkesbury mill.<sup>136</sup> On December 16, 2011, four bids were submitted to purchase Port Hawkesbury, two proposing to operate the mill as a paper factory and two proposing to liquidate it.<sup>137</sup> On January 4, 2012, the Nova Scotia Government announced the selection of PWCC to operate Port Hawkesbury as a paper mill.<sup>138</sup> NewPage and PWCC entered into a conditional contract in July 2012, subject to court approval and the fulfillment of numerous conditions.<sup>139</sup> It took nearly a year for PWCC's facility purchase to become effective on September 28, 2012, with paper production not beginning until October 3, 2012.<sup>140</sup> Until the deal was closed, whether the facility would ultimately be sold to PWCC and restarted as a paper mill was an undecided question. The court-appointed Monitor overseeing the process, on July 12, 2012, "noted its concern regarding the ongoing conditionality of the Plan and has asked that any conditions within the control" of the applicable parties be resolved by August 7, 2012.<sup>141</sup> Many of the interested parties, such as the Nova Scotia

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<sup>136</sup> Canada Mem'l ¶ 14; see also R-24, Suther Aff.

<sup>137</sup> R-031, Sixth Monitor Report ¶¶ 16-18.

<sup>138</sup> R-048, Jan. 4, 2012 Nova Scotia Press Release.

<sup>139</sup> C-013, Tenth Monitor Report ¶¶ 31-33, 55.

<sup>140</sup> Canada Mem'l ¶¶ 21, 59; see also R-056, Sep. 22, 2012 Nova Scotia Press Release (detailing agreement reached on September 22, 2012).

<sup>141</sup> C-013, Tenth Monitor Report ¶ 56.

Consumer Advocate and the opposing political parties, also criticized aspects of the proposed deal.<sup>142</sup>

101. Port Hawkesbury, in proceedings before the ITC, admitted that PWCC corporate “officials themselves did not know whether the Port Hawkesbury mill deal was going to go through” even as late as August 2012.<sup>143</sup> On September 21, 2012, the Nova Scotia Government issued a press release stating that “Pacific West Commercial Corporation will not be proceeding with reopening the mill in” Port Hawkesbury.<sup>144</sup> PWCC issued a similar statement, and the failure of the deal was reported widely.<sup>145</sup>

b. Resolute Had Been Planning To Restart Its Dolbeau Facility Since September 2011, If Not Earlier

102. Contrary to Canada’s claims, Port Hawkesbury was not the cause of the Laurentide Line #10 closure, nor has Resolute considered claiming closure of #10 as damages for its arbitration claim. As best stated by Richard Garneau, Resolute would not reopen its Dolbeau facility unless “capacity {is} closed elsewhere” – *i.e.*, its “low-yield” and “obsolete” machine at Laurentide.<sup>146</sup>

103. Resolute publicly announced in September 2011 that it would seek to reopen Dolbeau and struck a deal with the workers there – at a time when Port

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<sup>142</sup> C-029, *New Page rescue plan “too risky for ratepayers,”* Canadian Manufacturing (July 16, 2012); C-033, *N.S. announces \$124.5 in incentives for NewPage,* The Canadian Press (Aug. 20, 2012); R-068, *Mill gets millions in N.S. cash,* The Chronicle Herald (Aug. 21, 2012); C-034, *Port Hawkesbury mayor on NewPage mill tax break: ‘Enough is enough,’* Canadian Press (Aug. 22, 2012).

<sup>143</sup> C-044, PHP Post. Conf. Br. at Attachment A.

<sup>144</sup> C-035, Nova Scotia Press Release, *Province Standing with Strait after Announcement Mill Will Not Reopen* (Sep. 21, 2012).

<sup>145</sup> C-044, PHP Post. Conf. Br. at Attachment A (September 21, 2012 Pacific West Commercial Corporation Press Release).

<sup>146</sup> C-024, Q3 2011 AbitibiBowater Inc Earnings Conference Call at 11 (Oct. 31, 2011); C-025, *C’est terminé la 6 à Kénogami,* Le Quotiden du jour (Dec. 13, 2011).

Hawkesbury's sale to PWCC (let alone many of the Nova Scotia Measures) had not yet been concluded or announced.<sup>147</sup> In October 2011, M. Garneau explained during his quarterly conference call that if Dolbeau were to restart, "capacity will have to be closed elsewhere. So it is not going to be a net increase in terms of production."<sup>148</sup> And on December 13, 2011, still before PWCC's bid was accepted and it was yet to be known whether the mill would restart, press reports explained that Resolute's plan "involves starting up operations again in . . . Dolbeau and shutting down one of the two machines in Shawinigan {i.e., Laurentide}."<sup>149</sup>

104. On August 8, 2012, after Resolute resolved issues with respect to the co-generation electricity plant located near its Dolbeau facility, the press reported that "{t}he future of the Laurentide mill could take a real blow in the coming weeks or even days as the reopening of Resolute Forest Products' Dolbeau-Mistassini plant seems imminent" and that Resolute considered one of its machines at Laurentide "obsolete and at the end of its useful life."<sup>150</sup>

105. While Resolute was aware that Port Hawkesbury might reopen during the summer of 2012, Resolute continued its own SC paper production plans, including important investments at Dolbeau and Laurentide line #11 (which was upgrading its

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<sup>147</sup> C-023, *AbitibiBowater may restart Dolbeau Mill after workers endorse changes*, *The Canadian Press* (Sep. 23, 2011).

<sup>148</sup> C-024, Q3 2011 AbitibiBowater Inc Earnings Conference Call at 11 (Oct. 31, 2011).

<sup>149</sup> C-025, *C'est terminé la 6 à Kénogami*, *Le Quotidien du jour* (Dec. 13, 2011); R-031, Sixth Monitor Report ¶ 20.

<sup>150</sup> C-031, *Dur coup à venir pour l'usine Laurentide?*, *Le Nouvelliste* (Aug. 8, 2012); C-027, *Resolute Forest Products buys Boralex cogeneration plant in Dolbeau, Que.*, *The Canadian Press* (Apr. 7, 2012); C-030, *Papeterie de Dolbeau-Mistassini : la réouverture serait imminente selon le président du syndicat*, *ICI Radio-Canada* (July 18, 2012).

equipment), with confidence that it could and would compete. The Port Hawkesbury revival remained speculative and its market impact unknown and unknowable.<sup>151</sup>

106. On August 24, 2012, Resolute announced the restart of its Dolbeau facility, re-opening after a \$20 million investment to improve the efficiency of the plant. Resolute touted its achievement, stating that Dolbeau was “a good investment” and that Resolute “will be more competitive than ever.” The press release also noted that Resolute – acting on M. Garneau’s October 2011 statement to open Dolbeau only if overall capacity were reduced – was “assessing its network of paper mills to ensure that production continues to be balanced.”<sup>152</sup> Resolute needed about two months before the Dolbeau mill would come up to speed and start producing paper that would meet Resolute’s and its customers’ quality specifications.<sup>153</sup> Only then (at the earliest) did Resolute conclusively learn that Port Hawkesbury would be reopening.<sup>154</sup>

107. In 2013, Resolute confirmed that Dolbeau had replaced Laurentide PM #10. Resolute explained that Dolbeau “{r}eplace{d} higher cost machines at Kénogami and Laurentide” and that Resolute “benefited from more cost-efficient operations on the restart of the Dolbeau machine, which replaced permanently closed machines at Kénogami and Laurentide.”<sup>155</sup> Resolute’s eighteen month plan to reopen Dolbeau (which

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<sup>151</sup> *Supra* ¶¶ 15-21, 25-29, 100-101.

<sup>152</sup> R-011, *Resolute Forest Products Announces Restart of its Dolbeau (Quebec) Paper Mill*, Resolute News Releases (Aug. 24, 2012).

<sup>153</sup> Hausman Statement ¶ 10; *see also* C-052, Oct. 22, 2015 U.S. ITC Tr. at 239:22-240:6 (detailing PHP efforts to requalify its paper with customers).

<sup>154</sup> *See supra* ¶¶ 15-21, 25-29.

<sup>155</sup> C-040, Resolute Forest Products Q4 2012 Results at 7 (Feb. 12, 2013); C-042, Resolute Forest Products Q1 2013 Earnings Call Tr. at 3 (Apr. 30, 2013).



required capacity closures at inefficient machines such as Laurentide #10) finally had come to fruition.

**C. Resolute Acquired Knowledge Of Certain Breaches After December 30, 2012**

108. Articles 1116(2) and 1117(2) require that Resolute would have acquired (or should have acquired) “knowledge of the alleged breach.” While some of the breaches raised by Resolute were known by September 28, 2012 when the Port Hawkesbury sale finalized (but had not incurred loss), others were not known by Resolute until after December 30, 2012 (three years before Resolute initiated this arbitration).

109. Resolute could not have known that Nova Scotia breached Article 1110 by expropriating Resolute’s investment in its Laurentide mill until October 2014, when the claim became ripe after the mill closed. Until then, Resolute was not substantially deprived of its property. In addition, Resolute could not have known Nova Scotia passed a regulation mandating that a biomass facility remain on full-time – a C\$6-8 million value to Port Hawkesbury for which it never paid – until January 2013, when Nova Scotia enacted the regulation. Resolute’s claims regarding these two breaches were timely notwithstanding anything that may have happened or been known before December 30, 2012.

**1. Resolute Submitted Its Claim Within Three Years Of Canada’s Breach Of Article 1110**

110. An expropriation, in breach of Article 1110, requires a substantial deprivation of the allegedly expropriated investment.<sup>156</sup> A substantial deprivation means

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<sup>156</sup> See CL-026, *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award ¶ 242 (Aug. 2, 2010) (“For a measure to constitute expropriation under Article 1110 of NAFTA, it is common ground that (i) bad faith on the part of the Respondent is not required, and (ii) the measure must amount to a substantial deprivation of the Claimant’s investment,”); CL-013, *Merrill & Ring*

that there must have been “interference . . . sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”<sup>157</sup> It is more than a mere reduction in profits.<sup>158</sup> Absent a substantial deprivation, an investor cannot submit a claim for expropriation under Article 1116(1), which permits the submission of a claim only when “another Party has breached an obligation” under Chapter 11. Many companies have suffered damages from government actions over time but have been denied expropriation claims because their investments were never “expropriated,” as defined by a substantial deprivation.<sup>159</sup>

111. Resolute was substantially deprived of its Laurentide mill when the mill had to be closed in October 2014. Resolute could not have brought an expropriation claim prior to the substantial deprivation because it would not have been considered a breach, and therefore would not have been a ripe claim under 1116(1) or 1117(1).

112. As the tribunal in *Glamis Gold v. United States* explained:

In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it, the Tribunal begins from the

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*Forestry L.P. v. Government of Canada*, UNCITRAL, Award ¶ 145 (Mar. 31, 2010) (“*Merrill & Ring*”).

<sup>157</sup> CL-015, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, ¶ 102 (June 26, 2000).

<sup>158</sup> CL-015, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, ¶ 101 (June 26, 2000).

<sup>159</sup> See CL-018, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award ¶¶ 262–64 (May 12, 2005) (2005) (no expropriation); CL-019, *LG&E Energy Corp., LG&E Capital Corp. and LG&E Int’l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability ¶¶ 191, 198–200 (Oct. 3, 2006) (2007) (finding no expropriation when due to mere reduction in profits); CL-021, *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award ¶¶ 245–246 (May 22, 2007) (no expropriation); CL-023, *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award ¶¶ 284–286 (Sep. 28, 2007) (no expropriation). *But see* CL-020, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Award ¶¶ 271–272 (Feb. 6, 2007) (finding expropriation); CL-022, *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award ¶¶ 7.5.11, 7.5.34 (Aug. 20, 2007) (finding that expropriation had occurred when investment value).

premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage. . . . Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.<sup>160</sup>

113. Thus, Canada's breach of Article 1110 for expropriation of Resolute's Laurentide mill did not occur until Resolute was substantially deprived of the mill when it closed in October 2014 (and certainly after December 30, 2012). Resolute's claim for breach of Article 1110 was submitted December 30, 2015, less than three years from the date of expropriation. Canada has not posited, nor could it have, that Resolute suffered a substantial deprivation of the Laurentide mill immediately upon Nova Scotia's agreement with the investors of Port Hawkesbury in September 2012, nor at any time earlier than October 2014.

114. Canada speculates that Machine Number 10 at Laurentide was closed in November 2012 as a consequence of competition with Port Hawkesbury. Yet, even if that speculation were true (and it is not), the closure of Machine Number 10 did not result in a substantial deprivation of Resolute's investment in the Laurentide mill and, therefore could not have constituted a breach of Article 1110 at that time. Resolute invested in Machine Number 11's improvement and continued to produce SC paper profitably at Laurentide until profitability was destroyed by Nova Scotia's national champion and Resolute was forced to close Laurentide altogether.

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<sup>160</sup> CL-025, *Glamis Gold v. United States of America*, UNCITRAL, Award ¶ 328 (June 8, 2009).

2. Nova Scotia Continued To Introduce Electricity Measures Damaging To Resolute After December 30, 2012

115. Nova Scotia, as part of its electricity measures, adopted a new regulation in 2013 benefitting Port Hawkesbury with C\$6-\$8 million per year in benefits. Port Hawkesbury used steam provided by a Nova Scotia Power biomass facility to make its paper. To do so, the biomass facility needed to run constantly, but Port Hawkesbury would pay only for the portion it used – 24 percent of the costs.<sup>161</sup>

116. To ensure the mill ran full time, the Nova Scotia Government passed a regulation in January 2013, ensuring that the Utility Review Board would not have to resolve whether passing on 76 percent of these costs to ratepayers was permissible.<sup>162</sup> Until the regulation was enacted, no breach had occurred.

117. Passing the January 2013 Nova Scotia mandate still required rate payers to absorb these additional costs. In October 2015, Nova Scotia Power admitted for the first time that complying with the Government regulation cost ratepayers an additional C\$6-8 million per year.<sup>163</sup>

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<sup>161</sup> R-062, Aug. 20, 2012 NSURB Dec. ¶¶ 176, 179, 181, 183.

<sup>162</sup> C-039, Renewable Electricity Regulations, NS Reg 155/2010 (Jan. 2013), <<http://canlii.ca/t/51zv8>> retrieved on 2017-02-13; C-055, *Government Ends Must-Run Regulation, Reduces Biomass Use*, Nova Scotia Press Release (Apr. 8, 2016) (indicating must-run regulation adopted in January 2013). According to that same press release, the “must-run” provision ended in April 2016 when Nova Scotia amended the regulatory scheme.

<sup>163</sup> C-051, *Nova Scotia Power ratepayers foot \$7M bill for Port Hawkesbury Paper*, CBC News (Oct. 20, 2015).

**IV. THE IMPUGNED MEASURES “RELATE TO” RESOLUTE AND RESOLUTE’S INVESTMENT IN ACCORDANCE WITH ARTICLE 1101(1)**

118. Canada has stated that it is willing to accept Resolute’s allegations as true *pro tem* for the purposes of resolving its Article 1101(1) objection.<sup>164</sup> Key among Resolute’s relevant allegations for the purposes of this objection is that the Nova Scotia Measures were intended to make the Port Hawkesbury mill the national champion in SC paper.<sup>165</sup>

119. The Government of Nova Scotia could accomplish this objective only by deliberately undermining Resolute, then a leading SC paper producer, in the Canadian and North American markets, as the companies were in direct competition.<sup>166</sup> The promise to make PHP “the lowest cost” producer in North America guaranteed that PHP was to compete, with all of the advantages of state-backing, well beyond Nova Scotia’s borders. With no other SC paper producer in Nova Scotia, the measures were never intended for a Nova Scotia market, and the reference to “lowest cost” was inherently comparative, promising PHP would be enabled, with state backing, to produce SC paper at a cost lower than other North American producers of SC paper.<sup>167</sup> In a shrinking market, the intention of the measures had to be for PHP to take business away from its competitors, if not explicitly to put them out of business. Resolute, the leading producer in North America at the time, was necessarily PHP’s competitive target.<sup>168</sup>

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<sup>164</sup> Procedural Order No. 4, Decision on Bifurcation ¶ 4.14 (Nov. 18, 2016) (citing Canada’s Request for Bifurcation ¶ 10 (Sep. 29, 2016); Bifurcation Hr’g Tr. at 13:8-13 (Nov. 7, 2016)).

<sup>165</sup> SOC ¶¶ 5, 89, 92, 94, 95, 105, 107.

<sup>166</sup> See, e.g., SOC ¶¶ 5-7.

<sup>167</sup> See, e.g. SOC ¶ 40; C-012, Apr. 2012 Nova Scotia Power Evid. at 9.

<sup>168</sup> See SOC ¶¶ 3, 46; R-102 at 7 (detailing capacity of supercalendered paper producers).

120. The Nova Scotia Measures were not, as Canada now claims, inward-looking, defensive measures intended by the provincial government to provide necessary support to an ailing paper mill, with only incidental effects on Resolute's investment outside of Nova Scotia.<sup>169</sup> Nova Scotia deliberately intended PHP to compete against Resolute, endowing PHP with all the advantages of state support. Nova Scotia even promoted PHP as the “envy of the world.”<sup>170</sup> The notion that Nova Scotia could provide substantial competitive assistance to PHP without those measures relating adversely to its competitors in the market solely because the competitors are outside of Nova Scotia is “very far-fetched” and “ignores economic reality.”<sup>171</sup>

121. Canada's arguments in support of its Article 1101(1) objection fail for two reasons. First, Canada incorrectly interprets Article 1101(1), whether based on the ordinary meaning of the provision, or the applicable test as developed in the various awards that have interpreted and applied the provision. The words “relating to” in the provision require nothing more than a causal nexus between the measures and the consequences for the investment or investor. The test developed in previous awards does not require a showing of a “legal impediment,” which Canada argues is necessary.

122. Regardless of the interpretation of Article 1101(1), the direct impact that the Nova Scotia Measures had on the few participants in the SC paper market satisfies the requirement that the measures in question “relate to” Resolute and its Canadian investment – even if one were to apply Canada's incorrect standard. The Nova Scotia Measures have both a causal nexus (*i.e.*, “relate to”) and a “legally significant connection”

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<sup>169</sup> See Canada Mem'l ¶¶ 96, 101, 103.

<sup>170</sup> R-090, Sep. 22, 2012 Nova Scotia Backgrounder at 3.

<sup>171</sup> Hausman Statement ¶ 32.

to Resolute and its investment, based upon the intent, purpose and effect of the measures, which altered the competitive landscape of the North American SC paper market in which Resolute was one of the few participants, thus necessarily discriminating against Resolute.

**A. Article 1101(1) Requires Only A Causal Nexus, Not A “Legal Impediment”**

123. Canada’s objection under Article 1101(1) depends upon interpretation of the phrase “relating to.” According to the Ontario Superior Court, sitting in review of the *Cargill* award, Article 1101(1) imposes a low threshold, requiring only “some connection” between the measures and the investor/investment and not requiring “that the measure{s} be adopted with the express purpose of causing loss.”<sup>172</sup> The *Cargill* standard is the standard that this Tribunal should apply.

124. Canada, relying upon *Methanex*, argues that Article 1101(1) requires a “legally significant connection.” But, contrary to Canada’s argument, the *Methanex* analysis has not given rise to a series of consistent awards that either set out clearly what constitutes a “legally significant connection,” or somehow require a claimant to show it has a “legal impediment.”

125. The facts here easily satisfy the “some connection” test when interpreting “relating to.” Resolute’s claims, thus, come within the scope and coverage of NAFTA Chapter Eleven.

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<sup>172</sup> CL-004, *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656 ¶ 57, *aff’d* 2011 ONCA 622, *application for leave to appeal dismissed* 2012 CanLII 25159 (SCC).

1. “Relating To” Requires Only A *Prima Facie* Causal Connection For Jurisdiction

126. Resolute need only demonstrate that some causal connection exists between the challenged measures and Resolute’s investment, the standard laid out in *Cargill v. Mexico*. *Cargill* concerned Mexico's measures regarding high-fructose corn syrup (“HFCS”).<sup>173</sup> Mexico targeted several suppliers of HFCS (made in the United States) in order to assist Mexican sugar-cane producers, applying two measures: (1) a tax on all products that contained sweeteners other than cane sugar, with any beverage containing HFCS sufficient to trigger the tax; and (2) a permitting requirement to import HFCS.<sup>174</sup>

127. Mexico objected to the investor’s claims because, *inter alia*, the measures could not relate to Cargill because all of Cargill’s HFCS manufacturing facilities were in the U.S., not Mexico. The tribunal analyzed the objection under Article 1101(1), NAFTA’s “scope and coverage” provision:

Jurisdictional elements of this Article involve questions as to: whether there are “measures”; whether they are “relating to” the stipulated persons or things; whether they involve “investors of another Party”; and whether they involve “investments” of those investors “in the territory of the Party” that would be subject to the claim.<sup>175</sup>

128. The *Cargill* Tribunal, citing *Methanex*, noted that, “Article 1101 has a causal connection requirement as well: the measures adopted or maintained by the Respondent must be those ‘relating to’ investors of another Party or investments of investors of

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<sup>173</sup> CL-003, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, (Sep. 18, 2009) (“*Cargill*”).

<sup>174</sup> CL-003, *Cargill* ¶¶ 2, 100, 208.

<sup>175</sup> CL-003, *Cargill* ¶ 163.



another Party.”<sup>176</sup> After commenting that the test espoused by *Methanex* might be “too restrictive,” the tribunal stated that the permit requirement constituted a legal impediment to Cargill’s business in Mexico and thus clearly satisfied the *Methanex* test.<sup>177</sup>

129. The tribunal concluded its analysis by considering all of the measures (both the import permit requirement and the tax), deciding as follows:

In conclusion, the Tribunal holds that the scope and coverage requirements of Chapter 11 as set out in Article 1101 are satisfied in this case. . . . As to the remaining matters relevant to competence which are in contention in respect of Article 1101, the Tribunal determines that the measures are all “relating to” the stipulated investors and investments; and the interrelationship between Chapter II and other elements of the NAFTA is not resolved in favor of Respondent simply by the allegation that any measure having any effect on trade in goods cannot come within Chapter 11; whether it does or does not will depend on the interpretation of the specific commitment provisions and the scope of the damages entitlement as articulated below.<sup>178</sup>

The tribunal found that all of the regulations – both the tax on products sweetened with HFCS and the import permit requirement – were measures “relating to” Cargill and its Mexican subsidiary.

130. Although the tribunal had noted earlier that the import requirement constituted a “legal impediment,”<sup>179</sup> it made no similar finding regarding the tax. Nor could it; unlike the permit requirement, Cargill legally was not hindered from selling HFCS in Mexico. The tax was not even charged on suppliers, distributors, or manufacturers of HFCS but, rather, the soft drink manufacturers who sold products containing HFCS. Cargill did not have to be the specific target of the measures in order for the tribunal to

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<sup>176</sup> CL-003, *Cargill* ¶ 174.

<sup>177</sup> CL-003, *Cargill* ¶ 175.

<sup>178</sup> CL-003, *Cargill* ¶ 180.

<sup>179</sup> CL-003, *Cargill* ¶ 175; Canada Mem’l ¶ 87.

exercise jurisdiction over the investor's claims.<sup>180</sup> Cargill needed only to be directly affected by a measure that was intended to protect a local industry and hurt its competitors outside the relevant jurisdiction. The *Cargill* Tribunal put it this way:

Finally, the Tribunal holds that Respondent has breached its obligations under Article 1106 because the {HFCS tax}, by its very objective and design, involved a performance requirement within the meaning of Article 1106(3). It conditioned a tax advantage on the use of domestically produced cane sugar for the very purpose of affecting the sale of HFCS, and thus, it conditioned an advantage "in connection with" the operation of the Claimant's investment which supplied HFCS to the soft drink bottling industry.<sup>181</sup>

131. When the "causal connection" test was challenged post-award in *Cargill*, the Ontario Superior Court of Justice observed that "{t}he term 'related' requires only some connection and does not require that the measure be adopted with the express purpose of causing loss."<sup>182</sup>

132. The tribunal in *Mesa Power Group v. Canada* recently endorsed the *Cargill* "causal connection" test.<sup>183</sup> That case concerned a U.S. energy company that failed to receive a contract under Ontario's feed-in tariff program ("FIT Program"), which promoted the generation and consumption of renewable energy in the province. The tribunal found that the impugned measures were measures relating to Mesa Power or its investment. In

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<sup>180</sup> See CL-003, *Cargill* ¶¶ 2, 105, 169-175.

<sup>181</sup> CL-003, *Cargill* ¶ 2.

<sup>182</sup> CL-004, *Cargill, Incorporated v. United Mexican States*, 2010 ONSC 4656 ¶ 57, *aff'd* 2011 ONCA 622, *application for leave to appeal dismissed* 2012 CanLII 25159 (SCC).

<sup>183</sup> CL-005, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award ¶ 259 (Mar. 24, 2016) ("*Mesa Power*"). Canada argues that *Mesa Power* is not relevant here because Canada did not contest that the disputed measure was "relating to" the investor in that case. Canada Mem'l ¶ 215. But in view of the types of measures in *Mesa Power* (as described more fully below), this argument highlights Canada's inconsistent approaches as to what type of connection is needed to establish that a measure is "relating to" an investor or an investment.

so doing, the tribunal required only a “causal nexus” between the measure and the investment or investor:

{T}o fall within the ambit of Section A of Chapter 11, the impugned measures must “relate to” an investor of another NAFTA Party or to investments of such an investor. In the context of the present dispute, this means that all of the measures identified in (§254) above must have a causal nexus with the Claimant or its investment. Having reviewed each of the measures identified in §254 above, the Tribunal considers that all of them have a causal link with the Claimant and its Investments....<sup>184</sup>

133. The measures the *Mesa Power* Tribunal found related to the claimant or its investment included: (1) legislation creating an Ontario power authority and providing for management of electricity supply, capacity and demand; (b) legislation enacted to support and develop environmentally friendly energy, and (3) ministerial directions establishing the FIT program and directing the Ontario Power Authority to plan for 10,700 MW of renewable energy generating capacity by 2018.<sup>185</sup>

134. None of these measures created a legal impediment for the claimant or was intended to harm the claimant. Yet, the tribunal found that every measure – including general legislation – related to the claimant or its investment even though the legislation did not name or target the claimant and was not intended to harm the claimant. It was enough that there was a “causal connection” between the legislation and the claimant’s injury.<sup>186</sup>

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<sup>184</sup> CL-005, *Mesa Power* ¶ 259. However, the Tribunal dismissed Mesa Power’s claim on the merits and for lack of jurisdiction over measures that had been implemented prior to Mesa Power’s investment. CL-005, *Mesa Power* ¶ 706.

<sup>185</sup> CL-005, *Mesa Power* ¶ 254. The enacted legislation was entitled the *Green Energy and Green Economy Act, 2009* and the *Green Energy Act, 2009*.

<sup>186</sup> CL-005, *Mesa Power* ¶ 259.

2. Canada Exaggerates *Methanex*'s "Legally Significant Connection" Test

135. Canada relies heavily on the *Methanex v. United States*<sup>187</sup> standard to argue that Article 1101(1) requires a "legally significant connection" between the measures and the investor or investment. The *Methanex* Tribunal, however, accepted the reasoning of the *Pope & Talbot* Tribunal, concluding that a "legally significant connection" need not mean that a measure must be primarily directed at the investment or investor in order to qualify as "relating to" it.<sup>188</sup> The *Methanex* Tribunal also conceded that it is no easier "to define the exact dividing line" between related and unrelated measures than it is "in twilight to see the divide between night and day."<sup>189</sup>

136. As one academic commentator has mentioned, the *Methanex* Tribunal "seemed uncomfortable with its own legal test when examining whether it was met by the new allegation of intent to harm the foreign investor."<sup>190</sup> In its final award on jurisdiction and merits, the *Methanex* Tribunal felt compelled to consider and decide the merits of Methanex's claims (under Articles 1102, 1105 and 1110 of NAFTA) before it concluded that the measures had no "legally significant connection" to Methanex under Article 1101(1), and therefore that the tribunal lacked jurisdiction.<sup>191</sup>

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<sup>187</sup> CL-001, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (Aug. 7, 2002) ("*Methanex* Partial Award").

<sup>188</sup> CL-001, *Methanex* Partial Award ¶¶ 142, 147 (commenting on CL-002, *Pope & Talbot* ¶¶ 33-34).

<sup>189</sup> CL-001, *Methanex* Partial Award ¶¶ 139, 147. As the *Methanex* Tribunal noted, prior NAFTA awards are not legally binding on this Tribunal. CL-001, *Methanex* Partial Award ¶ 141.

<sup>190</sup> CL-029, Charles-Emmanuel Coté, "Looking for Legitimate Claims: Scope of NAFTA Chapter 11 and Limitation of Responsibility of Host State" ("Coté"), ch. 15 in Andrew Byrnes, Mika Hayashi et al, eds., *International Law in the New Age of Globalization* (Koninklijke Brill NV, Leiden, The Netherlands, 2013) at 408.

<sup>191</sup> RL-054, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) ("*Methanex* Final Award"), Part IV - Chapter B -

137. The *Methanex* Tribunal’s analysis of the merits to resolve a jurisdictional issue led the same commentator to conclude that the test in *Methanex* was circular: “The reasoning of the {*Methanex*} Arbitral Tribunal is that if the measure at stake violates the substantive provisions, then it may conclude that there exists a legally significant connection with the foreign investors or their investment.”<sup>192</sup>

138. Consistent with these observations, shortly after the *Methanex* award was issued, a non-NAFTA tribunal, in *BG Group Plc. v. Republic of Argentina*, criticized harshly the *Methanex* decision, explaining that, in its view, “relating to” could not be given the restrictive meaning assigned to it by the *Methanex* Tribunal because exceptions enshrined in other NAFTA articles would be unnecessary if some “legally relevant connection” beyond or in addition to “effect” were necessary for a measure to be within the scope of the signatories’ obligations.<sup>193</sup> The *BG Group* Tribunal noted that “Article 1101(1) is similar to introductory provisions in a number of other Chapters of NAFTA,” and concluded that “{t}he context of Article 1101(1), as well as the object and purpose of the

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Page 1 ¶ 1 (“{B}ut an affirmative finding under NAFTA Article 1102, which does not require the demonstration of the malign intent alleged by Methanex, could conceivably provide evidence relevant to a determination as to whether the “relation” required by NAFTA Article 1101 exists in this case. The potentially asymmetrical connection between these two Chapter 11 provisions was one of the reasons the Tribunal felt it appropriate to conjoin the jurisdictional and merits phases in the main hearing under Article 21(4) of the UNCITRAL Rules”), Part IV - Chapter A - page 2 ¶ 4, Part IV - Chapter F - page 1, ¶ .

<sup>192</sup> CL-029, Charles-Emmanuel Coté, “Looking for Legitimate Claims: Scope of NAFTA Chapter 11 and Limitation of Responsibility of Host State” (“Coté”), ch. 15 in Andrew Byrnes, Mika Hayashi et al, eds., *International Law in the New Age of Globalization* (Koninklijke Brill NV, Leiden, The Netherlands, 2013) at 408-09.

<sup>193</sup> CL-006, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award ¶¶ 227-231 (Dec. 24, 2007). The *Methanex* Tribunal had determined that a “legally significant connection” must be demonstrated between the measure and the investor or its investment for a measure to be one “relating to” an investment within the meaning of Article 1101(1). See CL-001, *Methanex* Partial Award ¶ 147.

NAFTA, demonstrate that the interpretation of Article 1101(1) in *Methanex I* cannot be sustained.”<sup>194</sup>

139. The *BG Group* Tribunal reasoned that the carve-out contained in Article 1101(4), preserving the right of the State to perform basic social services such as law enforcement and public education, would be unnecessary and redundant because the exercise of these state functions would not normally be directed to foreign investors or their investments.<sup>195</sup> The tribunal also questioned why the United States would have required the reservation in Annex VII, relating to “financial services, which applies generally to offers on commodity futures and options, thereby affecting both domestic and foreign investors/investments alike,” if something more than mere effect would be required to establish that a measure is one “relating to” an investment or investor. Such an exception presumably would be unnecessary if already addressed by Article 1101(1).<sup>196</sup> The *BG Group* Tribunal made similar observations about the redundancy of other exceptions contained in NAFTA if the *Methanex* interpretation of Article 1101(1) were correct.

140. Canada, itself, has acknowledged, before another tribunal, that “the *Methanex* tribunal did not define ‘legally significant connection’, {and} the question whether a legally significant connection exists between an impugned measure and an investor or investment must be decided on a case-by-case basis.”<sup>197</sup>

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<sup>194</sup> CL-006, *BG Group* ¶¶ 229-230.

<sup>195</sup> CL-006, *BG Group* ¶ 230 n. 195.

<sup>196</sup> CL-006, *BG Group* ¶ 230 n. 201.

<sup>197</sup> CL-007, *Bilcon* ¶ 235.

3. Other Tribunals Have Not Adopted the *Methanex* “Legally Significant Connection” Test

141. Since the *Methanex* decision, NAFTA panels (while avoiding any express rejection of *Methanex*) have expanded the “legally-significant-connection” spectrum to include measures that have a causal connection or causal nexus to a claimant. These Tribunals have interpreted and applied Article 1101(1) in a far more nuanced (and more persuasive) manner. These cases show that “relating to” is not an unduly narrow jurisdictional gateway preventing analysis of liability and quantum where a causal nexus is demonstrated and the universe of affected investors is not unlimited.

142. In its Memorial on Jurisdiction, Canada, despite this line of cases, insists that the *Methanex* approach is correct and has been consistently adopted. Canada insinuates that a “legally significant connection” requires a showing of a “legal impediment,”<sup>198</sup> citing the cases of *Cargill* (discussed above), *Apotex II*, *Bilcon*, and *Bayview*.

143. None of these cases supports Canada’s position that a “legal impediment” is required to establish that a measure “relates to” an investment or investor. Canada appears here to be inventing a new test, without definition and without authority. A closer reading of the cases cited by Canada reveals that Canada’s position on Article 1101(1) is untenable.

144. The tribunal in *Apotex II* examined the *Cargill* award and found that “something more than a mere ‘effect’ from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1).”<sup>199</sup> The “something more,” however,

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<sup>198</sup> Canada Mem’l ¶¶ 86-87, 90-91.

<sup>199</sup> RL-051, *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No.

required neither that the claimant have been named or expressly targeted nor, for jurisdictional purposes, that a causal connection be established between the measures and the investment: “[T]he Tribunal thinks it inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven’s substantive provisions for the merits of the Claimants’ claims. For jurisdictional purposes, the threshold is necessarily different under NAFTA Article 1101(1), given the ordinary meaning of the connecting phrase ‘relating to.’”<sup>200</sup>

145. The *Apotex II* Tribunal also distinguished *Methanex* on the basis that the “floodgates” concerns in that case did not apply, finding that “the potential class of investors {in *Methanex*} indirectly affected by the disputed measure was indeterminate and unknown.”<sup>201</sup> By contrast, “of all US recipients of Apotex Inc.’s products, Apotex-US was by far the enterprise most immediately, most directly and most adversely affected by the Import Alert. In the Tribunal’s view, that suffices to satisfy the Claimant’s relationship with the Import Alert, within the meaning of NAFTA Article 1101(1).”<sup>202</sup> Here, as in *Apotex II*, the class of investors constitutes only the Claimant Resolute, and the class of impacted companies is known and not indeterminate. Like in the case of *Apotex II*, the universe of possibly impacted companies here is very small, five for the entire continent.<sup>203</sup>

146. The *Apotex II* Tribunal further rejected the Respondent’s defense that there were alternative theories available for the Claimants’ losses because “{t}hat issue may likewise affect issues of liability and quantum . . . there is no reason for requiring NAFTA

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ARB(AF)/12/1, Award ¶ 6.13 (Aug. 25, 2014) (“*Apotex II*”); Canada Mem’l ¶¶ 89-90.

<sup>200</sup> RL-051, *Apotex II* ¶ 6.20.

<sup>201</sup> RL-051, *Apotex II* ¶ 6.24.

<sup>202</sup> RL-051, *Apotex II* ¶ 6.24

<sup>203</sup> SOC ¶¶ 46, 57, 59.



Article 1101(1) to be so narrowly interpreted as to require only a claimant with a successful case on causation to pass through its threshold gateway; or to establish that the disputed measure is the only relevant possible measure.”<sup>204</sup> If the jurisdictional rule were otherwise, “a claimant investor might have a legitimate claim for breach of a substantive NAFTA provision, made in good faith and upon reasonable grounds, without any remedy under NAFTA’s Chapter Eleven. In the Tribunal’s view, there is no reason to interpret or apply NAFTA Article 1101(1) as an unduly narrow gateway to arbitral justice under Chapter Eleven.”<sup>205</sup>

147. Similarly, in *Bilcon*, another case relied on by Canada to advance its theory requiring a “legal impediment,” the question was whether the measures at issue were “relating to” the U.S. claimants. These measures notably included the performance of a joint Canadian federal-provincial environmental assessment of a proposed quarry. Neither the claimants nor their investment had any rights or obligations under the industrial approvals at issue.<sup>206</sup> The tribunal referred to Bilcon’s partnership with the company (Nova Stone) to which the relevant approvals had been issued, not in reference to the establishment of a “legal impediment,” but rather to confirm that the claimants were in fact investors within the meaning of NAFTA 1101(1).<sup>207</sup>

148. Canada incorrectly argues that the tribunal in *Bayview Irrigation District v. United Mexican States* endorsed the *Methanex* “legally significant connection” test.<sup>208</sup> The *Bayview* award did not deal with the meaning of the phrase “relating to” in Article

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<sup>204</sup> RL-051, *Apotex II* ¶¶ 6.26.

<sup>205</sup> RL-051, *Apotex II* ¶¶ 6.28.

<sup>206</sup> CL-007, *Bilcon*, ¶ 235.

<sup>207</sup> CL-007, *Bilcon* ¶ 241.

<sup>208</sup> Canada Mem’l ¶ 86.

1101(1), which defines the required relationship between a State’s “measures” and the investor/investment. The *Bayview* award addressed a separate question under Article 1101(1) -- whether investors bringing a NAFTA claim had to have an investment “in the territory” of the NAFTA State allegedly adopting the measures.<sup>209</sup> The *Bayview* Tribunal was addressing the relationship between the investment and the State against which the claimant’s claim was filed.

149. The *Bayview* Tribunal held that the investment must be in the territory of the NAFTA State against which the claim is filed: “The Tribunal considers that in order to be an ‘investor’ within the meaning of NAFTA Art. 1101 (a), an enterprise must make an investment in another NAFTA State, and not in its own. Adopting the terminology of the *Methanex v. United States* Tribunal, it is necessary that the measures of which complaint is made should affect an investment that has a ‘legally significant connection’ with the State creating and applying those measures.”<sup>210</sup> The State had to be a NAFTA party; the tribunal said nothing, and had no reason to say anything, about subnational governments.

150. The *Bayview* Tribunal addressed the necessity of a “legally significant connection” between the investment at issue and the NAFTA State whose measures were impugned, not the necessity of a “legally significant connection” between the measures themselves and the investment or investor. The *Bayview* Tribunal did not endorse the *Methanex* “legally significant connection” test for “relating to;” instead, it borrowed the terminology of the *Methanex* test and applied it to another element of Article 1101(1)’s jurisdictional requirements.

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<sup>209</sup> RL-005, *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award ¶¶ 14, 28, 93, 104, 108, 122 (June 19, 2007) (“*Bayview*”).

<sup>210</sup> RL-005, *Bayview* ¶ 101.

151. In the present case, there is no dispute that Resolute has an investment in Canada, a NAFTA party, and that as significant a connection as possible exists between Resolute and Canada. Neither the *Bayview* Tribunal's reasoning nor its conclusions are therefore of any assistance to Canada's argument here.

**B. The Nova Scotia Measures “Relate To” Resolute For Purposes of Article 1101(1)**

152. The Nova Scotia Measures have a “causal connection” to Resolute and its investments in Canada. Resolute, in its Statement of Claim, repeatedly alleges that the Nova Scotia measures “relate to” Resolute:

- “Nova Scotia . . . undertook a series of measures late in 2012 to ensure that the Port Hawkesbury paper mill would have competitive advantages above any other SC paper producer, including Resolute . . . .”
- “The unforeseen and unforeseeable introduction into the Canadian market of an SC paper mill bankrolled by public funds to become ‘the lowest cost operation in North America’ has had a devastating impact on the viability and competitiveness of Resolute’s three SC Paper mills in Canada.”
- “Nova Scotia’s measures openly threatened Resolute and other SC paper producers because Port Hawkesbury Paper would take their customers, create a downward pressure on prices, and ‘push higher-cost operators out of business.’”
- “Port Hawkesbury Paper began to take market share from Resolute . . . in 2013.”
- “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.”
- “Nova Scotia selected the Port Hawkesbury Paper mill as a national champion, chosen by a government, to establish it as the ‘lowest cost and most competitive producer’ in the SC paper market, displacing all other producers, including Resolute.”
- “With tens of millions of dollars of assistance from the government and ongoing preferential operation arrangements, Port Hawkesbury Paper was empowered to drive Resolute’s SC paper mills in Québec out of business.”

- “Nova Scotia has picked its own provincial mill as a champion in the SC paper industry, and propped it up with benefits and operational advantages to ensure that its costs are lower than those of Resolute and other competitors in the Canadian, U.S. and other markets, thereby creating grossly unfair conditions in an SC paper market in Canada that has very few producers.”<sup>211</sup>

Like the tax in *Cargill*, which was not aimed specifically at, but directly impacted, the investor, the Nova Scotia Measures directly harmed Resolute by Nova Scotia’s choice of Port Hawkesbury Paper as champion in the SC paper industry, supported by millions in provincial funding and other operational benefits.

153. Resolute would still meet the requirements of Article 1101(1), even if this Tribunal were to apply Canada’s “legally significant connection” test based upon *Methanex*. Although the claimant in *Methanex* alleged a sinister government plot or conspiracy to harm the claimant, the tribunal in that arbitration did not find, contrary to Canada’s suggestion,<sup>212</sup> that a government must have malicious intentions when enacting measures for an investor to satisfy Article 1101(1). Intentionally discriminatory acts of protectionism may be committed openly, in the honest but mistaken belief that harming the foreign investor is a legitimate means of aiding domestic producers. The *Methanex* Tribunal also recognized that intent to harm is not necessary to show that a measure is one “relating to” the investment or the investor.

154. The intent to harm is, thus, not a necessary condition, but it is sufficient: if the intent or purpose of a measure were to harm foreign-owned investors or investments, then the measure necessarily would “relate to” the foreign-owned investor or

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<sup>211</sup> SOC ¶¶ 4, 47, 48, 50, 53, 89, 95, 107. These examples of course are exemplary, and the Statement of Claim is replete with allegations showing the Nova Scotia measures have a causal connection to Resolute and its investments in Canada.

<sup>212</sup> See Bifurcation Hr’g Tr. at 15-16 (Nov. 7, 2016); Canada Mem’l ¶¶ 109-110 (arguing that claimant in *Methanex* needed to prove “malign intent”).

investment.<sup>213</sup> An intention to harm a foreign investor also meets the legally significant connection test without the additional requirement of conspiracy. Measures designed to alter competition necessarily relate to the competitors, and an intention to harm a foreign investor through changes in a competitive market meets the “legally significant connection” test.

155. Resolute meets this standard. Resolute alleges that PHP began to engage in predatory pricing in 2013.<sup>214</sup> Predatory pricing, by its nature, involves an intention to harm competitors – in this case, the foreign investor, Resolute. Resolute also alleges that the Nova Scotia Measures were intended to make PHP’s competitors in the SC paper market less competitive relative to PHP.<sup>215</sup> The Nova Scotia Measures were intended not only to make PHP the lowest cost SC paper producer, but also to push higher-cost producers out of business.<sup>216</sup>

156. In the Nova Scotia Government’s decision to vault PHP ahead of its North American competitors in a shrinking market, the Nova Scotia Measures necessarily were intended to harm those competitors by taking business from them.<sup>217</sup> There was no other way for PHP to accomplish the objective of the measures. Success for PHP was uncertain, but success would have to mean harm to competitors.

157. After the United States launched a countervailing duty investigation because of the Nova Scotia Measures, Canada supported the advocacy of Resolute’s

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<sup>213</sup> CL-001, *Methanex* Partial Award ¶ 152; see also RL-054, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part II - Chapter - Page 5 ¶ 8 (Aug. 3, 2005).

<sup>214</sup> SOC ¶¶ 54-55; see also SOC ¶¶ 50, 96.

<sup>215</sup> SOC ¶ 4.

<sup>216</sup> SOC ¶ 48.

<sup>217</sup> Hausman Statement ¶¶ 36-39.

competitors to impose a higher countervailing duty on Resolute than on the other producers of SC paper in Canada.<sup>218</sup> Doing so furthered the harm suffered by Resolute.

158. Canada argues that NAFTA Chapter 11 “is not a body of rules that regulates state aid or government support.”<sup>219</sup> Canada may provide government support or state aid to ailing businesses, provided it either does so in accordance with the carve-out contained in Article 1108 for subsidies, or does so in a non-discriminatory manner. Canada has done neither here. Canada denies that the Nova Scotia Measures are subsidies,<sup>220</sup> and therefore those measures cannot fall within the exemption provided by Article 1108.<sup>221</sup> And, the measures were discriminatory, aiding PHP uniquely.

159. In some cases, non-discriminatory government support may incidentally affect competitive conditions. However, Resolute’s allegations – which Canada has accepted as true *pro tem* – contends the purpose of the Nova Scotia Measures was to undermine the competitive position of Port Hawkesbury’s main rival, Resolute, so that Port Hawkesbury could take from its market share. The Nova Scotia Measures did not

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<sup>218</sup> SOC ¶ 76; C-048, Letter from Ambassador Gary Doer to Secretary Penny Pritzker regarding *In re Supercalendered Paper* (Aug. 15, 2015).

<sup>219</sup> Canada Mem’l ¶ 106.

<sup>220</sup> C-020, *Notifications under the Agreement on Subsidies and Countervailing Measures*, World Trade Organization; C-021, Canada’s New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, G/SCM/N/253/CAN at 35 (July 19, 2013); SOC ¶ 119 (“Canada reported to the World Trade Organization that Nova Scotia provided no subsidies (‘nil’) for the period between July 12, 2011 and July 19, 2013, during which Nova Scotia undertook measures to resuscitate the Port Hawkesbury paper mill . . .”). Canada also has defended Nova Scotia vigorously in the countervailing duty investigation of supercalendered paper from Canada before the United States Department of Commerce and the ITC, denying categorically that any of the measures challenged before this Tribunal could be considered countervailable subsidies. See SOC ¶¶ 57-85.

<sup>221</sup> The Article 1108 exemption for subsidies, were it applicable here (and it is not, nor has Canada asserted it) would bar only Resolute’s Article 1102 National Treatment claim. Resolute’s remaining claims under Article 1110 and 1105 would still be actionable.

incidentally affect competition but, rather, were designed to intervene in a competitive market and alter it to the advantage of the government's chosen champion.

160. Canada now asserts that the "\$124.5 million investment was not a bag of money provided to PWCC to drive its competitors out of the market,"<sup>222</sup> which expressly contradicts Resolute's allegations that Canada undertook to accept as true *pro tem* for the purpose of resolving Canada's jurisdictional objection.<sup>223</sup> Resolute does not complain about "a bag of money," but about a collection of creative measures all designed to do exactly what Canada now denies.

161. Canada's assertion, that its "investment" was not a "bag of money provided to PWCC to drive its competitors out of the market" also contradicts statements made by various Nova Scotia Government officials that a \$40 million loan was "to help the mill become the lowest cost and most competitive producer of super calender {sic} paper," as well as numerous other statements about the purpose and terms of the PWCC transaction.<sup>224</sup>

162. Canada warns that "if NAFTA Chapter Eleven applied every time government spending had an impact on market conditions, it could lead to a flood of claims by innumerable investors."<sup>225</sup> This alarmist "floodgates" contention is unfounded, probably because Canada seems fundamentally to misunderstand Resolute's position.

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<sup>222</sup> Canada Mem'l ¶ 101.

<sup>223</sup> Procedural Order No. 4, Decision on Bifurcation ¶ 4.14 (Nov. 18, 2016) (citing Canada's Request for Bifurcation ¶ 10 (Sep. 29, 2016); Bifurcation Hr'g Tr. at 13:8-13 (Nov. 7, 2016)).

<sup>224</sup> R-055, Aug. 20, 2012 Nova Scotia Press Release; see *also, e.g.*, C-012, Apr. 2012 Nova Scotia Power Evid. at 9 ("From the beginning of {its} discussions {about the power rate}, PWCC has been clear that . . . {its} objective is to be the lowest cost operator in North America."); R-090, Sep. 22, 2012 Nova Scotia Backgrounder (promoting Port Hawkesbury mill as the "Nova Scotia promoted PHP as the "envy of the world").

<sup>225</sup> Canada Mem'l ¶ 106.

Resolute does not say that NAFTA Parties may not spend public funds in a way that incidentally impacts market conditions. Rather, Resolute argues that NAFTA Parties may not spend public monies deliberately, or with the unavoidable expectation, of undermining foreign investors or their investments.

**V. RESOLUTE’S ARTICLE 1102 NATIONAL TREATMENT CLAIM IS ADMISSIBLE**

163. NAFTA Article 1102(1) and (2) ensure that “{e}ach Party shall accord to investors of another Party {and their investments} treatment no less favorable than that it accords, in like circumstances, to its own investors {and their investments} with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Article 1102(3) explains that national treatment “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.”

164. Canada objects that Resolute’s national treatment claim is inadmissible, but Canada’s interpretation of Article 1102(3) that forms the basis of that objection has not been consistent. Canada first argued that Article 1102(3) presents a geographic limitation precluding Resolute from making any national treatment claims with respect to Canadian investments located outside of Nova Scotia. According to Canada, Article 1102(3) “plainly limits the national treatment obligation with respect to provincial measures to treatment accorded, in like circumstances, by a province to other Canadian investors within that province.”<sup>226</sup>

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<sup>226</sup> Government of Canada Statement of Defence ¶ 12.



165. Canada subsequently shifted its argument, that metaphysical “jurisdiction,” not physical geography, must be the determinant: “Article 1102(3) does not establish a territorial limitation, as the Claimant has misunderstood Canada’s argument to be, but rather a jurisdictional limitation. The limitation renders inadmissible claims that seek to compare treatment accorded by one government to the treatment accorded by a different government.”<sup>227</sup>

166. Canada’s reformulated argument inaccurately suggests that Resolute seeks to compare Nova Scotia’s treatment of Port Hawkesbury with Québec’s (or even the Government of Canada’s) treatment of Resolute. Canada, thus, contends that “{n}o NAFTA tribunal to date has founded a breach of Article 1102 on the grounds that the treatment accorded by one state or province was less favourable than the treatment accorded by another state or province.”<sup>228</sup> But those arguments are irrelevant here. Resolute is not asking this Tribunal to compare treatment accorded by one province to treatment accorded by another province.

167. The essence of a NAFTA Article 1102 claim is that the government of a NAFTA Party is not allowing the foreign investor (and its investment) to compete on the same terms as domestic companies “in like circumstances” (*i.e.*, their domestic rivals). A tribunal evaluates that claim by determining whether the measures in question provided less favorable treatment to the foreign investor than its domestic rival or, conversely, whether the measures provided more favorable treatment to the domestic rival than the foreign investor.

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<sup>227</sup> Canada Mem’l ¶ 115.

<sup>228</sup> Canada Mem’l ¶ 116.

168. The national treatment question presented by Resolute's claim is whether the treatment Nova Scotia accorded to Resolute is no less favorable than the treatment Nova Scotia accorded to PHP, when the purpose of the Nova Scotia Measures was to help PHP compete with Resolute in the SC paper business sector and in markets that they share in common.

169. Canada's Article 1102(3) objection, in its different formulations, presupposes that a province cannot accord treatment to foreign investors outside of the province's geographical or jurisdictional confines. Canada has not demonstrated why that supposition should be true, legally or factually, and there is compelling evidence in this case that it is not true.

170. It is undisputed that Resolute and PHP are competitors in the SC paper market, that Nova Scotia undertook measures to resuscitate the PHP mill so it could compete in that market, and that Nova Scotia invested in PHP to make it compete as, in its own words, the "most efficient . . . lowest cost and most competitive producer of super calendar {sic} paper."<sup>229</sup> Canada may ignore neither the obvious competitive relationship between Resolute and PHP in the same sector and market, nor the competitive advantage conferred by the Nova Scotia Measures that pertain directly to that sector and market.

**A. Canada's Interpretation Of Article 1102 Would Defeat Its Ordinary Meaning And NAFTA's Purpose**

171. Canada's interpretation of Article 1102 is contrary to the ordinary meaning and purpose of its text. Nothing in the plain language of Article 1102(3) precludes a foreign investor from making a national treatment claim where the foreign investor and its

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<sup>229</sup> R-055, Aug. 20, 2012 Nova Scotia Press Release.

investment is not located in the territory of the subnational government. Article 1102(3) does not state, as Canada assumes, that the treatment accorded by a province's measures is limited in its effect to companies located within its provincial territory.

172. Canada incorrectly contends that Resolute seeks a novel interpretation of the law for its national treatment claim. The facts of this case may be novel – a subnational government implementing measures to exercise market authority beyond its territorial borders – but Resolute requires the Tribunal to apply only the ordinary meaning of the text of Article 1102 in the context, object and purpose of NAFTA, to promote fair competition and encourage foreign investment.<sup>230</sup> That interpretation is also supported by *travaux préparatoires* for NAFTA.

1. Canada's Jurisdictionally Based Test Allows Provincial Discrimination Otherwise Prohibited By NAFTA

173. Canada's narrow interpretation of Article 1102(3), requiring a physical presence in the province, would undermine the fundamental premises of the national treatment obligation.<sup>231</sup> Canada assumes that Article 1102(3) would allow a province to do what Canada could not, to choose a domestic company to be elevated in a national market over its foreign competitors.

174. Canada's view promotes the proposition that a provincial government may favor a "domestic" enterprise regardless of the consequences for a foreign enterprise, one that is not physically in the province. Canada's interpretation would seem to allow a province to forbid a foreign investor from acquiring assets or investing in the province, or establishing a new business if it threatened to compete with an enterprise already favored

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<sup>230</sup> See CL-032, Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT").

<sup>231</sup> Canada Mem'l at 50 ("Nova Scotia Could Not Offer National Treatment to the Claimant or Its Investment Because Neither Are within Nova Scotia's Jurisdiction").

by the provincial government. It would allow a province to forbid a foreign investor from acquiring minerals, timber or other natural resources in its territory without first establishing its own physical presence in the province, while providing access (or even providing preferential access) to local competing companies. It would allow a province to forbid a foreign investor from transporting goods or supplies through its territory while allowing a provincial competitor full (or less expensive) access.

175. There is no apparent line here dividing provincial support for a domestic enterprise to compete against foreign enterprises operating elsewhere in Canada, and provincial creation of a state-owned enterprise to compete against the foreign enterprise. In this case, PHP might as well be a state-owned enterprise inasmuch as Nova Scotia controls all of the essential elements of its operations and success – electricity rates, timberlands, taxes, access to capital.<sup>232</sup>

176. Resolute invested in the supercalendered industry in Canada. Subsequent to that investment, and without warning, Nova Scotia (defended, aided and abetted by Canada) has challenged Resolute to compete against the state.

177. Article 1102, wisely, is not so narrowly construed as to allow subnational governments to disguise their national treatment discrimination by requiring a physical presence in the subnational government's territory. Article 1102(3), on its face, says nothing more than when national treatment involves a province or state, the treatment of the foreign investor by that province or state will be compared to the "most favorable

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<sup>232</sup> Nova Scotia agreed to pay PWCC C\$20 million to purchase timberlands previously owned by NewPage. Nova Scotia then entered into a "Forest Utilization License Agreement" to provide stumpage at undisclosed rates. R-052, Forest Utilization License Agreement between Canada and Port Hawkesbury Paper (Sep. 27, 2012).

treatment” by that province or state. Canada’s interpretation would require additional words (emphasized below) to be imported into Article 1102(3):

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment in that state or province no less favorable than the most favorable treatment in that state or province 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.

178. Investment treaty tribunals have recognized the need to avoid importing additional words or phrases into the treaty negotiated by the parties: “Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.”<sup>233</sup> If the NAFTA Parties had wished to limit their provinces’ or states’ obligations to treatment of investors with an investment physically located within the territory of the province or state, they could have done so. No such restrictions appear in the text.

179. NAFTA Article 102(2) directs that, “{t}he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law,” which include the “promot{ion of} conditions of fair competition in the free trade area” and “increase{d} investment opportunities in the territories of the Parties.” The national treatment standard is fundamental to achieving those objectives. Discriminatory treatment discourages foreign investment.

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<sup>233</sup> CL-016, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award ¶ 85 (Apr. 30, 2004) (“*Waste Management 2*”).

180. Canada's interpretation of Article 1102(3) would increase barriers to trade and decrease investment opportunities, and therefore contradicts the interpretive rule of Article 102. Canada wants a geographic definition of "like circumstances" so that all the SC paper competition it wants to defeat would have to be located in Nova Scotia. There is no such legal requirement, however, nor does Canada's idea make any economic sense.

181. Nova Scotia did not intend merely to make Port Hawkesbury the lowest-cost, most competitive, and most efficient SC paper operation in Nova Scotia. There are not sufficient SC paper customers in Nova Scotia to justify the substantial assistance Nova Scotia provided to PHP.<sup>234</sup> The rationale for Nova Scotia's measures was to ensure Port Hawkesbury's competitiveness in the North American market for SC paper following its re-emergence from creditor protection proceedings.<sup>235</sup> Thus, the relevant circumstances for a "like circumstances" comparison under Article 1102 – the most critical terms here – are the terms of competition in a market that exists beyond Nova Scotia's borders, and the market-distorting impact of the Government of Nova Scotia Measures to elevate its own provincial company at Resolute's expense.<sup>236</sup>

182. The Government of Nova Scotia did not see itself as limited to its own borders, and not only in enabling PHP to compete beyond them. Nova Scotia extended tax benefits to PWCC for assets outside Nova Scotia, thus reaching deliberately beyond its own borders, although still within Canada, to discriminate. Nova Scotia's borders did

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<sup>234</sup> See *supra* ¶¶ 27 (detailing freight distance from Port Hawkesbury), ¶¶ 31 (detailing export quantities to United States); see also Hausman Statement ¶¶ 36-39.

<sup>235</sup> See R-038, Sep. 9, 2011 Nova Scotia Press Release (explaining basis for forestry infrastructure and hot-idle funding); ."); R-090, Sep. 22, 2012 Nova Scotia Backgrounder (explaining that basis for the provincial measures was to ensure that mill would operate "profitably and for the long run").

<sup>236</sup> See, e.g., SOC ¶¶ 5-6.

not limit its activities, and consequently cannot here insulate it from its impact and Canada's consequent responsibilities. Nova Scotia never offered such treatment to Resolute, nor had it ever made such an offer to its previous foreign investor, NewPage. Instead, it provided unique and creative tax benefits for economic activity not taking place in Nova Scotia to a domestic Canadian company.<sup>237</sup>

183. The foreign investor, according to NAFTA, must be in Canada, but not necessarily in Nova Scotia. Canada is not defending Nova Scotia's competitive champion, but rather the company Nova Scotia wants to be the champion throughout Canada and North America.<sup>238</sup>

184. Canada knew that it was responsible for the conduct of Nova Scotia and that Nova Scotia's conduct would have continent-wide consequences. Canada was put on notice of the extra-territorial impact of the Nova Scotia Measures, not only by Resolute in 2014 but also by the United States who, through the WTO, had raised questions about the potential impact of the Nova Scotia Measures.

185. Canada should have known that, by defending and protecting the discriminatory measures of a provincial government, one consequence inevitably was to discourage foreign investment. According to Canada's view, an investor in one NAFTA Party would be better off not investing in another NAFTA Party, instead limiting its commercial engagement to commerce from its home country where it would then have

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<sup>237</sup> *Supra* ¶ 20. As explained in a recent University of Calgary Research Paper, “{i}n Canada there is no explicit formally legislated system of corporate group taxation to provide for transfer of tax losses from one corporation to another. . . . However, there is an articulated policy . . . of allowing corporate taxpayers to undertake self-help transactions that can effect the transfer of tax losses from one corporation to another . . . .” CL-028, Stephen R. Richardson & Michael Smart, “Tax Loss Utilization and Corporate Groups: A Policy Conundrum,” University of Calgary, School of Public Policy Research Paper, Vol. 6, Issue 3 (January 2013), page 6.

<sup>238</sup> *E.g.*, SOC ¶¶ 5-6.

recourse under other instruments, such as the WTO, if a province or state were to engage in discriminatory, trade-distorting measures. By NAFTA's terms, foreign investment is to be attracted to Canada, not necessarily to Nova Scotia. By making inevitable a U.S. trade remedy action against exports to the United States of an investor in Canada, Nova Scotia – aided and abetted by the Government of Canada – discouraged foreign investors by provoking U.S. industry to seek trade remedies against all exports from Canada.<sup>239</sup>

186. Canada knew or should have known that it was defending actions contrary to the object and purpose of NAFTA, which is to encourage and not discriminate against foreign investment.

2. Supplementary Means Of Interpretation Of Article 1102(3) Support Resolute's View Of National Treatment

187. Should the Tribunal consider referencing supplementary means to interpret Article 1102,<sup>240</sup> the Tribunal should note that Canada's interpretation is at odds with the NAFTA Chapter 11 *travaux préparatoires*. Each of the NAFTA Parties proposed several draft clauses to address how national treatment might apply to provincial and state measures, in texts exchanged in December 1991:

Article 2103: Provincial and State Measures

The provisions of this Chapter regarding the treatment of investors shall mean, with respect to a province or state, treatment no less favorable than that granted by such province or state to any investor of that province or state.

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<sup>239</sup> The United States began questioning Canada about the investments at Port Hawkesbury after Port Hawkesbury reopened, provoked by the U.S. industry. Canada tried to keep the existence of these communications secret, and subsequently kept their contents secret, whereas the United States has been forthcoming as to the contents of the inquiries. Resolute warned Canada of trade risks and hoped the likely consequences of the Nova Scotia Measures would be averted. See SOC ¶¶ 58-71 (documenting Resolute efforts, starting in July 2014, to address potential trade risks via letters to Canadian Trade Minister Ed Fast and meetings with the Canadian Embassy).

<sup>240</sup> See CL-032, Article 32 of the VCLT.



Article XX11: Application to Political Subdivisions

2. The treatment accorded by a Party

a) under Article XX01.1 with respect to nationals and companies of another Party; and

b) under Article XX02.2 with respect to the investments (and associated activities of those nationals and companies)

shall, in any state or political subdivision, be no less favorable than the treatment accorded by such state or political subdivision to its residents, or companies legally constituted under its laws, or their investments in its territory.

Article 105 NATIONAL TREATMENT

2. The Provisions of this Article shall mean, with respect to measures of a province or state, treatment no less favourable than the most favourable treatment accorded by such province or state to any like goods, services and service providers, investors and suppliers, as case maybe, of the Party of which it forms a part.<sup>241</sup>

188. Of the three options proposed in the *travaux*, the second option expressly would have limited the comparative analysis in any claim of national treatment to treatment “in any state or political subdivision.” The NAFTA Parties did not adopt this option, rejecting wording that would have restricted national treatment obligations of states and provinces to treatment of foreign investors physically within the province or state. Instead, they deliberately chose wording that did not allow a state or province to deny most favorable treatment to a foreign investor in like circumstances as the provincial investor solely because it was located in another state or province of the same country.

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<sup>241</sup> CL-014, Global Affairs Canada, *NAFTA Chapter 11 - Trilateral Negotiating Draft Texts*, Investment (Dec. 1991).

**B. Canada Seeks To Impose Comparative Requirements Beyond “Like Circumstances” In Article 1102**

189. The issue for the Tribunal to decide is whether Resolute has been accorded by the Government of Nova Scotia (and Canada) “national treatment.” That decision depends not on whether Resolute’s investments were situated in the physical territory of Nova Scotia, so long as Resolute and its domestic rival, PHP, are in “like circumstances.” For purposes of this bifurcation proceeding, Resolute is in “like circumstances” to PHP, and the Tribunal should compare the government treatment of Resolute to its economic/business sector competitor, PHP.

190. “Like circumstances” must be determined on a case-by-case basis. Prior NAFTA tribunals, including the Tribunals in *SD Myers*, *Pope & Talbot*, *Archer Daniels Midland*, *Cargill*, and *GAMI Investments*, have found, consistent with the context, object and purpose of NAFTA under Article 102 regarding “like circumstances,” that “like circumstances” are defined by economic and business sector, not geography or subnational jurisdiction.

191. In *SD Myers v. Canada*, the tribunal observed that the policy objectives of the government’s measures, and whether the comparable foreign and domestic businesses compete in the same sector, were important considerations for “like circumstances.” There, Canada issued an Interim Order banning the export of certain chemicals from Canada.<sup>242</sup> The U.S. investor claimed Canada breached Article 1102

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<sup>242</sup> RL-059, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award ¶ 123 (Nov. 13, 2000) (“*SD Myers*”).

because the Interim Order was “disguised discrimination” preventing the investor from conducting business in Canada.<sup>243</sup>

192. The tribunal recognized that “the phrase ‘like circumstances’ is open to a wide variety of interpretations in the abstract and in the context of a particular dispute.”<sup>244</sup> In interpreting the phrase, the tribunal looked at an Organization for Economic Cooperation and Development (“OECD”) declaration, which provides that “the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector.”<sup>245</sup> The tribunal also looked at Supreme Court of Canada jurisprudence, which required “an examination of the context in which a measure is established and applied and the specific circumstances of each” in lieu of a “purely mechanical test” when analyzing discrimination against individuals.<sup>246</sup>

193. In finding that the investors were “in like circumstances” with their Canadian competitors “from the business perspective,” the tribunal held:

The Tribunal considers that the interpretation of the phrase “like circumstances” in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of “like circumstances” invites an examination of whether a non-national investor complaining of less favourable treatment is in the same “sector” as the national investor. The Tribunal takes the view

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<sup>243</sup> RL-059, *SD Myers* ¶¶ 130-132.

<sup>244</sup> RL-059, *SD Myers* ¶ 243.

<sup>245</sup> *SD Myers* ¶ 248 (citing OECD Declaration on Int’l & Multinational Enterprises (June 21, 1976)). The tribunal noted that all three NAFTA parties were members of the OECD. RL-059, *SD Myers* ¶ 248.

<sup>246</sup> RL-059, *SD Myers* ¶ 249.

that the word “sector” has a wide connotation that includes the concepts of “economic sector” and “business sector”.<sup>247</sup>

“It was precisely because {the investor} was in a position to take business away from its Canadian competitors that {the competitors} lobbied the Minister of the Environment” to enact the discriminatory Interim Order.<sup>248</sup>

194. The *Pope & Talbot* Tribunal reached a similar conclusion. There, the tribunal was analyzing whether lumber exporters selling product to the United States under the Softwood Lumber Agreement violated NAFTA Article 1102; in so doing, the tribunal analyzed whether the investors were “in like circumstances” with other Canadian entities.<sup>249</sup> Key to that determination was the economic sector: “the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with the treatment accorded domestic investments in the same business sector.” Differences in treatment were impermissible unless those differences “have a reasonable nexus to rational government policies” that are neither discriminatory nor “otherwise unduly undermine the investment liberalizing objectives of NAFTA,”<sup>250</sup> which constitutes an analysis on the merits.

195. While Canada and the other NAFTA Parties argued for a nationality (i.e., jurisdictionally) based standard, the *Pope & Talbot* Tribunal rejected that approach because it “would tend to excuse discrimination that is not facially directed at foreign owned investments.” Instead, the “like circumstances” formulation would address “any

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<sup>247</sup> RL-059, *SD Myers* ¶¶ 250.

<sup>248</sup> RL-059, *SD Myers* ¶ 251. The tribunal found that Canada was in breach of Article 1102. RL-059, *SD Myers* ¶ 322.

<sup>249</sup> CL-008, *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 ¶ 73 (Apr. 10, 2001) (“*Pope & Talbot Phase 2 Award*”).

<sup>250</sup> CL-008, *Pope & Talbot Inc. v. Canada Phase 2 Award* ¶ 78.

difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.”<sup>251</sup>

196. In *Archer Daniels Midland v. Mexico*, the tribunal noted that “{c}onsidering the object of Article 1102 – to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors – other tribunals convened under Chapter Eleven have focused mainly on the competitive relationship between investors in the marketplace.”<sup>252</sup> The tribunal then observed that the claimant and the Mexican sugar industry were in “like circumstances” because “{b}oth are part of the same sector, competing face to face in supplying sweeteners to the soft drink and processed food markets.”<sup>253</sup> The very purpose of the government measures at issue – to support the Mexican cane sugar industry in relation to its U.S. competition, which produces fructose – reinforced the competitive relationship between the companies.

197. In *Cargill*, the tribunal, after reviewing two previous NAFTA decisions (*Pope & Talbot v. Canada* and *GAMI Investments, Inc. v. Mexico*) concluded that the character of the measures at issue, and its underlying rationale, were essential to determining whether a claimant was in “like circumstances” to a domestic producer:

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<sup>251</sup> CL-008, *Pope & Talbot Inc. v. Canada Phase 2 Award* ¶ 79 (emphasis in original). The tribunal ultimately found, on the merits, that the investor could not demonstrate it was in like circumstances because Canada showed the differential treatment “was reasonably related” to rational policies, such as ending a trade dispute with the United States. See CL-008, *Pope & Talbot Inc. v. Canada Phase 2 Award* ¶ 87. Again, that analysis should be reserved for a determination on the merits. For this jurisdictional phase, the parties have accepted the truth of Resolute’s allegations *pro tem* with respect to Nova Scotia’s conduct.

<sup>252</sup> CL-010, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award ¶ 199 (Nov. 21, 2007) (“ADM”).

<sup>253</sup> CL-010, *ADM* ¶ 201.

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.<sup>254</sup>

198. Emphasizing the importance of considering the nature of the measure at issue, the *Cargill* Tribunal observed that "[i]ndeed, 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 to be in "like circumstances."<sup>255</sup>

199. The *Cargill* Tribunal refused to find relevant when determining whether HFCS and sugar producers were in "like circumstances" the fact that the sugar market operates in a highly regulated environment in contrast to the HFCS market. Because the IEPS Tax was not a regulatory measure, the way HFCS producers were regulated compared to sugar cane producers was not relevant.<sup>256</sup>

200. Here, the question of national treatment is whether Nova Scotia may adopt measures to give a competitive advantage to its provincially favored company in the Canada-wide market for the production of SC paper, to the detriment of Resolute as a foreign investor competing in the same sector. Resolute contends that Article 1102 forbids Nova Scotia from providing an unfair advantage against the foreign investor or, alternatively, requires Nova Scotia to compensate the foreign investor for that discriminatory treatment as the price of the government choosing its provincial producer as the national champion in the market. For purposes of this jurisdictional phase,

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<sup>254</sup> CL-003, *Cargill* ¶ 206 (citing CL-008, *Pope & Talbot Inc. v. Canada Phase 2 Award* & CL-017, *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Final Award (Nov. 15, 2004)); see also CL-003, *Cargill* ¶ 205.

<sup>255</sup> CL-003, *Cargill* ¶ 206.

<sup>256</sup> CL-003, *Cargill* ¶ 200.

Resolute and PHP are in like circumstances for a comparison of treatment by Nova Scotia under Article 1102 because they compete in the same sector and Nova Scotia's Measures were intended to manipulate competition in that sector.

**C. Canada's Cited Authorities Concern Regulations Within The Territory Of The Subnational Government**

201. Canada cites various tribunal awards that it claims limit the national treatment obligation with respect to provincial measures to treatment accorded by a province to investors within that province. NAFTA jurisprudence has never gone as far as Canada urges this Tribunal to go, however, never finding that Article 1102(3) necessarily precludes, as a matter of law, the type of claim advanced by Resolute here.

202. Canada relies on *Merrill & Ring*, which concerns whether Canadian federal regulations on the export of logs from privately-owned timberland in British Columbia could be compared to less onerous British Columbia provincial regulations on the export of logs from B.C.'s publicly-owned timberland. The claimant argued that the more onerous federal restrictions on private timberland constituted less favorable treatment than provided by the B.C. government on provincial timberlands, in violation of the Article 1102 national treatment standard.<sup>257</sup> The argument compared regulations of two different governments, as applied to two legally different kinds of land.

203. The *Merrill & Ring* Tribunal found that the proper "like circumstances" comparison was between foreign and domestic competitors subject to the same federal restrictions on private land in B.C., not between foreign competitors subject to federal restrictions on private timberland versus domestic competitors subject to the provincial

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<sup>257</sup> See CL-013, *Merrill & Ring* ¶¶ 89-91; Canada Mem'l ¶ 120. Notably, the admissibility of the Article 1102 claim was not at issue in *Merrill & Ring*.

regulations on B.C.-owned timberland. The tribunal logically deemed that the appropriate comparison under Article 1102 was between investors subject to the same regulatory authority – investors in like circumstances.<sup>258</sup>

204. This case is different from *Merrill & Ring* because the measures taken by Nova Scotia were not restrictions of an industry within its territory. They were not regulatory. Instead, the measures were intended to confer an advantage on a domestic competitor to the detriment of the foreign investor in the same business sector – a business sector that was not limited to the territorial geography of the province. When the Government of Nova Scotia intervened in the SC paper market, it accorded “treatment” to Resolute – negative treatment – by eventually putting Resolute at a competitive disadvantage to Nova Scotia’s provincial champion in the national market. Nova Scotia distorted market competition in favor of one company, domestic, over another, a foreign investor.

205. The treatment being compared here, unlike in *Merrill & Ring*, is treatment by one and the same government, not the treatment offered by two different provinces, or the treatment of the national government compared to the treatment of a provincial government. Whether Resolute was in like circumstances to Port Hawkesbury is a matter going to the merits of Resolute’s claim. For purposes of jurisdiction and admissibility, it is enough that the Government of Nova Scotia favored PHP over Resolute. It is more than enough that Nova Scotia deliberately favored PHP over Resolute.

206. Canada argues that it should not be significant that the measures in the cases it cites are regulatory measures affecting business within a limited territory whereas

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<sup>258</sup> CL-013, *Merrill & Ring* ¶¶ 91-93.



the Nova Scotia Measures are not.<sup>259</sup> The *Merrill & Ring* Tribunal explained, however, that the character, purpose and policy rationale of the measure in dispute must be taken into account when analyzing whether a claimant is in “like circumstances” to a domestic investor.<sup>260</sup> The Canadian federal measures at issue in *Merrill & Ring* were regulatory, restrictions on business operations applicable to timberlands subject to federal authorities.

207. Here, Nova Scotia has intervened directly in a market that is not its own and in a non-regulatory fashion, using the government’s unbridled spending power beyond its physical or jurisdictional boundaries in order to grant Port Hawkesbury a competitive advantage over Resolute’s mills in the Canadian (and North American) market for SC paper.<sup>261</sup> As was the case in *Cargill*, whether Resolute and Port Hawkesbury are subject to the same jurisdictional authority is not relevant because the measures at issue are not regulatory in a way that is limited to provincial authority within a territory.<sup>262</sup> “Cases of

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<sup>259</sup> Canada Mem’l ¶ 121.

<sup>260</sup> See CL-013, *Merrill & Ring* ¶ 88.

<sup>261</sup> The “spending power,” which exists at both the federal and provincial levels of government in Canada, is the power that each government has to spend the money that it has collected through taxation, and to dispose of its property. This power, which is not set out explicitly in the Constitution Act, 1867, has nevertheless been recognized in Canadian constitutional law (both in the cases and in scholarly writings). When a federal or provincial government spends money, it is not confined by the limits of its respective legislative power. See CL-030, Peter W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. Supp. (Toronto: Carswell, 2016), § 6.8 (“Spending Power”). Prof. Hogg observes that “the provinces have never recognized any limits on their spending power and have often spent money for purposes outside their legislative competence, for example, by running a commuter train service on interprovincial trackage, by acquiring an airline, by giving international aid, or by paying casino profits to Indian communities.” CL-030, Hogg, § 6.8(b), page 6-23 (2012-Rel. 1). He adds: “although the spending of money by the Crown requires an appropriation by the Legislature (or the Parliament), it is clear that the spending power is not subject to the restrictions that apply to other legislative powers, including the extraterritorial restriction. Therefore, a province may spend, or lend, or guarantee, or otherwise dispose of public funds, outside the boundaries of the province.” CL-030, Hogg, § 13.4, page 13-16 (2008-Rel. 1).

<sup>262</sup> See CL-003, *Cargill* ¶¶ 200, 206. For the same reason, the fact that Resolute’s Laurentide mill

alleged denial of national treatment must be decided in their own factual and regulatory context.”<sup>263</sup>

208. The comments by the *Cargill* Tribunal are particularly apropos in the present case:

The Claimant's mills {in *GAMI*} were certainly treated differently, but they were not the target of a measure to drive them out of business. But, here, the measure and the effect are different from *GAMI*. If the *GAMI* principle could be used to justify a measure that destroys an economically viable foreign investment in order to benefit a domestic competitor, the national treatment protection in Article 1102 would be meaningless.<sup>264</sup>

209. Here, too, if the *Merrill & Ring* principle could be used to justify a measure that eventually destroys an economically viable foreign investment in order to benefit a domestic competitor, the national treatment protection in Article 1102 would be meaningless. Nova Scotia’s objective of making Port Hawkesbury the lowest cost SC paper producer could be achieved only through the introduction of discriminatory measures.

210. The Tribunal has determined that the issue to be decided under this admissibility objection is one of treaty interpretation.<sup>265</sup> For purposes of resolving this objection, it is again appropriate for the Tribunal to accept Resolute’s allegations as true *pro tem*. The Tribunal should allow Resolute’s claim under Article 1102(3) to proceed to the merits, and decide on the basis of a complete record whether Resolute and Port

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and Port Hawkesbury are not subject to the same provincial regulatory jurisdiction is also not relevant.

<sup>263</sup> CL-007, *Bilcon* ¶ 694.

<sup>264</sup> CL-003, *Cargill* ¶ 210.

<sup>265</sup> Procedural Order No. 4, Decision on Bifurcation ¶ 4.18 (Nov. 18, 2016).

Hawkesbury were in “like circumstances” for purposes of government intervention in the narrow SC paper market.

**VI. CANADA’S ARTICLE 2103 OBJECTION SHOULD BE REJECTED**

211. Another competitive advantage given Port Hawkesbury was a 50 percent reduction in property taxes, from C\$2.6 million annually to C\$1.3 million.<sup>266</sup> According to Canada, Resolute cannot assert this property tax reduction as part of its claims under Article 1110 because Resolute failed to comply with Article 2103(6), which provides that expropriation claims under Article 1110 must be submitted to “the appropriate competent authorities” for review prior to bringing a claim.<sup>267</sup>

212. Resolute, regardless of the outcome of this issue regarding the property tax, can still assert the property tax discount as a basis for its claims under Article 1102. Article 2103(4)(b) expressly provides that such claims “shall apply to all taxation measures . . . .”

213. Resolute does not claim that the Laurentide mill was expropriated through taxes on Resolute, which is the type of tax expropriation contemplated in Article 2103(6). Instead, Resolute has claimed that the special property tax breaks provided by Nova Scotia to Port Hawkesbury were among the many measures delivering the mill advantages that contributed to the constructive expropriation of Resolute’s Laurentide mill.<sup>268</sup> Resolute should, therefore, be permitted to continue to assert this measure as a basis for its expropriation claim.

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<sup>266</sup> See R-092, Nova Scotia Press Release, *Legislation Amends Taxation Agreement for Port Hawkesbury Paper Mill* (Nov. 29, 2012).

<sup>267</sup> Canada Mem’l ¶¶ 133-139.

<sup>268</sup> SOC ¶ 41.

**VII. CONCLUSION**

214. The burden of this motion to dismiss is Canada's. Canada was to prove, through treaty interpretation and the applicable facts, that Resolute failed to make a timely claim; that the untimely claim it made pertains to measures that do not "relate to" Resolute; and that Resolute improperly claims that taxes were used to expropriate Resolute's property.

215. Canada has failed to carry its burden. The facts are that Resolute did not incur damages from the Nova Scotia Measures and PHP's resurrection before December 30, 2012. Nova Scotia discriminated against Resolute, in favor of PHP, and did so deliberately. Resolute claims that taxes were among measures granting PHP competitive advantages, not used to expropriate Resolute's property.

216. NAFTA's plain language makes these facts determinative. The statute of limitations runs from the time a claimant knows or should have known that loss or damage has been incurred, not when it should have known that loss or damage may, or is even likely, to be incurred in the future. A measure relates to a foreign investor when it impacts the foreign investor or its investment. It relates even more powerfully when the measure deliberately impacts the foreign investment. The treatment of a foreign investor is to be compared to the treatment of a domestic investor in like circumstances by the same government, not by different governments in different circumstances. And the intent of the procedure for claims about taxes concerns the use of taxes to expropriate, not the use of taxes to confer competitive advantages.

217. On the law, and on the facts, Canada has failed to carry its burden and the Tribunal should issue a Partial Award commencing the Merits and Quantum Phases of this arbitration. The Tribunal's award should also order Canada to pay Resolute's costs and legal fees for this phase.

Respectfully submitted,



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