

**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

RESOLUTE FOREST PRODUCTS INC.

**COMMENTS ON THE ARTICLE 1128 SUBMISSIONS
OF MEXICO AND THE UNITED STATES**

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I. INTRODUCTION

1. Article 1128 of the North American Free Trade Agreement (“NAFTA”) entitles the United States of America (“the United States” or “U.S.”) and the Government of Mexico (“Mexico”) to submit comments on interpretations of NAFTA in any Chapter 11 dispute involving the Government of Canada (“Canada”). All the NAFTA Parties can be expected to express similar interpretations of NAFTA because all are cast as respondents in Chapter 11 proceedings, and all would prefer to limit the occasions when they have to defend their respective governments against foreign investor claims. The Article 1128 submissions here largely conform to that expectation, with some notable exceptions in which the U.S. submission supports Claimant’s position.

2. The Mexican submission repeats Canada’s basic position in respect of each of the issues. It does not address any of the arguments Claimant made in response. It contributes nothing new for examining some of the more complex and disputed issues in this proceeding and, in Claimant’s view, contains nothing of independent value for the Tribunal to consider.

3. Resolute already has answered most, if not all, of the arguments that the United States advances in support of Canada. Resolute generally is relying here on the analysis in its Rejoinder, unanswered by the United States, rather than plow again the same field. Significantly, however, the U.S. submission supports Claimant’s position on at least two important points.

4. The United States confirms, as to Article 1101, that whether the “relating to” threshold is met depends on the facts.¹ Claimant has demonstrated that the facts it

¹ United States Article 1128 Submission ¶ 13 (June 14, 2017) (“United States Article 1128 Submission”).

has alleged (which, at this stage, must be accepted *pro tem*) satisfy the Article 1101 “relating to” standard. Given the very limited number of competitors in the SC Paper market, the Tribunal need not be concerned that “untold numbers” of claimants could come forward if Claimant in this case were to pass the test.²

5. The United States concludes, too, as to Article 1102(3), that whether a provincial measure constitutes less favorable “treatment” accorded to foreign investors in “like circumstances” is a fact-specific inquiry to be determined on the merits.³ The U.S. position, thus, is consistent with Claimant’s position, and directly refutes Canada’s position that Article 1102(3), as a matter of law, necessarily negates Resolute’s claim.

II. LIMITATION PERIOD UNDER ARTICLES 1116(2) AND 1117(2)

A. Burden Of Proof

6. The parties disagree as to who bears the burden of proof for Canada’s time-bar objection because they disagree whether such an objection is jurisdictional. Resolute agrees that it has the burden to establish the Tribunal’s jurisdiction, which Resolute believes it has done.

7. As Resolute explained in its Rejoinder,⁴ however, Canada’s limitation period argument is not an objection to this Tribunal’s jurisdiction, but rather an objection to the admissibility of Resolute’s claims. Canada, therefore, bears the burden of proving that Resolute’s claims are untimely.

² See United States Article 1128 Submission ¶ 12.

³ United States Article 1128 Submission ¶ 17.

⁴ Resolute Rejoinder Memorial ¶ 17 (May 3, 2017) (“Rejoinder Mem’l”); see also Rejoinder Mem’l ¶¶ 15-31 (generally addressing burden of proof on timeliness objections raised by Canada).

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8. The submission of the United States on burden of proof fails to distinguish admissibility from jurisdiction. Its expansive notion of jurisdiction is supported only by references that do not address the distinction between jurisdiction and admissibility.

9. The only NAFTA Chapter Eleven award that has addressed specifically which party has the burden of proof regarding a time-bar objection is *Pope & Talbot*, ruling that such objection is “in the nature of an affirmative defence and [that], as such, Canada has the burden of proof of showing the factual predicate to that defence.”⁵

10. Presumably because *Pope & Talbot* is the only NAFTA tribunal that directly has discussed the burden of proof for a time-bar objection, the United States seeks to minimize its importance. The United States says no other tribunal followed *Pope & Talbot*'s conclusion on this subject, but no other tribunal specifically has ruled on the issue or displaced *Pope & Talbot*. *Pope & Talbot* stands alone among NAFTA arbitrations in directly addressing the subject.

11. Contrary to the U.S. argument, there is additional authority supporting the *Pope & Talbot* holding. For instance, in one of the NAFTA Chapter Eleven decisions cited by the United States, *Feldman v. Mexico*, the tribunal characterized a limitation period claim as a “defense” that a NAFTA state would be “interested in presenting,” thus finding that such a state has the ability to control the defense by refusing to assert it or otherwise waiving it.⁶ The *Feldman* tribunal thereby concurred with *Pope & Talbot* in

⁵ 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 ¶¶ 11-12 (Feb. 24, 2000) (“*Pope & Talbot*”), procedurally the same situation as here. See also CL-013, *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award ¶¶ 267-269 (Mar. 31, 2010), where the tribunal deferred addressing Canada’s time-bar defense until the final award (and then, finding it moot, never addressed it at all).

⁶ RL-021, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 ¶ 63 (Dec. 16, 2002) (“*Feldman*”).

finding that it is the State party that has the burden of presenting – and the corollary right of waiving – a limitations defense, in contrast to the tribunal’s jurisdiction, which is for the claimant investor to present and establish.⁷

12. In addition to *Feldman*, Resolute has cited and explained an array of authorities consistent with *Pope & Talbot*, including (a) scholarship from recognized authors such as Prof. Gary B. Born⁸ and Jan Paulsson⁹ describing “statute of limitations or similar time bar defense[s]” as “non-jurisdictional;”¹⁰ (b) non-NAFTA investment treaty arbitrations, such as *Tecmed*, in which the tribunal found that time-bar defenses “do not relate to the jurisdiction of the Arbitral Tribunal but rather to . . . admissibility of the foreign investor’s claims;”¹¹ and (c) domestic court rulings finding that timeliness questions must be resolved by – and do not otherwise undermine the competence of –

⁷ See, e.g., CL-007, 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 ¶ 343 (Mar. 17, 2015) (“*Bilcon*”) (explaining tribunals have a duty to rule *sua sponte* on their jurisdiction). A jurisdictional objection, therefore, could not be waived – a tribunal would still have a duty to resolve its own jurisdiction despite a waiver by respondent of any timeliness issues.

⁸ CL-044, Gary B. Born, *International Commercial Arbitration (Second Edition)* at 911-12, Kluwer Law International (2014).

⁹ CL-040, Jan Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution 601, Liber Amicorum in honour of Robert Briner*, ICC Publishing (Nov. 2005) (“Paulsson”) at 614, 617. See also CL-045, Hanno Wehland, “Chapter 8: Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules,” at 238 in Crina Baitag, *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016) (“For instance . . . limitation periods regarding assertion of claims . . . clearly relate to the admissibility of a claim.”).

¹⁰ CL-044, Gary B. Born, *International Commercial Arbitration (Second Edition)* at 911-12.

¹¹ CL-038, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award ¶ 73 (May 29, 2003).

arbitral tribunals.¹² The United States' argument that *Pope & Talbot* is an isolated precedent is erroneous, ignoring other cases and commentary.

13. The authority the United States cites as contrary does not address whether a time-bar objection is jurisdictional – the tribunals in neither *Methanex v. United States* nor *Apotex v. United States*¹³ were required to resolve that question.¹⁴ *Glamis Gold* also is inapposite as the tribunal needed to decide only whether proceedings should be bifurcated, expressly limiting its finding “for the purposes of Article 21(4)” of the UNCITRAL Arbitration Rules (1976).¹⁵ Under this provision, the standard of “jurisdiction” used for bifurcation determinations is commonly known to be expansive.

14. The UNCITRAL Working Group on revisions to the 1976 Rules confirmed the understanding that “the general power of the arbitral tribunal, referred to in [Article 21], to decide upon its jurisdiction should be interpreted as including the power of the

¹² Rejoinder Mem'l ¶ 23 (citing CL-043, *Bapu Corp. v. Choice Hotels Int'l Inc.*, 371 F. Appx. 306, 308-09 (3d Cir. 2010); CL-037, *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 456 (4th Cir. 1997); CL-036, *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991); CL-041, *Wagner Constr. Co v. Pac. Mechanical Corp.*, 157 P.3d 1029, 1030 (Cal. S. Ct. 2007); CL-035, *Coopers & Lybrand Ltd (Trustee) for BC Navigation SA v. Canpotex Shipping Servs. Ltd*, [1987] 16 F.T.R. 79 (Canadian Fed. Ct.)).

¹³ United States Article 1128 Submission ¶¶ 2, 4; see also Mexico Article 1128 Submission ¶¶ 3-4 (June 14, 2017) (citing Canada Reply Memorial ¶¶ 10-11 (March 29, 2017 (“Reply Mem'l”))).

¹⁴ Rejoinder Mem'l ¶¶ 25-26 (citing CL-001, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award ¶¶ 84, 86 (Aug. 7, 2002) (“*Methanex Partial Award*”); RL-023, *Apotex Inc. v. United States*, UNCITRAL, Award of Jurisdiction and Admissibility ¶ 314 (June 14, 2013) (“*Apotex*”)).

¹⁵ Article 21(4) of the UNCITRAL Arbitration Rules (1976) provides that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.” See also *Merrill & Ring Forestry L.P. v. Government of Canada*, in which, despite Canada's arguments that its time-bar objection should be taken as a preliminary, bifurcated question, the tribunal joined the question to the merits and never decided the question as it was mooted by the decision on the merits. CL-013, *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award ¶¶ 267-269 (Mar. 31, 2010) (“*Merrill & Ring Award*”).

arbitration tribunal to decide upon the admissibility of the parties' claims"¹⁶ Article 21(4) thus combines jurisdiction and admissibility for purposes of bifurcation and the determination of preliminary questions, but it does not change the different standards for burden of proof that apply to objections of jurisdiction and admissibility, respectively.

15. The United States follows Canada beyond NAFTA's boundaries to CAFTA without accounting for the difference between the two agreements. Like Canada, the United States fails to ascribe any significance to the fact that the statute of limitations, uniquely in CAFTA, is designated by the heading "Conditions and Limitations on Consent of Each Party."¹⁷ There is, consequently, no analogy to be drawn from CAFTA to NAFTA: in NAFTA, the statute of limitations is not a specific condition of consent. *Spence v. Costa Rica* itself cautioned against giving its finding precedential value in view of CAFTA's unique wording.¹⁸

B. Knowledge Of The Alleged Breach And Of Losses Incurred

16. The United States, in its Article 1128 submission, necessarily has nothing to contribute regarding the factual elements of Canada's limitations defense. Instead, it seeks to refine a Canadian argument about loss by arguing there is a difference between when a loss may be incurred and when the financial impact of the loss may be

¹⁶ CL-047, *Report of the Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session* (New York, February 9–13, 2009), UNCITRAL, 42nd session, UN Doc A/CN.9/669, at 10 ¶ 39 (2009); see also CL-048, David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* at 452, Oxford University Press (2012).

¹⁷ CAFTA Article 10.18; RL-028, *Spence Int'l Inv'ts, LLC v. Republic of Costa Rica*, UNCITRAL, Interim Award ¶ 27 (Oct. 25, 2016) ("*Spence*").

¹⁸ RL-028, *Spence* ¶ 166 ("The Tribunal thus cautions any reading of this Award that would give it wider 'precedential' effects.").

experienced.¹⁹ Resolute does not disagree. This distinction, however, is not relevant to the facts of this case. Resolute did not know and had no persuasive reason to know that it had either incurred or experienced injury prior to December 31, 2012 because, as the testimony of Professor Hausman and the other evidence submitted by Resolute proves, it hadn't.

17. Resolute does not dispute that the financial impact of a loss (be it a foreign investor's actual disbursement of funds or actual reduction in profits) may be felt after the occurrence of the respective loss (for the above examples, the imposition of obligations on the foreign investor or the reduction in sales, respectively). But as recognized in *Grand River*, the case upon which the United States relies for this argument,²⁰ a loss will not be incurred unless and until such "obligations," which can be met through future conduct, have been assumed by or imposed on the injured party. Similarly, in respect of a reduction in sales leading to a reduction in profits, a loss will not be incurred unless and until the party actually suffers a reduction in sales. To that extent, there is no discord between *Pope & Talbot* (where loss, as in this case, is felt as reduced income) and the cases in which loss manifested itself as an increased liability resulting from the breach, such as *Grand River* and *Mondev*.²¹

18. Resolute's losses were incurred when sales began to decrease because of the breaching measures, even though collection on those reduced sales (their

¹⁹ The June 14, 2017 Article 1128 Submission of Mexico merely "concur[s] with Canada's analysis" (¶ 6), and thus has been addressed in Resolute's February 22, 2017 Counter-Memorial (¶¶ 55-81) and May 3, 2017 Rejoinder Memorial (¶¶ 87-92).

²⁰ United States Article 1128 Submission ¶ 8 (citing RL-022, *Grand River Enters. Six Nations, Ltd., v. United States*, UNCITRAL, Decision on Objections to Jurisdiction ¶ 77 (July 20, 2006)).

²¹ Resolute Counter-Memorial ¶¶ 57-65 (Feb. 22, 2017) ("Counter-Mem'l") (citing, *inter alia*, RL-029, *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002); Rejoinder Mem'l ¶¶ 88-91).

financial impact) would not materialize until later. As confirmed by Prof. Hausman, Resolute's sales did not begin to falter before the first quarter of 2013. By any standard, losses had not occurred – and had not been incurred – until the first quarter of 2013 (if not later).²²

19. The United States confirms that Canada's time-bar objection cannot dismiss Resolute's claim for expropriation because the three-year limitation does not run until a claimant has "knowledge . . . that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking."²³ *Glamis Gold*, a case the United States generally seems to endorse,²⁴ holds that an expropriation claim ripens only upon substantial deprivation.²⁵ There is no taking under NAFTA Article 1110 unless and until there is substantial deprivation.²⁶ The Laurentide mill was compelled to close permanently and completely in October of 2014.²⁷ Resolute, therefore, could not have claimed expropriation, and made no such claim, until there was substantial deprivation in 2014.²⁸

²² *E.g.*, Counter-Mem'l ¶¶ 74-81; Rejoinder Mem'l ¶¶ 85-86, 92.

²³ United States Article 1128 Submission ¶¶ 10-11.

²⁴ United States Article 1128 Submission ¶ 10 n.17.

²⁵ Counter-Mem'l ¶¶ 111-112 (citing CL-025, *Glamis Gold v. United States of America*, UNCITRAL, Award ¶ 328 (June 8, 2009) ("[F]or 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."). See also CL-026, *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award ¶ 242 (Aug. 2, 2010); CL-013, *Merrill & Ring Award* ¶ 145.

²⁶ *E.g.*, Counter-Mem'l ¶¶ 110-114.

²⁷ *E.g.*, Resolute Statement of Claim ¶ 24 (Dec. 30, 2015).

²⁸ The expropriation in *Spence* was by government decree. The claimant had to know of expropriation, therefore, at the time of the breach. Rejoinder Mem'l ¶ 90 (citing RL-028, *Spence* ¶ 230).

III. “RELATING TO” REQUIREMENT UNDER ARTICLE 1101(1)

20. The United States explains that whether a measure is one “relating to” an investment or investor “depends on the facts of a given case.”²⁹ In the cases it cites (also discussed at length in Resolute’s submissions),³⁰ the United States highlights that each tribunal made factual findings in determining whether the challenged measures “relate to” an investment.³¹

21. The alleged purpose of the Nova Scotia measures was to make Port Hawkesbury the national champion of the supercalendered paper industry, necessarily to Resolute’s detriment.³² For purposes of bifurcation, Canada accepted these facts of Resolute’s claims *pro tem*.³³ The facts as alleged are sufficient to satisfy the Article 1101 standard and, if proven successfully during the merits phase, would lead to an award against Canada on liability. At this stage in this proceeding, there are no findings of fact for the Tribunal to make on this subject because such findings would go to the merits of Resolute’s claims.

22. The United States also observes that a key consideration underpinning the *Methanex* tribunal’s analysis was whether the nexus between the measure and

²⁹ United States Article 1128 Submission ¶¶ 13.

³⁰ *E.g.*, Counter-Mem’l ¶¶ 126-151.

³¹ United States Article 1128 Submission ¶¶ 14 (citing RL-059, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award ¶ 234 (Nov. 13, 2000) (making factual findings on purpose of import ban); CL-003, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶¶ 173, 175 (Sep. 18, 2009) (making findings on purpose of import permit requirement); CL-001, *Methanex* Partial Award ¶¶ 151-159 (making numerous findings regarding challenged measures); CL-007, *Bilcon* ¶ 241 (making a finding that Bilcon was an investor that had standing under to bring a claim under NAFTA because it had a partnership with Nova Stone)).

³² Counter-Mem’l ¶¶ 145, 152; Resolute Statement of Claim ¶¶ 46, 57, 59 (Dec. 30, 2015).

³³ Counter-Mem’l ¶ 118; *accord* 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)).

claimant was so tenuous that any recognition of a claim would result in unlimited liability for the state.³⁴

23. Resolute's claims about the Nova Scotia measures do not present a tenuous theory about an unforeseeable, unquantifiable impact of the government's actions. Nova Scotia knew that its measures would impact Port Hawkesbury's competitors directly because such measures had to impact the supercalendered paper industry in order to effect the province's goal that Port Hawkesbury succeed where it previously had failed and become the low cost producer in North America. Nova Scotia could not have been ignorant of the limited, well-defined number of Port Hawkesbury's competitors (Irving Paper, Catalyst Paper and Resolute in Canada; Madison and Verso in the United States),³⁵ and Resolute stands alone among them as a potential NAFTA claimant. Canada has raised alarmist floodgates arguments on various occasions, arguing that Resolute's interpretation of Article 1101(1) would "create a limitless class of affected investors,"³⁶ but it has not disputed seriously that the class of affected investors in the present case is narrowly confined.

IV. NATIONAL TREATMENT BY STATES/PROVINCES UNDER ARTICLE 1102(3)

24. The United States explains that "[a]n investor cannot rest its claim under Article 1102(3) on the fact that a domestic enterprise operating in another state or province receives a different or greater benefit or is subject to a different or lesser

³⁴ See United States Article 1128 Submission ¶¶ 12.

³⁵ See, e.g., Counter-Mem'l ¶¶ 145.

³⁶ Reply Mem'l ¶¶ 126.

burden *unless it is 'in like circumstances' with that enterprise.*³⁷ Hence, according to the United States, a claim can be asserted by an investor (or an investment) in respect of a provincial measure, regardless of the physical presence of the investor (or investment) in that province, provided the claimant can demonstrate that it is in like circumstances to a domestic investor (or investment) that is receiving more favorable treatment from that province. This proof, the United States recognizes, requires “a fact-specific inquiry at the merits phase.”³⁸

25. Although the United States does not say so explicitly, for purposes of the decision facing the Tribunal at this preliminary stage, it appears to agree with Resolute’s interpretation of Article 1102(3). Like Resolute, the U.S. concludes that whether a provincial measure constitutes less favorable “treatment” accorded to foreign investors in “like circumstances” is a fact-specific inquiry at the merits.³⁹ By definition, the Tribunal cannot make such a determination at this stage of the arbitration.

26. The U.S. position, based on an examination of like circumstances, is contrary to Canada’s categorical argument that a claim under Article 1102(3) in respect of a provincial measure is unavailable to an investor without an investment in that province.⁴⁰

27. The U.S. position is consistent with Claimant’s, and refutes Canada’s that Article 1102(3), as a matter of law, necessarily precludes Resolute’s claims.

³⁷ United States Article 1128 Submission ¶ 17 (emphasis added).

³⁸ United States Article 1128 Submission ¶ 17

³⁹ United States Article 1128 Submission ¶ 17; Counter Mem’l ¶ 195 n.251.

⁴⁰ Reply Mem’l ¶ 146.

V. TAXATION MEASURES UNDER ARTICLE 2103

28. The defense raised by Canada under Article 2103 concerns Resolute's expropriation claim under Article 1110 and its claim under Article 1105. It pertains only to the portion of the Nova Scotia Measures involving discounted property taxes (from C\$2.6 million to C\$1.3 million) provided to Port Hawkesbury in an agreement it entered with the Municipality of Richmond County. Canada concedes that its defense is not applicable to Resolute's claim under Article 1102.⁴¹ See Article 2103(4)(b).

29. The United States calls for the adoption of an overly expansive interpretation of "taxation measures." Relying only on the definition of "measure" as "any law, regulation, procedure, requirement or practice" under Article 201, the United States posits that a taxation "practice" would include "the application of, or failure to apply (or the enforcement of or failure to enforce) a tax."⁴² But a taxation "practice" cannot, without more, consist merely of some failure to apply a tax.⁴³

30. As previously expressed in its Counter-Memorial and Rejoinder,⁴⁴ Resolute maintains the position that the type of tax contemplated in the referral prerequisite of Article 2103(6) consists of affirmative tax measures burdening an investor to the point of expropriation. Tax breaks favoring a competitor without affirmatively burdening an investor, particularly when asserted as the basis for a

⁴¹ Canada Request for Bifurcation ¶ 20 (Sept. 29, 2016).

⁴² United States Article 1128 Submission ¶ 19.

⁴³ See RL-011, *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction ¶¶ 66-67 (June 24, 1998).

⁴⁴ Counter-Mem'l ¶¶ 211-13; Rejoinder Mem'l ¶ 141.

constructive expropriation claim in conjunction with other measures conferring competitive advantages, are not “taxation measures” requiring referral.⁴⁵

31. A similar interpretation was adopted by arbitral awards interpreting Article 21 of the Energy Charter Treaty, the wording of which is akin to NAFTA Article 2103. In *Hulley v. Russia*, the tribunal held that “taxation measures” should be limited to “*bona fide* taxation actions, *i.e.*, actions that are motivated by the purpose of raising general revenue for the State.”⁴⁶ State measures that are unrelated to the general imposition of tax burdens for the purpose of raising public revenue, such as discriminatory taxes on a specific investor (the case in *Hulley*), or tax breaks for a particular entity (the Port Hawkesbury agreement), do not meet this test.

⁴⁵ If the failure to impose a tax were a “measure,” other failures to act (such as failures to provide treatment) might also be “measures.” Canada, to the contrary, argues that there is no “measure” when Nova Scotia – as Canada claims – provides no treatment to Resolute. *E.g.*, Reply Mem’l ¶¶ 9, 146, 155.

⁴⁶ CL-049, *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award ¶ 1407 (July 18, 2014); see also CL-050, *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award ¶ 1407 (July 18, 2014); CL-051 Julien Chaisse, *International Investment Law and Taxation: From Coexistence to Cooperation* at 13 (International Center for Trade and Sustainable Development Jan. 2016).

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32. The appropriate interpretation under Article 2103(6) involves circumscribing “taxation measures” to their usual and ordinary meaning, which essentially consists in general tax burdens for the purpose of raising public revenue. Under this common-sense approach to Article 2103, Resolute should be permitted to continue to assert the tax breaks provided by Nova Scotia to Port Hawkesbury among the many other advantages Port Hawkesbury received as a basis for its claims under Articles 1105 and 1110.

Respectfully submitted,



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