

**PCA Case No. 2016-13**

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

**between**

**RESOLUTE FOREST PRODUCTS INC.**

**(Claimant)**

**and**

**GOVERNMENT OF CANADA**

**(Respondent)**

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**DECISION ON JURISDICTION AND ADMISSIBILITY**

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**January 30, 2018**

**Arbitral Tribunal:**

Judge James R Crawford, AC (Presiding Arbitrator)  
Dean Ronald A Cass  
Dean Céline Lévesque

**Registry:**

Permanent Court of Arbitration  
Ms Judith Levine, Tribunal Secretary

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## LIST OF DEFINED TERMS

<b>Article 1128 Submissions</b>	Submissions filed by the United States and Mexico pursuant to Article 1128 of NAFTA on June 14, 2017
<b>C\$</b>	Canadian Dollars
<b>Canada</b>	The Government of Canada
<b>CCAA</b>	<i>Companies' Creditor Arrangement Act</i> , R.S.C. 1985, ch. c-36 (Exhibit R-025)
<b>Claimant</b>	Resolute Forest Products, Inc. (or 'Resolute'), a company incorporated in the State of Delaware, United States of America
<b>Counter-Memorial</b>	Counter-Memorial on Jurisdiction filed by the Claimant on February 22, 2017
<b>Disputing Parties</b>	The Claimant and the Respondent
<b>Draft NOI</b>	Draft Notice of Intent to submit a claim to arbitration under NAFTA Chapter Eleven (Exhibit R-081)
<b>Expropriation Objection</b>	Respondent's Objection to Jurisdiction based on the argument that the questioned measures are not tantamount to expropriation of the Laurentide mill
<b>Federal Measures</b>	Measures taken by Canada in respect to the investigation by the United States Department of Commerce in relation to the Canadian supercalendered paper industry
<b>Hausman Statement</b>	Expert Witness Statement of Jerry Hausman, Ph.D., filed by the Claimant with its Counter-Memorial on Jurisdiction on February 22, 2017
<b>Laurentide mill</b>	The Laurentide supercalendered paper mill owned by the Claimant located at Shawinigan, Québec
<b>Memorial</b>	Memorial on Jurisdiction filed by the Respondent on December 22, 2016
<b>Mexico</b>	The United Mexican States
<b>Monitor</b>	Ernst & Young, as appointed by the Supreme Court of Nova Scotia to monitor the business and financial affairs of NPPH during the CCAA proceedings and monitor the sales process of NPPH
<b>NAFTA</b>	North American Free Trade Agreement
<b>Non-Disputing NAFTA Parties</b>	The United States of America and the United Mexican States
<b>Notice of Arbitration and Statement of Claim</b>	Notice of Arbitration and Statement of Claim filed by the Claimant on December 30, 2015
<b>Nova Scotia</b>	The Government of Nova Scotia (or 'the Province')
<b>Nova Scotia Measures</b>	The measures implemented by Nova Scotia in 2012 of which the Claimant complains

<b>NPC</b>	NewPage Corporation
<b>NPPH</b>	NewPage Port Hawkesbury Corp.
<b>NSPI</b>	Nova Scotia Power Inc.
<b>Opposition to Bifurcation</b>	Opposition to Respondent's Request for Bifurcation filed by the Claimant on October 13, 2016
<b>PCA</b>	The Permanent Court of Arbitration
<b>PHP</b>	Port Hawkesbury Paper Inc.
<b>Plan</b>	The Plan Sponsorship Agreement entered into by PWCC and NPPH on July 6, 2012
<b>Port Hawkesbury mill</b>	A supercalendered paper mill located in Port Hawkesbury, Nova Scotia
<b>Province</b>	The Government of Nova Scotia (or 'Nova Scotia')
<b>Provincial Treatment Objection</b>	Respondent's objection to jurisdiction based on Article 1102(3) of NAFTA
<b>PWCC</b>	Pacific West Commercial Corporation
<b>Rejoinder Memorial</b>	Rejoinder Memorial on Jurisdiction filed by the Claimant on May 3, 2017
<b>Reply Memorial</b>	Reply Memorial on Jurisdiction filed by the Respondent on March 29, 2017
<b>Request for Bifurcation</b>	Request for Bifurcation filed by the Respondent on September 29, 2016
<b>Resolute</b>	Resolute Forest Products, Inc. (or the 'Claimant')
<b>Respondent</b>	The Government of Canada (or 'Canada')
<b>Scope Objection</b>	Respondent's objection to jurisdiction based on Article 1101(1) of NAFTA
<b>Statement of Defence</b>	Reply Statement filed by the Respondent on September 1, 2016
<b>Taxation Measures Objection</b>	Respondent's objection to jurisdiction in relation to taxation measures implemented by Nova Scotia based on Article 2103 of NAFTA
<b>Time-Bar Objection</b>	Respondent's objection to jurisdiction based on Articles 1116(2) and 1117(2) of NAFTA
<b>UARB</b>	Nova Scotia Utility and Review Board
<b>UNCITRAL Rules</b>	United Nations Commission on International Trade Law Arbitration Rules (1976)
<b>US ITC</b>	The United States International Trade Commission
<b>USTR</b>	United States Trade Representative

## I. INTRODUCTION

### A. THE DISPUTING PARTIES

1. The Claimant in this arbitration is Resolute Forest Products Inc., a corporation incorporated in the State of Delaware, United States of America (the '**Claimant**'). The Claimant's address is 1209 Orange Street, Wilmington, Delaware 19801, United States of America. The Claimant brings this arbitration as an investor on its own behalf and on behalf of Resolute FP Canada Inc, a corporation incorporated in Canada that is directly owned and controlled by the Claimant. The address of Resolute FP Canada Inc is 111 Duke Street, Suite 5000, Montréal, Québec H3C 2M1, Canada. The Claimant is represented in these proceedings by Dr Elliot J Feldman, Mr Michael Snarr and Mr Paul M Levine of Baker Hostetler LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036, United States of America; and Mr Martin J Valasek, Ms Jenna Anne de Jong and Mr Jean-Christophe Martel of Norton Rose Fulbright Canada LLP, 1 Place Ville Marie, Suite 2500, Montréal, Québec H3B 1R1, Canada.
2. The Respondent in this arbitration is the Government of Canada ('**Canada**' or the '**Respondent**'). The Respondent is represented in these proceedings by Mr Mark Luz, Mr Rodney Neufeld, Ms Jenna Wates and Ms Michelle Hoffmann of the Trade Law Bureau (JLT), Global Affairs Canada, 125 Sussex Drive, Ottawa, Ontario K1A 0G2, Canada.

### B. OVERVIEW OF THE DISPUTE

3. A dispute has arisen between the Claimant and Canada in respect of which the Claimant commenced arbitration pursuant to Chapter Eleven of the North American Free Trade Agreement ('**NAFTA**').
4. The dispute concerns the Claimant's investment in the Laurentide supercalendered paper mill ('**Laurentide mill**') in Québec, Canada, as well as the Dolbeau and Kénogami mills, also located in Québec, Canada.<sup>1</sup> According to the Claimant, it was forced to close the Laurentide mill because it was unable to compete with another supercalendered paper mill located in Port Hawkesbury, Nova Scotia (the '**Port Hawkesbury mill**'). The Claimant alleges that the Nova Scotia Government implemented a series of measures in 2012 (the '**Nova Scotia Measures**') to 'ensure that the Port Hawkesbury mill would have competitive advantages above any other

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<sup>1</sup> Supercalendered paper is a glossy paper used for such things as newspaper supplements and advertising brochures.

[supercalendered] paper producer, including Resolute.’<sup>2</sup> Specifically, it is alleged that Nova Scotia preserved the Port Hawkesbury mill so that it could be sold as a going concern, provided electricity to the Port Hawkesbury mill at a discounted rate and provided the Port Hawkesbury mill with more than C\$124 million in assistance to ensure its competitiveness. The Claimant alleges that these measures are tantamount to the expropriation of the Laurentide mill, in violation of Article 1110 of NAFTA, and also constitute a violation of the minimum standard of treatment and national treatment standards of NAFTA (Articles 1105 and 1102, respectively).

5. The Claimant further alleges that officials of the Government of Canada discriminated against the Claimant by excluding it from a joint defence group in respect of an investigation by the United States Department of Commerce in relation to the Canadian supercalendered paper industry (the ‘**Federal Measures**’).
6. The Claimant claims compensation for: (a) the direct losses caused by the measures of Canada and Nova Scotia that amount to a violation of NAFTA; (b) consequential damages arising as a result of the offensive measures; (c) the costs of the proceedings, including the costs of the arbitration; and (d) interest.
7. The Respondent argues that the Claimant’s allegations in respect of the measures taken by Nova Scotia are time-barred under Articles 1116(2) and 1117(2) of NAFTA (the ‘**Time-Bar Objection**’). Alternatively, the Respondent also argues that the Nova Scotia related claims fall outside the scope of application of NAFTA under Article 1101(1) of NAFTA (the ‘**Scope Objection**’), that the Claimant’s national treatment claims are inadmissible under Article 1102(3) of NAFTA (the ‘**Provincial Treatment Objection**’), and that the questioned measures are not tantamount to expropriation of the Laurentide mill (the ‘**Expropriation Objection**’). Finally, the Respondent also considers the Tribunal to lack jurisdiction in respect of the Nova Scotia claims insofar as they relate to taxation measures implemented by Nova Scotia (the ‘**Taxation Measures Objection**’).
8. In addition to its arguments on jurisdiction and admissibility, the Respondent rejects the Claimant’s claims on the merits and requests the Tribunal to dismiss the claims in their entirety and order the Claimant to bear all the costs of the arbitration.
9. This Decision deals with the Time-Bar Objection (in Part V.B), the Scope Objection (in Part V.C), the Provincial Treatment Objection (in Part V.D), the Expropriation Objection (in Part V.E), and

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<sup>2</sup> Notice of Arbitration and Statement of Claim, para 4.

the Taxation Measures Objection (in Part V.F). Either the Time-Bar Objection or the Scope Objection, if upheld by the Tribunal, would entirely dispose of Claimant's claims in relation to the Nova Scotia Measures, whereas the other Objections would dispose of the claims in part.

10. These Objections relate only to the Nova Scotia Measures. The Disputing Parties agree that the Objections relating to the Federal Measures fall to be dealt with in a subsequent phase of this arbitration.

## II. PROCEDURAL HISTORY

11. On September 30, 2015, the Claimant served on Canada its Notice of Intent to Submit a Claim to Arbitration pursuant to Article 1119 of NAFTA.
12. On December 30, 2015, the Claimant served its Notice of Arbitration and Statement of Claim ('**Notice of Arbitration and Statement of Claim**') under Chapter Eleven of NAFTA on Canada. Pursuant to Article 1120(1)(c) of NAFTA, the Claimant also indicated its election to proceed with the arbitration pursuant to Article 3 of the United Nations Commission on international Trade Law Arbitration Rules of 1976 ('**UNCITRAL Rules**').
13. On February 9, 2016, pursuant to Article 7(1) of the UNCITRAL Rules and Article 1123 of NAFTA, the Claimant notified the Respondent of its appointment of Dean Ronald A Cass as arbitrator. Dean Cass is Dean Emeritus of Boston University School of Law and a national of the United States of America.
14. On March 18, 2016, pursuant to Article 7(1) of the UNCITRAL Rules and Article 1123 of NAFTA, the Respondent notified the Claimant of its appointment of Dean Céline Lévesque as arbitrator. Dean Lévesque is Dean of the Faculty of Law, Civil Law Section at the University of Ottawa and a national of Canada.
15. On May 25, 2016, pursuant to Article 7(1) of the UNCITRAL Rules and Article 1123 of NAFTA, the Disputing Parties appointed H.E. Judge James R Crawford, AC as the presiding arbitrator by mutual agreement. Judge Crawford is a judge of the International Court of Justice and a national of Australia.
16. Each arbitrator duly provided the Disputing Parties with a Statement of Independence.<sup>3</sup> The Disputing Parties have both confirmed that 'the Tribunal has been duly constituted in accordance

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<sup>3</sup> Procedural Order No 1, June 29, 2016, para 3.2.

with Article 1123 of the NAFTA. The Disputing Parties have no objections whatsoever to the constitution of the Tribunal or to the appointment of any Member of the Tribunal in respect of matters known to them' as at June 2016.<sup>4</sup>

17. On June 28, 2016, the Tribunal convened a preliminary procedural teleconference with the Disputing Parties.
18. Following the teleconference, the Tribunal issued Procedural Order No. 1 on June 29, 2016. Among other things, Procedural Order No. 1 recorded the Disputing Parties' confirmation that the Tribunal had been duly constituted in accordance with Article 1123 of NAFTA, and their agreement that the 1976 version of the UNCITRAL Arbitration Rules would apply to this arbitration, that the place of arbitration would be Toronto, Ontario, that the languages of the arbitration would be English and French, and that the Permanent Court of Arbitration ('PCA') would act as registry in relation to this arbitration. Procedural Order No. 1 also set out procedural rules and a date for Canada to file its Statement of Defence ('**Statement of Defence**').
19. By letters of July 27, 2016 and August 8, 2016, the Claimant and Respondent respectively presented an agreed procedural calendar for the Tribunal to decide on bifurcating any jurisdictional and admissibility objections in a preliminary phase. The Disputing Parties noted their agreement that the Claimant would indicate whether it consented to bifurcation by September 15, 2016. By the same correspondence, the Disputing Parties also outlined their respective positions in relation to the timing of submissions under Article 1128 of NAFTA by Non-Disputing NAFTA Parties and Amici Curiae. The Claimant provided further comments on the timing of the Article 1128 Submissions in a letter of August 11, 2016.
20. In accordance with Articles 7.1 and 8.1 of PO1, on September 1, 2016 the Respondent filed its Statement of Defence and accompanying documents.
21. By letter of September 14, 2016, the Claimant explained that it was unable to consent to bifurcation on the basis of the proposal set out in the Respondent's Statement of Defence.
22. By letter of September 22, 2016, the Respondent informed the Tribunal that the Disputing Parties had reached agreement on a Procedural Order regarding procedures to be followed during document production. The Respondent also informed the Tribunal that the Disputing Parties had largely agreed to the text of a confidentiality order, however, there were a number of outstanding issues to be decided by the Tribunal. The Respondent's letter also enunciated the Respondent's

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<sup>4</sup> Procedural Order No. 1, June 29, 2016, para 3.3.

position on the areas of disagreement regarding the confidentiality order.

23. The Claimant provided its comments on the outstanding issues regarding the draft confidentiality order on September 22, 2016.
24. On September 29, 2016, the Respondent filed its Request for Bifurcation (**'Request for Bifurcation'**) and accompanying documents.
25. On October 13, 2016, the Claimant filed its Opposition to Respondent's Request for Bifurcation (**'Opposition to Bifurcation'**).
26. On October 14, 2016, the Tribunal issued Procedural Order No. 2 dealing with document production. On the same date, the Tribunal issued a Confidentiality Order, which the Disputing Parties signed on October 27, 2016.
27. On November 3, 2016, the Tribunal issued Procedural Order No. 3, setting out two alternative schedules, one in the event that the Tribunal decided to bifurcate the proceedings and one in the event that bifurcation was refused.
28. On November 7, 2016, the Tribunal held an oral hearing on bifurcation via teleconference.
29. On November 18, 2016, the Tribunal issued Procedural Order No. 4 by which the Tribunal decided to bifurcate these proceedings for the purpose of hearing the Respondent's objections to jurisdiction and admissibility under Articles 1116(2), 1117(2), 1101(1), 1102(3) and 2103(6) of NAFTA as preliminary questions. Having decided to bifurcate the proceedings, the Tribunal also adopted Schedule A of Procedural Order No. 3.
30. On December 12, 2016, having considered the Disputing Parties' correspondence, the Tribunal issued Procedural Order No. 5 setting out a revised schedule for the jurisdictional phase of the proceedings. The Tribunal reserved any decision in respect of the scheduling for the merits phase of these proceedings.
31. On December 22, 2016, the Respondent filed its Memorial on Jurisdiction (**'Memorial'**) and accompanying documents.
32. By email of January 25, 2017, the Claimant informed the Tribunal on behalf of the Disputing Parties that they had agreed to hold the Hearing on Jurisdiction and Admissibility at Arbitration Place in Toronto, Canada.

33. On February 22, 2017, the Claimant filed its Counter-Memorial on Jurisdiction (**‘Counter-Memorial’**) and accompanying documents including an Expert Witness Statement of Jerry Hausman, Ph.D. on the issue of whether the management of the Claimant could have known of the damage to its supercalendered paper business prior to Q1 2013 (the **‘Hausman Statement’**).
34. By email of March 2, 2017, the Claimant designated: (a) the entire Hausman Statement; and (b) Exhibits C-026 and C-038 as confidential information.
35. By letter of March 3, 2017, the Respondent consented to the confidentiality designations in respect of Exhibits C-026 and C-038, but objected to the Claimant’s designation of the entire Hausman Statement as confidential. Pursuant to Section 12.1 of PO1, the Respondent also sought the data and information relied upon by Dr. Hausman in the preparation of his report.
36. On March 8, 2017, the Claimant provided the source information for the Hausman Report sought by the Respondent and proposed more specific confidentiality designations.
37. On March 29, 2017, the Respondent filed its Reply Memorial on Jurisdiction (**‘Reply Memorial’**) and accompanying documents.
38. On May 3, 2017, the Claimant filed its Rejoinder Memorial on Jurisdiction (**‘Rejoinder Memorial’**) and accompanying documents.
39. On May 8, 2017, the PCA published on its website a Press Release in both English and French inviting submissions from the Non-Disputing NAFTA Parties and potential *amici curiae* by May 31, 2017.
40. On May 31, 2017, an application to participate as *amici curiae* was submitted jointly by Professor Robert Howse and Mr Barry Appleton.
41. On June 14, 2017, following an extension of time granted by the Tribunal, the United States of America (**‘United States’**) and the United Mexican States (**‘Mexico’**) submitted Non-Disputing Party submissions pursuant to Article 1128 (the **‘Article 1128 Submissions’**).
42. On June 21, 2017, Canada submitted its objection to the participation of Professor Howse and Mr Appleton as *amici curiae*. On June 23, 2017, Resolute confirmed that it ‘has no comments regarding the amicus application.’
43. On June 29, 2017, the Tribunal issued its Procedural Order No. 6 on the Participation of Professor Robert Howse and Mr Barry Appleton as *amici curiae*, rejecting their joint application.

44. On July 12, 2017, the Disputing Parties filed their comments on the Article 1128 Submissions of the Non-Disputing NAFTA Parties.
45. A pre-hearing conference was held amongst the Disputing Parties and the Presiding Arbitrator on July 19, 2017.
46. Pursuant to paragraph 22.2 of Procedural Order No. 1, on July 21, 2017, the Tribunal provided a number of questions in writing for the Disputing Parties to address in their oral submissions during the Hearing on Jurisdiction and Admissibility.
47. At the instruction of the Tribunal and having consulted with the Disputing Parties, the PCA issued a Press Release on August 1, 2017 with information for the public live-streaming of the forthcoming Hearing on Jurisdiction and Admissibility.
48. The Hearing on Jurisdiction and Admissibility was held at the Arbitration Place in Toronto, Canada on August 15 and 16, 2017. The following individuals were present:

Tribunal

Judge James R Crawford, AC (Presiding Arbitrator)  
Dean Ronald A Cass  
Dean Céline Lévesque

The Claimant's Representatives

Mr Elliot J Feldman (Baker Hostetler LLP)  
Mr Michael S Snarr (Baker Hostetler LLP)  
Mr Paul M Levine (Baker Hostetler LLP)  
Mr Martin J Valasek (Norton Rose Fulbright Canada LLP)  
Mr Jean-Christophe Martel (Norton Rose Fulbright Canada LLP)  
Ms Jenna Anne de Jong (Norton Rose Fulbright Canada LLP)  
Mr Jacques Vachon (Resolute Forest Products Inc)  
Prof Jerry Hausman, PhD (Expert Witness)

The Respondent's Representatives

Mr Mark A Luz (Trade Law Bureau, Global Affairs Canada)  
Mr Rodney Neufeld (Trade Law Bureau, Global Affairs Canada)  
Ms Jenna Wates (Trade Law Bureau, Global Affairs Canada)  
Ms Michelle Hoffmann (Trade Law Bureau, Global Affairs Canada)  
Ms Shawna Lesaux (Trade Law Bureau, Global Affairs Canada)  
Ms Shamali Gupta (Investment Trade Policy Division, Global Affairs Canada)  
Mr Daniel Hill (Canadian Forest Service of Natural Resources Canada)  
Mr Andrew Weatherbee (Nova Scotia Department of Justice)

The Non-Disputing NAFTA Parties' Representatives

Mr Matthew Olmsted (United States of America)

PCA

Ms Judith Levine (Tribunal Secretary)

49. Oral submissions were made on behalf of the Claimant by Mr Elliot J Feldman and Mr Martin J

Valasek and on behalf of the Respondent by Mr Mark A Luz, Mr Rodney Neufeld and Ms Jenna Wates. With the agreement of the Disputing Parties, the Tribunal decided that no post-hearing briefs were necessary.

### III. THE UNCONTESTED FACTUAL BACKGROUND

50. The Claimant is a company incorporated under the laws of Delaware, United States of America. It was created in 2007 following the merger of two forest product companies, Abitibi-Consolidated Inc and Bowater Inc.<sup>5</sup> The Claimant describes itself as ‘an integrated forest products company that manufactures and markets a diverse range of wood and paper products, including a product known as supercalendered paper, or ‘SC paper’.’<sup>6</sup>
51. The Claimant’s Canadian subsidiary, Resolute FP Canada, owns three SC paper mills located in Canada: the Dolbeau and Kénogami mills located in Québec and the ‘now-defunct’ Laurentide mill, also located in Québec.<sup>7</sup>
52. The Port Hawkesbury mill, located in Nova Scotia, also produces SC paper and competes with Resolute in the North American SC paper market. In 2007, a US company, NewPage Corporation (‘NPC’) acquired the Port Hawkesbury mill which was then operated by its wholly-owned Canadian subsidiary NewPage Port Hawkesbury (‘NPPH’).<sup>8</sup> However, following losses of C\$4 million per month, NPPH announced that it was shutting down the mill in August 2011.<sup>9</sup>
53. On September 6, 2011, NPPH sought creditor protection under the *Companies’ Creditor Arrangement Act* (‘CCAA’), pursuant to which the Port Hawkesbury mill would be sold as part of a court supervised sale process.<sup>10</sup> The Supreme Court of Nova Scotia appointed Ernst & Young (the ‘Monitor’) to ‘monitor the business and financial affairs of NPPH during the CCAA proceedings’ and the sales process of NPPH.<sup>11</sup>
54. During the time that NPPH was seeking creditor protection, Nova Scotia implemented measures so as ‘to support the sale of the Port Hawkesbury mill in a way that would improve the chances it would be purchased as a going concern, which would result in continued employment for workers

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<sup>5</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 21; Respondent’s Statement of Defence, para 20.

<sup>6</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 22.

<sup>7</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 23.

<sup>8</sup> Respondent’s Memorial, para 12; Claimant’s Notice of Arbitration and Statement of Claim, para 27.

<sup>9</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 25. Respondent’s Memorial, para 13.

<sup>10</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 27; Respondent’s Memorial, paras 12-14.

<sup>11</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 27; Respondent’s Memorial, para 14.

in the Cape Breton region, rather than the mill be dismantled for scrap.’<sup>12</sup> Two measures are relevant to this period.

55. First, Nova Scotia agreed with NPPH to create a ‘\$14-million Forestry Infrastructure Fund’ pursuant to which ‘NPPH would serve as an intermediary between [Nova Scotia] and the approximately 350 independent contractors who would provide forestry services’ as part of Nova Scotia’s forest management activities and forestry strategy.<sup>13</sup> Nova Scotia provided an ‘additional \$12 million in funding to the FIF’ on March 16, 2012.<sup>14</sup>
56. Second, Nova Scotia provided up to C\$5 million in funding for the Port Hawkesbury mill to remain in ‘hot idle’ so that it could be sold as a going concern once NPPH’s cash ran out and it was no longer able to maintain the Port Hawkesbury mill in ‘hot idle’ on its own.<sup>15</sup> At the same time that Nova Scotia announced the additional funding to the FIF, Nova Scotia also announced a further C\$5.8 million in hot idle funding for the Port Hawkesbury mill.<sup>16</sup>
57. The Monitor published public notices of the sales process and directly contacted 110 parties who might be interested in acquiring the Port Hawkesbury mill, including the Claimant.<sup>17</sup> Four bidders submitted final offers in December 2011, two intended to acquire the Port Hawkesbury mill as a going concern with the other two proposing liquidation.<sup>18</sup> Ultimately, the Monitor recommended, and NPPH accepted, a bid from Pacific West Commercial Corporation (‘PWCC’) for the acquisition of the Port Hawkesbury mill.<sup>19</sup>
58. On July 6, 2012, PWCC and NPPH entered into the Plan Sponsorship Agreement (the ‘Plan’) pursuant to which ‘PWCC would act as the sponsor of a plan of compromise and arrangement for NPPH under the CCAA’ and acquire Port Hawkesbury for C\$33 million.<sup>20</sup> An amended and restated version of the Plan was sanctioned by the Court following creditor approval on September 25, 2012.<sup>21</sup>
59. The sale to PWCC was conditional on ‘certain support [being] provided by Nova Scotia.’<sup>22</sup> The

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<sup>12</sup> Respondent’s Statement of Defence, para 39; Claimant’s Notice of Arbitration and Statement of Claim, para 29.

<sup>13</sup> Respondent’s Statement of Defence, para 41; Claimant’s Notice of Arbitration and Statement of Claim, para 37.

<sup>14</sup> Respondent’s Statement of Defence, para 42; Claimant’s Notice of Arbitration and Statement of Claim, para 37.

<sup>15</sup> Respondent’s Statement of Defence, paras 44-46; Claimant’s Notice of Arbitration and Statement of Claim, paras 33, 37.

<sup>16</sup> Respondent’s Statement of Defence, para 47; Claimant’s Notice of Arbitration and Statement of Claim, para 37.

<sup>17</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 30; Respondent’s Memorial, para 15.

<sup>18</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 30; Respondent’s Memorial, para 15.

<sup>19</sup> Claimant’s Notice of Arbitration and Statement of Claim, para 31; Respondent’s Memorial, paras 15-16.

<sup>20</sup> Respondent’s Memorial, para 17; Claimant’s Notice of Arbitration and Statement of Claim, para 43.

<sup>21</sup> Respondent’s Memorial, para 17; Claimant’s Notice of Arbitration and Statement of Claim, para 43.

<sup>22</sup> Respondent’s Memorial, para 18; Claimant’s Notice of Arbitration and Statement of Claim, para 32.

Respondent observes that these conditions ‘are a matter of public record’ and notes the following:

Among these conditions was the requirement for PWCC to have entered into certain agreements with Nova Scotia, including a Sustainable Forest Management and Outreach Program Agreement in respect of achieving sustainable harvest and forest land practices in woodlands in Nova Scotia, a Forest Utilization License Agreement in respect of access to fibre on Crown Lands, a Letter of Offer Agreement in connection with the provision of certain financial assistance by Nova Scotia to PWCC and a Real Property Agreement with respect to the purchase and sale of certain real property owned by NPPH.

PWCC also conditioned the implementation of the restructuring and sale transaction on the Nova Scotia Utility and Review Board (the “UARB” or “Board”) approving a Load Retention Tariff (“LRT”) Pricing Mechanism governing the mill’s electricity rates, which was the subject of a private agreement between PWCC and the mill’s privately-owned electricity supplier, Nova Scotia Power Inc (“NSPI”).<sup>23</sup>

60. Once the conditions were met, the sale between NPPH and PWCC was completed on September 28, 2012.<sup>24</sup>
61. Following the Court’s approval for the sale of the Port Hawkesbury mill to PWCC, the United States Trade Representative (‘USTR’) investigated the support provided by Nova Scotia to the Port Hawkesbury mill.<sup>25</sup> In late 2012, the Government of Canada responded to questions regarding Nova Scotia’s support for the Port Hawkesbury mill from the USTR and the United States raised during a meeting of the WTO Committee on Subsidies and Countervailing Measures on October 23, 2012.<sup>26</sup>
62. At the beginning of 2015, two US SC paper producers ‘submitted a CVD petition to the US [Department of Commerce] and the United States International Trade Commission [(‘US ITC’)] requesting the initiation of an investigation into SC paper imports from Canada.’<sup>27</sup> The US Department of Commerce formally initiated an investigation into these allegations in March 2015.<sup>28</sup>

#### IV. RELIEF SOUGHT

63. In its Notice of Arbitration and Statement of Claim, the Claimant has sought the following relief:
  - i. Damages exceeding US\$70 million or such other amount to be proven in these proceedings in compensation for the direct losses caused by the measures of Canada

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<sup>23</sup> Respondent’s Memorial, paras 19-20; Claimant’s Notice of Arbitration and Statement of Claim, paras 31-42.

<sup>24</sup> Respondent’s Memorial, para 17; Claimant’s Notice of Arbitration and Statement of Claim, para 43.

<sup>25</sup> Respondent’s Statement of Defence, paras 56-57; Claimant’s Notice of Arbitration and Statement of Claim, paras 57 ff.

<sup>26</sup> Respondent’s Statement of Defence, para 57; Claimant’s Counter-Memorial on Jurisdiction, para 37.

<sup>27</sup> Respondent’s Statement of Defence, para 60; Claimant’s Notice of Arbitration and Statement of Claim, paras 57 and 68.

<sup>28</sup> Respondent’s Statement of Defence, paras 61-63; Claimant’s Notice of Arbitration and Statement of Claim, para 68.

- and Nova Scotia that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;
- ii. Additional consequential damages arising as a result of the illegal measures, in an amount to be proven in these proceedings;
  - iii. the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;
  - iv. pre- and post-award interest at a rate to be fixed by the Tribunal; and
  - v. such further relief as counsel may advise and the Tribunal may deem just and appropriate.<sup>29</sup>
64. Within the jurisdictional phase, the Claimant has requested the Tribunal to 'issue a Partial Award commencing the Merits and Quantum Phases of this arbitration' and order Canada 'to pay Resolute's costs and legal fees for this phase.'<sup>30</sup> It submits that the 'Tribunal should confirm that it does have jurisdiction over Resolute's claims and that the claims are admissible' and therefore the Tribunal 'should convene the Parties and move on to the next phase of this arbitration to determine liability and damages.'<sup>31</sup>
65. In its Statement of Defence, the Respondent has requested the Tribunal to (a) dismiss the Claimant's claims in their entirety; (b) require the Claimant to bear all costs of the arbitration, including legal costs and Tribunal costs; and (c) grant any other relief it deems appropriate.<sup>32</sup>
66. Within the jurisdictional phase, the Respondent requests this Tribunal to issue an award:
- i. dismissing the Claimant's Nova Scotia Claims under Articles 1102, 1105 and 1110 in their entirety and with prejudice on grounds of lack of jurisdiction;
  - ii. dismissing the Claimant's Nova Scotia Claims under Article 1102 in their entirety and with prejudice on grounds of admissibility;
  - iii. ordering the Claimant to bear the costs of this preliminary phase of the arbitration in full and to indemnify Canada for its legal fees and costs in the preliminary phase of this arbitration; and
  - iv. granting any further relief it deems just and appropriate under the circumstances.<sup>33</sup>

## V. THE ARGUMENTS OF THE DISPUTING PARTIES

### A. BURDEN OF PROOF

#### 1. Introduction

67. The Disputing Parties have competing views as to who bears the burden of proof, in particular in

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<sup>29</sup> Claimant's Notice of Arbitration and Statement of Claim, para 121.

<sup>30</sup> Claimant's Counter-Memorial on Jurisdiction, para 217.

<sup>31</sup> Claimant's Rejoinder on Jurisdiction, para 147.

<sup>32</sup> Respondent's Statement of Defence, para 106.

<sup>33</sup> Respondent's Memorial on Jurisdiction, para 141. See also Reply on Jurisdiction, para 171.

respect of the Time-Bar Objection. Some of their arguments touch upon the proof of jurisdictional and admissibility requirements more broadly. The Respondent considers time-bar to go to this Tribunal's jurisdiction and that the burden of proof falls on the Claimant. However, the Claimant considers time-bar to be an issue of admissibility, not jurisdiction, and thus, it argues, the burden of proof falls on the Respondent. The Non-Disputing NAFTA Parties both support the Respondent's position that the question of time-bar goes to the jurisdiction of this Tribunal and is for the Claimant to prove.

## 2. The Respondent's Arguments

68. The Respondent submits that the Claimant 'bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute' since it is the one bringing the claim under NAFTA.<sup>34</sup> The Respondent argues that a NAFTA Party's consent to arbitrate under Article 1122 is only engaged when certain requirements are met 'by a claimant.'<sup>35</sup> The Respondent refers to numerous NAFTA cases, such as *Bayview*, *Grand River* and *Gallo* as authority for the proposition that 'it is for the claimant to establish that its claims fall within NAFTA Chapter Eleven and the tribunal's jurisdiction.'<sup>36</sup> By reference to the decisions in *Methanex* and *Feldman*, the Respondent submits that Article 1122(1) establishes the time bar provisions of Article 1116 and 1117 of NAFTA as jurisdictional hurdles, not matters affecting the admissibility of the claim, since the time bar concerns the NAFTA Parties' advance consent to arbitrate.<sup>37</sup>
69. The Respondent also considers the Claimant to have 'overstat[ed] the extent to which its allegations are to be accepted as true *pro tem* for the purposes of this jurisdictional phase' and submits that the Claimant is nonetheless required to prove the existence of facts on which it relies in the jurisdictional phase.<sup>38</sup> The Respondent refers this Tribunal to a number of NAFTA and other investor-state cases where, it says, 'the principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction is [...] well established.'<sup>39</sup> In particular, it cites the following paragraph from the Interim Award in *Spence International Investments v Costa Rica*:

It is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a

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<sup>34</sup> Respondent's Reply Memorial, para 10.

<sup>35</sup> Respondent's Reply Memorial, para 11, referring to *Methanex Corporation v United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Liability), August 7, 2002, para 120 (CL-001) and (RL-018) ('*Methanex*, Partial Award').

<sup>36</sup> Respondent's Reply Memorial, para 13.

<sup>37</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 155:11-157:20; see also 162:12-165:11.

<sup>38</sup> Respondent's Reply Memorial, para 12.

<sup>39</sup> Respondent's Reply Memorial, para 14.

claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction.<sup>40</sup>

70. The *Spence* tribunal went on to explain that only once a claimant proffers that proof does the burden shift to a respondent to show why the tribunal lacks jurisdiction.<sup>41</sup> The Respondent notes that this rule 'makes perfect sense' in the context of this case where it would be unfair, for example, to put the burden on the Respondent to disprove the Claimant's state of knowledge, a matter on which the Claimant would have more extensive evidence.<sup>42</sup>
71. The Respondent also submits that the Claimant 'misinterprets' Article 24(1) of the 1976 UNCITRAL Arbitration Rules in order to attempt to shift the burden of proof onto the Respondent.<sup>43</sup> Article 24(1) of the UNCITRAL Rules provides:

Each party shall have the burden of proving the facts relied on to support his claim or defence.

72. The Respondent submits that this provision should be understood as referring only to the burden applicable to 'affirmative defences' raised by the Respondent and does not absolve the Claimant of its obligation to establish the Tribunal's jurisdiction.<sup>44</sup> The Respondent submits that the *Pope & Talbot* decision incorrectly determined that jurisdictional objections constitute an 'affirmative defence' and has since been 'overtaken by the more recent decisions in *Methanex*, *Apotex*, *Bayview*, *Grand River* and *Gallo*.'<sup>45</sup>

### 3. The Claimant's Arguments

73. The Claimant accepts that it bears the burden of proof in respect of establishing this Tribunal's jurisdiction.<sup>46</sup> The Claimant considers itself to have satisfied this burden in respect of the relevant jurisdictional elements, i.e., that Resolute is an American company doing business in Canada and had an investment in Canada at the relevant time that the impugned measures were adopted.<sup>47</sup> However, the Claimant submits that the Respondent's time-bar objection does not affect the jurisdiction of the Tribunal, only the admissibility of the claim; consequently, the Claimant maintains that it is the Respondent which bears the burden of proof in respect of the time-bar.<sup>48</sup>

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<sup>40</sup> Respondent's Reply Memorial, para 14, citing *Spence International Investments, LLC, Berkowitz, et al. v Republic of Costa Rica*, UNCITRAL, Interim Award, October 25, 2016, para 239 (**RL-028**) ('*Spence, Interim Award*').

<sup>41</sup> Respondent's Reply Memorial, para 15, referring to *Spence*, Interim Award, para 239.

<sup>42</sup> Respondent's Reply Memorial, para 17.

<sup>43</sup> Respondent's Reply Memorial, para 18.

<sup>44</sup> Respondent's Reply Memorial, para 19, referring to D Caron & L Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2<sup>nd</sup> ed, OUP 2012), 558 (**RL-078**).

<sup>45</sup> Respondent's Reply Memorial, para 20.

<sup>46</sup> Claimant's Rejoinder Memorial, para 12.

<sup>47</sup> Claimant's Rejoinder Memorial, para 13.

<sup>48</sup> Claimant's Rejoinder Memorial, para 15.

74. The Claimant notes that there have been ‘complementary theories’ as to whether the time-bar objection is ‘a defence against asserted claims’ or ‘pertain[s] to the admissibility of claims’, but either theory is unrelated to the Respondent’s consent to arbitration or the Tribunal’s authority and so the burden falls on the moving party, in this case, the Respondent.<sup>49</sup> The Claimant cites the *Pope & Talbot* decision which considered Canada’s timeliness objection in that case to be ‘in the nature of an affirmative defence’; therefore the burden fell on Canada.<sup>50</sup>
75. The Claimant refers to the decision in *Feldman* as well as scholarly writings and domestic court decisions from the United States and Canada in support of the proposition that a time-bar objection does not relate to the tribunal’s jurisdiction.<sup>51</sup> The Claimant submits that the only NAFTA case on point is *Pope & Talbot* where ‘that tribunal recognized the time bar as an affirmative defence, and as an affirmative defence, it carries with it a different consequence.’<sup>52</sup> By comparison, the Claimant considers the Respondent’s reliance on *Methanex*, *Apotex*, *Bayview*, and *Grand River* to be misconceived since none of those cases considered the question of whether a timeliness objection goes to jurisdiction or admissibility.<sup>53</sup> The Claimant also cautions this Tribunal from relying on the decision in *Spence v Costa Rica* since that case was under the DR-CAFTA ‘whose terms are notoriously different from NAFTA’s’ and whose tribunal itself ‘caution[ed] any reading of this Award that would give it wider “precedential” effects.’<sup>54</sup> In fact, other non-NAFTA decisions, including *Tecmed* have similarly determined that time limitation objections are not related to the tribunal’s jurisdiction but should be considered as admissibility objections.<sup>55</sup>
76. In any event, the Claimant considers sufficient proof to have been provided that it has brought its claims within time. Specifically, the Claimant points to the fact that the Respondent’s case, at its highest, ‘speculates that Resolute should have anticipated losses that Canada claims were incurred

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<sup>49</sup> Claimant’s Rejoinder Memorial, para 17.

<sup>50</sup> Claimant’s Rejoinder Memorial, paras 18-19 referring to *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, February 24, 2000, paras 11-12 (CL-002); see also Claimant’s Rejoinder Memorial, para 24, referring to Respondent’s Reply Memorial, para 20.

<sup>51</sup> Claimant’s Rejoinder Memorial, paras 20-23; Hearing on Jurisdiction and Admissibility, August 15, 2017, 293:10-297:6.

<sup>52</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 297:7-15

<sup>53</sup> Claimant’s Rejoinder Memorial, paras 25-28; Hearing on Jurisdiction and Admissibility, August 15, 2017, 297:16-300:8.

<sup>54</sup> Claimant’s Rejoinder Memorial, para 29, citing *Spence*, Interim Award, para 166 (RL-028); Hearing on Jurisdiction and Admissibility, August 15, 2017, 303:5-23.

<sup>55</sup> Claimant’s Rejoinder Memorial, para 31, referring to *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 (CL-038) (*‘Tecmed, Award’*).

in a price drop in January 2013.’<sup>56</sup>

#### 4. The Non-Disputing NAFTA Parties’ Comments

77. The United States submits that a NAFTA Party’s consent to arbitrate is ‘limited by the procedural conditions set out in Chapter Eleven’ including, *inter alia*, the requirements of Articles 1116(2) and 1117(2).<sup>57</sup> The time-bar imposed by these Articles, it says, ‘impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.’<sup>58</sup> It submits that ‘NAFTA Parties consistently raise, and tribunals generally address, the time bar defence as a jurisdictional objection’ and cites *Glamis Gold, Apotex I & II* and *Spence International Investments v Costa Rica* as examples of such a consistent approach.<sup>59</sup>
78. Mexico expresses its agreement with the Respondent that the Claimant ‘bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute.’<sup>60</sup> Mexico also recalls the decisions in *Methanex, Apotex, Spence International Investments v Costa Rica* and *Emmis International Holding v Hungary* as cases where the respective tribunals each found that the claimant bears the burden of proof in respect of the tribunal’s jurisdiction, with the *Methanex* and *Spence* tribunals specifically noting that time-bar provisions (under NAFTA and DR-CAFTA, respectively) go to the jurisdiction of the tribunal.<sup>61</sup>
79. The Respondent submits that the Article 1128 submissions of Mexico and the United States should be given ‘considerable weight’ when the NAFTA Parties ‘express concordant, common and consistent views on how to interpret NAFTA, they create subsequent agreement and practice within the meaning of Article 31(3) of the Vienna Convention’.<sup>62</sup> The Respondent points out that both the United States and Mexico support its position that the time bar is in the nature of a jurisdictional objection for which the Claimant bears the burden of proof.<sup>63</sup>

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<sup>56</sup> Claimant’s Rejoinder Memorial, para 33.

<sup>57</sup> Submission of the United States, para 2.

<sup>58</sup> Submission of the United States, para 3.

<sup>59</sup> Submission of the United States, para 4, citing *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), May 31, 2005 (**‘Glamis Gold, PO2’**); *Apotex Inc. v United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013 (**‘RL-023’**) (**‘Apotex, Award on Jurisdiction and Admissibility’**); and *Spence*, Interim Award.

<sup>60</sup> Submission of Mexico, para 2, citing Respondent’s Reply Memorial, para 10.

<sup>61</sup> Submission of Mexico, paras 3-5, citing *Methanex*, Partial Award; *Apotex*, Award on Jurisdiction and Admissibility, para 150; *Spence*, Interim Award; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media kereskedelmi ésSzolgáltató Kft. v Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014 (**‘Emmis, Award’**).

<sup>62</sup> Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States and the United Mexican States, July 12, 2017 (**‘Canada’s Reply to Art. 1128 Submissions’**), paras 6-8; Hearing on Jurisdiction and Admissibility, August 15, 2017, 165:12-167:9.

<sup>63</sup> Canada’s Reply to Art. 1128 Submissions, paras 15-25.

80. The Claimant prefaces its comments on the Article 1128 submissions by observing that all the NAFTA Parties ‘can be expected to express similar interpretations of NAFTA because all are cast as respondents in Chapter Eleven proceedings, and all would prefer to limit the occasions when they have to defend their respective governments against foreign investor claims.’<sup>64</sup> The Claimant acknowledged during the Hearing on Jurisdiction and Admissibility that the interpretation of NAFTA by the NAFTA Parties through their Article 1128 submissions ‘must be valued by the tribunal for its persuasive authority.’<sup>65</sup> The Claimant did, however, note that just as the Tribunal has been asked to take into account the agreement of the NAFTA Parties as to the interpretation of the treaty, the Tribunal should also pay serious attention to areas where the NAFTA Parties disagree with one another.<sup>66</sup>
81. With respect to the burden of proof, the Claimant reiterates its view that the time bar goes to admissibility and that Canada bears the burden. The Claimant argues that the United States’ submission in this respect fails to distinguish between admissibility and jurisdiction, and that the United States incorrectly characterizes *Pope & Talbot* as wrongly decided.<sup>67</sup>

## 5. The Tribunal’s Analysis

82. Section B of Chapter Eleven of NAFTA deals with settlement of disputes between investors and States Parties. Its central provision, jurisdictionally speaking, is section 1122 (‘Consent to Arbitration’), paragraph 1 of which reads:
- Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
83. The clear inference is that arbitration of a claim not submitted in accordance with those procedures is not consented to and that the tribunal lacks jurisdiction. Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.
84. Even if it did not, and was to be classified (as time limits in other contexts are often classified) as a matter of admissibility, it would not necessarily follow that the onus of proof in that regard was on the respondent party. Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party ‘the burden of proving the

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<sup>64</sup> Comments on the Article 1128 Submissions of Mexico and the United States, July 12, 2017 (‘**Claimant’s Reply to Article 1128 Submissions**’), para 1.

<sup>65</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 306:4-12.

<sup>66</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 306:16-307:1.

<sup>67</sup> Claimant’s Reply to Article 1128 Submissions, paras 6-15.

facts relied on to support [its] claim or defence’. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.

85. The Tribunal does not agree with the *Pope & Talbot* dictum that time bar objections under NAFTA Articles 1116(2) and 1117(2) constitute an ‘affirmative defence’. The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their Article 1128 submissions, that the claimant has to establish its case on this and other points.
86. The Tribunal would however add that too much importance should not be attached to the onus of proof in international arbitration. In the end, the question is whether one or the other party has done enough to persuade the tribunal of its case. It is relevant that the fact in question is one which is peculiarly within the knowledge of one or the other party.

## **B. THE TIME-BAR OBJECTION**

### **1. Introduction**

87. Turning to the substance of the time-bar objection, the Respondent argues that the Claimant’s claims relating to the Nova Scotia Measures are time-barred under NAFTA Articles 1116(2) and 1117(2). NAFTA Article 1116(2) provides:

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.

88. NAFTA Article 1117(2) is couched in similar terms:

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.

89. It is common ground between the Disputing Parties that the present dispute was submitted to arbitration on December 30, 2015, making December 30, 2012 the critical date for present purposes. The Respondent contends that the Claimant knew or could not have been unaware of the enactment of the Nova Scotia Measures which constitute the alleged NAFTA breach in this case, and that the Claimant had incurred loss or damage prior to that critical date of December 30, 2012. As such, the Claimant’s case relating to the Nova Scotia Measures is, in the Respondent’s

submission, time-barred.

90. The Claimant, on the other hand, argues that it did not and could not know of its loss or damage as a result of the Nova Scotia Measures before the first quarter of 2013. Therefore, the Claimant submits that it referred this dispute to arbitration in a timely manner.
91. As the Tribunal noted in its Decision on Bifurcation, ‘if successful, the time bar objection could dispose of all claims relating to the Nova Scotia Measures.’<sup>68</sup>

## 2. The Respondent’s Arguments

92. The Respondent submits that the Claimant’s claims related to the Nova Scotia Measures are time-barred in their entirety on the basis that the Claimant knew or ought to have known of its damage or loss more than three years before the submission of its claim to arbitration, i.e., before December 30, 2012. The Respondent raises five arguments in relation to this submission. First, the Claimant alleges that Articles 1116(2) and 1117(2) impose a strict time limit on the initiation of arbitration under NAFTA. Second, the time limits are triggered once the Claimant has either actual or constructive knowledge of loss or damage. Third, the Claimant does not need to know the full extent of its loss or damage to trigger the time-bar period. Fourth, the Claimant in this case did in fact have knowledge of the alleged NAFTA breaches and its loss or damage prior to December 30, 2012. Fifth, the Claimant’s reliance on a ‘continuing’ breach so as to renew the limitation period is misconceived in law and fact.

### (a) Rigidity of the time limit established by Articles 1116(2) and 1117(2) of NAFTA

93. The Respondent submits that NAFTA Articles 1116(2) and 1117(2) ‘impose a strict three-year time limit for a claimant to submit a claim to arbitration in its own behalf or on behalf of an enterprise that it owns or controls.’<sup>69</sup>
94. In the Respondent’s submission, the rigidity of the time limit established by the text of Articles 1116(2) and 1117(2) is ‘not subject to any suspension [...], prolongation or other qualification.’<sup>70</sup>
95. The Respondent submits that compliance with the time limits set out in these provisions is a pre-condition to a NAFTA Party’s consent to arbitration. In this respect, the Respondent relies on

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<sup>68</sup> Procedural Order No. 4, Decision on Bifurcation, November 18, 2016, para 4.10.

<sup>69</sup> Respondent’s Memorial, para 25.

<sup>70</sup> Respondent’s Memorial, para 26 citing *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, para 63 (**RL-021**) (*‘Feldman, Award’*).

NAFTA Article 1122(1) which provides that each NAFTA Party ‘consents to the submission of a claim to arbitration in accordance with the procedures set out in [NAFTA].’<sup>71</sup>

96. Accordingly, the Respondent submits that initiation of this arbitration after the three-year time limit specified by Articles 1116(2) and 1117(2) means that this Tribunal lacks jurisdiction *ratione temporis*.<sup>72</sup> The Respondent points to the awards in *Grand River*,<sup>73</sup> *Apotex*<sup>74</sup> and *Bilcon*<sup>75</sup> as instances where tribunals have dismissed claims following a strict application of the three year time limit.<sup>76</sup>

**(b) Conditions for triggering the time limits under Articles 1116(2) and 1117(2)**

97. The Respondent submits that the plain words of Articles 1116(2) and 1117(2) establish two possible points in time from which the time limit may commence running: (1) the moment when an investor or enterprise ‘first acquired’ knowledge of the alleged breach and loss, or (2) the moment when an investor or enterprise ‘should have first acquired’ knowledge of the alleged breach and loss.<sup>77</sup> Thus either actual or constructive knowledge of the alleged breach and loss would be sufficient to trigger the time limit.<sup>78</sup>
98. By reference to the decision in *Grand River*, the Respondent argues that Articles 1116(2) and 1117(2) require investors to exercise a measure of ‘reasonable care’ and ‘diligence’, thereby preventing a claimant from ‘feign[ing] ignorance of facts it should reasonably have been aware of had it conducted appropriate due diligence’ so as to circumvent the time limitation established under the NAFTA.<sup>79</sup>
99. The Respondent refers this Tribunal to a series of NAFTA decisions in *Grand River*, *Mondev*, and *Bilcon*, as well as the Canada-Venezuela BIT decision in *Rusoro Mining v Venezuela*, in support of the proposition that Articles 1116(2) and 1117(2) do not require a claimant to know

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<sup>71</sup> Respondent’s Memorial, para 23 citing *Methanex*, Partial Award, para 120.

<sup>72</sup> Respondent’s Memorial, para 28.

<sup>73</sup> *Grand River Enterprises Six Nations, Ltd v United States, of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 (**RL-022**) (*‘Grand River, Decision on Objections to Jurisdiction’*).

<sup>74</sup> *Apotex*, Award on Jurisdiction and Admissibility.

<sup>75</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015 (**RL-025**) (*‘Bilcon, Award on Jurisdiction and Liability’*).

<sup>76</sup> Respondent’s Memorial, paras 29-31; Hearing on Jurisdiction and Admissibility, August 15, 2017, 153:24-154:3.

<sup>77</sup> Respondent’s Memorial, para 32; Hearing on Jurisdiction and Admissibility, August 15, 2017, 153:4-11.

<sup>78</sup> Respondent’s Memorial, para 32; Hearing on Jurisdiction and Admissibility, August 15, 2017, 153:12-23.

<sup>79</sup> Respondent’s Memorial, paras 34, 36 citing *Grand River*, Decision on Objections to Jurisdiction, paras 44-73.

the full extent of the damage or loss. Rather, the time limit begins to run from the time the claimant knew or ought to have known that some loss or damage to it has been caused.<sup>80</sup>

100. The Respondent considers the *Mondev* tribunal to have been unequivocal when it stated that ‘a claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear.’<sup>81</sup> Such a position is necessary because, as the *Bilcon* tribunal explained, requiring knowledge of the full extent of damage or loss ‘might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue.’<sup>82</sup>

101. The Respondent considers the Claimant’s interpretation of Articles 1116(2) and 1117(2), which would require the loss or damage to be sufficiently precise before the claimant could know of it, to be incorrect since it would ‘allow claimants to ignore the fact that they have already incurred a loss or damage simply because the amount of that loss or damage will not be measured and reported to the claimants’ investors and the public until the end of the relevant financial reporting period.’<sup>83</sup> This, the Respondent submits, is ‘directly contrary to the ordinary meaning of “incurred”’ which was considered in *Grand River* and where that tribunal found:

A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party’s interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.<sup>84</sup>

102. The Respondent submits that non-NAFTA tribunals arrived at a similar interpretation of time-bar provisions in *Rusoro Mining v Venezuela*, *Corona Materials v Dominican Republic*, *Spence International Investments v Costa Rica*, and *Ansung Housing v China*.<sup>85</sup> The Respondent contends that the only case cited against it on this point, *Pope & Talbot*, was incorrectly decided and inconsistent with the NAFTA and non-NAFTA cases to which it has referred.<sup>86</sup>

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<sup>80</sup> Respondent’s Memorial, para 42 citing *Rusoro Mining Limited v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016 (**RL-030**).

<sup>81</sup> Respondent’s Memorial, para 38 citing *Mondev International Ltd v United States, of America* (ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para 87 (**RL-029**) (*‘Mondev, Award’*); Hearing on Jurisdiction and Admissibility, August 15, 2017, 173:4-14.

<sup>82</sup> Respondent’s Memorial, para 39 citing *Bilcon*, Award on Jurisdiction and Liability, para 275.

<sup>83</sup> Respondent’s Reply Memorial, para 97.

<sup>84</sup> Respondent’s Reply Memorial, para 97, citing *Grand River*, Decision on Objections to Jurisdiction, para 77.

<sup>85</sup> Respondent’s Reply Memorial, paras 98-101.

<sup>86</sup> Respondent’s Reply Memorial, para 103.

(c) **When did the Claimant first acquire (or should have first acquired) knowledge of its loss or damage?**

103. The Respondent explains that since this arbitration was submitted on December 30, 2015, the ‘critical date’ is December 30, 2012.<sup>87</sup> If the Claimant had actual or constructive knowledge of its loss or damage prior to December 30, 2012, then the Respondent submits that the Tribunal lacks jurisdiction *ratione temporis*.
104. The Respondent considers it uncontested that the Nova Scotia Measures were all adopted between September 2011 and September 2012, that is, before the ‘critical date’ of December 30, 2012.<sup>88</sup> The Claimant has not denied that it knew of the implementation of the Nova Scotia Measures at the time and, in any event, could not have been unaware of them given that they were a ‘matter of public record’ and ‘the subject of numerous news releases issued by Nova Scotia, [...] court filings in the CCAA’ and legislative debate in Nova Scotia.’<sup>89</sup> Additionally, the Respondent alleges that ‘the Claimant publicly acknowledged the adoption of the Nova Scotia Measures in November 2012,’ during an Earnings Conference Call.<sup>90</sup>
105. The Respondent submits that the Claimant, with the knowledge of the Nova Scotia Measures by November 2012 at the latest, must have known or could not have been unaware of its loss or damage on the basis of ‘an abundance of market data and analysis available prior to December 30, 2012, which confirmed the impact on Resolute’s market share and SC paper prices.’<sup>91</sup> Since the ‘damage to the Claimant’s competitive position is [...] the only loss or damage that the Claimant attributes directly to the Nova Scotia measures’, it ‘should have known about this alleged competitive disadvantage on September 28, 2012, when the last of the measures were adopted and the sale of the Port Hawkesbury mill to Pacific West closed.’<sup>92</sup>
106. Specifically, the Respondent refers to press reports and industry analysis in October 2012 regarding the capacity of the newly re-opened Port Hawkesbury mill and the effect it would have on market share and prices.<sup>93</sup> For example, one report in November 2012 assessed that ‘Resolute’s 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>94</sup>

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<sup>87</sup> Respondent’s Memorial, para 43.

<sup>88</sup> Respondent’s Memorial, para 45.

<sup>89</sup> Respondent’s Memorial, para 49.

<sup>90</sup> Respondent’s Memorial, para 49, referring to CQ Transcriptions, transcript, ‘Q3 2012 Resolute Forest Products Inc. Earnings Conference Call – Final’ (November 2, 2012), 9 (**R-096**).

<sup>91</sup> Respondent’s Memorial, para 52.

<sup>92</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 220:21-221:10.

<sup>93</sup> Respondent’s Memorial, paras 63-64.

<sup>94</sup> Respondent’s Memorial, para 64, referring to Verle Sutton, *Reel Time*, Special Edition (November 8, 2012), 7 (**R-102**).

Similarly, market data and reports were noting a fall in SC paper prices as a result of the increased capacity due to the reopening of the Port Hawkesbury mill.<sup>95</sup>

107. The Respondent additionally submits that it is ‘not credible’ for the Claimant to argue that it was unaware of its loss or damage until the First Quarter of 2013 since ‘prices for shipments of SC paper are contracted at least a month in advance.’<sup>96</sup> The Respondent points out that the Claimant’s expert, Professor Hausman, accepts that it is industry practice to contract at least a month in advance<sup>97</sup> and considers it conclusive that the Claimant has not led any evidence to contradict either the Respondent’s submission or Professor Hausman’s testimony on this point.<sup>98</sup> The Respondent refers to the findings of the US ITC that ‘lead times between order and delivery dates range from 35 to 45 days for US producers and 28 to 45 days for US importers,’ which took into account Resolute’s firm-specific lead times that have not been put into evidence by the Claimant before this Tribunal.<sup>99</sup> The Respondent, therefore, concludes that the Claimant must have known ‘in November or December 2012 what its January 2013 prices were going to be.’<sup>100</sup> The Respondent submits that this was widely reported in industry publications and data at the time and acknowledged simultaneously by Resolute’s competitors.<sup>101</sup> The Respondent notes that even though the Claimant criticizes these market data and forecasts as ‘speculation and prognostication,’ the Respondent considers that ‘they were accurate’ and ‘the Claimant has not cited a single divergent opinion from the industry publications at that time.’<sup>102</sup>
108. The Respondent also points to five instances where, it alleges, the Claimant acknowledged that it had incurred loss or damage starting in 2012. The Respondent submits that any one of these five facts alone would ‘be sufficient to establish Resolute’s knowledge of the alleged loss or damage before the critical date.’<sup>103</sup> First, the Respondent refers to a draft notice of intent to submit a claim to arbitration under NAFTA Chapter Eleven presented to it on February 24, 2015 (the ‘**Draft NOI**’) which alleged that ‘Resolute’s market share for all SC Paper has declined from 2012 to

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<sup>95</sup> Respondent’s Memorial, paras 65-67.

<sup>96</sup> Respondent’s Memorial, paras 66, 68; Respondent’s Reply Memorial, paras 69-70.

<sup>97</sup> Respondent’s Reply Memorial, para 71, referring to Hausman Statement, para 7 and fn. 29.

<sup>98</sup> Respondent’s Reply Memorial, para 72.

<sup>99</sup> Respondent’s Reply Memorial, paras 70, 72; Hearing on Jurisdiction and Admissibility, August 15, 2017, 229:16-230:14.

<sup>100</sup> Respondent’s Reply Memorial, para 72.

<sup>101</sup> Respondent’s Reply Memorial, paras 74-91; Hearing on Jurisdiction and Admissibility, August 15, 2017, 197:13-18.

<sup>102</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 233:5-11.

<sup>103</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 198:20-23.

2014’ as a result of the Nova Scotia Measures.<sup>104</sup> The Respondent asks this Tribunal to disregard the Claimant’s description of this document as a ‘non-paper’ and ‘rough internal draft’ and instead characterises the Notice as ‘a carefully crafted document which the Claimant’s President and CEO, Mr Richard Garneau, presented to Canada’s Minister of International Trade during an in-person meeting in order to threaten legal action against Canada.’<sup>105</sup>

109. The Respondent also considers the Claimant’s allegation that it has ‘misread’ the Draft NOI as ‘hollow’.<sup>106</sup> Contrary to the Claimant’s allegation, the meaning of the word ‘from’ used in the Draft NOI can only be understood as ‘starting in’, therefore revealing a decline in market share ‘starting in’ 2012, not merely noting a drop in market share in 2014 vis-à-vis market share held in 2012.<sup>107</sup> The Respondent also considers the Draft NOI to have ‘significant probative value’ given the time at which it was prepared and submitted to the Canadian government.<sup>108</sup>
110. Second, the Respondent alleges that the Claimant did not have to wait until the reopening of the Port Hawkesbury mill in September 2012 to know of its loss or damage. The Respondent refers to a transcript of a conference call relating to Resolute’s 2012 second quarter results and Mr Garneau’s comment that the restart of the Port Hawkesbury mill would ‘certainly have an impact on the market’ and it would be ‘impossible not to have an impact on the market.’<sup>109</sup>
111. Third, the Respondent points to the Claimant’s decision to shut down a paper machine at its Laurentide mill in November 2012 based on both a drop in demand and increase in market capacity elsewhere as evidence that the Claimant knew of the impact of the Port Hawkesbury mill’s restart.<sup>110</sup> The Respondent alleges that references by senior management of the Claimant to ‘increased market capacity’ could only refer to the re-opening of the Port Hawkesbury mill since: (a) the only other increase in capacity at the relevant time was from another Resolute mill in August 2012; and (b) a public statement by Mr Pierre Choquette (a spokesman for the

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<sup>104</sup> Respondent’s Memorial, para 54, referring to Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (February 24, 2015), para 19 (**R-081**); Respondent’s Reply Memorial, paras 26, 30.

<sup>105</sup> Respondent’s Memorial, para 55; Hearing on Jurisdiction and Admissibility, August 15, 2017, 223:15-224:16.

<sup>106</sup> Respondent’s Reply Memorial, para 31.

<sup>107</sup> Respondent’s Reply Memorial, para 31; Hearing on Jurisdiction and Admissibility, August 15, 2017, 196:8-197:12.

<sup>108</sup> Respondent’s Reply Memorial, paras 32-33.

<sup>109</sup> Respondent’s Memorial, para 56, referring to Resolute Forest Products Inc., Form 8-K (August 1, 2012), Exhibit 99.2: Transcript of Earnings Conference Call Held on August 1, 2012, p. 10 (**R-097**); Respondent’s Reply Memorial, para 26.

<sup>110</sup> Respondent’s Memorial, paras 58-61.

Claimant) directly referred to the restart of a competitor mill in Nova Scotia.<sup>111</sup>

112. The Respondent submits that the Claimant's allegation that Line #10 at the Laurentide mill closed down due to the reopening of the Dolbeau mill 'contradicts its earlier contemporaneous public statements'<sup>112</sup> as well as the public record.<sup>113</sup> In the Respondent's view, this contradiction and the lack of corroborating evidence 'destroys the credibility of a claimant's assertions'.<sup>114</sup>
113. The Respondent submits that it would be irrelevant if the Claimant could establish other reasons for the closure of Line #10 since it has already cited 'the reopening of Port Hawkesbury as one of its main reasons.'<sup>115</sup> The Respondent considers irrelevant the Claimant's suggestion that there was uncertainty about the reopening of Port Hawkesbury since Line #10 was not closed until November 6, 2012, over a month after Port Hawkesbury was reopened in September 2012.<sup>116</sup> The Respondent points to a number of public statements throughout 2011 and 2012 where the Claimant expressed uncertainty about the reopening of Dolbeau and the effect that might have on its other operations; it submits that as late as August 2012, when the Dolbeau mill was finally reopened, Mr Garneau made public statements in reassurance that the reopening of Dolbeau would not affect the Laurentide mill.<sup>117</sup>
114. Fourth, the Respondent also points to public statements surrounding the temporary shutdown of Line #11 at the Laurentide mill on December 19, 2012, one month after the permanent shutdown of Line #10, which 'explicitly cited the reopening of the Port Hawkesbury mill as one of the reasons for this decision.'<sup>118</sup>
115. By contrast to the publicly available evidence relied on above, the Respondent considers the Claimant to have 'failed to provide any direct or credible response in its Counter-Memorial to refute its past admissions' and finds it 'remarkabl[e]' that the Claimant has not presented a witness

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<sup>111</sup> Respondent's Memorial, para 60, referring to Radio-Canada, 'Shawinigan: 111 emplois perdus à l'usine Laurentide' (November 6, 2012) (**R-101**); Respondent's Reply Memorial, paras 26, 36, referring to 'Résolu va mettre à pied 111 travailleurs', *Le Journal de Montréal*, November 6, 2012 (**R-115**), and 'Résolu va mettre à pied 110 travailleurs' *TVA*, November 6, 2012 (**R-116**); Hearing on Jurisdiction and Admissibility, August 15, 2017, 197:19-198:8, 236:25-238:25.

<sup>112</sup> Respondent's Reply Memorial, para 34.

<sup>113</sup> Respondent's Reply Memorial, para 43.

<sup>114</sup> Respondent's Reply Memorial, para 44.

<sup>115</sup> Respondent's Reply Memorial, para 45.

<sup>116</sup> Respondent's Reply Memorial, para 46.

<sup>117</sup> Respondent's Reply Memorial, paras 48-60.

<sup>118</sup> Respondent's Reply Memorial, para 41, referring to Guy Veillette, 'Un marché difficile, répète Produits forestiers Résolu', *Le Nouvelliste*, December 19, 2012 (**R-120**); Hearing on Jurisdiction and Admissibility, August 15, 2017, 239:1-15.

of fact ‘who is willing and able to attest to what it actually knew during the relevant period.’<sup>119</sup> The Respondent submits that these uncontested contemporaneous statements from Resolute ‘demonstrat[e] that Resolute actually knew that the reopening of Port Hawkesbury had caused it the loss or damage that it claims in this arbitration’ and the statements therefore have great probative value.<sup>120</sup>

116. By comparison, the Respondent submits that Professor Hausman’s report has ‘no probative value’ since: (a) he conceded during cross-examination ‘that he has no experience working in sales or marketing of supercalendered paper’ and so ‘can’t offer an opinion on what a reasonable producer should have known and when based on specialized industry knowledge or expertise’; (b) the report is not based on interviews with Resolute’s employees or managers about their actual knowledge; (c) the report ‘relies on a limited amount of data which was curated by Resolute’; (d) his regression analysis used a market price index instead of prices from Resolute or, more specifically, Laurentide; and (e) he considered the weighted average price of three Resolute mills combined, rather than the Laurentide mill in isolation.<sup>121</sup>
117. Fifth, the Respondent considers the Claimant to have selectively cited statements of PHP during an Antidumping and Countervailing Duty Investigation pursued by the US International Trade Commission and says the Claimant has taken those statements out of context.<sup>122</sup> For example, the Claimant is alleged to have omitted the fact that the US ITC did not accept PHP’s submission that it was ‘impossible for PHP to cause any injury in 2012.’<sup>123</sup> Similarly, the Claimant is said to have omitted PHP’s testimony that it had customers ‘willing and able to start business with us shortly after we restarted’ leading to a production in 2012 of 72,000 metric tonnes.<sup>124</sup> This amounted to ‘20 per cent of the Port Hawkesbury mill’s total annual production capacity [...] and [...] as much as the average quarterly production capacity and actual sales tonnage of Resolute’s Laurentide and Dolbeau mills combined.’<sup>125</sup>
118. The Respondent concludes on the basis of the above that the Claimant was not, and could not have been, unaware that ‘a loss or damage in the form of decreased market share, lower prices and a competitive disadvantage’ would be incurred as soon as the Port Hawkesbury mill reopened

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<sup>119</sup> Respondent’s Reply Memorial, paras 27-28; Hearing on Jurisdiction and Admissibility, August 15, 2017, 20:22-22:13.

<sup>120</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 199:1-6, August 16, 2017, 422:18-423:17.

<sup>121</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 204:21-207:14.

<sup>122</sup> Respondent’s Reply Memorial, para 61.

<sup>123</sup> Respondent’s Reply Memorial, para 62, referring to *In Re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion, p. 25 (C-054).

<sup>124</sup> Respondent’s Reply Memorial, para 64, citing October US ITC Transcript p. 240:14-24 (C-052).

<sup>125</sup> Respondent’s Reply Memorial, paras 64-66.

on October 3, 2012 with the support of the Nova Scotia Measures.<sup>126</sup> Accordingly, the time-bar clock started to run from October 3, 2012 and as such, the Claimant's submission of this arbitration on December 30, 2015 is out of time insofar as it concerns the Nova Scotia Measures.<sup>127</sup>

119. The Respondent submits that if the Tribunal nonetheless determines that it has insufficient evidence to make a determination on this matter, the Tribunal should dismiss the claim on the basis that the Claimant has failed to meet its burden to establish the Tribunal's jurisdiction.<sup>128</sup> Alternatively, the Respondent submits that the Tribunal should join the time bar issue to the merits so as to avoid a decision at this stage that would be *res judicata*.<sup>129</sup> Finally, the Respondent suggested that the Tribunal should order a targeted production of documents on the part of the Claimant directed at disclosing the internal state of knowledge of its senior executives.<sup>130</sup>
120. In any event, the Respondent observes that if the Claimant succeeds on the time bar issue, that establishes a 'jurisdictional dilemma that [...] prevents the expropriation claim from proceeding' to the merits phase since:

If the substantial deprivation was unknown and unknowable until the intervening actions of Port Hawkesbury [...] then the Nova Scotia measures did not relate to the Claimant, and the expropriation was not a measure adopted or maintained by Canada. But if the substantial deprivation was known or should have been known by Nova Scotia, then Resolute also knew and so did everyone else in the market.<sup>131</sup>

**(d) Whether the Nova Scotia Measures constitute a continuing breach**

121. The Respondent asks the Tribunal to reject the Claimant's contention that the Nova Scotia Measures are 'ongoing measures' that constitute 'continuing violations' of NAFTA and so are not time-barred.<sup>132</sup> The Respondent raises two arguments in this respect.
122. First, the Respondent submits that the notion of 'continuing breach' would disregard the plain wording of Articles 1116(2) and 1117(2) which provide that the time-bar starts to run once the Claimant '*first* acquired, or should have *first* acquired knowledge of the alleged breach and loss.'<sup>133</sup> To interpret Articles 1116(2) and 1117(2) otherwise would go against the consistent

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<sup>126</sup> Respondent's Memorial, para 69; Respondent's Reply Memorial, para 93-94.

<sup>127</sup> Respondent's Memorial, paras 70-71.

<sup>128</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 189:12-190:5; August 16, 2017, 421:12-422:3.

<sup>129</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 422:4-11.

<sup>130</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 190:5-191:15; August 16, 2017, 422:1-3.

<sup>131</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 219:5-18.

<sup>132</sup> Respondent's Memorial, para 72.

<sup>133</sup> Respondent's Memorial, para 73 (emphasis in original).

findings of NAFTA tribunals and the practice of the NAFTA Parties themselves.<sup>134</sup>

123. Second, the Respondent submits that a continuing breach argument is not sustainable as a matter of fact since the Nova Scotia Measures were all concluded prior to the ‘critical date’ of December 30, 2012.<sup>135</sup> The Respondent draws a distinction between ‘continuing acts and completed acts that continue to cause loss or damage’, with the Nova Scotia Measures possibly falling into the latter category, but certainly not the former.<sup>136</sup>

**(e) The alleged breaches that took place after December 30, 2012**

124. The Respondent submits that the Claimant’s reliance on a January 2013 electricity regulation allegedly granting a C\$6-8 million yearly benefit to Port Hawkesbury did not appear in its Notice of Arbitration and Statement of Claim and was introduced in its Counter Memorial.<sup>137</sup> The Respondent submits that the Claimant’s submissions only on this topic are ‘outside of the scope of claims that Resolute submitted to arbitration’ and, unless the Claimant is permitted to amend its claim under Article 20 of the UNCITRAL Rules, should be ignored.<sup>138</sup>
125. In any event, the Respondent submits that any claim based on the January 2013 Renewable Energy Regulations is also time-barred since any arbitration based thereon would have had to have been submitted by January 2016.<sup>139</sup> Since this claim was omitted from the Claimant’s Notice of Arbitration and Statement of Claim, it would be out of time even if the Tribunal allowed the Claimant to amend its claim.<sup>140</sup>
126. The Respondent also considers it ‘specious’ for the Claimant to contend that its expropriation claim under Article 1110 is brought within time because the expropriation did not occur until October 2014, i.e., the date the Claimant shut down the Laurentide mill.<sup>141</sup> It is uncontested that the Nova Scotia Measures were all adopted in 2012, therefore they could not give rise to a case of ‘creeping expropriation’ here since the Claimant cannot point to any conduct in 2013 or 2014 that forms the basis of an expropriation claim.<sup>142</sup> Rather, the Claimant’s current formulation of its case demonstrates that no legally significant connection exists between the Nova Scotia Measures

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<sup>134</sup> Respondent’s Memorial, para 73.

<sup>135</sup> Respondent’s Memorial, para 74.

<sup>136</sup> Respondent’s Memorial, para 75.

<sup>137</sup> Respondent’s Reply Memorial, para 105.

<sup>138</sup> Respondent’s Reply Memorial, paras 104, 109; Hearing on Jurisdiction and Admissibility, August 15, 2017, 194:15-18, 208:11-210:12.

<sup>139</sup> Respondent’s Reply Memorial, para 109.

<sup>140</sup> Respondent’s Reply Memorial, paras 109-110.

<sup>141</sup> Respondent’s Reply Memorial, paras 111-112.

<sup>142</sup> Respondent’s Reply Memorial, para 112.

and its investment.<sup>143</sup>

127. The Respondent also notes that part of the Claimant's allegedly expropriated property included its sales and market share. While the Respondent denies these are assets capable of expropriation, it submits that if the Claimant were right on this point, it must have first acquired knowledge of the alleged breach as well as its loss and damage prior to December 30, 2012 and so would also be time-barred under Articles 1116(2) and 1117(2).<sup>144</sup>
128. Finally, the Respondent argues that acceptance of the Claimant's argument regarding the date of expropriation and the consequent effect on time-bar would lead to an absurd result in NAFTA arbitration. For example, the Respondent recalls that the Claimant reserved the right to claim expropriation in the event its Dolbeau and Kénogami mills closed as a result of the Nova Scotia Measures. The Respondent argues that permitting a claimant to rely on the date it decided to close its mill up to six or more years after the impugned measures were adopted would render the time limitation under Articles 1116(2) and 1117(2) irrelevant.<sup>145</sup>

### **3. The Claimant's Arguments**

#### **(a) Conditions for triggering the time limits under Articles 1116(2) and 1117(2)**

129. The Claimant submits that the three-year time limits established under Articles 1116(2) and 1117(2) are triggered upon the Claimant having actual or constructive knowledge of both (a) a breach of NAFTA and (b) loss or damage that has been incurred as a result of such a breach.<sup>146</sup> Contrary to the Respondent's submission, the Claimant argues that its knowledge must relate to losses or damages that have been 'incurred'; knowledge of the probability or likelihood of damages being insufficient to trigger the time limit.<sup>147</sup> In this respect, the Claimant relies on the decision in *Pope & Talbot* where the tribunal held 'the 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>148</sup>
130. The Claimant characterises the Respondent's argument that the time period runs even if a claimant does not know the 'full extent' of its loss or damage as an obfuscation and seeks to distinguish

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<sup>143</sup> Respondent's Reply Memorial, para 111.

<sup>144</sup> Respondent's Reply Memorial, para 115.

<sup>145</sup> Respondent's Reply Memorial, para 113.

<sup>146</sup> Claimant's Counter Memorial, para 56; Hearing on Jurisdiction and Admissibility, August 15, 2017, 258:19-24.

<sup>147</sup> Claimant's Counter Memorial, para 57.

<sup>148</sup> Claimant's Counter Memorial, para 57.

the *Mondev*, *Grand River* and *Bilcon* decisions relied upon by the Respondent.<sup>149</sup> The Claimant points out that in *Mondev*, the tribunal found that the claimant knew of its damage in 1992 when it brought proceedings in US courts, this was seven years before it filed its NAFTA claim and the claimant was therefore clearly out of time.<sup>150</sup> In *Grand River*, the statutory obligation to make payment into a 25 year escrow was sufficient to constitute ‘loss or damage’ under Articles 1116 and 1117 despite the fact that the payments were not yet due.<sup>151</sup> Finally, in *Bilcon*, the tribunal determined that damages arising from the Claimant’s loss of quarry operations as of May 2004 were sufficiently certain although not precisely quantified and therefore out of time since the arbitration was only commenced in June 2008. This finding was in spite of the fact that the relevant Canadian federal minister did not accept the results of the Joint Review Panel until December 2007.<sup>152</sup> The additional non-NAFTA decisions referred to by the Respondent in its Reply Memorial are, according to the Claimant, also distinguishable since ‘in each case, there was no serious dispute that the incurred damage was caused by the breaches.’<sup>153</sup>

131. By contrast, the Claimant submits that *Pope & Talbot* is ‘factually similar to the instant dispute’ and therefore the more persuasive authority.<sup>154</sup> In that case, the Canadian government unsuccessfully argued that the investor knew or should have known of its loss or damage at the time the relevant regulation was enacted, four years prior to the investor submitting the dispute to arbitration.<sup>155</sup> A similar outcome should be reached in this case since Canada here, like in *Pope & Talbot*, ‘relies upon uncertain market responses’ to ‘retrospective[ly] speculate’ without affirmative evidence that the Claimant knew or ought to have known of its loss or damage in 2012.<sup>156</sup>

**(b) When did the Claimant first acquire (or should first have acquired) knowledge of its loss or damage?**

132. Contrary to the Respondent’s contention that Resolute knew or could not have been unaware of the effect of the re-entry of the Port Hawkesbury mill on the market following the implementation of the Nova Scotia Measures, the Claimant submits that ‘there was great uncertainty as to the immediate likely effects of Port Hawkesbury’s re-entry into the market, and the statute of

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<sup>149</sup> Claimant’s Counter Memorial, para 58; Claimant’s Rejoinder Memorial, para 89.

<sup>150</sup> Claimant’s Counter Memorial, paras 60-61.

<sup>151</sup> Claimant’s Counter Memorial, para 62; Claimant’s Rejoinder Memorial, para 57.

<sup>152</sup> Claimant’s Counter Memorial, para 63.

<sup>153</sup> Claimant’s Rejoinder Memorial, para 90.

<sup>154</sup> Claimant’s Counter Memorial, para 64.

<sup>155</sup> Claimant’s Counter Memorial, para 64.

<sup>156</sup> Claimant’s Counter Memorial, paras 65-66; Claimant’s Rejoinder Memorial, para 91.

limitations is not triggered by probability, anticipation, fear or speculation.’<sup>157</sup> The Claimant maintains that it did not know of any loss or damage until the first quarter of 2013 and makes six submissions in support of this contention.<sup>158</sup>

133. First, the uncertainty surrounding the Port Hawkesbury mill reopening, longevity and the effect of its entry into the market is critical, in the Claimant’s view, in demonstrating that it could not have known of its loss or damage prior to December 30, 2012. The Claimant submits that the US ITC proceedings regarding Port Hawkesbury confirm the uncertainty surrounding the re-opening of the mill and that losses could not have been incurred before 2013. Counsel for PHP stated that: ‘PHP didn’t really get into the market until 2013. As such, it’s impossible for PHP to cause any injury in 2012.’<sup>159</sup> Additionally, PHP’s counsel noted that upon its re-entry in the market, PHP deliberately sought to avoid disrupting the US market by exporting its product.<sup>160</sup> Similarly, the American petitioners noted the uncertainty surrounding the re-entry of PHP in the market, the volume of sales it might make and the effect it would have on the market.<sup>161</sup> All of this demonstrates that PHP was not ‘in the market’ in any significant way before 2013.’<sup>162</sup> These statements, the Claimant says, ‘are consistent with Prof. Hausman’s findings that PHP did not affect the market (or cause Resolute to incur damages) in 2012.’<sup>163</sup>
134. The Claimant acknowledges that ‘after September 28, 2012 [...] PHP had reopened and would have some effect on the market, but no thoughtful or responsible observer was certain what the effect might be.’<sup>164</sup> Accordingly, the Claimant regards as implausible the Respondent’s argument that the Claimant knew or should have known of its loss or damage immediately upon the reopening of Port Hawkesbury mill.<sup>165</sup>
135. Second, the Claimant relies on the expert report of Professor Jerry Hausman asserting that ‘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>166</sup> Professor Hausman concludes that given Resolute’s 2012 results ‘showed no harm caused by Port Hawkesbury’,

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<sup>157</sup> Claimant’s Counter Memorial, para 67.

<sup>158</sup> Claimant’s Counter Memorial, para 68.

<sup>159</sup> Claimant’s Counter Memorial, para 71, referring to March 18, 2015 US ITC Transcript at 14:7-9 (**R-083**); Claimant’s Rejoinder Memorial, para 60.

<sup>160</sup> Claimant’s Rejoinder Memorial, para 61, referring to March 19, 2015 US ITC Transcript at 14:22-15:2 (**R-083**).

<sup>161</sup> Claimant’s Counter Memorial, para 73.

<sup>162</sup> Claimant’s Counter Memorial, para 73.

<sup>163</sup> Claimant’s Rejoinder Memorial, para 62.

<sup>164</sup> Claimant’s Rejoinder Memorial, para 58.

<sup>165</sup> Claimant’s Rejoinder Memorial, para 59.

<sup>166</sup> Claimant’s Counter Memorial, para 74, citing Hausman Statement, para 14.

‘Resolute would not have been able to determine the negative effects of PHP’s reopening until at least Q2 2013.’<sup>167</sup> The Claimant relies on its own data and Professor Hausman’s analysis to show that prices and sales quantities in the fourth quarter of 2012 were not affected by Port Hawkesbury’s reopening.<sup>168</sup> However, a price decrease was observed from the first quarter of 2013 and diminution in Resolute’s sales quantities after Q1 2013, although these sales volumes were ‘consistent with sales in [Q1 2012].’<sup>169</sup>

136. Third, the Claimant submits that the Respondent has failed to meet its evidential burden regarding the potential market effects of the reopening of the Port Hawkesbury mill and accuses the Respondent of selectively and misleadingly quoting certain statements of the Claimant’s CEO.<sup>170</sup> For example, in relation to an August 2012 conference call quoted by the Respondent, the Claimant points to other extracts in which its CEO ‘pushed back against the notion that it was going to incur loss or damages’ and expressed a desire to compete with Port Hawkesbury, even foreseeing ‘some improvement’ in Q4 2012.<sup>171</sup> Similar confidence in Resolute’s ability to compete was expressed in a November 2012 Earnings Conference Call, this portion having been omitted by the Respondent.<sup>172</sup>
137. Fourth, the Respondent’s selective reliance on various market forecasts is misplaced given that these forecasts are necessarily speculative and the forecasters in this case have acknowledged that their forecasts were incorrect.<sup>173</sup> For example, predictions regarding a surge in imports and price fall were ultimately proved to be incorrect with PHP ‘mov[ing] “seamlessly into the market”’ instead.<sup>174</sup> The Claimant considers these forecasts to be ‘legally irrelevant’ for determining when the Claimant knew or ought to have known of its loss or damage.<sup>175</sup>
138. Fifth, the Claimant submits that the Respondent erroneously relies on its February 2015 Draft Notice of Intent to submit a claim to arbitration.<sup>176</sup> For one thing, the Claimant notes that this document was merely a ‘Draft Only’ and ‘Strictly Confidential’ paper that was intended to

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<sup>167</sup> Claimant’s Counter Memorial, para 74, citing Hausman Statement, para 27; Hearing on Jurisdiction and Admissibility, August 15, 2017, 48:9-22.

<sup>168</sup> Claimant’s Counter Memorial, paras 75-77; Hearing on Jurisdiction and Admissibility, August 15, 2017, 259:19-260:7.

<sup>169</sup> Claimant’s Counter Memorial, paras 78-79.

<sup>170</sup> Claimant’s Counter Memorial, paras 82-83.

<sup>171</sup> Claimant’s Counter Memorial, para 84.

<sup>172</sup> Claimant’s Counter Memorial, para 85.

<sup>173</sup> Claimant’s Counter Memorial, paras 87-88.

<sup>174</sup> Claimant’s Counter Memorial, para 88, referring to PHP Post. Conf. Br. At Attachment D (C-044); March 2013 *Reel Time Report*, pp. 4-5 (C-026).

<sup>175</sup> Claimant’s Counter Memorial, para 89.

<sup>176</sup> Claimant’s Counter Memorial, paras 94-97.

‘initiate a conversation that might lead to compensation for Resolute.’<sup>177</sup> Additionally, this document does not, as the Respondent believes, reveal that the Claimant knew of its loss or damage in 2012, but only specifies that ‘Resolute’s market share for all SC Paper has declined from 2012 to 2014.’<sup>178</sup> That is to say, ‘Resolute’s market share for SC paper was less in 2014 than it was in 2012.’<sup>179</sup> The Claimant rebuffs the Respondent’s assertion that the word ‘from’ in the draft NOI must be understood as a ‘starting point’ for the loss of market share.<sup>180</sup> The Claimant points to the Respondent’s own Reply Memorial as conflating ‘from December 2012’ with ‘in January 2013’ as a demonstration that the phrase ‘from 2012’ in the draft NOI does not have the meaning ascribed to it by the Respondent.<sup>181</sup>

139. The Claimant considers the Respondent’s focus on the supercalendered paper price forecasts between 2012 and 2014 to be defective for five key reasons:

- i. despite the Respondent’s assertions, the Claimant’s volumes and profits did not decline between December 2012 and January 2013, which are insufficient in any event to constitute a broader trend;<sup>182</sup>
- ii. the Respondent has not presented evidence that prices decreased in December 2012, rather it accepts they held firm, so the Claimant had not incurred loss in December 2012;<sup>183</sup>
- iii. the seasonality of prices means that ‘it is not uncommon for prices to go down in January’ and no causal link has been demonstrated between the reopening of Port Hawkesbury and any price decrease in January 2013. In fact, the prices recovered in February 2013;<sup>184</sup>
- iv. the Respondent’s assertion that the Claimant must have known of the price decrease in January 2013 because of its 28-45 day contract conclusion lead time disregards the fact that the Claimant’s prices actually rose in February 2013 and this upcoming increase would have been known at a similar time;<sup>185</sup> and

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<sup>177</sup> Claimant’s Counter Memorial, para 96, referring to Letter from Richard Garneau to Minister Ed Fast (March 2, 2015) (**R-082**).

<sup>178</sup> Claimant’s Counter Memorial, para 95, citing Resolute Draft Notice of Arbitration, para 19 (**R-081**).

<sup>179</sup> Claimant’s Counter Memorial, para 95.

<sup>180</sup> Claimant’s Rejoinder Memorial, paras 38-40.

<sup>181</sup> Claimant’s Rejoinder Memorial, para 41, referring to Respondent’s Reply Memorial, para 86.

<sup>182</sup> Claimant’s Rejoinder Memorial, para 43.

<sup>183</sup> Claimant’s Rejoinder Memorial, para 44; Hearing on Jurisdiction and Admissibility, August 15, 2017, 66:20-67:1.

<sup>184</sup> Claimant’s Rejoinder Memorial, paras 45, 51-52; Hearing on Jurisdiction and Admissibility, August 15, 2017, 260:8-261:3.

<sup>185</sup> Claimant’s Rejoinder Memorial, para 46; Hearing on Jurisdiction and Admissibility, August 15, 2017, 73:13-77:15.

- v. there continued to be uncertainty surrounding the long term viability of Port Hawkesbury and the later increase in market prices in 2013 demonstrates that Port Hawkesbury's reentry in the market did not have such a dramatic effect.<sup>186</sup> In this regard, the Claimant argues 'a lot of people at the time said – and a customer said at the ITC in the hearing, "This place failed before. It lost its customers. Will the customers come back and trust it again?" Nobody knew for sure. And that was the underestimate, as I tried to suggest, of just how committed the Nova Scotia government was to make it succeed.'<sup>187</sup>
140. Sixth, the Respondent's assertion that the Claimant closed Line #10 at its Laurentide mill because of the reopening of Port Hawkesbury is factually incorrect. The Claimant points out that it attributed the closure of Line #10 to the reopening of the 'more modern and efficient Dolbeau plant' throughout 2011 and 2012, with the reopening of Port Hawkesbury not being certain until September 2012.<sup>188</sup> The Claimant does acknowledge that the closure of Line #11 was attributable to Port Hawkesbury.<sup>189</sup> However, the Claimant disagrees with the Respondent that the temporary shutdown of Line #11 in 2012 was to be attributed to PHP, but was rather scheduled to coincide with the seasonal downturn in demand.<sup>190</sup>
141. The Claimant considers the Respondent's reliance on a particular statement by Resolute's spokesman, Pierre Choquette, regarding the closure of Line #10 to be misconceived.<sup>191</sup> In fact, M. Choquette referenced the opening of Port Hawkesbury as potentially just one of 'several factors' leading to the closure of Line #10, and M. Garneau had elsewhere unambiguously referred to the fact that the reopening of Dolbeau would lead to the closure of another Resolute mill or machine.<sup>192</sup> Elsewhere, M. Choquette repeated the CEO's message that the closure of Line #10 related to the decision to reopen Dolbeau and was unrelated to Port Hawkesbury.<sup>193</sup> At the Hearing on Jurisdiction and Admissibility, the Claimant also explained that 'the decision [to close Line #10] had been taken a full year earlier [...] but a company doesn't show fully its hand when it has workers who are going to be very distressed in a town that depends completely on that mill.'<sup>194</sup>

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<sup>186</sup> Claimant's Rejoinder Memorial, para 47; Hearing on Jurisdiction and Admissibility, August 15, 2017, 95:7-98:20, 274:14-275:2.

<sup>187</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 279:12-22.

<sup>188</sup> Claimant's Counter Memorial, paras 98-107; Claimant's Rejoinder Memorial, paras 64, 66-83.

<sup>189</sup> Claimant's Rejoinder Memorial, paras 64, 68.

<sup>190</sup> Claimant's Rejoinder Memorial, para 79.

<sup>191</sup> Claimant's Rejoinder Memorial, para 71.

<sup>192</sup> Claimant's Rejoinder Memorial, paras 71-73.

<sup>193</sup> Claimant's Rejoinder Memorial, para 76, referring to Guy Veillette, '111 emplois perdus chez Laurentide', *Le Nouvelliste*, November 7, 2012 (**R-117**).

<sup>194</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 283:24-284:5.

**(c) Certain NAFTA breaches were only known to the Claimant after December 30, 2012**

142. While the Claimant acknowledges that certain breaches (but not loss or damage) were known by it by September 28, 2012, it submits that other breaches were not known to it until after December 30, 2012.<sup>195</sup> The Claimant refers to two breaches that arose after December 30, 2012: the expropriation of the Laurentide mill which only occurred after the mill closed in October 2014, and a January 2013 Nova Scotia Measure relating to a biomass facility providing Port Hawkesbury with a C\$6 to 8 million benefit.<sup>196</sup> These two claims remain timely notwithstanding the outcome of the Respondent's jurisdictional objection in relation to the other claims.<sup>197</sup>
143. First, in relation to the Claimant's expropriation claim, the Claimant submits that it could not have known of the Respondent's breach of NAFTA Article 1110 until it had been substantially deprived of its investment in the Laurentide mill.<sup>198</sup> This, the Claimant says, did not occur until the Laurentide mill closed in October 2014, after the critical date of December 30, 2012 and therefore within time for the purposes of Articles 1116(2) and 1117(2).<sup>199</sup> The Claimant explained during the Hearing on Jurisdiction and Admissibility that the Laurentide mill had been sold in January 2016, and that 'it's no longer owned at all by Resolute. It's in other hands, and, therefore, the mill could not possibly be restored or reopened.'<sup>200</sup>
144. The Claimant submits that the closure of Line #10 – which, in any event, was not attributable to the reopening of Port Hawkesbury – would not constitute a 'substantial deprivation' of its investment so as to amount to a breach of Article 1110.<sup>201</sup> The Claimant considers the Respondent's policy arguments regarding the operation of the time bar in relation to expropriation claims to be more prejudicial to investors than the NAFTA Parties if accepted since a 'claimant could be forced to bring an unripe NAFTA expropriation claim' that would necessarily be dismissed.<sup>202</sup> The Claimant also disavows the Respondent's allegation that the expropriation claim considers sales and market share to have been expropriated, explaining instead that these are cognizable damages even if they are not capable of expropriation. Its claim instead relies on

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<sup>195</sup> Claimant's Counter Memorial, para 108.

<sup>196</sup> Claimant's Counter Memorial, para 109.

<sup>197</sup> Claimant's Counter Memorial, para 109.

<sup>198</sup> Claimant's Counter Memorial, para 110; Claimant's Rejoinder Memorial, para 94; Hearing on Jurisdiction and Admissibility, August 25, 2017, 36:20-23.

<sup>199</sup> Claimant's Counter Memorial, paras 111-113; Hearing on Jurisdiction and Admissibility, August 15, 2017, 290:23-291:2.

<sup>200</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 37:23-38:9, 285:11-24.

<sup>201</sup> Claimant's Counter Memorial, para 114.

<sup>202</sup> Claimant's Rejoinder Memorial, para 97.

the closure of the Laurentide mill in 2014.<sup>203</sup>

145. Second, the Claimant refers to the fact that Port Hawkesbury ‘used steam provided by a Nova Scotia Power biomass facility to make its paper.’<sup>204</sup> The Claimant alleges that the biomass facility needed to run full time to power Port Hawkesbury, but Port Hawkesbury was only required to pay for the amount of energy it used, i.e., 24 per cent, with the remaining 76 per cent being passed on to ratepayers.<sup>205</sup> The passing down of costs was approved by the Nova Scotia Government by a regulation it passed in January 2013.<sup>206</sup> This regulation constituted a C\$6-8 million benefit to Port Hawkesbury and occurred after the critical date of December 30, 2012 so is nonetheless admissible.<sup>207</sup> Contrary to the Respondent’s contention that this argument was raised for the first time in the Claimant’s Counter Memorial and is therefore out of time, the Claimant submits that these measures formed part of the ‘electricity benefits received by PHP and identified by Resolute in its Statement of Claim.’<sup>208</sup> In the event that the Claimant is required to amend its claim (which it does not believe it ought), the Claimant submits that the Tribunal should permit such an amendment as no prejudice would accrue to the Respondent; the arbitrators would only need to address this claim in the merits phase of this arbitration, there being no identified jurisdictional objection to this claim.<sup>209</sup>

#### 4. The Non-Disputing NAFTA Parties’ Comments

146. The United States supports the Respondent’s contention that the limitation period established by Articles 1116(2) and 1117(2) are ‘clear and rigid’ and ‘not subject to any “suspension”, “prolongation”, or “other qualification”.’<sup>210</sup>
147. Further, the United States agrees with the Respondent’s interpretation of the plain text of Articles 1116(2) and 1117(2) regarding the start of the time limitation under those Articles. The United States recalls that the Articles require a ‘claimant to submit a claim to arbitration within three years of the ‘date on which the’ investor or enterprise ‘first acquired, or should have first acquired, knowledge’ of the alleged breach and its loss or damage.’<sup>211</sup> Contrary to the Claimant’s theory regarding continuing breach, ‘an investor or enterprise *first* acquires knowledge [...] at a particular moment in time [...] such knowledge cannot *first* be acquired at multiple points in time or on a

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<sup>203</sup> Claimant’s Rejoinder Memorial, para 98.

<sup>204</sup> Claimant’s Counter Memorial, para 115.

<sup>205</sup> Claimant’s Counter Memorial, paras 115-116.

<sup>206</sup> Claimant’s Counter Memorial, para 116.

<sup>207</sup> Claimant’s Counter Memorial, para 117.

<sup>208</sup> Claimant’s Rejoinder Memorial, paras 99-102.

<sup>209</sup> Claimant’s Rejoinder Memorial, para 102.

<sup>210</sup> United States Submission, para 6.

<sup>211</sup> United States Submission, para 7.

recurring basis.’<sup>212</sup>

148. The United States further submits that knowledge of ‘incurred loss or damage’ pursuant to Article 1116(2) and 1117(2) does not require ‘the financial impact of the loss [to be] realized’ but instead, the word ‘incur’ should be understood to refer to when the investor ‘become[s] liable or subject to’ such loss, even if ‘that loss or damage is not immediate.’<sup>213</sup>
149. In respect of the time a claimant acquires knowledge of an alleged breach of the expropriation standard under NAFTA Article 1110, the United States submits that ‘a claimant has actual or constructive knowledge of the ‘alleged breach’ once it has (or should have had) knowledge of all elements required to make a claim under Article 1110 – including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking.’<sup>214</sup> In cases where a series of measures are impugned as being expropriatory, knowledge of the expropriation can exist prior to the enactment of the last government measure.<sup>215</sup> Additionally, the United States submits that ‘a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value.’<sup>216</sup>
150. In a similar vein, Mexico agrees with the Respondent’s submission that ‘the plain language of Articles 1116(2) and 1117(2) does not require a claimant to acquire knowledge of the full extent of the loss or damage resulting from the alleged breaches in order to start the time limitation to submit a claim to arbitration.’<sup>217</sup> In this regard, Mexico refers to the finding in *Mondev* where the tribunal determined that ‘a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.’<sup>218</sup>
151. The Respondent points out these areas of agreement amongst the NAFTA Parties, and the authorities that they cite in common, including the statement of the *Mondev* tribunal that a ‘claimant may know that it has suffered loss or damage even if the extent of the quantification of the loss or damage is still unclear.’<sup>219</sup> The Respondent agrees with the United States that the holdings in *Pope & Talbot* and *Grand River* are not necessarily incompatible ‘as a loss occurs

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<sup>212</sup> United States Submission, para 7.

<sup>213</sup> United States Submission, paras 8-9.

<sup>214</sup> United States Submission, paras 10-11.

<sup>215</sup> United States Submission, para 11.

<sup>216</sup> United States Submission, para 11.

<sup>217</sup> Mexico Submission, para 6.

<sup>218</sup> Mexico Submission, para 6, citing *Mondev*, Award, para 87.

<sup>219</sup> Canada’s Reply to Article 1128 Submissions, paras 10-14.

when it is incurred, rather than when the financial impact of the loss is realized.’<sup>220</sup>

152. The Claimant considers that the distinction drawn by the United States between when a loss may be incurred and when the financial impact of the loss may be experienced, is irrelevant to the facts of the present case. That is because Resolute did not know and had no persuasive reason to know that it had either incurred or experienced injury prior to December 30, 2012.<sup>221</sup>

## 5. The Tribunal’s Analysis

### (a) General considerations

153. The relevant language of Articles 1116(2) and 1117(2) is identical: ‘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.’ The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result. The Tribunal agrees with the Respondent, and with the other NAFTA Parties in their Article 1128 submissions, that this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period, and there is no question here of any waiver on the part of the Respondent. On the other hand, the specified conditions must be fulfilled: the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and the claimant must know, or be in a position such that it should have known, of these facts.
154. As to the requirement of breach, one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur: paragraph (2) deals with allegations, no doubt, but not with contingencies.<sup>222</sup> There may thus be a difference between the date of different breaches arising from a given course of governmental conduct. The Claimant alleges breaches of Articles 1102(3) (national treatment), 1105(1) (unfair and inequitable treatment), and 1110(1) (expropriation). Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs. By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct

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<sup>220</sup> Canada’s Reply to Article 1128 Submissions, para 14.

<sup>221</sup> Claimant’s Reply to Article 1128 Submissions, paras 16-18.

<sup>222</sup> In certain cases, tribunals have been prepared to overlook technically premature claims, provided the relevant requirements have subsequently been satisfied: e.g. *Ethyl Corporation v Canada*, Award on Jurisdiction, June 14, 1998, paras 85-88 (where the legislation complained of had not been passed or come into force). The question here is a different one: it is whether a strict 3-year limit for bringing a claim has been exceeded. The 3-year limit is counted from the date of actual (putative) breach and knowledge of harm.

or indirect). Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation under Article 1110(1).<sup>223</sup>

**(b) Knowledge (actual or constructive) of the alleged breaches**

155. In the present case, the essential acts alleged to constitute breaches of Articles 1102(3) and 1105(1) were completed by September 2012, three months before the critical date. It was in September 2012 that the sale of the Port Hawkesbury mill was finalised, along with the associated promises of support. Moreover, the Claimant was well aware of this at the time. It had previously declined to bid for the mill, and the proposed sale was covered in the trade press. Indeed, the Claimant, subject to an argument as to continuing breach, did not really argue otherwise. Its principal argument was that it did not suffer loss or was, reasonably, not aware of having done so until, at the earliest, January 2013, after the critical date.
156. In its written pleadings, at least, the Claimant also sought to argue that the Nova Scotia Measures were continuing breaches of Articles 1102(3) and 1105(1), breaches which continued after the critical date and which consequently were not caught by the 3-year time limit. In oral argument, this argument was not pressed, and in the Tribunal's view rightly not.
157. The core point is that in the present case, the Nova Scotia measures were taken within a short space of time and were effectively complete when taken. It is true that they eventually had a continuing effect on the Claimant (from what date is disputed), but that does not suffice to qualify them as continuing wrongful acts. There is a distinction between a continuing breach of an obligation and a perfected breach which continues to have injurious effects. Decisions to provide support to the Port Hawkesbury mill were taken and implemented in September 2012, and with one possible exception (as to which see paragraph 160 below) they did not call for further measures to be taken.
158. Articles 1116(2) and 1117(2) of NAFTA refer to the time when the breach 'first' occurred. According to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant. In terms of Article 14(2) of the Articles on State Responsibility, '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire

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<sup>223</sup> 'The essence of the matter is the deprivation by state organs of the right of property either as such, or by permanent transfer of the power of management and control': *Brownlie's Principles* (8th edn, ed Crawford, 2012) 621.

period during which the act continues and remains not in conformity with the international obligation.’<sup>224</sup> But the breach nonetheless occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation. Here the reopening of the Port Hawkesbury mill on favourable terms – alleged by the Claimant to constitute a breach of Articles 1102(3) and/or 1105(1) – first occurred not later than September 2012.

159. In these circumstances the Tribunal does not need to attempt to reconcile the apparent discrepancies between various NAFTA tribunals concerning continuing wrongful acts.<sup>225</sup>
160. A possible exception to this conclusion concerns the January 2013 electricity regulation granting a further benefit to Port Hawkesbury (see paragraph 124, 145 above). At the oral phase the Parties spent very little time on this argument. It was not (and in the Tribunal’s view, could not have been) pleaded as giving rise to a new claim under Chapter Eleven; it was, if anything, a continuation of conduct already in operation. If necessary, the Tribunal would have permitted an amendment to the Notice of Arbitration and Statement of Claim, but in essence the 2013 electricity regulation was not more than an ancillary factor, linked to the original Measures. As such, it does not affect the operation of the time-bar.
161. The position is different, in the Tribunal’s view, in respect of the alleged breach of Article 1110(1). The gist of an expropriation claim is the actual loss of property or (in the case of conduct tantamount to an expropriation) of control over it. In the words of the tribunal in *Glamis Gold*:

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>226</sup>

162. The Claimant summarized its case on expropriation in closing as follows:

an expropriation is a measure that causes the substantial deprivation of my property. And if you, as a government, take measures, knowing that you will be supporting an entity in a way that will harm a limited number of other competitors in a shrinking market, I think that there is a very good basis to claim that that measure may cause the expropriation, indirect, constructive expropriation, of one of the other market players. It results in the substantial

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<sup>224</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2001, Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, 43, UN Doc. A/56/10 (2001).

<sup>225</sup> Cf, on the one hand, *United Parcel Service of America Inc (UPS) v Government of Canada*, ICSID Case No. UNCT/02/1, Award, May 24, 2007, para 28 and, on the other, *Apotex Inc v Government of the United States*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013, paras 325-7; *Glamis Gold, Ltd v United States of America*, UNCITRAL Award, June 8, 2009, para 348; *Grand River Enterprises Six Nations Ltd v United States*, Award, ICSID Case No ARB/10/5, IIC 481 (2011), January 12, 2011, para 74.

<sup>226</sup> *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, June 8, 2009, para 328.

deprivation of my asset...<sup>227</sup>

163. In accordance with this submission, the expropriation did not occur until 2014, when the Claimant's Canadian subsidiary decided to close down the Laurentide mill and the Claimant was thereby deprived of the benefit of its investment.<sup>228</sup> As will appear, there are difficulties with this claim for breach of Article 1110(1), but in the Tribunal's view, the timing requirements of Articles 1116(2) and 1117(2) have not been infringed in respect of the expropriation claim.

**(c) Knowledge (actual or constructive) of losses incurred**

164. This conclusion concerning expropriation makes it unnecessary for present purposes to decide when the Claimant became aware that it had suffered loss as a result of the alleged breach of Article 1110(1), or should have done so. But that question does arise with respect to the losses incurred by the Claimant as a result of the alleged breaches of Articles 1102(3) and 1105(1).

165. On this issue the Disputing Parties agreed that it is not necessary for this purpose that the full extent of losses incurred be known. As the tribunal said in *Mondev*, 'a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.'<sup>229</sup>

166. Beyond this point the Disputing Parties' positions diverged. The Claimant did not call its spokesman at the time, or its senior management, to testify as to their knowledge of present losses. Rather it called expert evidence in the person of Professor Hausman, who asserted that any adverse impact of the breaches did not occur until, at the earliest, the first quarter of 2013. The Respondent for its part contested Professor Hausman's evidence, although it did not call any

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<sup>227</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 458:19-459:4.

<sup>228</sup> There is an extensive case-law on the question when an expropriation occurs, much of it concerned with 'creeping' expropriation (which is not this case) and with issues of valuation rather than (as here) with jurisdiction. A typical finding is that of the Iran-US Claims Tribunal that:

When the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events

*International Technical Products Corporation v Government of the Islamic Republic of Iran*, Award No. 196-302-3, October 28, 1985, para 49, Iran-USCTR 206, 240-1 (1985). See further *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCTIRAL, Award, October 27, 1989, 95 ILR 184, 210, para 30. See also e.g. *First National City Bank, Memorandum of determinations*, IIC 1023 (1973), April 9, 1973, *Chile (Overseas Private Investment Corporation)*; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000, paras 77-8; *Nykomb Synergetics Technology Holding AB v Latvia*, Award, December 16, 2003, para 4.3.1.

<sup>229</sup> *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para 87.

expert in rebuttal. Instead, the focus of its case was on a series of statements, made by the Claimant in 2012 and subsequently, that, in the Respondent's view, indicated awareness that losses had already been incurred.

167. There is an almost metaphysical question whether a claimant which actually asserts that it has already suffered loss or damage can subsequently, in effect, argue that it was mistaken and that the loss or damage were only incurred at a later date. Is it possible to have actual knowledge of something that is not the case? But as not infrequently happens in the law, the metaphysical question does not really arise. Articles 1116(2) and 1117(2) are concerned to set time limits on NAFTA claims once the claimant has notice of what it considers breach and consequential loss. A claimant which unequivocally asserts both elements, then waits more than 3 years to commence proceedings, can hardly be heard to say that its original assertion was premature.
168. It is thus necessary to review the statements relied on by the Respondent to see whether they constituted unequivocal assertions of loss already incurred. The various statements were itemized in paragraphs 108-117 above.
169. The draft notice of intent presented to the Minister on February 24, 2015 referred to market share having declined 'from 2012 to 2014'.<sup>230</sup> The Tribunal does not accept Claimant's argument that this was merely a draft for the purposes of negotiation. It was a document transmitted to the Respondent with a view to the settlement of the dispute, and was correspondingly significant. However, the statement as to market share was not unequivocal. To say that market share declined from one year to another does not say anything specific about whether there was a decline in the first year, especially since only a few months in that year were implicated. The first year may be simply a comparator. The Tribunal does not read this isolated statement as an admission that Claimant suffered actual loss or damage in 2012.
170. As to the 2012 conference call and Claimant's statement that it was 'impossible [for the reopening of Port Hawkesbury] not to have an impact on the market',<sup>231</sup> this certainly shows that the Claimant expected to lose market share. But made at a time when Port Hawkesbury had yet to reopen, this was a mere prediction, not an acknowledgement of loss already incurred.
171. More significant in this regard is the Claimant's closure of Line #10 at Laurentide in November 2012, and the contemporaneous explanations for this given by the Claimant. The Claimant argues

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<sup>230</sup> Resolute Forest Products, 'Draft Notice of Intent', February 24, 2015, para 19 (**R-081**). No further specification was offered.

<sup>231</sup> See para 110.

that the major reason for the closure of Line #10 was its own decision, made a year before, to reopen its Dolbeau plant. This seems to have been the major reason, but the explanation reveals the interaction of economic factors in a saturated market. Claimant's spokesperson, Pierre Choquette, said at the time that the reopening of Port Hawkesbury was 'just one of several factors' in the decision to close Line #10 and the Tribunal is inclined to think that this statement was accurate. Moreover, the temporary closure of Line #11 at Laurentide was according to the Claimant itself, at least partly attributable to the reopening of Port Hawkesbury. But it is one thing, in a climate of uncertainty as to markets, to take precautionary measures, and another to acknowledge present loss or injury. The Claimant does not suggest that the temporary closure was a compensable loss, and in the Tribunal's view neither was it an acknowledgement of damage.

172. The Respondent quotes press articles from late 2012, which state that the Claimant will lose market share: (i) a 'Reel Time' report published on November 8, 2012 predicted that Resolute's market share would fall from 20.1% at the end of 2011 to 13.5% at the end of 2012;<sup>232</sup> (ii) the 'ERA Forest Products Monthly' November 2012 issue said that the Port Hawkesbury restart was already having an impact on contract negotiations for the first half of 2013;<sup>233</sup> and (iii) 'Industry Intelligence' reports about drops in prices.<sup>234</sup> The Claimant points out that previous reports by 'Reel Time' were erroneous, and asserts that speculation about markets is inherently uncertain.<sup>235</sup>
173. In the Tribunal's view, it was clear when Port Hawkesbury restarted in September 2012 that paper prices would be affected at some point. But that fact is not equivalent to a finding that damage was already being incurred, and that is what Articles 1116(2) and 1117(2) require. Press speculation and market predictions are no substitute for evidence of sales volumes and prices, or a clear acknowledgement of present loss.
174. Dr Jerry Hausman, a Professor of Economics at MIT, gave evidence on the former point. In his Expert Witness Statement he concluded that:

The management of 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. Several factors underlie my conclusion. First, the price and financial effects of the reopening were not evident until January 2013 or later. Second, PHP did not have a material impact on

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<sup>232</sup> Canada's Memorial on Jurisdiction, para 64, citing Verle Sutton, *Reel Time*, Special Edition (Nov. 8, 2012), p. 7, available at: <http://suttonpaperstrategies.com/PDFs/Nov%2012%20Forecast%20Issue.pdf>. (R-102)

<sup>233</sup> Canada's Memorial on Jurisdiction, para 65, citing ERA Forest Products Research, *ERA Forest Products Monthly* (November 30, 2012), p. 25 (R-105).

<sup>234</sup> Canada's Memorial on Jurisdiction, paras 66-7, citing, Industry Intelligence, report, 'Industry Intelligence i2dashboard - 35 lb SC-A' (R-108) and Industry Intelligence, report, 'Industry Intelligence i2dashboard - 33 lb SC-B' (R-109).

<sup>235</sup> Claimant's Counter-Memorial on Jurisdiction, paras 88, 91.

the North American SCP market until 2013. Third, there was nothing in the financial results of Resolute's SCP operations during the fourth quarter of 2012 to suggest that Resolute had been materially harmed by the reopening, especially when viewed in the context of declining consumption of SCP during 2012. Fourth, even if Resolute's management had suspected adverse effects might arise from the reopening, it would not have known the extent of any effects, or their materiality, prior to the first quarter of 2013.<sup>236</sup>

175. He added:

Based on the evidence presented [...] Resolute could not have contemporaneously known the damaging effects of PHP's reopening in 2012, due to the limited price, quantity, and profit effects apparent in Q4 2012.<sup>237</sup>

176. Dr Hausman was ably cross-examined on his Statement, but without resiling from its principal conclusions. He accepted that there had been a slight decline in SC paper prices in January 2013, and an even slighter increase in February 2013 (both of which would have been known in December), but said that someone in the Claimant's position should not have attached significance to that, given the relatively modest price changes and typical market fluctuations after the end of the holiday season. He also emphasized the uncertainties regarding Port Hawkesbury's reopening, which could not have been resolved in the short time scale in question. In his view the major impact on prices was not felt until later in 2013 or even 2014.<sup>238</sup> In the absence of rebuttal evidence and in light of the indications of prices for supercalendered paper in the period November 2012 to February 2013, the Tribunal accepts his evidence cited above.

177. As noted (paragraph 119 above), the Respondent submitted at the hearing that the Tribunal should join (or rather rejoin) the time bar issue to the merits, or at least order a targeted production of documents directed at disclosing the internal state of knowledge of Claimant's senior executives. The Tribunal is disinclined to accept either procedural proposal. The Respondent sought bifurcation *inter alia* on this issue, yet at the jurisdictional phase issues will typically be decided on the basis of written party submissions.<sup>239</sup> In fact, a quantity of documentary evidence was produced, including items taken from the trade literature and statements by informed company personnel, and the matter was fully argued. The resulting picture suggested that there was an expectation of increased competition and pressure on prices, but, consistent with the factual analysis presented above, there was no admission by the Claimant of immediate losses in the period after Port Hawkesbury restarted, and the economic evidence produced by the Claimant supported this conclusion. In the circumstances, no case for joinder or a special discovery process has been made out.

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<sup>236</sup> Hausman, Expert Witness Statement, February 22, 2017, para 14.

<sup>237</sup> *Ibid*, para 40.

<sup>238</sup> The oral evidence is at Hearing on Jurisdiction and Admissibility, August 15, 2017, 50-99.

<sup>239</sup> Cf *Grand River*, Decision on Objections to Jurisdiction, para 54.

178. In the Tribunal's view, the Claimant did not know, and could not reasonably have known, by December 2012, that it had already incurred loss or damage by reason of the alleged breach. Indeed, it has not been established that it did actually suffer loss in this short period. Market participants and observers expected increased price competition in the longer term, but that is a different matter. The Respondent argued that at least the reopening of Port Hawkesbury precluded the Claimant from raising its prices, but as Claimant pointed out, there is no evidence that it planned a price increase,<sup>240</sup> and anyway press speculation as to possible price increases is not the same thing as an admission of loss or injury. *A fortiori* it is not enough to trigger the time limit.
179. For these reasons, in the Tribunal's view the time-bar in Article 1116(2) and 1117(2) does not prevent the Tribunal exercising jurisdiction over the claims.

### **C. THE SCOPE OBJECTION**

#### **1. Introduction**

180. NAFTA Article 1101(1) deals with the 'Scope and Coverage' of NAFTA Chapter Eleven and relevantly provides:
- This Chapter applies to measures adopted or maintained by a Party relating to:
- (a) investors of another party;
  - (b) investments of investors of another Party in the territory of the Party; and
  - (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
181. The Respondent submits that the words 'relating to' in Article 1101(1) require a 'legally significant connection' between the impugned measures and the investor or its investment. The Respondent contends that such a connection does not exist in this case between the Nova Scotia Measures and the Claimant or the Laurentide mill and so the Nova Scotia Measures do not fall within the scope of application of NAFTA.
182. The Claimant, on the other hand, contends that the words 'relating to' only requires a 'causal connection' between the impugned measures and the investor or its investment. In this case, the Claimant submits that such a 'causal connection' exists here since the Nova Scotia Measures directly affected the Claimant and the Laurentide mill.
183. As noted by the Tribunal in its Decision on Bifurcation, if the Respondent's Article 1101(2) objection is successful, it would dispose of the entirety of the claims relating to the Nova Scotia

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<sup>240</sup> Claimant's Rejoinder Memorial, para 54.

Measures.<sup>241</sup>

## 2. The Respondent's Arguments

### (a) Interpretation of the words 'relating to' under Article 1101(1)

184. The Respondent's jurisdictional objection revolves around whether the words 'relating to' are sufficiently broad to include cases where the impugned measures merely have an effect on the investor and its investment, or whether something more is required.<sup>242</sup> The Respondent submits that the words 'relating to' impose a higher threshold than the 'causal nexus' test proposed by the Claimant and require a 'legally significant connection' between the impugned measures and the investor or its investment so as to be covered by NAFTA Chapter Eleven.<sup>243</sup>
185. The Respondent compares the words chosen in Article 1101(1) with other provisions of NAFTA that are formulated more broadly in order to cover measures that have a mere direct or indirect effect on trade.<sup>244</sup> The Respondent reinforces this point by reference to previous drafts of NAFTA which broadened the scope of application of Chapter Eleven to 'measures affecting investments [...] and investors'.<sup>245</sup> However, this earlier drafting was rejected by the NAFTA Parties and reformulated in its narrower current form. The Respondent notes that the Disputing Parties agree that 'a measure that has a mere effect on an investment [...] is not sufficient to satisfy the Article 1101(1) threshold' and a measure 'must directly affect the investor or its investment for it to meet the "relating to" threshold.'<sup>246</sup> The Respondent submits that it is also the agreed view amongst all three NAFTA Parties that the words 'relating to' ought to be understood as requiring a 'legally significant connection' between the measure, the investor and its investment so as to fall within Chapter Eleven's scope of application and, consequently, the jurisdiction of a NAFTA tribunal.<sup>247</sup> This view, which has been expressed in cases such as *Methanex* and *Apotex*, was adopted by those tribunals in their reasoning. For example, the tribunal in *Methanex* found:

If the threshold provided by Article 1101(1) were merely one of 'affecting', as *Methanex* contends, it would be satisfied wherever any economic impact was felt by an investor or an investment...

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<sup>241</sup> Procedural Order No. 4, Decision on Bifurcation, November 18, 2016, para 4.15.

<sup>242</sup> Respondent's Memorial, para 81.

<sup>243</sup> Respondent's Memorial, paras 79, 81; Hearing on Jurisdiction and Admissibility, August 15, 2017, 111:1-7.

<sup>244</sup> Respondent's Memorial, para 81 referring to NAFTA Articles 709 ('this Section applies to any such [sanitary and phytosanitary] measure of a Party that may, directly or indirectly, affect trade between the Parties') and 901 ('this Chapter applies to standard-related measures [...] that may directly or indirectly, affect trade in goods or services').

<sup>245</sup> Respondent's Memorial, para 82.

<sup>246</sup> Respondent's Reply Memorial, para 118.

<sup>247</sup> Respondent's Memorial, para 83; Hearing on Jurisdiction and Admissibility, August 15, 2017, 111:8-114:19.

We decide that the phrase ‘relating to’ in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.<sup>248</sup>

186. The Respondent submits that this approach has been endorsed and adopted by subsequent tribunals in *Bayview*<sup>249</sup> and *Cargill*.<sup>250</sup> In respect of the *Cargill* decision, the Respondent disagrees with the Claimant’s assertion that ‘the *Cargill* tribunal considered that the ‘legally significant connection’ test set out in *Methanex* ‘sets the bar too high, or requires refinement.’<sup>251</sup> Rather, the *Cargill* tribunal found that there was a ‘causal nexus’ between the investor, its investment and the Mexican permit regime imposed on the import of high fructose corn syrup.<sup>252</sup> Although phrased differently, the Respondent submits that the ‘causal nexus’ test is essentially the same as the ‘legally significant connection’ test.<sup>253</sup> In fact, the *Cargill* tribunal refused to comment on the stringency of the *Methanex* test, instead determining that: ‘regardless of whether or not the test espoused in *Methanex* is too restrictive, it is satisfied.’<sup>254</sup>

187. The Respondent further contends that the very same argument was considered and rejected in the *Apotex* and *Apotex II* cases, especially where the tribunal in *Apotex II* determined:

The Tribunal does not consider that the *Cargill* tribunal was seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the two tribunals in *Methanex* and *Bayview*.<sup>255</sup>

188. The Respondent maintains that the ‘legally significant connection’ test is the proper approach since it was the standard applied in *Bayview* and described by the *Bilcon* tribunal as ‘a sound basis for deliberation.’<sup>256</sup> The Respondent submits that the ‘legally significant connection’ test requires more than the measure ‘merely affect’ the claimant or its investment, but does not necessarily require that the measures be ‘intended to deliberately harm’ the investor nor ‘create a legal impediment’, even though measures such as these would ‘undoubtedly meet the threshold’ set by

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<sup>248</sup> Respondent’s Memorial, para 84

<sup>249</sup> *Bayview Irrigation District v United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, June 19, 2007 (**RL-005**) (*‘Bayview, Award’*); Hearing on Jurisdiction and Admissibility, August 15, 2017, 115:11-22.

<sup>250</sup> *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, September 18, 2009 (**RL-050**) (*‘Cargill, Award’*).

<sup>251</sup> Respondent’s Memorial, para 88, referring to Claimant’s Opposition to Respondent’s Request for Bifurcation, para 10.

<sup>252</sup> Respondent’s Memorial, para 88, citing *Cargill, Award*, para 174.

<sup>253</sup> Respondent’s Memorial, para 88; Respondent’s Reply Memorial, para 125.

<sup>254</sup> Respondent’s Reply Memorial, para 123, citing *Cargill, Award*, para 175.

<sup>255</sup> Respondent’s Memorial, para 89, citing *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, para 6.13 (**RL-051**) (*‘Apotex, Award’*); Respondent’s Reply Memorial, para 122; Hearing on Jurisdiction and Admissibility, August 15, 2017, 136:16-21.

<sup>256</sup> Respondent’s Reply Memorial, para 124 referring to *Bayview, Award*, para 101; *Bilcon, Award on Jurisdiction and Liability*, para 240.

the ‘legally significant connection’ test.<sup>257</sup>

189. The Respondent urges this Tribunal to follow the line of authority established by the tribunals mentioned above and also followed by the tribunal in *Bilcon* and ignore the Claimant’s reference to the *BG Group v Argentina* case which is based on the UK-Argentina BIT, inconsistent with NAFTA practice, and has never been endorsed by a NAFTA tribunal.<sup>258</sup> To find otherwise, the Respondent says, ‘would create a limitless class of affected investors’ and ‘do exactly what the *Methanex* tribunal cautioned against’.<sup>259</sup>

**(b) Whether a ‘legally significant connection’ exists between the Nova Scotia Measures, Resolute and Resolute’s investments**

190. The Respondent submits that while Resolute may have felt the economic impact of the Nova Scotia Measures and the re-opening of the Port Hawkesbury mill, this is insufficient to satisfy the ‘legally significant connection’ test required by Article 1101(1). This is, quite simply, because the Claimant’s operations are headquartered in Québec and the Claimant has no investment in Nova Scotia and, conversely, the Nova Scotia government exercises no legal authority over the Claimant’s investments outside of Nova Scotia.<sup>260</sup>

191. The Respondent considers the Claimant to have inappropriately added a new claim via its Counter Memorial by alleging that the Nova Scotia measures were intended to harm a foreign investor.<sup>261</sup> This allegation was not capable of being accepted *pro tem*, as alleged by the Claimant, since it only appeared for the first time in the Claimant’s Counter-Memorial.<sup>262</sup> Without permission to amend its claim under Article 20 of the UNCITRAL Rules, the Respondent submits that this allegation should be ignored.<sup>263</sup>

192. In any event, the Respondent contends that this ‘bare accusation of malign intent without so much as a hint of evidence’ still does not satisfy Article 1101(1).<sup>264</sup> The Respondent draws comparisons between this case and *Methanex*, where the claimant had permission to amend its claim so as to allege a conspiracy to harm in order to bolster its jurisdictional arguments.<sup>265</sup> However, just as

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<sup>257</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 116:18-117:16.

<sup>258</sup> Respondent’s Memorial, para 93.

<sup>259</sup> Respondent’s Reply Memorial, para 126; Hearing on Jurisdiction and Admissibility, August 15, 2017, 126:5-22.

<sup>260</sup> Respondent’s Memorial, para 95; Respondent’s Reply Memorial, para 130.

<sup>261</sup> Respondent’s Reply Memorial, paras 128, 131, referring to Claimant’s Counter Memorial, para 154.

<sup>262</sup> Respondent’s Reply Memorial, para 132.

<sup>263</sup> Respondent’s Reply Memorial, para 132.

<sup>264</sup> Respondent’s Reply Memorial, para 132.

<sup>265</sup> Respondent’s Reply Memorial, paras 133-135.

that tactic did not succeed in *Methanex*, so should the Claimant's attempt in this case fail.<sup>266</sup> The Respondent submits that the Claimant's allegation of intention to harm is 'totally unsupported by evidence' and contradicts Resolute's evidence before the US ITC that 'PHP and Resolute were not in direct competition because they make a lesser quality paper.'<sup>267</sup>

193. In addition to the above, the Respondent considers each category of the Nova Scotia Measures in turn to demonstrate 'that only a tangential, indirect connection exists between the measure and the Claimant's investment.'<sup>268</sup>
194. The funding provided by the Forestry Infrastructure Fund was used to train and sustain workers in the forestry industry and to help keep the Port Hawkesbury mill in 'hot idle', thereby preventing the mechanical deterioration of the mill so that it could be sold as a going concern to prospective buyers.<sup>269</sup> These measures contributed to the value of the Port Hawkesbury mill when being sold to prospective buyers, of whom Resolute could have been one, but could equally have been futile had no purchaser been found.<sup>270</sup> Additionally, these measures do not 'relate to' the Claimant nor its investments in a different province, they solely relate to the Port Hawkesbury mill and its resale value.<sup>271</sup> Canada asks that these measures be severed from the claim as not having a 'legally significant connection' to the investor or its investment since they were only 'temporary stopgap measures with neutral intent and limited scope.'<sup>272</sup>
195. The C\$124.5 million in government support for PWCC's acquisition of the Port Hawkesbury mill similarly lacks a significant legal connection to the Claimant and its investments. This funding was not provided to PWCC to give it a competitive advantage, as suggested by the Claimant, but was provided to assist the new owners implement 'improved land management practices, preservation and expansion of Crown land, sustainable harvesting, and support for the local work force, the forestry sector and the Mi'kmaq people.'<sup>273</sup>
196. PWCC's Property Tax Agreement and preferential electricity rate negotiated with NSPI similarly have no connection to the Claimant or its investments since the Claimant does not pay property

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<sup>266</sup> Respondent's Reply Memorial, para 135.

<sup>267</sup> Respondent's Reply Memorial, para 136, referring to March US ITC Transcript, p. 130:12-15 (**R-083**).

<sup>268</sup> Respondent's Reply Memorial, para 137.

<sup>269</sup> Respondent's Memorial, para 97; Respondent's Reply Memorial, paras 138, 139; Hearing on Jurisdiction and Admissibility, August 15, 2017, 13:13-14:3.

<sup>270</sup> Respondent's Memorial, para 98.

<sup>271</sup> Respondent's Memorial, para 99.

<sup>272</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 14:7-15, 138:3-141:2; August 16, 2017, 408:15-409:3.

<sup>273</sup> Respondent's Memorial, para 101; Respondent's Reply Memorial, para 140; Hearing on Jurisdiction and Admissibility, August 15, 2107, 141:3-145:2.

taxes in Nova Scotia nor is it subject to electricity rates in Nova Scotia.<sup>274</sup> In respect of the Property Tax Agreement, the Respondent submits that this agreement, between Richmond County and NewPage and Port Hawkesbury, does not relate to Resolute's investment in 'another province entirely where a different tax regime applies'.<sup>275</sup> The Respondent argues that it is insufficient for the Claimant to contend that the Property Tax Agreement 'benefitted PHP, and that's good enough for it to be related to Resolute.'<sup>276</sup> In respect of the preferential electricity rate, this was negotiated and given because it was in NSPI's interest, as a 'privately-owned, commercially-run corporation', to preserve PHP as a customer and was in the public interest since PHP's continued existence 'benefitted all of the customers on the grid' by avoiding a 'hike in electricity rates for all other customers on account of the loss of this extra-large customer.'<sup>277</sup>

197. The Respondent also submits that the Claimant's case relating to the biomass facility, in addition to being made belatedly, must fail 'for the same reasons as the Property Tax Agreement [...] because it doesn't draw the necessary legal connection.'<sup>278</sup>
198. The Respondent submits that the Claimant's complaints themselves illustrate how no 'legally significant connection' exists between the Claimant, its investments and the Nova Scotia Measures. For example, the Claimant's complaint that it was not afforded similar treatment as the Port Hawkesbury mill demonstrates how there is no 'legally significant connection' since such treatment was not afforded to it for the simple fact that it is not located in Nova Scotia.<sup>279</sup> Similarly, the fact that (on its own case) the Claimant did not know the economic impact of the Nova Scotia Measures until the first quarter of 2013 demonstrates that the Nova Scotia Measures did not relate to the Claimant's investment in a 'legally significant' way.<sup>280</sup>
199. The Respondent draws a parallel between this case and the *Methanex* case, where the impugned measures did not directly affect the claimant but only had an effect on the market that was felt by the claimant.<sup>281</sup> The Respondent contends that 'such market effects are too far removed to meet the threshold of Article 1101(1)' and therefore submits that the Claimant's claims relating to the Nova Scotia Measures fall outside the scope of application of Chapter Eleven of NAFTA.<sup>282</sup>

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<sup>274</sup> Respondent's Memorial, para 102; Respondent's Reply Memorial, paras 141-142.

<sup>275</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 147:6-14.

<sup>276</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 147:14-18.

<sup>277</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 145:3-21.

<sup>278</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 147:19-149:5.

<sup>279</sup> Respondent's Memorial, para 103.

<sup>280</sup> Respondent's Memorial, para 104; Hearing on Jurisdiction and Admissibility, August 15, 2017, 16:14-24.

<sup>281</sup> Respondent's Memorial, paras 107-109.

<sup>282</sup> Respondent's Memorial, para 109.

200. In this respect, the Respondent distinguishes this case from *Cargill* where the impugned measures were intended to harm the High Fructose Corn Syrup industry.<sup>283</sup> By comparison, in this case the Nova Scotia Measures are of ‘general application to the entire industry and are not intended to drive Resolute out of the market, are not intended to have the same types of effect that the very measure, the very tax that was at issue in *Cargill* did.’<sup>284</sup> The Respondent argues that the Nova Scotia Measures were intended to ‘bring back 330 jobs and to help stabilize logging in Cape Breton’, not to ‘make sure that we have one market player here and that there isn’t another one to compete with.’<sup>285</sup> In this respect, the present case is different to that in *Cargill* in terms of the ‘directness’ of the measure.<sup>286</sup> The Respondent clarified its position in this way during the Hearing on Jurisdiction and Admissibility:

If you have a measure that applies directly to a company, whether you want to harm them or not, and it has a relationship to them, it doesn’t have to intend to harm them. If you have an indirect measure that is helping somebody else, one of the ways of showing the relationship to the claimant in a situation like that would be to show an intention. Might there be other evidence to show a relationship? Sure. But my simple point is that you have to show a relationship. You have to show a legally significant connection to the rest of the industry or the ripple effects that that might cause.<sup>287</sup>

201. At the hearing, the Respondent observed that the Claimant simultaneously argues that Nova Scotia ‘wanted to create a national champion at the expense of Resolute’ but, at the same time, that the impact of the reopening of the Port Hawkesbury mill was ‘unknown and unknowable’ until 2014.<sup>288</sup> This inconsistency, the Respondent contends, demonstrates that no legally significant connection exists between the Nova Scotia Measures and the Claimant or its investment. The Respondent accordingly invites the Tribunal to follow the approach of the *Methanex* tribunal and dismiss the claim since it does not fall within the scope of NAFTA required by Article 1101(1).<sup>289</sup>

202. The Respondent further observes that the Claimant’s argument, that ‘predatory pricing’ by PHP in 2014 caused the shutdown of the Laurentide mill itself, demonstrates a lack of a ‘legally significant connection’ as required by Article 1101(1).<sup>290</sup> The Respondent submits that it was PHP, not the Government of Nova Scotia that would have engaged in any alleged predatory pricing and, since PHP’s actions are not attributable to the Respondent, the Claimant’s claim lacks

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<sup>283</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 119:17-124:7, August 16, 2017, 412:16-415:14.

<sup>284</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 124:8-15.

<sup>285</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 125:10-20.

<sup>286</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 125:10-20; August 16, 2017, 415:15-417:6.

<sup>287</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 135:13-24.

<sup>288</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 16:2-17:7-11.

<sup>289</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 17:7-23, 108:2-11.

<sup>290</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 18:6-11.

‘a fundamental jurisdictional prerequisite.’<sup>291</sup>

203. The Respondent summarized its case in this way during the Hearing on Jurisdiction and Admissibility:

[B]enefit to PHP that allows it to eventually, if successful, and if market conditions permit, cause harm to the Claimant’s investment can’t constitute a measure relating to the Claimant’s investment. It’s indirect, and it doesn’t establish a legally significant connection...

As Professor Hausman said, government support is not sufficient to make a company successful. There, we’re talking again about the preconditions. If that’s the case, if the government support isn’t sufficient to make the company successful in the first place, how is it that that same government support has a clear relationship to the investor or its investment? Clearly it doesn’t.<sup>292</sup>

### 3. The Claimant’s Arguments

#### (a) Interpretation of the words ‘relating to’ in Article 1101(1)

204. The Claimant alleges that the stated purpose of the Nova Scotia Measures was to ‘make the Port Hawkesbury mill the national champion in SC paper’ by making it the ‘lowest cost’ producer in North America and putting it in direct competition with Resolute, ‘a leading SC paper producer, in the Canadian and North American markets.’<sup>293</sup> This, the Claimant says, is sufficient to clear the ‘low threshold’ imposed by Article 1101(1) which only requires, in the words of the Ontario Superior Court, ‘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>294</sup>
205. The Claimant submits that the Ontario Superior Court formulation in *Cargill* of ‘some connection’ is the appropriate standard, not the ‘legally significant connection’ test espoused in *Methanex* and relied upon by the Respondent.<sup>295</sup> The Claimant observes that the *Cargill* tribunal thought the *Methanex* standard ‘might be “too restrictive”’, noting 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 another Party.’<sup>296</sup> While the *Cargill* tribunal found that the Mexican regulations requiring the Claimant to obtain a permit to import High Fructose Corn Syrup passed the *Methanex* test because it imposed a ‘legal

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<sup>291</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 18:6-21; 19:23-20:1.

<sup>292</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 149:17-150:19.

<sup>293</sup> Claimant’s Counter Memorial, paras 118-119.

<sup>294</sup> Claimant’s Counter Memorial, paras 123, citing *United Mexican States v Cargill, Inc.*, 2010 ONSC 4656, para 57, affirmed by 2011 ONCA 622, application for leave to appeal dismissed, 2012 CanLII 25159 (SCC) (CL-004); Claimant’s Rejoinder Memorial, para 108.

<sup>295</sup> Claimant’s Counter Memorial, para 124; Hearing on Jurisdiction and Admissibility, August 15, 2017, 333:19-334:14.

<sup>296</sup> Claimant’s Counter Memorial, para 128, citing *Cargill*, Award, paras 174-175 (CL-003); Hearing on Jurisdiction and Admissibility, August 15, 2017, 332:24-333:9.

impediment’ on Cargill’s business, it also found that a tax imposed on products sweetened with High Fructose Corn Syrup was a measure ‘relating to’ Cargill.<sup>297</sup>

206. Similar to the facts in this case, the tax measure impugned in *Cargill* was not imposed on the Claimant directly, but Cargill was nonetheless ‘directly affected by a measure that was intended to protect a local industry and hurt its competitors outside the relevant jurisdiction.’<sup>298</sup> The Claimant argues that this view was recently endorsed by the tribunal in *Mesa Power*.<sup>299</sup> That case dealt with Ontario legislation imposing new regulations on the power industry but where the claimant did not receive a contract under the newly created ‘feed-in tariff program’. The *Mesa Power* tribunal specified that the requirement imposed by Article 1101(1) that the measures ‘relate to’ the investor or its investments would be satisfied so long as the measures ‘have a causal nexus with the Claimant or its investment.’<sup>300</sup> Even though the measures in question in that case did not create a legal impediment or intend to harm the Claimant, the tribunal nonetheless considered the ‘causal connection’ between the legislation and the Claimant’s injury to be sufficient.<sup>301</sup>
207. The Claimant considers the Respondent’s reliance on and characterization of the *Methanex* ‘legally significant connection’ test to be ‘exaggerated’<sup>302</sup> The Claimant notes that the *Methanex* tribunal itself conceded 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’ and ‘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>303</sup> The Claimant also points to the fact that the *Methanex* tribunal analyzed the merits of the claims before concluding that there was no ‘legally significant connection’ and that the tribunal had no jurisdiction as evidence that the tribunal was ‘uncomfortable with its own legal test.’<sup>304</sup>
208. The Claimant submits, further, that the present case is distinguishable from *Methanex* on the basis that the measures impugned in *Methanex* affected a potentially indeterminate class of investors, whereas here ‘we have a finite number of affected market participants.’<sup>305</sup> In addition, the

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<sup>297</sup> Claimant’s Counter Memorial, paras 128-129.

<sup>298</sup> Claimant’s Counter Memorial, para 130; Claimant’s Rejoinder Memorial, para 111; Hearing on Jurisdiction and Admissibility, August 15, 2017, 335:6-336:1.

<sup>299</sup> Claimant’s Counter Memorial, para 132, citing *Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016 (CL-005) (*Mesa Power, Award*).

<sup>300</sup> Claimant’s Counter Memorial, para 132, citing *Mesa Power, Award*, para 259; Claimant’s Rejoinder Memorial, para 116; Hearing on Jurisdiction and Admissibility, August 15, 2017, 337:4-21.

<sup>301</sup> Claimant’s Counter Memorial, para 134.

<sup>302</sup> Claimant’s Counter Memorial, para 135.

<sup>303</sup> Claimant’s Counter Memorial, para 135, citing *Methanex*, Partial Award, paras 139, 142, 147.

<sup>304</sup> Claimant’s Counter Memorial, paras 136-137.

<sup>305</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 326:5-21.

Claimant argues that *Methanex* is ‘not particularly helpful because it decided only what did not satisfy Article 1101, that is, the mere effect in connection with a measure of general applicability, not what does satisfy the ‘relating to’ test beyond the phrase ‘legally significant connection.’<sup>306</sup>

209. The Claimant also notes the subsequent criticism of the *Methanex*’s ‘legally significant connection’ test, paying particular attention to the decision in *BG Group Plc. v Republic of Argentina*.<sup>307</sup> In that case, the tribunal disagreed with the *Methanex* tribunal’s interpretation of the words ‘relating to’ as requiring a ‘legally significant connection’ since such an interpretation would render other NAFTA articles unnecessary or redundant.<sup>308</sup> Rather, a simpler ‘effects’ test would be sufficient to ‘establish that a measure is one “relating to” an investment or investor.’<sup>309</sup>
210. The Claimant also points to a number of NAFTA decisions which ‘have expanded the “legally-significant-connection” spectrum to include measures that have a causal connection or causal nexus to a claimant.’<sup>310</sup> The Claimant submits that these cases, while not explicitly rejecting *Methanex*, provide a more nuanced and persuasive analysis which considers the existence of a causal nexus and possibility of liability to a determinate class or set of investors as sufficient to establish jurisdiction under Article 1101(1).<sup>311</sup>
211. The tribunal in *Apotex II* took such an approach and, when reviewing the decision in *Cargill*, determined that ‘something more than a mere “effect” from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)’, but went on to explain that it would be inappropriate to read into Article 1101(1) the requirement of a causal connection.<sup>312</sup> Additionally, the *Apotex II* tribunal did not consider indeterminate liability to be a danger in that case, an approach, the Claimant submits, this Tribunal should follow since ‘the universe of possibly impacted companies here is very small, five for the entire continent.’<sup>313</sup> Finally, the Claimant considers the Respondent’s reliance on cases such as *Bayview* as erroneous since those cases, it argues, do not in fact endorse the ‘legally significant connection’ test espoused in *Methanex* since it was not required to resolve the question of whether the measures ‘related to’ the claimants in

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<sup>306</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 326:22-327:3.

<sup>307</sup> *BG Group Plc. v Republic of Argentina*, UNCITRAL, Award, December 24, 2007 (CL-006) (**‘BG Group, Award’**).

<sup>308</sup> Claimant’s Counter Memorial, paras 138-140; Claimant’s Rejoinder Memorial, para 109; Hearing on Jurisdiction and Admissibility, August 15, 2017, 342:13-21.

<sup>309</sup> Claimant’s Counter Memorial, paras 138-139.

<sup>310</sup> Claimant’s Counter Memorial, para 141; Hearing on Jurisdiction and Admissibility, August 15, 2017, 40:14-18.

<sup>311</sup> Claimant’s Counter Memorial, para 141.

<sup>312</sup> Claimant’s Counter Memorial, para 144, citing *Apotex*, Award, para 6.13.

<sup>313</sup> Claimant’s Counter Memorial, para 145; Claimant’s Rejoinder Memorial, para 113.

that case.<sup>314</sup>

212. The Claimant submits that, in the present case, the ‘relating to’ threshold will be met so long as a measure ‘is adopted with the understanding or purpose that a significant impact on the investor will result.’<sup>315</sup> This standard would be appropriate, in the Claimant’s submission, because it would satisfy the causal nexus requirement while not prejudging the merits of the case during this bifurcated proceeding.<sup>316</sup>

**(b) Whether the Nova Scotia Measures ‘relate to’ Resolute and Resolute’s investments**

213. The Claimant points to the following excerpts from its Notice of Arbitration and Statement of Claim that establish a ‘causal connection’ between the Nova Scotia Measures and its investments:
- i. 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.
  - ii. Nova Scotia understood that the SC paper market was in ‘secular decline’.
  - iii. 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.
  - iv. 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’.
  - v. Port Hawkesbury Paper began to take market share from Resolute in 2013.
  - vi. 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.
  - vii. Nova Scotia selected the Port Hawkesbury Paper mill as a national champion, chosen by a

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<sup>314</sup> Claimant’s Counter Memorial, para 150; Claimant’s Rejoinder Memorial, para 115; Hearing on Jurisdiction and Admissibility, August 15, 2017, 340:1-6.

<sup>315</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 345:22-346:5.

<sup>316</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 346:6-14.

government, to establish it as the ‘lowest cost and most competitive producer’ in the SC paper market, displacing all other producers, including Resolute.

- viii. 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.
- ix. Nova Scotia propped its own provincial mill up with benefits and operational advantages to ensure that its costs are lower than those of Resolute and other competitors in the Canadian, US and other markets, thereby creating grossly unfair conditions in an SC paper market in Canada that has very few producers.<sup>317</sup>

214. A causal connection exists between Resolute, its investments in Canada and the Nova Scotia Measures given that these measures ‘eventually harmed Resolute directly’ even though they ‘were not aimed specifically at Resolute’ nor were they ‘adopted with the express purpose of causing [Resolute] loss.’<sup>318</sup> The Claimant refutes the contention that it has alleged ‘a grand, far-fetched conspiracy’. It simply states its case that the Nova Scotia Measures sought to make Port Hawkesbury the ‘national champion’; even though the measures were not directly aimed at the Claimant, it nonetheless felt a direct impact from them.<sup>319</sup> As was the case in *Cargill*, the Nova Scotia Measures were intended to harm an identifiable class of competitors, of whom ‘Resolute was the lone foreign investor in Canada.’<sup>320</sup> This, the Claimant submits, is sufficient to establish the necessary ‘causal nexus’ required by Article 1101(1).<sup>321</sup>

215. At the Hearing on Jurisdiction and Admissibility, the Claimant relied on the following documentary evidence to ‘show the inextricable connection between [the Nova Scotia Measures] and the sale to Pacific West and making Pacific West the lowest cost producer in North America,’<sup>322</sup> and to substantiate its submission that the Nova Scotia Measures ‘relate to’ the Claimant and the Laurentide mill:

- i. a CBC news report from September 2011 in which various individuals expressed the intention to sell the Port Hawkesbury mill as a going concern, despite the fact it was

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<sup>317</sup> Claimant’s Counter Memorial, para 152, referring to Claimant’s Notice of Arbitration and Statement of Claim, paras 4, 47, 48, 50, 53, 89, 95, 107; Hearing on Jurisdiction and Admissibility, August 15, 2017, 347:2-349-18.

<sup>318</sup> Claimant’s Rejoinder Memorial, para 118.

<sup>319</sup> Claimant’s Rejoinder Memorial, paras 120-121.

<sup>320</sup> Claimant’s Rejoinder Memorial, para 122; Hearing on Jurisdiction and Admissibility, August 15, 2017, 349:19-350:9.

<sup>321</sup> Claimant’s Rejoinder Memorial, para 122.

<sup>322</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 444:1-6.

suffering ‘significant operating losses’ of around \$50 million in operating losses per year. This report, the Claimant says, demonstrates the lengths to which Nova Scotia would support the Port Hawkesbury mill in order to ensure its ongoing viability. In this regard, reference in this report to the Forestry Infrastructure Fund shows that it was a measure required for the sale of the Port Hawkesbury mill and is not unrelated to the Claimant and the Laurentide mill.<sup>323</sup>

- ii. a press release from Nova Scotia in which the Premier explains that ‘the province had a role to play to make [the sale of Port Hawkesbury] a success. That the province took every reasonable step to keep this mill resale ready and facilitate the reopening’, particularly through the hot idle funding.<sup>324</sup>
- iii. various statements including: (a) of the Premier to the effect that the Forestry Infrastructure Fund was intended to keep the Port Hawkesbury mill ‘resale ready’;<sup>325</sup> (b) of the Court appointed Monitor that the hot idle funding ‘permit[s] a smooth resumption of production when circumstances permit’;<sup>326</sup> and (c) a press release from the Premier ‘when they announced the actual financial package, this is mentioned simply as part of the support for making [Port Hawkesbury] the national champion.’<sup>327</sup>

216. Notwithstanding the Claimant’s submission in relation to the inappropriateness of the *Methanex* ‘legally significant connection’ test, the Claimant submits that it would nevertheless meet the requirements of such a test if this Tribunal were to apply it.<sup>328</sup> This is because the intent or purpose of the Nova Scotia Measures was ‘not only to make PHP the lowest cost SC paper producer, but also to push higher-cost producers out of business.’<sup>329</sup> The desire to give PHP such a competitive advantage necessarily implies an intention to harm foreign investors, such intention being

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<sup>323</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 444:15-450:10, referring to *NewPage Port Hawkesbury mill to be sold*, *CBC News*, September 7, 2011 (**C-005**).

<sup>324</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 450:15-451:25, referring to Nova Scotia Press Release, Province Standing with Strait after Announcement Mill Will Not Reopen, September 21, 2012 (**C-035**).

<sup>325</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 452:11-453:11, referring to Nova Scotia Department of Natural Resources, News Release, ‘Province Presents Forestry Infrastructure Plan’, September 20, 2011 (**R-039**).

<sup>326</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 453:12-454:1, referring to *Re NewPage Port Hawkesbury Corp.*, Report of the Proposed Monitor (S.C.N.S.), September 7, 2011 (**R-046**); see also 454:2-455:5 referring to Nova Scotia Department of Natural Resources, News Release, ‘Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready’, January 4, 2012 (**R-048**).

<sup>327</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 455:6-458:3 referring to Nova Scotia Press Release, Province Invests in Jobs, Training, and Renewing the Forestry Sector, August 20, 2012 (**C-009**).

<sup>328</sup> Claimant’s Counter Memorial, para 153; Claimant’s Rejoinder Memorial, paras 123-124.

<sup>329</sup> Claimant’s Counter Memorial, para 155.

sufficient to satisfy the ‘legally significant connection’ test espoused in *Methanex*.<sup>330</sup>

217. The Claimant submits that the public spending measures implemented by Nova Scotia were ‘designed to intervene in a competitive market and alter it to the advantage of the government’s chosen champion.’<sup>331</sup> Contrary to the Respondent’s contention that ‘a flood of claims by innumerable investors’ could materialize ‘if NAFTA Chapter Eleven applied every time government spending had an impact on market conditions’, the Claimant submits that NAFTA Parties are permitted to ‘spend public funds in a way that incidentally impacts market conditions’ but ‘may not spend public monies deliberately, or with the unavoidable expectation, of undermining foreign investors or their investments.’<sup>332</sup>

#### 4. The Non-Disputing NAFTA Parties’ Comments

218. The United States and Mexico both endorse the finding of the *Methanex* tribunal that the words ‘relating to’ in Article 1101(1) require a ‘legally significant connection’ between the impugned measures and the claimant or its investment.<sup>333</sup> Both Non-Disputing NAFTA Parties further submit that if the ‘relating to’ requirement were satisfied by a ‘mere, or incidental, effect that a challenged measure had on a claimant’, an indeterminate number of investors may be entitled to bring claims under NAFTA and so the words ‘relating to’ would impose no threshold at all.<sup>334</sup>
219. The United States submits further that the question of whether a ‘challenged measure bears a “legally significant connection” to a foreign investor or investment depends on the facts of a given case’ but does require a ‘direct connection between the challenged measure and the foreign investor or investment’, not a mere ‘negative impact’ on the investor or investment.<sup>335</sup> The United States notes that such a connection was found in *SD Myers* since the relevant measure ‘was raised to address specifically the operations of SDMI and its investment’. In *Bilcon* there was clearly a ‘legally significant connection’ between the measure that rejected the claimant’s investment. In *Cargill*, the import permit requirement ‘directly affected’ the claimant by imposing a ‘legal impediment’ on the conduct of its business.<sup>336</sup> The United States notes that while a ‘legally significant connection’ was not found in *Methanex*, the tribunal speculated that such a connection would have existed had the claimant been able to prove that the ‘Governor of California intended

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<sup>330</sup> Claimant’s Counter Memorial, paras 152-156.

<sup>331</sup> Claimant’s Counter Memorial, para 159.

<sup>332</sup> Claimant’s Counter Memorial, para 162.

<sup>333</sup> United States Submission, para 12; Mexico Submission, paras 8, 11.

<sup>334</sup> United States Submission, para 12; Mexico Submission, para 9.

<sup>335</sup> United States Submission, para 13.

<sup>336</sup> United States Submission, para 14, citing *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, para 234 (*‘SD Myers, Partial Award’*); *Bilcon*, Award on Jurisdiction and Liability, paras 5, 12, 237, 239 and 241; and *Cargill*, Award, paras 173, 175.

to penalize foreign producers of methanol (such as the claimant).<sup>337</sup>

220. The Respondent points out that the NAFTA Parties all agree that to satisfy the ‘relating to’ requirement in Article 1101, a claimant must demonstrate that ‘legally significant connection’ exists between the challenged measures and the investor or its investment, and that something more than a ‘negative impact’ on the investor is required.<sup>338</sup> The Respondent further agrees with the United States that Article 1101 was not meant to allow ‘untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment’ to meet the threshold.<sup>339</sup>
221. The Claimant points out that the United States highlights that whether a measure is one ‘relating to’ an investment or investor ‘depends on the facts of a given case’.<sup>340</sup> The Claimant then recalls that the alleged purpose of the Nova Scotia Measures was to make Port Hawkesbury the national champion of the SC paper industry, necessarily to Resolute’s detriment and that these facts, accepted *pro tem* by Canada for purposes of bifurcation, are ‘sufficient to satisfy the Article 1101 standard’. Any findings on the facts for the Tribunal to make on this issue go to the merits of Resolute’s claims.<sup>341</sup> The Claimant also addresses concerns expressed by the United States that recognition of a claim would result in ‘unlimited liability’, by pointing out that the class of affected investors in the present case is narrowly confined.<sup>342</sup>

## 5. The Tribunal’s Analysis

### (a) The ‘relating to’ requirement: general considerations

222. The term ‘relating to’ in Article 1101 of NAFTA would appear to require that the measure complained of have some specific impact on the claimant: Chapter Eleven was not intended as a vehicle for public interest litigation. Beyond that, however, Article 1101’s limits are not very clear, and it is not a substitute for the specific requirements of other provisions of Chapter Eleven.
223. Under Article 32 of the Vienna Convention on the Law of Treaties, when the ordinary meaning of a treaty text leaves the meaning ambiguous or obscure, the interpreter may have recourse to the preparatory work.<sup>343</sup> In the earliest versions of Article 1101, dated December 1991, the

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<sup>337</sup> United States Submission, para 14, referring to *Methanex*, Partial Award, paras 151-159.

<sup>338</sup> Canada’s Reply to Art. 1128 Submissions, paras 26-27.

<sup>339</sup> Canada’s Reply to Art. 1128 Submissions, para 28.

<sup>340</sup> Claimant’s Reply to Art. 1128 Submissions, paras 20-23.

<sup>341</sup> Claimant’s Reply to Art. 1128 Submissions, para 22.

<sup>342</sup> Claimant’s Reply to Art. 1128 Submissions, paras 22-23.

<sup>343</sup> Arbitrator Cass, without diverging from the Tribunal’s analysis, would use great caution in according weight to sources other than the text accepted by the signatory Parties.

investment chapter's scope referred to measures 'affecting' either investments of another party in the host state's territory or 'affecting' investors.<sup>344</sup> By August 1992 the text was changed to 'relating to'. The drafts do not provide any explanation as to the modification.<sup>345</sup>

224. Canada's Statement of Implementation states that Chapter Eleven applies to:

measures by a Party (i.e. any level of government in Canada) that affect: investors of another Party [...]; investments of investors of another Party [...]; and for purposes of the provisions on performance requirements and environmental measures, all investments.<sup>346</sup>

225. The United States' Statement of Administrative Action uses different language, paraphrasing this element of Article 1101(1), stating simply that, subject to exceptions 'the chapter applies to all governmental measures relating to investment...'<sup>347</sup>

226. A number of tribunals have had the opportunity to analyze the 'relating to' requirement.

227. In *Ethyl Corporation*, Canada argued that the prohibition to import and trade a gasoline additive was not a measure relating to investment but one relating to the movement of goods. In rejecting the argument, the tribunal observed that Canada did not cite any authority, and did not elaborate any argument for a restrictive interpretation of the 'relating to' requirement.<sup>348</sup>

228. In *Pope & Talbot*, Canada contended that the implementation of the Canada-US Softwood Lumber Agreement did not relate to investments or investors but to trade in goods. The tribunal dismissed this argument. Among other things, it denied that a measure could be characterized as 'relating to' one subject matter to the exclusion of all others.<sup>349</sup>

229. In *SD Myers*, the applicant complained of a Canadian order prohibiting the export of PCB waste to the United States. The tribunal found that the 'relating to' requirement in Chapter Eleven was satisfied because the import ban was passed to address specifically the prospect that SDMI would carry through with its plans to expand its Canadian operations.<sup>350</sup>

230. In *Methanex*, the claimant was a producer and marketer of methanol, a key raw material in the manufacture of the gasoline additive MTBE. The challenged measure was California's ban on

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<sup>344</sup> INVEST, December 1991, 1, Article 2101, 401.

<sup>345</sup> INVEST.826, Lawyers' Revision (August 26, 1992) 1, Article 2101 (**RL-045**).

<sup>346</sup> Department of External Affairs, Canadian Statement on Implementation, Canada Gazette Part I, January 1, 1994, 148.

<sup>347</sup> US Statement of Administrative Action, 450.

<sup>348</sup> *Ethyl Corporation v Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, para 63.

<sup>349</sup> *Pope & Talbot Inc. v Canada*, UNCITRAL, Award in relation to Preliminary Motion by Canada, January 26, 2000, para 33 (**CL-002**).

<sup>350</sup> *S.D. Myers, Inc. v Government of Canada*, Partial Award, November 13, 2000, para 234.

the use of MTBE. In partially rejecting jurisdiction, the tribunal decided that there must be a legally significant connection between the questioned measure and the investor or its investment. Specifically, it said:

... The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. For example, in the law of tort, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage well-known in the laws of both the United States and Canada. Likewise, in the law of contract, the contract-breaker is not generally liable for all the consequences of its breach even towards the innocent party, still less to persons not privy to that contract. It is of course possible, by contract or statute, to enlarge towards infinity the legal consequences of human conduct; but against this traditional legal background, it would require clear and explicit language to achieve this result.

... there must be a legally significant connection between the measure and the investor or the investment. With such an interpretation, it is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day. Nonetheless, whilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie.<sup>351</sup>

231. Based on that reasoning, the tribunal determined that the meaning of the phrase 'relating to' in Article 1101(1) went beyond the simple effect of a measure on an investor or an investment and required a legally significant connection between them.<sup>352</sup>
232. Thus, the tribunal ruled it lacked jurisdiction to hear a claim based upon California's ban on the use of MTBE.<sup>353</sup> However, the tribunal stated it could hear a claim based on intent on the part of California's governor to favour domestic ethanol producers over foreign producers of MTBE and methanol.<sup>354</sup>

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<sup>351</sup> *Methanex*, Partial Award, paras 138-9.

<sup>352</sup> *Ibid*, para 147.

<sup>353</sup> *Ibid*, para 150.

<sup>354</sup> *Methanex Corporation v United States of America*, UNCITRAL, Tribunal's Letter re Request for Interpretation of Award, September 25, 2002, para 17.

**(b) Application and critique of *Methanex* in subsequent cases**

233. The *Methanex* test was adopted by the tribunals in *Bayview*,<sup>355</sup> *Cargill*,<sup>356</sup> *Apotex II*,<sup>357</sup> *Bilcon*<sup>358</sup> and *Mesa*.<sup>359</sup> While *Bayview* and *Bilcon* did not clarify the meaning of ‘legally significant connection’, the tribunals in *Cargill*, *Apotex II* and *Mesa* did contribute to a better, though not necessarily consistent, understanding of the test.
234. In *Cargill*, the claimant questioned Mexico’s imposition of a tax on soft drinks containing HFCS and its failure to issue import permits. Mexico argued that the import permit requirement was a trade measure, not an investment measure.<sup>360</sup> The tribunal considered that *Methanex* imposed two requirements: (a) that the questioned measure produce an effect on the investor or its investment; and (b) a ‘causal connection requirement’: there must be a legally significant connection between the measure and the investors of another party or investments of investors of another party.<sup>361</sup> In that regard, the tribunal said that although the import permit requirement notionally prevented the claimant’s goods from crossing the border from the United States into Mexico, the permit directly ‘affected’ the business of Cargill de Mexico.<sup>362</sup> The tribunal also understood that the import permit requirement constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.<sup>363</sup>
235. When reviewing (and upholding) the *Cargill* award, the Ontario Superior Court held that the term ‘related’ in Article 1101 requires only some connection but not that the measure be adopted with the express purpose of causing loss. The Court said:

With reference to the threshold issues in Article 1101, Mexico acknowledges that Cargill was an investor, and that CdM was an investment. Clearly the measures adopted by Mexico

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<sup>355</sup> *Bayview Irrigation District v United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, June 19, 2007, para 101. The tribunal decided it lacked jurisdiction because the investors were domestic investors in Texas, not foreign investors in Mexico (para 104).

<sup>356</sup> *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, para 174. The tribunal held that there was a legally significant connection between an import permit requirement and Cargill’s business in Mexico (para 175).

<sup>357</sup> *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, para 6.13.

<sup>358</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, para 240.

<sup>359</sup> *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, Award, March 24, 2016, para 259.

<sup>360</sup> *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, para 170.

<sup>361</sup> *Ibid*, para 174.

<sup>362</sup> *Ibid*, para 173.

<sup>363</sup> *Ibid*, para 175.

related to the investor and the investment. The term ‘related’ requires only some connection and does not require that the measure be adopted with the express purpose of causing loss.<sup>364</sup>

236. The Respondent argues that the *Cargill* tribunal did not interpret or apply the ‘relating to’ threshold in any way differently from *Methanex*.<sup>365</sup> while the *Cargill* tribunal used the phrases ‘causal connection’ and ‘causal nexus’ requirements, not ‘legally significant connection’, they share the idea that the measure must have a direct relationship constituting more than a mere effect on an investor or its investment.<sup>366</sup> On the other hand, the Claimant considers that *Cargill* did not have to be the specific target of the measures in order for the tribunal to exercise jurisdiction over its claims; it needed only to be directly affected, for example, by a measure that was intended to protect a local industry and to hurt its competitors elsewhere.<sup>367</sup>
237. In *Apotex II*, the claimant complained that the United States had imposed an import alert and detention of certain drugs produced in Canada.<sup>368</sup> The tribunal considered that the *Cargill* tribunal applied the same interpretation of Article 1101(1) as in *Methanex* and *Bayview*.<sup>369</sup> The tribunal considered that the circumstances of *Apotex II* were similar to those of *Cargill* but not to *Methanex*.<sup>370</sup> The facts were similar to *Cargill* in that the immediate effect of the import alert made it impossible for the claimant’s company in the host state to receive contracted products from its factories in Canada; as a direct result, the claimant’s investment was prevented from carrying on a major part of its business.<sup>371</sup> The facts were different from *Methanex*, because there the potential class of investors indirectly affected by the disputed measure was indeterminate and unknown, whereas in *Apotex II* the questioned measure affected the claimant immediately and directly.<sup>372</sup>
238. Importantly, contrary to the *Cargill* tribunal’s causal connection requirement, the *Apotex II* tribunal thought 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’. The tribunal stated that...

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<sup>364</sup> *United Mexican States v Cargill Inc*, 2010 ONSC 4656, para 57.

<sup>365</sup> Respondent’s Memorial on Jurisdiction, December 22, 2016, para 88; Respondent’s Reply Memorial on Jurisdiction, 29 March 2017, para 122.

<sup>366</sup> Respondent’s Reply Memorial on Jurisdiction, para 125.

<sup>367</sup> Claimants Counter-Memorial on Jurisdiction, para 130.

<sup>368</sup> *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014.

<sup>369</sup> *Ibid*, para 6.13.

<sup>370</sup> *Ibid*, para 6.23.

<sup>371</sup> *Ibid*.

<sup>372</sup> *Ibid*, para 6.24.

For jurisdictional purposes, the threshold is necessarily different under NAFTA Article 1101(1), given the ordinary meaning of the connecting phrase ‘relating to.’<sup>373</sup>

... Equally, in the Tribunal’s view, it is no answer for the Respondent to invoke different theories as to the legal cause of loss to Apotex-US, other than the Import Alert. That issue may likewise affect issues of liability and quantum; but, again, there is no reason for requiring NAFTA 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>374</sup>

... there is a practical problem in seeking to interpret and apply the phrase ‘relating to’ as a narrow threshold jurisdictional issue without any regard to the substantive NAFTA provisions invoked by a claimant investor in the particular case ...<sup>375</sup>

239. In *Mesa*, the claimant questioned certain measures taken in Ontario to promote the generation and consumption of renewable energy in the province.<sup>376</sup> In finding the government actions met the Article 1101(1) requirement, the tribunal followed *Cargill*, saying that all of the measures must have a causal nexus with the Claimant or its investment.<sup>377</sup>

240. The *Methanex* test has been subject to criticism. The *Methanex* tribunal built its argument by resorting to analogy with the law of state responsibility, contract law and tort law—that is, substantive law. Nevertheless, the tribunal used the test to exclude jurisdiction.<sup>378</sup>

241. The *BG* tribunal expressly rejected the *Methanex* test on additional grounds. The tribunal noted that several NAFTA chapters have exceptions to obligations that would not be necessary if measures which did not ‘relate to’ other NAFTA investors or their investments were already outside its scope.<sup>379</sup> However, the *BG* tribunal seems to have understood that the *Methanex* test requires that a questioned measure, on its face, targets an investor.<sup>380</sup> Additionally, *BG*’s claim was brought under the Argentina-United Kingdom BIT, not under NAFTA.

### (c) The Tribunal’s conclusion on the applicable test

242. Article 1101(1) requires that the questioned measure ‘relate to’ an investor or an investment. Having regard to the preponderant case-law and the convergent views of the three NAFTA Parties (see paragraphs 218-220 above), the Tribunal concludes that there must exist a ‘legally significant connection’ between the measure and the claimant or its investment. It agrees with the *Apotex II*

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<sup>373</sup> Ibid, para 6.20.

<sup>374</sup> Ibid, para 6.26.

<sup>375</sup> Ibid, para 6.27.

<sup>376</sup> *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, para 254.

<sup>377</sup> Ibid, para 259.

<sup>378</sup> Z Douglas, *The International Law of Investment Claims* (CUP, 2009) 244, para 464.

<sup>379</sup> *BG Group Plc. v Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para 230.

<sup>380</sup> Ibid, para 231.

tribunal in rejecting the application of a legal test of causation. Chapter Eleven's substantive requirements of causation should be analyzed when deciding on the merits of the claim. Rather, the Tribunal should ask whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment. In doing so, the tribunal should ordinarily accept *pro tem* the facts as alleged. It is not necessary that the measure should have targeted the claimant or its investment—although if it did so, the necessary legal relationship will be established. Nor is it necessary that the measure imposed legal penalties or prohibitions on the investor or the investment itself. However, a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.

**(d) Application to the present claim**

243. In the present case, the Claimant complains about Nova Scotia's measures taken for the benefit of PHP.<sup>381</sup> Canada argued that 'measures which merely affect an investor and its investment economically do not automatically allow an investor to invoke the protections of NAFTA Chapter Eleven.'<sup>382</sup> In principle this is correct, but it is necessary for this purpose to draw a distinction between those measures aimed at maintaining the Port Hawkesbury mill in a condition where it could be offered for sale as a going concern and those involved in the actual transaction of sale and reopening on favourable terms.
244. As to the former, the financial support offered by Nova Scotia to maintain the plant in 'hot idle' condition is key. It did not directly address, target, implicate, or affect the Claimant. Had the financial support not resulted in a sale of the plant as a going concern, it would have had no impact at all on Claimant or other producers of supercalendered paper. The cost to Nova Scotia of keeping the plant in 'hot idle' condition may or may not have been justified from a fiscal point of view but it maintained the plant's value and preserved the possibility of reopening, with consequent preservation of local employment opportunities. It was in no way a measure relating to the Claimant's investment in different plants, in a different province. Similar considerations apply to the other Nova Scotia measures taken during the period of administration of the company, including the FIF. Applying the principle as articulated in paragraph 242, these pre-sale measures fall outside the scope of Article 1101(1) of NAFTA and cannot form part of the present claim.
245. The position as concerns the actual terms of sale is arguably different. PWCC's winning bid of C\$33 million had attached to it a number of conditions, notably concerning financial benefits offered or approved by Nova Scotia, including (a) C\$124.5 million in loans (not under market

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<sup>381</sup> Claimant's Counter-Memorial on Jurisdiction, para 12-21.

<sup>382</sup> Respondent's Memorial on jurisdiction, para 82.

conditions) and other payments; (b) tax savings in Nova Scotia for assets in other provinces; (c) municipal tax breaks; and (d) an electricity discount.<sup>383</sup>

246. At the time of the measures there were only five companies in the business of producing supercalendered paper in the whole of North America. The measures allowed Port Hawkesbury to produce at a lower cost than it could have otherwise done. The Claimant argues that the total production capacity of the market increased, competition increased and market prices were, after a brief interval, driven down.
247. To determine whether these measures ‘related to’ the investor or its investment, the questions which need to be answered are: (a) is it possible that the benefits afforded to Port Hawkesbury might have allowed it to produce at a lower cost than its competitors?; (b) if so, is it possible that prices were reduced as a consequence?; (c) if so, is it possible that in a five-company market competitors might have incurred significant losses as a consequence?; and (d) if so, in a five-company market, is a significant business loss in Québec proximate to benefits provided for a company in Nova Scotia? Positive answers to these four questions would in the Tribunal’s view justify a finding that the questioned measures ‘related to’ the Claimant and its investment.
248. The Respondent stressed that the Measures did not target or discriminate against the Claimant or apply to it at all. But they were intended to put the purchaser in a favourable position, and in a small and saturated market it was to be expected that competitors would be affected. The Tribunal finds it unnecessary and inappropriate to parse the facts further at this preliminary stage: to do so risks intruding on issues of substance. The Tribunal regards the case as close to the line, but on balance it would answer each of the four questions identified above in the affirmative. It holds that the sale measures were sufficiently proximate to the Claimant and its investment to satisfy the ‘relating to’ requirement of Article 1101.

## **D. THE PROVINCIAL TREATMENT OBJECTION: NAFTA ARTICLE 1102(3)**

### **1. Introduction**

249. The Respondent submits that the Nova Scotia Measures are incapable of founding a national treatment claim under Article 1102(3). NAFTA Article 1102(3) provides:

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

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<sup>383</sup> Claimant’s Counter-Memorial on Jurisdiction, para 21. [This footnote, along with the name of the mill in para. 330 below, were corrected by the Tribunal on 5 March 2018 pursuant to Art. 36 of the UNCITRAL Rules. The corrections have been incorporated into this consolidated electronic version of the Decision].

circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

250. The Respondent submits that Article 1102(3) confines the scope of the national treatment obligation, insofar as concerns a component state or province, to treatment afforded to investors within the jurisdiction of that state or province. It does not extend to extraterritorial or extra-provincial treatment. Since the Claimant had no investment in Nova Scotia, there could have been no breach of the national treatment obligation by Nova Scotia in relation to it. The Claimant, for its part, submits that the Respondent's interpretation of Article 1102(3) is too narrow and would diminish the national treatment protection provided by NAFTA since it would exclude measures taken by one state or province that affect foreign investors in other states or provinces.
251. If the Respondent's objection is successful, it would dispose of the Claimant's national treatment claim in its entirety.<sup>384</sup>

## 2. The Respondent's Arguments

252. The Respondent refers to *Merrill & Ring* as the 'only NAFTA dispute [to date] in which the issue of cross-jurisdictional comparison has arisen.'<sup>385</sup> In that case, the tribunal rejected a comparison between treatment provided by the federal Government of Canada and the provincial government of British Columbia, holding:

Treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors [...] just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.<sup>386</sup>

253. The Respondent considers it unreasoned that the Claimant characterises *Merrill & Ring* as distinguishable on the basis that it is a 'regulatory case'.<sup>387</sup> The Respondent also considers the Claimant's reliance on *Bilcon* as erroneous since the tribunal in that case also determined that 'the claimant had the burden of proving that "a government accorded Bilcon or its investment 'treatment' during the environmental assessment and 'that the *same* government accorded treatment to other domestic [...] investors or investments.'"'<sup>388</sup> The Respondent submits that, in fact, 'every single one of the NAFTA national treatment cases relied upon by the Claimant undermines its own argument and proves Canada's point that this Article 1102 claim is

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<sup>384</sup> Procedural Order No. 4, Decision on Bifurcation, November 18, 2016, para 4.19.

<sup>385</sup> Respondent's Memorial, para 120.

<sup>386</sup> Respondent's Memorial, para 120, citing *Merrill & Ring Forestry L.P. v The Government of Canada* (UNCITRAL) Award, March 31, 2010, para 82 (RL-060) ('*Merrill & Ring, Award*').

<sup>387</sup> Respondent's Memorial, para 121; Respondent's Reply Memorial, para 157.

<sup>388</sup> Respondent's Memorial, para 122, citing *Bilcon*, Award on Jurisdiction and Liability, para 717.

inadmissible.’<sup>389</sup>

254. Accordingly, the Respondent submits that the Claimant’s complaint that ‘it should have been accorded the same treatment in Québec that Nova Scotia accorded to PWCC’ is precluded by virtue of Article 1102(3).<sup>390</sup> The Respondent points out that the Claimant ‘has not identified any treatment it received directly as an investor in Canada [...] [nor] any treatment that it received within the jurisdiction of the province of Nova Scotia’ and, therefore, the claim must fail.<sup>391</sup>
255. The Respondent considers the Claimant’s case as enunciated in its Counter-Memorial to demonstrate the ‘fundamental illogic of its position’.<sup>392</sup> The Respondent submits that plainly the Claimant’s complaint that it was not afforded like treatment by Nova Scotia ‘falls apart’ since ‘Nova Scotia cannot accord treatment to an investor over which it has no jurisdiction.’<sup>393</sup> The Respondent submits that there is no ‘treatment’ by Nova Scotia of Resolute or the Laurentide mill, only treatment of third parties, forestry workers and First Nations industries and, as such, the claim under Article 1102 must necessarily fail.<sup>394</sup> The Respondent points out that the Nova Scotia Measures covering ‘the subject matters of property tax, hydro-electricity, and the management and disposition of provincial Crown land’ are matters within the competence of the provincial government and are ‘limited by its territorial jurisdiction, as defined by its geographic boundaries.’<sup>395</sup> Accordingly, Nova Scotia simply has no competence to enact measures relating to Resolute’s investment in Québec.<sup>396</sup>
256. The Respondent argues that acceptance of the Claimant’s reading of Article 1102 would lead to the radical result that treatment by one state or province would permit a foreign investor in any other state or province to bring a national treatment claim against the federal government, meaning that ‘the measure of a single state would automatically become the standard of treatment by which the remaining [...] states are held.’<sup>397</sup>
257. The Respondent submits that the Claimant is attempting to ‘get around what 1102(3) would not

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<sup>389</sup> Respondent’s Reply Memorial, para 159.

<sup>390</sup> Respondent’s Memorial, para 124.

<sup>391</sup> Respondent’s Memorial, para 125.

<sup>392</sup> Respondent’s Reply Memorial, para 146.

<sup>393</sup> Respondent’s Reply Memorial, para 146; Hearing on Jurisdiction and Admissibility, August 15, 2017, 26:20-23.

<sup>394</sup> Respondent’s Reply Memorial, para 148; Hearing on Jurisdiction and Admissibility, August 15, 2017, 244:23-245:14.

<sup>395</sup> Respondent’s Reply Memorial, para 151.

<sup>396</sup> Respondent’s Reply Memorial, para 151; Hearing on Jurisdiction and Admissibility, August 15, 2017, 245:15-21.

<sup>397</sup> Respondent’s Reply Memorial, para 160.

allow them to do [...] by saying that there was treatment accorded to them even though Nova Scotia could never have offered them the same treatment.’<sup>398</sup> By reference to Judge Higgins’ opinion in *Oil Platforms*, the Respondent alleges that the impugned conduct is not capable of constituting a breach of the NAFTA since a factual predicate is missing, and therefore the Respondent invites the Tribunal to determine that the claim is inadmissible.<sup>399</sup>

258. Finally, the Respondent considers the Claimant’s arguments regarding the meaning of ‘in like circumstances’ to be premature since this question ought not be answered in the jurisdiction and admissibility phase and can only be considered once the Tribunal determines whether the Claimant’s Article 1102 claim is permissible.<sup>400</sup>

### 3. The Claimant’s Arguments

259. The Claimant alleges that the Respondent has shifted its interpretation of Article 1102(3) from being a ‘geographic limitation precluding Resolute from making any national treatment claims with respect to Canadian investments located outside of Nova Scotia’ to one referring to a ‘metaphysical “jurisdiction”’ which ‘renders inadmissible claims that seek to compare treatment accorded by one government to the treatment accorded by a different government.’<sup>401</sup> However, the Claimant submits that the Respondent’s reformulated argument is ‘irrelevant here’ because the Claimant ‘is not asking this Tribunal to compare treatment accorded by one province to treatment accorded by another province’ or some other level of government.<sup>402</sup>
260. Rather, the Claimant submits that its national treatment claim under Article 1102 deals with ‘whether the treatment Nova Scotia accorded to Resolute is no less favourable 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.’<sup>403</sup> The Claimant alleges that the Respondent’s supposition ‘that a province cannot accord treatment to foreign investors outside of the province’s geographical or jurisdictional

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<sup>398</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 427:5-22.

<sup>399</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 428:2-429:2. See *Oil Platforms* (Islamic Republic of Iran v United States of America), ICJ Reports 1996, Separate Opinion of Judge Higgins, addressing the methodology for determining whether a particular claim falls within the compromissory clause of a treaty.

<sup>400</sup> Respondent’s Reply Memorial, para 162.

<sup>401</sup> Claimant’s Counter Memorial, paras 163-165; Hearing on Jurisdiction and Admissibility, August 15, 2017, 368:14-372:2.

<sup>402</sup> Claimant’s Counter Memorial, para 166; Hearing on Jurisdiction and Admissibility, August 15, 2017, 41:23-42:2.

<sup>403</sup> Claimant’s Counter Memorial, para 168; Hearing on Jurisdiction and Admissibility, August 15, 2017, 42:21-43:10.

confines' is both legally and factually untrue.<sup>404</sup>

261. The Claimant submits that accepting the Respondent's 'narrow interpretation' of Article 1102(3) would permit provincial governments to favour local companies over competitors who are not physically located in the same province.<sup>405</sup> Such an interpretation would require this Tribunal to read in additional words to the plain words of Article 1102(3) chosen by the NAFTA Parties and would run contrary to the objectives of NAFTA as they are promoted by the national treatment standard.<sup>406</sup> The Claimant submits that measures undertaken to the benefit of a local investor and the detriment of a foreign investor operating elsewhere in Canada should properly be considered as 'treatment' under Article 1102.<sup>407</sup>
262. In fact, Nova Scotia did not see itself as limited to granting PWCC benefits within the jurisdiction, but also 'extended tax benefits to PWCC for assets outside Nova Scotia, thus reaching deliberately beyond its own borders, although still within Canada, to discriminate.'<sup>408</sup> The Claimant alleges that 'Canada knew that it was responsible for the conduct of Nova Scotia and that Nova Scotia's conduct would have continent-wide consequences' and was 'put on notice of the extra-territorial impact of the Nova Scotia Measures' by the Claimant itself and the United States through the WTO.<sup>409</sup> The Claimant alleges that despite this knowledge, Canada chose to defend and protect Nova Scotia's discriminatory measures that are 'contrary to the object and purpose of NAFTA.'<sup>410</sup>
263. The size of Port Hawkesbury in the market made it obvious that the Nova Scotia Measures would necessarily have an impact and 'were intended to confer a comparative advantage on a domestic competitor, to the detriment of the foreign investor in the same business sector, which was not limited to the territory of Nova Scotia.'<sup>411</sup> Accordingly, the Claimant submits that 'by distorting market competition, the Nova Scotia measures had extra provincial effects that constituted "treatment" for Resolute.'<sup>412</sup>
264. The Claimant refers to the *travaux préparatoires* of NAFTA Chapter Eleven to the effect that the NAFTA Parties 'reject[ed] wording that would have restricted national treatment obligations of states and provinces to treatment of foreign investors physically within the province or state' but

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<sup>404</sup> Claimant's Counter Memorial, para 169; Claimant's Rejoinder Memorial, para 129.

<sup>405</sup> Claimant's Counter Memorial, paras 173-174.

<sup>406</sup> Claimant's Counter Memorial, paras 177-179; Claimant's Rejoinder Memorial, para 140; Hearing on Jurisdiction and Admissibility, August 15, 2017, 390:18-391:20.

<sup>407</sup> Claimant's Rejoinder Memorial, para 131.

<sup>408</sup> Claimant's Counter Memorial, para 182.

<sup>409</sup> Claimant's Counter Memorial, para 184.

<sup>410</sup> Claimant's Counter Memorial, paras 185-186.

<sup>411</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 379:9-380:22.

<sup>412</sup> Hearing on Jurisdiction and Admissibility, August 15, 2017, 381:4-8.

instead ‘deliberately chose wording that did not allow a state or province to deny most favourable 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.’<sup>413</sup>

265. The Claimant submits that the issue for this Tribunal to resolve is whether Resolute has been accorded ‘national treatment’ by Nova Scotia and Canada.<sup>414</sup> This requires the Tribunal to assess whether the Claimant has been treated no less favourably than its Canadian competitors ‘in like circumstances’.<sup>415</sup> The Claimant submits that ‘like circumstances’ must be ‘determined on a case-by-case basis’ and, in past NAFTA cases, have been assessed according to the relevant ‘economic and business sector, not geography or subnational jurisdiction.’<sup>416</sup>
266. The Claimant finds support for this submission in the *SD Myers, Pope & Talbot, Archer Daniels Midland*, and *Cargill* decisions. The Claimant submits that these cases represent a consistent line of authority where each NAFTA tribunal has determined that the relevant comparison required by the words ‘like circumstances’ in Article 1102 relates to whether both comparators operate in the same business or economic sector.<sup>417</sup>
267. In this case, the Claimant says that it is in ‘like circumstances’ to PHP because it is a competitor in the same North American SC paper market, not because of physical location in the same province.<sup>418</sup> The Claimant submits that ‘NAFTA jurisprudence has never gone as far’ as to assert that the national treatment obligation relating to provincial measures requires comparison only with the treatment of other investors within that province.<sup>419</sup> The Claimant seeks to distinguish this case from the decision in *Merrill & Ring* relied upon by the Respondent on the basis that the measures in the present case were not ‘regulatory’ but ‘were intended to confer an advantage on a domestic competitor to the detriment of the foreign investor in the same business sector’, such business sector not being limited to the province of Nova Scotia.<sup>420</sup> In this case, the Claimant does not ask the Tribunal to compare the conduct of two different levels of government, as was the case in *Merrill & Ring*, but rather to compare the treatment of the Claimant and PHP by the Nova

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<sup>413</sup> Claimant’s Counter Memorial, paras 187-188; Claimant’s Rejoinder Memorial, para 141; Hearing on Jurisdiction and Admissibility, August 15, 2017, 391:21-395:21.

<sup>414</sup> Claimant’s Counter Memorial, para 189.

<sup>415</sup> Claimant’s Counter Memorial, para 189.

<sup>416</sup> Claimant’s Counter Memorial, para 190.

<sup>417</sup> Claimant’s Counter Memorial, paras 191-200.

<sup>418</sup> Claimant’s Counter Memorial, paras 180-181.

<sup>419</sup> Claimant’s Counter Memorial, para 201.

<sup>420</sup> Claimant’s Counter Memorial, para 204; Hearing on Jurisdiction and Admissibility, August 15, 2017, 398:14-20.

Scotia Government.<sup>421</sup>

268. Additionally, the Claimant recalls the following comments of the *Cargill* tribunal:

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>422</sup>

269. The Claimant submits that similarly, reliance by this Tribunal on the *Merrill & Ring* principle would render Article 1102 meaningless since Nova Scotia's stated intention to make PHP the lowest cost SC paper producer 'could be achieved only through the introduction of discriminatory measures.'<sup>423</sup>

#### 4. The Non-Disputing NAFTA Parties' Comments

270. The United States submits that the Article 1102 obligation 'prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are "in like circumstances"', but does not impose an obligation to 'provide nationally uniform treatment.'<sup>424</sup> Specifically, 'Article 1102(3) pertains to state and provincial measures only' and ensures that investors from NAFTA Parties are afforded the better of: (1) treatment accorded by a state or province to in-state (or in-province) investors or their investment; and (2) treatment accorded to domestic out-of-state (or out-of-province) investors or their investments.<sup>425</sup>

271. The United States submits that Article 1102(3) does not prevent a state or province from implementing measures that apply only to investors or investments in that state or province.<sup>426</sup> The United States contends that 'an 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 burden unless it is "in like circumstances" with that enterprise.'<sup>427</sup> Whether the measures discriminate against a foreign investor 'in like circumstances' on the basis of their nationality will be a 'fact-specific inquiry at the merits phase.'<sup>428</sup>

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<sup>421</sup> Claimant's Counter Memorial, para 205; Hearing on Jurisdiction and Admissibility, August 15, 2017, 395:23-396:20.

<sup>422</sup> Claimant's Counter Memorial, para 208, citing *Cargill*, Award, para 210.

<sup>423</sup> Claimant's Counter Memorial, para 209.

<sup>424</sup> United States Submission, para 15.

<sup>425</sup> United States Submission, para 16.

<sup>426</sup> United States Submission, para 17.

<sup>427</sup> United States Submission, para 17.

<sup>428</sup> United States Submission, para 17.

272. Mexico agrees with Canada's submission that the NAFTA Parties did not intend by Article 1102(3) that 'the treatment by one state or province would become the national standard for the entire country.'<sup>429</sup>
273. The Respondent does not disagree with the United States that an analysis of whether a foreign and domestic investor are 'in like circumstances' is a question for the merits. It points out, however, that such an analysis presumes there has been actual treatment accorded to the investor or its investment by the state or province in question in order for the claim to be admissible. In this respect, the Respondent states that 'absent any evidence of a link between Nova Scotia and the investor, the claim cannot even meet the *prima facie* basis of admissibility and can therefore be dismissed at this preliminary stage.'<sup>430</sup>
274. The Claimant notes that the United States recognizes that proof of national treatment under Article 1102(3) requires a 'fact-specific inquiry at the merits phase' and states that such an inquiry 'by definition' cannot be made at this stage of the arbitration.<sup>431</sup> Thus, the Claimant concludes that the US position is consistent with its own position, and, 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.<sup>432</sup>

## 5. The Tribunal's Analysis

### (a) The legal framework

275. Article 1102 of NAFTA, the national treatment clause, provides that each party must accord to investors of another party and to investments of investors of another party treatment no less favourable than it accords, in like circumstances, to its own investors or their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>433</sup>
276. In the present phase of this arbitration, the relevant measures were taken by Nova Scotia and not by the federal government. For those situations, Article 1102(3) of NAFTA provides that:

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

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<sup>429</sup> Mexico Submission, para 13, citing Respondent's Reply Memorial, para 161.

<sup>430</sup> Canada's Reply to Art. 1128 Submissions, para 33.

<sup>431</sup> Claimant's Reply to Art. 1128 Submissions, paras 25-26.

<sup>432</sup> Ibid, paras 26-27.

<sup>433</sup> Article 1102 paras 1 & 2, NAFTA.

circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

277. The interpretation of Article 1102(3) is not without its difficulties. The underlying question is whether, in order to apply the national treatment standard, the NAFTA investor or its investment must already be present or intend to be present in the province. Or is it enough that the NAFTA investor or its investment is located within any part of the host state as long as it is accorded ‘treatment’ by the province?
278. NAFTA’s preamble and articles give limited help. The preamble expresses the NAFTA Parties’ resolve to ‘reduce the distortions to trade’. Provincial measures that give preference to in-province or domestic investors could be understood as distortions to trade. In light of the preamble, Article 1102(3) could be understood as prohibiting that a state or province accords treatment less favourable than the most favourable treatment it accords, in like circumstances, to investors, and to investments of investors. As long as there is treatment of the investor/investment by the state or province, it should not matter whether those distortions produce effects inside or outside the state or province which applied the questioned measure.
279. The initial proposal for what became Article 1102(3) was included in the December 1991 negotiating text. Specifically regarding Article 1102(3), the parties’ proposals were as follows:
- i. The Mexican version read: ‘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.’<sup>434</sup>
  - ii. The US proposal was similar: ‘The treatment accorded by a Party [under XX01 with respect to nationals and companies, and under XX02 with respect to investments] 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.’<sup>435</sup>
  - iii. Canada’s proposal said: ‘treatment by a province or state shall be: 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 the case maybe [*sic*], of the Party of which it forms a part.’<sup>436</sup>

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<sup>434</sup> INVEST, December 1991, 2–3, Article 2103.

<sup>435</sup> INVEST, December 1991, 3.

<sup>436</sup> INVEST, December 1991, 3, Article 105.

280. By April 1992 Mexico also joined the pertinent part of the United States' proposal<sup>437</sup> with respect to political subdivisions.<sup>438</sup> At that point the United States and Mexico supported one formulation while Canada supported another. On July 10, 1992, the three Parties agreed on a text. The text adopted a formulation close to the United States-Mexico proposal:<sup>439</sup>

The treatment accorded by a Party under this paragraph with respect to investors of another Party and their investments shall be, with respect to a state or province, no less favorable than the treatment accorded, in like circumstances, by such state or province to its residents, or entities legally constituted under its laws, or their investments in its territory.<sup>440</sup>

281. On July 22, 1992 a new text of the political subdivisions section was agreed:

The treatment accorded by a Party under paragraphs 1 and 2 shall mean, with respect to a state or province, treatment no less favourable than the treatment accorded, in like circumstances, by such state or province to its residents, or enterprises legally constituted under its laws, or their investments in its territory.<sup>441</sup>

That is to say, the 22 July version set forth that the baseline treatment owed to a NAFTA investor was that accorded by the host state's province to its in-province investors. On August 4, 1992 the parties agreed on a further version, almost identical to the final text.<sup>442</sup> That text replaced the reference to 'by such state or province to its residents, or enterprises legally constituted under its laws, or their investments in its territory' by 'treatment no less favorable than the most favorable treatment accorded by such state or province in like circumstances to investors of the Party of which it forms a part.' That is to say, the baseline treatment owed to a NAFTA investor was not only to be that accorded by the host State's province to its in-province investors, but could include out-of-province domestic investors and their investments. This conclusion, however, does not provide an answer to the Respondent's argument to the effect that Nova Scotia provided no treatment to the Claimant because it does not operate or is not located in that province.

282. As regards the NAFTA Parties' views of the final text, Canada's Statement on Implementation reads:<sup>443</sup>

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<sup>437</sup> Mexico first did not endorse the US language that extended the obligation to any 'state or political subdivision' (March 1992). Later, Mexico agreed to extend obligations to 'states' but not to other 'political subdivisions' (6 April draft). See M Kinneer, A Bjorklund & J Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006), 1102-6.

<sup>438</sup> INVEST.403, Washington Composite (Apr. 3, 1992) 10.

<sup>439</sup> INVEST.710, All-Star Composite (July 10, 1992) 4.

<sup>440</sup> Ibid.

<sup>441</sup> INVEST.722 July 22, 1992, 4.

<sup>442</sup> INVEST.805, Watergate Daily Update, August 4, 1992, 3.

<sup>443</sup> Department of External Affairs, Canadian Statement on Implementation, Canada Gazette Part I, June 1, 1994, 148-149.

National treatment means that Canada will treat US and Mexican investors and their investments as favourably as it treats Canadian investors and their investments, in like circumstances [...] National treatment by state, provincial, and local governments is defined as the best treatment provided by that government to any investor or investment...

Canada's Statement does not distinguish between in-province, out-of-province and foreign investors.

283. The United States' Statement of Administrative Action reads:<sup>444</sup>

... the treatment provided by state and provincial governments to investors from other NAFTA countries and their investments must be no less favourable than the most favourable treatment they provide to domestic investors and their investments.

Under the United States' Statement, the standard of treatment is what state and provincial governments provide to any domestic investor. Neither statement, however, provides an answer to Canada's arguments on the absence of treatment.

#### (b) NAFTA jurisprudence

284. Three cases have dealt with issues close to but not exactly the same as the present one.

285. In *SD Myers*, the questioned measure was Canada's order prohibiting the export of polychlorinated biphenyl ('PCB') waste to the United States. The measure had been taken by the federal government.<sup>445</sup> The tribunal, explaining Article 1102(3), said: 'in that context the relevant comparison is between the treatment accorded to an investment or an investor and the best treatment accorded to investments or investors within the jurisdiction of the sub-national authority.'<sup>446</sup> This would require that a province provide a foreign investor the best treatment accorded to investors within the jurisdiction of that province. However, this comment was by way of *obiter dicta*.

286. In *Pope & Talbot*, the dispute arose out of Canada's implementation of the Softwood Lumber Agreement between Canada and the United States. The Agreement established a limit on the free export of softwood lumber into the United States and required Canada to collect a fee for export of softwood lumber in excess of a set quantity.<sup>447</sup> Canada argued that (a) the plural form of the language of Article 1102(2) placed a single investment outside its scope or required a claimant to demonstrate that there were other similarly-situated foreign investments; and (b) the plural form

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<sup>444</sup> US Statement of Administrative Action, 141.

<sup>445</sup> *SD Myers, Inc v Government of Canada*, Partial Award, November 13, 2000, para 123.

<sup>446</sup> *Ibid*, para 240.

<sup>447</sup> *Pope & Talbot Inc v Canada*, UNCITRAL, Memorial of the Investor (Initial Phase), January 28, 2000, paras 16-39.

required a comparison of the treatment provided to the foreign investor with that accorded to more than one domestically owned investment. The tribunal rejected both arguments,<sup>448</sup> on the ground that ‘use of the plural form does not, without more, prevent application of statutory or treaty language to an individual case.’<sup>449</sup>

287. Canada also argued that NAFTA treats the two levels of government differently, imposing more rigorous restraints on provinces.<sup>450</sup> Once again, the tribunal rejected this view. Specifically, the tribunal understood that ‘the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors.’<sup>451</sup> Under *Pope & Talbot* neither Canada nor its provinces can comply with NAFTA by according foreign investments less than the most favourable treatment they accord any investment in Canada. But once again, the questioned measures there had been taken at federal level. Article 1102(3) was only discussed in order to compare it with Article 1102(2). The tribunal’s reading of Article 1102(3) has no direct application here.

288. In *Merrill & Ring*, the claimant questioned Canada’s timber export regime, which was implemented through both federal and provincial legislation. Both included a log surplus test prior to authorization of log removal or export from the province.<sup>452</sup> The claimant complained that the federal regulations were disadvantageous compared to the provincial ones.<sup>453</sup> Canada argued that Article 1102(3) specifically distinguished treatment accorded by a state or province from that of the national government and, thus, the two could not be compared.<sup>454</sup> The tribunal understood that the ‘treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors [...] just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.’<sup>455</sup> Thus for the tribunal ‘the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority.’<sup>456</sup> The tribunal added that to establish a breach of national treatment, the key is to determine which investors are in like circumstances.<sup>457</sup> The tribunal rejected using the better treatment offered by a province as

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<sup>448</sup> *Pope & Talbot Inc v Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, para 36.

<sup>449</sup> *Ibid*, para 37.

<sup>450</sup> *Ibid*, para 40.

<sup>451</sup> *Ibid*, para 41.

<sup>452</sup> *Merrill & Ring Forestry L.P. v Government of Canada*, UNCITRAL, Award, March 31, 2010, paras 26-8.

<sup>453</sup> *Ibid*, paras 61-2.

<sup>454</sup> *Ibid*, para 81.

<sup>455</sup> *Ibid*, para 82.

<sup>456</sup> *Ibid*, para 89.

<sup>457</sup> *Ibid*, para 83.

a point of reference to compare the less beneficial federal regime, and thus declined to find a breach of the national treatment standard.<sup>458</sup>

289. Canada reads these awards, particularly *Merrill & Ring*, as saying that Article 1102(3) does not allow comparison of Nova Scotia's treatment of investors within its jurisdiction to the treatment received by the claimant from other governments, whether provincial or federal.<sup>459</sup> The Claimant argues that the *Merrill & Ring* rationale does not apply to the present case because the facts are different. The Claimant says that the measures taken by Nova Scotia were not restrictions of an industry within its territory and were not regulatory. The measures were intended to confer an advantage on a domestic competitor to the detriment of the foreign investor in the same business sector which was not limited to the province's territory.<sup>460</sup>

**(c) The Tribunal's conclusions**

290. The Tribunal agrees with the NAFTA parties that Article 1102(3) should not be read so as to impose, vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to NAFTA. It agrees with the tribunal in *Merrill & Ring* that Article 1102(3) only applies to 'the same regulatory measures under the same jurisdictional authority'. But it does not follow that Canada's argument limiting the effective scope of the national treatment obligation to investments located within the particular province should be accepted. Examples can be imagined of protective measures taken for the benefit of local investors while effectively keeping NAFTA investors or their investments out. Whether this would involve a breach of Article 1102 would depend on the circumstances, including the application of the 'like circumstances' requirement. But there seems no doubt that there *could* be a breach of the national treatment obligation in such case. The same would be true in a *Methanex*-type scenario if the out-of-province investor had been the specific target of a provincial campaign to cause it loss. The situation is not limited necessarily to a scenario where there has been a single specific target. While the Claimant does not suggest that it was specifically targeted by the Nova Scotia measures, it is open to it to establish on the merits a breach of Article 1102 on some other basis.
291. The Tribunal also stresses that it is not called on in this phase of the proceedings to discuss the application of the 'like circumstances' test to the present case. Nor is it necessary to discuss in further detail here the meaning of 'treatment' in Article 1102.

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<sup>458</sup> Ibid, para 94.

<sup>459</sup> Canada's Memorial on Jurisdiction, para 125.

<sup>460</sup> Claimant's Counter-memorial on Jurisdiction, para 204.

292. For these reasons and on this basis, the Tribunal rejects Canada's preliminary objection based on Article 1102(3).

**E. JURISDICTION OVER THE EXPROPRIATION CLAIM UNDER THE *OIL PLATFORMS* TEST**

**1. Introduction**

293. The Tribunal has held that the Claimant's expropriation claim is not time-barred, on the ground that the expropriation, if there was one, could not have occurred until October 2014. But that claim requires more careful scrutiny, given that the last Nova Scotia measure of which the Claimant complains occurred in September 2012 and that the Claimant retained complete control of the Laurentide mill until it was closed and sold more than two years later.<sup>461</sup>

294. The Claimant argues that the Respondent constructively expropriated the Laurentide mill by destroying the value of the investment.<sup>462</sup> The Claimant goes on to say that: (a) there was no valid public purpose for the expropriation, since provincial protectionism is not a legitimate public purpose;<sup>463</sup> (b) the expropriation was discriminatory because Nova Scotia favoured a domestically-owned, in-province mill over foreign-owned out-of-province mills, without any regard to principles of fair market competition;<sup>464</sup> (c) the expropriation was taken in disregard of international standards of due process;<sup>465</sup> and (d) the Claimant received no compensation.<sup>466</sup>

295. The Respondent replies that the questioned measures cannot be construed as an indirect expropriation: (a) sales and market share cannot be expropriated;<sup>467</sup> (b) the questioned measures are not the proximate cause of alleged damages;<sup>468</sup> (c) neither Canada nor Nova Scotia substantially deprived the Claimant of its investment; and (d) the Claimant remained in control of the mill at all times.<sup>469</sup>

296. At the hearing, following a question from the Presiding Arbitrator, counsel for Canada referred to Judge Higgins' separate opinion in *Oil Platforms* as having addressed whether or not, on the facts as pled, the alleged conduct is capable of constituting a breach.<sup>470</sup> He continued:

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<sup>461</sup> Claimant's Counter-Memorial on Jurisdiction, para 113.

<sup>462</sup> Notice of Arbitration and Statement of Claim, paras 88, 90.

<sup>463</sup> Notice of Arbitration and Statement of Claim, para 94.

<sup>464</sup> Notice of Arbitration and Statement of Claim, para 95.

<sup>465</sup> Notice of Arbitration and Statement of Claim, para 96.

<sup>466</sup> Notice of Arbitration and Statement of Claim, para 97.

<sup>467</sup> Canada's Statement of Defence, para 82.

<sup>468</sup> Canada's Statement of Defence, para 83.

<sup>469</sup> Canada's Statement of Defence, para 83.

<sup>470</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 428:2-429:2. See also Hearing on Jurisdiction and Admissibility, August 15, 2017, 132:20-132:24.

with respect to the expropriation claim, our view is that it's not capable of doing it because the alleged expropriation was not done by the state. It was done by a private actor. Similarly, here, it's not capable of constituting a breach because the language of 1102(3), the factual predicate that a province accord treatment to the investor is not here, and it couldn't be here because they're in a different province.<sup>471</sup>

297. By contrast, counsel for the Claimant did not consider *Oil Platforms* to provide a basis for arguing inadmissibility for the purpose of Article 1101:

[Article] 1101 is not a claim-related procedure. 1101 is very clear. It just requires Claimant to establish that the measures are related to their investment. It doesn't say that you can use that to short-circuit an analysis of the claims.<sup>472</sup>

## 2. The *Oil Platforms* Test and its Application to NAFTA Chapter Eleven Proceedings

298. In *Oil Platforms (Preliminary Objections)*, the Court determined the scope of various articles of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States on which Iran relied, deciding it had jurisdiction to entertain the Iranian claims only on the basis of one provision of the Treaty, Article X. The Court said:

... the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain...<sup>473</sup>

299. Judge Higgins explained the reasoning behind the Court's approach in the following terms:

The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.<sup>474</sup>

300. It should be stressed that both the Court and Judge Higgins treated this as a jurisdictional matter rather than one going to admissibility.

301. The *Oil Platforms* test has been applied by investment tribunals, although the arbitral practice is not entirely consistent. In particular, in *Methanex*, the tribunal, while paying lip service to *Oil*

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<sup>471</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 428:2-429:2. See also Hearing on Jurisdiction and Admissibility, August 15, 2017, 132:20-133:7.

<sup>472</sup> Hearing on Jurisdiction and Admissibility, August 16, 2017, 466:22-467:2.

<sup>473</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of December 12, 1996 (Preliminary Objections), ICJ Reports 1996 p. 810 (para 16).

<sup>474</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of December 12, 1996 (Preliminary Objections), Separate Opinion of Judge Higgins, ICJ Reports 1996 p. 810 (para 32).

*Platforms*, held that since the UNCITRAL Rules refer only to preliminary objections on jurisdictional grounds, there was no scope for the application of that test to claims of inadmissibility. The tribunal said:

In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.

Accordingly, there is no necessity at the jurisdictional stage for a definitive interpretation of the substantive provisions relied on by a claimant: the jurisdiction of the arbitration tribunal is established without the need for such interpretation [...] On the other hand, in order to establish its jurisdiction, a tribunal must be satisfied that Chapter 11 does indeed apply and that a claim has been brought within its procedural provisions. This means that it must interpret, definitively, Article 1101(1) and decide whether, on the facts alleged by the claimant, Chapter 11 applies. Similarly, insofar as the point is in issue, the tribunal must establish that the requirements of Articles 1116-1121 have been met by a claimant, which will similarly require a definitive interpretation of those provisions...<sup>475</sup>

302. In practice the *Methanex* tribunal assumed that the facts alleged by the claimant, albeit disputed by the USA, were correct only for the purpose of the award on jurisdiction. The tribunal went on to hold that it had no power to consider, under the rubric of admissibility, whether the claims were capable of giving rise to responsibility under the substantive provisions of Chapter Eleven.<sup>476</sup>

303. But other tribunals have not taken this view. For example, in *UPS*, a NAFTA arbitration under the UNCITRAL Rules, the tribunal decided that for the purpose of the respondent's challenge to jurisdiction 'the facts alleged [...] are to be accepted as correct.'<sup>477</sup> After quoting *Oil Platforms* and noting the differences between the various formulations of the test offered by the Court and in separate opinions, it said that:

... the Tribunal's task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state? It may be that those formulations would differ in their effect in some circumstances but in the present case that appears not to be so.<sup>478</sup>

304. In *Impregilo v Pakistan*, the tribunal quoted *Oil Platforms* and inquired whether the facts as alleged by the claimant, if established, were capable of coming within the provisions of the BIT invoked. It considered aspects of the claims were not capable of constituting 'unfair or inequitable treatment' or discriminatory measures for the purposes of the applicable BIT because they

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<sup>475</sup> *Methanex*, Partial Award, paras 120-121.

<sup>476</sup> *Ibid*, paras 122-126.

<sup>477</sup> *United Parcel Service of America Inc. (UPS) v Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, November 22, 2002, para 32.

<sup>478</sup> *Ibid*, para 37.

concerned merely the implementation of contracts.<sup>479</sup>

305. In *Bayindir v Pakistan*, the tribunal cited *Impregilo*<sup>480</sup> and defined the task as requiring it...

to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.<sup>481</sup>

306. The tribunal found that it had jurisdiction, emphasizing that this decision was ‘not equivalent to joining the question of jurisdiction to the merits’ but rather that the claims were ‘capable of constituting a violation of the BIT’. The tribunal added that ‘[t]he threshold at the jurisdictional level, which implies a *prima facie* standard, is different from the standards which the Claimant will have to discharge on the merits to show an actual treaty breach.’<sup>482</sup>

307. In *Canfor*, a NAFTA arbitration under the UNCITRAL rules, the respondent relied on Article 1901(3) by way of a jurisdictional objection. The Respondent proposed that the tribunal apply the test enunciated by Judge Koroma in the *Fisheries Jurisdiction* case.<sup>483</sup> In contrast, the claimants understood that article 1901(3) was an interpretative provision that did not concern jurisdiction, and that the *Oil Platforms* test need not be applied.<sup>484</sup>

308. The *Canfor* tribunal quoted *Oil Platforms*, *Methanex* and *UPS*, and said that:

The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under the NAFTA:

—First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met.

—Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118–1121 are satisfied.

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<sup>479</sup> *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, para 268.

<sup>480</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para 193-194.

<sup>481</sup> *Ibid*, para 197.

<sup>482</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para 263.

<sup>483</sup> *Canfor Corporation and Terminal Forest Products Ltd. v United States of America*, Decision on Preliminary Question, June 6, 2006, para 174 (**RL-007**) (*‘Canfor and Tembec, Decision’*).

<sup>484</sup> *Ibid*.

—Third, the facts as alleged by a claimant must be accepted as true *pro tempore* for purposes of determining jurisdiction.

—Fourth, the tribunal must determine whether the facts as alleged by the claimant, if eventually proven, are *prima facie* capable of constituting a violation of the relevant substantive obligations of the respondent State Party under the NAFTA.

It is also clear that, in determining jurisdiction by applying the above test, a NAFTA tribunal is not in any way prejudging the merits of the case.<sup>485</sup>

309. The tribunal found that under Article 1901(3) the only possible interpretation was that the entire Chapter Eleven did not apply with respect to the antidumping law and countervailing duty law of a NAFTA's party.<sup>486</sup> Hence, it concluded that the respondent did not consent to arbitrate most of the claims, except those which did not form part of the respondent's antidumping law or countervailing duty law.<sup>487</sup>
310. In *Desert Line Projects v Yemen*, the tribunal cited *Oil Platforms* and several of the precedents that applied it.<sup>488</sup> In deciding whether it had jurisdiction *ratione materiae*, the tribunal said that since 'issues of jurisdiction and admissibility are examined on the hypothesis that the relevant claims are factually founded in principle, the claim may still be defeated at the merits stage if they are not proven.'<sup>489</sup> The respondent had argued that the tribunal did not have jurisdiction because the dispute had been heard by a Yemeni arbitration tribunal. The *Desert Line Projects* tribunal disagreed, on the basis that the claims formulated by the claimant were capable of constituting violations of the BIT, and that the claims asserted in the prior arbitration were fundamentally distinct from those related to the violation of the BIT.<sup>490</sup>
311. This Tribunal agrees with these and other decisions on the point. A NAFTA tribunal (whether sitting under the UNCITRAL Rules or some other set of arbitral rules) is entitled to inquire not merely whether procedural prerequisites and time limits for commencing arbitration have been satisfied, but whether the claims, assuming *pro tem* that the claimant's allegations of fact are true, fall within the scope of Chapter Eleven of NAFTA, that is to say, are capable of giving rise to a finding of breach. It should be stressed that since, under *Oil Platforms*, this is a matter going to jurisdiction, not admissibility, it is not necessary for this purpose to consider whether Article 21 of the UNCITRAL Rules, which refers only to jurisdictional objections, excludes the power to rule as a preliminary matter on questions of admissibility of claims.

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<sup>485</sup> Ibid, paras 171-172.

<sup>486</sup> Ibid, para 273.

<sup>487</sup> Ibid, para 348.

<sup>488</sup> *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, paras 129-134.

<sup>489</sup> Ibid, para 134.

<sup>490</sup> Ibid, paras 137-8.

### 3. The Tribunal's Analysis

312. In the Tribunal's view, the Article 1110 claim for expropriation of the Laurentide mill faces considerable difficulties, even assuming the facts as pleaded. These include the following:
- i. The Claimant retained full control over the mill until its closure in October 2014, and subsequently negotiated its sale. It was the Claimant's choice to close Laurentide rather than one of its other two mills in Quebec.
  - ii. The closure decision was allegedly made because of the low paper prices offered by PHP, and did not involve state action of any kind. The Claimant has not alleged that PHP: (a) was a state agency; (b) exercised governmental powers delegated to it; or (c) was controlled by government officials in taking its pricing decisions.
  - iii. There was a significant delay between the Nova Scotia measures taken in September 2012 and the alleged expropriation in October 2014. The Claimant argues that it had decided to take a risk by running the mill after the measures, and that the mill was no longer profitable after two years. The question is how the negative consequences of its investment decision to take that risk can be construed as an expropriation.
313. Moreover, if the Claimant's argument were to prevail, claims under Chapter Eleven could be pursued, many years after the event, as 'new' expropriations, with all the problems of causality that might raise. This would drive a coach and horses through the time-limits for action under NAFTA.
314. On the other hand, the *Oil Platforms* argument was not raised by the Respondent in its written pleadings, and only at the oral stage in reply to questioning from the Tribunal. On balance, the Tribunal considers that the Article 1110 claim, despite the questions it raises, should not be dismissed at this preliminary stage but should be left to the merits.

## F. THE TAXATION MEASURES OBJECTION

### 1. Introduction

315. The Respondent submits that the Tribunal lacks jurisdiction insofar as the Claimant's expropriation claim encompasses 'taxation measures'. This results from the restriction imposed by NAFTA Article 2103. Relevantly, Article 2103(6) provides:

Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is

not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration).

316. The Respondent argues that under Article 2103(6) the Claimant was required to refer the claim relating to ‘taxation measures’ to the appropriate tax authorities before being able to submit such a claim to NAFTA arbitration. The Claimant, however, submits that the taxation measures to which it refers do not independently amount to an expropriation, but are part of a series of measures that amount to the alleged expropriation, and so do not need to be referred to the authorities under Article 2103(6).

## 2. The Respondent’s Arguments

317. The Respondent submits that any claims relating to the Property Tax Agreement between PWCC, Richmond County and NPPH are precluded by Article 2103. In the Respondent’s view, Article 2103(1) provides a broad carve-out in respect of taxation measures: ‘except as set out in this Article, nothing in this Agreement shall apply to taxation measures.’<sup>491</sup> The Respondent relies on the decision in *Canfor and Tembec*<sup>492</sup> as well as the claimant’s withdrawal of its claim in *UPS* to support its submission that this broad carve-out excludes the Claimant’s minimum standard of treatment claim under Article 1105 insofar as it relates to the property tax measures.

318. In respect of the Claimant’s expropriation claim under Article 1110, the Respondent acknowledges that Article 2103(6) permits such a claim relating to taxation measures so long as the Claimant follows the procedure set out therein.

319. The Respondent refers this Tribunal to *Gottlieb Investments Group v Canada* where the claimant followed the Article 2103(6) procedure, obtained a determination from the competent US and Canadian authorities that the measure was not an expropriation, and accordingly abandoned its expropriation claims.<sup>493</sup>

320. The Respondent asks this Tribunal to reject the Claimant’s assertion that the current approach to Article 2103 ‘distort[s] the exception’s intent’ and that its real purpose is ‘to deny claims that taxes might have been used as a tool to expropriate’, not instances where tax relief, as part of a

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<sup>491</sup> Respondent’s Memorial, para 130.

<sup>492</sup> *Canfor and Tembec*, Decision, para 259.

<sup>493</sup> Respondent’s Memorial, para 135.

suite of measures, gives a third party a competitive advantage over the claimant.<sup>494</sup> The Respondent submits that such approach has no textual basis in NAFTA and would permit claimants to circumvent the exception in Article 2103(6) by grouping taxation measures with other measures.<sup>495</sup> The Respondent refers to *EnCana v Ecuador* which concerned Article VII of the Canada-Ecuador BIT, almost identically worded to Article 2103 of NAFTA. In that case, the claimant followed the procedure set out in Article VII notwithstanding the fact that the taxation measures were one part of the government conduct that allegedly constituted expropriation.<sup>496</sup> The Respondent submits that such an approach should have been followed by the Claimant in this case. The Respondent recalls the statement of the *Feldman* tribunal that ‘Chapter 11 jurisdiction over tax matters is carefully circumscribed by Article 2103’ and that ‘this Tribunal would be derelict in its duties if it either expanded or reduced that jurisdiction.’<sup>497</sup>

### 3. The Claimant’s Arguments

321. The Claimant submits that its reference to the property tax discount provided by Nova Scotia is admissible since it does not claim that this taxation measure amounts in itself to an expropriation covered by Article 2103(6).<sup>498</sup> Rather, this measure is merely one of many that ‘contributed to the constructive expropriation of Resolute’s Laurentide mill.’<sup>499</sup>

### 4. The Non-Disputing NAFTA Parties’ Comments

322. The United States submits that Article 2103 ‘generally excludes taxation measures from the NAFTA’s provisions’ and so are ‘not subject to any Chapter Eleven obligations’ unless ‘expressly identified as exceptions’ to that general exclusion.<sup>500</sup> Article 2103 applies equally to all ‘taxation measures’, whether they are imposed on the investment or the investor or apply to a domestic investment or investor as a means of expropriating the foreign claimant’s investment.<sup>501</sup> The United States further submits that Article 2103(6) ‘imposes a jurisdictional requirement’ that the investor must refer its complaint to the competent tax authorities before it can raise an Article 1110 claim before a NAFTA arbitration.<sup>502</sup>

323. The Respondent observes that all three NAFTA Parties agree that, pursuant to Article 2103,

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<sup>494</sup> Respondent’s Memorial, para 136.

<sup>495</sup> Respondent’s Memorial, para 137; Respondent’s Reply Memorial, paras 163-165; Hearing on Jurisdiction and Admissibility, August 15, 2017, 249:3-22.

<sup>496</sup> Respondent’s Memorial, para 138.

<sup>497</sup> Respondent’s Memorial, para 139, citing *Feldman*, Award, para 188.

<sup>498</sup> Claimant’s Counter Memorial, para 213; Hearing on Jurisdiction and Admissibility, August 15, 2017, 35:3-10.

<sup>499</sup> Claimant’s Counter Memorial, para 213.

<sup>500</sup> United States Submission, para 18.

<sup>501</sup> United States Submission, para 19.

<sup>502</sup> United States Submission, para 20; see also Mexico Submission, para 14.

taxation measures may not be contested as a breach of Article 1105 and accordingly, the Claimant's argument about the Property Tax Agreement between Pacific West Commercial Corporation and Richmond County as a breach of Article 1105 must fail.<sup>503</sup> The Respondent also notes that the NAFTA Parties agree that a taxation measure may only be contested as a breach of Article 1110 if a claimant has first sought a determination from the NAFTA Parties that the measure is an expropriation, a procedural step which Resolute has not followed here.<sup>504</sup>

324. The Claimant considers that the United States calls for the adoption of an overly expansive interpretation of 'taxation measures' such that it would include a taxation 'practice' for the enforcement or failure to enforce a tax. By contrast, the Claimant submits that the referral obligation in Article 2103(6) consists of affirmative taxation measures burdening an investor to the point of expropriation. Tax breaks favouring a competitor without affirmatively burdening an investor are not, according to the Claimant, 'taxation measures' requiring referral.<sup>505</sup>

## 5. The Tribunal's Analysis

325. Article 2103(1) of NAFTA provides that 'except as set out in this Article, nothing in this Agreement shall apply to taxation measures.' Article 2103(6) provides a limited exception for claims that a tax measure constitutes an expropriation contrary to Article 1110: this requires prior submission of the claim to 'the appropriate competent authorities set out in Annex 2103.6', a procedure not followed by the Claimant in this case. This raises two issues: first, are the two measures invoked by the Claimant 'taxation measures' as referred to in Article 2103(1); and second, if so, can the Claimant invoke them here as an aspect of its Article 1110 claim, given that it does not rely on the measures as *per se* amounting to an expropriation but only as contributory to it.
326. The term 'taxation measure' was considered by the tribunal in *EnCana v Ecuador*. That was a claim for expropriation under the Ecuador-United States BIT, but the relevant provisions were not materially different from NAFTA's. The *EnCana* tribunal adopted a broad interpretation of the term, observing that...

All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of 'taxation measures'. Thus tax deductions, allowances or rebates are caught by the term [...] [A] measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place.<sup>506</sup>

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<sup>503</sup> Canada's Reply to Art. 1128 Submissions, para 29.

<sup>504</sup> Canada's Reply to Art. 1128 Submissions, para 30-31.

<sup>505</sup> Claimant's Reply to Art. 1128 Submissions, paras 30-31, also citing *Hulley Enterprises Limited (Cyprus) v Russian Federation*, PCA Case No. AA226, Final Award, July 18, 2014, para 1407, as an example of a similar finding in the context of claims under the Energy Charter Treaty.

<sup>506</sup> *EnCana Corporation v Republic of Ecuador*, Award, February 6, 2006, para 142(3)-(4) (RL-066).

327. The tribunal did not need to consider a taxation measure dealing with taxation of a third party; indeed, an expropriation effected by conferring a tax benefit on a competitor of the claimant was probably not contemplated by the drafters. But the exception for taxation measures under Article 2103(1) is a general exception, and there is no reason to limit it to taxation measures imposed on the claimant or its investment. To do so would be to add words not in the text. Moreover, it would be anomalous if a tribunal could evaluate a third-party taxation measure under Chapter Eleven but not a measure imposing a tax directly on the claimant.
328. For similar reasons, the fact that the expropriation claim only relies on Nova Scotia's property tax discount as one among several circumstances leading to a claim for expropriation does not bring the claim under the Tribunal's jurisdiction. Taxation measures are simply not covered by NAFTA except as provided in Article 2103, and there is no relevant exception here.<sup>507</sup>
329. For these reasons, even if the present claim fell within the jurisdiction of the Tribunal and was otherwise admissible, it could not include any aspect of Nova Scotia's conduct covered by the taxation measures exemption in Article 2103.

## **DECISION**

330. For the foregoing reasons, the Tribunal holds that it has jurisdiction to decide the Claimant's claims concerning the Nova Scotia Measures, with the exception of the interim measures taken to keep the Port Hawkesbury mill in operation prior to its sale in September 2012 and the claims concerning taxation measures, and that the claims are admissible.
331. Questions of costs and expenses are reserved to the final decision on the merits.

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<sup>507</sup> Arbitrator Cass takes a narrower view of what qualifies as a 'taxation measure' under Article 2103. Because he does not read that provision as covering exemptions from taxation for reasons unrelated to framing and application of tax laws and regulations, he would not find measures complained of in this proceeding excluded under Article 2103.

Place of Arbitration: Toronto, Ontario

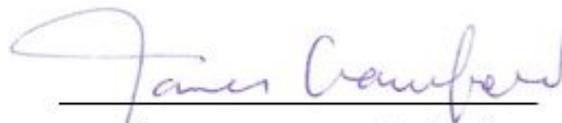
Date: *January 30, 2018*



Dean Ronald A. Cass



Dean Céline Lévesque



Judge James R. Crawford, AC