

PUBLIC VERSION

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

BETWEEN:

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA Case No. 2016-13

GOVERNMENT OF CANADA

REJOINDER MEMORIAL ON MERITS AND DAMAGES

March 4, 2020

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CANADA

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I. INTRODUCTION AND SUMMARY OF CANADA’S DEFENCE

1. In its Reply Memorial, Resolute Forest Products Inc. (“Resolute” or the “Claimant”) continues with its same strategy to portray financial assistance by the Government of Nova Scotia (“GNS”) to the Port Hawkesbury mill in 2012 as a breach of NAFTA Chapter Eleven: misstating the law, misrepresenting the nature and amount of the assistance provided and wrongly ascribing malevolent intentions to the GNS.

2. *Resolute misstates the law.* First, the Claimant improperly seeks to attribute to the GNS the electricity load retention rate (“LRR”) negotiated between two private companies, Pacific West Commercial Corporation (“PWCC”)¹ and Nova Scotia Power Inc. (“NSPI”). The significant reversal from Resolute’s Memorial, which relied solely on the international legal test from Article 8 (Conduct directed or controlled by a State) of the *International Law Commission’s Draft Articles on State Responsibility* (“ILC Articles”), to ILC Article 4 (Conduct of organs of a State) and Article 11 (Conduct acknowledged and adopted by a State as its own) only serves to confirm the correctness of Canada’s position that “the LRR had indeed resulted from negotiations based on market considerations”² between two private companies that were not under the GNS’ effective control, which is required under international law for attribution of private acts to the State.

3. The private conduct of PWCC and NSPI was separate and distinct from the conduct of the Nova Scotia Utility and Review Board (“UARB”) and the GNS’ Department of Energy (“DOE”) in carrying out their regulatory roles. The regulatory conduct of these entities is not the conduct alleged to have caused harm to Resolute, namely the “discounted” and “preferential” LRR that Resolute alleges is less than what Port Hawkesbury should have been paying for electricity. As the International Court of Justice (“ICJ”) and other international tribunals have confirmed, international law maintains a clear distinction between the conduct of State organs and the conduct of private parties and will not conflate them, as Resolute does, unless the effective control test is

¹ Port Hawkesbury Paper (“PHP”) is the corporate entity that owns the mill and is in turn owned by PWCC. In this Rejoinder and where appropriate in the particular context, Canada will refer to PHP as the corporate entity operating the mill since September 2012.

² **R-238**, *United States – Countervailing Measures on Supercalendered Paper from Canada*, Report of the Panel (Jul. 5, 2018) (“WTO Panel Report”), ¶ 7.77. Contrary to what Resolute asserts in this arbitration, the WTO Panel has already determined that the GNS did not entrust or direct NSPI to provide the requested electricity rate to Port Hawkesbury. *Id.*, ¶ 7.75.

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passed. Resolute has failed in this respect and its arguments regarding electricity cannot be saved by reference to ILC Article 4 or 11. The LRR is outside the Tribunal's jurisdiction because it is not a measure "adopted or maintained by a Party" as required by NAFTA Article 1101(1).

4. Second, the Claimant realizes that its NAFTA Article 1102 claim is essentially moot if the exclusions to the national treatment obligation found in Article 1108(7) for procurement and government supported loans and grants are applied as written and intended. In yet another significant shift in emphasis from its Memorial, Resolute no longer relies on the principle of estoppel to avoid application of Article 1108(7). It now resorts to "good faith," accusing Canada of "self-contradiction" based on past positions at the World Trade Organization ("WTO"). This misleading portrayal of Canada's past positions is unavailing and Resolute has no credible legal basis to argue that this Tribunal can refuse to apply the explicit text of a provision in NAFTA Chapter Eleven because of an alleged non-compliance with a provision of a different treaty over which the Tribunal has no jurisdiction.

5. Third, even if Article 1102(3) were to apply to the Nova Scotia measures at issue, Resolute would still not succeed in establishing a violation of Canada's national treatment obligation. Resolute is incorrect when it says in its Reply that nationality-based discrimination is irrelevant in the context of Article 1102(3) (or Article 1102 generally) – the long-standing concordant views of all three NAFTA Parties and the preponderance of authority contradict that position. Furthermore, Resolute's Reply Memorial does nothing to advance its argument that it was accorded "treatment" by the GNS or that its treatment was accorded "in like circumstances" to that of PWCC.

6. Fourth, Resolute tries to dilute the high threshold of severity and egregious behaviour that the minimum standard of treatment of aliens in customary international law demands before a NAFTA Party can be held in violation of Article 1105. It asserts a "proportionality" test, which is not part of the minimum standard of treatment but which the Nova Scotia measures would satisfy easily anyway. It also asks the Tribunal to stand in the shoes of the GNS to determine what might have been a more preferable course of action, which NAFTA and other investment tribunals have consistently said is not their role. Resolute makes other unsupported legal arguments such as "in international law, the interest of a constituent element does not overcome the interests of the

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greater whole”³ with the same aim of weakening the legal standard in Article 1105 because it knows that, if the Tribunal applies customary international law to the facts of this case, nothing the GNS did can be fairly described as “a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination or a manifest lack of reasons.”

7. *Resolute also misrepresents the nature and amount of the assistance provided by the GNS.* A prime example of the Claimant’s misleading narrative of the GNS’ allegedly unfair assistance to Port Hawkesbury is the LRR, which the Claimant portrays as the GNS bending over backwards to ensure PWCC received cheap electricity for its mill. The reality is very different. It was Resolute that convinced the UARB in November 2011 that it was common throughout North America and in the “broader public interest” to provide major industries with lower electricity rates (“load retention tariff” or “LRT”) when they are in economic distress in order to avoid the load leaving the electricity system entirely.⁴ Resolute urged the UARB to approve a lower electricity rate for its Bowater Mersey mill and its competitor Port Hawkesbury (then still owned by NewPage) in order for both mills to stay open, operate profitably and continue to contribute to the local economy. Resolute and its expert, during the UARB proceedings, also recognized that a lower electricity rate would help NewPage sell Port Hawkesbury to a new owner.⁵

8. But Resolute pretends none of this happened and now protests that it was egregious and grossly unfair for PWCC to have benefited from that same opportunity for a lower electricity rate. PWCC was able to negotiate a new variable pricing mechanism with NSPI, but the LRR that it actually received after its advance tax ruling (“ATR”) was rejected by the Canada Revenue Agency (“CRA”) in September 2012 has generated nowhere near the savings PWCC had wanted to achieve

³ *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant’s Reply on Merits and Damages, 6 December 2019 (“Claimant’s Reply”), ¶ 123.

⁴ See **R-319**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, M04175, Closing Submission of NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited (Nov. 9, 2011), pp. 77, line 20 & Appendix A, line 8-10; **C-138**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, Decision 2011 NSUARB 184 (Nov. 29, 2011) (“UARB Decision (Nov. 29, 2011)”); **R-383**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, M04175, Direct Evidence and Exhibits of Dr. Alan Rosenberg (Jun. 22, 2011), p. 3; **R-429**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, M04175, Opening Statement of Dr. Alan Rosenberg in the Matter of a Load Retention Rate for NPB (Oct. 26, 2011) (“Rosenberg Opening Statement”), p. 2.

⁵ **R-319**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, M04175, Closing Submission of NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited (Nov. 9, 2011), pp. 58-68.

and is, in fact, not much better than the electricity rate that the UARB had said would have been applicable to Port Hawkesbury in November 2011.⁶ Resolute tries to confuse matters by pointing to the GNS’ confirmation to the UARB in July 2013 of its pre-existing renewable energy standards (“RES”) and policy plans for the NSPI-owned biomass plant.⁷ Resolute incorrectly asserts that they provide some kind of additional financial benefit to Port Hawkesbury – they do not.

9. As for the other Nova Scotia measures, Resolute misleadingly lumps together every dollar in an effort to portray the GNS’ actions as an extravagant and unfair financial donation to a private company. Again, reality does not support Resolute’s narrative. For example, while there is no dispute that PWCC received two loans from the GNS totalling \$64 million and \$2.5 million in grants for training and marketing,⁸ this can hardly be described as “extraordinary” when a government faces the collapse of a critical industry. The Tribunal need only look to Resolute’s Bowater Mersey newsprint mill, which also received \$50.25 million in financial assistance from the GNS (with an option for an additional \$40 million) intended to make it “a low-cost, highly competitive mill” [REDACTED].⁹

10. The Claimant misrepresents the nature of other measures as well. It is unclear what forms the basis of Resolute’s complaint that the GNS purchased land from NewPage/PHP given that the transaction was done at fair market value.¹⁰ Resolute’s complaint regarding the Sustainable Forest Management and Outreach Agreement (“Outreach Agreement”) is also misplaced – that

⁶ See Part IV.C.1(b) below.

⁷ **C-179**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (Jul. 20, 2012).

⁸ **C-182**, [REDACTED]

[REDACTED] An additional \$1.5 million from funds previously allocated to keeping the mill in hot-idle was used to help with its restart. See, **C-190**, Preparatory Activities Agreement (Aug. 27, 2012).

⁹ See **R-149**, [REDACTED]

[REDACTED] **R-211**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-62 (Dec. 8, 2011), p. 5015: (“We went through every single part of the cost chain with Bowater and removed costs so that they would be a *low-cost, highly competitive mill in the market* that exists.”) (emphasis added).

¹⁰ Canada’s Counter-Memorial, ¶ 23; **R-207**, Forestry Transition Land Acquisition Program, Guidelines for Applicants (Apr. 2008), p. 1: (“The Land Acquisition Program gives forestry companies that are operating in Nova Scotia an opportunity to sell some of their non-essential land assets to the Department of Natural Resources at fair market value.”); Witness Statement of Julie Towers, 17 April 2019 (“Towers First Statement”), ¶¶ 14, 30; Rejoinder Witness Statement of Julie Towers, 4 March 2020 (“Towers Rejoinder Statement”), ¶ 11. See **R-216**, [REDACTED]; **C-209**, [REDACTED]

agreement is nothing more than the GNS paying PHP up to \$3.8 million a year [REDACTED]

[REDACTED]¹¹ Resolute’s argument regarding the Forest Utilization License Agreement (“FULA”) is even more obscure: it no longer argues that PHP receives timber from Crown land essentially for free,¹² but advances no other coherent argument to indicate what is wrong with an agreement that requires PHP to pay a specified price for stumpage and, separately, [REDACTED]¹³

Glossing over the details of these measures in order to exaggerate their significance is part of the Claimant’s strategy, but it does not establish a breach of NAFTA Chapter Eleven.

11. Finally, *Resolute wrongly ascribes malevolent intentions to the GNS*. Resolute’s Reply Memorial contains accusations that the GNS was intent on “crushing foreign competition”¹⁴ by providing PHP with a “virtual guarantee to become immediately and to remain in perpetuity North America’s lowest cost producer”¹⁵ and by creating “an invulnerable giant that no other SC Paper producer could out-compete.”¹⁶ Resolute accuses the GNS of engaging in a “*Methanex*-style” campaign whereby it was the specific target of a provincial campaign to cause it loss.¹⁷

12. None of these accusations are true. In reality, the GNS approached the 2011-2012 crisis of having two of its three paper mills shut down simultaneously as any other government would, by acting responsibly and in good faith. It gathered information about the prospects for the mills in light of the future potential for their respective paper products (newsprint and supercalendered paper (“SC paper”). It assessed the broader economic impact of each mill closing down and considered the implications of not stepping in with financial assistance (i.e., the “do nothing”

¹¹ C-206, [REDACTED] ¶¶ 5.1, 5.4, 5.5 [REDACTED], 6.1-6.6 [REDACTED] 7.1 [REDACTED], 10.1 and 10.2 [REDACTED]. Canada’s Counter-Memorial, ¶ 231; Towers First Statement, ¶ 39; Towers Rejoinder Statement, ¶¶ 5-6.

¹² *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant’s Memorial on Merits and Damages, 28 December 2019 (“Claimant’s Memorial”), ¶ 96.

¹³ R-192 Port Hawkesbury Paper, Forest Utilization License Agreement (Sep. 27, 2012) (“FULA”).

¹⁴ Claimant’s Reply, ¶ 198.

¹⁵ Claimant’s Reply, ¶ 20.

¹⁶ Claimant’s Reply, ¶ 20.

¹⁷ Claimant’s Reply, ¶ 270.

option). It considered whether investing a reasonable amount of public funds was necessary and appropriate in light of all the circumstances.

13. In the case of Bowater Mersey, despite the gloomy prospects for newsprint and the mill's outdated equipment, the GNS worked with Resolute to agree in December 2011 on a financial assistance package that would complement Resolute's other cost reduction measures (in particular, a lower electricity rate and a new labour agreement) with the intention that the mill would stay open [REDACTED]. While it is unfortunate that Resolute decided to close the mill in June 2012 after a collapse in foreign currency exchange rates affected its future prospects, there can be no doubt that the GNS acted in good faith and with a rational public policy objective when it decided that investing was better than the "do nothing" option for Bowater Mersey.

14. The GNS took the same approach with respect to Port Hawkesbury. NewPage had entered into *Companies' Creditors Arrangement Act* ("CCAA") proceedings in order to sell its mill as a going concern "to preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole."¹⁸ An open and competitive bidding process commenced and the GNS encouraged Resolute to make a bid for the mill. While Resolute chose not to do so, many other companies did. In the end, PWCC was selected by Ernst & Young (the "Monitor") in December 2012 as the highest bidder and the most likely to successfully operate Port Hawkesbury as a going-concern. In the meantime, the GNS had been [REDACTED]

[REDACTED]¹⁹ Accordingly, just as it did with Resolute, it considered what would be a reasonable amount of financial assistance that would complement PWCC's other cost reduction measures (in particular, a lower electricity rate and a new labour agreement) and weighed that financial support against the "do nothing" option. Doing nothing could have impacted the Province's GDP by [REDACTED],²⁰ resulted in higher electricity rates for other consumers and

¹⁸ R-024, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther (S.C.N.S.) (Sep. 6, 2011), ¶ 8.

¹⁹ R-146, [REDACTED]

²⁰ C-158, [REDACTED]

[REDACTED], p. 2: (The Department of Finance estimated that "there would be a decrease [REDACTED] on the base case forecast on the provincial GDP" following a permanent shutdown of NewPage.) See also R-160, [REDACTED], p. 3; R-157, [REDACTED]. See also R-430, [REDACTED]

caused a massive loss of employment in a rural part of the Province that was almost entirely dependent on the mill. Again, there can be no doubt that the GNS acted in good faith and with a rational public policy objective when it decided that investing into Port Hawkesbury was better than the “do nothing” option.

15. It is also incorrect that the GNS engaged in a “*Methanex*-style” campaign to cause Resolute loss.²¹ Resolute tries to portray [REDACTED] as evidence of the GNS “knowingly” and “willfully” targeting [REDACTED]

[REDACTED]²² Unsurprisingly, Resolute ignores [REDACTED]

[REDACTED]. Resolute also ignores the fact that [REDACTED], which by 2013 had [REDACTED]

[REDACTED] The GNS had to balance those risks and uncertainties against the consequences of the “do nothing” option, which, at the end of July 2012, would have meant the collapse of NewPage’s court-approved Plan of Compromise and Arrangement and the liquidation of the mill.²⁴ States are often faced with difficult decisions involving competing public policy objectives and serious economic implications, but they are “not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance.”²⁵ In this case, the GNS did nothing that violated NAFTA Articles 1102 or 1105.

²¹ Claimant’s Reply, ¶ 270.

²² Claimant’s Reply, ¶ 23; **R-161**, [REDACTED], p. 36.

²³ **R-263**, [REDACTED], p. 24.

²⁴ **R-034**, *Re NewPage Port Hawkesbury Corp.*, Meeting Order (S.C.N.S.) (Jul. 17, 2012); **R-159**, *Re NewPage Port Hawkesbury Corp.*, Twelfth Report of the Monitor (Aug. 8, 2012), ¶¶ 132-141.

²⁵ **CL-230**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Award, 25 November 2015 (“*Electrabel – Award*”), ¶ 165.

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16. Accompanied by new witness statements from Messrs. Murray Coolican and Duff Montgomerie and Mmes. Jeannie Chow and Julie Towers, as well as expert reports by Cohen Hamilton Steger and AFRY (formerly Pöyry)²⁶, Canada's Rejoinder Memorial is organized as follows. In Part II, Canada addresses the Claimant's arguments regarding attribution of Port Hawkesbury's electricity rate to the GNS. While there would still be no violation of Article 1102 or 1105 even if the LRR were included amongst the measures attributable to the GNS, it is important as a matter of international law to distinguish the acts of the GNS from those of two private parties that negotiated a new electricity pricing mechanism because it served their commercial interests.

17. In Part III, Canada responds to Resolute's claim of a violation of NAFTA Article 1102.²⁷ Canada first explains why the majority of the Nova Scotia measures are covered by the exclusions from the national treatment obligation set out in Article 1108(7). But even if none of the Nova Scotia measures were excluded from the scope of the national treatment obligation, Resolute still fails to establish a breach of Article 1102.

18. In Part IV, Canada describes why the Claimant's allegation that Canada has breached the minimum standard of treatment of aliens in customary international law, which is the standard under NAFTA Article 1105, is untenable. In Part V, Canada requests that the Tribunal dismiss Resolute's entire claim on the merits.

19. Finally, in Part VI, Canada addresses the eventuality of the Tribunal concluding that there has been a breach of NAFTA Article 1102 and/or 1105 and considers whether any damages should be awarded. Canada will demonstrate that the Claimant should not be awarded anything: Resolute not only fails to establish legal causation, but also fails to quantify its damages to the reasonable certainty threshold required by international law.

²⁶ In light of its recent corporate name change, Canada will refer to the two reports filed by AFRY (formerly Pöyry) as: Expert Report of AFRY/Pöyry, 17 April 2019 ("AFRY/Pöyry-1") and Rejoinder Expert Report of AFRY/Pöyry, 4 March 2020 ("AFRY/Pöyry-2").

²⁷ The Claimant's Reply Memorial changed the order of argument from its Memorial, now addressing Article 1105 before Articles 1102(3) and 1108(7). For the sake of consistency and logical argumentation, Canada will in this Rejoinder Memorial maintain its order of presentation, first dealing with Article 1108(7) and Article 1102(3) in Part III and addressing Article 1105 in Part IV.

II. THE ELECTRICITY RATE NEGOTIATED BETWEEN PWCC AND NSPI IS NOT ATTRIBUTABLE TO THE GNS UNDER INTERNATIONAL LAW

20. Since its Statement of Defence, Canada has argued that the electricity rate negotiated between PWCC and NSPI is not within the jurisdiction of the Tribunal because it is not a measure of a Party as defined in NAFTA Article 1101(1).²⁸ The Claimant maintains that the LRR negotiated between PWCC and the GNS is attributable to the GNS, but its approach to attribution has undergone a significant shift from its Memorial. In its Reply Memorial, Resolute has demoted its primary argument that the conduct of PWCC and NSPI is attributable to the GNS under the legal test outlined in Article 8 of the ILC Articles and now emphasizes that the conduct is attributable under the State organ test in ILC Article 4.²⁹ As a fall-back position, Resolute argues that even if the application of the legal tests in ILC Articles 4 or 8 do not result in the LRR for Port Hawkesbury being attributable to the GNS under international law, it should nevertheless be considered attributable “to the extent that the State acknowledges and adopts the conduct in question as its own” as per ILC Article 11.

21. All of Resolute’s arguments are unavailing. The Claimant’s sudden reliance on ILC Article 4 misapplies the customary international law test for attribution by incorrectly conflating the supposed international wrong — the alleged “preferential” and “reduced”³⁰ electricity rate negotiated between PWCC and NSPI – with the UARB’s statutorily mandated regulatory oversight and with the GNS DOE’s conduct in confirming its long-standing and pre-existing renewable energy policies. Resolute essentially eliminates the critical distinction between ILC Articles 4 and 8, that is, the conduct of State organs versus the conduct of private or non-State parties, and assumes that regulatory association with private acts always results in attribution of the latter to the State. That is not how the rules of international law operate. Rather, they require a focus on the

²⁸ See *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada’s Statement of Defence, 1 September 2016 (“Canada’s Statement of Defence”), ¶ 75. Canada did not propose that this issue be dealt with in the preliminary phase of the arbitration because it was highly intertwined with the merits of the case. See Canada’s Statement of Defence, ¶ 104; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada’s Request for Bifurcation, 29 September 2016, fn 3.

²⁹ **RL-032**, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries* (Text adopted by the International Law Commission at its fifty-third session, in 2001) (“ILC Articles”), Articles 1-11 and 28-39.

³⁰ Claimant’s Reply, ¶¶ 9, 264.

specific conduct at issue and whether the State has effective control over the private acts alleged to be wrongful.

22. In this case, the conduct of PWCC and NSPI is legally and factually distinct from that of the UARB and the GNS DOE and the former cannot be attributed to the latter under the rules of international law. The LRR paid by PHP to NSPI, which Resolute alleges is one of the financial benefits provided by the GNS to Port Hawkesbury,³¹ is a complex pricing mechanism negotiated between two private companies acting in their own commercial interests. Failure to attribute that private conduct under ILC Article 8 cannot be saved by recasting it as if it were the same conduct as that of the UARB and GNS DOE and thus attributable under ILC Article 4.

A. Resolute’s Argument that the Electricity Rate is Inseparable from the Other Nova Scotia Measures is Inconsistent with Basic Tenets of the International Law of State Responsibility and is Factually Wrong

23. Resolute argues in its Reply Memorial that the “electricity measures” are inseparable from Nova Scotia’s other measures (e.g., the government loan and grants) and should be treated as a single component of an “ensemble” of measures that are all attributable to the GNS.³² This is both legally inappropriate and factually inaccurate.

24. First, as Canada has argued previously, it is an essential element of jurisdiction for a NAFTA Chapter Eleven Tribunal that the impugned measure be “adopted or maintained by a Party relating to” an investor and its investment. The Claimant cannot side-step this requirement under NAFTA Article 1101(1) by taking a simple “ensemble” approach that relies on other measures to establish jurisdiction over a measure that would not otherwise stand on its own.

25. Second, Resolute’s “ensemble” approach ignores the fundamental structure of the general international law of State responsibility. ILC Article 2 sets out the elements of an internationally wrongful act of a State:

³¹ Claimant’s Reply, ¶ 30.

³² Claimant’s Memorial, ¶ 159 and Claimant’s Reply, ¶ 30.

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There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.³³

26. This approach, reflecting customary international law and applied by the ICJ in *Diplomatic and Consular Staff in Tehran (United States v Iran)*, *Application of Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,³⁴ requires that a tribunal first determine whether the action or omission is attributable to the State, and then determine whether a breach of international law has occurred. In other words, the inquiries are distinct and cannot be conflated even if there are other measures over which the State does not contest attribution. Resolute’s attempt to make the electricity rate and alleged savings to PHP vicariously attributable through the other Nova Scotia measures cannot be accepted since it does not follow the correct approach in international law.

27. Third, it is wrong on the facts for Resolute to assert that the electricity measures are attributable to the GNS because they are “inseparable” from the remainder of the Nova Scotia measures.³⁵ For example, the GNS is a direct party to the loan and grant agreement with PWCC, the land purchase agreement, the Outreach Agreement and the FULA.³⁶ There is no dispute that such measures are attributable to the GNS because it is a counterparty to each of these agreements.

³³ **RL-032**, ILC Articles, Article 2.

³⁴ See **CL-210**, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, 24 May 1980 (“*Diplomatic and Consular Staff in Tehran Case*”), ¶ 56: (“[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”); **RL-194**, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment, I.C.J. Reports 2005, 19 December 2005, ¶ 215: (“[t]he Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda’s international obligations.”); **RL-115**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 27, 26 February 2007 (“*Genocide Convention Case*”), ¶ 379.

³⁵ Claimant’s Reply, ¶¶ 26, 30-38.

³⁶ See **C-182**, [REDACTED]; **C-195**, [REDACTED]; **R-192**, FULA; **R-216**, [REDACTED]; **C-206**, [REDACTED]

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28. In contrast, it was PWCC that wanted to negotiate an entirely new approach to electricity with NSPI rather than just using the LRR approved by the UARB in November 2011 for Bowater Mersey (and Port Hawkesbury, had the mill been operational at the time).³⁷ The outcome of those negotiations was never guaranteed, as is evident from the fact that PWCC sought a deal from NSPI that would lower the electricity rate down to [REDACTED].³⁸ The GNS had an occasional observer role and provided a consultant to facilitate their discussions, but it had no authority to furnish PWCC with the electricity rate that it sought. PWCC and NSPI were the applicants to the UARB for the LRR,³⁹ not the GNS (indeed, as former Deputy Minister of Energy Murray Coolican testifies, the GNS declined the request to be a co-applicant⁴⁰). Nor did the GNS direct the UARB to approve the LRR negotiated between PWCC and NSPI, a conclusion that a WTO panel has already reached.⁴¹ Port Hawkesbury's electricity rate is clearly separate and distinct from the other measures at issue and the rules of attribution in international law cannot be disregarded simply because of the allegation that the LRR was part of an "ensemble" of measures intended by the GNS to help Port Hawkesbury reopen.

³⁷ Witness Statement of Murray Coolican, 17 April 2019 ("Coolican First Statement"), ¶ 11; Rejoinder Witness Statement of Murray Coolican, 4 March 2020 ("Coolican Rejoinder Statement"), ¶¶ 4-6; See **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011); **C-138**, UARB Decision (Nov. 29, 2011), ¶¶ 223-224: ("[T]he Board believes that the LRR being approved in this Decision would have been an appropriate LRR for NewPage, had it continued to operate the mill.")

³⁸ **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011), p. 1; **C-222**, [REDACTED], p. 3. See Part IV.C.1(b) below; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial on Merits and Damages, 17 April 2019 ("Canada's Counter-Memorial"), ¶ 170.

³⁹ **R-062**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, 2012 NSUARB 126, M04862, Decision (Aug. 20, 2012) ("UARB Decision (Aug. 20, 2012)"), ¶ 9: ("PWCC and NSPI applied to the Board for approval of a Load Retention Tariff ("LRT") pricing and dividend calculation mechanism. Each of them filed Applications, dated April 27, 2012, with the Board, which then sat down a hearing to commence on July 16, 2012 at its offices in Halifax.")

⁴⁰ Coolican First Statement, ¶ 17, *citing to* **C-147**, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2, p. 108 of 165.

⁴¹ **R-238**, WTO Panel Report, ¶ 7.63.

B. The GNS Did Not Exercise “Effective Control” over PWCC and NSPI and the Alleged Wrongful Conduct – the “Preferential” and “Reduced” Electricity Rate – As Required Under Customary International Law (ILC Article 8)

29. In its Memorial, the Claimant’s submission on attribution rested entirely on ILC Article 8, arguing that the conduct of PWCC and NSPI was “directed and controlled by” the GNS.⁴² Unable to dispute Canada’s submission that customary international law requires evidence of “effective control” of private conduct in order for attribution of private acts to a State,⁴³ and unable to demonstrate such effective control on the evidence, Resolute’s reliance on ILC Article 8 has been relegated to an alternative argument in its Reply Memorial.⁴⁴ While Canada responds below to the new arguments regarding conduct of State organs (ILC Article 4) and conduct acknowledged and adopted by a State as its own (ILC Article 11), it is important to first re-emphasize the consequences of Resolute’s failure to establish that the conduct of PWCC and NSPI is attributable to the GNS.

30. In its Reply Memorial, Resolute does not try to contest the applicability of the “effective control” test described by the ICJ in *Military and Paramilitary Activities (Nicaragua v. United States of America)* and applied consistently by international courts and tribunals when it comes to the question of attribution of private conduct to the State. In the *Military and Paramilitary Activities* case, the ICJ determined that, despite the United States’ extensive support, involvement with and influence over the *contra* rebels in Nicaragua, it did not effectively control them and thus could not be responsible for specific acts alleged to violate international law.⁴⁵ The *Application of Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* case affirmed that rigorous standard, requiring that instructions given by the State be “in respect of each operation in

⁴² Claimant’s Memorial, ¶¶ 176-186.

⁴³ Canada’s Counter-Memorial, ¶¶ 172-182.

⁴⁴ Claimant’s Reply, ¶¶ 74-80.

⁴⁵ **RL-114**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment, I.C.J. Reports 1986, 27 June 1986 (“*Military and Paramilitary Activities Case*”), ¶ 115. As Judge Ago noted in his separate opinion, “[o]nly in cases where certain members of those forces happened to have been specifically charged by the United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them” as attributable to the United States. (**RL-195**, *Military and Paramilitary Activities Case*, Separate Opinion of Judge Roberto Ago, 27 June 1986, ¶ 16.) The ICJ held the United States responsible for its own acts of support for the *contras*, but a “general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.” See **RL-032**, ILC Articles, pp. 47-48.

which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”⁴⁶ Tribunals in investor-State cases such as *Jan de Nul*, *Hamester*, *White Industries*, *Almas* and others have applied the demanding “effective control” standard as requiring “both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake.”⁴⁷ The Claimant’s sole reliance on *Bayindir*,⁴⁸ as Canada already explained in its Counter-Memorial, is unavailing both on the law and the totally different factual situation that has no similarity to the present case.⁴⁹ International law is clear: in order for the conduct of PWCC and NSPI to be attributable to the GNS, Resolute must prove that the GNS had *both* general control over the parties *and* specific control over the electricity pricing mechanism they negotiated to establish the LRR payable at Port Hawkesbury.

31. The Claimant fails to meet the effective control standard. Resolute simply asserts that the GNS “gave instructions to NSPI within the meaning of Article 8 to ensure an electricity rate passed” supported by a sundry list of inaccurate characterizations of the facts.⁵⁰ Canada has already described in its Counter-Memorial the nature of the negotiations between PWCC and NSPI, and the role of the GNS and Mr. Todd Williams therein,⁵¹ but certain factual mischaracterizations in the Claimant’s Reply Memorial require correction here.

⁴⁶ **RL-115**, *Genocide Convention Case*, ¶ 400.

⁴⁷ **CL-105**, *Jan de Nul N.V. and Dredging International N.V. v. Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008 (“*Jan de Nul – Award*”), ¶ 173, *cited with approval in* **RL-116**, *White Industries Australia Limited v. The Republic of India* (UNCITRAL) Final Award, 30 November 2011 (“*White Industries – Award*”), ¶¶ 8.1.16-8.1.18. *See also* **RL-069**, *Gustav F Hamester GmbH and Co KG v. Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 179 (describing the effective control test in terms identical to the *Jan de Nul* tribunal); **RL-120**, *Almas v. Poland* (UNCITRAL) Award, 27 June 2016, ¶¶ 268-269; **RL-118**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Award, 10 March 2014, ¶¶ 304-305; **RL-119**, *Teinver v. Argentina* (ICSID Case No. ARB/09/01) Award, 21 July 2017, ¶ 722-724; **RL-117**, *Gavrilovic v. Croatia* (ICSID Case No. ARB/12/39) Award, 26 July 2018, ¶¶ 828-829.

⁴⁸ Claimant’s Reply, ¶ 76.

⁴⁹ *See* Canada’s Counter-Memorial, ¶ 178. As Canada described in its Counter-Memorial, *Bayindir* was a departure from the “effective control” test deeply entrenched in international jurisprudence and was in any event, a highly fact-specific finding of attribution where approval to terminate a contract was obtained by the highest levels of the Pakistani government and military.

⁵⁰ Claimant’s Reply, ¶ 77.

⁵¹ Canada’s Counter-Memorial, ¶¶ 183-221.

32. First, Resolute alleges that the GNS “requested” that NSPI initiate discussions with PWCC “as soon as they were selected” as the winning bidder.⁵² This does nothing to establish effective control of the GNS over NSPI. The Monitor introduced PWCC to GNS officials during the CCAA process,⁵³ and the GNS in turn introduced PWCC to NSPI officials so they could hear about PWCC’s ambitious and creative electricity savings plan.⁵⁴ Introducing PWCC (a newcomer to the Province with no experience with Nova Scotia’s electricity market) and NSPI (a publically traded for-profit corporation operating in a regulated market) can hardly be classified as an instruction to establish effective control as understood in international law – in the words of the *Electrabel* tribunal, “an invitation to negotiate cannot be assimilated to an instruction”,⁵⁵ especially since the GNS had no authority to instruct NSPI to give PWCC the electricity rate it was seeking.

33. Second, Resolute alleges an “active role” of the GNS during negotiations by “providing work product and reviewing others’ work product” and by hiring Mr. Todd Williams from Navigant and sponsoring his testimony before the UARB.⁵⁶ The “honest broker” role of Mr. Williams has been exhaustively described in Canada’s Counter-Memorial, Mr. Coolican’s first witness statement and in Mr. Williams’ own testimony to the UARB.⁵⁷ Retaining Mr. Williams in December 2011 to facilitate the discussions between PWCC and NSPI does not mean he nor the GNS had any ability to issue instructions to those parties to reach any particular deal on an electricity rate.⁵⁸ It is hardly surprising that GNS officials would occasionally attend meetings to

⁵² Claimant’s Reply, ¶ 77.

⁵³ **C-318**, [REDACTED].

⁵⁴ Coolican First Statement, ¶ 13; **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011), p. 3.

⁵⁵ **RL-113**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.111. In *Electrabel*, the tribunal held that a letter by the government encouraging the power plant owner and operator to negotiate in the direction favoured by them could not be considered an “instruction” because its “purpose was to encourage.” *Id.*, ¶ 7.107.

⁵⁶ Claimant’s Reply, ¶ 77.

⁵⁷ Canada’s Counter-Memorial, ¶¶ 189-192; Coolican First Statement, ¶¶ 15-16; **C-168**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Direct Evidence of Todd Williams (May 2012), p. 6: (“Essentially, I served as an ‘honest broker’ in these discussions. I listened carefully and, as needed, tried to get each party to understand the other party’s perspective and to reach agreement on the various elements of the Load Retention Rate Mechanism as it was being developed. *I did not advocate for any specific party or position, but occasionally offered suggestions and proposals to help resolve differences and keep the discussions moving forward.*”) (emphasis added).

⁵⁸ **R-425**, [REDACTED]; **C-151**, Todd Williams Engagement Agreement (Feb. 13, 2012). Mr. Williams contract

observe the progress of NSPI and PHP’s discussions. The demanding effective control test that international law requires to attribute the negotiated deal between PWCC and NSPI to the GNS is not met.

34. Third, Resolute alleges that the GNS loan agreement with PWCC was “linked” to the electricity deal and [REDACTED]

[REDACTED].⁵⁹ Ms. Jeannie Chow, Director at the Nova Scotia Department of Business, addressed this inaccuracy in her first witness statement and does so further in her second witness statement.⁶⁰

[REDACTED].⁶¹ It is illogical for Resolute to argue [REDACTED]

[REDACTED] let alone that it establishes effective control over PWCC and NSPI.⁶² These were two separate and distinct measures subject to separate and distinct processes.

35. Finally, the Claimant repeats again its gratuitous comment that Nova Scotia’s Premier Dexter spoke to NSPI’s CEO during the rate negotiations.⁶³ Canada refers the Tribunal to its Counter-Memorial where Resolute’s misrepresentation of the record was already addressed.⁶⁴

states that he was “not the agent of the Province” (s. 9.01) and it limited his mandate to helping PWCC and NSPI in the negotiations, including by determining the value of the innovations being proposed by PWCC (Schedule A).

⁵⁹ Claimant’s Reply, ¶¶ 47-49, 77. See **C-182**, [REDACTED], p. 4.

⁶⁰ Witness Statement of Jeannie Chow, 17 April 2019 (“Chow First Statement”), ¶ 17; Rejoinder Witness Statement of Jeannie Chow, 4 March 2020 (“Chow Rejoinder Statement”), ¶¶ 2-4.

⁶¹ **C-346**, Email from Jeannie Chow to Duff Montgomerie (Sep. 21, 2012), p. CAN000124_0002- CAN000124_0003: [REDACTED]

⁶² Resolute suggests that this is similar to the Pakistani government’s role in terminating the contract at issue in **CL-112**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009. There are no parallels – in that case, the Chairman of the government-controlled National Highway Authority received “express clearance” from Pakistan’s military chief executive to terminate a contract.

⁶³ Claimant’s Reply, ¶ 77.

⁶⁴ Canada’s Counter-Memorial, ¶ 187, citing **C-162**, Nova Legislature House of Assembly Debates and Proceedings, Fourth Session (Apr. 25, 2012), p. 1000 (the Premier was “confident that the utility and Pacific West are working together to build a plan in the best interests of Nova Scotians. Once that plan is finalized, it will go before the Nova Scotia Utility and Review Board for approval.”)

36. None of the conduct identified by the Claimant, even with its significant mischaracterizations, rises to the level of effective State control over private conduct required to meet the test for attribution under international law. The “preferential” and “discounted” electricity rate that Resolute alleges enabled Port Hawkesbury to reopen and cause it damage was a commercial agreement between PWCC and NSPI, which they negotiated and agreed to on a basis that was “entirely consistent with market principles.”⁶⁵ They were not acting on the instructions, or under the direction or control, of the GNS.

C. Resolute’s New Argument Relying on ILC Article 4 is Unavailing Because the Conduct of the UARB in its Regulatory Role is Separate and Distinct from the Conduct of PWCC and NSPI in Negotiating the LRR

37. The Claimant’s Reply Memorial introduces a new approach to its attribution argument. Now relying on ILC Article 4, it argues that the conduct of the UARB in approving the LRR (and the GNS DOE’s conduct regarding renewable energy standards and biomass, addressed below) makes the electricity rate paid by PHP to NSPI attributable to the State.⁶⁶ However, that is not the determination which follows from a proper application of customary international law.

38. ILC Article 4 outlines when the conduct of a State organ is necessarily an act of the State and thus attributable thereto:

Article 4 - Conduct of organs of a State

(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

(2) An organ includes any person or entity which has that status in accordance with the internal law of the State.⁶⁷

39. Within this framework, there is no dispute that the UARB is a State organ: it is a quasi-judicial body that occupies a statutorily mandated role to independently supervise all utilities,

⁶⁵ **R-238**, WTO Panel Report, ¶ 7.77.

⁶⁶ Claimant’s Reply, ¶ 46.

⁶⁷ **RL-032**, ILC Articles, Article 4. ILC Article 4 is considered to be reflective of customary international law. See **RL-115**, *Genocide Convention Case*, ¶ 385.

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including electricity, and the rates they charge customers in the Province of Nova Scotia pursuant to the *Public Utilities Act*.⁶⁸

40. But determining whether an entity is a State organ is not by itself sufficient to satisfy the inquiry iterated under ILC Article 4 because consideration must also be given to what is the specific *conduct* that is alleged to be wrongful under international law. This is where the Claimant improperly imputes the conduct of PWCC and NSPI agreeing to a new electricity pricing mechanism, which is the alleged internationally wrongful act, to the UARB, whose own conduct is not alleged to be wrongful because all it did was fulfil its statutory role of determining whether ratepayers would be better off with the proposed LRR.⁶⁹ Just as “the instructions, direction or control must relate to the conduct that is said to have amounted to an internationally wrongful act” under ILC Article 8,⁷⁰ so too must there be a nexus between the specific conduct of the State organ and the internationally wrongful act under ILC Article 4.

41. The conduct as between PWCC and NSPI versus the conduct of the UARB are clearly distinguishable. As Canada has already outlined in its Counter-Memorial,⁷¹ and was recognized by the UARB⁷² and also acknowledged by the panel in its *United States - Supercalendered Paper* decision, the electricity pricing mechanism in the LRR was devised by PWCC and NSPI after a vigorous six-month negotiation which “*had indeed resulted from negotiations based on market considerations.*”⁷³ Referring to PWCC’s willingness “(a) to become ‘priority interruptible’; (b) to

⁶⁸ **R-061**, *Public Utilities Act*, R.S.N.S. 1989, c. 380, s. 18: (“Supervision of utility by Board. The Board shall have the general supervision of all public utilities and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.”); s. 64(1) (“No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.”)

⁶⁹ **R-062**, UARB Decision (Aug. 20, 2012), ¶ 69, *citing* **C-138**, UARB Decision (Nov. 29, 2011), ¶¶ 174-185. The test to be applied by the Board when considering an application for a Load Retention Rate considers whether the proposed LRR is necessary and sufficient for NSPI to retain the load of the customer and whether the total revenue received from the customer (PHP) exceeds the incremental costs associated with NSPI serving the customer.

⁷⁰ **RL-032**, ILC Articles, Article 8, Commentary (7).

⁷¹ Canada’s Counter-Memorial, ¶ 193.

⁷² **R-062**, UARB Decision (Aug. 20, 2012), ¶¶ 36-41 (noting with respect to the over 3,000 pages of meeting notes, email communications, and draft documents between the teams negotiating on behalf of NSPI and PWCC: “[T]he record is as full and complete as seen by the Board.”)

⁷³ **R-238**, WTO Panel Report, ¶ 7.77 (emphasis added).

pay for its electricity in part on the basis of the most expensive incremental source of energy in the stack in any given hour that it purchased electricity; [and] (c) to pre-pay its bill on a weekly basis,” the WTO panel went on to conclude that:

[I]t seems entirely consistent with market principles for an electricity provider to seek to both manage its load and accommodate the needs of its largest customer, and for a company that consumes a large amount of electricity to make concessions and accept flexibilities that would result in a lower rate being payable.⁷⁴

42. That commercial deal on electricity is what Resolute alleges saved PHP over ██████████ from 2012-2015, in comparison to what it would have had to pay at the rate approved for NewPage-Port Hawkesbury (and Bowater Mersey) in November 2011.⁷⁵

43. But the negotiation of that deal between PWCC and NSPI, which Resolute alleges generated the “financial benefit” that caused it damage, is *not* the same conduct as that of the UARB, whose only role was to adjudicate, after a lengthy adversarial process with the presentation of written and oral evidence, whether the proposed LRR would leave ratepayers better off than they would be otherwise. *That* conduct by the UARB is not alleged to be internationally wrongful, which is why Resolute’s reliance on ILC Article 4 is flawed.

44. In this respect, Resolute’s reliance on *Bilcon* is entirely misplaced.⁷⁶ In *Bilcon*, it was the actual conduct of the Joint Review Panel (determined by the tribunal to be a State organ) that was the alleged internationally wrongful act (i.e., denying approval of the quarry project by adopting the wrong standard under Canadian law).⁷⁷ In this case, unlike in *Bilcon*, the conduct of the UARB itself in fulfilling its statutory mandate of adjudicating whether ratepayers are better off with the proposed LRR is not the source of the claimed injury.

⁷⁴ **R-238**, WTO Panel Report, ¶ 7.77.

⁷⁵ Claimant’s Reply, ¶¶ 162-165.

⁷⁶ Claimant’s Reply, ¶¶ 50-53.

⁷⁷ **RL-025**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon – Award on Jurisdiction and Liability*”), ¶¶ 305-320.

45. Resolute argues that the WTO *United States - Supercalendered Paper* decision on “entrustment” or “direction” does not diminish its argument on attribution,⁷⁸ but the reasoning applied by the WTO panel in distinguishing the actions of the UARB from NSPI serves to illustrate the same flaws in the Claimant’s reasoning in applying ILC Article 4, as Canada described above. In reaching its conclusion that NSPI had not been entrusted or directed by the UARB to provide an LRR to PHP, the WTO panel cautioned against equating a State organ “merely exercising its general regulatory powers” to entrustment and direction of a private company.⁷⁹ This is the mistake Resolute makes in conflating the UARB’s regulatory role of determining that the proposed LRR met the requirements under the *Public Utilities Act* with the conduct of PWCC and NSPI to reach a specific agreement over the rate. If Resolute cannot demonstrate that the latter conduct is attributable to the GNS through ILC Article 8, it cannot create vicarious attribution for the same alleged wrongful private conduct simply by switching its focus to the conduct of the UARB through ILC Article 4.

D. The GNS Department of Energy’s Confirmation of its Pre-existing Renewable Energy Policies Does Not Make the Electricity Rate Negotiated by NSPI and PWCC Attributable to the GNS

46. The Claimant also attempts to attribute the PWCC-NSPI electricity rate mechanism to the GNS using ILC Article 4 by arguing that the GNS DOE “modified” renewable energy requirements to facilitate confirmation of the LRR by the UARB by (a) resolving the Board’s concern that future government action could create additional renewable energy costs for NSPI’s ratepayers, and (b) designating the Port Hawkesbury biomass plant as “must run.”⁸⁰ Here again, the Claimant glosses over the critical distinctions between the actions of the DOE, the UARB and PWCC/NSPI and their implications under customary international law.

47. Resolute relies on the July 20, 2012 letter from then-GNS Deputy Minister of Energy Mr. Coolican to the UARB addressing the risk of future incremental renewable energy supply (“RES”)

⁷⁸ Claimant’s Reply, ¶¶ 79-80.

⁷⁹ **R-238**, WTO Panel Report, ¶¶ 7.37-7.38, 7.61. The panel referred to the WTO Appellate Body’s previous statements that entrustment and direction “cannot be inadvertent or *a mere by-product of governmental regulation*.” (emphasis added).

⁸⁰ Claimant’s Reply, ¶¶ 61-62.

costs.⁸¹ As Mr. Coolican points out in his Rejoinder witness statement, given the GNS' ongoing efforts since 2007 to promote renewable electricity and reduce reliance on coal,⁸² it is unsurprising that the UARB raised the question of what would happen if the GNS were to change its RES requirements in the future such that additional costs would result for PWCC and/or other ratepayers.⁸³ NSPI and PWCC were confident that additional costs were very unlikely given the amount of renewable energy that would soon be available in the Province,⁸⁴ but as Mr. Coolican testifies, the Board wanted further comfort on the issue so it could proceed with its determination on the LRR proposed by PWCC and NSPI. Mr. Coolican's letter provided that clarification, saying the GNS "was confident that there is enough RES supply coming on-line that the mill-load will not trigger an incremental RES cost over the term of the proposed mechanism."⁸⁵ The GNS wanted to be responsive to an issue being addressed by the UARB, so it made a commitment that additional incremental costs would not be imposed on PHP or on NSPI's other ratepayers.

48. But just as the conduct of the UARB is distinct from the private conduct of PWCC and NSPI, the conduct of the GNS DOE in clarifying its intent regarding RES-related eventualities is distinct from the negotiated commercial terms of how much NSPI would be paid for its electricity. Indeed, the RES issue is a non-issue: there is no allegation of a benefit to PHP from not having to pay

⁸¹ **C-179**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (Jul. 20, 2012).

⁸² The *Environmental Goals and Sustainable Prosperity Act*, in 2007, mandated that by the year 2013, 18.5% of the total electricity needs of Nova Scotia had to be obtained from renewable electricity sources. (See **R-194**, *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c. 7, s. 4(2)(b)(i)). Regulations from the same year required NSPI, in 2010-2012, to supply its customers with renewable electricity in a proportion of not less than 5%. (**R-171**, *Renewable Energy Standard Regulations*, N.S. Reg. 35/2007, ss. 5(1)). This requirement was later increased to 10% (**R-179**, *Renewable Electricity Regulations*, N.S. Reg. 155/2010, s. 5) but allowed NSPI to acquire additional renewable electricity either from IPPs or from its own generation facilities. See also, **R-424**, Nova Scotia Department of Energy, "Toward a Greener Future, Climate Change Action Plan" (Jan. 2009), p. 17; **R-180**, Nova Scotia Department of Energy, "Toward a Greener Future, Nova Scotia's 2009 Energy Strategy" (Jan. 2009); **R-181**, Nova Scotia Department of Energy, "Renewable Electricity Plan: A path to good jobs, stable prices, and a cleaner environment" (Apr. 2010), p. 2.

⁸³ Coolican Rejoinder Statement, ¶ 7. At the UARB hearing, the Board asked the question "if indeed the renewable targets changed as a result of government action...there is a risk with respect to other ratepayers having to pick up the cost of renewables serving your load?" (**R-397**, *In re an Application by Pacific West Commercial Corp. and Nova Scotia Power Incorporated*, Transcript – Part A (Jul. 16, 2012), p. 160:13-18).

⁸⁴ Canada's Counter-Memorial, ¶ 219; **C-179**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (Jul. 20, 2012).

⁸⁵ **C-179**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (Jul. 20, 2012).

RES-related incremental costs because, as predicted in 2012, the mill load has never triggered any such costs since it reopened.⁸⁶

49. The statement in the July 20, 2012 GNS DOE letter with respect to the Port Hawkesbury biomass plant is similarly distinct from the pricing mechanism terms of the LRR. As was already explained in Canada’s Counter-Memorial and Mr. Coolican’s first witness statement,⁸⁷ the letter discussed the draft regulations devised in 2011 (i.e., before NewPage went into CCAA proceedings) that already planned to designate the biomass plant as “must run” because it advanced Nova Scotia’s renewable energy policy and it simply confirmed that “the policy intention has not changed” and the GNS would follow-through on its pre-existing plan (which it did in January 2013).⁸⁸ The regulatory conduct to “enhanc[e] system reliability and facilitat[e] the balancing of non-firm intermittent wind generation”⁸⁹ is separate and distinct conduct from the specific pricing terms and conditions for the supply of electricity negotiated between NSPI and PWCC that Resolute alleges saved PHP ██████████ between 2013-2015.⁹⁰ Indeed, the fact that the biomass regulation was modified by the GNS in 2016 without altering Port Hawkesbury’s LRR

⁸⁶ Coolican First Statement, ¶¶ 30-31.

⁸⁷ Canada’s Counter-Memorial, ¶ 211; Coolican First Statement, ¶¶ 38-43.

⁸⁸ **C-179**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (Jul. 20, 2012); **R-186**, Order in Council, No. 2013-13 (Jan. 17, 2013); **R-225**, Order in Council, No. 2013-12 (Jan. 17, 2013), Schedule A. The amendments to RES Regulations were prepared and released for public consultation on June 27, 2011, months before PWCC was even in the picture. **R-185**, Proposed Amendments to Renewable Electricity Regulations Released (Jun. 27, 2011).

⁸⁹ **C-179**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (Jul. 20, 2012).

⁹⁰ Claimant’s Reply, ¶ 162. PHP receives no financial benefit from the biomass plant – it pays NSPI \$4.72 million for steam, the pricing of which the UARB said was “reasonable and not subsidized by ratepayers.” (**R-062**, UARB Decision (Aug. 20, 2012), ¶¶ 156-158). Even if NSPI had decided not to operate the Biomass Plant, PHP would still have been able to obtain the necessary steam from its own gas-fired boiler (PB4), which was not sold to NSPI. (**R-062**, UARB Decision (Aug. 20, 2012), ¶ 156; **R-417**, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, M04862, Redacted Pacific West Commercial Corporation (“PWCC”) Responses to Information Requests from the Small Business Advocate (May 30, 2012), Request IR-24, p. 25: (“The Port Hawkesbury Mill has sufficient steam generation capacity to run the Mill from its wholly-owned PB4 boiler.”)). Resolute’s reliance on a newspaper article (**C-051**, CBC News “Nova Scotia Power ratepayers foot \$7M bill for Port Hawkesbury Paper,” (Oct. 20, 2015)) is misleading – PHP does not receive \$7 million annually because of the biomass plant; rather, that was NSPI’s estimate of the extra cost to all ratepayers in the Province for running the mill in order to meet its renewable energy targets. NSPI was willing to absorb these costs to meet its renewable energy targets as they were still cheaper than wind. (**R-182**, *In re an Application by Nova Scotia Power Inc.*, Application for Approval of Capital Work Order CI 39029, Port Hawkesbury Biomass Project (Apr. 9, 2010), p. 6). As noted in the Rejoinder Expert Report of Peter Steger, 4 March 2020 (“Steger-2”), ¶ 40, Resolute’s expert Dr. Kaplan has not included any financial benefit arising from the biomass plant in his damages calculations.

demonstrates the clear divide between the regulatory conduct of the GNS and the private conduct of PWCC and NSPI.

50. In sum, the rules of state responsibility for internationally wrongful acts recognize that distinctions should be made between the conduct of a State organ and attribution of conduct of non-State actors to the State. Just as the ICJ and other international tribunals have distinguished between the consequences flowing from conduct attributable to State organs from consequences flowing from the conduct attributable solely to private actors,⁹¹ so too must this Tribunal maintain the distinction when considering ILC Article 4 and Article 8. In this case, the actions of PWCC and NSPI to create the allegedly “preferential” and “discounted” LRR cannot be attributed to the GNS because it did not have “effective control” over either of the private parties that negotiated and agreed to the commercial terms under which Port Hawkesbury pays for its electricity. The UARB’s regulatory approval of that privately-negotiated rate and the conduct of the GNS DOE to confirm its pre-existing policy intentions regarding renewable energy standards are separate and distinct from the alleged internationally wrongful act.

E. Resolute’s Allegation that [REDACTED] is Erroneous and Has No Bearing on Attribution

51. In its Reply Memorial, the Claimant makes the argument that “[t]he electricity measures are attributable to GNS because the UARB is a State organ of Nova Scotia and GNS, through the [REDACTED]⁹² and that [REDACTED]⁹³ Resolute’s sole basis for attribution here is [REDACTED]

⁹¹ See e.g., **RL-114**, *Military and Paramilitary Activities Case*, ¶¶ 93-112, 115: (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. [...] It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras.”); **CL-105**, *Jan de Nul – Award*, ¶¶ 172-175 (distinguishing between the conduct of the Suez Canal Authority and other State organs); **RL-116**, *White Industries – Award*, ¶¶ 8.1.18-8.1.21, 10.2.3, 10.4.2 (distinguishing the conduct of the Indian Government and courts from the conduct of Coal India).

⁹² Claimant’s Reply, ¶ 43.

⁹³ Claimant’s Reply, ¶ 49.

the LRR and the [REDACTED]

F. Resolute’s Attempt to Attribute the LRR to the GNS by Reference to ILC Article 11 is Also Without Merit

55. Resolute’s final argument is that, if the Tribunal were to find that the electricity rate was the product of private actors, the GNS’ actions nevertheless “acknowledged and adopted” it and is therefore attributable to the State pursuant to the customary international law principles reflected in ILC Article 11.⁹⁸ Resolute relies on the same misplaced imputation of conduct and factual misrepresentations, including with respect to the regulatory hearing at the UARB and RES issues, as well as the [REDACTED]. The Claimant’s reliance on ILC Article 11 to attribute the Port Hawkesbury LRR to the GNS is no more appropriate than its flawed reliance on ILC Articles 4 or 8.

56. ILC Article 11 is entitled “Conduct acknowledged and adopted by a State as its own” and states:

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

57. ILC Article 11 is only potentially applicable if the conduct by PWCC and NSPI in concluding a “discounted” and “preferential” electricity rate is not attributable to the GNS via ILC Articles 4 or 8 (or any other earlier article). ILC Article 11 requires “clear and unequivocal” acknowledgement *and* adoption of conduct by the State, and it will not be sufficient if a state “...merely acknowledges the factual existence of conduct or expresses its verbal approval of it.”⁹⁹ For example, in the *Diplomatic and Consular Staff in Tehran* case, the ICJ recognized that once

⁹⁸ Claimant’s Reply, ¶ 68.

⁹⁹ **RL-032**, ILC Articles, Article 11, Commentaries (6) and (8). *See also*, **RL-196**, James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) (“*Crawford, ILC Commentary*”), Article 11(6)(8) at p. 123. *See also*, **CL-210**, *Diplomatic and Consular Staff in Tehran Case*, ¶¶ 73, 91; **RL-197**, *Affaire relative à la concession des phares de l’Empire ottoman*, UNRIAA, vol. XII, 24/27 July 1956, at p. 198; **RL-198**, James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 187 (stating that the act of adoption may be express, as in *Diplomatic and Consular Staff in Tehran* or implied, as in the *Affaire relative à la concession des phares de l’Empire ottoman (Lighthouses)* arbitration).

the Iranian Government maintained the occupation of the U.S. Embassy and the detention of hostages for the purpose of exerting pressure on the United States, the legal nature of the situation was “fundamentally transform[ed]” whereby “the approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of hostages into acts of that State.”¹⁰⁰

58. In contrast to the *Diplomatic and Consular Staff in Tehran* case, nothing in the conduct of the GNS with respect to the PWCC-NSPI LRR can be accurately described as an express or implied acknowledgment and adoption of the impugned conduct as its own.

59. First, the UARB did not seek to make the conduct of PWCC/NSPI in negotiating the LRR its own conduct. The UARB’s role was limited to making a determination as to whether the proposed LRR, which PWCC and NSPI negotiated based on their own commercial interests, met the statutory test of leaving all ratepayers better off than they would otherwise be if Port Hawkesbury’s load was removed from the electricity system. Resolute is wrong to suggest that a State organ that adjudicates a regulatory process to review a proposed private transaction (e.g., a court approving a bankruptcy settlement or corporate merger) acknowledges and adopts the conduct of the private parties appearing before it. Imputing responsibility on the UARB or any adjudicative State organ in that way would have radical implications for the international law on State responsibility.

60. Second, Resolute’s mischaracterization of [REDACTED] is no more relevant in the ILC Article 11 context than it is under ILC Articles 4 or 8. The GNS does not operate the Port Hawkesbury mill nor is it a party to the pricing mechanism under which PHP pays NSPI for electricity. Whether Port Hawkesbury can realize any electricity savings under the LRR rests on PHP and NSPI (which, as discussed above, has proven to be far more difficult than PHP had hoped for).¹⁰¹ The GNS did not “adopt” the LRR as its own through

¹⁰⁰ CL-210, *Diplomatic and Consular Staff in Tehran Case*, ¶ 74.

¹⁰¹ R-431 [REDACTED], p. CAN0000131_005: [REDACTED]

the loan agreement – the GNS was simply presented with the deal that PWCC and NSPI had concluded, reviewed it and believed it to be sufficiently sound to justify making a loan.¹⁰² That is not what international law considers to be a State “acknowledging and adopting” conduct of private parties as its own. Resolute’s suggestion that a State organ lending money to a private party automatically means that under international law the State has “adopted as its own” that private party’s contractual rights and obligations vis-à-vis third parties is untenable.

61. Finally, Resolute’s Reply Memorial points again to the GNS DOE’s renewable energy actions as evidence that GNS “acknowledge[d] and adopt[ed]” the electricity measures.¹⁰³ Canada will not repeat here that a proper view of the facts reveals the clear distinction between PWCC and NSPI creating an allegedly “preferential” and “reduced” electricity rate and the GNS’ long-standing and pre-existing governmental policies to shift the province towards clean, renewable electricity. None of this conduct meets the international law test described in ILC Article 11. The requisite nexus did not exist between the regulatory actions of the province and the LRR in order to meet the exacting standard of “acknowledgment and adoption.”

62. Again, just as the Claimant missed the distinctions between this case and *Bilcon* with respect to attribution under ILC Article 4, its reliance on *Bilcon* is similarly inapposite with respect to ILC Article 11. In *Bilcon*, the tribunal found that a government Minister had explicitly adopted the JRP’s essential findings in determining that the project in dispute should be denied under environmental laws and this “link between the findings and recommendations of the JRP and the Minister’s final decision would be sufficient to constitute an acknowledgement and adoption for the purposes of Article 11.”¹⁰⁴ That “acknowledgement and adoption” by the Minister of the alleged international wrongful conduct (i.e., the JRP’s alleged use of a standard not present in Canadian law) meant that, even if the JRP’s conduct was not attributable to Canada by itself, it was attributable under ILC Article 11.

63. But there is no similar conduct in this case whereby the GNS “acknowledged and adopted” the PWCC-NSPI LRR (i.e., the alleged wrongful conduct) as its own. The GNS was not a co-

¹⁰² Chow Rejoinder Statement, ¶¶ 2-4.

¹⁰³ Claimant’s Reply, ¶ 54.

¹⁰⁴ **RL-025**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 324.

applicant before the UARB (indeed, it declined the invitation to do so).¹⁰⁵ Further, its actions on the renewable energy issues were a by-product of broader regulatory action that does not have the requisite nexus to engage attribution under ILC Article 11, which requires a full acknowledgement and adoption of the measures as if it were the State’s own conduct as exemplified by the *Diplomatic and Consular Staff in Tehran* case. That is not the situation here.

III. CANADA HAS NOT VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1102 (NATIONAL TREATMENT)

A. The Exclusions Set Out in NAFTA Article 1108(7) Apply to the Vast Majority of the Nova Scotia Measures

64. In its Counter-Memorial, Canada argued that: (1) the \$40 million credit facility and the \$24 million capital loan are “government supported loans”, (2) the [REDACTED] are “grants”, (3) [REDACTED] is a “government supported loan”, (4) the [REDACTED] is a “grant” or a “government supported loan”, (5) the Land Purchase Agreement is “procurement”, and (6) the Outreach Agreement is “procurement” or a “grant”.¹⁰⁶ All of these measures would thus fall within the scope of Article 1108(7).¹⁰⁷

65. In its Reply Memorial, Resolute does not actually dispute the characterization of these measures as “procurement by a Party” or “subsidies or grants provided by a Party [...] including government supported loans, guarantees and insurance”, thereby conceding that they are covered by the terms of Article 1108(7). Resolute only takes issue with Canada’s argument in relation to the FULA and the Outreach Agreement, alleging that they do not qualify under Article 1108(7) and are accordingly subject to the national treatment obligation in Article 1102. This contention is without merit.

66. Resolute did not articulate its complaint with respect to the FULA in its Memorial. In response, Canada pointed out the lack of specificity and noted that, if Resolute is alleging the GNS is “essentially making the Crown timber free” through the FULA (which is false), then Article

¹⁰⁵ Coolican First Statement, ¶ 17.

¹⁰⁶ Canada’s Counter-Memorial, ¶¶ 225-232.

¹⁰⁷ Canada does not argue that the electricity rate negotiated between NSPI and PWCC is subject to an exclusion in Article 1108(7) as it was negotiated between two private entities on the basis of market principles. Canada’s Counter-Memorial, ¶ 224. *See also* Part II above.

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1108(7)(b) would still apply, and furthermore, that payments made by the GNS for silviculture activities conducted by PHP would constitute “procurement” covered by Article 1108(7)(a).¹⁰⁸

67. Resolute’s Reply Memorial adds no clarity to its claim, stating simply that the GNS “is not buying goods or services—when PHP pays for stumpage under the FULA.”¹⁰⁹ This does nothing to further substantiate the underlying accusation that PHP pays next to nothing for Crown timber, an allegation with no supporting evidence and contradicted by the second witness statement of Deputy Minister of the Nova Scotia Department of Lands and Forestry Julie Towers.¹¹⁰ But even if there were any evidence to establish that this were true, then the NAFTA Article 1108(7)(b) exception would apply.¹¹¹ Resolute also ignores Canada’s point that payments by the GNS to PHP under the FULA for silviculture activities on Crown lands fall within the meaning of NAFTA Article 1108(7)(a). As Deputy Minister Towers explains, “the Province compensates PHP for taking care of Crown lands. Without PHP or another licensee conducting those silviculture activities, it would fall to the Crown to pay contractors to do so. Entering into such agreements with licensees to perform silviculture activities is commonplace in Nova Scotia and it is to the advantage of the Province as most of the activities will yield benefits for decades after they have been performed.”¹¹² In any event, it is not for Canada to argue Resolute’s case for it and the Tribunal should disregard Resolute’s arguments regarding the FULA as confused and having no substance.

68. Resolute’s complaint about the Outreach Agreement is also irrelevant. Resolute has consistently alleged that payments made by the GNS to PHP (a maximum of \$3.8 million a year for a period of 10 years) are “grants.”¹¹³ Deputy Minister Towers has clarified that these sums are

¹⁰⁸ Canada’s Counter-Memorial, ¶¶ 233-234.

¹⁰⁹ Claimant’s Reply, ¶ 309.

¹¹⁰ As Deputy Minister Julie Towers explains, under the FULA “PHP pays for all stumpage harvested from Crown lands at the prices and quantities prescribed in the FULA.” Towers Rejoinder Statement, ¶ 3.

¹¹¹ As explained by Deputy Minister Julie Towers in her first witness statement (¶¶ 31-36), the FULA is a modern licensing regime that allows PHP to access Crown land for the timber it requires for its paper making operations at the stumpage rates set out therein while also paying PHP for silviculture activities it undertakes in order to comply with Nova Scotia’s forest management requirements. *See also*, Towers Rejoinder Statement, ¶ 3.

¹¹² Towers Rejoinder Statement, ¶ 3. At ¶ 4 of her Rejoinder Statement, Deputy Minister Towers explains the provisions of the FULA that set out what the GNS obtains under that agreement when it comes to silviculture activities.

¹¹³ *See e.g.*, Claimant’s Memorial, ¶¶ 71, 219 and 253. In its Reply Memorial (¶ 264), the Claimant states that the GNS provided PWCC/PHP with over \$40 million in grants. Canada understands that Resolute gets to this amount by adding the sums payable under the \$1.5 million workforce training grant, the \$1 million marketing contribution and the

disbursed to PHP so [REDACTED]

[REDACTED]¹¹⁴ Therefore, the Outreach Agreement is more properly considered as “procurement” of services covered by the exclusion set out in Article 1108(7)(a).¹¹⁵ In either case, Resolute cannot include the Outreach Agreement in its national treatment claim because of Article 1108(7).

69. Resolute complains that “Canada has refused to produce documents itemizing how much money was attributable to each different cost category in the Outreach Agreement”.¹¹⁶ This is a misleading and irrelevant point. First of all, Canada produced all of the documents responsive to the relevant document request and made redactions only in some documents in line with the Tribunal’s decision contained in Procedural Order No. 9.¹¹⁷ As explained in a letter to the Claimant dated October 12, 2018, Canada only redacted the amount of payments or reimbursements made in connection with the Outreach Agreement after October 15, 2014.¹¹⁸ Anything after that date (i.e., when the Claimant closed the Laurentide mill¹¹⁹) is irrelevant to this dispute. But regardless of Resolute’s belated complaint about redactions, it fails to explain how amounts of payments made after October 15, 2014 have any impact or relevance for the application of Article 1108(7).¹²⁰ As noted above, payments by the GNS for activities performed under the Outreach Agreement

Outreach Agreement (\$3.8 million per year for 10 years). If the payments in the Outreach Agreement are considered to be “grants,” then they are exempt from NAFTA Article 1102 because of Article 1108(7)(b).

¹¹⁴ Canada’s Counter-Memorial, ¶ 231; Towers First Statement, ¶ 39: (“ [REDACTED] ”); Towers Rejoinder Statement, ¶¶ 5-6. At ¶¶ 7-8 of her Rejoinder Statement, Deputy Minister Towers explains how the four elements cited by Resolute as not constituting “procurement” “are related to services provided to, and approved by, the GNS.”

¹¹⁵ Canada’s Counter-Memorial, ¶ 232.

¹¹⁶ Claimant’s Reply, ¶ 310. *See also*, Towers Rejoinder Statement, ¶ 9 (explaining that the quarterly reports prepared by PHP “provide to the GNS detailed work reports and expenses for nine categories of work”, which “correspond with the eligible work in the Outreach Agreement.” These report are subject to review by the Department of Lands and Forestry and PHP submits an annual independent auditor’s report, “which reviews the schedule of work performed and payments received under the Outreach Agreement.”)

¹¹⁷ Procedural Order No. 9, 21 August 2018, pp. 21-24.

¹¹⁸ **R-432**, [REDACTED], p. 3.

¹¹⁹ **R-016**, Resolute Forest Products, News Release, “Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec” (Sep. 2, 2014).

¹²⁰ Claimant’s Reply, ¶ 310.

constitute “procurement.” Resolute refers to them as “grants”. Article 1108(7) applies in either case and the Outreach Agreement cannot be part of Resolute’s Article 1102 claim.

B. The Tribunal Has No Authority or Reason to Disregard the Explicit Language of NAFTA Article 1108(7) Based on Resolute’s Misleading Characterizations of Canada’s Past Positions

70. In its Reply Memorial, Resolute continues to insist that Canada should be prevented from applying the Article 1108(7) exclusions because it did not notify the measures at issue pursuant to the WTO *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). Resolute also asserts that “Canada took a different position before the World Trade Organization (“WTO”), where it denied that GNS provided any subsidies (including grants, loans, and procurement) to PHP/PWCC.”¹²¹ Both contentions are without legal or factual validity.

71. First and foremost, Resolute’s contention that a NAFTA Chapter Eleven tribunal can refuse to apply the explicit text of Article 1108(7) because of an alleged non-compliance with a different treaty over which that tribunal has no jurisdiction and that contains different text is without precedent. This Tribunal has no jurisdiction to decide whether Canada complied with its obligations under Article 25 of the SCM Agreement,¹²² and Resolute has no standing to allege or rely on an alleged violation of that provision.¹²³ Resolute has not cited to any legal authority or

¹²¹ Claimant’s Reply, ¶ 277.

¹²² NAFTA Articles 1116 and 1117 state that an investor may only bring a claim on its own behalf or on behalf of an enterprise for a breach of Section A of Chapter Eleven of the NAFTA, not any other treaty. A NAFTA tribunal has no jurisdiction to decide whether Canada has violated its obligations under any international treaty other than the NAFTA. This was recognized by the tribunals in *Grand River, Methanex* (where the other treaty was the GATT), *Bayview* and *ADM*. **RL-019**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 (“*Grand River – Award*”), ¶ 71; **RL-054**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (“*Methanex – Final Award*”), Part II, Chapter B, ¶¶ 4-6; **RL-005**, *Bayview Irrigation District et al v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007, ¶ 121; **RL-092**, *Archer Daniels Midland v. Mexico* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 (“*ADM – Award*”), ¶¶ 128-131. *See also* **RL-199**, *MOX Plant Case (Ireland v. United Kingdom)*, Order on Request for Provisional Measures, ITLOS Reports 2001, p. 95, 3 December 2001, ¶¶ 50-52: (“[E]ven if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention [...] the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires* [...] since the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of the Convention and no other agreement [...].”)

¹²³ The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) applies to disputes arising under the SCM Agreement and the dispute settlement mechanism set out in the DSU is only available to WTO Members and not to private parties like Resolute. *See* **RL-200**, WTO, *Understanding on rules and procedures*

precedent that would justify the non-application of the NAFTA text because of an alleged violation of a different treaty with different text.

72. Second, Resolute’s latest appeal in its Reply Memorial to the general principle of good faith is just as irrelevant to this issue as its initial reliance on the concept of estoppel (which has been relabelled as enjoining “self-contradiction.”).¹²⁴ A considerable weight of authority indicates the principle of good faith must be grounded in a source of obligation, such as the general principle of estoppel.¹²⁵

73. While good faith forms part of general international law,¹²⁶ it does not constitute a separate source of obligation where none would otherwise exist. As the ICJ explained in the *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*:

The principle of good faith is [...] “one of the basic principles governing the creation and performance of legal obligations” [...] it is not in itself a source of obligation where none would otherwise exist.¹²⁷

governing the settlement of disputes, Article 4.2 (Consultations): (“Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by *another Member* concerning measures affecting the operation of any covered agreement taken within the territory of the former” (emphasis added)). *See also* DSU Article 1: (“[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding”). Appendix I to the DSU includes a reference to the multilateral agreements listed in Annex 1A to the *Agreement Establishing the World Trade Agreement*. The SCM Agreement is listed in Annex 1A and is thus subject to the rules and procedures set out in the DSU.

¹²⁴ Claimant’s Reply, ¶¶ 291-308. In its Memorial, Resolute argued that Canada should be estopped from relying on Article 1108(7). *See* Claimant’s Memorial, ¶ 230. Canada has already explained in its Counter-Memorial that Resolute had no legal or factual basis to rely on the principle of estoppel. *See* Canada’s Counter-Memorial, ¶¶ 240-244.

¹²⁵ *See* **RL-124**, James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (Oxford University Press, 2015), p. 421; **CL-204**, I.C. MacGibbon, *Estoppel in International Law* (1958) 7 ICLQ 468, p. 471; **RL-201**, Yearbook of the International Law Commission 1953, Vol II, Document A/CN.4/63: Report by Mr. H. Lauterpacht, Special Rapporteur, p. 144.

¹²⁶ *See e.g.*, Article 26 (“*Pacta sunt servanda*”) of the *Vienna Convention on the Law of Treaties* (“VCLT”) provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” (**RL-086**, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1115 U.N.T.S. 31, 27 January 1980, Article 26).

¹²⁷ **RL-202**, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69, 20 December 1988, ¶ 94, quoting **CL-209**, *Nuclear Tests Case (Australia v. France)* Judgment, I.C.J. Reports 1974, p. 268 (“*Nuclear Tests Case*”), ¶ 46.

74. The ICJ confirmed this principle in the *Case Concerning the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v. Nigeria)*.¹²⁸ In that case, Nigeria contended that Cameroon had violated the principle of good faith by “omitt[ing] to inform it that it intended to accept the jurisdiction of the Court, then that it had accepted that jurisdiction and, lastly, that it intended to file an application”.¹²⁹ Nigeria also alleged that Cameroon prepared itself to address the Court while it maintained bilateral contact with Nigeria on border issues.¹³⁰ The Court did not accept Nigeria’s argument and repeated the holding in the *Nicaragua v. Honduras* case cited above and noting further that:

In the absence of any such obligations and of any infringement of Nigeria’s corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submission.¹³¹

75. Thus, while the principle of good faith is an overarching principle to be applied to the interpretation and application of a specific legal rule, it does not permit this Tribunal to refuse to apply an explicit provision of a treaty (namely NAFTA Article 1108(7)) because of the alleged non-compliance of Canada with a different provision of another treaty (namely Article 25 of the SCM Agreement) over which the Tribunal has no jurisdiction. Under NAFTA Chapter Eleven, the NAFTA Parties are not required to notify measures pursuant to Article 25 of the SCM Agreement in order to invoke the exclusions found in Article 1108(7). A general invocation by Resolute of the general principle of good faith changes nothing in the Tribunal’s responsibility to apply Article 1108(7) as written.

76. Resolute fails to acknowledge that the underling substantive elements for the application of this principle is not present in this case. As Canada already mentioned in its Counter-Memorial,¹³² the underlying principle for Vice-President Ricardo Alfaro’s Separate Concurring Opinion in the *Temple of Preah Vihear* case was that “a State must not be permitted to benefit by its own

¹²⁸ **RL-134**, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* Preliminary Objections, Judgment, I.C.J. Reports 1998, 11 June 1998 (“*Land and Maritime Boundary Case*”).

¹²⁹ **RL-134**, *Land and Maritime Boundary Case*, ¶ 36.

¹³⁰ **RL-134**, *Land and Maritime Boundary Case*, p. 296.

¹³¹ **RL-134**, *Land and Maritime Boundary Case*, p. 297.

¹³² Canada’s Counter-Memorial, ¶ 242.

inconsistency to the prejudice of another State”.¹³³ As Judge Alfaro noted, “[t]he primary foundation of [the principle of estoppel] is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith.”¹³⁴ However, this principle of good faith does not exist separate from estoppel. As such, Resolute cannot employ it to disregard the requirement to meet the applicable test under international law for estoppel.

77. Resolute’s reliance on the Separate Concurring Opinion in the *Temple of Preah Vihear* case fails to establish the applicability of a general principle of good faith as being relevant in this case.¹³⁵ That case concerned a question of sovereignty, in a dispute between two States, and as the court noted “when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality”, it cannot be that a line is established and then one State continually calls it into question.¹³⁶ In such a scenario, where a consistent and final approach by states on their frontiers is paramount, the application of the principle of good faith is merited. Indeed, the existence of legitimate reliance by Cambodia was significant as it believed that certainty and finality on the frontiers had been achieved, fulfilling another essential element of estoppel and the principle of good faith, which requires that the party invoking the rule must have relied upon the statements or conduct of the other party, either to its own detriment or to the other’s advantage.¹³⁷

¹³³ **CL-136**, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Concurring Opinion of Vice-President Alfaro, 15 June 1962 (“*Temple of Preah Vihear – Alfaro Opinion*”), p. 40.

¹³⁴ **CL-136**, *Temple of Preah Vihear – Alfaro Opinion*, p. 42.

¹³⁵ Claimant’s Reply, ¶¶ 293-295.

¹³⁶ **RL-203**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* Merits, Judgment, I.C.J. Reports 1962, 15 June 1962 (“*Temple of Preah Vihear*”), pp. 34-35.

¹³⁷ **RL-203**, *Temple of Preah Vihear*, p. 32. *See also*, for the aspect of reliance on the conduct, **CL-209**, *Nuclear Tests case*, ¶ 46. The Claimant also relies on the *Lisman* and *Bering Sea* awards but it fails to explain the relevance of those cases to this arbitration. For instance, the arbitrator in *Lisman* noted that the claimant had previously taken a position contrary to the one it was advocating in the context of the arbitration. This is not the case here: the positions presented by Canada and Nova Scotia concerning the measures at issue before the DOC and the NAFTA Chapter Nineteen and the WTO panels have been consistent. The Claimant’s reliance on the *Bering Sea* arbitration is also misplaced given the consistency in the positions taken by Canada and Nova Scotia in the context of various dispute settlement proceedings.

78. In its Reply Memorial, the Claimant relies on the principle of consistency as iterated by Dr. Iain MacGibbon,¹³⁸ but fails to mention his acknowledgement that “international practice, if not international jurisprudence, has accorded less tentative recognition to the principle of consistency”,¹³⁹ and that the limited extent to which it has been invoked in the international sphere is “in the relations between States”.¹⁴⁰ Indeed, the guiding source of this principle is based in international relations between States, and the necessity for one State to not benefit from its own inconsistency to another State.

79. Resolute similarly relies upon a variety of cases, including *the Arbitral Award by the King of Spain* at the ICJ, the *Legal Status of Eastern Greenland* at the Permanent Court of International Justice and the *Oil Fields of Texas* before the Iran-United States Claims Tribunal to support its arguments for applying the principle of good faith and the principle against self-contradiction.¹⁴¹ However, none of these cases illustrate how a general principle of good faith can exist as a separate source of obligation, nor does relabelling “estoppel” as “self-contradiction” provide Resolute with the justification to eschew the test for estoppel. These cases do not justify Resolute’s disregard for international jurisprudence that reiterates the basic and essential elements for estoppel and the principle of good faith in international law.¹⁴² In its failure to illustrate these elements, most fatally on the ability to illustrate reliance on its part, Resolute has no standing to argue estoppel or the general principle of good faith.

¹³⁸ Claimant’s Reply, ¶ 292.

¹³⁹ **CL-204**, I.C. MacGibbon, *Estoppel in International Law* (1958) 7 ICLQ 468, p. 469.

¹⁴⁰ **CL-204**, I.C. MacGibbon, *Estoppel in International Law* (1958) 7 ICLQ 468, p. 471.

¹⁴¹ Claimant’s Reply, ¶¶ 296-300.

¹⁴² See Canada’s Counter-Memorial, ¶ 240. Numerous arbitral tribunals in investor-state disputes, the ICJ, the International Tribunal on the Law of the Sea, and State-to-State arbitral tribunals have found that for estoppel, a party will be bound to its prior words or conduct if it has evinced (1) a clear and authorized statement, action or omission with (2) reliance in good faith by another party on that statement, action or inaction (3) to that party’s detriment or to the advantage of the first party. See **RL-204**, Charles T. Kotuby, Jr., Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2015), Chapter 2: Modern Applications of the General Principles of Law, p. 122. See also **CL-116**, *Pope & Talbot v Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 111; **RL-130**, *Canfor Corp et al. v. United States of America* (UNCITRAL) Order of the Consolidation Tribunal, 7 September 2005, ¶ 168; **RL-205**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/02/06) Decision on Jurisdiction, 29 January 2004, ¶ 109.

80. Resolute also turns to *Chevron*, in order to make the argument that the general principle of good faith exists under international law, separate from the general principle of estoppel.¹⁴³ The tribunal in that case denied Ecuador’s jurisdictional objection that Chevron had not made an investment in Ecuador, relying on findings to the contrary by Ecuadorian courts. In doing so, the *Chevron* tribunal relied on Article 26 (“*Pacta sunt servanda*”) of the VCLT to evaluate whether the parties had performed their obligations in good faith under the Arbitration Agreement derived from the investment treaty at issue.¹⁴⁴ *Chevron* is very different than the case at hand given that the *Chevron* tribunal had jurisdiction over both the investment treaty and the Arbitration Agreement. Resolute cannot rely on such a precedent to ask this Tribunal to consider the performance by Canada of its obligations under the SCM Agreement, a treaty over which this Tribunal has no jurisdiction, and to prevent Canada from relying on the exclusions set out in Article 1108(7).

81. Finally, Resolute has no basis to complain that the applicability of Article 1108(7) was not dealt with during the jurisdiction and admissibility phase of this dispute.¹⁴⁵ There was no obligation or need to do so, and in any event, it is normal for NAFTA tribunals to deal with Articles 1102 and 1108(7) together with the merits.¹⁴⁶ Canada explicitly stated in its Statement of Defence that Article 1108(7) applied to the Nova Scotia measures and fully articulated its arguments in its Counter-Memorial.¹⁴⁷ The Claimant’s protest on this issue is hollow.

82. While as a matter of law the Tribunal need not inquire into the issue further, it is important to dispel Resolute’s misleading allegation that Canada has adopted different positions in other proceedings with respect to the characterization of the measures at issue.

¹⁴³ Claimant’s Reply, ¶ 277.

¹⁴⁴ **CL-239**, *Chevron Corp. v. Republic of Ecuador* (UNCITRAL) Second Partial Award on Track II, 30 August 2018, ¶ 7.106.

¹⁴⁵ Claimant’s Reply, ¶ 277.

¹⁴⁶ See e.g., **RL-122**, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 (“*Mercer – Award*”), ¶ 6.27; **CL-123**, *Windstream Energy LLC v. Canada* (UNCITRAL) Award, 27 September 2016, ¶ 391; **RL-052**, *Mesa Power Group v. Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶ 214; **CL-113**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on the Merits and Separate Statement of Dean Ronald A. Cass (“*UPS – Award and Separate Statement of Arbitrator Cass*”), ¶ 125; and **CL-130**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 4 January 2003 (“*ADF – Award*”), ¶ 86. Canada requested bifurcation on four specific issues of jurisdiction and admissibility because, as the Tribunal confirmed in its Decision on Bifurcation, it would be more efficient to proceed with those as a preliminary matter.

¹⁴⁷ Canada’s Statement of Defence, ¶¶ 12, 14, 88-90 and 103; Canada’s Counter-Memorial ¶¶ 222-244.

83. Canada and Nova Scotia’s positions before the United States Department of Commerce (“DOC”), as well as before the NAFTA Chapter Nineteen and WTO panels, have been consistent. Canada and Nova Scotia did not dispute a number of the elements that led to the DOC’s Final Determination that some of the measures at issue in this case were countervailable subsidies under U.S. domestic law.¹⁴⁸ As for the subsequent NAFTA Chapter Nineteen and WTO proceedings, they dealt with a narrower range of issues, namely the electricity rate negotiated by NSPI and PWCC, the provision of stumpage and biomass to PHP and payments made by the GNS under the Outreach Agreement.¹⁴⁹ It is thus incorrect to allege that Canada’s past positions are somehow contradictory to the arguments it is now making under Article 1108(7).

84. Whether Canada notified the Nova Scotia measures under the SCM Agreement is also irrelevant to the application of the exclusions found in NAFTA Article 1108(7). As Canada already noted in its Counter-Memorial, the SCM Agreement itself provides that WTO “[m]embers recognize that notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.”¹⁵⁰ It is nonsensical to argue that the absence of notification under the SCM Agreement precludes the

¹⁴⁸ At ¶ 289 of its Reply Memorial, Resolute submits that Canada “was defending GNS’s action before the U.S. Department of Commerce by denying that GNS had conferred subsidies” without submitting any evidence to support its claim. In fact, with respect to most of the measures at issue in this arbitration, the GNS never contested that there was a subsidy and limited its arguments to the quantification of the benefit.

¹⁴⁹ Canada’s Counter-Memorial, ¶¶ 154-155. On the electricity rate, the main issue before the Chapter Nineteen and WTO panels was the DOC’s finding on entrustment or direction by the GNS (both panels disagreed with the DOC on that point). The WTO Panel also found that the DOC’s determination that the provision of electricity conferred a benefit was inconsistent with the SCM Agreement (**R-238**, WTO Panel Report, ¶¶ 7.68 and 7.78; **R-270**, NAFTA Article 1904 Binational Panel Review, Supercalendered Paper from Canada: Final Affirmative Duty Determination, Memorandum Opinion and Order (Apr. 13, 2017) (“NAFTA Panel Report”), p. 4). As for the provision by the GNS of stumpage and biomass, the questions before the Chapter Nineteen and WTO panels related to the initiation of an investigation by the DOC (**R-238**, WTO Panel Report, ¶ 7.154; **R-270**, NAFTA Panel Report, pp. 3-4). Finally, with respect to the Outreach Agreement, the NAFTA Chapter Nineteen Panel found that the determination by the DOC that payments under that agreement were grants was reasonable and supported by substantial evidence (**R-270**, NAFTA Panel Report, pp. 44-50).

¹⁵⁰ Canada’s Counter-Memorial, ¶ 239, citing to **RL-193**, WTO, *Agreement on Subsidies and Countervailing Measures*, Article 25.7. Canada’s 2013 Subsidy Notification also provides that “The notification process under Article 25 of the Agreement on Subsidies and Countervailing Measures (ASCM) aims to enhance transparency by calling for the provision of information on the operation of the notified programs and measures. Therefore, and further to Article 25.7 of the ASCM, this notification does not prejudice the legal status, nature or effects of notified programs under the ASCM and GATT 1994; certain programs included in this notification may not be considered as “specific subsidies” within the meaning of the Agreement.” See **C-021**, Canada’s New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, G/SCM/N/253/CAN, at page 2 (the “2013 Subsidy Notification”).

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application of Article 1108(7)(b) when the notification of the same measure does not prejudice its legal status, its effects or the nature of the measure under the SCM Agreement itself.

85. In any event, by the time Canada's 2013 Subsidies Notification was submitted on July 1, 2013, the issue had been discussed at two meetings of the WTO Committee on Subsidies and Countervailing Measures ("SCM Committee") and Canada had provided written responses, including specific details about the measures at issue, to questions it had received from the United States.¹⁵¹ At the October 2012 SCM Committee meeting, Canada "stated that it was working with the [Nova Scotia] government on replies to the questions that the US had sent regarding this issue and expected to provide such replies in November 2012" (which were provided) and that it "was ready to have further dialogue on this matter with interested Members."¹⁵² When the Nova Scotia measures were discussed again at the April 2013 SCM Committee meeting, Canada noted that "it took the concerns seriously" and that it had worked (together with the GNS) with other WTO Members to resolve the issue. Canada noted further "that the circumstances of the sale of the Port Hawksbury mill and its re-opening were a matter of public record in the context of [the CCAA process] in which US creditors and other stakeholders had figured prominently in the decision-making."¹⁵³ At no point during those SCM Committee meetings or in the written responses provided to the United States did Canada ever "deny" that the GNS provided subsidies to PHP.¹⁵⁴ While the WTO notification issue has no bearing on the application of NAFTA Article 1108(7), Resolute's portrayal of Canada's "denial" regarding the nature of the Nova Scotia measures is misleading.¹⁵⁵

¹⁵¹ **C-037**, USTR Questions Regarding Reports of Assistance to Port Hawkesbury (Oct. 10, 2012); **C-212**, [REDACTED].

¹⁵² **R-078**, WTO, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 23 October 2012", WTO Doc. G/SCM/M/83 (Jan. 10, 2013) ("G/SCM/M/83"), ¶ 63.

¹⁵³ **R-079**, WTO, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 22 April 2013", WTO Doc. G/SCM/M/85 (Aug. 5, 2013) ("G/SCM/M/85"), ¶ 131.

¹⁵⁴ See **R-078**, G/SCM/M/83 and **R-079**, G/SCM/M/85.

¹⁵⁵ Resolute's attempt to assign an ulterior motive to Canada shows a lack of understanding of the complexity of that process, especially when the WTO Member responsible for a notification is a federal state. In response to a question posed by the United States with respect to Canada's 2013 Subsidy Notification, Canada explained that it "is engaged in continuing consultations with the provincial and territorial governments regarding subsidy notification requirements" and that "[d]uring the consultation for the 2013 notification, five provinces and three territories informed [it] of programs that meet the criteria for the purposes of notification, which was an improvement over the 2009 and 2011 notifications. **R-433**, WTO, Committee on Subsidies and Countervailing Measures, "Subsidies -

86. Resolute also erroneously conflates the legal tests applicable under the SCM Agreement and NAFTA Article 1108(7) and confuses this arbitration with a trade remedies case. For instance, Resolute alleges that Canada contends that the FULA and the Outreach Agreement “are covered by the *subsidies* exception of 1108(7)(b),” that Canada thus concedes that it receives “less than adequate remuneration for the fiber, a subsidy according to the [SCM Agreement]” and that “Canada is providing subsidies to PHP under the Outreach Agreement.”¹⁵⁶ Resolute is confusing matters and it has no justification for disregarding the plain language of the applicable treaty.¹⁵⁷

87. As Canada explained in its Counter-Memorial and again above, the Outreach Agreement is properly considered as “procurement” under Article 1108(7)(a), but if Resolute believes that payments thereunder are “grants”, then Article 1108(7)(b) applies. As for the FULA, Resolute has not articulated a coherent argument in either its Memorial or Reply Memorial, so there is nothing for Canada to concede. However, even if Resolute’s unsubstantiated claims were true, the Article 1108(7)(b) exclusion would apply to the provision of stumpage and the Article 1108(7)(a) exclusion for “procurement” would apply to payments made with respect to silviculture activities.

88. Resolute also relies on the Separate Statement of Dean Cass in *UPS* to convince this Tribunal that it should not apply NAFTA Article 1108(7).¹⁵⁸ In his Separate Statement, Dean Cass noted that Canada Post had “declared – in materials not prepared in contemplation of the current dispute – that it receives no subsidies of any kind.”¹⁵⁹ In contrast, Canada did not contest the nature of some of the Nova Scotia measures as subsidies in the DOC, NAFTA Chapter Nineteen or WTO proceedings – the quantification of a benefit for the purposes of countervailing duties under U.S. law was in dispute, but that is irrelevant for the purposes of Article 1108(7). Nor did Canada

Replies to Questions Posed by The United States Regarding the New and Full Notification of Canada”, WTO Doc. G/SCM/Q2/CAN/62 (Oct. 31, 2014), p. 2.

¹⁵⁶ Claimant’s Reply, ¶ 311 (emphasis added). There are important differences between the definition of “subsidy” contained in Article 1.1 of the SCM Agreement and the language of NAFTA Article 1108(7)(b). For instance, under Article 1.1 of the SCM Agreement, “grants” are cited as an example of “direct transfer of funds” (and hence of “financial contribution”) and can constitute a “subsidy” if a benefit is conferred. In contrast, Article 1108(7)(b) speaks of “subsidies *or* grants” and treats them as distinct elements (emphasis added).

¹⁵⁷ In its Counter-Memorial, Canada set out the definitions of some of the terms used in Article 1108(7) (*See* Canada’s Counter-Memorial, fn. 473 (ordinary meaning of “loan”), 476 (ordinary meaning of “grant”), 486 (ordinary meaning of “procurement”). Resolute did not offer different definitions or argued that the terms should be interpreted differently based on their context or in light of the object and purpose of NAFTA.

¹⁵⁸ Claimant’s Reply, ¶ 303.

¹⁵⁹ **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 156 of Separate Statement.

declare during SCM Committee meetings that PHP had received “no subsidies of any kind,” which concerned Dean Cass in *UPS*.

89. More substantively, Dean Cass found that “Article 1108(7)(b) does not appear intended to cover the entire, broad sweep of government activity that might reduce the costs or increase the benefits of a particular business” but that it “appears intended more narrowly to reach only self-conscious and overt decisions by government to expressly convey cash benefits to a particular business, enterprise, or activity.”¹⁶⁰ This is what happened in the case at hand with respect to the GNS giving PWCC loans and grants to assist it with the purchase of the Port Hawkesbury mill. As a result, the concerns Dean Cass raised in *UPS* are not present in this arbitration.

C. Even if the Tribunal Were to Find that the Exclusions Set Out in NAFTA Article 1108(7) Do Not Apply, There is No Violation of Article 1102

1. Evidence of Nationality-Based Discrimination is Required for the Tribunal to Find a Violation of Article 1102

90. As Canada explained in its Counter-Memorial, Article 1102 is intended to protect foreign investors from discrimination on the basis of nationality by the host Party. The purpose of that provision is not to prohibit all differential treatment among investors and investments but to ensure that the NAFTA Parties do not treat investors and investments that are “in like circumstances” differently based on their nationality.¹⁶¹

91. In its Reply Memorial, Resolute confuses nationality-based discrimination with a requirement to demonstrate discriminatory intent. For instance, Resolute cites the finding of the *ADM* tribunal that “previous Tribunals have relied on the measure’s adverse effects on the relevant investors and their investments rather than on the intent of the Respondent State.”¹⁶² Resolute conveniently omits to mention that the same tribunal found that “[t]he national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality, including both *de jure* and *de facto* discrimination” and that “Article 1102 prohibits treatment which discriminates on the basis of the foreign investor’s nationality.”¹⁶³ In *ADM*, the

¹⁶⁰ **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 159 of Separate Statement.

¹⁶¹ Canada’s Counter-Memorial, ¶¶ 250-253.

¹⁶² Claimant’s Reply, ¶ 229.

¹⁶³ **RL-092**, *ADM – Award*, ¶¶ 193 and 205.

claimant's U.S. nationality was precisely the point of the measures (i.e., to bring about a change in U.S. government trade policy). That is plainly not the situation here.

92. Resolute misunderstands and misrepresents Canada's argument. Canada did not suggest that for something to be nationality-based discrimination it must also be shown to constitute intentional discrimination.¹⁶⁴ A claimant is not required to establish discriminatory intent. Rather, to establish a breach of Article 1102, including Article 1102(3), Resolute must show evidence of nationality-based discrimination, i.e. evidence that the Claimant or its investments were treated, in fact or in law, less favourably than Canadian investors or their investments because of its U.S. nationality. Resolute still has not met this burden.¹⁶⁵

93. Resolute has not provided any objective evidence that it was accorded less favourable treatment than PWCC (a Canadian investor) because it is an investor of the United States.¹⁶⁶ Canada has already demonstrated that there is no evidence whatsoever of nationality-based discrimination in this case.¹⁶⁷ Bidding on the Port Hawkesbury mill was open to Resolute and any other company, regardless of nationality. The Monitor and NPPH's creditors, not the GNS, selected PWCC as the winning bidder not because of its Canadian nationality but because it had the best bid. Further, the re-opening of the mill had an impact on Canadian SC paper producers Irving (from New Brunswick) and Catalyst (from British Columbia) as well, not only on Resolute.

94. To support its view that Article 1102 does not require proof of nationality-based discrimination, Resolute focuses on the language of Article 1102(3) and insists that "[t]he Tribunal

¹⁶⁴ Indeed, numerous NAFTA tribunals have held that it is not necessary to prove an intent to discriminate, though evidence of such intent may be considered. See, for instance, **RL-092**, *ADM – Award*, ¶¶ 209-210; **RL-091**, *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008, ¶¶ 118 and 138.

¹⁶⁵ The *UPS* tribunal found that the legal burden to show the elements necessary to establish a violation of the national treatment obligation "rests squarely with the Claimant. That burden never shifts to the Party, here Canada." (**CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶¶ 83-84 of Award). Article 24(1) of the 1976 UNCITRAL Arbitration Rules provides that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." The tribunal in *Thunderbird* explained that, in a claim under Article 1102, the burden of proof lies with the claimant pursuant to that provision of the 1976 UNCITRAL Arbitration Rules (**CL-131**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award, 26 January 2006 ("*Thunderbird – Award*"), ¶ 176). The NAFTA Parties also agree on this point. See, for instance, **RL-096**, *Mesa Power Group v. Canada* (UNCITRAL) Second Submission of the United States of America, 12 June 2015 ("*Mesa – U.S. Second 1128 Submission*"), ¶ 4, fn. 10; **RL-206** *Mesa Power Group v. Canada* (UNCITRAL) Second Submission of Mexico, 12 June 2015 ("*Mesa – Mexico Second 1128 Submission*"), ¶¶ 5-6.

¹⁶⁶ Canada's Counter-Memorial, ¶ 252.

¹⁶⁷ Canada's Counter-Memorial, ¶¶ 252-253.

must be guided by the specific terms of Article 1102(3) to determine the content and scope of the 'national treatment' obligation in respect of sub-national measures.”¹⁶⁸

95. Resolute incorrectly suggests that Article 1102(3) sets out a legal test that is different from the one established under the first two paragraphs of Article 1102. The *Pope & Talbot* tribunal found that “the treatment of states and provinces in Article 1102(3) is expressly an *elucidation* of the requirement placed on the NAFTA Parties by Article 1102(1) and (2)” and “the treatment required by Articles 1102(1) and 1102(2), on the one hand, and 1102(3) on the other, *to be identical*, save for the limitations to states and provinces”.¹⁶⁹

96. In coming to this conclusion, the *Pope & Talbot* tribunal referred to the structure of Article 1102 and to the fact that it “expressly states that it is *defining* the meaning of the requirements of Article 1102(1) and 1102(2) when those provisions are applied to states and provinces”.¹⁷⁰ In other words, Article 1102(3) is meant to clarify the meaning of Articles 1102(1) and 1102(2) when the treatment at issue is accorded by a state or province, not to establish a distinct legal test for such treatment. This interpretation is supported by eminent scholars, who have explained that Article 1102(3) was added by the NAFTA Parties “apparently *to clarify* the obligations they were undertaking with respect to states and provinces.”¹⁷¹

97. While Article 1102(3) requires a province or state to accord to foreign investors (and their investments) “treatment no less favourable than the most favourable treatment” it accords to investors (and their investments) of the NAFTA Party “of which it forms a part,” nationality must still form the basis for the least favourable treatment in order for that treatment to constitute a breach of Article 1102.

¹⁶⁸ Claimant’s Reply, ¶ 216.

¹⁶⁹ **RL-058**, *Pope & Talbot Inc. v. Canada* (UNCITRAL), Award on the Merits of Phase 2, 10 April 2001 (“*Pope & Talbot – Award on Merits of Phase 2*”), ¶¶ 41-42 (emphasis added).

¹⁷⁰ **RL-058**, *Pope & Talbot – Award on Merits of Phase 2*, ¶ 40 (emphasis added). Article 1102(3) starts with the phrase “[t]he treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province [...]”.

¹⁷¹ **RL-207**, Meg. N. Kinnear et al., *Investment Disputes under NAFTA* (Kluwer Law International, 2009), p. 54-1102 (emphasis added). Counsel for Resolute recognized that this is the correct interpretation during the jurisdictional hearing: “Article 1102, of course, is the national treatment provision in NAFTA, and the previous two paragraphs [...] set out that the NAFTA parties guarantee national treatment to investors, and they guarantee national treatment to investments. Then there’s this paragraph 3, which is meant *to specify* what that means in respect of measures adopted by state or province or sub-national governments, state or provinces.” *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Jurisdictional Hearing Transcript, 15-16 August 2017 (“Jurisdictional Hearing Transcript”), Day 1, p. 367:2-11 (emphasis added).

98. For instance, in a situation where a Canadian province (for instance, Nova Scotia) would treat more favourably investors from another Canadian province (for instance, British Columbia) than its own local investors, a foreign investor from another NAFTA Party could still bring a claim alleging a breach of Article 1102 based on the fact that it did not receive the treatment accorded by Nova Scotia to investors from British Columbia. There would still be a nationality element to such a claim and, contrary to what Resolute alleges, there is no “loophole for sub-national protectionism.”¹⁷²

99. The NAFTA Parties have consistently agreed on the fact that Article 1102 is designed to protect against nationality-based discrimination.¹⁷³ Commentators and scholars as well as a number of previous NAFTA tribunals have also emphasized this point.¹⁷⁴

100. The consistent and concordant views of the NAFTA Parties on nationality-based discrimination must be given “considerable weight”¹⁷⁵ by the Tribunal given that they constitute a

¹⁷² Claimant’s Reply, ¶ 223.

¹⁷³ Canada’s Counter-Memorial, ¶ 250. For a list of submissions made by the NAFTA Parties on this issue, see Canada’s Counter-Memorial, fns. 523-525. Resolute points to the fact that the NAFTA Parties’ submissions cited by Canada to support its arguments on nationality-based discrimination do not refer to Article 1102(3) (Claimant’s Reply, ¶ 240). The explanation for this is simple: even when their claims relate to a provincial measure, claimants will bring them under Article 1102 in general or under one of the first two paragraphs of this provision.

¹⁷⁴ Canada’s Counter-Memorial, ¶¶ 250-251 and fns. 527-531. See also **CL-117**, Andrew Newcombe and Luís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) (“*Newcombe & Paradell*”), p. 147, s. 4.1: (“[o]ne of the main objectives of international trade and investment law is to limit state measures that discriminate based on the nationality of the foreign individual, entity, good, service or investment in question”), p. 148: (“[i]nternational economic treaties limit nationality-based discrimination through two distinct non-discrimination treatment obligations: national and most-favoured-nation (MFN) treatment”), pp. 182-183: (“[t]he standard of treatment does not differ depending on whether the nationality-based discrimination is *de facto* or *de jure*”), and p. 189: (“[i]t may be argued that best-in-state treatment is more consistent with the overriding rationale of the relative treatment standards: to prohibit differential treatment of comparable investors on the basis of nationality [...] Since national treatment is a discipline on nationality-based discrimination, discrimination based on residency in a particular subdivision is not within the purview of national treatment.”)

¹⁷⁵ The tribunal in *Mobil v. Canada* (“*Mobil II*”) found that “the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight”. **RL-208**, *Mobil Investments Canada Inc. v. Government of Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018 (“*Mobil II – Decision*”), ¶ 158.

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“subsequent practice”¹⁷⁶ under Article 31 of the VCLT.¹⁷⁷ Resolute considers that the Tribunal should disregard this subsequent practice because “the NAFTA Parties have not interpreted Article 1102(3) as to nationality-based discrimination”.¹⁷⁸ However, and as Canada explained above, Article 1102(3) does not establish a different legal test for treatment accorded by a province or state. As such, there is no ground for the Tribunal to ignore prior statements by the NAFTA Parties on the issue of nationality-based discrimination.

101. As for Resolute’s contention that “[i]nstead of relying upon various statements in arbitral submissions, the appropriate mechanism for the NAFTA Parties to reach agreement on a matter of interpretation is the Free Trade Commission,”¹⁷⁹ the tribunal in *Mobil* rejected a similar argument and found that “that there might be many reasons for the absence of a Free Trade Commission decision and [did] not believe that the subsequent practice of the three NAFTA Parties can be disregarded merely because it takes forms different from a Commission decision.”¹⁸⁰ Similarly, the *Bilcon* tribunal was also not convinced by the claimants’ argument that the “power of the FTC to make authoritative interpretations of NAFTA replaces the rule in Article 31(3)(b) of the VCLT”.¹⁸¹

102. Resolute also disregards basic principles of treaty interpretation when alleging that “Article 1102(4) further demonstrates that where the Parties wanted to prohibit discrimination on the basis of nationality, they said so expressly”.¹⁸² It fails to notice that this paragraph starts with the phrase

¹⁷⁶ The *Bilcon* tribunal recalled that “the commentary to the ILC draft conclusions on 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' includes 'statements in the course of a legal dispute' as potentially relevant subsequent practice of States for the purposes of interpretation.” (RL-209, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Award on Damages, 10 January 2019 (“*Bilcon – Award on Damages*”), ¶ 378, referring to RL-210, Report of the ILC, Seventieth session (30 April-1 June and 2 July-10 August 2018), UN Doc. A/73/10, Chapter IV, ¶ 18 (note that the *Bilcon* tribunal referred to “Chapter VI”, but the correct reference is “Chapter IV”).

¹⁷⁷ RL-086, VCLT, Article 31(3)(b) reads as follows: “There shall be taken into account, together with the context: [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

¹⁷⁸ Claimant’s Reply, ¶ 242.

¹⁷⁹ Claimant’s Reply, ¶ 243.

¹⁸⁰ RL-208, *Mobil II – Decision*, ¶ 160.

¹⁸¹ The *Bilcon* tribunal added that the fact that the NAFTA Parties did not make a binding interpretation under NAFTA Article 1131(2) “means that treaty interpretation simply follows the normal interpretative rules, which include taking account of subsequent agreements and subsequent practice of the parties.” RL-209, *Bilcon – Award on Damages*, ¶ 377.

¹⁸² Claimant’s Reply, ¶ 221.

“[f]or greater certainty,”¹⁸³ which makes it clear that the paragraph does not create a prohibition on nationality-based discrimination that does not already exist in Article 1102. Rather, it clarifies that the prohibition on nationality-based discrimination also applies to the requirement set out in Article 1102(4)(b).

2. Resolute Fails to Meet its Burden to Prove a Breach of Article 1102

a) The GNS did not accord “treatment” to Resolute or its investments

103. As Canada demonstrated in its Counter-Memorial, the facts of which Resolute complains cannot be considered to constitute “treatment” of Resolute and its investments under Article 1102.¹⁸⁴ In its Reply Memorial, Resolute continues to suggest that this requirement is met based on a very remote notion of “treatment” that has not been endorsed by any NAFTA tribunal.

104. For the most part, Resolute simply re-states allegations contained in its Memorial. For instance, it insists on using elements of the Tribunal’s Decision on Jurisdiction and Admissibility with respect to Article 1101(1) to build its case in relation to Article 1102.¹⁸⁵ As Canada has already noted, the *Methanex* tribunal observed that “[a]n affirmative finding of the requisite ‘relation’ under NAFTA Article 1101 [...] does not necessarily establish that there has been a corresponding violation of NAFTA Article 1102.”¹⁸⁶ Also, the Tribunal highlighted in its Decision on Jurisdiction and Admissibility that it was not “necessary to discuss in further detail here the meaning of ‘treatment’ in Article 1102.”¹⁸⁷

¹⁸³ Article 1102(4) reads as follows (emphasis added): “*For greater certainty*, no Party may: (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.”

¹⁸⁴ Canada’s Counter-Memorial, ¶¶ 254-262. Resolute continues to attempt to transform the national treatment obligation found in Article 1102 by having recourse to the objectives listed in NAFTA Article 102. See Claimant’s Reply, ¶ 275. Canada emphasizes once again that the objectives of NAFTA do not impose obligations on the NAFTA Parties, only its substantive provisions do.

¹⁸⁵ Claimant’s Reply, ¶ 246.

¹⁸⁶ Canada’s Counter-Memorial, ¶ 256, citing **RL-054**, *Methanex – Final Award*, Part IV – Chapter B – Page 1, ¶ 1.

¹⁸⁷ *Resolute Forest Products Inc. v. Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 (“Decision on Jurisdiction and Admissibility”), ¶ 291.

105. In the absence of a definition of the term “treatment” in the NAFTA, the Tribunal must apply the rules of treaty interpretation set out in the VCLT.¹⁸⁸ Far from being a “diversion” as suggested by Resolute,¹⁸⁹ the definition of “treatment” put forward by Canada in its Counter-Memorial (i.e. “behaviour in respect of an entity or person”) is supported by customary international law and is in line with the findings of the tribunal in *Siemens*.¹⁹⁰

106. In relation to Resolute’s continued reliance on *UPS* and the three sugar cases brought against Mexico to support its claim that it was accorded “treatment” by the GNS, Canada has already explained why these cases are different on the facts. In *UPS*, there was “treatment” that meets the definition presented above by Canada,¹⁹¹ and in the three sugar cases (*ADM*, *Corn Products* and *Cargill*), the claimants had made investments in the jurisdiction imposing the measure at issue and the tribunals found that there was nationality-based discrimination or protectionist intent by Mexico.¹⁹² As none of these elements are present in this arbitration, Resolute’s contention that the GNS accorded it “treatment” must be rejected.

107. Resolute’s reliance on the testimony of Dr. Kaplan and on [REDACTED], as well as its contention that these documents demonstrate that the “GNS accorded Resolute treatment for purposes of Article 1102(3)” are also ill-founded.¹⁹³ Rather than showing that the GNS accorded treatment to Resolute and its investments, these documents discuss [REDACTED].

¹⁸⁸ See Canada’s Counter-Memorial, ¶ 257 and fn. 541.

¹⁸⁹ Claimant’s Reply, ¶ 250.

¹⁹⁰ Canada’s Counter-Memorial, ¶ 257 and fn. 542. At fn. 373 of its Reply Memorial, Resolute cites excerpts from the Decision on Jurisdiction from that tribunal to support its contention that the term “treatment” should be given a “wide scope”. It omits to include the very sentence where the *Siemens* tribunal refers to the ordinary meaning of “treatment” as “behaviour in respect of an entity or a person”. **RL-165**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Decision on Jurisdiction, 3 August 2004, ¶ 85.

¹⁹¹ Canada’s Counter-Memorial, ¶ 260. The *UPS* tribunal considered that the “conduct of Canada Customs in processing items to be delivered in Canada” by UPS and its investment and the “assignment of costs and obligations in connection with processing of items” constitute “treatment”. **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 85 of Award (emphasis added).

¹⁹² Canada’s Counter-Memorial, ¶ 261. **RL-092**, *ADM – Award*, ¶¶ 8, 100, 190, 208 and 212; **RL-091**, *Corn Products – Decision on Responsibility*, ¶¶ 2, 137-138; **RL-050**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (“*Cargill – Award*”), ¶¶ 1, 220. In *Cargill*, the Respondent did not even challenge that it accorded “treatment”. See **RL-050**, *Cargill – Award*, ¶ 222.

¹⁹³ Claimant’s Reply, ¶¶ 248-249.

108. As discussed in Part IV(F) below, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] However, [REDACTED]
[REDACTED]
[REDACTED]¹⁹⁶ [REDACTED]
[REDACTED]
[REDACTED]¹⁹⁷

109. As Ms. Chow explains in her second witness statement, market predictions such as [REDACTED]
[REDACTED] “are uncertain because they operate without perfect information, especially with respect to other market participants and dynamics.”¹⁹⁸ Resolute [REDACTED]
[REDACTED]
[REDACTED], to allege that there was “treatment” by the GNS of a specific enterprise and its investments.

b) The treatment allegedly accorded to Resolute and its investments is not “in like circumstances” to the treatment accorded to PWCC and PHP

110. Even if the Tribunal were to find that the GNS accorded treatment to Resolute and/or its investments, Canada has already shown that such alleged treatment was not “in like circumstances” to the treatment accorded to PWCC and PHP.¹⁹⁹ In its Reply Memorial, Resolute does not raise anything new and focuses on its contention that the Nova Scotia measures “were aimed directly at making PHP the national champion” and that “competitors in that same sector

¹⁹⁴ R-161, [REDACTED], pp. 10, 36, 38.

¹⁹⁵ R-161, [REDACTED], pp. 8, 53 and 56.

¹⁹⁶ Canada’s Counter-Memorial, ¶ 109, citing R-161 [REDACTED], pp. 8, 55-56.

¹⁹⁷ Canada’s Counter-Memorial, ¶ 109, citing AFRY/ Pöyry-1, ¶ 46.

¹⁹⁸ Chow Rejoinder Statement, ¶ 8.

¹⁹⁹ Canada’s Counter-Memorial, ¶¶ 263-272.

are in 'like circumstances' for purposes of Article 1102 when a measure singles out and discriminates in favor of one competitor in that sector.”²⁰⁰ This argument must fail because factors other than the existence of a competitive relationship must be taken into account in a determination of whether treatment was accorded “in like circumstances”.

111. The fact that a domestic investor and a foreign investor (and their respective investments) are in the same economic or business sector is not sufficient to conclude that treatment was accorded “in like circumstances”. As Canada noted in its Counter-Memorial, past NAFTA tribunals have recognized that this element is pertinent but not determinative.²⁰¹ In addition, past NAFTA tribunals have found that the relevant circumstances in an Article 1102 analysis “are context dependent”²⁰² and that such analysis requires consideration “of all the relevant circumstances in which the treatment was accorded”.²⁰³ Resolute’s attempt to narrow the scope of the “in like circumstances” part of the test should therefore be rejected.

112. Canada has already highlighted other factors that must be taken into account in a determination of whether treatment was accorded “in like circumstances”, including the regulatory framework applicable to the foreign and the domestic investors as well as public policy considerations that justify the differential treatment by showing that it bears a “reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments”.²⁰⁴

113. Contrary to what Resolute alleges, the Nova Scotia measures were not “designed to impair” Resolute’s investment.²⁰⁵ Rather, the GNS implemented those measures to further a number of legitimate public policy objectives: to avoid a potential [REDACTED] to the Province’s economy, to avoid significant increases in electricity prices because of the loss of NSPI’s largest

²⁰⁰ Claimant’s Reply, ¶ 255. Resolute attempts to use references to [REDACTED] but fails to articulate how they are relevant to determining whether treatment was accorded “in like circumstances”. See Claimant’s Reply, ¶ 261.

²⁰¹ Canada’s Counter-Memorial, ¶ 266, citing **RL-058**, *Pope & Talbot - Award on the Merits Phase 2*, ¶ 78.

²⁰² Canada’s Counter-Memorial, ¶ 267, citing **RL-058**, *Pope & Talbot – Award on Merits of Phase 2*, ¶ 75.

²⁰³ Canada’s Counter-Memorial, ¶ 267, citing **CL-113**, *UPS – Award and Separate Statement of Arbitrator Cass*, ¶ 87 of Award.

²⁰⁴ Canada’s Counter-Memorial, ¶¶ 268-269 and 271 and authorities cited therein. **RL-058**, *Pope & Talbot – Award on Merits of Phase 2*, ¶ 79.

²⁰⁵ Claimant’s Reply, ¶ 257.

customer, to support continued employment in a rural part of the Province with few alternative employment opportunities and to support the Province’s sustainable forestry management goals, just to name a few. International law will generally extend a “high measure of deference” to the right of a domestic government to regulate matters within its own borders.²⁰⁶ It is *a fortiori* not for Resolute to decide whether the GNS should have “refrained from adopting the Nova Scotia Measures”, “taken steps to mitigate the damage” or “spent its considerable resources in other ways to boost employment”.²⁰⁷

114. With respect to the GNS’ alleged goal of creating a “national champion”, Newcombe and Paradell note that “if there were an open competition to obtain special advantages and competition criteria were not tied to the nationality of the investment, an argument could be made that the investment or investor chosen by the state for special treatment was not in like circumstances to other investors.”²⁰⁸ This description aptly describes why Resolute’s Article 1102 claim is fatally flawed: the CCAA proceedings included a process for soliciting offers for the assets of NPPH and the competition was open to bidders of all nationalities. Resolute was invited to bid, but chose not to. Nationality was not one of the criteria used to select PWCC as the preferred bidder. The Tribunal should adopt the reasoning suggested by Newcombe and Paradell and dismiss Resolute’s national treatment claim.

c) Resolute and its investments were not accorded less favourable treatment

115. For the Tribunal to reach this part of the national treatment analysis, Resolute should have demonstrated that the GNS accorded “treatment” and that the latter was accorded “in like circumstances”. Resolute failed to do so, and, in any event, Canada has already demonstrated that Resolute and its investments were not accorded “less favourable treatment” than PWCC and its investments.²⁰⁹

²⁰⁶ Canada’s Counter-Memorial, ¶ 272.

²⁰⁷ Claimant’s Reply, ¶ 263.

²⁰⁸ **CL-117**, *Newcombe & Paradell*, p. 188. Resolute seems to have adopted the expression “national champion” from the same authors.

²⁰⁹ Canada’s Counter-Memorial, ¶¶ 275-276. To start, Resolute did not show that the treatment its SC paper operations received from the jurisdiction where they are located is less favourable than the one accorded by the GNS to PWCC and PHP. For instance, Resolute does not dispute the fact that the electricity rate it pays to Hydro-Québec is more favourable than the rate negotiated by PWCC and NSPI. Also, the Claimant negotiated certain tax abatements with

116. In its Reply Memorial, Resolute contends that the “most favorable treatment was the Nova Scotia Measures” and observes that it received none of these benefits.²¹⁰ According to the Claimant, “[t]he nature of the treatment accorded to Port Hawkesbury [...] meant that no other producer could receive equivalent treatment.”²¹¹

117. Resolute cannot blame Canada or the GNS for this situation given that it had the opportunity to bid on the Port Hawkesbury mill and to approach the GNS for financial assistance. It decided not to bid for the mill and it did not ask the GNS for assistance. While Mr. Garneau’s personal expectations as to what might or might not happen may have influenced Resolute’s decisions and actions, there is no evidence that Nova Scotia would have refused to provide financial assistance to Resolute if it had decided to bid on the mill.

118. Despite its allegations, Resolute has failed to demonstrate that this case amounts to one of the scenarios presented by the Tribunal as potential breaches of Article 1102 in its Decision on Jurisdiction and Admissibility.²¹² The measures at issue did not keep Resolute or its investments out of Nova Scotia (the Claimant did that to itself) and there was no campaign by the GNS to target Resolute and cause it loss. Even if those two scenarios were just “examples” as Resolute contends, it has not demonstrated that Canada breached its national treatment obligation on any other basis.

119. In light of the fact that this is not an instance of nationality-based discrimination and that Resolute still has not fulfilled its burden to show that it meets the national treatment test, its Article 1102 claim must fail.

IV. CANADA HAS NOT VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT)

A. The Claimant Has Provided No Evidence of State Practice and *Opinio Juris* to Support its Claim

120. The Claimant has not attempted to provide evidence of substantial state practice and *opinio juris* to establish that the minimum standard of treatment of aliens under customary international

the municipality of Saguenay for its Kénogami mill. *See* Canada’s Counter-Memorial, fn. 543 and references cited therein.

²¹⁰ Claimant’s Reply, ¶¶ 264-265.

²¹¹ Claimant’s Reply, ¶ 265.

²¹² Decision on Jurisdiction and Admissibility, ¶ 290.

law contains disciplines on the provision of subsidies, grants and government supported loans by a State to a domestic investor. Just as the *UPS* tribunal found that there is no rule under customary international law prohibiting or regulating anticompetitive behaviour,²¹³ nor is there a customary international law rule prohibiting or regulating domestic subsidies. Failure to carry its burden of proof to establish otherwise is fatal to Resolute’s Article 1105 claim.²¹⁴ As the *Mobil/Murphy* tribunal noted, “[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law.”²¹⁵

121. Instead, the Claimant’s entire case for a breach of Article 1105 rests on amplifying the volume of its claim of “gross unfairness” that Port Hawkesbury was allowed to emerge from CCAA proceedings, re-enter the SC paper market and allegedly cause a drop in prices, which in turn reduced Resolute’s profits. The use of hyperbolic language in the Reply Memorial accusing Nova Scotia of creating a “national champion”²¹⁶ with “a virtual guarantee to become immediately and to remain in perpetuity North America’s lowest cost producer”²¹⁷ and of acting “in the service

²¹³ **RL-062**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 92.

²¹⁴ **RL-050**, *Cargill – Award*, ¶ 273: (“[T]he proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on the Claimant. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that the Claimant fails to establish the particular standard asserted.”) See also **CL-130**, *ADF – Award*, ¶ 185: (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strictly technical matter, the Respondent does not have to prove that customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”)

²¹⁵ **RL-170**, *Mobil Investments Canada Inc. and Murphy Oil Company v. Canada* (ICSID Case No. ARB(AF)/07/04) Decision on Liability and Principles of Quantum, 22 May 2012 (“*Mobil/Murphy – Decision*”), ¶ 153. See also **RL-029**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev – Award*”), ¶ 120: (“The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1)”); **RL-050**, *Cargill – Award*, ¶ 268: (“Article 1105 requires no more, no less, than the minimum standard of treatment demanded by customary international law.”); **CL-026**, *Crompton (Chemtura) Corp. v. Government of Canada* (UNCITRAL) Award, 2 August 2010 (“*Chemtura – Award*”), ¶ 121: (“it is not disputed that the scope of Article 1105 of NAFTA must be determined by reference to customary international law.”). The NAFTA Parties’ insistence that the customary international law minimum standard of treatment of aliens is applicable to their respective covered investments is further confirmed by Article 14.6 and Annex 14-A of **RL-211**, *Agreement between Canada, the United States of America, the United Mexican States*, signed 30 November 2018, Chapter 14 (“CUSMA”).

²¹⁶ Claimant’s Reply, ¶¶ 102, 133, 143, 196.

²¹⁷ Claimant’s Reply, ¶¶ 17, 20 (emphasis in original).

of crushing foreign competition”²¹⁸ is intended to evoke images of conspiracy, discrimination and malicious intent targeting Resolute’s SC paper mills in Québec.

122. But Resolute’s narrative of connivance is not reflective of reality. As described in Canada’s Counter-Memorial and further below, a sober analysis of the timeline and of Nova Scotia’s actions with respect to Port Hawkesbury reveals nothing but a good-faith effort by the GNS to try and achieve what it also wanted to do in cooperation with Resolute in December 2011 when its Bowater Mersey mill faced similar economic distress: invest a reasonable amount of public funds to support PWCC’s separate efforts to lower operating costs (including new electricity and labour deals), become profitable and remain a contributor to one of the most critical sectors of the Province’s economy. It is not the role of a NAFTA Chapter Eleven tribunal to substitute its own views as to what might have been a preferable path for the GNS regarding Port Hawkesbury. The Tribunal only needs to consider whether, in light of all the circumstances, the choices of the GNS were so objectively egregious as to constitute a breach of the minimum standard of treatment of aliens in customary international law. Nothing that has been presented to the Tribunal supports such a finding.

B. The Claimant Seeks to Dilute the Threshold of the Customary International Law Minimum Standard of Treatment of Aliens

123. Resolute takes issue with “emphasizing the adverbs and adjectives to precede the descriptions of what constitutes unfair and inequitable treatment” and criticizes the *Glamis* tribunal’s use of “hyperbolic terms.”²¹⁹ Watering down the international legal standard applicable under NAFTA Article 1105 is part of the Claimant’s effort to match the law to its misleading version of the facts.

²¹⁸ Claimant’s Reply, ¶ 198.

²¹⁹ Claimant’s Reply, ¶ 90.

124. What Resolute dismisses as “hyperbole” was also employed by the *Waste Management II*,²²⁰ *Cargill*,²²¹ *International Thunderbird*,²²² *Mobil/Murphy*,²²³ *Eli Lilly*²²⁴ and other tribunals²²⁵ to emphasize the high level of egregious behaviour required before a finding of liability against a NAFTA Party can be made under the minimum standard of treatment of aliens under customary international law:

[T]he existence of such a high threshold is clear given NAFTA tribunals’ consistent use of qualifiers such as ‘manifest,’ ‘gross,’ ‘evident,’ ‘blatant’ and ‘complete.’ In fact, the existence of this high threshold of severity is probably the predominant characteristic of NAFTA case law.²²⁶

125. This is not an inconsequential use of “hyperbole,” as Resolute would have this Tribunal believe. As both the *Grand River* and *Glamis* tribunals emphasized:

The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the

²²⁰ **CL-016**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 (“*Waste Management II – Award*”), ¶¶ 98, 115 (State action must be “grossly unfair” and “wholly arbitrary” in order to violate the minimum standard of treatment in customary international law). Indeed, the *Glamis* tribunal endorsed the approach of *Waste Management II*. See **CL-025**, *Glamis Gold v. United States of America* (UNCITRAL) Award, 8 June 2009 (“*Glamis – Award*”), ¶ 559. See also **RL-170**, *Mobil/Murphy – Decision*, ¶ 146 (noting that the *Glamis* tribunal followed the approach of *Waste Management II*).

²²¹ **RL-050**, *Cargill – Award*, ¶ 296. The *Cargill* tribunal described the requisite standard in terms almost identical to *Glamis*: impugned measures must be “grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.”

²²² **CL-131**, *Thunderbird – Award*, ¶ 194 (Article 1105 protects against acts that “amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”) (emphasis added).

²²³ **RL-170**, *Mobil/Murphy – Decision*, ¶¶ 152-153 (Article 1105 only protects against “grossly unfair” and “egregious behavior.”)

²²⁴ **RL-169**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017, ¶ 222 (endorsing the *Glamis* description as accurately representing customary international law).

²²⁵ **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016, ¶ 282: (“[t]he Tribunal agrees with the analysis...of the tribunal in *Glamis Gold*, to the effect that a violation of the customary international law minimum standard of treatment requires an act that is sufficiently egregious and shocking so as to fall below accepted international standards.”)

²²⁶ **CL-141**, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013) (“*Dumberry*”), p. 271: (“The *Glamis*, *Cargill*, *Waste Management*, *ADF* and *Thunderbird* tribunals have all set a very high threshold of liability.”). The *Apotex* tribunal specifically endorsed Professor Dumberry’s assessment that “a high threshold of severity and gravity is required in order to conclude that the host state breached any of the elements contained within the FET standard of Article 1105.” See **RL-051**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, (ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014) ¶ 9.47.

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circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor.²²⁷

126. The Tribunal need not give weight to Resolute’s reliance on *Merrill & Ring* or *Bilcon* with respect to NAFTA Article 1105. In *Merrill & Ring*, the tribunal was internally divided on how to conceptualize the minimum standard of treatment of aliens in customary international law.²²⁸ In any event, it also dismissed the Article 1105 claim because of the claimant’s flawed “but for” damages analysis and “entirely speculative” projections on future prices in the market (a problem that also affects Resolute’s damages claim here).²²⁹ In *Bilcon*, the tribunal noted with specific approval the *Waste Management II* standard,²³⁰ but split on whether a mere alleged breach of domestic law should result in a breach of the minimum standard of treatment of aliens in customary international law.²³¹ That issue, as well as the *Bilcon* claimants’ “legitimate expectations” and allegations of arbitrariness, are not relevant in the case before this Tribunal.

127. It is axiomatic that merely causing economic loss to a foreign investor is insufficient to result in a violation of the minimum standard of treatment. But there is nothing more to Resolute’s claim than that: it does not attempt to demonstrate that Nova Scotia’s actions were arbitrary²³² and it

²²⁷ **CL-025**, *Glamis – Award*, ¶ 615, cited in **RL-019**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 214.

²²⁸ **RL-060**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award, 31 March 2010 (“*Merrill & Ring – Award*”), ¶¶ 219-246: (The tribunal noted the existence of “different opinions within the Tribunal on the applicable scenarios and their corresponding thresholds, and whether, under either scenario, there has been a breach” (¶ 246)). See **CL-141**, *Dumberry*, pp. 272-273 (critiquing the lower threshold of Article 1105 described in *Merrill & Ring* as not reflecting customary international law).

²²⁹ **RL-060**, *Merrill & Ring – Award*, ¶¶ 256-266.

²³⁰ **RL-025**, *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 442-443; **RL-212**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Dissenting Opinion of Professor Donald McRae, 10 March 2015 (“*Bilcon – Dissenting Opinion of Professor Donald McRae*”), ¶ 32: (Professor McRae noted his agreement “with the majority that the appropriate standard to apply in the application of 1105 is that set out in *Waste Management*.”)

²³¹ See **RL-212**, *Bilcon – Dissenting Opinion of Professor Donald McRae*. Since the *Bilcon* award, the NAFTA Parties have been unanimous that the mere breach of domestic law does not by itself establish a breach of the customary international law minimum standard of treatment. See **RL-213**, *Mesa Power Group v. Government of Canada* (UNCITRAL) Canada’s Observations on the *Bilcon* Award, 14 May 2015, ¶ 19; **RL-096**, *Mesa – U.S. Second 1128 Submission*, ¶¶ 21-22; **RL-206**, *Mesa – Mexico Second 1128 Submission*, ¶ 11. See also **CL-130**, *ADF – Award*, ¶ 190: (“Something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1).”)

²³² **CL-025**, *Glamis – Award*, ¶ 617: (“a breach of Article 1105 requires something greater than mere arbitrariness, something that is surprising, shocking or exhibits a manifest lack of reasoning.”). This reflects the description by the ICJ of arbitrariness in the *ELSI* case: “wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.” See **RL-178**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, I.C.J. Reports (1980) 15, 20 July 1989, ¶ 128. The description of arbitrariness by the ICJ has been endorsed

does not allege a repudiation of “legitimate expectations” that would have been created by explicit commitments or representations by Nova Scotia.²³³ The Claimant’s Reply Memorial also leaves behind the argument that the Nova Scotia measures were discriminatory and based on “sectional prejudice” as understood in customary international law because it knows there is no evidence to support such an allegation.²³⁴ The bidding process for Port Hawkesbury was open to investors of any nationality. Indeed, Resolute was specifically encouraged by the GNS to bid on Port Hawkesbury and, if it had been selected by the Monitor, it could have itself asked for financial assistance from Nova Scotia.²³⁵ Moreover, Resolute has acknowledged that two Canadian SC paper producers (Irving and Catalyst) were also impacted by Port Hawkesbury’s reopening.²³⁶ This confirms that there was no discrimination by the GNS and that Resolute’s foreign nationality was not a factor in the Province’s decision-making, which the Claimant has already conceded: “[W]e [Resolute] are not saying necessarily that Nova Scotia had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only. [...] *We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA.*”²³⁷

128. In its Reply Memorial, Resolute misunderstands Canada’s argument regarding discrimination under Article 1105 and the right of a NAFTA Party to deny national treatment when it comes to government supported loans, grants and procurement.²³⁸ Canada has never argued that the exclusions in NAFTA Article 1108(7) are exclusions from the minimum standard of treatment.

by many NAFTA and other tribunals. See e.g., **RL-122**, *Mercer – Award*, ¶ 7.78; **RL-029**, *Mondev – Award*, ¶ 127; **RL-174**, *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award, 8 July 2016 (“*Philip Morris – Award*”), ¶ 390.

²³³ This allegation has not been developed by Resolute since its Notice of Arbitration. See *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Notice of Arbitration and Statement of Claim, 30 December 2015 (“Statement of Claim”), ¶¶ 101-105. Resolute’s references to preambular statements of a general nature in NAFTA Article 102 to “promote conditions of free competition in the free trade area” do not create legitimate expectations or otherwise assist in establishing a violation of Article 1105. See Claimant’s Reply, ¶ 196.

²³⁴ Claimant’s Memorial, ¶ 272; Claimant’s Reply, ¶ 134.

²³⁵ Witness Statement of Duff Montgomerie, 17 April 2019 (“Montgomerie First Statement”), ¶ 24; Rejoinder Witness Statement of Duff Montgomerie, 4 March 2020 (“Montgomerie Rejoinder Statement”), ¶ 8.

²³⁶ Claimant’s Reply, ¶ 132. Resolute notes that there were four other producers of SC paper in North America (Resolute and NewPage, both of which are U.S. companies, and Catalyst and Irving, both Canadian (British Columbia and New Brunswick, respectively).

²³⁷ Jurisdictional Hearing Transcript, Day 1, pp. 350:21-351:4 (emphasis added).

²³⁸ Claimant’s Reply, ¶¶ 129-139.

Rather, Canada explained that the NAFTA specifically allows a Party to provide subsidies and grants, including government-sponsored loans, to domestic investors but not to foreign investors *even when they are in like circumstances*.²³⁹ If this is the case, the same action cannot be prohibited by the minimum standard of treatment of aliens in customary international law.²⁴⁰

129. Resolute's entire case rests on the singular premise that customary international law *required* the GNS to stand aside and let Port Hawkesbury close and that it was "egregious, unjust, inequitable"²⁴¹ to provide it with financial assistance because doing so allegedly reduced the prices for SC paper that Resolute might have otherwise received. Resolute seems to believe that customary international law prohibits the consideration of the other circumstances facing the Province in 2011 and 2012, including that the GNS had given millions of dollars in financial assistance to Resolute to help Bowater Mersey become a low-cost mill, that Resolute had been encouraged by the GNS to bid on Port Hawkesbury (but decided not to do so), that a court-supervised open bidding process identified a willing buyer (Canadian by coincidence, not by favouritism) with innovative ideas on how to reduce costs and that the closure of the mill would have had a devastating impact on the Province's economy. In other words, Resolute argues that its financial interests should have been elevated above all other considerations and that Nova Scotia's failure to do so was a violation of Article 1105.

130. The Tribunal should reject this portrayal of customary international law. Even those tribunals applying autonomous fair and equitable treatment clauses, which are more stringent than what is required under Article 1105(1),²⁴² have affirmed that "the host State is not required to elevate

²³⁹ NAFTA Articles 1102 and 1108(7)(b). The same reasoning applies with respect to procurement by a Party. *See also* **RL-211**, CUSMA, Article 14.12(5).

²⁴⁰ *See* Canada's Counter-Memorial, ¶¶ 288-292 and cases cited therein. *See also*, **RL-059**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) First Partial Award, 13 November 2000 ("*S.D. Myers – First Partial Award*"), ¶ 255: (stating that "CANADA'S right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures" that could have been imposed rather than a ban on the Claimant's PCB exports.); **RL-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman – Award*"), ¶ 103 ("[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, *the granting or withdrawal of government subsidies*, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this") (emphasis added).

²⁴¹ Claimant's Reply, ¶ 134.

²⁴² **RL-214**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) Excerpts of Award, 22 June 2010 ("*Liman – Excerpts of Award*"), ¶ 263: ("[T]he Tribunal considers that the purpose of ECT Article 10(1), second sentence, is to provide a protection which goes beyond the minimum

unconditionally the interests of the foreign investor above all other considerations in every circumstance.”²⁴³ The *BayWa* tribunal, endorsing the conclusion of the *Antaris* tribunal, said the same:

*The host State is not required to elevate the interests of the investor above all other considerations, and the application of the [Energy Charter Treaty Article 10(1)] FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.*²⁴⁴

131. Resolute concedes that States deserve deference when it comes to decision-making in the public interest, but it says that such deference is not “unlimited.”²⁴⁵ That is an uncontroversial observation. But what the Claimant fails to appreciate is that under Article 1105, the customary international law minimum standard of treatment of aliens *is* the limit on State action, so unless a measure falls below that minimum threshold, there is no liability for a NAFTA Party. The “high measure of deference” that international law allows for States to make good faith policy decisions²⁴⁶ ensures that a tribunal does not have “unfettered discretion to decide for itself, on a

standard of treatment under international law. The ECT was intended to go further than simply reiterating the protection offered by the latter. In this respect, ECT Article 10(1), second sentence, differs from NAFTA Article 1105 (in its interpretation given by the Free Trade Commission on 31 July 2001) which contains an express reference to international law. Therefore, when assessing Respondent’s actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT.”); **CL-141**, *Dumberry*, pp. 262-263: (NAFTA tribunals “are required, under Article 1105, to apply the minimum standard. This standard involves a higher threshold of liability than an unqualified FET clause.”)

²⁴³ **CL-230**, *Electrabel – Award*, ¶ 165. The *Electrabel* tribunal was applying Article 10(1) of the Energy Charter Treaty, which is an autonomous “fair and equitable treatment” clause and not the same as the minimum standard of treatment in customary international law.

²⁴⁴ **RL-215**, *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/16) Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (“*BayWa – Decision*”), ¶ 459 (emphasis added), citing **RL-216**, *Antaris GMBH (Germany) and Dr. Michael Göde (Germany) v. The Czech Republic* (UNCITRAL) Award, 2 May 2018 (“*Antaris - Award*”), ¶ 360(9).

²⁴⁵ Claimant’s Reply, ¶ 100.

²⁴⁶ *BayWa – Decision*, ¶ 459. In addition to the statement by the *BayWa* tribunal, see **RL-059**, *S.D. Myers – First Partial Award*, ¶¶ 261-263 (explaining that a “high measure of deference generally extends to the right of domestic authorities to regulate matters within their own borders”); **CL-025**, *Glamis – Award*, ¶ 762 (holding that “it is not for an international tribunal to delve into the details of and justifications for domestic law.”); **CL-026**, *Chemtura – Award*, ¶ 123 (taking into account that “the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations.”); **RL-173**, *Gemplus, S.A., et al. v. Mexico* (ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010 (“*Gemplus – Award*”), ¶ 6-26: (“Fourth, as to ‘deference’, the Tribunal accepts the Respondent’s submissions to the effect that this Tribunal should not exercise ‘an open-ended mandate to second-guess government decision-making’, in the words of the arbitration tribunal in *S.D. Myers*.”); **CL-230**, *Electrabel – Award*, ¶ 181: (“It is all too easy, many years later with hindsight, to second-guess a State’s decision and its effect on

subjective basis, what was ‘fair’ or ‘equitable’ in the circumstances in each particular case...it may not simply adopt its own idiosyncratic standard of what is ‘fair’ or ‘equitable’ without reference to established sources of law.”²⁴⁷ As the tribunal in *Feldman* observed:

[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, *the granting or withdrawal of government subsidies*, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.²⁴⁸

132. In other words, this Tribunal should not accept the Claimant’s invitation to substitute its subjective belief as to what would have been the “better” decision by Nova Scotia when faced with the choice of letting Port Hawkesbury close or giving it a chance to re-enter the market.

C. Resolute’s Arguments that the Nova Scotia Measures Offended the Principle of Proportionality and Were Not in the Public Interest Are Not Grounded in International Law and Have No Basis in Fact

133. Resolute’s Reply Memorial presents two related arguments that Canada will address together in this section. First, the Claimant argues that the GNS violated the principle of proportionality in international law.²⁴⁹ Second, the Claimant argues that the GNS did not act in the public interest and that no deference is owed to Canada because “in international law, the interest of a constituent element does not overcome the interests of the greater whole.”²⁵⁰ Both arguments misapply international law and rely on a misleading presentation of facts.

one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors.”); **RL-122**, *Mercer – Award*, ¶ 7.42: (“as a general legal principle, in the absence of bad faith, a measure of deference is owed to a State’s regulatory policies.”); **RL-174**, *Philip Morris – Award*, ¶ 418: (“[t]he fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal.”); **RL-052**, *Mesa – Award*, ¶ 553: (“the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs.”)

²⁴⁷ **RL-029**, *Mondev – Award*, ¶ 119.

²⁴⁸ **RL-021**, *Feldman – Award*, ¶ 103 (emphasis added).

²⁴⁹ Claimant’s Reply, ¶¶ 191-208.

²⁵⁰ Claimant’s Reply, ¶¶ 107-123.

1. Resolute Has No Basis to Argue that the Nova Scotia Measures Violated the Alleged Principle of “Proportionality” in International Law

a) The minimum standard of treatment of aliens in customary international law does not include a “proportionality” test

134. Resolute simply asserts in its Reply Memorial that the minimum standard of treatment of aliens in customary international law includes an obligation of proportionality, but fails to present any state practice and *opinio juris* to demonstrate this, let alone any relevant NAFTA award or other authority that supports the application of such a test in the context of Article 1105. As Professor Dumberry succinctly noted:

[T]he proportionality test presupposes that the objective behind a consented measure taken by a State is legitimate. The ‘suitability for a legitimate government purpose’ is indeed the first question to be examined by a tribunal when applying the proportionality test. It is difficult to conceive how a measure considered as ‘sufficiently egregious and shocking’ could ever be deemed by a tribunal as serving a legitimate government purpose. In other words, because under Article 1105 the threshold of severity is so high, it is submitted that the contested measure will never satisfy the first step of the proportionality test. When faced with an egregious and shocking measure, a NAFTA tribunal need not apply the proportionality test.²⁵¹

135. None of the cases cited by Resolute are relevant here. Resolute’s reliance on *ADM*²⁵² is entirely misplaced. In that case, the tribunal was applying the principle of proportionality in the context of *countermeasures*, an area where the requirement of proportionality is part of customary international law.²⁵³ Countermeasures are not at issue before this Tribunal.

²⁵¹ **CL-141**, *Dumberry*, p. 264 (emphasis added).

²⁵² Claimant’s Reply, ¶ 205 fn. 302.

²⁵³ **RL-092**, *ADM – Award*, ¶¶ 124-126, 133. Proportionality is a customary international law principle applicable in the context of countermeasures and self-defence. See **RL-032**, ILC Articles, Article 51 and commentary thereto at pp. 294-296; **RL-114**, *Military and Paramilitary Activities Case*, ¶ 176 (affirming that it is well established in customary international law that “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it.”).

136. Resolute’s reliance on *S.D. Myers* is also misguided.²⁵⁴ That tribunal did not apply a “proportionality” test in the context of Article 1105.²⁵⁵ Moreover, the tribunal stated that it would have been “legitimate” for Canada to provide subsidies to its domestic companies even though doing so would have caused significant financial harm to the claimant.²⁵⁶ If the *S.D. Myers* tribunal believed that subsidies to domestic companies that would have had adverse financial effects on a foreign competitor were “legitimate,” it is difficult to understand how Resolute can argue the opposite in this case.

137. The Claimant’s reliance on cases like *Occidental*,²⁵⁷ *PL Holdings*,²⁵⁸ *Azurix*²⁵⁹ and *RREEF*²⁶⁰ is inapt, not only because of the entirely different factual circumstances of those cases, but also

²⁵⁴ Claimant’s Reply, ¶ 205. The *S.D. Myers* Partial Award is of limited precedential value on Article 1105 in any event because it was rendered *before* the 2001 FTC Note of Interpretation confirmed that NAFTA tribunals should apply no more than the minimum standard of treatment of aliens in customary international law. *S.D. Myers – Partial Award (RL-059)* was rendered on November 13, 2000. The FTC Note of Interpretation regarding Article 1105 was issued on July 31, 2001. See **RL-001**, NAFTA Free Trade Commission, “Notes of Interpretation of Certain Chapter Eleven Provisions” (July 31, 2001).

²⁵⁵ The discussion at ¶ 255 of the *S.D. Myers – Partial Award (RL-059)*, to which the Claimant cites in its Reply, was in the context of Article 1102, not Article 1105. Furthermore, the majority of the tribunal provided no meaningful analysis for its finding of a breach of Article 1105: it simply concluded at ¶ 266 that “the breach of Article 1102 essentially establishes a breach of Article 1105 as well”. Arbitrator Edward C. Chiasson Q.C. disagreed with this conclusion, noting that the breach of another provision of NAFTA is not a foundation for the conclusion that there has been a violation of fair and equitable treatment in international law and that on the facts of the case, there was no violation of Article 1105 (¶ 267).

²⁵⁶ **RL-059**, *S.D. Myers – Partial Award*, ¶ 255: (“CANADA’s right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures.”)

²⁵⁷ **CL-225**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012 (“*Occidental – Award*”). In this case, the Ecuadorian government terminated a hydrocarbons participation contract and seized property from Occidental’s offices and oil fields as property of the State, which the tribunal did not consider to be proportional to its intended goal. The tribunal also considered proportionality because the Ecuadorian Constitution establishes the principle of proportionality as a matter of Ecuadorian law (¶ 397). *Occidental* is not a relevant authority in the context of this NAFTA dispute.

²⁵⁸ **CL-235**, *PL Holdings S.à r.l v. Poland* (SCC Case No. V 2014/163) Partial Award, 28 June 2017 (“*PL Holdings – Partial Award*”), ¶ 354. This tribunal was looking at claims that arose out of alleged forced sale of the claimant’s shareholding in a Polish bank, FM Bank PBP, which was alleged to be an expropriation under the Luxembourg–Poland BIT. *PH Holdings* is also inapposite in the context of this NAFTA case.

²⁵⁹ **CL-233**, *Azurix Corp. v. Argentina* (ICSID Case No. ARB//01/12) Award, 14 July 2006 (“*Azurix – Award*”), ¶ 310. In this case, the tribunal held that Argentina had expropriated the claimant’s investment as a result of interference with the tariff regime applicable to claimant’s investment and breaches of obligations under a water concession agreement. *Azurix* considered the principle of proportionality in the context of expropriation without compensation. Further, Resolute states that the tribunal in *Azurix* considered *S.D. Myers* case as “useful guidance” on the doctrine of proportionality, however, this is a mischaracterization. Indeed, the tribunal in *Azurix* only referred to *S.D. Myers* as it related to the purposes of regulatory measures, and even then, criticised the findings of that tribunal as being “contradictory” (¶ 311).

²⁶⁰ **CL-240**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l v. Spain* (ICSID Case No. ARB/13/30) Decision on Responsibility and on the Principles of Quantum, 30 November 2018

because those tribunals were applying autonomous fair and equitable clauses from different treaties,²⁶¹ which is not the minimum standard of treatment in customary international law reflected in Article 1105(1).²⁶²

138. The “principle of proportionality” is not a legal test that any NAFTA tribunal has applied to determine whether an impugned measure is consistent with the minimum standard of treatment of aliens in customary international law. Just as a NAFTA Chapter Eleven tribunal should not seek to replace the rational policy decisions of a NAFTA Party by its own judgment (an issue discussed further below), it should also not engage in a determination as to whether a measure was “proportionate” under Article 1105.

(“*RREEF – Decision*”). This tribunal found that Spain had breached its obligations under the Energy Charter Treaty, as a result of a series of energy reforms undertaken by the Government affecting the renewables sector. However, the principle of proportionality applied in that case is inapposite here, as the applicable law in that case was the Energy Charter Treaty. The tribunal applied the fair and equitable treatment as found in Article 10(1) of the ECT, which expressly requires the Contracting Parties to encourage and create “stable” conditions for Investors (¶ 288).

²⁶¹ See **CL-230**, *Electrabel – Award*, ¶¶ 92, 116; **CL-240**, *RREEF - Decision*, ¶ 11 (both interpreted Article 10(1) of the Energy Charter Treaty, which contains no reference to the minimum standard of treatment in customary international law). **CL-233**, *Azurix - Award*, ¶ 361 (interpreting Article II.2(a) of the 1991 Argentina-US BIT, which also contains no reference to the minimum standard of treatment in customary international law); **CL-225**, *Occidental – Award*, ¶ 388 (interpreting Article II.3(a) of the 1993 Ecuador-US BIT, which contains no reference to the minimum standard of treatment in customary international law); **CL-235**, *PL Holdings – Partial Award*, ¶ 273 (interpreting Article 3(1) of the Poland-Belgium BIT, which contains no reference to the minimum standard of treatment of aliens in customary international law). Resolute’s reliance on **CL-038**, *Tecnicas Medioambientales Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2) Award, 29 May 2003 is also misplaced: that tribunal discussed proportionality in the context of expropriation, not fair and equitable treatment (see ¶ 122). Furthermore, the fair and equitable treatment provision in Article 4(1) of the 1996 Spain-Mexico BIT had no reference to the minimum standard of treatment in customary international law (¶ 151).

²⁶² **CL-025**, *Glamis – Award*, ¶¶ 609-611 (affirming that autonomous fair and equitable treatment clauses are of limited relevance in the context of NAFTA Article 1105(1)); **RL-050**, *Cargill – Award*, ¶ 276: (“It is the Tribunal’s view that significant evidentiary weight should not be afforded to autonomous [fair and equitable treatment] clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom”); **RL-052**, *Mesa – Award*, ¶ 503: (“The Tribunal disagrees with the Claimant’s submissions that the ‘autonomous’ fair and equitable treatment provisions in other treaties impose additional requirements on Canada beyond those deriving from the minimum standard...the FTC Note is clear that the Tribunal must apply the customary international law standard of the minimum standard of treatment and nothing else. There is thus no scope for autonomous standards to impose additional requirements on the NAFTA Parties.”); **RL-214**, *Liman – Excerpts of Award*, ¶ 263: (“[T]he Tribunal considers that the purpose of ECT Article 10(1), second sentence, is to provide a protection which goes beyond the minimum standard of treatment under international law. The ECT was intended to go further than simply reiterating the protection offered by the latter. In this respect, ECT Article 10(1), second sentence, differs from NAFTA Article 1105 (in its interpretation given by the Free Trade Commission on 31 July 2001) which contains an express reference to international law. Therefore, when assessing Respondent’s actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT.”); **CL-141**, *Dumberry*, pp. 262-263: (NAFTA tribunals “are required, under Article 1105, to apply the minimum standard. This standard involves a higher threshold of liability than an unqualified FET clause.”)

b) Resolute’s “proportionality” argument is also misguided on the facts

139. Resolute argues that the GNS could have used its financial resources in other ways to help displaced workers, including giving assistance directly to employees or investing in other industries that are not in decline.²⁶³ But as Deputy Minister of the Nova Scotia Department of Labour and Advanced Education Duff Montgomerie has already testified,²⁶⁴ Nova Scotia *did* consider the option of not offering financial support to Port Hawkesbury. However, it decided that, in light of all the circumstances (including [REDACTED] [REDACTED]²⁶⁵), helping the mill reopen was the better option.

140. It is not the role of the Tribunal to decide, as Resolute argues it should, that giving \$124 million to unemployed workers or investing in some other industry would have been the more “proportionate” option. This Tribunal need only determine whether financial support to Port Hawkesbury had a rational connection to a legitimate public policy goal. As the *Eli Lilly* tribunal stated, “it is not the role of a NAFTA Chapter Eleven tribunal to question the policy choices of a NAFTA Party.”²⁶⁶ In that case, the tribunal accepted that there was a rational public policy justification for the legal test that resulted in the nullification of the claimant’s patents and found that it “need not opine” on whether that test was the only or best means of achieving those policy objectives.²⁶⁷ The *Merrill & Ring* tribunal found that: “the Tribunal’s task is not to pass judgement on the policy legitimacy of Canada’s log export regime”.²⁶⁸ The *Glamis* tribunal took the same

²⁶³ Claimant’s Reply, ¶ 192.

²⁶⁴ Montgomerie First Statement, ¶¶ 28-29: (“[W]e considered all of the options before us based on the information we had, including the option of not offering any financial support to the mill.”)

²⁶⁵ **C-158**, [REDACTED] [REDACTED], p. 2. *See also* **R-160**, [REDACTED], p. 5; **R-157**, [REDACTED].

²⁶⁶ **RL-169**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017 (“*Eli Lilly – Award*”), ¶ 426.

²⁶⁷ **RL-169**, *Eli Lilly – Award*, ¶ 423: (“*The Tribunal need not opine on whether the promise doctrine is the only, or the best, means of achieving those [policy] objectives. The relevant point is that, in the Tribunal’s view, the promise doctrine is rationally connected to these legitimate policy goals.*”) (emphasis added). *See also* ¶ 428: (“In the Tribunal’s view, Respondent has advanced a legitimate justification for this distinction: the sound prediction doctrine allows inventors to obtain a patent before they can demonstrate that the invention is useful. In exchange for the monopoly granted, the patentee must disclose to the public the basis of its prediction of utility and what makes it sound. *Whether or not this is the preferred approach, it is plainly not an irrational one.*”) (emphasis added).

²⁶⁸ **RL-060**, *Merrill & Ring – Award*, ¶ 236: (“*It is non-controversial that the Tribunal’s task is not to pass judgment on the policy legitimacy of Canada’s log export regime, but only to determine in this case whether its application breaches the minimum standard of treatment for aliens. Canada clearly feels that it is in the country’s national interest to promote the local processing of its timber. The fact that its chosen regulatory instrument imposes a degree of*

approach: “[t]he sole inquiry for the Tribunal [...] is *whether or not there was a manifest lack of reasons for the legislation.*”²⁶⁹ Other tribunals have also emphasized this point.²⁷⁰ This Tribunal should reach the same conclusion with respect to the Nova Scotia measures.

141. Resolute contends that the approach taken with respect to Bowater Mersey, namely to make the mill “temporarily competitive”, would have been “proportionate” and therefore appropriate with respect to PHP.²⁷¹

142. As a preliminary matter, it is notable that Resolute now concedes that it would have been acceptable for Nova Scotia to provide financial assistance to keep Port Hawkesbury open, which is in contradiction with its previous position that the GNS should have allowed the mill to close permanently.²⁷² This retreat by Resolute shifts the analysis to one whereby it suggests that it would

constraint on the freedom of other Canadian based businesses, particularly the timberland owners, to export their unprocessed logs *may properly be seen as a legitimate public policy consequence of its chosen industrial policy.* Indeed, it would be hard to see the imposition of such a non-discriminatory policy in respect of foreign investors as sufficiently reprehensible to amount to a breach of a minimum standard with the substantial threshold considered under scenario two. Such policy could not be fairly described in this context as meeting any of the adjectives that have been used over the years, such as egregious, outrageous, arbitrary, grossly unfair or manifestly unreasonable.”) (emphasis added).

²⁶⁹ **CL-025**, *Glamis - Award*, ¶ 805 (emphasis added).

²⁷⁰ The awards in *S.D. Myers*, *GAMI*, *Chemtura*, *Mesa Power*, *Thunderbird* and *Glamis* all found that the State should be accorded deference with respect to its policy choices and that international law does not allow for second-guessing government decisions. See **RL-059**, *S.D. Myers – First Partial Award*, ¶¶ 261-263; **CL-100**, *GAMI Investments Inc. (U.S.) v. Mexico* (UNCITRAL) Final Award, 15 November 2004, ¶ 114: (“Mexico determined that nearly half of the mills in the country should be expropriated in the public interest...that measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.”); **CL-026**, *Chemtura – Award*, ¶ 134; **RL-052**, *Mesa – Award*, ¶ 505; **CL-131**, *Thunderbird – Award*, ¶ 160). **CL-025**, *Glamis – Award*, ¶ 779: (“[I]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency’s review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.”); **CL-232**, *Crystallex International Corporation v. Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016, ¶ 581. The *Electrabel* tribunal similarly stated that its role was not to “sit retrospectively in judgment upon Hungary’s discretionary exercise of a sovereign power, *not made irrationally and not exercised in bad faith...*”. **CL-230**, *Electrabel – Award*, ¶ 8.35 of Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, appended to Award (emphasis added). See also **CL-230**, *Electrabel – Award*, ¶ 181: (“It is all too easy, many years later with hindsight, to second-guess a State’s decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors.”)

²⁷¹ Claimant’s Reply, ¶ 193.

²⁷² Claimant’s Memorial, ¶¶ 274-275. See also Jurisdictional Hearing Transcript, Day 1, p. 372:3-13: ([President Crawford]: “If you had gone to Nova Scotia and said ‘In order to comply with Article 1102, we want to be treated the same way,’ what would that have involved?” [Resolute]: “You cannot provide the support to your local industry,

have been “proportional” for Nova Scotia to provide enough financial assistance for Port Hawkesbury to remain open and “temporarily competitive” like Bowater Mersey, but just as long as it did not become the “national champion” that would “defeat all competition.”²⁷³ Resolute’s reasoning is flawed on multiple fronts.

143. First, Resolute is again seeking to substitute its belief as to what would have been the preferable course of action for the GNS. As described above, it is not the role of a NAFTA tribunal to examine if it would have been a better policy for the GNS to allow Port Hawkesbury to be only “temporarily competitive” for some undetermined period of time.

144. Second, Resolute’s suggestion that the Bowater Mersey approach would have been more “proportional” is self-defeating. The December 2011 agreement between the GNS and Resolute was intended to [REDACTED]

[REDACTED].²⁷⁴ Resolute does not explain how it is “proportional” to provide financial assistance to Bowater Mersey to help it lower its costs and make it more competitive but it is not “proportional” for the GNS to do the same for Port Hawkesbury.

145. Third, Resolute’s “proportionality” comparison between Bowater Mersey and Port Hawkesbury is misplaced because it ignores that the actual assistance provided was based on the factual differences between the two mills. The economic implications of Port Hawkesbury’s closure would have been [REDACTED] of the closure of the smaller Bowater Mersey mill.²⁷⁵ Industry sector experts opined that [REDACTED] which [REDACTED]

because, otherwise, we are being necessarily being negatively impacted...the other hypothetical is that they give us the equivalent amount of money. So you would give us equal treatment.”)

²⁷³ Claimant’s Reply, ¶¶ 194-196.

²⁷⁴ **R-149**, [REDACTED] p. 2: (“ [REDACTED]”).

²⁷⁵ See **R-148**, [REDACTED]; **R-157**, [REDACTED].

was Bowater Mersey’s sole product.²⁷⁶ As Canada has stated, the Tribunal should not step into the shoes of the GNS, but in any event, the assistance provided was proportional.

146. Finally, the Claimant says the Nova Scotia measures are not proportional because they were intended to make PHP an “invulnerable giant that no other SC Paper producer could out-compete” with “a virtual guarantee to become immediately and to remain in perpetuity North America’s lowest cost producer.”²⁷⁷ Resolute and its former President and CEO Mr. Richard Garneau allege that the GNS “seems to have invited PWCC to define exactly what it thought it needed from the province to make it the lowest cost producer in North America, and then the province seems to have given PWCC everything it asked for.”²⁷⁸ These exaggerations lack credibility.

147. It is a canard that the GNS gave PWCC everything it demanded and a “virtual guarantee” to be the lowest cost producer in North America. For example, Resolute spends much of its Reply Memorial complaining about Port Hawkesbury’s “discounted” and “preferential” electricity rate. While the LRR is not a measure of the GNS and not attributable to it under international law, even if it were, it is clear that the GNS and NSPI provided nothing even remotely resembling a “guarantee” on electricity rates. PWCC went into negotiations with NSPI in November 2011 seeking an electricity rate of [REDACTED].²⁷⁹ It believed it could achieve that rate through a variable pricing mechanism, energy storage strategies and a tax-efficient partnership it negotiated with NSPI.²⁸⁰ But PWCC’s application for an advanced tax ruling was rejected by the Canada Revenue Agency in September 2011, which meant the mill would be “considerably less profitable” than

²⁷⁶ **R-146**, [REDACTED], p. 16, 18, 22, 29, 73; [REDACTED]
[REDACTED]
[REDACTED] See **C-163**, [REDACTED], p. 20. Resolute itself recognized the potential for profitability selling SCA+ paper. See **C-119**, [REDACTED] pp. 3-6.

²⁷⁷ Claimant’s Reply, ¶¶ 17, 20.

²⁷⁸ Claimant’s Reply, ¶¶ 32, 38; Garneau Statement ¶ 18.

²⁷⁹ **C-125**, PWCC Discussion Memorandum (Nov. 9, 2011); See also **R-434**, [REDACTED] p. CAN000338_0003: [REDACTED]
[REDACTED]

²⁸⁰ See **R-062**, UARB Decision (Aug. 20, 2012), ¶¶ 20-26; Coolican Rejoinder Statement, ¶ 6; **R-363**, *Re NewPage Port Hawkesbury Corporation*, M04175, Opening Statement of NewPage Port Hawkesbury Corp. (Oct. 25, 2011), pp. 2-3.

PWCC had planned and the LRR that was ultimately approved would not be as beneficial as PWCC had originally intended.²⁸¹ Furthermore, because of the risks inherent in the variable electricity pricing mechanism it negotiated with NSPI, PHP’s actual energy costs are much higher than the [REDACTED] it had originally contemplated: in 2013, they were [REDACTED].

[REDACTED] Notably, this is [REDACTED] than what it would have paid under the fixed electricity rate that the UARB approved in November 2011 for Bowater Mersey (and Port Hawkesbury, had it been operating at the time).²⁸³ The GNS never guaranteed that Port Hawkesbury would have low electricity costs. Indeed, the GNS observed [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED] In 2014 and 2015, PHP reported publicly that it needed to take downtime because of prohibitively high electricity costs and other factors, making it “very difficult [for PHP] to make proper economic decisions for its business regarding when to operate the mill at varying levels and to best utilize its pulp storage capability.”²⁸⁵ In fact, the electricity rates that Resolute pays in Québec are still much lower than

²⁸¹ **R-063**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 144 (Sep. 27, 2012), ¶ 19: (“In response to IR’s from various parties, PWCC filed confidential financial information update to reflect projections for profitability of the mill, recognizing the loss of the ATR. It projects the mill to be considerably less profitable without the ATR than it would have been had the ATR been granted.”). See also application by PWCC to amend the LRR, so as to not make the order conditional upon the ATR, **R-170**, *Re Pacific West Commercial Corporation*, Order, NSUARB M04862 10433 (Sep. 28, 2012). Peter Steger estimated from [REDACTED] that the projected annual [REDACTED] were more modest than the Claimant’s Memorial would suggest because the proposed electricity arrangement with the ATR would have been approximately [REDACTED], but the ATR was rejected. See Steger-1, ¶¶ 95-96.

²⁸² See Canada’s Counter-Memorial, ¶ 170. **C-222**, [REDACTED].

²⁸³ In 2013, PHP paid an average of \$ [REDACTED], which is only [REDACTED] less than the 2013 rate the UARB approved for Bowater Mersey and would have been appropriate for Port Hawkesbury had it been operating at the time (See **C-138**, UARB Decision (Nov. 29, 2011), ¶¶ 224, 287. See also **R-434**, [REDACTED].

²⁸⁴ **R-431**, [REDACTED] p. CAN0000131_005: [REDACTED].

²⁸⁵ **R-435**, Letter from PWCC to UARB (Mar. 21, 2014), p. 2. See also **C-236**, Transcript of Proceedings before U.S. International Trade Commission in *re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015),

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the electricity rates in Nova Scotia.²⁸⁶ The Claimant’s portrayal of the GNS endowing PHP with cheap electricity is simply not true.²⁸⁷

148. Resolute’s exaggeration about Port Hawkesbury “crushing foreign competition” is further discredited by the fact that it abandoned its allegation that Nova Scotia enabled PHP to engage in predatory pricing.²⁸⁸ It did not pursue that claim because it has no evidence to support it. As an industry expert reported at the time, [REDACTED]

[REDACTED]²⁸⁹ Indeed, the Claimant had no response to Canada’s observation that, in 2013, Resolute attempted to drive down prices while PHP was driving them up.²⁹⁰ Nor has Resolute presented any evidence of unfair competition by PHP. If Resolute’s allegations regarding PHP’s role in the SC paper market were actually credible, it could have filed a complaint with the Canadian competition authorities, which have jurisdiction to deal with unfair practices such as abuse of dominance and abuse of market power.²⁹¹ Resolute has never done so.

149. Finally, Resolute ascribing so much weight to PWCC’s aspiration to become North America’s “lowest cost producer” is a red herring. Resolute not established that this is true and the

pp. 163:19-164:2: (“Port Hawkesbury Paper gets its electricity rate from the privately-held company Nova Scotia Power Incorporated. Under our contract we are the last customer served. Meaning, we get the most expensive power available, but have the option not to use it. As a result, from the time Port Hawkesbury resumed operations in October 2012 until July 2015, Port Hawkesbury took 40 days of lost production because the electricity was uneconomical or unavailable.”)

²⁸⁶ See Canada’s Counter-Memorial, ¶ 275 fns. 571 and 572 and exhibits cited therein. See also **R-147**, [REDACTED], p. 17; **R-436 to R-444**, Hydro Québec, Comparison of Electricity Prices in Major North American Cities, 2011-2019, p. 5 of each document (demonstrating that large industrial user (like paper mills) electricity rates as between NSPI and Hydro-Québec are more than double in Halifax, Nova Scotia as compared to Montreal, Québec).

²⁸⁷ Resolute’s suggestion at ¶ 166 of its Reply that PHP receives a financial benefit from NSPI’s biomass plant is also untrue. As Canada has previously explained (Canada’s Counter-Memorial ¶¶ 194, 208), PHP pays \$4.72 million annually for the steam it gets from NSPI and UARB found that to be “reasonable and not subsidized by ratepayers.” **R-062**, UARB Decision (Aug. 20, 2012), ¶¶ 156-158.

²⁸⁸ Statement of Claim, ¶¶ 55 and 96.

²⁸⁹ See **R-261** [REDACTED] (emphasis added).

²⁹⁰ See Canada’s Counter-Memorial ¶¶ 361-362. See also ITC Final Determination, noting that two buyers described Resolute as driving prices down: **C-054**, *In re Supercalendered Paper from Canada*, U.S. International Trade Commission Inv. No. 701-TA-530, Final Determination (Dec. 2015), p. V-7.

²⁹¹ **R-445**, Canada Competition Bureau, “Abuse of Market Power” (Feb. 22, 2018); **R-446**, Canada Competition Bureau, “Abuse of Dominance,” (Nov. 11, 2015).

companies' respective financial information actually indicates the opposite: Resolute's Dolbeau and Kénogami mills have produced their paper at a lower average cost than PHP since it reopened in 2012.²⁹² Resolute wrongly characterizes the GNS' actions as being anti-competitive and targeting foreign investors because of occasional references by the GNS to [REDACTED] [REDACTED]²⁹³ (which also included less prosaic statements by PWCC of being [REDACTED] [REDACTED]²⁹⁴) and rhetorical flourishes in a press release.²⁹⁵ This does not translate into a violation of customary international law.

150. In sum, while there is no legal basis under NAFTA Article 1105 to even consider the question, there is simply no basis in fact to argue that the GNS' assistance to Port Hawkesbury was "disproportionate" in international law. A [REDACTED] assistance package [REDACTED] [REDACTED]²⁹⁶ can hardly be described as a disproportionate investment of public funds given the economic and social impacts to the Province had the mill been liquidated. Nova Scotia paid fair market value for the land it received from NewPage/PHP, and it fairly compensates PHP for the silviculture and other forest management services it performs on Crown and private land

²⁹² See Expert Report of Peter Steger, Cohen Hamilton Steger, 17 April 2019) ("Steger-1"), ¶ 116 and Schedule 29 (estimating PHP's average cash cost for 2013-2015 as [REDACTED] average total annual cash costs/[REDACTED] and Steger-1 ¶ 19 and Schedule 12 (estimating Dolbeau's average cash cost for 2013-2015 as [REDACTED] and Kenogami's average cast cost for 2012-2015 as [REDACTED]). See also AFRY/Pöyry-1, Annex II pp. 50-51 [REDACTED]

[REDACTED] See AFRY/Pöyry-1, ¶ 64.

²⁹³ See Claimant's Reply, ¶¶ 31-32, citing C-158, [REDACTED]

[REDACTED] (emphasis added).

²⁹⁴ R-434, [REDACTED], p. CAN000338_0002.

²⁹⁵ C-009, Nova Scotia Premier's Office, "Province Invests in Jobs, Training, and Renewing the Forestry Sector" (Aug. 20, 2012). The announcement of financial assistance for Port Hawkesbury came only two months after the closure of Bowater Mersey. See R-345, Nova Scotia Premier's Office, "Premier Responds to Indefinite Closure of Bowater Mill" (Jun. 15, 2012).

²⁹⁶ C-182, [REDACTED]

C-195, [REDACTED]

on behalf of the Province.²⁹⁷ The Claimant’s argument that Canada violated the minimum standard of treatment in customary international law because the GNS’ measures were not “proportionate” should be rejected.

2. Resolute’s Argument that the Nova Scotia Measures Were Not in the Public Interest is Baseless

151. In its Reply Memorial, Resolute alleges that the Nova Scotia measures were not in the public interest, had extraterritorial effects and were therefore illegitimate.²⁹⁸ Resolute argues that Nova Scotia acted in “parochial self-interest” and not in the wider public interest because it failed to prioritize Resolute’s investments in Québec over investments on its territory and submits that “in international law, the interest of a constituent element does not overcome the interests of the greater whole.”²⁹⁹

152. To start, Resolute has not cited to any authority that suggests the minimum standard of treatment of aliens in customary international law requires a sub-national government (such as a province or state) to put the interests of foreign investors located in a different province or state above those of the investors located on its territory. This cannot be true as a general proposition even when talking about a national government,³⁰⁰ and Resolute has not explained how this can be true in the even more specific context of sub-national governments.

153. Moreover, it is erroneous for Resolute to argue that Nova Scotia did not act in the “public interest.” Canada has already demonstrated in its Counter-Memorial and in this Rejoinder Memorial that Nova Scotia had *bona fide* public policy justifications to provide financial

²⁹⁷ Towers Rejoinder Statement ¶ 11; **R-216**, [REDACTED]; **C-209**, [REDACTED]; **R-192**, FULA; **C-206**, [REDACTED]

²⁹⁸ Claimant’s Reply, ¶¶ 105-123.

²⁹⁹ Claimant’s Reply, ¶ 123. Resolute’s gratuitous reference to **C-312**, *AbitibiBowater Inc. v. Canada*, ICSID Consent Award (Dec. 15, 2010) is irrelevant in this case. It is axiomatic that customary international law allows States to nationalize or expropriate foreign investments as long as it is done with a public purpose, in accordance with due process of law and with payment of compensation. In the case of *AbitibiBowater*, the expropriation of *AbitibiBowater*’s assets in Newfoundland and Labrador was done with a public purpose and in accordance with the due process of law, as required by NAFTA Article 1110(1)(a) and (c). Under the Consent Award, *AbitibiBowater* was paid C\$130 million for the fair market value of the expropriated investment and as required by NAFTA Article 1110(1)(d) and (2). This does nothing to advance Resolute’s claim in this case.

³⁰⁰ As the *Electrabel* and other tribunals have confirmed, “the host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance.” See **CL-230**, *Electrabel – Award*, ¶ 165; **RL-215**, *BayWa – Decision*, ¶ 459 (emphasis added), citing **RL-216**, *Antaris - Award*, ¶ 360(9).

assistance to Port Hawkesbury, just as it did for supporting Bowater Mersey. The most obvious was the potential impact on the Province's economy:

[REDACTED]

154. The permanent closure of Port Hawkesbury would have had significant implications throughout the province's economy, particularly in rural Cape Breton Island, affecting [REDACTED]

[REDACTED]³⁰² Closure would have also affected electricity rates throughout Nova Scotia: Resolute's own expert Dr. Alan Rosenberg testified to the UARB that Port Hawkesbury's closure would have "rippling effects throughout the economy, that would inevitably lead to still more lost fixed cost recovery, which would in turn lead to still higher [electricity] rates."³⁰³ In light of the serious economic impacts for the Province, providing \$66.5 million in loans and grants can hardly be described as not in the public interest.

155. Even if the LRR between PWCC and NSPI is attributable to the GNS (it is not), it is disingenuous for Resolute to argue that it was not in the public interest for Port Hawkesbury to get it.³⁰⁴ Resolute itself argued to the UARB in 2011³⁰⁵ that both Bowater Mersey and Port

³⁰¹ **C-158**, [REDACTED]. See also **R-160**, [REDACTED] **R-157**, [REDACTED]

³⁰² **R-430**, [REDACTED].

³⁰³ **R-429**, Rosenberg Opening Statement, p. 4.

³⁰⁴ As noted in Part II above, the LRR itself is not attributable to the GNS because that variable pricing mechanism and the electricity cost savings therefrom was negotiated as between PWCC and NSPI, two private parties over which the GNS did not have effective control. But even if it were attributable to the GNS, Resolute still cannot question the UARB's finding that it was necessary, appropriate and in the public interest for Port Hawkesbury to receive the requested LRR.

³⁰⁵ **R-162**, *Re NewPage Port Hawkesbury Corporation*, Letter re: Proposed Amendments to Nova Scotia Power Inc.'s Load Retention Tariff, M04175 NPB-1 (Jun. 6, 2011); **R-165**, *Re NewPage Port Hawkesbury Corporation*, Pre-Filed Evidence of NewPage Port Hawkesbury, M04175 NPB-4 (Jun. 22, 2011); **R-166**, *Re NewPage Port Hawkesbury Corporation*, Pre-Filed Evidence of Bowater Mersey Paper Company Limited, M04175 NPB-5 (Jun. 22, 2011); **R-**

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Hawkesbury should be granted lower electricity rates because they were in economic distress, that ratepayers would be better off with them receiving an LRR than if both mills were to leave the electricity system and because “*the public interest is far better served if these mills can remain in operation*”.³⁰⁶ Resolute’s expert Dr. Alan Rosenberg testified that “[m]any North American jurisdictions have provisions for load retention tariffs. They are a mechanism available to the utility and to the regulator to retain load on the system that could otherwise be lost.”³⁰⁷ Dr. Rosenberg went on to say that “a LR [load retention] tariff merely emulates what any rationale business would do in like circumstances. A rationale business concludes that it is better to discount the standard price and keep the customer, as long as the new price covers the avoided cost and makes a contribution to fixed costs.”³⁰⁸ The UARB agreed with Resolute that it was in the public interest for both mills to continue operating and approved a rate for Bowater Mersey, and Port Hawkesbury had it not been in CCAA proceedings, that was not subsidized by other ratepayers.

156. In 2012, the UARB applied the same reasoning with respect to PWCC’s application:

Moreover, the establishment of an LRT based on economic distress is grounded on long-established and well accepted ratemaking principles applied in various jurisdictions, including by the Board in this province. Further, *such rates are in the public interest. In the end, the approval of a well-designed LRT, whether it is to avoid the switching of load in the instance of co-generation by the customer, or to help prevent the closure or relocation of an extra large industrial customer due to economic distress, benefits all other customer classes on the system. In the Board’s opinion, such a result provides for rates that are reasonable and*

164, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, Order (Dec. 21, 2011); **R-383**, *Re NewPage Port Hawkesbury Corporation*, Direct Evidence and Exhibits of Dr. Alan Rosenberg, M04175 NPB-3 (Jun. 22, 2011), p. 3:11-15; **R-429**, Rosenberg Opening Statement p. 1.

³⁰⁶ **R-319**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, M04175, Closing Submission of NewPage Port Hawkesbury Corp. and Bowater Mersey Paper Company Limited (Nov. 9, 2011), p. 68 (emphasis added); *See also* **R-318**, *Re New Page Port Hawkesbury Corporation*, Opening Statement of Bowater Mersey Paper Company Ltd., M04175 NPB-53 (Oct. 24, 2011), p. 4 (“Finally, Mr. Chair, Board members, we know you have to make this decision on sound economic and regulatory principles, *but we understand you may also take into account the broader public interest.* In this regard, we believe the Board fully understands the importance of our mill to the economy of south-western Nova Scotia, and in fact the significant impact on other areas and businesses throughout the Province. The pulp and paper business is highly integrated with sawmills, wood suppliers, trucking, transportation such as through the Port of Halifax, and has a myriad of other environmental, engineering, legal, accounting and other support services.”) (emphasis added); **C-138**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, Decision 2011 NSUARB 184 (Nov. 29, 2011) (“UARB Decision (Nov. 29, 2011)”).

³⁰⁷ **R-383**, *Re NewPage Port Hawkesbury Corporation*, Direct Evidence and Exhibits of Dr. Alan Rosenberg, M04175 NPB-3 (Jun. 22, 2011), p. 3; **R-429**, Rosenberg Opening Statement, p. 2.

³⁰⁸ **R-429**, Rosenberg Opening Statement, pp. 2, 9, 110, 304, 310.

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appropriate for all customers. [...] *The Board is satisfied that the evidence of PWCC establishes the need for a LRR in order for the mill to re-open and afford it the prospect of long-term viability.* The Board considers that some contribution to fixed costs is better than the other ratepayers having to bear all of the costs. The Board therefore finds that the granting of a load retention rate is necessary.³⁰⁹

157. Resolute has no basis to question the finding of the UARB, a quasi-judicial and impartial body empowered by law to adjudicate the issue, that it was reasonable, in the public interest and more beneficial for ratepayers overall for Port Hawkesbury to receive a LRR, especially since it was Resolute that opened the door to that outcome.

158. The Supreme Court of Nova Scotia also affirmed, as is required when approving a plan of compromise or arrangement under the CCAA,³¹⁰ that the public interest was served by PWCC's

³⁰⁹ **R-062**, UARB Decision (Aug. 20, 2012), ¶ 83 (emphasis added), *citing* **C-138**, UARB Decision (Nov. 29, 2011), ¶ 85 (emphasis added). *See also*, ¶ 221 of **R-062**: (“With respect to necessity and sufficiency, the Board is satisfied that the evidence of PWCC establishes the need for a LRR to re-open the mill and afford it the prospect of long-term viability. The Board considers that some contribution to fixed costs is better than the other ratepayers having to bear all the costs. The Board therefore finds that the granting of a LRR is necessary and the rate is sufficient.”)

³¹⁰ Canadian courts are required under the CCAA to determine whether a plan is “fair and reasonable” and whether it is in the public interest. *See* **R-447**, *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, ¶ 60: (“[T]he court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company [...]. *In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.*”) (emphasis added); **R-448**, *Re Repap British Columbia Inc.* (1998), 1 C.B.R. 4(th) 49 (B.C.S.C.), ¶ 2: (“the ‘fairness’ of the Plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as ‘shareholders’ of the company, creditors of the company, suppliers and employees of the company, and competitors of the company.”); **R-449**, *Re Canadian Airlines Corp.*, 2000 ABQB 442, ¶ 3: (“Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court’s role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: *does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge?* It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.”); ¶ 60 (a CCAA plan “must be *fair and reasonable.*”); ¶ 174 (“*The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways.* It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travelers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.”) (emphasis added); **R-450**, *Re Canwest Global Communications Corp.*, 2010 ONSC 4209, ¶ 21: (“In assessing whether a proposed plan is fair and reasonable, considerations include the following: (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (b) what creditors would have received on bankruptcy or liquidation as compared to the plan; (c) alternatives available to the plan and bankruptcy; (d) oppression of the rights of credits; (e) unfairness to shareholders; and (f) *the public interest.*”) (emphasis added) and ¶ 26 (“The last consideration I wish to address is the public interest...the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact

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plan for Port Hawkesbury because it was “fair and reasonable” and “greater benefit will be derived from the continued operation of [the] business than would result from the forced liquidation of the Company’s assets.”³¹¹ Indeed, “the CCAA is aimed at avoiding, where possible, the devastating social and economic consequences of loss of business operations, and is aimed at allowing the corporation to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. Hence, the treatment of claims in a CCAA proceeding is undertaken with the public interest in mind.”³¹² The Claimant cannot challenge the conclusion of the Supreme Court of Nova Scotia that PWCC’s purchase of Port Hawkesbury from NewPage was “fair and reasonable” and in the public interest before this NAFTA Tribunal.

159. Resolute is simply equating its own interest with the “public” interest. Governments are required to balance competing interests and priorities constantly and they often face difficult decisions as to what is the best course of action when no option leads to a favourable outcome for all. The fact that there may be adverse financial consequences for other investors, domestic or foreign, is often part of the policy decision-making process that States will undertake in good faith. Customary international law does not hold a State liable for such decisions without clear evidence of egregious and grossly unfair behaviour against the foreign investor. There is no such evidence here.

on the Canadian public.”); **R-451**, Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), pp. 158-167, 500-501, 530-534.

³¹¹ **C-347**, *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Plan Sanction Order (Sep. 25, 2012), p. 2 ¶ (h), approving the Plan (Schedule A) Article 2.1, “Purpose of the Plan”: (“The purpose of this Plan is to (a) complete a reorganization of the Company by implementing the Restructuring Transactions and (b) to effect a compromise and arrangement of all Affected claims, in order to enable the business of the Company to continue as a going concern, *in the expectation that a greater benefit will be derived from the continued operation of its business than would result from the forced liquidation of the Company’s assets.*” See also **R-452**, *Re NewPage Port Hawkesbury Corp.*, Order (Approving the Activities of the Monitor (S.C.N.S.) (Aug. 30, 2012); **R-453**, *Re NewPage Port Hawkesbury Corp.*, Fourteenth Report of the Monitor (S.C.N.S.) (Sep. 6, 2012), ¶ 33. The Monitor reported to the Court that it was “not aware of any opposition to the sanction of the Amended and Restated Plan” (¶ 34) and there were no interventions in the NewPage CCAA proceedings opposing the plan as not being in the public interest. See **R-025**, *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 11: (“General Power of court. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.”)

³¹² **R-451**, Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), p. 501.

D. Resolute Cannot Complain of Unfairness While Simultaneously Admitting That It Never Asked for Government Assistance to Support a Bid for Port Hawkesbury

160. The Claimant complains that it was never offered any of the same support given to PWCC for the purchase of the Port Hawkesbury mill.³¹³ In fact, Resolute never *asked* for government assistance to operate Port Hawkesbury because it pulled itself out of the competition before the bidding even began.

161. There is no dispute that Nova Scotia *wanted* Resolute to bid for the Port Hawkesbury mill. Deputy Minister Montgomerie has testified that he encouraged Resolute to join the bidding process and that Nova Scotia had hoped that it would do so.³¹⁴ In his witness statement, Mr. Richard Garneau admits that the GNS encouraged Resolute to consider bidding on Port Hawkesbury.³¹⁵

162. PWCC had no more specific assurances of government financial support than Resolute (or any other company) when it decided to submit a non-binding letter of intent for the mill on September 28, 2011.³¹⁶ PWCC, Paper Excellence and the other 19 companies that decided to meet that deadline all had the same information as Resolute, including the general knowledge that “the [Nova Scotia] government has indicated a willingness to be constructive in supporting mill operations”³¹⁷ and that the GNS had previously provided substantial financial support to struggling paper mills and other industries in the Province through the *Nova Scotia Jobs Fund* and other programs.³¹⁸

³¹³ Claimant’s Reply, ¶ 268; Witness Statement of Richard Garneau, 6 December 2019 (“Garneau Statement”), ¶ 19.

³¹⁴ Montgomerie First Statement, ¶¶ 20, 24; Montgomerie Rejoinder Statement, ¶ 8.

³¹⁵ Garneau Statement, ¶ 15: (“At the request of the Province, Resolute senior management examined the possibility a ██████████ of buying the Port Hawkesbury mill.”)

³¹⁶ **R-030**, *Re NewPage Port Hawkesbury Corp.*, Second Report of the Monitor (S.C.N.S.) (Oct. 3, 2011), ¶ 17; **R-029**, *Re NewPage Port Hawkesbury Corp.* Order – Approval of Settlement and Transition Agreement and Sales Process (Sep. 9, 2011), Schedule A, pp. 9-10.

³¹⁷ **R-361**, Sanabe Confidential Information Memorandum (Sept. 2011) p. 50. The September 2011 Sanabe Memorandum noted that the mill “has historically benefitted from a strong relationship with the provincial government” and that in 2006, Port Hawkesbury had reached an agreement with Nova Scotia that provided \$65 million in support over seven years. It was also public knowledge that Nova Scotia had provided a \$75 million loan to Northern (Paper Excellence) in 2010 so it could purchase timber and maintain mill operations. *See R-454*, CBC News article, “N.S. government lends \$75M to Northern Pulp” (Mar. 1, 2010); **R-455**, Nova Scotia Executive Council Office website excerpt, Order in Council # 2010-90 (Feb. 26, 2010); **R-456**, Nova Scotia Natural Resources website excerpt, “Nenah Land Purchase” (Mar. 1, 2010); **R-457**, Nova Scotia News Release, “Province Supports Forestry Industry, Environment, Economy” (Mar. 1, 2010).

³¹⁸ *See e.g.*, **R-458**, Order in Council No. 2009-136 (Mar. 23, 2009); **R-459**, Order in Council No. 2013-131 (Apr. 4, 2013); **R-460**, Order in Council No. 2013-132 (Apr. 4, 2013); **R-455**, Order in Council No. 2010-90 (Feb. 26, 2010);

163. It was only *after* 21 non-binding letters of intent were submitted on September 28, 2011, and only *after* PWCC and Paper Excellence were selected by the Monitor on October 29, 2011, that the GNS started to discuss in earnest their respective requests for government assistance. [REDACTED]

[REDACTED]³¹⁹ By that time, Resolute had already taken itself out of the process. As Deputy Minister Montgomerie has already testified, there is no reason to believe that Resolute could not have also negotiated with the GNS for financial assistance had it chosen to pursue the opportunity.³²⁰

164. Resolute may have had its reasons for not participating in the CCAA process, including the fact that [REDACTED] but NAFTA Chapter Eleven cannot be used to insure Resolute against the implications of its own business decision to [REDACTED]. As the *Antaris* and *BayWa* tribunals noted, in the absence of specific promises or representations, a foreign investor, “may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework.”³²²

165. Resolute’s complaint that it was never offered assistance in negotiating an electricity rate with NSPI, hiring a consultant or getting support for obtaining UARB approval for an LRR is

R-461, Nova Scotia Department of Natural Resources Land Purchases, 2006-2015; **R-462**, News article “Sweeter smell of prosperity: Funding to help reduce pulp mill odour, increase efficiency (Jan. 20, 2011); **R-463**, Pulp and Paper Canada News Article, “N.S. to pay \$6M toward Northern Pulp’s new wastewater treatment plant” (Aug. 23, 2018).

³¹⁹ Montgomerie First Statement, ¶ 25.

³²⁰ Montgomerie First Statement, ¶ 24: (“Had Resolute submitted a bid to purchase the mill within the deadlines set by the Monitor (which I encouraged Resolute to do) and had the Monitor selected Resolute as a qualified bidder, I can confirm that the GNS would have been ready to discuss reasonable requests for financial assistance, just as we did with PWCC and Paper Excellence once they were chosen by the Monitor.”)

³²¹ **C-118**, [REDACTED], p. 3; **C-119**, [REDACTED], pp. 8, 9, 11.

³²² **RL-215**, *BayWa – Decision*, ¶ 459, citing **RL-216**, *Antaris - Award*, ¶ 360(10); See also **CL-016**, *Waste Management II – Award*, ¶ 114: (“investment treaties are not insurance policies against bad business judgments.”); **RL-170**, *Mobil/Murphy – Decision*, ¶ 153: (“In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with.”)

similarly illogical.³²³ All of this occurred *after* Resolute decided not to participate in the CCAA bidding process and *after* PWCC was selected by the Monitor as one of two going-concern bidders. PWCC had no more assurances from Nova Scotia than Resolute or any other company with respect to electricity rates. By the time PWCC and NSPI started their discussions in early November 2011, Resolute had long since walked away from the CCAA process.

E. The GNS’ Financial Support for Resolute’s Bowater Mersey Mill is not a “Distraction” – it Provides the Full Context as to why the Financial Support for Port Hawkesbury Does Not Violate NAFTA Article 1105

166. Resolute dismisses Nova Scotia’s financing for its Bowater Mersey mill as a “diversion”.³²⁴ To the contrary, the GNS’ simultaneous efforts to keep both the Bowater Mersey and Port Hawkesbury mills open and competitive provide critical context on the GNS’ good faith decision-making and motivations, which is essential to an Article 1105 analysis.

167. Resolute attempts to distinguish Bowater Mersey from Port Hawkesbury by saying that the GNS never intended to help its mill become a low-cost producer of newsprint and only wanted Bowater Mersey to be “temporarily competitive”.³²⁵ However, the facts contradict Resolute’s assertions.

168. First, the December 2011 agreement between the GNS and Resolute stated explicitly that it was the shared goal of the parties to reduce Bowater Mersey’s costs enough that it could stay open

[REDACTED]:

[REDACTED]

³²³ Garneau Statement, ¶ 19.

³²⁴ Claimant’s Reply, ¶ 12.

³²⁵ Claimant’s Reply, ¶ 193.

³²⁶ R-149 [REDACTED] p. 2 (emphasis added). The [REDACTED] was what Resolute had wanted to achieve or even better than what it had aimed

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169. Second, the goal was to make Bowater Mersey a low-cost and competitive newsprint mill. When the *Bowater Mersey Pulp and Paper Investment (2011) Act* was adopted by the Nova Scotia Legislature,³²⁷ the Premier made the following statements describing the purpose of providing financial assistance to Resolute:

[W]e went through every single part of the cost chain with Bowater and removed costs so that they would be a *low-cost, highly competitive mill in the market that exists*.³²⁸

We set this up to ensure that the investments that were going to be made were going to go directly into the mill, that they weren't going to leave Nova Scotia and they weren't going to go anywhere else, and that *the money was going to be invested right back into the plant to make it a more efficient, low-cost mill and therefore be able to survive in that exact environment*.³²⁹

*What we wanted to do was put money in place that would allow that mill to actually operate in that low-cost, high-efficiency environment. We know that at some point in time the newsprint market will reach its equilibrium, and when it does, the remaining mills will be able to make money and be prosperous.*³³⁰

What we know is that there is an industry in transition and we know that there will be mills that do survive. The question is, how will they survive? *They will survive in a low-cost, high efficiency, and very competitive market, and that's the way this [Bowater Mersey] mill is being positioned.*³³¹

for. See **R-320**, “Bowater Mersey on the Brink of Closure,” (Nov 3, 2011), p. 2: (“Dexter said AbitibiBowater wants to reduce labour costs to \$80 per tonne from \$97, and manufacturing costs to \$480 per tonne from \$537.”)

³²⁷ **R-151**, *Bowater Mersey Pulp and Paper Investment (2011) Act*, SNS 2011, c. 32 (“*Bowater Mersey Act*”); **R-149**,

³²⁸ **R-211**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-62 (Dec. 8, 2011), p. 5015 (emphasis added).

³²⁹ **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011), p. 5220 (emphasis added).

³³⁰ **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011), p. 5220, (emphasis added).

³³¹ **R-212**, Nova Scotia House of Assembly Debates and Proceedings, No. 11-64 (Dec. 12, 2011), p. 5222 (emphasis added). The Premier made similar statements to the media. See e.g. **R-330**, Global News, “Nova Scotia offers \$50 million package for Bowater Mersey paper mill” (Dec. 2, 2011): (“In the end, I believe that in the newsprint industry it is the lowest-cost mills that are going to survive, and once the newsprint industry reaches an equilibrium, those companies will make money and they will be a long-term business.) Other GNS officials made similar comments about the agreement between the GNS and Resolute: **R-333**, Nova Scotia Houses of Assembly, Standing Committee on Economic Development (Dec. 6, 2011), p. 20 (per Marvin Robar): (“[T]he whole exercise was designed to reduce the operating costs of the [Bowater Mersey] mill to a cost-competitive level. So the union contributed to it. The province worked with the company [Resolute] and the company indicated that, you know, if we had \$25 million to

170. Resolute's argument that the GNS never had the intention of helping to make Bowater Mersey a low-cost and competitive mill is revisionist history.

F. Resolute's Allegations Regarding the [REDACTED] Are Misleading

171. Resolute alleges that [REDACTED], evidences a "knowing" and "wilful" attempt by Nova Scotia to harm Resolute.³³² This is not true.

172. As Deputy Minister Montgomerie testified,³³³ with both the Port Hawkesbury and Bowater Mersey mills facing permanent closure in September 2011, Nova Scotia started to consider the future of its forestry industry and the prospects for both of those mills. As part of that effort, Nova Scotia [REDACTED] and other consultants to advise on the SC paper and newsprint markets in North America and abroad.³³⁴ The [REDACTED]

[REDACTED]³³⁵ [REDACTED], it was still unknown who would be the winning bidder for the mill, but [REDACTED] provided some encouragement to Nova Scotia that there was a future for the mill and that it would not be imprudent to consider a reasonable amount of financial assistance if a credible buyer was selected by the Monitor.

173. However, in the first half of 2012, the market had unexpectedly deteriorated due to a sharp drop in demand for SC paper, causing prices to plunge.³³⁶ Nova Scotia accordingly requested [REDACTED]³³⁷ The [REDACTED]³³⁸

invest, we could invest in energy-saving projects that would result in significant reduction in our costs per ton for energy.")

³³² Claimant's Reply, ¶¶ 3-4, 23, 102-103. See **R-161**, [REDACTED]

³³³ Montgomerie First Statement, ¶¶ 6-8.

³³⁴ **C-116**, Nova Scotia Department of Natural Resources, "Seven-point Woodlands Plan Keeps Plant Resale Ready" (Sep. 9, 2011). See also **R-148**, [REDACTED]

³³⁵ **R-146**, [REDACTED] pp. 9-11, 39-43, 64-65.

³³⁶ AFRY/Pöyry-1, ¶ 42.

³³⁷ Montgomerie First Statement, ¶ 30.

³³⁸ AFRY/Pöyry-2, Section 4.

174. In its Reply Memorial, Resolute focuses exclusively on [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
³⁴⁰ Resolute argues that this is evidence that Nova Scotia knowingly and deliberately tried to harm its Kénogami mill.

175. However, the Claimant’s Reply does not [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
³⁴¹ Resolute’s singular focus on one pessimistic aspect of the [REDACTED] ignores its broader context.

176. In any event, the pessimistic scenarios turned out to be wrong [REDACTED]
[REDACTED]
³⁴² While that return may have had a short-term impact on market prices,³⁴³ the Kénogami mill did not shut down and it remains operating profitably today. Furthermore, the increase in

³³⁹ Claimant’s Reply, ¶ 103.

³⁴⁰ **R-161**, [REDACTED], p. 36.

³⁴¹ See e.g., **R-161**, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁴² See *AFRY/Poyry-2*, Section 4.

³⁴³ Canada has never claimed that the re-entry of Port Hawkesbury in September 2012 had zero effect on market prices in the short term. What Canada has always contested is that even if there was a short-term market impact, it is not compensable to Resolute under the NAFTA and international law. See *Resolute Forest Products v. Canada* (UNCITRAL) Canada’s Memorial on Jurisdiction, 22 December 2016, ¶ 22 fn. 35

demand for SCA+ paper, which resulted from customers moving away from more expensive coated mechanical paper, [REDACTED] and helped SC paper prices to increase in 2013.³⁴⁴ By 2013, as contemporaneous market commentary confirms, [REDACTED] and it “[REDACTED].”³⁴⁶

177. During the jurisdictional phase of this arbitration, Resolute even acknowledged that PHP sought to avoid causing disruption when it re-entered the market by exporting much of its SC paper outside of North America.³⁴⁷ This was consistent with the business plan PWCC presented to the GNS indicating its [REDACTED] [REDACTED]³⁴⁸

178. Resolute says the GNS “knew...the restart of Port Hawkesbury would cause the demise of a Resolute mill.”³⁴⁹ This is not true. If Resolute is referring to the Laurentide mill, [REDACTED] [REDACTED] That mill only produced SCB/SNC paper, whereas Port Hawkesbury is focused on higher grades of SCA+ paper. Therefore, any market impact would have been limited given that [REDACTED].³⁵⁰

³⁴⁴ See Steger-1, ¶ 86; Steger-2, fn 59.

³⁴⁵ R-263, [REDACTED] p. 24 (emphasis added).

³⁴⁶ R-261 [REDACTED] p. 24 (emphasis added). The first expert report of Peter Steger contains numerous references to contemporaneous market commentary confirming that the SC paper market absorbed Port Hawkesbury’s production without much disruption to prices or competition. See Steger-1, ¶ 86.

³⁴⁷ *Resolute Forest Products v. Canada* (UNCITRAL) Claimant’s Rejoinder Memorial on Jurisdiction, 3 May 2017 (“Claimant’s Rejoinder on Jurisdiction”), ¶¶ 61-62 (confirming that the following statement from PHP is consistent with Professor Hausmann’s analysis: “[W]hen PHP entered the market in the end of 2012 and the beginning of 2013, it could have brought a fair amount of SC paper to the U.S. market. Rather than do this and deliberately seeking to avoid market disruption, PHP exported this product. PHP acted responsibly with regard to the U.S. market.”)

³⁴⁸ C-163, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]) ; C-167, [REDACTED]
[REDACTED]
[REDACTED]

³⁴⁹ Claimant’s Reply, ¶ 141.

³⁵⁰ R-161, [REDACTED] 13, 29, 30.

Furthermore, the [REDACTED] could not foresee that Resolute would reopen its Dolbeau mill in October 2012 to make the same SCB/SNC paper as Laurentide, thereby contributing to Resolute's decision to close Laurentide two years later.³⁵¹

179. In other words, the only possible conclusion regarding [REDACTED] is precisely what Resolute has argued about “gurus and soothsayers”³⁵² trying to predict market forces: “Forecasts about markets are always speculative.”³⁵³

180. However, even more important than what [REDACTED] got right or wrong is the broader context in which Nova Scotia's good faith decision-making took place. NewPage had initiated the CCAA proceedings in September 2011 with the goal of selling Port Hawkesbury as a going-concern in order to “preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole.”³⁵⁴ [REDACTED]

[REDACTED]³⁵⁵ In the same month, PWCC was selected by the Monitor through a fair and open bidding process supervised by the Nova Scotia Supreme Court, a process which the Province had specifically encouraged Resolute to participate in.³⁵⁶ PWCC was selected not only because it was the highest bidder but because of its ability to bring new thinking and efficiencies to mill operations. For more than six months, PWCC negotiated a complex web of agreements with NSPI, labour unions, the GNS and other actors. [REDACTED] a decision from the UARB on the LRR application was imminent, and PWCC and NewPage (a U.S. investor) had already secured approval by the Supreme Court of Nova Scotia of the Plan of Arrangement and were on the verge of receiving approval by the creditors. As the Monitor told the Court, by that point in the CCAA process, liquidation was the only alternative, which would have deprived

³⁵¹ AFRY/Pöyry-1, ¶ 15.

³⁵² See e.g., Jurisdictional Hearing Transcript, Day 1, pp. 269:11-19, 272:22-273:6.

³⁵³ Claimant's Rejoinder on Jurisdiction, ¶ 57.

³⁵⁴ R-024, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther (S.C.N.S.) (Sep. 6, 2011), ¶¶ 8, 89-92 and 104.

³⁵⁵ R-146, [REDACTED]

³⁵⁶ Montgomerie First Statement ¶ 20; Garneau Statement ¶ 15; Montgomerie Rejoinder Statement ¶ 8.

NewPage’s creditors of significant value and resulted in the “loss of continued benefits of employment and economic activity.”³⁵⁷

181. Resolute cannot reasonably argue that, because [REDACTED]

[REDACTED]

the minimum standard of treatment of aliens in customary international required the GNS to walk away and allow Port Hawkesbury to be liquidated. Even setting aside the fact that the Kénogami mill continues to operate profitably today and that the more negative forecasts [REDACTED] turned out to be overstated, when a government acts in good faith and in the public interest while balancing difficult and competing policy objectives, there can be no liability under NAFTA Article 1105.

G. Resolute Continues to Exaggerate and Misrepresent the Nature and Scope of the GNS’ Support for Port Hawkesbury in Order to Bolster its Claim of “Gross Unfairness”

182. Canada has already accurately described the various Nova Scotia measures at issue in this arbitration in its Counter-Memorial.³⁵⁸ However, a brief rebuttal of some of the inaccurate characterizations contained in the Claimant’s Reply Memorial is warranted even though none of them have any bearing on the Tribunal’s determination of whether there has been a breach of NAFTA Article 1105.

183. First, the Tribunal has already ruled that the Richmond County taxation measure is outside the scope of its jurisdiction with respect to Article 1105,³⁵⁹ but Resolute persists in alleging that a property tax reduction was “part of what PWCC demanded, and got, to reopen the mill.”³⁶⁰ The Tribunal should disregard the Claimant’s submissions on this point, which are inaccurate in any event.³⁶¹

³⁵⁷ **R-159**, *Re NewPage Port Hawkesbury Corp.*, Twelfth Report of the Monitor, ¶¶ 132-141.

³⁵⁸ Canada’s Counter-Memorial, ¶¶ 111-138.

³⁵⁹ Decision on Jurisdiction and Admissibility, ¶ 329.

³⁶⁰ Claimant’s Reply, at fn. 250.

³⁶¹ It was NPPH that sought to disclaim the May 2006 tax agreement with Richmond County (see **C-303**, *An Act Respecting the Taxation of Stora Enso Port Hawkesbury Limited by the Municipality of the County of Richmond*, SNS 2006, c. 51), which the County of Richmond opposed. The final agreement between PWCC and the municipality was based on reduced operations. In its Counter-Memorial, Canada noted that if there was a “benefit” to PWCC, the

184. Second, Resolute suggests that the [REDACTED] PWCC to avoid \$130 million in pension liabilities.³⁶² This is misleading. Unlike when Nova Scotia took over Resolute’s \$118.4 million pension obligations to its workers at Bowater Mersey,³⁶³ Premier Dexter stated that the Port Hawkesbury pension liability “cannot be transferred to the taxpayers” and the Province never took on any liability or topped up NPPH’s pensions.³⁶⁴ Workers at the mill negotiated new pension terms with PWCC rather than become unsecured creditors of NPPH in the CCAA proceedings and those workers with existing pensions were given more time before their plans were wound up.³⁶⁵

185. Third, Resolute says that Canada never explains why the “GNS gave PWCC [REDACTED] more than it had promised to pay for the same land from NewPage-Port Hawkesbury.”³⁶⁶ As Deputy Minister Towers explains, the reason for this is that the lands ultimately purchased were different and more valuable parcels with a corresponding higher fair market value.³⁶⁷

186. Finally, the Claimant maintains that it is somehow relevant to the Article 1105 analysis that PWCC is allowed under the terms of its financing with the GNS to use tax losses on assets located outside Nova Scotia.³⁶⁸ There is no substance to this complaint. The *Income Tax Act* is a federal statute so the benefits arising from it can be “extraterritorial” to Nova Scotia. The more relevant point, which Resolute ignores, is that this aspect of the [REDACTED]

exclusion for subsidies and grants set out in Article 1108(7)(b) would apply. *See* Canada’s Counter-Memorial, fn. 472. Resolute’s Bowater Mersey mill also received a municipal property tax reduction. *See* Canada’s Counter-Memorial, ¶ 135; **R-149**, [REDACTED], p. 6; **R-151**, *Bowater Mersey Act*.

³⁶² Claimant’s Reply, ¶ 182.

³⁶³ Canada’s Counter-Memorial, ¶ 66.

³⁶⁴ **R-464**, CBC News, “Underfunded NewPage pensions plans to be abandoned” (Apr. 13, 2012); **R-465**, CTV News, “N.S. won’t bail out pension plan for NewPage workers: Dexter” (Jan. 5, 2012).

³⁶⁵ **R-466**, Canadian HRReporter, “Legislation to delay N.S. paper mill pension windup” (May 10, 2012).

³⁶⁶ Claimant’s Reply, ¶ 183.

³⁶⁷ Towers Rejoinder Statement, ¶ 11. *See also* Towers First Statement ¶¶ 14, 30; **R-207**, Forestry Transition Land Acquisition Program, Guidelines for Applicants (Apr. 2008), p. 1: (“The Land Acquisition Program gives forestry companies that are operating in Nova Scotia an opportunity to sell some of their non-essential land assets to the Department of Natural Resources at fair market value.”); **R-216**, [REDACTED]; **C-209**, [REDACTED]

³⁶⁸ Claimant’s Reply, ¶¶ 184-185. *See also* Canada’s Counter-Memorial, ¶ 116.

.³⁶⁹ This restriction on PWCC and additional security for the GNS' investment is what matters.

H. The EY Report is of No Value in Establishing a Breach of the Minimum Standard of Treatment of Aliens in Customary International Law

187. In its Memorial, Resolute alleged that the “customary practice among NAFTA Parties, and in market-oriented economies generally, is for companies that are not commercially viable to be allowed to fail”.³⁷⁰ To support its allegation, Resolute relied on photocopies of a bankruptcy yearbook and provided no explanation other than asserting that it has not been able to find any comparable example in CCAA proceedings to what was done for PHP.³⁷¹ After Canada critiqued this approach, Resolute retained Ernst and Young (“EY”) to buttress the credibility of this line of argument in its Reply Memorial.³⁷² Unfortunately for Resolute, the self-serving EY Report does nothing to bolster its case. In fact, the flaws in EY’s methodology are numerous and sufficient by themselves to undermine the credibility and value of the report.

188. First, because the EY report is limited exclusively to Canada, it does not provide evidence of substantial state practice sufficient to establish that what Nova Scotia did for PWCC is not in line with the minimum standard of treatment of aliens in customary international law. EY did not consider the practice of any other State, let alone that of the other two NAFTA Parties whereas Resolute alleges it is “customary practice” to allow companies that are not commercially viable to fail.³⁷³

189. Second, EY’s analysis erroneously includes the hot idle funding (\$15.1 million) and the funding provided under the Forestry Infrastructure Fund (\$19.1 million), measures that the

³⁶⁹ Chow First Statement, ¶ 16. In its Reply Memorial, Resolute suggests that PWCC would have likely reinvested in the mill regardless; *see* Claimant’s Reply, fn. 270. Resolute has no knowledge of PWCC’s tax planning motivations and thus has no basis to make this assumption, which it seems to wrongly attribute to Canada.

³⁷⁰ Claimant’s Memorial, ¶ 274.

³⁷¹ Claimant’s Memorial, ¶¶ 274-277.

³⁷² Expert Witness Statement of Ernest and Young Inc., 6 December 2019 (“EY Report”).

³⁷³ It is a given in the practice of States that financial assistance to distressed domestic companies may be provided when it is in the public interest to do. *See e.g.*, **R-467**, Grigorian & Raei, “Government Involvement in Corporate Debt Restructuring: Case Studies from the Great Recession”, IMF Working Paper WP/10/260 (Nov. 2010).

Tribunal has already ruled outside of its jurisdiction.³⁷⁴ EY's comments that debtor-in-possession (DIP) financing is uncommon are therefore irrelevant.³⁷⁵

190. In an appendix to its report, EY also refers to the purchase of "timberlands from PHP for \$20 million" under the heading "Funding on Emergence from CCAA."³⁷⁶ Canada recalls that the Land Purchase Agreement was a transaction done at fair market value,³⁷⁷ so it is unclear why EY would consider this to be "government funding" in the same category as a government supported loan or a grant. In the same appendix, EY refers to a "reduced electricity rate agreement," which, even if it were attributable to the GNS (it is not), was negotiated "based on market considerations" and "entirely consistent with market principles" according to a WTO panel.³⁷⁸ Similarly, EY includes in that appendix a reference to "\$3.8 million annually for 10 years to support harvesting and forest land management" and an unquantified reference to a "forest utilization and license agreement," but provides no reason as to why PHP being paid to perform valuable silviculture services, which are to the benefit of the Province, has any bearing or relevance on the "uniqueness" of government support.

191. In other words, EY makes no attempt to identify the actual quantum of financial assistance provided by the GNS to PWCC and no independent effort to assess whether Resolute's characterization of the measures is accurate and comparable to the other cases it investigated. It is therefore unclear how EY can come to the conclusion that the Nova Scotia measures were "unique" when its analysis includes measures that have already been ruled outside the scope of this dispute and transactions that were done for fair market value or consistent with market principles.

192. Third, further to instructions received from the Claimant's counsel, EY intentionally limits its analysis to situations where a company sought creditor protection under the CCAA.³⁷⁹ This is despite EY's own observation that "[t]here may be instances whereby government assistance was provided to an insolvent company in order to avoid having it file for formal insolvency

³⁷⁴ Decision on Jurisdiction and Admissibility, ¶ 244; EY Report, ¶¶ 18-21, 61-63.

³⁷⁵ EY Report, ¶ 60.

³⁷⁶ EY Report, Appendix H (Summary of Comparable Cases).

³⁷⁷ Canada's Counter-Memorial ¶¶ 120, 318; Towers First Statement ¶ 30.

³⁷⁸ **R-238**, WTO Panel Report, ¶ 7.77. In Appendix H, EY also lists "water permit" under the heading "Other". It is unclear to what measure, if any, this entry refers.

³⁷⁹ EY Report, ¶¶ 3 and 32.

proceedings.”³⁸⁰ There is no principled reason for EY to distinguish between formal and informal restructuring scenarios. Furthermore, this arbitrary approach allows EY to ignore cases that are clearly relevant, including precedents where companies have received billions of dollars in government funding to keep them from having to seek protection from their creditors or file for bankruptcy. The support provided by the Canadian and U.S. governments to domestic automakers in 2008-2009 is an obvious example, which was far more financially significant than the support provided to PHP by the GNS. However, in both instances, governments had the same motivations: “to avoid the significant negative economic consequences of the [a]uto [c]ompanies ceasing their operations.”³⁸¹ EY provides no credible explanation as to why the government intervention with respect to domestic automakers is excluded from its analysis but a much smaller financial package to help avoid a mill closure that could have resulted in a [REDACTED] decline in Nova Scotia’s GDP is “unique”.³⁸²

193. EY’s arbitrary scope of analysis also allows it to avoid dealing with the most obvious comparable example: Resolute receiving \$50.25 million of government support (plus a potential additional \$40 million) in order to help keep the Bowater Mersey mill open [REDACTED].³⁸³ EY also says nothing regarding other measures of financial support the GNS has provided to other mills (e.g., Paper Excellence) and industries over the years.

194. Moreover, EY is overly restrictive in various ways in its analysis of CCAA cases:

- It analyzed 174 CCAA cases since 2009, which is less than half of the 363 cases that are publicly listed on the Office of the Superintendent of Bankruptcy’s website.³⁸⁴
- EY’s analysis is limited to the post-October 2009 period, which it justifies by the fact that the Office of the Superintendent in Bankruptcy “initiated” its registry at that time.

³⁸⁰ EY Report, ¶ 44.

³⁸¹ EY Report ¶ 45. *See also* **R-468**, Goolsbee & Krueger, “A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler,” NGER Working Paper Series (Mar. 2015).

³⁸² **C-158** [REDACTED]; **R-157**, [REDACTED]; **R-430**, [REDACTED]. *See also* **R-160** [REDACTED].

³⁸³ **R-149** [REDACTED].

³⁸⁴ *See* CCAA records list on the website of the Office of the Superintendent of Bankruptcy: https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html (last modified: March 1, 2019). Because of its volume, Canada did not submit the list as an exhibit but it can do so if the Tribunal so requests.

However, EY discusses a number of cases for which Monitor reports are no longer publicly available on the basis of an internet search.³⁸⁵ It is therefore unclear why it decided to ignore CCAA cases predating October 2009.

- EY excluded from its review CCAA cases that pertain to a number of industry classifications by simply stating that “it was unlikely such companies would obtain government assistance while in insolvency proceedings.”³⁸⁶ In the same vein, EY judges that two CCAA cases involving mining companies are not comparable without elaborating on its reasoning for coming to this conclusion.³⁸⁷ At least one of those excluded cases shows important similarities with the situation at issue.³⁸⁸
- EY identified 117 CCAA cases that had no apparent form of government assistance during the restructuring process. EY admits that this group includes cases where government agencies or Crown corporations may have been among the creditors³⁸⁹ but it ignores the possibility that a government that is a debtor can decide to compromise its claim beyond what other creditors in a given class would be asked to do.³⁹⁰ EY also fails to recognize that there is a number of reasons why a government may decide not to intervene, such as the fact that in smaller CCAA proceedings the net effect on the public interest is likely to be marginal.
- EY does not explain how its analysis is consistent with academic studies that have found government involvement in 34 percent of cases involving CCAA proceedings.³⁹¹

195. Even within the group of CCAA cases EY considers to be comparable, it seeks to make artificial distinctions. For instance, it contends that support given to U.S. Steel Canada Inc. (“U.S. Steel”) and Essar Steel/Algoma (“Algoma”) was mostly about addressing legacy obligations.³⁹² With respect to Algoma, EY distinguishes government support in the amount of \$150 million in the form of repayable loans and grants to assist with the upgrade and modernization of a steel mill

³⁸⁵ EY Report, ¶ 48.

³⁸⁶ EY Report, ¶¶ 38-39.

³⁸⁷ EY Report, ¶¶ 51, 54.

³⁸⁸ The Bloom Lake case, which was excluded because it involves a mining company, demonstrates that governments (in that case a state enterprise) can offer financial assistance to a debtor in order to ensure to promote regional economic growth and support other companies involved in the same sector. See EY Report, ¶ 56.

³⁸⁹ EY Report, ¶ 47.

³⁹⁰ Notably, this happened in the cases of U.S. Steel Canada Inc. and Terrace Bay Pulp Inc., which are both mentioned at Appendix H (Summary of Comparable Cases) of the EY Report.

³⁹¹ **R-469**, Stephanie Ben-Ishai & Larissa Lucas, *Government Involvement in CCAA Proceedings: Has Transparency Been Achieved?*, Annual Review of Insolvency Law (2015). See also **R-451**, Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), pp. 470-471.

³⁹² EY Report, ¶¶ 66-68.

by noting the “extremely difficult environment that Algoma was operating in given the application of U.S. tariffs on Canadian steel” and the fact “that the government assistance was not unique to Algoma and was provided to other steel companies.”³⁹³

196. These are distinctions without a difference to the present case. Government assistance can take many forms and the fact that a company saves on costs related to legacy obligations or on expenses it would need to incur to update outdated equipment is not a sufficient basis to conclude that different scenarios are not comparable. Furthermore, the assistance provided to PHP was not “unique”: the GNS used the *Nova Scotia Jobs Fund* as the financing program for the loan to PWCC and used money previously allocated under the Nova Scotia Natural Resources Strategy to purchase land from NewPage/PWCC.³⁹⁴ Those same pre-existing government programs were used to lend money to and purchase land from EY’s own client Resolute for its Bowater Mersey mill in December 2011.³⁹⁵

197. Despite the restrictive approach it adopted, EY notes that there are cases where governments have provided assistance in the form of loans or concessions to debtors or purchasers in the context of CCAA proceedings to make “the business more successful in the longer term”.³⁹⁶ It notes that assistance for industrial companies involved in such proceedings can take various forms, including “incentives, grants, and/or loans to assist in making the business more successful to satisfy conditions of a prospective purchaser for the business”³⁹⁷ and that “[i]n large industrial companies

³⁹³ EY Report, ¶ 81. However, in the same paragraph, EY notes that PHP, Algoma and Terrace Bay Pulp Inc. all “received grants and/or loans from the government, to effectively assist in the modernization/transformation of the mills and improve efficiency with the ultimate goal of the mill being successful over the longer term.” See also **R-451**, Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), p. 471 (“In the 1991-1992 Algoma workout, the Ontario Government used the incentive of more than \$100 million in loan guarantees to help bring parties to the bargaining table.”)

³⁹⁴ **R-189**, *Nova Scotia Jobs Fund Act*, SNS 2011, c. 40, s. 3 (Dec. 21, 2011); Chow First Statement, ¶¶ 4-5, 8; Towers First Statement ¶¶ 14, 23-30 **R-207**, Forestry Transition Land Acquisition Program, Guidelines for Applicants (Apr. 2008), p. 1: (“The Land Acquisition Program gives forestry companies that are operating in Nova Scotia an opportunity to sell some of their non-essential land assets to the Department of Natural Resources at fair market value.”); **R-216**, [REDACTED] **C-209**, [REDACTED]

³⁹⁵ **R-149**, [REDACTED] See Chow First Statement ¶ 4, fn. 2; Towers First Statement ¶¶ 24-27.

³⁹⁶ EY Report, ¶ 64.

³⁹⁷ EY Report, ¶ 65. At ¶ 78 of its report, EY notes that “[m]onetary assistance is usually in the form of loans or grants to the debtor/purchaser upon exit of the CCAA proceedings.”

that offer significant regional employment, governments have provided both monetary and non-monetary assistance to a purchaser to complete a transaction and continue the business as a going concern.”³⁹⁸ These statements correspond *exactly* to what the GNS did and to its motivations with respect to the Port Hawkesbury mill.

198. According to EY, there are two factors distinguishing the PHP case from other CCAA cases where government assistance was provided: (1) it characterizes the GNS’ stated goal as not only assisting in making PHP competitive, “but to help the mill become the lowest cost and most competitive producer” of SC paper, and (2) its perception of the comprehensiveness of the government assistance provided to PHP.³⁹⁹

199. With respect to the first factor, it is hardly surprising that the purpose of government assistance offered in the context of CCAA proceedings is to allow a company to be competitive. As for the second factor, EY relies on the fact that PHP “received interim funding” but, as Canada explained above, the hot idle funding and the financing provided under the Forestry Infrastructure Fund are outside of the Tribunal’s jurisdiction.⁴⁰⁰ In addition, the government assistance provided to other companies cited by EY was similarly comprehensive and included various components.⁴⁰¹ If EY can come to the conclusion that PHP’s case is “unique”, it is only because of the questionable parameters that it chose and which led to the exclusion of relevant comparators.

200. In light of the fundamental flaws affecting the EY report, the Tribunal should consider it as having no value to Resolute’s NAFTA claim. If anything, the EY report actually serves to demonstrate that the GNS’ actions with respect to Port Hawkesbury are not unique in the context of CCAA proceedings or other similar situations where a government, faced with the collapse of

³⁹⁸ EY Report, ¶ 76. See also **R-451**, Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed.) (Toronto: Carswell, 2013), p. 471: (“While all creditors must make compromises in the restructuring process, governments must compromise more so in the sense that they have competing public policy objectives of debt collection and encouraging the survival of businesses. On the one hand, they wish to collect monies owing through tax instruments, contributions to CPP and workers’ compensation, as well as industrial start-up or recapitalization loans. On the other hand, closure of operations can have devastating effects for local communities in terms of decreased local tax bases, lost tax revenues from financial difficulties faced by spin-off economic activities, and increased costs of social supports in terms of employment insurance and welfare assistance. Thus governments will often assist the restructuring through debt forgiveness, loan guarantees or other adjustment measures.”)

³⁹⁹ EY Report, ¶¶ 85-86.

⁴⁰⁰ Decision on Jurisdiction and Admissibility, ¶ 244.

⁴⁰¹ See ¶¶ 66 and 68 of EY report for the description of the financial assistance packages granted to U.S. Steel and Algoma.

a critical industry that could have devastating effects for the local economy, decides it is in the public interest to provide assistance to ensure that a company continues to operate as a going-concern.

V. CONCLUSION ON THE MERITS

201. The Claimant's effort to establish a breach of NAFTA Articles 1102 and 1105 relies on flawed legal reasoning and inaccurate representations of the facts. Even if the benefits arising from PHP's electricity rate were attributable to the GNS, which it is not, and even if most of the other measures were not exempted from the national treatment obligation, which they are, Resolute still cannot overcome the reality that the GNS acted fairly, in good faith and with a rational public policy objective that took into account all relevant circumstances when making the decision that providing financial assistance to PWCC was reasonable and in the public interest. It is disingenuous on the part of Resolute to protest that the public interest considerations that the GNS took into account when it provided a financial assistance package to its Bowater Mersey mill should not apply to Port Hawkesbury. Resolute had equal opportunity to bid on Port Hawkesbury and seek financial assistance from the GNS. It chose not to. NAFTA Chapter Eleven is not intended to compensate a claimant for the outcome of their own business decisions, and nothing the GNS did results in a breach of either NAFTA Article 1102 or 1105. The Tribunal should dismiss Resolute's claim entirely.

VI. RESOLUTE IS NOT ENTITLED TO THE DAMAGES THAT IT SEEKS

A. Overview

202. As noted in Canada's Counter-Memorial, in order for Resolute to be entitled to damages pursuant to NAFTA Articles 1116 and 1117, it must prove that the purported harm it suffered is the direct consequence of a specific breach that is the proximate cause of the claimed loss.⁴⁰² The quantification of such loss must subsequently be calculated in a manner that provides reasonable certainty.⁴⁰³

⁴⁰² Canada's Counter-Memorial, ¶ 325.

⁴⁰³ Canada's Counter-Memorial, ¶ 328.

203. Resolute fails on both counts. It does not prove proximate harm or quantify damages with reasonable certainty. Rather, through Drs. Kaplan and Hausman, it advances what they each misleadingly refer to as a “well-accepted” and “widely used” economic approach to damages.⁴⁰⁴ Resolute’s economic theory is as follows: but-for the added supply of SC paper due to PHP’s re-entry, Resolute’s SC paper prices would have been higher, as quantified using price increases forecasted in October 2011 by RISI.⁴⁰⁵ Resolute asks for damages calculated by subtracting the prices at which its three mills sold their paper from the prices they would have received, according to percentage increases predicted by RISI. By basing its calculations on predictions made in October 2011, Resolute asks for 16 years of future lost profits, which it wrongly divides into past and future periods. It is wrong to conceive of any of this period as being in the “past” because its 2013-to-present damages are based on price predictions made in 2011. According to Resolute, “MIT Professor Jerry Hausman, using a combination of Resolute data and industry market forecasts for SC paper, showed that Resolute incurred between \$91 million and \$137 million in damages because of Port Hawkesbury’s restart.”⁴⁰⁶

204. Resolute’s problem is that a theory coupled with a forecast does not *show* that damages were incurred. Dr. Kaplan’s economic theory of causation and Dr. Hausman’s RISI forecast-based quantification amount to guesswork, not proof. Canada pointed out the Claimant’s failure to prove proximate cause in its Counter-Memorial.⁴⁰⁷ Resolute responded that “Canada and its experts ... lack understanding of the economics”, “do not follow this well-accepted economic approach to damages,” and “prefer some other analytical approach than the ‘but for’ world”.⁴⁰⁸ However, it is the Claimant that is wrong, as a matter of law. In law, its approach fails for many reasons, but most of all because it does not isolate the harm of price erosion allegedly caused by the breach from all of the other market factors affecting prices.

205. One of those market factors is highlighted by Dr. Kaplan himself: the effect of pulp costs. Canada pointed out that, based on economic theory, SC paper prices should have experienced a

⁴⁰⁴ Reply Expert Witness Statement of Jerry Hausman, Ph.D, 6 December 2019 (“Hausman-3”), ¶ 6; Reply of Seth T. Kaplan, Ph.D., 6 December 2019 (“Kaplan-2”), ¶ 33.

⁴⁰⁵ Kaplan-2, ¶ 4, Hausman-3, ¶ 3.

⁴⁰⁶ Claimant’s Reply, ¶ 368.

⁴⁰⁷ Canada’s Counter-Memorial, ¶¶ 339-345.

⁴⁰⁸ Claimant’s Reply, ¶¶ 378, 384; Kaplan-2, ¶ 33; Hausman-3, ¶ 6, p. 1.

“ [REDACTED] 409
However, in 2011/2012, SC paper prices did not go up; they weakened and there was excess supply. Dr. Kaplan explains that the expected jump in SC paper prices never occurred because Bleached Softwood Kraft Pulp costs were so low.⁴¹⁰ If Resolute’s own expert is of the opinion that one cost factor can totally offset the price effects of the removal of 360,000 MT of SC paper supply from the market, then surely it cannot expect the Tribunal to accept its position that 16 years of price erosion in the SC paper market will have been caused by PHP’s re-entry alone. The downfall of the Claimant’s damages methodology is that it attributes all of the price erosion to one cause only, never addressing other market events or facts.

206. Dr. Hausman feigns surprise that Canada’s experts point to other events and factors, arguing that there is no other analytical approach than his “well-accepted” but-for economic approach.⁴¹¹ However, operating in the but-for world does not entitle the Claimant to pretend that other market factors did not cause its prices to fall in the real world. It also does not allow the Claimant to pretend that the price increases forecasted in October 2011 by RISI would have been borne out, when we know that they were based on incorrect assumptions. RISI’s forecast was not based on accurate predictions of economic growth or exchange rates, but even more significantly, it [REDACTED]

[REDACTED] 412
Resolute’s sales alone were down 100 MT that year.⁴¹³ Already from 2012, *before the alleged breach even occurred*, real world events rendered the RISI forecast defective. The Claimant’s damages case fails because it relies on a but-for world that is constructed using speculative forecasts built on false assumptions.

⁴⁰⁹ **R-470**, [REDACTED] pp. 68, 61, 64; Canada’s Counter-Memorial, ¶¶ 355-356, 383.

⁴¹⁰ Kaplan-2, ¶ 54. Dr. Kaplan’s explanation for a price offset being caused by a decrease in Bleached Softwood Kraft Pulp costs in 2012 is contradictory to the explanation offered in his first report where he described “stable” prices following the closure of the Port Hawkesbury mill in 2011 as “offset by declining demand.” Kaplan-1, ¶ 49, fn. 79.

⁴¹¹ Hausman-3, ¶ 6, p. 1.

⁴¹² Canada’s Counter-Memorial, ¶ 353, citing **R-235**, [REDACTED] ¶ 21.

⁴¹³ **R-246**, Resolute Forest Products Inc., Annual Report for the Fiscal Year Ended December 31, 2011 (Form 10-K); **R-247**, Resolute Forest Products Inc., Annual Report for the Fiscal Year Ended December 31, 2012 (Form 10-K); Steger-1, Schedule 10.

207. Ultimately, even if the Claimant succeeds in proving that the “single ensemble of measures” caused a breach of NAFTA,⁴¹⁴ it cannot be awarded any damages because it has chosen a means of proving and quantifying its damages – the price erosion of its products sold – that is wholly inappropriate. It is too speculative, indirect and remote for a sufficient causal link to be established between the alleged breach and the harm. Since Resolute’s methodology fails to isolate any injury caused by the breach from other market effects causing its SC paper prices to fall, it is impossible to quantify its alleged damages with reasonable certainty. Pointing to another incorrect forecast, [REDACTED], does nothing to save the Claimant’s case. [REDACTED] that were common to all forecasters, including RISI. For Resolute to speculatively project damages 16 years into the future based on any prognostication defies logic. A projection of a single day into the future is equally unacceptable when it is based on incorrect assumptions. By purposely ignoring important market factors that affected prices in the real world and/or would have affected them in the but-for world, Resolute’s claim for damages fails.

B. Resolute Fails to Prove Legal Causation

1. The Claimant’s Request for a Simplified and “Flexible” Damages Test that Does Not Isolate the Harm Caused by the Alleged Breach Is Unsupported by Law

208. Canada laid out the elements that the Claimant must establish to demonstrate causation at customary international law in its Counter-Memorial.⁴¹⁵ To summarize, the burden is on the Claimant to prove causation of its injury by the breach of the NAFTA, which requires that the damage it suffered arose directly from the breach, not from other causes.⁴¹⁶ As the tribunal in *Romp petrol* said, “[t]o the extent [...] that a claimant chooses to put its claim [...] in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary

⁴¹⁴ Claimant’s Reply, ¶ 30. Canada remains of the view that if any one of the impugned measures are compliant with NAFTA or dismissed as outside of the Tribunal’s jurisdiction, the only option for the Tribunal would be to award no damages due to the Claimant’s position that without the entire package of measures “PHP never would have re-entered the market and Resolute would not have been damaged.” The Claimant has not provided any other means of quantifying its damages. See Canada’s Counter-Memorial, ¶¶ 373-376.

⁴¹⁵ Canada’s Counter-Memorial, ¶¶ 329-335.

⁴¹⁶ Canada’s Counter-Memorial, ¶¶ 329-335.

causal link between the loss or damage and the treaty breach”.⁴¹⁷ A necessary starting point for the construction of a but-for analysis to any damages assessment is isolating the impact of the alleged harm since the State is not responsible for harm that it did not cause.⁴¹⁸

209. In response, Resolute argues that to prove causation, it must merely show that the alleged injury was a “foreseeable consequence of the breach” and that this is a “flexible” test.⁴¹⁹ Further, it argues that “compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”⁴²⁰ To support its position, the Claimant relies on a short string of cases involving lost profits,⁴²¹ but, unlike the case at hand, the claimants in those cases proved proximate harm and were able to quantify the losses with reasonable certainty. The decisions it cites awarded damages based on lost sales,⁴²² the fair market value of an investment,⁴²³ and replacement costs,⁴²⁴ all of which were established, assessable and tied directly to the respective breaches.⁴²⁵ Resolute, however, advances none of these heads of damage, including lost sales, for which it adduced no

⁴¹⁷ **RL-190**, *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013 (“*Rompetrol – Award*”), ¶ 190.

⁴¹⁸ **RL-179**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002 (“*S.D. Myers – Second Partial Award*”), ¶ 140: (“damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.”) NAFTA Article 1116(1) itself limits recoverable damages to those which occur “by reason of, or arising out of” the wrongful act.

⁴¹⁹ Claimant’s Reply, ¶ 369.

⁴²⁰ Claimant’s Reply, ¶ 369, citing **CL-145**, ILC Article 36.

⁴²¹ Claimant’s Reply, ¶ 369 fn. 602.

⁴²² **RL-092**, *ADM – Award*, ¶ 287.

⁴²³ **CL-214**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001 (“*CME – Partial Award*”), ¶ 618.

⁴²⁴ **CL-231**, *Hrvatska Elektroprivreda d.d.v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015 (“*Hrvatska – Award*”), ¶¶ 362-363 (did not award lost profits). The Tribunal also noted that the Respondent was correct that only damage actually incurred represents the upper limit of the amount of damages and that, “HEP cannot recover damages that it did not suffer. These are trite principles of international law.” (See ¶ 363).

⁴²⁵ In **CL-231**, *Hrvatska – Award*, the tribunal employed a “Replacement Model” to calculate the difference in quantifiable costs incurred by the Claimant in replacing electricity that should have been supplied under a breached agreement from the cost of electricity that should have been applied under that agreement (¶ 348). In **RL-092**, *ADM – Award*, the tribunal found that the loss of profits was triggered by a loss of sales and that the Claimants submitted “sufficient evidence” to reflect the sharp drop in sales immediately following the alleged breach (¶ 287). In **CL-214**, *CME – Partial Award*, damages were calculated based on the fair market value of a going concern and on the basis of an arms-length offer to buy the company (¶ 618). The parties’ DCF calculations were ultimately not used as the tribunal found them to “contain a rather high element of uncertainty and speculation.” (**RL-217**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Final Award, 14 March 2003, ¶ 604.

evidence and did not even attempt to quantify.⁴²⁶ Instead, Resolute’s claim rests solely on price erosion. It strives to establish that the alleged breach caused *some* decline in prices over a 16-year period, but its methodology fails to distinguish and quantify the decline caused by the alleged breach from the effects of a multitude of other relevant factors.

210. Resolute has not identified a single award, or even a domestic court decision, that granted lost profits based on a claim for price erosion of products sold or a single author that notes the availability of this method.⁴²⁷ As will be discussed below, price erosion is occasionally put forward in patent disputes, which is what inspired Dr. Hausman’s economic approach,⁴²⁸ but even there it is not a favoured method. It is often rejected for the same reason that it must be rejected here: the patent’s price drop after the infringement may be attributable to a variety of other causes, “including shifts in demand or marketing.”⁴²⁹

211. The cases on which Resolute relies do not alter the necessary requirement, under customary international law, to identify the causal link between the harm and alleged breach.⁴³⁰ In its quest for a flexible damages theory, the Claimant would prefer to drop this requirement, but as one of the decisions it relies upon clearly states, “lost profits are allowable insofar as the Claimants prove that the alleged damage is not *speculative or uncertain* – i.e., that the profits anticipated were probable or reasonably anticipated and not merely possible.”⁴³¹

⁴²⁶ See Steger-2, ¶¶ 7(b), 14, fn. 12.

⁴²⁷ Leading commentaries on damages in investment treaty arbitration contain no discussion of price erosion on products sold as a possible basis for awarding damages. See Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008), Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2017) and John Trenor, *The Guide to Damages in International Arbitration*, 3rd ed. (London: Law Business Research, Ltd, 2018).

⁴²⁸ Hausman-3, ¶ 5.

⁴²⁹ See below, Part VI.B.3, citing **R-471**, Thomas F. Cotter, *Comparative Patent Remedies: A Legal and Economic Analysis*, Oxford, (2013), p. 109.

⁴³⁰ Canada’s Counter-Memorial, ¶¶ 329-330.

⁴³¹ **RL-092**, *ADM – Award*, ¶ 285. Academic commentary has also noted that tribunals’ discretion in computing damages “does not extend to speculative, uncertain, or hypothetical damages.” See **RL-218**, Borzu Sabahi, Kabir Duggal and Nicholas Birch, *Principles Limiting the Amount of Compensation*, in Christina L. Beharry, *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Leiden: Brill Nijhoff, 2018), p. 337.

212. Lost profits is a controversial subject in international law. The ILC has noted that lost profits “have not been as commonly awarded in practice as compensation for accrued losses,” and particularly not where their determination is “uncertain and their calculation is speculative.”⁴³²

213. The ILC specifically commented on the unsettled nature of the law in 1993 when it said:

The relative uncertainty in the case-law discloses three questions which give rise to controversy: a) In what cases are loss of profits recoverable b) Over what period of time are they recoverable? And c) How should they be calculated? ... The state of the law on all these questions is, in the Commission’s view, not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them.⁴³³

214. The ILC’s statement still captures the principal difficulties associated with many lost profits claims to this day, and why many tribunals consider these claims not to be compensable. While there is no doubt that customary international law recognizes the right to loss of profits, the ILC Articles make clear that it is only “insofar as it is established,”⁴³⁴ and it is their establishment that remains controversial. Indeed, in this dispute, Canada and the Claimant would answer each of the ILC’s questions cited above differently.

215. The first question – whether lost profits are recoverable – is one that the Claimant presumes and one that Canada contests. Canada has admitted that PHP’s re-entry had an effect on the market, but contests the extent of the effect, particularly with respect to Resolute (as opposed to paper producers that compete directly with PHP, including European producers of SCA+ paper and

⁴³² **RL-032**, ILC Articles, Article 36, Commentary (27); **RL-192**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007 (“*LG&E – Award*”), ¶ 96; See also **RL-219**, *Amoco International Finance Corporation v. Iran* (IUSCT Case No. 56) Partial Award, 14 July 1987 (“*Amoco – Partial Award*”), ¶ 238: (“One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.”); **RL-220**, Jiménez de Aréchaga, E, *International Responsibility*, in Max Sorensen (ed.), *Manual of Public International Law* (Toronto: Macmillan, 1968), p. 570, as cited in **RL-192**, *LG&E – Award*, ¶ 89: (“Prospective gains which are highly conjectural, ‘too remote or speculative’ are disallowed by arbitral tribunals.”); **RL-221**, *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38) Award, 31 July 2019, ¶ 478, citing **RL-173**, *Gemplus, S.A., et al. v. Mexico* (ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010, Part XII, ¶ 12-56: (“Under international law and the BITS, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.”)

⁴³³ **RL-222**, Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, Document A/48/10, ¶ 39 at p. 76.

⁴³⁴ **RL-032**, ILC Articles, Article 36(2).

producers of coated mechanical paper).⁴³⁵ The only proof that Resolute offers is an economic theory on the effect that PHP's re-entry had on the prices of Resolute's mediocre SCA, SCB and SNC grades of paper.⁴³⁶

216. The second question – over what period are lost profits recoverable – is also contested in this case. The Claimant suggests that it is owed lost profits based on price erosion until its mills stop producing paper, which in Dr. Hausman's opinion is no less than 16 years from 2013.⁴³⁷ He has no reason for selecting this period other than his confidence that Resolute will still be in business in 2028. However, the fact that Resolute may be operating 16 years into the future, and whether and how a discount rate should be applied, does not answer the question of how long into the future PHP's re-entry allegedly damaged the Claimant. Relying on Pöyry and Peter Steger's expert opinions as well as the contemporaneous views of industry commentators, including RISI, Canada argued⁴³⁸ that PHP's supply was [REDACTED]⁴³⁹ and that PHP "[REDACTED]⁴⁴⁰, which is demonstrated by the fact that SC paper was "[REDACTED]⁴⁴¹ just six months after PHP's full market entry.⁴⁴¹ The effect of PHP's re-entry was mainly anticipatory and once it became apparent that PHP was servicing customers previously absent from the SC paper market, prices "came back up."⁴⁴² Resolute's Reply Memorial is silent on this contemporaneous evidence and the only point that Dr. Hausman raises in response is that [REDACTED]. However [REDACTED]

⁴³⁵ AFRY/Pöyry-2, ¶¶ 2, 13, 34.

⁴³⁶ Claimant's Reply, ¶ 373.

⁴³⁷ Hausman-3, ¶ 32.

⁴³⁸ Canada's Counter-Memorial, ¶ 322; Steger-1, ¶ 86; AFRY/Pöyry-1, ¶ 85; AFRY/Pöyry-2, ¶ 35.

⁴³⁹ **R-259**, [REDACTED] p. 15.

⁴⁴⁰ **R-261**, [REDACTED] p. 24.

⁴⁴¹ **R-263**, [REDACTED] p. 24.

⁴⁴² **C-236**, Transcript of Proceedings before U.S. International Trade Commission *in re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015), pp. 170-171, Testimony of John Coche.

the real world and the likely effects that would have occurred in the but-for world of PHP not returning to the market.

218. As will be shown in the next three sections, the Claimant and Canada disagree over all of the fundamental requirements to show proximate cause when it comes to a claim of lost profits.

2. The Claimant’s But-For Analysis Must Be Rejected Because it Fails to Isolate the Price Erosion of the Alleged Breach from Price Decline Caused by Other Factors

219. Resolute argues that Canada wrongly considers that factors other than the re-emergence of Port Hawkesbury caused alleged price erosion.⁴⁴⁷ However, Resolute misunderstands Canada’s argument. Canada is not saying that Resolute’s prices were not affected by PHP’s re-entry, only that it is impossible that PHP’s reopening is responsible for *all* of the potential price erosion that Resolute may have experienced or will experience between 2013 and 2028. As Pöyry made clear in its expert report, and noting Dr. Hausman’s acknowledgement that “I agree with this statement”⁴⁴⁸: “paper prices are not dependent only on supply volume but also on economic growth, factor costs and exchange rates.”⁴⁴⁹

220. Dr. Kaplan also acknowledges that there are other drivers of price erosion when he discusses one particular cost: Bleached Softwood Kraft Pulp.⁴⁵⁰ He raised the matter in response to Canada’s argument that, in late 2011 and 2012, when PHP had exited the market, SC paper prices did not follow the common sense economics conclusion expected by forecasters. RISI, for example, expected a “[REDACTED]”,⁴⁵¹ yet prices did not increase at all, they weakened.⁴⁵²

221. According to Dr. Kaplan, price erosion at that time was caused by the “decline in raw materials costs.”⁴⁵³ But the Claimant cannot have it both ways. It cannot, on the one hand, argue that common sense economics dictate “how” the prices will necessarily go down with the addition

⁴⁴⁷ Claimant’s Reply, ¶ 367.

⁴⁴⁸ Hausman-3, ¶¶ 6-7.

⁴⁴⁹ AFRY/Pöyry-1, ¶ 69.

⁴⁵⁰ Kaplan-2, ¶ 54.

⁴⁵¹ R-471, [REDACTED].

⁴⁵² AFRY/Pöyry-1, ¶ 42; Canada’s Counter-Memorial, ¶ 383.

⁴⁵³ Kaplan-2, ¶ 54; Claimant’s Reply, ¶ 372.

of new supply,⁴⁵⁴ irrespective of factor costs, economic growth, exchange rates, etc., and, on the other hand, argue that prices did not go up with the removal of supply on account of a “significant cost item.”⁴⁵⁵

222. Pulp prices is just one of many relevant factors that Resolute fails to account for its damages methodology, which improperly attributes all of the drop in SC paper prices to the re-entry of PHP. A market as complex as the North American SC paper market, which is subject to variables such as shifting grades, quality differences, demand shocks, various supply shocks, European competition, economic growth and foreign exchange rates cannot be analysed with reliable accuracy by a but-for model that ignores these factors.⁴⁵⁶ Dr. Kaplan specifically acknowledges that his economic causation analysis does not consider any of these factors when he states that his “method was not to trace the price of SCP *over time* and try to segregate the effects of changes in all possible supply and demand drivers.”⁴⁵⁷

223. Recognizing that he does not segregate other effects on prices either, Dr. Hausman turns to criticizing Canada’s experts for not opining on what the price of SC paper would have been without PHP’s re-entry.⁴⁵⁸ “I agree” writes Dr. Hausman, “but it does not answer the fundamental question” of “what would SCP prices have been.”⁴⁵⁹ His critique misses the mark because this is not a question for Canada to answer. Resolute chose price erosion as its means of calculating damages. It could have chosen a more reliable and tested method. It made this election even though its expert, Dr. Hausman, recognizes that the method fails to isolate the effects of PHP’s re-entry from all other effects on Resolute’s SC paper prices.

224. The burden rests squarely on Resolute’s shoulders to explain why the Tribunal should accept its damages methodology, but the Claimant has no explanation. Instead, it argues that it does not

⁴⁵⁴ At Kaplan-2, ¶ 16, Dr. Kaplan professes to “put forth a framework of analysis to directly assess *how* re-entry of a large, low-cost SCP mill affects the prices and shipments in that market” (emphasis added), however his framework does not measure how or how long in terms of quantification, nor does it segregate the effects from other price drivers. See Steger-2, ¶¶ 6-7.

⁴⁵⁵ Claimant’s Reply, ¶ 372.

⁴⁵⁶ AFRY/Pöyry-2, ¶¶ 9-14, 20, 30-37.

⁴⁵⁷ Kaplan-2, ¶ 50.

⁴⁵⁸ Hausman-3, ¶¶ 7, 8.

⁴⁵⁹ Hausman-3, ¶ 7.

matter if other factors contributed to price erosion, since, according to the Claimant, Canada is liable even if there are concurrent causes for the harm.⁴⁶⁰

3. The Claimant Cannot Rely on Contributory Causes to Avoid its Obligation to Show Proximate Cause

225. The Claimant argues that even if additional factors participated in causing its damages, Canada would still be fully liable.⁴⁶¹ It relies on the principle of contributory causation, as articulated in *CME* and *Gavazzi*, to attempt to avoid proving proximate causation.⁴⁶²

226. The cases that Resolute cites are inapposite as the concurrent cause of harm in those cases were the actions of identifiable third party tortfeasors, as opposed to market effects on prices.⁴⁶³ Market factors – like economic growth, exchange rates, and costs – are not wrongs committed by another tortfeasor. The principle that a State should not be allowed to escape responsibility by pointing the finger at another wrong-doer is well-known, but it applies only after the responsibility of that State has been established. It cannot be invoked without first having proven proximate cause.

227. In any event, the approach in *CME* favoured by Resolute⁴⁶⁴ has been specifically rejected by other tribunals, including the tribunal in *Lauder*,⁴⁶⁵ a case based on the same facts. That tribunal rejected the investor’s claim for damages on the basis that the breach in question was “too remote to qualify as a relevant cause for the harm caused,”⁴⁶⁶ finding that “even if the breach [...] constitutes one of several ‘sine qua non’ acts, this alone is not sufficient.”⁴⁶⁷ The tribunal also noted:

In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. [T]he Claimant therefore has

⁴⁶⁰ Claimant’s Reply, ¶ 382.

⁴⁶¹ Claimant’s Reply, ¶ 382.

⁴⁶² Claimant’s Reply, ¶¶ 382, 383.

⁴⁶³ **CL-214**, *CME – Partial Award*, ¶ 582; **CL-218**, *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25) Excerpts of Award, 18 April 2017, ¶ 275.

⁴⁶⁴ Claimant’s Reply, ¶ 382.

⁴⁶⁵ **CL-213**, *Ronald S. Lauder v. Czech Republic* (UNCITRAL) Final Award, 3 September 2001 (“*Lauder – Award*”).

⁴⁶⁶ **CL-213**, *Lauder - Award*, ¶ 235.

⁴⁶⁷ **CL-213**, *Lauder - Award*, ¶ 234.

to show that the last, direct act, the immediate cause [...] did not become a superseding cause and thereby proximate cause.⁴⁶⁸

228. In *Rompetrol*, the tribunal rejected the Claimant’s request for damages to its stock price because its damages study was incapable of “differentiating between the market effects of a company’s coming under investigation by the authorities for a legitimate purpose and the asserted incremental effects of illegalities that happened in the course of such an investigation.”⁴⁶⁹ The *Rompetrol* tribunal noted that the event study method did not meet the test of establishing a sufficient causal nexus between the claimed illegality and the asserted loss and that “no alternative method has been advanced that would put the Tribunal in a position to determine whether any quantifiable economic loss to the present Claimant flowed specifically from the potentially actionable events.”⁴⁷⁰

229. As in *Rompetrol*, the Claimant’s contention that Canada is responsible for any and all drops in SC paper prices, whatever their cause, does not establish a causal nexus between the alleged breach and the harm.

4. Resolute’s Proof of Price Erosion Is Too Indirect, Speculative and Does Not Provide Reasonable Certainty

a) Price Erosion Is Not an Appropriate Way to Calculate Damages in this Dispute

230. The Claimant presents price erosion as though it is an acceptable means of quantifying damages, based on Dr. Hausman’s comparison to a patent infringement case,⁴⁷¹ yet it fails to advance any legal authority supporting its position, whether at international or domestic law.⁴⁷² Instead, Resolute seeks to justify its use of price erosion on the basis that its experts believe it to be a “well-accepted” and “widely used” economic approach to damages.⁴⁷³ However, as widely

⁴⁶⁸ CL-213, *Lauder - Award*, ¶ 234.

⁴⁶⁹ RL-190, *Rompetrol – Award*, ¶¶ 286, 288.

⁴⁷⁰ RL-190, *Rompetrol – Award*, ¶ 288.

⁴⁷¹ Hausman-3, ¶ 5.

⁴⁷² Hausman-3, ¶ 5.

⁴⁷³ Hausman-3, ¶ 6; Kaplan-2, ¶ 33.

accepted as Drs. Kaplan and Hausman’s economic theory might be in economic circles, it has not been accepted in investor-state arbitration.

231. The only instance that Canada has found of a claim for price erosion in an investor-state context is *Rompetrol*, where the claimant argued, based on an expert event study, that its stock price dropped as a result of criminal investigations conducted by the respondent.⁴⁷⁴ The tribunal closely scrutinized the expert event study, and while not doubting its high quality,⁴⁷⁵ ultimately rejected the claim on the basis that the event study did not show a “sufficient causal nexus between the claimed illegality and the asserted loss” in part because it was incapable of differentiating between the effects caused by the breach and the market effects not related to the breach:

The Tribunal therefore could only accept as a valid technique for the quantification of economic damages one which, proceeding from the prior need to establish by the appropriate standard of proof a sufficient causal nexus between the claimed illegality and the asserted loss, allows a suitably objective comparison then to be made between the status quo ante and the Claimant’s situation at the time that suit is brought. The event study method as advanced in these proceedings fails that test, and no alternative method has been advanced that would put the Tribunal in a position to determine whether any quantifiable economic loss to the present Claimant flowed specifically from the potentially actionable event.⁴⁷⁶

232. At domestic law, price erosion has occasionally been awarded in patent disputes where competition from an infringing product improperly reduces the price a patent holder may obtain for its product.⁴⁷⁷ However, it is noteworthy that even in that setting, “[g]lobalized competition, turbulent economic conditions, and the cost and complexity of price erosion analyses have reduced the recovery (and most likely pursuit) of price erosion claims.”⁴⁷⁸

⁴⁷⁴ **RL-190**, *Rompetrol – Award*, ¶ 283.

⁴⁷⁵ **RL-190**, *Rompetrol – Award*, ¶ 281.

⁴⁷⁶ **RL-190**, *Rompetrol – Award*, ¶ 288.

⁴⁷⁷ **R-472**, David M. N. Bohrer, Matt Lynde, and Elizabeth M. N. Morris, *The Shifting Sands of Price Erosion: Price Erosion Damages Shift by Tens of Millions of Dollars Depending upon the Admissibility of Pre-Notice Eroded Prices*, 25 Santa Clara High Tech. L.J. 723 (2012), p. 737. See also **R-473**, Roy Epstein, *The Market Share Rule with Price Erosion: Patent Infringement Lost Profits Damages after Crystal*, AIPLA Quarterly Journal, Vol. 31. No. 1. (2003), p. 9.

⁴⁷⁸ **R-474**, PWC, *2012 Patent Litigation Study: Litigation continues to rise amid growing awareness of patent value*, p. 11.

233. Arguably, the unique features of patent infringement cases lend themselves to findings of price erosion because they typically involve a less complex market based on the fact that the patent holder enjoys a legal monopoly.⁴⁷⁹ Where the patent holder's monopoly is infringed upon by an illegal market entrant, it is theoretically possible to measure the amount by which the patent holder had to actively lower its prices given that there are only two parties in question, the patent-holder and an infringer.⁴⁸⁰ Where the market is not quite that circumscribed and non-infringing substitutes exist, the court may refuse to award lost profits.

234. Another important element of price erosion claims is the recognition that fewer sales will be made at higher prices, so “in a credible economic analysis, the patentee cannot show entitlement to a higher price divorced from the effect of that higher price on demand for the product. In other words, the patentee must also present evidence of the (presumably reduced) amount of product the patentee would have sold at the higher price.”⁴⁸¹ Accurate calculations of price erosion damages must account for such changes in volumes relative to price, which is known as demand elasticity. Courts view “price erosion damages that do not account for demand elasticity as “less than credible”.”⁴⁸²

235. In sum, although price erosion has been used to award lost profits in patent disputes in some circumstances, it has not been without significant complication. Globalized competition, non-infringing substitutes, turbulent economic conditions and difficulties in discerning demand elasticity have caused price erosion to fall out of favour as a remedy to patent disputes.⁴⁸³ Professor

⁴⁷⁹ **R-475**, *Kalman v. Berlyn Corp.*, No. CIV. A. 82-0346-F, 1988 WL 156126 (Jul. 25, 1988), at *8: (“A patentee may recover lost profits by proving that but for the infringement, the patentee would have charged higher prices. [...] When the relevant market includes only two competitors, one may infer that the patentee would have charged higher prices but for the competition caused by the infringement. [...] Having found that only two competitors, plaintiff and defendant, participated in the relevant market, the Court finds proper an inference that plaintiff would have charged higher prices but for defendant's t infringement.”)

⁴⁸⁰ **R-476**, Andrew Harington, Alexander Stack, Dimitrios Dimitropoulos, *Calculating Monetary Remedies in Intellectual Property Cases in Canada*, A Reference Book of Principles and Case Law (2018 Edition), p. 134.

⁴⁸¹ **R-477**, *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l Inc.*, No. 99-1558 (Fed. Cir. Mar. 7, 2001) at p. 18 of pdf. *See also R-478*, *In re Mahurkar Patent Litigation*, District Court, N.D. Illinois, (28 U.S.P.Q.2d 1801), August 18, 1993 and October 22, 1993.

⁴⁸² **R-479**, James Nieberding, The But-For Market, Economic Damages, and Elasticity Considerations, *Economics Committee Newsletter* Vol. 9 No. 2. Fall 2009, p. 19; AFRY/Pöyry-2, ¶ 24; Steger-2, ¶¶ 14 (fn.12 “Dr. Hausman's model explicitly calculates no change in Resolute's sales volumes as between his but-for world versus Resolute's actuals in the real world.”), 17, 27.

⁴⁸³ **R-471**, Thomas F. Cotter, *Comparative Patent Remedies: A Legal and Economic Analysis*, Oxford, (2013), p. 109.

Cotter writes that although courts have occasionally adopted a price erosion analysis that compares the patentee's profits on sales before and after the infringement over some relevant period, this approach is not favoured today "for obvious reasons":

The amount of the patentee's profit before and after infringement may be attributable to a variety of other causes not limited to the infringement, including shifts in demand or marketing; ... Recognizing these flaws, courts today would permit computation of the patentee's lost profit using these techniques only when the evidence supports the reasonableness of the underlying assumptions, that no other causes led to the loss of profits or that every sale the defendant made would have gone to the patentee.⁴⁸⁴

236. Resolute's damages case suffers from exactly the same flaws. Its price erosion claim fails to isolate the harm caused by the alleged breach, requesting damages that could just have easily arisen out of globalized competition in SC paper, substitution by non-SC paper, inaccurate predictions concerning economic growth and exchange rates, and an assumption that Resolute's mills would have sold the same amount of paper at a higher price.

237. Ultimately, the Claimant's price erosion claim has no foundation in international investment law. Dr. Hausman likens the damages scenario to a patent infringement case,⁴⁸⁵ but Resolute is not akin to a patent holder with a monopoly in the market, and Dr. Hausman's approach fails to rule out price effects from other causes than the alleged breach.

b) Resolute Has Shown at Most an Indirect Effect on the Price of its Low Quality Paper Products with the Re-Emergence of Port Hawkesbury's High Quality Paper Supply

238. Canada argued in its Counter-Memorial that Resolute's SCB/SNC paper (which constitutes the majority of its [REDACTED])⁴⁸⁶ competes with standard grades of UM paper such as high bright news, whereas PHP's high quality SCA+ grades (which constitutes the majority of its [REDACTED] annual production) are in direct competition with North American CM paper and European imports.⁴⁸⁷ As a result, any effect that PHP had on Resolute's prices was at most indirect, and at the same time, "the two main shock absorbers of PHP's re-entry into the

⁴⁸⁴ R-471, Thomas F. Cotter, *Comparative Patent Remedies: A Legal and Economic Analysis*, Oxford, (2013), p. 109.

⁴⁸⁵ Hausman-3, ¶5.

⁴⁸⁶ Steger-1, Sch. 11, p. 54.

⁴⁸⁷ Canada's Counter-Memorial, ¶ 347.

market were the European SC paper suppliers and the CM suppliers”.⁴⁸⁸ In addition, Canada also pointed out that CM paper suppliers or European SCA+ imports would have filled the void left by PHP, not Resolute.⁴⁸⁹

239. In its Reply Memorial, Resolute admits it “does not produce SCA+ paper”,⁴⁹⁰ but it argues that this does not matter because “there is overlap in competition” in SCA paper, and because “at the margin SCA competes with SCA+, and is therefore affected by changes in the prices of SCA+”.⁴⁹¹ It also argues that there is an “extremely high correlation between SCA and SCB grades,”⁴⁹² and finally that the United States International Trade Commission (“U.S. ITC”) rejected arguments regarding the substitutability of higher grades (CM and SCA+) and lower grades (SNC/SCB and UM, like high bright news) paper.⁴⁹³

240. Resolute’s argument that there is correlation between all SC paper prices and therefore any increase in the supply of SCA+ paper will cause the erosion of its SCA, SCB and SNC paper prices⁴⁹⁴ is, by definition, an indirect theory of causation that fails to meet the legal standard necessary to award damages. As is well recognized, simple correlation does not imply causation.⁴⁹⁵ The assumption that changes in SCA+ supply affected SCA/SCB/SNC prices because their price

⁴⁸⁸ Canada’s Counter-Memorial, ¶¶ 145, 347, 351.

⁴⁸⁹ Canada’s Counter-Memorial, ¶ 371; AFRY/Pöyry-1, ¶¶ 36, 44, 50.

⁴⁹⁰ Hausman-3, ¶ 22.

⁴⁹¹ Claimant’s Reply, ¶ 375; Kaplan-2, ¶ 47.

⁴⁹² Claimant’s Reply, ¶ 373.

⁴⁹³ Claimant’s Reply, ¶ 376.

⁴⁹⁴ Claimant’s Memorial, ¶ 202; Expert Witness Report of Seth T. Kaplan, 28 December 2018 (“Kaplan-1”), ¶ 37.

⁴⁹⁵ **RL-226**, Lauren Stiroh, *Proving Causation in Damages Analyses*, in *Economics of Antitrust: Complex Issues in a Dynamic Economy*, 2007 (“Stiroh”), p. 181: ([...] an empirical correlation between the “bad act” and the calculated damages does not imply causation.”), p. 184: (“The distinction between correlation and causation is the presence of a theory, a chain of reasoning that explains why the cause leads to the effect. That the effect has followed the cause in the past is not sufficient.”) See AFRY/Pöyry-2, ¶ 47, explaining that Resolute does not advance an adequate theory to demonstrate how an increase in SCA+ supply would cause the alleged impacts on lower paper grades given the nature of the SC paper market to include substitution and imports. See also, **RL-227**, Boaz Moselle and Ronnie Barnes, *The Use of Econometric and Statistical Analysis and Tools*, in John Trenor, *The Guide to Damages in International Arbitration*, 2nd ed. (London: Law Business Research, Ltd., 2018), p. 304: (One cannot necessarily conclude that there is a causal relationship between two variables as no matter how sophisticated economic techniques are utilized to interpret such data, “the exercise becomes one of what is disparagingly referred to as “data mining”, where chance correlations are confused with meaningful relations.”)

movements are correlated is precisely the type of weak causal linkage that tribunals reject.⁴⁹⁶ The causal link that Resolute puts forward but fails to prove is that: i) a “single ensemble of measures” allegedly amounting to more than \$124.5 million caused PHP’s re-entry⁴⁹⁷ and an increased supply of mostly SCA+ paper that Resolute did not produce, ii) although that supply was fully absorbed into the market largely by taking market share from CM and European imports,⁴⁹⁸ drove down the price of Resolute’s SCA, SCB and SNC grades of paper for a 16-year period; and iii) during this period, nothing else caused any price erosion (including slower economic growth, competition from other CM, SC or UM paper suppliers, etc.). The leaps of logic required to jump from the alleged breach to the harm are too great to justify Resolute’s theory of causation. The causal link is simply too remote.

241. That the U.S. ITC rejected arguments on grade substitution should in no way guide this Tribunal. While it is true that the U.S. ITC was not concerned with grade substitution, this was because its investigation was circumscribed to SC paper only. The U.S. ITC’s mandate is to assess injury of the petitioners based on a like product analysis,⁴⁹⁹ which is different than the test of proximate cause that is before this Tribunal. In the face of incontrovertible evidence that CM paper was one of the main shock absorbers of PHP’s re-entry in 2013, this Tribunal cannot simply dismiss the importance of grade substitution in the same way that the U.S. ITC did. In addition to the evidence already presented,⁵⁰⁰ Resolute’s own documents are replete with statements about the market share that PHP and other SCA+ suppliers took from CM paper suppliers. Resolute’s documents note: [REDACTED]⁵⁰¹ that

⁴⁹⁶ See for example, **RL-190**, *Rompetrol – Award*, ¶¶ 287-288; **RL-180**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶¶ 787, 807.

⁴⁹⁷ Kaplan-1, ¶¶ 18, 24.

⁴⁹⁸ **R-236**, [REDACTED] p. 77; AFRY/Pöyry-1, ¶ 89; AFRY/Pöyry-2, ¶ 35.

⁴⁹⁹ **C-054**, *In re Supercalendered Paper from Canada*, U.S. International Trade Commission Inv. No. 701-TA-530, Final Determination (Dec. 2015), p. I-7.

⁵⁰⁰ Canada’s Counter-Memorial, ¶¶ 348-349.

⁵⁰¹ **R-480**, [REDACTED]; **R-481**, [REDACTED]; **R-482**, [REDACTED]; **R-484**, [REDACTED]; **R-485**, [REDACTED]

[REDACTED]
[REDACTED]⁵⁰² and [REDACTED]
[REDACTED]⁵⁰³ RISI, the Claimant’s chosen market forecaster,
similarly concluded less than six months after PHP’s re-entry that its supply [REDACTED]
[REDACTED]
[REDACTED]

242. Second, Resolute’s Board of Directors’ documents are equally replete with statements about
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]⁵⁰⁷ This was also something the ITC did not consider in its
scope of investigation.

243. Third, Resolute’s Board of Directors’ documents and other contemporaneous evidence
emphasize the important role played by European imports. In contrast to Drs. Kaplan and
Hausman’s dismissal of imports as “minor” and “limited”,⁵⁰⁸ RISI refers to cuts in European
imports as [REDACTED].⁵⁰⁹ Indeed, SC-A/A+ imports from Europe
dropped by 111,000 MT, from 385,000 MT in 2011 to 274,000 MT in 2014.⁵¹⁰ Moreover,

⁵⁰² R-486, [REDACTED]
[REDACTED]

⁵⁰³ R-486, [REDACTED]
[REDACTED]

⁵⁰⁴ R-236, [REDACTED] p. 77.

⁵⁰⁵ R-480, [REDACTED]
[REDACTED] R-481, [REDACTED]
[REDACTED] R-487
[REDACTED]
[REDACTED]

⁵⁰⁶ R-488, [REDACTED]
[REDACTED]

⁵⁰⁷ R-489, [REDACTED]
[REDACTED].

⁵⁰⁸ Kaplan-2, ¶¶ 64, 69; Hausman-3, fn. 11.

⁵⁰⁹ R-236, [REDACTED], p. 77.

⁵¹⁰ AFRY/Pöyry-2, ¶ 13.

European imports have continued to exert pressure, suggesting that had PHP not re-entered the market, they would have been vying for the market share that PHP and Irving took from CM paper producers. As RISI economist John Maine said in a 2017 interview, the paper “industry will also continue to battle imports as a means of balancing the market, but these battles will have marginal success at best as long as the real culprit driving up the imports, the strong dollar, remains unchecked.”⁵¹¹ Resolute’s [REDACTED] note the same thing, stating that the [REDACTED] [REDACTED]⁵¹² and that [REDACTED] [REDACTED]⁵¹³ Drs. Kaplan and Hausman may believe that the role of European imports is marginal, but the industry economists at RISI believed otherwise, and in the but-for world absent PHP, there is every reason to believe that imported volumes from Europe would have been greater.⁵¹⁴

244. In the face of substantial evidence that: a) PHP’s supply was absorbed by substitution from CM paper and cuts from European imports; b) Resolute faced mounting pressure from UM paper and newsprint suppliers; and c) European imports of SC paper continued to rise, it is inconceivable that PHP’s added supply directly caused all of Resolute’s price erosion. The effect that Resolute experienced from PHP’s added supply, if any, was indirect, not direct. Other than stating that SC paper prices are correlated, Resolute offers no causal (or economic) explanation of how changes at one end of the SC market drove prices at the other end.

245. If Resolute had undertaken a damages analysis that focused on actual overlap in production, rather than one that relies on indirect correlation, it would have excluded PHP’s SCA+ grades of paper, leaving it with an analysis based on a new supply of approximately [REDACTED], not 360,000 MT.⁵¹⁵ This amount compares closely to the amount of SCA paper that Resolute has been producing out of Kénogami, except that PHP’s paper is better quality. Resolute describes its

⁵¹¹ R-490, Paper 360 website excerpt, Mark Rushton, “Industry Trends in Graphic Paper” (2017), p. 2.

⁵¹² R-488, [REDACTED]

⁵¹³ R-482 [REDACTED]

⁵¹⁴ AFRY/Pöyry-2, ¶ 13.

⁵¹⁵ AFRY/Pöyry-1, ¶ 34; AFRY/Pöyry-2, ¶ 34; This figure is based on reporting by PPI Pulp and Paper Week that 20 percent of PHP’s approximately [REDACTED] production is SCA paper and 11 percent is SCB.

quality as [REDACTED],⁵¹⁶ which it recognizes [REDACTED].⁵¹⁷ In recognition that it is [REDACTED], Resolute has recently invested \$11 million to “enhance the Kénogami paper mill’s short-term competitiveness by modernizing equipment in order to produce high-grade SCA+ supercalendered paper, allowing the mill to access more favorable markets.”⁵¹⁸ If the Tribunal needed any other indication that Resolute and PHP play in different markets, it need look no further.

c) The Claimant’s Quantification of Damages is Based on Speculative Market Forecasts that Rely on False Assumptions and that Cannot Provide Reasonable Certainty

246. Dr. Hausman quantifies Resolute’s damage by employing a price erosion analysis based on an October 2011 RISI forecast, the type of which the Claimant itself had previously argued is speculative at best.⁵¹⁹ Canada demonstrated in its Counter-Memorial that this RISI forecast has been proven to be incorrect regarding, amongst other elements: forecasted volumes of supply without PHP’s re-entry, significant downgrading from coated mechanical paper to SCA+ grades, GDP growth and foreign exchange rates.⁵²⁰

247. In response to Canada’s argument that Resolute’s means of quantifying damages is speculative and not reasonably certain, the Claimant maintains its position that “Professor Jerry Hausman, using a combination of Resolute data and industry market forecasts of SC paper, *showed* that Resolute incurred ... damages because of Port Hawkesbury’s restart.”⁵²¹ Resolute’s problem is that forecasts do not “show”, they speculate. To award damages on the basis of an incorrect forecast would run counter to the general principle highlighted by Sir Ian Brownlie in his Separate

⁵¹⁶ Canada’s Counter-Memorial, ¶ 351; **R-230**, [REDACTED]

⁵¹⁷ **R-230**, [REDACTED]

⁵¹⁸ **R-427**, Resolute News Release, “Resolute invests \$38 million in its Kénogami mill in Québec” (Jan. 15, 2020).

⁵¹⁹ *Resolute Forest Products Inc. v. Canada* (UNCITRAL) Claimant’s Counter-Memorial on Jurisdiction, 22 February 2017, ¶¶ 88-91.

⁵²⁰ Canada’s Counter-Memorial, ¶ 385.

⁵²¹ Claimant’s Reply, ¶ 368 (emphasis added).

Opinion in *CME* “that merely speculative benefits, based upon unproven economic projections, do not count as investment or as returns.”⁵²²

248. The Claimant argues that Canada misunderstands that Dr. Hausman does not rely on RISI’s forecasted prices, but on RISI’s forecasted yearly change in prices, which it applies to Resolute’s actual mill net prices to establish quantum.⁵²³ The Claimant’s position is based on a distinction without a difference, since the yearly change in prices is necessarily based on the forecasted price of SC paper by RISI. One cannot determine the yearly percentage change without knowing what the yearly forecasted prices are.

249. Tribunals have been adverse to award damages based on market forecasts, since, as the *Mobil/Murphy* tribunal found with respect to oil price forecasts, they do not meet the relevant and generally accepted standard of reasonable certainty.⁵²⁴ When looking “at a totality of relevant and necessary variables” needed to calculate damages, the tribunal was “simply unable to have confidence that the estimation of the entire picture is one that meets a test of ‘reasonable certainty’.”⁵²⁵ In *Philips Petroleum*, the Iran-US Claims Tribunal took the same position, noting that “experience shows that forecasting future crude oil prices is difficult and open to a high risk of being proved wrong by the subsequent realities of the actual market.”⁵²⁶ The evaluation of a long period of lost profits, in contrast to past lost profits, is “extremely hazardous.”⁵²⁷

250. Resolute’s damages claim is just as speculative with respect to the past period (2013-2017) that Dr. Hausman has designated as it is the future (2018-2028) period.⁵²⁸ This is because Dr.

⁵²² **RL-228**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Separate Opinion of Ian Brownlie, 14 March 2003, ¶ 34.

⁵²³ Claimant’s Reply, ¶ 387.

⁵²⁴ **RL-170**, *Mobil/Murphy – Decision*, ¶ 474: (In analyzing oil production forecasts among other critical market-based variables, “The Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion per se, but rather to a finding that there is too much *uncertainty* at this stage for the Tribunal to make a determination.”). See also **RL-229**, Craig Miles and David Weiss, *Overview of Principles Reducing Damages*, in John Trenor, *The Guide to Damages in International Arbitration*, 3rd ed. (London: Law Business Research, Ltd., 2018), p. 84: (“The standard most often utilized in municipal and international law is one of “reasonable certainty” or a “reasonable degree of certainty.”)

⁵²⁵ **RL-170**, *Mobil/Murphy – Decision*, ¶ 477.

⁵²⁶ **RL-230**, *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company* (IUSCT Case No. 39) Award, 29 June 1989, ¶ 125.

⁵²⁷ **RL-170**, *Mobil/Murphy – Decision*, ¶ 477.

⁵²⁸ Claimant’s Reply, ¶ 386.

Hausman’s “past period” is wrongly conceived, since it is based on a future prediction made in October 2011. The period of 2013-2018 therefore reflects a future rather than a past period. Perhaps the forecast becomes more and more speculative with the passage of time,⁵²⁹ but its grossly inaccurate prediction of SC paper consumption (or demand, as RISI calls it) in 2012 renders it flawed as of 2013.⁵³⁰ Using a forecast that relies on incorrect assumptions makes it wrong from day one, and more and more incorrect as those assumptions are projected into the future.⁵³¹ As the Iran-US Claims Tribunal made clear, projections can be useful indications for a prospective investor, but they “cannot be used by a tribunal as the measure of a fair compensation.”⁵³²

251. In its Reply Memorial, Resolute does not offer a credible rebuttal to Canada’s criticisms of the 2011 RISI 5-year forecast, and in some cases, it offers no response at all.⁵³³ Instead, it simply argues that Canada refuses to consider the but-for world. However, operating in the but-for world does not entitle the Claimant to pretend that the 2011 RISI forecast was correct when it was already known by 2012 that RISI was wrong. RISI’s forecast wrongly predicted the volume of SC paper that would be purchased in 2012 by [REDACTED]⁵³⁴ and made an error in predicting a “[REDACTED]” in 2012,⁵³⁵ which Dr. Kaplan explains was the result of having made an error in predicting

⁵²⁹ **RL-190**, *Romp petrol – Award*, ¶ 287: (“The Tribunal notes [...] fundamental caution that an event study grows less reliable the less well defined the events to be studied and the longer in time over which they extend.”)

⁵³⁰ AFRY/Pöyry, ¶¶ 20-23.

⁵³¹ **RL-231**, Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), p. 25: (“One reason why forecasts suffer from high error rates is that they project assumptions across a long period of time. Errors in predicting the scope of identifiable events, such as changes in interest rates or discount rates, will play out over the entire duration of a forecast. Those errors will often have large consequences for the overall value.”)

⁵³² **RL-219**, *Amoco – Partial Award*, ¶ 239: (“The element of speculation in a short-term projection is rather limited, although unexpected events can make it turn out to be wrong. The speculative element rapidly increases with the number of years to which a projection relates. It is well known, and certainly taken into account by investors, that if it applies to a rather distant future a projection is almost purely speculative, even if it is done by the most serious and experienced forecasting firms, especially if it relates to such a volatile factor as oil prices. Such projections can be useful indications for a prospective investor, who understands how far it can rely on them and accepts the risks associated with them; they certainly cannot be used by a tribunal as the measure of a fair compensation.”)

⁵³³ Canada’s Counter-Memorial, ¶¶ 379-386; Steger-2, ¶ 37.

⁵³⁴ Canada’s Counter-Memorial, ¶ 353, citing **R-235**, [REDACTED], p. 66. See also AFRY/Pöyry-2, ¶ 12, Table 2-1.

⁵³⁵ **R-470**, [REDACTED], pp. 68, 61, 64.

the cost of pulp.⁵³⁶ These are just a few of the errors that make the RISI forecast unreliable, already from 2012, before the alleged breach even occurred. Having constructed a but-for world that begins in October 2011 does not entitle the Claimant to overlook real world events that took place prior to the alleged breach. Any but-for world that is constructed using speculative forecasts built on false assumptions must be rejected.

252. Resolute's attempt to justify its approach by drawing parallels between the RISI price forecasts and the forecasts contained in [REDACTED]⁵³⁷ is equally unavailing. [REDACTED]⁵³⁸ and that they did not foresee, like RISI and other forecasters at the time, the sharp increase in demand for SC paper in 2013 and the subsequent price effects.⁵³⁹ [REDACTED]

However, as noted by RISI and other commentators following PHP's reopening,⁵⁴² this was not the case as SC-A producers were running at full capacity to meet demand.⁵⁴³ [REDACTED] it would have undoubtedly agreed (as it does today) with RISI and all of the other market commentators that: [REDACTED]

[REDACTED]⁵⁴⁴

⁵³⁶ Kaplan-2, ¶ 54.

⁵³⁷ Claimant's Reply, ¶¶ 384, 388.

⁵³⁸ AFRY/Pöyry-2, ¶¶ 66-73.

⁵³⁹ Canada's Counter-Memorial, ¶ 142; AFRY/Pöyry-2, ¶¶ 66-73.

⁵⁴⁰ Claimant's Reply, ¶ 385.

⁵⁴¹ Claimant's Reply, ¶ 385.

⁵⁴² See above, ¶ 216.

⁵⁴³ **R-483**, Reel Time Report (Jun. 2013), p. 7: ("The SCA market is very strong and the SCB market is even stronger. There will not be enough SC paper available in the fall unless imports increase quite a bit.")

⁵⁴⁴ **R-236**, [REDACTED] p. 77; **C-236**, Transcript of Proceedings before U.S. International Trade Commission *in re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015), pp. 170-171, Testimony of John Coche; **R-259**, [REDACTED] p. 15; **R-260**, ERA Forest Products Monthly, "A Comprehensive Analysis of the Forest Products Sector" (Jan. 29, 2013), p. 20; **R-261**, [REDACTED] p. 24; **R-262**, [REDACTED], pp. 21-22; **R-263**, [REDACTED]

253. The Claimant seizes on the word “demand” in an attempt to undermine Pöyry’s understanding of the market, arguing that Canada and its experts cannot distinguish between consumption and demand and therefore lack an understanding of economics.⁵⁴⁵ However, Pöyry was using the term “demand” in its colloquial business sense, the same way that RISI used it when it assessed the market with PHP idled as follows: [REDACTED]

[REDACTED] Then, with PHP having re-entered, RISI stated: [REDACTED]⁴⁶ The Claimant’s request that Pöyry’s entire report be dismissed because it used the term “demand” in its colloquial rather than its economic sense rings hollow when its economic approach to damages relies on a forecaster that uses the term the same way.⁵⁴⁷

254. In 2013, with the re-entry of PHP, all of the SC paper produced in North America was being consumed with demand actually exceeding supply.⁵⁴⁸ After this reality was acknowledged by producers in June 2013, prices returned to where they were immediately before PHP’s reopening and the market continued on a path of secular decline. [REDACTED], like RISI, relied on the wrong assumptions when it predicted that [REDACTED] due to PHP’s re-entry. By choosing a method of proving causation and quantifying damages that relies on a price forecast, the Claimant’s case fails.

C. It is Not for Canada to Estimate Resolute’s Alleged Damages According to Resolute’s Failed Economic Theory

255. Dr. Hausman argues that he did not attempt to forecast using independent values of the independent variables in an econometric model because of its “necessary complexity.”⁵⁴⁹ Instead,

[REDACTED], pp. 23-24; **R-264**, [REDACTED] p. 26.

⁵⁴⁵ Claimant’s Reply, ¶¶ 378-381; Kaplan-2, ¶ 30.

⁵⁴⁶ **R-235**, [REDACTED], p. 66 (emphasis added).

⁵⁴⁷ Note that Dr. Hausman also uses the term “demand” in the business sense (*See* Hausman-3, ¶¶ 11, 13, 17, 23, 27).

⁵⁴⁸ **R-483**, [REDACTED], p. 7.

⁵⁴⁹ Hausman-3, ¶ 14.

he adopted a simple economic approach to quantification that ignores aforementioned market factors that he admits affect prices.⁵⁵⁰ As one commentator notes “An economist who has been asked to estimate damages first identifies the but-for world (i.e., the world that the plaintiff would have experienced but for the defendant’s acts). *The second step is to quantify the relevant variables that describe the but-for world.* Finally, the damages expert calculates the damages that the plaintiff sustained by not being able to operate in the but-for world.”⁵⁵¹ Dr. Hausman fails to undertake the responsibility of the second step, advancing an economic theory based on false assumptions and incorrect predictions⁵⁵² instead of a calculation of any *actual* damages.⁵⁵³

256. Indeed, Dr. Hausman’s adjustment of his damages calculation in light of recently obtained 2018 data⁵⁵⁴ is indicative of the fundamental problems in an approach that is far too speculative to be relied upon as an accurate measure of future damages.⁵⁵⁵ His own model demonstrates the possibility that Resolute is actually *better off* with PHP’s re-entry through the introduction of recent sales information, which may become even more pronounced if Dr. Hausman would continue to readjust his estimates based on actual sales information from 2019 onward.⁵⁵⁶ The better view, as explained by Canada’s expert, is that Dr. Hausman’s “model is untenable by virtue of being completely upended by one year (2018) of market price recovery (not to mention a second year of continued price recovery in 2019 which Dr. Hausman ignores).”⁵⁵⁷

257. Rather than addressing the criticism levelled at his model, Dr. Hausman contends that Canada “fails to answer the fundamental economic question of what would SCP prices have been if PHP had not re-opened?”⁵⁵⁸ However, it is not Canada’s responsibility to undertake such an

⁵⁵⁰ Hausman-3, ¶ 14. See above, ¶ 219.

⁵⁵¹ **RL-226**, *Stiroh*, p. 188 (emphasis added).

⁵⁵² Hausman-3, ¶ 4.

⁵⁵³ **RL-226**, *Stiroh*, p. 185: (“Because the economist cannot set up an experiment that allows him to rewind the time period over which the damage was alleged to occur and replay the market events without the bad acts in question, he often relies upon statistical tools to attempt to isolate the impact of the actions under investigation from the impact of natural market forces that are not being challenged by the plaintiff.”) Resolute notably did not attempt to isolate the impact of the alleged breach through such a statistical analysis, as noted by AFRY/ Pöyry (Pöyry-2, ¶ 16).

⁵⁵⁴ Hausman-3, ¶ 29.

⁵⁵⁵ Steger-2, ¶¶ 4, 18, 19; AFRY/Pöyry-2, ¶¶ 38-39.

⁵⁵⁶ Steger-2, ¶ 19.

⁵⁵⁷ Steger-2, ¶ 18(a)(ii).

⁵⁵⁸ Hausman-3, ¶¶ 8, 13.

analysis.⁵⁵⁹ The responsibility lies squarely with the Claimant to make its case. If it has failed to prove proximate cause, or to quantify its damages with reasonable certainty, the Tribunal, like the tribunal in *Rompetrol*,⁵⁶⁰ has no choice but to dismiss its claim for damages.

258. In the alternative, if the Tribunal decides that Resolute has proven proximate cause, Canada does provide an estimate of the impacts of PHP's re-entry.⁵⁶¹ Based on the opinion of market commenters, including RISI, Mr. Steger quantifies damages up until the point that Port Hawkesbury's re-opening was fully absorbed into the market, a quantum analysis he stands by after having reviewed Resolute's Reply Memorial and expert reports.⁵⁶²

⁵⁵⁹ **RL-173**, *Gemplus, S.A., et al. v. Mexico* (ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4) Award, ¶ 12-56: ("Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.), ¶ 13-80: ("It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle *actori incumbit probatio* is 'the broad basic rule to the allocation of the burden of proof in international procedure'. This burden does not rest on a respondent, [...].")

⁵⁶⁰ **RL-190**, *Rompetrol – Award*, ¶ 288.

⁵⁶¹ Canada's Counter-Memorial, ¶ 392; Steger-1, ¶ 90.

⁵⁶² Steger-1, ¶ 86; **R-236**, [REDACTED]

p. 77; [REDACTED]

[REDACTED] Steger-2, ¶¶ 4, 8-10.

VIII. ORDER REQUESTED

259. For the foregoing reasons, Canada respectfully requests that this Tribunal issue an award:

- i. finding that the Claimant's claims relating to the Port Hawkesbury electricity rate are outside the Tribunal's jurisdiction;
- ii. dismissing the Claimant's claims that Canada has violated its obligations under Articles 1102 and 1105 of NAFTA in their entirety;
- iii. dismissing the Claimant's claim that it incurred damages as the result of Canada violating its obligations under Chapter 11 of NAFTA;
- iv. ordering the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- v. granting any further relief it deems just and appropriate under the circumstances.

March 4, 2020

Respectfully submitted on behalf of the
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