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

between

RESOLUTE FOREST PRODUCTS INC.

Claimant

and

GOVERNMENT OF CANADA

Respondent

(PCA CASE NO. 2016-13)

RESOLUTE FOREST PRODUCTS INC.

OPPOSITION TO RESPONDENT'S REQUEST FOR BIFURCATION

October 13, 2016

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I. INTRODUCTION

1. The Government of Canada ("Canada"), in its September 29, 2016 Request for Bifurcation ("Request"), offers two standards by which, Canada argues, its Request should be judged. First, Canada submits that a motion for bifurcation should be judged according to the criteria of fairness, efficiency and economy.[1] Second, Canada proposes that the Tribunal apply the three-part test from *Philip Morris v. Australia*, which considered bifurcation appropriate when (1) the jurisdictional objection is *prima facie* serious and substantial; (2) the objection can be examined without prejudging or entering the merits; and (3) the objection, if successful, could dispose of all or an essential part of the claims raised.[2] Canada contends that, after applying the criteria and its proposed test, the Tribunal should bifurcate this arbitration.

2. Claimant, Resolute Forest Products Inc., ("Resolute") agrees with Canada that bifurcation could, in some cases, serve purposes of fairness, efficiency and economy, but also agrees with Canada's concession that "bifurcation is not appropriate in every case."[3] Canada has not made a persuasive argument why bifurcation would serve here the intended purposes, nor do Canada's preliminary objections satisfy the three-part *Philip Morris* test. To the contrary, Canada has demonstrated inadvertently why bifurcation in this case would be unfair, inefficient, and costly. It would "require prejudging or entering into the merits," causing the Tribunal to visit issues and facts more than once as issues of liability and measures of damages are bound up in Canada's theories for dismissal.

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[1] Request, ¶2.
[2] Request, ¶6.
[3] Request, ¶3.

3. The jurisdictional objections that Canada has presented as "*prima facie* serious and substantial" are premised on categorical arguments divorced from legal authority (that Resolute needs to have invested in the production of supercalendered paper in Nova Scotia); conclusory misconstructions of law (counting the statute of limitations from the date of the Measures instead of the date of the damages); and creative reimagining of the law's intent (that tax breaks providing assistance to one company must be considered in the same manner as direct taxation for the expropriation of another). Consequently, they cannot be taken as *prima facie* serious and substantial.

4. Canada's objections require prejudging the merits. They misstate the law and ignore critical facts. Examination of the merits necessarily will include all the essential facts. And even if Canada's objections were to prevail, presuming the facts as alleged by Resolute to be true, Canada would not have disposed of all, nor even an essential part, of the claims. Canada's objections thus fail to satisfy the *Philip Morris* test and Canada's Request fails to achieve the purposes of bifurcation.

II. BIFURCATION IS NOT APPROPRIATE FOR CANADA'S ARTICLE 1101(1) AND ARTICLE 1102(3) OBJECTIONS

5. Canada's objections under Articles 1101(1) and 1102(3) are related because Canada seeks to avoid the same fact in both instances, that the Nova Scotia Measures were deliberately aimed at giving Port Hawkesbury Paper ("Port Hawkesbury") an advantage over competitors located outside Nova Scotia. This fact is fundamental to the merits of Resolute's claims and means the objection necessarily fails Canada's purpose in seeking bifurcation: fairness, efficiency and economy require that these objections be joined to the merits, where the pertinent factual issues can and must be presented as a whole.

6. These objections also fail the prongs of the *Philip Morris* test. They are not *prima facie* serious and substantial based on an extreme, categorical argument for which Canada has cited no authority. They cannot be examined without prejudging the merits because they exclude significant facts. They will not dispose of all, nor even an essential part, of the claims.

A. Canada's Article 1101(1) Objection

1. The Objection Is Not Serious Or Substantial

7. The objection Canada raises as to Article 1101(1) is that the Nova Scotia Measures, according to Canada, were not measures "relating to" the investor, Resolute, nor to Resolute's investments, because Resolute does not have an investment in Nova Scotia.

8. Canada relies on the *Methanex v. United States* standard requiring a "legally significant connection" between the measures and the investor or investment, a standard criticized by several tribunals because it does not offer clear guidelines for an efficient jurisdictional decision independent of the facts and legal merits of the claims. Canada has failed to state a *prima facie* serious or substantial objection, whether under *Methanex* or under the tests applied by other NAFTA tribunals, because Nova Scotia's assistance to Port Hawkesbury "related to" the competitive harm to Resolute and Resolute's investment.

9. The *Methanex* tribunal determined that a "legally significant connection" must be demonstrated between the measure and the investor or its investment for a measure to be one "relating to" an investment within the meaning of Article 1101(1). It opined that not all effects of measures necessarily rise to the "relating to" standard of Article 1101(1), yet conceded that it is no easier "to define the exact dividing line"

between related and unrelated measures than it is "in twilight to see the divide between night and day."[4] The *Methanex* tribunal accepted the reasoning of the *Pope & Talbot* tribunal,[5] concluding that a measure need not be primarily directed at the investment in order to qualify as "relating to" the investment.[6]

10. Other tribunals have considered that the *Methanex* tribunal's "legally significant connection" test sets the bar too high, or requires refinement. The tribunal in *Cargill v. Mexico*[7] applied a "causal connection" test with respect to Article 1101(1), and when that standard was challenged post-award, the Ontario Superior Court of Justice observed that, "The term 'related' requires only some connection and does not require that the measure be adopted with the express purpose of causing loss."[8] The effect of a measure, according to the Ontario Superior Court of Justice, did not have to be intentional.

11. The tribunal in *Mesa Power Group v. Canada*[9] recently endorsed the *Cargill* "causal connection" test, stating:

> ...to fall within the ambit of Section A of Chapter 11, the impugned measures must "relate to" an investor of another NAFTA Party or to investments of such an investor. In the context of the present dispute, this means that all of the measures identified in {¶254} above must have a causal nexus with the Claimant or its investment.[10]

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[4] CL-001, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ("*Methanex* Partial Award"), ¶¶139, 147.
[5] CL-002, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Dismiss Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven "Measure Relating to Investment" Motion, 26 January 2000 ("*Pope & Talbot*").
[6] CL-001, *Methanex* Partial Award, *supra* note 1, ¶142, commenting on *Pope & Talbot,* ¶¶33-34.
[7] CL-003, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 ("*Cargill* Award").
[8] CL-004, *Cargill, Incorporated v. United Mexican States*, 2010 ONSC 4656, ¶57; aff'd 2011 ONCA 622.
[9] CL-005, *Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-17, Award, 24 March 2016.
[10] CL-005, *Id.* ¶259.

12. At least one non-NAFTA tribunal has gone even further, expressly indicating that the meaning of "relating to" had been wrongly decided in *Methanex*. The tribunal in *BG Group Plc. v. Republic of Argentina*[11] explained that, in its view, "relating to" could not be given the restrictive meaning found by the *Methanex* tribunal because exceptions enshrined in other NAFTA articles would be wholly unnecessary if some "legally relevant connection" beyond or in addition to "effect" were necessary for a measure to be within the scope of the signatories' obligations.[12]

2. The Objection Cannot Be Examined Without Entering The Merits

13. Canada's Article 1101(1) objection is based on the unsupported categorical argument that a provincial measure cannot, under any circumstances, relate to an investor or its investments when the complaining investor does not have an investment in that province. There is substantial evidence, however, that Nova Scotia's Measures were intended specifically to have, and did have, extraterritorial effects on the supercalendered paper market and competitors located outside the province. The relationship between the Measures and the market requires an examination of the merits of the case.

14. Nova Scotia's Measures were not regulations of intra-provincial activities. Nova Scotia expressly contemplated impact on a competitive market existing almost entirely outside the province and, at a minimum, knew or should have known that its Measures would harm Resolute and its supercalendered paper investments in Canada. There is no support in the text of NAFTA that, in such circumstances, Resolute "cannot

[11] CL-006, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007.
[12] CL-006, *Id.* ¶227-231.

establish" a legally significant connection between the provincial measures and its investment outside the province.

15. Resolute does not have to prove Nova Scotia's intent. There is no such requirement for a finding of liability under Articles 1102, 1105 or 1110. Nonetheless, it is reasonable to find a "causal nexus" as well as a "legally significant connection" when a measure demonstrably was introduced with the intention of impacting the investor or investment. Even the *Methanex* tribunal recognized that when the intent or purpose of a measure was to harm foreign-owned investors or investments, the measure would "relate to" the foreign-owned investor or investment.[13] The facts and legal arguments in Resolute's Statement of Claim demonstrate a *prima facie* case that the Nova Scotia measures related to Resolute and its investments.

16. Canada contends that Resolute's claims may be dismissed summarily under Article 1101(1) because, according to Canada, "The Nova Scotia Measures were aimed solely at facilitating the sale of the Port Hawkesbury mill in Nova Scotia ..."[14] That statement, however, does not report accurately and completely the public aims of the province's Measures.

17. The Office of the Premier of Nova Scotia announced, during the negotiations for the sale of the Port Hawkesbury facilities, that the Measures were intended "to sell the Nova Scotia forestry sector to the world," and to make Port Hawkesbury "the most efficient paper producer in the world," "the lowest cost and most competitive producer of super calend[ered] paper," and "the most efficient paper producing machine in the

[13] CL-001, *Methanex* Partial Award, *supra* note 1, ¶152.
[14] Request, ¶9.

industry."[15] These goals could be pursued only in relation to supercalendered paper producers located outside the territory of Nova Scotia.

18. The Nova Scotia Measures were not regulations governing a market and those of its participants located exclusively within the province's political boundaries. They were decidedly and expressly extra-territorial, both in their effects and in their intended purposes. Resolute was Port Hawkesbury's leading competitor.

19. The Nova Scotia Measures were aimed at resurrecting the Port Hawkesbury mill and endowing it with a superior competitive position among supercalendered paper producers in Canada and elsewhere, in order to ensure a source of permanent employment in Nova Scotia. In a declining market, the employment purpose meant effectively transferring jobs from Québec, in particular, to Nova Scotia, from Resolute to Port Hawkesbury. Had the Measures been solely for facilitating the sale, as Canada argues, the mill could have been sold for scrap, for which there were bidders.[16] It would not have required preferential electricity rates. It did not have to be maintained in hot idle at a cost of $36.8 million.[17]

20. The bankruptcy sale was strictly for reopening the mill with substantial advantages over North American competitors.[18] Only potential buyers committed to restoring the mill to competition in North America ultimately were considered.[19] No investors would have bid to participate in a resurrection of Port Hawkesbury as a going concern if they could sell paper competitively only within the Nova Scotia market. Port

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[15] *See* Resolute Statement of Claim, Exhibit 9.
[16] *See* Resolute Statement of Claim at Exhibit 6, ¶¶18-19.
[17] *See* Resolute Statement of Claim at Exhibit 10.
[18] *See* Resolute Statement of Claim at Exhibit 6 ¶19.
[19] *Id.*

Hawkesbury's investors demanded, as a condition of purchase, assistance to obtain a superior competitive position over other producers in Canada and elsewhere.

21. The purpose of the Nova Scotia Measures was to make the Port Hawkesbury mill the low cost producer in North America. Canada itself recognizes supercalendered paper in North America as a highly competitive market, not a highly competitive market confined to Nova Scotia.[20] This fact is at the heart of Resolute's claims, yet Canada makes no mention of it with reference to the underlying premise of its Article 1101(1) objection, or its Article 1102(3) objection. The Nova Scotia Measures amounted to state sponsorship of a national champion financed and designed to out-compete Resolute, who had been the leading producer of supercalendered paper in Canada and in North America when Port Hawkesbury was idle.

22. Canada cannot argue credibly that the Measures had no legally significant effect on other supercalendered paper producers, outside Nova Scotia, nor that it did not know they would. Nova Scotia was not making Port Hawkesbury the low cost producer in Nova Scotia. The United States, on behalf of its supercalendered paper producers, had been questioning Canada about the Measures for at least two years, and the United States International Trade Commission ("ITC") has found unanimously that the U.S. industry suffered material injury because of unfair competition from Port Hawkesbury. It is now established, and Canada has not claimed to the contrary, that the Nova Scotia Measures have led to injury to competitors outside Nova Scotia. Canada was qualified as an interested party to deny such injury before the ITC, but chose not to contest the claims of the U.S. industry, nor the injury findings of the ITC, in

[20] Request for Bifurcation, ¶32.

any forum. Canada, therefore, has not contested that the Measures have harmed competitors beyond Nova Scotia's borders.

3. The Purposes Of Bifurcation Will Not Be Served Here

23. Reasons of fairness, efficiency and economy weigh against bifurcated consideration of Canada's Article 1101(1) objection. Canada's proposal to bifurcate for preliminary analysis its objection under Article 1101(1) would mean examining the causal nexus detached from the relevant facts necessary to determine the relationship between the measures and the investment, thus resulting in a decision on the objection that prejudges the merits.

B. Canada's Article 1102(3) Objection

24. Canada's argument in favor of bifurcating its Article 1102(3) objection is, like its Article 1101(1) objection, based on the unsupported categorical argument that a provincial measure cannot, under any circumstances, deny national treatment to an investor or its investment when the complaining investor does not have an investment in that province. Canada's argument, again, fails the prongs of the *Philip Morris* test,

1. The Objection Is Not Serious And Substantial

25. Canada's objection starts from the unfounded and unsupported premise that Article 1102(3) is "specifically intended" to preclude a claim of the kind Resolute has brought against the Nova Scotia Measures.[21] Canada argues that Article 1102(3) "makes clear the NAFTA Parties' intention that national treatment claims, with respect to a state or province, must be based on in-jurisdiction treatment, not treatment accorded across multiple jurisdictions."[22]

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[21] Statement of Defense, ¶80.
[22] Request, ¶23.

26. Canada contends that Article 1102(3) is "clear" in respect of Resolute's claim. Nowhere does Article 1102 preclude the type of claim brought by Resolute, and Canada cites no authority for the conclusion it has reached.

27. Canada wants the Tribunal to rule on the meaning of Article 1102(3) in the factual vacuum of a preliminary phase of a bifurcated proceeding. It has offered neither unambiguous language in Article 1102 nor authority to support its position. Canada here has not presented a *prima facie* serious and substantial objection.

2. The Objection Cannot Be Examined Without Prejudging The Merits

28. Canada has not established that Resolute's Article 1102(3) claim can be dismissed without prejudging the merits because Canada has not established that Resolute's supercalendered paper mills in Québec were not "in like circumstances" to Port Hawkesbury. They were competing in the same market, the market Nova Scotia said it intended to dominate. NAFTA tribunals have determined that national treatment analysis is not rigid. Instead, such analysis should be tailored by the tribunal to the facts of each case.

29. This principle has been reiterated by numerous NAFTA and BIT tribunals. In *Bilcon,*[23] for example, the tribunal determined "[c]ases of alleged denial of national treatment must be decided in their own factual and regulatory context."[24] In *Pope & Talbot*, the tribunal confirmed that "[by] their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations … [a]n important element of the surrounding facts will be the character of the measures

[23] CL-007, *Clayton and Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon*").
[24] CL-007, *id.*, ¶694.

under challenge."[25] And the tribunal in *Total S.A. v. Argentina*,[26] considering a national treatment claim under the France-Argentina bilateral investment treaty, noted that the "elements that are [...] the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case."[27]

30. The Tribunal here needs to consider more than the physical addresses of Resolute and Port Hawkesbury to determine the viability of an Article 1102 claim. It must consider the factual circumstances of the North American market for producing supercalendered paper and Nova Scotia's attempts to vault Port Hawkesbury to the forefront of the competition. Those considerations are intrinsic to the merits of the claim and require more detailed evidence than reasonably could be examined in a bifurcated preliminary jurisdictional proceeding. Nova Scotia knew and intended that its Measures would have national and international effects, a fact that runs to the merits of Resolute's claims.

31. Article 1102 must be applied to the facts of each case in light of NAFTA's objective to "promote conditions of fair competition" and "increase substantially investment opportunities." *See* NAFTA Article 102. Provincial intervention discouraging investment and creating unfair competition is central to this case and must inform the Tribunal's interpretation of Article 1102. "The object of Article 1102 [is] to ensure that a national measure does not upset the competitive relationship between domestic and

[25] CL-008, *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 ¶75-76.
[26] CL-009, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.
[27] CL-009, *id.*, ¶210.

foreign investors."[28] An in-depth consideration of the evidence is required in the present case to expose that Nova Scotia knew that its Measures would have an impact beyond Nova Scotia, necessarily prejudicing foreign investors.

32. Canada writes, "There is one fact and one fact only which is central to Canada's Article 1102(3) objection and it is not in dispute: the Claimant does not have an SC paper investment within the jurisdiction of Nova Scotia. That fact alone means, in Canada's submission, that the claimant cannot bring a national treatment claim against measures adopted by the Government of Nova Scotia because of Article 1102(3)."[29] But, there are at least two additional and essential facts: the purposes and effects of the Measures, which were not limited to the regulation of conduct within Nova Scotia, impacted competitors throughout Canada; and Canada, under NAFTA, is responsible for provincial measures.

33. If Canada's interpretation of Article 1102(3) were correct, provinces could act with impunity to harm foreign investments beyond their provincial borders. The trade remedy laws, which Canada accepts, empower the United States and other countries to object when the actions of provincial governments lead to injury to domestic industries. The Tribunal must decide on the merits whether there are remedies available, as well, to investors in Canada when provincial governments deny investors national treatment. If there were remedies for competitors in the United States (as there are) but no remedies for American investors in Canada (as Canada claims), the purpose of Article 1102 would be defeated because foreign investment would be expressly

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[28] CL-010, *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶199.
[29] Request for Bifurcation, ¶24.

discouraged: better to compete from the United States with remedies available when provincial governments intervene to create unfair competition.

3. Bifurcation For This Objection Would Serve No Purpose

34. Reasons of fairness, efficiency and economy weigh against bifurcated consideration of Canada's Article 1102(3) objection. Whether the Nova Scotia Measures were intended and had effects beyond Nova Scotia's borders is an issue of fact. Whether Resolute and Port Hawkesbury are in "like circumstances" depends on how the scope of the Nova Scotia Measures is defined, a question inseparable from the merits. Hence, Canada's Article 1102(3) objection fails the second prong of the *Philip Morris* test because dismissal would prejudge the merits by ignoring essential facts.

35. The objection also fails to dispose of claims under Articles 1105 and 1110. Consequently, a bifurcated proceeding for Article 1102(3) would be costly and inefficient.

III. BIFURCATION IS NOT APPROPRIATE FOR CANADA'S ARTICLES 1116(2) AND 1117(2) OBJECTION

36. Canada's objection under Articles 1116(2) and 1117(2) is based on an interpretation of the legal standard for the limitations period that emphasizes the date the Nova Scotia Measures were adopted, ignoring almost entirely the question of when Resolute acquired knowledge that the Measures caused it loss. The analysis of this objection is impossible without reference to the merits and damages. Consequently, Canada's objection fails critical prongs of the *Philip Morris* test.

A. Canada's Objection Is Not Serious And Substantial

37. Canada defines the statute of limitations test in Articles 1116 and 1117 as referring only to dates when measures are taken, largely disregarding the complete

language of those provisions. Article 1116(2) says, more completely than acknowledged by Canada, "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach *and knowledge that the investor has incurred loss or damage.*" (emphasis added) Canada misstated the legal standard entirely in its Statement of Defense, focusing on when Resolute had knowledge, an expectation, that it would suffer loss, not that it had suffered loss.[30] Canada corrected the statement of the legal standard in its Request,[31] but then ignored entirely the standard's damages component. Canada cannot raise a serious *prima facie* objection on the basis of the limitations period without consideration of the second half of the standard.

38. The test under the limitations period is factual – when did the investor have knowledge that it incurred loss or damage as a result of the measures? This test involves facts that would not be in evidence if Canada's motion to bifurcate were granted because knowledge must relate to actual damage incurred – rather than the prediction of future damage – to trigger the running of the limitations period contained in Article 1116. A determination of actual damage will require evidence of when Resolute knew or ought to have known it had incurred damage, necessitating evidence of the circumstances of the Measures and Resolute's discovery of its loss.

39. The principle that knowledge, actual or constructive, relates to actual damage incurred, rather than predicted future damage, was confirmed in *Pope & Talbot.*[32] The investor in that case had claimed damage under Article 1116 with respect to its

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[30] Statement of Defense, ¶77.
[31] Request, ¶13.
[32] CL-011, *Pope & Talbot v. Canada*, (UNCITRAL), Award in Relation to Preliminary Motion By Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim From the Record, Feb. 24, 2000.

investment in Harmac Pacific, Inc. ("Harmac"), which it claimed was injured because it had to purchase wood chips for its pulp and paper operation that were made increasingly expensive by the implementation of the Softwood Lumber Agreement between the United States and Canada.

40. Canada moved to strike the claim with respect to Harmac on the grounds that it violated the limitations period in Article 1116(2). Canada argued that Pope & Talbot or Harmac must have known of any damage to its investment in Harmac well before January 10, 1997, when the limitations period began, because the Softwood Lumber Agreement had been signed on May 29, 1996, took effect April 1, 1996, and details on its implementation (specifically the quota allocation methodology), from which the injury was alleged to have flowed, had been announced on October 31, 1996.

41. The *Pope & Talbot* tribunal rejected Canada's argument. It determined that the time-bar claim was "in the nature of an affirmative defense" and that Canada thus had "the burden of proof of showing [a] factual predicate to that defense." The tribunal found that Canada's assertions had failed to establish such factual proof. The investor had to have knowledge of both the breach and of the consequent damage.

42. The sole fact that the export control regime under the Softwood Lumber Agreement was implemented at a particular date was insufficient for the tribunal to find the requisite knowledge on the part of the investor in *Pope & Talbot*. Rather, the tribunal decided that knowledge could be dated only as of the time the investor knew that Harmac had to purchase expensive wood chips, which could have occurred only after the implementation of the regime. "The critical requirement," the tribunal said, "is that the loss has occurred and was known or should have been known by the Investor,

not that it was or should have been known that loss could or would occur."[33] Hence, and as confirmed by Kinnear and Bjorklund, "according to the *Pope & Talbot* tribunal, actual damage, rather than predicted future damage, was required to trigger the three-year limitation period."[34]

43. The critical question for the statute of limitations is not, as Canada argues, when the Measures were introduced, but when Resolute knew or should have known that a loss had occurred. Nor is the critical question about when Resolute might have predicted that loss could or would likely occur, as the *Pope & Talbot* tribunal explained.[35] Articles 1116 and 1117 require an examination of facts related to damages.[36]

B. The Objection Cannot Avoid The Merits

44. Canada argues that there are dates certain when the Nova Scotia Measures were taken, but provides no evidence that Resolute knew or should have known it had sustained damages immediately on those dates. Moreover, the Nova Scotia Measures

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[33] CL-011, *id.*, ¶12. ("[T]he economic loss for the investors' investment in Harmac has been caused by the decreasing supply of wood chips due to lost production on the British Columbia coast requiring the purchase of increasingly expensive wood chips for Harmac's pulp and paper operation. It is not clear to the Tribunal at what stage this loss of production resulted in a necessity to purchase expensive wood chips, except that it can only have arisen at some stage after implementation of the Export Control Regime. The critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur. Examined by that standard, Canada has not satisfied the Tribunal that the Investor knew or ought to have known for more than three years prior to January, 2000 that it had incurred loss or damage in respect of its investment in Harmac.")

[34] CL-012, Meg N. Kinnear, Andrea K. Bjorklund, et al., "Article 1116 - Claim by an Investor of a Party on its Own Behalf" in *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, Supplement No. 1, March 2008 (Kluwer Law International; Kluwer Law International 2006) pp. 1116-36c - 1116-36d.

[35] Canada seems to acknowledge that Resolute was not deprived of its Laurentide mill until 2014, but offers no explanation for how an Article 1110 expropriation breach occurring in 2014 could raise a *prima facie*, serious jurisdictional objection under Articles 1116 and 1117.

[36] CL-013, *Merrill & Ring v. Canada*, ICSID, Award, 31 March 2010 ¶¶ 267-268. (joining consideration of the timing when damages occurred to the quantum phase of the merits "since the three-year time limitation period would have to be examined in light of the specific breaches that might have been found to exist and also in light of the relationship of such breaches to the date on which the Investor first acquired knowledge of it having incurred loss or damage.").

are "continuing violations" because assistance provided under the Measures (*e.g.*, loan installments, loan forgiveness, preferential electricity rates) continued through 2013 and beyond. The effects of continuing violations must be examined as to the merits of liability and damages.

45. Reasons of fairness, efficiency and economy require that Canada's Article 1116 and 1117 objections be joined to the merits, where those objections may be considered in connection with the parties' evidence on loss and damages, as the text of those Articles requires. Bifurcation of the limitations issue would oblige the Tribunal to choose between ruling without sufficient information, or entering into the merits of Resolute's claims.

C. The Objection Would Not Dispose Of The Claim

46. Even if Canada's objection were successful, it would not dispose, as claimed by Canada, of the entirety of the claim against the Nova Scotia Measures. It would not dispose of Resolute's expropriation claim, nor of the continuing violations. The expropriation claim did not crystallize until the Laurentide mill actually shut down, which was not until October 2014. There can be no doubt that the Article 1110 claim would proceed, requiring analysis of most of the very same issues that would be relevant to the analysis of the claims under Articles 1102 and 1105. Such repetition would not serve bifurcation's purposes of fairness, efficiency, or economy.

IV. BIFURCATION IS NOT APPROPRIATE FOR CANADA'S ARTICLE 2103 OBJECTION

47. Canada seeks bifurcation for a preliminary decision on its objection that tax breaks provided by Nova Scotia to benefit Port Hawkesbury may not be the subject of claims under Article 1105, nor Article 1110, unless those measures were submitted first

to domestic tax authorities for a determination whether those measures constituted an expropriation.

A. The Objection Is Not Serious Or Substantial And Would Not Avoid The Merits

48. Resolute does not claim that the Laurentide mill was expropriated through taxes on Resolute, which is the type of tax expropriation claim contemplated in Article 2103(6). Instead, Resolute has claimed that special property tax breaks provided by Nova Scotia to Port Hawkesbury were among the many measures delivering Port Hawkesbury additional advantages in a "highly competitive market" that contributed to the constructive expropriation of Resolute's Laurentide mill.

B. The Objection Does Not Dispose Of The Claim

49. Because Canada concedes that Article 2103 does not preclude a claim that national treatment has been denied with respect to tax measures,[37] there would be no effective benefit in addressing Article 2103 separately from the merits of that claim. Nor would elimination of the county property tax benefits provided to Port Hawkesbury materially change Resolute's claims: the tax benefits do not represent the most significant contributions in Nova Scotia's efforts to establish a national champion in the supercalendered paper industry.

50. Resolute's national treatment claim would be unaffected because Article 1102 is excluded from the carve-out (see Article 2103(4)(b)). Similarly, the claims under Articles 1105 and 1110 would be unaffected because those claims are based on much more than the tax-related measures.

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[37] Request, ¶20 n.31.

51. There would be no effective benefit in addressing the Article 2103 objection separately, in an initial phase of a bifurcated proceeding. It would be more efficient to consider this objection together with the merits of the claim.

V. CONCLUSION

52. Despite Canada's admirably stated purpose – to make this arbitration more efficient and less expensive for both Parties – it has not demonstrated why bifurcation to examine its defenses of jurisdiction and admissibility would help. To the contrary, the objections are not *prima facie* serious or substantial and their consideration would require entering into the merits of liability and damages. There would be a substantial risk that the Tribunal would have to prejudge the merits without adequate information, thereby violating Resolute's right to have a full opportunity to present its case. Alternatively, if the Tribunal were to bifurcate and Canada's objections were to fail, bifurcation would create a duplication of effort rather than a reduction.

53. Canada has failed to make its case for bifurcation because it has excluded essential facts while in some instances misstating or creatively reimagining the law. The Request for bifurcation should be denied and, as previously agreed by Canada in such circumstances, the arbitration should proceed directly to the merits.

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