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

MEMORIAL ON JURISDICTION

DECEMBER 22, 2016

Government of Canada
Trade Law Bureau
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I. INTRODUCTION

1. Resolute Forest Products Inc. ("Resolute" or the "Claimant") seeks to engage the Government of Canada in arbitration under NAFTA Chapter Eleven for alleged breaches of Articles 1102, 1105 and 1110. The measures which are the primary focus of its claim, and which are the subject of this preliminary phase,[1] were adopted by the Government of Nova Scotia ("Nova Scotia" or the "Province") between September 2011 and September 2012 in relation to a supercalendered ("SC") paper mill near Port Hawkesbury, Nova Scotia (the "Nova Scotia Measures").[2]

2. Although Resolute's claims against the Nova Scotia Measures under NAFTA Articles 1102 (national treatment), 1105 (minimum standard of treatment) and 1110 (expropriation) (the "Nova Scotia Claims") are meritless, this Tribunal must first decide whether it even has the authority to consider the substance of Resolute's allegations. Canada respectfully submits that it does not for two reasons.

3. First, the Claimant has failed to comply with a basic condition of Canada's consent to arbitrate under NAFTA Articles 1116(2) and 1117(2): claims must be filed within three years of first acquiring knowledge of the alleged breach and knowledge that loss or damage has been suffered as a result of that alleged breach. There is no dispute that the Nova Scotia Measures were all adopted more than three years before the Claimant filed its Notice of Arbitration ("NOA") on December 30, 2015. Nor does the Claimant deny that it knew of the measures at the time they were adopted.

[1] On November 18, 2016, the Tribunal ordered that four of Canada's objections to jurisdiction and admissibility be heard in a preliminary phase. *See Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4, 18 November 2016 ("Procedural Order No. 4"), ¶ 5.1. Canada also objected to jurisdiction based on attribution of the private agreement between Nova Scotia Power Inc. and the owners of the Port Hawkesbury mill regarding the mill's electricity rates, but Canada proposed that this issue be dealt with in the merits phase, if necessary. *See Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Statement of Defence, 1 September 2016 ("Statement of Defence"), ¶¶ 7, 75, 104.

[2] One of the challenged measures – the municipal property tax rate payable for the mill – was established on September 27, 2012, but not finalized until the enactment of authorizing legislation on December 6, 2012. *See* Parts III.D.1, IV.B, VI, *infra*. The Claimant has also alleged that certain actions by the Government of Canada in 2015 breached NAFTA Chapter Eleven, but those federal measures are not the subject of this preliminary phase on jurisdiction and admissibility. *See* Statement of Defence, ¶¶ 91-95.

4. The Claimant has also admitted in writing that it first knew that it had suffered a loss allegedly as a result of the Nova Scotia Measures in 2012.[3] This admission was not a mistake on the Claimant's part. In fact, the contemporaneous evidence corroborates that the Claimant knew of the alleged loss or damage before December 30, 2012. For example, in November 2012, Resolute stated publicly that the reopening of the Port Hawkesbury mill played a role in its decision to shut down one of two SC paper machines at its Laurentide mill. Market data and analysis published from October to December 2012 further confirm what Resolute must have known and certainly ought to have known: the re-entry of the Port Hawkesbury mill into the market decreased the Claimant's share of total SC paper production capacity and had a downward impact on SC paper prices in the final months of 2012. This is hardly surprising, since the reappearance of the Port Hawkesbury mill in early October 2012 as a competitor in the SC paper market, with the support of the Nova Scotia Measures (which the Claimant alleges are a breach of NAFTA), in and of itself would have been sufficient to provide knowledge triggering the limitations period. For all these reasons, the Nova Scotia Claims are time-barred and beyond this Tribunal's jurisdiction *ratione temporis*.

5. Second, regardless of their untimeliness, Resolute's Nova Scotia Claims cannot pass through the jurisdictional gateway of NAFTA Chapter Eleven. Article 1101(1) demands a legally significant connection between a challenged measure and an investor and its investment before they may bring a claim under Chapter Eleven. Mere economic impact of a measure – which is all the Claimant alleges – is simply not enough. Nova Scotia's funding to keep the Port Hawkesbury mill in operable condition and to maintain the region's forestry sector during the creditor protection proceedings of the mill's former owner, NewPage Port Hawkesbury Corp. ("NPPH"), had no legally significant connection to Resolute or its Laurentide mill in Québec. Nor did any of the measures that Nova Scotia adopted to support the sale of the mill by NPPH to Pacific West Commercial Corporation ("PWCC"). As such, the Nova Scotia Claims are outside the Tribunal's jurisdiction.

[3] *See* **R-081**, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Feb. 24, 2015), ¶¶ 18-19.

6. The Claimant's failure to pursue its Nova Scotia Claims in a timely fashion and its inability to establish a legally significant connection with the Nova Scotia Measures are sufficient to end the Tribunal's analysis in this preliminary phase. But should the Tribunal decide it has jurisdiction, there remains an insurmountable barrier to Resolute's national treatment claim under Article 1102: the Claimant and its investments are not within the jurisdiction of the provincial government that adopted the measures at issue. The Claimant assumes that it was entitled to be accorded national treatment by Nova Scotia, where it has no investments. This proposition is contrary to the plain meaning of Article 1102(3), as well as its object and purpose of ensuring that the treatment accorded by an individual state or province of a NAFTA Party does not become the standard by which the treatment accorded by the Party's other states or provinces is assessed. Article 1102(3) precludes the Claimant from proceeding with its national treatment claim.

7. Finally, the Tribunal lacks jurisdiction to consider Resolute's NAFTA Article 1105 and 1110 claims challenging the property tax rate applicable to the Port Hawkesbury mill pursuant to a September 2012 agreement between PWCC, NPPH and the Municipality of Richmond County, which was later given effect through provincial legislation. Article 2103 could not be more explicit: NAFTA Article 1105 does not apply to taxation measures (Article 2103(1)) and a Claimant cannot challenge taxation measures as an expropriation under Article 1110 without an advance ruling by the taxation authorities of the NAFTA Parties (Article 2103(6)), which the Claimant never sought. The Claimant's attempt to include this measure as part of its Article 1105 and 1110 claims should be rejected by the Tribunal.

II. FACTUAL BACKGROUND

8. Three undisputed facts lie at the heart of this preliminary phase on jurisdiction and admissibility. First, the Claimant's SC paper investments in Canada are all located in the province of Québec. Second, the Claimant is challenging measures allegedly adopted by Nova Scotia, a province where it has no SC paper investments. Third, those measures were all adopted between September 2011 and September 2012.

A. The Claimant and Its Investment in Québec

9. The Claimant alleges that it is an investor of the United States, incorporated under the laws of Delaware.[4] The Claimant further alleges that its current and former investments in Canada's SC paper industry consist of the enterprise Resolute FP Canada Inc. and three SC paper mills located in the province of Québec.[5] These are the Dolbeau mill in Dolbeau-Mistassini, the Kénogami mill in Jonquière and the former Laurentide mill in Shawinigan.[6] The last of these is the focus of the claims in this arbitration.

10. On September 2, 2014, the Claimant announced the closure of the Laurentide mill effective October 15, 2014.[7] The Laurentide mill produced a grade of SC paper known as SCB,[8] and had an annual production capacity of 191,000 metric tonnes when it closed.[9] Two years earlier, in November 2012, the Claimant had already decided to shut down one of two machines that produced commercial printing papers at the Laurentide mill, reducing its capacity by 125,000 metric tonnes.[10]

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[4] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Notice of Arbitration and Statement of Claim, 30 December 2015 ("Notice of Arbitration" or "NOA"), ¶ 21.

[5] Notice of Arbitration, ¶ 23. Canada understands that the enterprise Resolute FP Canada Inc. was federally incorporated in Canada on December 10, 2010, as the continuation of a predecessor corporation established under the laws of British Columbia. Originally known as AbiBow Canada Inc., the enterprise changed its name to Resolute FP Canada Inc. on May 24, 2012. *See* **R-086**, Industry Canada, website excerpt, "Federal Corporation Information - 771302-9" (Jul. 12, 2016), available at: https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=7713029&V_TOKEN=1473189058216&crpNm=Resolute%20FP%20canada&crpNmbr=&bsNmbr=.

[6] Notice of Arbitration, ¶ 23.

[7] **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Quebec" (Sep. 2, 2014), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135267.

[8] **R-087**, "Groundwood Market Slump Continues Due to Weak Demand, Excess Supply," *Paper Age* 130:5 (September/October 2014), p. 22, available at: http://www.paperage.com/issues/sept_oct2014/09_2014marketgrade.pdf.

[9] **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Quebec" (Sep. 2, 2014).

[10] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135177.

B. The Port Hawkesbury Mill in Nova Scotia and Its Court-Supervised Sale

11. The Port Hawkesbury mill is located on the southwest coast of Cape Breton Island in Nova Scotia, in another province and over 1,200 kilometres away from the Claimant's Laurentide mill in Shawinigan, Québec. Used for various pulp and paper mill operations since 1962, the mill currently has one paper machine with an annual production capacity of 360,000 metric tonnes.[11] The machine is capable of printing several grades of SC paper, including SCA++, SCA+, SCA and SCB.[12]

12. The current owner of the Port Hawkesbury mill, PWCC, acquired it from its former owners, the United States-based NewPage Corporation ("NPC") and NPC's wholly-owned Canadian subsidiary NPPH,[13] through a corporate restructuring and sale transaction completed on September 28, 2012. This acquisition took place in the context of creditor protection proceedings and a court-supervised sale process initiated by NPPH.

13. On September 6, 2011, NPPH applied[14] to the Supreme Court of Nova Scotia (the "Court") seeking creditor protection under the *Companies' Creditor Arrangement Act* ("CCAA").[15] NPPH's application for creditor protection followed an announcement on August 22, 2011, that NPC would initiate downtime of the Port Hawkesbury mill's operations starting in mid-September 2011 due to market and economic conditions facing NPPH.[16]

14. On September 9, 2011, the Court granted the application for creditor protection and appointed Ernst & Young Inc. (the "Monitor") to monitor the business and financial affairs of

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[11] **R-023**, Port Hawkesbury Paper LLC, "Port Hawkesbury Mill Datasheet" (2016), pp. 1-2, available at: http://westlinnpaper.com/documents/PH_Mill_Datasheet_v4.2016.pdf.

[12] **R-023**, Port Hawkesbury Paper LLC, "Port Hawkesbury Mill Datasheet" (2016), p. 1.

[13] Regarding the relationship between NPC and NPPH, *see* **R-024**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Tor E. Suther (Sep. 6, 2011) (S.C.N.S.) ("Suther Affidavit"), ¶¶ 14-15.

[14] *See* **R-026**, *Re NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers (Sep. 6, 2011) (S.C.N.S.).

[15] **R-025**, *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, available at: http://lawslois.justice.gc.ca/eng/acts/C-36/FullText.html.

[16] *See* **R-024**, Suther Affidavit, ¶ 7.

NPPH during the CCAA proceedings.[17] The Court also authorized and directed NPPH and the Monitor to implement a process for soliciting offers for the sale of the assets of NPPH, to be facilitated and overseen by the Monitor (the "Sales Process").[18]

15. The Monitor's extensive process to identify potential buyers for the Port Hawkesbury mill is well-documented in the record of court filings in NPPH's creditor protection proceedings. The Monitor first published a notice of the Sales Process in regional and national newspapers and directly contacted 110 different parties potentially interested in acquiring the assets of NPPH.[19] Ultimately, four bidders submitted final offers by the deadline of December 16, 2011, two proposing to acquire the mill as a going concern and two proposing to liquidate it.[20] On January 12, 2012, the Monitor reported to the Court that it had recommended that NPPH accept PWCC's going concern offer.[21] In the Monitor's opinion, "[t]he PWCC offer provide[d] the greatest potential recovery to the estate in terms of purchase price and the likelihood of having ongoing operations in Port Hawkesbury, which in turn [would] have beneficial ramifications to NPPH employees and the community."[22]

16. On July 6, 2012, PWCC and NPPH entered into an agreement (the "Plan Sponsorship Agreement") whereby, subject to the fulfilment of certain conditions, PWCC would act as the sponsor of a plan of compromise and arrangement for NPPH under the CCAA (the "Plan").[23] The Plan and Plan Sponsorship Agreement further contemplated a restructuring transaction

[17] **R-028**, *Re NewPage Port Hawkesbury Corp.*, Initial Order (Sep. 9, 2011) (S.C.N.S.), ¶¶ 17-19, 26-34.

[18] **R-029**, *Re NewPage Port Hawkesbury Corp.*, Order (Approval of Settlement and Transition Agreement and Sales Process) (Sep. 9, 2011) (S.C.N.S.), ¶ 3 and Schedule A: Sales Process Terms.

[19] **R-030**, *Re NewPage Port Hawkesbury Corp.*, Second Report of the Monitor (Oct. 3, 2011) (S.C.N.S.), ¶¶ 14-15.

[20] **R-031**, *Re NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor (Jan. 13, 2012) (S.C.N.S.) ("Sixth Report of the Monitor"), ¶¶ 18-20.

[21] **R-031**, Sixth Report of the Monitor, ¶ 19.

[22] **R-031**, Sixth Report of the Monitor, ¶ 19.

[23] *See* **R-032**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 1 (Jul. 6, 2012) (S.C.N.S.), Exhibit A: Plan of Compromise and Arrangement of NewPage Port Hawkesbury Corp.; **R-033**, *Re NewPage Port Hawkesbury Corp.*, Affidavit of Peter Wedlake – Part 2 (Jul. 6, 2012) (S.C.N.S.) ("Wedlake Affidavit – Part 2"), Exhibit B: Plan Sponsorship Agreement.

through which NPPH would be continued as a successor corporation that PWCC would acquire for $33 million.[24]

17. On July 17, 2012, NPPH obtained the Court's approval of the Plan Sponsorship Agreement and authorization to present the Plan for the consideration of its creditors.[25] NPPH obtained the approval of its creditors, the Court sanctioned an amended and restated version of the Plan dated September 25, 2012, and the sale transaction between NPPH and PWCC closed on September 28, 2012.[26] NPPH was continued as Port Hawkesbury Paper Inc. ("PHP"),[27] which PWCC acquired for $33 million[28] and which currently operates the mill.

18. As the Claimant alleges, "PWCC made the implementation of the sale contingent upon [certain] conditions,"[29] including certain support to be provided by Nova Scotia. The conditions of PWCC's acquisition of the Port Hawkesbury mill are a matter of public record, set out in subsection 9(1) of the Plan Sponsorship Agreement, entitled "Conditions for the Benefit of the Plan Sponsor,"[30] and article 9.2 of the Plan, entitled "Conditions of Plan Implementation."[31]

19. Among these conditions was the requirement for PWCC to have entered into certain agreements with Nova Scotia, including a Sustainable Forest Management and Outreach

[24] **R-033**, Wedlake Affidavit – Part 2, Exhibit B: Plan Sponsorship Agreement, s. 1.

[25] **R-034**, *Re NewPage Port Hawkesbury Corp.*, Meeting Order (Jul. 17, 2012) (S.C.N.S.), ¶¶ 3(a), 3(b).

[26] Section 1.1 of the Plan defined the "Effective Date" as "the day on which the Monitor delivers the Monitor's Certificate to the Applicant and the Plan Sponsor pursuant to Section 9.3," which occurred on September 28, 2012. *See* **R-035**, *Re NewPage Port Hawkesbury Corp.*, Plan Sanction Order (Sep. 25, 2012) (S.C.N.S.) ("Plan Sanction Order"), Schedule A: Amended and Restated Plan of Compromise and Arrangement, s. 1.1; **R-036**, *Re NewPage Port Hawkesbury Corp.*, Monitor's Certificate (Sep. 28, 2012) (S.C.N.S.).

[27] *See* **R-088**, Government of Nova Scotia Registry of Joint Stock Companies, website excerpt, "Profile – Port Hawkesbury Paper Inc. – as of 2016-12-22 09:53 AM" (Dec. 22, 2016), available at: https://rjsc.gov.ns.ca/rjsc/; **R-089**, Industry Canada, website excerpt, "Federal Corporation Information – 822735-7" (Jul. 12, 2016), available at: https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpDtls.html?corpId=8227357&V_TOKEN=1473802590016&crpNm=port%20hawkesbury%20paper&crpNmbr=&bsNmbr=.

[28] *See* **R-033**, Wedlake Affidavit – Part 2, Exhibit B: Plan Sponsorship Agreement, s. 1.

[29] Notice of Arbitration, ¶ 32.

[30] **R-033**, Wedlake Affidavit – Part 2, Exhibit B: Plan Sponsorship Agreement, s. 9(1) (*see especially* s. 9(1)(d), requiring that "all of the conditions set out in Section 9.2 of the Plan shall be satisfied or waived prior to the date specified therein.").

[31] **R-035**, Plan Sanction Order, Schedule A: Amended and Restated Plan of Compromise and Arrangement, s. 9.2.

Program Agreement in respect of achieving sustainable harvest and forest land practices in woodlands in Nova Scotia, a Forest Utilization License Agreement in respect of access to fibre on Crown lands, a Letter of Offer Agreement in connection with the provision of certain financial assistance by Nova Scotia to PWCC and a Real Property Agreement with respect to the purchase and sale of certain real property owned by NPPH.[32]

20. PWCC also conditioned the implementation of the restructuring and sale transaction on the Nova Scotia Utility and Review Board (the "UARB" or "Board") approving a Load Retention Tariff ("LRT") Pricing Mechanism governing the mill's electricity rates, which was the subject of a private agreement between PWCC and the mill's privately-owned electricity supplier, Nova Scotia Power Inc. ("NSPI").[33]

21. As stated in the Claimant's NOA, following the fulfilment of conditions imposed by PWCC, "[b]y way of [the] Plan of Arrangement concluded under the CCAA proceedings, the purchase of NPPH by investors of PWCC became effective on September 28, 2012."[34] With this, the Port Hawkesbury mill re-opened and promptly resumed production and sale of SC paper.

III. RESOLUTE'S NOVA SCOTIA CLAIMS ARE TIME-BARRED UNDER NAFTA ARTICLES 1116(2) AND 1117(2)

22. There is no debate that the Nova Scotia Measures were all adopted more than three years prior to the Claimant filing its NOA on December 30, 2015. The only doubt that the Claimant

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[32] **R-035**, Plan Sanction Order, Schedule A: Amended and Restated Plan of Compromise and Arrangement, ss. 1.1 (*see especially* the definitions of "Applicant," "Forest Utilization License Agreement," "Letter of Offer Agreement," "Plan Sponsor," "Province," "Provincial Agreements," "Real Property Agreement," "Sustainable Forest Management and Outreach Program Agreement,"), 9.2(e) (requiring PWCC to have entered into these agreements before the transaction closed), 9.2(f) (requiring the agreements to remain in full force and effect as of the date of the transaction's closing).

[33] **R-035**, Plan Sanction Order, Schedule A: Amended and Restated Plan of Compromise and Arrangement, s. 9.2(i). NSPI is a wholly-owned subsidiary of the publicly-traded company Emera Incorporated (*see* **R-059**, Emera, "2015 Annual Report" (2015), pp. 6, 106, available at: http://investors.emera.com/Cache/1500083715.PDF?Y=&O=PDF&D=&fid=1500083715&T=&iid=4072693; **R-060**, Emera, "Investor Presentation" (May 18, 2016), p. 5, available at: http://investors.emera.com/Cache/1500085794.PDF?Y=&O=PDF&D=&FID=1500085794&T=&IID=4072693). NSPI is Nova Scotia's primary electricity provider and the supplier of electricity to the Port Hawkesbury mill.

[34] Notice of Arbitration, ¶ 43.

tries to sow is with respect to when it first acquired knowledge of some cognizable loss or damage arising out of those measures.[35] The Claimant says it did not acquire such knowledge "until January or February [2013]."[36] This argument is not credible and is directly contradicted by the Claimant's own admissions of knowledge of loss of market share in 2012, by market data and analysis and by the Claimant's own actions, in particular its decision to shut down an SC paper machine at the Laurentide mill in November 2012. The Claimant's failure to comply with the strict three-year time limit to submit its Nova Scotia Claims to arbitration pursuant to NAFTA Articles 1116(2) and 1117(2) requires that these claims be dismissed.

A. Articles 1116(2) and 1117(2) Impose a Strict Three-Year Time Limitation for a Claimant to Submit a Claim to Arbitration

23. Pursuant to NAFTA Article 1122(1), each NAFTA Party consents to arbitration only "in accordance with the procedures set out in this Agreement." As explained by the tribunal in *Methanex v. United States*:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[37]

[35] Throughout this submission when referring to the time when the Claimant incurred loss or damage sufficient to trigger the limitations period in Articles 1116(2) and 1117(2), Canada does not agree or concede that the Claimant has incurred any compensable damage under NAFTA Chapter Eleven.

[36] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Bifurcation Hearing Transcript, 7 November 2016 ("Bifurcation Hearing Transcript"), pp. 23-25, 60:1-5, 61:1-2.

[37] **RL-018**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex –Partial Award*"), ¶ 120. *See also* **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*"), ¶ 229 (referring to Articles 1116(2) and 1117(2): "The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent.").

24. Conformity with Articles 1116(2) and 1117(2) is thus one of the pre-conditions to Canada's consent to arbitration. The Claimant must comply with these provisions in order to establish this Tribunal's jurisdiction.

25. Articles 1116(2) and 1117(2) impose a strict three-year time limit for a claimant to submit a claim to arbitration on its own behalf or on behalf of an enterprise that it owns or controls. They prohibit claims "if more than three years have elapsed from the date on which the investor [under Article 1116(2), or the enterprise, under Article 1117(2),] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage."[38]

26. In *Feldman v. United States*, the tribunal stressed that "NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defence which, as such, is not subject to any suspension […], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years."[39]

27. The ordinary meaning of NAFTA Chapter Eleven's time limitation for filing a claim has also been succinctly described by Professor Michael Reisman:

> It takes great effort to misunderstand Article 1116(2). It establishes that the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries

[38] NAFTA Article 1116(2) states: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." Similarly, Article 1117(2) states: "An investor may not make a claim on behalf of an enterprise […] if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

[39] **RL-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman – Award*"), ¶ 63. *See also* **RL-022**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River – Decision on Objections to Jurisdiction*"), ¶ 29; **RL-023**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex – Award on Jurisdiction and Admissibility*"), ¶ 327; **RL-024**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 ("*Corona – Award on Preliminary Objections*"), ¶¶ 192, 199, citing **RL-021**, *Feldman – Award* with approval in interpreting the equivalent three-year limitations period in the DR-CAFTA as "strict" and not susceptible to suspension or tolling.

> economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred.[40]

28. In short, the NAFTA Parties do not consent to arbitrate claims submitted to arbitration after the expiry of the three-year limitations period, and a NAFTA Chapter Eleven tribunal has no jurisdiction *ratione temporis* over such untimely claims.

29. Several NAFTA Chapter Eleven tribunals have dismissed claims on this basis. For example, in *Grand River Enterprises Six Nations Ltd. v. United States*, the claimant commenced a NAFTA Chapter Eleven arbitration on March 12, 2004, alleging NAFTA breaches arising from a 1998 tobacco litigation Master Settlement Agreement ("MSA") and subsequent state actions taken pursuant to the MSA.[41] The United States challenged the tribunal's jurisdiction over the claim on the ground that it was time-barred by Article 1116(2). The *Grand River* tribunal agreed with the United States, finding that claims based on the MSA were untimely.[42] In its award, the tribunal confirmed that Articles 1116(2) and 1117(2) impose a strict three-year limitations period on claims under Chapter Eleven.[43]

30. More recently, in *Apotex Inc. v. United States* the tribunal agreed with the United States that the claimant's allegation that a decision by the United States Food and Drug Administration ("FDA") that prevented Apotex from bringing its drug to market was time-barred under Article 1116(2).[44] The claimant in that case commenced the arbitration on June 4, 2009.[45] However, the administrative decision challenged by the claimant had been issued by the FDA more than three years earlier, on April 11, 2006. As such, the tribunal concluded that "all claims based

[40] **RL-027**, *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Opinion of W. Michael Reisman with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, 22 April 2008, ¶ 28 (emphasis in original).

[41] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 24.

[42] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 103-104. The only claim it reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual states after March 12, 2001 (i.e., within the applicable three-year limitation period).

[43] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 29.

[44] **RL-023**, *Apotex – Award on Jurisdiction and Admissibility*, ¶¶ 314-335.

[45] **RL-023**, *Apotex – Award on Jurisdiction and Admissibility*, ¶ 3.

exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed."[46]

31. Similarly, the tribunal in *Bilcon v. Canada* found that certain decisions and actions by government officials relating to the claimants' investments in a proposed quarry could not form the basis of a NAFTA claim because they fell outside of the three-year limitations period set out in Articles 1116 and 1117.[47] The claimants in *Bilcon* commenced that arbitration on June 17, 2008.[48] However, the tribunal found that some of the breaches they alleged arose prior to the beginning of the three-year time period starting on June 17, 2005.[49] These included key decisions with respect to an application to the Nova Scotia Department of Environment and Labour for a blasting permit, which expired on May 1, 2004, and a decision to refer the project to a joint review panel for an environmental assessment process, which was made on August 7, 2003.[50] The *Bilcon* tribunal took the view, therefore, that "as regards the breaches identified by the Investors that arose prior to the beginning of the three-year period starting on 17 June 2005, the corresponding claims must be considered time-barred."[51]

B. Either Actual or Constructive Knowledge is Sufficient to Start the Time Limitation in Articles 1116(2) and 1117(2)

32. Articles 1116(2) and 1117(2) provide that the time limitation may commence from two possible points in time: (1) the moment when an investor or enterprise "first acquired" knowledge of the alleged breach and loss, or (2) the moment when an investor or enterprise "should have first acquired" knowledge of the alleged breach and loss. As acknowledged by the

[46] **RL-023**, *Apotex – Award on Jurisdiction and Admissibility*, ¶ 324.

[47] **RL-025**, *Bilcon – Award*, ¶¶ 258-282.

[48] **RL-025**, *Bilcon – Award*, ¶ 41.

[49] **RL-025**, *Bilcon – Award*, ¶ 281.

[50] **RL-025**, *Bilcon – Award*, ¶ 267.

[51] **RL-025**, *Bilcon – Award*, ¶ 281.

Claimant,[52] the limitations period thus begins to run once a claimant has acquired either actual knowledge or constructive knowledge of the alleged breach and loss.[53]

33. The notion of actual knowledge accounts for what an investor subjectively knew. In contrast, the notion of constructive knowledge accounts for what a reasonable investor objectively ought to have known. As explained by the tribunal in *Grand River*, "'[c]onstructive knowledge' of a fact is imputed to [a] person if by exercise of reasonable care or diligence, the person would have known of that fact."[54] The *Grand River* tribunal also noted the close relationship between constructive knowledge and constructive notice, which "entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge."[55]

34. The reference to constructive knowledge in Articles 1116(2) and 1117(2) prevents the time limitation from being extended, for example, through wilful blindness on the part of an investor, through a failure on the part of the investor to acknowledge that a measure is causing it loss or damage or through a lack of carefulness on the part of the investor to discover any loss or damage that it may have incurred. Rather, Articles 1116(2) and 1117(2) require investors to exercise a measure of "reasonable care" and "diligence," in the words of the *Grand River* tribunal, to the standard of "a reasonably prudent investor."[56]

35. The claimants in *Grand River* argued in part that "there was uncertainty and ambiguity regarding the scope and application of the MSA and its implementing measures, and that they

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[52] *See Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Opposition to Respondent's Request for Bifurcation, 13 October 2016 ("Claimant's Opposition to Respondent's Request for Bifurcation"), ¶ 39.

[53] *See* **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 53, 58; **RL-025**, *Bilcon – Award*, ¶ 273. *See also* **RL-024**, *Corona – Award on Preliminary Objections*, ¶¶ 193, 217; **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016 ("*Spence – Interim Award*"), ¶ 170.

[54] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 59.

[55] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 59.

[56] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 59, 66. *See also* **RL-028**, *Spence – Interim Award*, ¶ 171 (Applying the standard of constructive knowledge, the tribunal inquired as to what a "reasonable property investor […] ought at the very least to have concluded.").

should not be held to constructive knowledge of an unclear regime."[57] The tribunal rejected this argument, holding that the claimants should have known of the measures before the applicable cut-off date because they were "developments of fundamental significance in the U.S. tobacco trade" and "information concerning them was widely available in that trade in the [relevant] period."[58] The tribunal considered that "[e]ven limited inquiries by the Claimants would have shown, at a minimum, the existence of a significant and potentially burdensome new body of state legal requirements bearing on off-reservation sales of their products, and warned of the need for further diligent investigation."[59] The tribunal adopted a similar conclusion when holding that the claimants also had constructive knowledge of loss or damage:

> Given the Claimants' situation as experienced participants in the U.S. tobacco market, the scale of their investments and plans as presented to the Tribunal, and the availability of relevant information from multiple possible sources, they should have acquired knowledge of the escrow statutes and other measures being taken by U.S. states to implement the MSA. And, to the extent that these measures necessarily resulted in loss or damage to the Claimants before March 12, 2001, appropriate diligence would have disclosed that fact.[60]

36. In other words, a claimant cannot feign ignorance of facts it should reasonably have been aware of had it conducted appropriate due diligence.

C. Knowledge of the Full Extent of the Loss or Damage Incurred is Not Required to Start the Time Limitation in Articles 1116(2) and 1117(2)

37. NAFTA tribunals have consistently held that concrete knowledge of the actual amount of loss or damage incurred is not a pre-requisite to the running of the limitations period under Articles 1116(2) or 1117(2). For example, the *Grand River* tribunal stated:

> A party is said to incur losses, expenses, debts or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover,

[57] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 44.

[58] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 68.

[59] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 68.

[60] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 73.

> damage or injury may be incurred even though the amount or extent may not become known until some future time.[61]

38. This confirms what the tribunal in *Mondev v. United States* had written: "A claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear."[62]

39. More recently, the *Bilcon* tribunal "agree[d] with the reasoning of its predecessors on this point" and stated that "[t]he plain language of Article 1116(2) does not require full or precise knowledge of loss or damage."[63] The *Bilcon* tribunal further held that a requirement of "reasonably specific knowledge of the amount of the loss" could not be read in to the plain language of Article 1116(2), because this "might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue; it would have to be determined in each case not only whether there is actual or constructive knowledge of loss of damage, but whether the investor has knowledge that is sufficiently 'actual' or 'concrete.'"[64]

40. The *Bilcon* tribunal also noted the practical reasons that militate against "interpreting Article 1116(2) in a manner that expands the timing options open to an investor."[65] In particular, the tribunal considered that a "host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches" and that "[d]elay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation."[66]

41. The above-noted NAFTA decisions on this point were recently endorsed by the tribunal in *Rusoro Mining Limited v. Venezuela*. That tribunal was interpreting Article XII.3(d) of the

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[61] **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 77.

[62] **RL-029**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 87.

[63] **RL-025**, *Bilcon* – Award, ¶ 275.

[64] **RL-025**, *Bilcon* – Award, ¶ 275.

[65] **RL-025**, *Bilcon* – Award, ¶ 277.

[66] **RL-025**, *Bilcon* – Award, ¶ 277.

Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, which contains a three-year limitations period similar to that in NAFTA Article 1116(2).[67] "In accordance with established NAFTA case law," the tribunal held, "what is required [to start the limitations period] is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear."[68]

42. In sum, the plain language of Articles 1116(2) and 1117(2) does not require a claimant to acquire knowledge of the full extent of the loss or damage resulting from the alleged breaches in order to start the time limitation to submit a claim to arbitration. That time limitation begins to run from the moment a claimant first obtains or should first obtain knowledge that it has incurred loss or damage as a result of the alleged breaches.

D. Resolute First Acquired Knowledge of Both the Alleged Breaches and an Alleged Resulting Loss or Damage Before December 30, 2012

43. The Claimant submitted its claim to arbitration on December 30, 2015.[69] As such, the cut-off date that applies to its claims for the purposes of the three-year limitation under NAFTA Articles 1116(2) and 1117(2) is December 30, 2012.[70] This "critical date" is "the earliest possible date on which the Claimant would have obtained knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant's claims to have been submitted within the time limit."[71]

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[67] **RL-030**, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 ("*Rusoro – Award*"), ¶¶ 204-205.

[68] **RL-030**, *Rusoro – Award*, ¶ 217.

[69] Pursuant to NAFTA Article 1137(1)(c), "A claim is submitted to arbitration under this Section when: […] the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party." Canada received the Claimant's Notice of Arbitration and Statement of Claim on the date that it was filed, i.e. December 30, 2015.

[70] Procedural Order No. 4, ¶ 4.7 ("The relevant 3-year cut off in this case is December 30, 2012.").

[71] **RL-024**, *Corona – Award on Preliminary Objections*, ¶ 198. *See also* **RL-028**, *Spence – Interim Award*, ¶ 163, fn.139 (adopting the same approach with a slight difference in terminology, referring to the "critical limitation date"). Both the *Corona Materials* and *Spence* tribunals were applying Article 10.18.1 of the Dominican Republic-

44. As set out below, the Claimant knew of both the Nova Scotia Measures that it alleges breached NAFTA Chapter Eleven *and* of a loss or damage that allegedly resulted from those measures before December 30, 2012.

1) It is Uncontested that the Nova Scotia Measures Were All Adopted Before December 30, 2012

45. As the Tribunal has stated, "[t]he date[s] of the alleged breaches—the Nova Scotia Measures—are uncontested."[72] By the Claimant's own pleading, these measures were adopted between September 2011 and September 2012.

46. The Claimant divides the Nova Scotia Measures into two categories. First, it challenges "$36.8 million that Nova Scotia spent in its effort to keep the mill in a 'hot idle' state and support the local forest products sector for nearly a year"[73] before it was acquired by PWCC. It alleges that this funding was provided "*during* [the] CCAA proceedings"[74] of NPPH, that is, between September 6, 2011, when NPPH filed for creditor protection, and September 28, 2012, when PWCC acquired the Port Hawkesbury mill.

47. Second, the Claimant challenges "$124.5 million in government measures"[75] that Nova Scotia provided to PWCC when it acquired the Port Hawkesbury mill, including "grants, loans, cash to purchase land, reduced electricity rates and property taxes, among other financial contributions and measures."[76] It alleges that Nova Scotia "announced [this] series of measures on August 20, 2012,"[77] and, "*[b]y September 2012*, […] finalized agreement on various requests made by PWCC in the negotiations and *provided [the] no less than $124.5 million in government*

Central America-United States Free Trade Agreement of 2004, which imposes a three-year time bar similar to NAFTA Articles 1116(2) and 1117(2).

[72] Procedural Order No. 4, ¶ 4.8.

[73] Notice of Arbitration, ¶ 43.

[74] Notice of Arbitration, ¶ 33 (emphasis added).

[75] Notice of Arbitration, ¶ 36.

[76] Notice of Arbitration, ¶ 41.

[77] Notice of Arbitration, ¶ 35.

measures."[78] The NOA further alleges that "the purchase of NPPH by investors of PWCC," facilitated by these government measures, "*became effective on September 28, 2012*."[79]

48. While the Claimant's own words acknowledging that the Nova Scotia Measures were all completed before December 30, 2012 are sufficient to end the debate, the following summary further establishes this fact:

- ***Forestry Infrastructure Fund ("FIF"):*** The Province and NPPH entered into the agreement establishing the FIF, subject to Court approval, on September 16, 2011, with initial funding of $14 million.[80] That agreement was announced[81] and publicly disclosed in court filings[82] on September 20, 2012. The Court approved the FIF on September 23, 2011.[83] The Province announced an additional $12 million in FIF funding on March 16, 2012,[84] implemented through amendments to the FIF Agreement executed on March 27, 2012.[85]

- ***"Hot Idle" Funding:*** On January 4, 2012, the Province announced[86] that it had agreed to provide NPPH with up to $5 million in "hot idle"[87] funding. The Monitor reported this

[78] Notice of Arbitration, ¶ 36 (emphasis added).

[79] Notice of Arbitration, ¶ 43 (emphasis added).

[80] **R-040**, *Re NewPage Port Hawkesbury Corp.*, First Report of the Monitor (Sep. 20, 2011) (S.C.N.S.) ("First Report of the Monitor"), Appendix B. Pursuant to this Agreement, NPPH would serve as an intermediary between the Province and the independent contractors affiliated with the Port Hawkesbury mill, who would provide forestry services to the Province. These services included silviculture, harvesting, cutting and transportation of forest products on Crown lands, road maintenance on Crown lands, forestry training program design and delivery, and all work of the core NewPage staff in relation to these items. *See* **R-040**, First Report of the Monitor, Appendix B, s. 1.

[81] **R-039**, Nova Scotia Department of Natural Resources, News Release, "Province Presents Forestry Infrastructure Plan" (Sep. 20, 2011), available at: http://novascotia.ca/news/release/?id=20110920006.

[82] **R-040**, First Report of the Monitor, Appendix B.

[83] **R-041**, *Re NewPage Port Hawkesbury Corp.*, Forestry Infrastructure Agreement and Silviculture Reserve Fund Claims Process Order (Sep. 23, 2011) (S.C.N.S.), ¶¶ 1-2.

[84] **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs, Keeps Mill Re-sale Ready" (Mar. 16, 2012), available at: http://novascotia.ca/news/release/?id=20120316002; **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 1, available at: http://www.novascotia.ca/news/docs/2012/Mar/factsheet.pdf.

[85] *See* **R-044**, *Re NewPage Port Hawkesbury Corp.*, Eighth Report of the Monitor (Mar. 26, 2012) (S.C.N.S.), ¶¶ 56-58; **R-045**, *Re NewPage Port Hawkesbury Corp.*, Ninth Report of the Monitor (May 28, 2012) (S.C.N.S.), ¶ 46.

[86] **R-048**, Nova Scotia Department of Natural Resources, News Release, "Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready" (Jan. 4, 2012), available at: http://novascotia.ca/news/release/?id=20120104002.

[87] As explained by the Monitor, "Hot Idle Status indicates that the plant has been taken out of active production in such a way as to permit a smooth resumption of production when circumstances permit." By contrast "'cold idle' is a more complex shut-down operation involving draining of potentially hazardous chemicals and preparation of the

to the Court on February 27, 2012,[88] and the Court issued an order memorializing the funding agreement on March 1, 2012.[89] The Province announced an additional $5.8 million in "hot idle" funding on March 26, 2012.[90] An agreement granting the additional "hot idle" funding was concluded and publicly disclosed in a court filing on March 27, 2012.[91]

- ***Support for PWCC's Acquisition of the Mill and Related Investments:*** On August 20, 2012, the Province announced a financial commitment to support PWCC's acquisition of the mill and related investments including: a $24-million loan to support improved productivity and efficiency; a $40-million repayable loan for working capital; $1.5 million to train workers; $1 million to implement a marketing plan; $20 million in exchange for 51,500 acres of land; $3.8 million annually, for 10 years, from the forestry restructuring fund to support sustainable harvesting, forest land management, and fund programs to promote woodland management; and funding for the development of a Mi'kmaq Forestry Strategy and Co-ordinator.[92] On September 22, 2012, the Province announced a renegotiated agreement, under which "all elements of [its] previously announced support remain[ed] the same," subject to limited exceptions.[93] "The provincial assistance [was] contingent upon Pacific West purchasing the mill,"[94] which occurred on September 28, 2012.

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machinery either for decommissioning or potentially a long-term shut down." **R-046**, *Re NewPage Port Hawkesbury Corp.*, Report of the Proposed Monitor (Sep. 7, 2011) (S.C.N.S.), ¶ 32.

[88] **R-049**, *Re NewPage Port Hawkesbury Corp.*, Seventh Report of the Monitor (Feb. 27, 2012) (S.C.N.S.), ¶¶ 32-45.

[89] *See* **R-050**, *Re NewPage Port Hawkesbury Corp.*, Reimbursement Order (Mar. 1, 2012) (S.C.N.S.).

[90] **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs, Keeps Mill Re-sale Ready" (Mar. 16, 2012); **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 2.

[91] **R-051**, *Re NewPage Port Hawkesbury Corp.*, Supplement to the Eighth Report of the Monitor (Mar. 27, 2012) (S.C.N.S.), Appendix A.

[92] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012), available at: http://novascotia.ca/news/release/?id=20120820001.

[93] **R-056**, Nova Scotia Premier's Office, News Release, "Province Negotiates New, Better Deal to Reopen Mill, Support the Strait" (Sep. 22, 2012), available at: http://novascotia.ca/news/release/?id=20120922001. *See also* **R-090**, Nova Scotia Premier's Office, Statement and Backgrounder (Sep. 22, 2012), available at: http://novascotia.ca/newpage/NewPage-Backgrounder-September-2012.pdf.

[94] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012).

- ***Property Tax Agreement:*** On September 27, 2012, PWCC and NPPH entered into an agreement with Richmond County regarding the municipal property taxes payable for the mill from September 28, 2012, to March 31, 2013 (the "Property Tax Agreement").[95] This agreement was given effect through the *Richmond-NewPage Port Hawkesbury Tax Agreement Act*, introduced in the legislature on November 29, 2012,[96] and enacted on December 6, 2012.[97]

- ***Load Retention Tariff ("LRT"):***[98] On April 27, 2012, PWCC and NSPI applied to the UARB for approval of a LRT governing the rates payable for electricity to be supplied to the Port Hawkesbury mill until December 31, 2019.[99] The Board approved the LRT on August 20, 2012.[100] NSPI and PWCC sought an amendment on September 22, 2012, which the Board granted on September 27, 2012.[101]

49. The Claimant has not denied knowledge of these measures at the time they were adopted. Nor could it, as the adoption of the Nova Scotia Measures was a matter of public record. It was the subject of numerous news releases issued by Nova Scotia,[102] the court filings in the CCAA

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[95] Amendment to Tax Agreement, being Schedule B to **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*, S.N.S. 2006, c. 51, as amended by S.N.S. 2012, c. 49 ("*Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*"), available at: http://nslegislature.ca/legc/statutes/richmond%20port%20hawkesbury%20paper.pdf.

[96] *See* **R-091**, Bill 155, *Richmond–NewPage Port Hawkesbury Tax Agreement Act*, 4th Sess., 61st Leg. (first reading November 29, 2012), available at: http://nslegislature.ca/legc/bills/61st_4th/1st_read/b155.htm; **R-092**, Service Nova Scotia and Municipal Relations, News Release, "Legislation Amends Taxation Agreement for Port Hawkesbury Paper Mill" (Nov. 29, 2012), available at: http://novascotia.ca/news/release/?id=20121129003.

[97] **R-058**, *Richmond-NewPage Port Hawkesbury Tax Agreement Act*, S.N.S. 2012, c. 49, available at: http://nslegislature.ca/legc/PDFs/annual%20statutes/2012%20Fall/c049.pdf. Note that the *Richmond-NewPage Port Hawkesbury Tax Agreement Act* amended an existing statute that authorized a Letter of Intent dated May 25, 2006, between Richmond County and NPPH's corporate predecessor, Stora Enso Port Hawkesbury Limited, which established the property taxes payable for the ten-year period from April 1, 2006, to March 31, 2016 (*see* Letter of Intent between the Municipality of the County of Richmond and Stora Enso Port Hawkesbury Limited, ss. 1-2, being the Schedule to **R-093**, *Richmond Stora Enso Taxation Act*, S.N.S. 2006, c. 51, available at: http://nslegislature.ca/legc/PDFs/annual%20statutes/2006%20Fall/c051.pdf). The amending legislation also renamed the statute the *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*. The amended version of the statute appears as **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.

[98] Because the Load Retention Tariff setting the electricity rates payable for the Port Hawkesbury mill is the result of a private agreement between PWCC and NSPI, it cannot be attributed to Canada and is therefore outside of the Tribunal's jurisdiction. *See* Statement of Defence, ¶¶ 7, 75, 104.

[99] **R-062**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126 ("*Re Pacific West I*"), ¶¶ 9, 145, available at: http://www.canlii.org/en/ns/nsuarb/doc/2012/2012nsuarb126/2012nsuarb126.html?resultIndex=1.

[100] **R-062**, *Re Pacific West I*.

[101] **R-063**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 144 ("*Re Pacific West II*"), ¶¶ 7, 40, available at: http://www.canlii.org/en/ns/nsuarb/doc/2012/2012nsuarb144/2012nsuarb144.html?resultIndex=1.

[102] *See* **R-039**, Nova Scotia Department of Natural Resources, News Release, "Province Presents Forestry Infrastructure Plan" (Sep. 20, 2011); **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs,

proceedings,[103] the taxation legislation debated[104] and enacted[105] by the Nova Scotia Legislature and the public record of proceedings before the UARB.[106] The Nova Scotia Measures also received a significant amount of coverage in the press at the time they were adopted, including in news articles published before the cut-off date of December 30, 2012, which the Claimant submitted as the basis of its claim.[107] Finally, the Claimant publicly acknowledged the adoption of the Nova Scotia Measures in November 2012.[108]

Keeps Mill Re-sale Ready" (Mar. 16, 2012); **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 1; **R-048**, Nova Scotia Department of Natural Resources, News Release, "Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready" (Jan. 4, 2012); **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012); **R-056**, Nova Scotia Premier's Office, News Release, "Province Negotiates New, Better Deal to Reopen Mill, Support the Strait" (Sep. 22, 2012).

[103] For example, the FIF Agreement and "hot idle" funding were publicly disclosed in filings with the Court. *See* **R- 040**, First Report of the Monitor, Appendix B; **R-050**, *Re NewPage Port Hawkesbury Corp.*, Reimbursement Order (Mar. 1, 2012) (S.C.N.S.); **R-051**, *Re NewPage Port Hawkesbury Corp.*, Supplement to the Eighth Report of the Monitor (Mar. 27, 2012) (S.C.N.S.), Appendix A. All of the court filings in the CCAA proceedings of NPPH were made publicly available online by the Monitor at www.ey.com/ca/npph and http://documentcentre.eycan.com/Pages/Main.aspx?SID=189.

[104] *See* **R-091**, Bill 155, *Richmond–NewPage Port Hawkesbury Tax Agreement Act*, 4th Sess., 61st Leg. (first reading November 29, 2012).

[105] *See* **R-058**, *Richmond-NewPage Port Hawkesbury Tax Agreement Act*, S.N.S. 2012, c. 49; **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.

[106] *See* **R-062**, *Re Pacific West I*; **R-063**, *Re Pacific West II*. In addition to these publicly-available decisions, the UARB allows public access to hearings and makes written submissions and evidence available on its web site at https://nsuarb.novascotia.ca/.

[107] To support the allegations in its NOA, the Claimant relies on many examples of press coverage contemporaneous to the adoption of the Nova Scotia Measures. *See e.g.* **R-064**, The Chronicle Herald, "Paper mill sale finalized" (Sep. 28, 2012), available at: http://thechronicleherald.ca/business/141140-paper-mill-sale-finalized (cited at NOA, ¶ 25); **R-065**, Nancy King, Cape Breton Post, "UARB approves paper mill power deal" (Aug. 20, 2012), available at:http://www.capebretonpost.com/News/Local/2012-08-20/article-3056733/UARB-approvespaper-mill-power-deal/1 (cited at NOA, ¶ 34); **R-066**, Pulp & Paper Canada, "Nova Scotia mill restarts as Port Hawkesbury Paper" (Dec. 1, 2012), available at: http://www.pulpandpapercanada.com/news/nova-scotia-mill-restarts-as-port-hawkesbury-paper-1001952406 (cited at NOA, ¶ 37); **R-067**, Cumberland News Now, "Former NewPage Port Hawkesbury paper mill in Nova Scotia sold to Vancouver firm" (Sep. 28, 2012), available at: http://www.cumberlandnewsnow.com/Canada-World/News/2012-09-28/article-3086046/Former-NewPage-Port-Hawkesbury-paper-mill-in-Nova-Scotia-sold-to-Vancouver-firm/1 (cited at NOA, ¶ 43); **R-068**, Brett Bundale, Chronicle Herald, "Mill gets millions in N.S. Cash" (Aug. 21, 2012), available at: http://thechronicleherald.ca/novascotia/128302-mill-gets-millions-in-ns-cash (cited at NOA, ¶¶ 44, 114); **R-069**, Cassie Williams, CBC News, "Nova Scotia paper mill revived in 11th-hour twist" (Sep. 22, 2012), available at: http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-paper-mill-revived-in-11th-hour-twist-1.1148136 (cited at NOA, ¶ 45); **R-070**, Brett Bundale, The Chronicle Herald,"Plant restart could topple competitors" (Aug. 21, 2012), available at: http://thechronicleherald.ca/business/128645-plant-restart-could-topple-competitors (cited at NOA, ¶ 48); **R-071**, Marc Dube, The Chronicle Herald, "Full steam ahead for paper mill" (Dec. 6, 2012), available at:

50. In sum, the Claimant first acquired, or should have first acquired, knowledge of the Nova Scotia Measures alleged to breach Canada's obligations under NAFTA Chapter Eleven before the cut-off date of December 30, 2012.

2) The Claimant First Knew of a Loss or Damage Allegedly Caused by the Nova Scotia Measures Before December 30, 2012

51. As the Tribunal has recognized, its decision on time bar in this case "will turn on the question of when the Claimant first knew – or ought to have known – that it incurred loss or damage."[109] The answer is that the Claimant first knew or should have known of a loss or damage of the type it alleges (which Canada maintains is not compensable under Chapter Eleven), in the form of lost market share, lower prices for its SC paper, and a negative impact on its competitive position,[110] before December 30, 2012. The Claimant's position that it "probably" only had knowledge that it incurred any loss or damage due to the Nova Scotia Measures "in January or February [of 2013]"[111] is not credible.

52. Not only is the Claimant's argument contradicted by its own previous admissions and public statements, it is rebutted by an abundance of market data and analysis available prior to December 30, 2012, which confirmed the impact on Resolute's market share and SC paper

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http://thechronicleherald.ca/opinion/222523-full-steam-ahead-for-paper-mill (cited at NOA, ¶ 52). *See also* **R-094**, Article, CBC, "Nova Scotia court approves sale of paper mill for $33M" (Sep. 27, 2012), available at: http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-court-approves-sale-of-paper-mill-for-33m-1.1187617; **R-095**, Article, CTV, "Pacific West says NewPage sale has been finalized" (Sep. 28, 2012), available at: http://atlantic.ctvnews.ca/pacific-west-says-newpage-sale-has-been-finalized-1.975988.

[108] *See* **R-096**, CQ Transcriptions, transcript, "Q3 2012 Resolute Forest Products Inc. Earnings Conference Call – Final" (Nov. 2, 2012), p. 9 (Containing statements made by the Resolute's President and CEO, Mr. Richard Garneau, during a conference call held to discuss the company's third quarter earnings held on November 2, 2012. During this call, an analyst from Bennett Management asked Mr. Garneau: "What have you seen in terms of market activity related to Port Hawkesbury's restart?" Mr. Garneau responded that "it's a large capacity and you see the stats. And it is a concern, but they'll have to compete.").

[109] Procedural Order No. 4, ¶ 4.8.

[110] The Claimant alleges that the Nova Scotia Measures caused it loss or damage in the form of lost sales and market share which ultimately forced it to close its Laurentide mill (*see* Notice of Arbitration, ¶¶ 49, 56, 89, 92, 108). It attributes these losses to a reduction in the price of SC paper allegedly caused by the reopening of the Port Hawkesbury mill, due to the fact that it expanded market supply by 360,000 tonnes and had lower production costs as a result of the Nova Scotia Measures (*see* Notice of Arbitration, ¶¶ 41, 47, 48, 49, 50, 53).

[111] Bifurcation Hearing Transcript, pp. 60:3-5, 23-25, 61:1-2.

prices. As a large, publicly-traded corporation in a highly competitive industry facing declining demand, Resolute would have been monitoring developments in the market in real time. While the reappearance of the Port Hawkesbury mill onto the market in early October 2012 in and of itself would have been sufficient to start the Article 1116(2) and 1117(2) limitations period running, the contemporaneous information available at the relevant time period puts the issue beyond debate.

a) The Claimant Has Already Acknowledged that It Had Incurred Loss or Damage Starting in 2012

53. The Claimant has already admitted in writing and in its public statements that it started losing market share and was impacted by the reopening of Port Hawkesbury in 2012, not in 2013 as it now alleges.

54. First, on February 24, 2015, the Claimant presented Canada with a draft notice of intent to submit a claim to arbitration under NAFTA Chapter Eleven ("NOI") which stated that, as a result of the Nova Scotia Measures, "Resolute's market share for all SC Paper has declined from 2012 to 2014."[112]

55. The Claimant's recent attempt to explain away this admission by saying the reference to its market share decline "from 2012 to 2014" means from "the end of 2012"[113] is not credible.[114] Nor is the Claimant's attempt to minimize the impact of its admission by describing the draft NOI as a "non-paper" which was "not meant as a final document of any kind."[115] This was not

[112] **R-081**, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Feb. 24, 2015), ¶ 19. The Claimant filed its NOI on September 30, 2015, and its NOA on December 30, 2015. In its NOI and NOA, the Claimant changed the date of the alleged time at which it started to lose market share to PHP from 2012 to 2013. See *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Notice of Intent to Submit a Claim to Arbitration, 30 September 2015 ("NOI"), ¶ 36 (emphasis added); Notice of Arbitration, ¶ 50.

[113] Bifurcation Hearing Transcript, p. 56:17-18.

[114] The words "the end" do not appear in the draft NOI, nor does the context imply this meaning. It is also not credible to say that the Claimant would even refer to 2012 if it only meant to include one or two days in 2012 (i.e. December 30 and 31). If that were the case, the Claimant would have said "from 2013 to 2014" or "in 2013 and 2014."

[115] Bifurcation Hearing Transcript, p. 56:5, 11-12.

just a rough internal draft document with a preliminary analysis not intended for external scrutiny. It was a carefully crafted document which the Claimant's President and CEO, Mr. Richard Garneau, presented to Canada's Minister of International Trade during an in-person meeting in order to threaten legal action against Canada.[116] The reference to loss of market share beginning in 2012 was clearly not an oversight. Moreover, this admission is consistent with its other public statements and available market data and analysis from that time (discussed below).

56. Second, the Claimant's suggestions that it could not "have known that it would incur loss or damage by virtue of the [Nova Scotia] measures and [the Port Hawkesbury mill's] re-entry into the market without any knowledge of the actual effects of the re-entry and when they occurred"[117] and that "[k]nowledge of the consequences of the Nova Scotia measures had to wait for Port Hawkesbury's activity in and impact on the market, which did not happen instantly"[118] are belied by contemporaneous statements made by Resolute President and CEO, Mr. Richard Garneau. In particular, during a conference call to discuss Resolute's 2012 second quarter results held on August 1, 2012, an analyst from TD Securities asked Mr. Garneau: "assuming Port Hawkesbury restarts, […] either later this quarter or early in Q4, […] can you speak to expectations of substitution across the grade spectrum and how that might impact markets for some of the other uncoated groundwood grades you produce?"[119] Mr. Garneau responded that "obviously, the restart of Port Hawkesbury would certainly have an impact on the market […] quite frankly, restart of the 350 or 400,000 tonnes machine, well *it's impossible not to have an impact on the market*."[120]

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[116] *See* **R-082**, Letter from Richard Garneau, President and CEO of Resolute Forest Products Inc., to Ed Fast, Minister of International Trade (Mar. 2, 2015).

[117] Bifurcation Hearing Transcript, p. 50:7-10.

[118] Bifurcation Hearing Transcript, p. 50:16-19.

[119] **R-097**, Resolute Forest Products Inc., Form 8-K (Aug. 1, 2012), Exhibit 99.2: Transcript of Earnings Call Held on August 1, 2012, p. 10, available at: http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=8404168&type=PDF&symbol=RFP&companyName=Resolute+Forest+Products&formType=8-K&dateFiled=2012-08-07.

[120] **R-097**, Resolute Forest Products Inc., Form 8-K (Aug. 1, 2012), Exhibit 99.2: Transcript of Earnings Call Held on August 1, 2012, p. 10 (emphasis added).

57. In the face of its previous admission that "obviously" the restart of the Port Hawkesbury mill would "certainly have an impact on the market," and that it would be "impossible [for it] not to have an impact on the market," the Claimant's latest suggestion that it did not and could not know that was negatively impacted as soon as the Port Hawkesbury mill reopened lacks credibility.

58. Third, the Claimant publicly acknowledged that it shut down one of its SC paper machines at its Laurentide mill in November 2012 in part due to the reopening of the Port Hawkesbury mill.

59. PHP began producing paper on October 3, 2012.[121] Just over one month later, on November 6, 2012, the Claimant announced "that it [was] permanently shutting down paper machine No. 10 at its Laurentide mill," effective November 26, 2012.[122] At the time of this announcement, the mill produced over 350,000 metric tonnes of commercial printing papers annually between two machines, with machine no. 10 producing 125,000 metric tonnes annually and machine no. 11 producing nearly 225,000 metric tonnes annually.[123] The Claimant explained that "[t]he permanent shutdown [came] after an important drop in demand and *an increase in market capacity* of the paper grade produced on machine No. 10."[124] The Claimant's President and CEO, Mr. Garneau, further stated that "market demand and *capacity*, the strong Canadian

[121] *See* **R-098**, Article, Truro Daily News, "Paper rolling off line at mill" (Oct. 4, 2012), available at: http://www.trurodaily.com/; **R-099**, Article, Cape Breton Post, "Paper rolling off line at mill" (Oct. 3, 2012), available at: http://www.pressreader.com/canada/cape-breton-post/textview; **R-100**, Article, PaperAge, "Papermaking Rolls Again at Port Hawkesbury Mill in Nova Scotia" (Oct. 5, 2012), available at: http://www.paperage.com/2012news/10_05_2012port_hawkesbury_restart.html.

[122] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012).

[123] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012).

[124] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012) (emphasis added).

dollar, rising freight and fuel costs, and the continuing high cost of fiber also factored into management's decision" to shut down the machine.[125]

60. The Claimant's mention of "increased market capacity" as one of the factors that led it to reduce Laurentide mill's production capacity by approximately 35 per cent in November 2012 was a reference to the re-opening of the Port Hawkesbury mill.[126] Resolute spokesman Mr. Pierre Choquette made this clear when he stated publicly that the Claimant would not keep the Laurentide machine no. 10 operating because of Port Hawkesbury's recent re-entry onto the market:

> On a essayé dans les derniers mois de trouver un nouveau grade de papier pour produire dans cette machine-là, mais dans les dernières semaines, on a appris qu'une nouvelle usine en Nouvelle-Écosse va redémarrer, d'un concurrent, et va venir ajouter 400 000 tonnes de ce grade de papier-là. Tous les efforts ont donc été interrompus.[127]

61. The Claimant's announcement of its decision to close paper machine no. 10 at the Laurentide mill on November 6, 2012, approximately one month after PWCC acquired and restarted the Port Hawkesbury mill, and approximately two years before it decided to close the Laurentide mill entirely, further confirms that the Claimant had actual knowledge of the alleged loss or damage before December 30, 2012.

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[125] **R-014**, Resolute Forest Products, News Release, "Resolute Forest Products announces permanent shutdown of paper machine at its Laurentide mill" (Nov. 6, 2012) (emphasis added).

[126] The only other increase in market capacity around that time was the reopening of the Claimant's own Dolbeau mill, announced on August 24, 2012, but that had a much smaller impact on the total capacity of the SC paper market given that Dolbeau only had an annual production capacity of 143,000 metric tonnes. *See* **R-011**, Resolute Forest Products, News Release, "Resolute Forest Products Announces Restart of its Dolbeau (Québec) Paper Mill" (Aug. 24, 2012), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135310; **R-012**, Resolute Forest Products, website excerpt, "Dolbeau" (2016), available at: http://www.resolutefp.com/installation_site.aspx?siteid=159&langtype=4105.

[127] **R-101**, Radio-Canada, "Shawinigan: 111 emplois perdus a l'usine Laurentide" (Nov. 6, 2012), available at: http://ici.radio-canada.ca/nouvelle/586191/arret-machine-10-shawinigan. ("We have tried in the past months to find a new grade of paper to produce with that machine [no. 10], but in the past weeks, we have learned that a new mill in Nova Scotia will restart, by a competitor, and will come and add 400 000 tonnes of the same grade of paper. All efforts have therefore been interrupted.") (translation).

b) The Impact of the Mill's Reopening on the Market Was Documented During the Fourth Quarter of 2012

62. The Claimant's argument that it did not know of any cognizable loss or damage allegedly caused to it by the Nova Scotia Measures before the first quarter of 2013 is further undermined by the market data and analysis that was available in real time from well-known and widely-used industry publications throughout the fourth quarter of 2012.

63. The Claimant would have been aware of press reports that "[o]n Wednesday [October 3, 2012,] the first roll of supercalendered paper, destined for the magazine and catalogue market, rolled off the production line at Port Hawkesbury Paper."[128] Those reports quoted the Port Hawkesbury mill's restructuring manager, Marc Dube, as stating that "the paper machine was able to run for about 12 hours without a paper break," and that "[o]nce it ramps up to full production, the machine, which holds speed records and is the fastest machine of its kind in North America, will be able to run for more than 24 hours straight without a paper break."[129] By Mr. Dube's account, the mill's reopening was going smoothly, as "[c]ustomers [were] awaiting the paper and the mill's order book [was] filling up," and "[p]aper from the mill could be on the presses as early as Monday [October 8, 2012]."[130]

64. With the Port Hawkesbury mill up and running again, industry observers began analyzing and reporting on the effect that it was having on the market, both in terms of producers' market share and market prices. For example, the *Reel Time Report* published on November 8, 2012, noted that the Port Hawkesbury mill would recapture 32.9 per cent of total North American

[128] **R-098**, Article, Truro Daily News, "Paper rolling off line at mill" (Oct. 4, 2012); **R-099**, Article, Cape Breton Post, "Paper rolling off line at mill" (Oct. 3, 2012).

[129] **R-098**, Article, Truro Daily News, "Paper rolling off line at mill" (Oct. 4, 2012); **R-099**, Article, Cape Breton Post, "Paper rolling off line at mill" (Oct. 3, 2012).

[130] **R-098**, Article, Truro Daily News, "Paper rolling off line at mill" (Oct. 4, 2012); **R-099**, Article, Cape Breton Post, "Paper rolling off line at mill" (Oct. 3, 2012).

production capacity of SCA paper by the end of 2012 while Resolute's market share would fall from 20.1 per cent at the end of 2011 to 13.5 per cent at the end of 2012.[131]

65. In terms of price, the October 2012 issue of *Market Pulp Monthly* noted that the restart of the Port Hawkesbury mill had "almost certainly eliminated any prospect of implementing the $40/ton October price increase announced for SC grades by several producers."[132] Not only did SC paper prices not increase, the October and November 2012 issues of *ERA Forest Products Monthly* reported that they were actually falling due the expansion of market capacity associated with the reopening of the Port Hawkesbury mill.[133] The November 2012 issue stated that "[t]he Port Hawkesbury restart is already having an impact on contract negotiations for the first half of 2013."[134] The report further stated: "Pricing deals are being negotiated in the mid-$700s for SC-A in many cases. We expect SC-A prices to drop to around $770 on average for Q1/13 (from $815 currently)."[135]

66. Data from Industry Intelligence, a supplier of market intelligence in the forest products industry,[136] confirms that the price of SCA paper shipments did fall from US$815 per ton in July through December 2012 to US$770 per ton in January 2013.[137] This represented a reduction of US$45 per ton, or 5.5 per cent. The data also shows that the price of shipments of SCB paper, the grade produced by the Laurentide mill, fell from US$780 per ton in August through November

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[131] **R-102**, Verle Sutton, *Reel Time*, Special Edition (Nov. 8, 2012), p. 7, available at: http://suttonpaperstrategies.com/PDFs/Nov%2012%20Forecast%20Issue.pdf.

[132] **R-103**, Brian McClay & Associates, *Market Pulp Monthly* 16:10 (Oct. 8, 2012), p. 5.

[133] **R-104** ERA Forest Products Research, *ERA Forest Products Monthly* (Oct. 26, 2012), pp. 4 ("With Port Hawkesbury and Dolbeau both restarted this month, SC prices are set to fall later this year."), 28 ("For SC grades, demand is in absolute freefall (down 36.8% y/y; -25.3% ytd), yet Resolute recently restarted its Dolbeau facility (160,000 tpy of mostly soft-nip/SC-B) and Port Hawkesbury has added nearly 400,000 tpy of SC-A capacity. *Prices must fall until such time as other tonnage is removed*. […] All prices will be under pressure given these restarts.") (emphasis added); **R-105**, ERA Forest Products Research, *ERA Forest Products Monthly* (Nov. 30, 2012), p. 4 ("With Port Hawkesbury restarted, SC contract prices for January are set to fall.").

[134] **R-105**, ERA Forest Products Research, *ERA Forest Products Monthly* (Nov. 30, 2012), p. 25.

[135] **R-105**, ERA Forest Products Research, *ERA Forest Products Monthly* (Nov. 30, 2012), p. 25.

[136] *See* **R-106**, Industry Intelligence, website excerpt, "About Us: Overview", available at: http://www.industryintel.com/about-us/overview. *See also* **R-107**, Industry Intelligence, website excerpt, "i2dashboard service", available at: http://www.industryintel.com/products-services/i2dashboard.

[137] *See* **R-108**, Industry Intelligence, report, "Industry Intelligence i2dashboard - 35 lb SC-A".

2012 to US$760 per ton in December 2012, and to US$750 per ton in January 2013.[138] This represented a reduction of US$30 per ton, or 3.8 per cent. Given that prices for shipments of SC paper are contracted at least a month in advance (SC paper is manufactured on a produced-to-order basis), it is not credible for the Claimant to argue that its contracted shipments in January 2013 had not been priced before December 30, 2012, and that those prices had not been affected by the re-entry of Port Hawkesbury on to the market.

67. The price impact of the Port Hawkesbury mill's reopening was also discussed in the issue of *ERA Forest Products Monthly* published on December 18, 2012, which reported that "[w]ith Port Hawkesbury restarted, negotiated SC contract prices for January are lower than current prices by 5% or so."[139] The report explained the effect on prices as follows:

> The big news in this sector has been the restart of the huge Port Hawkesbury Paper facility in Nova Scotia. That is already having a detrimental impact on first-half 2013 price negotiations for SC-A. The oversupply of SC-A will push down prices for almost all uncoated mechanicals, and the impact will be felt even in newsprint to some degree (either as producers alter the grades they manufacture and/or as buyers change their purchasing patterns). The downward pressure on SC prices will persist until excess supply is removed.[140]

68. Given this readily-available industry information and analysis, it is not plausible for the Claimant to argue that it was ignorant of a price or market capacity impact associated with the Port Hawkesbury mill reopening until the first quarter of 2013. While it may not have yet known the full extent of the impact, the market data above confirms that the Claimant did know before December 30, 2012 that it had begun to experience the economic effect for which it now seeks damages.

[138] *See* **R-109**, Industry Intelligence, report, "Industry Intelligence i2dashboard - 33 lb SC-B".

[139] **R-110**, ERA Forest Products Research, *ERA Forest Products Monthly* (Dec. 18, 2012), p. 4.

[140] **R-110**, ERA Forest Products Research, *ERA Forest Products Monthly* (Dec. 18, 2012), p. 26.

c) The Reappearance of the Port Hawkesbury Mill in October 2012 Was Sufficient In and Of Itself to Give Knowledge of Alleged Loss or Damage

69. A loss or damage in the form of decreased market share, lower prices and a competitive disadvantage should have been evident to the Claimant as soon as the Port Hawkesbury mill reappeared on the SC paper market with the benefit of the Nova Scotia Measures.

70. The fact that the Port Hawkesbury mill's owner, NPPH, entered creditor protection proceedings and did not produce SC paper for sale from early September 2011 to the end of September 2012 obviously benefited Resolute by giving it a temporary reprieve during which it had one less competitor. That temporary market advantage ended as soon as paper started being produced at the Port Hawkesbury mill again on October 3, 2012.[141] In and of itself, the reappearance of this former competitor and the addition of 360,000 tonnes of capacity into a market facing declining demand would trigger knowledge of loss or damage sufficient to engage NAFTA Articles 1116(2) and 1117(2).

71. The Claimant has attempted to avoid this conclusion by relying on unsupported allegations that "Port Hawkesbury itself was mired in doubt as to whether it would succeed."[142] Even if this were in evidence (which it is not) it would be irrelevant. NAFTA Articles 1116(2) and 1117(2) focus on when the *Claimant* first acquired or should have first acquired knowledge of the loss or damage that it alleges, not on whether PHP had any doubts as to the long-term viability of the Port Hawkesbury mill. At the core of its allegations, the Claimant complains of a loss or damage to its competitive position. As soon as the Port Hawkesbury mill reopened on October 3, 2012 and started producing SC paper, with all the "benefits" that the Claimant complains were not made available to it, its competitive position was impacted. This started the clock running on the limitations period, meaning the Claimant has missed the three-year window to challenge the Nova Scotia Measures.

[141] *See* **R-098**, Article, Truro Daily News, "Paper rolling off line at mill" (Oct. 4, 2012); **R-099**, Article, Cape Breton Post, "Paper rolling off line at mill" (Oct. 3, 2012); **R-100**, Article, PaperAge, "Papermaking Rolls Again at Port Hawkesbury Mill in Nova Scotia" (Oct. 5, 2012).

[142] Bifurcation Hearing Transcript, p. 50:11-13.

E. Resolute's Continuing Breach Argument Should Be Rejected

72. The Claimant has also suggested, without elaboration, that its Nova Scotia Claims are not time-barred because the Nova Scotia Measures are "ongoing measures"[143] that amount to "continuing violations"[144] of NAFTA Chapter Eleven. It remains to be seen if the Claimant will pursue this argument. It should not for two reasons. First, the three-year time limitation for filing a claim under Articles 1116(2) and 1117(2) is not tolled by a continuing act. Second, even if it were, the Nova Scotia Measures plainly cannot be classified as continuing courses of conduct at international law.

73. A continuing breach argument would misinterpret Articles 1116(2) and 1117(2), which provide that the three-year time bar runs from the date the Claimant or its enterprise *first* acquired, or should have *first* acquired knowledge of the alleged breach and loss, not from the date that they last acquired, or should have last acquired such knowledge. NAFTA Tribunals have consistently held,[145] and the NAFTA Parties have consistently maintained by agreement

[143] Bifurcation Hearing Transcript, p. 48:16.

[144] Claimant's Opposition to Respondent's Request for Bifurcation, ¶¶ 44, 46.

[145] *See* **RL-021**, *Feldman – Award*, ¶ 63 ("NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension […], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years."); **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 29 ("Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification."), 81 (Holding that an analysis leading to "not one limitations period, but many [would] render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."); **RL-023**, *Apotex – Award on Jurisdiction and Admissibility*, ¶¶ 325-326 (Holding that a claimant "cannot avoid [the time bar] by asserting that the […] measure is part of a "*continuing breach*" […], or "*part of the same single, continuous action*," in so far as this is intended as a mechanism to […] toll the limitation period […]. [N]othing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period in this way.") (emphasis in original). *See also* **RL-028**, *Spence – Interim Award*, ¶ 208 ("While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty.").

and by practice,[146] that a continuing course of conduct does not renew the limitations period in NAFTA Chapter Eleven.

74. An argument based on continuing breach would also be irrelevant because none of the Nova Scotia Measures are continuing. As set out in Part III.D.1 above, each of the Nova Scotia Measures was completed before the cut-off date of December 30, 2012. While the Claimant argues that "not all measures preceded Canada's cut-off date,"[147] it fails to identify a single Nova Scotia Measure adopted or continuing on or after December 30, 2012.

75. Instead, the Claimant misguidedly focuses on "continuing damages."[148] It argues that "Nova Scotia […] *undertook a series of measures late in 2012* to ensure that the Port Hawkesbury paper mill would have competitive advantages above any other SC paper producer, including Resolute,"[149] and that, as a result, the Port Hawkesbury mill now benefits from "continuing state-sponsored competitive advantages."[150] Similarly, the Claimant complains of

[146] *See* **RL-033**, *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008, ¶ 5 ("An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular '*date*.' Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.") (emphasis in original); **RL-034**, *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Submission of Mexico Pursuant to Article 1128 of NAFTA, 2 April 2009 (In which Mexico "concurs with in its entirety the Submission of the United States of America."). *See also* **RL-035**, *Detroit International Bridge Company v. Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014, ¶ 21; **RL-036**, *Detroit International Bridge Company v. Canada* (UNCITRAL) Submission of the United States of America, 14 February 2014, ¶ 3; **RL-037**, *Detroit International Bridge Company v. Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions, 3 March 2014, ¶¶ 27-28; **RL-038**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc. v. Canada* (UNCITRAL) Submission of the United States of America, 19 April 2013, ¶ 12, fn. 16; **RL-039**, *Apotex Inc. v. United States of America* (UNCITRAL) Memorial on Objections to Jurisdiction of Respondent United States of America, 16 May 2011, ¶¶ 46-49; **RL-040**, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015, ¶ 5; **RL-041**, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Canada's Rejoinder Memorial, 31 March 2015, ¶¶ 223-228; **RL-042**, *Eli Lilly and Company v. Canada* (UNCITRAL) Submission of the United States of America, 18 March 2016, ¶ 4; **RL-043**, *Eli Lilly and Company v. Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶¶ 7-8.

[147] Bifurcation Hearing Transcript, p. 51:7.

[148] Notice of Arbitration, ¶ 108 ("Resolute and its investments in the SC paper industry have experienced damages […] and continuing damages"). *See also* Notice of Arbitration, ¶ 116 ("Resolute's other investments likewise have experienced and continue to experience damages").

[149] Notice of Arbitration, ¶ 4 (emphasis added).

[150] Notice of Arbitration, ¶ 91.

"Nova Scotia's bestowal [in 2012] of an unfair competitive advantage on Port Hawkesbury Paper that harmed and continued to harm Resolute."[151] These arguments fail to account for the fundamental distinction between continuing acts and completed acts that continue to cause loss or damage.[152] The Claimant cannot convert a completed act into a continuing one simply by alleging continuing damages.

76. In short, there is no legal or factual basis to support a continuing breach argument by the Claimant, should it choose to pursue it.

F. Conclusion

77. The Claimant admitted in writing to Canada's Minister of International Trade that it started to lose market share to Port Hawkesbury in 2012. The Claimant publicly acknowledged in November 2012 that it shut down an SC paper machine at its Laurentide mill because of Port Hawkesbury's re-entry into the market. The Claimant had access to real-time market information from October to December 2012 that evidenced the impact of Port Hawkesbury on its market share and on the market price for SC paper. In other words, the Claimant's suggestion that it could not have known of any cognizable loss or damage sufficient to trigger the limitations period in Articles 1116(2) and 1117(2) until January or February 2013 is not believable.

78. The consequence of Resolute having submitted its claim to arbitration more than three years after first learning of the Nova Scotia Measures and of a loss or damage allegedly incurred as a result of those measures is clear: this Tribunal has no jurisdiction *ratione temporis* over the

[151] Notice of Arbitration, ¶ 65.

[152] *See* **RL-031**, Responsibility of States for Internationally Wrongful Acts (as reproduced in the annex to United Nations General Assembly Resolution 56/83 of 12 December 2001 and corrected through U.N. Doc. A/56/49(Vol. I)/Corr.4), Art. 14 ("The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."). *See also* **RL-032**, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), p. 60 ("An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues."); **RL-029**, *Mondev – Award*, ¶ 58 ("[T]here is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage."); **RL-025**, *Bilcon – Award*, ¶ 268 ("The Tribunal's position that an act can be complete even if it has continuing ongoing effects, is in line with the view of the tribunal in *Mondev*.").

Nova Scotia Claims under NAFTA Articles 1116(2) and 1117(2) and those claims must be dismissed as time-barred.

IV. RESOLUTE'S NOVA SCOTIA CLAIMS FALL OUTSIDE OF THE SCOPE AND COVERAGE OF NAFTA CHAPTER ELEVEN AS DEFINED BY NAFTA ARTICLE 1101(1)

79. While failure to comply with Article 1116(2) and 1117(2) obviates the need for further analysis, Resolute's Nova Scotia Claims are also outside the Tribunal's jurisdiction due to NAFTA Article 1101(1). The ordinary meaning of the term "relating to" in this Article requires a significant legal connection between the challenged measure and the investor or investment. All three NAFTA Parties agree with this interpretation, which has been applied consistently by every NAFTA Chapter Eleven tribunal that has been tasked with interpreting Article 1101(1). The Claimant asks the Tribunal to ignore this and overlook the fact that its investments are located entirely outside Nova Scotia's jurisdiction and that there is no legal connection at all (let alone significant) between the Nova Scotia Measures and Resolute's investment. Resolute's claim is outside the scope of what is protected by NAFTA Chapter Eleven.

A. Article 1101(1) Requires a Legally Significant Connection between the Investor or the Investment and the Challenged Measures

80. Under the heading "Scope and Coverage," NAFTA Article 1101(1) states in relevant part: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another party; (b) investments of investors of another Party in the territory of the Party."

81. The use of the phrase "relating to" speaks to the requirement that a measure have more than a mere effect on an investor and its investment in order for it to trigger the obligations in Section A of NAFTA Chapter Eleven. This is evidenced by the fact that other NAFTA provisions use a broader formulation than that in Article 1101(1) when the intention is to cover measures which have direct or indirect effects. For example, NAFTA Article 709 states: "this Section applies to any such [sanitary and phytosanitary] measure of a Party that may, directly or indirectly, affect trade between the Parties." Similarly, NAFTA Article 901 provides in relevant

part that "[t]his Chapter applies to standard-related measures […] that may directly or indirectly, affect trade in goods or services."

82. In other words, measures which merely affect an investor and its investment economically do not automatically allow an investor to invoke the protections of NAFTA Chapter Eleven. This is confirmed by the fact that early drafts of NAFTA Chapter Eleven provided that "this Chapter shall apply to measures affecting investments […] and investors,"[153] as opposed to the current formulation, which negotiators ultimately agreed to: "this Chapter applies to measures adopted or maintained by a Party relating to" investments and investors.[154]

83. All three NAFTA Parties have endorsed the view that "relating to" should be interpreted as requiring a "legally significant connection" between the measure and the investor or its investment in order for a claim to come within the jurisdiction of a NAFTA Chapter Eleven tribunal.[155]

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[153] *See* **RL-044**, NAFTA, Trilateral Negotiating Draft Text, Chapter 11, Doc. No. INVEST.522 (May 22, 1992), available at: www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-10.pdf.

[154] *See* **RL-045**, NAFTA, Trilateral Negotiating Draft Text, Chapter 21, Doc. No. INVEST.826 (Aug. 26, 1992), available at: www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-19.pdf.

[155] For example, in the *Methanex* arbitration, all three NAFTA Parties endorsed the interpretation that was eventually adopted by the tribunal. *See* **RL-046**, *Methanex Corporation v. United States of America* (UNCITRAL) Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, ¶ 23 ("Canada agrees with the United States that the term 'relating to' requires a 'significant connection between the measure at issue and the essential nature of the investment'"); **RL-047**, *Methanex Corporation v. United States of America* (UNCITRAL) Second Submission of Mexico Pursuant to NAFTA Article 1128, 15 May 2001, ¶¶ 6-7 ("The United States contends that this language requires that there be a 'legally significant connection between the complained of measures and the specific investor . . . or its investments' . . . Mexico agrees with the position of the United States, and disagrees with Methanex's contention that measures that merely 'affect' investors or investments are covered by Chapter Eleven."); **RL-048**, *Methanex Corporation v. United States of America* (UNCITRAL) Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, pp. 48-49 ("Measures of general applicability – especially ones such as those at issue here that are aimed at the protection of human health and the environment – are, by their nature, likely to affect a vast range of actors and economic interests. Given the potential of such measures to affect enormous numbers of investors and investments, with respect to any such specific measure, there must be a legally significant connection between the measure and a claimant investor or its investment."). *See also* **RL-049**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (UNCITRAL) Claimant's Reply, 24 May 2013, ¶ 94 ("The parties further agree that the 'relating to' language in Article 1101(1) requires a 'legally significant connection' between measure and investment/investor, as held by the *Methanex* tribunal.").

84. The tribunal in *Methanex v. United States* concurred with the position of the NAFTA Parties and interpreted Article 1101(1) as to require a legally significant connection between the measure and the investor and its investment in order for it to have jurisdiction over the dispute.[156] In *Methanex*, the claimant was a producer and marketer of methanol in the United States, a key ingredient in the gasoline additive MTBE. California banned the use of MTBE on environmental grounds. The claimant argued that its investment in manufacturing and marketing methanol in the United States was drastically harmed by California's ban on MTBE. The tribunal ruled that this was not enough:

> If the threshold provided by Article 1101(1) were merely one of 'affecting', as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to a NAFTA arbitration. A threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex's interpretation derives from the fact that it imposes no practical limit.
>
> […]
>
> We decide that the phrase 'relating to' in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.[157]

85. The tribunal concluded that Methanex's original statement of claim, which focused on the MTBE ban itself, could not pass the "legally significant connection" test even if it were true that Methanex was economically harmed by the measure.[158]

86. The "legally significant connection" standard adopted in *Methanex* has been endorsed by other NAFTA tribunals. For example, in *Bayview v. Mexico*, the tribunal held that:

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[156] **RL-018**, *Methanex Partial – Award*, ¶ 147.

[157] **RL-018**, *Methanex –Partial Award*, ¶¶ 137, 147.

[158] **RL-018**, *Methanex –Partial Award*, ¶ 150.

> The simple fact that an enterprise in one NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven: it is the relationship, the legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.[159]

87. In *Cargill v. Mexico*, Mexico imposed a tax and import permit requirement on high fructose corn syrup ("HFCS"), which was produced by the claimant at its United States facilities and shipped to its Mexican subsidiary for use in sweetening soft drinks. The tribunal found that while the import permit requirement had an "immediate and direct" economic effect on the claimant's investment, it was the "legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico" that satisfied the "legally significant connection" test endorsed in *Methanex*.[160]

88. Resolute is incorrect to argue that the *Cargill* tribunal considered that the "legally significant connection" test set out in *Methanex* "sets the bar too high, or requires refinement."[161] To the contrary, the *Cargill* tribunal applied the same test. It found that, because Mexico had imposed a legal barrier to the import of Cargill's product where one did not exist before, there was not just an economic impact on the claimant's business, there was a direct legal applicability of the impugned measure to the claimant's investment. Like the *Mesa* tribunal, which pointed to the need for a "causal nexus,"[162] the *Cargill* tribunal described the need to show a "causal connection."[163] These tribunals may have used different words than the *Methanex* tribunal, but they did not interpret or apply the "relating to" threshold any differently.

89. In fact, Resolute's argument that *Cargill* lowered the threshold was specifically rejected by the tribunal in *Apotex Holdings Inc. and Apotex Inc. v. United States* (*Apotex II*) when the

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[159] **RL-005**, *Bayview Irrigation District v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, 19 June 2007, ¶ 101.

[160] **RL-050**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ("Cargill – Award"), ¶ 175.

[161] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 10.

[162] **RL-052**, *Mesa Power Group v. Canada*, (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 259.

[163] **RL-050**, *Cargill – Award*, ¶ 174.

claimant in that case made the same allegation. The *Apotex II* tribunal stated: "the Tribunal does not consider that the *Cargill* tribunal was seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the two tribunals in *Methanex* and *Bayview*."[164] In *Apotex II*, the tribunal reiterated the need for a legally significant connection between the impugned measure and the investor and its investment in order to pass the NAFTA Article 1101(1) jurisdictional threshold and ruled that "something more than a mere 'effect' from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)."[165]

90. In *Apotex II*, the tribunal noted that the Import Alert issued by the United States (which resulted in the detention of the claimant's manufactured drugs at the U.S.- Canada border) not only explicitly referred to and applied to the Canadian entity (Apotex Inc.) which manufactured the drugs to which the Import Alert applied, but that the United States subsidiary (Apotex-United States) was also legally subject to its provisions because it was a named consignee of the drugs being imported from Canada.[166] The tribunal found that "the immediate effect of the Import Alert made it impossible for Apotex-US legally to receive contracted products from Apotex Inc.'s two facilities […] and, as a direct result; Apotex-US was prevented from carrying on that major part of its business of sourcing those products from Apotex Inc.'s two facilities for re-sale in the USA."[167] In the tribunal's view, these were more than just economic effects; they were legal impediments which passed the test set out in *Methanex*.

91. The tribunal in *Bilcon v. Canada* also endorsed the *Methanex* approach to Article 1101(1):

> The Tribunal recalls the holding of the *Methanex* tribunal that, to relate to investors of another Party, it was not enough for a measure to have an economic impact on an investor. Such an approach would expose host states to claims not

[164] **RL-051**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014 ("*Apotex II – Award*"), ¶ 6.13. The Claimant's suggestion that the tribunal in *Mesa Power Group v. Canada* "endorsed the *Cargill* 'causal connection' test" is also irrelevant since there was no dispute from Canada that the measures at issue were relating to the investor and there was no consideration of the "legally significant connection" test by the *Mesa* tribunal at all. *See* Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 11, citing **RL-052**, *Mesa – Award*, 24 March 2016.

[165] **RL-051**, *Apotex II – Award*, Part VI, ¶ 6.13.

[166] **RL-051**, *Apotex II – Award*, Part VI, ¶ 6.22.

[167] **RL-051**, *Apotex II – Award*, Part VI, ¶ 6.23.

> only from an investor affected directly by a government measure, but also for example, the investor's suppliers, the suppliers to the investor's suppliers, and so on. Rather, the *Methanex* tribunal found that there must be a 'legally significant connection' between a state measure and an investor. The *Methanex* tribunal acknowledged that 'whilst the exact line may remain undrawn, it should still be possible to determine which side of the divide a particular claim must lie.' The present Tribunal considers the *Methanex* approach to be a sound basis for deliberation on this case.[168]

92. In *Bilcon*, the tribunal found that there was a legally significant connection between the investor and the proposed quarry and terminal project by virtue of the fact that the claimant had a legal partnership with the company (Nova Stone) to which the relevant approvals had been issued.[169] The *Bilcon* tribunal endorsed the same interpretation of Article 1101(1) as the tribunals in *Methanex, Bayview, Cargill* and *Apotex II*.

93. The Claimant asks the Tribunal to ignore this long line of NAFTA decisions and the common view of all three NAFTA Parties confirming the proper interpretation of Article 1101(1) in favour of the *obiter* comments made by a non-NAFTA tribunal in *BG Group Plc. v. Argentina*, which was charged with interpreting a different treaty provision.[170] The *BG Group* award, which arises out of the bilateral investment treaty between the United Kingdom and Argentina, is not relevant context to interpreting NAFTA Article 1101(1). Since its views have not been endorsed by any other NAFTA tribunal, are inconsistent with NAFTA decisions (including those which have come subsequent to the writing of *BG Group*) and are inconsistent with the concordant views of the NAFTA Parties, it has no persuasive authority.

94. The NAFTA cases cited above considered it a jurisdictional threshold of Article 1101(1) that there must be a legally significant connection between the measure and the investor and its investment. Following the approach in *Methanex*, the *Cargill*, *Apotex II* and *Bilcon* tribunals each found that there was a legal connection between the measure and the investor sufficient to

[168] **RL-025**, *Bilcon – Award*, ¶ 240.

[169] **RL-025**, *Bilcon – Award*, ¶ 241.

[170] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 12, citing **RL-053**, *BG Group Plc. v. Republic of Argentina* (UNCITRAL) Award, 24 December 2007.

meet this test and not just an economic impact that was indirectly felt by the claimant. That a measure has a financial impact or economic effect on a claimant is not sufficient, in and of itself, to establish jurisdiction under NAFTA Chapter Eleven.

B. There is No Legally Significant Connection between Resolute or its Investments and the Nova Scotia Measures

95. The Claimant challenges measures adopted by Nova Scotia despite the fact that it has no SC paper investments in the jurisdiction. Its enterprise, Resolute FP Canada Inc., is headquartered in Montréal, Québec, the same province in which the Claimant operates its SC paper mills.[171] As a result, Nova Scotia has no legal authority – it exercises no jurisdiction whatsoever – over the Claimant's investments in Canada.

96. All of the Nova Scotia Measures were adopted to support the restructuring and sale of NPPH so that the Port Hawkesbury mill would continue to operate and not be sold for scrap, and so that the forestry sector and related employment in the region of the mill would be maintained. The measures are therefore relating to the Port Hawkesbury mill and the Nova Scotia forestry sector, not Resolute.

97. The first category of Nova Scotia Measures challenged by the Claimant[172] includes the FIF and "hot idle" funding, which were provided as part of a plan to keep "hundreds of woods workers [employed], provide specialized training programs and keep the NewPage mill in Port Hawkesbury ready for a quick re-sale."[173] The Province announced its initial investment in the FIF on September 20, 2011, emphasizing that it was part of the "plan to provide jobs, specialized training and to keep the NewPage mill in Point Tupper re-sale ready."[174] Announcing additional FIF funding on March 16, 2012, the Province confirmed that the fund was in place "to support NewPage's supply chain and keep the mill re-sale ready," keeping "hundreds of people working

[171] *See* Part II.A, *supra*; Notice of Arbitration, ¶ 12.

[172] *See* Part III.D.1, *supra*.

[173] **R-038**, Nova Scotia Premier's Office, News Release, "Seven-point Woodlands Plan Keeps Plant Resale Ready" (Sep. 9, 2011), available at: http://novascotia.ca/news/release/?id=20110909004.

[174] **R-039**, Nova Scotia Department of Natural Resources, News Release, "Province Presents Forestry Infrastructure Plan" (Sep. 20, 2011).

and [helping to] maintain a contractor base in the region."[175] Similarly, the "hot idle" funding was intended to "ensure the mill continue[d] to be re-sale ready."[176] In other words, the goal of the FIF and "hot idle" funding was to keep the mill running, although not producing paper for sale, during the creditor protection proceedings in order to facilitate its sale as a going concern.

98. The "hot idle" and FIF funding may have proved futile had no prospective buyer been interested in operating the mill. Ultimately, it proved successful, since PWCC purchased the mill as a going concern. However, PWCC did not get anything that it did not pay for. The Sales Process involved competitive bidding amongst private parties for what they determined to be the fair market value of NPPH and the Port Hawkesbury mill. Any bidders wishing to purchase the mill as a going concern would have accounted in their bid for any perceived value associated with the Province's funding to keep it in "hot idle" and maintain its supply chain. Therefore, even if economic effects were sufficient to meet the threshold of Article 1101(1) – and they are not – the effects of these measures are not what the Claimant makes them out to be. They made the sale of the mill possible to a going-concern buyer, which could just as easily have been the Claimant (had it bid for the mill) as PWCC.

99. More importantly, the FIF and "hot idle" funding relate to the Port Hawkesbury mill and the Nova Scotia forestry sector, and to the price that PWCC paid for NPPH, but they are not even remotely connected to the Claimant's investment in a different province, let alone sufficient to fulfill the legally significant connection test set out in *Methanex*.

100. The second category of measures challenged by the Claimant, comprised of the $124.5 million in government measures provided by Nova Scotia to support PWCC's acquisition of the Port Hawkesbury mill,[177] was also aimed at ensuring that the mill would continue to operate and

[175] **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs, Keeps Mill Re-sale Ready" (Mar. 16, 2012); **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 1.

[176] **R-042**, Nova Scotia Premier's Office, News Release, "Province Protects Jobs, Keeps Mill Re-sale Ready" (Mar. 16, 2012); **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p. 1.

[177] *See* Part III.D.1, *supra*.

not be sold for scrap. The Province's support for the transaction and its related investments in the forestry sector included $64 million in loans to PWCC for working capital and improved productivity and efficiency and a grant of $38 million over 10 years to support sustainable harvesting, forest land management and fund programs to allow more woodlot owners and pulpwood suppliers to become more active in the management of their woodlands.[178] It further included a $20 million payment in exchange for the rights to 51,500 acres of land, which became Crown land, $1.5 million for worker training, $1 million for a marketing plan on Nova Scotia forestry and funding for a Mi'kmaq (First Nation) Forestry Strategy and coordinator.[179]

101. As with the "hot idle" and FIF funding, the effects of these measures are not what the Claimant makes them out to be. The $124.5 million investment was not a bag of money provided to PWCC to drive its competitors out of the market. Rather, the funding was motivated by a number of different policy objectives of Nova Scotia, which included the sale of the Port Hawkesbury mill to a buyer that would get it up and running again, but also included improved land management practices, preservation and expansion of Crown land, sustainable harvesting, and support for the local work force, the forestry sector and the Mi'kmaq people. In order to secure this funding, PWCC made an investment in Nova Scotia, sold land to Nova Scotia and accepted contractual obligations. The Claimant has no legal relationship whatsoever with these agreements between PWCC and the Province.

102. As part of its challenge to the Province's support for PWCC's investment in Nova Scotia, the Claimant includes PWCC's Property Tax Agreement with Richmond County, which set the mill's property taxes at $1,326,227 for 2012-2013, and $1.3 million for each subsequent year up to 2016.[180] It also includes the LRT that PWCC negotiated with NSPI, through which that arm's-length corporation provided a reduced electricity rate to PWCC to help prevent the mill's closure

[178] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012).

[179] **R-055**, Nova Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector" (Aug. 20, 2012).

[180] *Amendment to Tax Agreement*, ss. 1(a), 1(c), being Schedule B to **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.

and the corresponding increase in electricity rates that remaining customers would have had to incur on account of the loss of an extra-large industrial customer.[181] The Claimant is not subject to any property taxes or electricity rates applicable in Nova Scotia, nor does Nova Scotia have the authority to impose its property tax or electricity regime on the Claimant in Québec.

103. Whatever the effects of the measures may have been on the SC paper market generally, what is clear is that they relate only to the Nova Scotia forestry sector and the Port Hawkesbury mill and its Court-approved sale from NPPH to PWCC, not to the Claimant's investment in another province. Indeed, the Claimant's complaint is not about the treatment that it was accorded through the application of these measures, but the fact that they "were, and remain unavailable to Resolute."[182] This is the Claimant's own recognition that it is not in a position to receive similar funding from Nova Scotia, which is obvious – it cannot receive any treatment by Nova Scotia because it is not within Nova Scotia's jurisdiction.

104. The Claimant's arguments with respect to time bar and the Property Tax Agreement also speak to the lack of a legally significant connection between the Nova Scotia Measures and its investment. Resolute argues that it could not have known that the Nova Scotia Measures would have any effect on its investment in Québec until it had "the quarterly data" in early 2013[183] and because there was doubt as to whether Port Hawkesbury would be able to compete.[184] Resolute's suggestion that it could not have known about any impact, negative or otherwise, until months after Port Hawkesbury reopened further confirms the Nova Scotia Measures do not relate to its investment. The Claimant also argues that the taxation carve-out in Article 2103 does not apply

[181] "The general purpose of [a LRT] is to retain customer load that would otherwise leave the system ([for example] to help prevent the closure or relocation of an extra large industrial customer due to economic distress) and detrimentally affect the remaining customers. Other customers will benefit if the customer receiving the discounted tariff would cease purchasing power in the absence of a discount and the discounted tariff fully recovers the marginal cost of supplying power to the customer, in addition to making a contribution to the fixed and common costs of a utility's electricity system. Load retention tariffs are considered to be in the public interest where making the tariff available to the customer is necessary and sufficient for retaining the load; and the total revenue received from the customer exceeds the total incremental cost of serving that customer." **R-111**, Nova Scotia Utility and Review Board, website excerpt, "Electricity", available at: https://nsuarb.novascotia.ca/mandates/electricity.

[182] Notice of Arbitration, ¶ 112.

[183] Bifurcation Hearing Transcript, p. 60:24-25.

[184] Bifurcation Hearing Transcript, p. 50:11-13.

where tax relief afforded to a third party gives that third party a competitive advantage.[185] Again, its own words indicate that it recognizes that the tax measures at issue relate to a third party, PWCC, but they do not have a legally significant connection to its investment.

105. According to the Claimant, the fact that Nova Scotia lacks authority over its investments is inconsequential to whether the Nova Scotia Measures relate to it because, in its words, "[t]his is not a regulatory case."[186] The Claimant argues that its claims concern "Nova Scotia's spending power, which in fact has no territorial limitation."[187]

106. The Claimant has offered no reasoning why this dispute allegedly not being a "regulatory case" changes the plain meaning of Article 1101(1) as applied by the long line of NAFTA tribunals which have insisted on a legally significant connection between a measure and an investor in order for a claim to come within the scope of NAFTA Chapter Eleven. If NAFTA Chapter Eleven applied every time government spending had an impact on market conditions, it could lead to a flood of claims by innumerable investors. NAFTA Chapter Eleven is not a body of rules that regulates state aid or government support, nor does it offer blanket protection against "competitive harm"[188] in the absence of a significant legal connection between the measure and the Claimant's investment.

107. That the measure has "some connection" with or "affects" an investment is not enough to be actionable under NAFTA Chapter Eleven. As the *Methanex* tribunal stated, if the threshold "were merely one of 'affecting' […] it would be satisfied wherever any economic impact was felt by an investor or an investment."[189] That is precisely what the Claimant seeks, and what NAFTA does not permit. As the *Methanex* tribunal observed, a "threshold which could be

[185] Bifurcation Hearing Transcript, p. 53:5-15.

[186] Bifurcation Hearing Transcript, p. 36:9-10.

[187] Bifurcation Hearing Transcript, p. 36:14-15.

[188] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 8.

[189] **RL-018**, *Methanex –Partial Award*, ¶¶ 137, 147. *See also* FN 37, 156, 157, 158.

surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[190]

108. By the Claimant's own admission, the Nova Scotia Measures were "aimed at resurrecting the Port Hawkesbury mill."[191] It does not challenge the treatment that it has received through these measures, only the alleged effect that they have had on the market. It argues that the "discriminatory effects of Nova Scotia's conduct"[192] had "effect on the competition outside the province,"[193] threatening other SC paper producers by creating "downward pressure on prices, and "push[ing] higher-cost operators out of business."[194] It has not complained of treatment that it received as a foreign investor. Rather, it complains of Nova Scotia's "discriminatory advantages to the Port Hawkesbury Paper mill"[195] that "impacted competitors throughout Canada"[196] and the "competitive harm to Resolute."[197] Such market effects are too far removed to meet the threshold of Article 1101(1).

109. The Claimant's position bears similarities with the case brought by the claimant in *Methanex*, which that tribunal specifically rejected in its Partial Award when it set out the "legally significant connection" threshold.[198] Following the Partial Award in that arbitration, the claimant tried to create the kind of connection that would satisfy Article 1101(1) and amended its claim to specifically allege that the Governor of California had secretly colluded with ADM, a United States corporation which made ethanol (the competitor product to methanol), in order to intentionally favour ADM and the United States ethanol industry and drive out foreign producers of methanol through the MTBE ban. While the tribunal in *Methanex* accepted that an allegation

[190] **RL-018**, *Methanex Partial – Award*, ¶ 137.

[191] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 19.

[192] NOI, ¶ 12.

[193] Bifurcation Hearing Transcript, pp. 34:25, 35:1-4.

[194] Notice of Arbitration, ¶ 48.

[195] Notice of Arbitration, ¶ 8.

[196] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 32.

[197] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 8.

[198] **RL-018**, *Methanex – Partial Award*, ¶ 147.

of secret collusion intended to directly target a foreign investor might be enough to satisfy the "legally significant connection" test,[199] it eventually ruled that the claimant had failed to prove the alleged malign intent and, hence, failed to pass the Article 1101(1) jurisdictional threshold.[200]

110. The Claimant in this case has made no such claim of collusion (nor could it, because there was none). Instead, it argues that market effects are sufficient to meet the jurisdictional threshold,[201] stressing that the Nova Scotia Government "must have been considering the effects of its interventions on the broader market."[202] Even if this unsupported statement were true, it still would not reach the threshold described by the *Methanex* tribunal, without which Article 1101(1) would be open to any affected market participant and an indeterminate class of complainants.

C. Conclusion

111. The Claimant accuses Canada of having presented an "[u]nsupported categorical argument that a provincial measure cannot under any circumstances be caught by Article 1101(1) […] where the competing investor does not have an investment in that province."[203] While Resolute misrepresents Canada's position, whether a claim challenging measures of a province in which the Claimant has no investment may ever be grounded in Chapter Eleven is beside the point. It is this case which fails for the lack of a legally significant connection. The Claimant cannot create such a connection from whole cloth through its "spending power" theory. An adverse economic effect by government spending alone is not enough to establish jurisdiction under Article 1101(1).

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[199] **RL-018**, *Methanex – Partial Award*, ¶ 147.

[200] **RL-054**, *Methanex Corporation v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter E ("*Methanex – Award on Jurisdiction and Merits*"), ¶¶ 18-22.

[201] *See e.g.* Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 22 (Arguing that Canada "cannot argue credibly that the Measures had no legally significant effect on other supercalendered paper producers, outside Nova Scotia.").

[202] Bifurcation Hearing Transcript, p. 36:20-21.

[203] Bifurcation Hearing Transcript, p. 34:19-23.

V. RESOLUTE'S CLAIM THAT THE NOVA SCOTIA MEASURES VIOLATE ARTICLE 1102 IS INADMISSIBLE

112. If the Tribunal concludes that the claim against the Nova Scotia Measures is not time-barred and meets the threshold of Article 1101(1), is should nevertheless refuse to admit the Claimant's national treatment claim.

113. The Claimant argues that Canada violated Article 1102 because "Nova Scotia provided Port Hawkesbury Paper preferential treatment over that received by Resolute."[204] According to the Claimant, "Nova Scotia's direct, targeted, non-regulatory market intervention was designed specifically to have, and did have, extra-territorial effect on the competition outside the province."[205] But for a national treatment claim against a province to be admissible, it must satisfy the requirement of Article 1102(3), which requires comparable treatment within the same jurisdiction.

A. National Treatment Claims against State and Provincial Measures Are Limited by Article 1102(3) to Treatment within State and Provincial Jurisdiction

114. Article 1102(3) provides that, with respect to a state or province, "the treatment accorded by a Party" means "treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."

115. Article 1102(3) therefore requires a comparison of the treatment accorded by a state or province to investors and investments within that state or province's jurisdiction. Article 1102(3) does not establish a territorial limitation, as the Claimant has misunderstood Canada's argument to be,[206] but rather a jurisdictional limitation. The limitation renders inadmissible claims that seek to compare treatment accorded by one government to the treatment accorded by a different government.

[204] Notice of Arbitration, ¶ 114.

[205] Bifurcation Hearing Transcript, pp. 34:25-35:4.

[206] Bifurcation Hearing Transcript, pp. 45:16, 46:1-2.

116. No NAFTA tribunal to date has founded a breach of Article 1102 on the grounds that the treatment accorded by one state or province was less favourable than the treatment accorded by another state or province.

117. In *Pope & Talbot v. Canada*, the claimant challenged the different treatment provided to producers in different provinces, but all of the treatment at issue was accorded by a single level of government, the national government. The claimant did not challenge any treatment accorded by a province. Rather, it argued that one single level of government, the Government of Canada, breached Article 1102 because it failed to "provide […] the best level of treatment available in Canada."[207]

118. There was no disagreement in *Pope & Talbot* over whether Article 1102 permits a comparison of treatment across jurisdictions, and therefore no interpretative issue for the tribunal to resolve.[208] Both the claimant and Canada agreed that any treatment provided by a subnational government can only be compared to treatment accorded "within that jurisdiction."[209] The tribunal agreed with this shared view, as demonstrated by its statement that the language of Article 1102(3) makes clear that the obligation of a state or province is "to provide investments of foreign investors with the best treatment *it* accords any investment of its country."[210] In other words, the tribunal recognized that the same province has to be providing the treatment to both comparators for there to be a violation of Article 1102(3).

[207] **RL-055**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Memorial of the Investor – Initial Phase, 28 January 2000 ("*Pope & Talbot – Memorial of the Investor*"), ¶ 73; *See also* **RL-056**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Canada's Counter-Memorial, 29 March 2000, ¶ 181.

[208] Likewise, Article 1102(3) was "not relevant to the […] case" in **RL-054**, *Methanex – Award on Jurisdiction and Merits*, Part IV, Chapter B, p.10 or in **RL-057**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 140.

[209] **RL-055**, *Pope & Talbot – Memorial of the Investor*, ¶ 75.

[210] **RL-058**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001, ¶ 41 (emphasis added).

119. Likewise, there was no interpretative issue in *SD Myers v. Canada*, in which the tribunal made a similar statement that for the purposes of Article 1102(3), "the relevant comparison" is between the treatment accorded "within the jurisdiction of the sub-national authority."[211]

120. To date, the only NAFTA dispute in which the issue of cross-jurisdictional comparison has arisen is *Merrill & Ring v. Canada*. In that case, the claimant attempted to compare the treatment accorded by a national government, the Government of Canada, to the treatment accorded by a subnational government, the province of British Columbia. The tribunal rebuffed the claimant's attempt, holding as follows:

> "[t]reatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors […] just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments."[212]

121. The Claimant here is espousing a completely new interpretation of Article 1102(3) that has never been recognized by a previous NAFTA tribunal or any of the NAFTA Parties. It acknowledges *SD Myers*, as well as *Merrill & Ring*, which states that "the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority,"[213] but it argues that they should be distinguished as they are "regulatory cases."[214] Again, Resolute offers no reasoning as to how this not being a "regulatory case" (which is a fallacy to begin with) changes the ordinary meaning of the treaty text.

122. The Claimant also mistakenly suggests that *Bilcon v. Canada* supports its position as a precedent that compared treatment across different jurisdictions. In fact, the *Bilcon* award was based on a comparison of projects treated differently by Canada "for the purposes of the laws of its central government."[215] The tribunal did not base its decision on different treatment by

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[211] **RL-059**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶ 240.

[212] **RL-060**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award, 31 March 2010 ("*Merrill & Ring – Award*"), ¶ 82.

[213] **RL-060**, *Merrill & Ring – Award*, ¶ 89.

[214] Bifurcation Hearing Transcript, p. 17:12-16.

[215] **RL-025**, *Bilcon – Award*, ¶ 702.

different governments. Rather, it agreed with Canada that the claimant had the burden of proving that "a government accorded Bilcon or its investment 'treatment' during the environmental assessment and 'that the *same* government accorded treatment to other domestic […] investors or investments.'"[216] The *Bilcon* award does nothing to support the Claimant and only confirms the interpretations of Article 1102 given by *SD Myers* and *Merrill & Ring*: Article 1102(3) does not permit national treatment claims based on a province's treatment of an investor within its jurisdiction and investors outside its jurisdiction.

B. Nova Scotia Could Not Offer National Treatment to the Claimant or Its Investment Because Neither Are within Nova Scotia's Jurisdiction

123. The treatment alleged by the Claimant to breach Article 1102 is "the discriminatory, inequitable and harmful conduct of Nova Scotia,"[217] including "an array of measures […] to give Port Hawkesbury Paper significant competitive advantages over other SC paper mills,"[218] which "remain, unavailable to Resolute."[219] In the Claimant's words, "[t]his is a province that clearly is deciding to treat its own investor in a way that is different from the treatment that is accorded to other investors in Canada and is doing so in a way that is not necessarily limited to its territorial jurisdiction because it is not a regulatory measure, and the question is, does NAFTA allow that?"[220] With respect to national treatment claims under Article 1102, the answer to the Claimant's posited question is yes, NAFTA allows that, precisely because of Article 1102(3).

124. Resolute asserts that it should have been accorded the same treatment in Québec that Nova Scotia accorded to PWCC. Obviously, it could not have been accorded similar treatment from Nova Scotia, a jurisdiction where it has never made or sought to make any SC paper investments. It has not alleged that it was entitled to such treatment from the provincial Government of Québec, the jurisdiction where its SC paper investments are located, or the federal Government

[216] **RL-025**, *Bilcon – Award*, ¶ 717.

[217] Notice of Arbitration, ¶ 9.

[218] Notice of Arbitration, ¶ 112.

[219] Notice of Arbitration, ¶ 112.

[220] Bifurcation Hearing Transcript, p. 45:16-23.

of Canada, because it knows that such a position would run directly contrary to the reading NAFTA tribunals like *Merrill & Ring* and *Bilcon* have given to Article 1102. Whatever the Claimant's position on this issue, Article 1102(3) precludes the comparison of Nova Scotia's treatment of investors within its jurisdiction to the treatment received by the Claimant from other governments, whether provincial or federal.

125. What is also clear on the face of the Claimant's NOA is that it complains not of treatment that it received directly, but of the treatment that Nova Scotia accorded to Port Hawkesbury, which had "effect beyond its provincial borders."[221] It was this treatment that was allegedly "designed specifically to give PHP an unfair competitive advantage over Resolute in the SC paper market in Canada."[222] In other words, the Claimant complains of the indirect effect that Nova Scotia's treatment of Port Hawkesbury had on its operations, but it has not identified any treatment it received directly as an investor in Canada, and it has certainly not identified any treatment that it received within the jurisdiction of the province of Nova Scotia (which it cannot since its investment is in the province of Québec).

C. Conclusion

126. The Claimant invites the Tribunal to transform Article 1102 into a provision prohibiting government support by interpreting it in light of the NAFTA objective to "promote conditions of fair competition" and to "increase substantially investment opportunities."[223] Otherwise, it claims, there would be "remedies for competitors in the United States […] but no remedies for American investors in Canada."[224]

127. The Claimant is wrong. The objectives of NAFTA do not impose obligations on Parties; its substantive provisions do. Nor can NAFTA's objectives be used to transform a substantive provision into something it is not. Article 1102 obliges the NAFTA Parties to accord non-

[221] Notice of Arbitration, ¶ 112.

[222] Notice of Arbitration, ¶ 115.

[223] NAFTA Article 102(1) (b) and (c); Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 31.

[224] Claimant's Opposition to Respondent's Request for Bifurcation, ¶ 33.

discriminatory treatment to investors and investments (in like circumstances) within their jurisdiction. With respect to measures of state and provincial governments, the NAFTA Parties agreed that the obligation would only apply to investors and investments within the jurisdiction of the state or province. The Claimant's attempt to transform Article 1102 into a regulator of competition and state aid is unavailing in light of the plain text of Article 1102(3). The Claimant's Article 1102 claim against the Nova Scotia Measures is inadmissible and should not be permitted to proceed.

VI. THE TRIBUNAL LACKS JURISDICTION OVER THE NOVA SCOTIA CLAIMS BASED ON THE PORT HAWKESBURY MILL'S PROPERTY TAXES

128. The Claimant also challenges the property tax rate payable on the Port Hawkesbury mill, which was established by agreement between PWCC, Richmond County (the municipality where the mill is located), and the mill's previous owner NPPH, and given effect by the *Richmond-NewPage Port Hawkesbury Tax Agreement Act*.[225] The Property Tax Agreement sets the mill's annual property taxes at $1,326,227 for 2012-2013, and $1.3 million for each subsequent year up to 2016.[226]

129. The Port Hawkesbury mill's property taxes can form no part of the Claimant's Article 1105 or 1110 claims because Article 2103 put such taxation measures outside of the Tribunal's jurisdiction.

A. Article 2103 Precludes Challenges to Taxation Measures under Articles 1105

130. NAFTA Article 2103 (Taxation) provides that "[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures."[227] This Agreement-wide carve-out that it provides for taxation measures is subject only to narrow exceptions in specific circumstances, as set out in Articles 2103(3) to 2103(6). No exception whatsoever is made for Article 1105.

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[225] **R-058**, *Richmond–NewPage Port Hawkesbury Tax Agreement Act*, S.N.S. 2012, c. 49.

[226] *Amendment to Tax Agreement*, ss. 1(a), 1(c), being Schedule B to **R-057**, *Richmond Port Hawkesbury Paper GP Ltd. Taxation Act*.

[227] NAFTA Article 2103(1).

131. As the tribunal in *Canfor Corporation v. United States* and *Tembec Corporation v. United States* pointed out, Article 2103 is "very detailed with respect to which substantive provisions of Section A of Chapter Eleven do or do not apply to 'taxation measures.'"[228] Article 1105 is not one of them; therefore it does not apply to taxation measures.[229]

132. In *UPS v. Canada*, Canada objected to UPS' Article 1105 claim against a taxation measure, arguing that it was not permitted under Article 2103. The United States agreed with Canada, submitting that "taxation measures are not subject to any Chapter Eleven obligations, including those embodied in Article 1105, that are not expressly identified as exceptions."[230] UPS consequently informed the Tribunal that it had abandoned its Article 1105 claim against a taxation measure.[231] The Claimant should do the same in this case, and save any further submissions or consideration on the issue.

B. The Claimant May Not Bring an Article 1110 Claim Because It Failed to Comply with the Requirements of Article 2103

133. Claims relating to taxation may be brought under Article 1110, provided that certain conditions stipulated in Article 2103(6) are met. Compliance with the requirements of Article 2103 is a prerequisite for this Tribunal to hear Claimant's Article 1110 claim. Without it, the NAFTA Parties' consent to arbitrate under Article 1122(1) is void and deprives a tribunal of jurisdiction to hear the claim.

134. The critical limitation is contained in the text of Article 2103(6), which provides:

> Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim

[228] **RL-007**, *Canfor Corporation v. United States of America* and *Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 259.

[229] **RL-021**, *Feldman – Award*, p. 40, fn. 9.

[230] **RL-061**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Second Submission of the United States of America, 13 May 2002, ¶ 13.

[231] **RL-062**, *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶ 116-117.

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

135. This procedural requirement is clearly understood as between the NAFTA parties[232] and by tribunals.[233] For example, in *Gottlieb Investments Group v. Canada*, the claimants were investors in income trusts in the energy sector who alleged that a change in the tax treatment of their income trusts was a violation of Canada's obligations under NAFTA Chapter Eleven. Among other claims, they alleged that the change in the tax treatment was an expropriation under Article 1110. As required under the NAFTA, the same day they filed their NOI, the claimants wrote to the competent authorities[234] as listed in 2103(6) to request a determination as to whether the measure was an expropriation. In that case, the competent authorities from the United States and Canada agreed that the challenged measure was not an expropriation. As such, the claimants could not pursue their expropriation claims under Article 1110.

136. The Claimant asks the Tribunal to reject this established approach to Article 2103, which it argues "distort[s] the exception's intent."[235] It argues that the purpose of this provision is "to deny claims that taxes might have been used as a tool to expropriate," and that it does not address situations where tax relief afforded to a third party gives that third party a competitive

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[232] *See* **RL-063**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Request for Bifurcation of Respondent United States of America, 29 August 2005, pp. 6-7. *See also* **RL-021**, *Feldman – Award*, ¶ 101; **RL-064**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Counter-Memorial of the Respondent, 24 May 2001, ¶ 51-53.

[233] *See* **RL-065**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January, 2008, ¶ 166; **RL-021**, *Feldman – Award*, ¶ 109.

[234] *See* **RL-067**, Letter from Bob Hamilton, Senior Assistant Deputy Minister of the Depertment of Finance Canada, to Eric Solomon, dated April 22, 2008; s*ee also* Annex 2103.6 in Chapter 21.

[235] Bifurcation Hearing Transcript, p. 53:4-5.

advantage.[236] In the Claimant's view, claims involving "tax relief," when part of an ensemble of measures which "contributed" to the constructive expropriation" of an investment, need not comply with the requirement of Article 2103(6).[237]

137. This interpretation has no foundation in the plain text of Article 2103(6) or its object and purpose. The fact that a taxation measure is part of an ensemble of measures does not make it any less a taxation measure. To accept the argument that the carve-out does not apply because the taxation measure is not the only measure alleged to constitute an expropriation of the Claimant's investment would allow any claimant to easily circumvent Article 2103 by grouping the measures it challenges to allow its expropriation claims against a taxation measure to proceed. Article 2103(6) applies to all taxation measures, whether challenged on their own or alongside other measures. Whether a taxation measure is expropriatory, on its own or together with other measures, is a determination that NAFTA Parties reserved for themselves.

138. A similar situation occurred in *EnCana v. Ecuador*, in which EnCana challenged a taxation measure under the Canada-Ecuador Agreement for the Promotion and Reciprocal Protection of Investments ("Canada-Ecuador BIT"). The wording of Article VII of the Canada-Ecuador BIT is almost identical to that of Article 2103 of the NAFTA, including the procedural requirement to refer the matter to the taxation authorities of the Contracting Parties, in that case Canada and Ecuador.[238] The tribunal was faced with sharply opposed views on whether government conduct fell "inside or outside" Article VII because the Claimant challenged tax measures as part of the conduct of the government that it alleged expropriated its investment.[239] Ultimately, the tribunal was able to assess the merits of the matter because the claimant had referred the matter to the relevant authorities pursuant to Article VII.[240] Since the authorities declined to make a

[236] Bifurcation Hearing Transcript, p. 53:5-15.

[237] Claimant's Opposition to Respondent's Request for Bifurcation, 13 October 2016, ¶¶ 48-51.

[238] **RL-066**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006 ("*Encana – Award*"), ¶ 108.

[239] **RL-066**, *Encana – Award*, ¶ 34.

[240] **RL-066**, *Encana – Award*, ¶ 109.

determination within six months, the claimant was entitled to proceed with its claim, as it had met the procedural hurdle set out in the BIT.[241]

139. In this case, the Claimant has failed to fulfill the procedural requirements under the NAFTA and as a result, it does not have the right to proceed with its Article 1110 claim against the taxation measure at issue. This is a clear and simple procedural rule governing the conduct of NAFTA Chapter Eleven arbitration. As stated by the *Feldman* tribunal, "Chapter 11 jurisdiction over tax matters is carefully circumscribed by Article 2103 […] this Tribunal would be derelict in its duties if it either expanded or reduced that jurisdiction."[242]

C. Conclusion

140. The jurisdiction of this Tribunal is founded on the consent of the parties to arbitrate. The text of the NAFTA itself clearly outlines the requirements that claimants must observe in order to bring a claim under NAFTA Chapter Eleven. If a claimant fails to comply with the procedural requirements of the NAFTA, it does not have the right to proceed with its claim. These requirements include Article 2103, which excludes from the Tribunal's jurisdiction Resolute's claims under Articles 1105 and 1110 with respect to the Port Hawkesbury mill's property taxes. The Claimant itself has stated that it could abandon the tax measures entirely from its claim with little impact.[243] Given the weakness of its legal position on this issue, the Claimant should do so and save the parties from having to further brief the issue, and the Tribunal from having to further consider it.

[241] **RL-066**, *Encana – Award*, ¶ 142.

[242] **RL-021**, *Feldman – Award*, ¶ 188.

[243] *See* Bifurcation Hearing Transcript, p. 52:11-14 ("The tax measures were part of a large collection of measures deployed by Nova Scotia. Were they not part of Resolute's claims, nothing significant would change in this case.").

VII. ORDER REQUESTED

141. For the foregoing reasons, Canada respectfully requests that this Tribunal issue an award:

i. dismissing the Claimant's Nova Scotia Claims under Articles 1102, 1105 and 1110 in their entirety and with prejudice on grounds of lack of jurisdiction;

ii. dismissing the Claimant's Nova Scotia Claims under Article 1102 in their entirety and with prejudice on grounds of inadmissibility;

iii. ordering the Claimant to bear the costs of this preliminary phase of the arbitration in full and to indemnify Canada for its legal fees and costs in the preliminary phase of this arbitration; and

iv. granting any further relief it deems just and appropriate under the circumstances.

December 22, 2016

Respectfully submitted
On behalf of the Government of Canada,

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