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

REPLY MEMORIAL ON JURISDICTION

MARCH 29, 2017

Government of Canada
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I. INTRODUCTION

1. In its Memorial on Jurisdiction, Canada demonstrated that the claims of Resolute Forest Products Inc. ("Resolute" or the "Claimant") were defective on several jurisdictional and admissibility bases. The Claimant's Counter-Memorial only serves to further expose the deficiencies in its factual evidence and legal reasoning. The Tribunal should dismiss all of the claims against the Nova Scotia Measures[1] for lack of jurisdiction and admissibility.

2. With respect to the timeliness of the claims against the Nova Scotia Measures under NAFTA Articles 1116(2) and 1117(2), it is the Claimant's burden to establish that this Tribunal has jurisdiction by proving that it actually did not know and that it objectively could not have known that it had incurred the type of loss or damage it alleges prior to December 30, 2012. The Claimant failed to meet that burden in its Counter-Memorial.

3. In its Memorial, Canada presented substantial publicly available evidence showing that the Claimant actually knew (and, without doubt, should have known) that it had been financially impacted by the re-opening of Port Hawkesbury before the time bar cut-off date of December 30, 2012. The Claimant's Counter-Memorial offers no credible response. Indeed, what speaks volumes about the specious nature of Resolute's assertion that it had no knowledge of the alleged impact in 2012 is its refusal to present any first-hand evidence, such as a witness statement from an executive or manager at Resolute along with corroborating internal documentation.

4. For example, the Claimant decided not to present a witness or any contemporaneous internal documents to disavow the public admissions of its own corporate spokesperson, Mr. Pierre Choquette, who stated on several occasions that one of the reasons Resolute decided to permanently shut down one of its supercalendered

[1] *See Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada's Memorial on Jurisdiction, 22 December 2016 ("Memorial"), ¶ 48.

("SC") paper machines at Laurentide in November 2012 was because of the reopening of the Port Hawkesbury mill. The Counter-Memorial ignores these statements entirely. That there might have been additional reasons for closing down the machine is irrelevant for the purposes of Articles 1116(2) and 1117(2). Furthermore, it is not credible for the Claimant to plead that it had no idea its paper prices would be lower due to the Port Hawkesbury mill's re-entry into the market until after December 30, 2012. Its own expert witness Professor Jerry Hausman acknowledges that the lead times for SC paper orders are, at the very least, 28 to 45 days in advance, so it is implausible for the Claimant to submit that prices for its January 2013 shipments had not already been set in November or December 2012.

5. In the absence of witness testimony and contemporaneous internal documentation (which Canada reserves its right to request prior to the hearing pursuant to Article 24(3) of the UNCITRAL Arbitration Rules (1976) and section 12 of Procedural Order No. 2), the Tribunal cannot accept the Claimant's skewed story. The Claimant's implausible explanations on these issues, as well as its belated and impermissible attempt to introduce into its claim for the first time a January 2013 measure relating to a biomass facility at Port Hawkesbury, are futile attempts to evade the consequences of Articles 1116(2) and 1117(2).

6. The Claimant's argument that the Nova Scotia Measures meet the Article 1101(1) standard that requires a legally significant connection to the investor or its investment also fails for unsound legal reasoning and a lack of factual support. The Claimant asks this Tribunal to go further than any previous NAFTA tribunal and accept that a measure's indirect and remote economic impact on an investor is sufficient to ground a claim in Chapter Eleven. It bundles all of the Nova Scotia Measures together despite the fact that several of them (including the Forestry Infrastructure Fund or "FIF" and hot-idle funding) did not even relate to the ultimate buyer of the Port Hawkesbury mill, Pacific West Commercial Corporation ("PWCC"), let alone Resolute. It also

accuses the Government of Nova Scotia of seeking to drive Resolute out of business, but it has presented no evidence to support this bald allegation.

7. The Claimant's Counter-Memorial reveals that the true basis of its entire claim is that, despite its strong confidence in 2012 that it would "compete successfully with"[2] Port Hawkesbury Paper ("PHP"), PHP allegedly started to engage in "predatory pricing" which in turn supposedly forced Resolute to close its Laurentide mill in October 2014.[3] PHP's pricing even if proven to be predatory cannot be attributed to the Government of Nova Scotia under international law. The Claimant's allegation that Nova Scotia "unilaterally decided that the [PHP] mill in its province should be empowered to undertake predatory pricing measures with respect to Resolute…"[4] is bereft of factual and legal foundation.

8. The Claimant is therefore left only with the convoluted logic that a "constructive expropriation" under international law occurred[5] because of government support for the reopening of a paper mill in Nova Scotia in 2011 and 2012, which caused PHP – a private company whose success and market impact Resolute itself says was "unknown and unknowable"[6] – to engage in supposedly unfair market tactics, which then caused a drop in market SC paper prices, which then caused Resolute to drop its own SC paper prices, which then caused Resolute to decide *more than two years later* to shut down a 126-year old mill thousands of miles away in a different province from the mill that received the government support. The remoteness of this chain of events cannot satisfy the legally significant connection test that NAFTA tribunals have required. As the tribunal in *Methanex* did, this Tribunal should dismiss the claims on jurisdiction

[2] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Counter-Memorial, 22 February 2017 ("Counter-Memorial"), ¶¶ 22- 24, 29, 48, 85-86, 105.

[3] Counter-Memorial, ¶ 155.

[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"), ¶ 96.

[5] Counter-Memorial, ¶ 4.

[6] Counter-Memorial, ¶¶ 48, 105.

pursuant to Article 1101(1) because the impugned measures plainly do not "relate to" the Claimant.

9. On the basis of Articles 1101(1), 1116(2) and 1117(2), the Tribunal need not consider the issue of whether the Claimant's national treatment claim is admissible. But if it does, the Claimant provides no convincing reason why the Tribunal should reinvent the plain language and evident intention of Article 1102 to meet what the Claimant wants that provision to mean. The Counter-Memorial frames the Claimant's position as whether "*the treatment Nova Scotia accorded to Resolute* is no less favorable than the treatment Nova Scotia accorded to PHP…"[7] This sentence demonstrates exactly why the national treatment claim is inadmissible under Article 1102: Nova Scotia did not and cannot accord treatment to Resolute because the investment on which Resolute attempts to found its claim (comprised of its Laurentide SC paper mill, two of its other SC paper mills and the enterprise Resolute FP Canada Inc.) is not within Nova Scotia's territory or jurisdiction. Article 1102(3) makes clear that the best treatment offered by a state or province is not the national standard by which all treatment is to be measured. Resolute spends dozens of pages explaining why it believes this should not be the case, but its preference for what the treaty should say cannot supplant what the treaty does say.

II. RESOLUTE BEARS THE BURDEN OF PROVING THE TRIBUNAL'S JURISDICTION UNDER NAFTA CHAPTER ELEVEN

10. The Claimant bases its arguments on the faulty premise that the burden of proof in this jurisdictional phase falls on Canada, and that the Tribunal's jurisdiction must be presumed, unless Canada can prove facts sufficient to rebut that presumption.[8] This is not correct. As discussed below, an investor bringing a claim under NAFTA Chapter Eleven bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute.

[7] *See* Counter-Memorial, ¶ 168 (emphasis added).

[8] *See* Counter-Memorial, ¶¶ 54, 67, 82, 94, 214-215.

A. As the Claimant, Resolute Must Establish Canada's Consent to Arbitration and the Tribunal's Jurisdiction over its Claims

11. Canada's consent to arbitration under Article 1122(1) only applies to claims submitted to arbitration "in accordance with the procedures set out in this Agreement," that is, NAFTA Chapter Eleven. As stated by the tribunal in *Methanex v. United States*, Article 1122(1) is satisfied, and a NAFTA Party's consent to arbitration is established, only "[w]here [certain] requirements are met *by a claimant*."[9] To establish consent to arbitration, a claimant must show: (1) that it has fulfilled the requirements of Article 1101, such that NAFTA Chapter Eleven applies; and, (2) that it submitted its claim in accordance with Articles 1116 or 1117 and has satisfied all pre-conditions and formalities under Articles 1118-1121.[10]

12. The Claimant not only ignores this burden of proof but also overstates the extent to which its allegations are to be accepted as true *pro tem* for the purposes of this jurisdictional phase. Contrary to the Claimant's unsupported position that all of its allegations must be accepted as true *pro tem*,[11] it is well established in international investment arbitration that "if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[12]

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[9] **RL-018**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex –Partial Award*"), ¶ 120 (emphasis added).

[10] **RL-018**, *Methanex –Partial Award*, ¶ 120.

[11] *See* Counter-Memorial, ¶ 118, 159, 160, 210, fn. 251.

[12] **RL-068**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009 ("*Phoenix – Award* "), ¶ 61; **RL-069**, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010 ("*Hamester - Award* "), ¶ 143. *See also* **RL-070**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.8 ("[T]he Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that 'prima facie' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends. … In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision *pro tempore* by a tribunal.").

13. Tribunals have consistently found that claimants must prove jurisdiction over NAFTA Chapter Eleven claims. For example, the tribunal in *Apotex v. United States* stated that "Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction."[13] The tribunals in *Bayview v. Mexico, Grand River v. United States* and *Gallo v. Canada* also affirmed that it is for the claimant to establish that its claims fall within NAFTA Chapter Eleven and the tribunal's jurisdiction.[14]

14. The principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction is also well established in international investment arbitration generally.[15] The tribunal in *Spence International Investments v. Costa Rica* observed:

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[13] **RL-023**, *Apotex Inc. v. United States* (UNCITRAL) Award on Jurisdiction and Admissibility, June 14, 2013, ¶ 150, citing **RL-068**, *Phoenix – Award*, ¶¶ 58-64.

[14] **RL-005**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007 ("*Bayview – Award*"), ¶¶ 63, 122 (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **RL-019**, *Grand River Enterprises Six Nations, Ltd, et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 122 (holding that "Claimants must… establish an investment that falls within one or more of the categories established by that Article [1139]"); **RL-071**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶ 328 (stating that "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.").

[15] *See e.g.* **RL-072**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48 ("As a party bears the burden of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof required at the jurisdictional phase."); **RL-073**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 192 ("[Claimant] has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); **RL-074**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280 ("[A] State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined."). This principle has been long established at the International Court of Justice. *See* **RL-075**, *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment, I.C.J Reports, 4 June 2008, ¶ 62 ("The consent allowing for the Court to assume jurisdiction must be certain… whatever the basis of consent, the attitude of the respondent State must 'be capable of

> [I]t is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. *The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction.*[16]

15. The *Spence* tribunal further explained that "[i]f that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction."[17] However, if the claimant cannot prove the facts necessary to establish jurisdiction, the respondent need not lead any evidence in support of its jurisdictional objections.[18] While a respondent must rebut evidence that would otherwise establish the Tribunal's jurisdiction, the legal burden of proving jurisdiction always rests with the claimant. As explained by the tribunal in *Philip Morris v. Australia:*

> [I]t is for the Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty; for the Respondent to allege and prove the facts on which its objections are based; and, to the extent that the Respondent has established a *prima facie* case, for the Claimant to rebut this evidence.[19]

16. If a claimant cannot rebut the respondent's evidence, as in this case, the claimant fails to meet its burden of proof.

17. This well-accepted rule makes perfect sense, especially in the context of demonstrating that the Nova Scotia measures relate to its investment for the purposes of

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being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable manner'" (internal citations omitted)).

[16] **RL-028**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016 ("*Spence – Interim Award*"), ¶ 239 (emphasis added).

[17] **RL-028**, *Spence – Interim Award*, ¶ 239 (emphasis added).

[18] *See* **RL-076**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014, ¶ 171 ("If the Claimants burden of proving [jurisdiction] is not met, the Respondent has no burden to establish the validity of its jurisdictional defences.").

[19] **RL-077**, *Philip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 495.

Article 1101(1), or that they are not time barred under NAFTA Articles 1116(2) and 1117(2). Contrary to what the Claimant argues, it would be unfair to put the burden on Canada as the Respondent to disprove a presumption that the Claimant did not first acquire knowledge of the alleged breaches and loss or damage until after January 2013. Canada is the party with more limited information on this issue. Indeed, Canada has obtained all of its evidence from the public record. Thus, when the Claimant's actual knowledge is at issue, it necessarily has the burden to definitively establish the date on which it first acquired knowledge of the loss or damage it alleges. The Claimant could have tried to do so through witness testimony and corroborating internal documentation, but chose not to do so.

B. Resolute Cannot Evade its Burden by Misreading the UNCITRAL Arbitration Rules or by Mischaracterizing Canada's Objections

18. The Claimant's misinterpretation of Article 24(1) of the UNCITRAL Arbitration Rules (1976) and mischaracterization of Canada's jurisdictional objections as "affirmative defenses"[20] do not allow it to evade its burden of proof. Article 24(1) does not shift the legal burden of proof to Canada. Canada has not raised any affirmative defences; it argues that the Claimant has failed to establish the jurisdictional foundation necessary to support its claims under NAFTA Articles 1101(1), 1116(2), 1117(2) and 2103(6).

19. Article 24(1) states, as a proposition of evidence, that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." This is "simply a restatement of the general principle that each party has the burden of proving the facts on which he relied in his claim or in his defence, or else risk an adverse decision."[21] It does not "alter the standard rule that the claimant has the burden of demonstrating the

[20] Counter-Memorial, ¶ 54.

[21] **RL-078**, *The UNCITRAL Arbitration Rules: A Commentary*, 2d ed., David D. Caron & Lee M. Caplan, eds. (Oxford: Oxford University Press, 2012) ("*The UNCITRAL Arbitration Rules: A Commentary*"), p. 558.

legal obligation on which its claim is based."[22] As such, Article 24(1) does not override the Claimant's legal burden of establishing the Tribunal's jurisdiction.

20. Resolute's mischaracterization of Canada's jurisdictional objections as "affirmative defenses" does not assist its case. The tribunal in *Pope & Talbot v. Canada* remains the only NAFTA Chapter Eleven tribunal to have held that an objection to jurisdiction based on the time limitation in Article 1116(2) is an affirmative defence.[23] It was wrong on this point. Similarly, the *Pope & Talbot* tribunal's conclusion that "Canada has the burden of proof"[24] to establish that a NAFTA Chapter Eleven tribunal does not have jurisdiction was not correct and has been overtaken by the more recent decisions in *Methanex*, *Apotex*, *Bayview*, *Grand River* and *Gallo*.[25]

21. The only other NAFTA case that the Claimant cites to is the consolidated *Canfor v. United States* and *Tembec v. United States*.[26] However, the tribunal's key holding with respect to the burden of proof in that case is consistent with *Methanex*: "a claimant must satisfy the Tribunal that the requirements of Article 1101 are fulfilled, that a claim has been brought by a claimant investor in accordance with Article 1116 or 1117, and that all preconditions and formalities under Articles 1118-1121 are fulfilled."[27]

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[22] **RL-078**, *The UNCITRAL Arbitration Rules: A Commentary*, p. 558.

[23] *See* **CL-002**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record, 24 February 2000, ("*Pope & Talbot – Award on Preliminary Motion*"), ¶ 11.

[24] **CL-002**, *Pope & Talbot Inc. – Award on Preliminary Motion*, ¶ 11.

[25] *See* paragraphs 11, 13, *supra*.

[26] **RL-007**, *Canfor Corp. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006 ("*Canfor – Decision on Preliminary Question*"), cited at Counter-Memorial, fn. 79.

[27] **RL-007**, *Canfor – Decision on Preliminary Question*, ¶¶ 174, 176. The tribunal's holding that "the respondent has the burden of proof that the provision has the effect which it alleges" was limited to whether Article 1901(3) barred the submission of claims with respect to antidumping law and countervailing duty law to arbitration under NAFTA Chapter Eleven as a matter of jurisdiction. In contrast, Resolute has not disputed that Articles 1101(1), 1116(2) and 1117(2), and 2103(6) all go to the Tribunal's jurisdiction.

22. Nor do two non-NAFTA cases cited by the Claimant[28] support its contention that Canada has raised affirmative defences requiring it to disprove the Tribunal's jurisdiction. The tribunals in *Teinver v. Argentina* and *Siag v. Egypt* only imposed a burden of proof on the respondents because they had alleged that the investor committed an illegality or fraud.[29] Similarly, the cases cited by the *Teinver* tribunal to justify imposing a burden of proof on the respondent involved situations where respondents alleged abuse of process by the claimant or illegality when making its investment.[30]

23. Canada has not alleged any illegality or fraud by Resolute that would vitiate the Tribunal's jurisdiction, otherwise established. Rather, Canada's position is that Resolute has failed to establish the facts necessary to prove Canada's consent to arbitration and the Tribunal's jurisdiction.

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[28] *See* **CL-027**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1) Decision on Jurisdiction, 12 December 2012 ("*Teinver S.A. – Decision on Jurisdiction*"), cited at Counter-Memorial, fn. 79; **CL-024**, *Siag v. Egypt* (ICSID Case No. ARB/05/15) Award, 1 June 2009 ("*Siag – Award*"), cited at Counter-Memorial, fn. 79.

[29] *See* **CL-027**, *Teinver S.A. – Decision on Jurisdiction*, ¶ 324 (finding that the "Respondent has failed to demonstrate that Claimants, as a factual matter, committed illegalities in the process of acquiring their investment."); **CL-024**, *Siag – Award*, ¶ 316 (stating that "[t]he question therefore is whether Egypt can nevertheless establish that fraud, forgery or other misconduct vitiates the [Claimant's] acquisition of Lebanese nationality.").

[30] *See* **RL-079**, *Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶ 75 (holding that certain "issues of fact" related to the respondent's abuse of process argument, including whether the investments were under the investor's dominant control and whether the origin of the investment funds was Romanian "are ones which the Respondent bears the burden of proving according to the requisite standard"); **RL-080**, *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17) Award, 6 February 2008, ¶¶ 104-105 (holding that references in investment treaties to investments being made according to the respondent's laws and regulations "are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership," and that "the Respondent has not come close to satisfying the Arbitral Tribunal that the Claimant made an investment which was either inconsistent with Yemeni laws or regulations or failed to achieve acceptance by the Respondent."); **RL-069**, *Hamester - Award*, ¶¶ 131-132 (stating that "[t]he Tribunal must… examine whether the investment was illegal from its very inception, because of the foreign investor's alleged fraudulent behaviour in manipulating the invoices…. Having carefully considered all the evidence, the Tribunal considers that the Respondent has not fully discharged its burden of proof in this regard.").

III. RESOLUTE HAS FAILED TO ESTABLISH THAT ITS NOVA SCOTIA CLAIMS ARE TIMELY

24. In accordance with the burden of proof set out above, the Claimant has the onus to prove that its claims are timely. As held in *Spence*, if a claimant cannot show that it first acquired, knowledge of the alleged breaches and losses only after the relevant cut-off date, its claims must fail.[31] Such is the case here, where the evidence shows that the Claimant first acquired knowledge of both the Nova Scotia Measures and of the loss or damage that it alleges arose from those measures before the cut-off date of December 30, 2012.

25. As Canada explains below, to the extent that the Claimant incurred any of the loss or damage it alleges, to the extent that the alleged loss or damage was caused by the Nova Scotia Measures, and to the extent that the loss or damage is compensable under NAFTA Chapter Eleven, the Claimant first acquired knowledge that it incurred such loss or damage before December 30, 2012.

A. Resolute Has Failed to Establish that it Only First Learned of the Alleged Loss or Damage After December 30, 2012

26. Canada's Counter-Memorial established that the Claimant expressly affirmed its knowledge of the loss or damage that it alleges before the cut-off date of December 30, 2012 on three separate occasions.[32] First, Resolute's President and CEO, Mr. Richard Garneau, stated just before the adoption of the last of the Nova Scotia Measures that the restart of the Port Hawkesbury mill would inevitably have an effect on the market.[33]

[31] **RL-028**, *Spence – Interim Award*, ¶ 245 ("In the face of this extensive pre-1 January 2009, pre-10 June 2010 conduct, the Tribunal considers that Claimants have failed to show…. that they first acquired, or must be deemed to have first acquired, knowledge of the breaches and losses that they now allege only after 10 June 2010. The appreciations that lie at the core of every allegation that the Claimants advance can be traced back to pre-10 June 2010 conduct, and indeed to pre-1 January 2009 conduct, by the Respondent. The claims thus fall at the first acquisition of knowledge requirement of Article 10.18.1.").

[32] *See* Memorial, ¶¶ 53-61.

[33] **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.

Second, Resolute publicly cited the reopening of the Port Hawkesbury mill as one of the reasons it permanently shut down machine no. 10 at the Laurentide mill in November 2012.[34] Third, Resolute provided Canada with a draft NOI which stated that it began incurring damages in 2012.[35] Further, Canada has now identified yet another public admission by the Claimant which attributes a temporary shutdown of machine no. 11 at the Laurentide mill in December 2012 to the reopening of the Port Hawkesbury mill.[36]

27. Resolute failed to provide any direct or credible response in its Counter-Memorial to refute its past admissions. Remarkably, the Claimant did not file a single witness statement from any individual who is willing and able to attest to what it actually knew during the relevant period, including any member of its executive management team, sales force, or accounting department. Instead, the Counter-Memorial makes assertions about what Resolute President and CEO Mr. Richard Garneau allegedly knew on various issues by using – and substantially misrepresenting – his public statements as a proxy for his actual testimony.[37]

28. While Canada has already established through the Claimant's public and other admissions that it *first* learned, or should have *first* learned, of a loss or damage allegedly arising from the Port Hawkesbury re-opening before December 30, 2012, the fact that the Claimant chose to shield its officers and employees and contemporaneous internal documents from scrutiny leaves the Tribunal with the conclusion that such testimony and documents would have corroborated the Claimant's past admissions.[38]

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[34] *See* paragraphs 35-41, *infra*

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

[36] *See* paragraphs 41-42, *infra*.

[37] *See* Counter-Memorial, ¶¶ 22-24, 43, 50, 51, 83-85, 96, 102, 103, 106.

[38] Canada nonetheless reserves the right to request that the Tribunal order the Claimant to produce documents prior to the hearing. While the Tribunal previously decided that document production would not be necessary during the preliminary phase (*Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 5, 12 December 2016, ¶ 2.1), the Tribunal can order the Claimant to produce documents at any time. Section 12 of Procedural Order No. 2 states that "the Tribunal may of its

29. Instead of directly addressing what it actually knew, the Claimant contests what it could have known before December 30, 2012, primarily through the report of Professor Hausman. As described below, Professor Hausman's report is not only irrelevant on the question of actual knowledge, but it devastates the Claimant's own arguments on constructive knowledge. Professor Hausman concludes that the Claimant's January 2013 prices were impacted by the re-opening of Port Hawkesbury, but he neglects his own testimony that Resolute would have had, at the very least, one month's notice of what its January 2013 prices were going to be. In other words, since the Claimant's January 2013 paper orders must have been placed by its customers by November or December 2012 at the latest, it first acquired knowledge of the alleged damage prior to December 30, 2012. For this and the other reasons described below, Resolute's claims are untimely under NAFTA Articles 1116(2) and 1117(2).

1) *Resolute Admitted that the Reopening of the Port Hawkesbury Mill Caused it to Lose Market Share in 2012*

30. As explained in Canada's Memorial on Jurisdiction,[39] the most recent of the Claimant's admissions appears in its draft notice of intent to submit a claim to arbitration under NAFTA Chapter Eleven ("NOI"), presented to Canada on February 24, 2015: "Resolute's market share for all SC Paper has declined from *2012* to 2014."[40] As loss of market share is one of the forms of damage that Resolute claims to have incurred as a result of the Nova Scotia Measures,[41] this statement is fatal.

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own motion order a Disputing Party to produce documents at any time." This reiterates what Article 24(3) of the UNCITRAL Arbitration Rules already allows: "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."

[39] Memorial, ¶¶ 54-55.

[40] **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 (emphasis added).

[41] *See* NOA, ¶¶ 50, 89, 92, 108.

31. The protests in the Claimant's Counter-Memorial ring hollow. Canada does not misread or misconstrue the draft NOI, as the Claimant argues.[42] The plain meaning of "from" is "starting in."[43] The draft NOI thus alleged that Resolute began to lose market share beginning in 2012, not in 2013, which is what the Claimant later changed its position to in its NOA to avoid a time-bar disqualification.[44] While the Claimant now pleads that it only meant "that Resolute's market share for SC paper was less in 2014 than it was in 2012,"[45] it fails to explain why 2012 is a relevant reference point, if not to identify when the alleged damages began. The Claimant would simply not have referred to 2012 if it only meant to include 2013 and 2014.[46]

32. The Claimant's only other answer is to accuse Canada of misusing the draft NOI.[47] However, its suggestion that the draft NOI is not properly before the Tribunal as evidence cannot be sustained. In accordance with Sections 8 and 9 of Procedural Order No. 1, Canada filed the draft NOI as an exhibit to its Statement of Defence on September 7, 2016. The parties made submissions about the content of the draft NOI when briefing the Tribunal on bifurcation[48] and the Tribunal relied on the draft NOI in

[42] *See* Counter-Memorial, ¶ 95.

[43] The word "from" is a "preposition expressing separation or origin, followed by… a person, place, time, etc. that is the starting point of motion or action," or "a place, object, etc. whose distance or remoteness is reckoned or stated." **R-113**, *Canadian Oxford Dictionary*, 2d. ed., Katherine Barber, ed. (Oxford University Press, 2005), *s.v.* "from", available online: http://www.oxfordreference.com/.

[44] Resolute's NOI and NOA allege that "Port Hawkesbury Paper began to take market share from Resolute and Resolute FP Canada in 2013." *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Notice of Intent to Submit a Claim to Arbitration, 30 September 2015, ¶ 36; NOA, ¶ 50.

[45] Counter-Memorial, ¶ 95.

[46] *See* Memorial, ¶ 55, fn. 114.

[47] Counter-Memorial, ¶ 96.

[48] *See* Canada's *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Canada's Request for Bifurcation, 29 September 2016, fn. 40; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Bifurcation Hearing Transcript, 7 November 2016, pp. 19:4-20:9, 55:20-57:9, 65:7-11.

granting Canada's request for bifurcation.[49] At no time has the Claimant ever objected to the admissibility of the document.

33. The draft NOI admits that the Claimant knew in 2012 that it had lost market share as a result of PHP reopening. The date on which the Claimant made this admission also gives it significant probative value. It submitted the draft NOI to Canada's Minister of International Trade on February 24, 2015,[50] less than three years after the adoption of most of the Nova Scotia Measures. Only after the three-year anniversary of those measures did the Claimant realize the implication of this statement and reengineer its position to say that it did not begin to lose market share until 2013. Having chosen not to file better evidence, the Claimant cannot avoid the consequences of this admission as evidence that its claims are time-barred.

2) *Resolute Stated Publicly in November and December 2012 that it Permanently Shut Down Machine No. 10 and Temporarily Shut Down Machine No. 11 at Laurentide Because of Port Hawkesbury's Reopening*

34. Canada's Memorial cited to public statements made by Resolute in November 2012,[51] when Resolute explained that one of the reasons it had decided to permanently shut down machine no. 10 at the Laurentide mill was the Port Hawkesbury mill's reopening. These statements amount to another admission that the Claimant acquired actual knowledge that the Nova Scotia Measures caused the damage it alleges before the cut-off date of December 30, 2012.[52] The Claimant's assertion[53] that the shutdown of machine no. 10 had only to do with the reopening of its Dolbeau mill and nothing to do

[49] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4, 18 November 2016 ("P.O. No. 4"), ¶ 4.8.

[50] *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).

[51] *See* Memorial, ¶¶ 59-61.

[52] Resolute later reported in its filings to the United States Securities and Exchange Commission that the permanent shutdown of machine no. 10 cost a total of US$ 22 million, comprised of US$ 18 million in accelerated depreciation costs and US$ 4 million in severance and other costs. *See* **C-041**, Resolute 2012 10-K, 1 March 2013, p. 92.

[53] *See* Counter-Memorial, ¶¶ 42-51, 99-107.

with the Port Hawkesbury mill contradicts its earlier contemporaneous public statements.

35. In its news release announcing the permanent shutdown of machine no. 10, Resolute cited "an increase in market capacity of the paper grade produced on machine No. 10."[54] This was a thinly-veiled reference to the restart of the Port Hawkesbury mill, which had begun production only a month earlier, on October 3, 2012.[55] While the Claimant's Dolbeau mill reopened around the same time,[56] Port Hawkesbury's production capacity of 360,000 metric tonnes added more than two-and-a-half times the capacity to the market that Dolbeau did, with its capacity of 143,000 metric tonnes.[57] Indeed, when Port Hawkesbury reopened, it expanded total market production capacity of SC paper by approximately 25 per cent and represented over 30 per cent of the new total market production capacity for SCA paper.[58]

36. The Claimant was less subtle in attributing the permanent shutdown of machine no. 10 to the reopening of the Port Hawkesbury mill in its statements to the media. For example, Canada's national broadcaster, Radio-Canada, reported:

> Or, le porte-parole de l'entreprise, Pierre Choquette, explique qu'il y a eu un imprévu. « 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

[54] **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.

[55] *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.

[56] *See* **C-041**, Resolute 2012 10-K, 1 March 2013, p. 47 (indicating that the Dolbeau mill restarted in October 2012).

[57] *See* **R-012**, Resolute Forest Products, website excerpt, "Dolbeau" (2016), available at: http://www.resolutefp.com/installation_site.aspx?siteid=159&langtype=4105.

[58] *See* **R-102**, Verle Sutton, *Reel Time*, Special Edition, (Nov. 8, 2012), p. 7.

> tonnes de ce grade de papier-là. Tous les efforts ont donc été interrompus. »[59]

37. *Le Journal de Montréal* and *TVA* also reported Resolute's statements that it would have kept machine no. 10 online but for the reopening of Port Hawkesbury:

> « Des tests ont été effectués au cours des derniers mois pour voir si on ne pourrait pas y produire un autre grade de papier, a expliqué le porte-parole de la compagnie, Pierre Choquette. Mais une usine concurrente en Nouvelle-Écosse va redémarrer et produire plus de 400 000 tonnes de papier de ce type. Les efforts faits à l'usine Laurentide ont dû être interrompus. »[60]

38. A local newspaper even quoted Resolute as describing the reopening of the Port Hawkesbury mill as the "coup de grâce" for machine no. 10 at Laurentide:

> De plus, au même moment, la reprise des activités de la Port Hawkesbury Paper, en Nouvelle-Écosse, ajoutait 400 000 tonnes annuellement dans un marché en déclin.
>
> Bien qu'il souligne que plusieurs facteurs doivent être considérés pour expliquer la fermeture de la machine numéro 10 de Laurentide, M. Choquette qualifie de « coup de grâce » cette annonce de production supplémentaire venant de Pacific West.

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[59] **R-101**, Radio-Canada, "Shawinigan: 111 emplois perdus à l'usine Laurentide" (Nov. 6, 2012) ("Yet, the company's spokesman, Pierre Choquette, explains that there was an unexpected event. 'We've been trying in the last few months to find a new grade of paper to produce in that machine, but in the last few weeks we've learned that a new plant in Nova Scotia will be starting up, from a competitor, and will add 400,000 tons of that grade of paper. All efforts were therefore ceased.'") (translation). *See also* **R-114**, "Shawinigan: 111 emplois perdus à l'usine Laurentide" Huffington Post Québec (Nov. 6, 2012), available at: http://Québec.huffingtonpost.ca/2012/11/06/shawinigan--111-emplois-_n_2082421.html.

[60] **R-115**, "Résolu va mettre à pied 111 travailleurs" Le Journal de Montréal (Nov. 6, 2012), available at: http://www.journaldemontreal.com/2012/11/06/resolu-va-mettre-a-pied-111-travailleurs; **R-116**, TVA Nouvelles, "Résolu va mettre à pied 110 travailleurs" (Nov. 6, 2012), available at: http://www.tvanouvelles.ca/2012/11/06/resolu-va-mettre-a-pied-110-travailleurs-1 ("Tests have been carried out over the past few months to see if we could not produce another grade of paper, said company spokesman Pierre Choquette. But a competing plant in Nova Scotia will restart and produce more than 400,000 tonnes of this type of paper. The efforts at the Laurentide plant had to be interrupted.") (translation).

> « Nous sommes dans un marché en décroissance et on ajoute de la production », résume-t-il. « Pour nous, ça devenait impossible de continuer nos efforts sur la machine numéro 10. »[61]

39. Even Resolute's other SC paper competitors were aware of the fact that it had publicly cited the reopening of Port Hawkesbury as a reason for its decision to permanently shut down machine no. 10.[62]

40. These unambiguous statements confirm that Resolute knew of a loss or damage alleged to have resulted from the Nova Scotia Measures by at least November 6, 2012. The spokesperson who gave the statements on behalf of Resolute was Mr. Pierre Choquette, Resolute's Principal Director of Public Affairs in Canada.[63] There can be no question that the statements are attributable to the Claimant. Nor has the Claimant denied the existence or the content of the statements. It has introduced neither evidence from Mr. Choquette nor contemporaneous documents that establish the Claimant believed his statements to be in error. The Counter-Memorial just ignored them.

41. The Claimant also publicly cited the reopening of the Port Hawkesbury mill as the reason for another decision it took with respect to its Laurentide mill before

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[61] **R-117**, Guy Veillette, "111 emplois perdus chez Laurentide" Le Nouvelliste (Nov. 7, 2012), available at: http://www.lapresse.ca/le-nouvelliste/affaires/201211/07/01-4591127-111-emplois-perdus-chez-laurentide.php?utm_categorieinterne=trafficdrivers&utm_contenuinterne=cyberpresse_lire_aussi_4591529_article_POS4. ("In addition, at the same time, the resumption of operations at Port Hawkesbury Paper in Nova Scotia added 400,000 tonnes annually to a declining market. While pointing out that several factors must be considered to explain the closure of Laurentide's machine no. 10, Mr. Choquette described this additional production announcement from Pacific West as a 'coup de grâce'. 'We are in a declining market and we are adding production', he said. 'For us, it became impossible to continue our efforts on the machine number 10.'") (translation).

[62] *See* **R-083**, Testimony of Vice President of Distribution Sales for Madison Paper Industries Mr. Michael Johnston, United States International Trade Commission, Investigation No. 701-TA-530, "Transcript of Staff Conference" (Mar. 19, 2015) ("March U.S. ITC Transcript"), p. 35:11-15 ("In November 2012, Resolute Forest Products closed one of its SC paper machines at its Laurentide SC paper mill in Québec. *At that time Resolute noted the closure was due in part to the reopening of the Port Hawkesbury mill.*") (emphasis added). The development was also reported by the industry publication *Paper Trader*, which described the shutdown of machine no. 10 as "partially offset[ting]" the restart of Port Hawkesbury. **R-118**, RISI, *Paper Trader* (Nov. 2012), p. 9.

[63] *See* **R-117**, Guy Veillette, "111 emplois perdus chez Laurentide" Le Nouvelliste (Nov. 7, 2012); **R-119**, LinkedIn, website excerpt, "Pierre Choquette, MBA", available at : https://www.linkedin.com/in/pierre-choquette-mba-131a2045/.

December 30, 2012. On December 19, 2012, just over a month after announcing the permanent shutdown of machine no. 10, Resolute announced that it would temporarily shut down machine no. 11 at the Laurentide mill and explicitly cited the reopening of the Port Hawkesbury mill as one of the reasons for this decision:

> « Au cours des six ou sept derniers mois, il y a une baisse de la demande pour ces grades de papier et une nouvelle production de la compétition, avec le redémarrage de l'usine Nouvelle-Écosse », commente Pierre Choquette, porte-parole chez Produits forestiers Résolu.
>
> « Ça crée un déséquilibre et on n'a pas le choix de s'ajuster. Nous observerons donc les conditions de marché au cours des prochains jours pour déterminer de quelle façon pourrons-nous reprendre la production. »[64]

42. In sum, not only did Resolute publicly state in November 2012 that it would permanently shut down one of its two machines at Laurentide in response to Port Hawkesbury's reopening (machine no. 10), it publicly stated in December 2012 that it would temporarily shut down the other machine (no. 11) for the same reason. The Claimant cannot *ex post facto* explain its way out of its own contemporaneous public statements, all of which occurred prior to the cut-off date of December 30, 2012.

3) *Resolute's Claim that it Planned to Shut Down Machine No. 10 Regardless of Port Hawkesbury Contradicts the Public Record*

43. The Claimant argues that the closure of machine no. 10 at the Laurentide mill was totally unrelated to the reopening of Port Hawkesbury, based on a dubious explanation about the timing of the reopening and inaccurate characterizations of public statements made by its President and CEO, Mr. Richard Garneau.[65] Neither argument

[64] **R-120**, Guy Veillette, "Un marché difficile, répète Produits forestiers Résolu" Le Nouvelliste (Dec. 19, 2012), available at: http://www.lapresse.ca/le-nouvelliste/actualites/201212/19/01-4605195-un-marche-difficile-repete-produits-forestiers-resolu.php. ("In the last six or seven months, demand for these paper grades has declined and a new production from a competitor, with the restart of the Nova Scotia mill", says Pierre Choquette, spokesperson for Resolute Forest Products. "It creates an imbalance and we have no choice but to adjust. We will therefore observe the market conditions over the next few days to determine how we can resume production.") (translation).

[65] *See* Counter-Memorial, ¶¶ 98-107.

overcomes the fact that Resolute publicly cited the reopening of the Port Hawkesbury mill as a reason why it announced the permanent shutdown of machine no. 10 on November 6, 2012, nearly two months before the cut-off date of December 30, 2012.

44. The Claimant has advanced no evidence – no witness testimony or internal memoranda, reports or plans – as to the other reasons it may have had for closing machine no. 10 and to establish it had nothing to do with Port Hawkesbury's reopening. If the Claimant had an 18-month plan shut down machine no. 10, as it alleges, it would surely have voluminous evidence thereof. As stated in *Gallo v. Canada*, "[o]bjectively, the tribunal would expect… testimony to be corroborated by some circumstantial evidence."[66] The expectation for corroborating documentary evidence is even greater here, where there is no testimony. As the *Gallo* tribunal aptly said, the absence of corroborating evidence destroys the credibility of a claimant's assertions:

> In an age where almost every human action leaves a written record, it is simply unconceivable that the Claimant… has not been able to produce one single shred of documentary evidence, confirming the [relevant] date…: no agreement, no contract, no confirmation slip, no instruction letter, no memorandum, no invoice, no email, no file note, no tax declaration, no submission to any authority - absolutely nothing."[67]

45. But again, even if the Claimant could establish that other reasons existed for its decision to close down machine no. 10, this would not negate the fact that Resolute cited the reopening of Port Hawkesbury as one of its main reasons.

46. The Claimant places much significance on the notion that Port Hawkesbury was not certain to restart until September 22, 2012.[68] However, this point is irrelevant, since the Claimant did not announce the permanent shutdown of machine no. 10 until a month

[66] *See* **RL-071**, *Gallo – Award*, ¶ 289.

[67] *See* **RL-071**, *Gallo – Award*, ¶ 289.

[68] *See* Counter-Memorial, ¶¶ 100-101.

and a half later, on November 6, 2012.[69] By then there was no uncertainty around Port Hawkesbury's restart – it had already happened.[70]

47. The Claimant next argues that "throughout 2011 and 2012, [Resolute] publicly linked closure of Line #10 at Laurentide to the reopening of Dolbeau."[71] This is not only unsupported by the evidence the Claimant relies on, it contradicts the public record. As described below, Resolute assured workers, union representatives, politicians and the local community that its decision to reopen the Dolbeau mill would have no impact on machine no. 10 in Shawinigan for the foreseeable future. For Resolute to now argue, as it does,[72] that it had a publicly known 18-month business plan to shut down machine no. 10 in November 2012 is disingenuous. If such a plan existed, it was not a matter of public record and it is not in evidence before this Tribunal.

48. Resolute claims that it "publicly announced in September 2011 that it would seek to reopen Dolbeau,"[73] citing to a news article published on September 23, 2011. However, the article states only that "AbitibiBowater," the Claimant's corporate predecessor, "*may* restart [the] Dolbeau mill," and that "AbitibiBowater *is considering* reopening" the mill.[74] The article quotes Resolute's spokesperson, Mr. Pierre Choquette, as stating that there was "the *possibility* of restarting the mill… *but we're not there yet*."[75] According to this article, at least two conditions for restarting the Dolbeau mill

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

[70] The Port Hawkesbury mill had restarted production on October 3, 2012. *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).

[71] Counter-Memorial, ¶ 99.

[72] *See* Counter-Memorial, ¶ 107.

[73] Counter-Memorial, ¶ 103.

[74] **C-023**, Canadian Press, News Article, "AbitibiBowater may restart Dolbeau Mill after workers endorse changes" (Sep. 23, 2011) (emphasis added).

[75] **C-023**, Canadian Press, News Article, "AbitibiBowater may restart Dolbeau Mill after workers endorse changes" (Sep. 23, 2011) (emphasis added).

remained outstanding: Resolute "need[ed] to secure a government supply of fibre for at least five years and then address energy issues at the mill."[76] The article makes no reference to the Laurentide mill or Resolute's plans for machine no. 10.

49. The Claimant next relies on a statement by its President and CEO Mr. Richard Garneau in a quarterly earnings conference call held on October 31, 2011. It inaccurately quotes Mr. Garneau as stating that Resolute would not reopen its Dolbeau facility unless "capacity [is] closed elsewhere,"[77] and that "if Dolbeau were to restart, 'capacity will have to be closed elsewhere.'"[78] In fact, Mr. Garneau stated that "*I think that* capacity will have to be closed elsewhere."[79] This suggests that Resolute had not made a final decision as to whether other capacity would need to close, and if so, where – at least one that it was willing to disclose publicly. Mr. Garneau did not state or even imply that the closure of machine no. 10 at Laurentide was a condition of Dolbeau reopening.

50. The Claimant also relies on a French-language news article published on December 13, 2011, following Resolute's announcement that it would shut down paper machine no. 6 at its Kénogami mill. According to the translation provided by Resolute, this article states: "Resolute says that shutting down one of the two machines at its Kénogami mill is part of its business plan, all aspects of which are known. It involves starting up operations again in Gatineau and Dolbeau and shutting down one of the two machines in Shawinigan [i.e. Laurentide]."[80]

51. The Claimant's translation is inaccurate. The article did not explain "that Resolute's [business] plan 'involves starting up operations again in . . . Dolbeau and

[76] **C-023**, Canadian Press, News Article, "AbitibiBowater may restart Dolbeau Mill after workers endorse changes" (Sep. 23, 2011).

[77] Counter-Memorial, ¶ 102, citing **C-024**, Q3 AbitibiBowater Inc. Earnings Conference Call – Final, (Oct. 31, 2011), p. 11.

[78] Counter-Memorial, ¶ 103.

[79] **C-024**, Q3 AbitibiBowater Inc. Earnings Conference Call – Final, (Oct. 31, 2011), p. 11.

[80] Counter-Memorial, ¶ 44, citing **C-025**, Le Quotidien, News Article, Denis Villeneuve, "C'est terminé la 6 à Kénogami" (Dec. 13, 2011) (emphasis added).

shutting down one of the two machines in Shawinigan [i.e., Laurentide]'," as the Claimant asserts.[81] It only states that there was talk of the possibility of one of the machines in Shawinigan closing down, and says nothing about how it would fit into Resolute's business plan. The only confirmed machine shutdown was at Kénogami. The full excerpt of the news article reads as follows:

> Résolu affirme que la fermeture d'une des deux machines de son usine Kénogami fait partie de son plan d'affaires dont tous les éléments sont connus. *Il est question de* relancer les activités à Gatineau et à Dolbeau, et de fermer une des deux machines de son usine de Shawinigan.[82]

52. Not long after it announced this closure of a machine at the Kénogami mill, Resolute resolved one of the outstanding issues needed to reopen the Dolbeau mill, related to energy supply. It was seeking to acquire an electricity co-generation plant, which had formerly been operated by another company at the site of the Dolbeau mill.[83] This issue was resolved by February 6, 2012, when it was announced that Resolute had acquired the co-generation plant, which "produced electricity that was sold to Hydro-Québec from wood waste and steam used in the paper making process."[84] All that remained for Dolbeau to restart was for "Resolute…to convince Hydro-Québec to restart the electricity purchase agreement for Dolbeau."[85]

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[81] *See* Counter-Memorial, ¶ 103.

[82] **C-025**, Denis Villeneuve, "C'est terminé la 6 à Kénogami", Le Quotidien (Dec. 13, 2011) (emphasis added) ("Resolute says that the closure of one of the two machines of its Kénogami plant is part of its business plan of which all the elements are known. There is talk of relaunching activities in Gatineau and Dolbeau, and closing one of the two machines at its Shawinigan plant.") (translation).

[83] **C-023**, The Canadian Press, "AbitibiBowater may restart Dolbeau Mill after workers endorse changes" (Sep. 23, 2011).

[84] **R-121**, Global News, "Resolute Forest Products buys Boralex co-generation plant in Dolbeau, Que." (Feb. 6, 2012), available at: http://globalnews.ca/news/208155/resolute-forest-products-buys-boralex-co-generation-plant-in-dolbeau-que/; **R-122**, The Canadian Press, "Resolute Forest Products buys Boralex co-generation plant in Dolbeau, Que." (Feb. 6, 2012), available at: http://www.huffingtonpost.ca/2012/02/06/resolute-forest-products-_n_1258349.html.

[85] **R-123**, Global News, "Resolute Forest Products buys Boralex co-generation plant in Dolbeau, Que." (Feb. 6, 2012), available at: http://globalnews.ca/news/208155/resolute-forest-products-buys-boralex-co-generation-plant-in-dolbeau-que/; **R-124**, The Canadian Press, "Resolute Forest Products buys Boralex

53. These developments around the potential reopening of Dolbeau caused some concern that Resolute would close the no. 10 machine in Shawinigan.[86] However, Resolute, through its spokesperson Mr. Pierre Choquette, reassured everyone that, as of February 18, 2012, there were no new developments regarding machine no. 10 at Laurentide:

> Hier après-midi, Pierre Choquette, porte-parole de la compagnie, n'avait rien de nouveau à annoncer sur ce plan.
>
> « Nous avons investi sur la machine no 11 et c'est clair qu'elle est dans une catégorie à part par rapport à la 10 », souligne le porte-parole. « Elle est beaucoup plus productive. *Il y a des préoccupations par rapport à la 10, mais il n'y a aucun nouveau développement*. »[87]

54. Resolute maintained this position in statements reported in an article cited by the Claimant dated August 8, 2012, which indicated that Resolute was close to reaching an agreement with Hydro-Québec on the signing of an electricity contract. Mr. Choquette said that he "did not want to venture too much information about the future of the Shawinigan mill."[88] The article further quotes Mr. Choquette as saying: "I don't want to jump to conclusions.… We will see, when there are any developments regarding Dolbeau, what the impact might be on the other mills."[89]

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co-generation plant in Dolbeau, Que." (Feb. 6, 2012), available at: http://www.huffingtonpost.ca/2012/02/06/resolute-forest-products-_n_1258349.html.

[86] **R-125**, Guy Veillette, "Usine Laurentide: arrêt de production de dix jours," Le Nouvelliste (Feb. 18, 2012), available at: http://www.lapresse.ca/le-nouvelliste/affaires/201202/17/01-4497355-usine-laurentide-arret-de-production-de-dix-jours.php?utm_categorieinterne=trafficdrivers&utm_contenuinterne=cyberpresse_lire_aussi_4493313_article_POS1.

[87] **R-125**, Guy Veillette, " Usine Laurentide: arrêt de production de dix jours" Le Nouvelliste (Feb. 18, 2012). ("Yesterday afternoon, Pierre Choquette, spokesman for the company, had nothing new to announce on this plan. 'We have invested in machine no. 11 and it's clear that it's in a category apart from the 10', said the spokesman. 'It is much more productive. There are concerns about the 10, but there is no new development.'") (translation) (emphasis added).

[88] **C-031**, Vincent Gauthier, "Dur coup à venir pour l'usine Laurentide?", Le Nouvelliste (Aug. 8, 2012), Resolute courtesy translation.

[89] **C-031**, Vincent Gauthier, "Dur coup à venir pour l'usine Laurentide?", Le Nouvelliste (Aug. 8, 2012), Resolute courtesy translation.

55. This article does not support the Claimant's position that it had already decided to close machine no. 10, as it argues. Indeed, Mr. Choquette went on to say that other factors could impact Resolute's eventual decision about machine no. 10: "We are going to be keeping an eye on market conditions, as well. There has to always be a balance between supply and demand. *There are, however, no new developments in the case of the Laurentide mill*."[90]

56. The restart of the Dolbeau mill was not announced until August 24, 2012.[91] The Claimant relies on the press release containing this announcement, which said that "[t]he Company is currently assessing its network of paper mills to ensure that production continues to be balanced."[92] Far from stating that the reopening of Dolbeau would result in the closure of machine no. 10 at Laurentide, this only serves to reinforce that the Claimant had made no final decision regarding the fate of that machine.

57. Indeed, Resolute President and CEO Mr. Richard Garneau went out of his way in late August 2012 to reassure those involved that the reopening of Dolbeau did not necessarily spell the closure of machine no. 10 at Laurentide, because Resolute was conducting tests to produce a new grade of paper on that machine. Radio-Canada reported on Mr. Garneau's reassurances in two separate news articles, excerpted below:

> Par ailleurs, Richard Garneau se fait rassurant pour l'avenir de l'usine Laurentide, où l'on craint que la réouverture de l'usine à papier de Dolbeau-Mistassini ne cause la fermeture éventuelle de la machine numéro 10 de celle de Shawinigan, ce qui pourrait toucher 160 emplois.
>
> L'usine Laurentide produit le même type de papier que celle de Dolbeau-Mistassini, mais avec des équipements beaucoup plus vieux.

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[90] **C-031**, Vincent Gauthier, "Dur coup à venir pour l'usine Laurentide?", Le Nouvelliste (Aug. 8, 2012) (emphasis added), Resolute courtesy translation.

[91] **R-011**, Resolute Forest Products, News Release, "Resolute Forest Products Announces Restart of its Dolbeau (Québec) Paper Mill" (Aug. 24, 2012) ("Resolute News Release of August 24, 2012"), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135310.

[92] **R-011**, Resolute Forest Products, News Release, "Resolute Forest Products Announces Restart of its Dolbeau (Québec) Paper Mill" (Aug. 24, 2012) ("Resolute News Release of August 24, 2012").

> M. Garneau affirme que des tests sont faits pour un nouveau produit à l'usine Laurentide. Lors du point de presse, Richard Garneau a aussi confirmé que pour l'instant, il n'y avait aucune conséquence pour les travailleurs de Shawinigan.[93]
>
> **
>
> Cette annonce est de nature à susciter l'inquiétude à Shawinigan où l'on craint que cette décision ne cause la fermeture éventuelle de la machine numéro 10 à l'usine Laurentide, ce qui pourrait toucher 160 emplois.
>
> C'est que l'usine Laurentide produit le même genre de papier que celle de Dolbeau-Mistassini, mais avec des équipements beaucoup plus vieux.
>
> Or, le grand patron de la compagnie se veut rassurant. Richard Garneau affirme que des tests sont faits pour un nouveau produit à la Laurentide. Lors du point de presse, Richard Garneau a aussi confirmé que pour l'instant, il n'y avait aucune conséquence pour les travailleurs de Shawinigan.[94]

58. In light of Mr. Garneau's assurances, Resolute's announcement, just over two months later, that it would permanently shut down machine no. 10 came as a shock. Many spoke out against Resolute's conduct, including the Mayor of Shawinigan, who issued a press release confirming that Mr. Garneau had repeated his assurances for the benefit of local politicians only weeks earlier:

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[93] **R-126**, Radio-Canada, "Dolbeau-Mistassini : 20 millions pour rouvrir la papeterie" (Aug. 24, 2012), available at: http://ici.radio-canada.ca/nouvelle/575576/annonce-papeterie-resolu-dolbeau. ("In addition, Richard Garneau is reassuring about the future of the Laurentide plant, where it is feared that the reopening of the paper mill of Dolbeau-Mistassini will cause the eventual closure of Shawinigan machine no. 10, which could affect 160 jobs. The Laurentide plant produces the same type of paper as Dolbeau-Mistassini, but with much older equipment. Mr. Garneau says tests are being done for a new product at the Laurentide plant. At the press briefing, Richard Garneau also confirmed that for the time being, there were no consequences for workers in Shawinigan.") (translation).

[94] **R-127**, Radio-Canada, "La papeterie de Dolbeau-Mistassini rouvrira : les dirigeants se font rassurants pour l'usine de Shawinigan" (Aug. 24, 2012), available at: http://ici.radio-canada.ca/nouvelle/575613/dolbeau-reactions-shawinigan. ("This announcement is likely to raise concerns in Shawinigan, where it is feared that this decision will result in the eventual closure of the No. 10 machine at the Laurentide plant, which could affect 160 jobs. The Laurentide plant produces the same kind of paper as Dolbeau-Mistassini, but with much older equipment. But the company's top executive wants to be reassuring. Richard Garneau says tests are being done for a new product at the Laurentide. At the press briefing, Richard Garneau also confirmed that for the time being, there were no consequences for workers in Shawinigan.") (translation).

> Le 25 août dernier… la ministre Julie Boulet rencontrait le président de Résolu qui lui mentionnait qu'à moyen terme, il n'allait pas toucher à la machine numéro 10, étant donné que « le secteur est en demande ». Il a même ajouté que les travailleurs ont réussi à produire un papier à valeur ajoutée de grade A, alors qu'à Dolbeau-Mistassini, c'est de grade B et C.
>
> « Puis, il y a trois semaines, le 11 octobre dernier, j'étais à l'usine Laurentide à la demande de la direction, en compagnie des députés Julie Boulet et Lise St-Denis et des représentants syndicaux », ajoute Michel Angers. « On nous a répété que tout allait bien, que les performances en santé sécurité sont parmi les meilleures et que les réductions de coûts de production sont au rendez-vous. »[95]

59. The Mayor of Shawinigan felt misled by the management of Resolute:

> « Ou bien, la direction de Résolu nous a menti le 11 octobre dernier, ou bien elle nous ment aujourd'hui. Choisissez votre date », lance le maire Angers. « Une seule chose est certaine : la direction de Résolu ne nous dit pas la vérité. »[96]

60. Contrary to the Claimant's current position, it never publicly attributed the closure of machine no. 10 at Laurentide to the reopening of its Dolbeau mill in 2011 or 2012. The public record confirms that Resolute had made no final decision with respect to machine no. 10 until after the Port Hawkesbury mill reopened in October 2012. When it did, the Claimant cited the mill's reopening as one of the reasons to permanently shut down machine no. 10 in November 2012 and then later as one of the reasons for

[95] **R-128**, City of Shawinigan, News Release, "Choqué par l'annonce de fermeture de la machine numéro 10 : Le maire de Shawinigan en colère contre Résolu" (Nov. 6, 2012), available at: http://www.shawinigan.ca/Citoyens/Communiques/fermeture-de-la-machine-no-10-le-maire-de-shawinigan-en-colere-contre-resolu_953.html ("On August 25 ... Minister Julie Boulet met the president of Resolute who told her that in the medium term, he would not touch machine no. 10, since 'the sector is in demand'. He added that the workers have succeeded in producing grade A value-added paper, while in Dolbeau-Mistassini, it's grade B and C. 'Then, three weeks ago, on October 11, I was at the Laurentide plant at the request of the management, along with MPs Julie Boulet and Lise St-Denis and union representatives', added Michel Angers. 'We were told again that everything was going well, that health and safety performance is among the best, and that production cost reductions are clear.'") (translation).

[96] **R-128**, City of Shawinigan, News Release, "Choqué par l'annonce de fermeture de la machine numéro 10 : Le maire de Shawinigan en colère contre Résolu" (Nov. 6, 2012) ("'Either Resolute's management lied to us on October 11, or they lie to us today. Choose your date', says Mayor Angers. 'Only one thing is certain: Resolute's management does not tell us the truth.'") (translation).

temporarily closing machine no. 11 on December 19, 2012. Resolute cannot now avoid the consequences of its prior admissions.

4) *Resolute's Selective Citations of PHP's Statements do not Support its Position*

61. In an effort to muster evidence to support its position that it did not know of the alleged loss or damage until 2013, the Claimant quotes selectively from the record of the U.S. investigation into SC paper from Canada. However, the statements it relies on, taken in their proper context, do not support its position.[97]

62. For example, the Claimant quotes a statement from a representative of PHP that "PHP didn't really get into the market until 2013. As such, it's impossible for PHP to cause any injury in 2012."[98] However, the same speaker also said that "PHP entered the market in the end of 2012."[99] In any event, the U.S. ITC ultimately did not accept PHP's submission on this point, finding that "underselling by the subject imports *in 2012* led to a loss of the domestic industry's market share," causing "[t]he domestic industry [to] cut prices in response."[100]

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[97] Canada has challenged certain aspects of the ITC's final determination in its investigation into supercalendered paper from Canada under NAFTA Chapter 19 and at the World Trade Organization (WTO). Canada takes no position in this submission as to whether the ITC's findings were correct, nor should any reference to statements made during the ITC hearings be considered agreement or disagreement with that testimony. Canada only refers to these statements as evidence to refute the purported claims by Resolute for the purposes of establishing jurisdiction. Anything stated in this pleading is without prejudice to Canada's position under NAFTA Chapter 19 and at the WTO.

[98] **R-083**, United States International Trade Commission, Investigation No. 701-TA-530, "Transcript of Staff Conference" (Mar. 19, 2015) ("March U.S. ITC Transcript"), p. 14:7-9, cited at Counter-Memorial, ¶ 71.

[99] **R-083**, March U.S. ITC Transcript, p. 14:22-23.

[100] **C-054**, *In Re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion ("U.S. ITC Staff Report"), p. 25 (emphasis added). *See also* **C-054**, U.S. ITC Staff Report, fn. 124 ("PHP argues that the Commission should consider its increase in supply to the U.S. market to be non-injurious because it oversold the domestic like product in many instances. It also urges the Commission to discount underselling by the subject imports during the fourth quarter of 2012 because it was restarting its plant.… The Commission considers the subject imports as a whole, and PHP's lower prices when it re-entered the U.S. market are pertinent to consideration of the effect of subject imports on domestic prices. We therefore have considered pricing over the entirety of the POI.").

63. The Claimant also asserts that "after reopening, PHP had few sales and much uncertainty as it had to qualify and re-establish itself in the market."[101] It cites no evidence to support this assertion, except a statement made by PHP in the U.S. ITC hearings to the effect that PHP "had to go through the whole process of requalifying [its] paper with major buyers"[102] and that Port Hawkesbury spent "the first month or two… dealing with teething problems in the plant."[103]

64. However, the Claimant ignores the testimony that immediately follows, which explains that Port Hawkesbury had customers soon after reopening:

> We had several customers that were willing and able to start business with us shortly after we restarted, once they saw that the quality of the product was good.
>
> … [T]here were several customers that primarily were brought through paper brokers and paper merchants that were ready to go back into business with Port Hawkesbury because they love the quality of the sheet and the brightness of the sheet.[104]

65. Customers of PHP attested to this fact. For example, the Vice President of Operations at Publishers Press stated that "[w]hen the restart came, [customers] trusted that the new management would provide the high quality of paper they had available and [they] felt like the reputation is credible."[105]

66. Finally, the Claimant asserts that "PHP reported to the ITC that its 2012 production was minimal."[106] However, in the exhibit cited to support this statement,

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[101] Counter-Memorial, ¶ 73.

[102] **C-052**, Transcript of Proceedings before United States International Trade Commission in *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015) ("October U.S. ITC Transcript"), pp. 239:22-240:6, Counter-Memorial, ¶ 73.

[103] **C-052**, October U.S. ITC Transcript, pp. 239:22-240:6, cited at Counter-Memorial, ¶ 25.

[104] **C-052**, October U.S. ITC Transcript, p. 240:14-24.

[105] **C-052**, October U.S. ITC Transcript, p. 169:13-16.

[106] Counter-Memorial, ¶ 73.

PHP reported its 2012 production at 72,000 metric tonnes worth $45 million.[107] This represents 20 per cent of the Port Hawkesbury mill's total annual production capacity 360,000 metric tonnes.[108] Considering that the mill was only open for the last quarter of 2012, this can hardly be characterized as minimal. Indeed, during that quarter PHP produced and sold nearly as much paper as the average quarterly production capacity and actual sales tonnage of Resolute's Laurentide and Dolbeau mills combined.[109]

67. Even if the likelihood of PHP succeeding were a relevant factor, the Claimant has failed to establish that PHP suffered for want of customers, orders or sales. But this issue is legally irrelevant anyway – under NAFTA Articles 1116(2) and 1117(2), the test is when the Claimant *first* acquired, or should have *first* acquired, knowledge of the loss or damage that it alleges to have incurred as a result of the impugned measure. The evidence definitively demonstrates that this occurred before December 30, 2012.

5) *Resolute Has Failed to Prove that it Only First Learned in 2013 that Port Hawkesbury's Reopening Was Impacting its SC Paper Prices*

68. Resolute argues that it could not have known that it suffered the alleged damage until 2013 because the reopening of the Port Hawkesbury mill had no impact on SC

[107] **C-046**, Port Hawkesbury Paper Initial Questionnaire Resp. in *In Re Supercalendered Paper from Canada*, 27 May 2015, pp. 13-14.

[108] *See* **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, p. 2.

[109] Based on the Laurentide mill's annual production capacity of 191,000 metric tonnes and the Dolbeau mill's annual production capacity of 143,000 metric tonnes (*see* **R-016**, Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec" (Sep. 2, 2014), available at: http://resolutefp.mediaroom.com/index.php?s=28238&item=135267; **R-012**, Resolute Forest Products, website excerpt, "Dolbeau" (2016), available at: http://www.resolutefp.com/installation_site.aspx?siteid=159&langtype=4105), Canada understands that average quarterly production capacity for these mills was 47,750 metric tonnes and 35,750 metric tonnes respectively, for a total of 83,500 metric tonnes. According to mill data produced to Canada by the Claimant, it sold [redacted] metric tonnes of SC paper at Laurentide and [redacted] metric tonnes of SC paper at Dolbeau in the fourth quarter of 2012, for a total of [redacted] metric tonnes. See **R-129**, Resolute Forest Products Inc., Excel spreadsheet, "Resolute Response to Canada Mill Data: Data per Mill All Data"; **R-129**, Resolute Forest Products Inc., Excel spreadsheet, "Resolute Response to Canada Mill Data: Data per Mill Adjusted"; **R-142**, Resolute Forest Products Inc., Excel spreadsheet, "Laurentide".

paper prices until the first quarter of that year.[110] In this regard, it relies on Professor Hausman's opinion that "price effects were not evident until January 2013" and there was "no significant decrease in price at the end of 2012."[111]

69. This analysis wrongly assumes that Resolute did not and could not know the price of SC paper until the month that it was shipped and invoiced to customers. It implausibly assumes that Resolute confirmed a full month of orders for January 2013 without reaching agreement with its customers on prices before December 30, 2012, and that it had no idea of the price in its contracts for 2013. This is not credible. As explained below, because of the way that SC paper is sold and the lead times involved, Resolute necessarily knew its prices for January 2013 before December 30, 2012. Resolute's analysis also fails to consider that the reopening of the Port Hawkesbury mill not only reduced January 2013 prices of both SCA and SCB, but also reduced prices for SCB paper shipped as early as December 2012. Finally, Resolute's analysis fails to consider that the reopening of the Port Hawkesbury mill not only resulted in a price decrease, but also prevented a price increase in 2012.

70. SC paper is primarily sold through transaction-by-transaction negotiations and through contracts.[112] Annual contracts and short-term contracts (with an average duration three to six months for most U.S. importers) make up the largest proportions of sales type, while long-term contracts (with an average duration of two years) and spot sales make up smaller proportions.[113] These sales contracts typically include "meet-or-release provisions that permit buyers to negotiate lower contract prices if market prices

[110] Counter-Memorial, ¶¶ 74-76, 91-93.

[111] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Counter-Memorial, Expert Witness Statement of Jerry Hausman, 22 February 2017 ("Hausman Report"), ¶¶ 17-25.

[112] **C-054**, U.S. ITC Staff Report, p. V-3.

[113] According to the U.S. ITC, the distribution of sales type among U.S. producers is 19.9 per cent for long-term contracts, 51.5 per cent for annual contracts, 21.2 per cent for short-term contracts and 7.5 per cent for spot sales. The distribution of sales type among importers is 10.4 per cent for long-term contracts, 30.3 per cent for annual contracts, 47.9 per cent for short-term contracts and 11.3 per cent for spot sales ("Note.—Because of rounding, figures may not add to the totals shown."). **C-054**, U.S. ITC Staff Report, pp. V-4 to V-5.

fall."[114] However, because SC paper is normally made to order, with little product held in inventory,[115] the buyer and seller must agree upon a price before the order is confirmed and sent to production. According to the findings of the U.S. ITC, lead times between order and delivery dates range from 35 to 45 days for U.S. producers and 28 to 45 days for U.S. importers.[116]

71. Professor Hausman accepts these facts as true,[117] but says nothing about the obvious implication thereof: orders and prices for paper that Resolute delivered in January 2013 were known to it by the end of December 2012, at the very latest.

72. The Claimant has not introduced into evidence any of its contracts for paper shipped in 2013 to conclusively establish that those orders were only placed and known to Resolute after December 30, 2012. Nor is there testimony from anyone in the Claimant's sales or accounting department to confirm that they did not know what their January 2013 prices would be prior to December 30, 2012. Such testimony would contradict Professor Hausman's understanding that, as a matter of industry practice, orders are placed at least one month in advance of delivery. Indeed, Resolute has never asserted, let alone proven, that contrary to industry practice and the assumptions of its own expert, it would confirm a month of orders for January 2013 before agreeing with its customers on prices before December 30, 2012. This is implausible given that the U.S. ITC's aggregate figure of 28 to 45 days lead time for SC paper orders accounts for Resolute's firm-specific lead times, which it disclosed to the U.S. ITC on a confidential basis,[118] but has not presented to this Tribunal.[119] The only credible conclusion to be

[114] **C-054**, U.S. ITC Staff Report, p. 19.

[115] **C-054**, U.S. ITC Staff Report, pp. 16, II-14.

[116] **C-054**, U.S. ITC Staff Report, p. II-14.

[117] Hausman Report, ¶ 7 and fn. 29.

[118] As a subject importer, Resolute was required to submit responses to a U.S. importers' questionnaire distributed by the U.S. ITC, which asked: "what is the typical lead time between a customer's order and the date of delivery for your firm's sales of SC paper?" Similarly, as a U.S. producer, Resolute was required to submit responses to a U.S. producers' questionnaire distributed by the U.S. ITC, which asked the same question with respect to Resolute's sales of U.S.-produced SC paper. *See* **R-130**, U.S. ITC, "U.S. Importers' Questionnaire", s. III-9; **R-130**, U.S. ITC, "U.S. Producers' Questionnaire", s. IV-9.

drawn is that the Claimant knew in November or December 2012 what its January 2013 prices were going to be.[120]

73. Not only did Resolute know the price of SC paper shipped in January 2013 before December 30, 2012, but by then it had also negotiated the price for its annual contracts commencing in January 2013 and knew or should have known that the price had been negatively affected by the reopening of the Port Hawkesbury mill. Canada understands that negotiations for annual contracts in the SC paper industry typically start "sometime in the fall for the following year."[121] Therefore, negotiations for 2013 annual contracts would have commenced around the same time that the Port Hawkesbury mill was coming back online in October 2012, and prices were impacted at that time.[122]

74. Resolute's competitors have acknowledged that the Port Hawkesbury mill's reopening impacted prices for 2013 under negotiation in the second half of 2012. For example, an executive with Madison Paper Industries explained:

> When the word on the street was that there was a purchaser for [the Port Hawkesbury] mill, immediately buyers took advantage of that

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[119] The U.S. ITC's Electronic Document Information Management System (EDIS) confirms that Resolute filed the questionnaire responses on September 17, 2015, but they have been designated as confidential and therefore are not publicly accessible. *See* **R-131**, U.S. International Trade Commission, web site, "Document Details" for Document ID 565671 (Questionnaire – Importer) (accessed March 23, 2017), available at: https://edis.usitc.gov/edis3-external/app; **R-112**, U.S. International Trade Commission, web site, "Document Details" for Document ID 565678 (Questionnaire – Importer) (accessed March 23, 2017), available at: https://edis.usitc.gov/edis3-external/app; **R-132**, U.S. International Trade Commission, web site, "Document Details" for Document ID 565681 (Questionnaire – U.S. Producer) (accessed Mar. 22, 2017), available at: https://edis.usitc.gov/edis3-external/app.

[120] According to the mill data produced by Resolute to Canada, its net sales prices for the Laurentide, Dolbeau and Kénogami mills combined dropped from US$ [redacted]/metric tonne in December 2012 to US$ [redacted]/metric tonne in January 2013. However, the Claimant has not indicated what items were deducted to arrive at this "net sales" figure. See, **R-129**, Resolute Forest Products Inc., Excel spreadsheet, "Resolute Response to Canada Mill Data: Data Compilation".

[121] **R-083**, March U.S. ITC Transcript, p. 75:16-20.

[122] As Professor Hausman notes, price is the most important factor in SC paper contract negotiations. Hausman Report, ¶ 36. Similarly, the U.S. ITC concluded that "price is an important consideration in purchasing decisions," given the use of meet-or-release provisions in sales contracts for SC paper and because purchasers reported to the ITC that they "generally contact two to five suppliers before making a purchase, indicating robust competition among suppliers for sales." **C-054**, U.S. ITC Staff Report, p. 19.

> opportunity, to remind us that there was a large slug of volume coming in and therefore pricing would be under pressure. That's an obvious discussion.
>
> …
>
> *So already there was price pressure because of the announcement of this machine potentially coming on. Once it was on and running, even if it was officially not shipping paper until 2013, it was already negatively impacting the market*[.][123]

75. Madison's President and CEO similarly attested that "[a]fter the Port Hawkesbury mill restarted in October '12, … *[p]rices immediately began to erode*."[124] The Vice President of Pricing and Commercial Finance at Verso, another SC paper producer, also attested that "purchasers knew that Port Hawkesbury would be offering low prices…. And that is what exactly happened."[125]

76. Numerous industry publications from September to December 2012 confirm that producers such as Resolute knew that the reopening of the Port Hawkesbury mill had reduced prices for 2013. These publications include *Reel Time* and RISI's *Paper Trader*, which the Claimant's expert Professor Hausman claims to have reviewed in preparing his opinion.[126] The reports of these industry publications were not mere speculation, as Resolute asserts,[127] but reasonable estimations based on what had already occurred in the market – market intelligence for which Resolute had a front row seat.

77. For example, the September 2012 issue of *Paper Trader* stated that "[s]everal things will happen as a result of the Port Hawkesbury restart. The first will be a drop in

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[123] **R-083**, March U.S. ITC Transcript, pp. 75:10-76:2 (emphasis added).

[124] **R-083**, March U.S. ITC Transcript, p. 28:11-15 (emphasis added); **C-052**, October U.S. ITC Transcript, p. 60:12-16 (emphasis added).

[125] **R-083**, March U.S. ITC Transcript, pp. 42:25 – 43:2. *See also* **R-083**, March U.S. ITC Transcript, p. 74:10-13 (where the same representative of Verso stated that "the start-up of a -- essentially a new paper machine that had been idle for over a year, to a market that its size composed nearly 25 percent of that market, was very disruptive to market prices.").

[126] *See* Hausman Report, ¶ 16 and p. 23.

[127] *See* Counter-Memorial, ¶¶ 87-93.

prices.… [P]rices are likely to drop $30-60/ton for contracts signed for 2013. We now show a drop in SC prices for 2013, with no recovery until late 2013 or 2014."[128]

78. The October 2012 issue of *Paper Trader* reiterated that "SC prices will drop $30-60/ton, with new business starting in January 2013…. We are forecasting a drop in SC prices of $30-60/ton for all new program business established in 2013 due to the increased availability."[129] Similarly, the issue of *ERA Forest Products Monthly* published on November 30, 2012, reported: "The Port Hawkesbury restart is already having an impact on contract negotiations for the first half of 2013. Pricing deals are being negotiated in the mid-$700s for SC-A in many cases."[130]

79. In November 2012, *Paper Trader* reported that "[p]ricing will of course drop for SC papers in 2013 due to the excess capacity. We are showing a 4% drop in January, but the risk is that average prices might drop a little more."[131] The issue of *Reel Time* published on November 8, 2012, estimated that the January 2013 price drop for SCA paper would be 5.5 per cent, US$45/short ton less than the US$ 815/short ton price in the fourth quarter of 2012.[132] The report attributed this decrease to the reopening of Port Hawkesbury, stating: "Obviously, the SCA and SCB markets will be massively oversupplied as the Port Hawkesbury impact hits the market. … Our high-side-of-average price estimate (35#) for [SCA] in January will fall to $770/ton from the current $815 level."[133]

80. The Claimant ignores this estimate in favour of the report's earlier acknowledgement that "pricing has been firm in the second half" of 2012.[134] However,

[128] **R-133**, RISI, *Paper Trader*, (Sep. 2012), p. 6.

[129] **R-134**, RISI, *Paper Trader* (Oct. 2012), pp. 1, 6.

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

[131] **R-118**, RISI, *Paper Trader* (Nov. 2012), p. 9.

[132] **R-102**, Verle Sutton, *Reel Time*, Special Edition, (Nov. 8, 2012), p. 12.

[133] **R-102**, Verle Sutton, *Reel Time*, Special Edition, (Nov. 8, 2012), p. 11.

[134] **R-102**, Verle Sutton, *Reel Time*, Special Edition, (Nov. 8, 2012), p. 5.

that only shows that the anticipated drop in SCA prices would be reflected in January 2013 shipments and not in shipments in the months immediately preceding. It does not mean that the price drop was not already known to the Claimant in last months of 2012.

81. Professor Hausman cites the next issue of *Reel Time*, published on December 4, 2012, to support his assertion that "PHP did not fully enter the market in 2012, and thus had little influence on the SC market after its reopening."[135] However, this issue concludes just the opposite, confirming that "[e]veryone thought SCA prices would fall by the first quarter of 2013, and, as anticipated, a general (and substantial) market price adjustment has taken place."[136] *Reel Time* estimated that as a result of this market adjustment, "[p]rices will generally drop (35 lb.) to well under $800/ton in January. We will show a $770 price for standard SCA."[137]

82. The passage Professor Hausman relies on states that "[a]ll SCA producers are ready to respond to more aggressive price offerings – if forced to – in order to maintain their current business. However, such responses have not been necessary."[138] However, this passage refers to the absence of *additional* price weakness beyond the general and substantial market price adjustment that had already taken place and was known.[139]

83. The December 2012 issue of *Paper Trader* agreed with *Reel Time* that "SC prices have already dropped and are encouraging users to consider switching."[140] *Paper*

[135] Hausman Report, ¶ 23.

[136] **C-038**, Verle Sutton, *The Reel Time Report*, (Dec 4. 2012), p. 3.

[137] **C-038**, Verle Sutton, *The Reel Time Report*, (Dec 4. 2012), p. 14.

[138] **C-038**, Verle Sutton, *The Reel Time Report*, (Dec 4. 2012), p. 3.

[139] This is confirmed by the report's further explanation that "[a]round the time of the restart of Port Hawkesbury, the company, and brokers selected by Port Hawkesbury, began to offer 35# SCA prices in the $760–$780/ton area. … It is true that this price was $30–$50/ton below the Q4 market, but, once established, there were few Port Hawkesbury exceptions to this general price level." **C-038**, Verle Sutton, *The Reel Time Report*, (Dec 4. 2012), p. 3.

[140] **R-135**, RISI, *Paper Trader* (Dec. 2012), p. 1.

Trader estimated the drop at "$30/ton in January when new contracts become effective," and stated that prices "will be down 4% for 2013 as a whole."[141]

84. These estimates proved accurate, as both the RISI data filed by the Claimant and the *Reel Time* price data filed by Canada reflect a decrease in the price of SCA paper from December 2012 to January 2013. The RISI data reports the actual decrease at US$ [redacted]/short ton (US$ [redacted]/metric tonne),[142] while the *Reel Time* data reports the actual decrease at US$ 45/short ton (US$ 49.6/metric tonne).[143] This amounted to a relative decrease of 4.8 per cent for RISI prices[144] and 5.5 per cent for *Reel Time* prices.[145] Whether the Tribunal prefers RISI or *Reel Time* data, both show a similar and significant reduction in SCA paper prices in January 2013, necessarily known to the Claimant before December 30, 2012.

85. However, SCA paper is only produced at one of Resolute's three Québec mills – Kénogami. The relevant grade to consider for Resolute's other two mills – Laurentide and Dolbeau – is SCB. As Resolute only provided the Tribunal with RISI prices for SCA, Canada has obtained and filed the SCB prices. The RISI data shows a decrease in SCB prices of US$ 40/short ton (US$ 44/metric tonne) from December 2012 to January 2013.[146] The *Reel Time* data shows a similar decrease of around US$ 30/short ton (US$ 33.1/metric tonne) around the same time, but beginning in December 2012.[147] This

[141] **R-135**, RISI, *Paper Trader* (Dec. 2012), p. 1.

[142] Hausman Report, Attachment 2.

[143] **R-108**, Industry Intelligence, report, "Industry Intelligence i2dashboard - 35 lb SC-A." Note that *Reel Time* prices are only reported in US$/short ton, therefore all *Reel Time* prices indicated as US$/metric tonne reflect conversion calculations by Canada.

[144] RISI's SCA prices were US$ [redacted]/short ton (US$ [redacted]/metric tonne) from December 2011 to December 2012. Hausman Report, Attachment 2.

[145] *Reel Time*'s SCA prices were US$ 815/short ton (US$ 898/metric tonne) from July 2012 to December 2012. **R-108**, Industry Intelligence, report, "Industry Intelligence i2dashboard - 35 lb SC-A."

[146] **R-136**, RISI, SCB Prices, "PPI Markets & Prices", (USD/ST); **R-137**, RISI, SCB Prices "PPI Markets & Prices", (USD/MT).

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

amounted to a relative decrease of 4.8 per cent for RISI prices[148] and 3.8 per cent for *Reel Time* prices.[149] This is consistent with the findings of the U.S. ITC, which also show a decrease in the price of SCB paper in the fourth quarter of 2012.[150]

86. Based on the above, RISI and *Reel Time* data show a decrease in SCB prices in January 2013 which Resolute would have been aware of in December 2012 at the latest. The *Reel Time* data and conclusions of the U.S. ITC also show a reduction in SCB prices in December 2012, which Resolute would have been aware of in November 2012 at the latest.

87. The Claimant argues that the drop in SC paper prices immediately following the Port Hawkesbury mill's reopening in 2012 is not relevant, because prices rebounded in July 2013 and "[o]nly in 2014 does the SCA and SCB paper pricing drop precipitously and not rebound."[151] However, the fact that prices improved before dropping again does not change the fact that the first price drop occurred immediately after the reopening of the Port Hawkesbury mill in 2012. This is when the Claimant *first* acquired knowledge of a price decrease resulting from the reopening of Port Hawkesbury, which resulted in lost sales revenue, a loss or damage that it claims in this arbitration.

88. In addition to failing to prove that it did not know what its January 2013 prices would be before December 30, 2012, the Claimant has also failed to rebut Canada's evidence that the reopening of the Port Hawkesbury mill prevented a planned price increase for SC paper in the fall of 2012.

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[148] RISI reports SCB prices as a range from "low side" to "high side." According to RISI, SCB prices remained at the same level from August 2011 to December 2012, at US$ 825/short ton (US$ 909/metric tonne) on the "low side" and US$ 845/short ton ($931/metric tonne) on the "high side." **R-136**, RISI SCB Prices, "PPI Markets & Prices", (USD/ST); **R-137**, RISI, SCB Prices "PPI Markets & Prices", (USD/MT).

[149] *Reel Time*'s SCB prices were US$ 780/short ton (US$ 859.8/metric tonne) from August to November 2012, dropping to US$ 760/short ton (US$ 837.8/metric tonne) in December 2012 and US$ 750/short ton (US$ 826.7/metric tonne) in January 2013. **R-109**, Industry Intelligence, report, "Industry Intelligence i2dashboard - 33 lb SC-B."

[150] *See* **C-054**, U.S. ITC Staff Report, pp. V-11, V-12 (showing decreases in the price of SCB paper in the fourth quarter of 2012).

[151] Counter-Memorial, ¶ 92.

89. Evidence of this foregone price increase also appears in various trade publications. For example, in August 2012, *Paper Trader* reported that "[s]ome SC producers are… announcing a [price] increase, but it is not expected to fly if the capacity restarts at Port Hawkesbury and Dolbeau occur as planned."[152] *Paper Trader* therefore was "not forecasting any successful price increase for SC because of this new capacity"[153] that was likely coming on to the market. *Paper Trader's* next issue in September confirmed that while "[s]everal producers have already announced SC price increases of $40/ton for October, [only] some of this increase is getting squeezed in as quickly as possible" before Port Hawkesbury came back online.[154]

90. On September 26, 2012, four days after Nova Scotia and PWCC announced that they had reached a deal,[155] *Forest Products Monthly* reported that "[t]he outlook for the announced $40 SC-A price increase took a sudden turn for the worse this past weekend [w]ith the now-certain restart of the Port Hawkesbury mill."[156] On October 8, 2012, *Market Pulp Monthly* reported that the restart "almost certainly eliminated any prospect of implementing the $40/ton October price increase announced for SC grades by several producers."[157] Similarly, on November 8, 2012, *Reel Time* reported that "[w]ere it not for the pending restart, and now actual start-up of Port Hawkesbury, SCA prices would have moved up in October."[158]

91. The Vice President of Pricing and Commercial Finance of Verso Corporation confirmed that the reopening of the Port Hawkesbury mill had prevented a price increase in his testimony before the ITC, stating:

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[152] **R-138**, RISI, *Paper Trader* (Aug. 2012), p. 1.

[153] **R-138**, RISI, *Paper Trader* (Aug. 2012), p. 7.

[154] **R-133**, RISI, *Paper Trader*, (Sep. 2012), p. 6.

[155] *See* **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.

[156] **R-139**, ERA Forest Products Research, *ERA Forest Products Monthly* (Sep. 26, 2012), p. 26.

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

[158] **R-102**, Verle Sutton, *Reel Time*, Special Edition (Nov. 8, 2012), p. 5.

> Even before it reopened Port Hawkesbury was negatively affecting U.S. market prices as purchasers anticipated and leveraged the addition of massive new supply into the U.S. market. For example, our prices for SCA paper would have been higher in October 2012 but for the anticipation of the additional Port Hawkesbury supply.[159]

92. Even if a decrease in the price of SC paper was not known in the fourth quarter of 2012, the inability to increase prices in that quarter would have been sufficient to give Resolute knowledge of the type of loss or damage it alleges under NAFTA Articles 1116(2) and 1117(2). Canada pointed this out in its Memorial,[160] and the Claimant did not respond.

6) *Resolute Has No Response to the Fact that Re-entry of Port Hawkesbury into the SC Paper Market by Itself Triggered the Limitations Period*

93. Finally, the Claimant avoids engaging the point that Port Hawkesbury's re-entry into the market after a temporary absence is sufficient to trigger the NAFTA limitations period. While the Claimant mischaracterizes the Port Hawkesbury mill as a new and untested competitor,[161] and Professor Hausman says "PHP tentatively entered the market in late 2012 and there was uncertainty regarding whether PHP would more fully re-enter in 2013 (and at what point in 2013),"[162] neither are accurate depictions. Port Hawkesbury was a known quantity and not a brand new competitor.[163] As the Vice President of Operations at Publishers Press put it: "the market never considered Port Hawkesbury to be permanently down as it was in the hot idle state between the

[159] **R-083**, March U.S. ITC Transcript, p. 42:19-24 (emphasis added). *See also* **R-083**, March U.S. ITC Transcript, p. 74:14-22 (where the same Verso executive confirmed that the increase in supply caused by the restart of Port Hawkesbury, in the context of the declining market, gave more choice to buyers who "pushed suppliers to be competitive to the lowest prices, and again, this size of a machine coming online that much, that suddenly lowered any opportunity to realize a price increase in October of 2012.").

[160] Memorial, ¶ 65.

[161] *See* e.g. Counter-Memorial, ¶ 86.

[162] Hausman Report, ¶ 24.

[163] **C-052**, October U.S. ITC Transcript, p. 47:9-18 ("This plant began operations in 1998, was previously owned by Stora and then New Page… and operated for 13 years until it was hot-idled for less than a year. In the year that it fully operated, it was at about… 91 percent utilization…. As such, PHP should not be considered a new supplier by any stretch. It's one of [NewPage's] former mills that resumed operation under PHP's ownership.").

NewPage and Port Hawkesbury sale."[164] While PHP did not start printing SC paper at full capacity until later in 2013, *Reel Time* reported on December 4, 2012 that "there has been no market-related downtime" at Port Hawkesbury.[165]

94. The Port Hawkesbury mill's reopening as the market was experiencing a long-term decline in demand necessarily meant that Resolute's market share would be smaller and prices would be impacted. As one of Resolute's former competitors, Madison Paper Industries, has explained, "basic economics and common sense will tell you [that] the introduction of 400,000 tons of SC volume into the very mature U.S. market would invariably result in falling prices."[166] As the essence of Resolute's complaint is that the Nova Scotia Measures put it at a competitive disadvantage to Port Hawkesbury, this occurred the moment the Nova Scotia Measures were adopted – all before December 30, 2012.

B. When Resolute Acquired Knowledge of the Full Quantum of its Alleged Loss or Damage is Irrelevant

95. As set out in Canada's Memorial on Jurisdiction,[167] 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 NAFTA Articles 1116(2) or 1117(2). Contrary to the Claimant's position, the notion "that the investor may know, or should have known, of at least some loss or damage, without necessarily knowing its 'full extent'," [168] is not an obfuscation, but a well-established

[164] **C-052**, October U.S. ITC Transcript, p. 169:9-12.

[165] **C-038**, Verle Sutton, *The Reel Time Report*, (Dec 4. 2012), p. 1.

[166] **R-083**, March U.S. ITC Transcript, p. 173:2-5. According to *Reel Time*, North American production capacity at the end of 2012 was 845,000 short tons of SCA and 625,000 short tons of SCB, for a combined total of 1,470,000 short tons of SC paper. PHP expanded this supply by 415,000 short tons. **R-102**, Verle Sutton, *Reel Time*, Special Edition, (Nov. 8, 2012), p. 7.

[167] Memorial, ¶¶ 37-42.

[168] Counter-Memorial, ¶ 58.

principle under NAFTA Chapter Eleven as applied by the tribunals in *Grand River Enterprises v. United States,*[169] *Mondev v. United States,*[170] and *Bilcon v. Canada*.[171]

96. The Claimant advocates an interpretation of Articles 1116(2) and 1117(2) similar to that advanced by the claimant in *Grand River*, who argued that "loss or damage is only incurred when funds are actually paid out."[172] Similarly, the Claimant's expert Professor Hausman asserts that Resolute's management "would have had to wait until actual financial reports on the fourth quarter were completed"[173] before they could know whether Resolute had incurred any negative price or financial effects due to the reopening of Port Hawkesbury.

97. Resolute's interpretation would allow claimants to ignore the fact that they have already incurred a loss or damage simply because the amount of that loss or damage will not be measured and reported to the claimants' investors and the public until the end of the relevant financial reporting period. This runs directly contrary to the ordinary meaning of "incurred", as explained by the *Grand River* tribunal:

> In many sources, the verb ["incurred"] is regularly taken to mean "become liable to." Judicial dicta likewise suggest that one incurs a loss when liability accrues; a person may "incur" expenses before he or she actually dispenses any funds. In the Tribunal's view, this interpretation corresponds most closely to the ordinary meaning of the term. The verb "to incur" in ordinary usage is often used to describe situations where there is no immediate outlay of funds by the affected party. A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct.

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

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

[171] **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*"), ¶¶ 275-277.

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

[173] Hausman Report, ¶ 30.

> Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[174]

98. Tribunals have also given effect to this principle when applying treaties containing a time limitation similar to that in NAFTA. For example, the tribunal in *Rusoro Mining v. Venezuela*, interpreting an equivalent time limitation under the Canada-Venezuela BIT,[175] held that "[i]n accordance with established NAFTA case law, what is required is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear."[176]

99. Similarly, the tribunal in *Corona Materials v. Dominican Republic*, applying the equivalent time limitation under CAFTA-DR,[177] held that while knowledge of both the alleged breach and the alleged loss or damage were required,

> … in order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity); nor must the amount of loss or damage suffered be precisely determined. It is enough, as the *Mondev* tribunal found when applying NAFTA's limitation clause, that a "*claimant may know that it has suffered loss or*

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

[175] Article XII.3(d) of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments states: "An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) [ICSID Convention Arbitration or ICSID Additional Facility Rules Arbitration] only if: (d) not 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." *See* **RL-030**, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 ("*Rusoro – Award*"), ¶ 191.

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

[177] Article 10.18.1 of the Dominican Republic – Central America – United States Free Trade Agreement of 2004 states: "No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage." *See* **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*"), ¶ 184.

> *damage even if the extent or quantification of the loss or damage is still unclear…*"[178]

100. Also applying CAFTA-DR, the tribunal in *Spence* "agree[d] with the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials* that the limitation clause does not require full or precise knowledge of the loss or damage."[179] The *Spence* tribunal went on to explain that, for the purpose of the time limitation,

> …knowledge is triggered by the first appreciation that loss or damage *will be (or has been) incurred*. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.[180]

101. This holding from *Spence* was recently endorsed by the tribunal in *Ansung Housing v. China*,[181] applying an equivalent limitation period under the China-Korea BIT.[182] The *Ansung* tribunal emphasized that "[t]he limitation period begins with an investor's *first* knowledge of the *fact* that it has incurred loss or damage, not with the date on which it gains knowledge of the *quantum* of that loss or damage."[183] Thus the tribunal distinguished between "the date on which [the claimant] could *finalize* or *liquidate* its damage," and "the *first* date on which it had to know it was incurring damage."[184]

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[178] **RL-024**, *Corona – Award on Preliminary Objections*, ¶ 194 (emphasis in original).

[179] **RL-028**, *Spence – Interim Award*, ¶ 213.

[180] **RL-028**, *Spence – Interim Award*, ¶ 213 (emphasis added).

[181] **RL-082**, *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) Award, 9 March 2017, ("*Ansung Award*"), ¶ 111.

[182] Article 9(7) of the Agreement Between the Government of the Republic of Korea and the Government of the People's Republic of China on the Promotion and Protection of Investments states: "Notwithstanding the provisions of paragraph 3 of this Article, an investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage." *See* **RL-082**, *Ansung Award*, ¶ 29.

[183] **RL-082**, *Ansung Award*, ¶ 110 (emphasis in original).

[184] **RL-082**, *Ansung Award*, ¶ 110 (emphasis in original).

102. The principle that a claimant need not know the full extent of its loss or damage to trigger the time limitation operates equally in this case as in those cited above, albeit in a different factual context. The Claimant's attempt to distinguish *Mondev*, *Grand River* and *Bilcon* on the facts has no merit. While these cases dealt with different factual scenarios, the basic principle they applied is the same. Applied in this case, it means that when Resolute learned the full extent of its loss or damage is not determinative of when it first acquired knowledge of the alleged loss or damage.

103. The only authority the Claimant cites in its favour is *Pope & Talbot*.[185] However, the *Pope & Talbot* tribunal's holding that the time limitation is not triggered even where "it was or should have been known that loss… would occur"[186] ignores the ordinary meaning of the word "incurred" as used Articles 1116(2) and 1117(2). It is also inconsistent with the more recent NAFTA and non-NAFTA cases decided on this issue, cited above, none of which endorse the holding in *Pope & Talbot*.

C. Resolute's Introduction of a Brand New Measure and Specious Expropriation Claim Are Futile Attempts at Circumventing the NAFTA Chapter Eleven Limitations Period

1) *Resolute Has Not Submitted any Claims to Arbitration Based on Nova Scotia's Renewable Electricity Regulations*

104. In an effort to salvage its claims from the effect of NAFTA Articles 1116(2) and 1117(2), the Claimant has introduced brand new allegations based on regulatory amendments made by Nova Scotia in January 2013 related to a biomass facility at Port Hawkesbury.[187] This tactic cannot succeed, as the new allegations are outside of the scope of claims that Resolute submitted to arbitration, and any potential claims based on the regulatory amendments are now also time-barred.

[185] *See* Counter-Memorial, ¶ 57.

[186] **CL-002**, *Pope & Talbot Inc. v. Government of Canada – Award on Preliminary Motion*, ¶ 12.

[187] *See* Counter-Memorial, ¶¶ 109, 115-117.

105. Resolute's Counter-Memorial asserts, for the first time, that "Nova Scotia, as part of its electricity measures, adopted a new regulation in 2013 benefitting Port Hawkesbury with C$6-$8 million per year in benefits."[188] This allegation appears to refer to amendments made to Nova Scotia's existing *Renewable Electricity Regulations* on January 17, 2013.[189] However, this measure did not feature anywhere in the NOA filed by Resolute on December 30, 2015. Indeed, the Claimant had to file the regulations as a brand new exhibit with its Counter-Memorial because they were not already in the record.

106. The only electricity measure complained of in the NOA was the load retention rate negotiated between PWCC and Nova Scotia Power Inc. ("NSPI"),[190] which the Claimant characterized as a "preferential"[191] or "reduced"[192] electricity rate. The NOA made no allegation about Nova Scotia's *Renewable Electricity Regulations*, the biomass facility at Port Hawkesbury or the $6 to $8 million in benefits that PHP allegedly received through the regulatory amendments made in January 2013.

107. To the contrary, Resolute's NOA made clear that the measures alleged to breach NAFTA Chapter Eleven – including the electricity measure – were undertaken "late in 2012,"[193] not also in 2013 as Resolute now alleges. Canada's Memorial on Jurisdiction described how, by the Claimant's own pleading, the Nova Scotia Measures were all adopted between September 2011 and September 2012.[194] To put the matter beyond any

[188] Counter-Memorial, ¶ 115.

[189] **C-039**, *Renewable Electricity Regulations*, N.S. Reg. 155/2010, cited at Counter-Memorial, fn. 162.

[190] *See* NOA, ¶ 34.

[191] NOA, ¶ 5.

[192] NOA, ¶¶ 36, 41, 112.

[193] NOA, ¶ 4.

[194] Memorial, ¶¶ 46-47.

doubt, Canada also set out in detail the specific dates on which each challenged measure was adopted, all before December 30, 2012.[195]

108. As the Tribunal noted when granting Canada's request for bifurcation, "[t]he date[s] of the alleged breaches," as pleaded in Resolute's NOA, "are uncontested."[196] The Claimant cannot now, more than a year after submitting its NOA, render this issue controversial by alleging new breaches.

109. To pursue its new claims based on the January 2013 amendments to the *Renewable Electricity Regulations*, Resolute would have to amend its claim under Article 20 of the UNCITRAL Arbitration Rules (1976),[197] which it has not sought to do. However, even if it had, Resolute's claim cannot be amended since its new claims are time-barred and therefore fall outside the scope of Canada's consent to arbitration. Under NAFTA Articles 1116(2) and 1117(2), a timely claim against a measure adopted in January 2013 would have had to have been submitted to arbitration in January 2016, more than a year ago. No other NAFTA tribunal has allowed a claim to be amended in such circumstances.[198]

110. Allowing an amendment would also be inappropriate given the Claimant's delay in making this new claim and the prejudice it has caused to Canada, which has prepared its defence based on the case as presented by the Claimant. Resolute waited over fourteen months to introduce this new claim, and has done so in the middle of the

[195] Memorial, ¶ 48.

[196] P.O. No. 4, ¶ 4.8.

[197] Article 20 of the UNCITRAL Rules (1976) states: "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."

[198] The only NAFTA tribunals that have permitted amendments to claims have done so in circumstances far from analogous to this case. In both *Ethyl v. Canada* and *Grand River Enterprises v. United States*, the tribunals only allowed amendments on the basis of their conclusions that the new claims were not time-barred and, in the view of the tribunals, could otherwise be submitted for arbitration to another tribunal. *See* **RL-011**, *Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998, ¶¶ 75, 95; **RL-022**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 100.

preliminary phase on jurisdiction, when its original claims would otherwise be dismissed for being brought after the expiry of the time limitation. Moreover, the claims which it seeks to add are themselves now time-barred. The Claimant cannot simply avoid the time limitation by amending and adding claims to this on-going dispute. This is contrary to the UNICITRAL Arbitration Rules, the NAFTA and basic fairness.

2) *Resolute's Concocted Article 1110 Claim Cannot Allow it to Escape Chapter Eleven's Limitations Period*

111. The Claimant has conceded that it knew of the alleged breaches of NAFTA Articles 1102 (National Treatment) and 1105 (Minimum Standard of Treatment) pleaded in its NOA "by September 28, 2012 when the Port Hawkesbury sale finalized."[199] However, it argues that its Article 1110 (Expropriation) claim cannot be time-barred because the alleged expropriation did not occur until Resolute decided in October 2014 to shut down its Laurentide mill.[200] This bizarre claim underscores that there is no legally significant connection between the measures at issue and Resolute and its investment, as required by Article 1101(1) (discussed in Part IV below). It also shows that the Claimant concocted its Article 1110 claim to ensure that some aspect of the arbitration survives the time limitation under Articles 1116(2) and 1117(2). But this tactic cannot succeed because the Claimant itself has pleaded that the assets allegedly expropriated were its sales and market share, which it first acquired knowledge of in 2012.

112. It is specious for Resolute to argue that it should be allowed to pursue an expropriation claim almost three years after the alleged Nova Scotia Measures were adopted, when its NOA challenged no action by the Nova Scotia Government after 2012.[201] In this context, a "creeping expropriation" argument is not possible.[202] It is also

[199] Counter-Memorial, ¶ 108.

[200] *See* Counter-Memorial, ¶¶ 109-110.

[201] Resolute raised a brand new measure relating to a biomass facility in January 2013 in its Counter-Memorial, but as discussed above, this impermissible attempt at amending its claim is futile since it would be time-barred. *See* paragraphs 104-111, *supra*.

indisputable that nothing PHP did in 2013 or 2014 can be attributed to the Government of Nova Scotia under international law such that it could form the basis of an expropriation claim. Even if the Tribunal accepts the Claimant's unproven allegation that PHP engaged in so-called "predatory pricing", this would be solely attributable to PHP. As for Resolute's accusation that Nova Scotia was intending to harm it, there is zero evidence of this – Resolute has produced not a single piece of evidence to support even a *prima facie* argument that Nova Scotia had any intention of expropriating or harming Resolute's business.

113. If accepted, the implications of the Claimant's strategy are deleterious to NAFTA Chapter Eleven and the system of investor-State arbitration. To illustrate, the Claimant gave itself in its NOA an open-ended right to claim expropriation against Canada for any future closings of its Dolbeau and Kénogami mills because of the Nova Scotia Measures adopted in 2011 and 2012.[203] In other words, if the Claimant decides next year (2018) to shut down one of its other SC paper mills, it expects such a claim not to be time-barred even though the alleged "expropriation" will have occurred more than six years after the Nova Scotia Measures were adopted. If this logic were accepted, there would be nothing to stop the Claimant (or any other NAFTA claimant) from bringing an expropriation claim years after the relevant measures and avoiding the three-year limitations period in Articles 1116(2) and 1117(2).

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[202] "Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property. The case of *German Interests in Polish Upper Silesia* is one of many examples of an indirect expropriation without a 'creeping' element—the seizure of a factory and its machinery by the Polish Government was held by the PCIJ to constitute an indirect taking of the patents and contracts belonging to the management company of the factory because they were so closely interrelated with the factory itself. But although international precedents on indirect expropriation are plentiful, it is difficult to find many cases that fall squarely into the more specific paradigm of creeping expropriation." **RL-083**, *Generation Ukraine, Inc. v. Ukraine* (ICSID CASE No. ARB/00/9) Award, 16 September 2003, ¶ 20.22.

[203] NOA, ¶ 92.

114. But the Claimant's Article 1110 claim is time-barred regardless of the way it now attempts to characterize it. In its NOA under the heading "Breach of Article 1110 – Expropriation and Compensation," Resolute wrote:

> Nova Scotia's measures to resuscitate the Port Hawkesbury Paper mill and enable the taking of sales and market share from Resolute constituted actions tantamount to an unlawful expropriation of Resolute's Laurentide SC paper mill.[204]

115. While Canada denies that sales and market share are assets capable of being expropriated as contemplated by NAFTA Article 1110,[205] the fact that the Claimant has pleaded otherwise and argued that Canada has unlawfully expropriated these alleged assets begs the question of when the Claimant *first* acquired knowledge of this alleged breach and that it had suffered the alleged loss or damage arising therefrom. The answer is the same as with respect to the Claimant's Article 1102 and 1105 claims: before December 30, 2012. By the Claimant's own pleading, the eventual closure of the Laurentide mill was a later consequence of the original "expropriation" of sales and market share, or a form of continuing damage. However, as set out in Canada's Memorial on Jurisdiction, neither continuing breaches nor continuing damages can renew the time limitation under NAFTA Chapter Eleven.[206] The Claimant's own words therefore require dismissal of its Article 1110 claim on the basis of Articles 1116(2) and 1117(2).

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[204] NOA, ¶ 89. *See also* NOA, ¶¶ 50 ("Nova Scotia began to take market share from Resolute and Resolute FP Canada in 2013"), 92 ("Nova Scotia has reallocated the value and market share of the Laurentide mill to its chosen national champion, Port Hawkesbury Paper, and continues to take market share and value from the Dolbeau and Kenogami mills."); **R-081**, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Feb. 24, 2015), ¶¶ 48 ("Canada, through Nova Scotia's conduct, has violated its obligations under NAFTA Article 1110 by taking measures that facilitate the taking of SC Paper market share from Resolute, and destroy the value of Resolute's SC Paper investments."), 50 ("Nova Scotia has confiscated and reallocated SC Paper market share from Resolute to Nova Scotia's preferred company, Port Hawkesbury. These actions do not comply with the conditions for lawful expropriation provided under NAFTA Article 1110."), 52 ("Canada allowed the Government of Nova Scotia to confiscate market share, jobs, and market position from Resolute's Canadian investments").

[205] *See Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Statement of Defence, 1 September 2016 ("Statement of Defence"), ¶¶ 10, 83.

[206] Memorial, ¶¶ 72-76.

IV. THE NOVA SCOTIA MEASURES DO NOT "RELATE TO" THE CLAIMANT OR ITS INVESTMENTS

A. The Claimant's Attempt to Redefine the Meaning of "relating to" in NAFTA Article 1101 Must Fail

116. In its Memorial, Canada explained that for a measure to trigger the obligations of Chapter Eleven, it must have more than a "mere effect" on an investment. As the *Methanex* tribunal articulated, and has been endorsed by subsequent NAFTA tribunals and all three NAFTA Parties,[207] NAFTA Article 1101 requires the Claimant to demonstrate a "legally significant connection" between the measure and the investment to establish jurisdiction under NAFTA Chapter 11.

117. In response, the Claimant relies on *Cargill* to argue that it need only demonstrate "some causal connection" between the measure and the investment.[208] It recognizes that "something more than a mere 'effect' from the measure is required to overcome the jurisdictional threshold,"[209] but argues that a "*prima facie* causal connection" is sufficient provided that the investment is "directly affected" by the measure.[210] Alternatively, the Claimant argues that, if it must demonstrate the existence of a legally significant connection, the threshold should not be read as requiring a legal impediment.[211]

118. Thus, Canada and the Claimant agree that a measure that has a mere effect on an investment, or, to use the Claimant's words, "incidentally impacts market conditions" is not sufficient to satisfy the Article 1101(1) threshold.[212] The parties also agree that the measure must directly affect the investor or its investment for it to meet the "relating to" threshold. Moreover, a measure need not be intended to deliberately harm the investor or

[207] Memorial, ¶ 83.

[208] Counter-Memorial, ¶ 126.

[209] Counter-Memorial, ¶ 144.

[210] Counter-Memorial, ¶ 130.

[211] Counter-Memorial, ¶¶ 121, 124, 143.

[212] Counter-Memorial, ¶ 162.

necessarily impose a legal obstacle or prohibition to carrying out business. Where the parties continue to disagree is over whether the "relating to" threshold requires demonstrating a "legally significant connection" or whether it is sufficient to show a *prima facie* causal connection.

119. The Claimant argues that Canada "exaggerates" the test set out in *Methanex*, and that it has not been adopted by other tribunals.[213] It argues that NAFTA panels, in particular *Cargill, Apotex II* and *Mesa* have "expanded the 'legally-significant-connection' spectrum to include measures that have a causal connection or causal nexus to the Claimant."[214] Its position is based on a misinterpretation of the arbitral jurisprudence, which it parses to create differences where there are none.

120. The Claimant tries to distinguish the various NAFTA decisions by focusing on the factual differences of the measures at issue rather than on the legal test tribunals have consistently applied. However, an examination of the facts in those cases shows that jurisdiction has been established only where a measure has a direct connection of legal significance to the Claimant. This is true for all of the arbitral decisions relied on by the Claimant.

121. In *Cargill*, the import requirement and a tax on high fructose corn syrup applied to the product that the investor was shipping to its Mexican subsidiary.[215] In *Bayview*, the tribunal was concerned with the claimant's decision to invest in farms and irrigation equipment in Texas rather than Mexico, a decision made "in the light of its appraisal of the law and of the authorities who are making, creating and applying the law to that investment."[216] In *Apotex II*, the Import Alert "more than affected, uniquely, both Apotex Inc. and Apotex-US [which] was by far the enterprise most immediately, most

[213] Counter-Memorial, ¶ 141.

[214] Counter-Memorial, ¶ 141.

[215] **RL-050**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("*Cargill – Award*"), ¶ 1.

[216] **RL-005**, *Bayview – Award*, ¶ 99.

directly and most adversely affected by the Import Alert."[217] In *Bilcon,* the tribunal found that "Bilcon had a significant legal connection with the proposed 3.9 ha quarry—and with the larger quarry and terminal project—as a result of its partnership agreement with Nova Stone."[218] In *Mesa*, the claimant argued that the alleged improper treatment it received as an applicant within the Feed-in-Tariff (FIT) Program caused it not to receive a FIT contract to produce electricity.[219] In sum, where jurisdiction has been established, it has involved one or more measures with some direct application of legal significance to the investors or their investments in the same jurisdiction that adopted the measure.

122. An objective reading of the jurisprudence demonstrates little or no difference between how NAFTA tribunals have applied the "relating to" threshold since *Methanex.* In fact, the *Apotex II* tribunal concluded that it "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*."[220] Indeed, *Cargill, Bayview* and subsequent tribunals have all applied the threshold as it was articulated in *Methanex* – a legally significant connection.

123. In *Cargill,* the tribunal cited to *Methanex'* determination "that the phrase 'relating to' 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." While the Claimant urges the Tribunal to believe that the *Cargill* tribunal felt the *Methanex* test "might be too restrictive,"[221] in truth, the tribunal expressed no such belief. In fact, it said: "[r]egardless of whether or not the test espoused in *Methanex* is too restrictive, it is satisfied."[222] In other words, it did not need to take a position on

[217] **RL-051**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Award, 25 August 2014 ("*Apotex – Award II*"), ¶ 6.24.

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

[219] **RL-052**, *Mesa Power Group v. Canada* (UNCITRAL) Award, 24 March 2016, ¶ 37.

[220] **RL-051**, *Apotex – Award II*, ¶ 6.13.

[221] Counter-Memorial, ¶ 128.

[222] **RL-050**, *Cargill – Award*, ¶ 175.

whether or not the test was too restrictive, because jurisdiction was established using the "legally significant connection" standard.

124. The *Bayview* tribunal also cited to *Methanex,* specifically stating that "it is necessary that the measures of which complaint is made should affect an investment that has a 'legally significant connection' with the State creating and applying those measures."[223] Likewise, the *Bilcon* tribunal found "the *Methanex* approach to be a sound basis for deliberation",[224] and so did the tribunal in *Apotex II.*[225] In fact, the *Mesa* tribunal was the only tribunal not to specifically refer to the "legally significant connection" test, which is not surprising given that Article 1101 was not at issue in that dispute. Canada did not contest whether the measures at issue related to the investor. Much like in *Cargill,* there was no question that the *Methanex* test was satisfied.

125. "Causal connection" and "causal nexus", referred to in *Cargill* and *Mesa,* may be different words than "legally significant connection", but they share the basic ideas that the measure must have a direct relationship constituting more than a mere effect on an investor or its investment. While the words "connection" and "nexus" appropriately reflect the notion of relationship, "causal" captures the idea that a direct impact is necessary, and that it may not be too remote. What is clear is that "relating to" was not meant to capture every possible connection or relationship, and it was certainly not meant to capture all of the economic ripple effects of a government's measures on a market in general, or the consequences of those effects for individual market participants, particularly those outside of its jurisdiction. Proximity between the measure and the investor or its investment is required. Indeed, as the *Methanex* tribunal articulated, in "a traditional legal context… a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable."[226]

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[223] **RL-005**, *Bayview – Award*, ¶ 101.

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

[225] **RL-051**, *Apotex – Award II*, ¶ 6.13.

[226] **RL-018**, *Methanex –Partial Award*, ¶ 138.

126. In contrast, accepting the Claimant's position that Article 1101(1) requires only some connection between the measure and the investment would create a limitless class of affected investors. It would do exactly what the *Methanex* tribunal cautioned against, namely to run the line between the consequences of conduct by government agencies "towards an endless horizon."[227] As the *Methanex* tribunal pointed out, "the Chaos theory provides no guide to the interpretation of this important phrase; and a strong dose of practical common-sense is required."[228]

127. Common sense requires that jurisdiction shall only be founded upon measures that apply or affect directly the Claimant's investment in a manner that constitutes a "legally significant connection."

B. The Claimant Has Not Demonstrated that any of the Nova Scotia Measures Relate to its Investment

128. In an effort to avoid the dismissal of its claims under Article 1101(1), the Claimant inappropriately adds a new claim, attempting to transform the intention of the series of measures from making the Port Hawkesbury mill the "national champion" [229] into a series of measures intended "to harm a foreign investor."[230] Even if its new claim is accepted – and it should not be – it still fails to establish that the Nova Scotia measures relate to its investment for the purpose of establishing jurisdiction under Article 1101(1).

129. In its Notice of Arbitration, the Claimant alleged that the Government of Nova Scotia "provided grants, loans, cash to purchase land, reduced electricity rates and property taxes, among other financial contributions and measures, and thus lowered the production costs of Port Hawkesbury relative to those of Resolute's SC paper mills.[231] It

[227] **RL-018**, *Methanex –Partial Award*, ¶ 138.

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

[229] NOA, ¶ 5.

[230] Counter-Memorial, ¶ 154.

[231] NOA, ¶ 41.

argued that the Nova Scotia measures gave PHP "competitive advantages" which enabled it to become the "lowest cost and most competitive producer" of SC paper in North America.[232] The Claimant also argued that the effect of the measures was that Port Hawkesbury would have improved production capacity, enabling it to better compete in the market by creating downward pressure on prices and pushing higher-cost operators out of business.[233]

130. In response, Canada argued in its Memorial that an adverse economic effect by a government's spending alone is not enough to establish jurisdiction under Article 1101(1).[234] 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.[235] Canada pointed out that these measures relate to the Port Hawkesbury mill and to the Nova Scotia forestry sector, but they are not even remotely connected to the Claimant's investment in Québec,[236] and are not sufficient to establish a "legally significant connection" for the purposes of Article 1101(1).[237]

131. With no adequate response to these arguments, the Claimant now aggressively asserts in its Counter-Memorial that it is no longer just complaining about the advantages that the Nova Scotia Measures gave to PHP and how this allowed PHP to affect the North American SC paper industry, but also that the measures were intended to "deliberately undermin[e] Resolute"[238] or to "explicitly put them out of business."[239] In other words, the Claimant's allegations have evolved from a series of measures that

[232] NOA, ¶¶ 4, 35, 89.

[233] NOA, ¶ 48.

[234] Memorial, ¶ 111.

[235] Memorial, ¶ 96.

[236] Memorial, ¶ 96.

[237] Memorial, ¶ 99.

[238] Counter-Memorial, ¶ 119; *See also* Counter-Memorial, ¶¶ 154, 156, 159.

[239] Counter-Memorial, ¶ 119.

gave financial advantages to PHP, which it in turn used to compete in the North American SC paper market, to a series of measures adopted with the "intention to harm a foreign investor."[240]

132. The Claimant says Canada has accepted this new allegation regarding the intention of the Government of Nova Scotia to deliberately harm Resolute *pro tem*.[241] It is mistaken. Canada could not have accepted this allegation *pro tem*, since it was raised for the first time in the Claimant's Counter-Memorial. Given that the Claimant has not sought the Tribunal's permission under Article 20 of the UNCITRAL Rules to amend its claim, it has no right to make new claims pertaining to the Government of Nova Scotia's alleged intention to undermine Resolute. But in any event, a bare accusation of malign intent without so much as a hint of evidence does not satisfy the Article 1101(1) threshold. As described further below, the Claimant does not come close to establishing even a *prima facie* basis for its allegation that the Nova Scotia Measures were intended to "harm a foreign investor."

133. The evolution of claims for the sake of establishing jurisdiction in this dispute bears similarity to what the tribunal faced in *Methanex.* As is the case here, Methanex's claims took new shape in response to the arguments raised by the United States in its Memorial on Jurisdiction, in particular with respect the "relating to" threshold. However, unlike the Claimant in this dispute, Methanex requested the right to bring its new claim. On the same day that it filed its Counter-Memorial on Jurisdiction, Methanex sought to amend its NAFTA claim "to allege intentional discrimination" by the State of California "to favour" a local business by banning MTBE, its competitor's product.[242]

134. The measures Methanex challenged, the Executive Order and regulations banning MTBE, remained the same as in its original Statement of Claim, but it brought a

[240] Counter-Memorial, ¶ 154.

[241] Counter-Memorial, ¶ 118.

[242] **RL-084**, *Methanex Corporation v. The United States of America* (UNCITRAL) Claimant Methanex Corporation's Draft Amended Claim, 12 February 2001, ("*Methanex Draft Amended Claim*"), p.1.

new claim tying the measure to its investment. It alleged that the Governor of California issued the Executive Order banning MTBE after meeting secretly with, and receiving $155,000 in contributions from top executives of Archer-Daniels-Midland (ADM), the principal US producer of ethanol, which was the competitor product to methanol.[243] Contrary to what Resolute has done here, the claimant in that case relied on evidence reported in the press and court documents with respect to ADM's alleged practices of political manipulation.[244] The *Methanex* tribunal rejected the claimant's bid for jurisdiction based on its original claim that the California ban on MTBE "related to" the claimant's investment. However, it granted Methanex's request to amend its claim, and considered whether it had jurisdiction on the basis of these more serious allegations, recognizing that such an allegation may be enough to satisfy the "legally significant connection" test (in the end the tribunal decided it did not).[245]

135. Like the claimant in *Methanex,* the Claimant here is also attempting to bolster its jurisdictional arguments by bringing a new allegation based on the objectives of the Nova Scotia Government. It too alleges a grand, far-fetched conspiracy, this one between PHP and the Government of Nova Scotia, with the "objective" not just to establish the "lowest cost operator in North America"[246] but to purposefully undermine a foreign investor operating in another province.[247] However, unlike the claimant in *Methanex,* it makes this new allegation without having requested to amend its NAFTA claim. More significantly still, it makes these new claims without so much as a shred of evidence.

136. Indeed, the Claimant's new allegations are based entirely on speculation, and the words it uses to describe the Nova Scotia's objectives are telling. According to the

[243] **RL-084**, *Methanex Draft Amended Claim*, pp. 1-2.

[244] **RL-084**, *Methanex Draft Amended Claim*, p. 1.

[245] **RL-018**, *Methanex – Partial Award*, ¶ 161.

[246] NOA, ¶ 47.

[247] Counter-Memorial, ¶ 155.

Claimant, Nova Scotia must have had an "unavoidable expectation" that Resolute's investment would be affected.[248] It argues that the intent of the Nova Scotia Measures "had to be" to run Resolute out of business, because Resolute was "necessarily PHP's competitive target."[249] Not only is such rhetoric totally unsupported by evidence, it runs counter to the statements that Claimant's counsel made in the ITC SC paper proceedings that PHP and Resolute were not in direct competition because they make a lesser quality paper.[250]

137. These new allegations are nothing more than poorly disguised attempts to establish jurisdiction where none exists. Just as the Claimant has not even attempted to demonstrate that a legally significant connection exists between each of the Nova Scotia Measures and its investment, it does not do so with its new allegation. It merely alleges without any factual support that "Nova Scotia gave a bag of money to PHP through a collection of creative measures" that were "all designed" to drive Resolute out of the market.[251] But as Canada argued in its Memorial, even a superficial analysis of the Nova Scotia Measures demonstrates clearly that only a tangential, indirect connection exists between the measure and the Claimant's investment.

138. ***The Forestry Infrastructure Fund (FIF)***: Nova Scotia established this fund to facilitate sustainable forestry practices in September 2011,[252] and allocated additional

[248] Counter-Memorial, ¶ 162.

[249] Counter-Memorial, ¶ 119.

[250] **R-083**, March U.S. ITC Transcript, p. 130:12-15 ("we'll admit, we don't and cannot make the quality of SC paper that's made by the new entrants in the market").

[251] Counter-Memorial, ¶ 160.

[252] *See* **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; **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; **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; **R-043**, Province of Nova Scotia, Backgrounder, "Provincial Support to former NewPage Port Hawkesbury Paper Mill" (Mar. 16, 2012), p.1.

funding in March 2012.[253] Components of the FIF program included new silviculture work; harvesting; road maintenance on Crown land; forestry training program; and establishing a woodlands core team.[254] The FIF was intended to maintain the province's forestry sector and the supply chain for the Port Hawkesbury mill, to support the search for a buyer who would purchase the mill as a going concern.[255] Even the Claimant acknowledges that the FIF was intended to "support sustainable harvesting and forest land management," and it never explains how the FIF relates to its investment in Canada.[256] This is because it cannot. The FIF was negotiated by NPPH and the Province during the court-supervised proceedings under the *Comparnies' Creditors Protection Act* ("CCAA") before the sale of the mill to PWCC. The Port Hawkesbury mill was not even producing paper at the time the FIF funding was provided, so it could not even have had a "mere effect" on the Claimant's investment. The FIF has no direct or indirect link to Resolute, and no legal connection whatsoever.

139. ***"Hot Idle" Funding***: The Province provided this funding in the context of NPPH's court-supervised CCAA proceedings to help keep the Port Hawkesbury mill running but not producing paper during negotiations with PWCC from February to September 2012.[257] As with the FIF, there is no connection whatsoever between the "hot

[253] *See* **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.

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

[255] **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, 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.

[256] NOI, ¶ 24; NOA, ¶ 37.

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

idle" funding in Nova Scotia, and Resolute's investment in Québec; it does not directly affect Resolute. This measure cannot even be described as having a "mere effect" on the Claimant's investment. While the mill was in "hot idle", it was not producing paper,[258] thus had zero effect on Resolute's prices or market share. The Claimant complains that once the mill reopened and PHP began producing paper, the funding affected Resolute's share of the market. However, this alleged effect would have been caused by PHP, not the "hot idle" funding provided to NPPH, which has no connection, legally significant or otherwise, to the Claimant's investment.

140. ***Support for PWCC's Acquisition of the Mill and Related Investments in the Nova Scotia Forestry Sector and Provincial Crown Land***: Nova Scotia's support for PWCC's acquisition of the mill involved certain loans and grants to PWCC, the acquisition of certain former mill lands and the establishment of a sustainable forest management program, all contingent on PWCC purchasing the mill.[259] These measures were adopted directly for the purpose of making the mill operable again, maintaining a sustainable forestry sector in Nova Scotia and increasing Nova Scotia's share of Crown land. Funding was provided to train workers, promote efficiency and productivity at the mill, and promote sustainable forest management. The Claimant argues that it was affected by this funding, because it allowed the mill to reopen and drive down prices.[260] Any effect that the support had on the Claimant was by definition indirect, and therefore not sufficient to pass the "relating to" threshold.

141. ***Property Tax Agreement***: The Claimant challenges an agreement between PWCC, NPPH and Richmond County that establishes the municipal property tax rate applicable to PHP in the Municipality of Richmond County in the Province of Nova

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

[258] **R-046**, Re NewPage Port Hawkesbury Corp., Report of the Proposed Monitor (Sep. 7, 2011) (S.C.N.S.), ¶ 32 ("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.").

[259] *See* Memorial, ¶ 18.

[260] Counter-Memorial, ¶ 155.

Scotia (the "Property Tax Agreement").[261] There is no legal connection between this measure implemented in Nova Scotia and the Claimant's investment in Québec. Indeed, the province of Nova Scotia and the Municipality of Richmond County do not have the authority to tax companies located in another province.[262] The fact that a private party may negotiate a tax rate with a municipality is not unique to Richmond County, or even Nova Scotia. This is distinct from the treatment Resolute has received. For example, in 2013 the Claimant negotiated certain tax abatements with the municipality of Saguenay for its Kénogami mill.[263] It would not have been able to obtain similar abatements from Richmond County, since it has no property there. The Property Tax Agreement does not directly affect the Claimant's investment.

142. ***Load Retention Tariff (LRT)***: The LRT approved by the Nova Scotia Utility and Review Board upon an application from PWCC and NSPI following their negotiations set a rate payable for electricity supplied to the Port Hawkesbury mill.[264] Even if it can be shown that the agreement between NSPI and PWCC is a measure attributable to Canada,[265] there can be no legal connection between the measure adopted in Nova Scotia and the Claimant's investment in Québec, as Nova Scotia has no authority over

[261] *See 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; **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.

[262] **RL-085**, Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp. (Toronto: Carswell, 2016), p. 31-24.2 ("[T]he provincial taxing power, like other provincial powers, is limited to the territory of the province. This limitation is explicit s. 92(2) [of the *Constitution Act, 1867*], which refers to direct taxation 'within the province'.").

[263] **R-140**, Radio-Canada, "Évaluation de l'usine Kénogami: Produits forestiers Résolu s'entend avec Saguenay" (Jan. 7, 2013), available at: http://ici.radio-canada.ca/nouvelle/594490/pfr-evaluation-kenogami.

[264] *See* **R-062**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 126; **R-063**, *Re Pacific West Commercial Corporation*, 2012 NSUARB 144.

[265] In addition to the jurisdictional objections at issue in this preliminary phase of the arbitration, Canada objects 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. However, Canada proposed, and the Tribunal agreed, that this issue be dealt with in the merits phase, if necessary. *See* Statement of Defence, ¶¶ 7, 75, 104.

electricity rates in Québec.[266] There is no connection between the Port Hawkesbury mill's electricity rate and the Claimant.

143. As the foregoing demonstrates, Resolute cannot establish that there is a "legally significant connection" between its investment in Québec and any of the Nova Scotia Measures. To accept the Claimant's simplistic position that the above measures relate to its investment because: i) they allegedly benefit PHP, and ii) PHP is in competition with the Claimant's investment, would reduce the "relating to" threshold in Article 1101(1) to a standard of "mere effect." Indeed, the Claimant's argument "that PHP began to engage in predatory pricing in 2013 [and that] predatory pricing, by its nature, involves an intention to harm competitors – in this case, the foreign investor, Resolute"[267] betrays the weakness of the Claimant's position. It blends the actions of the Province with those of a private actor, automatically imputing the allegedly harmful effects of PHP's business activities to the Government of Nova Scotia. Even if PHP received benefits from the Government of Nova Scotia, PHP's alleged decision to implement competitive pricing was just that – a decision of PHP, not of Nova Scotia.

144. It is a basic principle of customary international law that States are responsible for the acts of private persons only if those persons are acting on instructions of, or under the direction or control of, that State,[268] or if the State acknowledges and accepts the conduct as its own.[269] The burden of establishing responsibility, just like the burden of showing that the measures at issue meet the threshold set out in Article 1101(1), lies with the Claimant, and it has failed even to attempt to meet it.

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[266] *See* paragraph 151, *infra*.

[267] Counter-Memorial, ¶ 155.

[268] **RL-032**, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, Article 8.

[269] **RL-032**, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, Article 11.

V. RESOLUTE'S INTERPRETATION OF ARTICLE 1102(3) IS CONTRARY TO ITS ORDINARY MEANING AND INTENTION

A. Article 1102(3) Presupposes a Province or State Having "Accorded Treatment" to an Investor, Which it Cannot Do to an Investor Having No Connection to its Jurisdiction

145. As Canada has said previously, there is no need for the Tribunal to consider whether the Claimant's Article 1102 claim is admissible if it decides that it has no jurisdiction to hear the challenge against the Nova Scotia measures in the first place. But if the Tribunal does decide it has competence over the claim, the Counter-Memorial provides no rational explanation as to why the Claimant's national treatment claim is even admissible in light of the plain meaning of Article 1102(3).[270]

146. The Claimant's Counter-Memorial contains a statement which exemplifies the fundamental illogic of its position that it can proceed with a national treatment claim under Article 1102(3). The Claimant writes: "The national treatment question presented by Resolute's claim is *whether the treatment Nova Scotia accorded to Resolute* is no less favourable than the treatment Nova Scotia accorded to PHP…"[271] While it is helpful that the Claimant has confirmed that it is not complaining about the treatment it received from the Government of Québec or the Government of Canada in comparison to the treatment PHP received by the Government of Nova Scotia, this assertion is where the Claimant's argument falls apart: there has never been an opportunity for treatment by "Nova Scotia accorded to Resolute." Nova Scotia cannot accord treatment to an investor over which it has no jurisdiction.

147. Resolute argues that Canada's reading of Article 1102(3) would "seem to allow" a province to forbid a foreign investor from acquiring assets or investing in the province,

[270] As Canada has said previously, the merits of this claim are spurious to begin with. Not only is Article 1102 inapplicable to any of the Nova Scotia Measures which constitute a subsidy (*see* NAFTA Article 1108(7)(b)), but the Claimant cannot demonstrate that it is in like circumstances with Port Hawkesbury.

[271] Counter-Memorial, ¶ 168 (emphasis added).

or to prevent a foreign investor from transporting goods through a province's territory.[272] Again, the Claimant is deliberately misrepresenting the text and intention of Article 1102(3). A foreign investor which tries to acquire an asset in a province or a state but is prevented from doing so by that province or state is being accorded treatment by that province or state. In the examples provided by the Claimant, the province or state is exercising its jurisdiction at its border and within its territory by excluding the foreign investor in favour of its own domestic investors. A national treatment claim could be admissible in these circumstances under Article 1102(3).

148. The scenario before this Tribunal is completely different. Resolute is not seeking to make any kind of SC paper investment in Nova Scotia (indeed, it explicitly decided not to do so when it decided on two separate occasions not to buy the Port Hawkesbury mill).[273] Nova Scotia has never had the opportunity to accord any treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of the Claimant's investments. Given that it is a factual predicate for the admissibility of any Article 1102 claim that there be "treatment" of the foreign investors or its investment by the same government alleged to have provided more favourable treatment to a domestic investor,[274] there is no way for this claim to proceed.

[272] Counter-Memorial, ¶ 174. *See also* Professor Hausman's statement that "Canada appears to argue that since PHP is the only SCP plant in Nova Scotia, other SCP producers could not be harmed because they are not located in Nova Scotia." This mischaracterization was invented by the Claimant and has appeared nowhere in Canada's pleadings. Professor Hausman's remaining testimony regarding the North American paper market (¶¶ 33-39) is irrelevant to the jurisdictional and admissibility issues under Articles 1101(1), 1102(3), 1116(2), 1117(2) and 2103 currently before the Tribunal. While Canada disagrees with several of the assumptions contained therein, it is unnecessary to respond to them in this preliminary phase. Hausman Report, ¶ 32.

[273] Resolute admits that it decided not to seek to invest in the Port Hawkesbury mill on two occasions. The first was in June 2011 (before the CCAA proceedings), when Resolute was allegedly approached by an investment bank on behalf of the mill's former owner, NewPage Corporation. The second was in the fall of 2011 (after NPPH entered creditor protection), when Resolute alleges it was one of the 110 interested parties contacted by the court-appointed monitor in the sales process for NPPH and its assets. Resolute was not interested in either investment opportunity. *See* NOA, ¶ 26; Counter-Memorial, ¶ 13.

[274] **RL-060**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL) Award, 31 March 2010 ("*Merrill & Ring – Award*"), ¶¶ 81-82. *See also* **R-141**, Shorter Oxford English Dictionary, 5th ed. (Oxford University Press, 2002), p. 3338 defines "treatment" as "The process or manner of behaving towards or dealing with a person or thing."

A complaint that Nova Scotia "accorded treatment" to PHP, which in turn "treated" the North American SC paper market writ large (and in a way that Resolute itself says was "unknown and unknowable" at the time the Nova Scotia Measures were adopted[275], which in turn "treated" Resolute and its Laurentide mill investment, fails *ab initio*. No NAFTA tribunal has ever endorsed such a remote concept of "treatment," which would render the term essentially meaningless.

149. The Claimant argues that "the purpose of the Nova Scotia measures was to help PHP compete with Resolute in the SC paper business sector and in markets that they share in common."[276] As discussed above,[277] the purpose of the Nova Scotia Measures was to maintain the mill and its supply chain – the major source of employment for a thousand mill employees and independent contractors in the Cape Breton Region[278] – during court-supervised sales process and the negotiation of a going-concern sale. However; irrespective of the purpose of the measures, the NAFTA Parties chose to contain the national treatment obligations of provinces and states to within their jurisdiction in order to ensure that the best treatment afforded to a domestic investor in one state or province does not automatically become the national standard by which all provinces and states in the NAFTA Parties are to be bound.

150. The Counter-Memorial asserts that Nova Scotia has "implement[ed] measures to exercise market authority beyond its territorial borders."[279] This argument is not serious – exercising "market authority beyond its territorial borders" would involve Nova Scotia implementing spending measures inside Québec, such as giving Resolute's Laurentide mill financing, which did not happen here. The Claimant also describes the Nova Scotia Measures as "non-regulatory" and based on Nova Scotia's alleged spending power

[275] Counter-Memorial, ¶¶ 48, 105.

[276] Counter-Memorial, ¶ 168.

[277] *See* ¶¶ 138-142, *supra*.

[278] *See* Statement of Defence, ¶ 38.

[279] Counter-Memorial, ¶ 172.

beyond its borders.[280] Again, this does not accurately reflect the nature of the Nova Scotia Measures at issue, but it does confirm the inadmissibility of Resolute's national treatment claim.

151. The subject matters of property tax,[281] hydro-electricity,[282] and the management and disposition of provincial Crown land[283] are matters within the competence of the individual provinces of Canada, including Nova Scotia and Québec. However, each province's competence in these areas is limited by its territorial jurisdiction,[284] as defined by its geographic boundaries.[285] In other words, Nova Scotia has no jurisdiction to establish the municipal property tax rate that applies to Resolute's Laurentide mill in Shawinigan. Nor can Nova Scotia establish the electricity rates that Resolute must pay its electricity provider for electricity consumed by the Laurentide mill in Shawinigan.

[280] Counter-Memorial, ¶ 207.

[281] **RL-085**, Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp. (Toronto: Carswell, 2016), pp. 31-2, 31-10 ("The provincial Legislatures, under s. 92(2) of the Constitution Act, 1867, have the power to make laws in relation to 'direct taxation within the province in order to the raising of a revenue for provincial purposes.' … Municipal real property taxes fall into this category.").

[282] **RL-085**, Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp. (Toronto: Carswell, 2016), p. 30-18 ("The provincial Legislatures have power over the generation and distribution of hydro-electricity, because dams, generating stations and distribution systems are 'local works and undertakings' within s. 92(10) of the Constitution Act, 1867.").

[283] **RL-085**, Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp. (Toronto: Carswell, 2016), pp. 30-10, 30-11 ("Under s. 92(5) of the Constitution Act, 1867, the provinces have power to make laws in relation to 'the management and sale of the public lands belonging to the province and of the timber and wood thereon'. As well as this power over provincial public property, s. 92A confers on the provinces power to make laws in relation to the 'development, conservation and management of… forestry resources in the province, including laws in relation to the rate of primary production therefrom.' … In each province, the provincially-owned forests are not only subject to provincial legislative power under s. 92(5) and s. 92A, they are also subject to provincial executive power as proprietor: the provinces enjoy the same powers of disposition and management as a private proprietor.").

[284] **RL-085**, Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp. (Toronto: Carswell, 2016), pp.13-4, 13-5 ("[T]he Constitution Act, 1867 couches provincial legislative power in terms which rather plainly impose a territorial limitation on the scope of the power. The sections allocating power to the provincial Legislatures, namely, ss. 92, 92A, 93 and 95, open with the words 'In each province'; and each class of subjects listed in s. 92 as within provincial legislative power contains the phrase "in the province" or some other indication of a territorial limitation. *A body of case law has established that these phrases in the Constitution Act, 1867 do impose a territorial limitation on provincial legislative power*.").

[285] **RL-085**, Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp. (Toronto: Carswell, 2016), pp.13-5 ("In assessing the territorial limit on provincial legislative power, a threshold question concerns the territorial limits of the province. Obviously, these are defined by the boundaries of the province.").

Nor does Nova Scotia have the ability to acquire mill lands from Resolute in Québec and convert them to provincial Crown lands. Each of these measures relates to a head of power allocated to each individual province under Canada's constitution, but only within the bounds of its territory.

152. The Claimant's "non-regulatory" extraterritorial "spending power" theory makes little sense in any event. If Nova Scotia was not jurisdictionally competent to afford similar treatment to the Claimant, there can be no claim of discrimination under Article 1102 because Nova Scotia never had the legal competence to discriminate against Resolute in the first place.

153. Referring to an alleged "extended tax benefit to PWCC for assets outside Nova Scotia," the Claimant writes "Nova Scotia never offered such treatment to Resolute."[286] Again, Nova Scotia could never have offered such allegedly favourable tax treatment to Resolute. It is trite to say that Nova Scotia cannot offer tax benefits to a company in Québec when that company has no investment in Nova Scotia and specifically decided that it did not want to make any investment there.

154. The Counter-Memorial argues that Canada's reading of Article 1102(3) requires reading in additional text, and that it believes the NAFTA negotiating texts supports its position. Both positions are wrong.

155. First, the Claimant argues that for Canada's interpretation to stand, the words "in that state or province" would have to be inserted into the text of Article 1102(3).[287] There is no need to add such language because that is the necessary implication of the existing text in Article 1102(3) for the obvious reason that, as Canada has explained previously, a state or province cannot accord treatment to investors and investments over which it has no jurisdictional competence.

[286] Counter-Memorial, ¶ 182.

[287] Counter-Memorial, ¶ 177.

156. Second, the Counter-Memorial relies on very first negotiating draft of NAFTA Chapter Eleven.[288] There is no need to refer to negotiating texts, as there is no lack of clarity as to the ordinary meaning of that provision.[289] but Resolute's omission of the subsequent drafts of Article 1102(3) further confirms Canada's interpretation serves to undermine its own argument.[290]

157. The Counter-Memorial seeks to explain away the reading of Article 1102(3) by the *Merrill & Ring* tribunal,[291] which plainly supports Canada's position. In that case, the claimant was complaining about the adverse effects of the impugned measures on its business in British Columbia, which is precisely where the investor's investment was located. There was no issue of having been afforded "treatment" by British Columbia because the claimant was located there and subject to its jurisdiction.[292] Resolute's

[288] Counter-Memorial, ¶¶ 187-188.

[289] The *Vienna Convention on the Law of Treaties* places the highest importance on the ordinary meaning of the text, taken in its context. *See* **RL-086**, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 31(3). Resort to supplementary means of interpretation are only necessary to confirm the ordinary meaning or when the interpretation arrived at by the normal means of interpretation lead to a result that is unclear or incoherent. *Id.*, Article 32. The Tribunal should be mindful of the limited value of negotiating texts and not to assume what was in the mind of the negotiating parties, which is why the ordinary meaning of the text, taken in its context, must be of highest priority when interpreting a treaty.

[290] Subsequent drafts of Article 1102(3) indicate that the United States had proposed language to clarify that "The provisions of this Chapter regarding the treatment of investors shall mean, with respect to a province or state, treatment no less favourable than that granted by such province or state to any investor of that province or state." *See* **RL-087**, NAFTA, Trilateral Negotiating Draft Text, Chapter 21, Doc. No. INVEST.116 (Jan. 16, 1992), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-02.pdf. Subsequent drafting alternatives provided by Canada, the United States and Mexico that led to the final text of Article 1102(3) confirm that there was no intention by the NAFTA Parties to adopt the meaning urged by the Claimant. *See* **RL-088**, NAFTA, Trilateral Negotiating Draft Text, Doc. No. INVEST.221 (Feb. 21, 1992), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-04.pdf; **RL-089**, NAFTA, Trilateral Negotiating Draft Text, Doc. No. INVEST.615 (June 15, 1992), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-12.pdf; **RL-090**, NAFTA, Trilateral Negotiating Draft Text, Chapter Eleven, Doc. No. INVEST.920, (Sept. 20, 1992), available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/chap11-neg-33.pdf.

[291] Counter-Memorial, ¶¶ 202-206.

[292] **RL-060**, *Merrill & Ring – Award*, ¶ 79 ("The investor has specifically complained about the adverse effects the measures in question have on the expansion, management, conduct and operation of its forestry business in British Columbia. The Tribunal is thus satisfied that the treatment complained of has been adequately identified by the Investor.").

continued repetition of the idea that the Nova Scotia measures "were not regulatory" makes no difference to the plain meaning of Article 1102(3).

158. The Claimant also pretends that *Cargill* assists its argument on this point.[293] It does not. In *Cargill*, Mexico "[did] not challenge the claim that, under the IEPS Tax, HFCS was treated less favourably than cane sugar…"[294] This was because the claimant's investment and the domestic investors alleged to have received more favourable treatment were both subject to the jurisdiction of the Mexican federal government, which imposed the tax.[295]

159. In fact, every single one of the NAFTA national treatment cases relied upon by the Claimant undermines its own argument and proves Canada's point that this Article 1102 claim is inadmissible.[296] As noted above, the investor and its investment in *Cargill* was subject to the jurisdictional authority of Mexico, which agreed that it had been "accorded treatment" for the purposes of Article 1102(1). The situation was the same in both *ADM* and *CPI* – the claimants and their investments in both cases were subject to the same IEPS tax and Mexico never disputed that they were being "accorded treatment."[297] In *SD Myers*, the claimant was subject to the jurisdictional authority of the Canadian federal government to impose PCB export restrictions at the border, so there was no question of whether it had been "accorded treatment" within the meaning of Article 1102.[298] In *Pope & Talbot*, the claimant's lumber investments were subject to the Canadian federal softwood lumber export control regulations and levies and hence could

[293] Counter-Memorial, ¶¶ 207-208.

[294] **RL-050**, *Cargill – Award*, ¶ 217.

[295] **RL-050**, *Cargill – Award*, ¶¶ 2, 105.

[296] *See* Counter-Memorial, ¶ 190, referring to *SD Myers*, *Pope & Talbot*, *Archer Daniels Midland*, *Cargill* and *GAMI Investments*.

[297] **RL-091**, *Corn Products International v. Mexico*, Decision on Responsibility, 15 January 2008, ¶¶ 40-48, 119; **RL-092**, *Archer Daniels Midland v. Mexico*, (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 ("*Archer Daniels Midland – Award*"), ¶¶ 2, 107, 205-208.

[298] **RL-059**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶¶ 162-193, 241.

be "accorded treatment."[299] In *GAMI*, the sugar mills that were expropriated, foreign and domestic, were all subject to the Mexican federal government's expropriation decree.[300] The Claimant has not cited a single case, NAFTA or otherwise, in which a national treatment claim was allowed when the investor or its investment was not in some way subject to the jurisdictional authority of the government "according treatment."

160. The implications of accepting the Claimant's reading of Article 1102 are serious for all three NAFTA Parties. To illustrate, if one state in the United States decided to offer benefit, subsidy or any other economic incentive to a company in its jurisdiction, any Canadian or Mexican investor which competes with that company (or has some other basis upon which to claim it is "in like circumstances" therewith) located anywhere in any of the other 49 states would be able to bring a national treatment claim against the United States under NAFTA Article 1102. In other words, the measure of a single state would automatically become the standard of treatment by which the remaining 49 states are held. The same situation would arise in Mexico: if one of the 31 states in Mexico provided a company within its jurisdiction any kind of beneficial treatment, a U.S. or Canadian investor in any of the other 30 Mexican states allegedly "in like circumstances" could bring a national treatment claim.

161. It is untenable to argue that the NAFTA Parties intended for the treatment by one state or province would become the national standard for the entire country. The text of Article 1102(3) does not support this radical interpretation, and Resolute has offered no evidence supporting the idea that this was the goal of the NAFTA Parties. Even though the Claimant would obviously prefer that the national treatment obligation in Article 1102(3) be more sweeping, the Claimant's preference is irrelevant here – all that can be applied is the text of Article 1102(3) as written and intended.

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[299] **RL-058**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001, ¶¶ 18-29.

[300] **CL-017**, *Gami Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶¶ 12-22, 114.

B. The Claimant's Attempt to Establish that it and Port Hawkesbury Are "in like circumstances" is Irrelevant for the Question of Admissibility

162. The Claimant also devotes a substantial portion of the Counter-Memorial explaining the meaning of "in like circumstances" and trying to justify its interpretation of Article 1102(3) by arguing that the Port Hawkesbury mill and the Laurentide mill were in like circumstances. Canada's position is that they were plainly not in like circumstances, but this question has no place in this jurisdictional and admissibility phase, as the Claimant itself recognizes.[301] The Tribunal cannot even consider the question of whether PHP and Resolute were "in like circumstances" without first deciding if Article 1102 permits such a claim to be made.

VI. THE CLAIMANT IS BARRED FROM BRINGING A TAXATION CLAIM

163. As Canada explained in its Memorial, this Tribunal does not have jurisdiction to consider the claim based on the Property Tax Agreement under Article 1110 because the Claimant did not fulfil the procedural prerequisites under 2103(6). This would also be the case for the Claimant's allegation that Nova Scotia's Measures gave PWCC an "extended tax benefit… for assets outside of Nova Scotia."[302] In response, the Claimant asserts in its Counter-Memorial that it challenges the taxation measures "as part of its claims" under Article 1110. This is not permissible.

164. The NAFTA Parties negotiated Article 2103 to specifically address taxation measures, excluding them from dispute resolution unless clearly prescribed procedural requirements are met. NAFTA Parties and tribunals have invariably demanded – as was the case in *Cargill*, *ADM*, *CPI v. Mexico* and *Gottlieb Investment Group v. Mexico* – that no taxation measure can proceed as part of an expropriation claim in the absence of compliance with Article 2103(6).[303] The Claimant's argument that the taxation

[301] Counter-Memorial, ¶¶ 202-206.

[302] Counter-Memorial, ¶ 182.

[303] **RL-092**, *Archer Daniels Midland – Award*, ¶ 15; **RL-050**, *Cargill – Award*, ¶ 16. The tribunal in *Encana v. Ecuador*, interpreting a similar provision in the Canada-Ecuador BIT, did the same. *See* Memorial, ¶ 138, citing *Encana*, ¶ 108. *See also* **RL-081**, *Corn Products International v. Mexico*, Request

agreement is one of "the many measures… that contributed to the constructive expropriation of Resolute's Laurentide mill"[304] implies that it can evade the procedural requirements established by the NAFTA Parties if it lumps a taxation measure in along with other non-taxation measures. To allow the Claimant to evade the procedural requirements of Article 2103 in this way would render the provision useless. Article 2103 clearly limits the jurisdiction of this Tribunal to consider taxation measures, and the taxation agreement must be considered separately from the other measures.

165. As Canada explained in its Memorial, the Claimant may not challenge the Property Tax Agreement measure under Article 1105, and since it has not met the requirements of 2103(6), the Tribunal must require the Claimant to leave it out of its Article 1110 claim as well.

VII. CONCLUSION

166. The Tribunal is faced with four objections by Canada, three jurisdictional and one admissibility, in this preliminary phase with respect to the Nova Scotia Measures.

167. Canada's time bar objection comes down to a single question of factual evidence: has Resolute proven that it did not *first* learn (and objectively could not have first learned) that it had suffered some loss or damage arising from the re-opening of Port Hawkesbury prior to the cut-off date of December 30, 2012? Canada has submitted substantial evidence on multiple bases showing that Resolute has already admitted that it did, as well as evidence establishing that it must have known of the loss or damage it alleges before that date. The Claimant has either ignored or obfuscated that factual evidence. If the Tribunal concludes that the facts establish that Resolute did not file its Notice of Arbitration within three years of first learning of alleged loss or damage to its investments in Canada as required by NAFTA Articles 1116(2) and 1117(2), then it

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for Institution of Arbitration Proceedings, 21 October 2003, ¶¶ 11-13; **RL-067**, Letter from Bob Hamilton, Senior Assistant Deputy Minister of the Department of Finance Canada, to Eric Solomon dates April 22, 2008.

[304] Counter-Memorial, ¶ 213.

must dismiss the Claimant's Articles 1102, 1105 and 1110 claims for lack of jurisdiction *ratione temporis*.

168. If any of the claims survive the time-bar objection, then the Tribunal must ask whether any such claim is even arbitrable under Article 1101(1). This question comes down to whether the "legally significant connection" test endorsed by every NAFTA tribunal since *Methanex* should apply, or whether the floodgates should be opened to allow the Claimant's expansive test – that any government measure affecting an investment falls within the scope of Chapter Eleven – to be adopted for the first time. For the Claimant to meet the 1101(1) threshold, it must also adduce factual evidence to support its allegations that it was deliberately targeted by Nova Scotia in order to destroy its business. The Claimant has no credible legal or factual support for either of its positions. No NAFTA tribunal has ever accepted that a factual matrix so far removed and remote from the impugned measures as meeting the Article 1101(1) threshold. And the Claimant relies on nothing but clichés and speculation to impugn the motivations and intentions of the Government of Nova Scotia. If the Tribunal concludes that there is no legally significant connection between the Nova Scotia Measures and the Claimant and its investment, then the national treatment, minimum standard of treatment and expropriation claims must be dismissed for lack of jurisdiction.

169. In the event that the Claimant's Article 1110 claim survives the two tests above, then it will have to be significantly truncated in the merits phase because the Property Tax Agreement can play no role in an expropriation claim. Article 2103 prevents a NAFTA tribunal from seizing jurisdiction over a measure in an expropriation claim unless the claimant went to the relevant NAFTA Party tax authorities for a decision first. That did not happen here and there is no exception for Resolute's invented "bundle of measures" theory. If the Tribunal allows an Article 1110 claim to go through to the merits, it must stipulate that this taxation measure can play no part therein.

170. As for Resolute's Article 1102 claim, if it passes the two jurisdictional thresholds set out above, it faces yet another hurdle which would also prevent it from moving on to

the merits. The Claimant's national treatment claim is missing an obvious factual predicate which is essential for admissibility: it cannot be said that it was ever "accorded treatment," as is required for a claim under Article 1102(3), because the Claimant has no connection whatsoever to the jurisdiction of Nova Scotia. There is no need for the Tribunal to move on to more detailed merits questions of whether PHP and the Claimant were "in like circumstances," whether the treatment was discriminatory, or whether the exception for subsidies under Article 1108(7)(b) applies. If the fundamental prerequisite that there be actual treatment of Resolute by Nova Scotia is missing, then the claim is defective from the outset. Canada urges the Tribunal to find that it has no jurisdiction over the national treatment claim at all, but if it does, it should deny the Claimant's ability to proceed to the merits on the basis of Article 1102(3).

VIII. ORDER REQUESTED

171. 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;

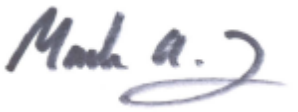
ii. dismissing the Claimant's Nova Scotia Claims under Article 1102 in their entirety and with prejudice on grounds of inadmissibility;

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.

March 29, 2017

Respectfully submitted
On behalf of the Government of Canada,



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