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

BETWEEN

RESOLUTE FOREST PRODUCTS INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

PCA CASE No. 2016-13

RESOLUTE FOREST PRODUCTS INC.

REJOINDER MEMORIAL ON JURISDICTION

MAY 3, 2017

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I. INTRODUCTION

1. It takes patience to find the substance of Canada's defense of its motion to dismiss. Along the way, Canada draws many conclusions for the Tribunal, such as the declaration that, "{t}he evidence definitively demonstrates that this {knowledge of the loss or damage} occurred before December 30, 2012."[1] Canada may have drawn this conclusion for the Tribunal out of concern that the Tribunal might not reach the same conclusion on its own.

2. Canada accuses Resolute of not being "credible," relying on "assertion," making arguments that are "defective" and full of "deficiencies." Resolute, according to Canada, is guilty of "unsound legal reasoning and a lack of factual support," making "futile attempts to evade," arguments "bereft of factual and legal foundation," with "no evidence to support this bald allegation." Resolute, Canada says, "provides no convincing reason" and engages in "convoluted logic." All those failures Canada offers in just the first four pages of its Reply.[2]

3. Facing these judgments, Resolute has no realistic expectation of convincing Canada, but Resolute also is not deciding matters for the Tribunal. Canada moved to dismiss Resolute's claims, confident that it had sufficient evidence to say it needed and wanted no discovery and would see the issues decided on the facts: "Establishing when Resolute first knew or should have known of the damage, before or after, is a straightforward factual inquiry that is ideally suited for a preliminary phase,"[3] and "Canada does not expect that document production will be required in the

[1] Canada Reply Mem'l ¶ 67 (March. 29, 2017) ("Reply Mem'l").

[2] Reply Mem'l ¶¶ 1, 3-9.

[3] Bifurcation Hr'g Tr. at 20:24-21:2 (Nov. 9, 2016).

jurisdictional phase."[4] Canada advised the Tribunal that it "need look no further than the exhibits the Claimant itself filed along with its Statement of Claim to see that the underlying factual issues are straightforward and ripe for a determination as to whether the claim is in compliance with the NAFTA time-bar under Articles 1116(2) and 1117(2)."[5]

4. The Tribunal was persuaded by Canada's argument, concluding that, "{t}he Tribunal considers that no discovery will be necessary in the jurisdictional phase of these proceedings."[6] It was Canada's confidence in the facts already presented and pledge that the matter was straightforward and discovery not needed that anchored Canada's motion to bifurcate these proceedings.

5. Now, Canada complains, repeatedly, that it does not have enough evidence after all, and that it was Resolute's burden to invite Canada into Resolute's proprietary internal documents and to offer a company witness for Canada to cross-examine (urging the Tribunal to call a witness on Canada's behalf).[7] Canada had pledged that it would not be necessary to go there to resolve issues of jurisdiction and admissibility, but now says "Canada is the party with more limited information on this issue."[8] If so, Canada must have known it had more limited information when it moved with confidence for bifurcation and said it had all the evidence it needed. The Tribunal took Canada at its word, and so did Resolute.

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[4] Letter from Canada to Tribunal (Dec. 5, 2016).

[5] Canada Bifurcation Motion ¶ 15 (Sept. 29, 2016).

[6] Procedural Order No. 5 ¶ 2.1 (Dec. 12, 2016).

[7] Reply Mem'l ¶ 28 n. 38.

[8] Reply Mem'l ¶ 17.

6. Resolute has not relied entirely on documents that accompanied its Statement of Claim to satisfy the Tribunal that its claims are not time-barred. Resolute has submitted proprietary company data concerning production, sales, and profit, and has introduced the expert analysis and testimony of MIT Economics Professor Jerry Hausman.[9] Professor Hausman's scholarly analysis of all the relevant economic data, covering more than two years, demonstrates that Resolute did not incur damage from the resuscitation of Port Hawkesbury ("PHP") before 2013.

7. Professor Hausman's analysis and testimony are criticized, but unrebutted, by Canada. Canada has produced no expert witness to contest Professor Hausman.

8. Canada's original claims as to the statute of limitations were based on alleged knowledge of the government's measures rather than incurred damage, and on speculation that Resolute should have known that damage would occur in the future. Canada's defense under Article 1101(1) similarly depends upon a revision of the legal standards.

9. Canada contends that Resolute must demonstrate a "legally significant connection" between the Nova Scotia Measures and Resolute to bring its claim. Decisions interpreting Article 1101(1), however, have not followed *Methanex* (where the idea of a "legally significant connection" began). Instead, subsequent decisions require a lower threshold – a "causal nexus" or "some connection." Resolute satisfies these standards, and the *Methanex* idea as well.

[9] These data were included as Attachments 3 and 4 to Professor Hausman's February 22, 2017 Witness Statement and in Resolute's March 8, 2017 submission in response to Canada's request for data, which Canada submitted to the Tribunal as R-129.

10. Canada's Article 1102(3) defense has now changed. Canada previously argued that Resolute's national treatment claim was invalid because it involved cross-jurisdictional treatment. Canada had also argued that Resolute's claim was impossible to sustain under what Canada contends is Resolute's misreading of Article 1102(3).

11. Resolute demonstrated that Canada was wrong in arguing that Resolute was asserting cross-jurisdictional treatment, so Canada now asserts that Nova Scotia did not accord Resolute any treatment at all. The definition of "treatment" is broad, however, and this Tribunal has jurisdiction to resolve Canada's disparate treatment of its national champion as compared to Resolute. The Tribunal may take up Canada's new argument in the merits phase. It is not a jurisdictional issue.

II. CANADA'S MOTION DENIES ADMISSIBILITY, NOT JURISDICTION, AND THEREFORE IMPOSES THE BURDEN OF PROOF ON CANADA

12. Canada has characterized its statute of limitations objection as a motion to deny this Tribunal's jurisdiction over Resolute's claims. Resolute has never questioned that it is for Resolute to establish that this Tribunal has jurisdiction over Resolute's claims.

13. The essential elements of jurisdiction for NAFTA Chapter 11 include whether Resolute is an American company doing business in Canada and whether Resolute, as an American company at the time, had an investment in Canada at the time when government measures were taken that may have had, then or thereafter, an adverse impact on Resolute's investment. Canada has not disputed that Resolute satisfies these jurisdictional elements.

14. Canada's time-bar objections go to the admissibility of Resolute's claims, not the jurisdiction of this Tribunal. The only NAFTA Tribunal to address this issue

specifically was *Pope & Talbot v. Canada*, which found that a time-bar objection constituted an affirmative defense for which Canada had the burden of proof.[10] The other NAFTA awards cited by Canada did not address specifically this question.[11] But, regardless of who has the burden of proof on this issue, this Tribunal has sufficient evidence to find that Resolute has timely brought its claims.

A. Time-Bar Objections Go To Admissibility, Not Jurisdiction

15. Canada challenges Resolute's claims as time-barred, a statute of limitations contention. Such a challenge goes to the claims asserted by Resolute, not the Tribunal's authority to rule on them. The alleged time-bar, therefore, is not jurisdictional, and the burden of proof, consequently, falls on Canada.[12]

16. This distinction is important because, even in the cases and examples offered by Canada in its contention that Resolute bears the burden of proof as to the statute of limitations, the burden of proof in those cases was borne by the moving party, the government respondent. Although Canada argues that its timeliness objection is not an affirmative defense to Resolute's claims, in all the examples it has offered, and others, tribunals that have addressed the statute of limitations and responded to queries as to whether it is jurisdictional have found it to be unrelated to jurisdiction.

17. There are inconsistencies. Not all tribunals have treated all questions of burden of proof in limitation period challenges the same way. Some have placed the

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[10] 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 ¶ 11 (Feb. 24, 2000) ("*Pope & Talbot*").

[11] Reply Mem'l ¶¶ 11, 13 (citing decisions in *Methanex*, *Apotex*, *Bayview*, *Grand River*, and *Gallo*).

[12] CL-042, *Itera International Energy LLC and Itera Group NV v. Georgia,* ICSID Case No. ARB/08/7, Decision on Admissibility of Ancillary Claims ¶ 62 (Dec. 4, 2009).

burden of proof on the respondent by characterizing the time-bar objection as a defense against asserted claims. Others have defined timeliness issues as pertaining to the admissibility of claims. By the terms of either of these complementary theories, limitation periods are unrelated to the scope of a state's consent to arbitrate, and to a tribunal's authority.

18. In the most relevant case, *Pope & Talbot,* the tribunal preferred the first approach and held that Canada's timeliness objection was "in the nature of an affirmative defence and, as such, Canada has the burden of proof of showing the factual predicate to that defence."[13] The tribunal considered Canada's objection as a defense to the investor claims, not as a challenge to the tribunal's jurisdiction.

19. The *Pope & Talbot* Tribunal, when ruling against Canada, concluded that "Canada has not satisfied" its burden of proof because "{i}t is not clear," based on the evidence, "at what stage" the loss became known or should have been known by the investor.[14]

20. The tribunal in *Feldman v. Mexico* also concluded that a timeliness defense under Articles 1116(2) and 1117(2) is not jurisdictional. The claimant sought to estop the respondent from invoking a limitations argument, which the tribunal characterized as a "clear and rigid limitation defense" that a member state would "be interested in presenting."[15] While determining the respondent was not estopped from presenting the defense, the Tribunal found that a respondent could, in some circumstances, waive or otherwise be estopped from asserting a limitations defense:

[13] CL-002, *Pope & Talbot* ¶ 11.

[14] CL-002, *Pope & Talbot* ¶ 12.

[15] RL-021, *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 ¶ 63 (Dec. 16, 2002) ("*Feldman*").

> Of course, an acknowledgment of the claim under dispute by the organ competent to that effect and in the form prescribed by law would probably interrupt the running of the period of limitation. But any other state behavior short of such formal and authorized recognition would only under exceptional circumstances be able to either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense. Such exceptional circumstances include a long, uniform, consistent and effective behavior of the competent State organs which would recognize the existence, and possibly also the amount, of the claim.[16]

Respondent states, thus, control the limitation defense and can refuse to assert it or otherwise waive it. Either act is inconsistent with a jurisdictional prerequisite a claimant must satisfy to bring a NAFTA claim.

21. Leading scholars share the view that timeliness objections do not challenge a tribunal's authority but, instead, the admissibility of a claimant's claims. Professor Gary B. Born, for example, in his treatise on *International Commercial Arbitration,* concludes that when "a statute of limitations or similar time bar defense to the underlying claim" is advanced, such objections "are non-jurisdictional, and instead go to the substance of the dispute before the arbitrators."[17]

22. Jan Paulsson says that a time-bar objection is an issue of admissibility,[18] explaining that, "{t}imeliness issues are unrelated to jurisdiction *ratione temporis,* which limits the scope of the tribunal's authority to disputes having their origin in – or after or before – a particular time period."[19] According to Paulsson, a challenge based on the

[16] RL-021, *Feldman* ¶ 63.

[17] CL-044, Gary B. Born, *International Commercial Arbitration* (*Second Edition*) at 911-12*,* Kluwer Law International (2014).

[18] CL-040, Jan Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution* 601, Liber Amicorum in honour of Robert Briner, ICC Publishing (Nov. 2005) ("Paulsson").

[19] CL-040, Paulsson at 614 n. 36.

statute of limitations is a challenge to whether the claims may be arbitrated at all, in any forum, not a challenge to hearing the claims in the particular forum. Hence, it is a challenge to admissibility, not to jurisdiction.[20] Other scholars agree.[21]

23. Domestic courts have held consistently that awards on timeliness of claims cannot be reviewed *de novo* because they do not pertain to jurisdictional issues. Courts have taken this position because rulings on timeliness involve substantive defenses against claims, not the tribunal's jurisdiction.[22]

24. Canada concedes that the tribunal in *Pope & Talbot* found a challenge on the statute of limitations to be an affirmative defense, but claims that in all other NAFTA

[20] *See* CL-040, Paulsson at 617.

[21] *E.g.,* CL-045, Hanno Wehland, "Chapter 8: Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules," at 238 in Crina Baitag, *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016) ("For instance . . . limitation periods regarding assertion of claims . . . clearly relate to the admissibility of a claim.").

[22] Examples include CL-043, *Bapu Corp. v. Choice Hotels Int'l Inc.,* 371 F. Appx. 306, 308-09 (3d Cir. 2010) (rejecting claim that statute of limitations had expired and therefore arbitrator lacked jurisdiction because "appellants have presented no evidence to demonstrate that the arbitrator, in deciding to arbitrate this case, exceeded his power"); CL-037, *Glass v. Kidder Peabody & Co*., 114 F.3d 446, 456 (4th Cir. 1997) ("questions of mere delay, laches, statute of limitations, and untimeliness raised to defeat the compelled arbitration are issues of procedural arbitrability exclusively reserved for resolution by the arbitrator"); CL-036, *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991) ("we stated emphatically that *any* limitations defense -- whether stemming from the arbitration agreement, arbitration association rule, or state statute -- is an issue to be addressed by the arbitrators") (emphasis in original); CL-041, *Wagner Constr. Co v. Pac. Mechanical Corp.,* 157 P.3d 1029, 1030 (Cal. S. Ct. 2007) ("the affirmative defense that the statute of limitations has run is for the arbitrator rather than the court to decide"); CL-035, *Coopers & Lybrand Ltd (Trustee) for BC Navigation SA v. Canpotex Shipping Servs. Ltd*, [1987] 16 F.T.R. 79 (Canadian Fed. Ct.) ("No evidence {to challenge the arbitral award} has been shown in the present case, except the fact that the right to proceed to arbitration could be time-barred; but this is 'no reason for regarding arbitration as inoperative, and refusing a stay'. (Walton, Russel on Arbitration (18th ed.), 1970, p. 166). This arbitration tribunal is therefore the forum where this issue will have to be debated, and the Court must refer the parties to arbitration.").

cases tribunals found to the contrary.[23] Canada is mistaken because no other tribunals have addressed squarely this issue.

25. Canada relies on *Methanex v. United States,* but the tribunal there did not address whether a time-bar objection was jurisdictional.[24] The tribunal did opine that a party's characterization of a challenge as "jurisdictional" did not necessarily make it so.[25]

26. Canada also relies on *Apotex v. United States*.[26] The tribunal there assigned the burden of proof on jurisdiction to the claimant, but identified the issue of jurisdiction to be "the factual elements necessary to establish the Tribunal's jurisdiction."[27] Timeliness was not among those elements. The parties agreed to consider a timeliness objection as jurisdictional. The tribunal was never asked to determine whether it was, although it thought "there {was} an initial question as to the precise nature of this objection, and whether it is truly one of 'jurisdiction' or merits/substance."[28]

27. Canada further relies on *Bayview v. Mexico*.[29] The tribunal there found it did not have jurisdiction, but not because of a time-bar and not because of a related burden of proof. Jurisdiction was denied because the investor did not have an investment in Mexico, with the tribunal ruling that "it is unnecessary to consider further

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[23] Reply Mem'l ¶ 20.

[24] Reply Mem'l ¶ 11; *see* CL-001, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award ¶ 84 (Aug. 7, 2002) ("*Methanex* Partial Award").

[25] CL-001, *Methanex* Partial Award ¶ 86.

[26] Reply Mem'l ¶ 13.

[27] RL-023, *Apotex Inc. v. United* States, UNCITRAL, Award on Jurisdiction and Admissibility ¶ 150 (June 14, 2013) (*Apotex*).

[28] RL-023, *Apotex* ¶ 314.

[29] Reply Mem'l ¶ 13.

issues {including the limitations objection} because it is plain that the Tribunal cannot have jurisdiction over these claims."[30] The tribunal, consequently, did not consider which party bears the burden of proof for a time-bar objection.

28. Canada cites to *Grand River v. United States*,[31] but the tribunal there "did not find it necessary," as to a timeliness objection, "to determine which Party had a burden of going forward with the evidence."[32] Similarly, in *Gallo v. Canada,* the tribunal did not determine burden of proof for time-bar objections because no timeliness defense was raised. The issue was only whether the investor had an investment at the time of the subject measures.[33]

29. Canada relies, above all, on *Spence v. Costa Rica,* an arbitration pursuant to the Central American Free Trade Agreement ("CAFTA"), whose terms are notably different from NAFTA's.[34] Because of the conspicuous differences, "{t}he Tribunal thus cautions any reading of this Award that would give it wider 'precedential' effects."[35] Canada paid no heed to this caution. This Tribunal should.

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[30] RL-005, *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award ¶ 123 (June 19, 2007) ("*Bayview*"); *see also* RL-005, *Bayview* ¶¶ 34-36 (stating respondent has asserted a time-bar objection).

[31] Reply Mem'l ¶ 13.

[32] RL-022, *Grand River Enters. Six Nations, Ltd., et al. v. United States,* UNCITRAL, Decision on Objections to Jurisdiction ¶ 37 (July 20, 2006) ("*Grand River*").

[33] Reply Mem'l ¶ 13; RL-071, *Vito G. Gallo v. Government of Canada,* UNCITRAL, Award ¶¶ 321, 324-330 (Sept. 15, 2011) ("*Gallo*") ("Investment 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.").

[34] Reply Mem'l ¶¶ 14-15, RL-028, *Spence Int'l Inv'ts, LLC v. Republic of Costa Rica*, UNCITRAL, Interim Award ¶ 27 (Oct. 25, 2016) ("*Spence*"). CAFTA Article 10.18, containing the limitations period, states it is a "Condition{} and Limitation{} on Consent of Each Party." NAFTA Articles 1116(2) and 1117(2), in contrast, provide that "{a}n investor may not make a claim" if it is not brought in a timely fashion; nothing regarding consent to arbitration is provided.

[35] RL-028, *Spence* ¶ 166.

30. Canada may yet object that Resolute is not answering adequately with respect to *Spence v. Costa Rica*. It should be enough to observe that the case involves peculiar facts and different rules sufficient for the tribunal itself to caution against relying on it as precedent. Yet, when reviewing all the cases upon which Canada relies, it is all Canada has.

31. In contrast, other non-NAFTA tribunals have determined that limitation objections are challenges to the admissibility of a claim (as distinct from a challenge to the jurisdiction of the tribunal). The leading investor-state decision on this point is the award in *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*,[36] a decision under the bilateral investment treaty between Spain and Mexico. Mexico "reject{ed} the Arbitral Tribunal's jurisdiction over acts or omissions attributed or attributable to the Respondent which were or could have been known to the Claimant, together with the resulting damages, prior to a fixed 3-year period, calculated as from the commencement date of this arbitration pursuant to the Agreement."[37] The tribunal disagreed: "In the opinion of the Arbitral Tribunal, the defenses filed by the Respondent . . . do not relate to the jurisdiction of the Arbitral Tribunal but rather to (non)compliance with certain requirements of the Agreement governing the admissibility of the foreign investor's claims."[38]

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[36] CL-038,*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) ("*Tecmed*").

[37] CL-038, *Tecmed* ¶ 48. The limitations period in that treaty provided that "{t}he investor may not submit a claim under this Agreement if more than three years have elapsed since the date on which the investor had or should have had notice of the alleged violation, as well as the loss or damage sustained. CL-038, *Tecmed* ¶ 72.

[38] CL-038, *Tecmed* ¶ 73.

B. Regardless Where The Burden Of Proof Falls, Enough Proof Has Been Presented That Resolute Has Timely Brought Its Claims

32. Canada has produced no evidence to contradict the expert testimony of Professor Jerry Hausman. He found that Resolute incurred no damages during 2012 from the resuscitation of Port Hawkesbury (or "PHP") enabled by the Nova Scotia Measures. He did find cognizable loss later on.

33. Canada still insists that Resolute should have known of losses in 2012, but there were no losses to have known. Canada speculates that Resolute should have anticipated losses that Canada claims were incurred in a price drop in January 2013. Whether the price drop in January 2013 was caused by the Nova Scotia Measures, or by other factors such as seasonality that forecast and produced a January price drop in most other years, is a question for this Tribunal to address in the merits phase of this arbitration. For purposes of a statute of limitations, Canada effectively admits that any cognizable loss was not incurred before January 2013 and, therefore, Resolute's claim for the loss is not time-barred.

III. RESOLUTE'S CLAIMS ARE TIMELY UNDER ARTICLES 1116(2) AND 1117(2)

34. Resolute has produced substantial evidence demonstrating that it incurred no losses from the resuscitation of Port Hawkesbury in 2012. There is no evidence of lost sales. There is no evidence of falling prices. There is no evidence of a decline in production. There is no evidence of lost profits. Professor Hausman has presented and analyzed both data from the supercalendered paper industry generally, and from Resolute in particular,[39] to conclude that Resolute could not have known and, therefore,

[39] Witness Statement of Jerry Hausman, Ph.D. ("Hausman Statement") at Attachments 3-4 (Feb. 22, 2017); R-129, Resolute Mill data provided in Resolute's March 8, 2017 Letter and accompanying CD (providing "original mill spreadsheets" from Resolute).

should not have known, of losses caused by Port Hawkesbury in 2012, because there were none.

35. Canada has selected three pieces of evidence for its statute of limitations objection. In the first, Canada argues that when Richard Garneau (a francophone) prefaces a statement in English with "I think," he changes dramatically his own meaning.[40] In the second, Canada relies on a local newspaper's characterization of one sentence spoken by Resolute's public relations director about "balance" in the market to construct a causal relationship between the reopening of Port Hawkesbury on September 28, 2012 and a virtual announcement of the closure of Machine #10 at Laurentide six weeks later, before PHP had barely re-entered the market.[41] And in the third, in place of deciding what the meaning of "is" is, Canada wants "from" to mean "starting in."[42]

36. Whereas Canada now tries to ascribe the closure of Laurentide PM#10 to PHP, Canada previously admitted "{t}he Claimant's Strategic Business Decision to Shift Production Capacity From the Laurentide Mill to the Dolbeau Mill."[43]

37. Canada seeks to diminish statements made by PHP before the U.S. International Trade Commission ("ITC") conceding that no damage occurred in 2012. Canada disputes that Resolute's expropriation claims are timely even though Resolute

[40] Reply Mem'l ¶ 49.

[41] Reply Mem'l ¶ 38.

[42] Reply Mem'l ¶ 31. Canada also objects, at paragraph 51 of its Reply Memorial, to Resolute's translation of the French phrase, "Il est question de . . ." Canada wants the phrase to mean, "There is talk of," but the word "talk" is nowhere to be found and it would change the French meaning, which more correctly translates as "It is a matter of, " or "It involves." The French phrase implies a reference, in the context of Resolute's business plan, to the preceding sentence.

[43] Canada Statement of Defence ("SOD") at 9 (Sept. 1, 2016).

could not bring these claims until a substantial deprivation occurred. And Resolute has demonstrated that Nova Scotia conferred a C$6-8 million electricity benefit on PHP by passing regulations in January 2013, a fact Canada does not dispute. Instead, Canada argues that this financial assistance is not properly before the Tribunal.

A. It All Depends On What The Definition Of "From" Is

38. Canada presents its evidence in a different order from the summary we offer here. Canada begins by endowing the word "from" with the novel meaning of "starting in." "From" is defined as a "starting point,"[44] but the point is the outer edge of the measurement and therefore not "in" anything. Cartographers measure where "the distance between any two features is calculated as the shortest separation between them, that is, where the two features are closest to each other."[45] One does not start from some unknown location inside the first place. One starts from the point closest to the destination.

39. When Resolute said it lost market share "from 2012 to 2014,"[46] it did not say it lost market share from some unknown time "starting in" or during 2012. Nor could it say, in February 2015, that it would not continue to lose market share after 2014, which it could not yet know. Resolute could know a starting point (which was not "in" 2012), but it could not know the destination. Hence, "from" could indicate the starting point, but "to" could not necessarily reference the end point. Resolute said, in 2015,

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[44] CL-046, *The Concise Oxford Dictionary of Current English* at 425, Clarendon Press, (6th ed. 1976).

[45] C-060, *How proximity tools calculate distance*, ARCGIS Desktop (2017). Astronomers measure this way, too, from the surface of one object to the surface of another. *See* C-061, *Apollo 11 Laser Ranging Retroreflector Experiment*, Lunar and Planetary Institute (2017) (detailing use of mirrors on surface of moon to calculate distance).

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

that it lost market share from 2012. On the calendar, the very end of 2012 is effectively the beginning of 2013. It is not "in" 2012.

40. Canada's exceptional reliance on its assertive interpretation of this one word arises from a document offered privately and confidentially, as a draft, to a government minister in the hopes of avoiding this arbitration altogether. Canada's use of it here is shameless, but also irrelevant.[47] All that Canada has derived from the whole document is its interpretation of "from," then claiming that Resolute's unwillingness to fuss over the document earlier must prove its valid and appropriate use.[48] Its use here negates good faith, but it does not make the word "from" mean "starting in."

41. Canada appears to agree. Canada argues that "price data filed by Canada reflect a decrease in the price of SCA paper from December 2012 to January 2013. . . . Whether the Tribunal prefers RISI or Reel Time data," Canada continues, "both show a similar and significant reduction in SCA paper prices in January 2013, necessarily known to the Claimant before December 30, 2012."[49] "From," then, must mean "after," for Canada's reference to the price decrease "from December 2012" is then reported, in the same paragraph, as "in January 2013."[50]

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[47] Canada relies on it heavily. *See, e.g.* Reply Mem'l ¶ 114 n. 204 (quoting from this draft document (R-081) three times without ever identifying it as a draft).

[48] Reply Mem'l ¶¶ 31-32.

[49] Reply Mem'l ¶ 84.

[50] Canada slips on the same greasy spot soon thereafter: "Based on the above, RISI and *Reel Time* data show a decrease in SCB prices in January 2013 . . . ." Reply Mem'l ¶ 86. Canada then shifts ground, accepting a January 2013 price decline but arguing knowledge of the January 2013 decline, and its cause, in December 2012, "which Resolute would have been aware of in December 2012 at the latest." Reply Mem'l ¶ 86.

42. The rest of Canada's argument about "from" and "in" depends upon the last phrase of the sentence just quoted: "necessarily known to the Claimant." What Canada insists Resolute had to have known was that prices were going down in January.

43. There are at least five defects in this argument. First, Canada is building its case on one piece of evidence – prices – and for all of two months.[51] There is considerable contrary evidence in volumes and profits: Resolute's production and sales did not decline over those two months, nor did its profits.[52] And looking before and beyond December 2012 and January 2013 reveals that those two months do not present the kind of trend upon which broader observations could reasonably be made.[53]

44. Second, Canada itself presented evidence that prices did not go down in December. Therefore, Resolute could not have experienced any loss or damage in December when, according to Canada's own evidence, prices held firm.[54] Even if it were "necessarily known" to Resolute that prices were going down in January 2013, they had not yet gone down in December 2012 and so Resolute incurred no loss.

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[51] *E.g.*, Reply Mem'l ¶ 72 (arguing that Resolute knew of a January 2013 price decrease in 2012).

[52] Hausman Statement ¶ 27 ("Q1 2013 volumes were similar to Q1 2012 volumes."); Hausman Statement ¶ 28 ("{T}he margin recovered in January and February 2013, and followed the seasonal pattern of higher contribution margins from September to November and a lower margin in December.").

[53] Hausman Statement ¶ 28 ("Based on the changes to the EBITDA margin, a firm conclusion on injury was not possible until the first quarter of 2013 or later."); Hausman Statement ¶ 31 ("{S}ubsequent financial performance was uneven, so the company could not have ruled out a recovery indicating ordinary market fluctuations, rather than PHP, was the cause of any changes in financial performance.").

[54] R-136, RISI, SCB Prices, "PPI Markets & Prices," (USD/ST).

Professor Hausman's econometric analysis confirms that 2012 pricing was not affected by PHP.[55]

45. Third, it is not uncommon for prices to go down in January because of the seasonality of the business.[56] Resolute saw no causal link in December 2012 between Port Hawkesbury's market re-entry and the lower January 2013 prices, and there were enough other market factors at the time to account for the decrease.

46. Fourth, Canada argues that Resolute must have known that prices were going down in January, 2013 because most supercalendered paper supply contracts are written with a 28-45 day lead time.[57] But Resolute's prices rose in February 2013.[58] By Canada's reasoning, if Resolute were to have known of a January price decline in December, Resolute also would have had to have known in December that prices were going back up in February. If a January decline were to be explained by PHP's growing market presence, there would have been no logical explanation for a rise in February's prices. The only way to explain this price movement would have been to look at market

[55] Hausman Statement ¶ 22 & Table 3.

[56] *See* Hausman Statement ¶ 8; *see also* R-125, Guy Veillette, "Usine Laurentide: arrêt de production de dix jours," *Le Nouvelliste* (Feb. 18, 2012) ("Over the years, Laurentide experienced frequent temporary production shutdowns in the first quarter. The fact that so many mills are involved, both for newsprint and commercial printing paper, will give you an idea of the market. 'After the holiday season, advertisers pick up their business activities a little later, around the beginning of spring,' Mr. Choquette emphasized."). A courtesy translation is attached.

[57] Reply Mem'l ¶¶ 70, 72. Canada also contends that Resolute should have known from its annual contracts that prices for supercalendered paper were dropping. Reply Mem'l ¶ 73. But Canada admits these contracts contain "meet-or-release" provisions that permit renegotiation of pricing. Reply Mem'l ¶ 70. Canada, in summoning another quotation, conveniently omits through ellipses that "many buyers wanted to wait and wait to the last possible minute to see what would happen" in 2012, after the restart of PHP, before negotiating contracts. *Compare* Reply Mem'l ¶ 74, *with* R-083, Transcript of Proceedings before U.S. International Trade Commission in *In re Supercalendered Paper from Canada, Inv*. No. 701-TA-530 (Mar. 19, 2015) at 75:16-22 ("Mar. 19, 2015 U.S. ITC Tr.").

[58] Hausman Statement at Table 1.

factors that had nothing to do with the additional production capacity at Port Hawkesbury.

47. Fifth, because of the uncertainty surrounding whether Port Hawkesbury's operations would last,[59] there was no certainty that Port Hawkesbury, if responsible for depressing prices in January 2013, would continue to do so and, Canada acknowledges, later in 2013 prices went back up,[60] notwithstanding Port Hawkesbury's growing presence in the market.[61]

48. Canada, focusing its argument on one variable – price – for a two-month period – December 2012 and January 2013 – has failed to explain, nor even mention, the contrary data of profits and production volumes for a period of nearly two years.[62] The price data alone could not have been enough to draw the conclusions Canada

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[59] *See* Resolute Counter Mem'l ¶¶ 25-29 (Feb. 22, 2017) (detailing obstacles in restarting PHP) ("Counter Mem'l").

[60] Counter Mem'l ¶ 92; Reply Mem'l ¶ 87.

[61] Canada attempts to impeach Port Hawkesbury testimony before the United States International Trade Commission by claiming that "Canada has challenged certain aspects of the ITC's final determination in its investigation into supercalendered paper from Canada under 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." Reply Mem'l ¶ 61 n.97. Unfortunately for Canada, this statement is entirely inaccurate. Canada has not challenged any aspects of the ITC's final determination, in any forum. As Canada protests that its challenges neutralize anything said at the ITC, presumably the absence of any challenge lends ITC testimony enhanced credibility. Canada has accepted in full and definitively the final determination of the ITC in *Supercalendered Paper from Canada.* Canada has not disputed in any appeal Port Hawkesbury's testimony that it was slow to reenter the market, deliberately avoided disrupting North American markets, and could have incurred no injury on North American competitors in the last quarter of 2012. Canada also quotes American petitioners saying at the ITC that they were injured by prices in 2012, Reply Mem'l ¶ 75, while discounting the contrary testimony of Port Hawkesbury. Counter Mem'l ¶ 71 (citing R-083, Mar. 19, 2015 U.S. ITC Tr. at 14:7-9; C-044, Post Conference Br. of Port Hawkesbury Paper LP, *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, U.S. International Trade Commission at 2 (March 25, 2015) ("PHP Post Conf. Br.")). At best, Canada's selection of evidence yields an inconclusive result.

[62] Hausman Statement at Attachment 3.

thinks Resolute should have drawn, nor would the price data alone have justified such conclusions.[63]

49. Apparently accepting that ”from” cannot mean “in,” Canada releases its grip on December 2012 as the date when damage or loss occurred, substituting an argument that loss or damage necessarily occurred in January 2013 as manifested in a price decline, and that Resolute had to have known in December 2012 that the January 2013 price decline was coming.[64] Canada argues, at length, that it is not necessary for a claimant to know “precisely” the amount or extent of a loss before recognizing the cause of a loss sufficiently to make a claim.

50. Resolute has never said anything in these pleadings on the statute of limitations about the amount or extent of damages, withholding that issue for the merits. Canada, however, complains that Resolute has not engaged on this issue, even as there is nothing in dispute about it.[65] The issue here is not about how much damage Resolute has suffered, but when it suffered a cognizable loss reliably attributable to the Nova Scotia measures resuscitating PHP. Canada’s contrary argument appears to acknowledge that Canada’s jurisdictional claims are bound up with the merits of the case and should not have been segregated into a first phase.

51. Claims asserting causal relationships ought not be brought before there is confidence that the cognizable losses can be attributed to measures breaching NAFTA obligations. Resolute does not contend that it would not have known its January 2013

[63] C-026, Verle Sutton, *The Reel Time Report* at 9 (Mar. 4, 2013) (“All SC producers have acceptable backlogs and pricing is firm. Pricing cannot deteriorate anytime soon, and it appears that producers will be safe at least through Q2.”).

[64] *E.g.*, Reply Mem’l ¶ 69.

[65] *E.g.*, Reply Mem’l ¶ 95.

prices would be lower than its prices in December 2012, although the December 2012 prices were higher than the prices in January 2012. Resolute contends that it did not know in December 2012, and could not have known, that a cause for the decline in prices was PHP. Prices for supercalendered paper often fall in the month of January, sometimes with the same regularity as the New Year following Christmas.[66] That there may have been a new and additional cause in 2013 required a fresh analysis without relying on "gurus" who consistently had been mistaken about PHP's reopening, the timing and extent of its impact.[67]

52. Professor Hausman has explained that demand for supercalendered paper is seasonal,[68] and falling demand frequently coincides with lower prices. As Professor Hausman explained, "{c}onsumption is higher during the second half of the year," but "October and November quantities were not affected by the opening {of PHP}, and the drop off in quantity in December is due to the seasonality of the SCP industry."[69]

53. Canada offers several, inconsistent theories as to when the statute of limitations in this case began to run. Canada posits that Resolute had to have known in 2012 about loss or damage caused by PHP, based entirely on a one-month decline in price following the end of the calendar year, yet Canada also argues that the damage had to have been known at "the moment the Nova Scotia measures were adopted." In the same paragraph, the damage had to have been known upon "the Port Hawkesbury

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[66] *Supra* ¶ 45.

[67] Counter Mem'l ¶¶ 87-89.

[68] Hausman Statement ¶ 8 ("{D}emand for SCP is seasonal.").

[69] Hausman Statement ¶¶ 8, 26.

mill's reopening" on September 28.[70] It had to have been, Canada claims, in August,[71] but in another place, Canada argues that it had to have been upon the closing of PM #10 at Laurentide in November.[72] Or, it had to have been in November or December when negotiating January 2013 prices.[73]

54. Canada also argues that PHP's reopening "prevented a planned price increase for SC paper in the fall of 2012."[74] But Canada never showed that Resolute was planning a price increase in the fall of 2012, and Canada's own evidence shows why: according to *Paper Trader*, only "{s}ome SC producers are . . . announcing a {price} increase."[75] And that increase was "not expected to fly if the capacity restarts at Port Hawkesbury and Dolbeau occurred as planned."[76] Other commentators cited by Canada also determined that Dolbeau's restart would affect pricing. "Resolute's pending restart of its Dolbeau facility adds unneeded capacity as well."[77] Resolute itself, according to the gurus, was responsible, by restarting Dolbeau, for the supposed price increase not materializing for "some SC producers." If additional capacity were the reason for holding back prices and Resolute was adding capacity, then certainly Resolute would not have been looking to raise prices.

55. To sustain its fixation, first on a two-month period, then on the last five months of 2012, Canada must, and does, ignore all the evidence that PHP's reopening

[70] Reply Mem'l ¶ 94.

[71] Reply Mem'l ¶ 89.

[72] Reply Mem'l ¶ 40.

[73] Reply Mem'l ¶ 72.

[74] Reply Mem'l ¶ 88.

[75] Reply Mem'l ¶ 89 (citing R-138, RISI, *Paper Trader* at 1 (Aug. 2012)).

[76] Reply Mem'l ¶ 89 (citing R-138, RISI, *Paper Trader* at 1 (Aug. 2012)).

[77] R-139, ERA Forest Products Research, *ERA Forest Products Monthly* at 27 (Sept. 26, 2012).

was uncertain until, literally, the day it reopened;[78] that its prospects for success after opening were doubted even by its new operators; and the damage or loss it might cause initially had to be understood as transitory, limited, or even non-existent.[79] No responsible corporation would have made durable decisions concerning losses, based on what might happen at Port Hawkesbury, without actual, not speculative evidence of losses.

56. Canada offers no economic evidence or witness to contradict Professor Hausman on this issue. There is no evidence of loss or damage suffered by Resolute in 2012 caused by Port Hawkesbury. There could be, therefore, no "should have known" when there was not yet anything to know.

57. Markets are not like statutes or regulations. Forecasts about markets are always speculative, whereas implementation of a regulation or statute is certain. Canada relies on *Grand River* for the proposition that knowledge of future loss or damage may qualify to run the clock on the statute of limitations, but in that lone example there was, as Resolute already has pointed out, "a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-

[78] Counter Mem'l ¶¶ 100-101; C-044, PHP Post Conf. Br. at Attachment A; C-035, Nova Scotia Press Release, *Province Standing with Strait after Announcement Mill Will Not Reopen* (Sep. 21, 2012).

[79] *See* R-083, Mar. 19, 2015 U.S. ITC Tr. at 14:7-9; C-044, PHP Post Conf. Br. at 2. Canada quotes approvingly counsel for Port Hawkesbury's argument at the ITC (without identifying the speaker) that "PHP should not be considered a new supplier by any stretch," thereby contradicting testimony of his own witnesses that PHP's fate in 2012 was unpredictable. Reply Mem'l ¶ 93 n.163; C-052, Transcript of Proceedings before U.S. International Trade Commission in *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530 (Oct. 22, 2015) at 45:11-47:18 ("Oct. 22, 2015 U.S. ITC Tr."). All that may be proved here is that, even among PHP defenders, there was disagreement and speculation about what to expect in the autumn of 2012, and Canada admits that "PHP did not start printing SC paper at full capacity until later in 2013." Reply Mem'l ¶ 93.

compliance."[80] That payments were not immediately due and there was no immediate cash outlay did not obviate the certain loss or damage incurred by the statute.[81] Here, there is nothing more in December 2012-January 2013 than economic speculation based on a single variable at the expense of all other, contrary data.[82]

58. There could be no reasonable dispute that everyone in the supercalendered paper business was acutely aware after September 28, 2012 that PHP had reopened and would have some effect on the market, but no thoughtful or responsible observer was certain what the effect might be, particularly because of movement and slippage in grades of paper, Resolute's planned withdrawal of PM#10 at Laurentide, Resolute's reopening of Dolbeau, and Port Hawkesbury's historic failures to be competitive. As M. Garneau stated when questioned about a possible PHP restart, Resolute intended to compete "head on" with Port Hawkesbury and "serve {its} customers with the same dedication than . . . before the restart." Resolute even foresaw "some improvement" in the fourth quarter when Canada claims Resolute should have known it had incurred loss or damage.[83] Resolute disputed that it was going to incur loss or damages because of PHP.

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[80] Counter Mem'l ¶ 62 (citing RL-022, *Grand River* ¶ 82).

[81] It is also arguable that the *Grand River* Tribunal was wrong: even certain future loss because of a regulation or statute is not loss actually incurred, which is required by NAFTA's plain language Still, markets are materially different from statutes and regulations and, even if the *Grand River* Tribunal were right, which Resolute does not concede, that decision is wholly distinguishable.

[82] *See* CL-002, *Pope & Talbot* ¶ 12 ("It is not clear to the Tribunal at what stage this loss of production resulted in a necessity to purchase expensive wood chips, except that it can only have arisen at some stage alter implementation of the Export Control Regime.").

[83] *Compare* R-097, Resolute Forest Products Inc. Form 8-K (Aug. 7, 2012) at Ex. 99.2, p. 10 (Transcript of Resolute 2nd Quarter 2012 Earnings Conference Call) ("Resolute Aug. 2012 Earnings Call Tr."), *with* Canada Mem'l ¶ 56 (Dec. 22, 2016) ("Mem'l").

B. What Did Resolute Know, And When Did It Know It?

59. Canada insisted, during its argument for bifurcation, that Resolute "first knew, or should have known, of some cognizable loss or damage from the Nova Scotia measures as soon as Port Hawkesbury reopened and re-entered the market in September 2012."[84] Even as the evidence about PHP's future upon launch confirms that this argument is not plausible, Canada persists with it.[85] Whether Port Hawkesbury would succeed or fail was speculative. The Government of Nova Scotia may have been confident and determined that Port Hawkesbury would become the low cost producer in North America, but competitors and customers were not so sure. The Government of Nova Scotia's tenacity and Port Hawkesbury's new management were unknowns. On the day Port Hawkesbury opened, there is no record that any competitor lost a sale or dropped a price.[86] Across the industry, as Professor Hausman has demonstrated, prices were stable; some even rose.[87]

[84] Bifurcation Hr'g Tr. at 18:25-19:4 (Nov. 9, 2016).

[85] Reply Mem'l ¶¶ 93-94.

[86] *See* C-026, Verle Sutton, *The Reel Time Report* at 4, 5 (Mar. 4, 2013) (explaining that Port Hawkesbury had "unobtrusive output" and competitors were not harmed by PHP reentry); C-044, PHP Post. Conf. Br. at Attachment D (PHP claiming that its"reentry into the market" was not "disruptive" in 2012 and that it moved "seamlessly into the market" and that it "consciously chose not to disrupt the market" by "export{ing} product to third countries"); R-083, Mar. 19, 2015 U.S. ITC Tr. at 76:4-10 ("The first year, our feedback from customers was that we're not so sure that this {PHP} machine will survive. It shut down before; what's to stop it from doing that again?").

[87] Hausman Statement ¶ 17 (citing RISI data at Attachment 2); *see also* R-136, RISI SCB Prices (showing SCB prices held stable from October 2012 through December 2012); Hausman Statement at Attachment 2, RISI SCA Prices (showing SCA prices held stable from October 2012 through December 2012); Hausman Statement at Attachment 4 (showing Resolute's prices rose from October 2012 to November 2012).

60. Counsel for PHP argued before the ITC, "PHP didn't really get into the market until 2013. As such, it's impossible for PHP to cause any injury in 2012."[88] In its Post-Conference Brief, PHP argued, "PHP's entry into the market in late 2012 did not cause a significant disruption in the market and could not have caused any injury in 2012."[89] The Petitioner in that proceeding stated that "{t}he first year, our feedback from customers was that we're not so sure that this {PHP} machine will survive. It shut down before; what's to stop it from doing that again?"[90]

61. Canada attempts to deflect PHP's admission that it was "impossible for PHP to cause any injury in 2012" by claiming PHP also said that "PHP entered the market in the end of 2012."[91] Entry into the market, however, does not equate with instantly damaging competitors. Canada omits the full quotation from the ITC proceeding, which was rendered under the penalty of perjury:

> Fourth, when PHP entered the market in the end of 2012 and the beginning of 2013, it could have brought a fair amount of SC paper to the U.S. market. Rather than do this and deliberately seeking to avoid market disruption, PHP exported this product. PHP acted responsibly with regard to the U.S. market.[92]

62. PHP's own statements are consistent with Prof. Hausman's findings that PHP did not affect the market (or cause Resolute to incur damages) in 2012.[93] These

[88] R-083, Mar. 19, 2015 U.S. ITC Tr. at 14:7-9.

[89] C-044, PHP Post Conf. Br. at 2.

[90] R-083, Mar. 19, 2015 U.S. ITC Tr. at 76:4-10.

[91] Reply Mem'l ¶ 62 (citing R-083, Mar. 19, 2015 U.S. ITC Tr. at 14:22-23).

[92] R-083, Mar. 19, 2015 U.S. ITC Tr. at 14:22-15:2.

[93] *E.g.*, Hausman Statement ¶¶ 14, 22-23, 26, 28.

findings are supported further by industry publications that found PHP had "unobstructive output" and "moved so seamlessly into the market."[94]

63. Canada has turned then to two other arguments: that Resolute closed PM #10 at Laurentide in November 2012 because of Port Hawkesbury, and that Resolute had to have negotiated lower January 2013 prices during 2012.

64. Resolute, however, had been planning the closure of the antique and inefficient PM #10 for a long time, dependent not on Port Hawkesbury, but upon the return of Dolbeau. The closure of PM # 11, in 2014, had not been planned, was not desired or desirable, and was caused by Port Hawkesbury.

65. January 2013 prices were lower than prices in December 2012 just as prices in January 2012 were lower than in December 2011. Demand for paper used for advertising climbs in the autumn anticipating Thanksgiving and Christmas and falls after New Year's with the returns of unwanted presents.[95]

1. <u>The Closure Of Laurentide PM #10 Was Independent Of Port Hawkesbury</u>

66. Resolute demonstrated in its Counter Memorial that Laurentide PM#10 closed because of the Dolbeau restart, and Resolute has made no claim for damages associated with that Laurentide machine. Throughout 2011 and 2012, Resolute repeatedly stated that it wanted to reopen Dolbeau but would do so only if it were to reduce capacity elsewhere. The reduction was inevitably and inescapably in the closure of the aging and inefficient machine at Laurentide PM#10.[96]

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[94] C-026, Verle Sutton, *The Reel Time Report* at 4, 5 (Mar. 4, 2013).

[95] R-139, ERA Forest Products Research, *ERA Forest Products Monthly* at 27 (Sept. 26, 2012) (explaining "weaker months" are December through second quarter of the year).

[96] Counter Mem'l ¶¶ 42-51, 102-107.

67. Canada now disputes Resolute's arguments, even though Canada previously admitted that Laurentide PM#10 closed for the reasons stated by Resolute in its Counter Memorial. Canada chooses isolated statements from the public record and attacks Resolute's President and CEO, Richard Garneau, for saying "I think that capacity will have to be closed elsewhere."[97] M. Garneau, a francophone, says "I think" approximately 50 times during 6 pages of questioning on the conference call upon which Canada relies.[98] The record, as previously confirmed by Canada, establishes that Laurentide PM#10 closed because Dolbeau reopened.

68. It is apparent from M. Garneau's earlier statements that the reopening of Dolbeau necessarily meant the end of PM#10 at Laurentide in the manufacture of supercalendered paper. Resolute's customers could be satisfied with the new production from Dolbeau. PM#10 did not close because of Port Hawkesbury. It would have closed regardless. The resuscitation of Port Hawkesbury did not cause the closure of PM#10 in November 2012. It did cause the later closure of PM#11, in 2014. Resolute claims damages from the closure of PM#11, not from PM#10.

a. Canada Previously Conceded That Laurentide PM#10 Closed Because Of Resolute's Dolbeau Restart

69. Canada concedes, in a headline in its Statement of Defence, that it was "{t}he Claimant's Strategic Business Decision to Shift Production Capacity From the

[97] Reply Mem'l ¶ 49.

[98] C-024, Q3 2011 AbitibiBowater Inc Earnings Conference Call (Oct. 31, 2011). In a shorter conference call, M. Garneau said "I think" approximately 25 times. R-097, Resolute Aug. 2012 Earnings Call Tr. at Ex. 99.2, p. 10.

Laurentide Mill to the Dolbeau Mill."[99] Paragraphs 22 through 26 of the Statement of Defence are reprinted below in full (without citations and headings):

> 22. Mr. Garneau later stated in the Claimant's 2011 annual report that the Claimant was continuing to take steps to "optimize [its] asset base", and that it would "continue to assess profitability at each paper […] operation, focusing production and investments at [its] most competitive and modern facilities, and closing or restructuring higher cost operations." As a result of this strategy, Mr. Garneau explained, the Claimant had already made the decision to permanently close three paper machines, including a machine at its Kénogami mill in Québec. Mr. Garneau also set out the Claimant's business priorities for 2012, including "[c]ontinuing to manage [its] production and inventory levels in line with lower demand", "[p]ursuing a strategy of only bringing profitable tonnes to market", and "[m]aking capital investments at [its] most competitive facilities."
>
> 23. The Claimant continued its asset optimization strategy and began to rationalize its SC paper operations in Québec in August 2012, before the sale of the Port Hawkesbury paper mill closed. Over the next two years, the Claimant reduced its overall production capacity of SC paper and shifted its remaining capacity out of the aged, inefficient and high-cost Laurentide mill and into its other assets, including the more competitive Dolbeau mill.
>
> 24. On August 24, 2012, the Claimant announced that it was restarting its Dolbeau mill. The Dolbeau mill, which currently has a capacity of 143,000 metric tonnes, had been idle since July 2009. The Claimant stated in a news release that it had decided to reopen the Dolbeau mill "follow[ing] the receipt of a notice of acceptance of the tender regarding the sale of electricity to be produced at the Company's Mistassini cogeneration facility to Hydro-Québec." In this news release, Mr. Garneau stated that Resolute had "spared no effort to relaunch the Dolbeau mill because it [was] a good investment" that would make Resolute "more competitive than ever." However, the news release also stated that the Claimant was still "assessing its network of paper mills to ensure that production continue[d] to be balanced."
>
> 25. On November 6, 2012, the Claimant announced that it had decided to permanently shut down one of the two paper machines at the Laurentide mill, reducing the mill's capacity by 125,000 metric tonnes, from over 350,000 to 225,000 metric tonnes annually. In a news release, Mr. Garneau stated that "market demand and capacity, the strong Canadian dollar, rising freight and fuel costs, and the continuing high cost of fiber

[99] SOD at 9. All alterations and bracketing in paragraphs 22-26 quoted below were made by Canada.

> […] factored into management's decision" to shut down the Laurentide paper machine. Mr. Garneau further stated that "Resolute must prove that it is profitable with mills that perform well, which forces us to improve our competitive edge by focusing on our best assets and cutting costs."
>
> 26. In the Claimant's 2012 annual report, Mr. Garneau cited the August 2012 restart of the Dolbeau mill and the November 2012 closure of the paper machine at the Laurentide mill among the highlights of the Claimant's efforts towards "optimizing [its] asset base and investing in [its] future," stating that the Claimant had "made significant progress toward optimizing [its] paper and pulp mill network." Mr. Garneau further explained that "[t]he [Dolbeau] machine was newly built in 1999, and [he] believe[d] that together with the power cogeneration unit, the mill [would] be a highly competitive operation." In contrast, Mr. Garneau stated the Claimant had "rationalized higher cost capacity by closing [the] supercalendered paper machine in Laurentide."

70. Canada's Statement of Defence thus recounts events essentially the same way as Resolute in its Counter Memorial: Resolute was seeking to maximize its production efficiency well before PHP was closed (let alone certain to restart). Reopening Dolbeau required a "balancing" of Resolute's paper mills, which eventually led to the closure of an inefficient machine of nearly identical capacity at Laurentide PM#10.

b. Port Hawkesbury Did Not Cause Laurentide PM#10 To Close

71. Despite offering the same version of events previously, Canada is keen now to impeach Resolute on the basis of a single interview of a single spokesman, Pierre Choquette, who referenced the reopening of Port Hawkesbury In November 2012 when declaring that Resolute's last-ditch efforts to change PM#10 at Laurentide to a different grade or type of paper probably had come to an end. According to the various press reports Canada invokes, M. Choquette emphasized that there were "several

factors" leading to the Resolute conclusion and that Port Hawkesbury may have been among them.[100]

72. Canada asserts that M. Choquette's statements are "unambiguous" and that they "confirm that Resolute knew of a loss or damage alleged to have resulted from Nova Scotia Measures by at least November 6, 2012."[101] But what, exactly, did M. Choquette say?

73. M. Garneau had reported that Resolute would not be increasing its output of supercalendered paper when it would reopen production at Dolbeau.[102] This promise was unambiguous: if a union contract were reached, as well as a new contract with Hydro-Québec, Dolbeau would reopen to produce supercalendered paper.[103] When Dolbeau would reopen to produce supercalendered paper, some other Resolute mill or machine producing supercalendered paper would have to close because there would not be, M. Garneau had promised, an increase in Resolute's output of supercalendered paper.

74. Resolute (and numerous press articles) also stated that the inefficient machine for producing supercalendered paper in the Resolute system was Laurentide PM#10.[104] However much the Mayor of Shawinigan may have hoped to hear or

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[100] Reply Mem'l ¶¶ 36-38 (citing R-117, Guy Veillette, "111 emplois perdus chez Laurentide," *Le Nouvelliste* (Nov. 7, 2012)).

[101] Reply Mem'l ¶ 40.

[102] Counter Mem'l ¶ 43 (citing C-024, Q3 2011 AbitibiBowater Inc. Earnings Conference Call at 11 (Oct. 31, 2011)).

[103] Counter Mem'l ¶ 42 (citing C-023, *AbitibiBowater may restart Dolbeau Mill after workers endorse changes*, *The Canadian Press* (Sep. 23, 2011)); Counter Mem'l ¶ 46 (citing C-027, *Resolute Forest Products buys Boralex cogeneration plant in Dolbeau, Que.*, *The Canadian Press* (Apr. 7, 2012)).

[104] C-025, *C'est terminé la 6 à Kénogami*, *Le Quotiden du jour* (Dec. 13, 2011); C-031, *Dur coup à venir pour l'usine Laurentide?*, *Le Nouvelliste* (Aug. 8, 2012); C-032, *Les rumeurs de*

understand otherwise, there could be no mistaking that when Dolbeau would reopen, PM#10 would be closing.[105]

75. During the autumn of 2010, Resolute experimented with alternatives for PM#10, to produce something other than SCB paper.[106] The economics, however, had not changed. The machine was an inefficient antique, and Resolute was not required to make a new grade of paper just to salvage a machine that was slated for closure. As Canada admits, "{t}he relevant grade to consider for Resolute's other two mills – Laurentide and Dolbeau – is SCB."[107]

76. One journalist characterized M. Choquette as calling Port Hawkesbury a *coup de grace*, but no one actually quotes him using this phrase. Instead, they quote M. Choquette as saying, "We're in a declining market and we're increasing output. . . . For us it was becoming impossible to maintain our efforts on machine #10."[108] M. Choquette was effectively repeating the message, from months before, of his CEO, involving a decision related to Dolbeau, a decision having nothing to do with PHP. M.

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réouverture de la papeterie de Dolbeau-Mistassini inquiètent à Shawinigan, *Radio-Canada* (explaining potential for shutdown at Laurentide Line #10); C-042, Resolute Forest Products Q1 2013 Earnings Call Tr. at 3 (Apr. 30, 2013). Courtesy translations of the French language articles are attached.

[105] 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) (stating that mayor was not surprised that PM#10 closed and noting 40 vacant jobs had not been filled in last few months). A courtesy translation is attached.

[106] *See, e.g.*, R-126, Radio-Canada, "Dolbeau-Mistassini : 20 millions pour rouvrir la papeterie" (Aug. 24, 2012) (claiming tests were ongoing). A courtesy translation is attached.

[107] Reply Mem'l ¶ 85.

[108] R-117, Guy Veillette, "111 emplois perdus chez Laurentide," *Le Nouvelliste* (Nov. 7, 2012). A courtesy translation is attached.

Choquette also acknowledged that a new forestry régime in Québec would be affecting Laurentide PM#10.[109]

77. The same article upon which Canada relies explains repeatedly that the closure of Laurentide PM#10 was "foreseeable" and that "many observers had been predicting the mothballing of this machine for quite some time."[110] The national representative for the Communications, Energy, and Paperworkers Union of Canada described the closure as "not very surprising."[111] Another article reported a Union representative as "understand{ing}" Resolute's decision: "Production in Dolbeau could match that of two machines, one in Kénogami and one at Laurentides. So, if you only operate one machine, you have fewer workers, less maintenance work and, what's more, you have a cogeneration plant {at Dolbeau}."[112] The reopening of Dolbeau was characterized by a professor of Wood and Forest Sciences as "{t}he chronicle of a death foretold."[113]

78. Canada cites statements where Resolute did not say conclusively it was going to close Laurentide PM#10 until November 2012.[114] That Resolute did not want to comment definitively on the future of Laurentide while the Dolbeau re-opening was

[109] R-117, Guy Veillette, "111 emplois perdus chez Laurentide," *Le Nouvelliste* (Nov. 7, 2012).

[110] R-117, Guy Veillette, "111 emplois perdus chez Laurentide," *Le Nouvelliste* (Nov. 7, 2012).

[111] R-117, Guy Veillette, "111 emplois perdus chez Laurentide," *Le Nouvelliste* (Nov. 7, 2012) ("The announcement that had hung in the air for several months over the Laurentide mill at Shawinigan suddenly came down yesterday.").

[112] C-057, Radio-Canada, *Alma: les travailleurs de Produits forestiers Résolu acceptant le plan de restructuration* (Dec. 19, 2012). A courtesy translation is attached.

[113] R-117, Guy Veillette, "111 emplois perdus chez Laurentide," *Le Nouvelliste* (Nov. 7, 2012).

[114] Reply Mem'l ¶¶ 53-57.

not yet certain because of a "major" "dispute with Hydro-Québec"[115] is hardly surprising.[116] That Resolute did not want to discuss the future of Laurentide PM#10 on the same day Dolbeau reopened,[117] particularly when Dolbeau needed two months to come up to speed,[118] is also not surprising.

79. Canada also claims that Laurentide PM#11 "temporarily shut down"[119] as a result of PHP, but ignores that the downtime started around Christmas and continued through January 2, 2013, when seasonal production is already low.[120] An article regarding the shutdown emphasized that Resolute was using the downtime "to find the right solutions with its employees" because "restructuring, with a single machine, is absolutely necessary to this plant to be profitable in the long term."[121]

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[115] R-126, *Radio-Canada*, "Dolbeau-Mistassini: 20 millions pour rouvrir la papeterie" (Aug. 24, 2012).

[116] Indeed, in the article cited by Canada the risk to Laurentide No. 10 was clear even though a final decision could not have been made. R-125, Guy Veillette, " Usine Laurentide: arrêt de production de dix jours," *Le Nouvelliste* (Feb. 18, 2012) (explaining, six months before Resolute reached a deal with Hydro-Québec, that no new developments about PM#10 were available but "{t}here are concerns" about that machine); C-031, *Dur coup à venir pour l'usine Laurentide?*, *Le Nouvelliste* (Aug. 8, 2012) (stating that because Dolbeau had yet to reopen, "{w}e will see, when there are any developments regarding Dolbeau, what the impact might be on the other mills."). Courtesy translations of both articles are attached.

[117] R-126, *Radio-Canada*, "Dolbeau-Mistassini : 20 millions pour rouvrir la papeterie" (Aug. 24, 2012).

[118] Hausman Statement ¶ 10; *see also* C-052, Oct. 22, 2015 U.S. ITC Tr. at 239:22-240:6 (detailing PHP efforts to requalify its paper with customers).

[119] Reply Mem'l ¶ 41.

[120] C-058, Radio Canada, *Usine Laurentide à Shawinigan: retour au travail* (Jan. 3, 2013); s*ee also* Hausman Statement ¶ 8; R-125, Guy Veillette, "Usine Laurentide: arrêt de production de dix jours," *Le Nouvelliste* (Feb. 18, 2012) ("Over the years, Laurentide experienced frequent temporary production shutdowns in the first quarter. The fact that so many mills are involved, both for newsprint and commercial printing paper, will give you an idea of the market. 'After the holiday season, advertisers pick up their business activities a little later, around the beginning of spring,' Mr. Choquette emphasized."). Courtesy translations are attached.

[121] R-120, Guy Veillette, "Un marché difficile, répète Produits forestiers Résolu," *Le Nouvelliste* (Dec. 19, 2012). A representative of the Communications, Energy and Paperworkers Union was reported as "believ{ing} that machine #11 was shut down because the workers recently

80. Far from believing it was damaged by the PHP resuscitation, Resolute explained that "{w}e're convinced that this plant can be profitable with only one machine" if the right solutions were found, which was the purpose of the downtime.[122] Resolute made capital improvements to Laurentide PM#11 in 2012 to increase efficiency and ensure the machine remain profitable.[123]

c. Resolute Did Advance Evidence That Laurentide PM#10 Would Close

81. Canada argues that "{t}he Claimant has advanced no evidence – no witness testimony or internal memoranda 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."[124] That statement is false.

82. Resolute has explained and documented the decision to reopen Dolbeau and, therefore, retire PM#10. Resolute made clear, starting in September 2011, that it would seek to reopen Dolbeau but only if "capacity will . . . be closed elsewhere. So it is not going to be a net increase in terms of production."[125] PM#10's size, age and

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voted not to reopen their employment contract." C-057, Radio-Canada, *Alma: les travailleurs de Produits forestiers Résolu acceptant le plan de restructuration* (Dec. 19, 2012). Laurentide PM#11 restarted after workers made concessions to ensure the plant remained profitable. C-058, Radio Canada, *Usine Laurentide à Shawinigan:retour au travail* (Jan. 3, 2013).

[122] R-120, Guy Veillette, "Un marché difficile, répète Produits forestiers Résolu," *Le Nouvelliste* (Dec. 19, 2012); *see also* C-058*,* Radio Canada, *Usine Laurentide à Shawinigan:retour au travail* (Jan. 3, 2013).

[123] Counter Mem'l ¶¶ 47, 114.

[124] Reply Mem'l ¶ 44.

[125] C-023, *AbitibiBowater may restart Dolbeau Mill after workers endorse changes*, *The Canadian Press* (Sep. 23, 2011); C-024, Q3 2011 AbitibiBowater Inc. Earnings Conference Call at 11 (Oct. 31, 2011).

inefficiency – termed by Resolute as "obsolete and at the end of its useful life" – made it ripe for closure if Dolbeau were to reopen.[126]

83. The additional articles provided by Canada also support Resolute's explanation that Laurentide PM#10 closed because of Dolbeau, not PHP. One article called the re-launch of Dolbeau a "$20 million" investment that Resolute "had been working {on} for nearly 18 months."[127] As Resolute stated in its Counter-Memorial, it had an "eighteen month plan to reopen Dolbeau (which required capacity closures at inefficient machines such as Laurentide #10)."[128]

84. Canada relies on *Gallo v. Canada*, quoting that decision as stating that "Claimant . . . has not been able to produce one single shred of documentary evidence.""[129] But missing, courtesy of Canada's well-placed ellipses, is the key phrase: "after extensive discovery."[130] Here, Canada told the Tribunal that "document production will {not} be required in the jurisdictional phase." Canada cannot complain now that it cannot muster evidence to support its motion to dismiss.

2. Falling Prices May Matter When They Fall, But Not Until They Fall

85. There is no disagreement between the parties that prices matter and that falling prices can lead to damages. But falling prices do not do damage (if and when they do) until they fall, and rarely without other indicia of damage.

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[126] C-031, *Dur coup à venir pour l'usine Laurentide?*, *Le Nouvelliste* (Aug. 8, 2012). As Canada has acknowledged, Dolbeau has a 143,000 tonne capacity, while Laurentide PM#10 had a 125,000 tonne capacity. Reply Mem'l ¶ 66 n.109; SOD ¶ 25.

[127] R-126, Radio-Canada, "Dolbeau-Mistassini : 20 millions pour rouvrir la papeterie" (Aug. 24, 2012).

[128] Counter Mem'l ¶ 107.

[129] Reply Mem'l ¶ 44 (ellipses in Canada Reply Memorial).

[130] RL-071, *Gallo* ¶ 289.

86. Canada speculates that "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."[131] Elsewhere, Canada argues August or September or November or December, any time before December 31.[132] But its authority for this statement is Professor Hausman,[133] who did emphasize the importance of price, but who said nothing to support the statement that "prices were impacted at that time." For that statement, despite the footnote to Professor Hausman, Canada has no authority.

3. A Strawman's Argument About Quantum

87. Canada marshals case law that Resolute did not need to know the "full quantum of its alleged loss or damage."[134] There is no disagreement here. The quantum, full or partial, is a merits issue. At no time has Resolute ever suggested anything to the contrary. Canada's "reply" is not answering anything.

88. There is a dispute about cause. The standard refers to when Resolute knew or should have known that injury it incurred was caused by Port Hawkesbury. When, year in and year out, prices rise toward the holidays and fall in the new year, there is no reason to search for a new cause when prices behave as they typically have behaved in the past. There may be new factors to consider in the marketplace. They may be recognized, publicly or privately, but their causal impact cannot be assumed.

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[131] Reply Mem'l ¶ 73.

[132] Reply Mem'l ¶¶ 77 (September), ¶ 79 (November), ¶ 83 (December), 89 (August).

[133] Reply Mem'l ¶ 73 n.122.

[134] Reply Mem'l ¶¶ 95-103.

89. Canada continues to rely upon *Grand River*, *Mondev*, and *Bilcon* to support its arguments, but fails to rebut Resolute in distinguishing these decisions. Instead, Canada claims, without any analysis, that "{t}he Claimant's attempt to distinguish *Mondev*, *Grand River* and *Bilcon* on the facts has no merit."[135] But as Resolute demonstrated, those cases all involved damage that was certain to have been caused by the breaches.[136] "No merit" has no merit without content.

90. Canada attempts to bolster its arguments by relying upon four additional non-NAFTA decisions, all of which are distinguishable. In each case, there was no serious dispute that the incurred damage was caused by the breaches. In *Rusoro Mining v. Venezuela*, a letter written by the claimant to the respondent government at or around the time of the measures acknowledged the harm caused by the breaches.[137] In *Corona Metals v. Domincan Republic*, the claimant also wrote a letter to a government minister more than three years before it brought arbitration, admitting that the breaches in question would cause millions in damage.[138] In *Ansung Housing v. China*, the claimant pled specific acts of damage arising more than three years before it brought

[135] Reply Mem'l ¶ 102.

[136] Counter Mem'l ¶¶ 59-63.

[137] RL-030, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award ¶ 216 (Aug. 22, 2016) ("In this letter, Claimant complains about the June 2009 {measures}, and states that these measures establish "[. . .] new rules for the sale of gold which harm our gold production companies alone.") (second alteration in the original).

[138] 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 ¶¶ 234, 237 (May 31, 2016) ("[I]f the Environmental License and the Terms of Reference for the Private Port are not issued the damages to {the claimant} arising from the violations of [Environmental] Management would be USD 342 Million.") (first and third alterations in original).

arbitration.[139] And in *Spence v. Costa Rica*, the alleged claims involved the taking of "valuable residential real estate," so that the damage incurred was known to be caused by the breaches at the time they occurred.[140]

91. The holding in *Pope & Talbot* is consistent with these rulings, finding that "{t}he critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur."[141] The potential that loss or damage may occur is not sufficient to trigger the statute of limitations – damages caused by the breaches must have occurred, or be certain by law to occur, for the statute of limitations to start running.

92. As Professor Hausman observed, "the margin recovered in January and February 2013, and followed the seasonal pattern of higher contribution margins from September to November and a lower margin in December."[142] With the consistency of the pattern came consistency in the explanation. Even had there been injury incurred in in 2012 or even early 2013 (and Professor Hausman says there was not), there was no reason for Resolute to have known that it would have been incurred by Port Hawkesbury. There were no new patterns or trends requiring new explanations.

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[139] RL-082, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 Award ¶ 107 (Mar. 9, 2017) ("{T}he record is clear that Claimant repeatedly pleaded facts setting the date at which it 'first acquired . . . the knowledge . . . that [it] had incurred loss or damage' to be" more than three years before bringing arbitration) (ellipses and second alteration in original).

[140] *See* RL-028, *Spence* ¶ 230.

[141] CL-002, *Pope & Talbot* ¶ 12.

[142] Hausman Statement ¶ 28.

C. Resolute Acquired Knowledge Of Certain Breaches After December 30, 2012

93. Resolute did not know about two breaches until after December 30, 2012. First, Resolute did not and could not have known it was substantially deprived of its investment in Laurentide until October 2014, when the mill closed. Only then did Resolute's Article 1110 claim become ripe. Second, Resolute could not have known that Nova Scotia had passed a regulation mandating that a biomass facility remain on full-time until January 2013, when Nova Scotia enacted the regulation and thus conferred a C$6-$8 million benefit on PHP.

1. Resolute Could Not Bring its Expropriation Claim Absent A Substantial Deprivation

94. Resolute was not substantially deprived of its Laurentide mill until October 2014, when the mill had to be closed, which is less than three years before Resolute's Article 1110 claim was submitted. Only then could Resolute bring its expropriation claim under Article 1110, because it would not have been ripe earlier under Articles 1116(1) or 1117(1).

95. Canada does not dispute that Article 1110 requires a substantial deprivation of the expropriated investment and not a reduction in profits.[143] And Canada does not dispute that Resolute's expropriation claim could not become ripe and brought in arbitration until "the governmental act must have directly or indirectly taken a

[143] *See* CL-026, *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award ¶ 242 (Aug. 2, 2010) ("*Chemtura*") ("For a measure to constitute expropriation under Article 1110 of NAFTA, it is common ground that (i) bad faith on the part of the Respondent is not required, and (ii) the measure must amount to a substantial deprivation of the Claimant's investment,"); CL-013, *Merrill & Ring Forestry L.P. v. Government of Canada,* UNCITRAL, Award ¶ 145 (Mar. 31, 2010) ("*Merrill & Ring*"); CL-015, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, ¶¶ 101-102 (June 26, 2000); Counter Mem'l ¶ 110.

property interest resulting in actual present harm to the investor."[144] Canada offers no other decisions or analysis to rebut these tribunals, despite calling Resolute's claim "concocted" and "bizarre."[145]

96. Canada also claims that Resolute "has not produced 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," which is neither the standard for this jurisdictional phase nor the standard for an Article 1110 claim.[146]

97. Canada attacks the implications of Resolute's claim: "there would be nothing to stop . . . 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)."[147] If the implications of Canada's theory may be troubling for defendant governments, the implications of Canada's attack may be even more problematic for potential claimants. NAFTA's provisions permit claims for *de facto* and indirect expropriations that may not occur instantly or quickly with the institution of government measures, but Canada's theory would bar all such claims: a claimant could be forced to bring an unripe NAFTA expropriation claim in response to a government measure that necessarily would be dismissed, thereby preventing an investor any opportunity at compensation for indirect expropriations that take longer than three years to ripen.

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[144] CL-025, *Glamis Gold v. United States of America*, UNCITRAL, Award ¶ 328 (June 8, 2009).

[145] Reply Mem'l ¶ 111.

[146] CL-026, *Chemtura* ¶ 242 (explaining that "bad faith on part of the Respondent is not required" to advance an expropriation claim).

[147] Reply Mem'l ¶ 113.

98. Canada, citing isolated statements from Resolute's Notice of Arbitration, argues that Resolute's Article 1110 claim is time-barred because Resolute supposedly alleged that its sales and market share were expropriated and Resolute should have known by December 30, 2012.[148] But, as Canada states, "sales and market share" cannot be the basis for an expropriation claim under Article 1110. Resolute's expropriation claim concerns the final closure of Laurentide in 2014.[149] Article 1110 requires a "substantial deprivation," such as the loss of the Laurentide mill.[150] Losses of sales and market share are cognizable damages, but they are not of themselves "expropriated" pursuant to Article 1110.

2. Resolute's Electricity Allegations Encompass The Renewable Energy Benefits Nova Scotia Provided PHP

99. Canada does not contest the facts regarding the Renewable Electricity Regulations the Nova Scotia Government enacted in January 2013. PHP needed steam from an adjacent biomass facility to run the factory, which in turn needed to run full- time even though PHP would pay for only 24 percent of the cost. To rectify the imbalance (full-time operations on behalf of PHP, but with PHP paying only a fraction of the cost), the Nova Scotia Government enacted a special regulation. Nor does Canada dispute that Nova Scotia Power first admitted in October 2015 that passing this

[148] Reply Mem'l ¶¶ 114-115. Canada uses the term "Notice of Arbitration" interchangeably with Statement of Claim. Reply Mem'l ¶ 7 n.4.

[149] Reply Mem'l ¶ 115 ("Canada denies that sales and market share are assets capable of being expropriated as contemplated by NAFTA Article 1110 . . . .")

[150] Canada attempts to recast Resolute's claim as one of "continuing damage" or a "continuing breach," incorrectly suggesting that Resolute is contending lost "sales and market share" are the bases for Resolute's Article 1110 claim. Reply Mem'l ¶ 115. The 2014 loss of Laurentide altogether is the basis of Resolute's Article 1110 claim.

regulation conferred a C$6-$8 million benefit on PHP.[151] Canada, instead, contends that Resolute failed to present this claim in its Statement of Claim and, therefore, is time-barred from doing so now.

100. Resolute's Statement of Claim discussed the province's electricity package for PHP multiple times, including: (1) "{t}he provincial government enabled the investors to obtain preferential electricity rates from the local utility";[152] and (2) "{i}n the NSUARB-proceedings, Nova Scotia Power stated that it began discussions with PWCC '{a}t the request of the government of Nova Scotia and the Monitor' as soon as PWCC was selected for exclusive negotiations to buy the Port Hawkesbury mill, and it recognized that 'a new and innovative approach is necessary.'"[153] Receiving a C$6-$8 million benefit representing 76 percent of the cost of a biomass facility reasonably defines a "preferential electricity rate" and "a new and innovative approach."

101. A paper mill needs steam to dry the paper. Nova Scotia Power operated a biomass facility adjacent to the PHP mill that could supply steam.[154] In the regulatory proceeding, PHP stated, "{i}t is essential that it otherwise have cost certainty with respect to . . . its electricity and steam costs."[155] Other articles reported that "Port Hawkesbury Paper . . . convinced the previous provincial government it would not reopen the shuttered NewPage mill unless the biomass plant on the same property also

[151] Counter Mem'l ¶ 117.

[152] Resolute Statement of Claim ("SOC") ¶ 5 (Dec. 30, 2015).

[153] SOC ¶ 40 (second alteration in original).

[154] R-062, *In the Matter of an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Nova Scotia Utility and Review Board (Aug. 20, 2012) ¶ 156 ("To operate, the mill needs steam.").

[155] C-056, Pre-Filed Evidence of Pacific West Commercial Corporation at 19:19-22 (Apr. 27, 2012).

ran full time."[156] This measure was part of the electricity benefits received by PHP and identified by Resolute in its Statement of Claim..

102. Despite these facts, Canada argues that Resolute's position constitutes an amendment to the claim that must be introduced pursuant to Article 20 of the UNCITRAL Rules. That rule permits supplementation unless it prejudices the opposing party. The *Grand River* Tribunal, cited by Canada, found at the jurisdictional stage that "the cases cited by Respondent in which other tribunals have refused amendments often involve amendments offered at a considerably later stage in the proceedings, sometimes at the final hearing or even in a submission after the final hearing."[157] If amendment were necessary (and Resolute believes it is not), then the Tribunal should permit Resolute to amend. Canada's only prejudice would be in defending a claim brought by Resolute, as the parties are not even at the merits phase and Canada has identified no specific jurisdictional objection it could have raised with respect to Nova Scotia's Renewable Energy Regulation.

IV. THE NOVA SCOTIA MEASURES HAVE A CAUSAL NEXUS TO RESOLUTE AND ITS INVESTMENT

103. Resolute alleged in its Statement of Claim that the Nova Scotia Government adopted numerous measures to make PHP its national champion. For PHP to be a national champion, by its own reckoning, it would need to be the low cost

[156] C-059, Jennifer Henderson, *Nova Scotia Power ratepayers foot $7M bill for Port Hawkesbury Paper*, *CBC News* (Oct. 20, 2015).

[157] RL-022, *Grand River* ¶ 98 (noting approach to amendments is "liberal"). The *Methanex* Tribunal permitted the Claimant to amend its claims even after the issuance of the Partial Award on jurisdiction but not another amendment that "was made very late, after the conclusion of the first week of the main hearing in June 2004 . . . ." RL-054, *Methanex Corporation v. United States of America,* UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) ("*Methanex* Final Award") Part II, Chapter C ¶ 6 and Part II, Chapter F ¶ 28.

producer of SC paper. PHP, as the low cost producer, would (if successful), eventually be able to price its paper lower than its competitors and cause them damage.

104. Article 1101(1) is an introductory provision requiring measures "relate to" an investor or investments. Canada seeks to interpret this provision as a narrow gateway requiring a "legally significant connection," thus interpreting "relate to" more narrowly and restrictively than NAFTA's plain language or its jurisprudence. Canada's courts and NAFTA tribunals do not support Canada's interpretation. They require only "some connection" or a "causal nexus." Even the tribunals that adopt Canada's "legally significant connection" labelling do not treat Article 1101(1) as narrowly as Canada suggests.

105. The labels are not reliably instructive. Some tribunals refer to a "legally significant connection" after *Methanex,* but their reasoning is not so restrictive.[158]

106. Canada also accuses Resolute of evolving its claims to raise a sinister conspiracy[159] even though Resolute's allegations have not changed and Resolute charged Nova Scotia, as an alternative argument if a "legally significant connection" were required, with protectionism that harmed Resolute. Although Resolute's claims would survive under Canada's unduly narrow reading and application of Article 1101(1), the Tribunal need not reach this question. Resolute has alleged facts that establish a

[158] Counter Mem'l ¶¶ 126-130 (citing CL-003, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶¶ 2, 100, 105, 163, 169-175, 180, 208 (Sep. 18, 2009) ("*Cargill* ")); Counter Mem'l ¶¶ 141-150 (citing RL-051, *Apotex II* ¶¶ 6.13, 6.20, 6.24, 6.26, 6.28; CL-007, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware, Inc. v. Government of Canada,* UNCITRAL, Award on Jurisdiction and Liability ¶¶ 235, 241 (Mar. 17, 2015) ("*Bilcon*"); RL-005, *Bayview* ¶¶ 14, 28, 93, 101, 104, 108, 122). These decisions are discussed in more detail below. *Infra* ¶¶ 110-115.

[159] Reply Mem'l ¶¶ 133, 135.

"causal nexus" between the Nova Scotia Measures and Resolute sufficient to satisfy Article 1101(1).

A. Article 1101(1) Requires Only A Causal Nexus

107. Article 1101(1) provides that NAFTA Chapter 11 "applies to measures adopted or maintained by a Party relating to" investors or investments of another party. Article 1101(1) requires only a "causal nexus" between the measures and the investor/investment. It is not meant to be an "unduly narrow gateway." It requires only "some connection."[160] Canada now argues that "'{c}ausal connection' and 'causal nexus'" mean essentially the same thing as "legally significant connection." Canada, thus, apparently concedes that a "legally significant connection" does not require a "legal barrier," "direct legal applicability of the impugned measure to the claimant's investment," or "direct connection of legal significance,"[161] to establish NAFTA jurisdiction under Article 1101(1).

108. Canada criticizes Resolute's use of the "some connection" test,[162] yet fails to acknowledge (let alone address) that the test emerges from its own national courts. Canada ignores discussion of the Ontario Superior Court's ruling that Article 1101 imposes a low threshold, requiring only "some connection" between "the measures and

[160] CL-004, *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656 ¶ 57, *aff'd* 2011 ONCA 622, *application for leave to appeal dismissed*, 2012 CanLII 25159 (SCC); RL-051, *Apotex Holdings Inc. & Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award ¶ 6.20 (Aug. 25, 2014) ("*Apotex II*"); CL-005, *Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-17, Award ¶ 259 (Mar. 24, 2016) ("*Mesa Power*").

[161] Mem'l ¶ 88; Reply Mem'l ¶ 120.

[162] *See* Reply Mem'l ¶ 126.

the investor/investment" and not requiring "that the measure{s} be adopted with the express purpose of causing loss."[163]

109. Canada also ignores the award in *BG Group Plc. v. Republic of Argentina* that found "relating to" could not be given the restrictive meaning assigned to it by the *Methanex* Tribunal because exceptions enshrined in other NAFTA Articles would be unnecessary if some "legally relevant connection" beyond or in addition to "effect" were necessary for a measure to be within the scope of the signatories' obligations.[164]

110. Instead of addressing these precedents, Canada attempts to fashion a new test requiring "{p}roximity between the measure and the investor or its investment."[165] In pursuit of this new test, Canada recycles arguments from its initial Memorial regarding *Cargill*, *Apotex II*, *Bilcon*, and *Bayview*.[166] Canada cites no new support for its new "proximity" standard, and fails to identify exactly how much proximity it thinks is necessary to satisfy Article 1101(1).

111. Canada claims that the *Cargill* Tribunal did not reject the "legally significant connection" test even though it found the test might be "too restrictive."[167] But, as Resolute explained in its Counter-Memorial, the *Cargill* Tribunal made no findings that the tax on high-fructose corn syrup ("HFCS"), one of two measures at

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[163] CL-004, *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656 ¶ 57, *aff'd* 2011 ONCA 622, *application for leave to appeal dismissed*, 2012 CanLII 25159 (SCC).

[164] CL-006, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award ¶¶ 227-231 (Dec. 24, 2007). The *Methanex* Tribunal had determined that a "legally significant connection" must be demonstrated between the measure and the investor or its investment for a measure to be one "relating to" an investment within the meaning of Article 1101(1). *See* CL-001, *Methanex* Partial Award ¶ 147.

[165] Reply Mem'l ¶ 125.

[166] *Compare* Memorial ¶¶ 87-92, *with* Reply Memorial ¶¶ 121-124.

[167] Reply Mem'l ¶ 123; CL-003, *Cargill* ¶ 175.

issue, constituted a legal impediment to Cargill's business in Mexico.[168] The tribunal thus found that Mexico "conditioned a tax advantage on domestically produced cane sugar for the very purpose of affecting the sale of HFCS."[169]

112. To overcome this deficiency, Canada wrongly claims that the tax on high-fructose corn syrup ("HCFS") "applied to the product that the investor was shipping to its Mexican subsidiary."[170] But "{t}he tax applied to the soft drink price, not the HFCS price;" the HCFS tax "imposed a 20% tax on the internal transfer or importation of carbonated soft drinks and certain other beverages, syrups, powders, and concentrates" that neither Cargill nor its Mexican subsidiary produced.[171] Cargill – who was not the only producer of HFCS in the Mexican market – explained in its Notice of Arbitration: "As soon as the tax became effective . . . Mexican producers of beverages and concentrates were forced to cancel orders of HFCS and resume their use of cane sugar as a soft drink sweetener, because the tax precluded them from being able to use HFCS cost-effectively as a sweetener."[172] The tribunal's award, which accepted the claimant's position, was upheld by the Ontario Superior Court.[173]

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[168] Counter-Mem'l ¶ 130.

[169] CL-003, *Cargill* ¶ 2.

[170] Reply Mem'l ¶ 121.

[171] CL-003, *Cargill* ¶¶ 105, 107; *see also* CL-003, *Cargill* ¶¶ 64-67, 74-80 (detailing Cargill's business operations in Mexico).

[172] CL-039, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 Request for Institution of Arbitration Proceedings ¶ 54 (Dec. 29, 2004); *see also* CL-003, *Cargill* ¶¶ 77, 80 (detailing percentages of Mexican market held or sought by the claimant).

[173] CL-004, *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656, *aff'd* 2011 ONCA 622, *application for leave to appeal dismissed*, 2012 CanLII 25159 (SCC).

113. Canada attempts to distinguish *Apotex II,* but that tribunal held it was

> inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven's substantive provisions for the merits of the Claimants' claims. For jurisdictional purposes, the threshold is necessarily different under NAFTA Article 1101(1), given the ordinary meaning of the connecting phrase "relating to."[174]

The *Apotex II* Tribunal later stated that, "there is no reason to interpret or apply NAFTA Article 1101(1) as an unduly narrow gateway to arbitral justice under Chapter Eleven."[175] Canada cites language from *Apotex II* stating the measure in that case specifically affected the claimants.[176] But the *Apotex II* Tribunal used that language to distinguish the *Methanex* decision, which found there was an "indeterminate and unknown" "class of investors."[177]

114. The tribunal in *Bilcon* analyzed whether the claimant, a partner with a company (Nova Stone) that had rights to a proposed quarry, could bring a claim under NAFTA based upon claimant's partnership agreement with Nova Stone.[178] The issue, which Canada does not dispute in its Reply, was whether "Bilcon qualified as an investor for purposes of Chapter Eleven of NAFTA" based upon this partnership.[179] The

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[174] RL-051, *Apotex II* ¶ 6.20.

[175] RL-051, *Apotex II* ¶ 6.28. The *Apotex II* Tribunal's statement that it viewed no difference in the legal interpretation of Article 1101(1) by the *Cargill* and *Methanex* Tribunals demonstrates that Canada's interpretation of "relate to" would cause an "unduly narrow gateway to arbitral justice." RL-051, *Apotex II* ¶ 6.13.

[176] Reply Mem'l ¶ 121 (citing RL-051, *Apotex II* ¶ 6.24 ("{T}he Import Alert 'more than affected, uniquely, both Apotex Inc. and Apotex-US {which} was by far the enterprise most immediately, most directly and most adversely affected by the Import Alert.")).

[177] RL-051, *Apotex II* ¶ 6.24.

[178] CL-007, *Bilcon* ¶ 241.

[179] CL-007, *Bilcon* ¶ 241; *see also* CL-007, *Bilcon* ¶ 233 (explaining that Canada's position was that Bilcon had no rights over the quarry because industrial approval was granted only to Nova Stone).

tribunal found that the partnership agreement was sufficient to give the claimant "standing to raise challenges under Chapter Eleven."[180]

115. Canada essentially concedes that Resolute's analysis of *Bayview* was correct,[181] stating that "the tribunal was concerned with the claimant's decision to invest in farms and irrigation equipment in Texas rather than Mexico . . . ."[182] The *Bayview* Tribunal did not determine whether the measures in question "related to" the claimants because the tribunal did not find it necessary to resolve that issue: the claimants had no investment in Mexico.[183]

116. The *Mesa Power* Tribunal found that the "causal nexus" required by Article 1101(1) was satisfied even though none of the measures at issue – regarding the claimant's failure to receive a contract under Ontario's feed-in tariff program ("FIT Program") – caused the claimant a legal impediment.[184] Canada contends "the claimant argued {it received} improper treatment . . . as an applicant" to the FIT Program,[185] but it was the "design and implementation of the FIT Program, as well as the directives of the Minister of Energy" that caused the claimant not to receive any contracts, not any treatment afforded specifically to the claimant.[186]

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[180] CL-007, *Bilcon* ¶ 241.

[181] Counter Mem'l ¶¶ 148-150 (explaining the issue in dispute was whether claimant could seek redress against a NAFTA party for an investment made in a different NAFTA country).

[182] Reply Mem'l ¶ 121.

[183] RL-005, *Bayview* ¶¶ 108 n.105 & 122.

[184] CL-005, *Mesa Power* ¶¶ 254, 259.

[185] Reply Mem'l ¶ 121.

[186] CL-005, *Mesa Power* ¶ 37.

117. Canada contends that Resolute's interpretation of Article 1101(1) and the awards of other tribunals would "create a limitless class of affected investors."[187] The tribunal in *Cargill*, for example, permitted the claimant to advance its claim even though it was not the sole potential investor affected by the HFCS tax. However, and as Resolute previously explained, the class of potential investors here is not "limitless" because it consists of (at most) five companies in North America, only one of whom has standing under NAFTA.[188]

B. The Nova Scotia Measures "Relate To" Resolute

118. The Nova Scotia Measures have a "causal" nexus to Resolute and its investments in Canada. Those measures were not aimed specifically at Resolute and were not required to "be adopted with the express purpose of causing {Resolute} loss,"[189] but the measures eventually harmed Resolute directly.

119. Canada claims incorrectly that "Claimant inappropriately adds a new claim" to avoid dismissal under Article 1101 by "attempting to transform the intention of the series of measures from making the Port Hawkesbury mill the 'national champion' into a series of measures intended 'to harm a foreign investor.'"[190] According to Canada, Resolute's claims have "evol{ved} . . . for the sake of establishing jurisdiction" and that Resolute "alleges a grand, far-fetched conspiracy, this one between PHP and the Government of Nova Scotia . . . not just to establish the 'lowest cost operator in

[187] Reply Mem'l ¶ 126.

[188] Counter Mem'l ¶ 145 (citing SOC ¶¶ 46, 57, 59).

[189] CL-004, *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656 ¶ 57, *aff'd* 2011 ONCA 622, *application for leave to appeal dismissed* 2012 CanLII 25159 (SCC).

[190] Reply Mem'l ¶ 128.

North America' but to purposefully undermine a foreign investor operating in another province."[191]

120. Nowhere does Resolute allege a conspiracy, much less "a grand, far-fetched conspiracy." As Resolute stated in its Counter-Memorial, "{i}ntentionally discriminatory acts of protectionism may be committed openly, in the honest but mistaken belief that harming the foreign investor is a legitimate means of aiding domestic producers." [192] Resolute began alleging this scenario (not the conspiracy suggested by Canada) at the outset of this arbitration.

121. Resolute's position is that a company that Is assured national champion status by the government inevitably will compete with other producers in North America. Resolute explained that its Statement of Claim alleged measures "which {were} not aimed specifically at, but directly impacted" Resolute.[193] This allegation has not "evolved." It is based in significant part on statements made by the Nova Scotia Government and PHP officials that PHP was to be "the lowest cost operation in North America" (hence, a continental champion) and "the lowest cost and most competitive producer" of SC paper. Other allegations in Resolute's Statement of Claim noted that the Nova Scotia measures gave PHP "competitive advantages above any other SC paper producer, including Resolute," which eventually had "a devastating impact on the viability and competitiveness of Resolute's three SC Paper mills in Canada.[194]

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[191] Reply Mem'l ¶¶ 133, 135.

[192] Counter Mem'l ¶ 153.

[193] Counter Mem'l ¶ 152.

[194] *See* SOC ¶¶ 4, 47; *accord* Counter Mem'l ¶ 152. Canada asserts that PHP's predatory pricing was done by a "private actor," and not the Nova Scotia Government. Reply Mem'l ¶ 143. But the Nova Scotia Measures provided the financial backing to PHP so that it could enact predatory pricing. The Nova Scotia Government, as evidenced by its public statements, knew

122. Eventually the Nova Scotia Measures harmed Resolute even though they were not, and did not have to be, aimed at Resolute specifically. Their intent was to harm competitors, among whom Resolute was the lone foreign investor in Canada. Resolute was put in the same position as the claimant in *Cargill* with respect to the HCFS tax. In both instances, the measures were directed at entities other than the claimants: soft drink manufacturers in *Cargill,* Resolute in this case. In both instances, the measures affected the claimant: Cargill lost business because of the HCFS tax, and Resolute lost business because of the competitive advantages provided to PHP by the Nova Scotia Government. In both instances, the class of similar investors was limited: to the other HCFS manufacturers in the Mexican market, and to the other SC paper producers in North America. The Nova Scotia Measures, thus, have a causal nexus to Resolute that satisfies Article 1101(1), just as Cargill had.

123. Resolute also has demonstrated that it would satisfy Article 1101(1) even if the Tribunal were to apply Canada's "legally significant connection" test based upon *Methanex.*[195] Although not required to do so, Resolute demonstrated that it met this alternative test because: (1) PHP engaged in predatory pricing in 2013, enabled by the Nova Scotia Measures; (2) the Nova Scotia Measures were intended to make PHP's competitors in the SC paper market less competitive relative to PHP; and (3) in a

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the potential implications of enacting its measures. Canada, therefore, should not be permitted to evade responsibility by supplying the preconditions that ultimately permitted PHP to harm Resolute.

[195] Counter Mem'l ¶ 153.

shrinking market, PHP eventually would push higher-cost producers out of business because of government measures lowering PHP's costs.[196]

124. Canada complains that Resolute's allegations are speculative and contrary "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 less quality paper."[197] But the Nova Scotia Measures were intended to make PHP the lowest cost SC paper producer, which would ultimately drive business to PHP and away from competitors such as Resolute.[198] In Premier Dexter's words, "{t}he key for Nova Scotia was this mill operates for the long term" and that it "become a leader."[199] There is no serious dispute that PHP, to accomplish these goals successfully, would eventually have to capture its competitors' market share in a market of declining demand, despite the efforts of Resolute and other SC paper producers. And Resolute's counsel never said Resolute and PHP were not in competition. Rather, counsel said

[196] Counter Mem'l ¶¶ 155-156. These claims, contrary to Canada's assertions, also have not evolved. For example, Resolute alleged in its Statement of Claim that "Nova Scotia unilaterally decided that the Port Hawkesbury mill in its province should be empowered to undertake predatory pricing measures with respect to Resolute, its competitor in the SC paper industry." SOC ¶ 96; *see also* SOC ¶ 47 ("Nova Scotia's measures accomplished their express objective, to lower the production costs for the Port Hawkesbury mill relative to Resolute's SC paper mills."); ¶ 49 ("Nova Scotia provided the means for Port Hawkesbury's SC paper to take Resolute's business unfairly"); ¶ 106 ("Nova Scotia has rearranged the SC paper market in Canada by presenting Resolute with a direct competitor that is bankrolled by Nova Scotia's public purse . . . ."). Nor are these allegations evidence of a "grand, far-fetched conspiracy." *See* Counter Mem'l ¶ 154 ("An intention to harm a foreign investor also meets the legally significant requirement test without the additional requirement of conspiracy.").

[197] Reply Mem'l ¶ 136.

[198] Counter Mem'l ¶ 156 (citing Hausman Statement ¶¶ 36-39).

[199] C-035, Nova Scotia Press Releae, *Province Standing with Strait after Announcement Mill Will Not* Reopen (Sept. 21, 2012); Counter Mem'l ¶ 35 (citing R-055, Nova Scotia Press Release, *Province Invests in Jobs, Training and Renewing the Forestry Sector* (Aug. 20, 2012); R-068, *Mill gets millions in N.S. cash*, *The Chronicle Herald* (Aug. 21, 2012)).

that Resolute does not "and cannot make the quality of SC paper that's made by" PHP.[200] Competition was never discussed.

125. Canada tries to portray certain Nova Scotia Measures as having an indirect effect on Resolute. These are merits phase arguments Canada is presenting improperly now in an effort to avoid reaching that stage. Canada accepted Resolute's allegations as true *pro tem*. Those allegations provide that the Nova Scotia Government intervened intentionally in a competitive market and altered it, deliberately enabling PHP to become the "lowest cost operator in North America" and thereby ultimately causing harm to Resolute.

V. THE NOVA SCOTIA GOVERNMENT ACCORDED TREATMENT TO RESOLUTE

126. The Nova Scotia Government accorded less favorable treatment to Resolute, a foreign investor, than PHP, its domestic champion. PHP received loans, tax breaks, electricity benefits, and other measures that ultimately enabled PHP to dominate the SC paper sector. These measures violated Article 1102(3).

127. In its initial Memorial, Canada contended that the touchstone under Article 1102(3) was a "jurisdictional limitation" that "renders inadmissible claims that seek to compare treatment accorded by one government to the treatment accorded by a different government."[201] According to Canada, "{n}o NAFTA tribunal to date has founded a breach of Article 1102 on the grounds that the treatment accorded by one

[200] R-083, Mar. 19, 2015 U.S. ITC Tr. at 130:12-15. Canada also misquotes Resolute, which consequently misrepresents, later writing that Resolute "alleges without any factual support that 'Nova Scotia gave a bag of money to PHP.'" Reply Mem'l ¶ 137. Resolute actually wrote that "Resolute does not complain about 'a bag of money.'" Counter Mem'l ¶ 160 (citing Canada Mem'l ¶ 106).

[201] Mem'l ¶ 115.

state or province was less favorable than the treatment accorded by another state or province."[202]

128. Now, Canada abandons its initial argument, requiring the actions of two different governments, and concedes that the key issue is about only one government, whether Nova Scotia accorded "treatment" to Resolute. Because Resolute has no investment in Nova Scotia, Canada argues, "Nova Scotia cannot accord treatment to an investor over which it has no jurisdiction."[203]

129. Resolute already has demonstrated that a province may have jurisdiction over matters not necessarily within its physical borders.[204] Canada's objection, therefore, is not about the legal impossibility of Resolute's claims, but about the merits of the claims.

130. According to Canada's position, Nova Scotia could provide benefits to PHP even if Resolute had investments in Nova Scotia. But if Nova Scotia were to have provided benefits to PHP without acting toward (or "treating") Resolute, then, according to Canada, no treatment would have been accorded to Resolute and there would have been no discrimination. "Treatment," as defined by Canada, would not require presence in the jurisdiction because presence does not necessarily mean that there is discrimination when favorable treatment is accorded to a domestic company while no treatment is accorded the foreign competitor.

131. Because favoring one company over another may not be affected by physical presence within a jurisdiction, "treatment" can consist of measures taken by a

[202] Mem'l ¶ 116.

[203] Reply Mem'l ¶ 146.

[204] Counter Mem'l ¶ 207.

province to benefit one investor, such as PHP, to the detriment of a foreign investor, in this case Resolute. The Nova Scotia Government's decision to give competitive advantages to PHP to the detriment of Resolute in the SC paper market meets the "broad" standard of treatment defined in *Merrill & Ring*.[205] The question for this Tribunal to resolve is not whether Nova Scotia has "accorded treatment" to Resolute: according to Canada's own apparent understanding of "treatment," it has.

132. Instead, the question that must be answered is whether Nova Scotia has accorded treatment to an investor in "like circumstances" to Resolute. Nova Scotia cannot provide, without breaching Article 1102(1), advantages to a provincially favored company (PHP) over a foreign investor (Resolute) that are otherwise in "like circumstances." Canada has not disputed Resolute's analysis of *SD Myers*, *Pope & Talbot*, *Archer Daniels Midland*, *Cargill*, and *GAMI Investments*.[206] "Like circumstances" do not require the same physical location. They might require the same jurisdiction where the issues are statutory and regulatory, but the issues here are economic and, as Professor Hausman has demonstrated, North America defines the relevant market for this case.[207] Canada appears to be relying on a theory that PHP underwent "treatment" while Resolute did not, but the broad definition of "treatment" encompasses favoring one company over another.

133. The "like circumstances" test requires that "*any* difference in treatment . . . be justified by showing that it bears a reasonable relationship to rational policies not

[205] *See also* Counter Mem'l ¶ 204 ("When the Government of Nova Scotia intervened in the SC paper market, it accorded 'treatment' to Resolute – negative treatment – by eventually putting Resolute at a competitive disadvantage to Nova Scotia's provincial champion in the national market.").

[206] Counter Mem'l ¶¶ 189-200.

[207] Hausman Statement ¶¶ 32-39.

motivated by preference of domestic over foreign owned investments."[208] This test also addresses "the need to avoid trade distortions," the business sector at issue, and the character of the measures at issue and their underlying rationale.[209]

134. Canada agrees that differences in treatment need not be resolved in this phase.[210] As Resolute previously explained, "{f}or purposes of jurisdiction and admissibility, it is enough that the Government of Nova Scotia favored PHP over Resolute. It is more than enough that Nova Scotia deliberately favored PHP over Resolute."[211]

135. Canada attempts to minimize the Nova Scotia Measures as not being significant unto themselves, portraying them as "maintaining the mill and its supply chain . . . during" the sale process.[212] The Measures, however, were much broader, including a $24 million loan to improve productivity and efficiency; a $40 million repayable loan for working capital; $1.5 million to train workers; $20 million to buy 51,500 acres of land; and $3.8 million annually for ten years.[213] They included preferential electricity rates, tax breaks, and stumpage. These Measures were essential for PHP's revival and were provided for the purpose of enabling PHP to compete outside of Nova Scotia.

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[208] CL-008, *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 ¶ 79 (Apr. 10, 2001) ("*Pope & Talbot Phase 2 Award*") (emphasis in original).

[209] RL-059, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award ¶ 250 (Nov. 13, 2000); CL-008, *Pope & Talbot Inc. v. Canada Phase 2 Award* ¶ 78; CL-010, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award ¶ 201 (Nov. 21, 2007); CL-013, *Merrill & Ring* ¶ 88.

[210] Reply Mem'l ¶ 162.

[211] Counter Mem'l ¶ 205.

[212] Reply Mem'l ¶ 149.

[213] Statement of Claim, ¶ 37.

136. A province's spending power is not limited by geography, nor by political boundaries. Peter Hogg has explained that, "the spending power is not subject to the restrictions that apply to other legislative powers, including the extraterritorial restriction. Therefore, a province may spend, or lend, or guarantee, or otherwise dispose of public funds, outside the boundaries of the province."[214] The Nova Scotia Measures imposed no territorial restrictions on PHP's sales. The purposes and effects of Nova Scotia's spending power reached outside the boundaries of the province, just as Nova Scotia hoped and knew they would.[215]

137. Originally, Canada's objection to Resolute's Article 1102(3) claim was based exclusively on treaty interpretation.[216] Now, Canada is objecting on the merits, the facts relating to each specific measure, asserting that, for each one, Nova Scotia did not accord Resolute treatment. The objection, therefore, appears no longer to be about the admissibility of the claim.

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[214] CL-030, Peter W. Hogg, Constitutional Law of Canada § 13.4 at 13-16, 5th ed. Supp. (Toronto: Carswell) (2008-Rel.1).

[215] Canada assumes that any practical exercise of provincial power always will be confined to the theoretical limitations of the province's legislative or regulatory jurisdiction, which is not always so. *See, e.g.,* CL-034, *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan,* [1979] 1 SCR 42 (Saskatchewan's production restrictions and minimum potash prices interfered with potash sales outside of Saskatchewan. The only market for which the provincial schemes had any significance was the export market, out of province and offshore sales being the target of the regulations). Canada's interpretation of Article 1102(3) necessarily would prevent a foreign investor from complaining about illegal provincial measures that denied national treatment under NAFTA's Chapter 11. Nothing in the text of NAFTA suggests that the drafters intended to limit claims to lawful national discrimination. Provinces may also act unlawfully, and foreign investors must be permitted to raise claims against such unlawful measures. Regardless of the theoretical limitations that Canada perceives about Nova Scotia's jurisdiction, the Nova Scotia government put its thumb on the scales, helping PHP to Resolute's detriment in a market that was not confined to Nova Scotia's boundaries.

[216] Canada Bifurcation Motion ¶ 24 (Sept. 29, 2016); *see also* Procedural Order No. 4 ¶ 4.18 (Nov. 18, 2016) (that the objection was a "distinct and relatively straightforward question of treaty interpretation.").

138. Canada states that application of the "like circumstances" test could make one U.S. state's, a Canadian province's, or a Mexican state's "benefit, subsidy, or other economic incentive" subject to a potential Article 1102 claim. But Canada has not claimed the Nova Scotia Measures are subsidies, and the subsidies hypothesized by Canada would be covered by the subsidy exception of Article 1108(7)(b), which provides that Article 1102 does not apply to "subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees, and insurance."

139. Canada, it seems, wants to avoid asserting inconsistent positions in multiple forums while invoking arguments that underpin NAFTA's subsidy exception. Canada tries to fit into this exception without formally claiming it, in contravention of Canada's prior position before the World Trade Organization and other bodies, where it has claimed that Nova Scotia did not confer any subsidies on PHP.[217] But Canada has not moved to dismiss Resolute's claims by invoking the subsidies exception. If Canada were to have believed that the subsidy exception applied in this case, it should have asserted that exception formally in this phase when it has presented its defenses as to jurisdiction and admissibility. Canada should not be permitted to assert such a defense later under Article 1108(7)(b), nor under any other provision.

[217] *Compare* Reply Mem'l ¶ 145 n. 270 (claiming that Nova Scotia Measures constitute a subsidy), *with* Counter Mem'l ¶ 158 n.220 (stating that Canada reported "nil" for any Nova Scotia subsidies to the World Trade Organization from July 12, 2011 through July 19, 2013 and denied the existence of subsidies before the United States Department of Commerce and the ITC); C-020, *Notifications under the Agreement on Subsidies and Countervailing Measures*, World Trade Organization; C-021, Canada's New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, G/SCM/N/253/CAN at 35 (July 19, 2013).

140. Canada claims that "the NAFTA parties chose to contain the national treatment obligations of provinces and states to within their jurisdiction."[218] There is nothing in Article 1102(3) expressing that view. Resolute addressed in its Counter-Memorial the problem with Canada's reasoning, the attempt to import additional words into Article 1102(3) (the additional words are italicized):

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment *in that state or province,* no less favorable than the most favorable treatment *in that state or province* accorded, in like circumstances, by that state or province to investors, and to investments of investors by the Party of which it forms a part.

The Article, by excluding the words Canada wants to add, ensures that discrimination caused by a state or provincial measure does not escape scrutiny solely because the foreign investor is physically outside the province. Whether the foreign investor is in "like circumstances" and has experienced discrimination because of state or provincial measures is an inquiry for the merits, but Article 1102(3) does not bar the claim because the foreign investor may not be physically within the state or provincial borders. .

141. The *travaux préparatoires* presented by Canada, if supplementary means of interpreting Article 1102 were to be considered by the Tribunal, do not support Canada's argument that the measures of states and provinces somehow could be exempt from the discipline of national treatment by giving new emphasis to the internal, federal boundaries of the parties.[219] Canada claims that the drafts indicate the United States proposed language to clarify that "{t}he provisions of this Chapter regarding the treatment of investors shall mean, with respect to any province or state, treatment no

[218] Reply Mem'l ¶ 149.

[219] Reply Mem'l ¶ 156 n.290.

less favourable than that granted by such province or state to any investor of that province or state."[220] Article 1102(3), however, does not contain the phrase "of that province or state," any more than it contains the word "in," as to say "in that province or state." Instead, it refers to treatment accorded "by that state or province," leaving only the question whether two investors, for the necessary comparison, both underwent "treatment" by that state or province. The language quoted by Canada is identical to the language proposed by Mexico in Article 2103 previously cited by Resolute.[221] Canada has failed to identify any other language in the subsequent drafts that would support its argument.

VI. CANADA'S REPLY MEMORIAL OFFERS NOTHING NEW AS TO ARTICLE 2103(6)

141. Resolute does not suggest that Canada, or Nova Scotia, used taxes to expropriate. They used tax credits to give advantage to PHP. Article 2103(6) was not written for this purpose. Resolute includes these tax credits among the many Nova Scotia Measures designed to resurrect and maintain PHP as the North American low cost producer of supercalendered paper. The tax credits reduced PHP's cost. Canada has provided no new information and no new insight into this issue in its Counter Memorial.

VII. CONCLUSION

142. Canada's statute of limitations objection to the timeliness of Resolute's claims is not jurisdictional. It concerns admissibility. Resolute has met its evidentiary burden in proving that this Tribunal has jurisdiction: Resolute is an American investor in

[220] Reply Mem'l ¶ 156 n.290 (citing RL-087, NAFTA Trilateral Negotiating Draft Text, Chapter 21, Doc. No. INVEST. 116 (Jan. 16, 1992)).

[221] Counter Mem'l ¶ 187.

Canada who had investments in Canada when the Government of Nova Scotia introduced measures that eventually caused damage to Resolute.

143. Whereas establishing jurisdiction has been a burden Resolute has met, the burden of proof for admissibility objections lies with the moving party, here the respondent state. Timeliness – motions claiming a breach of the statute of limitations – concerns admissibility. That burden is Canada's, and Canada has not met it.

144. Resolute has met its burden to demonstrate that the Nova Scotia Measures "relate to" Resolute and that Nova Scotia accorded Resolute treatment notwithstanding that Resolute was not invested in Nova Scotia. This case is about economics, not regulations or legislation. Nova Scotia's economic reach is well beyond its borders, and its support for PHP was intended to have a continental reach.

145. Nova Scotia accorded Resolute treatment, in the broad sense in which the term applies in NAFTA, when it expressly preferred one competitor in the North American market. The Nova Scotia Measures, deliberately deployed to make PHP the low cost North American producer, relate to every competitor. Hence, Resolute's claims are admissible.

146. Canada argues that it needs more information, more evidence, to make its case, but Canada moved to bifurcate with the representation that Resolute had provided enough information already for Canada to prove that this Tribunal does not have jurisdiction and Resolute's claims are inadmissible. Resolute supplemented the evidence in its Statement of Claim with expert testimony and proprietary economic data about sales, and profit, and volumes of production.

147. Canada complains that this supplemental information is still not enough because it does not help Canada make its case. With the burden of proof on Canada to prove the inadmissibility of Resolute's claims, Canada's cry for more witnesses and more evidence is a confession that it cannot, and has not, proved that the claims are inadmissible. Nor has it rebutted Resolute's demonstration that this Tribunal does have jurisdiction over Resolute's claims. For these reasons, this Tribunal should confirm that it does have jurisdiction over Resolute's claims and that the claims are admissible. The Tribunal should convene the Parties and move on to the next phase of this arbitration to determine liability and damages.

Respectfully submitted,

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