

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

**BETWEEN:**

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,  
DOUGLAS CLAYTON AND DANIEL CLAYTON AND BILCON OF  
DELAWARE INC.**

**Claimants**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA**

**REJOINDER**

**March 21, 2013**

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Departments of Justice and of  
Foreign Affairs  
and International Trade  
Trade Law Bureau  
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## TABLE OF ABBREVIATIONS

| ABBREVIATION | DEFINITION                                                    |
|--------------|---------------------------------------------------------------|
| ADM          | Assistant Deputy Minister                                     |
| <i>CEAA</i>  | <i>Canadian Environmental Assessment Act</i>                  |
| CLC          | Community Liaison Committee                                   |
| CS           | Comprehensive Study                                           |
| DFO          | Department of Fisheries and Oceans                            |
| EA           | Environmental Assessment                                      |
| EC           | Department of the Environment                                 |
| EIS          | Environmental Impact Statement                                |
| FTC          | Free Trade Commission                                         |
| GATT         | General Agreement on Tariffs and Trade                        |
| GQP          | Global Quarry Products                                        |
| ha           | Hectare                                                       |
| HADD         | Harmful Alteration, Disruption or Destruction of Fish Habitat |
| iBoF Salmon  | Inner Bay of Fundy Salmon                                     |
| JRP          | Joint Review Panel                                            |
| NSDEL        | Nova Scotia Department of Environment and Labour              |
| <i>NSEA</i>  | <i>Nova Scotia Environment Act</i>                            |
| <i>NWPA</i>  | <i>Navigable Waters Protection Act</i>                        |
| UNCTAD       | United Nations Conference on Trade and Development            |
| WPQ          | Whites Point Quarry                                           |

## **I. INTRODUCTION**

### **A. Preliminary Statement**

1. The Claimants have now had over five years, access to some 50,000 of Canada's documents, and a full opportunity to file hundreds of pages of pleadings, witness statements and expert reports in support of their NAFTA claim. And yet, despite all of the time, effort and expense they have forced both sides to incur in this arbitration, they have failed to establish that the environmental assessment ("EA") of the Whites Point Quarry and Marine Terminal violated any of Canada's NAFTA obligations. Each and every one of the Claimants' claims in these proceedings is without merit and should be dismissed.

2. The Claimants' Reply of December 21, 2012 continues to insist that the Whites Point project was the subject of a grand conspiracy perpetrated by government officials and elected representatives of Canada and Nova Scotia over a period of five years and several different governments. In support of their theory, the Claimants and their experts attack the *bona fides* of virtually every decision made throughout the Whites Point EA process, attributing each one to alleged ill-will and bias against the Whites Point project.

3. Their story is pure fabrication. Cognizant of the complete lack of evidence that would substantiate it, the Claimants continue with their desperate claim that Canada has intentionally withheld relevant documents. This is simply not true. Canada has exercised the utmost diligence in producing all of the documents requested by the Claimants. It has not produced any documents that support the Claimants' allegations of conspiracy or bad faith for a simple reason – such documents do not exist.

4. The rhetoric and bluster of the Claimants' Reply, based as it is upon out-of-context sound bites and blatant distortions of the facts, fails to prove that the decisions they impugn were made with a view to anything other than fulfillment of the policy objectives underlying the EA regimes contained in the *Canadian Environmental*

*Assessment Act* (“CEAA”) and the Nova Scotia *Environment Act* (“NSEA”). Each and every one of the decisions taken in the course of the Whites Point EA was rational in light of the facts, legitimate in light of the law, and carried out on a non-discriminatory basis which accorded the Claimants due process.

5. The Claimants were entitled to nothing more. Despite their many misguided notions about EA in Canada, they did not have a right to project approval. At the end of every EA process, a decision must be made by the responsible government(s) as to whether a proposed project should be permitted to proceed. The evidence gathered and evaluated through the EA process will sometimes lead to the determination that the potential environmental effects of a project make it inappropriate for the environment for which it is proposed. Canada has already explained why this very determination was made in the Whites Point EA. While the Claimants and their experts take issue with the rejection of the Whites Point project, in the end their many complaints fail to show that the outcome of the Whites Point EA would, or should, have been any different.

6. Relative to the Claimants’ Reply, Canada’s Rejoinder is brief. This is partly because the Claimants have failed to demonstrate that the true narrative of the Whites Point EA is anything other than as Canada has portrayed it in its Counter-Memorial and supporting affidavits. Accordingly, Part II below is limited to highlighting just the overarching facts that explain how and why the Whites Point EA process unfolded, and concluded, as it did. These facts, which should all be undisputed, illustrate the utter irrelevance of the pages upon pages of complaints submitted by the Claimants.

7. In Part III, Canada explains how the Claimants’ Reply does not seriously address – and in some cases simply ignores – the jurisdictional barriers to their claims. In particular, the Claimants continue to fixate on measures taken in connection with the industrial approval issued to Nova Stone Exporters, Inc. (“Nova Stone”) to operate a 3.9 ha quarry on the site of the Whites Point project – measures that did not “relate to” the Claimants or their investment and that are, in addition to a number of their other claims, time-barred. The Claimants also continue to fail in their efforts to show that certain

decisions made by the JRP in the course of the Whites Point EA are measures adopted or maintained by Canada and thus, subject to Chapter Eleven. Finally, they fail to show why the Tribunal has jurisdiction to consider the Federal Government's decision on the EA when that decision could not cause them loss or damage given the project had been definitively rejected a month earlier by Nova Scotia.

8. In Part IV Canada then explains how the Claimants have been unable to rehabilitate any of their claims on the merits. Specifically, the Claimants have merely repackaged their erroneous interpretations of Article 1105 in an attempt to prove that Canada breached the minimum standard of treatment obligation through the initiation, administration and outcome of the Whites Point EA. The Claimants not only misrepresent the applicable standard under Article 1105, they also fail to establish that any of the decisions, acts or recommendations of which they complain reach the high threshold required to breach that standard.

9. The Claimants' allegations with respect to Articles 1102 and 1103 are similarly ill-founded. In addition to advancing several dubious new interpretations of these provisions, the Claimants persist with their absurd proposition that *all* enterprises in the EA process are in "like circumstances" for the purposes of a national treatment or most-favoured nation treatment claim. This proposition is without merit as it ignores the requirement to consider the very factors existing in *every* EA process that result in legitimate differences in the treatment accorded to EA proponents. The Claimants fail to establish they were treated less favourably than other EA proponents in actual like circumstances by reason of their nationality.

10. For the reasons explained in detail below, Canada requests that the Tribunal dismiss each and every one of the Claimants' claims in their entirety, and that Canada be completely indemnified for the costs that it has been forced to incur in this arbitration.

**B. Materials Filed by Canada with its Rejoinder**

11. Canada's Rejoinder is accompanied by 60 additional Exhibits and 21 additional

Authorities which have been included in Canada’s Book of Exhibits and Book of Authorities. In addition, Canada has filed the following Affidavits and Expert Report in support of its Rejoinder:

- **SECOND AFFIDAVIT OF BOB PETRIE:** Mr. Petrie’s second Affidavit provides further testimony on his decision to include the blasting conditions, suggested by the Department of Fisheries and Oceans (“DFO”), in Nova Stone’s industrial approval for the 3.9 ha quarry that it sought to operate on the site of the Whites Point project.
- **SECOND AFFIDAVIT OF MARK MCLEAN:** In his second Affidavit, Mr. McLean corrects the Claimants’ mischaracterization of DFO’s involvement in the review of Nova Stone’s blasting plan for its 3.9 ha quarry, and of the decision DFO made, once the Whites Point project had been referred to a review panel, regarding interactions with Nova Stone on mitigation measures that could be taken on the 3.9 ha quarry.
- **SECOND AFFIDAVIT OF STEPHEN CHAPMAN:** In his second Affidavit, Mr. Chapman explains the recommendation that the Canadian Environmental Assessment Agency (the “Agency”) made to DFO in the summer of 2003 regarding DFO’s interactions with Nova Stone on mitigation measures that could be taken on the 3.9 ha quarry. Mr. Chapman also clarifies the facts relating to the notification provided to the Claimants of the referral of the Whites Point project to a review panel.
- **SECOND AFFIDAVIT OF CHRISTOPHER DALY:** Mr. Daly’s second Affidavit clarifies the nature of the decision the Government of Nova Scotia had to make after the JRP issued its recommendations on the Whites Point project.
- **REJOINDER EXPERT REPORT OF LAWRENCE E. SMITH, Q.C.:** Lawrence E. Smith, Q.C., an expert in regulatory and environmental law, files his

Rejoinder Expert Report to address matters raised in the Reply Expert Report of David Estrin, and the Expert Report of T. Murray Rankin.

## **II. THE FACTS**

12. As Canada explained in its Introduction, the paragraphs that follow are in no way intended as an exhaustive summary of all the facts relevant to the EA of the proposed Whites Point project. A comprehensive statement of the relevant facts has been provided in Canada's Counter-Memorial, and in the exhibits and testimony noted therein. Canada offers the following points and clarifications to cast light on the indisputable facts that the Claimants ignore in their attempt to make out a NAFTA claim. In particular, the Claimants fail to acknowledge the Whites Point project for what it was – a massive quarry and marine terminal to be located in the middle of a highly sensitive environment. They also fail to acknowledge the Whites Point EA process for what it had to be – an environmental review that reflected the nature of the project and that satisfied the requirements of both the federal and Nova Scotia EA regimes. Finally, the Claimants fail to acknowledge the nature and effect of the independent decisions that had to be made by Canada and Nova Scotia with respect to the project.

### **A. The Whites Point Project – The Claimants' Proposal Was to Build and Operate a 152 ha Quarry and Marine Terminal on the Digby Neck in Nova Scotia**

13. The Whites Point project was proposed as a large scale and long-term industrial undertaking consisting of two interdependent components: (1) a 152 ha aggregate quarry that would blast, crush, wash and stockpile millions of tons of rock a year for 50 years; and (2) a 170m long marine terminal that would service and load massive cargo ships with approximately 40,000 tons of aggregate, every week of that 50-year period.<sup>1</sup>

14. The project was to operate on a narrow peninsula of land, the Digby Neck, and

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<sup>1</sup> See Canada's Counter-Memorial, ¶¶ 5, 106. See also, letter from Paul Buxton to Derek McDonald, copied to Christopher Daly, attaching third project description, March 10, 2003, **Exhibit R-181**.

along the world renowned Bay of Fundy – both of which are unique environments of ecological significance and sensitivity.<sup>2</sup> In their Reply, and in the Supplemental Witness Statement of Mr. Buxton in particular, the Claimants suggest that this region of Nova Scotia is run-down, was previously industrialized, and is of no particular environmental concern.<sup>3</sup> As Canada has shown, these characterizations are inaccurate.<sup>4</sup> Moreover, the fact that a small gravel pit may have existed some 60 years ago on the proposed Whites Point site does not mean that blasting an entire mountain to rubble and shipping it to market via post-Panamax size ships would have been an environmentally insignificant endeavour. Nor does it undo the simple reality that, given where the project was to be situated, the Claimants' plan engaged a high level of public concern from the very outset.<sup>5</sup> For the Claimants to suggest otherwise<sup>6</sup> is evidence only of the cavalier attitude and the sense of entitlement that they brought to the entire EA process.<sup>7</sup>

15. At the time that they made their proposal, there appeared to be no question in the minds of the Claimants, or of government regulators for that matter, that the proposed

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<sup>2</sup> See Canada's Counter-Memorial, ¶¶ 22-32. See also Affidavit of Neil Bellefontaine, ¶¶ 25-28.

<sup>3</sup> Claimants' Reply, ¶ 36. See also footnote 21 of the Supplemental Witness Statement of Paul Buxton which references "The Bay of Fundy Video for NAFTA Tribunal, *Bilcon et al v. Canada* December, 2012, Videographed by: Warren Jefferies, Narrated by: John Baillie (*Investors' Schedule of Documents Tab C 910*)."

<sup>4</sup> Canada's Counter-Memorial, ¶¶ 22-32. See also Affidavit of Neil Bellefontaine, ¶¶ 25-28.

<sup>5</sup> See Affidavit of Bob Petrie, ¶ 14.

<sup>6</sup> See footnote 134 of the Claimants' Memorial, wherein it is asserted that "There was no empirical evidence of any public concern" over the Whites Point project.

<sup>7</sup> As reflected by the following excerpt from the November 24, 2004 CLC minutes which record comments made by the Claimants' representative, Paul Buxton, to the CLC:

[Y]ou can refer to the Canadian Environmental Assessment Act and the verbiage that goes with it.... It essentially says that the Canadian Environment Assessment Agency is to ensure that projects are carried out in an environmentally safe manner. He further noted it does not say that CEAA will determine whether or not a project will go ahead.

Mr. Buxton noted this project is a legal project and there is nothing in law to prevent this project from going ahead. He noted there are hoops to jump through and satisfy to obtain permits but there is nothing to say that the quarry can't proceed at Whites Cove.

See CLC Minutes, November 24, 2003, p. 234, **Exhibit R-299**.

quarry and marine terminal were two interdependent components of one single project. Indeed, in every description they gave of their project, whether provided in verbal discussions with regulators or in formal project descriptions filed with the Governments of Canada and Nova Scotia, the Claimants described both components as being part of one single project.

16. For example, in a meeting with officials of the Nova Scotia Department of Environment and Labour (“NSDEL”) on June 14, 2002, the Claimants explained that their plan was to develop a large quarry and a marine terminal, with the latter being an “integral part of this project.”<sup>8</sup> Two weeks later, at a meeting with DFO officials, the Claimants described their proposed project as consisting of a quarry and a marine terminal, explaining that “quite frankly, if they cannot put in a wharf structure they are not interested in the quarry.”<sup>9</sup>

17. Similarly, the Claimants consistently reiterated the integrated nature of the Whites Point project in each of their project descriptions submitted to government regulators. In their first rudimentary project description, submitted on September 30, 2002 and referring to the “Whites Point Quarry and marine facility,” they described the required infrastructure as including both a “Land Based Construction” and “Marine Based Construction.”<sup>10</sup> The second project description submitted on January 28, 2003, entitled “Whites Point Quarry & Marine Terminal,” similarly described the dual nature of the project, identifying it as a “physical plant for construction aggregate processing and a marine terminal for ship loading of the aggregate.”<sup>11</sup> And their third project description,

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<sup>8</sup> See Notes of Helen MacPhail, June 14, 2002, **Exhibit R-171**. See also first Affidavit of Christopher Daly ¶¶ 24-25 and Canada’s Counter-Memorial, ¶ 92.

<sup>9</sup> See Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 3, **Exhibit R-27**. See also first Affidavit of Mark McLean, ¶ 25 and Canada’s Counter-Memorial, ¶¶ 93-94.

<sup>10</sup> See Whites Point Quarry – Project Description, faxed from Paul Buxton to Helen MacPhail, September 30, 2002, **Exhibit R-129**. See also Canada’s Counter-Memorial, ¶ 95.

<sup>11</sup> See letter from Paul Buxton to Derek McDonald, copied to Christopher Daly, January 28, 2003, attaching draft project description, January 28, 2003, **Exhibit R-180**. See also Canada’s Counter-Memorial, ¶ 103.

filed on March 10, 2003 and also entitled “Whites Point Quarry & Marine Terminal,” was even clearer, describing the proposed project as the construction, operation and decommissioning of a basalt quarry with a marine terminal.”<sup>12</sup>

18. In their Reply, the Claimants try to distance themselves from these facts. At several places, they mischaracterize the project as being only a quarry without a marine terminal.<sup>13</sup> It was not. In other instances, both the Claimants and their expert, Mr. Estrin, disingenuously refer to the proposed marine terminal as merely a “nearby dock.”<sup>14</sup> Again, it was not. The quarry and the marine terminal were indissociable – there would be no Whites Point quarry without the marine terminal, and there would be no Whites Point marine terminal without the quarry.<sup>15</sup>

19. The Claimants have also generated pages of complaints against governmental decisions relating to a conditional approval granted to Nova Stone to quarry a 3.9 ha portion of the Whites Point site.<sup>16</sup> That the Claimants persist in complaining about these measures is baffling. As Canada has explained, any debate over these measures was ultimately rendered moot in May of 2004 when the Claimants and Nova Stone invalidated the conditional industrial approval.<sup>17</sup> Moreover, the Claimants’ reliance on

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<sup>12</sup> See letter from Paul Buxton to Derek McDonald, copied to Christopher Daly, attaching third project description, March 10, 2003, **Exhibit R-181**. See also Canada’s Counter-Memorial, ¶106

<sup>13</sup> See Claimants’ Reply, ¶ 12(c) (“The quarry and an adjacent marine terminal were scoped into one joint environmental assessment.”) See also Claimants’ Reply, ¶ 17 (“This remains the only quarry application in Canada that was ever referred to a Joint Review Panel.”) See also, Reply Expert Report of David Estrin, ¶ 56 (“Bilcon came to Nova Scotia to extract rock, not to build a dock.”)

<sup>14</sup> See for example, Claimants’ Memorial, ¶ 75. See also Expert Report of David Estrin, ¶¶ 96, 135, 153.

<sup>15</sup> As explained by Mr. Buxton, “Quite frankly, if they cannot put in a wharf structure they are not interested in the quarry.” See Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 3, **Exhibit R-127**.

<sup>16</sup> See Canada’s Counter-Memorial, ¶¶ 33-42 and the Exhibits cited therein. As explained in the first Affidavit of Bob Petrie, this conditional approval was issued to Nova Stone only. Under the *NSEA* industrial approvals cannot be transferred, sold, leased, assigned, or otherwise disposed of without the consent of the Minister. See first Affidavit of Bob Petrie, ¶¶ 15-16.

<sup>17</sup> See first Affidavit of Bob Petrie, ¶¶ 16-17 and first Affidavit of Stephen Chapman, ¶ 36. See also letter from Paul Buxton to Jean Crépault, August 17, 2004, **Exhibit R-94** and Lease Agreement between Bilcon of Nova Scotia and the Linebergers and Johnsons, May 1, 2004, **Exhibit R-95**.

this project is surprising because they seem to complain about the treatment afforded to this project as if *it* was the project they had proposed. Once again, it was not.

20. While it is true that in April of 2002 Nova Stone obtained a conditional approval from Nova Scotia to operate a 3.9 ha quarry on the site of the Whites Point project *before* the EA of the Whites Point project was even commenced,<sup>18</sup> the Claimants never intended for the Whites Point project to be confined to a small 3.9 ha plot of land. In fact, after Nova Stone received its conditional approval, its representative's first act was not to provide DFO officials with a blasting plan for the 3.9 ha quarry as required by the conditional approval;<sup>19</sup> rather, it was to meet with officials to discuss the Claimants' plan for the 152 ha quarry and marine terminal<sup>20</sup> and to file a draft project description for the Whites Point project.<sup>21</sup>

21. As explained by Stephen Chapman and Mark McLean, all of this left government officials uncertain as to the purpose of Nova Stone's 3.9 ha quarry operation once the Claimants triggered an EA of the Whites Point project.<sup>22</sup> It also rendered government officials understandably cautious in dealing with Nova Stone once the EA of the Whites

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<sup>18</sup> See first Affidavit of Bob Petrie, ¶¶ 4-14, which explains how Nova Stone deliberately applied to Nova Scotia for an approval of a quarry whose size was just under the threshold that would require an EA under Nova Scotia law. See also Nova Stone Approval to Construct and Operate a quarry near Little River, Digby County, April 30, 2002, **Exhibit R-87** and Canada's Counter-Memorial, ¶¶ 63-81.

<sup>19</sup> The Claimants complain about the amount of time it took for DFO to arrive at a decision on Nova Stone's blasting plan which had to be filed as part of the conditional approval for the 3.9 ha quarry (see for example, Claimants' Reply, ¶ 57). But in doing so they ignore the fact that Nova Stone took almost five months before filing a rudimentary and incomplete blasting plan to DFO (see Canada's Counter-Memorial, ¶ 86), and then had to be prompted by DFO for an additional two months before finally providing the missing information (see Canada's Counter-Memorial, ¶¶ 86-90).

<sup>20</sup> See Notes of Helen MacPhail, June 14, 2002, **Exhibit R-171** and first Affidavit of Christopher Daly ¶¶ 24-25 and Canada's Counter-Memorial, ¶ 92. See also Thomas Wheaton's notes of meeting between DFO and GQP, July 25, 2002, p. 3, **Exhibit R-127** and first Affidavit of Mark McLean, ¶ 25 and Canada's Counter-Memorial, ¶¶ 93-94.

<sup>21</sup> See Whites Point Quarry – Project Description, faxed from Paul Buxton to Helen MacPhail, September 30, 2002, **Exhibit R-129**. See also Canada's Counter-Memorial, ¶ 95.

<sup>22</sup> See second Affidavit of Stephen Chapman, ¶¶ 4-10 and first Affidavit of Mark McLean, ¶¶ 43-44.

Point project had been referred to a review panel.<sup>23</sup> In particular, once a review panel became responsible for the Whites Point EA, government officials could not interact with Nova Stone in a way that could ultimately undermine the EA process.<sup>24</sup> While the Claimants question, criticize and misrepresent the approach of government officials here, any difficulties or disappointment they encountered were purely of their own making. Placed in its appropriate context, Nova Stone's 3.9 ha quarry was nothing more than the first step in the Whites Point project. Government officials certainly could not be expected to be complicit in the Claimants' efforts to use another company, Nova Stone, to exploit a regulatory loophole and develop the first phase of their planned 152 ha quarry and marine terminal *before* an EA of the Whites Point project was completed.<sup>25</sup>

22. Accordingly, it is essential to remember that the Whites Point project was neither just a quarry nor just a dock. It was not short-term, it was not on an already industrialized site, and it was most definitely never to be confined to just 3.9 ha of land. The project that the Claimants sought to operate was a 152 ha quarry and marine terminal – one component fully dependent upon and integrated with the other – of a size and magnitude which did not exist anywhere else on the Digby Neck. The project, in its entirety, engaged the potential for a wide array of significant adverse environmental effects, and gave rise to a high level of public concern.<sup>26</sup> The project, in its entirety, is what determined the nature and the course of its EA.

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<sup>23</sup> See second Affidavit of Stephen Chapman, ¶¶ 6-8 and second Affidavit of Mark McLean, ¶ 5.

<sup>24</sup> See second Affidavit of Stephen Chapman, ¶ 7.

<sup>25</sup> See second Affidavit of Stephen Chapman, ¶ 7, and second Affidavit of Mark McLean, ¶ 8.

<sup>26</sup> See Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72** (“DFO believes that the project as proposed, is likely to cause environmental effects over a large area of this rich and diverse marine and terrestrial environment as well as on fisheries and tourism, the two largest economic sectors.... This proposal has generated extensive public and media attention related to its potential environmental and social impacts. Concerns include impacts on lobster, herring and endangered Bay of Fundy stock of Atlantic salmon, fisheries, marine mammals including the endangered right whale, release of ballast water and introduction of exotic species, loss of tourism and disruption of the local community.” (emphasis added))

**B. The Whites Point EA Process – The EA Process Reflected the Nature of the Whites Point Project**

23. The nature and location of the Whites Point project meant that it required authorizations or approvals from the Governments of Canada and Nova Scotia.<sup>27</sup> Before such authorizations or approvals could be issued, an EA of the Claimants' proposal had to be conducted under applicable federal and provincial legislation.<sup>28</sup>

**1. The Scope of the Project Had to Include Both the Quarry and the Marine Terminal**

24. The Claimants and their experts consistently ignore the dual nature of the Whites Point EA process. For example, they expend much of their energy contesting DFO's jurisdiction to assess the quarrying activities proposed by the Claimants.<sup>29</sup> For the reasons Canada has explained, DFO's decision that the quarrying element of the Whites Point project should be included in the scope of the project was legitimate and reasonable.<sup>30</sup> As explained below, DFO's decision was also of no practical consequence.

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<sup>27</sup> See generally, Canada's Counter-Memorial, ¶¶ 92-115. See also Expert Report of Robert Connelly, ¶¶ 38-40 and first Affidavit of Christopher Daly, ¶ 4, 7.

<sup>28</sup> With respect to the requirement to conduct an EA under the *CEAA* see generally, Expert Report of Robert Connelly, ¶¶ 34-41 and first Affidavit of Mark McLean, ¶¶ 28 and 35. With respect to the requirement to conduct an EA under the *NSEA* see first Affidavit of Christopher Daly, ¶¶ 4, 24-32.

<sup>29</sup> For example, in his Reply Expert Report, David Estrin spends 100 paragraphs and 30 pages calling DFO's scope of project determination into question. See Reply Expert Report of David Estrin, ¶¶ 28-128.

<sup>30</sup> See Canada's Counter-Memorial, ¶¶ 116-121. See also Affidavit of Neil Bellefontaine, ¶¶ 29-34, first Affidavit of Mark McLean, ¶¶ 36-42, first Expert Report of Lawrence Smith, ¶¶ 96-116, and Expert Report of Robert Connelly, ¶¶ 42-46. See also letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**. DFO found that a *Fisheries Act* authorization was required for blasting on Nova Stone's 3.9 ha quarry, and as this project was part of the larger Whites Point project it was concluded that there was a *Fisheries Act* authorization required for the larger quarry – see email from Derek McDonald to Phil Zamora, June 27, 2003, attaching Federal Coordination Request Chart setting out discussions between CEAA and DFO, **Exhibit R-552** ("DFO determined that it had a Fisheries Act s. 32 trigger in relation to the blasting plan for a provincially approved 3.9 Ha quarry contained within the proposed 380 acre main quarry site. Since 3.9 Ha quarry will ultimately be part of the larger main quarry, DFO determined that therefore it likely also has a Fisheries Act s. 32 trigger for the main quarry."). See also letter from Phil Zamora to Stephen Chapman, September 17, 2003, **Exhibit R-526** wherein Mr. Zamora advises Mr. Chapman that the 3.9 ha quarry would likely require a s. 32 authorization under the *Fisheries Act* and that the environmental effects of blasting on the 3.9 ha quarry were expected to be the same as those on the larger Whites Point quarry.

25. The Claimants' proposal called for the construction of a 152 ha quarry at Whites Point. A quarry in excess of 4 ha is an "undertaking" according to Nova Scotia's applicable regulations.<sup>31</sup> Before work can begin on any undertaking in Nova Scotia, a proponent must obtain the approval of the Nova Scotia Minister of Environment and Labour.<sup>32</sup> And before such an approval can be provided, an EA must first be conducted in accordance with Nova Scotia law.<sup>33</sup> The Claimants do not dispute these facts.

26. The Claimants' proposal also required the construction of a marine terminal that would jut 170m out into the Bay of Fundy and interfere with marine navigation.<sup>34</sup> As such, it required a permit under the *Navigable Waters Protection Act* ("NWP").<sup>35</sup> Further, the construction of the marine terminal would have resulted in the destruction of some fish habitat, and therefore required an authorization under s. 35 of the *Fisheries Act*.<sup>36</sup> Before an NWP permit or a s. 35 authorization can be provided, a federal EA

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<sup>31</sup> See Canada's Counter-Memorial, ¶¶ 46, 48. See also first Affidavit of Bob Petrie, ¶ 4 and first Affidavit of Christopher Daly, ¶ 7. See also, Nova Scotia *Environmental Assessment Regulations*, Schedule 'A', (B)(2)(1) and ss. 9(1), **Exhibit R-6**.

<sup>32</sup> See Canada's Counter-Memorial, ¶ 49. See also generally, first Affidavit of Christopher Daly.

<sup>33</sup> See Canada's Counter-Memorial, ¶ 45. See also first Affidavit of Christopher Daly, ¶¶ 4, 7-17 and NSEA, ss. 31-32, **Exhibit R-5**.

<sup>34</sup> Letter from Paul Buxton to Derek McDonald, copied to Christopher Daly and attaching third project description, March 10, 2003, **Exhibit R-181**.

<sup>35</sup> See Canada's Counter-Memorial, ¶¶ 112-113 and first Affidavit of Mark McLean, ¶ 28. See also memo from Melinda Donovan of NWP to Paul Boudreau of DFO Habitat Management Division, February 17, 2003, **Exhibit R-136**.

<sup>36</sup> See Canada's Counter-Memorial, ¶ 114 and first Affidavit of Mark McLean, ¶ 35. See also letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**. In their Reply, the Claimants assert that a s. 35 authorization for the marine terminal should not have been required, claiming that DFO's Tony Henderson told Mr. Buxton in 2007 that "Bilcon should have never been required to file a HADD or design a compensation plan" for its marine terminal (Claimants' Reply ¶ 86, and Supplemental Witness Statement of Paul Buxton, ¶ 31). This is false. After being made aware of Bilcon's misrepresentation of his statement, Mr. Henderson advised Mark McLean that he actually stated that "although each pile [used for the marine terminal] may not be a HADD individually, the number of pipe piles, as a whole, would exclude an area utilized by fish, and would lead to a HADD" (emphasis added) – see email from Tony Henderson to Mark McLean, November 20, 2007, **Exhibit R-562**.

must be completed under the *CEAA*.<sup>37</sup> This fact is also beyond dispute.

27. As such, irrespective of whether or not the activities on the quarry actually required an authorization from the Federal Government under the *Fisheries Act*, the Whites Point project could not proceed until an EA of both of its components had been completed. Moreover, for the reasons explained in Canada’s Counter-Memorial, federal and provincial officials decided to harmonize their respective EAs<sup>38</sup> and ultimately to assess the project by way of a JRP.<sup>39</sup> The joint approach taken by the two governments – one that the Claimants actually encouraged<sup>40</sup> – meant that the scope of the project that would be assessed in the EA would ultimately be decided by the Federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour in the JRP Agreement.<sup>41</sup> The scope would have to be broad enough to meet the informational needs of both jurisdictions.<sup>42</sup> The Claimants do not dispute this fundamental fact. Indeed, they were given the opportunity to comment on the scope of the project in the JRP Agreement before it was finalized. In response, they noted that they “regarded [the JRP Agreement]

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<sup>37</sup> See Canada’s Counter-Memorial, ¶ 115 and first Affidavit of Mark McLean, ¶ 36. See also letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

<sup>38</sup> See Canada’s Counter-Memorial, ¶¶ 96-102 and 109-111. The decision to harmonize the EA processes was also consistent with one of the overriding purposes of *CEAA* – “eliminating unnecessary duplication in the environmental assessment process” – see also *CEAA*, s. 4(b.1), **Exhibit R-1**.

<sup>39</sup> See Canada’s Counter-Memorial, ¶¶ 146-151.

<sup>40</sup> See Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 3, (noting the Claimants’ inquiry as to “whether or not the Fed and Prov EA can be done as a joint effort.”) **Exhibit R-127**. See also first Affidavit of Mark Mclean, ¶ 25. See also Lorilee Langille’s notes of January 6, 2003 meeting with JRP, **Exhibit R-132**.

<sup>41</sup> See JRP Agreement, **Exhibit R-27**. See also first Expert Report of Lawrence Smith, ¶¶ 126-132 (“The scope of project selected for the joint panel review, which encompassed all aspects of Nova Scotia and federal jurisdiction, superseded any discussion or determinations made earlier by the DFO regarding the scope of the Project.”).

<sup>42</sup> See Expert Report of Robert Connelly, ¶ 102 (“[a]n assessment by a joint review panel must generate the type and quality of information required to meet the legal requirements of each party. As such, in the terms of reference, the description of the scope of project, the listing of the factors to be considered in the assessment, and the requirements of the panel report will exceed that which would be required under just one of the involved jurisdictions.”).

... as a reasonable document and hence did not feel the need for comment.”<sup>43</sup>

28. Put simply, while DFO correctly determined that blasting on the quarry would likely require authorizations under the *Fisheries Act* and therefore trigger an EA under the *CEAA*,<sup>44</sup> this determination had no material effect on the scope of the project to be assessed in the EA of the Whites Point project. Because of the involvement of both the Federal and Provincial Governments, the scope of the project *necessarily* included both the quarry and the marine terminal. For this very reason, Lawrence Smith has observed in his Rejoinder Expert Report that “[i]n this respect, it seems pointless to protract a theoretical debate about what parts of the Whites Point Project would have been appropriate to include in a federal-only review.”<sup>45</sup>

## **2. The Referral of the Whites Point EA to a Joint Review Panel Was Based Upon Public Concern and the Risk of Significant Adverse Environmental Effects Relating to the Entire Whites Point Project**

29. Under the *CEAA*, a project can be referred to a review panel if it presents a risk of significant adverse environmental effects or if public concerns warrant such a referral.<sup>46</sup> The reasons that officials believed that the Whites Point project satisfied these criteria are

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<sup>43</sup> See letter from Paul Buxton to Christopher Daly, November 11, 2003, **Exhibit R-229**. See also Canada’s Counter-Memorial, ¶¶ 154-156.

<sup>44</sup> See Canada’s Counter-Memorial, ¶¶ 116-121. See also Affidavit of Neil Bellefontaine, ¶¶ 29-34, first Affidavit of Mark McLean, ¶¶ 36-42, first Expert Report of Lawrence Smith, ¶¶ 96-116, and Expert Report of Robert Connelly, ¶¶ 42-46. See also letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**. DFO found that a *Fisheries Act* authorization was required for blasting on Nova Stone’s 3.9 ha quarry, and as this project was part of the larger Whites Point project it was concluded that there was a *Fisheries Act* authorization required for the larger quarry – see email from Derek McDonald to Phil Zamora, June 27, 2003, attaching Federal Coordination Request Chart setting out discussions between CEAA and DFO, **Exhibit R-552** (“DFO determined that it had a Fisheries Act s. 32 trigger in relation to the blasting plan for a provincially-approved 3.9 Ha quarry contained within the proposed 380 acre main quarry site. Since 3.9 Ha quarry will ultimately be part of the larger main quarry, DFO determined that therefore it likely also has a Fisheries Act s. 32 trigger for the main quarry.”). See also letter from Phil Zamora to Stephen Chapman, September 17, 2003, **Exhibit R-526** wherein Mr. Zamora advises Mr. Chapman that the 3.9 ha quarry would likely require a s. 32 authorization under the *Fisheries Act* and that the environmental effects of blasting on the 3.9 ha quarry were expected to be the same as those on the larger Whites Point quarry.

<sup>45</sup> See Rejoinder Expert Report of Lawrence Smith, ¶4.

<sup>46</sup> See generally, Expert Report of Robert Connelly, ¶¶ 47-51.

laid out in Canada's Counter-Memorial.<sup>47</sup> There is no need to repeat those reasons here.

30. In order to attack that decision in their Reply, the Claimants and their experts suggest that the Whites Point EA could only be referred to a review panel because of the Federal Government's allegedly improper assumption of jurisdiction over the quarry. For example, in his Reply Expert Report, Mr. Estrin states, "DFO knew there were no significant adverse environmental effects to fish or navigation arising from the marine terminal, and that public concerns related to the quarry, not the marine terminal. Therefore, unless the quarry was scoped into the project to be reviewed, there was no basis for a CEAA referral."<sup>48</sup> Mr. Estrin's claims are factually inaccurate. The public was as concerned with the proposed marine terminal as it was with the proposed quarry,<sup>49</sup> and officials had concerns about the possible significant adverse environmental effects that could result from the marine terminal.<sup>50</sup> The fact that other marine terminals existed along the Bay, or that shipping already took place in the Bay,<sup>51</sup> did not negate the public concerns or the risks of adverse environmental effects at Whites Point. Thus, irrespective of whether or not the Federal Government considered the quarry in the course of the EA, a referral to a review panel would have still, in light of the marine terminal, been entirely legitimate.

31. The Claimants also allege that they were unfairly misled to believe that the EA

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<sup>47</sup> See Canada's Counter-Memorial, ¶¶ 133-151.

<sup>48</sup> See Reply Expert Report of David Estrin, ¶ 106.

<sup>49</sup> See Affidavit of Neil Bellefontaine, ¶¶ 36-37. See also email from Melinda Donovan to Tim Surrette, Neil Bellefontaine and others, March 4, 2003, **Exhibit R-57**. See also letters of concern from April of 2002 to August of 2003, **Exhibit R-170**. See also "Expressions of Public Concern at the Whites Point JRP Hearing Over the Proposed Whites Point Marine Terminal, **Exhibit R-535**, which Canada has prepared for the purposes of the arbitration.

<sup>50</sup> See for example, Affidavit of Neil Bellefontaine, ¶¶ 23-28 and Sample Letters of Concern to Minister Robert Thibault on Whites Point Project, April – September 2002, Complined for Affidavit of Neil Bellefontaine, **Exhibit R-53**. See also letter from Paul Boudreau to Christopher Daly, June 20, 2003, **Exhibit R-70** ("DFO believes that the Whites Point Quarry and Marine Terminal Project as proposed is likely to cause environmental effects over a large area on both the land and marine environments." (emphasis added)).

<sup>51</sup> See Claimants' Reply, ¶¶ 495-496.

would take the form of a comprehensive study, not a review panel.<sup>52</sup> Canada has already explained that nothing could be further from the truth. Government officials were consistent in advising the Claimants that given the nature of their project and the environment for which it was proposed, it could very well be referred to a review panel.<sup>53</sup>

32. Finally, the Claimants and their experts attack the decision to refer the Whites Point project to a review panel because some officials believed the likely effects of the proposed project were less significant than others, and because information generated through the EA process modified the project's risk profile.<sup>54</sup> But in lodging their criticisms, they again ignore the relevant facts about how decisions are made. Determinations as to the "likelihood" of significant adverse environmental effects at the outset of an EA are, by their very nature, preliminary. No official has a crystal ball – rather, knowledgeable officials can act only on the best information available to them at the time. As explained by Robert Connelly:

At the stage when the initial type of assessment decision is being made, the information that the government has with respect to the second and third factors, potential significant adverse environmental effects and the level of public concern associated with a proposed project, is necessarily incomplete.... As a result, when making a decision on the type of assessment, only a preliminary determination can be made, on the basis of the information available to governmental authorities at that time, that

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<sup>52</sup> See Claimants' Reply, ¶ 534.

<sup>53</sup> See Canada's Counter-Memorial, ¶ 134 and Christopher Daly's notes of January 6, 2003 meeting with GQP, **Exhibit R-178**, wherein the possibility of the Whites Point project being referred to a panel was discussed with Mr. Buxton ("Bill also talked about possibility of a panel > likely significant effects > public concerns."). See also Canada's Counter-Memorial, ¶ 137 and letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**, wherein Mr. Zamora advised Mr. Buxton that "although the type of assessment being used for this project is a CS [Comprehensive Study], CEAA (Section 23) includes the provision that the project could be referred to a mediator or review panel."

<sup>54</sup> See for example Reply Expert Report of David Estrin ¶ 38 wherein Mr. Estrin uses the benefit of hindsight in criticizing DFO's assumption of jurisdiction over the quarry by citing an internal 2007 DFO memorandum that "informed the ADM that DFO could not provide the Joint Panel with any definite predictions of harm to marine life from quarry blasting. To the contrary, in DFO's own words, "it is expected that any impacts would be minimal." This memo, issued over four years after NSDEL and DFO acted on their initial concerns over quarrying at Whites Point and with the benefit of the EA having run its course, in no way impugns the legitimacy of NSDEL's and DFO's initial concerns.

significant adverse environmental effects may arise as a result of the project, or that public concern exists over the project being proposed. This preliminary determination is then used to inform the type of assessment to which a project is subject.<sup>55</sup>

At this early stage in the process, officials can disagree with one another and debate is inevitable. But unanimity is not a requirement, debate is not a sign of impropriety, and at some point a decision must be made.<sup>56</sup> Further, initial concerns about the likelihood of significant adverse environmental effects may well prove to be lessened after additional information becomes available. But this does not mean there was anything inappropriate about the initial judgment call that a deeper level of understanding was needed. All it means is that the EA process has run its course and fulfilled its purpose.<sup>57</sup>

**3. The Whites Point JRP Was Required to Consider Both the “Environmental Effects” of the Project Under Federal Law and the “Socio-Economic” Effects of the Project Under Nova Scotia Law**

33. In an EA conducted by a JRP, *all* possible environmental effects relevant to the decisions to be made by each participating jurisdiction must be considered, evaluated and addressed. As explained by Robert Connelly, “an agreement to establish a joint review of the entire project eliminates potential questions as to which government has jurisdiction over the various project components and in the scope of project. This is because the environmental assessment must provide the information required to allow each government to make a decision following completion of the assessment.”<sup>58</sup> As such, the Whites Point JRP was necessarily mandated to review and assess information pertaining

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<sup>55</sup> Expert Report of Robert Connelly, ¶ 52.

<sup>56</sup> See for example, second Affidavit of Bob Petrie, ¶ 5. See also Affidavit of Neil Bellefontaine, ¶¶ 32-33.

<sup>57</sup> See Expert Report of Robert Connelly, ¶ 52 (“As noted by the Supreme Court of Canada in the Oldman River dam case, the environmental assessment process that ensues after the type of assessment decision is made serves the purpose of gathering the relevant information that will provide the decision-maker with an objective basis for ultimately granting or denying approval of a proposed project.”).

<sup>58</sup> See Expert Report of Robert Connelly, ¶ 103. See also Expert Report of Robert Connelly, ¶¶ 102, 104 and first Expert Report of Lawrence Smith, ¶¶ 132, 230-246 (“In this regard, it is important to recognize that as the review process was a *joint* process, it necessarily included all aspects of the Whites Point Project that required review under both the Nova Scotia *Environment Act* and the *CEAA*.”).

to any and all environmental effects under both the *CEAA* and the *NSEA*.

34. Pursuant to the *CEAA*, an EA must consider and evaluate “any change that the project may cause in the environment” including “any effect of any change [in the environment] ... on health and socio-economic conditions”, and “physical and cultural heritage.”<sup>59</sup>

35. Pursuant to Part IV of the *NSEA*, under Nova Scotia law an EA is required to consider and evaluate “any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing”<sup>60</sup> (emphasis added). As the Claimants’ own expert David Estrin has acknowledged, this means that as part of an EA, the Province of Nova Scotia is required to consider, in addition to the effects of a project on the physical environment, the socio-economic effects of a project, an inquiry that can include consideration of whether the effects of the project would be inconsistent with the community’s core values.<sup>61</sup>

36. For this very reason, the JRP Agreement signed between Canada and Nova Scotia required the JRP to conduct its review of the Whites Point project “in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act*” and also “Part IV of the Nova Scotia *Environment Act*.”<sup>62</sup> Similarly, the Agreement required the JRP to consider the environmental effects of the project, as defined under federal law,

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<sup>59</sup> See *CEAA* s. 2, **Exhibit R-1**. See also, Expert Report of Robert Connelly, ¶ 73 and first Expert Report of Lawrence Smith, ¶ 284.

<sup>60</sup> See *NSEA* s. 3, **Exhibit R-5**. See also first Affidavit of Christopher Daly, ¶ 5.

<sup>61</sup> See Expert Report of David Estrin, ¶ 230 (“inconsistency with community core values ... is a pure socio-economic effect”). See also Reply Expert Report of David Estrin, ¶ 306 (“It is beyond debate that ... whether the WPQ would offend the community’s core values, are purely local matters falling under the exclusive jurisdiction of the provincial government”) and ¶ 311 (“The only significant adverse environmental effects cited by the Panel were on community core values, matters of provincial jurisdiction.”).

<sup>62</sup> JRP Agreement, ¶ 4.1, **Exhibit R-27**.

as well as the socio-economic effects of the Project, as required by the Nova Scotia legislation.<sup>63</sup> The Nova Scotia specific requirements were also reflected in the Environmental Impact Statement Guidelines (“EIS Guidelines”) adopted by the JRP, which required the Claimants to provide information on the impacts of the proposed project on factors such as the “Existing Human Environment” and on “Social and Cultural Patterns.”<sup>64</sup>

37. Faced with this unavoidable reality, the Claimants have constructed a one-dimensional case that focuses on the JRP’s alleged improprieties under federal law.<sup>65</sup> Their allegations here are unfounded – as Lawrence Smith has explained, “the Panel’s determination was in fact based on a significant adverse environmental effect within the meaning of the *CEAA*.”<sup>66</sup> Moreover, their arguments also fail to recognize that the JRP’s recommendations had to also satisfy the requirements of provincial law.

**C. The Whites Point EA Government Decisions – Both Nova Scotia and Canada Had to Make A Decision With Respect to the Whites Point Project**

38. Once the JRP completed its work, it made its recommendations to the Governments of Nova Scotia and Canada. Again, the Claimants seem to forget that this is all the JRP did because it was all it could do – make recommendations. In spending pages upon pages attacking the work of the JRP and the recommendations it reached, the Claimants ignore the fact that the JRP’s recommendations were simply an input into the decision-making of the governments involved. Indeed, once the harmonized EA process ended, Nova Scotia and the involved federal departments were required to respond to the

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<sup>63</sup> JRP Agreement, ¶ 6.3 and Appendix – Terms of Reference for the Joint Review Panel, Part III (“Scope of the Environmental Assessment and Factors to be considered in the Review”), **Exhibit R-27**.

<sup>64</sup> EIS Guidelines, p. 45, **Exhibit R-210**. For an overview of the socio-economic factors that were to be addressed pursuant to the EIS Guidelines, see first Expert Report of Lawrence Smith, ¶¶ 262-275.

<sup>65</sup> See, e.g. Expert Report of David Estrin, ¶¶ 228-267 (see in particular, ¶ 237 – “the Panel had *no legal basis* to recommend rejection of the project under *CEAA*.”)

<sup>66</sup> See first Expert Report of Lawrence Smith, ¶ 290. See also ¶¶ 282-291.

recommendations in accordance with their own legislation.<sup>67</sup> Both levels of government had to make decisions. Neither of the government decision-makers could “rubber stamp” the JRP’s recommendations, nor endorse its reasoning, without appropriate reflection and consideration.

39. In addition, the Claimants also ignore that they needed the approval of both levels of government in order for the Whites Point project to proceed. A decision not to approve the project by Nova Scotia, or not to issue the required authorizations by the Federal Government, would mean that the Whites Point project, as it had been proposed by the Claimants, could not proceed.<sup>68</sup>

40. In this regard, the Claimants and Mr. Estrin focus almost entirely on the alleged wrongfulness of the Federal Government’s response to the Whites Point JRP’s recommendations.<sup>69</sup> But as Lawrence Smith has explained, the Federal Government’s decision was “lawful and constitutionally proper” because “the socio-economic effects of the project which arose from the environmental effects the JRP identified were a legitimate basis for federal authorities to base their decisions.”<sup>70</sup>

41. More importantly, the Claimants ignore the fact that Nova Scotia also had a decision to make that was critical to the fate of the project.<sup>71</sup> While authorizations under various federal acts were indeed necessary, they were not sufficient for the project to proceed. The quarry also had to be approved by Nova Scotia, and as the Claimants themselves had noted, without the quarry they were not interested in the marine

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<sup>67</sup> See Expert Report of Robert Connelly, ¶¶ 125-126, 130.

<sup>68</sup> See Expert Report of Robert Connelly, ¶ 131 (“if one jurisdiction decides that a project should not proceed or that a decision to enable a project to proceed should not be allowed, then the decision of the other jurisdiction effectively becomes moot. A project cannot proceed in such a circumstance as the approval of both levels of government is required.”). See also Rejoinder Expert Report of Lawrence Smith, ¶¶ 206-209.

<sup>69</sup> Reply Expert Report of David Estrin, ¶¶ 301-318.

<sup>70</sup> See Rejoinder Expert Report of Lawrence Smith, ¶ 214.

<sup>71</sup> See Claimants’ Reply, ¶¶ 528-531 and Reply Expert Report of David Estrin, ¶¶ 301-318.

terminal.<sup>72</sup> As such, the refusal by Nova Scotia to approve the quarry, on grounds permitted by its legislation,<sup>73</sup> meant the end of the Claimants' proposed project.<sup>74</sup>

42. In an attempt to avoid this fact, the Claimants suggest that Nova Scotia would not have rejected the project if the Federal Government had expressed concern over the approach taken by the JRP in its recommendations.<sup>75</sup> There is no evidence that this is true. As Christopher Daly explains in his second Affidavit, Nova Scotia's decision had to be made, and indeed was made, independently of the Federal Government's decision.<sup>76</sup> In fact, the Nova Scotia Minister of the Environment and Labour made his decision not to approve the project almost one month before the Federal Government made its decision.<sup>77</sup> As Mr. Smith summarizes in his Rejoinder Expert Report, "The evidence discloses not the faintest hint of doubt, hesitation or equivocation on the part of Nova Scotia about its decision to reject the project.... Nova Scotia demonstrated a clear intention, in that respect, to "go it alone" and its decision amounted to a complete rejection of the Whites Point Project regardless of the federal decision-making process."<sup>78</sup>

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<sup>72</sup> See Thomas Wheaton's notes of meeting between DFO and GQP, July 25, 2002, p. 3, **Exhibit R-27**. See also first Affidavit of Mark McLean, ¶ 25 and Canada's Counter-Memorial, ¶¶ 93-94.

<sup>73</sup> See Rejoinder Expert Report of Lawrence Smith, ¶ 205. Notably, the Claimants' Expert does not dispute that Nova Scotia had the authority to reject the project based on socio-economic effects. See Expert Report of David Estrin, ¶ 230 ("inconsistency with community core values ... is a pure socio-economic effect"). See also Reply Expert Report of David Estrin, ¶ 306 ("It is beyond debate that ... whether the WPQ would offend the community's core values, are purely local matters falling under the exclusive jurisdiction of the provincial government") and ¶ 311 ("The only significant adverse environmental effects cited by the Panel were on community core values, matters of provincial jurisdiction.").

<sup>74</sup> See for example first Expert Report of Lawrence Smith, ¶ 444 ("With the provincial decision having been made, the Project could not proceed. As noted, the Nova Scotia government rejected the Project prior to the federal government's decision rejecting the project. Accordingly, the federal government decision, whether flawed or not (and I am of the opinion it was not), was somewhat of an academic point.").

<sup>75</sup> See Reply Expert Report of David Estrin, ¶¶ 327-352, in particular ¶ 352.

<sup>76</sup> See second Affidavit of Christopher Daly, ¶ 4.

<sup>77</sup> See Canada's Counter-Memorial ¶¶ 208, 212. See also letter from Minister of the Environment and Labour to Paul Buxton, November 20, 2007, **Exhibit R-331**, and *News Release – The Government of Canada Accepts Panel Conclusion for the Whites Point Quarry and Marine Terminal*, December 18, 2007, **Exhibit R-161**.

<sup>78</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 211.

43. Provincial and federal decision-makers were indeed interested in how the other viewed the recommendations of the JRP,<sup>79</sup> but as Mr. Daly explains in his second Affidavit “Nova Scotia was not looking to align its decision with that of the Federal Government. Rather, Nova Scotia communicated with Canada regarding the timing and nature of the decisions in order to prepare an appropriate communications strategy around the Minister’s announcement.”<sup>80</sup>

44. Ultimately, while the Claimants advance a multitude of complaints and arguments on virtually every decision taken during the Whites Point EA process, their entire case boils down to the fact that they were not permitted to build and operate their proposed quarry and marine terminal at Whites Point. They are understandably disappointed. However, contrary to what they seem to believe, the EA process is not merely a licensing exercise and a proponent subject to an environmental assessment in Canada – any level of assessment – is not entitled by right to have its proposal approved. The EA process exists for a reason, and it is inevitable that some projects will be rejected because they are simply inappropriate for the biophysical and human environments for which they are proposed.

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<sup>79</sup> See for example the documents cited in the Reply Expert Report of David Estrin, ¶¶ 333, 334, 336, 338, 339 and 341.

<sup>80</sup> See second Affidavit of Christopher Daly, ¶4.

### **III. THE TRIBUNAL LACKS JURISDICTION TO HEAR CERTAIN ALLEGATIONS BEING ADVANCED BY THE CLAIMANTS**

45. As Canada explained in its Counter-Memorial, a number of the Claimants' claims are beyond the jurisdiction of this Tribunal. In their Reply, the Claimants fail to seriously respond to any of the jurisdictional barriers identified by Canada. This approach is remarkable given that it is the Claimants who bear the burden of establishing that this Tribunal has jurisdiction to hear the claims they have submitted.<sup>81</sup>

46. Below, Canada explains how the Claimants have failed to meet their burden of establishing this Tribunal's jurisdiction to hear their claims with respect to: (1) the industrial approval for a 3.9 ha quarry granted to Nova Stone; (2) measures of which the Claimants had knowledge over three years prior to the date on which they commenced these proceedings; (3) the actions of the JRP; and (4) the Government of Canada's acceptance of the JRP's recommendations.

#### **A. The Tribunal Lacks Jurisdiction Over the Claimants' Claims Relating to Nova Stone's Industrial Approval for the 3.9 ha Quarry**

47. In their Memorial and their Reply, the Claimants allege a number of NAFTA violations in connection with the industrial approval issued to Nova Stone for its 3.9 ha quarry. These include the alleged imposition by DFO of blasting conditions and inappropriate set back distances, and the alleged refusal by DFO to approve Nova Stone's blasting plan or to explain setback distances on the 3.9 ha quarry.<sup>82</sup> Canada explained in its Counter-Memorial that any measures taken in connection with Nova Stone's industrial approval do not "relate to" the Claimants or to their investment. Canada also explained that even if these measures were found to "relate to" either the Claimants or their

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<sup>81</sup> *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, 15 September 2011, ¶ 277, **RA-87**.

<sup>82</sup> See Claimants' Memorial, ¶¶ 459-460. See also Claimants' Reply, ¶ 481. These allegations are all made in support of the Claimants' claim that Canada violated Article 1105. They make a similar argument that the alleged imposition of blasting conditions in Nova Stone's industrial approval violated Article 1102 – see Claimants' Reply, ¶¶ 617-648.

investment, the Claimants have not rebutted the overwhelming evidence demonstrating that their claims are time-barred under Article 1116(2).

48. In their Reply, the Claimants offer no new evidence or theories sufficient to meet their burden of establishing that this Tribunal has jurisdiction to hear these claims. Instead, as explained below, the Claimants resort to offering nothing more than misleading factual statements and erroneous interpretations of the law in support of their positions.

**1. Measures Taken in Connection with Nova Stone’s Industrial Approval do not “Relate to” the Claimants or to Their Investment**

49. The manner in which measures must “relate to” an investor or an investment of another NAFTA Party in order to be the subject of a Chapter Eleven claim has been explained in detail in Canada’s Counter-Memorial.<sup>83</sup> In order to demonstrate that the measures they complain of in connection with the industrial approval for the 3.9 ha quarry “relate to” them or their investment, the Claimants take liberties with the facts of this case. For example, in their Reply they state that “Bilcon’s attempt to operate a quarry at Whites Point ... was set in motion by the industrial approval of its application on April 30, 2002.”<sup>84</sup> (emphasis added) They also describe “Bilcon” as the entity that prepared the blasting plan pursuant to the conditions contained in the industrial approval.<sup>85</sup> None of these assertions is correct. In fact, Bilcon neither applied for nor received the industrial approval of April 30, 2002. Nor did Bilcon prepare and file the blasting plan pursuant to the approval. Nova Stone did both.<sup>86</sup>

50. The Claimants further argue that their execution of a partnership agreement with

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<sup>83</sup> See Canada’s Counter-Memorial, ¶¶ 215-221.

<sup>84</sup> Claimants’ Reply, ¶ 698.

<sup>85</sup> Claimants’ Reply, ¶ 481.

<sup>86</sup> See the facts set out in Canada’s Counter-Memorial, ¶¶ 63-81.

Nova Stone, entered into on May 2, 2002,<sup>87</sup> somehow means that measures taken in connection with the industrial approval issued on April 30, 2002, “relate to” them. To the contrary, the approval was issued to only Nova Stone – not to the Claimants. As Bob Petrie, the official who issued the approval, has already explained, “the holder of the approval from NSDEL’s perspective was always Nova Stone. Under the *NSEA*, industrial approvals – such as the one issued here – cannot be transferred, sold, leased or otherwise disposed of without the written consent of the Minister.”<sup>88</sup> Accordingly, the industrial approval could only belong to Nova Stone. Nothing in the Claimants’ Reply contradicts that fact.

51. In admitting that their only interest in the industrial approval arises from a “partnership agreement,”<sup>89</sup> the Claimants are essentially admitting that they have no standing to bring claims concerning measures relating to that approval. Under international law, a claimant does not have standing to bring a claim on behalf of or for losses or damages suffered by one of its partners. Rather, its standing is limited to an ability to claim for its own share of the losses.<sup>90</sup> In this case, the Claimants had no share of the 3.9ha industrial approval, as it belonged to Nova Stone alone, and hence, they have no standing to pursue any claims in respect of measures relating to that industrial approval.

52. Moreover, as a factual matter, it is not apparent why a partnership agreement entered into *after* the issuance of the industrial approval should even be considered relevant at all. Nova Stone actually first applied for the industrial approval on February

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<sup>87</sup> See Partnership Agreement between Bilcon and Nova Stone, May 2, 2002, **Exhibit R-293**.

<sup>88</sup> See first Affidavit of Bob Petrie, ¶ 15. See also *NSEA*, s. 59(1), **Exhibit R-5**.

<sup>89</sup> Claimants’ Reply, ¶ 710.

<sup>90</sup> *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶¶ 154-155, **RA-88**.

18, 2002,<sup>91</sup> over two months prior to it entering into any sort of business relationship with the Claimants. NSDEL rejected the application and so on April 23, 2002, Nova Stone – again on its own and prior to entering into the partnership agreement with the Claimants – filed a new application for the approval.<sup>92</sup> The industrial approval was issued one week later, on April 30, 2002,<sup>93</sup> still prior to Nova Stone and Bilcon entering into the partnership agreement.

53. Ultimately, it is undisputed that Nova Stone entered into a business relationship with the Claimants in order to advance the Whites Point project. It is also undisputed that Nova Stone’s 3.9 ha quarry was to be the first step in that larger project. But it does not follow from these facts that measures taken in connection with Nova Stone’s industrial approval for the 3.9 ha quarry “related to” either the Claimants or to their investment for the purposes of a NAFTA claim. At best, the Claimants have shown that they were part of an “indeterminate class of investors” that could be affected by the measures. However, as the *Methanex* Tribunal explained,<sup>94</sup> this is far from sufficient to meet the threshold provided by Article 1101. The blasting conditions, and any subsequent communications or decisions relating to those conditions, related to Nova Stone and Nova Stone only, and therefore could not and did not “relate to” the Claimants for the purposes of NAFTA.

## **2. Any Measures Taken in Connection with Nova Stone’s Industrial Approval Are Time-Barred**

54. As Canada explained in its Counter-Memorial, Article 1116(2) of NAFTA requires an investor to challenge a measure within three years of its first acquiring actual

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<sup>91</sup> See first Affidavit of Bob Petrie, ¶ 7 and Nova Stone, Application for Approval, February 18, 2002, **Exhibit R-75**.

<sup>92</sup> See first Affidavit of Bob Petrie, ¶ 8 and Nova Stone, Application for Approval, April 23, 2002, **Exhibit R-78**.

<sup>93</sup> See first Affidavit of Bob Petrie, ¶ 14 and Nova Stone Approval to Construct and Operate a quarry near Little River, Digby County, April 30, 2002, **Exhibit R-87**.

<sup>94</sup> See Canada’s Counter-Memorial, ¶ 217 wherein the *Methanex* Tribunal is cited as concluding that “If the threshold provided by Article 1101(1) were merely one of ‘affecting,’ as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment.”

or constructive knowledge: (1) of the measure giving rise to the breach; and (2) that it has incurred loss or damage as a result of the breach.<sup>95</sup> In addition, Canada described the facts that definitively show that the Claimants are time-barred from advancing claims in respect of any measures for which they had the requisite knowledge over three years prior to the June 17, 2008 commencement of the arbitration – i.e., prior to June 17, 2005.<sup>96</sup> In their Reply, the Claimants’ only response is once again to misapply the law and misrepresent the relevant facts.

55. First, the Claimants persist in advancing the untenable argument that measures relating to Nova Stone’s conditional approval are not time-barred due to their “ongoing and prejudicial effect on the Investment.”<sup>97</sup> Canada has already explained why an alleged “ongoing effect” does not toll the limitation period of Article 1116(2).<sup>98</sup> The Claimants’ “ongoing effect” interpretation completely ignores the ordinary meaning of the terms of Article 1116(2) which provides that the three year time period runs from the point at which the Claimants “first acquired ... knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”<sup>99</sup> (emphasis added) The “effect” of a

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<sup>95</sup> Article 1116(2) provides that: “An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”

<sup>96</sup> See Canada’s Counter-Memorial, at ¶¶ 224-258. As noted in Canada’s Counter-Memorial, the disputing parties have agreed that the commencement date of this arbitration was June 17, 2008 – see letter from Meg Kinnear to Barry Appleton, June 18, 2008, **Exhibit R-501** and letter from Barry Appleton to Meg Kinnear, August 5, 2008, **Exhibit R-502**.

<sup>97</sup> See Claimants’ Reply, ¶ 700.

<sup>98</sup> See Canada’s Counter-Memorial, ¶ 238, wherein it cited the *Mondev* Tribunal’s finding that “there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage.” See also *Mondev – Award*, ¶ 58, **RA-46**.

<sup>99</sup> The Claimants blatantly misrepresent Canada’s position on the relevance of “continuing measures” to the analysis that must be conducted under Article 1116(2). In ¶ 715 of their Reply the Claimants quote Canada as having “admitted” that the NAFTA “authorizes investors to make Chapter Eleven claims based on continuing measures.” However, the paragraph references to Canada’s Counter-Memorial they cite in support do not reflect Canada as having made this statement. Nor did it. Canada did acknowledge in ¶ 240 of its Counter-Memorial that the NAFTA Parties contemplated that measures which might be construed as “continuing” could be challenged under Chapter Eleven, given that Article 1101 provides that Chapter Eleven applies to “measures adopted or maintained” by a Party. However, the Claimants ignore the key point made by Canada in connection with this statement – notwithstanding that continuing measures may

measure, which might be felt well after an investor acquires knowledge of an alleged breach and resultant loss or damage, is irrelevant to the issue of whether a claim is time-barred under Article 1116(2).

56. Moreover, the Claimants once again resort to re-inventing the facts of this case to make out their argument. In an attempt to demonstrate the measures relating to Nova Stone's 3.9ha industrial approval "continued" up to the point at which the federal and Nova Scotia governments decided to reject the Whites Point project, they argue that the blasting conditions "allowed the DFO to continue to refuse permission to Bilcon to undergo test blasting throughout the remainder of the Environmental Assessment," "prevented Bilcon from being able to begin accumulating the necessary data," and that "the lack of test blasting was relied upon by the Joint Review Panel as a reason to recommend against approval."<sup>100</sup> These assertions are not only misleading, they are wrong.

57. The blasting conditions in Nova Stone's industrial approval had nothing to do with whether or not test blasting was conducted at the site through to the end of the EA in 2007. In fact, as a result of Nova Stone's withdrawal from the project, the industrial approval was invalidated on May 1, 2004. Accordingly, the blasting conditions ceased to exist more than three years before the end of the EA in 2007. There were simply no measures pertaining to the industrial approval that occurred after May 1, 2004, let alone after June 17, 2005.<sup>101</sup>

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be the subject of a NAFTA claim, "[t]he running of the time bar is to be calculated from the "first" acquisition of relevant knowledge, not subsequent, repeated or ultimate acquisition of such knowledge" – see Canada's Counter-Memorial, ¶ 240.

<sup>100</sup> See Claimants' Reply, ¶ 700.

<sup>101</sup> See Affidavit of Bob Petrie, ¶ 17 and Canada's Counter-Memorial, ¶¶ 158-160. In ¶ 721 of their Reply, the Claimants appear to cite the award of the *Grand River* Tribunal as support for their argument that measures taken in connection with the industrial approval for the 3.9 ha quarry are not time barred. However, the measures the Claimants complain of here are in no way like the measures at issue in the *Grand River* arbitration. In that case, the Tribunal found that certain measures were not time-barred because they were taken within three years of the initiation of the claim - see *Grand River – Jurisdiction*

58. Nor could these measures have had the continuing “effect” suggested by the Claimants. For example, they had no impact on Bilcon’s ability to “accumulate the necessary data” for its EA. Irrespective of measures taken in connection with Nova Stone’s industrial approval, Bilcon had three years to make arrangements for test blasting on the project site in order to gather any data that it thought might be necessary for the EA. It chose not to. Further, the “lack of test blasting” was not relied upon by the JRP as a reason to recommend against approval of the Whites Point project – the project’s inconsistency with community core values was the reason underlying the Panel’s recommendation.<sup>102</sup>

59. Second, the Claimants attempt to avoid this jurisdictional bar by misrepresenting the requirements for the application of Article 1116(2). In particular, they claim that Article 1116(2) requires “concrete knowledge of actual loss.”<sup>103</sup> (emphasis added) This purported interpretation ignores the ordinary meaning of the terms in Article 1116(2). Those terms require nothing more than knowledge of loss or damage. The Claimants cite no authority in support of their interpretation. In fact, all the authority is to the contrary. The overwhelmingly consistent approach of other NAFTA tribunals has been that *concrete* knowledge of the *actual* amount of loss or damage is not a pre-requisite to the running of the time period under Article 1116(2).<sup>104</sup>

60. Moreover, even if the Claimants were correct as to the interpretation of Article

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*Decision*, ¶¶ 84-90, **RA-30**. The same cannot be said for *any* of the measures the Claimants complain of in connection with Nova Stone’s industrial approval.

<sup>102</sup> See JRP Report, p. 14, **Exhibit R-212**.

<sup>103</sup> See Claimants’ Reply, ¶ 727.

<sup>104</sup> See for example, *Grand River – Jurisdiction Decision*, ¶ 77, **RA-30** (“A party is said to incur losses, expenses, debts or obligations, all of which may significantly damage the party’s interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.”). See also *Mondev – Award*, ¶ 87, **RA-46** (“a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”). See also *UPS – Award*, ¶ 29, **RA-79** (“The fact that the exact magnitude of the loss was not yet finally determined would not have been enough... to avoid the time bar if the time bar otherwise would have applied.”).

1116(2), it is clear that they did have concrete knowledge of actual damages arising from this alleged breach by no later than 2003. In 2003, Mr. Buxton, who was the representative of both Nova Stone and Global Quarry Products (“GQP”), claimed that he was aware of actual losses which he alleged were connected with the inability to begin quarrying at Whites Point. In particular, Mr. Buxton wrote to NSDEL on June 25, 2003, advising that there “are serious financial consequences which arise from our inability to operate in accordance with the Permit,” that the “Company has suffered significant costs,” and that the “[f]ailure to act [i.e., to allow Nova Stone to blast] will cause severe economic hardship to the Company and the project.”<sup>105</sup> Moreover, contrary to the Claimants suggestion that the alleged “financial consequences” noted by Mr. Buxton in his letter were not known to Nova Stone at the time in *actual* quantifiable terms, two weeks earlier, on June 10, 2003, Mr. Buxton complained to the Agency’s Derek McDonald that Nova Stone “Now had an opportunity to bid on Hwy 217 upgrading worth [REDACTED] but unable to because blasting plan not approved.”<sup>106</sup> In short, the evidence discloses that the Claimants, through their representative, Mr. Buxton, had actual knowledge of the alleged NAFTA breaches, and of the alleged losses suffered, at least five years before submitting this claim to arbitration. Accordingly, the Tribunal should dismiss the Claimants’ claims relating to Nova Stone’s industrial approval.

**B. The Tribunal Lacks Jurisdiction Over the Claimants’ Claims Regarding DFO Determinations on the EA of the Whites Point Project as These Claims are Time-Barred**

61. As Canada explained in its Counter-Memorial, the Claimants’ allegations regarding DFO’s determinations on the EA of the Whites Point project – including DFO’s determinations that the quarry should be included in the scope of project for the purposes of the EA, that the Whites Point project was subject to a comprehensive study, and that the EA be referred to a review panel – are all also time-barred under Article

<sup>105</sup> See letter from Paul Buxton to NSDEL, June 25, 2003, **Exhibit R-382**.

<sup>106</sup> Excerpt from 2003 Journal of Derek McDonald, June 10, 2003, **Exhibit R-551**.

1116(2).<sup>107</sup>

62. While the Claimants' Reply submissions regarding each of these DFO determinations are difficult to decipher, it appears the Claimants argue that the continuing *effect* of each of these measures tolled the running of the limitation period under Article 1116(2).<sup>108</sup> As Canada has explained both above and in its Counter-Memorial,<sup>109</sup> the alleged "ongoing effects" of a measure do not render it a continuing measure under Article 1116(2). Each one of the DFO determinations described above were distinct measures that were clearly made known to the Claimants. Further, to the extent that they entailed additional cost or expense as alleged by the Claimants,<sup>110</sup> the Claimants knew or should have known of those costs or expenses well before June 17, 2005.<sup>111</sup> Any alleged "effects" of these measures are irrelevant to the analysis to be conducted under Article 1116(2). As such the Claimants' Reply fails to address the jurisdictional barrier facing their allegations regarding DFO's determinations on the EA process.

**C. The Tribunal Does not Have Jurisdiction to Consider the Alleged Acts of the Whites Point JRP**

63. In its Counter-Memorial, Canada explained that the jurisdiction of this Tribunal is limited to consideration of measures that are attributable to Canada at international law.<sup>112</sup>

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<sup>107</sup> See Canada's Counter-Memorial, ¶¶ 259-266.

<sup>108</sup> Claimants' Reply, ¶¶ 700-703.

<sup>109</sup> See Canada's Counter-Memorial, ¶ 238.

<sup>110</sup> Claimants' Reply, ¶ 742. Perplexingly, the Claimants also allege that these measures did not lead to loss or damage until the governments of Nova Scotia and Canada accepted the recommendations of the JRP Report. The Claimants have given no explanation why these extra costs and expenses that they allege do not constitute damages within the meaning of Article 1116(2). If the Claimants do not consider these costs and expenses as damages, then they should not be compensable in this arbitration.

<sup>111</sup> See Canada's Counter-Memorial, ¶¶ 262-264.

<sup>112</sup> Canada's Counter-Memorial, ¶¶ 267-270. To be clear, there is no dispute that Canada is responsible for the acts of DFO, the Agency and NSDEL, as such entities are organs of the governments of Canada and Nova Scotia. There is also no dispute that Canada is responsible as a matter of international law for the acts of the Minister of Fisheries and Oceans, the Minister of the Environment or the Nova Scotia Minister of Environment and Labour when they act in their Ministerial capacities. Finally, there is no dispute

In their Memorial, the Claimants alleged that all of the acts of the JRP are attributable to Canada because it is an organ of Canada, the JRP members were agents of Canada, and the JRP exercised delegated governmental authority. In response, Canada clearly laid out the tests at international law, as explained by the International Court of Justice most recently in the *Genocide Convention* case, for attributing to States the conduct of both *de jure* and *de facto* organs, as well as the test for attributing to States the acts of private parties exercising delegated governmental authority. On the basis of these tests, applied appropriately, Canada demonstrated how the acts of the JRP that the Claimants challenge cannot be attributed to Canada.<sup>113</sup>

64. In their Reply, the Claimants now group their arguments under two headings: (1) “Canada’s Internal Law Recognizes the Joint Review Panel as an Organ of Canada” and (2) “Canada Acknowledged and Adopted the Joint Review Panel Report.” Despite this superficial organization, what the Claimants have actually presented in their Reply is an unhelpful and confused jumble of baseless allegations and unsupported assertions haphazardly applying various theories of state responsibility. For example, under their first point, in addition to arguing that the JRP is a *de jure* organ of Canada,<sup>114</sup> the Claimants also argue, in the alternative, that the JRP is a private party exercising delegated governmental authority,<sup>115</sup> and acting under the instruction or effective control

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between the parties that Canada is responsible for the acts of Nova Scotia, one of its constituent political subdivisions.

<sup>113</sup> Canada’s Counter-Memorial, ¶¶ 271-297.

<sup>114</sup> Claimants’ Reply, ¶¶ 747-750, 756-758. As Canada explained in its Counter-Memorial, at customary international law, an assertion that an entity is an organ of a State because it is recognized by that State’s internal law as such, is an argument that the entity is a *de jure* organ. See Canada’s Counter-Memorial, ¶ 272 and *Genocide Convention* case, ¶¶ 386, RA-12. Notably, in their Reply the Claimants seem to abandon any argument that the JRP should be considered a *de facto* organ of Canada. At least, none of the allegations made seem to relate to such an argument in any clearly discernable way. Regardless, even if they had intended to pursue this argument, they offer no evidence that would come even close to meeting their burden of establishing the JRP’s “complete dependence” on Canada, and Canada’s “complete control” of the JRP. To the extent necessary, Canada reiterates the arguments that it made on this point in its Counter-Memorial, ¶¶ 280-285.

<sup>115</sup> Claimants’ Reply, ¶¶ 751-755, 759-762.

of Canada.<sup>116</sup> Under their second heading, the Claimants do not even bother to lay out the legal test for attribution on these grounds, and even more confusingly, include a number of paragraphs that actually do not seem to relate to the question of attribution argument at all.<sup>117</sup>

65. While the Claimants' unstructured and convoluted approach makes it difficult for Canada to respond, it also evidences the lack of a solid legal basis for any of the Claimants' claims. Indeed, nothing in the Claimants' Reply offers anything sufficient to meet their burden to establish that the complained of acts of the JRP are in fact measures adopted or maintained by Canada. This does not mean of course that Canada is not responsible for its own acts, or the acts of Nova Scotia during the EA of the Whites Point Project. For example, there is no dispute between the parties that Canada is responsible at international law for both its own and Nova Scotia's decision to ultimately accept the JRP's recommendation and reject the project on the basis of its inconsistency with community core values – though as is shown below, there was nothing wrongful about those decisions.

### **1. The JRP Is Not a *De Jure* Organ of Canada**

66. In their Reply, the Claimants offer nothing new to respond to the explanations Canada offered as to why the JRP is not a *de jure* organ of the government. Instead, they simply reprise the same argument from their Memorial, claiming that the mere fact that a JRP's decisions are subject to judicial review in Canadian courts means that Canadian law recognizes a JRP as an organ of the government. As Canada explained in its Counter-Memorial, this is not true as a matter of Canadian law.<sup>118</sup> In none of the cases cited by the Claimants does a court conclude that a JRP is an organ of government. This

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<sup>116</sup> Claimants' Reply, ¶¶ 763-764.

<sup>117</sup> As noted below, ¶¶ 773-782 of the Claimants' Reply seem to be a response to Canada's objection to the jurisdiction of the Tribunal to consider the decision of the government of Canada to refuse to issue the requested authorization on the grounds that the decision was not capable of causing the Claimants harm.

<sup>118</sup> Canada's Counter-Memorial, ¶¶ 277-279.

is unsurprising as the issue was not before any of these courts. Contrary to what the Claimants allege, the acts of non-organs can be subject to judicial review in Canada.

67. The Supreme Court made this clear in *McKinney v. University of Guelph*, explaining that the fact that an entity is a statutory body performing a public service and thus subject to judicial review “does not in itself make [it] part of government...”<sup>119</sup> In their Reply, the Claimants imply that this is no longer good law in Canada and that the Supreme Court reconsidered this decision in *Godbout v. Longueuil (City)*.<sup>120</sup> This is simply wrong. In fact, a mere four paragraphs after the quotation that the Claimants have extracted and inserted in their Reply, the Supreme Court expressly reaffirmed its decision in *McKinney* on this point quoting the exact paragraph that Canada quoted in its Counter-Memorial, and itself adding emphasis on the text quoted above.<sup>121</sup> Accordingly, the Claimants have failed to meet their burden of showing that the JRP is a *de jure* organ of Canada. If anything, the authorities that they cite actually support Canada’s position in this matter.

## **2. The JRP Was Not Exercising Governmental Authority With Respect to Any of the Alleged Breaches**

68. In their Reply, the Claimants again fail to offer an explanation as to how any of the complained of acts of the JRP were carried out in the exercise of the limited governmental authority delegated to it.<sup>122</sup> There is no dispute between the parties that the JRP performed and was mandated to perform a public service for Canada and Nova Scotia in gathering information during the EA and coming up with its recommendations for government decision makers to consider. Nor is there a dispute that this was its only

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<sup>119</sup> *McKinney v. University of Guelph* [1990], 3 S.C.R. 229 at p. 48, **Exhibit R-384**.

<sup>120</sup> Claimants’ Reply, ¶ 758.

<sup>121</sup> *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, **CA-214**, ¶ 49.

<sup>122</sup> In certain instances, the Claimants appear to confuse the issue of delegated governmental authority with the question of whether an entity is an organ. See Claimants Reply, ¶¶ 759-760. As the ICJ has made clear, these are distinct legal concepts, and exercising delegated governmental authority does not turn an entity into an organ of the government. See *Genocide Convention Case*, ¶ 397, **RA-12**.

function and purpose. However, as Canada explained in its Counter-Memorial, none of these facts are relevant. The sole issue is whether any of the complained of acts of the JRP were in the exercise of delegated governmental authority.<sup>123</sup> As Canada explained in its Counter-Memorial, they were not.<sup>124</sup>

69. The decision of the Tribunal in the *Jan de Nul v. Egypt* arbitration clearly supports Canada's position in this regard. In its Reply, the Claimants suggest that Canada has misrepresented the *Jan de Nul* decision. This is simply not true. The Tribunal in *Jan de Nul* considered at length the issue of whether the acts of the Suez Canal Authority could be attributed to Egypt, and it decided that they could not be on exactly the grounds Canada has described.<sup>125</sup>

70. In fact, it appears that the Claimants are confused about some basic facts in *Jan de Nul*. The Claimants refer to a paragraph in the decision that describes a separate entity than the one referred to in the paragraphs Canada cites. While not clear from the particular paragraph the Claimants reference, it appears from earlier in the decision that this "Second Panel of Experts" was expressly delegated the authority by the court "to determine the damage elements, assessment of same and causes thereof, if any, incurred by the plaintiff companies as a result of the contract works."<sup>126</sup> (emphasis added). If the JRP in this case had been delegated the authority to "determine" issues that would otherwise fall to government decision makers, there would be little question as to Canada's responsibility for its acts in making such a determination. However, it was not so empowered. All it could do was gather information and make recommendations. Such activities cannot be considered an "exercise" of government authority because they simply do not entail a power over some third party. Accordingly, the decision in *Jan de*

<sup>123</sup> See Canada's Counter-Memorial, ¶¶ 294-297.

<sup>124</sup> See Canada's Counter-Memorial, ¶¶ 289-293.

<sup>125</sup> *Jan de Nul v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, **RA-33**, ¶¶ 155-174.

<sup>126</sup> *Jan de Nul*, **RA-33**, ¶ 97.

*Nul* is in fact the perfect example of Canada’s position – the acts of a private entity are not attributable to a State just because it provides a public service. Rather, they are attributable only when that entity exercises its delegated governmental authority.

71. In attempting to escape from these requirements of international law, the Claimants refer to domestic Canadian law and suggest that Canadian courts applying domestic Canadian law would find the JRP to have been exercising a governmental function, and thus subject to laws that typically only apply to government bodies.<sup>127</sup> First, this point is irrelevant. The question here is whether, *as a matter of international law*, which the Tribunal is bound to apply, the JRP could be deemed to be exercising delegated governmental authority.

72. Second, even if Canadian law were considered, the very case cited by the Claimants to support their arguments, *Godbout v. Longueuil*, suggests that relevant factors to consider in assessing whether an entity is performing a governmental function include whether the entity is “appointed and removable at pleasure” by the government and whether the “government may at all times by law direct its operation.”<sup>128</sup> While the JRP was appointed by the governments of Canada and Nova Scotia, its members were not removable at the governments’ pleasure and nor were the Governments of Canada and Nova Scotia able to “direct its operations.”<sup>129</sup> As such, the JRP would not meet the test under Canadian law outlined in the very cases the Claimants cite.

### **3. The JRP Was Not Acting Under the Instructions or Effective Control of Canada When It Committed the Complained of Acts**

73. For the first time in their Reply, the Claimants allege that the acts of the JRP are attributable to Canada because it was acting under Canada’s instructions. The Claimants do not describe what the test is at international law for such a determination. Moreover,

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<sup>127</sup> Claimants’ Reply, ¶¶ 756-761.

<sup>128</sup> Claimants’ Reply, ¶ 758, citing *Godbout* ¶¶ 44-45.

<sup>129</sup> See Canada’s Counter-Memorial ¶¶ 283-284.

they make no efforts to even apply any test whatsoever. This is clearly insufficient and their arguments should be dismissed on this ground alone.

74. Even considered on its merits, this argument is baseless. Article 8 of the International Law Commission’s Articles on State Responsibility provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>130</sup>

75. In the *Genocide Convention* case, the ICJ explained that in order to meet this standard, it would have to be shown that the person or group of persons “acted in accordance with that State’s instructions or under its ‘effective control.’ It must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”<sup>131</sup> (emphasis added)

76. The Claimants have offered no evidence – and none exists – which would prove that Canada or Nova Scotia instructed the JRP to engage in each of the decisions which is alleged to be a violation of NAFTA. While the JRP operated within the general mandate of its Terms of Reference (which could be considered general instructions), the JRP was an autonomous body. It organized its own internal procedures, determined how it would conduct the hearing, and decided itself on what it believed to be the appropriate approach to topics such as a cumulative effects analysis, the precautionary principle, adaptive management, mitigation measures, and information requests of the Claimants. Neither Canada nor Nova Scotia had any role in instructing the JRP with respect to any of these complained of acts. Accordingly, despite the Claimants’ assertion to the contrary, as a

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<sup>130</sup> *ILC Articles*, **RA-61**.

<sup>131</sup> *Genocide Convention* case, **RA-12**, ¶ 400.

matter of international law, the complained of acts of the JRP are not attributable to Canada on these grounds.

**4. Canada Has Not Acknowledged or Adopted Any of the Complained of Acts as its Own**

77. Also for the first time in their Reply, the Claimants allege that the complained of acts of the JRP are attributable to Canada under Article 11 of the ILC's Articles on State Responsibility because Canada, though apparently not Nova Scotia, accepted the recommendations in its report. Once again, however, the Claimants fail to even describe the applicable legal test for attribution under this rule. Simply asserting a legal conclusion is insufficient to meet their burden of proof, and on this ground alone, the Claimant's arguments should be dismissed.

78. Even if the allegation is examined, it becomes clear that it has no legal merit. Article 11 of the Articles on State Responsibility provides:

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.<sup>132</sup>

79. As the official commentary to Article 11 explains, international law requires a "clear and unequivocal" acknowledgement or adoption of the "conduct in question" in order for this rule to apply.<sup>133</sup> It further clarifies that the "language of 'adoption' carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct."<sup>134</sup>

80. On December 17, 2007 Canada issued its response to the report of the JRP, in which it concluded, after having "carefully considered" the report, that it "accepted" and

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<sup>132</sup> *ILC Articles*, **RA-61**.

<sup>133</sup> *ILC Articles and Commentary to Article 11*, Cmt 7, p, 53, **RA-60**.

<sup>134</sup> *ILC Articles and Commentary to Article 11*, Cmt 6, p, 53, **RA-60**.

“supported” the ultimate recommendations made by the JRP. In this response, there is no acknowledgement or adoption at all, let alone a clear and unequivocal one, of the conduct that the Claimants complain about regarding the JRP hearing process, or its particular decisions as to the approach that it would adopt on questions such as cumulative effects, precautionary principle, adaptive management, mitigation measures and information requests. Indeed, there is no evidence whatsoever that it acknowledged this particular conduct “as its own.” Merely accepting a recommendation is not enough, at international law, for all of the acts of the entity that made that recommendation to be attributed to the State. Accordingly, the complained acts of the JRP cannot be considered acts of Canada under this rule of attribution.

**D. The Tribunal Does Not Have Jurisdiction to Consider Measures not Capable of Causing Damage**

81. In its Counter-Memorial, Canada explained that the Federal Government’s decision to accept the recommendation of the JRP was rendered moot by the decision of Nova Scotia to do the same a month earlier. Accordingly, the Federal Government “decision” was actually incapable of causing loss or damage to the Claimants; and thus, pursuant to Article 1116(2), this Tribunal does not have jurisdiction to hear claims relating to it.<sup>135</sup>

82. In their Reply, the Claimants allege that “Nova Scotia’s acceptance of the JRP’s first recommendation to reject Bilcon’s application was not dispositive of the application.”<sup>136</sup> However, they cite no evidence to support this incredible assertion. There can be no question in this case that the Claimants were interested only in constructing a quarry and a marine terminal together.<sup>137</sup> As Mr. Buxton told the

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<sup>135</sup> See Canada’s Counter-Memorial, ¶¶ 298-301.

<sup>136</sup> Claimants’ Reply, ¶ 779. Oddly and confusingly, the Claimants’ response comes in the section dealing with whether or not the acts of the JRP can be considered measures of Canada at international law. Claimants’ Reply, ¶¶ 773-782.

<sup>137</sup> See Canada’s Counter-Memorial, ¶¶ 92-93. See also Thomas Wheaton’s notes of meeting between DFO and representatives of the Claimants, July 25, 2002, **Exhibit R-127**.

Community Liaison Committee in January 2003, “unless you can ship it [the rock] no one will produce it.”<sup>138</sup> There can also be no serious question that in order to operate the quarry at Whites Point a provincial permit was required. On November 20, 2007, nearly a month before the federal Cabinet (the federal decision-maker), met to consider the JRP’s Report, Nova Scotia publicly announced its decision to accept the JRP’s recommendation that the project not be approved, which meant no provincial permit would be issued.<sup>139</sup> The provincial rejection of the quarry did more than simply “hurt the investment”<sup>140</sup> – it definitively stopped the project from proceeding. In short: no provincial permit, no quarry; no quarry, no project.

83. This is not to say that the Federal Government did not have its own decision to make. It did. However, as Canada explained in its Counter-Memorial, and as Mr. Smith has explained in his first Expert Report, given that the project had already been definitively stopped over a month earlier, the federal decision as to whether or not to issue any requested authorizations was academic.<sup>141</sup>

84. The Claimants’ only response to this conclusion is to rely on spectacularly speculative theories imagined by their two experts based on a distorted understanding of the facts. First, both Mr. Estrin and Mr. Rankin speculate that the fact that Nova Scotia and federal officials were communicating about their respective decisions meant that they were aligning them. There is no evidence of this, and in his second Affidavit, Chris Daly makes clear that “Nova Scotia was not looking to align its decision with that of the Federal Government.”<sup>142</sup>

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<sup>138</sup> CLC Minutes, January 9, 2003, p. 109, **Exhibit R-299**.

<sup>139</sup> Letter from Minister of the Environment and Labour to Paul Buxton, November 20, 2007, **Exhibit R-331**.

<sup>140</sup> Claimants’ Reply, ¶ 779.

<sup>141</sup> See Canada’s Counter-Memorial, ¶¶ 210 and 300. See also First Expert Report of Lawrence Smith, ¶ 444.

<sup>142</sup> See second Affidavit of Christopher Daly, ¶ 4.

85. Second, both Mr. Estrin and Mr. Rankin speculate further that Nova Scotia would not have rejected the quarry unless and until the Federal Government also decided to accept the JRP's recommendation.<sup>143</sup> Again, there is absolutely no support in the record upon which such speculation could be based. In fact, as pointed out above, Nova Scotia made and announced its decision before the federal Cabinet even met to consider the Federal Government response. As Mr. Daly explains in his Second Affidavit:

Mr. Estrin's speculation misconstrues the Nova Scotia Minister's responsibilities in responding to a report of a JRP, which are to consider the recommendations in the report and to either approve or reject the undertaking in issue, in accordance with our governing legislation.<sup>144</sup> This is a Nova Scotia only decision, one distinct from and independent of the decision to be made by the federal government under its own legislation.<sup>145</sup>

86. In short, the Claimants cite no evidence to support their bald assertion that the Federal Government decision to refuse to issue the authorizations and approvals requested by the Claimants "caused additional damage to Bilcon."<sup>146</sup> No such evidence exists. Accordingly, as it was not a measure even capable of causing damages to the Claimants, this Tribunal has no jurisdiction to hear claims that the decision of the Federal Government in December 2007 was a violation of NAFTA.

## **E. Conclusions**

87. The Claimants have made numerous claims in respect of measures that are simply outside the jurisdiction of this Tribunal and they have failed to discharge their burden of proving anything to the contrary. For the reasons Canada has explained above, the Tribunal should recognize the limitations over its jurisdiction and refuse to hear each and

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<sup>143</sup> Reply Expert Report of David Estrin, ¶¶ 327-352 and Expert Report of Murray Rankin, ¶ 164.

<sup>144</sup> See paragraph 6.7 of the "Agreement Concerning the Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal," which required the Minister to "consider the recommendation of the Panel, and either approve with conditions, or reject the Project." See **Exhibit R-27**.

<sup>145</sup> See second Affidavit of Christopher Daly, ¶ 4.

<sup>146</sup> Claimants' Reply ¶ 782.

every one of these claims.

#### IV. CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS

##### A. The Claimants Have Failed to Demonstrate a Violation of Article 1105(1) – Minimum Standard of Treatment

88. In its Counter-Memorial, Canada identified the numerous ways in which the Claimants failed to discharge their burden of proving that Canada has breached Article 1105(1). In their Reply, the Claimants largely gloss over Canada's response and simply re-package the arguments already presented in their Memorial. In so doing, they continue to misrepresent the applicable standard of treatment under Article 1105(1).

89. In particular, the Claimants continue to ignore the express wording of Article 1105(1) and the binding nature of the Free Trade Commission's 2001 *Note of Interpretation* ("FTC Note"). They also conflate the role of this Tribunal in applying the customary international law minimum standard of aliens with the role of a domestic court in applying the domestic standard of judicial review under Canadian administrative law.<sup>147</sup> NAFTA Chapter Eleven does not duplicate or internationalize domestic Canadian law and procedure, and NAFTA tribunals are not to assume the role of domestic courts in reviewing administrative decisions.<sup>148</sup> The evidence on the record shows that Canada acted consistently with its obligations under Article 1105(1).

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<sup>147</sup> Compare for example the Expert Report of Murray Rankin, ¶¶ 26, 174 ("The applicable standard of review the decisions made by the Ministers with respect to the Bilcon EA process is reasonableness..." (*sic*); ("By not confining itself to the parameters of its enabling legislation and Terms of Reference, the JRP abused its discretion. And the manner in which it conducted its hearing was a flagrant violation of Bilcon's rights of natural justice and procedural fairness."); with the Claimants' Memorial, ¶ 304: ("NAFTA Article 1105 [...] confirms that treatment be in accordance with the requirements of *jus aequum* – fairness and reasonableness") and Reply, ¶¶ 543, 508: ("All seven of the JRP recommendations exceeded the JRP's Terms of Reference"); ("The Panel's lack of impartiality was reflected in the content and tone of its Report.").

<sup>148</sup> Article 3 of the *ILC's Articles on State Responsibility*, **RA-61** establishes a fundamental distinction between lawfulness as a matter of domestic law and as a matter of international responsibility: "The characterization of an act of a State as internationally wrong is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

**1. NAFTA Article 1105(1) Requires Canada to Accord the Customary International Law Minimum Standard of Treatment of Aliens**

90. As Canada explained in its Counter-Memorial, the FTC Note establishes that Article 1105(1) requires no more and no less than the customary international law minimum standard of treatment of aliens.<sup>149</sup> In the most recent Chapter Eleven award, *Mobil v. Canada*, the Tribunal explained:

In light of the FTC’s interpretation and the binding form of that interpretation on this Tribunal by virtue of Article 1131(2), the Tribunal joins all previous NAFTA tribunals in the view that Article 1105 requires no more, nor less, than the minimum standard of treatment demanded by customary international law.<sup>150</sup>

91. The Claimants suggest in their Reply that this Tribunal should be the first tribunal to ignore the content of the FTC Note and its binding effect on the basis that: (1) pursuant to the customary international law of treaty interpretation, the FTC Note is only one source of interpretation for Article 1105(1);<sup>151</sup> and (2) the FTC Note is so at odds with the plain meaning of Article 1105(1) that it is not a *bona fide* interpretation but rather an illegal amendment of NAFTA that should be given no effect by the Tribunal.<sup>152</sup> In the alternative, the Claimants suggest that even if it was binding, the FTC Note itself requires that it be treated as only one source of interpretation.<sup>153</sup> As Canada explains below, none of their arguments withstand scrutiny.

**a) The FTC Note is Binding and Clear**

92. The Claimants assert that an interpretation of the FTC rendered under Article

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<sup>149</sup> See Canada’s Counter-Memorial, ¶¶306-312.

<sup>150</sup> *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada* (ICSID Case No.ARD(AF)07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶135, **RA-89** citing to *Cargill- Award*, ¶268; see also ¶ 152 (“...the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens.”).

<sup>151</sup> Claimants’ Reply, ¶ 174.

<sup>152</sup> Claimants’ Reply, ¶¶ 176-188.

<sup>153</sup> Claimants’ Reply, ¶¶ 192-195.

1131(2) is merely “one source of interpretation that a treaty interpreter is required to take into account”.<sup>154</sup> In essence, their position is that Article 1131(2) merely restates Article 31 of the *Vienna Convention*, which directs a treaty interpreter to take “into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”

93. This argument ignores the express wording of Article 1131(2) which provides that an “interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.” (emphasis added) Contrary to the Claimants’ suggestion, it does not say that such an interpretation shall only be “taken into account.” If the NAFTA Parties had simply wanted to restate the rule in Article 31 of the *Vienna Convention*, they would have done so. They did not. In short, a binding Note of Interpretation leaves no space for the application of customary international law rules of treaty interpretation. If it were permissible for NAFTA tribunals to take into account other sources of interpretation and to interpret Article 1105(1) in a way other than that set out in the FTC Note, then the Note would not, in fact, be binding at all.

**b) The FTC Note Must be Given Effect by this Tribunal**

94. The Claimants further argue that even if, in general, an interpretation by the FTC is binding, this particular FTC Note is not binding because it is so at odds with the plain meaning of Article 1105(1).<sup>155</sup> They assert that this Tribunal should find that the FTC Note is not an interpretation at all, but rather an amendment that is outside the FTC’s mandate.<sup>156</sup> On this basis, they claim that the FTC Note “has no legal force or effect.”<sup>157</sup> Their argument must be rejected for two reasons.

95. First, given the clear wording of Article 1131(2), it is not this Tribunal’s place to

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<sup>154</sup> Claimants’ Reply, ¶174.

<sup>155</sup> Claimants’ Reply, ¶179.

<sup>156</sup> Claimants’ Reply, ¶188.

<sup>157</sup> Claimants’ Reply, ¶¶ 189, 191.

question the validity of the FTC Note. The *ADF* Tribunal was faced with a similar objection, and summarily refused to consider it, explaining that it lacked jurisdiction to make a ruling on the validity of the FTC Note. It explained:

Nothing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an ‘amendment’ which presumably may be disregarded until ratified by all the Parties under their respective internal law.<sup>158</sup>

96. Similarly, the *Methanex* Tribunal considered the FTC Note to be “entirely legal and binding on a tribunal seized with a Chapter Eleven case.”<sup>159</sup> Indeed, since its issuance over a decade ago, not one tribunal under Chapter Eleven has found that it was not bound to apply the FTC Note when interpreting Article 1105(1).

97. Even the scholars that the Claimants cite in support of their position acknowledge that the FTC Note definitively establishes the meaning of Article 1105(1). For instance, while they cite to Professor Schreuer’s work,<sup>160</sup> they fail to note his observation that in light of the Note “it may now be regarded as established that, in the context of Article 1105(1) NAFTA, the concept of fair and equitable treatment is equivalent to the minimum standard of treatment under customary international law.”<sup>161</sup> Similarly, while the Claimants refer to a 1999 UNCTAD Report in support of their position<sup>162</sup> – a report written two years before the FTC Note was issued – when UNCITRAL revisited the issue in 2012, it stated that “the NAFTA Free Trade Commission, composed of representatives of the three NAFTA countries, issued in 2001 the Notes of Interpretation, which rejected any notion that NAFTA Article 1105 contained any elements that were ‘additive’ to the

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<sup>158</sup> *ADF-Award*, ¶ 177, **RA-1**.

<sup>159</sup> *Methanex-Award*, Part IV-Chapter C, ¶9, 20, **RA-44**.

<sup>160</sup> Claimants’ Reply, ¶ 179 (citing to Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice”, 6:3, *The Journal of World Investment & Trade* (June 2005), 360).

<sup>161</sup> Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice”, 6:3, *The Journal of World Investment & Trade* (June 2005), 361, **RA-90**.

<sup>162</sup> Claimants’ Reply, ¶ 182.

international minimum standard.”<sup>163</sup>

98. Second, it is clear that the FTC Note is, in fact, an interpretation, which clarifies the meaning of Article 1105(1) that was always intended by the NAFTA Parties. This is evident from the statements of interpretation made by all of the NAFTA Parties in the years before the FTC Note was issued. For example, in the years preceding issuance of the Note, each of the three NAFTA Parties filed non-disputing party submissions emphasizing that Article 1105(1) was intended to prescribe the customary international law minimum standard of treatment of aliens.<sup>164</sup>

99. Once again, the Claimants seek to buttress their arguments by referring to scholarly works, but they do so in a way that misrepresents the true conclusions reached by those writers. For example, they cite to Professor Schreuer’s view that it is “inherently implausible” that a treaty would use the words “fair and equitable treatment” if the intention were to refer to the minimum standard of treatment in customary international

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<sup>163</sup> See UNCTAD, Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II, UN Doc. UNCTAD/DIAE/IA/2011/5 (2012) at pp.23-24, **RA-91**.

<sup>164</sup> See e.g. *S.D. Myers v. Canada*, Mexico’s 1128 Submission (January 14, 2000), ¶28, **RA-92** (“Article 1105 does not expand the standard of treatment recognized in customary international law. Rather, it is a minimum standard that reflects the expectation in international law that governments will act in good faith and will not subject foreign investors to abusive or discriminatory treatment, nor fail to accord them full protection and security.”); *Methanex Corp v. United States*, Second Submission of Canada Pursuant to Article 1128, ¶ 26, **RA-93** (“Article 1105 incorporates the international minimum standard of treatment recognized by customary international law.”); *Pope & Talbot v. Canada*, Fourth Submission of the United States of America, pp.1-2, **RA-104** (“the obligation of Article 1105(1), by its plain terms, is to provide ‘treatment in accordance with international law.’ ‘[F]air and equitable treatment’ and ‘full protection and security’ are provided as examples of the customary international law standards incorporated into Article 1105(1). The plain language and structure of Article 1105(1) requires those concepts to be applied as and to the extent that they are recognized in customary international law.” See also *Mondev v. United States* - Counter Memorial of the United States, pp.33-34, **RA-105**; *Loewen v. United States*-Counter Memorial of the United States, pp.170-171, **RA-106**; *United Mexican States v. Metalclad Corp.*, Vancouver Registry No. L002904 (Brit. Colum. S. Ct.), Outline of Argument of Intervenor Attorney General of Canada at 17 ¶ 48, **RA-94**. For example, Canada’s Statement of Implementation for NAFTA indicates that the intent of Article 1105 is “to assure a minimum standard of treatment of investments of NAFTA investors” and to provide for “a minimum absolute standard of treatment, based on long-standing principles of customary international law.” Canada, Department of Foreign Affairs and International Trade, Statement of Implementation: North American Free Trade Agreement, vol.128, no.1 (Ottawa: Canada Gazette, 1994), p.149 (“Statement of Implementation: NAFTA”), **RA-85**.

law.<sup>165</sup> What they fail to acknowledge, however, is that several pages later Professor Schreuer engages in an extensive discussion of why the specific features of the text of Article 1105(1) “suggest that under this provision, fair and equitable treatment is part of international law, specifically of its rules on the minimum standard of treatment.”<sup>166</sup>

100. Similarly, they claim that Professors Dolzer and Stevens “confirm the implausibility of the drafters of the NAFTA intending to confine the scope of ‘fair and equitable treatment’ standard only to customary international law.”<sup>167</sup> And yet, when the passage the Claimants cite is read in its entirety it is clear that Professors Dolzer and Stevens hold the exact opposite view to that held by the Claimants. Specifically, Professors Dolzer and Stevens conclude the particular passage partially quoted by the Claimants by saying “[h]owever, in the North American Free Trade Agreement (NAFTA), the fair and equitable treatment standard is explicitly subsumed under the minimum standard of customary international law.”<sup>168</sup>

101. Accordingly, the Claimants have not, and cannot, provide support for their claim that the FTC Note should not be given effect. The Note is binding, and makes it clear that Article 1105(1) requires no more than the customary international law minimum standard of treatment.

**c) The FTC Note Does Not Require Article 1105(1) to be Interpreted With Other Sources of International Law**

102. The Claimants also argue that “[e]ven if the *Note* is valid and binding, and the Tribunal is required only to interpret NAFTA Article 1105(1) in accordance with

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<sup>165</sup> Claimants’ Reply, ¶ 179 (citing to Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice”, 6:3, *The Journal of World Investment & Trade* (June 2005), 360).

<sup>166</sup> Christoph Schreuer, “Fair and Equitable Treatment in Arbitral Practice”, 6:3, *The Journal of World Investment & Trade* (June 2005), 362, and *generally* 362-364, **RA-90**.

<sup>167</sup> Claimants’ Reply, ¶ 180.

<sup>168</sup> Rudolph Dolzer & Margarete Stevens, *Bilateral Investment Treaties* (London: Martinus Nihoff Publishers, 1995), 60. **RA-95**.

customary international law, it may nonetheless do so with reference to the full array of sources of international law”<sup>169</sup> because it is “customary” for international legal disputes to be resolved in accordance with all the rules and principles of international law.<sup>170</sup>

103. This circular argument produces an absurd result. If correct, Article 1131(2) would require the Tribunal to apply the Note and not the customary international law rules of interpretation, only to then have the Note require the Tribunal to apply the customary international law rules of interpretation. There is no reason to think that the NAFTA Parties intended such an irrational result. If the NAFTA Parties had wished tribunals to apply the customary international law rules of interpretation to Article 1105, there would have been no need to issue the FTC Note at all.

104. Second, contrary to what the Claimants assert, the FTC Note itself does not prescribe that Article 1105 must be *interpreted* in accordance with customary international law. The Note clarifies that the standard of treatment guaranteed under 1105(1) is the customary international law minimum standard of treatment of aliens. This substantive standard does not require an arbitral tribunal to interpret language in a treaty using all of the sources of international law. It is not, as the Claimants suggest, an interpretive tool; rather, pursuant to the Note itself, it represents the substantive content contained in Article 1105(1).

105. Third, the Claimants appear to misconstrue the colloquial term “customary” with the legal term “customary international law.”<sup>171</sup> The simple fact that tribunals *usually* or

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<sup>169</sup> Claimants’ Reply, ¶ 195.

<sup>170</sup> Claimants’ Reply, ¶¶ 194-195 (“Resolving international legal disputes in accordance with all the rules and principles of international law is thus a part of customary international law.”). The Claimants’ reliance on ICJ Statute, section 38 is a *non sequitur*. The fact that the provision refers to all the sources of international law does not by itself establish the existence of a rule of customary international law.

<sup>171</sup> The Claimants’ confusion is made clear in the heading of the relevant section “It is Customary to Interpret Treaties in Accordance with All Sources of International Law”. It is also clear when the Claimants refer to “[t]he established practice” and “as is customary” in reference to their alleged rule. (see Claimants’ Reply, ¶¶ 192, 195).

*typically* resolve disputes based on a reference to all sources of law, does not mean that there is a customary international law rule requiring them to do so. The Claimants have done nothing to even attempt to prove that this purportedly typical approach to dispute resolution is in fact a rule of customary international law.

**2. The Claimants Bear the Burden of Proving the Rules of the Customary International Law Minimum Standard of Treatment of Aliens they Allege Have been Breached**

106. As Canada’s Counter-Memorial explains, it is a well-established principle of international law that the party alleging the existence of a rule of customary international law bears the burden of proving it.<sup>172</sup> In this claim, this principle requires the Claimants to prove that customary international law has evolved to include the elements they claim are protected. This fundamental principle is not simply “a matter of interpretation”<sup>173</sup> but rather a substantive requirement for the Claimants to prove their claim.

107. In their Reply, the Claimants seek to evade this burden by arguing that Article 1105(1) is a treaty standard, not a standard of customary international law. In this context, they suggest, the burden is shifted on to the Tribunal or Canada.<sup>174</sup> This is incorrect. As the party alleging the breach, the Claimants bear the burden of proving why the conduct in question breaches the treaty obligation contained in Article 1105(1). To discharge this burden requires them to prove the content of that treaty obligation, which necessarily entails a determination of the content of customary international law. This is not merely a question of law to be decided by the Tribunal.<sup>175</sup> As the *Cargill* Tribunal observed: “ascertainment of the content of custom involves not only questions of law but

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<sup>172</sup> See Canada’s Counter-Memorial, ¶¶ 313-318.

<sup>173</sup> Claimants’ Reply, ¶240.

<sup>174</sup> Claimants’ Reply, ¶¶ 240, 242.

<sup>175</sup> Claimants’ Reply, ¶ 240.

primarily a question of fact, where custom is found in the practice of States regarded as being legally required by them.”<sup>176</sup>

### 3. The Threshold for Establishing a Breach of Article 1105(1) is High

108. Canada explained at length in its Counter-Memorial that the threshold for a breach of the customary international law minimum standard of treatment under Article 1105(1) is high.<sup>177</sup> Consistent with other NAFTA awards, the award in *Mobil* reaffirmed this principle. Specifically, the *Mobil* Tribunal concluded that Article 1105(1) “protects against egregious behavior” such as “conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.”<sup>178</sup>

109. In their Reply, the Claimants persist in claiming that the threshold for a breach of Article 1105(1) is lower than claimed by Canada. Surprisingly, they allege that the *Mobil* tribunal “acknowledged that the gravity or severity of the breach need not be ‘egregious’ or ‘shocking’.”<sup>179</sup> As shown above, this is simply false. The *Mobil* tribunal concluded that “egregious” behaviour was required and the Claimants fail to point to a single NAFTA award since the FTC Note that has not endorsed this threshold.

110. Instead, the Claimants rely solely on arbitral awards interpreting treaty standards that are not related to the customary international law minimum standard of treatment.<sup>180</sup> In particular, they rely on cases applying treaty provisions guaranteeing an autonomous

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<sup>176</sup> *Cargill-Award*, ¶271, **RA-11**

<sup>177</sup> Canada’s Counter-Memorial, ¶¶ 319-325.

<sup>178</sup> *Mobil – Decision on Liability and on Principles of Quantum*, ¶¶ 152-153, **RA-89**.

<sup>179</sup> Claimants’ Reply, ¶ 230.

<sup>180</sup> Claimants’ Reply, ¶¶ 196-209.

fair and equitable treatment standard.<sup>181</sup> In so arguing, they urge the Tribunal to reject Canada's "formalistic view"<sup>182</sup> requiring proof of customary international law by proving the existence of state practice and *opinio juris* and to instead look to these arbitral awards.

111. As Canada explained in its Counter-Memorial,<sup>183</sup> and as recognized by both scholars<sup>184</sup> and tribunals,<sup>185</sup> while investment arbitration awards may contain valuable *analysis* of State practice and *opinio juris*, they are not a substitute for actual *evidence* of State practice and *opinio juris*. The cases cited by the Claimants do not hold otherwise. For example, in the *Gulf of Maine Case*, the ICJ relied on one of its previous decisions not because it created customary international law, but because the decision contained an analysis of state practice and *opinio juris* in relation to maritime boundaries.<sup>186</sup>

112. Moreover, as Canada explained in its Counter-Memorial, non-NAFTA arbitral awards interpreting autonomous treaty clauses guaranteeing fair and equitable treatment

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<sup>181</sup> Claimants' Reply, ¶ 200.

<sup>182</sup> Claimants' Reply, ¶ 202.

<sup>183</sup> See Canada's Counter-Memorial, ¶ 314.

<sup>184</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London:Stevens, 1958), at p.20-21, **RA-96**: "[d]ecisions of international courts are not a source of international law...[t]hey are not direct evidence of the practice of States or of what States conceive to be the law"; Maurice H. Mendelson, "The Formation of Customary International Law" (1998) 272 *Rec. des Cours* 155 at p.202, **RA-97**; Mohamed Shahabuddeen, *Precedent in the World Court*, (Cambridge: Cambridge University Press, 1996) at p.71, **RA-98**; London Statement of Principles Applicable to the Formation of General Customary International Law, with commentary: Resolution 16/2000 (Formation of General Customary International Law), adopted on 29 July 2000 by the International Law Association: *International Law Association, Report of the Sixty-ninth Conference, London*, p.39 ("Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice".) **RA-99**.

<sup>185</sup> *Glamis-Award*, ¶ 605, **RA-29**; *Cargill-Award*, ¶ 277, **RA-11**.

<sup>186</sup> *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, - *Judgement*, ¶¶ 91-92, **RA-100**. The ICJ referred to its prior decision in the *North Sea Continental Shelf* cases where the court held that the equidistance principle to delineate maritime boundaries is not a rule of customary international law based on state practice and a lack of *opinio juris*. *North Sea Continental Shelf Cases – Judgement*, ), [1969] I.C.J. Rep. 3, ¶¶ 60-82, **RA-101**. Similarly, the ADF Tribunal's reference to judicial or arbitral case law as a source of customary international law cannot be understood to contradict this fundamental point and must rather be understood as a reference to awards and decisions analyzing state practice and *opinio juris*.

are not of any persuasive value here.<sup>187</sup> They apply a different treaty standard than the one guaranteed by NAFTA. In their Reply, the Claimants attempt to argue there is no material difference between the customary international law minimum standard of treatment in Article 1105(1) and the standard guaranteed by BITs containing autonomous fair and equitable treatment clauses.<sup>188</sup> However, they fail to cite to a single award interpreting a treaty with a customary international law minimum standard of treatment provision that supports their conclusion. In fact, NAFTA tribunals interpreting Article 1105(1) have rejected the relevance of cases interpreting the autonomous fair and equitable treatment standard. As the *Glamis* Tribunal explained “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.”<sup>189</sup>

113. None of the awards cited by the Claimants undertake the requisite examination of state practice and *opinio juris* to establish that the customary international law minimum standard of treatment of aliens has the same substantive content as the autonomous fair and equitable treatment standard. In fact, to the extent that they address the relationship at all,<sup>190</sup> often they simply assert that the two standards are the same with no real analysis.<sup>191</sup> For example, the *CMS Gas* Tribunal summarily stated that in the particular context in front of it, the customary international law minimum standard of treatment was the same as the standard of fair and equitable. However, the Tribunal limited its decision to the facts in front of it which involved specific legal and contractual commitments. It explained that “[w]hile the choice between requiring a higher treaty standard and that of

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<sup>187</sup> Claimants’ Reply, ¶¶ 233-236.

<sup>188</sup> Claimants’ Reply, ¶¶ 205-209, 236.

<sup>189</sup> *Glamis-Award*, ¶ 608, **RA-29**. See also *Cargill-Award*, ¶ 278, **RA-11**.

<sup>190</sup> For example, there is no reference to the customary international minimum standard of treatment in the applicable BIT in the *Bogdanov*, *Eureko*, *Continental Casualty*, *Azurix* and *Siemens* arbitrations and those tribunals did not undertake any analysis of state practice or *opinio juris*.

<sup>191</sup> *Azurix-Award*, ¶ 361, **RA-6**; *Rumeli Teledom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 611, **RA-107**.

equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case.”<sup>192</sup>

114. Further, the Claimants ignore the fact that in other awards interpreting an autonomous fair and equitable standard, arbitral tribunals have concluded this standard is not the same as the standard contained in Article 1105(1). For example, the Claimants mistakenly rely on the award rendered by the *Saluka* Tribunal to attempt to establish a standard of mere “reasonableness.”<sup>193</sup> Yet, the *Saluka* Tribunal specifically distinguished the treaty clause it had to apply with the standard guaranteed under NAFTA:

Whichever the difference between the customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the “fair and equitable treatment” standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the “fair and equitable treatment” standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a “fair and equitable treatment” standard such as the one laid down in Article 3.1 of the Treaty.<sup>194</sup> (references omitted and emphasis added).

115. Similarly, in the *MTD Equity* award, a decision on which the Claimants also rely,<sup>195</sup> the Tribunal noted “that there is no reference to customary international law in the BIT in relation to fair and equitable treatment.”<sup>196</sup>

116. In sum, the Claimants have failed to call into question that the threshold for a breach of the customary international law minimum standard of treatment under Article

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<sup>192</sup> *CMS Gas – Award*, ¶ 284, **RA-102**.

<sup>193</sup> Claimants’ Reply, ¶ 233.

<sup>194</sup> *Saluka-Award*, ¶ 294, **RA-86**.

<sup>195</sup> Claimants’ Reply, ¶ 235.

<sup>196</sup> *MTD Equity – Award*, ¶¶ 111-112, **RA-103**.

1105(1) is high. And as Canada shows below, the evidence in this case establishes that none of the treatment of which the Claimants complain rises to this threshold.

**4. The Claimants Have Still not Established that Any of the Measures they Complain of Rise to the Level Required to Breach Article 1105(1)**

117. The Claimants allege that a number of measures of the governments of Canada and Nova Scotia taken throughout the Whites Point EA violated Article 1105(1). They also continue to assert that certain acts of the Whites Point JRP breached Canada's Article 1105 obligation. As Canada has shown in its Counter-Memorial, and shows again below, *none* of the decisions that the Claimants complain of in the Whites Point EA breached the minimum standard of treatment obligation under Article 1105(1).

118. The disorganization of the Claimants' Reply, and the fact that they have merely re-packaged a number of their complaints against measures already challenged in their Memorial, make it difficult to respond to their allegations. For example, the Claimants argue that Canada violated Article 1105(1) as a result of: (a) measures taken by DFO and NSDEL prior to the JRP process;<sup>197</sup> (b) the acts of the JRP prior to the issuance of its report;<sup>198</sup> (c) the approach taken by the JRP in preparing its report;<sup>199</sup> and, (d) the government decisions in responding to the JRP's report.<sup>200</sup> They also make overarching allegations of lack of full transparency,<sup>201</sup> abuse of process,<sup>202</sup> arbitrariness and discrimination,<sup>203</sup> and delay.<sup>204</sup> Given the overlap in many of these claims, Canada responds to all of them in the context of its response to the treatment the Claimants

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<sup>197</sup> Claimants' Reply, ¶¶ 481-500.

<sup>198</sup> Claimants' Reply, ¶¶ 501-507.

<sup>199</sup> Claimants' Reply, ¶¶ 508-526.

<sup>200</sup> Claimants' Reply, ¶¶ 527-531.

<sup>201</sup> Claimants' Reply, ¶¶ 532-536.

<sup>202</sup> Claimants' Reply, ¶¶ 537-544.

<sup>203</sup> Claimants' Reply, ¶¶ 545-549.

<sup>204</sup> Claimants' Reply, ¶¶ 550-552.

complain of in categories (a) through (d) above. Canada then responds to the Claimants' claims that Canada failed to provide them full protection and security and a stable legal environment,<sup>205</sup> and denied the Claimants' legitimate expectations.<sup>206</sup>

119. Each and every one of the measures in issue was rational in light of the facts and legitimate in light of applicable law and policy. None of them were wrongful, arbitrary or unfair, or of the shocking nature required for a breach of Article 1105.

**a) The Measures Taken by DFO and NSDEL Prior to the JRP Process Did Not Breach Article 1105(1)**

120. While the Claimants advance a multitude of complaints over DFO and NSDEL decisions made prior to the JRP process in their Reply, they generally appear to take the position that Canada's obligations under Article 1105(1) were breached as a result of: (1) the blasting conditions and setback distances to which Nova Stone's proposed blasting activity was subjected; (2) DFO's decision not to discuss mitigation measures with Nova Stone on its 3.9 ha quarry in the form of revised setback distances; (3) DFO's inclusion of the Whites Point quarry in the scope of project for the purposes of the Whites Point EA; and (4) the manner in which the Whites Point project was referred to a review panel.

121. Canada has already explained in its Counter-Memorial why most of these decisions did not violate Article 1105(1). However, to the extent that the Claimants have advanced new arguments in their Reply, they are addressed below.

**(1) The Blasting Conditions and Setback Distances to Which Nova Stone's Proposed Blasting Activity was Subjected Did Not Breach Article 1105(1)**

122. The Claimants allege that DFO "brought itself into the process"<sup>207</sup> of NSDEL's review of Nova Stone's proposed quarrying activity on the Whites Point project site, and

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<sup>205</sup> Claimants' Reply, ¶¶ 553-565.

<sup>206</sup> Claimants' Reply, ¶¶ 566-574.

<sup>207</sup> Claimants' Reply, ¶483.

somehow “imposed blasting conditions” on Nova Stone “that it had no authority to impose.”<sup>208</sup> As explained in Canada’s Counter-Memorial, the record does not bear out the Claimants’ allegations.<sup>209</sup> As Lawrence Smith explains, the fact that Nova Scotia consulted DFO in issuing the industrial approval was “a constructive arrangement” that is “the antithesis of obstructionism.”<sup>210</sup>

123. Moreover, as Mr. Petrie has explained in his second Affidavit, DFO only became involved in the review at his request, as a part of his “due diligence” to make sure that he “understood and considered all of the potential impacts of the proposed activities before making a decision on the requested industrial approval.”<sup>211</sup> Mr. Petrie adds that under the circumstances, he decided that inclusion of the blasting conditions in Nova Stone’s conditional approval “was the only responsible course I could take.”<sup>212</sup> The exercise of “due diligence” and the taking of “responsible decisions” by the authority empowered to issue the required approval cannot possibly result in a violation of Article 1105(1).

124. Nor did the blasting conditions or setbacks, relate to “spurious aquatic issues” as alleged by the Claimants.<sup>213</sup> To the contrary, they were grounded in concerns expressed by officials responsible for reviewing and evaluating Nova Stone’s proposed blasting activity. Bob Petrie has explained these concerns in his first and second Affidavits.<sup>214</sup> DFO scientists also expressed concerns over the potential impact of the blasting activity on marine mammals from the very outset.<sup>215</sup> These concerns were also shared by Dr.

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<sup>208</sup> Claimants’ Reply, ¶ 481.

<sup>209</sup> See Canada’s Counter-Memorial, ¶¶ 336-338.

<sup>210</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 34.

<sup>211</sup> Second Affidavit of Bob Petrie, ¶ 5.

<sup>212</sup> Second Affidavit of Bob Petrie, ¶ 6.

<sup>213</sup> Claimants’ Reply, ¶¶ 494-500.

<sup>214</sup> See first Affidavit of Bob Petrie, ¶¶ 10-11 and second Affidavit of Bob Petrie, ¶¶ 4-5.

<sup>215</sup> See Canada’s Counter-Memorial, ¶ 72. See also email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86** and first Affidavit of Mark McLean, ¶ 13. In their Reply, the Claimants make much of the fact that certain officials at DFO, including Rod Bradford and Jerry Conway, did not share the concerns

Brodie, a consultant retained by Nova Stone, who advised that “a high level of caution is necessary in planning any long-term industrial venture within or proximal to [North Atlantic Right whale] habitats.”<sup>216</sup> Even Nova Stone itself recognized from the very beginning that its blasting activity could have an adverse impact on whales.<sup>217</sup>

125. When DFO calculated setback distances for Nova Stone’s quarry, it did so out of a *bona fide* concern over the potential impacts of Nova Stone’s blasting activity on endangered iBoF salmon and whales that could be found in close proximity to the site of the blasting.<sup>218</sup> Contrary to what the Claimants allege,<sup>219</sup> the mere fact that DFO’s opinion on the issue of blasting evolved does not impugn the validity of its concerns at the beginning of the process. To conclude otherwise would be to insist “that the cart should be placed before the horse.”<sup>220</sup> In this context, the Claimants’ characterization of the blasting conditions and setback distances as “needless requirements”<sup>221</sup> is evidence only of their disregard for the EA process. They obviously disagree with these measures. However, this Tribunal “does not have an open-ended mandate to second-guess

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held by others. Claimants’ Reply, ¶¶ 58 and 494. As Canada has consistently pointed out, that officials may differ on questions of science is unremarkable, and such debates are not a sign of any impropriety. See first Affidavit of Mark McLean ¶ 21; see also Affidavit of Bob Petrie, ¶ 5; Affidavit of Neil Bellefontaine, ¶¶ 32-33.

<sup>216</sup> See Canada’s Counter-Memorial, ¶¶ 83-85. See also Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 4, **Exhibit R-301**.

<sup>217</sup> Nova Stone, Application for Approval to Operate a Quarry, Little River, Digby County, February 18, 2002, **Exhibit R-75**. See in particular s. 2.1.2.1 of Nova Stone’s Project Description, attached to its Application, which raised the concern of the impacts of blasting on whales.

<sup>218</sup> See first Affidavit of Mark McLean, ¶¶ 21, 40. See also email from Peter Amiro to Phil Zamora, May 27, 2003, **Exhibit R-150**. See also letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**; See also Rejoinder Expert Report of Lawrence Smith, ¶ 29.

<sup>219</sup> See, e.g. Claimants’ Reply, ¶ 497. DFO’s response to a question from the JRP at the end of the EA process, simply reflects the information that came to light and was learned during the EA. It was in no means a “concession” that DFO’s earlier concerns were unwarranted.

<sup>220</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 62.

<sup>221</sup> Claimants’ Reply, ¶ 494.

government decision making.”<sup>222</sup>

**(2) DFO’s Decision Not to Discuss Mitigation with Nova Stone on its 3.9 ha Quarry in the Form of Revised Setback Distances Did Not Breach Article 1105(1)**

126. The Claimants allege that Canada violated Article 1105(1) as a result of DFO’s decision not to discuss revised setback distances with Nova Stone in the summer of 2003. This claim is also devoid of any merit.

127. DFO’s decision not to discuss setback distances with Nova Stone can only be understood in the context of the Claimants’ fragmented approach to seeking regulatory approval for the Whites Point project. Had the Claimants not proposed to build the Whites Point project on the same site as Nova Stone’s 3.9 ha quarry, there would have been no reason for DFO to refrain from discussing setback distances with Nova Stone. In this regard, both the blasting conditions and DFO’s initial setback distance of 500 meters related to Nova Stone’s 3.9ha quarry only.<sup>223</sup> But as Mr. McLean and Mr. Chapman explain in their second Affidavits, by the time DFO determined a revised setback might be feasible, the Whites Point project had been referred for referral to a review panel.<sup>224</sup>

128. Because the environmental effects of both the smaller and larger projects were expected to be the same, the Agency recognized that Nova Stone’s 3.9 ha quarry could be scoped within the terms of reference of the joint review panel being established to assess the Whites Point project. This outcome was all the more probable given that DFO had determined blasting on the 3.9 ha quarry – the exact same activity being contemplated for Whites Point project – would require a s.32 authorization under the *Fisheries Act* and therefore necessitate an EA.<sup>225</sup> The Agency accordingly advised DFO to *not* engage in

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<sup>222</sup> *S.D. Myers – Partial Award*, ¶ 261, **RA-65**.

<sup>223</sup> Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

<sup>224</sup> See second Affidavit of Mark McLean, ¶¶ 4-5. See also second Affidavit of Stephen Chapman, ¶ 4.

<sup>225</sup> See second Affidavit of Stephen Chapman, ¶ 9.

discussions with Nova Stone regarding its proposed blasting until it was determined whether the 3.9 ha quarry would indeed be assessed as part of the Whites Point EA.<sup>226</sup> Recognizing the reasonableness of this request, DFO agreed.<sup>227</sup>

129. As explained in the second Affidavit of Stephen Chapman, DFO's decision to not discuss setbacks safeguarded the integrity of the EA process in two ways. First, if Nova Stone's blasting was to generate data for the EA of the Whites Point project, the Agency was of the view that the joint review panel, which would conduct the EA, should have the opportunity to comment on whether or not the information that could be generated by test blasting was required.<sup>228</sup> Second, if Nova Stone's project was simply the first step in the Whites Point project, which had been referred to a review panel, "then for DFO to take action which could lead to the development of that part of the project would be contrary to the purposes, if not the letter of the *Canadian Environmental Assessment Act*."<sup>229</sup>

130. In light of the above, DFO's decision to not discuss mitigation measures with Nova Stone on its 3.9 ha quarry in the form of revised setback distances was entirely reasonable and in keeping with an overarching purpose of the *CEAA* – to "ensure that the environmental effects of projects receive careful consideration before responsible

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<sup>226</sup> See second Affidavit of Stephen Chapman, ¶¶ 8-10.

<sup>227</sup> See second Affidavit of Mark McLean, ¶ 5. Note that in conformity with the Agency's request, DFO was prepared to share the revised setback recommendations with Nova Stone on finalization of the JRP Agreement. However, in February of 2004, GQP requested postponement of the constitution of the JRP pending resolution of issues relating to its business relationship with Nova Stone. Ultimately, DFO provided the revised setback recommendations to the Claimants on November 12, 2004, just over a week after the constitution of the Whites Point JRP, even though the 3.9 ha quarry permit had by then become void as a result of the transfer of the lease on which the 3.9 ha quarry was located (see second Affidavit of Mark McLean, ¶¶ 6-7).

<sup>228</sup> See second Affidavit of Stephen Chapman, ¶ 6. Contrary to the Claimants' allegations in paragraph 532 of their Reply, DFO and provincial regulators did not tell Bilcon that it was impermissible for it to conduct a test blast for the purposes of the EA. In fact, as Mark McLean made clear in his affidavit, DFO did not close the door on test blasting at any point. The simple fact was that the Claimants never actually sought to do any test blasting for the EA. See also first Affidavit of Mark McLean, ¶ 44.

<sup>229</sup> See second Affidavit of Stephen Chapman, ¶ 7.

authorities take actions in connection with them.”<sup>230</sup> While the Claimants argue that DFO *should* have been wilfully blind to the fact that Nova Stone sought to conduct the very blasting activities that were to be assessed in the Whites Point EA their contention cannot provide the basis for an Article 1105(1) claim.

**(3) DFO’s Inclusion of the Whites Point Quarry in the Scope of Project for the Purposes of the EA Did Not Breach Article 1105(1)**

131. The Claimants’ allegations regarding DFO’s inclusion of the Whites Point quarry in the scope of project for the purposes of the Whites Point EA are not worthy of any further comment. Canada has completely addressed the Claimants’ allegations in its Counter-Memorial, as has Mr. Smith in both of his Expert Reports.<sup>231</sup>

**(4) The Manner in Which the Whites Point Project was Referred to a Review Panel Did Not Breach Article 1105(1)**

132. In their Reply, the Claimants appear to take the position that Canada breached a transparency obligation owed to the Claimants because Bilcon was “not provided a ‘heads up’” about the referral of the Whites Point project to a review panel, and that “it was continuously led to believe otherwise.”<sup>232</sup>

133. Even if the Claimants could prove that Article 1105(1) includes a transparency obligation, which they have not,<sup>233</sup> the fact that the Whites Point project was referred to a

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<sup>230</sup> See second Affidavit of Stephen Chapman, ¶7 and CEAA, s.4(a), **Exhibit R-1**; See also Rejoinder Expert Report of Lawrence Smith, ¶ 31 (“Given that the activities described by Mr. Buxton were about to be assessed by the review panel that was in the process of being convened, I am not surprised that both DFO and the Agency took the cautious approach that they did in deciding not to discuss potential mitigation measures that could allow for blasting to be conducted on the 3.9 ha quarry.”)

<sup>231</sup> Canada’s Counter-Memorial, ¶¶ 341-346; First Expert Report of Lawrence Smith, ¶¶ 96-133; Rejoinder Expert Report of Lawrence Smith, ¶¶ 41-77.

<sup>232</sup> Claimants’ Reply, ¶ 534.

<sup>233</sup> Other Chapter Eleven Tribunals have dismissed arguments that Article 1105 includes an obligation of transparency: *Cargill – Award*, ¶ 294, **RA-11** (“The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment

review panel should not have come as a surprise to the Claimants. Canada has already described how government regulators made it absolutely clear that the Whites Point project could always be referred to a review panel.<sup>234</sup> Moreover, this possibility would have been apparent to any *CEAA* practitioner – as Lawrence Smith explains, “[a]ny proponent should expect a project with the potential for significant adverse environmental effects, and which has attracted widespread public controversy, to have a high likelihood of being reviewed in a public hearing process.”<sup>235</sup> Accordingly, the Claimants’ allegation that the referral of the project to a review panel was “entirely unexpected”<sup>236</sup> is neither credible, nor grounds for a claim under Article 1105(1).

**b) The Claimants Have Not Established that the Acts of the JRP Prior to the Issuance of its Report Breached Article 1105(1)**

134. The Claimants complain that they were denied due process, natural justice, fairness and reasonableness before the JRP.<sup>237</sup> These complaints are difficult to reconcile with the fact that they were given full opportunity to engage in all steps in the JRP’s process – from commenting on the draft EIS Guidelines,<sup>238</sup> to attending the public scoping meetings the JRP held before finalizing the EIS Guidelines, to participating in the JRP hearings in the summer of 2007.<sup>239</sup>

135. Specifically, the Claimants have complained that Bilcon was prevented from adequately preparing for the JRP hearing because the JRP failed to ensure that it would

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owed to foreign investors per Article 1105’s requirement to afford fair and equitable treatment.”). *See also Merrill & Ring – Award*, ¶ 231, **RA-28**.

<sup>234</sup> *See* Canada’s Counter-Memorial, ¶ 354. *See also* Christopher Daly’s notes of January 6, 2003 meeting with GQP, **Exhibit R-178**. *See also* letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

<sup>235</sup> *See* First Expert Report of Lawrence Smith, ¶ 12. On the lawfulness and reasonableness of the referral *see also*: Rejoinder Expert Report of Lawrence Smith, ¶¶ 78-100.

<sup>236</sup> Claimants’ Reply, ¶ 536.

<sup>237</sup> Claimants’ Reply, p. 134 (Heading “B”).

<sup>238</sup> Letter from Robert Fournier to Paul Buxton, December 15, 2004, **Exhibit R-242**.

<sup>239</sup> *See* first Affidavit of Stephen Chapman, ¶ 53.

be provided with all presentations and expert CVs within a reasonable time before the hearing.<sup>240</sup> Their complaint should be dismissed as it is based on a misunderstanding of the role of the JRP in the EA process. To ensure the efficiency of the hearings, the JRP issued operational procedures requesting participants scheduled for thematic sessions “to provide written summaries (hard copy and electronic) to the Panel Secretariat 10 days in advance of their scheduled presentation.”<sup>241</sup> However, at the same time, the procedures recognized that the JRP process is by nature not akin to a court of law – its purpose is to gather information. As such, the JRP’s operational procedures noted that “the hearings will not conform to the strict rules of procedure and evidence required in a court of law”<sup>242</sup> and that the JRP chair retained discretion to “alter or waive specific procedures if, in the Panel’s opinion, hearing objectives might be better met with that change.”<sup>243</sup> The operational procedures thus did not impose a rigid obligation on hearing participants to provide summaries, let alone the full version of the presentations, in advance of scheduled presentations.

136. Moreover, at no time did Bilcon voice a concern that it was prevented from adequately preparing for the hearings, or that its experts were not afforded a fair opportunity to present their evidence.<sup>244</sup> If it had such concerns, it was fully entitled to request additional time from the JRP. It did not, and its failure to do so does not elevate this trifling issue to the level of an international wrong.<sup>245</sup>

137. The Claimants’ allegation that they did not have an opportunity to address the

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<sup>240</sup> Claimants’ Reply, ¶ 501a).

<sup>241</sup> Procedure for Public Hearings, May 1, 2007, Article 2.1.3, **Exhibit R-574**.

<sup>242</sup> Procedure for Public Hearings, May 1, 2007, Article 1.3, **Exhibit R-574**.

<sup>243</sup> Procedure for Public Hearings, May 1, 2007, Article 1.4, **Exhibit R-574**.

<sup>244</sup> Claimants’ Reply, ¶ 501(b). The Claimants provide no evidence to substantiate this allegation.

<sup>245</sup> Canada has also explained in its Counter-Memorial how Bilcon itself failed to give advance notice of the information it presented to the JRP – see Canada’s Counter-Memorial, ¶ 200.

concept of “community core values” is similarly without merit.<sup>246</sup> As explained by Lawrence Smith in his Rejoinder Expert Report, this position “ignores completely the fact that every component of what the JRP discussed as community core values was identified in detail in the ‘Final EIS Guidelines’ which, as the title suggests, was supposed to guide Bilcon in the preparation of its evidence.”<sup>247</sup> The Claimants had several opportunities to comment on or question the EIS Guidelines but did not. They then had over a year to prepare an EIS that responded to instructions such as:

Provide historical, current and projected information as to the health and importance of social and economic issues which broadly encompass and affect people and communities in the study area. Use a comprehensive and holistic approach that acknowledges any distinctiveness in economy, life style, social traditions or quality of life, along with any criteria requirement for their maintenance and enhancement. Consider the status, health, persistence, vulnerability and resilience of the local economy, especially in relation to the physical and biological environments. Provide context-specific information in sufficient detail to address a range of public interests and concerns, as well as to assist in recognition of the varying significance of the potential impacts on communities throughout the region.<sup>248</sup>

138. Finally, the Claimants appear to believe that the information they provided to the JRP was sufficient and convincing, and point to the volume of information as proof of its weight.<sup>249</sup> However, the number of pages submitted is not proof of the quality of the information contained in those pages. There is no dispute that the JRP questioned the adequacy of the “evidence” put forward by the Claimants.<sup>250</sup> But, it was their role to

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<sup>246</sup> Claimants’ Reply, ¶¶ 501(c), 507.

<sup>247</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 138; *See also* ¶ 148 (“there can be no doubt that Bilcon was on notice and was provided with ample opportunity to address every component of what the Panel considered to represent community core values.”)

<sup>248</sup> EIS Final Guidelines, pp. 25-26, **Exhibit R-210**.

<sup>249</sup> Claimants’ Reply, ¶ 502.

<sup>250</sup> *See* First Expert Report of Lawrence Smith, ¶ 316. *See also* JRP Hearing Transcript, pp. 118-120, **Exhibit R-457**, pp.263-265, **Exhibit R-330**, pp. 1180-81, **Exhibit R-458**, p. 1212, **Exhibit R-495**. With respect to the JRP’s apparent view of the quality of the work done by Bilcon, *see* Counter-Memorial, ¶¶ 181-200.

review, evaluate and ultimately weigh the information the Claimants provided.<sup>251</sup> The fact that they were not convinced is not evidence that they mistreated the Claimants. To the contrary, it is evidence only that they did their job.<sup>252</sup>

**c) The Approach Taken by the JRP in Preparing its Report Did Not Breach Article 1105(1)**

139. In their Reply, the Claimants continue to allege that the approach taken by the JRP breached Canada's obligations under Article 1105(1).<sup>253</sup> Most of their claims simply retread over the same ground that they outlined in their Memorial. In particular, they continue to allege that the JRP failed in almost every respect – from ignoring evidence, to drawing conclusions and making recommendations not based on fact or applicable law and in contravention of their mandate.<sup>254</sup>

140. Canada has already explained in its Counter-Memorial why these complaints are without merit.<sup>255</sup> In what follows, Canada will thus only address several new allegations made by the Claimants and reiterate a few of the overarching failures of their arguments.

141. First, it is unsurprising that the Claimants continue to insist that the information they presented to the JRP was compelling and did not warrant the recommendation that was made on the Whites Point project. However, the fact is that the JRP members, based on their specific expertise in the relevant fields, disagreed.<sup>256</sup> As Canada explained at length in its Counter-Memorial, and as Mr. Smith has explained in both of his Expert Reports, in coming to this conclusion the JRP accorded the Claimants all the due process

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<sup>251</sup> Expert Report of Robert Connelly, ¶¶ 102-105.

<sup>252</sup> With respect to the Claimants' complaint of bias during the JRP hearings (*see* Claimants' Reply, ¶ 501(b)), Canada has already explained in its Counter-Memorial why this claim should also be dismissed. *See* Canada's Counter-Memorial, ¶¶ 371-373.

<sup>253</sup> Claimants' Reply, p. 136.

<sup>254</sup> Claimants' Reply, ¶¶ 508-531.

<sup>255</sup> *See* Canada's Counter-Memorial, ¶¶ 365-383.

<sup>256</sup> *See* Canada's Counter-Memorial, ¶¶ 161-164 and 194-200.

required.<sup>257</sup> In particular, the JRP adopted a careful and methodical approach which considered the voluminous, though often irrelevant and unresponsive, evidence contained in the Claimants' EIS and in their responses to information requests, the oral presentations from 77 registered participants during a two week public hearing, and the written submissions from 126 interested members of the public.

142. It is clear that the Claimants believe that information they and their experts presented to the JRP was entitled to some sort of special deference and that the JRP should simply have overlooked the deficiencies in their submissions and afforded them the benefit of the doubt.<sup>258</sup> They are wrong. As Canada's experts have explained, a JRP is required to independently analyze all of the information available to it, apply its expertise, and make a recommendation accordingly.<sup>259</sup> Its role is not simply to parrot the "science" and "conclusions" put forward by a proponent and then rubber stamp their proposal.

143. Second, the Claimants also continue to allege that the JRP's recommendation that the project be rejected based on its inconsistency with the relevant community core values breached Article 1105(1). Canada has already explained in its Counter-Memorial, and Mr. Smith has explained at length in both his Expert Reports, why the JRP's consideration of the community's core values in the EA should not only be given deference by this Tribunal, but was also wholly consistent with its mandate and the relevant Nova Scotia and Canadian legislation.<sup>260</sup>

144. In their Reply, the Claimants now argue that the JRP's conclusion was improper

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<sup>257</sup> See Canada's Counter-Memorial, ¶¶ 367-370. See also First Expert Report of Lawrence Smith ¶¶ 247-275. See also Rejoinder Expert Report of Lawrence Smith, ¶¶ 138-148.

<sup>258</sup> Claimants' Reply, ¶¶ 98, 513-523.

<sup>259</sup> See First Expert Report of Lawrence Smith ¶¶ 299, 305-313. See also Rejoinder Expert Report of Lawrence Smith, ¶ 119 and Expert Report of Robert Connelly, ¶¶ 115-117, 122.

<sup>260</sup> See Canada's Counter-Memorial ¶¶ 378-380. See also First Expert Report of Lawrence Smith ¶¶ 224-229, 282-291 and Rejoinder Expert Report of Lawrence Smith, ¶¶ 126-128.

because it failed to find that the project’s significant adverse environmental effects on community core values rose to the level of “major or catastrophic” as required under the *CEAA*.<sup>261</sup> In making this argument, the Claimants once again ignore the fact that this was a joint review panel. As such, it had a dual mandate and as explained in its report, the JRP applied the definition of “significant” set out in the *Nova Scotia EA Regulations*. Those *Regulations* do not require that an adverse effect rise to the level of a “major or catastrophic” for it to be deemed “significant.”<sup>262</sup> As the JRP had to satisfy the requirements of both the federal and provincial regulatory frameworks, it was entirely reasonable for it to use the definition of “significant” that afforded the highest standard of environmental protection.

145. The Claimants also attack the JRP’s conclusion with respect to community core values on the ground that it gave a veto to those opposed to the project.<sup>263</sup> There is no evidence in the JRP’s report to support this allegation. In fact, the JRP devoted the entire third chapter of its report to detailing the reasons why it concluded that the project would be inconsistent with the community’s core values.<sup>264</sup> As Mr. Smith explains, “[t]he Panel’s rigorous and deliberate review and analysis of a broadly based government and municipal planning framework, in my view, is the antithesis of a simple referendum-style tally of the Project’s opponents and supporters at a hearing.”<sup>265</sup>

146. Third, the Claimants also continue to take issue with a number of other minor conclusions of the JRP during the course of the EA relating to the JRP’s understanding of and approach to the precautionary principle,<sup>266</sup> adaptive management,<sup>267</sup> mitigation

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<sup>261</sup> Claimants’ Reply, ¶ 526.

<sup>262</sup> See *Nova Scotia EA Regulations*, s. 2, **Exhibit R-6**. See also JRP Report, p.18, **Exhibit R-212**.

<sup>263</sup> Claimants’ Reply, ¶ 512.

<sup>264</sup> See JRP Report, pp. 86-100, **Exhibit R-212**.

<sup>265</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 114.

<sup>266</sup> Claimants’ Reply, ¶¶ 515, 518-519.

<sup>267</sup> Claimants’ Reply, ¶¶ 515-517.

measures<sup>268</sup> and an alleged (but unsubstantiated) failure to take note of evidence provided by the Claimants.<sup>269</sup> However, they fail to show how any of these measures played into the JRP's recommendation that the project should be rejected because it was inconsistent with the community's core values. They also fail to show that the JRP's approach to these issues was the sort of "shocking repudiation" or "gross subver[sion]" of the policies and goals underlying EA in Canada that could support a claim under Article 1105(1).<sup>270</sup>

147. For the purposes of completeness, Mr. Smith has explained at length in both of his expert reports why, as a matter of Canadian law, there was nothing unusual, unlawful or inappropriate about the approach of the JRP to any of these issues.<sup>271</sup> Ultimately, however, their complaints here are no more than a sideshow – and while the principles at issue may be of academic and practical interest to Canadian EA practitioners, they have no relevance to this arbitration.

**d) The Decisions made by the Governments of Nova Scotia and Canada in Responding to the JRP's Report Did Not Breach Article 1105(1)**

148. The Claimants allege that the decisions of Nova Scotia and Canada to accept the recommendation of the JRP breached Article 1105(1), both in terms of how those decisions were made and the basis upon which they were made.<sup>272</sup> Their allegations have no merit.

149. In particular, the Claimants assert that the decisions of both the Provincial and

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<sup>268</sup> Claimants' Reply, ¶¶ 520-521.

<sup>269</sup> Claimants' Reply, ¶ 522.

<sup>270</sup> See *Cargill - Award*, ¶ 296, **RA-11**. See also at ¶ 292 – "[a]n actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes."

<sup>271</sup> See First Expert Report of Lawrence Smith, ¶¶ 317-389 and Rejoinder Expert Report of Lawrence Smith, ¶¶ 101-195.

<sup>272</sup> Claimants' Reply, ¶¶ 527-531.

Federal Governments to hear no further oral representations from Bilcon once the JRP issued its recommendations were a “denial of natural justice.”<sup>273</sup> However, as Mr. Smith explains, there is no requirement in Canadian law that Ministers must receive comments or hear views from the various stakeholders on a JRP’s recommendations.<sup>274</sup> The decision-making process after the release of a JRP Report is not an occasion to conduct yet another hearing of the issues raised before the JRP; nor is it an occasion for proponents to offer new or further evidence, or to appeal recommendations that they disagree with. The simple fact is that at some point in any decision-making process, the doors have to close, and the decision-maker has to retire to its deliberations. As such, Article 1105(1) does not require government decision-makers to grant endless audiences only to hear the same positions repeated *ad nauseum*, and the Ministers’ decisions not to meet with the Claimants, or with any other interested party for that matter, were reasonable, fair and in conformity with the minimum standard of treatment.

150. In any event, the Claimants are wrong to allege that “there is no evidence to suggest that the ministers considered the evidence Bilcon tried to convey”.<sup>275</sup> As Canada noted in its Counter-Memorial, the written evidence shows that the Nova Scotia Minister did in fact review the numerous written submissions that the Claimants sent detailing what they alleged were errors committed by the JRP. The transcript of Minister Parent’s conversation with Mr. Buxton, which the Claimants wrongfully sought to withhold from production in this arbitration, further reinforces the fact that the Minister gave careful consideration to the Claimants’ complaints.<sup>276</sup> The fact that he did not find those complaints justified, or even if justified, sufficient to cause him to reconsider his decision, cannot be grounds to find a breach of Article 1105(1).

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<sup>273</sup> Claimants’ Reply, ¶¶ 527-528. See also Expert Report of Murray Rankin ¶ 157.

<sup>274</sup> See Rejoinder Expert Report of Lawrence Smith, ¶¶ 221-225. See also, Expert Report of Robert Connelly, ¶127.

<sup>275</sup> Claimants’ Reply, ¶527.

<sup>276</sup> Transcript of a telephone conversation between Minister Mark Parent and Mr. Paul Buxton, November 20<sup>th</sup>, 2007, **Exhibit R-560**.

151. With respect to the government decisions to accept the JRP's recommendations, the Claimants summarily allege that "neither minister had a proper basis upon which to make his decision."<sup>277</sup> However, they offer no reasoning in their Reply to support their assertion that the Nova Scotia Minister was not permitted to make his decision based upon what their own expert has acknowledged is clearly a matter falling within provincial jurisdiction.<sup>278</sup> They have not done so, because they cannot. As Mr. Smith explains, "Nova Scotia's rejection of the Project was unimpeachable."<sup>279</sup>

152. With respect to the federal decision, Canada has already shown in its Counter-Memorial, and through the Expert Reports of Mr. Smith, that the decision of the federal cabinet to accept the JRP's recommendation<sup>280</sup> on the basis of the project's inconsistency with the community's core values was entirely within its jurisdiction.<sup>281</sup> There is no need to repeat these arguments here.

**e) The Claimants Have Failed to Establish that Canada Did not Afford them or their Investments Full Protection and Security**

153. In their Reply, the Claimants allege that, in violation of Canada's obligation to provide full protection and security, the treatment they received was substantially different from the treatment they claim they were promised in a series of statements by the Province of Nova Scotia.<sup>282</sup>

154. However, they have not responded to the fundamental point that the obligation to provide full protection and security extends only to guaranteeing the physical security of

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<sup>277</sup> Claimants' Reply ¶ 531.

<sup>278</sup> See Expert Report of David Estrin, ¶ 262 ("The impact identified by the Panel, inconsistency with community core values, is a pure socio-economic impact.").

<sup>279</sup> See Rejoinder Expert Report of Lawrence Smith, ¶ 198.

<sup>280</sup> Oddly, the Claimants refer to the decision of the "federal minister" to accept the JRP recommendation (see Claimants' Reply, ¶ 530). This decision is not a ministerial decision but is rather one taken by the Governor-in-Council. See Expert Report of Robert Connelly, ¶125.

<sup>281</sup> See Rejoinder Expert Report of Lawrence Smith, ¶¶ 212-215.

<sup>282</sup> Claimants' Reply, ¶¶ 553-554.

investors and their investments.<sup>283</sup> They specifically provide no evidence of state practice and *opinio juris* to support their assertion that the customary international law minimum standard of treatment includes an obligation to provide a stable legal environment for investors. Nor have they addressed the fact that the *Mobil* Tribunal recently rejected such an unqualified obligation, finding that Article 1105 “is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.” To the contrary, “[w]hat the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behavior.”<sup>284</sup>

155. The Claimants’ assertion that Canada breached the obligation of full protection and security is not only not supported by law, it also has no basis in fact. While they claim to have been denied a stable legal environment because political interference allegedly derailed their EA process,<sup>285</sup> they provide no serious evidence in support. Nor have they rebutted the testimony that Canada provided in this arbitration, including the testimony of those purportedly involved in the scheme they allege, that there was no conspiracy.<sup>286</sup> In the end, as Mr. Smith has explained, “[t]o ascribe a ‘political agenda’ of anti-American discrimination to these activities, or to characterize them as being outside of a proponent’s reasonable expectations, systematically strains credulity.”<sup>287</sup>

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<sup>283</sup> See Canada’s Counter-Memorial, ¶ 385. See also UNCTAD, Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II, UN Doc. UNCTAD/DIAE/IA/2011/5 (2012) p.36 (footnote 2), **RA-91** (“the full protection standard is usually understood as the obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks by public officials or third parties”).

<sup>284</sup> *Mobil – Decision on Liability and on Principles of Quantum*, ¶¶ 153, **RA-89**.

<sup>285</sup> Claimants’ Reply, ¶¶ 556-557.

<sup>286</sup> See Affidavit of Robert Thibault, ¶¶ 11-16, Affidavit of Neil Bellefontaine, ¶¶ 42-43 and Affidavit of Bruce Hood, ¶ 22.

<sup>287</sup> First Expert Report of Lawrence Smith, ¶ 17.

**f) The Claimants Have Still Not Established that Legitimate Expectations are Protected by Article 1105(1), or that they Had any Legitimate Expectations to Begin With**

156. The Claimants persist in asserting that Article 1105(1) includes a standalone obligation protecting legitimate expectations. However, they again fail to provide any evidence of state practice and *opinio juris* establishing the existence of such a rule of customary international law. In several recent NAFTA awards, including the recent *Mobil* award, tribunals have held that a breach of legitimate expectations is not itself a breach of Article 1105(1), though it can be a relevant factor in considering whether a measure amounts to the type of egregious conduct that would.<sup>288</sup> As Canada explained in its Counter-Memorial, for any of the Claimants’ “expectations” to be a relevant factor, they must demonstrate that they had objective expectations which arose from specific assurances made by Canada in order to induce their investment at Whites Point.<sup>289</sup> They have not discharged this burden.

157. All the Claimants have done in their Reply is claim that “Nova Scotia represented to the Investors that Whites Point was an appropriate site to develop and operate a quarry by granting an approval to construct and operate a quarry.”<sup>290</sup> In other words, they appear to be saying that their “expectation” was that they would be permitted by both Canada and Nova Scotia to develop a 152ha quarry and a 170m long marine terminal that would operate for 50 years, all because Nova Scotia issued a conditional approval to Nova Stone for a 3.9 ha quarry at the Whites Point project site.<sup>291</sup> This assertion is absurd.

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<sup>288</sup> See *Mobil – Decision on Liability and on Principles of Quantum*, ¶¶ 152, RA-89. See also *Thunderbird – Final Award*, ¶¶ 147, 194, RA-32 and *Waste Management – Award*, ¶ 98, RA-82.

<sup>289</sup> See Canada’s Counter Memorial, ¶ 392, along with the authorities cited in footnotes 784, 785, 786.

<sup>290</sup> Claimants’ Reply, ¶ 567.

<sup>291</sup> See Canada’s Counter-Memorial, ¶¶ 35 - 42. Even the Letter of Intent relied on by the Claimants to support their claim in ¶ 571 of their Reply was dated *prior* to the issuance of the conditional industrial approval. Moreover, the Claimants are incorrect to allege that “obtaining the permit was a pre-condition for capital contributions by the Investor” (see Claimants’ Reply, ¶ 571). To the contrary, clause 6 of the Letter merely provided Bilcon with the right either to invest in a different location, or to receive a return of

158. First, the mere issuance of a conditional approval does not give rise to an objective expectation arising from a specific assurance. As the *Feldman* Tribunal explained, to make out such a claim, the government assurances have to be definitive, unambiguous, repeated, and given by an entity that had the authority to do so.<sup>292</sup> There is no evidence that the relevant authorities made any such assurances to the Claimants.

159. Moreover, Nova Stone's conditional approval could not lead to the objective expectation that the Claimants would be entitled to develop their larger project. Put simply, a conditional approval for a 10-year, 3.9ha quarry issued under one set of regulations does not give rise to any objective expectation that Nova Scotia would approve, under a different regulatory framework, a quarry on the same location that was nearly 40 times as large and would last 5 times as long. Nor could Nova Stone's conditional approval give rise to an objective expectation that the Federal Government would issue the required permits for the project. If this is what the Claimants did expect, their expectations were not only objectively unreasonable, they were irrational.

## 5. Conclusions

160. As they did in their Memorial, the Claimants have attempted to convert every act, decision or recommendation made in the Whites Point EA, with which they happen to disagree, into a violation of Article 1105(1). While some of their complaints may serve as the basis for academic debate amongst Canadian EA practitioners, absolutely none of them have a place before this Tribunal, let alone as the basis for a claim under Article 1105(1). Each and every one of the Article 1105 allegations made in the Claimants' Memorial and Reply are devoid of merit and must be rejected.

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its investment contribution. There is, of course, no evidence that Bilcon ever exercised either of those rights (**Exhibit C-5**).

<sup>292</sup> See *Feldman v. Mexico*, **RA-35**, ¶ 148. Moreover, the Claimants' reliance on the *Metalclad* Tribunal's treatment of legitimate expectations here is unhelpful because, as Canada observed in its Counter-Memorial (at footnote 779) and as the *Mobil* Tribunal correctly pointed out (see *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 140, **RA-89**), the relevant part of the *Metalclad* award was set aside by the Supreme Court of British Columbia. Moreover, the facts surrounding the issuance of the *Metalclad* permit were entirely unlike those pertaining to Nova Stone's 3.9 ha permit.

**B. Canada Has Not Breached NAFTA Articles 1102 or 1103**

161. As Canada has explained, to make out a claim under Articles 1102 and 1103, the Claimants bear the burden of showing that: (1) a government accorded them or their investment “treatment” and the same government accorded treatment to another domestic or foreign EA proponent; (2) the treatment was “less favourable” than that accorded to the other EA proponent; and (3) the treatment in issue was accorded “in like circumstances.”<sup>293</sup> The Claimants advance several new theories and arguments as to why decisions made in the Whites Point EA violated Articles 1102 and 1103. However, none of the arguments they advance discharge their burden. Ultimately, they have failed to demonstrate that they suffered any discriminatory treatment on the basis of their nationality.

**1. The Claimants Fail to Demonstrate Canada and Nova Scotia Accorded “Treatment”**

162. In their Reply, the Claimants allege that the Whites Point JRP’s approach to cumulative environmental effects, the precautionary principle, adaptive management, mitigation and the making of information requests violated Canada’s obligations under Articles 1102 or 1103.<sup>294</sup> They advance similar claims with respect to the decisions of the governments of Nova Scotia and Canada on the issues of blasting, scope of project and type of assessment.<sup>295</sup> The Claimants also persist in arguing that the “duration” of the Whites Point EA itself constitutes “treatment.”<sup>296</sup> While some of the acts described above may constitute treatment in some contexts, much of what the Claimants complain of cannot possibly be considered treatment for the purposes of a NAFTA claim.

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<sup>293</sup> See *UPS – Award*, ¶¶ 83-84, **RA-79** (“[The] legal burden ... rests squarely with the Claimant. That burden never shifts to the Party, here Canada.”).

<sup>294</sup> Claimants’ Reply, ¶¶ 579-616, 670.

<sup>295</sup> Claimants’ Reply, ¶¶ 617-681.

<sup>296</sup> Claimants’ Reply, ¶¶ 395-404.

**a) “Duration” is not “Treatment”**

163. The Claimants persist in wrongly claiming the “duration” of the Whites Point EA constitutes “treatment” that is by itself sufficient to support a claim for a breach of Articles 1102 and 1103. It is not. The *Glamis* award, which the Claimants cite in support of their argument that the duration of a regulatory process constitutes treatment, actually arrives at the exact opposite conclusion. The Claimants assert the *Glamis* Tribunal “confirmed that delay is a measure under the NAFTA” by finding that “delays must be more than ‘a little slow’ if they are to constitute a breach.”<sup>297</sup> The *Glamis* Tribunal made no such finding. In fact, it merely observed the regulatory process in that case was “proceeding a little slowly” but that this was understandable given that regulatory authorities were dealing with “a particularly complicated, contested issue in which numerous parties took an interest.”<sup>298</sup> What the *Glamis* Tribunal actually found was that any “arguments with respect to this asserted delay are to be evaluated solely when the Tribunal assesses the acts of the federal and state governments together, as part of a possible pattern of practice.”<sup>299</sup> (emphasis added) Accordingly, as Canada has explained, and as the Tribunal in *Glamis* confirmed, it is the “acts” of a State during a regulatory process, not the amount of time the process takes, that constitute “treatment” under NAFTA.

**b) “Treatment” Accorded by Different Levels or Combinations of Government Cannot be Compared**

164. The Claimants also continue to compare treatment accorded in the Whites Point EA with that accorded in other EAs by different levels or combinations of government. As the *Merrill & Ring* Tribunal explained, “treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors ... just as the treatment accorded by a province ought to be

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<sup>297</sup> Claimants’ Reply, ¶ 397.

<sup>298</sup> The *Glamis* Tribunal also noted the delay in that case resulted from the fact that the government was “aware of the likelihood, if not imminence, of litigation and therefore its need to be extraordinarily careful in its review and decision-making processes.” See *Glamis – Award*, ¶ 774, **RA-29**.

<sup>299</sup> *Glamis – Award*, ¶ 777, **RA-29**.

compared to the treatment of that province in respect of like investments.”<sup>300</sup> This same logic applies when treatment is accorded concurrently by two jurisdictions, as was the case with much of the treatment the Claimants complain of in the Whites Point EA.<sup>301</sup>

165. There are good reasons for this requirement, especially in a federal state like Canada. Articles 1102 and 1103 do not require uniformity across the various autonomous levels of government in Canada. Indeed, those provisions do not take away the discretion of governments to make the policies and decisions that they believe will best serve the interests of the public who democratically elected them. In the context of EA, in a country as large and ecologically diverse as Canada specifically tailored principles and rules are what make EA work. Put simply, the approach taken to EA in British Columbia might not be appropriate for EA in Nova Scotia, and it is the role of elected governments to make such policy determinations. Articles 1102 and 1103 do nothing to change that – what these provisions prevent is nationality based discrimination, and for such discrimination to occur, it must be one actor according both the more favourable and the less favourable treatment. Differences in treatment accorded by different levels, or combinations, of government are both inevitable and important in a federal democracy. But they cannot serve as the basis for a NAFTA claim.

166. The Claimants attempt to circumvent this logic by arguing that because of the shared federal-provincial jurisdiction over the environment in a federal state,<sup>302</sup> “[a]ll applicants come before the governmental authorities in similar situations seeking the same treatment, and in relation to this treatment, must be considered to be in like

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<sup>300</sup> *Merrill & Ring – Award*, ¶ 82, **RA-38**. See also Canada’s Counter-Memorial, ¶¶ 409.

<sup>301</sup> Canada’s Counter-Memorial, ¶¶ 410.

<sup>302</sup> Claimants’ Reply, ¶ 353 (“The division of powers in the case of the environment is governed by a range of diverse constitutional considerations and an evolving case law, which has led to overlapping and/or jointly exercised regulatory authority, with some aspects being subject to provincial regulation and others to federal regulation, and with significant elements of federal/provincial cooperation and jointly exercised jurisdiction. The environmental impacts of economic activity thus are a matter of concurrent federal and provincial jurisdiction. All of the entities Bilcon is asserting as being “in like circumstances” are subject to the same concurrent federal or provincial jurisdiction under the Canadian constitution.”)

circumstances.”<sup>303</sup> This argument conflates the two distinct requirements of demonstrating “treatment” and establishing that treatment was accorded in “like circumstances.” The Claimants must first demonstrate that treatment was accorded by the same level or combinations of government before any consideration can be made of whether the treatment was accorded in like circumstances. The fact that the environment is a matter of shared federal-provincial jurisdiction in Canada has no bearing on these requirements.

167. As such, it is inappropriate to compare the federal-Nova Scotia decisions the Claimants complain of in the Whites Point EA with decisions made in other EAs by the Federal Government only, the Provincial Government only, or by the Federal Government jointly with a province other than Nova Scotia. For example, the joint federal-Nova Scotia decision to include the quarry and marine terminal in the scope of the JRP of the Whites Point project cannot be compared with a federal decision alone to *not* include the Tiverton Quarry in the scope of the federal-only EA of the Tiverton Wharf repair project,<sup>304</sup> as the “treatment” in these two cases accorded by different combinations of government actors.

168. For the same reasons, the Claimants’ attempt to compare the JRP’s approach to conducting the EA under terms of reference based on federal and Nova Scotia law, with the approach employed by government authorities or review panels operating in or under different provincial jurisdictions, must fail. For example, it is inappropriate to compare the Whites Point JRP’s approach to cumulative environmental effects with that of the federal authorities that conducted the comprehensive studies of the Eider Rock project in New Brunswick,<sup>305</sup> the Belleoram Marine Terminal in Newfoundland<sup>306</sup> or the Deltaport

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<sup>303</sup> Claimants’ Reply, ¶ 357.

<sup>304</sup> Claimants’ Reply, ¶¶ 652-655.

<sup>305</sup> Claimants’ Reply, ¶ 582(b).

<sup>306</sup> Claimants’ Reply, ¶ 583(c).

Third Berth project in British Columbia.<sup>307</sup> Nor can the Whites Point JRP's approach to cumulative environmental effects be compared to the approach of the JRP constituted under the *CEAA* and the Newfoundland *Environmental Assessment Act* that assessed the Voisey's Bay project.<sup>308</sup> Similarly, the manner in which the Whites Point JRP dealt with the adaptive management concept in its EA cannot be compared to how DFO or NSDEL approached adaptive management in the provincial EAs of the Elmsdale Quarry, the Glenholme Gravel Pit Expansion, or the Lovett Road Aggregate Pit Expansion.<sup>309</sup> In each case the Claimants seek to compare the decisions of different actors operating under different regimes. Discrimination cannot result from the acts of these different actors.

**2. The Claimants Fail to Demonstrate they were Accorded Treatment “Less Favourable” than that Accorded to Other Domestic or Foreign EA Proponents**

169. The deficiencies in the Claimants' approach to demonstrating “treatment” are compounded by their inability to demonstrate the treatment they were accorded was “less favourable.” As Canada explained in its Counter-Memorial, in order to make out a claim under Articles 1102 and 1103, the Claimants must show that they suffered discriminatory treatment on the basis of their nationality. There are two elements the Claimants must prove in order to satisfy this requirement.

170. First, the Claimants must show that the treatment they were accorded was, in fact, less favourable than that accorded to domestic investors. This requires more than a mere allegation that this is the case. Second, the Claimants must show that the less favourable treatment was accorded to them on the basis of their nationality. The Claimants allege that Canada's inclusion of this element in the test for “less favourable treatment” requires them to prove a *subjective* intent to discriminate on the part of regulators in the Whites

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<sup>307</sup> Claimants' Reply, ¶¶ 583-585.

<sup>308</sup> Claimants' Reply, ¶ 583(a).

<sup>309</sup> Claimants' Reply, ¶¶ 593-600. The Claimants' claims regarding the manner in which the Whites Point JRP addressed matters such as the precautionary principle (Reply, ¶¶ 588-592), mitigation (Reply, ¶¶ 601-614) and information requests (¶¶ 615-616) must all be rejected on the same grounds.

Point EA.<sup>310</sup> This is not true, and Canada made no such assertion in its Counter-Memorial. What the national treatment and MFN obligations do require of the Claimants is *objective* evidence that they have been discriminated against by reason of nationality. As shown below, the Claimants have failed to meet this burden.

**a) The Claimants Fail to Establish that the Treatment They Were Accorded was “Less Favourable”**

171. The Claimants suggest that the phrase “treatment no less favourable” means that Canada is to provide them with “equality of competitive opportunities.” They further suggest that such “equality” requires “that Canada accord Bilcon treatment that is the same as the best treatment received by domestic investors that are in direct competition with Bilcon.”<sup>311</sup> (emphasis added) In fact, they go so far as to baldly assert that a demonstration of mere “differences in treatment between firms in the same economic sector shift the burden on the respondents to show the treatment is no less favourable.”<sup>312</sup> They are wrong on all counts.

172. As a preliminary matter, in some instances the Claimants have failed to even show that the treatment they were accorded was actually different than the treatment accorded in other EAs. For example, with respect to the consideration of cumulative environmental effects, the Claimants complain that the Whites Point JRP considered “hypothetical projects” when there was no reasonable certainty that such projects would be developed (in actual fact the Whites Point JRP concluded that “the establishment of future quarries is reasonably foreseeable,”<sup>313</sup> not “hypothetical”). In contrast, the Claimants say, the cumulative environmental effects standard employed in other EAs did not focus on hypothetical projects and was less stringent. However, in support of their

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<sup>310</sup> Claimants’ Reply, ¶¶ 369-388, 459-468.

<sup>311</sup> Claimants’ Reply, ¶ 367.

<sup>312</sup> Claimants’ Reply, ¶ 324.

<sup>313</sup> JRP Report, p. 83, **Exhibit R-212**.

arguments, they cite to the Eider Rock EA which appears to have employed the very same “reasonably foreseeable”<sup>314</sup> standard that the Whites Point JRP used, and also considered “potential future projects” in its cumulative environmental effects assessment.<sup>315</sup> The Claimants also cite to the Deltaport Third Birth EA<sup>316</sup> even though that EA also considered, as part of its cumulative environmental effects assessment, the expansion of a terminal that it deemed to be “hypothetical.”<sup>317</sup>

173. Similarly, the Claimants complain about the referral of the Whites Point project to a review panel, but in support of their claim they cite to a list of six projects that were also referred to review panels.<sup>318</sup> In addition, they make cryptic and unsubstantiated complaints about the Prosperity Gold-Copper Project,<sup>319</sup> ignoring the fact that it was also referred to a review panel and was hence accorded treatment equal to that accorded to the Claimants.

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<sup>314</sup> Claimants’ Reply, ¶ 582(b).

<sup>315</sup> See the Claimants’ **Exhibit C-374** (in particular, at p. 97, “Though no projects are currently being considered/planned in the Mispec area, potential future Irving Oil projects in the Mispec Area could interact with the Project’s environmental effects on the Freshwater Aquatic Environment, through construction and operation of additional linear facilities.”(emphasis added)).

<sup>316</sup> Claimants’ Reply, ¶¶ 583-587.

<sup>317</sup> Excerpt from Deltaport Comprehensive Study Report, pp. 168-185, **Exhibit R-545**. (See in particular, at p. 178, “The exact footprint and location for the proposed T2 [Terminal 2] has not been determined, so the effects on marine habitats as a result of the construction of this 80 to 100ha terminal is somewhat hypothetical. However, for any practical location of T2 the direct footprint effects will mostly be on intertidal sand and mudflats, with some proportion of eelgrass and salt marsh habitats also affected.” (emphasis added))

<sup>318</sup> Claimants’ Reply, ¶ 664. As part of their complaint over type of assessment, the Claimants also allege in ¶ 663 of their Reply that Bilcon “had no say at all in what type of environmental assessment it was to undergo” and that “it was misled, through the spring and summer of 2003, to believe that it would undergo a comprehensive study.” The Claimants provide no evidence whatsoever that any of the proponents in the comparator EAs “had a say” in the type of EA they were to undergo. Their assertions are also incorrect – government officials never misled the Claimants and always made it clear “that the project could be referred to a review panel” – see letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**. See also Christopher Daly’s notes of a January 6, 2003 with GQP, **Exhibit R-65**, in which federal officials advised Paul Buxton of the possibility of a referral to panel review.

<sup>319</sup> Claimants’ Reply, ¶ 666 (“The Canadian proponent was able to assert influence over the level of review and insisted it would not accept a Panel Review where the panel had the ability to make a “go/no go” decision. The Canadian proponent placed pressure on provincial and federal regulators to leave the determination of the level of review in the hands of politicians.”)

174. Even where the Claimants have been able to identify different treatment, they fail to meet their burden of showing that the different treatment they were accorded was less favourable. As Canada explained in its Counter-Memorial, in order to show that treatment is in fact “less favourable” for the purposes of these provisions, a claimant must do more than merely point to differences in treatment. “Different” is not presumed to be “less favourable” or “unequal”. Rather, it is up to the Claimants to demonstrate the different treatment is, in fact, less favourable.<sup>320</sup>

175. The Claimants fail to discharge this burden. In their Reply, they identify treatment accorded in other EA processes that was different than the treatment they were accorded with respect to concepts such as cumulative environmental effects, the precautionary principle, adaptive management, and mitigation measures.<sup>321</sup> They point to another JRP that allegedly requested less information than was requested of them by way of information requests.<sup>322</sup> And they highlight different government decisions for different projects regarding the issues of blasting, scope of project and type of assessment.<sup>323</sup> Again, leaving aside the fact that none of this alleged treatment was accorded in “like circumstances,” a point which Canada addresses below, the fact is that no two EA panels will ever proceed in exactly the same way with respect to each and every procedural or analytical detail. The Claimants have not shown that the minor differences in approach that they have identified negatively impacted the outcome of the Whites Point EA such that they constitute less favourable treatment for the purposes of Articles 1102 and 1103.

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<sup>320</sup> See *UPS – Award*, ¶¶ 83-84, **RA-79** (“[T]he legal burden ... rests squarely with the Claimant. That burden never shifts to the Party, here Canada.”). See also, *Thunderbird – Final Award*, ¶ 176, **RA-32** (“The burden of proof lies with Thunderbird, pursuant to Article 24(1) of the UNCITRAL Rules. In this respect, Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican Nationals.” (emphasis added)).

<sup>321</sup> Claimants’ Reply ¶¶ 579-614.

<sup>322</sup> Claimants’ Reply ¶¶ 615-616.

<sup>323</sup> Claimants’ Reply ¶¶ 617-681.

176. Nor have the Claimants proven that they were accorded less favourable treatment because they were denied competitive opportunities. Absolutely none of the proponents in the comparator EAs invoked by the Claimants were engaged in competition, let alone “direct competition”, with Bilcon. The comparator EAs include projects such as a port facility expansion, diamond, nickel, gold and gypsum mines, oil refineries and marine terminals, liquid natural gas terminals, pipelines, repairs to an existing wharf and harbour facility, and small quarries providing aggregate for local use. The Claimants offer no explanation for how they lost “competitive opportunities” because the proponents of, for example, a diamond mine in northern Ontario or a port facility in Vancouver were not required to consider “reasonably foreseeable projects” in their cumulative environmental effects analysis.<sup>324</sup>

177. In the end, none of the treatment that the Claimants complain of ultimately affected their opportunity to develop their proposed project. For example, as Canada has explained above, DFO’s decision to scope the Whites Point quarry into the EA was rendered moot by the referral of the EA to a JRP, and hence it had no practical effect on the Claimants. Further, the government of Nova Scotia did not reject the Whites Point project because Bilcon failed to consider reasonably foreseeable projects in its cumulative environmental effects analysis, or to provide adequate information for the purposes of the precautionary principle or adaptive management. Nor did the government of Nova Scotia reject the project because Bilcon did not adequately answer all of the JRP’s information requests. As none of the treatment that the Claimants complain of actually denied them the opportunity they sought, it cannot be considered “less favourable” treatment.

**b) The Differences in Treatment Identified by the Claimants do not Amount to Nationality-Based Discrimination**

178. Even if the Claimants could demonstrate that the treatment they were accorded

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<sup>324</sup> Claimants’ Reply, ¶¶ 584-587, 670.

was objectively less favourable than that accorded to other domestic or foreign investors, they have still failed to demonstrate that they were accorded this treatment because of their nationality.<sup>325</sup> As the Tribunal in *Loewen* explained, Articles 1102 and 1103<sup>326</sup> are directed “only to nationality-based discrimination and . . . proscribe only demonstrable and significant indications of bias and prejudice on the basis of nationality.”<sup>327</sup>

179. In their Reply, the Claimants allege only that the treatment they were accorded was less favourable than some of the treatment accorded to a small sample of other EAs hand-picked in support of their claim. They ignore the fact that, as Canada explained in its Counter-Memorial,<sup>328</sup> they were accorded the same treatment as many other domestic EA proponents. In doing so, they seem to claim that these instances of equal treatment are irrelevant because Articles 1102 and 1103 require that Canada provide them with the “best” treatment, i.e. treatment no less favourable than every single domestic investor.<sup>329</sup> This is an absurd and untenable interpretation of Articles 1102 and 1103.

180. In the application of every regulation, some investors will benefit, and some will not. That is simply a fact of life, not a wrong that has to be corrected. If all a claimant can establish is that some Canadian investors were accorded better treatment than foreign investors, some were accorded worse treatment, and some were accorded the same treatment, they have proven nothing more than that a regulatory program was applied in a

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<sup>325</sup> The Claimants can only suggest that nationality-based discrimination is to be “inferred” from the fact that the JRP did not “distance” itself from statements made by some presenters at the Whites Point hearings regarding the nationality of the Claimants, and because members of the JRP allegedly “raised considerations of the investor’s nationality” (*see* Claimants’ Reply, ¶ 138). But the inference they suggest, has nothing to do with the actual acts that they complain of for the purposes of their national treatment and MFN claims.

<sup>326</sup> The *Loewen* tribunal was only expressly considering the application of Article 1102, but its analysis is equally applicable to Article 1103.

<sup>327</sup> *Loewen – Award*, ¶ 139 RA-75; *see also ADM – Award*, ¶ 205 RA-3.

<sup>328</sup> Canada’s Counter-Memorial, ¶¶ 417-420.

<sup>329</sup> Claimants Reply, ¶¶ 367-368 and footnote 585.

completely non-discriminatory way.<sup>330</sup>

**3. The Claimants Fail to Demonstrate the Treatment they Challenge Was Accorded “In Like Circumstances” to the Treatment Accorded to Other EA Proponents**

181. In addition to failing to establish that the acts they complain of constitute “treatment” that was “less favourable” than that accorded to other EA proponents, the Claimants also fail to establish that the treatment in issue was accorded “in like circumstances.” Their approach of comparing treatment selected from a host of EAs across Canada to that accorded in the Whites Point EA on the basis of the simplistic proposition that all enterprises subject to an EA are “in like circumstances” does not withstand scrutiny. It is conducted in a total vacuum, irrespective of the specific factors that are determinative of the decisions made in each EA process.<sup>331</sup> It also ignores how the quality of the information and evidence a proponent supplies can affect the administration of the EA process.

182. NAFTA Chapter Eleven cannot be interpreted in a manner that would negate the flexibility of the EA regime to adapt to the multitude of different projects that are proposed in a country as large and ecologically diverse as Canada. On this ground alone the Claimants’ national treatment and MFN claims must be rejected.

**a) The Claimants Ignore that “In Like Circumstances” Mandates Consideration of the Specific Context, Facts and Policy Objectives Relating to the Treatment in Issue**

183. The Claimants’ national treatment and MFN claims continue to rest on the flawed premise that “it is appropriate to consider all enterprises affected by the environmental

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<sup>330</sup> Contrary to what the Claimants assert, Article 1102(3) requires only that a state or province must provide the better of the treatment that it provides to its own investors or to other domestic investors. In essence, it accounts for the possibility that a state or province will choose to provide its own investors with less favourable treatment than it provides other domestic investors. In such, instances, it is the treatment provided to other domestic investors that is the appropriate comparator for the purposes of Article 1102.

<sup>331</sup> See Canada’s Counter-Memorial, ¶ 427.

assessment regulatory process to be in like circumstances with Bilcon.”<sup>332</sup> This interpretation glosses over the ordinary meaning and context of the words appearing in Articles 1102 and 1103.

184. As Canada explained in its Counter-Memorial, every EA process is driven by a host of environmental, economic, social, legislative and policy factors unique to the project under assessment and the environment for which it is proposed. The issue of whether treatment in two EA processes was accorded “in like circumstances” necessarily hinges on how these factors influenced the treatment in issue, not the mere fact that the treatment was accorded in an EA process. To conclude otherwise would take away the flexibility that regulators need when making decisions in an EA process.

185. Contrary to what the Claimants assert, this does not mean “that what places two investors in ‘like circumstances’ or not is the way in which Canada treats them.”<sup>333</sup> It is the circumstances *underlying* the way in which Canada treats two investors that are determinative of whether or not treatment was accorded in like circumstances. Nor do the words “in like circumstances” require a showing of “identical” or “most like” circumstances.<sup>334</sup> What they require is full consideration of all of the factors underlying the treatment in issue, including consideration of a State’s policy objectives in according the treatment in question. While the Claimants argue that a State’s policy objectives are irrelevant,<sup>335</sup> they fail to provide a single award of a NAFTA tribunal that, if interpreted correctly, would support their position.

186. For example, the Claimants suggest the *S.D. Myers* Tribunal qualified the

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<sup>332</sup> Claimants’ Reply, ¶ 279.

<sup>333</sup> Claimants’ Reply, ¶ 307.

<sup>334</sup> Claimants’ Reply, ¶ 292-297.

<sup>335</sup> Claimants’ Reply, ¶ 321 (“Canada has sought support from several NAFTA Tribunals who have considered Respondent States policy objectives in the course of their “like circumstances” analysis. These Tribunals, unfortunately, were not in a position to do so. Neither the wording of NAFTA Article 1102, nor the objects and purposes of the NAFTA suggest that this approach is appropriate or consistent with the treaty.”).

relevance of policy objectives by observing they should only be taken into account “inasmuch as those objectives are not contrary to the principle of national treatment.”<sup>336</sup> But this only illustrates Canada’s point – a policy objective that is consistent with the principle of national treatment (i.e., not motivated by discrimination on the basis of nationality) can result in legitimate differences in the treatment, whereas a policy objective that is discriminatory cannot.

187. The Claimants also suggest that the *GAMI* Tribunal held that policy objectives are not to be considered in determining whether the impugned treatment was accorded “in like circumstances”.<sup>337</sup> However, the *GAMI* Tribunal found that it “has not been persuaded that GAM’s circumstances were demonstrably so “like” those of non-expropriated mill owners that it was wrong to treat GAM differently.” (emphasis added) It added that the measure in issue, which distinguished between the Claimant’s and comparator investments “was plausibly connected with a legitimate goal of policy ... and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.”<sup>338</sup>

188. In a further attempt to avoid the fact that factors such as policy objectives must be considered in assessing “like circumstances,” the Claimants assert that Canada did not take a reservation under NAFTA for decisions made in the EA process, or for those sectors that might be subject to the EA process.<sup>339</sup> They argue that as Canada had full opportunity to take such reservations, Articles 1102 and 1103 should not be subject to “a new unwritten public policy exception.”<sup>340</sup> This confused argument must be rejected.

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<sup>336</sup> Claimants’ Reply, ¶ 327.

<sup>337</sup> Claimants’ Reply, ¶ 328 (“Ultimately, the *GAMI* Tribunal had held that a *prima facie* case must involve at least some evidence that the commercially disadvantageous outcome resulted from less favourable treatment. In other words, the Tribunal was not referencing likeness, but rather, the meaning of treatment no less favourable.”)

<sup>338</sup> *GAMI – Award*, ¶ 114, RA-27.

<sup>339</sup> Claimants’ Reply, ¶ 302-303.

<sup>340</sup> Claimants’ Reply, ¶ 303.

NAFTA reservations were taken in respect of measures that discriminate between investors on the basis of nationality – for example through limitations on foreign ownership<sup>341</sup> – and that would otherwise breach the national treatment or MFN obligations. These reserved measures are entirely different from a measure taken on legitimate policy grounds, that results in differential treatment of EA proponents, but that is not nationality based and hence does not need to be reserved. The implications of the Claimants’ proposed approach are that the NAFTA Parties would have to take reservations for *all* regulations which might differentiate between investors on non-discriminatory grounds.

189. Finally, the WTO case law the Claimants cite in support of their argument that the only factor that matters in an Article 1102 or 1103 analysis is “equality of competitive opportunities”<sup>342</sup> is irrelevant. As Canada has explained above, the Claimants fail to demonstrate how the proponents in the comparator EAs actually competed with Bilcon.

190. More importantly, however, WTO standards are not applicable in the interpretation of the NAFTA provisions in issue. Articles 1102 and 1103 are to be interpreted in accordance with their ordinary meaning, in their context and in light of the object and purpose of the NAFTA.<sup>343</sup> The Claimants argue this context includes WTO agreements containing national treatment and MFN obligations because these Agreements “were negotiated concurrently with NAFTA.”<sup>344</sup> However, they fail to explain why the provisions of these Agreements, which deal with entirely different subject matter and employ different wording, should inform the meaning of Articles 1102

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<sup>341</sup> For example, Canada’s reservation on Government Finance, cited in footnote 258 of the Claimants’ Reply, provides that “Canada reserves the right to adopt or maintain any measure relating to the acquisition, sale or other disposition by nationals of another Party of bonds, treasury bills or other kinds of debt securities issued by the Government of Canada, a province or a local government.”

<sup>342</sup> Claimants’ Reply ¶ 331.

<sup>343</sup> *Vienna Convention*, Article 31, Tab CA-44.

<sup>344</sup> Claimants’ Memorial, ¶ 268(b).

and 1103. Nor can they cite any NAFTA award in support of their proposition.<sup>345</sup> In fact, they ignore the *Methanex* Tribunal’s ruling that “[i]nternational law directs this Tribunal, first and foremost, to the text; here, the text and the drafters’ intention, which it manifests, show that trade provisions were not to be transported to investment provisions.”<sup>346</sup>

191. In the end, all the Claimants have offered is a series of flawed theories on the meaning of “like circumstances” that do not withstand scrutiny. The Claimants fail to establish that “like circumstances” requires anything less than a detailed consideration of the facts underlying the treatment in issue in each case. As Canada explains below, when such facts are considered here, it is clear that the treatment the Claimants challenge was not accorded in like circumstances to that accorded in the comparator EAs.

**b) The Treatment in Issue Here was not Accorded “In Like Circumstances”**

192. Below Canada demonstrates how the Claimants fail to show that any of the alleged instances of treatment in the Whites Point EA were accorded “in like circumstances” to those accorded in the comparator EAs. Each instance of alleged treatment was a product of the specific project under review, the environment for which it was proposed and the array of scientific, socio-economic, statutory and policy considerations that these factors presented to the officials and experts responsible for administering the EA. Decisions taken in the EA process cannot be classified as “right or wrong” or “black and white.” They are rather based upon the professional judgment of officials and experts, as informed by the unique facts of each case, and as long as they are rational, in light of these facts, they are not to be second-guessed by a NAFTA Tribunal.

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<sup>345</sup> All that the Claimants have cited is an excerpt from the dissenting opinion of Arbitrator Cass in the *UPS* case to the effect that Arbitrator Cass’ analysis “does not suggest that GATT law is devoid of any instructive value in the context of NAFTA Article 1102” (*see* Claimants’ Reply, ¶ 290). However, the excerpt makes no reference to the use of GATT law in the interpretation of NAFTA Articles 1102 or 1103.

<sup>346</sup> *Methanex – Award*, Part IV-Chapter B, ¶ 37, **RA-44**.

**(i) The JRP’s Administration of the EA of the Whites Point Project Was Not Carried Out in Like Circumstances with the Administration of other EAs**

193. The Claimants attack five separate instances of allegedly less favourable treatment that was accorded to them by the Whites Point JRP during the EA of the Whites Point project. These are: the JRP’s consideration of cumulative environmental effects;<sup>347</sup> its application of the precautionary principle;<sup>348</sup> its consideration of adaptive management;<sup>349</sup> its consideration of potential mitigation measures;<sup>350</sup> and, the manner in which it dealt with information requests.<sup>351</sup>

194. At their core, all of the Claimants’ complaints appear to boil down to an allegation that the Whites Point JRP required a level of proof and certainty that was not required of other EA proponents. However, the EA process must be flexible enough to adapt to the nature of the project in issue, the environment for which it is proposed, the public concerns it has engaged, and the applicable legal and regulatory system or systems involved. It must also be flexible enough to accommodate the fact that the evidence that proponents put before EA authorities will inevitably vary in quality and impact the outcome of each EA process differently. The Claimants’ arguments fail to acknowledge that the treatment in each of the comparator EAs was accorded in significantly different circumstances that were influenced by the kinds of factors outlined above.

195. For example, the Claimants complain that, in contrast to the Whites Point JRP, the Sable Gas JRP accepted a far greater degree of uncertainty with respect to the pipeline being proposed in that EA.<sup>352</sup> But as Lawrence Smith explains, while the Whites Point

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<sup>347</sup> Claimants’ Reply, ¶¶ 579-587.

<sup>348</sup> Claimants’ Reply, ¶¶ 588-592.

<sup>349</sup> Claimants’ Reply, ¶¶ 593-600.

<sup>350</sup> Claimants’ Reply, ¶¶ 601-614.

<sup>351</sup> Claimants’ Reply, ¶¶ 615-616.

<sup>352</sup> Claimants’ Reply, ¶ 592. *See also* Estrin Reply Report, ¶¶ 226-229.

and Sable Gas JRPs “come to different conclusions ... that is not surprising since they were two fundamentally different projects with different impacts.” Mr. Smith adds that:

It is obvious that the practical burdens on public land use, planning, tourism and fisheries would be quite different between these two very different projects. For example, post-construction, there is a significant difference in the physical effects of a buried, underground pipeline ... and a large scale, above ground quarrying operation with daily rock crushing, bi-weekly blasting, marine loading, and almost weekly shipments of post-Panamax-size freighters in and out of the Bay of Fundy continuously for a period of 50 years. The physical impacts and the impacts on “rural quality of life” of the operational phase of the two projects upon the local communities and their value systems are simply not comparable.<sup>353</sup>

196. The Claimants also complain that the Whites Point JRP considered not just reasonably certain projects in its cumulative environmental effects assessment, but also reasonably foreseeable projects. The Whites Point JRP, they say, took a more stringent approach to cumulative environmental effects than that taken in other EAs.<sup>354</sup> What the Claimants ignore however, is that the Whites Point JRP’s cumulative environmental effects analysis, which was entirely consistent with Agency policy,<sup>355</sup> was based upon specific evidence put before the JRP that led it to conclude that the establishment of additional quarries on the Digby Neck was reasonably foreseeable. That evidence included statements of government officials pointing to expressions of interest by other potential proponents in establishing coastal quarries in the region,<sup>356</sup> the abundance of quality rock on the Digby Neck, the proximity of the Bay of Fundy to a major export

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<sup>353</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 137.

<sup>354</sup> Claimants’ Reply, ¶¶ 579-587, 670.

<sup>355</sup> See *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act*, s. 3, **Exhibit R-482**.

<sup>356</sup> This was not a groundless concern. While not put before the JRP as evidence, Canada attaches a Briefing Note to Minister Thibault, prepared several months after the Whites Point project had been referred to a review panel, reporting on meetings between NSDEL, DFO, CEAA and a prospective proponent of a quarry and marine terminal that was to be situated on 2,000 acres of land on the Digby Neck, just 25 km away from the Whites Point project site. See Memorandum to Minister – Proposed Quarry and Marine Terminal Gullivers Cove, Digby County, Nova Scotia, **Exhibit R-546**.

market, the fact that earlier quarrying proposals had been made on the Digby Neck, and the proponent's own statement that it was far more difficult to get a quarrying permit in the United States than in Nova Scotia.<sup>357</sup>

197. By contrast, in the comparator EAs cited by the Claimants, the entities responsible for the EA had no such evidence before them. For example, the Victor Diamond Mine Comprehensive Study Report<sup>358</sup> concluded that “there are no anticipated additional mines or development in the area.”<sup>359</sup> (emphasis added) Likewise, in the Belleoram Marine Terminal EA<sup>360</sup> there appears to have been no evidence that expanded or additional quarries were reasonably foreseeable as a result of the project.<sup>361</sup> The Voisey's Bay<sup>362</sup> JRP's report is also devoid of such evidence.<sup>363</sup>

198. In another instance, the Claimants have compared the Whites Point JRP's decision not to detail mitigation measures in its report despite its negative recommendation, with the decision of the Kemess, Prosperity Mine and Lower Churchill JRPs to do the opposite.<sup>364</sup> In doing so however, they entirely ignore the relevant legal frameworks of these different JRPs. The Terms of Reference for the Whites Point JRP mandated that it “recommend either the approval, including mitigation measures, or

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<sup>357</sup> JRP Report, p. 83, **Exhibit R-212**.

<sup>358</sup> Claimants' Reply, ¶ 670.

<sup>359</sup> Excerpt from Victor Diamond Mine Comprehensive Study Report, p. 7-24, **Exhibit R-547**. The Claimants distort this finding in their Reply, stating that that “[d]espite the likelihood of future projects in the area, cumulative effects were limited ... to known projects.” See Claimants' Reply, ¶ 670.

<sup>360</sup> Claimants' Reply, ¶ 582(c).

<sup>361</sup> Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, **Exhibit R-357**.

<sup>362</sup> Claimants' Reply, ¶ 582(a).

<sup>363</sup> Moreover, the Voisey's Bay JRP's approach and findings were subject to an earlier Agency Policy Statement mandating a more restrictive interpretation of cumulative environmental effects than that to which the Whites Point JRP was subject. For an explanation of the differences in the Agency's policy guidance prior to and after the issuance of the *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* see First Expert Report of Lawrence Smith, ¶¶ 372-377.

<sup>364</sup> Claimants' Reply, ¶¶ 601-614.

rejection of the Project.<sup>365</sup> (emphasis added) If the JRP's conclusion was that the Whites Point project should be rejected – which it was – its Terms of Reference did not give it the mandate to suggest potential mitigation measures.<sup>366</sup> By contrast, the terms of reference in the other EAs referenced above expressly mandated the identification of significant adverse environmental effects and of potential mitigation measures.<sup>367</sup>

199. Finally, the Claimants complain that as opposed to what happened in other EAs, the Whites Point JRP applied an overly cautious and restrictive interpretation of the precautionary principle,<sup>368</sup> leading to the JRP's alleged "hostility" to the adaptive management strategy being advanced by Bilcon<sup>369</sup> and to its alleged non-consideration of Bilcon's proposed mitigation measures.<sup>370</sup> They also suggest that the Whites Point JRP made or permitted too many information requests, relative to other JRPs.<sup>371</sup>

200. Contrary to what the Claimants allege, the JRP was not "hostile" to the concept of adaptive management. It was actually very interested in the issue of adaptive management<sup>372</sup> in light of how heavily Bilcon proposed to rely on the concept in monitoring the effects of the Whites Point project. The JRP also considered mitigation measures throughout its report in assessing the significance of the environmental effects

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<sup>365</sup> JRP Agreement, ¶ 6.3, **Exhibit R-27**.

<sup>366</sup> See also First Expert Report of Lawrence Smith, ¶ 352 ("No mitigation measures were recommended because the Panel did not recommend approval. Its recommendation complied with the literal requirement of Article 6.3 as it was specifically directed to include mitigation measures only if it approved the Project which it did not. This fact is a complete answer to Mr. Estrin's criticism of the Panel's failure to include alleged mitigation recommendations in its report.")

<sup>367</sup> Canada notes that the Claimants also complain that unlike in the Whites Point EA, mitigation measures were identified in the Deltaport, Keltic and Rabaska EAs. But they ignore that in each of these EAs the recommendation was made that the project should be approved. If the Whites Point JRP had made a similar recommendation (i.e. for project approval) its terms of reference would have also required it to include mitigation measures with its recommendation.

<sup>368</sup> Claimants' Reply, ¶¶ 588-592.

<sup>369</sup> Claimants' Reply, ¶ 593.

<sup>370</sup> Claimants' Reply, ¶ 614.

<sup>371</sup> Claimants' Reply, ¶ 516.

<sup>372</sup> JRP Hearing Transcripts, Day 1, pp. 114-120, **Exhibit R-457**.

of the Whites Point project.<sup>373</sup> However, the JRP had serious questions about the quality of the information that had been provided by Bilcon through the EA process, noting that:

while the environmental impact statement provided considerable data, in many ways the information provided by the Proponent was inadequate for the requirements of an environmental assessment. The Proponent declined to provide some of the information requested by the Panel, forcing the Panel to obtain required information from government officials, interveners and holders of traditional knowledge, during public hearings. The Panel believes that while it acquired adequate information to assess the likely environmental effects of the Project, a more adequate EIS document and responses to information requests would have facilitated the review process.<sup>374</sup>

201. Given the poor quality of the information presented by Bilcon during the EA, including its lack of responsiveness to relevant information requests,<sup>375</sup> the JRP noted that “the accumulation of concerns about adequacy leads the Panel to question the Project.”<sup>376</sup> Also, in light of these concerns, the JRP was not satisfied that Bilcon had proven itself capable of using either adaptive management or mitigation as effective tools for monitoring and responding to unforeseen environmental effects.<sup>377</sup> For example, the JRP

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<sup>373</sup> See JRP Report, p. 20, **Exhibit R-212**, wherein the JRP noted that “When determining the nature and significance of environmental effects, the Panel analyzed and evaluated the information provided, along with the monitoring and mitigation proposed, in order to draw conclusions about the adequacy of the proposed measures and predicted effects on valued environmental components.” (emphasis added)). Consistent with this statement, the JRP’s report is replete with references to its consideration of the mitigation strategies proposed by Bilcon.

<sup>374</sup> JRP Report, p. 84, **Exhibit R-212**.

<sup>375</sup> See JRP Report, p. 87, **Exhibit R-212**, wherein the JRP stated that “Information requests were an important part of the assessment process, providing a vehicle to enable greater participation and input by interested parties. While the Proponent responded to those made by the Panel, those submitted by others often received the response of “noted” without further comment. This had the dual effect of reducing the amount of critical and substantive input into the process while exacerbating negative relations between the Proponent and members of the various communities who could be directly impacted by the Project.”

<sup>376</sup> JRP Report, p. 84, **Exhibit R-212**.

<sup>377</sup> JRP Report, pp. 12-13, **Exhibit R-212**. The JRP’s conclusion in this regard is what makes the Claimants’ referral to the provincial EAs of the Glenholme Gravel Pit Expansion, the Lovett Road Aggregate Pit Expansion and the Elmsdale Quarry confusing. In each one of those EAs, the documentary evidence cited by the Claimants refers to the fact that DFO suggested to NSDEL that adaptive management could be used as an approach to monitoring the environmental impacts of these projects (see **Exhibits C-810, C-668 and C-664**). However, a regulator’s mere suggestion that adaptive management could be used

observed that while the “EIS makes many references to the need for continuous monitoring and implementation of adaptive management as a tool to rectify unexpected environmental changes,” it “often appeared inadequate for evaluating the long-term processes described throughout the EIS.”<sup>378</sup> Mr. Smith describes this as a “key point” with which the Panel was concerned. As he explains, “merely offering to monitor and then to implement adaptive management measures does not adequately address uncertainty or insufficient information regarding the environmental effects of a project, the significance of those effects and appropriate mitigation measures required to eliminate, reduce, or control those effects.”<sup>379</sup>

202. While the Claimants may have been satisfied with their EIS and felt entitled to ignore or not respond to certain information requests that they deemed to be “indiscriminate,”<sup>380</sup> EA is not a self-judging process. The JRP found the information the Claimants presented to be deficient and obviously considered the information requests to which they were to respond relevant and valid. The lack of quality and responsive information provided by the Claimants during the EA was one of the most important circumstances governing how the Whites Point JRP managed the process. As Mr. Smith explains, it was thus unsurprising “for the Panel to have been critical of Bilcon, or to have expressed some frustration, when after repeated requests, such information was still lacking.”<sup>381</sup> By contrast, there is no evidence in the record of such similar overriding concerns regarding the quality and responsiveness of the information provided by the proponents in the comparator EAs cited by the Claimants.

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to monitor environmental effects, or the issuance of a conditional approval that is contingent on the submission of an adequate adaptive management strategy, is not the same or even remotely similar to the Whites Point JRP actually reviewing Bilcon’s adaptive management strategy and finding that the strategy was deficient.

<sup>378</sup> JRP Report, p. 51, **Exhibit R-212**.

<sup>379</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 155.

<sup>380</sup> Claimants’ Reply, ¶¶ 615-616.

<sup>381</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 165.

203. The Claimants were not entitled to simply sail through an EA providing what they themselves deemed to be information that was good enough for the JRP. A proponent in an EA reaps what it sows, and the Claimants need look no further than their own approach to the EA and the insufficient information they provided in order to fully understand the reasons for how the JRP managed the process. In light of these factors, the various decisions that the Whites Point JRP made in administering the EA process were not made in like circumstances to decisions made in the administration of any of the comparator EAs. The Claimants' complaints about these decisions must accordingly fail.

**(ii) The Decisions of Government Regulators in the Whites Point EA Were Not Made in Like Circumstances To Decisions Made in Other EAs**

204. In their Reply, the Claimants allege that Canada violated NAFTA as a result of divergences in the approach regulators took on the issues of blasting, scope of project, and type of EA for the Whites Point project, relative to the approach taken on these issues in the review of other projects including Tiverton Quarry, Tiverton Harbour, Belleoram, Keltic, Victor Diamond, Diavik Diamond and Surface Gold Mine projects. However, in advancing their claims on the issues of scope of project<sup>382</sup> and type of EA, the Claimants continue to rely on the same allegations that they made in their Memorial. Canada has already explained why decisions made in the Whites Point project with respect to these issues were not accorded in like circumstances with decisions made in these comparator

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<sup>382</sup> While the Claimants alleged in their Memorial that the “scope of project” treatment accorded to the Tiverton Quarry breached Article 1102 (*see* Claimants’ Memorial, ¶ 551(a)) they provided no argument in support that would have permitted Canada to understand the basis of their complaint. In their Reply they now appear to suggest that the Tiverton Quarry should have been included in the scope of project for DFO’s screenings on the Tiverton Harbour and the Tiverton Wharf repair projects because rock from the Tiverton Quarry happened to be used for these projects (*see* Claimants’ Reply, ¶¶ 652-655). As explained in the Rejoinder Expert Report of Lawrence Smith, this fact does not demonstrate “like circumstances” between the Tiverton and Whites Point EAs in connection with the scope of project issue. *See* Rejoinder Expert Report of Lawrence Smith, ¶¶ 64-77. *See also* Briefing Note for the Minister, Wharf Repairs at Tiverton, Digby County, Nova Scotia, **Exhibit R-548**, letter from Donald Maynard to Gary Hubbard, April 4, 2003, **Exhibit R-568**, and email from Jerome MacGillivray, to Benson Miner and Claude Burry, February 5, 2004, **Exhibit R-570**.

projects. There is no need to repeat those explanations here.<sup>383</sup>

205. The only new allegations the Claimants have made in their Reply relate to alleged divergences in the approach regulators took at Whites Point on the issue of blasting, relative to that taken with respect to the Tiverton Quarry, Tiverton Harbour, Belleoram, North Head Harbour, and Miller's Creek Gypsum Mine projects. However, again the Claimants gloss over the relevant details of these projects, the environments for which they were proposed, and the inherent complexity of blasting – as Dennis Wright, the author of the DFO *Blasting Guidelines* explained at the time Nova Stone's blasting plan was under review, "there is much uncertainty concerning how explosives behave when detonated in or near water and how fish and marine mammals will react to the shock waves produced by the detonation of explosives.... To provide guidelines to cover all species and size ranges for all possible explosive use situations is virtually impossible."<sup>384</sup> Given the many variables that can affect the use of explosives in different environments, none of the decisions regarding the issue of blasting were made in like circumstances.

206. For example, conditions similar to those in the industrial approval issued to Nova Stone were not included in the industrial approval for the Tiverton Quarry, but NSDEL and DFO personnel certainly considered the potential impact of blasting on the Tiverton Quarry, ultimately concluding that it would not engage the fisheries concerns that were engaged by Nova Stone's proposal.<sup>385</sup> Unlike Nova Stone's proposed quarry – the first step in a 50 year operation on 152 ha of land – the Tiverton project was confined to 1.8

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<sup>383</sup> With respect to the treatment accorded in the review of: Tiverton Quarry, *see* Canada's Counter-Memorial, ¶¶ 446-448; Tiverton Harbour, *see* Canada's Counter-Memorial, ¶¶ 449-552; Belleoram, *see* Canada's Counter-Memorial, ¶¶ 462-463; Keltic, *see* Canada's Counter-Memorial, ¶¶ 438-441; Victor Diamond, *see* Canada's Counter-Memorial, ¶¶ 470-472; Diavik Diamond, *see* Canada's Counter-Memorial, ¶¶ 475-477; and, Surface Gold, *see* Canada's Counter-Memorial, ¶¶ 442-445.

<sup>384</sup> Email from Dennis Wright to Phil Zamora, July 29, 2003, **Exhibit R-520**.

<sup>385</sup> *See* first Affidavit of Bob Petrie, ¶¶ 21-23. *See* also email from Robert Balcom to Bob Petrie, March 17, 2003, **Exhibit R-567**.

ha, was of limited duration,<sup>386</sup> and was to be used for armourstone.<sup>387</sup> The Tiverton blasting activity was also to be conducted much further back than at Nova Stone's proposed quarry, which was just 35 metres from the Bay of Fundy.<sup>388</sup> In light of all of these considerations, a June 2003 NSDEL briefing note stated that, with respect to Tiverton, "[d]ue to differences in the nature and scope of the project, DFO has not required any special conditions regarding blasting."<sup>389</sup>

207. This relevant context explains any differences in the initial blasting conditions to which Nova Stone and the Tiverton Quarry proponent were subjected when they received their industrial approvals. The Claimants complain in their Reply that their request that the conditional approval issued to Nova Stone should "be amended to reflect the terms and conditions of the nearby Tiverton Quarry" was "never granted."<sup>390</sup> However, in light of the "differences" between the Nova Stone and Tiverton projects outlined above, they fail to explain why there was anything improper about this decision. The Nova Stone Quarry and the Tiverton Quarry were different projects and engaged different considerations.<sup>391</sup>

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<sup>386</sup> See letter from Bruce Arthur to Michael Lowe, December 15, 2004, **Exhibit R-573**, which notes that the Tiverton Quarry approval, which was approved on March 24, 2003, "was no longer valid" as of December 15, 2004."

<sup>387</sup> See first Affidavit of Bob Petrie, ¶¶ 18-19. See also fax from Jamie Gill to Jacqueline Cook, June 11 2003, attaching blasting records from 2003, **Exhibit R-563**, which notes that at Tiverton "None of the blasts triggered the seismograph. When blasting for armour stone, there is very small amounts of explosive used to try and leave the rock as large as possible. This reduces the vibration."

<sup>388</sup> See first Affidavit of Bob Petrie, ¶ 21.

<sup>389</sup> See NSDEL Briefing Note, Nova Stone Exporters Inc., Quarry Approval White's Cove, Digby County, June 11, 2003, **Exhibit R-569**.

<sup>390</sup> Claimants' Reply, ¶ 84.

<sup>391</sup> In their Reply, the Claimants also suggest for the first time that a conspiracy was afoot to speed up the approval process for the Tiverton Quarry, while slowing down the process for Nova Stone's (see Claimants' Reply ¶¶ 630-633). This is simply more baseless speculation. Their evidence is an alleged meeting between DFO Minister Thibault and the Tiverton Quarry proponent, and the absence of a meeting between Minister Thibault and Bilcon or the Clayton family (see Claimants' Reply, ¶ 631). It should be noted, however, that Minister Thibault met with Nova Stone about its 3.9ha quarry proposal at Whites Point (see Briefing Note for the Minister, Wharf Repairs at Tiverton, Digby County, Nova Scotia, **Exhibit**

208. The Claimants also assert that DFO used the issue of the effects of blasting on iBoF salmon to “stall” Nova Stone’s attempts to blast while “iBoF salmon was never an issue at the Tiverton Quarry.”<sup>392</sup> Again, they ignore the relevant circumstances and distort the relevant facts. As explained in the second Affidavits of Stephen Chapman and Mark McLean, DFO did not engage in discussions with Nova Stone on how to mitigate the effects of blasting, once the potential presence of iBoF salmon became an issue at Whites Point, because Nova Stone’s quarry was on the site of the larger Whites Point project which had been referred to a JRP.<sup>393</sup> There was therefore a legitimate policy reason underlying the decision not to discuss mitigation on Nova Stone’s quarry. As noted by Lawrence Smith in his Rejoinder Expert Report, “[g]iven that the activities described by Mr. Buxton were about to be assessed by the review panel that was in the process of being convened, I am not surprised that both DFO and the Agency took the cautious approach that they did ...”<sup>394</sup>

209. The Tiverton Quarry, by contrast, never engaged such a concern and was accordingly not in like circumstances. But in any event, once iBoF salmon became an issue for DFO at Whites Point, no blasting took place before DFO conducted a review of the blasting design and setback distances at the Tiverton Quarry and determined that there would be no adverse impacts on iBoF salmon or other endangered species.<sup>395</sup>

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**R-548).** That Minister Thibault did not meet with Bilcon or the Claytons about a project for which they were not even the proponents is hardly evidence of improper conduct. Moreover, in the end, the Tiverton Quarry was not given expedited treatment. *See* Tiverton Quarry Communication Form, March 3, 2003, **Exhibit R-565**. *See also* NSDEL Briefing Note, Parker Mountain Aggregates Limited; Application for Quarry Tiverton, Long Island, Digby County, **Exhibit R-566**. (“Although it has been expressed there is an urgent need for repairs to the wharf, a local quarry cannot be considered without a complete application package and a thorough review of the proposal.”)

<sup>392</sup> Claimants’ Reply, ¶ 636.

<sup>393</sup> *See* second Affidavit of Stephen Chapman, ¶ 8. *See also* second Affidavit of Mark McLean, ¶ 5.

<sup>394</sup> Rejoinder Expert Report of Lawrence Smith, ¶ 31.

<sup>395</sup> *See* letter from Thomas Wheaton to NSDEL, March 15, 2004, **Exhibit R-341**. *See also*, letter from Parker Mountain Aggregates to Bob Petrie, March 15, 2004, **Exhibit R-571**. Canada notes that at ¶ 82 of their Reply the Claimants allege that DFO’s Paul Boudreau “suggested modifying the blasting conditions at Tiverton to reflect the conditions imposed at Whites Point” and that “Mr. Boudreau’s suggestion was not

210. Regarding the EA of the Tiverton Harbour, the Claimants complain that this project entailed blasting in the water, while blasting was not permitted on Nova Stone's proposed quarry.<sup>396</sup> But they again ignore the relevant context, specifically that blasting at Tiverton was only authorized once appropriate mitigation measures – including those that would avoid adverse environmental effects on endangered species like iBoF salmon and the North Atlantic Right whale – were developed through the EA process.<sup>397</sup> As explained in the second Affidavit of Mark McLean, DFO was initially willing to discuss the implementation of mitigation on the proposed Nova Stone quarry, but was unable to do so given that this quarry was contained in the Claimants' larger Whites Point project which had by that point been referred to a JRP.<sup>398</sup> Again, Nova Stone's quarry was in entirely different circumstances than the Tiverton Harbour and this explains the differences in how mitigation was addressed on each project.

211. The unique circumstances engaged by the other projects invoked by the Claimants dictated the different approaches to dealing with blasting in the comparator EAs. In the Belleoram Marine Terminal EA for example,<sup>399</sup> there was no active fishery in the vicinity of the proposed blasting,<sup>400</sup> no evidence that blasting would adversely impact species at

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adopted.” This is a mischaracterization of Mr. Boudreau's suggestion and a misrepresentation of what actually happened. First, the document cited by the Claimants (an email from Paul Boudreau to Peter Winchester of May 28, 2003, **C-306**) does not show that Mr. Boudreau suggested that the Tiverton blasting plan should be “modified.” It rather suggested that the “Tiverton Quarry file should be reassessed to determine if a HADD is likely to occur.”

<sup>396</sup> Claimants' Reply, ¶¶ 620-621.

<sup>397</sup> See Tiverton Harbour Screening Report, p. 30, **Exhibit R-342** (“Blasting will not be permitted from July until late December when Atlantic Right Whale and other species at risk (identified in Issue A7 [and including iBoF salmon]) are present in the Tiverton area. Blasting will only be conducted from January to the end of June. Other requirements include: blast caps will be detonated to scare fish and mammals away from the area; and shock wave padding (bubble curtain or air curtain) will be installed to minimize the transmission of the blast through the water.”) See also DFO Science Response to Habitat Request Re: Environmental Screening for Harbour Development, June 4, 2004, **Exhibit R-572**.

<sup>398</sup> See second Affidavit of Mark McLean, ¶¶ 3-5. See also second Affidavit of Stephen Chapman, ¶ 8.

<sup>399</sup> Claimants' Reply, ¶¶ 619, 641-642.

<sup>400</sup> Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, p.86, **Exhibit R-357**.

risk such as Right Whales,<sup>401</sup> no local whale watching and ecotourism industry and a resultant absence of public concern.<sup>402</sup> There was therefore no need for blasting conditions at Belleoram similar to those included in Nova Stone’s conditional permit.

212. Regarding the North Head Harbour project, the Claimants cite to mitigation measures identified during the EA that would allow for blasting to be carried out in the water. They complain, without offering anything more, that “Bilcon was never permitted to conduct any blasting.”<sup>403</sup> They forget however that Bilcon was ultimately not permitted to conduct blasting, not because there were no measures that might mitigate the effects of the blasting, but rather because its project was rejected by the JRP on grounds that were simply not engaged by the North Head Harbour project.

213. Regarding the Miller’s Creek Gypsum Mine Extension, it is not clear how the Claimants propose to compare the treatment accorded in respect of the blasting there with the treatment of blasting at Whites Point. Ultimately, blasting was permitted at Miller’s Creek, but the project is not, as the Claimants allege, located in or even as near to the Bay of Fundy as was the proposed Whites Point project.<sup>404</sup> Moreover, the proposal under consideration was the *extension* of an existing gypsum mine that already occupied 477 ha of land and that had been in operation since the 1950s.<sup>405</sup> Accordingly, any blasting there did not give rise to the same concerns as the blasting at Whites Point.

#### **4. Conclusions**

214. The Claimants are free to take issue with decisions made in the Whites Point EA,

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<sup>401</sup> Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, pp. 88-91; 99-105, **Exhibit R-357**.

<sup>402</sup> Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, pp. IV, 46, **Exhibit R-357**.

<sup>403</sup> Claimants’ Reply, ¶¶ 643-645.

<sup>404</sup> Claimants’ Reply, ¶¶ 646-648.

<sup>405</sup> See Excerpt from Advice and Recommendation to the Minister – Miller’s Creek Mine Extension, March 12, 2008, p. 1, **Exhibit R-549**. See also Map setting out Miller’s Creek Extension Project Site Location, **Exhibit R-550**.

but under Articles 1102 and 1103 they cannot do so in a vacuum. Rather, they must demonstrate that the acts they complain of actually constitute “treatment” covered by these provisions, and that the alleged treatment was “less favourable” than that accorded “in like circumstances” to other EA proponents. These terms require detailed consideration of all factors giving rise to the treatment in issue. To require anything less would prevent regulators from making determinations on the basis of the factors in an EA that inevitably result in differential treatment. This would not only subvert the objectives of EA, it would render the EA process meaningless. At best, the Claimants have shown that in some cases different approaches were taken and different decisions were made in the Whites Point EA relative to the comparator EAs. Far more is required of the Claimants in making out a claim under Articles 1102 and 1103.

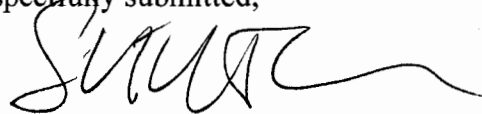
**V. ORDER REQUESTED**

215. Canada respectfully requests that this Tribunal render an award:

- i) Dismissing the Claimants' claims in their entirety; and
- ii) Ordering the Claimants to bear the costs of the arbitration in full and to indemnify Canada for all of its legal costs, disbursements and expenses incurred in the defence of this claim, as well as the costs of the Tribunal, plus interest. Canada also requests the opportunity to make submissions on the costs that it has been forced to incur as a result of this claim.

Dated: March 21, 2013

Respectfully submitted,



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Sylvie Tabet  
Scott Little  
Shane Spelliscy  
Reuben East  
Jean-Francois Hebert  
Stephen Kurelek  
Adam Douglas  
Jennifer Hopkins

On behalf of the Respondent,  
The Government of Canada