

**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, DANIEL CLAYTON AND BILCON OF
DELAWARE INC.**

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REJOINDER MEMORIAL ON DAMAGES

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I. INTRODUCTION

A. Overview of Canada's Rejoinder Memorial on Damages

1. A finding by a tribunal that a State has breached a treaty obligation is not a blank cheque on which a claimant can fill any amount it desires. Damages in international law are not about either rewarding investors or punishing States. They are about providing compensation for the losses caused by a State's wrongful conduct.

2. After the Claimants ignored the issue of causation in their Memorial, Canada highlighted it in its Counter-Memorial. Now, in their Reply, the Claimants pay lip-service to the legal principles governing causation. Both Canada and the Claimants agree¹ that the question the Tribunal must answer in this phase is the following: but for the acts giving rise to the NAFTA breach—namely “the distinct, unprecedented and unexpected approach taken by the JRP to ‘community core values’ in this particular case”²—did the Claimants suffer the losses that they claim?

3. However, while the Claimants acknowledge the controlling legal principles regarding causation and damages at international law, the proper application of these principles seems lost on them. In their Reply, the Claimants continue to advance a claim for the lost profits, now in the amount of US \$458,609,734, that they allege they would have realized if the NAFTA breach had not been committed. This is not a request for compensation. This is a request for a completely unjustifiable windfall.

4. Indeed, the Claimants' claim, and all of the expert opinions and witness statements they have filed in support of it, rest on the same flawed assumption that has been at the heart of their submissions throughout this phase of the arbitration—that but for the NAFTA breach found by the majority of the Tribunal, the Whites Point project would have, without question, been approved, permitted, constructed, and profitably operated for the 50-year life of the project. However, their but-for approach to making out this claim is to simply excise the Whites Point

¹ Canada's Counter-Memorial on Damages, June 9, 2017 (“Canada's Counter-Memorial on Damages”), ¶¶ 40-46. Claimants' Reply Damages Memorial, August 23, 2017 (“Claimants' Reply Damages Memorial”), ¶ 287.

² Award on Jurisdiction and Liability, March 17, 2015 (“Award”), ¶ 601.

Joint Review Panel's ("JRP's") reliance on community core values ("CCV") from its report (the "JRP Report"). On the basis of a CCV-free version of the Report, the Claimants assert that there was but one lawfully mandated outcome of the Whites Point environmental assessment ("EA") process—project approval. Both their lost profits claim and the assumption upon which it is based are untenable given the factual record before the Tribunal, the specifics of the majority's liability finding, and the most basic principles governing causation of damages in international investment law.

5. In attempting to make out their case, the Claimants assert that the Whites Point JRP Report not only identified just one likely significant adverse environmental effect ("SAEE") of the project – inconsistency with CCV – but also definitively determined that all other potential project effects were not likely SAEEs.³ This is wrong on a plain reading of the JRP Report. Moreover, in factual findings that cannot now be re-litigated, the Tribunal has already recognized that this was not the case. In its Award, the majority specifically faulted the JRP for not "carry[ing] out its mandate to conduct a 'likely significant effects after mitigation' analysis to the whole range of potential project effects."⁴ The majority found that, by failing to consider other potential project effects in its Report, the JRP "arrived at its conclusions without having fully discharged a crucial dimension of its mandated task," and that government decision-makers were consequently "not provided with all the information that could have provided a proper foundation from which to arrive at their own final conclusions."⁵ In light of these findings, a proper but-for analysis must consider the findings and recommendations that could have reasonably been made by the JRP had it not relied on the wrongful CCV-based approach, and had it properly considered the whole range of potential project effects.

6. In their Reply submissions, the Claimants go even further than misconstruing the conclusions of the JRP Report. They also misrepresent the finding of the majority in its Award, and then claim that their misrepresentation of the finding is *res judicata* between the parties. In particular, the Claimants wrongly assert that the Award concludes that government decision-

³ Claimants' Reply Damages Memorial, ¶¶ 287(b), 291.

⁴ Award, ¶ 452 (emphasis added).

⁵ Award, ¶ 452.

makers rejected the project on the sole basis of CCV, and that the Tribunal has thus precluded further consideration of how the EA process might have unfolded in the absence of the NAFTA breach.⁶ The majority made no such finding. In fact, it found the exact opposite, making clear that it was not offering a conclusion at all on what the result of the EA of the Whites Point project should have been.⁷ The Claimants have inexplicably ignored the core finding in the majority's decision—that in adopting its CCV-based approach, the JRP failed to consider the whole range of potential project effects and denied government decision-makers the information that they should have been provided.⁸ This determination of the majority is itself *res judicata* between the parties and again, it requires the Tribunal to consider at this stage how the Whites Point JRP might have assessed other project effects in discharging its mandate, the recommendations that it could have reasonably made in doing so, and the government decisions that could have reasonably followed.

7. Finally, the Claimants assert that decision-makers in both the federal and Nova Scotia governments would have been legally compelled to approve the Whites Point project if the JRP had not committed the NAFTA breach.⁹ This is an indefensible proposition under any but-for scenario given the discretionary nature of the federal and provincial decision-making processes legislated under the *Canadian Environmental Assessment Act* (“CEAA”) and the *Nova Scotia Environment Act* (“NSEA”).

8. In determining whether the Claimants have discharged their burden of establishing the requisite causal link between the NAFTA breach identified in the Award and their claim for lost profits, the Tribunal must assess the soundness of the Claimants' theory as to the situation that would have existed had the Whites Point JRP not taken an approach that was found to be wrongful under NAFTA. Canada's Rejoinder Memorial on Damages, and the supporting expert and witness evidence that it has filed, explain why the Claimants' theory of causation is

⁶ Claimants' Reply Damages Memorial, ¶¶ 304-310, 316.

⁷ Award, ¶¶ 602, 697.

⁸ Award, ¶ 452. See also, ¶¶ 514, 527, 535, 546, 547.

⁹ Claimants' Reply Damages Memorial, ¶¶ 294-299.

fundamentally unsound and make clear the result that must follow—dismissal of the Claimants' claim in its entirety and an award of no damages.

9. Canada has structured its Rejoinder Memorial as it did its Counter-Memorial in order to place the Claimants' claim in its appropriate context, and to provide answers to the questions of the injury and loss that were actually incurred as a result of the NAFTA breach. First, as Canada explained in its Counter-Memorial, the Claimants do not have standing under NAFTA Article 1116(1) to bring a claim for the damages allegedly suffered by their investment, Bilcon of Nova Scotia. In their Reply, the Claimants persist in claiming the lost profits of Bilcon of Nova Scotia on the ground that these profits would have been distributed as dividends to Bilcon of Delaware and ultimately to the individual Claimants as shareholders of Bilcon of Delaware.¹⁰ However, the language of NAFTA is clear—a claim for damages based on the losses allegedly incurred by the enterprise investment could only be advanced under NAFTA Article 1117(1). In pursuing their inflated claims, the Claimants fail to properly interpret Article 1116(1) in accordance with the *Vienna Convention on the Law of Treaties*¹¹ (“VCLT”), and the basic tenets of corporate law that were outlined in Canada's Counter-Memorial. The Claimants have no standing to make the claim that they do under Article 1116(1). As they expressly disclaim any intention of advancing a claim for their own damages as required under Article 1116, they have left the Tribunal with only one choice: to dismiss the claim for damages in its entirety. Canada explains why in Part II of its Rejoinder Memorial below.

10. In Part III, Canada explains why the Claimants' lost profits claim must also be dismissed because the excessive sum claimed bears no causal relationship at all to the NAFTA breach identified in the Award, nor to the injury that the majority found the breach to have caused—denial of the Claimants' opportunity to have their proposal considered, assessed, and decided in accordance with applicable laws.¹² The Claimants' theory of the limited but-for analysis that this Tribunal must undertake, and the singular conclusion that they say must follow, are both

¹⁰ Claimants' Reply Damages Memorial, ¶ 386.

¹¹ CA-44, United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, United Nations, Treaty Series, vol. 1155, Article 31.

¹² Award, ¶ 603.

meritless. Their failure to satisfy the basic requirements of the principles governing causation warrants only one result here: the outright rejection of their claim, and an award of no damages.

11. However, even if the Tribunal were to proceed further and attempt to assess an appropriate quantum of damages in the face of the Claimants' failure to do so, an award should amount to no more than the costs the Claimants would have incurred had they taken steps to mitigate their losses. The Claimants had available to them a cost- and time-effective means of fully mitigating any losses that they might have suffered as a result of the NAFTA breach. An application for judicial review in Canada's domestic courts would have fully restored the opportunity inherent in a lawfully compliant EA process. In their Reply, the Claimants argue they had no duty to mitigate. They are wrong. Canada explains why in Part IV below, and consequently why the Claimants are entitled to an award of no more than the costs that they would have incurred in pursuing judicial review in order to restore their lost opportunity.

12. If the Tribunal were to disagree with Canada's position regarding the issues of standing and causation, and were to conclude that the Claimants were not under a duty to mitigate their losses, then it would have to determine how to properly value the loss of their opportunity in having the Whites Point project considered, assessed, and decided in accordance with applicable laws. As Canada explained in its Counter-Memorial, the only appropriate measure of these losses could be the costs that Bilcon of Nova Scotia incurred in the JRP process that resulted in the NAFTA breach. For the most part, the Claimants have not challenged Canada's calculation of those losses. Instead, the Claimants confirmed that they were advancing just one damages claim—for the "loss of demonstrated profits"—and that they were not claiming "'sunk costs' in developing the Whites Point Quarry project."¹³ In Part V below, Canada provides further support for its calculation of the JRP-related costs of Bilcon of Nova Scotia that can be substantiated by the documentary evidence produced in the arbitration.

13. Finally, Canada explained in its Counter-Memorial why, if the Tribunal were to disagree with Canada's position regarding the issues of standing, causation, mitigation, and Bilcon of Nova Scotia's sunk costs in the JRP process, the Claimants' lost opportunity cannot be credibly

¹³ Claimants' Reply Damages Memorial, ¶ 221.

valued on the basis of a fully operational Whites Point project. As Bilcon of Nova Scotia never had the right to develop the project, at most the value of the project would be represented by Bilcon of Nova Scotia's established and verifiable investment costs. As Canada explains in Part VI below, neither the arbitral awards nor the facts the Claimants cite in their Reply in support of their lost profits claim demonstrate why the result in this case should be based on their speculative discounted cash flow ("DCF") model. Further, even if the Tribunal were to be willing to entertain consideration of a lost profits calculation on the basis of a DCF analysis, Canada explains in Part VII why the DCF model that the Claimants have presented is rife with flawed assumptions, errors in approach, and key omissions, and cannot be considered a realistic measure of future lost profits.

B. Materials Filed By Canada

14. Canada's Rejoinder Memorial is accompanied by 76 new exhibits and 14 new authorities, in addition to the exhibits and authorities already filed in the arbitration. Canada has also filed the following nine Expert Reports and one Witness Statement in support of its Rejoinder Memorial:

- **REJOINDER EXPERT REPORT OF TONY BLOUIN, Ph.D:** Dr. Blouin is the former Chair of the Nova Scotia Environmental Assessment Board and has served as the appointed chair of numerous review panels established under the *NSEA*. In his Rejoinder Expert Report, he explains that if the discussion of CCV were to be excised from the Whites Point JRP Report, the Panel's recommendation to reject the project on the basis of CCV would have also been struck. This would render the Report incomplete in respect of the Panel's provincial mandate. Furthermore, Dr. Blouin explains why, contrary to Mr. Estrin's approach, the findings of the Whites Point JRP cannot be compared to the findings in other EAs. The assessment of projects is context-specific and as such, review panels do not base their recommendations on the recommendations and outcomes of other EAs. He also responds directly to Mr. Estrin's critiques of his analysis of the JRP's findings with respect to adverse environmental effects and explains why these findings provided an adequate basis to reject the project under the *NSEA*, even absent the NAFTA breach.

- **REJOINDER EXPERT REPORT OF LESLEY GRIFFITHS:** Ms. Griffiths has served as the chair of five JRPs constituted under the *CEAA* and has also been a member of a federal-provincial EA constituted under the *NSEA* and the federal Environmental Assessment and Review Process. In her Rejoinder Expert Report, she explains that the Whites Point JRP's federal mandate required the Panel to make its own independent determinations with respect to likely SAEE of the project after mitigation. As Ms. Griffiths explains, the determination of likely SAEE after mitigation under the *CEAA* is context-specific and not based on the findings of other EAs. Ms. Griffiths also responds directly to Mr. Estrin's criticisms of her analysis of the Whites Point project's effects on right whales and lobsters, and explains that the use of terms and conditions is only appropriate if they constitute adequate and effective mitigation. She concludes that none of Mr. Estrin's comments change her opinion that the Whites Point JRP could have reasonably determined that the project was likely to cause SAEE, after taking into account proposed mitigation measures, on the endangered North Atlantic right whale and on American lobster and lobster habitat, and that the JRP made other findings that did not support approval of the project.
- **WITNESS STATEMENT OF MARK MCLEAN:** Mr. McLean is Manager of the Fisheries Protection Program in the Maritimes Regional Office at Fisheries and Oceans Canada ("DFO"), and has 18 years of experience reviewing EA projects. Mr. McLean worked at the Nova Scotia Department of Environment and Labour, DFO, and the Canadian Environmental Assessment Agency over the course of the Whites Point EA. He also provided management oversight to DFO staff that provided expert advice on the Black Point Quarry project under the *CEAA* in the EA of that project. In his Witness Statement, Mr. McLean corrects certain inaccurate statements made by Mr. Estrin in his Reply Expert Report about the marine life in the vicinity of the Whites Point project and Black Point Quarry ("BPQ"). Mr. McLean explains the significant differences between the two projects with respect to the presence of endangered right whales and the abundance of lobsters. He explains that the same mitigation measures for the Black Point Quarry would be less effective for the Whites Point project.

- **REJOINDER REPORT OF PETER GEDDES:** Mr. Geddes, the past Manager of Environmental Assessment, past Director of Policy, Planning and Environmental Assessment, and past Environmental Assessment Administrator with the Nova Scotia Department of Environment, has longstanding experience in providing the Nova Scotia Minister of Environment with the advice and analysis necessary to make an EA decision. In his Rejoinder Report, Mr. Geddes responds to a number of assertions advanced by Mr. Estrin in his Reply Expert Report regarding the Nova Scotia EA process, most notably the mistaken view that a “boiler plate” practice exists in Nova Scotia to approve all quarry applications.
- **EXPERT REPORT OF THE HONOURABLE THOMAS CROMWELL:** Justice Cromwell served as a judge of the Supreme Court of Canada from 2008 until 2016 and as a judge of the Nova Scotia Court of Appeal from 1997 to 2008, and has extensive experience interpreting Nova Scotia statutes and jurisprudence. In his Expert Report, Justice Cromwell responds to the assertion of Dean Sossin in his Reply Expert Report that, absent the NAFTA breach, the Nova Scotia Minister of Environment was compelled to approve the Whites Point project. Justice Cromwell explains that the Minister has broad discretion under the *NSEA* to approve or reject an undertaking, and that it is not consistent with the breadth of this discretion to conclude that the Minister was legally compelled to approve the Whites Point project. Justice Cromwell also observes that, apart from the JRP's problematic CCV analysis, the JRP found that the project would result in adverse environmental effects and made other findings that would not have supported project approval.
- **REJOINDER EXPERT REPORT OF ROBERT G. CONNELLY:** Mr. Connelly is a former Vice President, Policy, and a former Acting President of the Canadian Environmental Assessment Agency. Mr. Connelly has over 38 years of experience in the EA field, was involved in the design and enactment of the *CEAA*, and has served as a member or the appointed chair of two *CEAA* review panels. In his Rejoinder Expert Report, Mr. Connelly responds to numerous assertions made by Mr. Estrin and Dean Sossin in their Reply Expert Reports on the role of federal government officials and

decision-makers in the EA process. Mr. Connelly explains that under the *CEAA*, the Minister of Environment can instruct a review panel to reconvene and complete a report. He also explains that federal decision-makers have broad discretion under the *CEAA* to find a SAEE that is not justified under the circumstances and to approve or deny a project. Mr. Connelly determines that in the hypothetical situation where the JRP adopted a NAFTA-compliant approach, government decision-makers could have still reasonably denied approval of the Whites Point project.

- **REJOINDER EXPERT REPORT OF THE HONOURABLE JOHN M. EVANS:** Justice Evans was appointed to the Federal Court of Canada in 1998 and the Federal Court of Appeal in 1999, where he served until 2013. He has substantial experience with the judicial review of administrative action, having presided over hundreds of judicial review applications and co-authored the treatise *Judicial Review of Administrative Action in Canada*. In his Rejoinder Expert Report, Justice Evans explains that, contrary to the Claimants' arguments, judicial review in Canadian courts would have provided an effective and efficient remedy that would have fully restored Bilcon of Nova Scotia's right to have its project considered in accordance with Canadian law. Justice Evans also explains that under the legislative scheme created by the *CEAA*, the ultimate decision-making power with respect to a project rests with the Governor in Council ("GIC"), who is not legally bound to approve a project even where a review panel has concluded the project would not cause any SAEEs that could not be satisfactorily mitigated.
- **REJOINDER EXPERT REPORT OF SC MARKET ANALYTICS LLC:** SC Market Analytics ("SCMA") combines the experience of experts working in the construction materials sector, primarily in cement, aggregates, and concrete products, with experience in forecasting North American construction materials markets. In its Rejoinder Expert Report, SCMA confirms its opinion that the increased supply of aggregates from Whites Point in a but-for world would have exerted downward pressure on prices for those aggregates in the New York market, where the Claimants purport they would have sold the majority of Whites Point product. SCMA also

explains that the Claimants have continued to underestimate the cost of production for the Whites Point project to meet the requirements of the sales plan the Claimants propose in this arbitration.

- **REJOINDER EXPERT REPORT OF ARLIE G. STERLING, MARSOFT INC.:** Dr. Sterling is the president and co-founder of Marsoft Inc., the world's largest independent advisory group focusing solely on the maritime industry. Dr. Sterling advises ship-owners, investors, and financial institutions on the development and execution of effective investment, chartering, and risk management strategies. In his Rejoinder Expert Report, Dr. Sterling addresses a number of flaws in the Claimants' freight rate estimations, and makes two adjustments to his [REDACTED] for reasonably and verifiably calculating freight rates for the proposed Whites Point project.
- **REJOINDER EXPERT REPORT OF DARRELL B. CHODOROW, THE BRATTLE GROUP:** Mr. Chodorow is a Principal of The Brattle Group, an international economics consultancy. He has over 20 years of experience in analyzing and advising on the quantification of economic damages and valuation in a wide range of litigation and advisory matters. In his Rejoinder Expert Report, Mr. Chodorow explains that, with the exception of a handful of questions about substantiation, the Claimants have not rebutted his approach to calculating the historical investment costs related to the JRP process and the Whites Point project. Mr. Chodorow also provides his opinion on the updated valuation and conclusions reached by the Claimants' damages Expert, Mr. Howard Rosen, in his Reply Expert Report. Mr. Chodorow updates his alternative DCF valuation of the Whites Point project's potential profits immediately prior to the NAFTA breach, and continues to find that the value of the project as of the breach date was significantly lower than the amount the Claimants claim. Mr. Chodorow also accounts for the effect of mitigation on the alleged lost profits of Bilcon of Nova Scotia.

II. THE CLAIMANTS DO NOT HAVE STANDING UNDER ARTICLE 1116 TO BRING A CLAIM FOR THE DAMAGES THEY SEEK

15. In its Counter-Memorial, Canada explained that the Claimants' attempt to recover losses allegedly suffered by their enterprise, Bilcon of Nova Scotia, must be rejected because Article 1116 does not allow investors to recover reflective losses. In their Reply Memorial, the Claimants do nothing to remedy this fundamental defect in how they have presented their claim for damages. In defining the nature of the loss they allegedly incurred, the Claimants state in their Reply that they are in fact valuing "the loss incurred by the Investors themselves"¹⁴ because

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵

16. Rather than changing their theory of damages, and pleading losses that they themselves suffered to their interest in Bilcon of Nova Scotia, the Claimants continue to seek to recover losses incurred by their enterprise. They present unconvincing legal arguments on why this Tribunal should ignore the distinction between claims brought under Article 1116 and Article 1117. In presenting these arguments, they fail to engage in a proper *VCLT* analysis of Article 1116, choosing instead to look to other provisions of Chapter Eleven for support. However, those other provisions, when properly interpreted, offer the Claimants no assistance.

17. The Claimants also try to persuade the Tribunal to rewrite the clear language of Article 1116 on the basis of a limited number of arbitral decisions that they say have "settled" its interpretation. Arbitral decisions cannot "settle" the interpretation of any provision of NAFTA. There is no such thing as binding precedent in investor-State arbitration. Moreover, the Claimants have misunderstood and misinterpreted the holdings of certain of these decisions, and completely ignored the importance the decisions actually placed on the distinction between standing to bring claims under Articles 1116 and 1117. Their arguments on these grounds should also be rejected.

¹⁴ Claimants' Reply Damages Memorial, ¶ 343 (emphasis in original).

¹⁵ Claimants' Reply Damages Memorial, ¶ 386.

18. Finally, the Claimants plead that, at most, the Tribunal should act as their counsel, and rewrite their pleadings so as to present a case under Article 1117 for which standing would exist to seek the losses of Bilcon of Nova Scotia. This is not the role of the Tribunal. When the Claimants commenced this arbitration ten years ago, they chose not to seek standing under Article 1117. The Tribunal should not permit the Claimants to reframe this foundational element of their claim at this late stage. The Claimants have no standing and hence, their damages claim must fail.

A. A Proper *VCLT* Analysis Reveals that Claims for Reflective Loss May Not Be Brought By Investors Under Article 1116

19. The Claimants perform an incorrect analysis under Article 31 of the *VCLT* to support their belief that Article 1116 permits reflective loss claims.¹⁶ A proper *VCLT* analysis reveals that investors have no standing to claim reflective loss under Article 1116.

1. The Ordinary Meaning of Article 1116 Does Not Permit Investors to Bring Claims For Reflective Loss

20. As Canada explained in its Counter-Memorial, an investor may bring a claim on its own behalf under Article 1116 for loss or damage that the investor incurred as a result of a breach of Section A of NAFTA Chapter Eleven.¹⁷ However, Article 1116 does not contain language that allows investors to recover damages for losses incurred by an enterprise that the investor owns or controls. Such claims may only be pursued under Article 1117. As Canada further explained, Article 1116 reflects a core principle of corporate law recognized not only by advanced domestic legal systems, but also by customary international law: the corporation has a separate legal personality from its shareholders.¹⁸ As a result, in common law and civil law courts, shareholders are generally precluded from personally recovering damages for wrongs done to their corporation.¹⁹ The Claimants object to this argument and contend that Canada bases its

¹⁶ Under Article 31 of the *VCLT*, NAFTA is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” **CA-44**, *Vienna Convention on the Law of Treaties* (1969), Article 31(1).

¹⁷ Canada's Counter-Memorial on Damages, ¶ 11.

¹⁸ Canada's Counter-Memorial on Damages, ¶¶ 15-18.

¹⁹ Canada's Counter-Memorial on Damages, ¶ 15.

interpretation of Article 1116 “on inapposite principles of corporate law that are frankly irrelevant to the interpretation of Article 1116.”²⁰ The Claimants are wrong that such principles are “inapposite” to the interpretation of Article 1116.

21. To the contrary, such principles of corporate law are central to the interpretative question the Tribunal faces. As Canada explained, it is well recognized that “[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”²¹ Based on corporate law principles established in municipal law, customary international law prohibits reflective loss claims.²² Nothing in the language of Article 1116 indicates a clear intention to dispense with this important principle of international law. In fact, the Claimants do not even attempt to argue that Article 1116 expressly does away with the relevant principle of customary international law. Instead, they argue in the negative, by stating: “[n]othing on the face of Article 1116 suggests that it was meant to exclude the reflective loss incurred by an investor as a shareholder with an interest in an enterprise.”²³ Such negative interpretative arguments are meritless. In short, in order to deviate from the principle of customary international law prohibiting claims for reflective loss, Article 1116 would have to reflect a clear intention on the part of the NAFTA Parties to do so. It does not.

2. The Context of Article 1116 Does Not Support Interpreting It to Allow Investors to Bring Claims For Reflective Loss

22. The Claimants’ argument that the context of Article 1116 displays a clear intention on the part of the NAFTA Parties to allow claims for reflective loss is also meritless. The Claimants ask the Tribunal to interpret Article 1116 in the context of Articles 1121(1), 1117(3), and 1117

²⁰ Claimants’ Reply Damages Memorial, ¶ 362.

²¹ **RA-75**, *Loewen Group Inc. v. United States* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 (“*Loewen – Award*”), ¶ 160 (citing **CA-105**, *Case Concerning Elettronica Sicula SpA (ELSI)* (*United States of America v. Italy*) (I.C.J. Reports 1989), p. 42). See also **RA-75**, *Loewen – Award*, 26 June 2003, ¶ 162: (“It would be strange indeed if sub silentio the international rule were to be swept away.”)

²² **RA-110**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970 (“*Barcelona Traction 1970*”), ¶ 38.

²³ Claimants’ Reply Damages Memorial, ¶ 350.

generally. However, none of these Articles support the Claimants' belief that Article 1116 permits claims of reflective loss.

(a) Article 1121(1) Does Not Support Interpreting Article 1116 to Allow Investors to Bring Claims For Reflective Loss

23. The Claimants argue “[t]hat such reflective loss is clearly included within the scope of damages recoverable under Article 1116 is confirmed by reading Article 1116 together with Article 1121(1), its companion provision.”²⁴ Article 1121(1) sets forth conditions precedent for submitting a claim to arbitration under Article 1116, including the requirement that the investor waive most rights to initiate or continue a claim for money in domestic courts or tribunals.²⁵ Article 1121(1)(b) requires a waiver from both the investor and the enterprise where an investor's claim under Article 1116 is a claim “for loss or damage to an interest in an enterprise...”²⁶ From this the Claimants infer: “[i]n other words, a claim under Article 1116 can include an investor's claim for reflective or derivative loss.”²⁷ However, this conclusion does not logically follow from the structure or the language of the provisions they cite. As explained below, loss or damage to an interest in an enterprise is distinct from loss or damage incurred by the enterprise itself.

24. As the Claimants recognize,²⁸ the structure of Articles 1121(1) and 1121(2) mirrors that of Articles 1116 and 1117. Where Article 1121(1) sets out the conditions precedent for claims brought under Article 1116, Article 1121(2) sets out the relevant conditions for claims brought

²⁴ Claimants' Reply Damages Memorial, ¶ 351.

²⁵ **RA-47**, NAFTA Article 1121(1): “1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party” (emphasis added).

²⁶ **RA-47**, NAFTA Article 1121(1)(b).

²⁷ Claimants' Reply Damages Memorial, ¶ 351.

²⁸ Claimants' Reply Damages Memorial, ¶ 359.

under Article 1117. The parallel structure of Articles 1121(1) and 1121(2) thus reflects the distinct nature of claims brought under Articles 1116 and 1117 and confirms that Articles 1116 and 1117 require separate and distinct treatment.

25. The language of Article 1121(1)(b) does not support the Claimants' argument that it includes reflective loss either. The provision refers to "loss or damage to an interest in an enterprise" (emphasis added). An "interest in an enterprise" is not equivalent to the enterprise's own interests, and the NAFTA Parties made clear distinctions between the two. Where they intended to refer to an enterprise, rather than an interest in an enterprise, they did so clearly. For example, Article 1117 provides that investors may submit to arbitration a claim on behalf of their enterprise where "the enterprise has incurred loss or damage" (emphasis added). In contrast, Article 1121(1)(b) refers not to loss or damage incurred by an enterprise, but rather to "loss or damage to an interest in an enterprise" (emphasis added). The language of Article 1121(1)(b) in no way suggests that Article 1116 covers the losses incurred by the enterprise itself, even if such losses may be felt reflectively by the owners of the enterprise.

26. Article 1139 further confirms this interpretation. For example, Article 1139(e) defines "investment" as "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise" (emphasis added). Similarly, Article 1139(f) defines "investment" as "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution" (emphasis added). Tellingly, none of Articles 1121(1)(b), 1139(e), or 1139(f) define an "interest in an enterprise" as the fluctuating frequency or amount of dividends. Rather, an interest in an enterprise is the entitlement or right to certain benefits regarding the enterprise. Accordingly, a proper interpretation of Articles 1116 and 1121(1)(b) in the context of Articles 1121(2), 1117, and 1139 reveals that Article 1116 does not grant standing to claim reflective losses.

27. Applying these Articles together in practice, it is clear that if the only effect of a NAFTA violation is, for example, to reduce the frequency or size of the dividends that an enterprise is able to pay to its investors, a claim may be brought under Article 1117 but not Article 1116. In such a situation, the investor still retains all of his or her entitlements regarding the enterprise.

The fact that the enterprise is making less money and therefore unable to pay dividends of the same amount or with the same frequency is a loss of the enterprise that is only felt reflectively by the investor. In contrast, if a measure were to actually cause the loss by the investor of its legal entitlement to receive dividends, then this would be damage or loss to the investor's interest in the enterprise, rather than damage to the enterprise itself. Other potentially relevant claims that could be brought under Article 1116 rather than Article 1117 would include damage or loss to an investor's entitlement to: vote on major issues for the enterprise; own a portion of the enterprise; transfer ownership of the investor's interest; have first refusal to purchase shares; inspect corporate records; or sue for wrongful acts. An investor that suffers damage to such entitlements may have standing for a claim under Article 1116. But an investor cannot submit a claim under Article 1116 based only on lost dividends if the investor retains the interest in the enterprise, with all of these rights remaining unaffected.

28. The counter-example provided by the Claimants does not support any other interpretation of these provisions of Chapter Eleven. In particular, the Claimants suggest that it should be permissible to submit a claim under Article 1116 in the "situation where the enterprise is not operational, such as where the state has destroyed the enterprise or its project."²⁹ This example seems to confuse two forms of expropriation: (1) direct expropriation, when a State confiscates the investor's interest in the enterprise or eliminates its legal existence; and (2) indirect expropriation, when the investor retains an interest in the enterprise, but the State's measure causes a substantial deprivation to the value of the investment.

29. When a State confiscates an enterprise, the investor loses all of its entitlements attaching to the enterprise – it can no longer vote or, for example, control the issuance of dividends. In such a case, the investor would have standing under Article 1116 to recover damages for the loss of those interests. The loss to the investor's interest is not lost dividends, but the loss of the entitlement to dividends, or other rights regarding the enterprise. However, a non-operational enterprise in which investors retain an interest is distinct from a confiscated enterprise. In that case, the investors would completely retain all of the entitlements to dividends or otherwise that

²⁹ Claimants' Reply Damages Memorial, ¶ 359.

their interest represents. If they chose to vote for a dividend, capital investments, or new management, they would retain their power to do so. Thus, when investors retain ownership of the enterprise and have lost no entitlements regarding the enterprise, such as in this case, they have no standing under Article 1116.

(b) Article 1117(3) Does Not Support Interpreting Article 1116 to Allow Investors to Bring Claims For Reflective Loss

30. The Claimants submit a two-sentence argument that Article 1117(3) supports their belief that Article 1116 offers standing for reflective loss.³⁰ They claim that when an investor brings claims under both Articles 1116 and 1117, “monies paid to the investment should flow through to the investor, and the investor would have to demonstrate a separate head of damages to recover directly.”³¹ The Claimants’ reasoning here is flawed, and their conclusion unfounded.

31. When an investor submits a claim under Articles 1116 and 1117 arising out of the same events, Article 1117(3)³² creates a presumption that the arbitrations should be consolidated in accordance with NAFTA Article 1126.³³ No language in Article 1117(3) supports the Claimants’ contention that these consolidation provisions permit reflective loss claims as a result. Rather, Article 1126 permits consolidation to pursue the “fair and efficient resolution of the claims.”³⁴ Further, the Claimants neglect to note that Article 1135(2)(b) provides that where a claim is made under Article 1117(1), any damages awarded pursuant to Article 1117 must be paid to the enterprise.³⁵ In short, even when Article 1116 and Article 1117 claims are consolidated, the

³⁰ Claimants’ Reply Damages Memorial, ¶ 353.

³¹ Claimants’ Reply Damages Memorial, ¶ 356.

³² **RA-47**, NAFTA Article 1117(3): “Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.”

³³ **RA-147**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05) Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008 (“*ADM – Decision on Requests for Correction*”), ¶ 21.

³⁴ **RA-47**, NAFTA Article 1126(2).

³⁵ **RA-47**, NAFTA Article 1135(2): “Subject to paragraph 1, where a claim is made under Article 1117(1): [...] (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.” **RA-147**, *ADM – Decision on Requests for Correction*, ¶ 22.

Tribunal cannot dictate in its award that “monies paid to the investment should flow through to the investor.”

(c) Permitting Reflective Loss Under Article 1116 Would Render Article 1117 Redundant

32. The Claimants “acknowledge that permitting recovery of reflective loss under Article 1116 could lead to the redundancy of Article 1117” but argue that it will do so “only in those cases where an investor brings claims under both Articles 1116 and 1117.”³⁶ The investors are wrong – permitting reflective loss renders Article 1117 redundant in claims submitted under Article 1116 alone as well. As Canada explained in its Counter-Memorial, NAFTA creates a strict separation between Articles 1116 and 1117 to ensure that investors bring any claims for losses incurred by the enterprise under Article 1117, on the enterprise’s behalf.³⁷

33. The Claimants say Article 1117 would still be a “very useful or helpful option” when “the controlling shareholder wishes to restore the *status quo ante* for the benefit of all stakeholders.”³⁸ However, this interpretation leaves the economic interests of creditors and minority shareholders susceptible to the controlling shareholder’s wishes. Under the Claimants’ theory, if the controlling shareholder desires to recover the enterprise’s losses for him or herself – *e.g.*, by claiming that those losses caused lower dividends – the controlling shareholder would be able to do so under Article 1116 and thus recover damages at the expense of the enterprise and other stakeholders. Creditors would effectively lose their priority position above the controlling shareholder over the enterprise’s assets.³⁹ Minority shareholders that do not bring their own claim based on the enterprise’s losses would recover nothing, despite the controlling shareholder’s victory. This is an unreasonable interpretation of the distinction between claims under Articles 1116 and 1117.

³⁶ Claimants’ Reply Damages Memorial, ¶ 356.

³⁷ Canada’s Counter-Memorial on Damages, ¶ 20.

³⁸ Claimants’ Reply Damages Memorial, ¶ 358.

³⁹ **RA-118**, D. Gaukrodger, *Investment Treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division (“Gaukrodger, 2013”), p. 44: (“It is widely recognised that allowing shareholder claims for reflective loss can injure creditors of the company (unless the defendant is forced to pay the same damages twice).”)

34. Moreover, the waiver in Article 1121(1) does not prevent multiple claims by minority shareholders. Permitting claims of reflective loss under Article 1116 creates the risk of overlapping claims. With the distinction between Articles 1116 and 1117 blurred, the State would be exposed to payment of double damages under each Article for the same measure.⁴⁰ It would be anomalous to conclude that while a non-controlling shareholder has no standing under Article 1117 to claim that damages should be paid to the enterprise for losses incurred by the enterprise, that same investor has standing to claim that damages should be paid directly to him or herself for losses that the enterprise incurred.

3. The Object & Purpose of NAFTA Does Not Support Interpreting Article 1116 to Allow Investors to Bring Claims For Reflective Loss

35. Contrary to the arguments offered by the Claimants, the object and purpose of NAFTA supports the interpretation of Article 1116 offered by Canada. The Claimants make deficient arguments on the object and purpose of NAFTA concerning Article 1116. The Claimants cite *Canadian Cattlemen for Fair Trade*, which observed that Chapter Eleven need not bear “the whole weight of the diverse purposes set out in Article 102.”⁴¹ Oddly, the Claimants then argue that the object and purpose includes two of the three factors that Canada identifies in its Counter-Memorial, including one set out in Article 102. Canada agrees that the object and purpose of NAFTA includes achieving: (1) a more predictable commercial framework; (2) greater investor protection; and (3) increasing opportunities for investment.⁴² However, another flaw in the Claimants’ argument is that granting standing for reflective loss undermines all three of these goals.

36. First, the established commercial framework in which corporations in advanced common and civil law countries conduct business deems that shareholders cannot circumvent the

⁴⁰ **RA-148**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006) (“Kinnear”), p. 1116-8: (“Derivative damages raise a concern about double recovery. If an enterprise were indeed to suffer loss or damage due to a breach of Section A of Chapter 11, damages to the enterprise could be awarded under Article 1117. If an investor pursuing a claim on its own behalf could also recover for the diminution in the value of the interest it owned, the injury might be recompensed twice.”)

⁴¹ Claimants’ Reply Damages Memorial, ¶ 360; **CA-371**, *Canadian Cattlemen for Fair Trade v. United States* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 166.

⁴² Claimants’ Reply Damages Memorial, ¶ 362.

corporate form to recover damages for losses incurred by the enterprise.⁴³ Allowing claims of reflective loss would overturn that settled principle, and subject investors to contradictory rules on the same issue depending on the applicable law. This would undermine commercial predictability.

37. Second, permitting claims of reflective loss would also undermine investor protection. Creditors that make loans to qualified investments may be investors under Article 1139(d). As noted above, allowing shareholders to personally recover damages for the losses incurred by the enterprise would reduce the assets available to creditors and non-claimant shareholders, undermining investor protection.

38. Third, permitting reflective loss claims could harm investment opportunities in the NAFTA territory. The perception that reflective loss entails stripping assets from the company to the detriment of creditors and other shareholders could affect the availability, pricing, and other conditions of debt and equity financing for investment.⁴⁴ Moreover, company management may be unable to settle claims with governments who determine that settling with the enterprise would not prevent shareholders from raising claims for the same measures. Thus, permitting reflective loss claims under Article 1116 undermines the object and purpose of NAFTA.

4. The Subsequent Agreement and Practice of The NAFTA Parties Confirms That Article 1116 Does Not Allow Investors to Bring Claims For Reflective Loss

39. The Claimants also argue that this Tribunal should ignore the consistent subsequent agreement and practice of the NAFTA Parties which make clear that claims for reflective loss are not permitted under Article 1116. In particular, the Claimants contend that “[p]er Article 2001 of NAFTA [...] it is only an interpretation of a provision by the [NAFTA Free Trade] Commission that is binding on a tribunal established under Chapter Eleven.”⁴⁵ The Claimants are

⁴³ **RA-119**, D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/2, OECD Publishing, p. 11.

⁴⁴ **RA-118**, Gaukrodger, 2013, p. 45.

⁴⁵ Claimants' Reply Damages Memorial, ¶ 379.

wrong. There is no question that one of the Commission's functions is to resolve disputes that may arise regarding the interpretation or application of NAFTA.⁴⁶ However, Article 2001 does not state – nor has any tribunal interpreted Article 2001 to imply – that an interpretation of the Free Trade Commission is the exclusive mechanism for the NAFTA Parties to establish subsequent agreement and practice under *VCLT* Articles 31(3)(a) and 31(3)(b).

40. According to *VLCT* Article 31(3), the Parties' subsequent agreement and practice "shall be taken into account." Subsequent agreement can take various forms, provided the purpose is clear; and consistent practice by all Parties is a strong indication of what they understand a provision to mean.⁴⁷ As Canada noted in its Counter-Memorial, since the U.S. *Statement of Administrative Action* of 1993 implementing NAFTA, the Parties have never departed from their consistent interpretation that Article 1116 does not offer standing for reflective loss. The NAFTA Parties' repeated statements that Article 1116 and Article 1117 are strictly separate constitute subsequent agreement and practice under *VCLT* Articles 31(3)(a) and 31(3)(b). In sum, interpreting the ordinary meaning of Article 1116 in light of its context, the object and purpose of NAFTA, and the Parties' subsequent agreement and practice demonstrates that a proper *VCLT* analysis supports one conclusion: Article 1116 does not grant standing to claim reflective loss.

B. The Limited Jurisprudence On Article 1116 Does Not Permit the Tribunal to Ignore the Distinction Between the Standing Available under Articles 1116 and 1117

41. The Claimants try to persuade the Tribunal that a settled interpretation of Article 1116 has emerged in arbitral jurisprudence. "There is no doubt," they declare, "that tribunals have developed a consistent interpretation of Article 1116 that supports the recoverability of reflective loss."⁴⁸ Even if this were true, it is irrelevant to the proper interpretation of Article 1116. While arbitral decisions are often referred to as offering useful guidance if convincingly reasoned, the interpretations of a treaty offered by investor-State arbitral tribunals cannot settle the meaning of a treaty provision.

⁴⁶ NAFTA Article 2001(2)(c). **RA-46**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 100.

⁴⁷ Canada's Counter-Memorial on Damages, ¶ 27.

⁴⁸ Claimants' Reply Damages Memorial, ¶ 376.

42. Moreover, the Claimants' statement is false and misleading. No NAFTA tribunal has ever stated a general rule that investors have standing to submit reflective loss claims under Article 1116. Indeed, reaching such a broad conclusion would be unprecedented.

43. In particular, the Claimants point to the decisions in *Pope & Talbot* and *UPS* to support their belief that there is a standard interpretation of Article 1116 that grants investors standing for reflective loss claims. Yet, neither *Pope & Talbot* nor *UPS* established such a general rule. In fact, both of these early decisions express case-specific determinations.⁴⁹ Moreover, to the extent that those two tribunals permitted an investor to bring a claim under Article 1116 to recover loss or damage incurred by its enterprise, they were wrong and these decisions should not be considered as useful guidance. Neither the *Pope & Talbot* tribunal nor the *UPS* tribunal conducted a *VCLT* analysis on the proper interpretation of Article 1116. These decisions are also contrary to the consistent subsequent practice and interpretation of the NAFTA Parties. Finally, as Meg Kinnear recognizes, those rulings do not adequately consider the issues concerning double recovery, shielding the corporate structure, and protecting the interests of creditors and non-claimant shareholders.⁵⁰

44. The extent of the error in these awards is perhaps most clearly present in the *UPS* tribunal's view of the distinction between Article 1116 and Article 1117 as "almost entirely formal".⁵¹ Standing is not merely a "formal" question that can be disregarded. As former Supreme Court of Canada Justice Thomas Cromwell stated in his text on standing: "[t]he real issues concern what rights ought to be legally protected and how those rights should be defined."⁵² Moreover, the famous legal adage of "point d'intérêt, point d'action" (no interest, no action) has played a major role in numerous cases at the International Court of Justice ("ICJ").⁵³

⁴⁹ **CA-39**, *Pope & Talbot v. Government of Canada*, (UNCITRAL) Award in Respect of Damages, 31 May 2002, ¶ 80; **RA-79**, *United Parcel Service v. Canada* (UNCITRAL) Award on Merits and Dissenting Opinion, 24 May 2007 ("*UPS – Award*"), ¶¶ 32-35.

⁵⁰ **RA-148**, *Kinnear*, p. 1116-8.

⁵¹ **RA-79**, *UPS – Award*, ¶ 35.

⁵² **RA-149**, T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) note 5, p. 34.

⁵³ **RA-150**, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase (I.C.J. Reports 1966) Judgment, 18 July 1966, ¶ 44. In the second phase of the *South West Africa* cases, the ICJ stated:

As the NAFTA Parties' consistent articulation of the correct interpretation of Article 1116 reveals, Chapter Eleven's standing provisions are not trifling technicalities.⁵⁴ NAFTA offers tribunals strictly separate categories for their determination. It would be improper to dismiss that distinction and blur NAFTA's carefully designated standing categories. The rights that an investor can protect under Article 1116 are his or her own, not the rights of the enterprise.

45. Contrary to the improper approach of *UPS*, and contrary to what the Claimants say here, the tribunal in *Mondev* recognized the importance of the distinction between the two provisions. The Claimants state that the *Mondev* tribunal "rejected the position of the United States that NAFTA creates a strict separation between Articles 1116 and 1117, based on principles of customary international law distinguishing between claims by a company and claims by shareholders."⁵⁵ The Claimants are mistaken on this point. Although the *Mondev* tribunal found that "there does not seem to be any room for the application of any rules of international law" to find standing under Chapter Eleven, it did not reject the position that NAFTA creates a strict separation between Articles 1116 and 1117. Instead, the *Mondev* tribunal was concerned with preserving the "detailed scheme" between Article 1116 and 1117 claims, explaining that "[h]aving regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."⁵⁶ The tribunal determined that:

[i]t is clearly desirable in future NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117, either concurrently or in the alternative, and that they fully comply with the procedural requirements under Articles 1117 and 1121 if they are suing on behalf of an enterprise.⁵⁷

"The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law [...]"; see also **RA-151**, Dr. J. H. W. Verzijl, *International Law in Historical Perspective: Inter-state Disputes and Their Settlement* (A. W. Sijthoff-Leyden, 1976), p. 442.

⁵⁴ **RA-125**, *Kinnear*, p. 1116-7: ("The NAFTA Parties have argued that tribunals should treat seriously the differences between claims under Articles 1116 and 1117.")

⁵⁵ Claimants' Reply Damages Memorial, ¶ 368.

⁵⁶ **RA-46**, *Mondev – Award*, ¶ 86 (emphasis added).

⁵⁷ **RA-46**, *Mondev – Award*, ¶ 86 (emphasis added).

46. The correct reading of the *Mondev* tribunal's comments is that if a claim can be brought under Article 1117 for the enterprise's losses, then it must not be brought under Article 1116.⁵⁸ Moreover, the *Mondev* tribunal highlighted the third party interests that the strict separation of Articles 1116 and 1117 serves to protect. It warned that preventing a shareholder from recovering damages for losses incurred by the enterprise was key to "enable third parties with, for example, security interests or other rights against the enterprise to seek to satisfy these out of the damages paid."⁵⁹ Ultimately, the tribunal dismissed *Mondev*'s claims. It was not obliged to allocate any award on damages, so it was unnecessary to reach a definitive ruling on the appropriateness of *Mondev*'s claim under Article 1116.⁶⁰

47. Similarly, while the Claimants try to minimize the *GAMI* award, as limited "only to the specific facts of *GAMI*,"⁶¹ they ignore the fact that in its merits analysis the *GAMI* tribunal warned of numerous complications arising if shareholders are permitted to raise reflective loss claims under Article 1116 – warnings which were not confined to the case.⁶² The tribunal cautioned that allowing minority shareholders to make claims for reflective loss created insoluble challenges concerning quantification, double recovery, inconsistent decisions, and judicial economy.⁶³ To demonstrate the problem of multiple and overlapping shareholder and company claims, the tribunal considered a hypothetical scenario to find that "[t]he overwhelming *implausibility* of a simultaneous resolution of the problem by national and international jurisdictions impels consideration of the practically *certain* scenario of unsynchronised resolution."⁶⁴ Ultimately, the main takeaway from *GAMI* for the purposes of interpreting Article 1116 is that permitting reflective loss is hazardous.

⁵⁸ **RA-152**, Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) ("*Douglas*"), ¶¶ 835- 836.

⁵⁹ **RA-46**, *Mondev – Award*, ¶¶ 84, 86.

⁶⁰ **RA-152**, *Douglas*, pp. 449-450.

⁶¹ Claimants' Reply Damages Memorial, ¶ 374.

⁶² Canada's Counter-Memorial on Damages, ¶ 23.

⁶³ **RA-27**, *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004 ("*GAMI – Award*"), ¶¶ 116-121.

⁶⁴ **RA-27**, *GAMI – Award*, ¶ 119 (emphasis in original).

48. The limited decisions that have addressed the issue of whether Article 1116 permits claims of reflective loss demonstrate that the matter has certainly not been “settled” in the Claimants’ favour. While *Mondev* and *GAMI* did not reach rulings on the award of damages, they expressly warned about the risks of interpreting Article 1116 as offering standing for reflective loss claims. In short, not only does the Claimants’ attempt to rely on previous jurisprudence fail because there is no binding precedent in international law, it also fails because the jurisprudence does not paint the picture that they allege. Article 1116, properly interpreted, does not permit the Tribunal to grant the Claimants’ reflective loss claim.

C. It Would Be Inappropriate to Reformulate the Claimants’ Claim on Their Behalf At This Late Stage

49. The Claimants argue in the alternative that if their standing claim is defective,⁶⁵ the Tribunal should simply consider that their claim was instead made under Article 1117. This would amount to a grave injustice. The Claimants had the opportunity to commence this arbitration under Article 1117. Their arguments allege loss or damage incurred by an enterprise. Yet they sought damages under Article 1116, without demonstrating any damage to their interest in the enterprise. Thus, they failed to establish standing. Any attempt to amend the Claimants’ standing claim now would be time-barred pursuant to Article 1117(2).⁶⁶ It is also inappropriate for the Claimants to ask the Tribunal to adopt the role of counsel and to revise their pleadings under Article 1117. The Tribunal should not perform this role or allow this foundational element of their claim to be reformulated ten years into this arbitration. The chance to claim standing under Article 1117 is now closed. As the *Mondev* tribunal stated, it is “clearly desirable in future

⁶⁵ Claimants’ Reply Damages Memorial, ¶ 389.

⁶⁶ Conformity with NAFTA Articles 1116(2) or 1117(2) is one of the pre-conditions to Canada’s consent to arbitration. Article 1117(2) states: “An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.” This sets a strict limitations period that claimants must comply with to establish a tribunal’s jurisdiction. As the *Feldman v. Mexico* tribunal stated: “the Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension [...], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years” (RA-35, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award and Dissenting Opinion, 16 December 2002, ¶ 63). In other words, the NAFTA Parties do not consent to arbitrate claims that fall outside the limitations period. Amending a claim ten years into the arbitration would necessarily be time-barred.

NAFTA cases that claimants consider carefully whether to bring proceedings under Articles 1116 and 1117.”⁶⁷ That the Claimants failed to heed these words is no one's fault but their own. For the above reasons, the Claimants have no standing to claim the losses allegedly suffered by their enterprise.

D. Conclusions

50. The detailed scheme that Articles 1116 and 1117 establish must be respected. NAFTA does not permit investors to circumvent corporate form and personally recover for losses incurred by an enterprise. Yet the Claimants try to do just that, by asking this Tribunal to award them damages based on the alleged losses of Bilcon of Nova Scotia. They offer an incorrect *VCLT* analysis in an attempt to shoehorn reflective loss claims into Article 1116. They misinterpret the jurisprudence and call it “settled”. They dismiss the strong warnings expressed by some NAFTA tribunals and the NAFTA Parties against this interpretation. But nothing they argue changes a simple truth: the Claimants did not lose any of their interest in Bilcon of Nova Scotia. Nor should this Tribunal permit the Claimants to re-draft, or re-draft on their behalf, a foundational element of their claim ten years into the arbitration. The Claimants have no standing and their damages claim fails on this basis alone.

III. THE CLAIMANTS HAVE NOT DISCHARGED THEIR BURDEN OF PROVING THAT THE IDENTIFIED NAFTA BREACH CAUSED THE DAMAGES THAT THEY CLAIM

51. Even assuming in the alternative that the Claimants were to have standing under Article 1116 to claim the alleged lost profits of Bilcon of Nova Scotia, their claim must still be dismissed as they have not established that, but for the identified NAFTA breach, the Whites Point project would have received the government approvals necessary for it to proceed.

52. The Claimants' Memorial barely touched on the issue of causation. They advanced an excessive claim for the lost profits of Bilcon of Nova Scotia based entirely on the assumption that “[b]ut for Canada's breaches, the Whites Point Quarry would have proceeded, and the Investors would have earned the profits generated by the Quarry for the 50 year life of the

⁶⁷ **RA-46**, *Mondev – Award*, ¶ 86.

Quarry.”⁶⁸ Canada’s Counter-Memorial explained the flaws inherent in that speculative assumption through reference to the actual NAFTA breach found by the majority—that because of the approach taken by the JRP to CCV,⁶⁹ the Claimants “were not afforded a fair *opportunity* to have the specifics of ... [their project] ... considered, assessed and decided in accordance with applicable laws.”⁷⁰ Canada then explained how in light of these findings, if the Whites Point JRP had taken a NAFTA compliant approach, the outcome of the EA process could have been exactly the same—*i.e.*, a JRP report containing findings of likely SAEF after mitigation and a recommendation that the project be rejected, and government decisions that ultimately resulted in the project not proceeding.⁷¹ For these reasons, the breach identified by the Tribunal in the liability phase did not, as a matter of law, cause the loss of the profits that might have been earned by Bilcon of Nova Scotia.

53. In their Reply, the Claimants and their experts maintain their untenable approach and continue to fail to meet their burden to prove that the breach identified by the majority actually caused the loss they seek to recover. Indeed, while the Claimants purport in their Reply to be “[a]pplying the international law principle of causation,”⁷² they have not even attempted to do so. Instead, the Claimants and their experts imagine what they characterize as two “indisputable circumstances” in order to justify their claim: that “there was no lawful basis for the JRP not to recommend approval,” and that “the Ministers were legally compelled to approve the Quarry.”⁷³ Incredibly, they go farther and assert that such circumstances are, in fact, *res judicata* because the Tribunal already reached these conclusions in the Award. These assertions are as unsound in law as they are unsupported by the facts. The Claimants’ assertion that in the but-for world government decision-makers would be left with no choice but to approve the Whites Point project is pure fallacy.

⁶⁸ Claimants’ Damages Memorial, December 16, 2016 (“Claimants’ Damages Memorial”), ¶ 243.

⁶⁹ Award, ¶ 601.

⁷⁰ Award, ¶ 603 (emphasis in original).

⁷¹ Canada’s Counter-Memorial on Damages, ¶¶ 62-83.

⁷² Claimants’ Reply Damages Memorial, ¶ 287.

⁷³ Claimants’ Reply Damages Memorial, ¶¶ 287, 288.

54. Ultimately, the Claimants continue to equate the loss of opportunity to have their project assessed in accordance with applicable laws with the loss of an approved and operating project. They never had an approved and operating project. Nor did they have the right to one, even absent the NAFTA breach. The Claimants' approach to causation is untenable and must be rejected. Further, as they have put forward no other basis on which to value their loss, the Tribunal has no reasonable option but to completely dismiss their claim for compensation.

A. The Claimants Fail to Properly Apply International Law Principles Requiring that They Prove the Breach Caused Their Claimed Damages

55. In its Counter-Memorial, Canada explained that at customary international law, reparation for a breach must "reestablish the situation which would, in all probability, have existed if that act had not been committed,"⁷⁴ and that it is the Claimants' burden to demonstrate a sufficient causal link between the wrongful act and alleged injury and damages. In other words, the Claimants bear the burden of proving that the wrongful act was the proximate cause of the alleged injury and damages.⁷⁵ At international law, it is clear that a claimant cannot be compensated "for the deprivation of a right that it never possessed."⁷⁶

56. In their Reply, the Claimants have only paid lip service to these principles of causation. They ignore past awards, such as *Nordzucker*, which provide that a claim should be completely dismissed when "[t]he damages demonstrated by [the claimant] ... have no causal link with the breach which the Arbitral Tribunal decided."⁷⁷ Instead, they rely only on the award in *Lemire*.⁷⁸ However, that decision offers no relevant guidance to this Tribunal given the fundamental differences between the breach found in that case and the breach found by the majority here. The

⁷⁴ Canada's Counter-Memorial on Damages, ¶ 42, citing **CA-327**, *Case Concerning the Factory at Chorzów (Germany v. Poland)* Award on the Merits, 1928 P.C.I.J. (ser. A) No. 17, 13 September 1928, p. 47.

⁷⁵ Canada's Counter-Memorial on Damages, ¶ 45, citing **RA-9**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶ 785.

⁷⁶ Canada's Counter-Memorial on Damages, ¶ 114, citing **CA-316**, *Gold Reserve Inc. v. Venezuela* (ICSID Case No. ARB (AF)/09/1) Award, 22 September 2014 ("*Gold Reserve – Award*"), ¶ 829.

⁷⁷ **RA-130**, *Nordzucker AG v. The Republic of Poland* (UNCITRAL) Third Partial and Final Award, 23 November 2009, ¶ 64.

⁷⁸ **CA-325**, *Joseph Charles Lemire v. Ukraine*, (ICSID Case No. ARB/06/18) Award, 28 March 2011 ("*Lemire – Award*").

dispute in *Lemire* arose from a series of public tenders in the Ukrainian radio broadcasting sector. At the liability stage, a majority of the tribunal found that the State violated the fair and equitable treatment standard by rejecting the investor's bids to acquire radio frequencies.⁷⁹ In its damages award, the majority explained that the "investor's loss does not consist in being deprived of some chance to win additional frequencies."⁸⁰ Rather, in that case, liability was based on the tribunal's conclusion that the State's wrongful actions actually prevented the claimant from owning a radio license,⁸¹ thereby warranting a damages award based on the enterprise having won the tender.⁸² By contrast, in the *Bilcon* Award, the majority defined the basis of liability and injury as the denial of the Claimants' fair opportunity to have their case considered, assessed, and decided in accordance with applicable laws, and, unlike the *Lemire* majority, made clear that it was not deciding the ultimate outcome of the process.⁸³

57. Ultimately, the Claimants' entire theory of causation continues to rest on their conclusory assertion that "but for Canada's breaches, the Whites Point Quarry would have proceeded," and generated profits for 50 years.⁸⁴ The Claimants' approach ignores the key findings of the majority on both the nature of the NAFTA breach and the injury that it caused. The Claimants' enterprise was engaged in an environmental review process because it had proposed a large quarry and marine terminal in a sensitive environment where no comparable undertaking had ever operated. The EA was designed to predict and assess the environmental effects of project

⁷⁹ **RA-153**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/ 18) Decision on Jurisdiction and Liability, 14 January 2010 ("*Lemire – Decision on Liability*"), ¶¶ 421, 513(3).

⁸⁰ **CA-325**, *Lemire – Award*, ¶ 252: ("the Tribunal's conclusion is not that Gala Radio was relegated in certain specific tenders for frequencies, and was deprived of a chance to win in these procedures; what the Tribunal has found is that the initial cause (Ukraine's wrongful acts) and the damage (Claimant's frustration to carry out his plans and create a nationwide FM channel plus an AM informational channel) are linked through a proximate chain of causation. The investor's loss does not consist in being deprived of some chance to win additional frequencies; what has been proven is that Ukraine's wrongful acts have resulted, through a foreseeable and proximate chain of events, in the damage suffered by the investor.") (emphasis added).

⁸¹ **CA-325**, *Lemire – Award*, ¶ 243: ("The main finding in the Tribunal's First Decision was that Gala Radio, although it tried insistently for six years, and presented more than 200 applications for all types of frequencies, was prevented, because of wrongful actions of the National Council, from obtaining a single licence.... If it had not been for this delictual treatment, Gala Radio would now be a bigger, more profitable and more valuable radio operator.") See also, **RA-153**, *Lemire – Decision on Liability*, ¶¶ 420 and 451.

⁸² **CA-325**, *Lemire – Award*, ¶ 253.

⁸³ Award, ¶¶ 601-603, 741.

⁸⁴ Claimants' Reply Damages Memorial, ¶ 31.

activities and the effectiveness of proposed mitigation in light of the surrounding environment. At the end of the review, there was never a guarantee that the proposal would be approved simply because other projects proposed in other environments had been approved, or because Bilcon offered to use similar mitigation measures that were found to be acceptable in the EAs of these other projects. Rather, approval hinged on provincial and federal discretionary decision-making processes, which took into account an array of considerations related to the environmental effects of the Whites Point project under separate statutory criteria, and which could have legally resulted in the project not proceeding.

58. In this light, the proper approach to causation is not to start out, as the Claimants do,⁸⁵ with a claim for lost profits “in recognition” that these profits would have been realized if the breach had not been committed. Rather, a tribunal must ask, taking into consideration all relevant facts, whether the wrongful conduct was the but-for and proximate cause of the alleged injury. Only then can a claim for damages be assessed. Applying this approach, it simply does not follow that, but for the NAFTA breach found by the majority – *i.e.*, if the JRP had carried out the EA in compliance with applicable legislation – the Whites Point project would have been approved, permitted, constructed, and profitably operated. A lost opportunity, not a lost project, is the injury proximately caused by the NAFTA breach. The Claimants’ lost profits claim accordingly bears no relationship to the injury that was caused by the breach identified by the majority of the Tribunal in the liability Award.

B. But For the NAFTA Breach the JRP Could Have Reasonably Found That the Whites Point Project Would Have Resulted in Likely Significant Adverse Environmental Effects that Could Not be Mitigated and Could Have Recommended that the Project be Rejected

59. In its Counter-Memorial, Canada highlighted the potential findings and recommendations that could have reasonably been made in the JRP Report absent the NAFTA breach. It did so through the expert testimony of Dr. Tony Blouin and Ms. Lesley Griffiths, who have chaired past EA review panels respectively under the *NSEA* and *CEAA*, and who carried out an independent review of the Whites Point JRP’s public record. On the basis of this review, Dr. Blouin

⁸⁵ Claimants’ Reply Damages Memorial, ¶ 31.

concluded that in the absence of the NAFTA breach, “it was certainly not a foregone conclusion that the Whites Point project would have been recommended for approval under Nova Scotia law.”⁸⁶ Ms. Griffiths concluded that absent the NAFTA breach, a review panel could have reasonably concluded the project would have a likely SAE on the endangered right whale and on the American lobster and lobster habitat in the vicinity of the project site.⁸⁷

60. In response to these opinions, the Claimants' Canadian EA law expert, David Estrin, has filed a Reply Expert Report outlining his disagreement with the but-for analysis in which Dr. Blouin and Ms. Griffiths were instructed to engage. He offers two arguments in support of his disagreement. First, he argues that the but-for analysis that Canada instructed Dr. Blouin and Ms. Griffiths to engage in is a “legal non-starter”⁸⁸ because of what he considers to be the *res judicata* effects of certain findings in the Award on liability. Second, Mr. Estrin explains what he views to be the flaws in the respective analyses of Dr. Blouin and Ms. Griffiths. However, as Canada explains below, neither Mr. Estrin's legal argument on *res judicata*, nor his opinion on the substance of Dr. Blouin's and Ms. Griffiths' Reports undermine the simple fact that, in the absence of the NAFTA breach, the JRP could have reasonably found that the Whites Point project would cause likely SAEs that could not be mitigated and could have reasonably recommended that the project should be rejected.

1. The Tribunal Is Not Precluded by *Res Judicata* From Conducting a Proper But-For Analysis

61. In their Reply, the Claimants assert that the majority determined the Whites Point JRP made only one finding of likely SAE (inconsistency of the project with CCV), and that government decision-makers adopted the JRP's recommendation to reject the Whites Point project on the basis of CCV.⁸⁹ They then go on to claim that as a result, the principle of *res judicata* precludes the Tribunal from considering the situation that might have existed if the NAFTA breach had not been committed. The Claimants assert it “is not open to Canada to now

⁸⁶ RE-2, Expert Report of Tony Blouin, June 9, 2017 (“Blouin Report I”), ¶ 12.

⁸⁷ RE-1, Expert Report of Lesley Griffiths, June 9, 2017 (“Griffiths Report I”), pp. 44-45, 63.

⁸⁸ Expert Reply Report of David Estrin, August 20, 2017 (“Estrin Reply Report”), ¶ 28.

⁸⁹ Claimants' Reply Damages Memorial, ¶¶ 287, 291.

reargue these issues, or to challenge the findings of fact that have been conclusively made by the Tribunal.”⁹⁰

62. However, the Claimants do little to explain this theory of *res judicata* in their pleadings. Instead, their purported independent expert on Canadian EA law, Mr. Estrin, assumes the role of Claimants' counsel in this arbitration and pleads the *res judicata* argument on their behalf. Mr. Estrin contends that any further consideration of what would have likely happened absent the NAFTA breach is a “legal non-starter” for the Tribunal because “these issues cannot be reopened in proceedings involving the same parties.”⁹¹ In making these arguments on behalf of the Claimants, Mr. Estrin abandons his role as an independent expert on Canadian EA law. His arguments have nothing to do with any area in which he has presented himself as an independent expert to the Tribunal. This abdication of his responsibility as an independent expert should give the Tribunal pause. When an expert acts as an advocate for one party, it should call into question the reliability of every aspect of his report. Indeed, it is clear at this point that Mr. Estrin has fully assumed a role as counsel to and advocate for the Claimants.

63. Even if the Tribunal were to consider Mr. Estrin's legal submissions, they are wholly without merit. Mr. Estrin cites the majority's conclusion that the JRP Report “expressly identifies only one effect of the project as both significant and adverse, namely ‘inconsistency with community core values’,”⁹² in addition to the fact that the majority noted that “the Panel allowed that ‘with the effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged ‘significant’.”⁹³ As the JRP made no other expressly affirmative findings of likely SAEs, and as “Canada and Nova Scotia acted on the CCV SAE,” in Mr. Estrin's view, it is

⁹⁰ Claimants' Reply Damages Memorial, ¶¶ 304-306.

⁹¹ Estrin Reply Report, ¶ 28.

⁹² Estrin Reply Report, ¶¶ 7, 33, citing Award, ¶ 503.

⁹³ Estrin Reply Report, ¶¶ 7, 33, citing Award, ¶ 503.

“irrelevant for the Tribunal in this phase of the proceedings to now consider possible further reasons as to why the project might cause SAEE.”⁹⁴

64. Canada does not take issue with the fact that the majority's findings in the Award have a *res judicata* effect in this phase of the proceedings. Further, contrary to the Claimants' view, Canada does not seek to re-argue or re-litigate such findings. What Canada does take issue with is the erroneous characterization by the Claimants and Mr. Estrin of the issues actually decided in the Award, and their contention as to the factors the Tribunal may now take into consideration in determining the damages that are attributable to the NAFTA breach.

65. The essence of the Claimants' *res judicata* argument is that the liability Award determined that the JRP conclusively found every potential effect of the Whites Point project (aside from its inconsistency with CCV) to not be a likely SAEE under the *CEAA*⁹⁵ or an adverse effect that might justify a recommendation for rejection under the *NSEA*.⁹⁶ In essence, the Claimants and Mr. Estrin argue that the Tribunal has already conducted the required EA of the proposed Whites Points project, and concluded in the liability phase that the project should have been approved. This characterization is wrong on a plain reading of the JRP Report and the Award. It also ignores other findings of the majority that are in fact *res judicata* and that illustrate why it is necessary, at this stage, to carry out the but-for analysis explained by Canada.

66. For example, the Claimants appear to ground their theory of *res judicata* on the Tribunal's determination that, for the purposes of considering Canada's responsibility for the acts of the JRP, government decision-makers “acknowledged and adopted” the JRP's CCV-based approach under Article 11 of the ILC Draft Articles on State Responsibility.⁹⁷ However, this determination does not serve as a *res judicata* finding that CCV was the only reason that government decision-makers actually rejected the Whites Point project. As Mr. Connelly explains in his Report, government decision-makers likely took into account factors other than

⁹⁴ Estrin Reply Report, ¶¶ 7-10.

⁹⁵ **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992, s. 16(1).

⁹⁶ **R-6**, *Nova Scotia Environmental Assessment Regulations*, O.I.C. 2003-67 (Feb. 28, 2003), s. 13(1).

⁹⁷ Claimants' Reply Damages Memorial, ¶¶ 307-308.

the JRP Report in their decision to reject the project.⁹⁸ Moreover, the majority never concluded that the JRP found all other effects beyond CCV to not be significant and adverse. In this regard, the JRP's passing comment that "most project effects" should not be judged significant cannot be interpreted as a definitive conclusion that all project effects were found not to be significant. In short, the majority did not find that there were no other bases to reject the project in the but-for world.

67. These basic facts are illustrated by numerous findings of the majority that are also *res judicata* between the parties, but which the Claimants and Mr. Estrin have ignored. For example, in finding fault with the JRP for its approach to CCV, the majority concluded that "[t]he JRP did not carry out its mandate to conduct a 'likely significant effects after mitigation' analysis to the whole range of potential project effects" and that it "arrived at its conclusions under both the laws of federal Canada and Nova Scotia without having fully discharged a crucial dimension of its mandated task."⁹⁹ The majority determined that "the JRP was, regardless of its 'community core values' approach, still required to conduct a proper 'likely significant effects after mitigation' analysis on the rest of the project effects" and that by not doing so "the JRP, to the prejudice of the Investors, denied the ultimate decision makers in government information which they should have been provided."¹⁰⁰ It also found the JRP acted unfairly by not "providing both the public and the ultimate government decision makers with a final report that includes the thorough and methodical assessment of environmental effects and consideration of mitigation measures promised by the CEAA based on a fair evaluation of all the evidence."¹⁰¹

68. These findings make clear that in fact what is *res judicata* between the parties is that the JRP Report was incomplete and did not contain the information required by Canadian law. By ignoring these findings, Mr. Estrin's *res judicata* theory would trade the NAFTA breaching version of the JRP Report with an equally deficient version of the JRP Report—one in which the

⁹⁸ RE-11, Rejoinder Expert Report of Robert G. Connelly, November 6, 2017 ("Connelly Report II"), ¶ 54.

⁹⁹ Award, ¶ 452 (emphasis added).

¹⁰⁰ Award, ¶ 535 (emphasis added).

¹⁰¹ Award, ¶ 514 (emphasis added).

JRP has not “fully discharged a crucial dimension of its mandated task.”¹⁰² Mr. Estrin’s view of *res judicata* and the flawed version of the JRP Report that would result, cannot possibly serve as the basis for determining the situation that would have existed but for the NAFTA breach, or as the foundation of a proper quantum analysis.

69. Instead, given the conclusions already reached by the Tribunal about the deficiencies of the JRP Report, a proper but-for analysis requires that the Tribunal consider: (1) whether, in the but-for world, after analyzing “the whole range of potential project effects”,¹⁰³ the JRP might have found other likely SAEs that could not be mitigated, or that might otherwise warrant a recommendation for rejection; and (2) with the JRP’s mandate having been properly and fully discharged, how government decision-makers might have decided on the Whites Point project.

2. Mr. Estrin’s Various Critiques of Dr. Blouin’s and Ms. Griffiths’ Findings Do Not Undermine Their Conclusions

70. In light of the majority’s finding that the JRP breached NAFTA through its singular focus on CCV and its failure to “carry out its mandate to conduct a ‘likely significant effects after mitigation’ analysis to the whole range of potential project effects,”¹⁰⁴ the Claimants’ approach of simply excising CCV from the JRP Report, and then assuming that there were no other findings of likely SAE and that the project would have been recommended for approval, is inappropriate. Accordingly, Canada instructed Dr. Blouin and Ms. Griffiths to review the JRP’s public record and to assess the findings and recommendations that the JRP should and could have made regarding the whole range of potential project effects had it not committed the NAFTA breach. Not surprisingly, Mr. Estrin disagrees with their review and findings. But as Canada explains below, none of Mr. Estrin’s arguments cast doubt on their basic conclusions that if the JRP did not commit the NAFTA breach, it could still have reasonably made findings of likely SAEs that could not be mitigated, and recommended that the project should be rejected.

¹⁰² Award, ¶ 452.

¹⁰³ Award, ¶ 452.

¹⁰⁴ Award, ¶ 452.

(a) A But-For Analysis Requires Consideration of the Whites Point JRP's Potential Findings and Recommendations Because the Whites Point Project Was Still Required to Undergo a Panel Review Absent the NAFTA Breach

71. Mr. Estrin argues that Dr. Blouin and Ms. Griffiths' approach of analyzing the environmental effects of the Whites Point project, which is based on their experience as former review panel chairs, uses the "wrong type of glasses" because no other quarry proposal in Nova Scotia has ever been subjected to a review panel.¹⁰⁵ This argument is irrelevant and ignores the Tribunal's decisions in the already completed jurisdiction and liability phase. The Claimants argued that the referral of this project to a review panel was wrongful; the Tribunal considered that argument, and rejected it.¹⁰⁶ Thus, there is no question at this point that the appropriate "glasses" through which to consider the but-for world are review panel glasses. The approach taken by Dr. Blouin and Ms. Griffiths in reviewing the Whites Point EA record is therefore appropriate to determine the outcome of the EA, but for the NAFTA breach.

(b) The Fact that No Government Officials Told the JRP that the Whites Point Project Would Likely Cause Significant Adverse Environmental Effects or Adverse Environmental Effects Did Not Determine the Outcome of the Panel's Review

72. Mr. Estrin also attempts to circumvent the analysis of the JRP's potential findings and recommendations absent the NAFTA breach by arguing that a "key and relevant factor in considering the approvability of WPQ" was that no government official told the JRP that the project would likely cause SAEE or adverse environmental effects.¹⁰⁷ In his Reply Report, Mr. Estrin argues that Canada's position that this is an irrelevant factor in determining the outcome of the panel's review is contradicted by the past practice of Canada's Experts in requesting input from government officials with respect to their views on the potential environmental effects of other projects.¹⁰⁸ This is incorrect.

¹⁰⁵ Estrin Reply Report, ¶ 172.

¹⁰⁶ Award, ¶ 490: ("In the Tribunal's opinion, therefore, there are no issues concerning the scope and level of the assessment that have been brought on a timely basis.")

¹⁰⁷ Expert Report of David Estrin, March 8, 2017 ("Estrin Memorial Report"), ¶ 8; Estrin Reply Report, p. 14.

¹⁰⁸ Estrin Reply Report, ¶¶ 50-141.

73. As explained by Ms. Griffiths, and corroborated by Mr. Connelly and Dr. Blouin, “[i]n conducting an environmental assessment, review panels are required to independently weigh and balance all of the information that is presented to them.”¹⁰⁹ While panels regularly request information from government officials to assist them in making a determination on likely SAEE or adverse environmental effects, “it is not the usual practice of federal departments to state that there are SAEEs in their area of expertise.”¹¹⁰ In the context of a panel review, “a review panel will consider all of the information submitted in the review panel process to evaluate the project’s effects.”¹¹¹ Government submissions only form part of the information in the public record.¹¹² Consequently, in the rare circumstance where a government official were to state her or his opinion as to whether a SAEE or adverse environmental effect is likely to occur, such statements do not bind the panel.¹¹³

74. Furthermore, whether government officials have taken a position on the environmental effects of a project does not alter the review panel’s mandate to independently evaluate the project’s effects.¹¹⁴ Thus, the absence of government submissions that a project would result in likely SAEEs or adverse environmental effects does not preclude the panel from recommending the rejection of a project.¹¹⁵ As described in the Rejoinder Expert Reports of Ms. Griffiths and Mr. Connelly, other panels have made findings of likely SAEE, despite there being no government submissions to this effect.¹¹⁶ In sum, the fact that no government officials told the JRP that the project would likely cause SAEEs or adverse environmental effects is irrelevant in determining what the JRP’s findings and recommendations could have been in the but-for world.

¹⁰⁹ **RE-9**, Rejoinder Expert Report of Lesley Griffiths, November 6, 2017 (“Griffiths Report II”), ¶ 17.

¹¹⁰ **RE-11**, Connelly Report II, ¶ 19.

¹¹¹ **RE-9**, Griffiths Report II, ¶ 21.

¹¹² **RE-9**, Griffiths Report II, ¶ 16; **RE-10**, Rejoinder Expert Report of Tony Blouin, November 6, 2017 (“Blouin Report II”), ¶ 79.

¹¹³ **RE-11**, Connelly Report II, ¶ 23.

¹¹⁴ **RE-9**, Griffiths Report II, ¶ 21; **RE-10**, Blouin Report II, ¶¶ 78-79.

¹¹⁵ **RE-9**, Griffiths Report II, ¶ 21; **RE-10**, Blouin Report II, ¶ 79.

¹¹⁶ **RE-9**, Griffiths Report II, ¶ 20; **RE-11**, Connelly Report II, ¶¶ 38-40. For example, the Lower Churchill Hydroelectric Generation project found four SAEEs, even though no federal department stated that SAEEs were likely on any Valued Ecosystem Component. Similarly, the New Prosperity Gold-Copper Mine project found three SAEEs, though no federal department advised that SAEEs were likely.

(c) Mr. Estrin's Approach of Comparing the Findings and Recommendations in Other EAs Is Inappropriate

75. In contrast to the approach taken by Dr. Blouin and Ms. Griffiths, Mr. Estrin's analysis of the "approvability" of the Whites Point project is largely based on the findings in the EAs of other projects that have been approved.¹¹⁷ According to Mr. Estrin, Dr. Blouin's and Ms. Griffiths' analyses of the Whites Point EA record is "highly problematic" because they fail to consider the "standard EA review and approval practices...including the mitigation measures that are normally applied in similar approved projects."¹¹⁸

76. As explained by Dr. Blouin and Ms. Griffiths, an EA conducted by a review panel is context-specific.¹¹⁹ In the Nova Scotia EA process, the review panel's role is to "predict and evaluate" an undertaking's environmental effects based on the information gathered by the review panel.¹²⁰ In practice, review panels do not base their findings and recommendations on the recommendations and outcomes of other projects.¹²¹ As Dr. Blouin states:

While provincial EAs may follow a similar general process with respect to the steps in the review process, review panels are not bound by any established precedent or practice with respect to past EAs in their evaluation of the environmental effects of the project under review or their recommendations to the Minister. The fact that a project is approved does not guarantee that future projects will also be approved or that a previous panel was incorrect to recommend the rejection of a past project.¹²²

77. In the federal context, the determination of likely SAEE after mitigation requires an evaluation of all of the factors under *CEAA* s. 16 in the appropriate context,¹²³ not an assessment of how other EAs were conducted and decided. The approach advocated by Mr. Estrin would be

¹¹⁷ Estrin Memorial Report, ¶ 7; Estrin Reply Report, ¶¶ 163-556.

¹¹⁸ Estrin Reply Report, ¶ 43.

¹¹⁹ **RE-10**, Blouin Report II, ¶ 13; **RE-9**, Griffiths Report II, ¶ 23.

¹²⁰ **RE-10**, Blouin Report II, ¶ 13.

¹²¹ **RE-10**, Blouin Report II, ¶ 16; **RE-9**, Griffiths Report II, ¶ 32.

¹²² **RE-10**, Blouin Report II, ¶ 16.

¹²³ **RE-9**, Griffiths Report II, ¶ 28.

inappropriate given that the degree and severity of impacts of environmental effects may vary depending on the specific project.¹²⁴ As explained by Ms. Griffiths:

[T]he environmental effects of projects differ due to differences in size, operations, sensitivity of the surrounding environment and the socio-economic components and characteristics of local communities. The process of environmental assessment requires a detailed project description. No two quarry operations are exactly the same – for example, the geological resource, terrain, groundwater characteristics, and type and proximity of transportation options of projects may vary. Consequently, a receiving environment adjacent to the Bay of Fundy will have many differences from a receiving environment adjacent to the Atlantic Ocean. These differences matter when it comes to determining environmental effects.¹²⁵

78. Moreover, as explained by Dr. Blouin and Ms. Griffiths, the fact that other review panels have suggested the use of terms and conditions to mitigate adverse effects is not determinative of what is proper in every case. For example, Mr. McLean states that given the significant differences between the potential impact of the Whites Point project and the BPQ on right whales and lobsters, it would be necessary to employ different mitigation measures for the two projects.¹²⁶ Moreover, the use of terms and conditions is only appropriate where a panel is satisfied that they constitute adequate and effective mitigation.¹²⁷ Review panels are not required to use terms and conditions to “avoid” findings of likely SAE or adverse environmental effects.¹²⁸

(d) Even if the Whites Point JRP Was Required to Consider the Findings and Recommendations of Other Projects, Dr. Blouin's and Ms. Griffiths' Conclusions Would Not Change

79. While Dr. Blouin and Ms. Griffiths find Mr. Estrin's EA approach to be misguided, in order to provide a complete response, they explain why the projects identified by Mr. Estrin are

¹²⁴ **RE-10**, Blouin Report II, ¶ 18; **RE-9**, Griffiths Report II, ¶ 31.

¹²⁵ **RE-9**, Griffiths Report II, ¶ 31.

¹²⁶ **RW-1**, Witness Statement of Mark McLean, November 6, 2017 (“McLean Statement”), ¶ 23.

¹²⁷ **RE-10**, Blouin Report II, ¶ 22; **RE-9**, Griffiths Report II, ¶ 78.

¹²⁸ **RE-9**, Griffiths Report II, ¶ 77. See also **R-32**, *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members*, Canadian Environmental Assessment Agency (Jul. 2001); **R-26**, *Procedures for an Assessment by a Review Panel*, A guideline issued by the Honourable Christine S. Stewart, Minister of the Environment (Nov. 1997).

inappropriate comparators due to the differences in predicted project impacts.¹²⁹ In particular, the Whites Point project was unique because its proposed site was in a highly sensitive area, which included the presence of an endangered population of North Atlantic right whales and a highly valued lobster fishery.¹³⁰

80. For example, the Bay of Fundy, where the Whites Point project was proposed, is considered one of only two critical habitats for endangered North Atlantic right whales in Canada.¹³¹ In contrast, the BPQ and Bear Head projects which Mr. Estrin refers to in his analysis are located near one another in Chedabucto Bay/Strait of Canso, which is not a critical habitat for right whales.¹³² Unlike the Whites Point project, the Belleoram project is located in Fortune Bay, Newfoundland, which is also not a critical habitat for right whales.¹³³ Finally, the Fundy Tidal Demonstration project is not a proposed quarry or marine terminal and does not involve regular shipping or blasting.¹³⁴ Thus, the predicted impacts on this endangered species were simply not the same.¹³⁵

81. With respect to the impact of the project on the local fishery, Mr. Estrin criticizes Dr. Blouin's conclusion that the Whites Point JRP's concerns regarding the effectiveness of a call-in line were reasonable. He bases his criticism on the fact that similar recommendations with respect to communication measures were accepted as a mitigation measure for other projects.¹³⁶ However, in the context of the Whites Point project, the JRP considered a call-in line ineffective to address the economic concerns raised by local fishermen with respect to the risk of invasive species, the loss of valuable fishing days, and additional fuel and labour costs associated with

¹²⁹ **RE-10**, Blouin Report II, s. IV; **RE-9**, Griffiths Report II, s. 3.0.

¹³⁰ **RE-9**, Griffiths Report II, ¶ 33.

¹³¹ **RW-1**, McLean Statement, ¶ 6.

¹³² **RE-10**, Blouin Report II, ¶ 32; **R-769**, Whalesitings Database, Population Ecology Division, Fisheries and Oceans Canada, Dartmouth, NS (Oct. 11, 2017).

¹³³ **RE-10**, Blouin Report II, ¶ 32; **R-769**, Whalesitings Database, Population Ecology Division, Fisheries and Oceans Canada, Dartmouth, NS (Oct. 11, 2017).

¹³⁴ **RE-10**, Blouin Report II, ¶ 32.

¹³⁵ **RE-10**, Blouin Report II, ¶¶ 31-34; **RE-9**, Griffiths Report II, ¶¶ 47-53; **R-769**, Whalesitings Database, Population Ecology Division, Fisheries and Oceans Canada, Dartmouth, NS (Oct. 11, 2017).

¹³⁶ Estrin Reply Report, ¶¶ 488-494.

having to move their traps.¹³⁷ In contrast, the communications measures stipulated in the Keltic, BPQ, and Fundy Tidal projects were aimed at addressing other issues such as the safe and timely passage of shipping traffic, the loss of fish habitat, and interference limited to construction, maintenance and decommissioning activities.¹³⁸

82. Overall, Dr. Blouin and Ms. Griffiths conclude that none of the projects identified by Mr. Estrin are appropriate comparators to the Whites Point project due to the differences in the predicted environmental effects of each project. Nor were the mitigation measures that were proposed in those EAs adequate to mitigate the environmental effects of the proposed Whites Point project to an acceptable level.¹³⁹ Therefore, even if the JRP was required to consider the findings and recommendations of other projects in its assessment of the Whites Point project, which it was not, it would not change Dr. Blouin's opinion that absent the NAFTA breach, the JRP's findings of adverse environmental effects were reasonable and would not support a recommendation to the Nova Scotia Minister of the Environment to approve the project. Nor would it change Ms. Griffiths' opinion that, absent the NAFTA breach, the Whites Point JRP could have reasonably concluded that the project would have resulted in likely SAEE on the right whale and lobsters and lobster habitat in the vicinity of the project site, taking into account proposed mitigation.

C. But For the NAFTA Breach, Decision-Makers in the Nova Scotia or Federal Governments Could Have Reasonably Taken Decisions Resulting in the Whites Point Project Not Proceeding

83. Just as a proper but-for analysis must consider the findings and recommendations that the JRP could have reasonably made if it had not committed the NAFTA breach, it must also consider what government decision-makers could have reasonably decided, absent the NAFTA breach, regarding whether the Whites Point project should proceed. In response to Mr. Estrin's assertion in his first Report that "there was no reasonable basis for either government to lawfully

¹³⁷ **RE-10**, Blouin Report II, ¶ 52; **R-212**, Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, Joint Review Panel Report (Oct. 2007), p. 76; **R-275**, LFA 34 Management Board, "Presentation to the Joint Review Panel Whites Point Quarry and Marine Terminal Project Public Hearings" (Jun. 27, 2007), p. 6.

¹³⁸ **RE-10**, Blouin Report II, ¶¶ 53-58.

¹³⁹ **RE-10**, Blouin Report II, ¶ 81; **RE-9**, Griffiths Report II, ¶ 85.

deny approval of WPQ,”¹⁴⁰ Canada submitted the Reports of Mr. Geddes and Mr. Connelly, who explained the broad considerations that factor into the decision-making process under the *NSEA* and the *CEAA*, respectively. As Canada explained in its Counter-Memorial, if the NAFTA breach had not been committed, “provincial and federal decision-makers could have exercised the wide discretion granted to them under provincial and federal law and rejected the project or refused to issue the requested permits.”¹⁴¹

84. In their Reply, the Claimants take an even more extreme view of the decisions that government decision-makers had to take if the NAFTA breach was not committed. According to the Claimants, “they could not deny, they had to approve.”¹⁴² Central to this argument is the Reply Expert Report of Dean Lorne Sossin who provides an opinion based on the same flawed assumption as Mr. Estrin’s – that “but for its erroneous conclusion with respect to ‘community core values,’ the Panel did not identify [SAEEs] which would likely result from the Whites Point Quarry Project.”¹⁴³ This statement confuses what the Whites Point JRP did, with what it might do in a but-for scenario. There is no basis to assume the JRP would not find a likely SAEE in the but-for scenario. Proceeding on this flawed assumption, Dean Sossin concludes that “[w]ithout legitimate grounds to deny approval to the project, and but for the inappropriate reliance on the JRP’s findings in relation to ‘community core values,’ in my view, the Ministers were legally compelled to exercise their discretion to approve the project.”¹⁴⁴

85. As Canada has already explained, this assumption is flawed because it ignores the nature of the NAFTA breach found by the majority. Strangely, Dean Sossin states that he was “guided” by the majority’s articulation of the NAFTA breach that “the JRP was, regardless of its ‘community core values’ approach, still required to conduct a proper ‘likely significant effects after mitigation’ analysis on the rest of the project effects,” and that by not doing so the JRP “denied the ultimate decision makers in government information which they should have been

¹⁴⁰ Estrin Memorial Report, ¶ 11.

¹⁴¹ Canada’s Counter-Memorial on Damages, ¶ 83.

¹⁴² Claimants’ Reply Damages Memorial, ¶ 299.

¹⁴³ Reply Expert Opinion of Lorne Sossin, August 3, 2017 (“Sossin Reply Report”), ¶ 6.

¹⁴⁴ Sossin Reply Report, ¶¶ 8-9.

provided.”¹⁴⁵ In light of the majority’s finding, it is not clear why Dean Sossin would provide an opinion based on a still-deficient version of the JRP Report and assume that “had the JRP not fallen into error with its conclusion with respect to community core values, it would not have found significant adverse environmental effects to exist.”¹⁴⁶

86. Aside from this basic flaw in his assumption, Dean Sossin’s opinion regarding the limitations on the respective Ministerial decisions that had to be made is incorrect for two reasons. First, government decision-makers had broad statutory discretion to deny or reject the project proposal, even if the JRP did not identify any likely SAEs or recommend the rejection of the project. Second, an incomplete report, as the majority has already determined the JRP Report to be, would not compel decision-makers to approve the project.

1. Decision-Makers Had Broad Statutory Discretion and Were Not Compelled to Approve the Whites Point Project

87. Dean Sossin fails to acknowledge the broad discretion that the Nova Scotia and federal decision-makers had to approve or reject a project under the *NSEA* and the *CEAA*, respectively. With respect to the *NSEA*, in his Expert Report, Justice Cromwell conducts a careful review of the legislation, the Minister’s role concerning it, and the relevant Nova Scotia jurisprudence.¹⁴⁷ He concludes that the legislative scheme confers broad discretion to the Nova Scotia Minister to approve or reject an undertaking.¹⁴⁸ A JRP report and the record before a JRP do not bind the Minister.¹⁴⁹ Indeed, in direct contrast to the position they now advocate, the Claimants themselves recognized this fact in November 2007. Following the release of the JRP Report, Paul Buxton, the Claimants’ representative then and now, wrote to the Nova Scotia Minister urging him not to rubber stamp the JRP Report, as this would set a “dangerous and inappropriate precedent for environmental assessments.”¹⁵⁰ He wrote again shortly after, adding: “[w]e ask,

¹⁴⁵ Sossin Reply Report, ¶ 37.

¹⁴⁶ Sossin Reply Report, ¶ 30.

¹⁴⁷ **RE-17**, Expert Report of the Honourable Thomas Cromwell, November 6, 2017 (“Cromwell Report”), ¶ 14.

¹⁴⁸ **RE-17**, Cromwell Report, ¶¶ 50- 51.

¹⁴⁹ **RE-17**, Cromwell Report, ¶¶ 33-34.

¹⁵⁰ **R-495**, Letter from Paul Buxton to Mark Parent (Nov. 8, 2007).

Minister, that you use your own good judgement to disregard the recommendations as not being of useful assistance to you, and that you and your government determine what you consider to be the right thing to do in these circumstances.”¹⁵¹ Thus, as the Claimants themselves have admitted, under the *NSEA*, the Minister is the ultimate decision-maker and is not limited in the range of factors he or she can consider when exercising discretion, provided they are relevant to the *NSEA*'s purpose.¹⁵² For these reasons, Justice Cromwell rejects Dean Sossin's conclusion and determines that a decision for project approval was not legally compelled under Nova Scotia law.¹⁵³ He states:

In my opinion, it is inconsistent with the breadth of these powers and the purposes for which they are given to conclude that the Nova Scotia Minister is legally compelled to approve a project following submission of a JRP Report where the JRP has failed to conduct the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada.¹⁵⁴

88. With respect to the discretion of decision-makers under the *CEAA*, Justice Evans concludes in his Rejoinder Expert Report that the Claimants understate the scope of federal decision-makers' discretion. Justice Evans explains that under s. 37(1.1) of the *CEAA*, the ultimate decision-making power rests with the GIC.¹⁵⁵ In this regard, a JRP report is not binding on the GIC¹⁵⁶ and s. 37(1.1) imposes no restrictions on the GIC's exercise of its discretion.¹⁵⁷ While a decision not to approve must have a reasonable basis in the applicable law, the GIC can reject a panel's findings and recommendations.¹⁵⁸ Mr. Connelly also confirms in his Rejoinder Expert Report that with CCV extricated from the JRP Report, federal decision-makers would

¹⁵¹ **R-496**, Letter from Paul Buxton to Mark Parent (Nov. 16, 2007), p. 4 (emphasis added).

¹⁵² **RE-17**, Cromwell Report, ¶¶ 12, 31.

¹⁵³ **RE-17**, Cromwell Report, ¶¶ 14-15.

¹⁵⁴ **RE-17**, Cromwell Report, ¶ 25.

¹⁵⁵ **RE-14**, Rejoinder Expert Report of the Honourable John M. Evans, November 6, 2017 (“Evans Report II”) ¶ 69.

¹⁵⁶ **RE-14**, Evans Report II, ¶ 59.

¹⁵⁷ **RE-14**, Evans Report II, ¶¶ 58-66.

¹⁵⁸ **RE-14**, Evans Report II, ¶¶ 66-70.

have discretion to find likely SAEs that cannot be mitigated and to reject the Whites Point project.¹⁵⁹

2. An Incomplete Report Does Not Legally Compel Approval

89. Dean Sossin also fails to adequately consider the fact that absent the Panel's recommendation based on CCV, the JRP Report would be incomplete.¹⁶⁰ Justice Cromwell explains that an incomplete report does not compel ministerial approval of an undertaking.¹⁶¹ He finds it concerning that, "Dean Sossin's opinion that the Nova Scotia Minister was legally compelled to approve this undertaking amounts to saying that an incomplete JRP Report that expresses many concerns about an undertaking's adverse effects somehow becomes the proponent's ticket to a legally compelled approval."¹⁶² Instead, Justice Cromwell and Mr. Connelly describe how the Ministers would likely seek additional information from the JRP, or ask it to reconvene and complete its mandate.¹⁶³

90. Upon receipt of a complete JRP Report, provincial and federal decision-makers would have a reasonable basis to exercise their broad statutory discretion to deny approval of the Whites Point project. In this regard, Justice Cromwell observes that the JRP's numerous findings that the project would result in adverse environmental effects would offer a reasonable basis for the Nova Scotia Minister to deny approval under the *NSEA*.¹⁶⁴ Mr. Connelly similarly finds that the GIC would have multiple bases to reasonably reject the Whites Point project, including on the basis of its effects on right whales and lobsters.¹⁶⁵

¹⁵⁹ **RE-11**, Connelly Report II, ¶¶ 42-43.

¹⁶⁰ **RE-11**, Connelly Report II, ¶ 14; **RE-17**, Cromwell Report, ¶¶ 61-64.

¹⁶¹ **RE-17**, Cromwell Report, ¶¶ 60-64.

¹⁶² **RE-17**, Cromwell Report, ¶ 9.

¹⁶³ **RE-17**, Cromwell Report, ¶¶ 61-62; **RE-11**, Connelly Report II, ¶ 15.

¹⁶⁴ **RE-17**, Cromwell Report, ¶¶ 67-68.

¹⁶⁵ **RE-11**, Connelly Report II, ¶¶ 16, 56.

D. Conclusions

91. The Claimants never had a right to the approval of the Whites Point project. However, they continue to claim the alleged value of 50 years of lost profits from the project. Such a claim might be warranted if Bilcon of Nova Scotia had been granted approval to build the Whites Point project, the operation was up and running, and the government expropriated it. But none of this ever happened. There is simply no way to reconcile the Claimants' claim for damages with the limited basis upon which the majority found that the approach of the JRP violated Canada's obligations under NAFTA. Rather than applying the basic international law principles governing causation that Canada outlined in its Counter-Memorial and putting forward a reasonable claim for the damages that might have been caused by the NAFTA breach, the Claimants have instead advanced untenable legal theories about the JRP recommendations and government decisions that could have been made if the NAFTA breach had not been committed. It is not the Tribunal's role to correct their error or to give them another chance at making out a realistic request. Accordingly, their excessive claim for the alleged lost profits of the Whites Point project should be dismissed in its entirety.

IV. IN THE ALTERNATIVE, THE CLAIMANTS ARE ONLY ENTITLED TO RECOVER THE AMOUNT IT WOULD HAVE COST TO MITIGATE THEIR DAMAGES

92. Even assuming that the Tribunal was willing to do the Claimants' work for them, and to identify any losses that were in fact caused by the identified breach of NAFTA, the Claimants could not be permitted, as a matter of law, to recover any more than it would have cost them to mitigate their damages. The Claimants argue that there was no duty to mitigate their losses in this case, and that even if such a general presumption was to exist, they have rebutted it by demonstrating that resorting to Canadian courts was not reasonable. None of these arguments has merit. The question with respect to the duty to mitigate damages at international law is simple – could the Claimants have taken reasonable steps to reduce the impact of the breach? The answer here is yes. In fact, judicial review in Canadian courts would have been an efficient and effective method to fully restore all that the Claimants lost because of the JRP's breach of NAFTA. As such, the Claimants should be entitled to nothing more than the costs associated with pursuing a

judicial review in Canada's domestic courts, which would have restored their opportunity to have their application considered in accordance with applicable laws.

A. The Claimants Were Under a Duty to Mitigate Their Damages By Applying for Judicial Review in Canadian Courts

93. The Claimants do not dispute that the duty to mitigate is a general principle of international law; rather, they disagree with the application of this principle to the valuation of damages in this dispute. First, they argue that there is no duty to mitigate damages by seeking judicial review, based on the mitigation principle in domestic law.¹⁶⁶ However, not only is their reliance on domestic law inappropriate, but as Justice Evans explains, they also misunderstand and misapply that domestic law. Second, the Claimants incorrectly state that the duty to mitigate does not apply here because there is no requirement to exhaust local remedies under the NAFTA. This argument misses the point. The duty to mitigate is not about whether a party has met a jurisdictional requirement to exhaust local remedies. Finally, the Claimants argue that the Tribunal already decided in the merits phase that the Claimants were not obligated to mitigate their damages by pursuing a judicial review in Canadian courts.¹⁶⁷ This argument relies on a substantial misinterpretation of the majority's Award. Whether the Claimants were under a duty to mitigate their losses was not, and could not have been, at issue in the jurisdictional and liability phase of these proceedings.

1. The Claimants Inappropriately Base Their Arguments on a Mistaken Interpretation of Canadian Law Rather than on the Duty to Mitigate as it Exists in International Law

94. In their Reply, the Claimants rely on the Expert Report of Professor John McCamus to support their argument that there is no need to mitigate damages by seeking judicial review.¹⁶⁸ Professor McCamus' Report considers "whether the concepts of compensable loss in domestic contract and tort law may include the loss of future profits suffered by a plaintiff as a result of

¹⁶⁶ Claimants' Reply Damages Memorial, ¶¶ 271-274.

¹⁶⁷ Claimants' Reply Damages Memorial, ¶¶ 231-280.

¹⁶⁸ Claimants' Reply Damages Memorial, ¶¶ 250-258, 272-274.

the defendant's breach of contract,"¹⁶⁹ and the Supreme Court of Canada case *Attorney General v. Telezone, Inc.*¹⁷⁰ However, Canadian domestic law is not the governing law in this dispute. Article 1131 clearly provides that NAFTA Chapter Eleven tribunals "shall decide the issues in dispute in accordance with this Agreement and the applicable rules of international law." As such, the Claimants' legal arguments based on Canadian domestic law must be disregarded.

95. Canada explained the international law of mitigation in its Counter-Memorial. In response, the Claimants do nothing more than take issue with Canada's reference to the *Gabčíkovo-Nagymaros* case because it refers, in part, to Slovakia's argument and because the court declined to further examine the issue of mitigation once it established that Slovakia's actions constituted an internationally wrongful act.¹⁷¹ This criticism is misplaced. In the passage cited by Canada, the ICJ stated that "an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided."¹⁷² This passage has been cited approvingly in the Commentary to the ILC Draft Articles on State Responsibility and the awards of other international investment tribunals in support of the notion that "a failure to mitigate damages preclude[s] recovery to that extent."¹⁷³ For example, in *EDF International*, the tribunal recognized the duty to mitigate as a general principle of law and quoted the ICJ's statement in the *Gabčíkovo-Nagymaros* case as support.¹⁷⁴ In applying the principle in *EDF*, the tribunal held that the respondent was "not liable for any loss attributable to Claimants' failure to take

¹⁶⁹ Expert Report of John D. McCamus, August 14, 2017 ("McCamus Report"), ¶ 4.

¹⁷⁰ **CA-445**, *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585.

¹⁷¹ Claimants' Reply Damages Memorial, ¶ 277, citing to **CA-378**, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (I.C.J. Reports 1977) Judgment, 25 September 1997, ¶¶ 80-81.

¹⁷² **CA-378**, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (I.C.J. Reports 1977) Judgment, 25 September 1997, ¶ 80.

¹⁷³ See for example, **RA-60**, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Text adopted by the International Law Commission at its fifty-third session, in 2001, (A/56/10), United Nations, New York 2001 ("Commentary on the ILC Articles"), Article 31, ¶ 11.

¹⁷⁴ **RA-154**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012 ("*EDF International – Award*"), ¶ 1305; and **RA-108**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/6) Award, 7 October 2003, ¶ 10.6.4.

reasonable steps” to mitigate and discounted from the damages awarded the amount that the claimants could have reasonably obtained had they mitigated their damages.¹⁷⁵

96. Moreover, even if Canadian law were relevant, Justice Evans explains in his Rejoinder Expert Report that Professor McCamus’ interpretation of Canadian law is incorrect.¹⁷⁶ In particular, *Telezone* does not stand for the principle that a claimant need not mitigate its damages by instituting a judicial review. *Telezone* was not a mitigation case at all. Specifically, in *Telezone*, the Attorney General challenged the jurisdiction of the Superior Court of Ontario on the ground that the claim constituted a collateral attack on the government’s decision not to grant the applicant a personal communication service license, arguing that it was barred by the Federal Court’s exclusive jurisdiction to judicially review decisions of all federal boards, commissions, or other tribunals. In dismissing the Attorney General’s appeal, the Supreme Court of Canada merely held that the Superior Court had jurisdiction over the parties and the subject matter, as well as the power to grant the remedy of damages. It did not rule on liability or damages in this dispute.¹⁷⁷

97. In fact, as Justice Evans explains, the recent Supreme Court of Canada case, *Ernst v. Alberta Energy Regulator* provides a more useful analogy to the current arbitration.¹⁷⁸ The issue in *Ernst* was whether an award of damages under the *Canadian Charter of Rights and Freedoms* (“*Charter*”) would be “appropriate and just in the circumstances” to remedy harm caused to the plaintiff by an allegedly unlawful administrative directive. The Supreme Court found that an order by a reviewing court on judicial review would serve most of the purposes of an award of *Charter* damages. It would have vindicated the plaintiff’s rights, put an end to the administrative action to which she objected more speedily than an action for damages, prevented further

¹⁷⁵ **RA-154**, *EDF International – Award*, ¶¶ 1301-1317.

¹⁷⁶ **RE-14**, Evans Report II, ¶¶ 39-47.

¹⁷⁷ **CA-445**, *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, ¶¶ 2 and 81.

¹⁷⁸ **RE-14**, Evans Report II, ¶ 48.

damage from occurring as a result of the breach, clarified the law, and prevented a repetition of the unlawful conduct.¹⁷⁹ As Justice Evans states:

While not directly on point, *Ernst* sets out the advantages of an application for judicial review over an action for damages, including its ability to mitigate further loss flowing from the unlawful administrative action. The summary nature of applications for judicial review also means that they are normally adjudicated much more quickly than actions. *Ernst* thus provides some support for the argument that it would have been reasonable for the Claimants to institute an application for judicial review in order to mitigate the losses allegedly attributable to the JRP's legally flawed process.¹⁸⁰

2. The Issue of Mitigation is Separate and Distinct from the Exhaustion of Local Remedies Rule

98. The Claimants next suggest that Canada's arguments concerning the duty to mitigate amount to nothing more than a disguised attempt to require the exhaustion of local remedies. This argument is also meritless. The exhaustion of local remedies rule requires that local remedies be exhausted before international proceedings may be instituted. It is a jurisdictional issue. At this point of the arbitration, Canada does not contest the Tribunal's jurisdiction to hear the Claimants' claim for damages. Further, it does not argue that judicial review was a "precondition" to the Claimants bringing their NAFTA claim, or that the Claimants were "obligated" to seek judicial review before they could seek redress under the NAFTA.

99. The exhaustion rule is separate and distinct from the duty to mitigate.¹⁸¹ While the exhaustion rule relates to jurisdiction, the duty to mitigate is a damages issue. The Claimants' failure to take reasonable steps to pursue existing and available legal remedies necessarily limits the amount of damages that can be awarded as a result of an international treaty breach.¹⁸² This issue relates solely to the quantification of damages, not the Tribunal's jurisdiction to hear the claim.

¹⁷⁹ **RA-672**, *Ernst v. Albert Energy Regulator*, 2017 SCC 13, [2017] 1 S.C.R. 3, ¶¶ 36-37.

¹⁸⁰ **RE-14**, Evans Report II, ¶ 50.

¹⁸¹ **RA-155**, *Interhandel Case (Switzerland v. United States of America)* Preliminary Objections (I.C.J. Reports 1959) Judgment, 21 March 1959, p. 27.

¹⁸² Canada's Counter-Memorial on Damages, ¶ 89.

100. The distinction between the duty to mitigate and the exhaustion of local remedies rule has been recognized by international tribunals. As explained by the *Dunkeld* tribunal, “recourse to local remedies is not strictly linked to the mitigation of losses, such that any duty to mitigate should require the exhaustion of local remedies or require a party to prefer a local remedy to one that may be available to it through international arbitration.”¹⁸³ Likewise, the fact that a claimant is not required to exhaust local remedies prior to commencing NAFTA arbitration does not obviate the Claimants’ duty to mitigate damages. Thus, while the Claimants’ decision not to pursue judicial review was not a “precondition” for bringing claims or for the Tribunal to determine liability under NAFTA Chapter Eleven, it is nevertheless a relevant factor for consideration in the quantification of damages.

3. The Issue of Mitigation Was Not Decided in the Merits Phase

101. The Claimants also allege that Canada should not be allowed to raise the issue of mitigation because it has already been decided in the merits phase of the proceedings that the Claimants were not required to bring a judicial review in order to mitigate their damages.¹⁸⁴ However, in making this argument, they fail to identify any findings of the Tribunal where it made such a determination. Nor could they. The Tribunal did not make any findings as to whether judicial review would have reasonably restored the Claimants’ lost opportunity to have their case considered on its individual merits. As explained above, the issue of mitigation relates to the quantification of the damages, which is an issue separate and apart from the determination of liability. As a result of the Tribunal’s order to bifurcate the proceedings as between jurisdiction and liability, and quantum,¹⁸⁵ the issue of mitigation was not (and could not have been) decided in the jurisdiction and liability phase of this arbitration.

¹⁸³ **RA-115**, *Dunkeld International Investment Ltd. v. Government of Belize* (UNCITRAL) Award, 28 June 2016, ¶ 197.

¹⁸⁴ Claimants’ Reply Damages Memorial, ¶ 263.

¹⁸⁵ *Procedural Order No. 3*, June 3, 2009, ¶¶ 1.1, 1.2.

B. The Claimants Have Failed to Present Any Argument or Evidence to Establish that the Duty to Mitigate Did Not Apply in this Case

102. The Claimants do not dispute that recourse to judicial review was available in Canadian courts and that had they applied for judicial review, the likeliest result would have been that the reviewing court would have remitted the matter back to a newly-constituted JRP for a new assessment.¹⁸⁶ However, they argue, relying on *Middle East Cement*,¹⁸⁷ that “all that is required to rebut the duty [to mitigate] is a ‘plausible’ explanation.”¹⁸⁸ Further, citing to *Hrvatska Elektroprivreda D.D.*, they assert that “where alternative courses of action are available, a party cannot be faulted for its decisions to choose one path over the other ‘without evidence those decisions were unreasonable’.”¹⁸⁹

103. Even if accurate statements of the law, these principles are of no avail to the Claimants in this case. The Claimants have failed to provide any “plausible” explanation for their decision not to seek judicial review. Unlike judicial review courts, NAFTA tribunals do not have the power to set aside or refer an administrative action back for determination in accordance with directions.¹⁹⁰ Accordingly, judicial review was the only available and effective means of fully restoring the Claimants’ lost opportunity to have their project assessed on its individual merits. As they had no alternative means of fully restoring their lost opportunity, the Claimants’ decision not to pursue judicial review and mitigate all that they lost for a tiny fraction of the amount that they now seek in damages was patently unreasonable.¹⁹¹

¹⁸⁶ Sossin Reply Report, ¶ 60.

¹⁸⁷ **CA-322**, *Middle East Cement Shipping and Handling Co. S.A v. Arab Republic of Egypt* (ICSID Case No. ARB/99/16) Award, 12 April 2002, ¶ 170.

¹⁸⁸ Claimants’ Reply Damages Memorial, ¶ 279.

¹⁸⁹ Claimants’ Reply Damages Memorial, ¶ 280.

¹⁹⁰ **RA-47**, NAFTA Article 1135: (“Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution”) (emphasis added).

¹⁹¹ The cost of mitigation would represent approximately 0.3% of the damages claimed in this arbitration. **RE-13**, Rejoinder Expert Report of Darrell B. Chodorow, The Brattle Group, November 6, 2017 (“Brattle Group Report II”), ¶ 174: (“the cost of mitigation would have been low relative to the damages being sought by the Claimants”); **RE-5**, Expert Report of Darrell B. Chodorow, The Brattle Group, June 9, 2017 (“Brattle Group Report I”), ¶¶ 196-198.

104. The Claimants argue against this conclusion on the basis of five assertions – all of which are without merit. First, the Claimants assert that pursuing judicial review is “contrary to the plain language of the Treaty,”¹⁹² and that it would have somehow prevented them from pursuing this NAFTA claim in a timely manner. However, there is nothing in the language of the NAFTA that prevented the Claimants from applying for judicial review at the same time as they pursued their NAFTA claim. While describing Article 1121 as “a means of managing the interaction of domestic and international recourses,”¹⁹³ the Claimants ignore the express language in Article 1121 that excludes “proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party” from the waiver requirement. This language refers specifically to the types of remedies available to a successful applicant for judicial review.¹⁹⁴ As the Claimants’ own expert Dean Sossin admits, NAFTA permits judicial review proceedings to be brought concurrently with NAFTA claims.¹⁹⁵

105. Second, the Claimants suggest that judicial review would not have been effective because the ultimate decision to reject the project was made by Ministers who enjoy significant discretion under the relative legislative provisions. While it is correct that the Ministers enjoy broad discretion in the EA process, Justice Evans explains that the fact that the decisions to reject the project were made by the Ministers, as opposed to the JRP does not diminish the ability of judicial review to restore the Claimants’ lost opportunity. The Claimants could have applied to judicially review both the JRP Report and the Ministers’ decisions.¹⁹⁶

106. Third, the Claimants assert that their decision not to pursue judicial review in this case should be seen as reasonable because they could assume that a second JRP process would also

¹⁹² Claimants’ Reply Damages Memorial, ¶ 269.

¹⁹³ Claimants’ Reply Damages Memorial, ¶ 270.

¹⁹⁴ **RE-6**, Expert Report of the Honourable John M. Evans, June 9, 2017 (“Evans Report I”), ¶ 30: (“A reviewing court has a wide array of remedies that it may grant to a successful applicant for judicial review, including relief corresponding to that available under the common law prerogative writs, declarations and injunctions...Damages, however, are not available through judicial, and must still be claimed by way of an action.”)

¹⁹⁵ Sossin Reply Report, ¶ 58: (“[t]he route of judicial review for non-monetary remedies could have been pursued concurrently with NAFTA proceedings.”)

¹⁹⁶ **RE-14**, Evans Report II, ¶ 11.

not be fair or just.¹⁹⁷ There is no basis for such an assertion and no evidence on the record to suggest that this thinly veiled attack on the effectiveness of the Canadian judiciary and EA system as a whole has any merit. In fact, in neither of the two known cases where a Canadian court remitted an environmental review back to a review panel with instructions were any further judicial reviews brought, indicating that there were no concerns about the fairness of the second process.¹⁹⁸ As Justice Evans has concluded, an application for judicial review would have fully responded precisely to the Claimants' complaint, and the majority's decision, that Bilcon of Nova Scotia was unlawfully denied a just and fair environmental process.¹⁹⁹ In order to address issues regarding bias or unfairness, Justice Evans states that the Court would likely order that the matter be referred to a differently constituted panel, with a direction that inconsistency with CCV is not legally relevant to the EA, as well as any other directions that the court thought appropriate and necessary to ensure that the remitted process was fair and just.²⁰⁰

107. Fourth, the Claimants suggest that the Tribunal should not second-guess their choice to pursue a remedy through NAFTA arbitration rather than through judicial review because it was reasonable for them to assume at the time that judicial review would not be "a 'more rapid or certain'" remedy.²⁰¹ Again, this argument must fail. While it is true that judicial review could not

¹⁹⁷ Claimants' Reply Damages Memorial, ¶ 242.

¹⁹⁸ In *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, the Federal Court held that as a result of the JRP's breaches of duty and error in due process, the environmental assessment of the Cheviot Coal project was not conducted in compliance with the requirements of the *CEAA* and therefore, the Minister's authorization was issued without jurisdiction. Accordingly, the Minister's decision was quashed and pursuant to s. 24(2), the Minister had the authority and responsibility to direct the JRP to reconvene and, having regard to the Court's findings, direct it to do what was necessary to make adjustments to the JRP's report to bring it into compliance with the *CEAA*. The JRP subsequently reconvened and issued a second report, which was not subject to a further judicial review challenge. (**R-625**, *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, [1999] 3 F.C.R. 425 (FC), 1999, s. VII; **R-770**, Report of the EUB-CEAA Joint Review Panel, Cheviot Coal Project, Cardinal River Coals Ltd., EUB Decision 2000-59 (Aug. 2000)). Similarly, the Federal Court remitted the environmental assessment of the Kearl Oil Sands project back to the same panel with directions to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the project's greenhouse gas emissions to a level of significance. The panel issued an addendum to its report on May 6, 2008, which was not subject to a further judicial review challenge (**R-626**, *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 2008, p. 34; and **R-771**, Canadian Environmental Assessment Agency, Joint Panel Report Kearl Oil Sands Project, Addendum to EUB Decision 2007-013 (May 6, 2008)).

¹⁹⁹ **RE-14**, Evans Report II, ¶ 19.

²⁰⁰ **RE-14**, Evans Report II, ¶ 20.

²⁰¹ Claimants' Reply Damages Memorial, ¶ 244.

guarantee that the outcome of the second JRP Report would be a positive assessment and recommendations to approve the project, followed by the issuance of permits, this is irrelevant. The Claimants had no legal right to the necessary permits.²⁰² What a judicial review would have rapidly and certainly provided the Claimants was a lawful EA. It would have restored their opportunity to have the Whites Point project considered and assessed in accordance with applicable laws. This is a remedy that a NAFTA proceeding simply cannot provide. Indeed, as Canadian courts have recognized, the remedies available in judicial review can be advantageous as compared to a simple claim for damages.²⁰³

108. Moreover, it is beyond doubt that recourse to judicial review would have provided the Claimants a remedy long ago and at much less expense than has been incurred in this arbitration. As Justice Evans explains, Mr. Buxton's assertion that a new JRP process would not get underway until late 2013 is unduly pessimistic.²⁰⁴ Justice Evans estimates that it would have taken approximately three years for an application for judicial review by the Claimants to be decided by the Federal Court and Federal Court of Appeal. Thus, the judicial review proceedings would likely have concluded at the intermediate appellate level by late 2010.²⁰⁵ As explained in Canada's Counter-Memorial and Justice Evans' Rejoinder Expert Report, the likelihood of an appeal to the Supreme Court of Canada was low given that there is no appeal as of right and that leave is only granted in 20% of cases.²⁰⁶ Even on the basis of Mr. Buxton's assumptions about the length of time that it would take to constitute a new JRP, the process could have started by late 2011, not December 2013.²⁰⁷

109. Additionally, Mr. Buxton's assertion that only 10% to 20% of the information submitted in the first case would have been useful in a second JRP process²⁰⁸ is unsupported by any

²⁰² **RE-14**, Evans Report II, ¶¶ 24-25.

²⁰³ **R-672**, *Jessica Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, ¶ 25.

²⁰⁴ **RE-14**, Evans Report II, ¶¶ 27-30.

²⁰⁵ **RE-14**, Evans Report II, ¶ 28.

²⁰⁶ Canada's Counter-Memorial on Damages, fn. 218; see also **RE-6**, Evans Report I, ¶ 48; and **RE-14**, Evans Report II, ¶ 29.

²⁰⁷ **RE-14**, Evans Report II, ¶ 30.

²⁰⁸ Reply Witness Statement of Paul Buxton, August 18, 2017 ("Buxton Reply Statement"), ¶ 47.

evidence. As noted by Justice Evans, “[a] co-operative attitude by participants can also go a long way to expediting the environmental assessment process and avoiding at least some of the complications of the previous time around, and thus to saving time and money. Guidance from the reviewing court on the permitted parameters of the JRP’s inquiry would also assist in focusing the process.”²⁰⁹ For example, in referring the Cheviot Coal and Kearl Oil Sands projects back to the review panels, the Federal Court provided specific directions with respect to the adjustments to the review panel’s report so that the EA would be compliant with the *CEAA*.²¹⁰ These directions were expressly cited in the review panel’s subsequent reports, to narrow the scope of the second review panel process.²¹¹

110. Finally, the Claimants argue, based on Dean Sossin’s suggestion, that it was reasonable for them to eschew judicial review in the Canadian courts because of certain alleged “juristic disadvantages” of judicial review in Canadian courts, including the inability to request additional documentary discovery.²¹² As Justice Evans explains, these arguments are irrelevant. In particular, where the relevant grounds for review relate to a question of law (*i.e.*, the legal relevance of CCV to EAs), additional information apart from the existing EA record would not be required.²¹³

C. Conclusions

111. Under international law, the Claimants had a duty to mitigate their damages, and their failure to take reasonable steps to fulfill this duty precludes their recovery of damages to that

²⁰⁹ **RE-14**, Evans Report II, ¶ 32.

²¹⁰ **R-0625**, *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, [1999] 3 F.C.R. 425 (FC), p. 26; **R-0626**, *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, p. 34: (“The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project’s greenhouse gas emissions to a level of insignificance.”)

²¹¹ **R-770**, Report of the EUB-CEAA Joint Review Panel, Cheviot Coal Project, Cardinal River Coals Ltd., EUB Decision 2000-59 (Aug. 2000), pp. 13-14; **R-771**, Canadian Environmental Assessment Agency, Joint Panel Report Kearl Oil Sands Project, Addendum to EUB Decision 2007-013 (May 6, 2008).

²¹² Claimants’ Reply Damages Memorial, ¶¶ 247-248; Sossin Reply Report, ¶ 58.

²¹³ **RE-14**, Evans Report II, ¶¶ 34-36.

extent. The issue of mitigation is separate and distinct from issues raised in the jurisdiction and liability phase. It relates specifically to the quantification of damages.

112. As Justice Evans has explained, it was reasonable for the Claimants to apply for judicial review as it was the only available and effective means of fully restoring their lost opportunity to have their project assessed in accordance with applicable laws. The Claimants have failed to provide any “plausible explanation” for their decision not to seek judicial review. As their own Expert, Dean Sossin, admits, NAFTA permits judicial review proceedings to be brought concurrently with NAFTA claims. Furthermore, judicial review was an effective remedy as the Claimants could have applied to judicially review both the JRP Report and the Ministers’ decisions, and the Claimants have provided no evidence in support of their assertion that a second JRP process would not be fair or just. While judicial review did not guarantee that the outcome of a second JRP process would have resulted in the approval of their project, the Claimants never had a legal right to the necessary permits for their project. There were also no “juristic disadvantages” to pursuing judicial review. To the contrary, it was reasonable for the Claimants to apply for judicial review, as it provided a more timely and cost-effective remedy as compared to this NAFTA arbitration.

113. Accordingly, since judicial review would have fully restored the Claimants’ lost opportunity, the Claimants should only be permitted to recover what it would have cost to mitigate their losses. As Canada explained in its Counter-Memorial, the cost to mitigate losses would have been comprised of two components: (1) non-reimbursable legal costs; and (2) the costs of remitting the EA back to a newly constituted JRP.²¹⁴ Using Justice Evans’ estimates of non-reimbursable legal costs, and adjusting them to expression in 2007 dollars, the cost of the first component is C\$77,982.²¹⁵ Using the Claimants’ costs in the initial JRP process, and assuming that a second JRP could begin at the public hearing stage of the JRP process, the cost of remitting the EA back to a second JRP is C\$1,072,662.²¹⁶ The sum of these two components is

²¹⁴ Canada’s Counter-Memorial on Damages, ¶¶ 96-98.

²¹⁵ Please refer to Canada’s Counter-Memorial on Damages, ¶ 97 for greater detail about the calculation of this component.

²¹⁶ Please refer to Canada’s Counter-Memorial on Damages, ¶ 98 for greater detail about the calculation of this component.

C\$1,150,644. This is the maximum amount that the Claimants should be entitled to recover, as a result of the identified NAFTA breach.

V. IN THE FURTHER ALTERNATIVE, THE CLAIMANTS ARE ONLY ENTITLED TO RECOVER THE AMOUNT BILCON OF NOVA SCOTIA INVESTED IN THE JRP PROCESS

114. As Canada has explained above and in its Counter-Memorial, at most the Claimants are entitled to recover no more than what it would have cost to fully mitigate their losses. However, if the Tribunal was to find that the Claimants can recover reflective loss under Article 1116, that they have sufficiently proven causation, and that the Claimants did not have a duty to mitigate, then it must determine the appropriate methodology to value the Claimants' lost opportunity to have the Whites Point project considered and assessed in accordance with Canadian law. The Claimants have not attempted to quantify damages pertaining to this lost opportunity. Instead, they have only claimed lost profits, on the basis that they were entitled to build and operate the Whites Point project.²¹⁷ As they had no such right, the Tribunal should award the Claimants no damages.²¹⁸

115. However, if the Tribunal was inclined to make an award of damages, Canada explained in its Counter-Memorial that the injury the Claimants suffered as a result of the lost opportunity could be no greater than the total value of the costs that Bilcon of Nova Scotia invested into the JRP process that resulted in the NAFTA breach.²¹⁹ The Claimants have failed to rebut Canada's assertion.

²¹⁷ See, e.g., Claimants' Reply Damages Memorial, ¶¶ 176, 180, 204, 230. See also Claimants' Reply Damages Memorial, ¶ 221: ("The Investors' claim for full reparation is properly measured by the loss of demonstrated profits resulting from Canada's breaches. Accordingly, the Investors are not claiming the costs incurred or 'sunk costs' in developing the Whites Point Quarry Project.")

²¹⁸ Faced with a similar situation, the tribunal in *Cargill v. Poland* did not award compensation to the claimant for damages that it failed to prove and for which it did not present alternative calculations. In particular, Cargill had claimed a portion of its damages as future lost profits, calculated using a DCF methodology. It did not claim damages for that portion of loss in any other way, and since Poland objected to the use of any method of damage quantification other than that chosen by the claimant, the Tribunal concluded that Cargill was not entitled to compensation on that ground (**RA-156**, *Cargill Incorporated v. Poland* (UNCITRAL) Final Award, 5 March 2008, ¶¶ 686-688).

²¹⁹ Canada's Counter-Memorial on Damages, ¶¶ 99-101.

A. The Claimants Do Not Object to Canada's Use of Historical Costs Data to Compute JRP Process Costs

116. While the Claimants take issue with certain tabulation and evidentiary questions in relation to Canada's computation of JRP process costs,²²⁰ they do not object to Canada's use of the historical costs the Claimants contend were made with respect to the Whites Point project. To arrive at the amount that Bilcon of Nova Scotia expended in the JRP process, Canada's damages Expert, Mr. Chodorow, compiled and analyzed the data contained in exhibits C-1169 through C-1318 – exhibits the Claimants put on the record.²²¹ In their Reply, the Claimants confirm that the data contained in these exhibits reflect "all expenses incurred" with respect to the Whites Point project,²²² including those costs incurred in the context of the project's EA.²²³ Mr. Buxton further describes these documents as the "product of meticulous record-keeping."²²⁴ Accordingly, on the basis of the Claimants' own admission, an analysis of JRP process costs that relies on the data in exhibits C-1169 through C-1318, like Mr. Chodorow's, accurately reflects what Bilcon of Nova Scotia expended in the JRP process. As Canada explains below, the Claimants' arguments with respect to how to define the JRP process and the requirement to substantiate historical costs must both be rejected.

B. Canada Properly Defined Costs Invested in the JRP Process

117. As Canada explained in its Counter-Memorial, Mr. Chodorow tabulated JRP process costs from the universe of data in the Claimants' exhibits using two broad parameters: time and category of expense.²²⁵ The Claimants do not meaningfully object to the use of either parameter.

²²⁰ Claimants' Reply Damages Memorial, ¶¶ 224-228. Mr. Chodorow has reviewed the alleged errors the Claimants argue were made in his Appendix C, and has determined that two categories of expenses require adjustment: the first with respect to invoices which contain third-party confirmation of prior invoice payment; and the second on the basis of Mr. Buxton's Reply Witness Statement with respect to payment of his own invoices. Mr. Chodorow has conducted a search for other instances of such substantiation and has revised his conclusions accordingly (**RE-13**, Brattle Group Report II, ¶¶ 39-41). Mr. Chodorow includes an updated historical cost analysis in **RE-13**, Brattle Group Rejoinder Appendix C.

²²¹ **RE-13**, Brattle Group Report II, Appendix C; Canada's Counter-Memorial on Damages, ¶¶ 102-105.

²²² Claimants' Reply Damages Memorial, ¶ 226; Buxton Reply Statement, ¶ 68.

²²³ Buxton Reply Statement, ¶¶ 70-79.

²²⁴ Buxton Reply Statement, ¶ 68.

²²⁵ Canada's Counter-Memorial on Damages, ¶¶ 102-105; **RE-5**, Brattle Group Report I, ¶ 52.

118. With respect to time, Canada defined the relevant time period as November 3, 2004, the date of the establishment of the JRP, through October 22, 2007, the date the JRP delivered its report to government decision-makers.²²⁶ While the Claimants do not make specific arguments about Canada's chosen time period in their Reply, Mr. Buxton conveys his belief that this is a "fundamental mischaracterization of 'JRP-related EA costs'."²²⁷ In his view, the Claimants were "fully engaged in an environmental assessment process" from the end of May 2002 until December 17, 2007,²²⁸ and he was "fully engaged in the preparation of the EIS and oversaw a very significant amount of technical work in relation to the Whites Point Quarry Project,"²²⁹ from May 2002 until November 2004. He claims that all of those costs should be included in the calculation of historical costs.²³⁰ He is wrong. While it may be true that the Claimants were involved in an EA process throughout that entire timeframe, it does not follow, as Mr. Buxton contends, that all of the expenses incurred in that time period constitute the injury directly caused by the breach.

119. The Tribunal has already determined that the fact that Bilcon of Nova Scotia was required to undergo an EA of its proposed project, and that the EA was referred to a JRP process, were not breaches of NAFTA.²³¹ Accordingly, the fact that Bilcon of Nova Scotia was preparing documents for an EA process that, in and of itself, was not found to be a breach of NAFTA, is not relevant to calculating the damage caused by the breach. A majority of the Tribunal found that the NAFTA breach was committed by the JRP failing to fully carry out its mandate.²³² The JRP could not have taken any actions either before it was constituted or after it submitted its Report. As a result, Mr. Buxton's assertion that the time period for calculating expenses related to the JRP process should be longer than that defined by Canada should be rejected.

²²⁶ Canada's Counter-Memorial on Damages, ¶ 102.

²²⁷ Buxton Reply Statement, ¶ 70.

²²⁸ Buxton Reply Statement, ¶ 70.

²²⁹ Buxton Reply Statement, ¶ 76.

²³⁰ Buxton Reply Statement, ¶ 79.

²³¹ Award, ¶¶ 272, 279-281 (finding that the Claimants' claim with respect to the referral to a JRP process was time-barred).

²³² See, e.g., Award, ¶¶ 601-602.

120. With respect to categories of expenses, the Claimants have objected to Canada's explanation of the specific categories attributable to the JRP process only by stating that "[a]ll of the costs incurred by the Investors in relation to the environmental assessment should be included in the calculation of historic costs."²³³ However, Mr. Buxton confirms that "all of the costs" include costs incurred "in relation to the environmental assessment and development of the Whites Point Quarry Project."²³⁴ Since developmental costs of the project do not relate to the JRP process, they are not recoverable by the Claimants.²³⁵

C. The Claimants Have Not Further Substantiated the Amount Bilcon of Nova Scotia Invested in the JRP Process

121. Despite clarifying that they "are not claiming the costs incurred or 'sunk costs' in developing the Whites Point Quarry Project,"²³⁶ the Claimants dispute in their Reply three issues related to the evidence required to substantiate historical costs. First, the Claimants disagree as to the type of evidence required. In its Counter-Memorial, Canada explained that possible evidence that could substantiate historical costs include receipts, contracts with evidence of payment, statements of account from vendors, or witness statements of third parties certifying payment.²³⁷ By contrast, the Claimants believe that invoices provide sufficient evidence when one of their employees confirms that payment was made.²³⁸ However, as the Claimants recognize, invoices are "evidence of services rendered and goods supplied."²³⁹ They are not evidence that payment was made for those services rendered or goods supplied. Nor is the testimony of an employee objective or independently verifiable evidence that payment was made, especially when there can be no dispute that documentary records of payments, if made, would necessarily exist. Accordingly, the Claimants have not provided further substantiation of their costs.

²³³ Buxton Reply Statement, ¶ 79.

²³⁴ Buxton Reply Statement, ¶ 70 (emphasis added).

²³⁵ Canada's Counter-Memorial on Damages, ¶ 103, fn 225; **RE-5**, Brattle Group Report I, fn 81.

²³⁶ Claimants' Reply Damages Memorial, ¶ 221.

²³⁷ Canada's Counter-Memorial on Damages, ¶ 104.

²³⁸ Claimants' Reply Damages Memorial, ¶ 226.

²³⁹ Claimants' Reply Damages Memorial, ¶ 225.

122. Second, the Claimants argue that Mr. Chodorow erred in his assessment of which expenses were substantiated. As Mr. Chodorow explains in his second Report, of the 2,947 expenses listed in his first Report, he identified evidence of payment for only 894 expenses.²⁴⁰ While the Claimants listed nine additional expenses in their Reply that they argue were substantiated,²⁴¹ Mr. Chodorow has made adjustments for only two categories of expense—one for invoices containing third-party confirmation of prior-made payment, and the other on the basis of Mr. Buxton's testimony with respect to payment of his own invoices.²⁴² In the remaining instances, the expenses either fell outside the time range considered, or the Claimants cite to unclear handwritten notes on the invoice.²⁴³ These do not constitute acceptable evidence of payment, and Mr. Chodorow has excluded them from his tally.

123. Finally, the Claimants take issue with the exclusion of expenses accompanied by evidence that [REDACTED].²⁴⁴ However, the evidence they cite actually supports Canada's point that Bilcon of Nova Scotia was not always [REDACTED]. In particular, Mr. Forestieri states that project expenses were paid [REDACTED] [REDACTED].²⁴⁵ Tellingly, Mr. Forestieri specifies neither [REDACTED] [REDACTED] in. The evidence on the record shows that in many instances [REDACTED] [REDACTED].²⁴⁶ The Claimants are not entitled to recover funds [REDACTED] other than the Claimants here and their enterprise, Bilcon of Nova Scotia.

²⁴⁰ RE-13, Brattle Group Report II, ¶ 37.

²⁴¹ Claimants' Reply Damages Memorial, ¶ 227.

²⁴² RE-13, Brattle Group Report II, ¶¶ 39-41.

²⁴³ RE-13, Brattle Group Report II, ¶¶ 38-39.

²⁴⁴ Claimants' Reply Damages Memorial, ¶ 228.

²⁴⁵ Reply Witness Statement of Joe Forestieri, August 21, 2017, ¶ 3.

²⁴⁶ See, e.g., C-1260, Bilcon of Nova Scotia Bi-Weekly Summary with Handwritten Notes, January 20, 2005, p. 1; C-1250, Bilcon of Nova Scotia Bi-Weekly Summary with Handwritten Notes, May 2, 2005, p. 1; C-1252, Bilcon of Nova Scotia Bi-Weekly Summary with Handwritten Notes, June 13, 2005, p. 1.

124. Apart from two appropriately identified categories of adjustment to Mr. Chodorow's analysis, the Claimants have failed to further substantiate the costs Bilcon of Nova Scotia incurred in the JRP process. Accordingly, after the corrections made by Mr. Chodorow, only [REDACTED] of Bilcon of Nova Scotia's alleged investments in the JRP process have been substantiated through evidence of payment.²⁴⁷

D. Conclusions

125. The Claimants have confirmed that they are not claiming the costs that Bilcon of Nova Scotia invested in the Whites Point JRP process. As such, they are not entitled to compensation for these costs. However, even if they were, the Claimants have only substantiated a third of the alleged [REDACTED] of costs incurred and paid by Bilcon of Nova Scotia or any of the Claimants directly. As such, the total amount that could possibly be awarded as damages to the Claimants is no more than [REDACTED]

VI. IN THE FURTHER ALTERNATIVE, THE CLAIMANTS ARE ONLY ENTITLED TO RECOVER THE AMOUNT BILCON OF NOVA SCOTIA INVESTED IN THE WHITES POINT PROJECT

126. For the reasons explained above and in Canada's Counter-Memorial, the appropriate approach to valuing the lost opportunity caused by the breach the majority identified should only consider the amounts Bilcon of Nova Scotia invested into the JRP process. However, should the Tribunal disagree, the appropriate approach to quantifying the lost opportunity is not a DCF analysis of lost profits, but an analysis of what Bilcon of Nova Scotia invested in the Whites Point project.

A. Using a DCF Model to Calculate Lost Profits is an Inappropriate Way to Value the Claimants' Lost Opportunity

127. Canada explained in its Counter-Memorial that claims for future lost profits and lost opportunity are commonly rejected at international law for being too remote and speculative, particularly in cases where the project has no legal right to exploit the project site, is not a going

²⁴⁷ RE-13, Brattle Group Report II, ¶ 41; Table 3.

concern, or does not have a sufficient history of dealings.²⁴⁸ The Claimants' primary response to the long line of authority supporting Canada's position is purportedly factual: that profits from the Whites Point project were a certainty.²⁴⁹ This is untrue. In an attempt to bolster their factual argument, the Claimants attempt to draw parallels between their case and the circumstances of a handful of cases, including *Gold Reserve*, *Crystallex*, *Rusoro*, and *Siag*.²⁵⁰ Neither the cases nor the facts support the Claimants' position.

1. Bilcon of Nova Scotia Did Not Have a Legal Right to Exploit the Whites Point Project

128. The Claimants argue for lost profit damages as though they had a vested right to develop their proposed quarry and marine terminal project.²⁵¹ As explained in detail above and in Canada's Counter-Memorial, they had no such right. Any valuation of damages based on the assumption that they did would be wholly inappropriate. Consistent with their vision of an inaccurate but-for world, the cases on which the Claimants rely were cases in which damages were awarded for the deprivation of vested rights.

129. For example, the Claimants point again to *Gold Reserve*, arguing that Gold Reserve received a large sum of compensation despite the absence of permits or a finalized mine plan.²⁵² The Claimants overlook that the tribunal in that case highlighted "the fact that the breach has resulted in the total deprivation of mining rights" in awarding its compensation.²⁵³ Unlike the Claimants here, Gold Reserve had vested mining rights. In fact, the only appropriate comparison between the circumstances of the Whites Point project and those at issue in the *Gold Reserve* case concerns an additional parcel of land adjacent to Gold Reserve's primary project in which it had no vested rights – the North Parcel. The tribunal explained that Gold Reserve "never

²⁴⁸ Canada's Counter-Memorial on Damages, ¶¶ 107-115.

²⁴⁹ Claimants' Reply Damages Memorial, ¶¶ 174-183.

²⁵⁰ Claimants' Reply Damages Memorial, ¶¶ 187-200.

²⁵¹ See, e.g., Claimants' Reply Damages Memorial, ¶ 183: ("Canada's position amounts to this: [...] you cannot now claim for the profit you would undoubtedly have realized had I not egregiously engaged in unfair and inequitable treatment that prevented you from establishing a track-record of profits by denying you the Quarry I was legally bound to approve") (emphasis added).

²⁵² Claimants' Reply Damages Memorial, ¶ 188.

²⁵³ CA-316, *Gold Reserve – Award*, ¶ 680.

acquired the *alfarjeta* concession it had requested” with respect to the North Parcel, and that there was no evidence that Gold Reserve had acquired a right of use for the parcel for infrastructure or services.²⁵⁴ As a result, the tribunal considered that Gold Reserve “had no rights to [the] (North Parcel)”,²⁵⁵ and excluded its value from the calculation of the fair market value of Gold Reserve’s investment (*i.e.*, its vested rights).²⁵⁶

130. The other cases the Claimants rely on are similarly unhelpful to their case because the interests for which compensation was paid were vested rights. In *Crystallex*, the tribunal recognized that Crystallex held several rights in relation to its mining projects, including “the right to ‘undertake all of the investments and works necessary to reactivate and execute in its totality the Mining Project [...]’”, and to “exploit and extract gold” in the same area.²⁵⁷ In *Rusoro*, the interests at issue were companies that “held a total of 58 mining concessions and contracts for the exploration, development and exploitation of gold and other minerals in the southeastern Bolivar State.”²⁵⁸ Some of the projects for which there were mining concessions and contracts were already in the production stage. Even in those circumstances, the tribunal rejected a DCF approach,²⁵⁹ explaining that “DCF is not a friars’ balm which cures all ailments.”²⁶⁰

131. Unlike in these cases where the claimants held legal rights, the Claimants here had no vested rights in the Whites Point project. As explained in Canada’s Counter-Memorial, above in Part III, and in the Expert Reports Canada has submitted, there was no certainty that absent the NAFTA breach identified by the majority, the Claimants would have obtained a vested right to

²⁵⁴ CA-316, *Gold Reserve – Award*, ¶ 488.

²⁵⁵ CA-316, *Gold Reserve – Award*, ¶ 492.

²⁵⁶ CA-316, *Gold Reserve – Award*, ¶ 682.

²⁵⁷ CA-317, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016 (“*Crystallex – Award*”), ¶ 664.

²⁵⁸ CA-345, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 (“*Rusoro – Award*”), ¶ 78.

²⁵⁹ CA-345, *Rusoro – Award*, ¶ 785.

²⁶⁰ CA-345, *Rusoro – Award*, ¶ 760.

exploit and extract the aggregate resources at Whites Point.²⁶¹ In the absence of such a vested right, and in light of the uncertainty surrounding the Claimants' ability to obtain such a right, a DCF method to calculate lost profits is too remote, uncertain, and speculative.

132. This conclusion is further supported by another case, *Caratube*, in which the claimant had vested rights in the form of a contract that granted it access to an oil field and its exploitation. The tribunal held that Caratube's rights had been expropriated when the contract was unlawfully terminated after Caratube had performed under the contract for five years.²⁶² However, again even in these circumstances, the tribunal rejected a DCF approach to calculating lost profits because the claimant had not made out its case with a sufficient degree of certainty.²⁶³ The tribunal explained that "the amount of damages must not exceed the damage actually incurred to avoid over-compensation,"²⁶⁴ and awarded Caratube only its sunk costs.²⁶⁵ The tribunal in *Copper Mesa* similarly rejected market-based valuations and awarded sunk costs for mining concessions that had been expropriated.²⁶⁶ The Tribunal here should follow suit and reject the DC approach to valuing damages.

2. Bilcon of Nova Scotia Was Not a Going Concern and Did Not Have a History of Dealings

133. The tribunal in *Caratube* recognized that "lost profits have to be sufficiently certain in order to be recovered."²⁶⁷ In this regard, it explained that "the standard of certainty is rather high to be considered sufficient and reaching that level of certainty is difficult, if not necessarily

²⁶¹ Canada's Counter-Memorial on Damages, ¶ 38; RE-9, Griffiths Report II, ¶ 5; RE-10, Blouin Report II, ¶ 1; RE-11, Expert Report of Robert G. Connelly, June 9, 2017, ¶ 16; RE-12, Rejoinder Report of Peter Geddes, November 6, 2017, ¶ 10; RE-17, Cromwell Report, ¶ 7.

²⁶² RA-157, *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award, 27 September 2017 ("*Caratube – Award*"), ¶ 1097.

²⁶³ RA-157, *Caratube – Award*, ¶¶ 1105-1118.

²⁶⁴ RA-157, *Caratube – Award*, ¶ 1085.

²⁶⁵ RA-157, *Caratube – Award*, ¶ 1164.

²⁶⁶ RA-158, *Copper Mesa Mining Corporation v. Republic of Ecuador* (UNCITRAL) Award, 15 March 2016 ("*Copper Mesa – Award*"), ¶¶ 7.27, 11.4.

²⁶⁷ RA-157, *Caratube – Award*, ¶ 1102.

impossible, in the absence of a going concern with a proven record of profitability.”²⁶⁸ The tribunal in *Copper Mesa* similarly recognized the “extreme caution” that is necessary in assessing compensation for early stage development projects that are not going concerns.²⁶⁹ In that case, the tribunal refused to award damages on the basis of various speculative fair-market valuation methods because they were “too uncertain, subjective and dependent upon contingencies”, particularly “given that the Claimant’s concessions remained in an early exploratory stage with no actual mining activities, still less any track record as an actual mining business; and, particularly as regards the Junin concessions, that the Claimant’s chances of moving beyond an exploratory stage were, by December 2006, slender.”²⁷⁰ The Claimants’ contention that they have proven, “beyond any doubt, the profitability of the Whites Point Quarry,”²⁷¹ is incorrect. The Whites Point project was not a going concern, had no proven track record of profitability, and was never even constructed.

134. The Claimants argue that the Whites Point project was “not a start-up.” Instead, they claim that it was a “division of the Investors’ fully established, integrated, and profitable, aggregate enterprise.”²⁷² While the Claimants may have interests in other corporations or projects with a history of operations or a record of profitability, those corporations are not substitutes for Bilcon of Nova Scotia or the Whites Point project. As recognized by the tribunal in *Rusoro*, a case upon which the Claimants rely, it is the enterprise at issue whose profitability is of interest. That tribunal noted that DCF works in cases where “all, or at least a significant part” of a number of criteria are met, including that “the enterprise has an established historical record of financial performance.”²⁷³ Bilcon of Nova Scotia did not have such a record. Simply because investors have other established, profitable businesses does not prove with certainty that a new enterprise that they establish will be equally profitable. In the real world, as opposed to the one

²⁶⁸ **RA-157**, *Caratube – Award*, ¶ 1102.

²⁶⁹ **RA-158**, *Copper Mesa – Award*, ¶ 7.24.

²⁷⁰ **RA-158**, *Copper Mesa – Award*, ¶ 7.24.

²⁷¹ Claimants’ Reply Damages Memorial, ¶ 176.

²⁷² Claimants’ Reply Damages Memorial, ¶ 177.

²⁷³ **CA-345**, *Rusoro – Award*, ¶ 759 (emphasis added).

imagined by the Claimants, even good investors and smart business people do not always succeed.

135. The *Rusoro* tribunal further identified as a criterion for the appropriateness of a DCF valuation method that “there are reliable projections of [the enterprise’s] future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company’s officers and verified by an impartial expert.”²⁷⁴ The tribunal in *Crystallex*, another case the Claimants rely on, agreed with the importance of a contemporaneous business plan, concluding that “[a]s noted by the tribunal in *ADC*, a business plan ‘constitutes the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows’.”²⁷⁵

136. The Claimants have not provided a contemporaneous detailed business plan, a statement of expected cash flows, or any evidence that an impartial expert verified any plan that may have existed. In particular, in the document production phase of the damages stage of this arbitration, Canada requested detailed business plans, forecasts, and cash flows from the Claimants that they had developed at the time for the project.²⁷⁶ The Claimants produced no such detailed plans or forecasts in response to this request. The only conclusion is that, because of the project’s early stage of development, the Claimants had not undertaken such plans. This conclusion is further confirmed by the Claimants’ request that the Tribunal compute lost profits “based on the Investors’ estimates and projections in this Arbitration proceeding.”²⁷⁷

137. Indeed, the primary information on the record to inform the Tribunal about the Claimants’ business expectations for the project at the time of the breach is contained in the Environmental Impact Statement (“EIS”). However, as the Claimants confirm in their Reply, the EIS was a conceptual document, “drafted at a very early stage of a project.”²⁷⁸ Mr. Buxton

²⁷⁴ CA-345, *Rusoro – Award*, ¶ 759.

²⁷⁵ CA-317, *Crystallex – Award*, ¶ 878.

²⁷⁶ R-720, Document Production Request of the Government of Canada, February 10, 2016, Document Requests Number 7 and 8.

²⁷⁷ Claimants’ Reply Damages Memorial, ¶ 204.

²⁷⁸ Buxton Reply Statement, ¶ 20.

explains that “[s]pecific business-related facts and dollar amounts referred to in an EIS, and business plans drafted at the early stages of the process were, by necessity, and as is usual, approximations made at the early stage of the project.”²⁷⁹ The Claimants even go so far now as to say that some of the assertions they made in their EIS do not make economic sense. For example, they stated in their EIS that they would make shipments of 40,000 tons per week of aggregates on a ship that could handle between 40,000 and 70,000 tons.²⁸⁰ In his Reply Witness Statement, Mr. Buxton states that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]²⁸¹

138. The project’s early stage of development is further evidenced by the apparent disconnect between the Claimants’ production and sales plans. While Bilcon of Nova Scotia indicated around the time of the EIS that it intended to sell various sizes of aggregates, there are no contemporaneous indications of the ratios of each size they planned to sell. In their arbitration materials, the Claimants have made assertions about the volumes of sales that Bilcon of Nova Scotia would have made of the various products the quarry would produce. However, as SCMA explains, even using the quarry design as updated for the purposes of this arbitration, the Claimants’ plan [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]²⁸³ The Claimants make no effort to match their specific sales volumes to their specific production volumes. SCMA has carried out this analysis,²⁸⁴ which shows that the Claimants had not – and have still not –

²⁷⁹ Buxton Reply Statement, ¶ 23.

²⁸⁰ **R-580**, Whites Point Quarry & Marine Terminal, Environmental Impact Statement, Volume VII (Mar. 31, 2006), Chapter 11-Environmental Management, p. 20; **R-581**, Whites Point Quarry & Marine Terminal, Revised Project Description (Nov. 1, 2006), p. 137.

²⁸¹ Buxton Reply Statement, ¶ 37. See also ¶¶ 39, 40.

²⁸² **RE-16**, Rejoinder Expert Report of SC Market Analytics, November 6, 2017 (“SCMA Report II”), ¶¶ 43-44.

²⁸³ **RE-16**, SCMA Report II, ¶ 45.

²⁸⁴ **RE-16**, SCMA Report II, ¶¶ 40-46.

developed a workable quarry project or business plan and that as a result, the DCF they present, which relies on these kinds of inputs, is inherently speculative, infeasible, and unreliable.

139. The early stage of development of the project, and the absence of detailed business plans or forecasts of revenues that existed at the time of the breach, confirm that the Whites Point project was not a going concern, and did not have a historical record of financial performance. These attributes demand “extreme caution” in approaching valuation of lost profit damages, and make a DCF method wholly inappropriate in this case.

140. Moreover, even if those reasons were not sufficient in and of themselves to reject the use of a DCF in this case, other factors that tribunals have considered in determining whether a DCF valuation methodology is appropriate are not present here. For example, the tribunal in *Caratube* explained that, in the absence of a going concern, “the [*Micula*] tribunal indicated that it might accept as evidence, to be assessed in light of all the factual circumstances of the case, the existence of a long-term contract or concession that guaranteed a certain level of profits or a track record of similar sales.”²⁸⁵

141. However, even in some instances where the claimant had a long-term contract that guaranteed profits, like in *Windstream*, tribunals have rejected a DCF method for computing lost profit damages.²⁸⁶ This was also the approach adopted in the *Siag* case on which the Claimants rely. While the Claimants present this as a case supporting awarding lost profit damages for a project at an early stage of development, the tribunal specifically rejected a DCF method of valuing the claimants’ damages, even where they had property interests that were

²⁸⁵ **RA-157**, *Caratube – Award*, ¶ 1100, summarizing **CA-319**, *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20) Award, 11 December 2013, ¶ 1010: (“In the Tribunal’s view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability. But it places the emphasis on the word ‘usually.’ Depending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but for the international wrong. This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits or where, as here, there is a track record of similar sales. This must be assessed on a case by case basis, in light of all the factual circumstances of the case.”)

²⁸⁶ Canada’s Counter-Memorial on Damages, ¶ 111.

expropriated.²⁸⁷ The tribunal in *Siag* was concerned about the uncertainties surrounding a DCF methodology, explaining that the uncertainty of projecting profits for a business opportunity that had not come to fruition and the number of “moving parts” involved in a DCF calculation “reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for ‘young’ businesses lacking a long track record of established trading.”²⁸⁸ The tribunal further noted that “reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all.”²⁸⁹

142. In this case, not only did Bilcon of Nova Scotia not have any trading history, it also did not have [REDACTED]

[REDACTED]. While the Claimants assert in this arbitration that they would sell their aggregate from the Whites Point project [REDACTED]

[REDACTED]. Moreover, as explained by Mr. Chodorow, there is a significant degree of doubt, based on historical evidence, that [REDACTED]

[REDACTED].²⁹⁰

143. In summary, Bilcon of Nova Scotia did not have a right to exploit the Whites Point project, did not have a history of business dealings, and had not built its project. To the contrary, the project was at a very early stage of development, and lacked verifiable contemporaneous detailed forecasts of potential revenues. As the *Caratube* tribunal reasoned, “[a]rbitrators, unlike businessmen, cannot reason as risk-taking investors and include speculative and uncertain profits in their awards.”²⁹¹ This admonition resonates all the more strongly in a case when the

²⁸⁷ CA-335, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15) Award, 1 June 2009 (“*Siag – Award*”), ¶ 510 (identifying the Claimants’ ownership rights in the Property at issue); ¶ 570 (concluding that DCF is an insufficiently certain method to calculate damages in that case).

²⁸⁸ CA-335, *Siag – Award*, ¶ 570; see also ¶¶ 567-569.

²⁸⁹ CA-335, *Siag – Award*, ¶ 570.

²⁹⁰ RE-13, Brattle Group Report II, ¶¶ 84-86.

²⁹¹ RA-157, *Caratube – Award*, ¶ 1018.

businessmen themselves did not have detailed verifiable business plans and forecasts. The Tribunal should reject a DCF analysis of lost profits in this case.

B. The Amount Bilcon of Nova Scotia Invested in the Project Reflects the Value of the Lost Opportunity More Appropriately Than a DCF

144. Canada explained in its Counter-Memorial that a more appropriate method than a DCF to value the Claimants' lost opportunity to have their proposed project fairly and properly considered in accordance with Canadian EA laws is the amount Bilcon of Nova Scotia expended on the Whites Point project.²⁹² Since the Claimants are not claiming this amount, the Tribunal has no choice but to award them no damages.

145. If the Tribunal was to disagree, then only those investment amounts the Claimants have substantiated with evidence of payment by Bilcon of Nova Scotia or its shareholders could possibly be awarded as damages.²⁹³ This finding is consistent with the *Copper Mesa* tribunal's finding that the "most reliable, objective and fair method in this case for valuing the Claimant's investments ... is to take the Claimant's proven expenditures incurred in relation to its Junin and Chaucha concessions."²⁹⁴ As with Canada's approach to JRP process costs, the Claimants do not object to Canada's use of their data in exhibits C-1169 through C-1318 to compute historical costs. As explained in Part V(C) above, with the exception of two categories of adjustments reflected in Mr. Chodorow's computation, the Claimants have also failed to further substantiate Bilcon of Nova Scotia's historical investment costs that were paid for by the Claimants in this arbitration.

146. Accordingly, the updated substantiated amount of Bilcon of Nova Scotia's investment in the Whites Point project is [REDACTED].²⁹⁵

²⁹² Canada's Counter-Memorial on Damages, ¶¶ 116-123.

²⁹³ Canada's Counter-Memorial on Damages, ¶¶ 120-123.

²⁹⁴ **RA-158**, *Copper Mesa – Award*, ¶ 7.27 (emphasis added).

²⁹⁵ **RE-13**, Brattle Group Report II, ¶ 41; Table 2.

C. Conclusions

147. If the Tribunal determines that the appropriate approach to valuing the opportunity lost by the Claimants involves considering the entire value of the project, then the only appropriate valuation methodology is to assess established and verifiable investment costs. A DCF analysis of lost profits is too speculative in this case, in light of the early stage of development of the project, the absence of a legal right to exploit the quarry site, the absence of any long term contract or concession that would guarantee a certain level of revenues, the absence of a record of similar sales, the absence of a historical record of financial performance for Bilcon of Nova Scotia, and the absence of any contemporaneous and verifiable forecasts of potential profits from the Whites Point project. The Claimants' exhibit evidence of their expenditures shows at most invoiced expenses of Bilcon of Nova Scotia of [REDACTED]. They have substantiated with evidence of payment only half of those invoiced expenses, and as such, they should be able to recover no more than [REDACTED] in damages should the Tribunal opt for this approach to valuation.

VII. IN THE FINAL ALTERNATIVE, THE CLAIMANTS' CALCULATION OF THE ALLEGED LOST PROFITS OF THE WHITES POINT PROJECT MUST BE REJECTED

148. For all of the reasons set out above and in Canada's Counter-Memorial, the Tribunal should reject the Claimants' request for damages based on the alleged lost profits of the Whites Point project, which had no right to development, had no permits, and was not in operation. However, should the Tribunal find that the Whites Point project's potential profits form some basis for measuring the Claimants' loss of an opportunity to have their project considered in accordance with Canadian law, it should still reject the Claimants' DCF model. It is rife with flaws that result in a gross overvaluation of the project's potential profits. These flaws are set out in detail in the Expert Reports of Mr. Darrell Chodorow of The Brattle Group, Dr. Sterling of Marsoft, and Messrs. Sutherland and Chereb of SCMA.

A. The Claimants Continue to Ignore Basic Project Development and Permitting Risks

149. Canada explained in its Counter-Memorial that the Claimants inappropriately ignored basic project development risks and permitting risks in their DCF model. In their Reply, the Claimants simply assert that “there is no risk” with respect to the Whites Point project.²⁹⁶ The Claimants are wrong and their approach to valuing the lost profits of the project should be rejected on this basis alone. At a basic minimum, any consideration of the future lost profits of the project should be discounted heavily to account for the market, project development, and permitting risks described in this section.

1. The Market Was Uncertain

150. Mr. Chodorow explained in his first Report that there was significant uncertainty in the market at the end of 2007.²⁹⁷ In particular, construction spending in the United States was in decline, shipments of aggregate had dropped, and the last quarter of 2007 was the seventh sequential downturn in aggregates demand.²⁹⁸ The uncertainty in the market is further confirmed by the fact that the Belleoram project in Newfoundland was paused, after having been approved, on account of market conditions.²⁹⁹ The Claimants have not contested these facts. However, their analysis continues to fail to account for them, and for that reason, is inherently unreliable.

2. The Project Was at an Early Stage of Development

151. As discussed above, the Claimants acknowledge that the project was at an early stage of development at the time of the breach. They argue that the “EIS is prepared at a very early stage of a project and is intended to be conceptual, and focused on the environmental effects of a project. It is not, nor is it intended to be focused on the specifics of the project’s business model or design.”³⁰⁰ The Claimants further acknowledge that such specific business models or designs did not exist at the time of the breach by asking the Tribunal to value the project “based on the

²⁹⁶ Claimants’ Reply Damages Memorial, ¶ 197.

²⁹⁷ **RE-5**, Brattle Group Report I, ¶ 160.

²⁹⁸ Canada’s Counter-Memorial on Damages, ¶ 128; **RE-5**, Brattle Group Report I, ¶ 160.

²⁹⁹ Canada’s Counter-Memorial on Damages, ¶ 129.

³⁰⁰ Claimants’ Reply Damages Memorial, ¶ 40.

Investors' estimates and projections in this Arbitration proceeding."³⁰¹ Inherent in the Claimants' approach is an acknowledgment that the plans they had at the time were either not fully formed, or unreliable.

152. Canada pointed out in its Counter-Memorial that the Whites Point project had not been subject to the kind of feasibility or pre-feasibility study common in the industry to establish the economic viability of a site's reserves.³⁰² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For example, Mr. Lizak recognizes that an important element of a feasibility study is an [REDACTED].³⁰⁴ However, in response to Canada's document requests for business plans in this arbitration,³⁰⁵ the only document the Claimants produced that was not a comment on its EIS was an April 2004 Business Plan prepared by Clayton Concrete.³⁰⁶ As Mr. Chodorow explains, this plan "contained a pro-forma income statement for only one year and was prepared approximately two years before the EIS submission date."³⁰⁷ As such, Mr. Chodorow appropriately does not consider it to be an economic model consistent with a feasibility or pre-feasibility study, which would "typically evaluate the present value or internal rate of return associated with a project."³⁰⁸

³⁰¹ Claimants' Reply Damages Memorial, ¶ 204.

³⁰² Canada's Counter-Memorial on Damages, ¶ 131; **RE-5**, Brattle Group Report I, ¶ 118.

³⁰³ Claimants' Reply Damages Memorial, ¶ 216.

³⁰⁴ Expert Reply Report of Mineral Valuation & Capital, Inc. (John Lizak), August 8, 2017 ("Lizak Reply Report"), p. 29.

³⁰⁵ See, e.g., **R-720**, Document Production Request of the Government of Canada, February 10, 2016, Document Request Number 5.

³⁰⁶ **R-717**, Business Plan for Whites Point Quarry, Prepared by Clayton Concrete (Apr. 2004).

³⁰⁷ **RE-13**, Brattle Group Report II, ¶ 93.

³⁰⁸ **RE-13**, Brattle Group Report II, ¶ 93.

3. The Claimants Did Not Possess a Right to Develop the Project

153. Canada explained in its Counter-Memorial that the Claimants' assumption that the Whites Point project would without a doubt have received all necessary approvals and permits was inconsistent with the majority's clear pronouncement that it was not determining what the outcome of the EA process should have been.³⁰⁹ The Claimants' failure to account for any uncertainty in the approval of its project resulted in an overvaluation.³¹⁰

154. The Claimants have not remedied this significant defect in their Reply. In fact, the Claimants go so far as to claim that the government decision-makers were compelled to approve the project in the but-for world.³¹¹ As explained in Part III, above, the evidence on the record here shows that is not the case. To the contrary, in the absence of the NAFTA breach, there remained significant uncertainty surrounding the project's approvals and permits. In fact, there was a reasonable possibility that either, and perhaps both, of the federal and provincial governments would have rejected the project.

155. The Claimants' continued failure to account for this risk results in an implausible analysis and in a continued overvaluation of the project. As Canada stated in its Counter-Memorial, a comparison of market indicators illustrates the significant impact an appropriate discount for permitting and regulatory risk has on the project's value.³¹² The Claimants have not meaningfully responded to these comparisons, and they have certainly not contested the notion that fully permitted projects are worth more than projects without permits. As is further explained below, these market indicators of value continue to be telling evidence of the implausibility of the Claimants' valuation of the project's potential lost profits.

156. First, with respect to Bilcon of Nova Scotia's 2004 acquisition of Nova Stone's █████ share of the opportunity to participate in the permitting and development of the project after the

³⁰⁹ Canada's Counter-Memorial on Damages, ¶¶ 133-134.

³¹⁰ Canada's Counter-Memorial on Damages, ¶¶ 134-137.

³¹¹ Claimants' Reply Damages Memorial, ¶¶ 287, 294-299.

³¹² Canada's Counter-Memorial on Damages, ¶¶ 134-137.

project was referred to a JRP,³¹³ the Claimants assert that this transaction does not represent a reliable indication of the value of the project at that time because Mr. Lowe of Nova Stone [REDACTED] [REDACTED]³¹⁴ However, there is no evidence, or reason to believe, that Nova Stone was compelled to sell its interest to Bilcon of Nova Scotia, or that the implied value of the transaction of [REDACTED] ([REDACTED] indexed to the 2007 valuation date), was anything but a market indicator of the value of the opportunity to develop the project that reflected the regulatory risk the project faced.³¹⁵

157. Similarly, with respect to [REDACTED] offer to purchase [REDACTED] Whites Point project [REDACTED] for [REDACTED], the Claimants' response is that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]³¹⁶ While it may be the case that the Claimants then, as now, assumed that the project faced no regulatory risk, the fact that [REDACTED]

[REDACTED]
[REDACTED]
The Claimants' response to this evidence confirms that they have not accounted for any regulatory risk, and illustrates their overvaluation of the project as a result.

B. The Claimants Incorrectly Value the Project's Potential Profits as of the Date of the Damages Award Instead of the Breach Date

158. The Claimants continue to incorrectly value the project's potential profits as of a projected date of the damages award.³¹⁷ The Claimants assert that such a valuation date is consistent with "full reparation", because it recognizes that, "but for Canada's breaches, the Whites Point Quarry would have proceeded, and the Investors would have realized the profits

³¹³ See Canada's Counter-Memorial on Damages, ¶ 135.

³¹⁴ Claimants' Reply Damages Memorial, ¶ 209; Reply Witness Statement of William Richard Clayton, August 21, 2017 ("Clayton Reply Statement"), ¶ 7.

³¹⁵ **RE-13**, Brattle Group Report II, ¶¶ 132-134; **RE-5**, Brattle Group Report I, ¶ 182, Figure 14.

³¹⁶ Claimants' Reply Damages Memorial, ¶ 210; Clayton Reply Statement, ¶ 9.

³¹⁷ Claimants' Reply Damages Memorial, ¶ 29.

generated by the Quarry for the 50 year life of the Quarry,”³¹⁸ and because it allows the Tribunal to take into account actual market data and to avoid “potential hindsight issues.”³¹⁹ The Claimants are wrong as both a matter of fact and law.

159. Selecting a valuation date different than the date of the breach does not put the Claimants back in the position that they would have been had the breach not occurred. The only appropriate valuation date for damages is the date immediately prior to the breach. As Canada explained in its Counter-Memorial, this is the approach that is more consistently followed by numerous international arbitral tribunals.³²⁰ It should be the approach adopted by the Tribunal in this case should the Tribunal decide (and it should not) to consider the potential future profits of Bilcon of Nova Scotia.

160. The cases identified by the Claimants in their Reply should not influence the Tribunal to decide otherwise. In support of their arguments, the Claimants point to a handful of non-NAFTA cases in which tribunals have awarded compensation on the basis of the award date, rather than the date of the breach, including the *Yukos* award that has been set aside. However, even if one were to accept, for the sake of argument, that these cases were appropriately decided, none of the cases provides support for an award-date valuation date in the particular circumstances of this case. For example, in *ADC* and *Von Pezold*, both unlawful expropriation cases, the tribunals recognized that they were faced with “one of those rare cases” where the value of the

³¹⁸ Claimants' Reply Damages Memorial, ¶ 31.

³¹⁹ Claimants' Reply Damages Memorial, ¶¶ 29-30; Reply Expert Report of FTI Consulting (Howard Rosen), August 23, 2017 (“Rosen Reply Report”), ¶ 3.8.

³²⁰ See, e.g., **CA-321**, *Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4) Award, 16 June 2010 ¶¶ 12-43-12-45 (valuing compensation as of the breach date); **RA-159**, *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* (ICSID Case No. ARB/05/06) Award, 22 April 2009, ¶ 119: (“It is enough for the Tribunal to note that, under the Act, the Claimants have in fact lost the possession of their property in 2001. The Respondent is responsible for such a dispossession. The damage resulting from appropriation of these lands must be evaluated as of the date of entry into force of the Act, i.e. 5 June 2001”); **RA-6**, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶¶ 417-418; **RA-160**, *Compañía Del Desarrollo De Santa Elena, S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000, ¶¶ 78-84. See ¶ 84: (“If the relevant date were the date of this Award, then the Tribunal would have to pay regard to the factors that would today be present to the mind of a potential purchaser.”)

expropriated asset had increased after the expropriation.³²¹ In both cases, as in *El Paso*,³²² the claimants had legal entitlements to returns prior to the treaty breach. Similarly, in none of the cases relied upon by the Claimants was an early development project at issue. In particular, in *ADC*, the claimant held interests in an airport terminal that it had constructed and in the operation of which it was actively involved.³²³ In *El Paso*, the claimant had going concern interests in electricity and oil companies.³²⁴ In *Von Pezold*, the claimant held property rights in three estates with a variety of going concern economic activities, such as sawmills and farming.³²⁵ In contrast to all of these cases, the Claimants' asset is Bilcon of Nova Scotia, which neither currently holds, nor has ever held, a right to build and to operate the Whites Point project as articulated today. The Claimants' claimed entitlement to compensation here "based on the likely actual development of the Whites Point Quarry,"³²⁶ is built on project details developed specifically for the purposes of this arbitration. The Claimants have provided no evidence to establish that theirs is "one of those rare cases" in which events that occurred after the breach could possibly be taken into account.

161. Finally, contrary to what the Claimants argue, not only would choosing the projected award date as the valuation date be legally inappropriate, it would offer none of the purported advantages The Claimants identify. As Mr. Chodorow explains, offering claimants the ability to choose between the "better" of two valuation dates actually enhances the problem of hindsight by allowing claimants to select, after-the-fact, which valuation date best resolves the risk they faced.³²⁷ The Claimants' approach involves no less speculation and forecasting into the future.³²⁸

³²¹ **CA-323**, *ADC Affiliate Ltd. v. Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 27 September 2006 ("ADC – Award"), ¶¶ 496-497; **CA-332**, *Von Pezold et al. v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) Award, 28 July 2015 ("Von Pezold – Award"), ¶ 763.

³²² **CA-330**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011 ("El Paso Energy – Award"), ¶ 712.

³²³ **CA-323**, *ADC – Award*, ¶¶ 164-170.

³²⁴ **CA-330**, *El Paso Energy – Award*, ¶¶ 7-14.

³²⁵ **CA-332**, *Von Pezold – Award*, ¶¶ 118-139.

³²⁶ Claimants' Reply Damages Memorial, ¶ 41 (emphasis added).

³²⁷ **RE-13**, Brattle Group Report II, ¶ 166.

³²⁸ **RE-13**, Brattle Group Report II, ¶ 167.

In fact, it allows the Claimants to develop a business and technical plan for the purposes of calculating damages, even though that business and technical plan was not fully developed at the time of the breach, and in many instances conflicts with Bilcon of Nova Scotia's articulated expectations at the time of the breach. It comes as no surprise that the assumptions used today in this arbitration result in a project with higher reserves, higher sales levels, and lower shipping costs than the actual forecast by the Claimants in the ordinary course of their business.³²⁹ The Claimants ignore the fact that they have developed a hypothetical business plan between the breach and today for damages purposes and have the audacity to argue that if the "quantum of damages is higher at the time of the Award, it is only because the Investors are being fully compensated in accordance with the *Chorzów Factory* standard."³³⁰ Such a result cannot reasonably form part of the principle of "full reparation". The Claimants' argument that this Tribunal should value their loss as of the projected damages award date should be rejected.

C. The Claimants Continue to Overlook the Impact of Competition on Future Prices

162. Canada explained in its Counter-Memorial that the Claimants' valuation model failed to account for, or analyze at all, the impact of competition on the prices that the Whites Point project could obtain for its aggregate products in New York.³³¹ The Claimants' primary response is to contend that no other quarry would present competition to the Whites Point project because [REDACTED].³³² As SCMA explains in its Rejoinder Report, this is not the case.³³³

163. Implicit in the Claimants' argument is an assumption that [REDACTED].
[REDACTED].
The Claimants overlook the fact that NYSS was owned at all relevant times by a joint venture between a Clayton group company and a third-party company, Great Lakes Dredge and Dock

³²⁹ RE-13, Brattle Group Report II, ¶¶ 103-108; see also Table 4.

³³⁰ Claimants' Reply Damages Memorial, ¶ 39.

³³¹ Canada's Counter-Memorial on Damages, ¶¶ 144-146.

³³² Claimants' Reply Damages Memorial, ¶¶ 49-63.

³³³ RE-16, SCMA Report II, ¶¶ 6-9.

Company.³³⁴ As Mr. Chodorow explains, so long as there was a third-party interest in NYSS, it cannot reasonably be assumed that [REDACTED]

[REDACTED].³³⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]³³⁶ There is no reason to believe [REDACTED]

164. The Claimants recognize that an increase in aggregates supply on the market might have significant competitive impacts, suggesting that the introduction of Whites Point aggregate might have changed the economics of entire projects. For example, the Claimants' expert Mr. Lizak suggests that "Vulcan may not have pursued the Black Point project had Canada approved Bilcon's Whites Point quarry venture."³³⁷ However, despite the apparent recognition in principle that additional supply will have some economic effect, the Claimants continue to incorrectly assume in their damages calculation that the addition of the Whites Point project's supply would have no impact on price. SCMA has conducted this analysis, and maintains that the addition of Whites Point's aggregates into the New York City market would [REDACTED]

[REDACTED].³³⁸ In sum, the Claimants' failure to account for the effects of competition leads them to overstate the prices Whites Point would receive for its aggregates, and therefore to overstate the value of the project.

D. The Claimants Understate the Operating and Capital Costs of the Project

165. Canada explained in its Counter-Memorial that the Claimants' DCF model also incorporated a number of understated costs relating to the operation of the Whites Point project. In particular, they understated the cost to ship their aggregates to New York and New Jersey, and

³³⁴ Witness Statement of Joe Forestieri, December 13, 2016, ¶¶ 14-17.
³³⁵ RE-13, Brattle Group Report II, ¶ 61.
³³⁶ C-1050, Amboy Aggregates Joint Venture Agreement (Jan. 24, 1989), s. 4.2.
³³⁷ Lizak Reply Report, p. 18.
³³⁸ RE-8, Expert Report of SC Market Analytics, June 9, 2017, ¶ 80; RE-16, SCMA Report II, ¶ 53.

understated labour costs based on [REDACTED]
[REDACTED] While the Claimants have submitted additional information with their Reply, they continue to understate the cost of operating the Whites Point project.

1. Freight Costs

166. In his first Report, Canada's shipping expert, Dr. Sterling, corrected errors made by the Claimants' Experts in their estimation of shipping rates. In particular, Dr. Sterling corrected errors with respect to [REDACTED] in Mr. Morrison's Report. The Claimants' responses to these critiques in their Reply, which Dr. Sterling addresses in his second Report,³³⁹ are unconvincing.

[REDACTED] In particular, in his second Report, Mr. Morrison points to [REDACTED]
[REDACTED]
[REDACTED]³⁴⁰ He points to [REDACTED]
[REDACTED]
[REDACTED]³⁴¹ Mr. Morrison ignores [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

168. Further, in putting together his [REDACTED] to estimate shipping costs in a reliable and verifiable way over the life of the Whites Point project, Dr. Sterling initially used the average vessel speed input of [REDACTED] relied on by Mr. Morrison.³⁴⁴ However, in reviewing the

³³⁹ RE-15, Rejoinder Expert Report of Dr. Arlie G. Sterling, Marsoft Inc., November 6, 2017 ("Marsoft Report II").
³⁴⁰ Reply Expert Report of Tamarack Resources (Wayne Morrison), August 18, 2017 ("Morrison Reply Report"), ¶¶ 4-14.
³⁴¹ Morrison Reply Report, ¶¶ 4-14, Appendices A and B.
³⁴² Rosen Reply Report, ¶¶ 5.20, 5.27; Witness Statement of Tom Dooley, December 9, 2016, ¶¶ 97, 83.
³⁴³ RE-15, Marsoft Report II, ¶ 16.
³⁴⁴ RE-15, Marsoft Report II, ¶ 48.

historical speeds of the [REDACTED], the vessel on which the Claimants base their shipping model, Dr. Sterling has discovered that the ship has an average historical speed of [REDACTED].³⁴⁵ Adjusting his model to reflect this vessel speed has an upward impact on freight rates. Moreover, even this assumption of [REDACTED] is potentially generous. For example, as Mr. McLean explains, speed restrictions have recently been introduced in the Gulf of St. Lawrence to help protect the North Atlantic right whale.³⁴⁶ A similar restriction in vessel speed in the Bay of Fundy could increase the duration of a ship's journey, thereby increasing freight costs, one of the project's largest operating costs.³⁴⁷

2. Labour and Other Operating Costs

169. Canada explained in its Counter-Memorial that the Claimants had understated their labour and other operating costs because [REDACTED].³⁴⁸ The Claimants have responded with [REDACTED] to support their claim that [REDACTED].³⁴⁹ As SCMA's Rejoinder Report explains in detail, even if the Tribunal were to consider this brand new model, the Claimants still [REDACTED]. In particular, the Claimants cannot [REDACTED].³⁵⁰ Even on their own new model, in order to [REDACTED]. Yet Mr. Rosen has [REDACTED]

³⁴⁵ RE-15, Marsoft Report II, ¶¶ 49-51.

³⁴⁶ RW-1, McLean Statement, ¶ 24.

³⁴⁷ Canada's Counter-Memorial on Damages, ¶ 147, citing to R-279, *Digby Neck/Islands Economic Profile*, Gardner Pinfold Report (Feb. 2006), p. 24.

³⁴⁸ Canada's Counter-Memorial on Damages, ¶ 151.

³⁴⁹ Claimants' Reply Damages Memorial, ¶¶ 98-118.

³⁵⁰ RE-16, SCMA Report II, ¶¶ 40-43.

██████████. Accordingly, since SCMA's model allowed ██████████ ██████████³⁵¹

3. Capital and Maintenance Costs

170. Based on its ██████████ conclusions, SCMA maintains that the additional capital expenditures that it identified in its first Report are necessary. With respect to maintenance costs, SCMA has determined, based on the Reply Expert Report of SNC-Lavalin (Bill Collins), that the

██████████ ██████████ have been adequately accounted for. It has updated its maintenance cost projections to that effect.³⁵²

E. The Claimants' Excessive Valuation of the Whites Point Project is Confirmed by Market Evidence

171. Mr. Chodorow explains that valuation practitioners typically use multiple valuation methods where possible to develop a more reliable valuation.³⁵³ In particular, he explains that consideration of other valuation methods is "particularly important given that Whites Point was never constructed, lacks feasibility and pre-feasibility studies, and that there was material uncertainty about the Project's potential operating characteristics and profitability."³⁵⁴ The tribunal in *Rusoro*, which the Claimants point to as support for the use of a DCF, recognized DCF valuations "must in any case be subjected to a 'sanity check' against other valuation methodologies."³⁵⁵ The Claimants have provided no such "sanity check." As Mr. Chodorow explains, at least two different sanity checks confirm that the Claimants' DCF valuation results are excessive.

³⁵¹ RE-16, SCMA Report II, ¶ 46.

³⁵² RE-16, SCMA Report II, ¶ 50.

³⁵³ RE-5, Brattle Group Report I, ¶ 92; RE-13, Brattle Group Report II, ¶ 117.

³⁵⁴ RE-13, Brattle Group Report II, ¶ 117.

³⁵⁵ CA-345, *Rusoro – Award*, ¶ 760 (explaining that this was the case because "[s]mall adjustments in the estimation can yield significant divergences in results.")

1. The Claimants’ Analysis is Excessive Compared to Market Indications of the Whites Point Project’s Value

172. First, comparing three historical transactions and offers related to the Whites Point project to the Claimants’ current valuation shows that the Claimants’ valuation is exponentially higher than their past behaviour and other market indicators, indexed for changes in market conditions to Mr. Rosen’s valuation date, would suggest:

Figure 1: Market Indicators of Whites Point vs. Updated Rosen Valuation³⁵⁶



173. While the Claimants argue that these transactions do not reflect the value of the Whites Point project to them,³⁵⁷ Mr. Chodorow explains that there is “no basis to conclude that the profits of Whites Point would have been higher if the Project were owned by BNS rather than a

³⁵⁶ RE-13, Brattle Group Report II, ¶ 140, Figure 8.

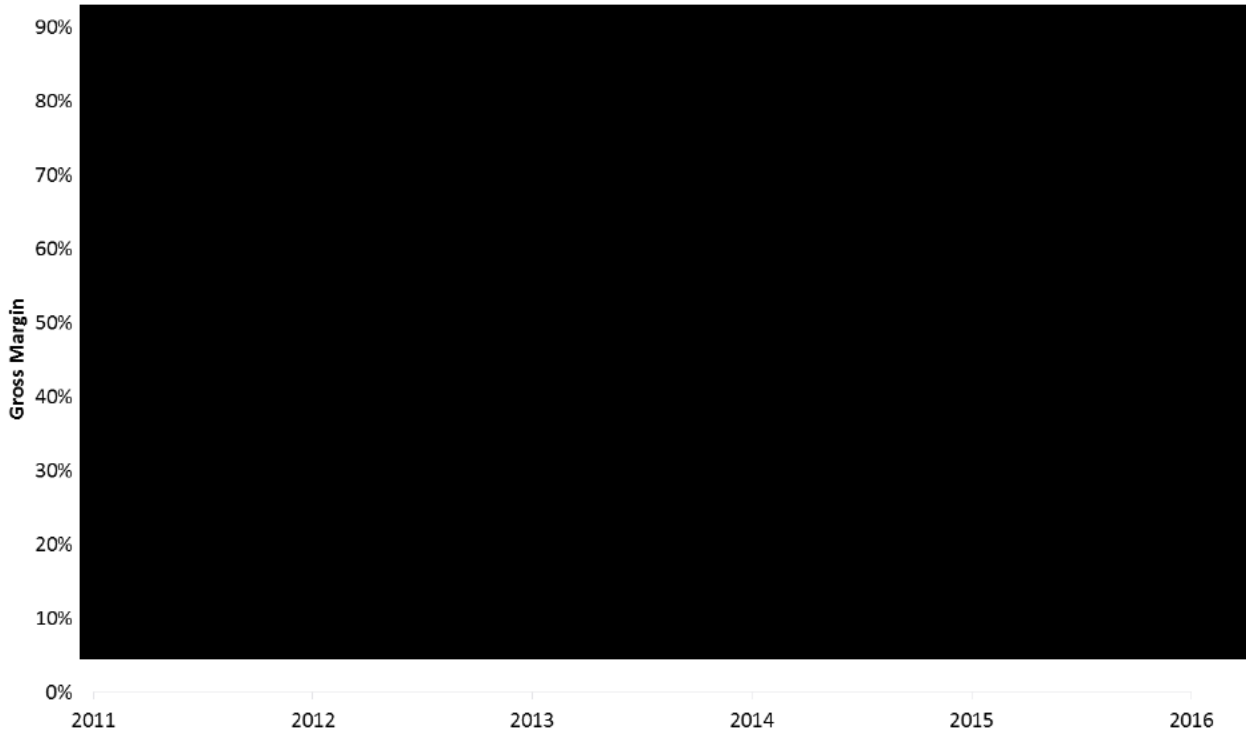
³⁵⁷ Claimants’ Reply Damages Memorial, ¶¶ 205-211.

third party.”³⁵⁸ These transactions illustrate the excessive results that the Claimants’ DCF calculation of lost profits produces.

2. The Claimants’ Analysis Results in Profit Margins that Far Exceed Those of Publicly Traded Market Leaders

174. Second, as shown in Figure 2 below, if accepted, the Claimants’ valuation in this arbitration would mean that Bilcon of Nova Scotia would earn a profit margin almost double that of publicly traded market leaders in the aggregates sales business:

Figure 2: Gross Margins for Whites Point and Publicly Traded Aggregate Producers 2011 - 2016³⁵⁹



175. As Figure 2 shows and Mr. Chodorow explains, this conclusion is unreasonable for a number of reasons, not least of which is that it is inconsistent with the fact that [REDACTED]

³⁵⁸ RE-13, Brattle Group Report II, ¶ 122.

³⁵⁹ RE-13, Brattle Group Report II, ¶ 111, Figure 5.

that circumstance, the damages would be paid to Bilcon of Nova Scotia. Even if the Claimants are right that the United States Government will tax that payment directly as a payment to the investors because, for United States tax purposes, Bilcon of Nova Scotia does not exist, that fact is irrelevant.

179. Arbitral tribunals have consistently considered that tax consequences in a foreign jurisdiction are not relevant to determining the level of compensation. For example, in *Rusoro Mining Ltd.*, the Canadian claimant sought indemnity “in respect of any double taxation of the Award that may rise in Canada (or elsewhere), to the extent this liability would not have arisen had Venezuela observed its international commitments under the Treaty.”³⁶⁶ In short, the Claimants in *Rusoro* sought exactly what the Claimants seek here. In *Rusoro*, the tribunal clearly pronounced that “[a]ny tax liability arising under Canadian tax laws (or from any other fiscal regime, other than the Venezuelan), does not qualify as consequential loss arising from Venezuela’s breach of the Treaty and does not engage Venezuela’s liability.”³⁶⁷ The tribunal recognized the sovereignty and international legal principles invoked by tax gross up claims, and properly determined that they were outside the scope of their task.

180. As Canada explained in its Counter-Memorial, the tribunals in *Ceskoslovenska obchodní banka* and *Mobil* arrived at similar conclusions.³⁶⁸ The Claimants attempt to distinguish these cases by arguing that the tribunals in those cases did not have sufficient evidence to make a determination with respect to a tax gross-up.³⁶⁹ But the Claimants ignore the central legal premise grounding the tribunals’ decisions not to include tax gross-ups in the damages in these cases, namely that “[i]ncome taxes are an act of government ... unrelated to the obligation of one

³⁶⁶ CA-345, *Rusoro – Award*, ¶ 854.

³⁶⁷ CA-345, *Rusoro – Award*, ¶ 854.

³⁶⁸ Canada’s Counter-Memorial on Damages, ¶ 159.

³⁶⁹ Claimants’ Reply Damages Memorial, ¶¶ 159-162.

party to fully compensate the other”,³⁷⁰ and that they were “not aware of a requirement under international law to gross up compensation as a result of tax considerations.”³⁷¹

181. After pointing to no cases at all in their Memorial on this point, the Claimants now rely on *Chevron* to support their claim for a tax gross-up, arguing that the existence of a contract between the claimant and Ecuador, out of which the breach arose, in that case is analogous to the *Canada – United States Double Taxation Treaty*.³⁷² In particular, the Claimants argue that, because the *Chevron* tribunal accounted for tax that Chevron owed to Ecuador in calculating the compensation Ecuador owed to Chevron, this tribunal should account for tax the Claimants might owe to the United States in calculating the compensation Canada owes them. On their face, the situations are not analogous. Canada is not responsible for the tax policy decisions of the United States and their sovereign decision to treat income from damages awards in a particular manner. Canada has no control over United States tax laws. Put another way, the tax decisions of the United States and their implications for the Claimants are not caused by the breach the Tribunal has identified here and should not be included in any determination of compensation.

H. The Claimants Are Not Entitled to Pre-Award Interest

182. Canada explained in its Counter-Memorial that the Claimants bear the burden of proving that the circumstances of their case justify an award of interest to ensure full reparation.³⁷³ The Claimants' only attempt to prove that the circumstances of the case justify an award of interest is a simple assertion from Mr. Rosen that “since the Investors did not receive the lost profits in the years in which they were expected to be earned, the Investors have been deprived of the opportunity to utilize the money generated from the Whites Point project and earn interest.”³⁷⁴ This is insufficient to meet their burden. Even if the Tribunal disagrees, as Mr. Chodorow

³⁷⁰ **RA-112**, *Ceskoslovenska obchodní banka, a.s. v Slovak Republic* (ICSID Case No. ARB/97/4) Award, 29 December 2004, ¶ 367; Canada's Counter-Memorial on Damages, ¶ 159.

³⁷¹ **RA-89**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 485.

³⁷² Claimants' Reply Damages Memorial, ¶¶ 163-164.

³⁷³ Canada's Counter-Memorial on Damages, ¶ 161.

³⁷⁴ Claimants' Reply Damages Memorial, ¶ 144; Rosen Reply Report, ¶ 7.1.

explains, Mr. Rosen's pre-award interest calculation is flawed, and accepting it would result in over-compensating the Claimants.³⁷⁵ Accordingly, the Tribunal should reject the Claimants' request for pre-award interest.

I. Conclusions

183. As Canada has outlined above, and as The Brattle Group, Marsoft, and SCMA have explained in their Expert Reports, the Claimants' damages calculation is flawed and unreliable. As such, the Tribunal should reject the Claimants' claim for lost profits. However, even if the Tribunal were to assume that the value of the lost opportunity in this case should account for the potential lost profits of the Whites Point project, and that the project faced no permitting risk (which as set out above, it should not), the most the Claimants would be entitled to in damages is US\$6,333,825.

VIII. ORDER REQUESTED

184. Canada respectfully asks the Tribunal to issue an order:

- (a) dismissing the Claimants' damages claim in its entirety;
- (b) awarding Canada its costs, with applicable interest, pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Rules; and
- (c) granting any other relief that may seem just.

November 6, 2017

Respectfully submitted on behalf of Canada,



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³⁷⁵ RE-13, Brattle Group Report II, ¶¶ 179-181.