

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

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
held at the offices of Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario
on Wednesday, February 28, 2018, at 8:32 a.m.

VOLUME 8 - FULL TRANSCRIPT {REVISED}

CONDENSED TRANSCRIPT WITH WORD INDEX

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Alex Baer
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1 Toronto, Ontario.
 2 --- Upon resuming on Wednesday, February 28, 2018,
 3 at 8:32 a.m.
 4 PRESIDING ARBITRATOR: Good
 5 morning, good morning to everybody. There are
 6 some organizational things we can deal with later.
 7 I give the floor instantly to Mr. Nash for the
 8 closing statement of the claimant.
 9 Mr. Nash, you have the floor.
 10 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 11 8:33 A.M.
 12 CLOSING ARGUMENT BY MR. NASH:
 13 MR. NASH: Thank you, Judge
 14 Simma. Good morning.
 15 Good morning, Professor
 16 Schwartz. Good morning, Professor McRae.
 17 In the testimony you have
 18 heard this past week, it has been confirmed that
 19 the investors have proven each and every one of
 20 the elements of their claims far beyond the
 21 required balance of probabilities. But for
 22 Canada's NAFTA breach, the investors would have
 23 received all of the necessary government
 24 approvals, established the Whites Point Quarry,
 25 and produced and profitably sold aggregate

1 products to affiliated and established customers.
 2 Canada's breach of the NAFTA
 3 directly caused the investors to lose a unique and
 4 long-term supply of high-quality aggregate to
 5 profitably sell into an established and largely
 6 captive market.
 7 Specifically, the testimony
 8 this week has confirmed that the investors have
 9 operated a successful and established aggregates
 10 and construction materials business for
 11 two generations, selling aggregate and
 12 construction materials into the New Jersey and New
 13 York markets.
 14 The investors were completely
 15 vertically integrated, and their companies, their
 16 interests, included two ventures, Amboy and an
 17 interest in New York Sand & Stone. [REDACTED]
 18 [REDACTED]
 19 The investors were importing
 20 coarse and fine aggregate products from Bayside to
 21 supply aggregates to Amboy and to New York Sand &
 22 Stone. They decided to identify, in the early
 23 2000s, their own long-term supply and reliable
 24 supply of aggregate to integrate into their
 25 operations. At Nova Scotia's invitation, the

1 investors identified Whites Point as the ideal
 2 location for a quarry to fulfil their need for a
 3 long-term independent supply of high-quality
 4 aggregate. [REDACTED]
 5 [REDACTED]
 6 The investors confirmed all
 7 elements necessary to establish a successful
 8 quarry, including the quantity and quality of the
 9 resource, the design and feasibility of the
 10 necessary infrastructure and the ability to ship
 11 the aggregate to their customers.
 12 Much of this evidence is
 13 substantially or entirely uncontested. Canada
 14 does not dispute, either meaningfully or at all,
 15 the investors' background, business experience and
 16 financial resources;
 17 the investors' need for,
 18 investment in and commitment to the Whites Point
 19 Quarry;
 20 the Whites Point Quarry's
 21 suitability and viability;
 22 the claimants' security of
 23 interest in the lands;
 24 the quantity and quality of
 25 in-place basalt;

1 that the basalt could be
 2 extracted;
 3 the feasibility and capacity
 4 of the design of the plant;
 5 the plant's capacity to
 6 produce suitable product for its intended market;
 7 the concept, design and
 8 feasibility of the marine terminal;
 9 the reasonableness of the
 10 investors' projected capital costs;
 11 the reasonableness of the
 12 investors' projected operating costs;
 13 that the aggregate products
 14 could be loaded directly onto a bulk carrier for
 15 transport;
 16 and that the aggregate
 17 products would have been delivered to [REDACTED]
 18 [REDACTED]
 19 The evidence also confirms
 20 that Canada cannot reasonably dispute [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
2 The testimony this past week
3 further confirmed that, in the ordinary course,
4 and absent an unlawful, unwinnable and arbitrary
5 process that you have found already constitutes a
6 breach of the NAFTA, the investors would have
7 received the government approvals necessary to
8 establish and operate the quarry.

9 On the facts as proven,
10 Canada's NAFTA breach directly caused the
11 investors' losses. But for Canada's unlawful
12 conduct, the investors would have produced and
13 profitably sold aggregate in the manner that they
14 say.

15 Accordingly, the investors
16 have made out their case for full reparation --
17 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
18 8:38 A.M.

19 MR. NASH: -- through an award
20 of lost profits using the DCF methodology.

21 Our closing statement is
22 organized into seven parts. First, I will briefly
23 summarize the relevant legal framework.

24 Second, I will summarize the
25 evidence that proves the Whites Point Quarry was

1 to be a backbone acquisition to the investors'
2 established businesses.

3 Third, I will review the
4 evidence that proves beyond the required -- beyond
5 the required balance of probabilities that the
6 investors would, in the ordinary course, have
7 received government approval for the Whites Point
8 Quarry.

9 Fourth, I will summarize the
10 evidence that proves, again beyond the required
11 balance of probabilities, the viability of the
12 Whites Point Quarry, including the quantity and
13 quality of the resource, the infrastructure, the
14 transportation and the economics.

15 Fifth, I will explain why
16 Howard Rosen's DCF analysis should be adopted in
17 assessing the investors' losses.

18 Number 6, I will address the
19 topics that the tribunal invited the parties to
20 consider in its January 26th, 2018, letter.

21 And, finally, we will explain
22 why the investors' claim is not barred under
23 Article 1116 and why the respondent's argument
24 that the investors failed to mitigate must be
25 rejected.

1 The applicable legal
2 principles are as follows:

3 The investors must receive
4 full reparation for their losses arising from
5 Canada's breach. On the issue of causation, the
6 burden is on the investors to establish, on a
7 balance of probabilities: A cause, here the
8 breach; an effect, here the loss of the quarry;
9 and a logical link and nexus between those two.

10 The investors' losses of
11 profit are the logical and natural consequence of
12 Canada's breaches of the NAFTA. The evidence
13 before you establishes each element in the chain
14 of causation. Once the investors have proven
15 their right to damage on a balance of
16 probabilities, the tribunal then estimates the
17 actual loss, which, as the tribunals in Crystallex
18 and Vivendi explained, does not require a record
19 of established production or profitable operation,
20 especially where, as in this case, the state
21 itself promoted the profitability of the
22 investment and the investors have established and
23 profitable expertise in the industry in which they
24 were investing.

25 The tribunal does not need to

1 conclude with precision exactly what conditions
2 would apply to the quarry and what exactly the
3 cost consequences of complying with each
4 individual condition would be. The investors have
5 proven a reasonable estimate of what those costs
6 would be. That is their burden; they have met it.

7 The investors' comprehensive
8 evidentiary record supports FTI's damages model,
9 and Mr. Rosen's presentation of the FTI valuation
10 summarized the evidentiary inputs that went into
11 each component of the model. The results of
12 Mr. Rosen's analysis and conclusions are
13 self-evident. The DCF method is appropriate where
14 the fact of further profits is proved on a balance
15 of probabilities. Where the fact of further
16 profits is proved on a balance of probabilities.

17 Some tribunals have described
18 the threshold as being reasonable certainty.
19 There's no difference between the two in this
20 context. Canada insinuates that some complicating
21 event could or might occur. Tellingly, Canada
22 never states that something is likely.
23 Dr. Blouin, for example, said that it is not, in
24 his words, a foregone conclusion that the
25 environmental assessment of the Whites Point

1 Quarry satisfied Nova Scotian regulatory
 2 requirements.
 3 Similarly, much of
 4 Ms. Griffiths' prophesying leads her to conclude
 5 that it is, in her word, "unclear" what the JRP
 6 would have decided absent the finding of CCV.
 7 Elsewhere, she cannot help but
 8 speculate about a JRP's possible findings. It is
 9 what might have happened, it's what could have
 10 happened; it's not what did happen.
 11 However, the evidence in this
 12 arbitration established --
 13 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 14 8:43 A.M.
 15 MR. NASH: -- far beyond a
 16 balance of probabilities that, but for Canada's
 17 breach, the investors would ultimately have
 18 operated a profitable quarry at Whites Point.
 19 Confirming that, the investors had security of
 20 title, there is enough [REDACTED] at Whites
 21 Point to operate for more than 50 years, in the
 22 ordinary course, there would have been no
 23 regulatory impediment.
 24 The eminent David Estrin's
 25 expert evidence confirms that, in the ordinary

1 course, a JRP would have recommended and the
 2 Ministers would have approved the project.
 3 Professor Sossin's expert
 4 evidence confirms that, in the ordinary course,
 5 the Ministers would have approved the quarry.
 6 Mr. Oram and SNC Lavalin's evidence confirms that,
 7 in the ordinary course, the investors would have
 8 secured all necessary permits and authorizations
 9 to build and operate the quarry. The quarry would
 10 have been built and operated. The particulars of
 11 that operation are confirmed by many, including
 12 Mr. Washer, the engineer who costed out capital
 13 costs; Mr. Bickford, who you heard here last week;
 14 Mr. Morrison; and SNC. None of the fundamental
 15 evidence regarding the design or cost to build and
 16 operate the quarry has been challenged. Tom
 17 Dooley and Mike Wick confirm that the investors
 18 had the ability to sell that stone directly into
 19 their intended mature, stable and highly lucrative
 20 market of New York City.
 21 The investors' damages are
 22 rooted in the fact that the Whites Point Quarry
 23 was planned to be vertically integrated into their
 24 established business operations. Mr. Rosen
 25 explained, this is not a start-up. It is a

1 business with a long history of successful and
 2 profitable operations with well-established track
 3 record, supporting a DCF measure of damages. The
 4 facts demonstrating the nature of the investors'
 5 business are well supported and substantially
 6 undisputed. It is not disputed that the investors
 7 operated and continue to operate through a group
 8 of closely held private family companies. As Bill
 9 Clayton testified, the Clayton family operates
 10 under the Clayton Group of companies, all of which
 11 further the Clayton family's fully integrated
 12 aggregates and construction materials business.
 13 [REDACTED]
 14 [REDACTED] While
 15 the Claytons held a partial economic interest in
 16 New York Sand & Stone through Amboy, the evidence
 17 is undisputed that the Claytons hired Mr. Dooley
 18 to operate New York Sand & Stone, and he did. [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 There is no controversy that,
 4 in 2002, the investors decided to pursue their own
 5 Canadian supply of reliable, high-quality
 6 aggregate products to vertically integrate with
 7 [REDACTED] This decision
 8 was primarily the result of several developments.
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 After the investors asked
 22 Mr. Lizak to investigate opportunities in Nova
 23 Scotia and he identified Whites Point as the best
 24 location there, the investors made a decision to
 25 proceed with their investment in Whites Point.

1 You have heard here how they
 2 engaged leading professionals, experts,
 3 professionals like Paul Buxton, John Wall as
 4 quarry manager, George Bickford and LB&W as the
 5 engineering firm, and Seabulk Systems as the
 6 marine engineering firm.

7 Demonstrating their commitment
 8 to the investment, they spent millions of dollars
 9 on the environmental assessment and remained
 10 throughout, even as costs escalated, totally
 11 committed to doing all that was required to secure
 12 the quarry.

13 Bill Clayton testified, and I
 14 quote:

15 [REDACTED]

1 [REDACTED]

1 [REDACTED]

1 [REDACTED]

1 which is the end terminal
 2 because they have
 3 different depths, so it
 4 may be that some rock or
 5 aggregate has to be
 6 dropped off before it
 7 goes to another
 8 facility."[as read]
 9 So all consistent with the
 10 original intention to go to both New York and New
 11 Jersey.
 12 Mr. Lizak was retained by the
 13 investors in 2002 to prepare a geologic source
 14 report for Whites Point [REDACTED]
 15 [REDACTED]. In his testimony, he confirmed
 16 that he wouldn't be looking at [REDACTED]
 17 [REDACTED]. That's going back to April of 2002, the
 18 very origin of his retainer.
 19 Finally, the JRP report itself
 20 acknowledged that the investors intended to sell
 21 Whites Point Quarry aggregate into New Jersey or
 22 New York, and I am quoting from the JRP report:
 23 "Ship-loading would
 24 consist of approximately
 25

1 40,000 tonnes of
 2 aggregate weekly, 44 to
 3 50 times per year for
 4 shipment to New Jersey or
 5 New York."[as read]
 6 So it's not a secret that they
 7 were going to New York. It wasn't something that
 8 they were not going to disclose to a JRP. It was
 9 fully disclosed to the extent required for a
 10 preliminary conceptual purpose for environmental
 11 assessment.
 12 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 13 8:57 A.M.
 14 MR. NASH: As Mr. Buxton
 15 explained in his testimony:
 16 "The purpose of an EIS
 17 means that variations,
 18 within limits, to the
 19 business concept are
 20 irrelevant."[as read]
 21 He explained that:
 22 "The difference between 2
 23 million tons, 2.1 million
 24 tons, 2.4 million tons is
 25 irrelevant when you are

1 going back to the purpose
 2 of the EIS, which is to
 3 define effects and define
 4 how you are going to get
 5 rid of them. That's the
 6 purpose of an EIS; not to
 7 drive a proponent to
 8 describe exactly how he
 9 is going to go this or
 10 that or the size of this
 11 or that crusher or the
 12 size of that conveyor. I
 13 really can't think of any
 14 major changes that would
 15 be made to an EIS because
 16 it was going 15 miles
 17 further down the coast or
 18 10 miles further down the
 19 coast. It made no
 20 difference to the
 21 EIS."[as read]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 This background context is
 5 critical to understanding the Whites Point
 6 Quarry's importance to the investors and properly
 7 appreciating the damages they have suffered as a
 8 result of Canada's breach.
 9 As Mr. Rosen explained, the
 10 investors' established business and plan for the
 11 quarry defeat any suggestion that the quarry can
 12 be characterized as a start-up. He explains:
 13 "This operation was not a
 14 start-up. The Claytons
 15 had business and had been
 16 in business for many
 17 years, two generations.
 18 They understood the rock
 19 business, the aggregate
 20 business, and they were
 21 buying, at this time,
 22 aggregate from a supplier
 23 to their NYSS operation.
 24 [REDACTED]
 25 [REDACTED]

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1 [REDACTED]
 2 When they didn't have the
 3 expertise, they went out
 4 and hired the
 5 expertise."[as read]
 6 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
 7 8:59 A.M.
 8 MR. NASH: I turn now to the
 9 point that Canada's breach precluded the claimants
 10 from obtaining the additional rights necessary to
 11 construct and operate the quarry.
 12 But for Canada's breach, the
 13 JRP would, in the ordinary course, have
 14 recommended approval. The Ministers would, in the
 15 ordinary course, have granted approval. And the
 16 industrial permits necessary for operation would,
 17 in the ordinary course, have been issued. The
 18 evidence proves beyond the required, far beyond
 19 the required balance of probabilities a direct
 20 causal link between the breach and the investors'
 21 loss of the Whites Point project.
 22 The investors tendered, as I
 23 have said, the expert reports of David Estrin
 24 which show that, in the ordinary course, the JRP
 25 would have recommended approval. Mr. Estrin's

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1 opinion is that the JRP had no lawful basis not to
 2 recommend approval of the project. His opinion
 3 should be accepted in whole. He testified:
 4 "In Nova Scotia, it's
 5 quite clear from their
 6 policy documents that
 7 they favour very highly
 8 the advantages of
 9 aggregate and other
 10 mineral resources being
 11 developed. They want to
 12 have an expeditious and
 13 consistent process for
 14 the proponents, and that
 15 helps explain why things
 16 do get approved. Because
 17 they set it out and
 18 proponents listen. I
 19 can't understand -- says
 20 Mr. Estrin -- how Whites
 21 Point Quarry could be any
 22 different than a pit or
 23 quarry that goes through
 24 the standard process.
 25 Whites Point Quarry's

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1 environmental impact
 2 statement was
 3 comprehensive, thousands
 4 of pages, considered
 5 things in much more
 6 detail, and yet didn't
 7 reveal anything startling
 8 or unique. So if it had
 9 been handled in the
 10 ordinary way by
 11 regulators, it would have
 12 been approved by Nova
 13 Scotia. If the burden of
 14 proof is on a balance of
 15 probabilities, in my
 16 opinion, having looked at
 17 the available comparative
 18 projects, all of which
 19 involve quarries or
 20 marine terminals and
 21 issues of whales and fish
 22 and explosives, every
 23 other one of them was
 24 approved by Canada or
 25 Nova Scotia and with

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1 mitigation measures that
 2 are not in any way
 3 materially different from
 4 what Whites Point came up
 5 with."[as read]
 6 In reaching his conclusion,
 7 Mr. Estrin analyzed the record before the JRP and
 8 determined that the environmental assessment
 9 established that the Whites Point Quarry project
 10 complied with both the CEAA and the NSEA, the Nova
 11 Scotia Environment Act, and did not reveal any
 12 project effects that could provide a basis for
 13 recommending approval.
 14 In amplifying his evidence
 15 regarding mitigation measures, Professor Estrin
 16 testified:
 17 "I looked at the
 18 mitigation measures and I
 19 compared them to Whites
 20 Point, Black Point,
 21 Aguathuna, and they were
 22 essentially similar.
 23 That's another reason why
 24 it can be objectively
 25 determined that there

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1 isn't really anything
2 unique about Whites Point
3 that would stand in the
4 way of some approvability
5 except politics. The
6 Black Point Quarry is a
7 much larger quarry than
8 Whites Point, would be
9 much more blasting, much
10 larger, much more
11 shipping, all of those
12 things. In the result,
13 they came up with
14 mitigation measures that
15 were ones that Bilcon
16 itself had anticipated
17 were required ten years
18 ago because of all the
19 expertise that they had
20 involved."[as read]
21 Additionally, Mr. Estrin
22 addressed the investors' reasonable expectations
23 that had been fostered by Nova Scotia, including,
24 as I've said, through the promotion of a
25 standardized and expeditious processing of

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1 environmental applications and approval review for
2 new or expanding quarries.
3 Canada has not led any
4 credible evidence to refute Mr. Estrin's opinion.
5 Instead, Canada relies on witnesses who were not
6 involved in the JRP, who lacked the relevant or
7 any expertise in the area, primarily in an attempt
8 to create the specter, just the specter of
9 potential adverse effects. Potential adverse
10 effects. Or what Canada calls concerns. This is
11 not the test.
12 The test, and everyone knew
13 the test, we heard that from Ms. Griffiths, is
14 whether the project would have likely significant
15 adverse environmental effects after mitigation.
16 The analysis does not conclude
17 and the JRP panel members knew absolutely well
18 that it does not conclude with the identification
19 of potential adverse effects or concerns. It ends
20 with likely significant adverse effects that can't
21 be mitigated.
22 Everyone knew precisely what
23 the test was, those very capable members of the
24 JRP most of all. They fully explained and
25 understood what they were obligated to do and what

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1 they were going to do. Not only are Canada's
2 environmental assessment witnesses unqualified to
3 express the opinions they purport to proffer,
4 Ms. Griffiths clearly dispelled any benefit of
5 engaging in the fallacy of second-guessing the
6 JRP.
7 She confirmed that the members
8 of the JRP were experts in the field of
9 environmental assessment. They knew exactly what
10 they were doing. She confirmed that speculation
11 about what the JRP did or did not do serves no
12 useful purpose, and I quote, Ms. Griffiths states:
13 "Speculation about that
14 is not helpful or proper.
15 With any panel, you just
16 have to go with what's in
17 the report. The report
18 speaks for the panel's
19 work."[as read]
20 We could not have said it
21 better ourselves. She is quite right. The report
22 speaks for this panel's work. Their work
23 concluded that, on all of the voluminous evidence
24 before them, and fully knowing already what their
25 mandate was, and after considerable deliberation

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1 of many months, they could find one likely
2 significant adverse environmental effect: CCV,
3 and no other. That was their finding. Like
4 Canada's other environmental assessment witnesses,
5 she acknowledged that she has no professional
6 expertise to offer any opinion about statutory
7 interpretation, about the scientific or
8 engineering evidence before the JRP; but she did
9 concede, finally, that for environmental
10 assessment purposes, significant does not include
11 minimal, which is how the Department of Fisheries
12 described the effect of this project on marine
13 mammals. And that low probability means unlikely.
14 Low probability means unlikely.
15 Without confirming statistics,
16 Ms. Griffiths agreed that the -- operating on the
17 figures, four right whale mortalities from 1970 to
18 2004, one every eight and a half years, reduced by
19 95 per cent as a result of a shipping lane change
20 in 2003, that the mortality of one whale in 175
21 years in the Bay of Fundy, one whale in 175 years
22 in the Bay of Fundy is a small additional risk.
23 Whales were never a legitimate issue in this case.
24 The arc of this evidence goes back to Jerry Conway
25 in 2002, who wrote to his boss and said -- I am

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1 paraphrasing, but it's very close -- I see no
2 problems on the effect of marine mammals in this
3 blasting plan, referring to the blasting plan that
4 Mr. Buxton had referred to. Here we are, 16 years
5 later, speaking about the potential problem with
6 harm to whales. It does not exist. It's a
7 phantom. And it's created in the face of all the
8 evidence.

9 Mr. Blouin acknowledged that
10 he is not an expert in any scientific, engineering
11 or sociological field related to the proceeding
12 and that his opinions are only personal opinions,
13 not professional ones.

14 So far as I can tell on the
15 evidence, none of Canada's experts have ever been
16 qualified to give evidence as an independent
17 expert in any other proceeding in any jurisdiction
18 on any subject at any time. They are not what
19 professional experts are. They are not David
20 Estrin, they are not Lorne Sossin, who are
21 detached third-party, objective, unbiased,
22 impartial experts who come before this tribunal to
23 assist it in resolving questions on which this
24 tribunal may not have the expertise. Canada's
25 witnesses do not meet any of that criteria.

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1 confirm that, from his experience, economic
2 development, as expressed in the purpose clause of
3 the Nova Scotia Environment Act, is a relevant
4 factor for the Nova Scotia Minister to consider in
5 making a decision regarding regulatory approval of
6 a project, as are the published policies,
7 including the 1996 Mineral Policy of the Nova
8 Scotia government. He also confirmed that the
9 government officials advised the Minister that six
10 of the seven recommendations of the JRP were
11 outside the scope of the JRP's mandate.

12 Mr. Connelly also acknowledged
13 that he too is not an independent, impartial
14 witness and that he has no professional basis on
15 which to offer an opinion about statutory
16 interpretation. But he did concede that it was
17 his understanding that even the Governor in
18 Council, the GIC, must operate within the
19 limitation of the CEAA.

20 And for his part, Mr. McLean
21 confirmed that the DFO, today, employs hundreds of
22 scientists and engineers who are experts in the
23 oceans and employs 25 scientific experts
24 specializing in marine mammals, none of who Canada
25 brought before you to give the best evidence

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1 Mr. Blouin acknowledged that,
2 from his experience, the development of the
3 aggregate industry to promote the prosperity --
4 this is good -- this is critical -- to promote the
5 prosperity of Nova Scotians is something that the
6 Minister of Environment would be compelled to take
7 into account in making his decision about the
8 Whites Point Quarry.

9 He also acknowledged that the
10 criteria the JRP used to assess environmental
11 effects were understood to be significant. And
12 you will recall that I took him through the
13 information request from the JRP in July of 2006
14 where it laid out very clearly to Bilcon exactly
15 what is expected in terms of the significance
16 analysis.

17 That is also the word,
18 "significant", that the Minister used in his
19 November 20th rejection letter to Mr. Buxton when
20 he said that the project would not be approved due
21 to its significant adverse effect.

22 Mr. Geddes also acknowledged
23 that he is not an independent, impartial witness
24 with firsthand involvement or a professional basis
25 on which to express opinions. He did, however,

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1 available as to the harm of this project and, in
2 particular, in that context, in comparison to
3 Black Point.

4 Canada's witnesses are
5 similarly also not a substitute for calling the
6 individual JRP members who authored the report and
7 who could have explained their decision to this
8 tribunal. Indeed, without hearing from the
9 individual JRP members, the tribunal is left with
10 a record before the JRP and the report itself.

11 The suggestion or assertion
12 that Canada cannot call the JRP members because
13 their deliberations are privileged is
14 transparently self-serving. The JRP members do
15 not have to hide behind the protective veil of
16 privilege if they have nothing to hide. An open,
17 transparent process, which Canada champions at
18 this hearing, would not now deny the investors and
19 this tribunal the opportunity to hear from the
20 people who were actually instrumental in the
21 process and the CCV recommendation, who could then
22 explain why they refrained from finding likely
23 SAEs after mitigation, other than CCV, if they
24 had determined if there were any. On all of the
25 evidence, the only reasonable inference to be

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1 drawn is that if the JRP panel members could have
2 found any legitimate SAEES to support their "no"
3 recommendation, they would have. And the fact
4 that they did not means that they could not, on
5 the evidence.

6 Canada brings witnesses to
7 this tribunal who know the real -- instead of
8 bringing witnesses to this tribunal who know the
9 real facts, Canada hides behind privilege and then
10 argues for findings adverse to the investors based
11 on the unreliable evidence of proxy witnesses.

12 Ms. Griffiths confirmed that
13 the JRP panel members were experts in the field of
14 environmental assessment and they knew exactly
15 what they were doing. Canada's treatment of all
16 similar projects establishes the very strong
17 likelihood of a favourable JRP recommendation and
18 Ministerial decision in the ordinary course.
19 There can be no question on the evidence that, in
20 the ordinary course, but for the NAFTA breach, the
21 JRP would have recommended approval.

22 I turn now to the Ministers.
23 Professor Sossin analyzed the Ministers' decisions
24 and concluded that the Ministers were compelled to
25 approve the Whites Point Quarry project, compelled

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1 to approve. He explains that without any evidence
2 of a likely SAEE after mitigation or its
3 provincial counterpart, the Ministers could not
4 reasonably deny approval.

5 He states:

6 "Where there is no
7 evidence of such
8 significant adverse
9 environmental effects, a
10 Minister does not retain
11 discretion to
12 nevertheless deny
13 approval for the project
14 if the project does not
15 give rise to significant
16 adverse environmental
17 effects; in other words,
18 there is no provision in
19 the CEAA that would allow
20 the responsible authority
21 or GIC to turn it down
22 for reasons of political
23 expediency, policy
24 preference or economic
25 reasons or in response to

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1 public opposition."[as
2 read]
3 A central element of Professor
4 Sossin's opinion is that the rule of law
5 constrains Ministerial discretion. He explained
6 that the exercise of all authority, all
7 discretionary authority "must be understood as
8 bounded and limited by its statutory terms".

9 And that authority must be
10 exercised in accordance with the rule of law.

11 At the hearing, Professor
12 Sossin testified:
13 "So I take the
14 establishment of purposes
15 here and, again, in the
16 Nova Scotia and federal
17 legislation, for these
18 purposes to be in effect,
19 the foundation from which
20 the boundaries on that
21 ultimate decision-maker's
22 discretion flow, (the
23 foundation). There is
24 also the context for this
25 broad grant of discretion

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1 remains unbounded, as all
2 broad grants of
3 discretion will be, by
4 set boundaries that are
5 both going to be tied to
6 the overall purpose and
7 context of the statute
8 and to the specific
9 record in front of the
10 cabinet
11 decision-makers."[as
12 read]

13 With respect to the JRP and
14 the Ministers, Professor Sossin based his opinion
15 on what was actually done in this case, not what
16 could have been done, what might have been done in
17 the abstract, but what was actually done. He
18 states:

19 "When you remove the one
20 basis that the
21 decision-makers had for
22 denying it, then the
23 logical inference is that
24 acting reasonably, in the
25 absence of CCV and based

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1 on the record, without
2 any other recommendation
3 on the evidence from the
4 JRP, they would have
5 approved it. Once you
6 take away the only
7 legitimate basis for
8 denial as not legitimate,
9 the only choices left to
10 the Ministers, acting
11 reasonably, would have
12 been to approve. I am
13 basing my conclusion on
14 the record before the
15 decision-makers. The
16 logic of their own
17 analysis, given that they
18 had the ability to choose
19 other grounds and didn't,
20 would be that they would
21 have recommended
22 approval."[as read]
23 The record before -- he
24 continues:
25 "The record before the

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1 decision-makers did not
2 have another legitimate
3 basis for denial; and,
4 therefore, reasonable
5 Ministers or Ministers
6 acting reasonably or a
7 cabinet acting reasonably
8 would have approved."[as
9 read]
10 This tribunal has made a
11 number of key findings relevant to this issue.
12 The tribunal has already found that the CEEA
13 requires socio-economic effects to be tied to an
14 ecological effect and that community core values
15 is a consideration outside the scope of both the
16 CEEA and the NSEA.
17 This tribunal has also found
18 that both Ministers simply adopted the JRP's
19 recommendation. In answer to Professor Sossin,
20 Canada has tendered the report of Thomas Cromwell.
21 The Cromwell report amounts to a general statement
22 of how the Nova Scotia Environment Act functions
23 in the abstract. It does not apply an
24 interpretation to the actual facts in evidence in
25 this case. It does not express any opinion on

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1 whether there were likely adverse environmental
2 effects after mitigation. It also does not
3 consider Nova Scotia's policies, particularly the
4 Mineral Policy, the 1996 policy, and the practice
5 of promoting quarry developments in general and on
6 the North Mountain Whites Point site in
7 particular.
8 As the Supreme Court of Canada
9 in Dunsmuir New Brunswick explain, statutes are
10 not to be interpreted in the abstract but rather
11 in a contextual and purposeful way, and quoting:
12 "Legislative supremacy is
13 affirmed by adopting the
14 principle that the
15 concept of jurisdiction
16 should be narrowly
17 circumscribed and defined
18 according to the intent
19 of the legislature in a
20 purposeful and contextual
21 way."[as read]
22 The Cromwell report interprets
23 the legislation in the abstract. It fails to
24 recognize that the legislative scheme has specific
25 purposes expressly stated in Section 2 of the NSEA

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1 and context which provide important guidance on
2 how Ministerial discretion under the scheme is to
3 be reasonably exercised by taking into account
4 relevant factors, including the overall goal of
5 the legislation, which is to strike the balance
6 between environmental protection on the one hand
7 and economic development on the other. Expressly
8 provided for in the purpose section of that
9 legislation, it's a twofold purpose.
10 In the circumstances, it was
11 unnecessary to subject Judge Cromwell to a public
12 cross-examination. In effect, the import of all
13 Canada's environmental assessment witnesses,
14 including Judge Cromwell, is to invite you to
15 reopen and redecide your award you have already
16 given on jurisdiction and liability because in
17 different hypothetical circumstances, something
18 else might have happened.
19 What we are dealing with here
20 in this phase of this proceeding is not what could
21 have happened or what might have happened, it is
22 what did happen in these circumstances.
23 Although "significance", as a
24 word, may not be a specifically articulated
25 precondition for a recommendation to the Nova

1 Scotia Minister that a project should not proceed,
 2 the Minister was not authorized to characterize
 3 any aspect of the proposal he wished to be an
 4 adverse effect. And I use the word "adverse
 5 effect" because you recall in that legislation,
 6 there are two phrases used, "significant
 7 environmental effect" and "adverse effect". It
 8 doesn't say specifically in the legislation
 9 "significant adverse effect".

10 Potential impacts that were
 11 trivial or of no consequence or were not mentioned
 12 in the JRP report and not otherwise part of the
 13 record could not be considered adverse effects.

14 They referred to in the
 15 legislation sufficient to justify denying a
 16 proposed project under this scheme. To the
 17 contrary, Section 34 of the Act mandates that an
 18 undertaking is rejected because of the likelihood
 19 that will cause adverse effects that cannot be
 20 mitigated.

21 In summarizing the basis for
 22 its finding that Canada has breached the NAFTA,
 23 this tribunal acknowledged the specific factual
 24 finding underlying its conclusions, and I am not
 25 going to read it out, but I will refer you to

1 paragraph 740 of the jurisdiction liability award.
 2 The conclusion relates to Nova
 3 Scotia government policy publications intended to
 4 encourage the investors to develop a quarry at
 5 Whites Point. These policy publications indicated
 6 the Nova Scotia government's environmental
 7 approval process would be guided by the goal of
 8 promoting the province's mineral potential. In
 9 the circumstances and context of this case, the
 10 policies, the guidelines and the communications
 11 all support the conclusion that the Minister's
 12 discretion must be guided by the stated purpose of
 13 the legislation, two-fold, and to the investors'
 14 reasonable expectation of an environmental review
 15 process and standard in relation to the Whites
 16 Point Quarry.

17 The investors have proved
 18 beyond the required balance of probabilities that
 19 but for Canada's breach, there is no question that
 20 they would have operated and constructed the
 21 Whites Point Quarry. The testimony heard also
 22 confirms that the investors have proved all of the
 23 elements necessary for the tribunal to conclude
 24 that the production and marketing of the aggregate
 25 products were technically feasible and

1 economically viable. As such, the investors have
 2 proved the causal link necessary between the
 3 denial of the approval and the result.
 4 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 5 9:23 A.M.

6 MR. NASH: -- which is the
 7 resulting loss of profits.

8 In establishing the quality,
 9 quantity and suitability for the intended purpose
 10 of this product, the investors have tendered the
 11 expert report of an independent professional
 12 geologist, Michael Cullen, of Mercator Geological
 13 Services, who was also not called for
 14 cross-examination. His evidence goes
 15 uncontroverted and unrefuted. His analysis was
 16 conducted in accordance with the Canadian
 17 Institute of Mining, Metallurgy and Petroleum
 18 definition standards for mineral resources and
 19 mineral reserves and concluded that the basalt
 20 contains -- [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 Canada has neither challenged
 4 Mr. Cullen's conclusions nor add any evidence to
 5 the contrary.

6 Because Bilcon is a private
 7 company, as I have said, it was not required to
 8 complete a feasibility study. That's for public
 9 companies in the public markets seeking financing
 10 or investment.
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 The evidence also proves
 18 beyond the required balance of probabilities that
 19 the plant and marine terminal infrastructure
 20 necessary to produce and transport the aggregate
 21 has been thoroughly planned, designed and costed.

22 George Bickford's evidence
 23 establishes that the investors had completed the
 24 design for a crushing plant that would have
 25 produced [REDACTED]

1 [REDACTED]
 2 He gave evidence about [REDACTED]
 [REDACTED]

1 [REDACTED]
 [REDACTED]

1 [REDACTED]
 [REDACTED]

1 [REDACTED]
 [REDACTED]
 16 And then Mr. Washer,
 17 Mr. Bickford's former partner, costed the whole
 18 thing at [REDACTED]. The amount is not
 19 materially in dispute.
 20 The investors have similarly
 21 proved beyond the required balance of
 22 probabilities the plan, feasibility and estimated
 23 cost of the marine terminal. There can be no
 24 doubt about the site's suitability, which had been
 25 fully investigated by Bilcon back in 2002.

1 Further, the uncontested evidence is that the
2 investors engaged a leading marine engineering
3 firm, Seabulk, to prepare a design-build proposal
4 and cost estimate for the terminal and ship
5 loader. [REDACTED]

9 For this arbitration, SNC
10 Lavalin independently confirmed that the design
11 and estimated [REDACTED] cost of the marine
12 terminal is reasonable and was within [REDACTED]
13 of SNC's own cost analysis.
14 [REDACTED]

18 None of this evidence has been
19 challenged in any way. The investors have
20 detailed their estimated operating costs in the
21 evidence of Mr. Wall and Mr. Buxton, and Canada
22 has not meaningfully contested the reasonableness
23 of those estimates and tendered no contrary
24 evidence except [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 Canada's critique of the
3 investors' operating costs, [REDACTED]
4 [REDACTED] should be disregarded because it depends
5 on the incorrect premise that [REDACTED]
6 [REDACTED]

8 There can also be no question about
the feasibility of the investors' plan to [REDACTED]
9 [REDACTED]

19 Wayne Morrison, former vice
20 president of CSL, correctly conducted a
21 market-based analysis. [REDACTED]
22 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
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1 [REDACTED]
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16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]

6 Mr. Morrison's market-based
7 estimate of freight rates should be accepted and
8 applied for the purpose of costing analysis in
9 this case.

10 The evidence also establishes
11 the market and unlikely prices of the
[REDACTED] products supplied.

16 The investors have tendered
17 credible and undisputed evidence of prices for the
aggregates products based on [REDACTED]

1 [REDACTED]

[REDACTED]

[REDACTED]

21 And, finally, the actual
22 costing and pricing information that's been
23 incorporated into the pro forma prepared by
24 Mr. Dan Fougere for the purposes of this
25 arbitration, the pro forma, which includes the

1 revenue matrix, presents a reasonable and reliable
2 statement of Bilcon of Nova Scotia's expected
3 financial activities based on all the evidence.
4 And I have given you each a copy, it's Exhibit 11
5 to Dan Fougere's witness statement. And all you
6 need to know about the actual costs of running
7 this quarry are on page 1. And there are some
8 other pages that have some detail. But there are
9 on page 1, it shows the production, the shipments,
10 if you go over to the next page, Judge Simma, it
11 shows the metrics per ton, the freight-adjusted
12 revenue, the plant operating costs, none of that
13 is disputed. Those dollars per ton, none of that
14 is disputed by an expert. No one comes and says,
15 oh, you are radically underestimating all of your
16 operating costs.

17 The revenue is based on [REDACTED]

22 None of that can be disputed.
23 There are dollar figures for
24 all the costs. There is then a calculation of
25 gross profits towards the bottom, the fourth line
from the bottom, there is the selling, general and

1 administrative expense, there's pre-tax earnings
 2 and there's income taxes. Thus the need for the
 3 tax equity adjustment. The profits of the
 4 operating Whites Point Quarry as presented in this
 5 summary of costs and revenue, the bottom line are
 6 after-tax profits. They paid 31 per cent to the
 7 Canadian government, and the profits are thereby
 8 reduced, you will see, in 2015, from [REDACTED]
 9 I am on the far right-hand side -- by [REDACTED], so
 10 that the profits are [REDACTED]
 11 [REDACTED]

[REDACTED]

23 Instead of meaningfully
 24 engaging with the investors' evidence on the tax
 25 equity adjustment, Canada implies, without any

1 evidentiary foundation, that recently proposed
 2 changes to the US tax code may have an impact on
 3 the tax equity adjustment. Canada's questions are
 4 not evidence. There's been no confirmation from
 5 any witness on any basis that says that the
 6 current US tax code, changed recently, will have
 7 any effect on the tax equity adjustment as
 8 calculated by Professor Shay. Mr. Rosen has
 9 explained that the common valuation practice is to
 10 deal with the legislation in place at the time of
 11 the valuation. He explained that he has inquired
 12 of --
 13 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
 14 9:43 A.M.

15 MR. NASH: -- tax experts
 16 about the impacts of the changes; he has been
 17 advised that there is no material difference. He
 18 explained that, as is common practice, if the
 19 tribunal is concerned about the impact of any new
 20 US tax legislation on the amount of the tax equity
 21 adjustment, the tribunal can instruct the quantum
 22 experts to assist the tribunal in accounting for
 23 any differences in the final award.
 24 In our submission, Howard
 25 Rosen's approach to valuation is commercially

1 reasonable and should be completely preferred over
 2 the Brattle Group's approach. It is all
 3 self-evident. It is self-evident on the numbers.
 4 He did his due diligence, he met with them, all
 5 the witnesses, he challenged them, and he found
 6 that the costings were reasonable in all of the
 7 circumstances, and the conclusion of his report is
 8 self-evident.

9 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 10 9:45 A.M.

11 MR. NASH: He explained the
 12 investors' damages case is not speculative. As he
 13 said, the quarry business is simple, "we are just
 14 blowing stuff up, rolling it through some screens
 15 and putting it on a ship". He further explained
 16 the difference between an aggregate operation and
 17 a sophisticated mining operation, which is a much
 18 more complicated and complex piece of business.

19 He explained how the
 20 investors' case was grounded in reality. He took
 21 these real-world inputs, the value of the
 22 investors' lost profits as of the current date, in
 23 this case December of 2016, which, as he
 24 explained, makes economic sense as well as
 25 practical common sense. It is also the legally

1 appropriate standard to apply in circumstances
 2 where there, as here, it is not an expropriation
 3 where property expropriated is a property valued
 4 at its fair market value at the time it's
 5 expropriated.

6 The Brattle Group's discounted
 7 cash flow analysis, which is purportedly conducted
 8 from the vantage point of 2007, is theoretical, as
 9 is much of Canada's case, it's unreliable and it's
 10 also unbalanced.

11 Mr. Rosen explained that the
 12 Brattle Group's evaluation is not a true 2007
 13 analysis. And, therefore, on the basis of
 14 constraining instructions from counsel and
 15 theoretical models, the Brattle report simply
 16 ignored Mr. Rosen's real-world inputs and
 17 real-world analysis. While all of the relevant
 18 information was available in the investors'
 19 evidence, Mr. Chodorow was instructed not to use
 20 it to inform his calculations. [REDACTED]

[REDACTED]

1 Instead, Mr. Chodorow
2 described the investors' profit from the Whites
3 Point Quarry as extraordinary, without regard to
4 their required investment of ██████████ in order
5 to earn the profits that the Whites Point Quarry
6 would earn. And that investment of ██████████
7 would result in a conservative return of ██████████
8 per ton over 50 years.

9 In the end, Mr. Rosen's
10 principal balance and commercially reliable
11 analysis, which is self-evident, must be preferred
12 to the theoretical, instruction-limiting and
13 unbalanced analysis of Mr. Chodorow.
14 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
15 9:47 A.M.

16 MR. NASH: I have alluded to
17 Mr. Seamen, who explains the reasons for profit
18 margins of private family businesses being far
19 greater than those of large public companies,
20 which tend to focus on growth, acquisition,
21 shareholder satisfaction and short-term financial
22 result.

23 Well-positioned and
24 well-financed family-owned companies focussed on a
25 long-term horizon tend to have significant higher

1 addressed through judicial review.
2 Canada's mitigation argument
3 is simply another attempt to recycle this argument
4 into the damages phase to try and achieve through
5 the back door what they failed to achieve through
6 the front door. It's simply another attempt to
7 avoid accountability for its breaches of the
8 NAFTA.

9 As we described in our
10 opening, mitigation is covered by the standard of
11 factual reasonableness. Professor McCamus, who
12 was not cross-examined, has opined that he is
13 aware of no Canadian legal authority suggesting
14 that the duty to take reasonable steps to mitigate
15 extends to pursuing litigation against the party
16 in breach, particularly where the litigation is
17 likely to be complex with an uncertain outcome.

18 As the Supreme Court of Canada
19 recently emphasized in *TeleZone*:
20 "People who claim to be
21 injured by government
22 action should have
23 redress to the legal
24 system which permits
25 through procedures that

1 profitability.

2 This provides further context
3 for the profit margins calculated for the Whites
4 Point Quarry to be entirely reasonable, especially
5 given the unique and extraordinarily high profit
6 margins as explained by Dr. Chereb.

7 What remains is Canada's
8 fantastical argument that the investors should
9 have pursued judicial review to mitigate their
10 losses before or while bringing a NAFTA claim.

11 This contention is
12 fundamentally misconceived. It is wrong, it is
13 wrong in law, and it is wrong in fact.

14 The NAFTA does not require
15 investors to exhaust local remedies before
16 bringing a claim to arbitration under the NAFTA.

17 Canada's contention invites
18 the tribunal to impose a precondition that would
19 fly in the face of an investor's independent
20 remedy found in the NAFTA to pursue a damages
21 claim.

22 The majority of the tribunal
23 rejected Canada's argument in the merits phase
24 that the investors alleged NAFTA breaches were
25 mere breaches of Canadian law that could be

1 minimize unnecessary cost
2 and complexity. The
3 Court's approach should
4 be practical and
5 pragmatic with that
6 objective in mind. It is
7 generally true here, as
8 it is in the UK, that a
9 plaintiff is not required
10 to bring an application
11 for judicial review."[as
12 read]

13 Judicial review would not
14 result in remedy of damages, would not have been
15 able through discovery of documents the
16 revelations of the deliberate deceit and deception
17 involved in the treatment of the investors by
18 Canada in this case.

19 The investors and this
20 tribunal would never have learned of the parallel
21 universe unfolding around Paul Buxton in 2002 and
22 2003 in secret but for the litigation process in
23 this case, which would never come out on a
24 judicial review. There can be no doubt that
25 judicial review would have involved lengthy and

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1 costly proceedings with virtually certain appeals
2 and an uncertain result.

3 Canada's expert John Evans
4 explains that the investors' likely best outcome
5 after a lengthy judicial review proceeding would
6 be to have the entire matter remitted back for
7 another lengthy and expensive environmental
8 assessment, with no assurance that it would be,
9 with respect, any more or less of a sham than the
10 first one.

11 This further lengthy and
12 complex environmental assessment could very well
13 be conducted by the very same JRP panel that
14 conducted the first one. It could be remitted
15 back to Dr. Grant, Dr. Fournier, Dr. Muecke, who
16 had already unlawfully defeated the investors'
17 legitimate expectations in the first place.

18 The law gives the investors a
19 choice; they chose the NAFTA. They had a right to
20 choose. They had the right to choose the remedy.
21 The NAFTA was designed to provide the investors
22 for exactly the discriminatory, unfair and
23 inequitable treatment Canada accorded them.

24 Bill Clayton eloquently
25 explained, he said:

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1 "There was no reasonable
2 person that would have
3 even considered going
4 back to the Canadian
5 courts for this. We
6 would have gone through
7 the five years of
8 struggle to end up back
9 where we were. Possibly
10 being dealt with by the
11 same people. So there
12 was no law, rule or
13 ordinance in Canadian law
14 that we knew of that said
15 we had to, and there was
16 no obligation to. We had
17 a right to go to the
18 NAFTA, and we chose to go
19 to the NAFTA because
20 going back to them and
21 being dealt with that way
22 for another ten years was
23 absolutely
24 unreasonable."[as read]
25 I will say briefly that

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1 Mr. Connelly spoke of the secrecy around the
2 cabinet confidence, around cabinet-oriented
3 documents. That secrecy is self-imposed. Canada
4 chooses to not allow the dozens of people who
5 handled that document, the JRP report, to come to
6 this tribunal to give evidence. That should not
7 be visited upon the investors or the tribunal.
8 Where there has been selective disclosure of
9 documents and information, as appears to be the
10 case here, and the failure to call witnesses under
11 the pretext of a cabinet confidence, which is
12 Canada's confidence to invoke or not, and where
13 Canada produces documents favourable to its
14 position and withholds others, the tribunal may
15 properly conclude that this is a litigation tactic
16 to avoid disclosure and may draw a reasonable
17 inference, an adverse inference from the tactic.
18 The inference to be drawn is that the document,
19 information or testimony would be adverse to
20 Canada's case in support of the investors.

21 I'd like now to turn briefly
22 to the tribunal's requests.

23 I have addressed the topics of
24 causation and mitigation and turn now to the
25 jurisdiction related to Mr. Clayton, Ralph

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1 Clayton, William Ralph Clayton, and Canada's
2 contention regarding Articles 1116 and 1117 and
3 valuation other than on the basis of lost profit.

4 With regard to William Ralph
5 Clayton, he withdraws his claim and does not
6 continue to pursue any claim in the arbitration.

7 With regard to Articles 1116
8 and 1117, I will ask Mr. Elrick to come and
9 address those in a moment.

10 With regard to loss of
11 opportunity, the investors' position is that the
12 related jurisprudence does not pertain to this
13 case, precisely because the Whites Point Quarry,
14 as explained by Mr. Rosen and confirmed by Mr. --
15 all the evidence, was not a start-up or in any way
16 speculative or merely aspirational.

17 The loss of opportunity cases
18 are all fundamentally distinguishable from this
19 case.

20 The investors are mindful of
21 the tribunal's consideration of the fact that the
22 investors' valuation of the quarry is in a but-for
23 world. Investors do their best to marshal the
24 evidence to prove what would have happened in the
25 but-for world that Canada, by its breach, created

1 language of the NAFTA, first, Article 1117, is
2 permissive, not mandatory. Its language is "may"
3 submit to an arbitration. The tribunal will note
4 the directive language in other articles of the
5 treaty.

6 Canada also raised the same
7 argument in UPS, which is particularly apposite to
8 this case since it concerned a wholly owned
9 subsidiary of a US company. There, the tribunal
10 noted that:

11 "We agree with UPS that
12 the claims here are
13 properly brought under
14 Article 1116. UPS is the
15 sole shareholder of UPS
16 Canada."[as read]

17 Just as, in this case, Bilcon
18 of Delaware is the sole shareholder of Bilcon of
19 Nova Scotia. The tribunal continues:

20 "That whether the damage
21 is directly to UPS or
22 directly to UPS Canada
23 and only directly to UPS
24 is irrelevant to our
25 jurisdiction over these

1 claims. That is clearly
2 the same position taken
3 by the tribunal in Pope
4 and Talbot."[as read]

5 The investors' reply memorial
6 discusses these and other cases where NAFTA
7 tribunals have rejected the argument Canada makes
8 here. I have discussed UPS and Pope and Talbot,
9 but the same issue was raised by the NAFTA parties
10 in Mondev and GAMI.

11 If the parties wished, the
12 appropriate mechanism to reach agreement on a
13 matter of interpretation is the Free Trade
14 Commission. They have, however, remained
15 conspicuously silent on the interpretation of
16 these articles. And, notably, the NAFTA parties
17 did issue Notes of Interpretation regarding
18 Article 1105. That was following the series of
19 somewhat controversial NAFTA awards, including
20 Metalclad and Pope and Talbot, where the NAFTA
21 parties felt that a far too expansive view was
22 taken of 1105, and so they issued Notes of
23 Interpretation circumscribing the rights afforded
24 under 1105. But what they didn't do is issue
25 Notes of Interpretation at that time explaining or

1 codifying their position that Article 1116 and
2 1117 offer exclusive remedies.

3 Finally, any distinction
4 between Articles 1116 and 1117 in the context of
5 this case are a mere formality. If the tribunal
6 does decide to depart from the settled
7 interpretation of Article 1116 and 1117, then the
8 tribunal should treat the investors' claims as
9 though they were, in fact, made under Article
10 1117, which was the tribunal in Mondev's proposed
11 remedy which they noted in obiter after finding
12 that the tribunal did have jurisdiction to hear
13 the claims brought under Article 1116.

14 Although in Mondev, the
15 tribunal accepted the reflective loss claims may
16 be made under Article 1116, the tribunal noted
17 that, and I'm quoting here:

18 "That a tribunal may
19 simply treat such a claim
20 as in truth brought under
21 Article 1117, provided
22 there has been clear
23 disclosure in Article
24 1119 notice of the
25 substance of the claim,

1 compliance with Article
2 1121 and no prejudice to
3 the respondent state or
4 third parties."[as read]

5 And, in these circumstances,
6 the investors meet these criteria.

7 And just one final point
8 regarding Canada's timing raising this argument.

9 We submit that the tribunal
10 should find that Canada tacitly accepts that this
11 argument should have been raised as an earlier
12 jurisdictional issue. It is to be recalled that,
13 in September of 2015, Canada brought an
14 application which it characterized as an
15 application to limit the scope of damages this
16 tribunal should consider. That, however, was only
17 in the context that the investors, based on the
18 findings of the tribunal, would not be able to
19 prove causation under Article 1116, sub 2. They
20 never raised 1117 at that time.

21 I will turn the floor back to
22 Mr. Nash.

23 CLOSING ARGUMENT BY MR. NASH (Cont'd):

24 MR. NASH: So in conclusion,
25 the investors have suffered an egregious wrong.

1 They were shamefully treated by Canada, and they
2 have been throughout. They were treated in a
3 discriminatory, unfair and inequitable way,
4 contrary to the NAFTA. The NAFTA provides them
5 with a remedy of full reparation for their loss.
6 They have proven they are entitled to that remedy,
7 and Howard Rosen has valued the loss. They
8 respectfully request, therefore, an award in the
9 amount of the proven loss, with the tax equity
10 adjustment needed to achieve full reparation.

11 Thank you.

12 PRESIDING ARBITRATOR: Thank
13 you, Mr. Nash. We are now going to have a break
14 of 30 minutes. Maybe -- how much time would be
15 left on the clock by Mr. Nash? According to my
16 accounting, five minutes.

17 DR. PULKOWSKI: Just a second.
18 I had six minutes, but not that it would make a --
19 somewhere in that range. I will just go back to
20 the master table.

21 MR. NASH: Either is enough.

22 DR. PULKOWSKI: I have
23 six minutes, in any case.

24 PRESIDING ARBITRATOR: All
25 right, so we resume at 10:35.

1 --- Upon recess at 10:04 a.m.

2 --- Upon resuming at 10:36 a.m.

3 PRESIDING ARBITRATOR: Hello,
4 Mr. Little, we continue with the closing
5 statements of Canada. Mr. Little, you have the
6 floor.

7 CLOSING ARGUMENT BY MR. SCOTT LITTLE:

8 MR. SCOTT LITTLE: Thank you.

9 Judge Simma, Professor McRae and Professor
10 Schwartz, well, we have arrived at the end of this
11 hearing exactly where we began, with the
12 claimants' failure to prove the NAFTA breach
13 caused the loss of 50 years of profits from the
14 Whites Point project.

15 Having abandoned their
16 original and only business plan for the project,
17 and having abandoned any claim for the investment
18 costs that they sunk into the project, the
19 claimants set out on a quest for 50 years of lost
20 profits.

21 Their quest was based on an
22 entirely new conception of the project. To
23 achieve their quest, the claimants have shown they
24 will say whatever they need to get the result that
25 they are after.

1 In the past, if they have said
2 that something's black, this has not stopped them
3 from now telling you that it's white.
4 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
5 10:37 A.M.

6 MR. SCOTT LITTLE: For
7 example, and I will just enter into confidential
8 session for a brief moment.

9 In their business plan --
10 sorry, we want to get our graphics up on the
11 screen.

12 -- brief recess taken.

13 MR. SCOTT LITTLE: As I noted,
14 in the past, the claimants have said that
15 something is black. This has not stopped them now
16 from telling you that it's white. We are in
17 confidential session very briefly.

18 For example, in their business
19 plan, in their EIS, in their representations to
20 the JRP, and even to their submissions to this
21 tribunal in the jurisdictional liability phase,
22 they stated that the Whites Point project would be
23 shipping up to 2 million tons per year.

24 And for the damages phase of
25 the arbitration, they have valued a project that

1 [REDACTED]

2 [REDACTED] We can exit
3 confidential now.

4 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
5 10:45 A.M.

6 MR. SCOTT LITTLE: Similarly,
7 in their business plan, their EIS, their
8 representations to the JRP, and even their reply
9 memorial on jurisdictional liability, their plan
10 was to export rock to New Jersey for the captive
11 production of the Clayton companies.

12 But because it would bolster
13 their damages claim in this phase of the
14 arbitration, they now purport the Whites Point
15 product was destined for the New York City market.

16 We were also led to believe
17 during the liability phase that the JRP members
18 were hacks, that the JRP was not comprised of
19 persons with the requisite professional
20 credentials and experience.

21 But over the past week, and
22 even today, in connection with their contention
23 that the JRP considered all aspects of the
24 project, and therefore had no legitimate basis to
25 recommend rejection, the JRP had transformed into

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1 three highly qualified, intelligent, capable
2 people who had no lack of training,
3 qualifications, experience, intelligence, skill
4 and infrastructure support.

5 And the claimants have a
6 similarly inconsistent take on the workings of
7 Canadian law. They argue on one hand that, absent
8 the NAFTA breach, the ministers were legally
9 compelled to approve the project.

10 But that on the other, despite
11 the existence of this legal requirement, judicial
12 review would have amounted to an endless legal
13 wrongdoing.

14 The claimants can't have it
15 both ways. By arguing out of both sides of their
16 mouths they've left the tribunal with a confused
17 and deeply inconsistent picture of what their
18 actual plan was for the Whites Point project, and
19 what could have happened if the JRP did not commit
20 the NAFTA breach found in the liability award.

21 The claimants bear the burden
22 of proving that the NAFTA breach caused their
23 damage, yet their twisted and tortured
24 explanations have done anything but meet that
25 burden.

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1 will explain why the tribunal lacks jurisdiction
2 to award damages for the claim the claimants have
3 put before you.

4 Mr. Klaver will also explain
5 why the NAFTA time bar precludes an amendment of
6 the claim such that it could be refiled under
7 Article 1117, in addition to why Canada is not
8 estopped from contesting standing.

9 The result, again, in the end,
10 is that their claim must be dismissed.

11 After this, Ms. Zeman will
12 summarize why, for many reasons, the speculative
13 discounted cash flow model the claimants have put
14 before you as a measure of lost profits has no
15 place in this arbitration, and must also
16 accordingly be rejected.

17 And, finally, Mr. Spelliscy
18 will explain why, even if one were to consider
19 lost profits as a measure of damages, the
20 claimants' DCF model is unreliable and suffers
21 from so many shortcomings that it can't be
22 considered a realistic measure of lost profits.

23 And as we did in our opening,
24 at the end of our closing, Ms. Kam is going to
25 remind you of the case that the claimants could

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1 Canada's closing statement
2 will follow the same structure as did its opening.
3 You can dismiss this case on any one of four
4 grounds.

5 Today we are going to review
6 each ground. In some areas, we will provide
7 supplementary responses to the questions the
8 tribunal asked the parties on January 26th.

9 Now, I will be addressing the
10 first of these grounds, which is that the
11 claimants failed to meet their burden of proving
12 the losses they claim were caused by the NAFTA
13 breach in this case.

14 In short, given the findings
15 made in the liability award, the claimants' legal
16 burden under customary international law in
17 proving their damages, and the flawed approach
18 they have taken to causation, their claim must be
19 dismissed.

20 Now, second, the claimants
21 have no standing under Article 1116 to claim
22 damages for the lost profits of Bilcon of Nova
23 Scotia.

24 Now, here, I am going to be
25 ceding the floor to my colleague Mr. Klaver, who

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1 and should have pled, and explain the only damages
2 to which the claimants could be entitled had they
3 pled such a case.

4 The injury the claimants
5 suffered was not the loss of the Whites Point
6 project, but rather the loss of an opportunity to
7 have their project assessed in accordance with
8 Canadian law.

9 This injury should have been
10 the basis of their claim, and it has a very
11 limited value. Moreover, the claimants could have
12 mitigated their lost opportunity by pursuing a
13 relatively simple application for judicial review
14 in Canada's domestic courts. And in so doing they
15 would have completely restored their fair chance
16 in a legally compliant process.

17 And what this means, in the
18 end, is that even if they had pled a proper case
19 on damages, which they haven't, the claimants
20 could be awarded no more than the costs of the
21 mitigation they should have reasonably pursued to
22 restore their lost opportunity. And Ms. Kam will
23 explain for you why.

24 So I want to turn to the first
25 branch now of the decision tree that I have just

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1 laid out for you, and the first ground on which
2 the claimants' claim can be dismissed.

3 And that's that the claimants
4 have failed to prove the damages they claim were
5 caused by the NAFTA breach found in the liability
6 award.

7 Now, as I explained in
8 Canada's opening, both the findings in the award
9 and the customary international law principles
10 governing causation have to be kept front and
11 centre.

12 And I am going to touch on
13 both of these briefly as a reminder, as the
14 claimants have both of them wrong.

15 I will then explain, in light
16 of the evidence that you heard this week from both
17 Canada's and the claimants' experts, how the
18 claimants' approach misapplies both the liability
19 findings and governing law.

20 In the end, the claimants'
21 approach doesn't establish that but for the
22 breach, their project would have gone on to 50
23 years of profits.

24 But before I move on, I want
25 to briefly address Mr. Nash's critique of Canada's

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1 experts, who he alleges do not focus on what he
2 calls the real-world evidence in this case.

3 And over the course of the
4 hearing, Mr. Nash has called Canada's experts
5 cheerleaders who only toe the party line and who
6 offer make-believe evidence.

7 Now, if he is going to levy
8 these charges against Canada's witnesses, it's a
9 little unclear how the same critique shouldn't
10 apply to the witnesses and the experts that he's
11 called, the majority of whom work or worked for
12 the Claytons.

13 And putting aside the
14 logistical impossibility of bringing in just some
15 of the tens and if not hundreds of government
16 officials that were involved in the Whites Point
17 EA, which Mr. Connelly made clear in his testimony
18 last week, there's a reason underlying Canada's
19 approach. And I adverted to this in my opening.

20 And this is that the tribunal
21 has already recognized and upheld a privilege over
22 the deliberations of all of the officials that
23 Mr. Nash is saying Canada should have put up to
24 give testimony.

25 Privileges exist for real,

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1 substantive reasons, not to hide evidence. On the
2 screen before you, this is the tribunal's ruling
3 in this regard, Procedural Order No. 13 of
4 June 2012.

5 Now in this order, after
6 extensive briefing on the issue of deliberative
7 privilege, the tribunal found that JRP
8 deliberations need not be produced in this
9 arbitration, given the JRP's extensive reasoned
10 report is in principle meant to speak for itself
11 rather than be supplanted by material that
12 originates from the JRP's internal discussions.

13 The tribunal also upheld the
14 well-recognized privilege over federal cabinet
15 related decision making documents because, in this
16 case, Canada had made extensive disclosures, not
17 selective disclosures, as Mr. Nash said today, of
18 internal government documents even at the senior
19 level, which included a cabinet briefing document
20 that presents the background for the rejection of
21 the project by the federal government and a list
22 of factors for and against the competing outcomes.

23 Now this was the document that
24 Mr. Connelly referred to in his testimony last
25 week, and that I am going to be referring to in a

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1 few minutes.

2 The tribunal also in this
3 procedural order upheld a similar privilege at the
4 provincial level. But even with this privilege
5 being recognized, Canada produced a provincial
6 decision making document that I am also going to
7 refer to momentarily.

8 So the issue of whether the
9 people Mr. Nash wanted to hear should have been
10 called to testify has been argued, and it's been
11 decided.

12 Mr. Nash may not have been
13 there at the time to argue the issue, he may not
14 like what Canada's witnesses have to offer, but
15 Canada was not obliged in any way to bring in any
16 of the JRP members or ministerial officials at
17 this stage to give the evidence that Mr. Nash
18 wants to hear.

19 And in this regard the
20 claimants' request that an adverse inference be
21 drawn is not only without foundation, it's
22 entirely inappropriate.

23 Now, I want to also note one
24 further procedural ruling from the tribunal, to
25 put Canada's selection of its witnesses in the

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1 proper context.

2 And this is the tribunal's
3 January 2016 ruling on Canada's motion to have a
4 preliminary step in the damages phase of the
5 arbitration on the types of damages the claimants
6 could seek as a consequence of the NAFTA breach,
7 effectively, the issue that I am briefing you on
8 right now, which is whether the award could
9 sustain a claim of lost profits.

10 Now, the tribunal will recall
11 that it dismissed Canada's motion. But in so
12 doing it noted that in such a preliminary phase
13 the salient issues would relate to the
14 international law on state responsibility and to
15 Canadian environmental law.

16 State responsibility and
17 Canadian environmental law.

18 Now, Canada took this ruling
19 and these words to heart when it prepared its case
20 on causation. And in so doing, it engaged experts
21 qualified in the review panel or decision-making
22 process under the applicable environmental laws in
23 this case.

24 You heard from a number of
25 these witnesses, these experts, this week, and in

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1 So let's move on.

2 I want to take about the next
3 20 to 25 minutes summing up precisely why this
4 case can be dismissed on the ground of causation,
5 so that the tribunal has total confidence in this
6 regard.

7 So keeping in mind the three
8 areas I wanted to address, let's just circle back
9 to some of the key findings in the liability
10 award, which the claimants have totally
11 misrepresented over the course of the hearing.

12 Regarding the acts giving rise
13 to NAFTA liability, the award provides that the
14 tribunal has respectfully taken issue with only
15 the distinct unprecedented and unexpected approach
16 taken by the JRP to community core values in this
17 particular case.

18 Specifically, the tribunal
19 found that the JRP was, regardless of its CCV
20 approach, still required to conduct a proper
21 likely significant effects after mitigation
22 analysis on the rest of the project effects.

23 And by not doing so, the JRP,
24 to the prejudice of the investors, denied the
25 ultimate decision makers in government information

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1 a couple minutes I am going to be summing up their
2 evidence.

3 Canada also engaged two
4 eminent Canadian jurists, Judge John Evans and
5 Judge Thomas Cromwell, who filed opinions on the
6 proper interpretation of these Canadian
7 environmental laws, and who concluded that the
8 interpretation of these laws by the claimants'
9 expert in this case, Dean Sossin, is simply
10 incorrect.

11 Now, I trust the claimants
12 aren't suggesting that these two former Canadian
13 judges, one of the Federal Court of Appeal and one
14 of the Supreme Court of Canada are non-objective
15 witnesses.

16 The claimants chose not to
17 cross-examine Judge Evans or Judge Cromwell. This
18 was their choice to make. It's a strange one
19 given the tribunal's comment regarding the
20 saliency of Canadian environmental law, but it was
21 their choice.

22 And the result of their choice
23 is that the opinions of these two jurists stands
24 uncontroverted, and we say they completely undo
25 the claimants' theory of causation.

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1 which they should have been provided.

2 In short, the JRP arrived at
3 its conclusions under both the laws of federal
4 Canada and Nova Scotia without having fully
5 discharged a crucial dimension of its mandated
6 task.

7 Now, over the past week and a
8 half, the claimants have distorted these findings
9 beyond recognition.

10 For example, in his opening,
11 Mr. Nash stated that it was not the JRP's acts
12 that breached the NAFTA, but rather that Canada
13 illegally denied regulatory approval for the
14 Whites Point Quarry contrary to its NAFTA
15 obligation.

16 The claimants' expert, Dean
17 Lorne Sossin, wrongly asserted that it's
18 ultimately the decision maker that was found to
19 have breached the Articles 1105 and 1102
20 standards.

21 Now, these allegations are not
22 borne out by the liability finding, and nor are
23 they borne out by the tribunal's finding as to the
24 injury that flowed from the NAFTA breach.

25 So let's look at that injury.

1 Now, what the tribunal found was that the
2 claimants were not afforded a fair opportunity to
3 have the specifics of their project, their case,
4 considered, assessed and decided in accordance
5 with applicable law.

6 The tribunal also made clear
7 that it was not here deciding what the actual
8 outcome should have been, including what
9 mitigation measures should have been prescribed if
10 the JRP had carried out its mandate.

11 Yet despite these clear
12 findings, the claimants' theory as you can see
13 from this excerpt from their opening is that the
14 injury caused was the loss of their project.

15 Mr. Nash suggested many times
16 that the claimants' understanding was that the EA
17 process would conform to Nova Scotia's policies to
18 promote economic development, leading to a
19 reasonable conclusion that it should have been
20 approved.

21 However, the tribunal never
22 found that government officials guaranteed Bilcon
23 would win approval. No government official had
24 the authority to make that guarantee before the
25 process began. The claimants knew this.

1 But it appears that this is
2 what they have done. They have given short shrift
3 to causation, and really just asked you to
4 consider their compensation.

5 For example, in their opening
6 they cited Crystallex, in support of the assertion
7 that ambiguity or uncertainty should be resolved
8 in a claimant's favour, where that uncertainty is
9 the state's fault.

10 But they ignore that this
11 element of the Crystallex award was with respect
12 to establishing compensation, not causation.

13 If you look at the Crystallex
14 award, what it actually found with respect to
15 causation is that, first, the fact, i.e., the
16 existence of the damage, needs to be proven with
17 certainty. So the test is not some unspecified
18 logical link between breach and loss. Causation
19 requires more.

20 Now, this principle can also
21 be seen at play in the Pey Casado award. In
22 assessing damages in this case, the tribunal first
23 inquired into whether the claimants had met their
24 burden of proving injury, finding that they had
25 focused in error on the evaluation of damage,

1 All the tribunal found in the
2 end was that the investors understood that they
3 would only obtain environmental permission if the
4 project satisfied the requirements of the laws of
5 federal Canada and Nova Scotia.

6 Thus the claimants' reasonable
7 expectation was limited to a chance at a fair
8 process. The possibility of approval, not a
9 guaranteed approval.

10 So any suggestion that the
11 tribunal found the claimants were denied a
12 specific outcome from the EA process, rather than
13 a fair opportunity in that process, is wrong.

14 Now equally as important as
15 the tribunal's findings are the customary
16 international law principles governing causation.

17 In this regard, there is no
18 dispute, Canada's under an obligation to make full
19 reparation for any injury that's been caused by
20 its internationally wrongful acts.

21 But the principle of causation
22 is key here. The claimants' burden of proving
23 causation can't be confused with the proof they
24 furnish, and have to furnish, in support of their
25 claim for compensation.

1 without undertaking the prior step of showing the
2 precise nature of the injury, causation and damage
3 itself.

4 Now, in light of the
5 claimants' failure to meet their burden, the Pey
6 Casado tribunal held that in the absence of any
7 sufficient proof of injury or damage caused to the
8 claimants by the breach of the BIT established in
9 the first award, the question of the assessment or
10 quantification of that damage does not arise.

11 So, as in the case of
12 Nordzucker which I summarized in Canada's opening
13 and as in other cases, like MNSS v. Montenegro,
14 where a claimant has simply failed to prove
15 causation, in Pey Casado the tribunal had no
16 choice but to arrive at a result of no damages.
17 And the same result must be arrived at here.

18 Let's take just a closer look
19 at how causation must be proven. Both the
20 claimants and Canada and the tribunal has cited to
21 guidance provided by Chorzow Factory.

22 The Chorzow Factory case
23 instructs you to ask if the JRP prepared a report
24 that wasn't based on the CCV approach but rather
25 carried out a likely significant adverse effects

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1 after mitigation analysis of the whole range of
2 potential project effects, then in all probability
3 would the situation that would exist be one not of
4 the Whites Point project being denied, but rather
5 one of the Whites Point project being approved and
6 constructed and operated profitably for 50 years?

7 Now, while the claimants cite
8 to Chorzow Factory as governing causation, they
9 don't really try to apply it. They make little
10 effort to re-establish the situation which would
11 in all probability have existed in a
12 NAFTA-compliant world.

13 Now, their reticence appears
14 founded on their view that this is not a
15 hypothetical case to be considered and assessed in
16 the abstract.

17 Now this is an interesting
18 comment because in their opening the claimants
19 asserted that but for the NAFTA breach, in the
20 ordinary course, the Whites Point Quarry would not
21 have been referred to a JRP. The EA would have
22 recommended approval. Ministerial approval would
23 have been granted, and all industrial permits
24 would have been issued.

25 And in so doing they certainly

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1 engaged in a number of hypothetical propositions.
2 The fact is, the causal
3 analysis to be carried out under Chorzow Factory
4 is by necessity a hypothetical exercise.

5 And I will note, assertions
6 about what would happen in the ordinary course is
7 not the test. As Professor Thomas Wälde wrote:

8 "Chorzow Factory requires
9 the construction of a
10 hypothetical course of
11 events with necessarily
12 speculative elements.
13 This hypothetical course
14 of events extends both
15 into the past, i.e., how
16 would the government have
17 acted if it had acted
18 lawfully, and into the
19 future."[as read]

20 So let there be no mistake.
21 You are by necessity engaged in a hypothetical
22 exercise, not some alleged ordinary course
23 exercise.

24 So with that, with reference
25 to the testimony that we heard this week, let's

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1 take a brief look at the way the claimants have
2 gone about attempting to prove causation and
3 injury.

4 In short, their approach
5 simply misapplies the liability findings and the
6 governing law on causation.

7 The claimants' theory of
8 causation is quite simple. You heard it in their
9 opening. There's a straight, solid black line
10 between the NAFTA breach and their loss of 50
11 years of profits.

12 And this is because, in their
13 view, the JRP made one recommendation only: That
14 the Whites Point project was inconsistent with
15 CCV. And that this NAFTA breaching recommendation
16 was the only ground, the only basis on which
17 provincial and federal ministers rejected the
18 project.

19 In the words of their expert,
20 Dean Sossin:

21 "Beyond CCV, there was no
22 other separate
23 information analysis
24 sought by the decision
25 makers beyond the report

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1 that is indicated in
2 their decision documents
3 to have been carefully
4 studied, reflected on and
5 adopted..."[as read]

6 Dean Sossin founded this
7 conclusion on the fact that there aren't other
8 bases in the record referred to beyond the JRP
9 report and that it, that is, CCV, was the key
10 evidentiary record and certainly the primary
11 factor in each of the decision makers'
12 justification for the rejection of the project.

13 So if you take away the
14 wrongful CCV recommendation, in the claimants'
15 view of the world, there would be no lawful basis
16 for the ministers to reject the project.

17 Now, as I noted, this approach
18 doesn't even try to apply the guidance of Chorzow
19 Factory by attempting to re-establish the
20 situation which in all probability would have
21 existed absent the NAFTA breach. And I will get
22 to that proper application in a few minutes.

23 But more than that, the
24 factual premises underlying Dean Sossin's
25 theories, they are simply incorrect.

1 He is completely wrong as to
2 what was actually done in the EA process. Now,
3 first off, there were multiple findings by the JRP
4 regarding the likely adverse effects of the Whites
5 Point project that could not be mitigated, and
6 that could result in the decision to reject.

7 The tribunal will recall my
8 exchange with Dean Sossin last week regarding the
9 JRP's many findings of adverse effects that could
10 not be mitigated.

11 Dean Sossin agreed that these
12 kinds of findings would be relevant to the Nova
13 Scotia minister's decision. These were other
14 bases in the record that could warrant rejection
15 of the project beyond the CCV finding in a but-for
16 world.

17 Now, second, Dean Sossin's
18 premise that the ministers based their decisions
19 only on the concept of CCV is demonstrably wrong.
20 It is not supported by evidence produced in the
21 arbitration.

22 On the screen before you is
23 the cabinet briefing document that I referred to
24 earlier that presents the background for the
25 Governor in Council's consideration of the

1 project, and a list of factors for and against the
2 potential competing outcomes.

3 This document features
4 prominently in the expert reports of Robert
5 Connelly. Mr. Connelly referred to it several
6 times in the course of cross-examination last
7 week, but Mr. Nash wasn't interested in looking at
8 it.

9 What it shows is the
10 considerations and the perspectives that were
11 brought to the attention of Canada's Governor in
12 Council in the wake of the JRP's report.

13 For example, it notes the key
14 environmental effects of the project within areas
15 of federal jurisdiction, which included things
16 like losses to fish habitat, impacts on surface
17 and sub surface water, impacts on migratory birds,
18 impacts to species at risk, and impacts on
19 navigation.

20 It also notes the concerns of
21 regional stakeholders over factors such as the
22 impacts to the tourism industry, including impacts
23 to whale watching, the fishing industry and the
24 aesthetics of the landscape and way of life.

25 It also reports on

1 consultations between government and Mi'kmaq First
2 Nations communities that took place weeks prior to
3 the release of the JRP report, noting concerns
4 over the potential for impacts to native fisheries
5 and hunting and foraging areas for traditional
6 purposes.

7 And it highlights the JRP's
8 many concerns about the evidence submitted by
9 Bilcon during the EA process.

10 Now, nowhere does the note
11 focus or mention the JRP's CCV-based
12 recommendation. Nor does it support Dean Sossin's
13 contention that federal ministers considered only
14 the CCV-based recommendation.

15 What it does make clear are
16 the many, many grounds on which the Governor in
17 Council could have denied approval of the Whites
18 Point project, even if the NAFTA breach hadn't
19 been committed.

20 Let's now consider Dean
21 Sossin's contention from the provincial side of
22 the spectrum. The PowerPoint presentation that
23 you see on the screen now was prepared to brief
24 the Nova Scotia cabinet on the minister's decision
25 after issuance of the Whites Point JRP report.

1 Canada produced this document
2 in follow-up to the tribunal's privilege ruling I
3 highlighted earlier, and the claimants attached it
4 to their reply memorial in the liability phase.

5 In summarizing the rationale
6 underlying the JRP's recommendation that the
7 project should be rejected, the presentation does
8 not say that the JRP's recommendation was based
9 solely on the CCV factor.

10 To the contrary, it notes the
11 wide range of findings the JRP made regarding the
12 adverse effects of the project, and these included
13 biophysical effects such as risks to groundwater
14 regimes, sensitive species like the right whale,
15 rare plants and on-site wet lands; socio-economic
16 effects, including the potential of the project to
17 negatively impact local industries like fishing
18 and tourism; and concerns over whether the project
19 would contribute to sustainable development.

20 There's no mention of the
21 JRP's sole CCV finding in this document. And,
22 again, all of these factors warranted a rejection
23 of the project.

24 And when Minister Parent
25 issued his rejection, his decision letter makes no

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1 recommendation specifically of a CCV
2 recommendation, or that his decision was based
3 solely on the CCV criteria.

4 It, rather, states that he
5 arrived at his decision following careful
6 consideration of the panel's report, and with a
7 view to all factors that are considered in an
8 assessment of environmental effects under the
9 NSEA.

10 So, again, Dean Sossin's
11 theory on why you can simply excise the CCV-based
12 finding from the JRP report and assume the
13 ministers had no other lawful basis for rejecting
14 the project? Well, it doesn't apply the Chorzow
15 Factory analysis. And it's also simply not
16 supported by the facts.

17 So let's move on and apply
18 Chorzow Factory. What could have been the outcome
19 come of a NAFTA-compliant JRP process?

20 Now, the tribunal will recall
21 the testimony and the reports of Ms. Lesley
22 Griffiths and Tony Blouin, both experienced review
23 panel chairs in past EAs, respectively under the
24 CEAA and the NSEA.

25 While both Ms. Griffiths and

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1 Dr. Blouin were subject to extensive questioning
2 as to whether they were qualified to express legal
3 opinions, which was really not the focus of their
4 reports, the cross-examinations to which they were
5 subjected didn't undermine their opinions that
6 absent the breach it wasn't a foregone conclusion
7 the project would be approved.

8 Certainly, their
9 cross-examinations didn't establish that on a
10 balance of probabilities, absent the JRP breach,
11 the JRP would have recommended approval of the
12 project.

13 Nor did the contents of the
14 JRP report establish this. There was far more to
15 it than CCV.

16 Even Dean Sossin agreed, when
17 I asked him whether it would be possible for the
18 JRP to find other likely significant adverse
19 environmental effects of the project, if it had
20 carried out its mandate in accordance with CEAA.

21 His response, as you can see,
22 was that he did not see why not.

23 And in response to
24 Mr. Estrin's view that a hypothetical
25 consideration of what would have happened absent

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1 the NAFTA breach was not required because the JRP
2 did assess the significance of environmental
3 effects but they just didn't bother to report
4 them, well, Professor Schwartz, you commented that
5 this actually reenforces the concern, as we don't
6 know on a hypothetical do-over precisely what a
7 panel acting absent the CCV issue would have
8 identified as significant adverse effects, or
9 which specific mitigation measures would have been
10 proposed.

11 So on a balance of
12 probabilities, absent the NAFTA breach, it has
13 simply not been established that the Whites Point
14 JRP would have recommended approval, or would not
15 have found likely significant adverse
16 environmental effects after mitigation.

17 Let's move to government
18 decision making.

19 Now, here the straight solid
20 black line posited by the claimants becomes even
21 more improbable. The ministers were not compelled
22 to approve the project under any conception of a
23 but-for world, and the evidence you heard this
24 week confirms this.

25 For starters, as shown by this

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1 exchange that I had with Dean Sossin, if just one
2 of the Nova Scotia or federal governments decided
3 not to approve, then the project couldn't proceed.

4 And in a but-for world in
5 which the JRP discharged its legal mandate,
6 ministers in either level of government were not
7 constrained by the JRP's possible recommendation.

8 Looking at it from the federal
9 side of the spectrum, this is because CEAA Section
10 37 provides that Canada's Governor in Council is
11 the ultimate approver of a project after a JRP
12 report is issued, but is in no way beholden to the
13 recommendations made in the JRP report, as this
14 exchange that I had with Dean Sossin demonstrates.

15 Now the tribunal should also
16 recall the evidence of Robert Connelly regarding
17 the discretion exercisable by the GIC after
18 issuance of a panel report.

19 Mr. Connelly testified that
20 when the act was first developed, it was very
21 clear no department, no minister wanted to give an
22 environmental assessment panel the authority to
23 make decisions. They wanted these panels to be
24 advisory.

25 So, therefore, they have the

1 opportunity to say yes or no, we agree or disagree
2 with your findings.
3 And despite the extensive
4 cross to which Mr. Connelly was subjected on the
5 fact that he too is not a lawyer, which we presume
6 was designed to suggest that he shouldn't be
7 pronouncing on CEAA Section 37 despite his years
8 of experience, what's noteworthy is that the
9 claimants didn't cross-examine the Honourable John
10 Evans, who is eminently qualified to interpret the
11 provision, and whose two opinions reinforce the
12 very conclusion that Mr. Connelly expressed on
13 Section 37.
14 Now looking at ministerial
15 discretion and decision making from the Nova
16 Scotia side of the spectrum, it's even simpler to
17 see that in a but-for world the claimants had no
18 guarantee the project would be approved absent the
19 NAFTA breach.
20 Last week you heard Peter
21 Geddes testify that the minister must look at the
22 entire picture, which includes the definition of
23 environmental effect, the overall principle of
24 balancing economic development with environmental
25 sustainability and the positive or adverse effects

1 Sossin's opinion makes sense.
2 We actually urge you to read
3 the entirety of Judge Cromwell's report, and in
4 particular paragraph 7, where in he noted that he
5 did not accept the factual premise underlying Dean
6 Sossin's report that there were no legitimate
7 grounds to deny project approval.
8 And this is because, apart
9 from the CCV findings, as I have already said, the
10 JRP made numerous determinations that the project
11 would result in adverse environmental effects that
12 could not be mitigated.
13 Now, finally, if the JRP had
14 completed its mandate, it could have recommended
15 mitigation measures that impacted the
16 profitability and in some cases the viability of
17 the Whites Point project.
18 As you noted to Mr. Estrin,
19 Professor Schwartz, and as Mr. Estrin agreed,
20 between approvability and rejection, there's
21 approval with mitigation.
22 In this regard, Professor
23 Schwartz, you put to Mr. Estrin that there still
24 would seem to be a lot of flex in there for
25 different terms and conditions, some of which

1 of a project.
2 And at the end of the day, the
3 minister is the final decision maker regardless of
4 the recommendation that's put before him or her.
5 As with all of Canada's other
6 witnesses, Mr. Geddes was cross-examined on the
7 fact that he was not a lawyer, and apparently
8 shouldn't be offering opinions on the workings of
9 ministerial decision making under the NSEA.
10 But, again, what's strange
11 about the claimants' fixation with Mr. Geddes'
12 lack of legal training, is that Canada filed an
13 expert legal opinion by Judge Cromwell on the very
14 conclusion on which the claimants tried to cast
15 doubt through the cross-examination of Mr. Geddes.
16 Specifically, that regardless
17 of the NAFTA breach, there was absolutely nothing
18 preventing the Nova Scotia minister from rejecting
19 the Whites Point project.
20 So to the extent that you have
21 any questions on this point from a legal
22 perspective, you can find comfort in Judge
23 Cromwell's uncontroverted opinion.
24 It will be quite helpful
25 reading for your consideration of whether Dean

1 might have a significant impact on the economics
2 and viability of the project. And Mr. Estrin
3 agreed.
4 You characterized Mr. Estrin's
5 view that Bilcon's mitigation in its EIS would
6 have just been accepted as unreasonably
7 speculative, and we agree.
8 The claimants haven't proven
9 what the costs or feasibility of mitigation would
10 have been, even on a balance of probabilities.
11 The fact is that the
12 claimants' proposal was its own unique project in
13 its own unique environment. It raised the
14 potential of its own unique significant adverse
15 environmental effects, and hence its own unique
16 significance criteria.
17 And it also raised the
18 prospect of its own unique mitigation measures
19 that might have been employed against such
20 effects.
21 As but one illustration, this
22 map, which we saw last week in the
23 cross-examination of Mark McLean, shows the
24 relative abundance of the endangered right whale
25 in proximity to the Whites Point project site

1 relative to other projects like the Black Point
2 project.
3 Now, as we have heard from the
4 evidence of Mr. McLean, it's these very kinds of
5 differences in the environmental -- or the
6 environment surrounding a project that can result
7 in extreme differences in the cost and the
8 feasibility of mitigation measures that might be
9 recommended for a project in the end.
10 So, for the claimants to
11 suggest that the only mitigation measures that
12 would be required for the Whites Point project in
13 a NAFTA compliant but-for world, well, it's quite
14 simply incorrect.
15 So in conclusion, when they
16 entered into the EA process, the claimants were
17 never guaranteed an approved and fully permitted
18 and profitable Whites Point project,
19 notwithstanding the encouragements they might have
20 received from the Nova Scotia government,
21 notwithstanding Nova Scotia's policy and practice
22 of promoting economic development and the
23 development of quarries in the province, and
24 notwithstanding the fact that other quarries
25 throughout Atlantic Canada may have been approved.

1 you of it before we leave the topic of causation.
2 Because what it shows is there is simply no
3 straight black line to project approval in the
4 but-for world when causation is properly applied.
5 In the end, if you agree that
6 any of these potential possibilities on this slide
7 could unfold in a NAFTA-compliant but-for world,
8 you have to also disagree with the claimants'
9 theory that but for the NAFTA breach the project
10 would have been approved, constructed and
11 profitably operated for 50 years.
12 And if this is the case, there
13 is but one conclusion at which we say you must
14 arrive, and that is dismissal of the claimant's
15 claim given their failure to prove causation.
16 So with that I would like to
17 now turn the floor over to my colleague, Mr. Mark
18 Klaver, who is going to address the next ground on
19 which you can dismiss the claimants' claim.
20 And that's specifically that
21 the claimants have no standing under Article 1116
22 to advance the claim that they have. Thank you.
23 **PRESIDING ARBITRATOR:** Thank
24 you, Mr. Little. Arbitrator Schwartz would like
25 to ask a question.

1 All they were entitled to was a lawful EA process.
2 And the fact is that every EA
3 process has the potential to result in the
4 government decision denying the requested
5 approvals and permits.
6 A point of knowledge, as you
7 can see here by Mr. Dooley and Mr. Fougere
8 regarding the Bayside Quarry, which sits just
9 across Bay of Fundy from the Digby Neck.
10 Mr. Dooley and Mr. Fougere
11 both testified that, like the Whites Point
12 project, the Bayside Quarry failed to obtain its
13 approval for an expansion permit in 2009.
14 And as you can see from this
15 testimony there was no shock, no surprise about
16 this denial. It's a fact of life. It's an
17 outcome contemplated by the EA regime.
18 There's nothing extraordinary
19 about the denial of an EA approval, it is a
20 completely natural and a certainly possible
21 outcome of any EA process. And if it could happen
22 at Bayside, it could happen at Whites Point.
23 Now, I presented the diagram
24 that you see on the screen now as part of Canada's
25 opening statement last week and I want to remind

1 **PROFESSOR SCHWARTZ:** Can I
2 just take you to your discussion of Crystallex at
3 page 26.
4 I am looking at the case that
5 you quote from that Crystallex. I am just asking
6 these questions not because I have a conclusion; I
7 am just trying to understand them better.
8 There is a discussion there
9 about how common lawyers get involved in their
10 ratiocination about is there a balance of
11 probability, some higher standard and that, and so
12 on and so forth.
13 But the passage you quote
14 there, if I am understanding it, seems to suggest
15 that it's more like a rule of law that damage has
16 to be proved with certainty.
17 There may be different
18 theories as well. Do you have to know on a
19 balance of probability that it's been proved with
20 certainty, or do you have to be certain that it's
21 proved with certainty?
22 But either way, whatever
23 standard of proof you are applying is related to a
24 substantive rule of law that damage must be proved
25 with certainty. Am I understanding that

1 correctly?
2 MR. SCOTT LITTLE: Well I
3 think Chorow Factory says in all probability what
4 would the situation be if the breach had not been
5 committed. Certainly I think Crystallex provides
6 us a stronger articulation of the Chorow Factory
7 test. And there's probably some gap between what
8 Crystallex provides and what Chorow Factory
9 provides.

10 But we cite that in
11 proposition that it's not just merely some logical
12 link that needs to be proposed in connection with
13 the breach in the injury. I think it is easier to
14 go back to the Chorow Factory case and just ask
15 yourself: In all probability, if this breach
16 wasn't committed, would that injury have resulted
17 or not?

18 PROFESSOR SCHWARTZ: Suppose
19 just hypothetically, not talking about this case,
20 this tribunal, a tribunal ends up looking at all
21 the evidence and says, well, we can't arrive at a
22 conclusion in all probability or in certainty, but
23 we think there's a 60 per cent chance that there
24 would have been a positive, that there would have
25 been regulatory approval.

1 accept in this case, that outcome has not been
2 demonstrated on a balance of probabilities that
3 absent the NAFTA breach, that is what would have
4 unfolded.

5 PROFESSOR SCHWARTZ: Just to
6 be clear in your submission, you are talking about
7 balance of probabilities 51, 61 per cent, whatever
8 the standard of internal consistency in the
9 arbitrator's mind, it is a pathway to having to
10 arrive at a substantive conclusion of in all
11 probability.

12 Like, I have to be, whatever
13 it is 50 per cent, 51 per cent, 60, 90, whatever
14 it is, what is it I have to be convinced of? It's
15 your submission I have to be convinced by whatever
16 percentage that the damage would have occurred in
17 all probability?

18 MR. SCOTT LITTLE: You would
19 have to be -- you would have to be certain that
20 absent the breach, in all probability, the result
21 that they are saying would have happened.

22 Absent the breach? Well, in
23 all probability it would have happened. And we
24 say that in this case that hasn't been proven on a
25 balance of probabilities.

1 Can a tribunal use a
2 probabilistic approach to assess damage, or is it
3 precluded from assessing damage because in all
4 probability or certainty has to be established?
5 Do you follow my question?

6 MR. SCOTT LITTLE: I do. You
7 are in a very gray area, I think.

8 I think you have to look at
9 what Chorow Factory says, which is in all
10 probability what would the situation have been.
11 And you have to look at the evidence as well, it's
12 evidence driven, and you have to make that
13 assessment if the evidence takes you there in all
14 probability.

15 In our submission, this case
16 here, the facts that present themselves in this
17 case do not get you close to in all probability.
18 Do not get you close to that 60 per cent or 51 per
19 cent.

20 PROFESSOR SCHWARTZ: Sorry,
21 could you just clarify for me what you meant by
22 the very last line, 50 per cent or 61 per cent?

23 MR. SCOTT LITTLE: It doesn't
24 get you to a balance of probabilities. The
25 outcome that the claimants are asking you to

1 PROFESSOR SCHWARTZ: Okay. So
2 I will just ask one last time. If the question is
3 too, can't give a clear answer, I am not
4 expressing it well, I won't pursue it.

5 But if a tribunal said, okay,
6 we are not convinced that this damage occurred
7 with certainty or in all probability. But we
8 think there is a 60 percent chance there would
9 have been an approval, with lost profits to
10 follow.

11 Does the claim then fail
12 because you haven't established in all probability
13 or certainty? But the tribunal has just achieved
14 a state, well, we think, you know, if we had to do
15 an actuarial estimate, 60 per cent, 70 per cent.
16 I mean, I am will just ask one last time. Maybe
17 it's not a good question.

18 MR. SCOTT LITTLE: I think I
19 hear what you are saying. Yes, the claim does
20 fail because you have to get into the zone of in
21 all probability would what happened -- would what
22 they say would happen -- would happen.

23 But there does have to be an
24 element, and I think that's driven by the
25 evidence, of in all probability is it certain or

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1 is it getting close to certain that this would
2 have happened?
3 If there's factual
4 uncertainty, then that should make you less
5 comfortable with the result that they are asking
6 you to accept.
7 PROFESSOR SCHWARTZ: Thank
8 you.
9 MR. SCOTT LITTLE: Okay.
10 CLOSING ARGUMENT BY MR. KLAVER:
11 MR. KLAVER: Hello, Judge
12 Simma, Professor McRae and Professor Schwartz. My
13 presentation has one purpose: To demonstrate that
14 this tribunal has no jurisdiction to award the
15 damages that the claimants seek because they lack
16 standing to claim the lost profits of Bilcon of
17 Nova Scotia. Five points substantiate this claim.
18 First, investors have no
19 standing under Article 1116 to claim damages for
20 loss incurred by the enterprise. In the opening,
21 my colleague Mr. Spelliscy outlined the NAFTA
22 parties' agreement on this point.
23 So I will briefly outline the
24 legal principles that confirm the correct
25 interpretation of Article 1116.

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1 original claim, but they abandoned them and never
2 provided the evidence necessary to substantiate
3 that claim.
4 I want to begin by explaining
5 why the tribunal cannot brush this issue aside.
6 If investors lack standing, the tribunal has no
7 jurisdiction to award damages for their claim.
8 Pursuant to Article 1122, the
9 NAFTA parties only consent to arbitrate claims
10 submitted in accordance with the procedures of the
11 agreement.
12 As the United States explains,
13 the NAFTA parties' consent to a tribunal's
14 jurisdiction is limited to a claim for loss under
15 the specific article pled. This tribunal has no
16 jurisdiction to hear a claim that the NAFTA
17 parties have not consented to arbitrate under
18 Article 1116.
19 Now, as you will recall,
20 Article 1116 (1) grants standing for an investor
21 to bring a claim on its own behalf, when the
22 investor has incurred loss or damage. Investors
23 must allege direct loss to recover damages under
24 Article 1116.
25 In contrast, Article 1117 (1)

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1 Second, it follows that the
2 claimants have no standing to seek the lost
3 profits of Bilcon of Nova Scotia.
4 Third, the claim must be
5 dismissed in its entirety. Permitting the
6 claimants to amend and refile their claim under
7 Article 1117 would be unduly delayed, time barred
8 and prejudicial to Canada.
9 After the liability award, the
10 claimants brought a completely different claim
11 from their original one. They made a litigation
12 decision to abandon their claim for sunk costs and
13 the cost of purchasing aggregate on the open
14 market, and they elected to shoot for the moon by
15 claiming lost profits.
16 Canada cannot be estopped from
17 contesting standing because it objected at the
18 earliest opportunity to this new claim.
19 Fourth, I will outline the
20 flaws inherent in alternative damages awards. The
21 claimants have no standing under Article 1116 to
22 recover any costs paid by Bilcon of Nova Scotia;
23 those are the enterprise's losses.
24 And fifth, the claimants might
25 have had standing under Article 1116 for their

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1 permits an investor to make a claim on behalf of
2 an enterprise for loss incurred by that
3 enterprise.
4 Any indirect loss to an
5 investor based on an injury to the enterprise may
6 only be claimed through Article 1117.
7 Now, Mr. Elrick today
8 suggested that NAFTA should read that investors
9 "shall" submit a claim instead of "may." But you
10 can see the absurdity of requiring investors to
11 bring claims against the NAFTA states.
12 Now, the reference in Article
13 1121.1 (b) to an investor's interest in an
14 enterprise cannot be read to allow an investor to
15 claim indirect loss. The waiver in Article 1121.1
16 (b) is not rendered redundant by Canada's
17 interpretation because an interest in an
18 enterprise is distinct from damage to the
19 enterprise itself.
20 In defining an investment,
21 Article 1139 uses the term "interest in an
22 enterprise" to refer to legal entitlements or
23 rights belonging to the investor, not the
24 enterprise.
25 Harm to such an interest could

1 include the lost right to receive dividends, to
2 vote, or to share in the residual assets of the
3 enterprise upon dissolution.
4 In contrast, lost dividends
5 are indirect losses. They result from lost
6 profits of the enterprise. Investors have no
7 standing to claim such losses under Article 1116.

8 This framework prevents
9 investors from effectively stripping corporate
10 assets at the expense of creditors who have a
11 superior financial position in the corporation.
12 Whether the corporation has one shareholder or
13 1,000, the tribunal is not authorized to read in
14 an exception to the strict separation between
15 Articles 1116 and 1117. Only the NAFTA parties
16 can amend the treaty.

17 And in the text itself and
18 their subsequent agreement and practice, the NAFTA
19 parties have never consented to arbitrate claims
20 by investors for the lost profits of an enterprise
21 under Article 1116. This tribunal has no
22 jurisdiction to award damages for such a claim.

23 In fact, the U.S. observes
24 that no NAFTA tribunal that has considered the
25 distinction between Article 1116 and 1117 has ever

1 awarded damages for indirect loss under Article
2 1116.

3 In Pope and Talbot, damages
4 were awarded for the investors' own out of pocket
5 expenses.

6 In UPS, the tribunal never
7 made an award of damages. To the extent that it
8 allowed standing to claim indirect loss, it was
9 wrong, and need not be followed.

10 And in GAMI, the tribunal
11 highlighted the risks of allowing indirect damages
12 claims under Article 1116 including the complexity
13 of quantifying the amount a minority shareholder
14 could recover, the risk of double recovery, and
15 the potential for inconsistent decisions for the
16 same loss to an enterprise.

17 Thus, it would be
18 unprecedented for this tribunal to permit a claim
19 under Article 1116 for the lost profits of an
20 enterprise.

21 Now, to assist the tribunal, I
22 will outline in a chart how the claimants lack
23 standing for the damages claimed and for
24 alternative awards.

25 The claimants seek damages for

1 the lost profits of Bilcon of Nova Scotia. In his
2 opening, Mr. Nash explained that the investors
3 seek an award of lost profits to compensate them
4 for what the Whites Point Quarry would have
5 otherwise earned. Their damages claim is for the
6 lost profits of the quarry, that is, the loss of
7 Bilcon of Nova Scotia.

8 According to Mr. Nash, a lost
9 profit award allows the tribunal to account for
10 what it would have in reality directly affected
11 the investors and their investment.

12 Yet his use of the term
13 "directly" is incorrect. The claimants have not
14 submitted a damages claim for losses they incurred
15 directly. Any dividends that they never gained
16 are indirect losses based entirely on losses of
17 Bilcon of Nova Scotia.

18 A claim for such losses could
19 have been made under Article 1117, but it is
20 impermissible under Article 1116.

21 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
22 11:41 A.M.

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]

3 For the purpose of determining
4 whose rights were injured, this is irrelevant. As
5 the United States notes, how a claim for loss or
6 damage is characterized is not determinative of
7 whether the injury is direct or indirect.

8 Rather, as Diallo and
9 Barcelona Traction had found, what is
10 determinative is whether the right that has been
11 infringed belongs to the shareholder or the
12 corporation.

13 A foreign jurisdiction's tax
14 treatment for shareholders does not change the
15 fact that the enterprise incurred the loss when it
16 lost the profits.

17 The capital that shareholders
18 invest in return for an ownership stake in the
19 enterprise is the enterprise's asset. Separate
20 legal personality requires that the assets of the
21 enterprise are its own, to grow or to lose.

22 The shareholder -- the
23 claimants did not gain dividends from Bilcon of
24 Nova Scotia, yet neither did they lose their right
25 to receive dividends. Canada did not appropriate

1 or injure any rights attached to their shares.
2 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
3 11:42 A.M.

4 MR. KLAVER: The claimants
5 retain all of the rights and elements of their
6 interest in Bilcon of Nova Scotia. Their claim is
7 solely one of indirect loss driving from loss
8 incurred by the enterprise.

9 They have no standing under
10 Article 1116 for this claim. And the tribunal has
11 no jurisdiction to award damages for the claim as
12 brought.

13 The appropriate result is to
14 dismiss the claim in its entirety. In 2002, the
15 Mondev tribunal stated that a NAFTA tribunal
16 should be careful to allow -- not to allow any
17 recovery in a claim that should have been brought
18 under Article 1117 to be paid directly to the
19 investor. It admonished claimants to consider
20 carefully whether to bring proceedings under
21 Article 1116 or 1117.

22 Now, the claimants say that
23 they intended to file under Article 1116 and this
24 may be true. Their original claim could have been
25 appropriate for Article 1116.

1 But now they ask to amend and
2 refile their claim under Article 1117 if the
3 tribunal confirms Canada's interpretation of
4 Article 1116. They fail to point to a single
5 tribunal that has allowed claimants to change
6 their standing under Article 1117 for a claim of
7 direct loss.

8 Moreover, this is not
9 permitted under the governing UNCITRAL arbitration
10 rules. Article 20 provides that a party may amend
11 its claim unless the tribunal considers it
12 inappropriate with regard to the delay, the scope
13 of the arbitration clause, or any prejudice to the
14 other party.

15 Considering all three factors,
16 it would be extraordinary and inappropriate to
17 allow the claimants to amend and refile their
18 claim under Article 1117.

19 First, changing the standing
20 claim now would be extremely delayed. This
21 arbitration began ten years ago. The claimants
22 could have claimed lost profits in their notice of
23 arbitration in 2008, their Amended Statement of
24 Claim in 2009, their memorial or reply for the
25 liability phase in 2011, or even during the

1 hearings in 2013.

2 Instead, the claimants waited
3 until their memorial on damages in 2017 to claim
4 the lost profits of Bilcon of Nova Scotia. They
5 made their request in the alternative to amend the
6 claim under Article 1117 in their reply last
7 August, nine years into this arbitration. This
8 delay is patently unreasonable.

9 Second, the attempt to amend
10 and refile the claim now is time barred multiple
11 times over. Under Article 1116 and 1117, a claim
12 must be brought within three years of the impugned
13 measure. The claimants lost the opportunity to
14 amend their claim under Article 1117 in 2010, over
15 seven years ago.

16 Amending the claim now would
17 fall outside of Canada's time limited consent to
18 arbitrate.

19 Now, given how recently the
20 claimants replaced their original claim of loss
21 with a brand new one, Canada cannot be estopped
22 from objecting to standing.

23 Mr. Elrick says that Canada
24 should have raised this objection in 2015. But
25 Canada first became aware of the claim of lost

1 profits in 2017. It objected to standing at the
2 earliest possible opportunity in Canada's counter
3 memorial, 90 days after learning.

4 Now, the third reason that the
5 claimants must not amend and refile their claim
6 now is that it would cause irreparable prejudice
7 to Canada.

8 The U.S. explained that a
9 respondent state may suffer prejudice when a
10 claimant changes its standing claim under Article
11 1116 or 1117.

12 Canada cannot possibly expand
13 in detail but the nature of a damages claim can
14 directly impact litigation defence strategy, and
15 settlement considerations.

16 At the end of these
17 decade-long proceedings, it would be impossible to
18 repair the prejudice that Canada would suffer if
19 the claimants changed their standing claim now.

20 Their claim cannot be amended
21 and refiled under Article 1117. It must be denied
22 in its entirety.

23 Now, the tribunal might choose
24 to award damages for sunk costs in the JRP
25 process. Although Canada offers this as a

1 potential alternative it is not the appropriate
2 award for at least three reasons.
3 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
4 11:47 A.M.

5 MR. KLAVER: First, Mr. Buxton
6 acknowledged that the vast majority of
7 expenditures on the quarry were paid by Bilcon of
8 Nova Scotia.

9 He said that he received money
10 for his services from Bilcon of Nova Scotia.
11 Having been paid by the enterprise, these expenses
12 would constitute losses incurred by the
13 enterprise.

14 Thus the appropriate standing
15 provision for such damages as Article 1117. The
16 claimants have no standing under Article 1116 to
17 recover any losses, any costs paid by Bilcon of
18 Nova Scotia for the project.

19 Second, the claimants have not
20 requested a sunk costs award. They made one claim
21 and one claim only for lost profits. They did not
22 even request an alternative award. There is no
23 good reason for this tribunal to award damages
24 that the claimants have not requested.

25 Third, the claimants failed to

1 establish an appropriate figure for a sunk costs
2 award. They choose not to answer the tribunal's
3 question 12 from its letter of January 26th
4 regarding alternative valuations.

5 Now, as the next two slides
6 show, Mr. Forestieri did agree with the Brattle
7 Group's estimates for the amount invested in the
8 project. Yet the claimants have not distinguished
9 costs paid by Bilcon of Nova Scotia versus the
10 claimants or other enterprises.

11 [REDACTED] These
12 [REDACTED] expenses would have to be excluded from any sunk
13 [REDACTED] costs award to the enterprise.

14 Mr. Forestieri also
15 acknowledged that Ralph Clayton and Sons Materials
16 LP is a distinct legal entity from Bilcon of
17 Delaware. [REDACTED]

18 [REDACTED]
19 [REDACTED] Since it is not a claimant in
20 this arbitration, neither Bilcon of Delaware nor
21 the claimants can recover damages for expenses
22 paid by [REDACTED]
23
24
25

1 Overall, then, an award for
2 sunk costs in the JRP process is rife with
3 problems that the claimants have not addressed.
4 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
5 11:50 A.M.

6 MR. KLAVER: Now the claimants
7 originally pled in their Statement of Claim that
8 the losses were their sunk costs as investors, and
9 the difference between the cost to supply their
10 operations from Whites Point versus the open
11 market.

12 These claims would appear to
13 qualify under Article 1116 as loss incurred
14 directly by the investors. In fact,
15 Mr. Forestieri said that Bill, Doug and Dan
16 Clayton paid every penny of the losses. Yet if we
17 go back to the chart, the claimants abandoned both
18 claims in the damages phase when they brought a
19 novel claim for the lost profits of Bilcon of Nova
20 Scotia.

21 The claimants did not prove or
22 distinguish costs that they paid versus
23 non-claimant enterprises including Bilcon of Nova
24 Scotia. Thus they failed to meet their burden
25 under Article 1116 to pursue losses that they

1 incurred directly.

2 Moreover, to establish damages
3 based on having paid higher prices for aggregate
4 on the open market, the claimants would have had
5 to give actual evidence of aggregate purchases
6 that they made from other suppliers.

7 They would then need to
8 analyze how much more they paid than potential
9 Whites Point prices. They produced no evidence to
10 support such analysis.

11 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
12 11:51 A.M.

13 MR. KLAVER: Another
14 inescapable problem for quantifying any loss
15 directly incurred by the claimants versus Bilcon
16 of Nova Scotia concerns tax deductions.

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
23 11:52 A.M.

24 MR. KLAVER: In sum, Canada
25

1 has not consented to arbitrate this claim under
2 Article 1116. Thus the tribunal has no
3 jurisdiction to award the damages that the
4 claimants seek. Their damages claim fails on this
5 basis alone.

6 Subject to any questions from
7 the tribunal, I will now turn the floor to my
8 colleague Ms. Zeman.

9 PRESIDING ARBITRATOR: Yes,
10 may I take the opportunity to maybe inquire from
11 Mr. Little how you want to structure the two
12 parts?

13 MR. SCOTT LITTLE: I think if
14 we could have Ms. Zeman present right now, and
15 then we would take a short break.

16 PRESIDING ARBITRATOR: Thank
17 you. Thank you, Mr. Klaver. Ms. Zeman, you have
18 the floor.

19 CLOSING ARGUMENT BY MS. ZEMAN:

20 MS. ZEMAN: Good morning,
21 Judge Simma, Professor McRae, Professor Schwartz.
22 I will spend the next half
23 hour or so explaining why, even if we leave aside
24 the standing points, when you look at the
25 narrative the claimants have crafted for the

1 purpose of the damages phase of this arbitration,
2 their claim for the lost profits of Bilcon of Nova
3 Scotia must be dismissed because it is
4 inappropriate as a matter of law.

5 In particular, a DCF method of
6 valuation is wholly inappropriate for an early
7 stage project like the Whites Point Quarry that
8 has no operating history and no right to develop.

9 As we saw last week,
10 commentary 27 to the ILC articles explains that
11 tribunals have been reluctant to provide
12 compensation for claims with inherently
13 speculative elements.

14 Commentary explains that where
15 lost profits have been awarded, it has only been
16 where an anticipated income stream has attained
17 sufficient attributes to be considered a legally
18 protected interest of sufficient certainty to be
19 compensable.

20 This is typically evidenced by
21 the existence of binding contractual arrangements
22 or a well-established history of dealings.

23 The cases are clear. The
24 standard of certainty required to warrant an award
25 of lost profits is difficult if not necessarily

1 impossible to achieve for projects like the Whites
2 Point Quarry with no proven record of
3 profitability.

4 As the tribunal in Rusoro,
5 determined, a DCF valuation cannot be applied to
6 all types of circumstances. Only where all or a
7 significant part of the listed criteria on this
8 slide are met, might a DCF even be considered
9 appropriate.

10 As Canada showed in its
11 opening argument, none of these factors is met in
12 this case. In the interests of time today, I will
13 address only the first two directly in light of
14 the evidence we heard this week.

15 And for the rest of my
16 submissions I suggest we enter confidential
17 session.

18 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
19 11:55 A.M.

20 MS. ZEMAN: First, there is no
21 established historical record of financial
22 performance in which the tribunal could grant an
23 award of lost profits in this case.

24 The proposed Whites Point
25 Quarry did not possess a right to be developed.

1 It was never built, it was never operated, and it
2 never produced profits.

3 The claimants argue that the
4 Clayton Group's experience in other ventures
5 suffices to establish that the Whites Point Quarry
6 would have been profitable.

7 Tribunals have rejected this
8 kind of reasoning for a simple reason: Businesses
9 fail, and planned projects fail. This project
10 would have been the first stone quarry that the
11 Claytons would have constructed, developed and
12 operated.

13 Building and operating a
14 greenfield project is a very different proposition
15 than acquiring an ownership interest in an
16 existing quarry, where others have already
17 undertaken the development risk.

18 The simple fact that a
19 business person has been successful in one venture
20 is no guarantee of success in another,
21 particularly in the absence of a detailed business
22 plan adopted in tempore insuspecto, or in the
23 ordinary course of project development.

24 And we heard in the claimant's
25 opening argument, and also earlier this morning,

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1 that the Whites Point project was not an early
2 stage start up, that it was a carefully planned
3 business venture.

4 Why do they say this? Because
5 they know the law is not on their side. In fact,
6 the claimants' witnesses all confirmed this week
7 that the project was at a very early stage of
8 development in 2007 and that there was no business
9 plan.

10 Indeed Mr. Clayton,
11 Mr. Forestieri and Mr. Buxton all went to great
12 pains to say that the EIS is too early in the
13 project, it is a very, very early document, and
14 has nothing to do with the business plan.

15 And, yet, the EIS is the only
16 contemporaneous document that we have to elicit
17 the claimants' expectations for the project at
18 that time. While it may not be the best place to
19 look, it is the only place.

20 Mr. Clayton explained that the
21 business plan developed later, but later was not
22 in the ordinary course of business. Later was in
23 the context of this arbitration for the purposes
24 of their damages plan.

25 And as you heard this week,

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1 the only pro forma we have to look at, which
2 Mr. Nash handed out this morning as well, was
3 prepared for the purposes of this phase of the
4 NAFTA arbitration.

5 It was prepared by
6 Mr. Fougere, who has never been employed by the
7 claimants, and he was not given any historical
8 documents to assist him in preparing the pro forma
9 that Mr. Rosen adopts in his valuation analysis.

10 He relied on inputs such as
11 Mr. Buxton's projected operating costs for the
12 plant, which were also prepared for the purposes
13 of this phase of the NAFTA arbitration.

14 In the absence of a business
15 plan developed in tempore insuspecto, the tribunal
16 can only conclude one of two things: Either such
17 a plan did not exist, or if it did, that it
18 contradicts the damages plan the claimants present
19 now.

20 In either case the result must
21 be the same: To reject the claimants' claim for
22 lost profits.

23 The claimants suggest that
24 less is needed when the state promotes the
25 profitability of the type of project at issue.

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1 But such promotion is no guarantee of permitting
2 approval, economic viability or a successful
3 operation.

4 If quarrying was as simple and
5 risk-free of a pursuit as the claimants suggest,
6 you would expect to see greenfield quarries being
7 built everywhere in Nova Scotia. But that is not
8 reality.

9 Despite the clear result that
10 these facts evince, we have heard a great deal
11 this week about the plan that the claimants have
12 developed for their DCF damages claim.

13 Canada presented this graphic
14 in front of you in its opening argument explaining
15 that the claimants would need to demonstrate
16 sufficient certainty with respect to each and
17 every element here.

18 The claimants agree.
19 Mr. Rosen even put this graphic in his own
20 presentation, indicating that each of these
21 elements represents a key business risk.

22 And since the parties agree, I
23 will walk through the contentious ones in light of
24 the evidence we heard this week.

25 First, the resource.

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1 Mr. Rosen and also Mr. Nash
2 this morning pointed to the evidence of Mr. Lizak
3 and Mr. Cullen to support his proposed checkmark
4 here.

5 But Mr. Cullen explained in
6 his first opinion that there is a difference
7 between estimates of mineral resources, and
8 mineral reserves whose economic viability has been
9 demonstrated.

10 Mr. Lizak agreed this week
11 that economic viability depends on more than just
12 the size of the deposit. Mr. Forestieri confirms
13 the claimants have not conducted a economic
14 feasibility study for the project.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 Now, that explanation may be
20 sufficient for the claimants in conducting their
21 business and in taking risks with their money.
22 However, it is nowhere near sufficient to ground a
23 lost profits damages award for hundreds of
24 millions of taxpayer dollars. Much more is
25 needed.

1 Turning next to permits, the
2 parties agree the Whites Point project had not
3 received its approvals or permits. This fact
4 alone is sufficient to mark this risk with an X.

5 The claimants essentially ask
6 the tribunal to find that they had a right to
7 develop the project. This is not the case. The
8 uncertainty that the project would receive its
9 approvals has been addressed by Mr. Little.

10 But as we have heard this
11 week, success in the permitting phase of a project
12 is no guarantee that the project will move
13 forward. We have two examples of projects that
14 received their environmental approvals but have
15 yet to put a shovel in the ground.

16 Belleoram received its
17 approvals in the fall of 2007. But, as
18 Mr. Fougere explained, they have been mired in
19 trying to develop a business case.

20 Similarly, it has now been two
21 years since Vulcan received its approvals at Black
22 Point. As we heard Mr. Power say this week, that
23 project too is still on hold.

24 In the absence of actual
25 permits in hand, the claimants ask this tribunal

1 to trust their business people that they would
2 move their project forward, unaffected by risks
3 that appear to affect even the largest aggregates
4 producers in North America. This again is an
5 insufficient basis on which to ground an award of
6 lost profits.

7 The parties also agree that
8 the Whites Point Quarry was never constructed. As
9 with permits, this undisputed fact alone is
10 sufficient to mark the construction risk here with
11 an X.

12 The claimants have argued that
13 there was sufficient certainty about construction
14 to turn this X into a checkmark. But what did the
15 claimants have?

16 Mr. Bickford explained that

17 [REDACTED]

19 Mr. Bickford also explained that

[REDACTED]

1 [REDACTED]
2 As with the pro forma and
3 operating cost documents, the claimants only had
4 detailed costings prepared for the purposes of the
5 damages phase of this arbitration.

6 This information is too
7 little, too late, to ground an award for lost
8 profits.

9 Moving to production, there
10 is, again, no dispute that the Whites Point Quarry
11 has never produced any aggregates. This fact
12 alone is sufficient to mark our production risk
13 with an X. The claimants' evidence on this point
14 does not change the X to a checkmark.

15 On this risk, I will address
16 three areas in particular.

17 First, [REDACTED]

1 [REDACTED]

8 Second, as Mr. Little
9 explained, [REDACTED]

17 For example, Mr. Buxton wrote
18 in the revised project description [REDACTED]
19 and when he was working very closely with
20 Mr. Wall, that the capacity of the production line
21 will be 48,000 tons per week.

22 As we heard this week [REDACTED]

1 [REDACTED]

1 [REDACTED]

4 Finally, on production,
5 contrary to what the claimants put to you today,
6 there is significant uncertainty surrounding the
7 cost to operate the plant to meet the specific
8 product mix and volumes the claimants model in
9 their damages claim.
10 This uncertainty stems from a
11 disconnect between the claimants' evidence on
12 production, and their evidence on sales.
13 First, [REDACTED]

1 [REDACTED]

1 [REDACTED]

1

[REDACTED]

1

For all of these reasons,
there is no basis on which to change the X to a
checkmark for the production risk.

2

3

4

Now, as with the other
elements, the parties agree that [REDACTED]

5

6

[REDACTED] This undisputed fact
alone is sufficient to mark this box with an X.

8

9

Mr. Rosen pointed to the
evidence of Mr. Morrison [REDACTED]

10

11

[REDACTED] The claimants call this real
world evidence.

13

14

But Mr. Morrison's evidence
does not help the claimants. Mr. Morrison assumed

15

16

17

18

In his view [REDACTED]

12

13

14

As a result, the freight rates
reflected in Mr. Rosen's DCF are based on the
result of [REDACTED]

1

[REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 Dr. Sterling explained that
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 With this kind of uncertainty
 19 surrounding the largest operating cost of the
 20 project [REDACTED],
 21 there is no basis on which to change this X to a
 22 checkmark.
 23 And the uncertainty on this
 24 issue is further compounded by the issue of the
 25 destination of the product, which Mr. Spelliscy

1 will address shortly.
 2 But before we get to that, the
 3 parties agree Bilcon had not concluded any sales
 4 agreements at the time of the breach. And, as
 5 with the other components we have looked at, this
 6 fact alone is sufficient to mark the risk with an
 7 X. There is no guaranteed revenue.
 8 The claimants argue that their
 9 sales would have been certain, but they failed to
 10 account for important risks. In particular, their
 11 entire quantification rests [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 This is a risky proposition
 15 for two main reasons. First, Mr. Dooley confirms
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 In fact, on the claimants'
 21 theory [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 The claimants' sales
 10 projections for Whites Point are simply
 11 unsupported by [REDACTED]
 12 [REDACTED]
 13 [REDACTED] their sales volumes
 14 are inherently unreliable.
 15 The second reason that [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 Critical to the
 19 claimants' theory on sales and pricing is the
 20 notion that [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 In this way, the claimants
 14 believe that Whites Point [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 But as Mr. Chodorow explained,
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 As Dr. Chereb explains, there
 12 is also risk to assuming that what is, is what
 13 will be. Indeed, what will be is changed because
 14 of [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 Now, SCMA estimates that
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 Dr. Chereb acknowledged that
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 So, the claimants' sales
 6 theory contains incredible risk with respect to
 7 sales volumes and prices, and those risks [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 As Mr. Forestieri confirmed,
 11 [REDACTED]
 12 [REDACTED]
 13 The claimants' damages model
 14 assumes sales volumes that are [REDACTED]
 15 [REDACTED]
 16 There is no evidence that they
 17 could support this volume. Nor is there evidence
 18 of [REDACTED]
 19 Accordingly the claimants'
 20 model does not offer anything close to assurance
 21 that could stand in for [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 Finally, there is insufficient
 25 certainty that Whites Point could have repeated

1 the cycle for the entire 50-year life of the
 2 project.
 3 For example, the claimants
 4 assume they would be constructing the Whites Point
 5 project [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 Nor have the claimants
 16 accounted for the fact tha [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] As
 24 Mr. Forestieri explained, there is no evidence of
 25 [REDACTED]

1 [REDACTED]
 2 There is thus insufficient
 3 certainty as to whether the whole plan could be
 4 repeated in the future on the terms the claimants
 5 assume.
 6 This week has made clear that
 7 the Whites Point project was at an early stage of
 8 development. At the time of the breach, it
 9 achieved no contracts, had no detailed budgets.
 10 As a result the claimants'
 11 claim for damages on the basis of a DCF is
 12 speculative and must be dismissed in its entirety.
 13 If there are any questions? I
 14 would suggest that we go to break, after which
 15 Mr. Spelliscy will address the last reason why the
 16 claimants' claim should be dismissed in its
 17 entirety.
 18 PRESIDING ARBITRATOR: I have
 19 a question with regards to the structure of the
 20 exercise in regard to what we call a lunch break.
 21 So we are going to have a short break -- that's
 22 what you said, Mr. Little?
 23 And for how long do you think
 24 would you go on and what kind of break would we
 25 have then? There would only be the rebuttals

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1 left, so just to have a better view of the future.
 2 MR. SCOTT LITTLE: I think
 3 that in our affirmative closing we will use up to,
 4 up to with 15 minutes remaining. We have
 5 Mr. Spelliscy and Ms. Kam still to present, so
 6 actually we probably have more than the 15 minutes
 7 remaining, I think, as well.
 8 If I may propose, I think, a
 9 short break now and if it's needed a short break
 10 after we are done our affirmative closing.
 11 We don't really see the need
 12 to have a large lunch break before we can
 13 complete, but we are in your hands.
 14 PRESIDING ARBITRATOR:
 15 Mr. Nash, any views on that?
 16 MR. NASH: Can I ask how much
 17 time has been used by Canada out of their
 18 three hours so far?
 19 DR. PULKOWSKI: Sure. A
 20 little over one and a half hours. I have recorded
 21 around 95 minutes. I stopped the clock very
 22 briefly when we were into Professor Schwartz's
 23 questions, so there's one a one- or two-minute
 24 measure of uncertainty in that count.
 25 MR. NASH: So perhaps we can

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1 get an idea from Canada how much more time they
 2 will be using in their main presentation?
 3 MR. SCOTT LITTLE: We estimate
 4 about an hour.
 5 PRESIDING ARBITRATOR: Okay,
 6 meaning one hour before the non-lunch short break
 7 or --
 8 MR. SCOTT LITTLE: We propose
 9 it might be reasonable to take a short break now
 10 and then we would be another hour with our
 11 closing. And then perhaps we can see where we are
 12 at that point.
 13 PRESIDING ARBITRATOR: Okay.
 14 All right, so we have a break now until 12:35.
 15 --- Upon recess at 12:24 p.m.
 16 --- Upon resuming at 12:38 p.m.
 17 PRESIDING ARBITRATOR: All
 18 right. We are all back. And you have the floor,
 19 Mr. Spelliscy.
 20 CLOSING ARGUMENT BY MR. SPELLISCY:
 21 MR. SPELLISCY: Good afternoon
 22 Judge Simma, Professor McRae, Professor Schwartz.
 23 As my colleagues have
 24 explained, there are absolutely no grounds to
 25 value the damages in this case using the DCF of

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1 Bilcon of Nova Scotia's lost profits that the
 2 claimants have presented. This claim should be
 3 dismissed for all of the reasons that they have
 4 already presented.
 5 But I want to turn to the
 6 final reason that this claim must be dismissed,
 7 and that is that the claimants' proposed DCF is
 8 unreliable and should be rejected.
 9 In its opening -- in the
 10 opening arguments, we presented five reasons why
 11 the particular DCF presented by the claimants is
 12 unreliable. You see them there in front of you.
 13 Now, Ms. Zeman has touched on many of these
 14 already in her review of the evidence that we just
 15 went through.
 16 And I could, of course, go
 17 over a number of these topics again as well as,
 18 for example, to explain why the claimants'
 19 approach to the valuation date results in
 20 increased damages for claimants depending on the
 21 speed with which a tribunal conducts its case.
 22 But you have heard that
 23 evidence already. And you can assess it.
 24 So instead of merely repeating
 25 what Ms. Zeman said or repeat what I said a week

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1 ago, what I would like to do here is pull back a
 2 bit and look at an even bigger picture question.
 3 And let's come back to the overriding point of
 4 damages, of considering damages. And it is a
 5 familiar one for us. It's been up on the screen
 6 already.
 7 The permanent court, the
 8 international justice in the Chorzow factory case
 9 told us that damages are intended to re-establish
 10 the situation which would, in all probability,
 11 have existed if the breach had not been committed.
 12 So, for this part, let's
 13 assume that this Whites Point project would have
 14 been permitted and that it would have been
 15 developed. What would have been developed?
 16 To put yourself in the
 17 position that would in all probability have
 18 existed, one must look to the business plan that,
 19 to use the words of the tribunal in Rusoro, was
 20 adopted in tempore insuspecto at the relevant
 21 time.
 22 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 23 12:40 A.M.
 24 MR. SPELLISCY: Why? Simple.
 25 If the breach had not occurred, the claimants

1 would have carried on with their business plan as
2 it existed then. There would have been no
3 arbitration that could cause them to rewrite it.

4 So what was that business
5 plan? In their opening arguments, the claimants
6 said to this tribunal the clear business purpose,
7 articulated 15, 16 years ago, was to provide the
8 Claytons with their own long-term reliable and
9 independent supply of aggregate for generations of
10 Claytons to come.

11 I believe this was a true
12 statement.

13 Now, this morning and
14 throughout this phase, it has been suggested by
15 the claimants again and again that this was always
16 and all the time about [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 This is not an accurate
20 statement. Let's go back 15 years, all the way
21 back to 2002 and 2003, and unpack what the
22 representation was. Bilcon first becomes part of
23 this project in April of 2002, when they sign that
24 partnership agreement with Nova Stone Exporters to
25 form Global Quarry Products. One of the first

1 things they do, they meet in June 2002 with Nova
2 Scotia government officials. What do they tell
3 them? They tell them about the Clayton operations
4 in New Jersey, 25 operations in New Jersey as part
5 of a concrete and gravel business there, no
6 mention of New York.

7 Then, in January of 2003, the
8 claimants have a joint meeting with Nova Scotia
9 and federal officials. What did they tell them
10 then? They tell them, on January 6th, 2003, that
11 the Claytons are a concrete manufacturer in New
12 Jersey; that they are looking for a permanent
13 source of stone, 2 million tons per year; and that
14 they are going to ship it. Ship it where? The
15 notes of the meeting taken make it clear, for ship
16 into New Jersey.

17 As 2003 goes on, Mr. Buxton
18 continues his work gathering the relevant
19 information to support the development of the
20 project. At this hearing, Mr. Clayton explained
21 that Mr. Buxton was given free range in Nova
22 Scotia to do whatever needed to be done to get
23 that project up and running and that they had no
24 concerns because, in Mr. Clayton's words:

25 "Mr. Buxton turns out to

1 be probably the most
2 honest man I've ever met,
3 and he treated every
4 penny of our money like
5 it was his own."

6 So how did Mr. Buxton do that?
7 And let's go into confidential session to look at
8 it.

9 In early 2003, he went out,
10 and he spent [REDACTED]
11 [REDACTED]
12 [REDACTED] what did Mr. Buxton tell
13 these consultants studying ballast water? He told
14 them that the point source for the ballast water
15 would be South Amboy, New Jersey. There is not a
16 single mention in this document of any concern
17 about ballast water picked up in Brooklyn.

18 If the ship was going to New
19 York City, one of the busiest international
20 harbours in the world, it would have been
21 mentioned. It was not.

22 Instead, the report prepared
23 concerns Raritan Bay. Now, in his testimony,
24 Mr. Buxton suggested to you that Raritan Bay is in
25

1 the New York Harbour, the New Jersey Harbour,
2 where the East River comes down on one side, and
3 the Hudson comes down on the other. I don't find
4 that in the expert report Mr. Buxton commissioned.
5 Not once did they suggest that Raritan Bay is part
6 of New York Harbour.

7 In fact, if we go into the
8 report and we look to Figure 1 where they identify
9 where Raritan Bay is, it's tough to see. We can't
10 see New York. And as we can see on a map that
11 we've pulled together from Google, Raritan Bay is
12 down to the south of Staten Island, at the
13 confluence of the Raritan River and what's called
14 the Arthur Kill. [REDACTED]

15 [REDACTED]
16 This is how Mr. Buxton was
17 honestly spending the Claytons' money in 2003, by
18 studying New Jersey.

19 Then, in 2004, the partnership
20 with Global Quarry Products falls apart, and in
21 April of 2004, the Claytons acquire full control
22 of the project. And what is the first thing that
23 they do? Perhaps not surprising, they prepare a
24 business plan.

25 Now, we need to recall that

1 the claimants' evidence here, again, in front of
 2 you, what they've told you, is that from the time
 3 Whites Point began in 2002, years before this
 4 business plan was put together, [REDACTED]
 5 [REDACTED] But let's
 6 look at what the business plan in 2004 says, the
 7 business plan for the Whites Point Quarry prepared
 8 not by Mr. Buxton, but, instead, prepared by
 9 Clayton Concrete, Lakewood, New Jersey.

10 So let's see what the Claytons
 11 themselves said in their own internal documents,
 12 written for themselves, no ulterior motive, 2004.

13 On page 1, in the description
 14 of the project, they write:
 15 [REDACTED]

1 [REDACTED]

9 Let's just stop there. The
 10 Claytons, in their own internal documents,
 11 identify the problem their business plan is
 12 intended to address. [REDACTED]

[REDACTED]

21 The problem identified in the
 22 business plan of the Claytons is not [REDACTED]

25 it is that the Claytons [REDACTED]

3 [REDACTED]
 4 We heard the reason from this
 5 from Mr. Lizak at this hearing. Mr. Lizak, whom
 6 my colleague Mr. Nash reminded you this morning
 7 the Claytons retained in 2002 to go to Nova Scotia
 8 to review potential sites, he explained:

9 "I would also like to
 10 point out that it's been
 11 40 years since a new
 12 quarry has been developed
 13 in Nova Scotia. I spend
 14 my time looking globally
 15 for new quarries. We
 16 can't find them. Okay?
 17 I have literally scouring
 18 the Maritimes, the Gulf
 19 Coast, Columbia, Jamaica,
 20 I have clients that are
 21 looking for this stuff
 22 all over the planet. We
 23 can't find them.
 24 Okay?"[as read]

25 And he goes on.
 "So my point is that, if

1 [REDACTED]

12 The solution devised by the
 13 Claytons? Let's just read on in their business
 14 plan.

15 They say:
 16 [REDACTED]
 22 [REDACTED] s read]

23 And how did the Claytons plan
 24 to operationalize that solution? Again, their
 25 business plan tells us. We go a couple of pages
 further into operations, and what did they say:

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1 communicate frequently with the Claytons to learn
2 about their operations, their plan for the project
3 in order to complete this important part of the
4 EIS that he identified, we know he wasn't working
5 alone, in isolation. Mr. Wall, the claimants'
6 chosen man to run the quarry, was working with
7 him, hand in hand.

8 In fact, we heard
9 Mr. Clayton's testimony that, by 2006, Mr. Buxton
10 and Mr. Wall were actually working together in the
11 same small office in Digby, Nova Scotia.

12 So, with all this information,
13 Mr. Wall there, working with him, what do Mr. --
14 what does Mr. Buxton put together in the EIS?
15 They originally file the whole
16 EIS in March of 2006, and we know they filed a
17 revised project description in November of 2006.
18 We have seen how they consistently described their
19 project and these documents from their witnesses.

20 Early stage, not binding. In
21 fact, in some of the questioning, claimants'
22 counsel even suggested that the only references in
23 this document to New York were actually in the
24 revised project description. That is simply not
25 true.

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1 enough about the project. No mention of New York
2 here.

3 Let's get to the main body of
4 the environmental impact statement, Volumes 4
5 through 7. Volume 4, still not the project
6 description yet. Volume 4, in the project
7 overview and purpose, Bilcon writes:
8 "The purpose of the
9 proposed project is to
10 quarry basalt rock and
11 ship the processed
12 aggregate products to New
13 Jersey." [as read]

14 Volume 5 of the EIS is
15 actually the project description, so we are going
16 to come to that, because we are going to look at
17 the revised one.

18 Let's keep going, Volume 7,
19 chapter 9, which is actually on just environments
20 and impacts analysis. What does Bilcon say:
21 "Crushed rock and grits
22 will be loaded via the
23 loading tunnel and the
24 ship loader on a period
25 basis for transshipment

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1 There were seven volumes, I
2 said. Let's go through some of them.
3 In Volume 1, the plain
4 language summary, page 4, 4 of the entire
5 document:
6 "Bilcon will ship by
7 common carrier the
8 crushed rock and grits to
9 New Jersey for use by its
10 parent company in the
11 manufacture of concrete
12 and concrete block." [as
13 read]

14 Not only a statement of where
15 but a statement of why.

16 In Volume 3, this is a
17 collection of the research done by Bilcon in
18 support of the EIS. We have the results of a
19 study conducted by consultants hired by Bilcon.
20 They surveyed people's opinions about the Whites
21 Point project, and they asked a question about
22 what the people knew about where the product was
23 to be shipped. And, of the responses, people
24 could actually select, response number A. The
25 participants could choose New Jersey if they knew

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1 to New Jersey.
2 And, finally, in Volume 7,
3 chapter 10 of their EIS, on cumulative impact
4 where they are writing to explain what the -- how
5 this may impact it all together, the project may
6 impact at all together, and here's what they say:
7 "The development of the
8 Whites Point project by
9 Bilcon is designed to
10 supply Bilcon's parent
11 company, Clayton
12 Concrete, Block & Sand,
13 with washed aggregates to
14 be used in the current
15 concrete and block
16 operations in New Jersey.
17 Claytons' requirement is
18 for 2 million tons per
19 year and the capacity of
20 the Whites Point Quarry
21 operation has been
22 designed to supply
23 this." [as read]

24 Not just where, but why.
25 Let's come back to the project

1 description, the revised project description filed
2 in November.

3 If we look at what they say
4 there in that description, we see numerous
5 references, again, to it being shipped to New
6 Jersey.

7 There was a chart that we saw
8 during the examination of Mr. Lizak on page 18
9 where what it lists is an advantage of Whites
10 Point shortest distance to New Jersey. And you
11 will recall that this is a chart that Mr. Lizak
12 also included in his opinion in front of you, but
13 he changed that to say shortest distance to the US
14 instead.

15 None of the references, in my
16 view are more telling, though, than the one we
17 looked at during Canada's opening arguments. In
18 the revised project description, Bilcon of Nova
19 Scotia explained in detail exactly the same
20 rationale for the project that we have
21 consistently seen. They need supply. They need
22 stone for their manufacturing operations in New
23 Jersey, not to sell to other people for those
24 other people's manufacturing operations somewhere
25 else.

1 testified as follows:

2 "You will find, with a
3 little more careful
4 reading of the transcript
5 of the panel hearings and
6 the EIS, New York is
7 widely described as being
8 one of the terminals." [as
9 read]

10 We heard a similar statement
11 from Mr. Nash this morning. Having been told by
12 Mr. Clayton about Mr. Buxton's honesty and having
13 heard Mr. Buxton talk about the absolute nature of
14 being honest, that statement of his intrigued me.
15 So I checked because the entire EIS is in the
16 record. The whole thing is text is searchable;
17 it's PDF. As I mentioned, there are the original
18 seven volumes and the revised project description.
19 When you exclude the studies and the appendices
20 and the exhibits, they run just over 1,000 pages.
21 So we searched it. And outside of the
22 bibliographies, which mentioned New York in the
23 context of where a book happened to be published,
24 the words "New York", "Brooklyn", "NYS", "NYC" in
25 any context appear in those 1,000 pages a grand

1 So what do they say the Whites
2 Point Quarry is for? Clayton Concrete, Block &
3 Sand, through Bilcon, intends to develop and
4 control their own supply of aggregate exclusively
5 for Clayton Concrete, Block & Sand.

6 During his testimony,
7 Mr. Buxton said something that I think is apt
8 here. He explained that there are words in our
9 language that cannot suffer gradation, words that
10 are absolute, words that are not capable of
11 partial diminution. I agree with him. And
12 "exclusively" is one of those words. In his
13 cross-examination, Mr. Buxton accepted that the
14 plan was to supply aggregate to Clayton Concrete,
15 Block & Sand in New Jersey. And when this
16 paragraph was put to him, he confirmed this
17 paragraph, in fact, generally reflected his
18 understanding of the rationale for the project.

19 It was only when his counsel
20 stood up to question him in redirect and asking a
21 question that specifically included mention of New
22 York that Mr. Buxton appeared to remember the
23 claimants' story about New York.

24 And then in response to a
25 question from Professor Schwartz, Mr. Buxton

1 total of nine times.

2 Now, we need to get more
3 granular than that because sometimes the word
4 would appear where it was describing something
5 irrelevant, so we looked at each individual
6 reference to New York.

7 Mr. Buxton's testimony was
8 that a careful reading of the EIS would show New
9 York widely described as one of the terminals,
10 that was not an accurate statement.

11 In fact, not a single one of
12 the references describes New York City or Brooklyn
13 as the destination or one of the terminals for the
14 project.

15 We can go through them. One
16 reference is just to a bird that happened to be
17 released in New York City in 1940, obviously
18 irrelevant, down to eight.

19 Two are references to New York
20 in the context of there being no new quarries
21 permitted in New York and New Jersey in recent
22 years.

23 They're not statements about
24 the product of the Whites Point Quarry going to
25 New York. In fact, to the contrary, if you look

1 on those pages, you will see in the record that
2 the follow-up to these sentences talks about how
3 the cost of transporting stone from the site to
4 the Claytons' southern New Jersey facilities would
5 likely be prohibited from quarries in New York,
6 prohibitive, making clear that, even in these
7 references where it's talking about no new quarry
8 sites, the plan was still to supply the Claytons'
9 New Jersey facilities.

10 That leaves six.

11 One of the other references
12 was to the simple fact that Amboy was part of a
13 joint venture that dredges sand in the New York
14 Harbour. That is not a reference to where the
15 rock from Whites Point Quarry would be shipped.

16 Down to five.

17 One is a reference to
18 environmental impacts due to the fact the ships
19 will be headed to the New York and New Jersey
20 geographic area.

21 Mr. Nash presented this to
22 you, but I would suggest he didn't read the whole
23 thing. He stopped after New Jersey area. Of
24 note, in this reference, if it says:

25 "And more specifically,

1 the ultimate destination
2 is South Amboy, New
3 Jersey."[as read]

4 Ships are indeed headed
5 towards the New York/New Jersey general area as a
6 matter of geography that can be important for
7 things like impacts on whales and impacts on the
8 environment, but that doesn't mean that they are
9 dropping products off in New York City for sale to
10 third-party concrete manufacturers. The reference
11 has nothing to do with actually shipping aggregate
12 to New York as a destination.

13 That leaves four.

14 Two of the other references,
15 including some of those that the claimants have
16 drawn your attention to in cross-examinations,
17 highlight and reference the fact that the
18 claimants have an ownership interest in stone
19 terminals in New York. But this is simply in the
20 context of describing who the proponents are. You
21 can go to these references. You can read around
22 them. [REDACTED]

24 In fact, if you look at one of
25 them, as you go to it, you will find it references

1 the shipments coming from New Brunswick. [REDACTED]
[REDACTED]

5 That leaves two references.

6 And the final two references
7 highlight the quality of the stone and the fact
8 that it will meet New York or New York State DOT
9 standard, and the claimants have taken you to
10 these before, suggesting why would they care if
11 the aggregate is going to New Jersey about New
12 York standards, Mr. Nash seemed to say it this
13 morning.

14 The explanation is simple.

15 The fact that stone will meet New York standards
16 does not mean that where the raw aggregate is --
17 that's where the raw aggregate is going to be
18 sold, [REDACTED]

19 As Mr. Chodorow
20 explained yesterday, a concrete and ready mix
21 manufacturer in New Jersey is going to want to
22 ensure that the aggregate that it is using in its
23 products meets New York standards so that it can
24 bid on New York contracts, supply New York
25 concretes with concrete for roads, overpasses,

1 bridges.

2 The fact that the claimants
3 wanted the stone to meet New York standards does
4 not even remotely establish that the raw
5 aggregates, the raw aggregates, not the finished
6 products the Claytons are making, but the raw
7 aggregates would be shipped into New York for sale

8 [REDACTED]
9 So, in the end, I would
10 suggest Mr. Buxton's testimony was not accurate.
11 A close read of the EIS reveals that there are
12 exactly zero references to the raw aggregate
13 product being shipped from Whites Point into New
14 York City [REDACTED]

15 [REDACTED]
16 In contrast, there are
17 numerous times in the environmental impact
18 statement -- and we just looked through some of
19 them -- where not only is New Jersey mentioned,
20 but where it expressly says that the destination
21 of the rock is New Jersey and that the rock is for
22 use in the Clayton companies in their manufacture
23 of concrete products.

24 You have heard today and you
25

1 have heard before the claimants have been at pains
2 to suggest that the EIS is just an early planning
3 document. The suggestion is that when they said
4 all those times that the aggregates were going to
5 New Jersey exclusively for Clayton Concrete, Block
6 & Sand to use in their manufacturing facilities.
7 What they really meant was that it was going to
8 New York [REDACTED]

9 [REDACTED] That is not a credible argument.
10 Contrary to what you heard, though, the New Jersey
11 story does not end at the EIS. Let's keep going.

12 In January of 2007, Bilcon of
13 Nova Scotia presented its project to four
14 ministers of the Nova Scotia Government. And what
15 did they say to these ministers of the Crown about
16 their project? Again, aggregate would be loaded
17 onto bulk carriers for shipment to New Jersey,
18 USA.

19 Then, in 2017, both Mr. Wall
20 and Mr. Buxton attend the JRP hearing, and what
21 did they say there? Mr. Buxton testified:

22 "What we are planning is
23 to develop a basalt
24 quarry, to crush and wash
25 2 million tons per year

1 for shipment to the
2 Clayton operations in New
3 Jersey. As we will note
4 later in the
5 presentation, the project
6 is not dependent upon a
7 marketing day process and
8 the search for markets
9 once the project is
10 opened essentially the
11 project has been sold and
12 so the jobs and
13 everything else, the
14 capital costs are
15 secure."[as read]

16 Now you will recall at this
17 hearing, Mr. Buxton, we looked at his testimony,
18 told us as well that there were numerous
19 references in the JRP transcript to New York being
20 a destination port for the products from Whites
21 Point.

22 Now, even though this wasn't
23 true for the EIS, I checked that too.
24 Again, this wasn't accurate.
25 The handful of references that

1 we found there, and we don't have time to go
2 through them all again, but they relate to the
3 same subjects we saw in the EIS, general
4 descriptions of what the companies the Claytons
5 have interest in, like Amboy, descriptions of
6 their ownership of piers in New York, the quality
7 of the stone wanting to meet New York standards,
8 the existence of quarries or the difficulty in
9 permitting them in states like New York.

10 The most telling exchange is
11 one that Mr. Nash referred to this morning.

12 But, again, I suggest to you
13 he did not read the entire exchange.

14 A question to Mr. Buxton from
15 a member of the public comes up who says, on
16 Friday, you, Mr. Buxton, spoke of shipments to New
17 Jersey. How many ports are there in New Jersey
18 how many other destination ports do you plan to
19 ship to, Mr. Buxton's eventual response:

20 "It is possible that some
21 could go into New York,
22 and it depends really on
23 which is the end terminal
24 because they have
25 different depths, so it

1 may be that some rock or
2 aggregate has to be
3 dropped off before it
4 goes to another facility.
5 I can tell you that south
6 Amboy has relatively
7 shallow water and
8 generally, speaking,
9 material has to be
10 offloaded before a ship
11 can get in there. But I
12 could also say that port
13 probably will not be
14 there in five or ten
15 years and that Bilcon,
16 and its affiliate is
17 looking at building an
18 alternative port in New
19 Jersey. New Jersey is
20 the destination, maybe, a
21 little to New York at
22 some point he says, but,
23 in fact, the plan is to
24 build an alternative port
25 that can bring in the big

1 ships in New Jersey."[as
2 read]
3 Claimants have testified, they
4 have put it in the record, they've talked about it
5 here, they have access to another dock in New York
6 and Brooklyn, and when that one at south Amboy no
7 longer becomes available their plan wasn't to use
8 the dock in Brooklyn, but rather to build a brand
9 new one in New Jersey. Why? Because, as all the
10 documents show, the plan was the use the aggregate
11 at the claimants own manufacturing facilities in
12 New Jersey, taking it into New York, unloading it
13 in Brooklyn and somehow bringing it to South Amboy
14 for the claimants to use would have been
15 prohibitively expensive, it wouldn't have made
16 sense.
17 Now, of course, the claimants
18 could still say this is just all part of the EIS
19 process. This is the hearings, and where the
20 stone was going didn't matter in terms of
21 environmental impacts. Now we could spend time
22 talking about ballast water. We could talk about
23 other impacts. We could talk about other impacts,
24 economic impacts, Buxton referenced one in his
25 answer about the surety of the jobs.

1 But what makes this argument
2 so incredible that the claimants are making is
3 really just this simple fact. If it didn't
4 matter, why say it?
5 Why say it again and again?
6 If it didn't matter or
7 Mr. Buxton didn't know, why did he write a long,
8 detailed paragraph in the EIS explaining exactly
9 what the rationale for the project was and where
10 the shipments were intended?
11 If it didn't matter, why say
12 that the destination was New Jersey time and time
13 again?
14 It did matter. It does
15 matter.
16 But let's move even beyond the
17 whole environmental assessment process. And to do
18 this, we are going to go back into confidential
19 session.
20 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
21 1:11 P.M.
22 MR. SPELLISCY: In 2010, after
23 the Whites Point project had failed to get its
24 environmental approvals, the Claytons [REDACTED]
25 [REDACTED]

1 [REDACTED] The
2 Whites Point project is done at this point, at
3 least according to the testimony in this phase.
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 I suggest to you that the
11 reason is because this is in 2010, and at this
12 point in the case, before the damages phase, the
13 claimants had never actually [REDACTED]
14 [REDACTED]
15 [REDACTED] That Whites Point
16 rock was [REDACTED]
17 was going to their facilities in New Jersey.
18 We can come out of the
19 confidential session now.
20 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
21 1:12 P.M.
22 MR. SPELLISCY: And we see --
23 and we can continue. We see how they have
24 presented their positions before this very
25 tribunal prior to the damages phase. In our

1 opening arguments, I took you through their
2 Statement of Claim and Mr. Clayton's witness
3 statement. I don't need to do it again. It's
4 just not there. They have reported -- just not
5 there. There is no plan to do it in New York.
6 It's always been New Jersey.
7 Mr. Little took you this
8 morning to the reply memorial, the reply memorial
9 filed to you, their representations to you in the
10 jurisdiction and liability phase, submitted in
11 2011. And they represented the quarry was to be
12 152 hectares to export rock to New Jersey, not New
13 York, New Jersey, their representation to you.
14 And we have already seen
15 Mr. Lizak's testimony about the depths of the dock
16 and how it was relevant what the depth was in New
17 Jersey, not New York.
18 I presented Mr. Lizak with
19 this evidence from the liability phase during this
20 phase and his response you will see here. I ask
21 him:
22 "You would agree with me
23 that, during the planning
24 phase of this project,
25 when you were working on

1 it, as reflected in these
 2 documents and in your
 3 testimony, sworn
 4 testimony before this
 5 tribunal, [REDACTED]
 [REDACTED] [as
 8 read]
 9 His answer:
 10 "I think it was sir, yes.
 11 That was the plan. Well,
 12 oh, no, wait. [REDACTED]
 [REDACTED] as read]
 16 Like Mr. Buxton, it took
 17 Mr. Lizak a moment to get back on message, to get
 18 back to the story created by the claimants in this
 19 phase of the arbitration.
 20 The indisputable fact, not
 21 one piece of contemporaneous documentary evidence,
 22 not one, refers to a plan to sell the raw
 23 aggregate [REDACTED]
 24 in New York. And why would that be the plan? The
 25 claimants are also a concrete manufacturer. [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 Every document refers instead
 5 to what the real plan was, supply their own
 6 manufacturing facilities in New Jersey with stone
 7 from Whites Point. They were honest about their
 8 plans to themselves in their own documents. They
 9 were honest about their plans with government
 10 officials, the JRP, the public, and the ministers.
 11 There's no incentive to misrepresent where the
 12 crushed rock was going. They were honest with you
 13 in the jurisdiction and liability phase, again,
 14 because there was no reason for them to
 15 misrepresent what the project was.
 16 But in this damages phase,
 17 they have not given you an honest story.
 18 They are the ones who have
 19 made it up here. And that is the exact reason why
 20 they have not relied on any evidence
 21 contemporaneous to the situation whatsoever,
 22 nothing prior to the alleged breach, because all
 23 of that evidence, all of it, directly contradicts
 24 the story they are asking you to accept.
 25 Now, why have they failed to

1 value the project selling aggregate -- their
 2 project, selling aggregates to themselves in New
 3 Jersey for the use at their concrete manufacturing
 4 facilities there? Why have they failed to value
 5 that? Again, the reason is pretty clear from the
 6 evidence in the record, and it is as Dr. Chereb
 7 explained. Prices are lower in New Jersey.
 8 Bilcon of Nova Scotia would not have made the
 9 level of profits selling its aggregates in New
 10 Jersey, even to itself, that it would in New York.
 11 As Dr. Chereb explained the prices are 45, 50 per
 12 cent lower in New Jersey, and you wouldn't make
 13 any money going into New Jersey.
 14 And, of course, that is
 15 exactly why the claimants had offered no evidence
 16 at all of the prices that they could have achieved
 17 in New Jersey.
 18 I asked Mr. Lizak, and he
 19 confirmed that [REDACTED]
 [REDACTED] I asked Mr. Wick. He
 22 confirmed that he only looked at prices in New
 23 York, not New Jersey. I asked Mr. Rosen, and he
 24 too confirmed that he did no analysis of the
 25 profits that might be earned by selling the

1 aggregate to Clayton Concrete in New Jersey.
 2 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 3 1:16 A.M.
 4 MR. SPELLISCY: Why haven't
 5 they done that analysis? Because they know what
 6 it would show; that this wouldn't have made money,
 7 as Dr. Chereb says. So faced with this fact, they
 8 tried to change their story, and in an appropriate
 9 effort to try and squeeze hundreds of millions of
 10 dollars out of Canadian taxpayers.
 11 We can ask ourselves why the
 12 claimants might build Whites Point if it couldn't
 13 make money, and to do this we are going to go back
 14 into confidential session.
 15 The reason is because that, in
 16 the ordinary course of their business, it makes
 17 perfect sense for the claimants to operate the
 18 Whites Point Quarry and not make a single penny
 19 doing it. Bilcon of Nova Scotia was never
 20 supposed to be a profit engine. It was never
 21 about making money at Bilcon of Nova Scotia. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 It could not be
 7 more clear from their 2006 environmental impact
 8 statement, and it could not be more clear from
 9 what they said at the JRP hearing in 2007,
 immediately prior to the breach.

10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]

15 If Bilcon of Nova Scotia could
 16 do that at cost or even perhaps at a slight loss,
 17 that made sense. It was about a guaranteed source
 18 of supply, not profit.

19 Now if you want to know what
 20 the claimants thought about the profit-making
 21 ability of Bilcon of Nova Scotia, taking into
 22 account the risk that it might not be permitted
 23 one need look no further than how much they paid
 24 to their partner for it in 2004. In 2004, right
 25 before they prepared that business plan that we

1 looked at so extensively [REDACTED]
 2 [REDACTED] they paid their
 3 partner an amount that shows an amount
 4 [REDACTED] an amount that shows that they
 5 valued the whole future profitability of Whites
 6 Point, the equivalent, in 2004 dollars [REDACTED]

7 [REDACTED]
 8 [REDACTED]

9 The other valuations you see
 10 on this slide -- this is Figure 14 from Brattle's
 11 report -- are simply not relevant. The valuation
 12 implied by the 2002 buy-in assumed the permits
 13 were issued.

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]

19 Now, we don't see Mr. Rosen's
 20 valuation here on this figure. Professor Schwartz
 21 tried valiantly to see if we could get them to
 22 comply, but I am not sure that we can. They are
 23 doing very different things. The Rosen valuation
 24 also assumes permitting, but more importantly it
 25

1 does not value the claimants' project.
 2 The only valuation in the
 3 market that we have that reflects both permitting
 4 risk and that values the claimants' own business
 5 plan is 2004, when they bought them out, when they
 6 prepared their business plan.

7 Perhaps unsurprisingly, that
 8 number is much more consistent with what you might
 9 get from other methods like sunk costs and
 10 mitigation, which my colleague Ms. Kam is going to
 11 talk about in a minute.

12 And we can come out of
 13 confidential session while I wrap up here.

14 --- REPORTER'S NOTE: Claimants' counsel held up
 15 confidential sign to stay in confidential session.

16 MR. SPELLISCY: You can take
 17 this off the screen.

18 As my colleague Mr. Little
 19 explained at the beginning, it was the claimants'
 20 burden to come in and prove to you both causation
 21 and quantum. Talking only about quantum, the only
 22 theory that claimants have presented is
 23 Mr. Rosen's, and that, as we have seen, is based
 24 on two parts: First, a DCF of the lost profits of
 25 Bilcon of Nova Scotia, entirely based on the

1 assumption that it would sell all of its coarse
 2 aggregates in New York City [REDACTED]
 3 [REDACTED]; second, a tax
 4 gross-up based on the assumed lost profits that
 5 would have been made by selling the product into
 6 New York. Both of these valuations necessarily
 7 fail for the same reason, that they're based on an
 8 assumption of sales into New York, which is
 9 demonstrably false, of course. And I will address
 10 this briefly, because Mr. Nash raised it, the tax
 11 argument fails for other reasons as well. As a
 12 matter of law, as the tribunal in Rusoro explains,
 13 any tax liability arising under the investors'
 14 home state laws, tax laws, or from any other
 15 fiscal regime other than the respondent does not
 16 qualify as consequential loss arising from the
 17 breach of the treaty and does not engage the
 18 respondent's liability, as a matter of law. As a
 19 matter of fact, the calculation is no longer
 20 reliable.

21 The claimants have a theory of
 22 damages that talks about valuing them as at the
 23 award date. The reality is that the US tax laws
 24 have changed just like Mr. Rosen said when he
 25 said, "Governments can change tax laws". That's

1 exactly the problem. These ones have changed, and
2 what do we know? The claimant has absolutely no
3 full idea to meet their burden of proof concerning
4 the accuracy of their calculations.
5 Mr. Forestieri's answer? I can't answer that to
6 100 per cent. The code is too new. Mr. Rosen
7 first said he wasn't even aware that the law had
8 come into force, but he also had no idea of its
9 impact, suggesting, instead, that further reports
10 from the experts might be necessary. I would
11 suggest to you that, for these reasons, the tax
12 gross-up claim fails not only because it is based
13 on the DCF premised on a completely false
14 assumption, but it also would fail individually as
15 a matter of law and evidence.
16 Ultimately, the claimants'
17 decision to craft a new plan, a new project for
18 the damages phase of this arbitration has
19 consequences. They are now seeking damages that
20 they cannot prove were caused by the breach. They
21 are now seeking damages that they do not have
22 standing to pursue. They are now seeking damages
23 based on a methodology that requires too many
24 speculative inputs. And they are now seeking
25 damages that, even if one used the DCF, is

1 loss of opportunity was and was not in this case.
2 Second, I will provide an overview of the case law
3 and evidentiary standards that should guide this
4 tribunal in its approach to valuing the claimants'
5 lost opportunity. And, third, I will explain how
6 the tribunal might value the claimants' lost
7 opportunity, though, to be clear, the claimants
8 have confirmed that they are not seeking
9 compensation for such losses.
10 As a starting point, the
11 majority in its award has only taken an issue with
12 the approach taken by the JRP to community core
13 values. Specifically, it found that the
14 claimants' lost opportunity was to have their
15 project considered, assessed, and decided in
16 accordance with applicable laws. This is entirely
17 distinct from the loss of an opportunity with
18 respect to a legal right to operate a project.
19 With regard to case law, as
20 noted by Mr. Little in Canada's opening, the
21 tribunal's approach should be informed by the
22 Stati case. It held that a high threshold of
23 sufficient probability must be applied to a claim
24 for loss of opportunity. The Stati tribunal also
25 affirmed that the claimants have the burden of

1 completely inappropriate because it does not offer
2 a valuation of their business. It offers a
3 valuation of a completely different project.
4 Awarding damages under such a
5 theory would not put the claimants back in the
6 position they would have in all probability been
7 in but for the breach, and for these reasons, the
8 claim must be dismissed entirely.
9 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
10 1:23 P.M.
11 MR. SPELLISCY: If there are
12 no questions, I will cede the floor to Ms. Kam.
13 PRESIDING ARBITRATOR: No. So
14 the floor goes to Ms. Kam now.
15 CLOSING ARGUMENT BY MS. KAM:
16 MS. KAM: Good afternoon. I
17 will address two final issues: First, the proper
18 approach to valuing the claimants' lost
19 opportunity and, second, the claimants' duty to
20 mitigate their damages. The first issue
21 concerning the proper approach to valuing the
22 claimants' lost opportunity relates to Tribunal
23 Questions Number 11. I will respond to this
24 question in three parts.
25 First, I will outline what the

1 proof. Where the investment has no legal right to
2 begin a project, the only damage that may be
3 sufficiently certain for a loss of opportunity is
4 the value invested.
5 While the claimants' position
6 is that this is not a loss of opportunity case,
7 they do rely on two cases, Lemire and Gemplus,
8 that consider such claims. However, neither of
9 these cases provide useful guidance in valuing a
10 loss of opportunity here.
11 Specifically, the Lemire
12 tribunal expressly found that the injury was not a
13 loss of chance, but that the claimant had lost
14 their radio frequencies because of the breach.
15 This differs from the circumstances of the Whites
16 Point project as it was subject to an EA, the
17 approval of which was never guaranteed. The
18 claimant in Lemire was also a leading radio
19 operator in Ukraine. The tribunal determined that
20 the claimant would have met all of the criteria
21 for the tender, which also differs from the
22 circumstances in this case. The same cannot be
23 said about the claimants, who had no history of
24 established quarry operations in Canada and were
25 only in the early conceptual planning stages.

1 Additionally, the claimants
 2 rely on Gemplus in which the tribunal found an
 3 expropriation and a violation of the fair and
 4 equitable treatments following the termination of
 5 a 10-year concession contract. Gemplus is not a
 6 relevant authority. The contract that was at
 7 issue in that case provided the claimants with the
 8 legal right to operate a national legal registry
 9 for ten years. In valuing this loss of
 10 opportunity, the Gemplus tribunal relied on the
 11 expropriation provision and its fair market value
 12 requirement as a useful guide to the measure of
 13 compensation.

14 As Bilcon's project was not
 15 expropriated, such an approach does not provide
 16 any guidance. Moreover, the Gemplus tribunal
 17 statement that the claimant should get the benefit
 18 of the doubt with respect to its burden of proof
 19 has been squarely rejected in other cases such as
 20 Stati.

21 But where the Gemplus award is
 22 relevant is in its confirmation that claimants
 23 cannot be compensated for a legal right that they
 24 never possessed. The tribunal rejected the claim
 25 for lost profits based on a DCF, because the

1 project in that case was not a going concern. It
 2 also rejected a claim with respect to a potential
 3 ten-year extension of the contract as it was far
 4 too contingent, uncertain, and unproven to assess
 5 compensation. Specifically the claimants had no
 6 legal right to any extension of the concession's
 7 original ten year term.

8 So how should this tribunal
 9 value the claimants' lost opportunity?

10 Assuming the claimants could
 11 overcome the distinction between articles 1116 and
 12 1117, restoring the amounts invested in the JRP
 13 process would put Bilcon of Nova Scotia back in
 14 the position it would have been prior to -- been
 15 in prior to the breach.

16 This is the most that the
 17 claimant should be entitled to recover for their
 18 lost opportunity because, one, they have failed to
 19 prove lost profits with sufficient probability;
 20 two, they had no legal right to the necessary
 21 permits to develop their project; three, the
 22 Whites Point project was required to undergo an
 23 environmental assessment; four, there was no
 24 expropriation of the claimants' land or assets;
 25 and, five, there was nothing preventing Bilcon of

1 Nova Scotia from seeking, once again, to develop
 2 the land.

3 What is clear is that the
 4 NAFTA breach did not cause the claimants to lose
 5 their entire investment in the Whites Point
 6 project.

7 Now I will just go into
 8 confidential session briefly.
 9 --- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT
 10 1:29 P.M.

11 MS. KAM: The claimants bear
 12 the burden of proof to substantiate the alleged
 13 expenses Bilcon of Nova Scotia invested in the JRP
 14 process. Paul Buxton has testified that the total
 15 amount expended on the Whites Point Quarry up to
 16 and including December 18th, 2007 is about

17 [REDACTED] However, Mr. Buxton has also made
 18 clear in paragraph 69 of his reply witness
 19 statement that this amount includes costs incurred
 20 in relation to the entire EA and the development
 21 of the project. But this tribunal has already
 22 determined that the required to undergo an EA and
 23 the referral of the project to a JRP were not
 24 breaches of the NAFTA. Accordingly, Canada cannot
 25 be found liable for the amounts incurred in

1 preparation of the EA. The claimants' JRP costs
 2 must therefore be limited to the costs incurred
 3 between the establishment of the JRP on
 4 November 3rd, 2004 and the delivery of the JRP
 5 report on October 22nd, 2007.

6 Furthermore, the claimants'
 7 cost must be substantiated. However, based on
 8 Mr. Chodorow's review of the record, the claimants
 9 have not provided verifiable evidence of actual
 10 payment of all invoices. They have also included
 11 evidence of payment from entities other than
 12 Bilcon of Nova Scotia and the claimants. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] So taking these
 16 errors into account, only approximately [REDACTED]
 17 million of Bilcon of Nova Scotia's investment in
 18 the JRP process have been properly substantiated.

19 This amount represents the
 20 value of the claimants' lost opportunity, an
 21 amount that is subject to mitigation. Now we can
 22 go back to public session.

23 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
 24 1:31 P.M.

25 MS. KAM: This brings me to

1 the second part of my submission. In this part, I
2 will discuss the claimants' duty to mitigate in
3 international law and explain why it was
4 reasonable for the claimants to seek judicial
5 review. In the end, if the claimants are entitled
6 to any damages, they must be mitigated. Let me
7 start by addressing the claimants' statements in
8 their opening that Canada's submissions are too
9 late or shamefully wrong.

10 According to the ILC
11 commentaries on state responsibility, the issue of
12 mitigation affects the scope of reparation and
13 relates to the quantification of damages. Thus,
14 mitigation was properly pled by Canada in the
15 damages phase of this arbitration, and it has not
16 been decided in the tribunal's merits finding.

17 Moreover, as determined by the
18 International Court of Justice in the Gabcikovo
19 case, mitigation is a general principle of
20 international law. In their submissions, the
21 claimants have referred to the report of John
22 McCamus, which they say is nowhere contradicted by
23 Canada. However, Professor McCamus' opinion,
24 which concerns the duty to mitigate in domestic
25 law, is wholly irrelevant and inapplicable. This

1 is because NAFTA Article 1131 limits the tribunal
2 to deciding issues in this dispute in accordance
3 with the agreement and the applicable rules of
4 international law.

5 This brings me to Tribunal
6 Question Number 9 as to whether the duty to
7 mitigate in international law can extend to
8 judicial review and renewed administrative
9 proceedings where the conduct in the same type of
10 administrative proceeding has given rise to a
11 breach. The response to this question is yes.

12 As Canada has explained in its
13 rejoinder, the issue of mitigation is separate and
14 distinct from exhaustion of local remedies. In
15 this regard, the claimants' argument that there
16 was no obligation to seek judicial review is
17 unpersuasive.

18 The fact that the claimants
19 had recourse to NAFTA Chapter 11 does not negate
20 their duty to mitigate damages. The inclusion of
21 local administrative procedures and the duty to
22 mitigate has also been recognized by other
23 international tribunals.

24 For example, the Dunkeld
25 tribunal held that it may be the case that local

1 administrative procedures may offer a remedy that
2 is more rapid or certain than that of an
3 international claim such that a party may be
4 derelict in failing to attempt the local process.

5 In the circumstances of this
6 case, it would have been reasonable for the
7 claimants to seek judicial review in order to
8 mitigate their damages, because judicial review
9 was available. Judicial review was also an
10 effective remedy that would have fully restored
11 the claimants' lost opportunity to have its
12 project considered, assessed, and decided in
13 accordance with applicable laws.

14 As explained at paragraph 63
15 to 65 of Justice Evan's first report, the Whites
16 Point JRP report and recommendations were subject
17 to judicial review in Canadian courts.

18 The claimants' argument that
19 this is contrary to the plain language of the
20 treaty ignores the wording of NAFTA Article 1121,
21 which expressly excludes proceedings for
22 injunctive, declaratory, or other extraordinary
23 leave not involving the payment of damages as a
24 condition precedent to the submission of a claim.

25 Simply put, nothing in the

1 language of the NAFTA prevented the claimants from
2 seeking judicial review. It would have also been
3 reasonable for the claimants to seek judicial
4 review as it was an effective remedy. As
5 explained by Justice Evans, the function of
6 judicial review is to provide redress for the
7 abuse of power by public officials or bodies. In
8 judicial review, the Courts determine the
9 legality, rationality, and procedural fairness of
10 administrative action and will normally provide a
11 remedy when the action under review does not meet
12 these standards.

13 In the claimants' opening,
14 Mr. Nash stated that judicial review would not
15 provide the claimants with remedies equivalent to
16 Chapter 11, particularly with regard to damages.
17 However, the fact that judicial review remedies do
18 not include the payment of damages does not
19 undermine their effectiveness.

20 To the contrary, the
21 availability of different remedies is what makes
22 judicial review more effective in restoring the
23 claimants' lost opportunity than its NAFTA claim.

24 Pursuant to article 11 --
25 NAFTA Article 1135, this tribunal is limited to

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1 awarding monetary damages, restitution of
2 property, and any applicable interest. In
3 contrast, a redetermination by a JRP would have
4 effectively remedied the breach of the claimants'
5 right to have their project assessed in accordance
6 with Canadian law.

7 Such a remedy would have
8 provided the Whites Point project with the
9 opportunity to proceed on its own merits. It
10 would have also avoided all of the speculation
11 with respect to the outcome of the JRP process,
12 the federal and provincial ministerial decisions
13 as well as the speculation involved in the
14 construction and operation of the project that the
15 claimants are now asking this tribunal to engage
16 in.

17 This brings me to Tribunal
18 Question Number 10 regarding the specific evidence
19 on the record of bias, which would render
20 mitigation measures futile.

21 Simply put, there is none. As
22 explained in Canada's opening, there is no basis
23 for the claimants' belief that a new JRP process
24 would have been unfair or unreasonable or
25 unlawful. Again, the majority took issue solely

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1 with the approach taken by the JRP to community
2 core values. It did not find any broader systemic
3 bias against the claimants regarding the EA
4 process or government decision-makers.

5 Nor have the claims provided
6 such evidence in the damages phase. Mr. Clayton's
7 likening of the Canadian courts to being
8 tantamount to throwing yourself at the mercy of
9 Kim Jong-un is entirely without basis. As
10 explained by Justice Evans, judicial review is an
11 essential element of the rule of law both to
12 protect individuals from harm and to vindicate the
13 public interest in ensuring that governmental
14 action is lawful. If there are concerns regarding
15 the unfairness or bias against the claimants, the
16 Court could have remitted the EA back to a new
17 panel.

18 It is also quite common for
19 individuals to apply to judicial review to
20 challenge the legality of an environmental
21 assessment and ministerial decisions on projects
22 and to request reconsideration.

23 Mr. Clayton said in his
24 testimony that the claimants didn't really find
25 out what happened, what was going on until the

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1 NAFTA arbitration. But this is contradicted by
2 the evidence in the record.

3 As noted in the claimants'
4 opening, following the issuance of the JRP report
5 and prior to both the federal and provincial
6 minister's rejection of the project, the claimants
7 reached out to the federal and Nova Scotia
8 ministers. Specifically Mr. Buxton expressed his
9 view that the Whites Point JRP report was
10 fundamentally flawed and did not apply the
11 analytical framework established by the applicable
12 legislation and guidelines.

13 Mr. Clayton's assertion that
14 the claimants only discovered what was going on
15 through the NAFTA process is simply not credible.

16 The claimants' argument that
17 it was unreasonable to seek judicial review at the
18 outcome of the second JRP process was not
19 guaranteed also ignores the tribunal's finding and
20 its award.

21 Specifically, this tribunal
22 has not purported to conduct its own environmental
23 assessment in substitution in that of the JRP,
24 nor, as stated in Canada's opening, would it be
25 appropriate for the tribunal to do so.

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1 Since the outcome of the EA
2 was never guaranteed, we will never know whether a
3 redetermination of the EA would have resulted in a
4 positive environmental assessment and the issuance
5 of permits. Since -- such an outcome is entirely
6 appropriate as the claimants had no legal right to
7 proceed with their project.

8 Notably the claimants'
9 decision not to seek judicial review is completely
10 at odds with its theory of causation. On the one
11 hand, they argue that judicial review would have
12 amounted to an endless legal wrongdoing. And on
13 the other hand, they argue that the ministers were
14 legally compelled to approve their project.

15 If the latter were true, as
16 Justice Cromwell has noted, the court, on judicial
17 review, would order the minister to approve the
18 undertaking and not to remit it for further
19 consideration under a discretionary process.

20 In these circumstances,
21 judicial review would have actually compelled the
22 approval of the project, which, again, undermines
23 the claimants' suggestion that judicial review
24 would not have restored its lost opportunity.

25 Ultimately, any consideration

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1 of the damages to which the claimants may be
2 entitled is subject to the principle of
3 mitigation. Accordingly, the only compensation
4 that the claimants could be entitled is their
5 costs to mitigate. As you heard, from Canada's
6 damage expert Mr. Chodorow, the claimants' cost to
7 mitigate would have entailed the non-recoverable
8 cost of applying to Canadian court for judicial
9 review, the costs of a second JRP hearing, and the
10 reduction of the project value resulting from the
11 delay caused by judicial review.

12 Regarding the cost of a second
13 JRP hearing, you heard Mr. Buxton testify that
14 approximately 10 to 20 per cent of the information
15 in the first EA would have been useful in a second
16 JRP process.

17 However, he also agreed that
18 he provided no supporting evidence for this
19 estimate and that he does not have any experience
20 in an environmental assessment that has been
21 remitted.

22 While Mr. Buxton stated that
23 he reviewed the materials in the EA, none of the
24 details of his analysis have been provided in
25 order to verify their reasonableness.

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1 In contrast, Justice Evans has
2 opined based on his experience as a judge that it
3 would have been open to the parties to save
4 expense and time in the second JRP process by
5 submitting the same expert reports and other
6 documentary evidence supplemented by additional
7 material as appropriate. Thus, assuming that a
8 second JRP process would take place at the public
9 hearing stage, Canada estimates that the total
10 costs adjusted to Canadian dollars in 2007 that
11 the claimants would have incurred to seek judicial
12 review would be approximately [REDACTED]

13 This is the maximum amount
14 that the claimant should be entitled to recover
15 for any damages awarded as judicial review was an
16 available and effective remedy, and it would have
17 fully restored the claimants' lost opportunity.

18 I will now turn things back
19 over to Mr. Little for Canada's concluding
20 remarks.

21 PRESIDING ARBITRATOR: Thank
22 you, Ms. Kam.

23 Mr. Little.

24 CLOSING ARGUMENT BY MR. SCOTT LITTLE (Cont'd):

25 MR. SCOTT LITTLE: Just a

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1 minute to wrap things up.

2 So in the end, Judge Simma,
3 Professor McRae, and Professor Schwartz, as I
4 noted last week, the tribunal need not even try to
5 divine the value of the claimants' lost
6 opportunity nor the cost of mitigation nor how the
7 cost of mitigation might impact the compensation
8 to which the claimants might be entitled. Why is
9 that? It's because all the claimants have done is
10 equate the denial of an opportunity in a NAFTA
11 compliant EA process with the denial of a fully
12 approved and operational and profitable Whites
13 Point project.

14 They have not presented you
15 with a case that would compensate them for their
16 lost opportunity. What they have presented you
17 with is one speculative claim for 50 years of lost
18 profits on the basis of a business plan that, as
19 Mr. Spelliscy has explained, didn't exist when
20 they conceived their proposal for the Whites Point
21 project, nor when they presented their project to
22 Canadian government regulators, nor even when they
23 appeared before you in the liability phase back in
24 2013.

25 They shouldn't be awarded

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1 damages on the basis of a plan that was cooked up
2 solely for the purposes of this phase of the
3 arbitration. And if you conclude that the
4 claimants' case can't stand on any one of the four
5 grounds that appears before you on the screen and
6 that my colleagues and I have outlined for you
7 today, then, in our view, all that's left to do
8 for the tribunal is to dismiss the case.

9 We thank you very much for
10 your time and your attention today.

11 PRESIDING ARBITRATOR: Thank
12 you, Mr. Little. This brings to an end the
13 concluding -- the closing statement of the
14 defendant. And the question now is: So what
15 remains to be done is rebuttal and surrebuttal,
16 and the question is to Mr. Nash for your
17 five-minute -- five- to six-minute rebuttal, how
18 much time do you need in between? I.e., what
19 lunch break or what length are we going to have?

20 MR. NASH: I don't need any
21 time. I can do that now.

22 PRESIDING ARBITRATOR: Okay.
23 How much time do you need -- well, not much;
24 right, to react to -- to what.

25 MR. SCOTT LITTLE: We will see

1 get stone [REDACTED] To
 2 go to Nova Scotia and get stone, find stone
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]. And, of course, why do they want to
 6 be in the New York City market? Because it is
 7 more lucrative, so it's not made up after the
 8 fact. You review all of the evidence and look at
 9 the whole of the evidence that's presented and all
 10 of the witness statements. You saw these people.
 11 They were cross-examined. They are authentic.
 12 They are real. They are genuine. And if they
 13 make a little mistake around the edges, it doesn't
 14 change the core of their testimony. They are
 15 telling the truth. That was the plan.
 16 And so, for Mr. Spelliscy to
 17 insist upon referring repeatedly to the EIS as
 18 being the vision for the future, it was not the
 19 vision for the future. It's never intended to be
 20 the vision for the future. It's not drafted with
 21 that in mind. It is for the purpose of an
 22 environmental assessment. This tribunal has said:
 23 "It's an early conceptual
 24 document to determine the
 25 environmental impacts,

1 how they can be
 2 mitigated, identify what
 3 they are, and how to deal
 4 with them."
 5 That's the purpose of that
 6 document. And that's the only purpose of that
 7 document.
 8 And so you look at
 9 environmental issues, and this -- whether the ship
 10 is going to New York City or New Jersey or
 11 anywhere in that area has zero implications for
 12 anything to do with an environmental assessment.
 13 It has no implications for ballast water. They're
 14 digging from Bayside [REDACTED]
 15 [REDACTED]
 16 And so rather than go through
 17 all of the various issues, I can speak to
 18 shipping. Mr. Spelliscy turned to it, 2004,
 19 shipping document, which is not a document which
 20 is based on a contract -- is my time up?
 21 DR. PULKOWSKI: I think you
 22 should wrap up, yes.
 23 MR. NASH: Okay. I'm going to
 24 wrap up. Those are my submissions in reply. I
 25 urge the tribunal to look at the whole of the

1 evidence and weigh it and think about the
 2 testimony that has been given here by the
 3 witnesses on behalf of the investors and weigh it.
 4 And if that is done, it is certain that the only
 5 result, there was a plan. It was a clear plan to
 6 go into New York City, to deliver grits to Amboy,
 7 and to develop the Whites Point Quarry for that
 8 purpose.
 9 Thank you.
 10 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT
 11 1:54 P.M.
 12 PRESIDING ARBITRATOR: Thank
 13 you, Mr. Nash.
 14 Any questions?
 15 Okay. Then the question to
 16 you: How much time would you need?
 17 MR. SCOTT LITTLE: I don't
 18 think very much at all. Let me confer with
 19 Mr. Spelliscy. If we can just be given a minute
 20 or two.
 21 PRESIDING ARBITRATOR: Yes.
 22 Sure.
 23 --- Short recess taken
 24 MR. SCOTT LITTLE:
 25 Mr. Spelliscy, I think, will just be a couple

1 minutes.
 2 PRESIDING ARBITRATOR: Okay.
 3 Thank you.
 4 Mr. Spelliscy.
 5 FURTHER CLOSING ARGUMENT BY MR. SPELLISCY:
 6 MR. SPELLISCY: Thank you,
 7 Judge Simma.
 8 When Mr. Nash got up and asked
 9 you to look at the whole of the evidence, I urge
 10 you to do the same thing particularly with respect
 11 to the plan, because they may try to minimize it.
 12 Their story here is look at what these witnesses
 13 have said. Perhaps I'm too much of a student of
 14 human nature, but there are 500 million reasons
 15 why we look to contemporaneous documents instead
 16 of testimony. Mr. Nash's explanation is the
 17 documents don't mean what they expressly say. His
 18 explanation is don't pay attention to them. It's
 19 not just the EIS. [REDACTED] It's
 20 what they told regulators [REDACTED]
 21 [REDACTED] It's what they told you, what they
 22 represented 2011, in 2013, in front of you in this
 23 hearing. I would suggest, when you look at the
 24 record, not what's been prepared for this
 25 arbitration, there is only one conclusion for you

1 to reach, and that's that the documents mean what
2 they say. These are not stray references to New
3 Jersey. This is a detailed explanation not just
4 of where but of why. And if you come to that same
5 conclusion, the only conclusion you have left is
6 that they have presented no valuation of what
7 their plan was, and their claim must be dismissed.
8 Thank you.

9 PRESIDING ARBITRATOR: Thank
10 you, Mr. Spelliscy. No questions.

11 That means it brings to an end
12 the second round, and we need to take up a few
13 organizational points.

14 Mr. Nash, you look like you
15 want to say something.

16 MR. NASH: Only when you are
17 concluded.

18 PRESIDING ARBITRATOR: All
19 right. So let me just mention the organizational
20 issues. There's first the matter of electronic
21 copies, and we probably -- we can probably await
22 the electronic version of the slides in due
23 course. And also Mr. Rosen's presentations and
24 Mr. Chodorow also electronically.

25 Okay. The second matter is

1 the matter of corrections and confidentiality
2 designations in the transcript. There we have --
3 in Procedural Order Number 25, we have a section
4 which deals with that. It says:

5 "Tribunal shall establish
6 as necessary procedures
7 and schedules for the
8 correction of
9 transcripts, and in the
10 event of disagreement
11 between the disputing
12 parties on corrections to
13 transcripts, the tribunal
14 shall determine whether
15 or not any such
16 corrections are to be
17 adopted." [as read]

18 And in line with this rule,
19 the tribunal would like to invite the parties to
20 exchange views on the necessary corrections and
21 what to be -- what is to be designated as
22 confidential. And then you are invited to submit
23 the result of that, if there is any issues that
24 remain open to the tribunal, and in -- the
25 tribunal will do its own part of that exercise,

1 very much a proposal -- welcome very much the use
2 of a tabular listing similar to the ones used for
3 disputed redactions to the memorial. And it will
4 further be useful if the -- if you could highlight
5 the transcripts that are still contentious in the,
6 in colour so we will not have to search them at
7 length.

8 And on the basis of the final
9 transcript, the PCA will then make arrangements to
10 edit the video recordings and place an edited,
11 redacted video recording on the website. The
12 question is a due date for the exercise of
13 corrections and -- to transcripts. Do you have
14 any proposal?

15 MR. NASH: From the timing
16 standpoint, we would propose that that exercise be
17 complete by the parties by the end of April. The
18 reason I say that, we have a backlog of
19 obligations facing us when we return to Vancouver.

20 PRESIDING ARBITRATOR:
21 Mr. Little?

22 MR. SCOTT LITTLE: I think
23 that's fine, and I think also that Mr. Nash and
24 myself can work out the steps that we need to
25 follow to get the process up to where we provide

1 the tribunal with something. I would ask one
2 necessary piece of this is that we get the audio
3 recordings of the testimony. We'll need that
4 obviously.

5 PRESIDING ARBITRATOR: Okay.
6 That's noted. Fine. So, by the end of April, we
7 would get the result of your work.

8 MR. NASH: The result of our
9 combined work together. If there was agreement on
10 everything, it would be easy. If there is
11 agreement on some things, but not on others, we
12 can sort that out and submit that.

13 MR. SCOTT LITTLE: Yes.

14 PRESIDING ARBITRATOR: Thank
15 you very much.

16 The last point I have here is
17 the matter of costs.

18 And the tribunal proposes that
19 you make your cost submissions after the exercise
20 with the transcript has been completed. That is,
21 also the PCA or the tribunal has done the
22 necessary final steps, if they are necessary.

23 So after the revision of the
24 transcripts are complete, cost submissions, and
25 the tribunal envisages two rounds of simultaneous

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1 cost submissions. These are to be made to the PCA
2 without copying the other side, and Mr. Pulkowski
3 will then forward both sides' submissions to all
4 concerned.

5 Assuming that the parties
6 request an award for costs against the other side,
7 those submissions should address a statement of
8 the amount of costs incurred by each side and (b)
9 arguments regarding the allocation of such costs,
10 subject, of course, to whatever decision the
11 tribunal will take in the quantum phase of the
12 proceedings. The parties are invited to consult
13 with each other as to the substantiation of their
14 cost claims; in particular, the required level of
15 details so that both sides adopt a comparably
16 detailed approach.

17 And then the matter of the
18 timeline, the deadline, so, of course, all those
19 hear, Mr. Nash.

20 MR. NASH: I find in cases
21 that it's very difficult to deal with costs in a
22 comprehensive way until the determination of
23 liability is made by decision-makers so that we
24 know, on what basis the costs should, in
25 principle, be allocated. And there are a variety

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1 of remedies that have been laid out by the parties
2 in this case. And, from my perspective, it would
3 very much determines -- is determinative of what
4 the tribunal decides with respect to those various
5 issues to make an informed submission with respect
6 to not only the quantum of costs, but the
7 allocation of costs as between the parties.

8 So I would propose -- I don't
9 know what my friend Mr. Little has in mind in this
10 regard, but, hearing this now, I would propose
11 that the cost submissions be made after the
12 tribunal has made its award of damages and that we
13 make suitable -- and, in fact, there could be
14 agreement at that point -- make suitable
15 submissions at that point if necessary.

16 PRESIDING ARBITRATOR:

17 Mr. Little?

18 MR. SCOTT LITTLE: I think I
19 agree in principle with what Mr. Nash is saying is
20 that it's obviously more helpful for the parties
21 to have an award in order to make more pointed
22 submissions on costs, but we are really in the
23 tribunal's hands here on what it thinks most
24 appropriate. We are prepared to prepare our
25 submissions in advance of the issuance of award if

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1 need be, and the parties just have to draft those
2 submissions mapping out the potential options that
3 could follow in light of the award. The reason
4 why I'm thinking that way is that we are almost --
5 well, we are ten years into a process here, and
6 there's cost submissions also pertaining to the
7 first phase of the proceedings. And, as the
8 months flip by, more and more substance regarding
9 costs is forgotten. So we think a reasonable
10 amount of time should be provided in terms of
11 providing cost submissions, but we are not against
12 having them be provided before the tribunal issues
13 its award.

14 PRESIDING ARBITRATOR: Just
15 give me a moment.

16 --- Off-the-record discussion

17 PRESIDING ARBITRATOR: I think
18 the tribunal would like to spend a little more
19 time on that matter, and so you will hear from us
20 in writing shortly what our decision is in that
21 regard.

22 Is there any organizational
23 matters that we need to take up? If that is not
24 the case, I -- Mr. Nash.

25 MR. NASH: The only thing I

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1 would raise is that, after the jurisdiction and
2 liability hearing, the parties were invited to
3 submit annotated transcripts of the closing, and I
4 -- as I recall perhaps the opening as well to link
5 to facts to references the submissions that have
6 been made. I think that would be appropriate in
7 this case. Hopefully the tribunal would find it
8 helpful. And we propose, again, to have that to
9 the tribunal by April 30th from our end.

10 PRESIDING ARBITRATOR: Mm-hmm.

11 Mr. Little.

12 MR. SCOTT LITTLE: We don't
13 view that as necessary at all. The PowerPoint
14 presentation that we provided the tribunal with
15 has all of our references. Any cite from the
16 transcript, any cite from the EIS, any document,
17 it's all exhibited, page numbered, everything. So
18 we don't view that as a necessary exercise on our
19 behalf.

20 PRESIDING ARBITRATOR: You
21 said "on our part"? So would you have a problem
22 if Mr. Nash, who did not apply slides, would do
23 that in his record, in the transcript?

24 MR. SCOTT LITTLE: Are we -- I
25 guess will ask Mr. Nash. Are we talking only

1 citations, or are we --
 2 MR. NASH: No further
 3 submissions, just simply citations, references
 4 to --
 5 PRESIDING ARBITRATOR: Simply
 6 citations.
 7 MR. NASH: Yeah. Certainly
 8 what we anticipated coming into this phase of the
 9 exercise.
 10 MR. SCOTT LITTLE: So maybe I
 11 will propose this: We will reserve the right to
 12 provide anything more in terms of an annotation to
 13 the actual transcript, but we don't think it's
 14 necessary on our part. And obviously it should be
 15 limited to nothing more than referencing where the
 16 document or excerpt is on the record.
 17 PRESIDING ARBITRATOR: That is
 18 what you mean by the reserving the right to
 19 further annotations, citations?
 20 MR. SCOTT LITTLE: Yes.
 21 PRESIDING ARBITRATOR: Okay.
 22 MR. NASH: All of that's fine
 23 with us.
 24 PRESIDING ARBITRATOR: Okay.
 25 So that's fine; right? Any technical problems in

1 citations within brackets in the text and you
 2 prefer endnotes, I think we could apply both. I
 3 don't see a big problem there, but maybe you
 4 could --
 5 MR. NASH: I believe they
 6 were. I think Mr. Little is right. I think they
 7 were endnotes last time. That's the advice I'm
 8 getting. So we are fine with that.
 9 PRESIDING ARBITRATOR: So you
 10 would also --
 11 MR. NASH: Yes.
 12 PRESIDING ARBITRATOR: -- add
 13 endnotes?
 14 MR. NASH: Yes.
 15 PRESIDING ARBITRATOR: Okay.
 16 Then we are fine; right?
 17 Okay. If there is no further
 18 problem, that, then, brings to an end -- okay,
 19 Mr. Nash.
 20 MR. NASH: If there's no more
 21 business to deal with --
 22 PRESIDING ARBITRATOR: I was
 23 just going to go into that, but --
 24 MR. NASH: -- can I just take
 25 this opportunity to first thank Dr. Pulkowski for

1 that regard? Dirk?
 2 DR. PULKOWSKI: I don't expect
 3 so, because the production people at Arbitration
 4 Place were able to produce it last time. I know
 5 it's not the usual way of proceeding in court
 6 reporting companies to add drop footnotes, because
 7 the page numbering can change and so on, but I
 8 believe it has been done before, so I'm sure it
 9 can be done again.
 10 MR. SCOTT LITTLE: I actually
 11 think that, as a result of that issue,
 12 Dr. Pulkowski, that we prepare those annotations
 13 with endnotes, not footnotes.
 14 DR. PULKOWSKI: Right. I
 15 think you are correct.
 16 MR. NASH: I recall that, at
 17 least from our end, there was no technical
 18 difficulty last time simply adding the footnotes
 19 to the transcript. I'm not sure technically how
 20 that was done, because I am not a techie, but
 21 there was a method by which it was done, and I
 22 think it was fairly simple.
 23 PRESIDING ARBITRATOR:
 24 Frankly, I don't remember whether we had footnotes
 25 or endnotes. So if, Mr. Nash, if you prefer mere

1 his outstanding management of this case and smooth
 2 management of this case for many, many years.
 3 He's both been generous and gracious and highly
 4 intelligent in his responses and everything, and
 5 so we really appreciate it, and we would like to
 6 thank Dr. Pulkowski for all of that.
 7 I'd like to take this
 8 opportunity to compliment Canada and Canada's
 9 counsel on the presentation they have made and
 10 their excellent advocacy skills, which we, of
 11 course, enjoyed last time at the merits hearing
 12 and again this time. And I may say that, while
 13 we've had our disagreements over time, the overall
 14 experience has been one of pleasure, including
 15 during the hearing. We appreciate their
 16 collaboration and their collegiality.
 17 I would like to thank all
 18 members of our team who have done so much to
 19 support the effort and the presentation of the
 20 case, and I'd also like to thank our client
 21 representatives and Mr. Buxton for their active
 22 engagement in this process throughout.
 23 And, finally, to you, the
 24 tribunal, I'd like to thank you very much for your
 25 attention, your diligence, your application of

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1 principles, and all of that. And it's been a long
2 period of time that we have been at this together,
3 a shared experience, so on behalf of our team, we
4 would like to thank you very much.

5 PRESIDING ARBITRATOR: Thank
6 you very much, Mr. Nash.

7 Mr. Little.

8 MR. SCOTT LITTLE: I want to
9 pre-empt anything you might have to say too, Judge
10 Simma.

11 I too want to thank, on behalf
12 of my team, the members of the tribunal, to
13 Dr. Pulkowski, as well to Lisa, our court
14 reporter, and to the Arbitration Place technical
15 staff for all your time and attention today and
16 over the course of the week and, for the tribunal
17 and Dr. Pulkowski, over the course of the last
18 nine years. I think on the prehearing conference
19 call, Judge Simma, you said that we'd been a large
20 part of your life. After the thousands of
21 documents and four procedural hearings and two
22 hearings, you have no idea how large a part of our
23 life you have been to us.

24 I also want to acknowledge
25 Mr. Nash's compliments, which I extend back to him

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1 during the intervals between the hearings has been
2 intense and -- yeah. I mean, but compared to
3 that, I have to say that I found the hearing --
4 the atmosphere here extremely cooperative,
5 friendly, amicable, and I would like to thank both
6 sides for that. I think it has been a long
7 exercise, ten days, but it has been pleasant under
8 the circumstances. So thank you. Thank you.

9 And I would also like to
10 thank -- I mean, I thank Dirk Pulkowski for the
11 last 20 years of my life. I think we have been
12 friends and working together for 20 years almost,
13 almost.

14 And I would also like to thank
15 the -- my colleagues for their constant support,
16 and I have learned a lot about the common law,
17 which I can use at Iran-US claims tribunal
18 actually.

19 So it's -- I would very much
20 like to thank everybody involved in the running,
21 like the -- our two transcript writers and the
22 technicians in the back. Have I forgotten
23 anything? The people who help preparing the food,
24 et cetera.

25 So thank you very much, and I

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1 and his team. As Mr. Nash noted, we can always
2 have our disagreements over the course of and in
3 connection with the file, but in the now three
4 hearings that I have worked on with Greg, it's
5 always been outside of the file collegial,
6 friendly, and we appreciate that. So thank you.

7 MR. NASH: And I, of course,
8 missed appreciating -- expressing our appreciation
9 for Lisa, the court reporter, and to the
10 outstanding staff here at Arbitration Place,
11 including our media audio staff, who have been
12 extremely effective and helpful, and we appreciate
13 that.

14 PRESIDING ARBITRATOR: It
15 is -- well, it is probably not proper on the part
16 of a presiding arbitrator to say at the end of a
17 long -- of a hearing that -- something like I will
18 miss you, but I think we had a chat, and actually
19 we are going to miss you. If this was -- if
20 something goes -- accompanies you over ten years
21 of your life, then the end is a remarkable
22 emotional experience.

23 So I would like to thank the
24 two parties. I think the conversations and
25 correspondence and exchanges, et cetera, in the --

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1 think you can count on an award in a reasonable
2 time. So I don't think it's going to be years
3 long. Okay. Safe travels home. Thank you.

4 ALL: Thank you.
5 --- Whereupon proceedings adjourned at 2:15 p.m.

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