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

APPEARANCES:

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Shane Spelliscy
Krista Zeman
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Toronto, Ontario.
--- Upon resuming on Wednesday, February 28, 2018, at 8:32 a.m.
PRESIDING ARBITRATOR: Good morning, good morning to everybody. There are some organizational things we can deal with later. I give the floor instantly to Mr. Nash for the closing statement of the claimant.
Mr. Nash, you have the floor.
--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 8:33 A.M.
CLOSING ARGUMENT BY MR. NASH:
MR. NASH: Thank you, Judge Simma. Good morning.
Good morning, Professor Schwartz. Good morning, Professor McRae.
In the testimony you have heard this past week, it has been confirmed that the investors have proven each and every one of the elements of their claims far beyond the required balance of probabilities. But for Canada's NAFTA breach, the investors would have received all of the necessary government approvals, established the Whites Point Quarry, and produced and profitably sold aggregate

products to affiliated and established customers.
Canada's breach of the NAFTA directly caused the investors to lose a unique and long-term supply of high-quality aggregate to profitably sell into an established and largely captive market.
Specifically, the testimony this week has confirmed that the investors have operated a successful and established aggregates and construction materials business for two generations, selling aggregate and construction materials into the New Jersey and New York markets.
The investors were completely vertically integrated, and their companies, their interests, included two ventures, Amboy and an interest in New York Sand & Stone, [redacted]
The investors were importing coarse and fine aggregate products from Bayside to supply aggregates to Amboy and to New York Sand & Stone. They decided to identify, in the early 2000s, their own long-term supply and reliable supply of aggregate to integrate into their operations. At Nova Scotia's invitation, the

investors identified Whites Point as the ideal location for a quarry to fulfil their need for a long-term independent supply of high-quality aggregate, [redacted]
The investors confirmed all elements necessary to establish a successful quarry, including the quantity and quality of the resource, the design and feasibility of the necessary infrastructure and the ability to ship the aggregate to their customers.
Much of this evidence is substantially or entirely uncontested. Canada does not dispute, either meaningfully or at all, the investors' background, business experience and financial resources;
the investors' need for, investment in and commitment to the Whites Point Quarry;
the Whites Point Quarry's suitability and viability;
the claimants' security of interest in the lands;
the quantity and quality of in-place basalt;

that the basalt could be extracted;
the feasibility and capacity of the design of the plant;
the plant's capacity to produce suitable product for its intended market;
the concept, design and feasibility of the marine terminal;
the reasonableness of the investors' projected capital costs;
the reasonableness of the investors' projected operating costs;
that the aggregate products could be loaded directly onto a bulk carrier for transport;
and that the aggregate products would have been delivered to [redacted]
The evidence also confirms that Canada cannot reasonably dispute [redacted]

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[redacted]
The testimony this past week further confirmed that, in the ordinary course, and absent an unlawful, unwinnable and arbitrary process that you have found already constitutes a breach of the NAFTA, the investors would have received the government approvals necessary to establish and operate the quarry.
On the facts as proven, Canada's NAFTA breach directly caused the investors' losses. But for Canada's unlawful conduct, the investors would have produced and profitably sold aggregate in the manner that they say.
Accordingly, the investors have made out their case for full reparation --
--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 8:38 A.M.
MR. NASH: -- through an award of lost profits using the DCF methodology.
Our closing statement is organized into seven parts. First, I will briefly summarize the relevant legal framework.
Second, I will summarize the evidence that proves the Whites Point Quarry was

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to be a backbone acquisition to the investors' established businesses.
Third, I will review the evidence that proves beyond the required -- beyond the required balance of probabilities that the investors would, in the ordinary course, have received government approval for the Whites Point Quarry.
Fourth, I will summarize the evidence that proves, again beyond the required balance of probabilities, the viability of the Whites Point Quarry, including the quantity and quality of the resource, the infrastructure, the transportation and the economics.
Fifth, I will explain why Howard Rosen's DCF analysis should be adopted in assessing the investors' losses.
Number 6, I will address the topics that the tribunal invited the parties to consider in its January 26th, 2018, letter.
And, finally, we will explain why the investors' claim is not barred under Article 1116 and why the respondent's argument that the investors failed to mitigate must be rejected.

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The applicable legal principles are as follows:
The investors must receive full reparation for their losses arising from Canada's breach. On the issue of causation, the burden is on the investors to establish, on a balance of probabilities: A cause, here the breach; an effect, here the loss of the quarry; and a logical link and nexus between those two.
The investors' losses of profit are the logical and natural consequence of Canada's breaches of the NAFTA. The evidence before you establishes each element in the chain of causation. Once the investors have proven their right to damage on a balance of probabilities, the tribunal then estimates the actual loss, which, as the tribunals in Crystallex and Vivendi explained, does not require a record of established production or profitable operation, especially where, as in this case, the state itself promoted the profitability of the investment and the investors have established and profitable expertise in the industry in which they were investing.
The tribunal does not need to

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conclude with precision exactly what conditions would apply to the quarry and what exactly the cost consequences of complying with each individual condition would be. The investors have proven a reasonable estimate of what those costs would be. That is their burden; they have met it.
The investors' comprehensive evidentiary record supports FTI's damages model, and Mr. Rosen's presentation of the FTI valuation summarized the evidentiary inputs that went into each component of the model. The results of Mr. Rosen's analysis and conclusions are self-evident. The DCF method is appropriate where the fact of further profits is proved on a balance of probabilities. Where the fact of further profits is proved on a balance of probabilities.
Some tribunals have described the threshold as being reasonable certainty. There's no difference between the two in this context. Canada insinuates that some complicating event could or might occur. Tellingly, Canada never states that something is likely. Dr. Blouin, for example, said that it is not, in his words, a foregone conclusion that the environmental assessment of the Whites Point

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Quarry satisfied Nova Scotian regulatory requirements.

Similarly, much of Ms. Griffiths' prophesying leads her to conclude that it is, in her word, "unclear" what the JRP would have decided absent the finding of CCV.

Elsewhere, she cannot help but speculate about a JRP's possible findings. It is what might have happened, it's what could have happened; it's not what did happen.

However, the evidence in this arbitration established --

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 8:43 A.M.

MR. NASH: -- far beyond a balance of probabilities that, but for Canada's breach, the investors would ultimately have operated a profitable quarry at Whites Point. Confirming that, the investors had security of title, there is enough [redacted] at Whites Point to operate for more than 50 years, in the ordinary course, there would have been no regulatory impediment.

The eminent David Estrin's expert evidence confirms that, in the ordinary

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course, a JRP would have recommended and the Ministers would have approved the project.

Professor Sossin's expert evidence confirms that, in the ordinary course, the Ministers would have approved the quarry. Mr. Oram and SNC Lavalin's evidence confirms that, in the ordinary course, the investors would have secured all necessary permits and authorizations to build and operate the quarry. The quarry would have been built and operated. The particulars of that operation are confirmed by many, including Mr. Washer, the engineer who costed out capital costs; Mr. Bickford, who you heard here last week; Mr. Morrison; and SNC. None of the fundamental evidence regarding the design or cost to build and operate the quarry has been challenged. Tom Dooley and Mike Wick confirm that the investors had the ability to sell that stone directly into their intended mature, stable and highly lucrative market of New York City.

The investors' damages are rooted in the fact that the Whites Point Quarry was planned to be vertically integrated into their established business operations. Mr. Rosen explained, this is not a start-up. It is a

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business with a long history of successful and profitable operations with well-established track record, supporting a DCF measure of damages. The facts demonstrating the nature of the investors' business are well supported and substantially undisputed. It is not disputed that the investors operated and continue to operate through a group of closely held private family companies. As Bill Clayton testified, the Clayton family operates under the Clayton Group of companies, all of which further the Clayton family's fully integrated aggregates and construction materials business.

[redacted] While the Claytons held a partial economic interest in New York Sand & Stone through Amboy, the evidence is undisputed that the Claytons hired Mr. Dooley to operate New York Sand & Stone, and he did. [redacted]

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[redacted]

There is no controversy that, in 2002, the investors decided to pursue their own Canadian supply of reliable, high-quality aggregate products to vertically integrate with [redacted] This decision was primarily the result of several developments.

[redacted]

After the investors asked Mr. Lizak to investigate opportunities in Nova Scotia and he identified Whites Point as the best location there, the investors made a decision to proceed with their investment in Whites Point.

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

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

Bill Clayton testified, and I quote:

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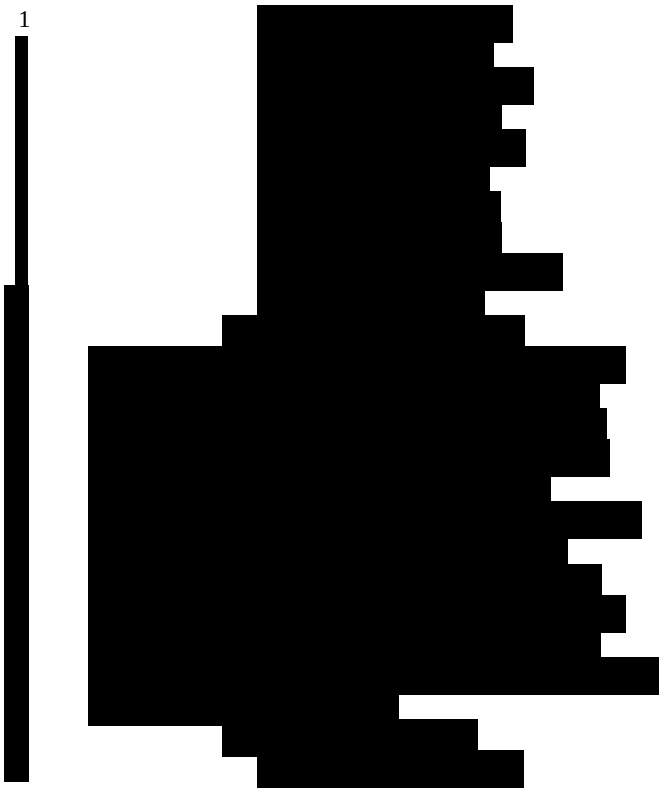

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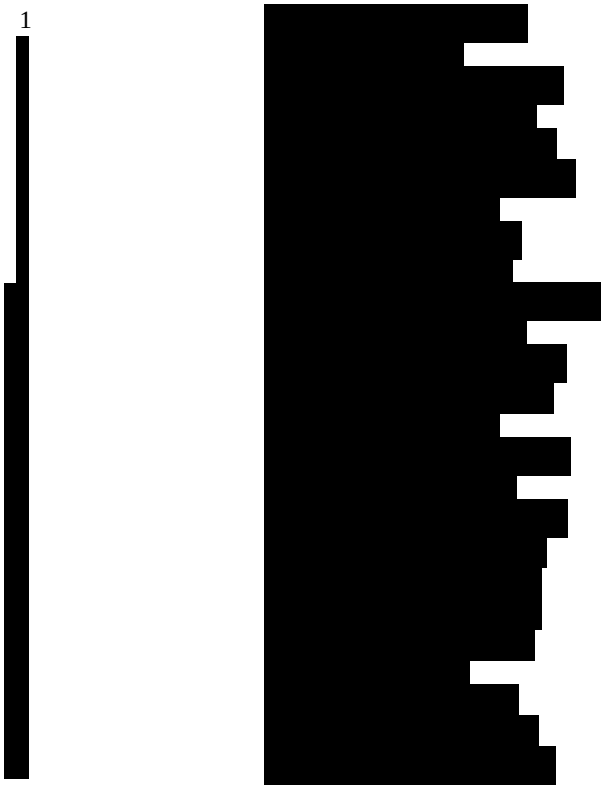

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[redacted]
--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 8:52 A.M.
MR. NASH: In running their business through closely held private family companies, the investors were not subject to securities law or reporting requirements like, for example, a 43-101. They were entitled to operate as they did, and they did so very successfully and highly effectively.
The investors have tendered the expert report of Mr. George Seamen, who explains the difference in capitalization, operation and profitability of a large public company and a small family company. Mr. Seamen was with Martin Marietta before it became a public company, when it was a private company. This is all in his statement. He explains why a focussed, integrated and highly efficient, tightly run quarry such as the Whites Point Quarry can achieve very high profit margins far beyond the big public company industry averages.
Canada has not rebutted or challenged Mr. Seamen's evidence. He was not called for cross-examination. It remains

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uncontested.
--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 8:53 A.M.
[redacted]

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[redacted]"[as read]
--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 8:54 A.M.
MR. NASH: Mr. Rosen addressed the significance of the investors' decision to operate as a closely held family business during his testimony, explaining:
"The Claytons, in the early 2000s, made an investment decision as a family with their own money. They didn't do the kind of feasibility a public company would do, nor were they required to. They were financing this; it was their decision."[as read]
Canada does not meaningfully dispute any of this background. Instead, it raises technical arguments about the status of the corporate parties and points most fundamentally to the EIS, an early conceptual environmental planning document, to raise questions about

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whether the investors really intended to sell Whites Point Quarry aggregate into New York City as well as New Jersey.
Canada efforts to show by a lack of so-called contemporaneous documents that the investors did not contemporaneously plan for the Whites Point Quarry to supply New York Sand & Stone is misconceived and ultimately futile.
The contemporaneous evidence, in fact, does reflect the fact that both New Jersey and New York were contemplated markets for Whites Point aggregate from the very beginning. The EIS refers to New York in various places, describing it, including "the primary destination of the rock products is the New York, New Jersey area". Amboy Aggregates is also a [redacted] owner of New York Sand & Stone, which is a Brooklyn, New York-based stone terminal that imports stone and operates two leased aggregate distribution terminals.
Paul Buxton himself explained at the JRP public hearing that:
"It is possible that some could go into New York, and it really depends on

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which is the end terminal because they have different depths, so it may be that some rock or aggregate has to be dropped off before it goes to another facility."[as read]

So all consistent with the original intention to go to both New York and New Jersey.

Mr. Lizak was retained by the investors in 2002 to prepare a geologic source report for Whites Point [redacted]. In his testimony, he confirmed that he wouldn't be looking at [redacted] That's going back to April of 2002, the very origin of his retainer.

Finally, the JRP report itself acknowledged that the investors intended to sell Whites Point Quarry aggregate into New Jersey or New York, and I am quoting from the JRP report:

"Ship-loading would consist of approximately

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40,000 tonnes of aggregate weekly, 44 to 50 times per year for shipment to New Jersey or New York."[as read]

So it's not a secret that they were going to New York. It wasn't something that they were not going to disclose to a JRP. It was fully disclosed to the extent required for a preliminary conceptual purpose for environmental assessment.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 8:57 A.M.

MR. NASH: As Mr. Buxton explained in his testimony:

"The purpose of an EIS means that variations, within limits, to the business concept are irrelevant."[as read]

He explained that:

"The difference between 2 million tons, 2.1 million tons, 2.4 million tons is irrelevant when you are

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going back to the purpose of the EIS, which is to define effects and define how you are going to get rid of them. That's the purpose of an EIS; not to drive a proponent to describe exactly how he is going to go this or that or the size of this or that crusher or the size of that conveyor. I really can't think of any major changes that would be made to an EIS because it was going 15 miles further down the coast or 10 miles further down the coast. It made no difference to the EIS."[as read]

[redacted]

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[redacted]

This background context is critical to understanding the Whites Point Quarry's importance to the investors and properly appreciating the damages they have suffered as a result of Canada's breach.

As Mr. Rosen explained, the investors' established business and plan for the quarry defeat any suggestion that the quarry can be characterized as a start-up. He explains:

"This operation was not a start-up. The Claytons had business and had been in business for many years, two generations. They understood the rock business, the aggregate business, and they were buying, at this time, aggregate from a supplier to their NYSS operation.

[redacted]

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[redacted]
When they didn't have the
expertise, they went out
and hired the
expertise."[as read]
--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 8:59 A.M.
MR. NASH: I turn now to the point that Canada's breach precluded the claimants from obtaining the additional rights necessary to construct and operate the quarry.
But for Canada's breach, the JRP would, in the ordinary course, have recommended approval. The Ministers would, in the ordinary course, have granted approval. And the industrial permits necessary for operation would, in the ordinary course, have been issued. The evidence proves beyond the required, far beyond the required balance of probabilities a direct causal link between the breach and the investors' loss of the Whites Point project.
The investors tendered, as I have said, the expert reports of David Estrin which show that, in the ordinary course, the JRP would have recommended approval. Mr. Estrin's

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opinion is that the JRP had no lawful basis not to recommend approval of the project. His opinion should be accepted in whole. He testified:
"In Nova Scotia, it's
quite clear from their
policy documents that
they favour very highly
the advantages of
aggregate and other
mineral resources being
developed. They want to
have an expeditious and
consistent process for
the proponents, and that
helps explain why things
do get approved. Because
they set it out and
proponents listen. I
can't understand -- says
Mr. Estrin -- how Whites
Point Quarry could be any
different than a pit or
quarry that goes through
the standard process.
Whites Point Quarry's

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environmental impact
statement was
comprehensive, thousands
of pages, considered
things in much more
detail, and yet didn't
reveal anything startling
or unique. So if it had
been handled in the
ordinary way by
regulators, it would have
been approved by Nova
Scotia. If the burden of
proof is on a balance of
probabilities, in my
opinion, having looked at
the available comparative
projects, all of which
involve quarries or
marine terminals and
issues of whales and fish
and explosives, every
other one of them was
approved by Canada or
Nova Scotia and with

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mitigation measures that
are not in any way
materially different from
what Whites Point came up
with."[as read]
In reaching his conclusion, Mr. Estrin analyzed the record before the JRP and determined that the environmental assessment established that the Whites Point Quarry project complied with both the CEAA and the NSEA, the Nova Scotia Environment Act, and did not reveal any project effects that could provide a basis for recommending approval.
In amplifying his evidence regarding mitigation measures, Professor Estrin testified:
"I looked at the
mitigation measures and I
compared them to Whites
Point, Black Point,
Aguathuna, and they were
essentially similar.
That's another reason why
it can be objectively
determined that there

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isn't really anything unique about Whites Point that would stand in the way of some approvability except politics. The Black Point Quarry is a much larger quarry than Whites Point, would be much more blasting, much larger, much more shipping, all of those things. In the result, they came up with mitigation measures that were ones that Bilcon itself had anticipated were required ten years ago because of all the expertise that they had involved."[as read]

Additionally, Mr. Estrin addressed the investors' reasonable expectations that had been fostered by Nova Scotia, including, as I've said, through the promotion of a standardized and expeditious processing of

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environmental applications and approval review for new or expanding quarries.

Canada has not led any credible evidence to refute Mr. Estrin's opinion. Instead, Canada relies on witnesses who were not involved in the JRP, who lacked the relevant or any expertise in the area, primarily in an attempt to create the specter, just the specter of potential adverse effects. Potential adverse effects. Or what Canada calls concerns. This is not the test.

The test, and everyone knew the test, we heard that from Ms. Griffiths, is whether the project would have likely significant adverse environmental effects after mitigation.

The analysis does not conclude and the JRP panel members knew absolutely well that it does not conclude with the identification of potential adverse effects or concerns. It ends with likely significant adverse effects that can't be mitigated.

Everyone knew precisely what the test was, those very capable members of the JRP most of all. They fully explained and understood what they were obligated to do and what

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they were going to do. Not only are Canada's environmental assessment witnesses unqualified to express the opinions they purport to proffer, Ms. Griffiths clearly dispelled any benefit of engaging in the fallacy of second-guessing the JRP.

She confirmed that the members of the JRP were experts in the field of environmental assessment. They knew exactly what they were doing. She confirmed that speculation about what the JRP did or did not do serves no useful purpose, and I quote, Ms. Griffiths states:

"Speculation about that is not helpful or proper. With any panel, you just have to go with what's in the report. The report speaks for the panel's work."[as read]

We could not have said it better ourselves. She is quite right. The report speaks for this panel's work. Their work concluded that, on all of the voluminous evidence before them, and fully knowing already what their mandate was, and after considerable deliberation

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of many months, they could find one likely significant adverse environmental effect: CCV, and no other. That was their finding. Like Canada's other environmental assessment witnesses, she acknowledged that she has no professional expertise to offer any opinion about statutory interpretation, about the scientific or engineering evidence before the JRP; but she did concede, finally, that for environmental assessment purposes, significant does not include minimal, which is how the Department of Fisheries described the effect of this project on marine mammals. And that low probability means unlikely. Low probability means unlikely.

Without confirming statistics, Ms. Griffiths agreed that the -- operating on the figures, four right whale mortalities from 1970 to 2004, one every eight and a half years, reduced by 95 per cent as a result of a shipping lane change in 2003, that the mortality of one whale in 175 years in the Bay of Fundy, one whale in 175 years in the Bay of Fundy is a small additional risk. Whales were never a legitimate issue in this case. The arc of this evidence goes back to Jerry Conway in 2002, who wrote to his boss and said -- I am

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He states:

> "Where there is no evidence of such significant adverse environmental effects, a Minister does not retain discretion to nevertheless deny approval for the project if the project does not give rise to significant adverse environmental effects; in other words, there is no provision in the CEAA that would allow the responsible authority or GIC to turn it down for reasons of political expediency, policy preference or economic reasons or in response to

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> public opposition."[as read]

A central element of Professor Sossin's opinion is that the rule of law constrains Ministerial discretion. He explained that the exercise of all authority, all discretionary authority "must be understood as bounded and limited by its statutory terms".

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

At the hearing, Professor Sossin testified:

> "So I take the establishment of purposes here and, again, in the Nova Scotia and federal legislation, for these purposes to be in effect, the foundation from which the boundaries on that ultimate decision-maker's discretion flow, (the foundation). There is also the context for this broad grant of discretion

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> remains unbounded, as all broad grants of discretion will be, by set boundaries that are both going to be tied to the overall purpose and context of the statute and to the specific record in front of the cabinet decision-makers."[as read]

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

> "When you remove the one basis that the decision-makers had for denying it, then the logical inference is that acting reasonably, in the absence of CCV and based

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on the record, without any other recommendation on the evidence from the JRP, they would have approved it. Once you take away the only legitimate basis for denial as not legitimate, the only choices left to the Ministers, acting reasonably, would have been to approve. I am basing my conclusion on the record before the decision-makers. The logic of their own analysis, given that they had the ability to choose other grounds and didn't, would be that they would have recommended approval."[as read]

The record before -- he continues:

"The record before the

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decision-makers did not have another legitimate basis for denial; and, therefore, reasonable Ministers or Ministers acting reasonably or a cabinet acting reasonably would have approved."[as read]

This tribunal has made a number of key findings relevant to this issue. The tribunal has already found that the CEAA requires socio-economic effects to be tied to an ecological effect and that community core values is a consideration outside the scope of both the CEAA and the NSEA.

This tribunal has also found that both Ministers simply adopted the JRP's recommendation. In answer to Professor Sossin, Canada has tendered the report of Thomas Cromwell. The Cromwell report amounts to a general statement of how the Nova Scotia Environment Act functions in the abstract. It does not apply an interpretation to the actual facts in evidence in this case. It does not express any opinion on

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whether there were likely adverse environmental effects after mitigation. It also does not consider Nova Scotia's policies, particularly the Mineral Policy, the 1996 policy, and the practice of promoting quarry developments in general and on the North Mountain Whites Point site in particular.

As the Supreme Court of Canada in Dunsmuir New Brunswick explain, statutes are not to be interpreted in the abstract but rather in a contextual and purposeful way, and quoting:

"Legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a purposeful and contextual way."[as read]

The Cromwell report interprets the legislation in the abstract. It fails to recognize that the legislative scheme has specific purposes expressly stated in Section 2 of the NSEA

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and context which provide important guidance on how Ministerial discretion under the scheme is to be reasonably exercised by taking into account relevant factors, including the overall goal of the legislation, which is to strike the balance between environmental protection on the one hand and economic development on the other. Expressly provided for in the purpose section of that legislation, it's a twofold purpose.

In the circumstances, it was unnecessary to subject Judge Cromwell to a public cross-examination. In effect, the import of all Canada's environmental assessment witnesses, including Judge Cromwell, is to invite you to reopen and redecide your award you have already given on jurisdiction and liability because in different hypothetical circumstances, something else might have happened.

What we are dealing with here in this phase of this proceeding is not what could have happened or what might have happened, it is what did happen in these circumstances.

Although "significance", as a word, may not be a specifically articulated precondition for a recommendation to the Nova

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

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

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

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

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paragraph 740 of the jurisdiction liability award.

The conclusion relates to Nova Scotia government policy publications intended to encourage the investors to develop a quarry at Whites Point. These policy publications indicated the Nova Scotia government's environmental approval process would be guided by the goal of promoting the province's mineral potential. In the circumstances and context of this case, the policies, the guidelines and the communications all support the conclusion that the Minister's discretion must be guided by the stated purpose of the legislation, two-fold, and to the investors' reasonable expectation of an environmental review process and standard in relation to the Whites Point Quarry.

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

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economically viable. As such, the investors have proved the causal link necessary between the denial of the approval and the result.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 9:23 A.M.

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

In establishing the quality, quantity and suitability for the intended purpose of this product, the investors have tendered the expert report of an independent professional geologist, Michael Cullen, of Mercator Geological Services, who was also not called for cross-examination. His evidence goes uncontroverted and unrefuted. His analysis was conducted in accordance with the Canadian Institute of Mining, Metallurgy and Petroleum definition standards for mineral resources and mineral reserves and concluded that the basalt contains --

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Canada has neither challenged Mr. Cullen's conclusions nor add any evidence to the contrary.

Because Bilcon is a private company, as I have said, it was not required to complete a feasibility study. That's for public companies in the public markets seeking financing or investment.

The evidence also proves beyond the required balance of probabilities that the plant and marine terminal infrastructure necessary to produce and transport the aggregate has been thoroughly planned, designed and costed.

George Bickford's evidence establishes that the investors had completed the design for a crushing plant that would have produced

Page 2415

He gave evidence about

Page 2416

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And then Mr. Washer, Mr. Bickford's former partner, costed the whole thing at The amount is not materially in dispute.

The investors have similarly proved beyond the required balance of probabilities the plan, feasibility and estimated cost of the marine terminal. There can be no doubt about the site's suitability, which had been fully investigated by Bilcon back in 2002.

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

For this arbitration, SNC Lavalin independently confirmed that the design and estimated [redacted] cost of the marine terminal is reasonable and was within [redacted] of SNC's own cost analysis.

[redacted]

None of this evidence has been challenged in any way. The investors have detailed their estimated operating costs in the evidence of Mr. Wall and Mr. Buxton, and Canada has not meaningfully contested the reasonableness of those estimates and tendered no contrary evidence except [redacted]

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[redacted]

Canada's critique of the investors' operating costs, [redacted] should be disregarded because it depends on the incorrect premise that [redacted]

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

Wayne Morrison, former vice president of CSL, correctly conducted a market-based analysis. [redacted]

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[redacted]

Page 2422

[redacted]

Page 2423

[redacted]

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

The evidence also establishes the market and unlikely prices of the [redacted] products supplied.

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

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[redacted]

Page 2425

[redacted]

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

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

The revenue is based on [redacted] None of that can be disputed.

There are dollar figures for all the costs. There is then a calculation of gross profits towards the bottom, the fourth line from the bottom, there is the selling, general and

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

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

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evidentiary foundation, that recently proposed changes to the US tax code may have an impact on the tax equity adjustment. Canada's questions are not evidence. There's been no confirmation from any witness on any basis that says that the current US tax code, changed recently, will have any effect on the tax equity adjustment as calculated by Professor Shay. Mr. Rosen has explained that the common valuation practice is to deal with the legislation in place at the time of the valuation. He explained that he has inquired of --

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 9:43 A.M.

MR. NASH: -- tax experts about the impacts of the changes; he has been advised that there is no material difference. He explained that, as is common practice, if the tribunal is concerned about the impact of any new US tax legislation on the amount of the tax equity adjustment, the tribunal can instruct the quantum experts to assist the tribunal in accounting for any differences in the final award.

In our submission, Howard Rosen's approach to valuation is commercially

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

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

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

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

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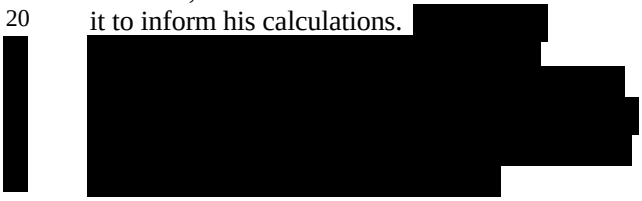
appropriate standard to apply in circumstances where there, as here, it is not an expropriation where property expropriated is a property valued at its fair market value at the time it's expropriated.

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

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



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Instead, Mr. Chodorow described the investors' profit from the Whites Point Quarry as extraordinary, without regard to their required investment of [redacted] in order to earn the profits that the Whites Point Quarry would earn. And that investment of [redacted] would result in a conservative return of [redacted] per ton over 50 years.

In the end, Mr. Rosen's principal balance and commercially reliable analysis, which is self-evident, must be preferred to the theoretical, instruction-limiting and unbalanced analysis of Mr. Chodorow.

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 9:47 A.M.

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

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

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profitability.

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

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

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

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

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

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

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addressed through judicial review.

Canada's mitigation argument is simply another attempt to recycle this argument into the damages phase to try and achieve through the back door what they failed to achieve through the front door. It's simply another attempt to avoid accountability for its breaches of the NAFTA.

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

As the Supreme Court of Canada recently emphasized in TeleZone:

> "People who claim to be injured by government action should have redress to the legal system which permits through procedures that

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> minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind. It is generally true here, as it is in the UK, that a plaintiff is not required to bring an application for judicial review."[as read]

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

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

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costly proceedings with virtually certain appeals and an uncertain result.

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

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

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

Bill Clayton eloquently explained, he said:

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"There was no reasonable person that would have even considered going back to the Canadian courts for this. We would have gone through the five years of struggle to end up back where we were. Possibly being dealt with by the same people. So there was no law, rule or ordnance in Canadian law that we knew of that said we had to, and there was no obligation to. We had a right to go to the NAFTA, and we chose to go to the NAFTA because going back to them and being dealt with that way for another ten years was absolutely unreasonable."[as read]

I will say briefly that

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

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

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

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

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

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

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

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

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

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and that the quarry was not actually built. As Mr. Rosen explained, the discounted cash flow methodology factors in ordinary business risk. Nonetheless, if, on its examination of the valuation, the tribunal is of the view that it does not adequately allow for potential cost overruns or --

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 9:56 A.M.

MR. NASH: -- or unforeseen circumstances, it can deduct an amount or a percentage of the capital cost from the calculated damage.

[redacted]

Similarly, if the tribunal is

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of the view that there is some uncertainty in either the projected revenue or expenses that it wishes to reflect in the damages assessed, it can simply take a percentage contingency and deduct it from the final overall damages award.

And I will ask Mr. Elrick to come and address you on the 1116 issue.

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 9:57 A.M.

CLOSING ARGUMENT BY MR. ELRICK:

MR. ELRICK: Judge Simma and members of the tribunal.

The investors have standing to claim the damages presented by FTI in their damages model. Canada's interpretation of Article 1116 and 1117 is incorrect. And in this point, the fundamental point is that the waiver under Article 1121 to perfect a claim for damages to an interest in an enterprise under Article 1116 be rendered redundant under any of Canada's interpretations.

Regarding the corporate structure, Bill, Doug and Dan Clayton invested all the money invested in the Whites Point project. From the beginning, the corporate structure Bill,

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Doug and Dan Clayton adopted for their investment in the Whites Point Quarry consisted of the following: Bilcon of Delaware, of which they were the sole shareholders, and Bilcon of Nova Scotia, an unlimited liability company which was wholly owned by Bilcon of Delaware. All of the equity capital that would be invested in the Whites Point Quarry, but for Canada's wrongdoing, is Bill, Doug and Dan's. All of the profits earned on the investment in the Whites Point Quarry is earned by Bill, Doug and Dan.

[redacted]

Leaving aside the corporate structure for which Bill, Doug and Dan Clayton made their investment, Canada has raised and lost identical arguments in numerous NAFTA

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arbitrations. In Pope and Talbot, for example, the tribunal found, and I'm quoting:

> "It could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for a loss or a damage to its interests in a relevant enterprise which is a juridical person that the investor owns. It is plain that a claim for loss or damage to its interest in that enterprise investment may be brought under Article 1116. The important point is that the existence of Article 1117 does not bar bringing a claim under Article 1116."[as read]

The tribunal has explained, just before making that point, is that the difficulty for Canada's position is that the

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

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

> "We agree with UPS that the claims here are properly brought under Article 1116. UPS is the sole shareholder of UPS Canada."[as read]

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

> "That whether the damage is directly to UPS or directly to UPS Canada and only directly to UPS is irrelevant to our jurisdiction over these

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

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

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

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

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

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

> "That a tribunal may simply treat such a claim as in truth brought under Article 1117, provided there has been clear disclosure in Article 1119 notice of the substance of the claim,

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

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

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

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

I will turn the floor back to Mr. Nash.

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

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

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

Thank you.

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

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

MR. NASH: Either is enough.

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

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

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

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

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

CLOSING ARGUMENT BY MR. SCOTT LITTLE:

MR. SCOTT LITTLE: Thank you. Judge Simma, Professor McRae and Professor Schwartz, well, we have arrived at the end of this hearing exactly where we began, with the claimants' failure to prove the NAFTA breach caused the loss of 50 years of profits from the Whites Point project.

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

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

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In the past, if they have said that something's black, this has not stopped them from now telling you that it's white.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 10:37 A.M.

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

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

-- brief recess taken.

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

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

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

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[redacted] We can exit confidential now.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Privileges exist for real,

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

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

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

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

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few minutes.

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

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

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

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

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

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proper context.

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

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

State responsibility and Canadian environmental law.

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

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

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

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

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

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

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

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So let's move on.

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

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

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

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

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

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which they should have been provided.

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

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

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

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

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

So let's look at that injury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And in so doing they certainly

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engaged in a number of hypothetical propositions.

The fact is, the causal analysis to be carried out under Chorzow Factory is by necessity a hypothetical exercise.

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

> "Chorzow Factory requires the construction of a hypothetical course of events with necessarily speculative elements. This hypothetical course of events extends both into the past, i.e., how would the government have acted if it had acted lawfully, and into the future."[as read]

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

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

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

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

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

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

In the words of their expert, Dean Sossin:

> "Beyond CCV, there was no other separate information analysis sought by the decision makers beyond the report

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> that is indicated in their decision documents to have been carefully studied, reflected on and adopted..."[as read]

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

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

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

But more than that, the factual premises underlying Dean Sossins' theories, they are simply incorrect.

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

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

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

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

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

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

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

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

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

It also notes the concerns of regional stakeholders over factors such as the impacts to the tourism industry, including impacts to whale watching, the fishing industry and the esthetics of the landscape and way of life.

It also reports on

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

While both Ms. Griffiths and

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

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

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

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

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

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

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

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

Let's move to government decision making.

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

For starters, as shown by this

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

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

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

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

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

So, therefore, they have the

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opportunity to say yes or no, we agree or disagree with your findings.

And despite the extensive cross to which Mr. Connelly was subjected on the fact that he too is not a lawyer, which we presume was designed to suggest that he shouldn't be pronouncing on CEAA Section 37 despite his years of experience, what's noteworthy is that the claimants didn't cross-examine the Honourable John Evans, who is eminently qualified to interpret the provision, and whose two opinions reinforce the very conclusion that Mr. Connelly expressed on Section 37.

Now looking at ministerial discretion and decision making from the Nova Scotia side of the spectrum, it's even simpler to see that in a but-for world the claimants had no guarantee the project would be approved absent the NAFTA breach.

Last week you heard Peter Geddes testify that the minister must look at the entire picture, which includes the definition of environmental effect, the overall principle of balancing economic development with environmental sustainability and the positive or adverse effects

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of a project.

And at the end of the day, the minister is the final decision maker regardless of the recommendation that's put before him or her.

As with all of Canada's other witnesses, Mr. Geddes was cross-examined on the fact that he was not a lawyer, and apparently shouldn't be offering opinions on the workings of ministerial decision making under the NSEA.

But, again, what's strange about the claimants' fixation with Mr. Geddes' lack of legal training, is that Canada filed an expert legal opinion by Judge Cromwell on the very conclusion on which the claimants tried to cast doubt through the cross-examination of Mr. Geddes.

Specifically, that regardless of the NAFTA breach, there was absolutely nothing preventing the Nova Scotia minister from rejecting the Whites Point project.

So to the extent that you have any questions on this point from a legal perspective, you can find comfort in Judge Cromwell's uncontroverted opinion.

It will be quite helpful reading for your consideration of whether Dean

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Sossin's opinion makes sense.

We actually urge you to read the entirety of Judge Cromwell's report, and in particular paragraph 7, where in he noted that he did not accept the factual premise underlying Dean Sossin's report that there were no legitimate grounds to deny project approval.

And this is because, apart from the CCV findings, as I have already said, the JRP made numerous determinations that the project would result in adverse environmental effects that could not be mitigated.

Now, finally, if the JRP had completed its mandate, it could have recommended mitigation measures that impacted the profitability and in some cases the viability of the Whites Point project.

As you noted to Mr. Estrin, Professor Schwartz, and as Mr. Estrin agreed, between approvability and rejection, there's approval with mitigation.

In this regard, Professor Schwartz, you put to Mr. Estrin that there still would seem to be a lot of flex in there for different terms and conditions, some of which

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might have a significant impact on the economics and viability of the project. And Mr. Estrin agreed.

You characterized Mr. Estrin's view that Bilcon's mitigation in its EIS would have just been accepted as unreasonably speculative, and we agree.

The claimants haven't proven what the costs or feasibility of mitigation would have been, even on a balance of probabilities.

The fact is that the claimants' proposal was its own unique project in its own unique environment. It raised the potential of its own unique significant adverse environmental effects, and hence its own unique significance criteria.

And it also raised the prospect of its own unique mitigation measures that might have been employed against such effects.

As but one illustration, this map, which we saw last week in the cross-examination of Mark McLean, shows the relative abundance of the endangered right whale in proximity to the Whites Point project site

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relative to other projects like the Black Point project.

Now, as we have heard from the evidence of Mr. McLean, it's these very kinds of differences in the environmental -- or the environment surrounding a project that can result in extreme differences in the cost and the feasibility of mitigation measures that might be recommended for a project in the end.

So, for the claimants to suggest that the only mitigation measures that would be required for the Whites Point project in a NAFTA compliant but-for world, well, it's quite simply incorrect.

So in conclusion, when they entered into the EA process, the claimants were never guaranteed an approved and fully permitted and profitable Whites Point project, notwithstanding the encouragements they might have received from the Nova Scotia government, notwithstanding Nova Scotia's policy and practice of promoting economic development and the development of quarries in the province, and notwithstanding the fact that other quarries throughout Atlantic Canada may have been approved.

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All they were entitled to was a lawful EA process.

And the fact is that every EA process has the potential to result in the government decision denying the requested approvals and permits.

A point of knowledge, as you can see here by Mr. Dooley and Mr. Fougere regarding the Bayside Quarry, which sits just across Bay of Fundy from the Digby Neck.

Mr. Dooley and Mr. Fougere both testified that, like the Whites Point project, the Bayside Quarry failed to obtain its approval for an expansion permit in 2009.

And as you can see from this testimony there was no shock, no surprise about this denial. It's a fact of life. It's an outcome contemplated by the EA regime.

There's nothing extraordinary about the denial of an EA approval, it is a completely natural and a certainly possible outcome of any EA process. And if it could happen at Bayside, it could happen at Whites Point.

Now, I presented the diagram that you see on the screen now as part of Canada's opening statement last week and I want to remind

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you of it before we leave the topic of causation. Because what it shows is there is simply no straight black line to project approval in the but-for world when causation is properly applied.

In the end, if you agree that any of these potential possibilities on this slide could unfold in a NAFTA-compliant but-for world, you have to also disagree with the claimants' theory that but for the NAFTA breach the project would have been approved, constructed and profitably operated for 50 years.

And if this is the case, there is but one conclusion at which we say you must arrive, and that is dismissal of the claimant's claim given their failure to prove causation.

So with that I would like to now turn the floor over to my colleague, Mr. Mark Klaver, who is going to address the next ground on which you can dismiss the claimants' claim.

And that's specifically that the claimants have no standing under Article 1116 to advance the claim that they have. Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Little. Arbitrator Schwartz would like to ask a question.

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PROFESSOR SCHWARTZ: Can I just take you to your discussion of Crystallex at page 26.

I am looking at the case that you quote from that Crystallex. I am just asking these questions not because I have a conclusion; I am just trying to understand them better.

There is a discussion there about how common lawyers get involved in their ratiocination about is there a balance of probability, some higher standard and that, and so on and so forth.

But the passage you quote there, if I am understanding it, seems to suggest that it's more like a rule of law that damage has to be proved with certainty.

There may be different theories as well. Do you have to know on a balance of probability that it's been proved with certainty, or do you have to be certain that it's proved with certainty?

But either way, whatever standard of proof you are applying is related to a substantive rule of law that damage must be proved with certainty. Am I understanding that

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correctly?

MR. SCOTT LITTLE: Well I think Chorzow Factory says in all probability what would the situation be if the breach had not been committed. Certainly I think Crystallex provides us a stronger articulation of the Chorzow Factory test. And there's probably some gap between what Crystallex provides and what Chorzow Factory provides.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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is it getting close to certain that this would have happened?

If there's factual uncertainty, then that should make you less comfortable with the result that they are asking you to accept.

PROFESSOR SCHWARTZ: Thank you.

MR. SCOTT LITTLE: Okay.

CLOSING ARGUMENT BY MR. KLAVER:

MR. KLAVER: Hello, Judge Simma, Professor McRae and Professor Schwartz. My presentation has one purpose: To demonstrate that this tribunal has no jurisdiction to award the damages that the claimants seek because they lack standing to claim the lost profits of Bilcon of Nova Scotia. Five points substantiate this claim.

First, investors have no standing under Article 1116 to claim damages for loss incurred by the enterprise. In the opening, my colleague Mr. Spelliscy outlined the NAFTA parties' agreement on this point.

So I will briefly outline the legal principles that confirm the correct interpretation of Article 1116.

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Second, it follows that the claimants have no standing to seek the lost profits of Bilcon of Nova Scotia.

Third, the claim must be dismissed in its entirety. Permitting the claimants to amend and refile their claim under Article 1117 would be unduly delayed, time barred and prejudicial to Canada.

After the liability award, the claimants brought a completely different claim from their original one. They made a litigation decision to abandon their claim for sunk costs and the cost of purchasing aggregate on the open market, and they elected to shoot for the moon by claiming lost profits.

Canada cannot be estopped from contesting standing because it objected at the earliest opportunity to this new claim.

Fourth, I will outline the flaws inherent in alternative damages awards. The claimants have no standing under Article 1116 to recover any costs paid by Bilcon of Nova Scotia; those are the enterprise's losses.

And fifth, the claimants might have had standing under Article 1116 for their

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original claim, but they abandoned them and never provided the evidence necessary to substantiate that claim.

I want to begin by explaining why the tribunal cannot brush this issue aside. If investors lack standing, the tribunal has no jurisdiction to award damages for their claim.

Pursuant to Article 1122, the NAFTA parties only consent to arbitrate claims submitted in accordance with the procedures of the agreement.

As the United States explains, the NAFTA parties' consent to a tribunal's jurisdiction is limited to a claim for loss under the specific article pled. This tribunal has no jurisdiction to hear a claim that the NAFTA parties have not consented to arbitrate under Article 1116.

Now, as you will recall, Article 1116 (1) grants standing for an investor to bring a claim on its own behalf, when the investor has incurred loss or damage. Investors must allege direct loss to recover damages under Article 1116.

In contrast, Article 1117 (1)

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permits an investor to make a claim on behalf of an enterprise for loss incurred by that enterprise.

Any indirect loss to an investor based on an injury to the enterprise may only be claimed through Article 1117.

Now, Mr. Elrick today suggested that NAFTA should read that investors "shall" submit a claim instead of "may." But you can see the absurdity of requiring investors to bring claims against the NAFTA states.

Now, the reference in Article 1121.1 (b) to an investor's interest in an enterprise cannot be read to allow an investor to claim indirect loss. The waiver in Article 1121.1 (b) is not rendered redundant by Canada's interpretation because an interest in an enterprise is distinct from damage to the enterprise itself.

In defining an investment, Article 1139 uses the term "interest in an enterprise" to refer to legal entitlements or rights belonging to the investor, not the enterprise.

Harm to such an interest could

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include the lost right to receive dividends, to vote, or to share in the residual assets of the enterprise upon dissolution.

In contrast, lost dividends are indirect losses. They result from lost profits of the enterprise. Investors have no standing to claim such losses under Article 1116.

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

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

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

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awarded damages for indirect loss under Article 1116.

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

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

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

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

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

The claimants seek damages for

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

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

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

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

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

[redacted]

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[redacted]

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

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

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

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

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

Page 2499

or injure any rights attached to their shares.
--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 11:42 A.M.
MR. KLAVER: The claimants retain all of the rights and elements of their interest in Bilcon of Nova Scotia. Their claim is solely one of indirect loss driving from loss incurred by the enterprise.
They have no standing under Article 1116 for this claim. And the tribunal has no jurisdiction to award damages for the claim as brought.
The appropriate result is to dismiss the claim in its entirety. In 2002, the Mondev tribunal stated that a NAFTA tribunal should be careful to allow -- not to allow any recovery in a claim that should have been brought under Article 1117 to be paid directly to the investor. It admonished claimants to consider carefully whether to bring proceedings under Article 1116 or 1117.
Now, the claimants say that they intended to file under Article 1116 and this may be true. Their original claim could have been appropriate for Article 1116.

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But now they ask to amend and refile their claim under Article 1117 if the tribunal confirms Canada's interpretation of Article 1116. They fail to point to a single tribunal that has allowed claimants to change their standing under Article 1117 for a claim of direct loss.
Moreover, this is not permitted under the governing UNCITRAL arbitration rules. Article 20 provides that a party may amend its claim unless the tribunal considers it inappropriate with regard to the delay, the scope of the arbitration clause, or any prejudice to the other party.
Considering all three factors, it would be extraordinary and inappropriate to allow the claimants to amend and refile their claim under Article 1117.
First, changing the standing claim now would be extremely delayed. This arbitration began ten years ago. The claimants could have claimed lost profits in their notice of arbitration in 2008, their Amended Statement of Claim in 2009, their memorial or reply for the liability phase in 2011, or even during the

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hearings in 2013.
Instead, the claimants waited until their memorial on damages in 2017 to claim the lost profits of Bilcon of Nova Scotia. They made their request in the alternative to amend the claim under Article 1117 in their reply last August, nine years into this arbitration. This delay is patently unreasonable.
Second, the attempt to amend and refile the claim now is time barred multiple times over. Under Article 1116 and 1117, a claim must be brought within three years of the impugned measure. The claimants lost the opportunity to amend their claim under Article 1117 in 2010, over seven years ago.
Amending the claim now would fall outside of Canada's time limited consent to arbitrate.
Now, given how recently the claimants replaced their original claim of loss with a brand new one, Canada cannot be estopped from objecting to standing.
Mr. Elrick says that Canada should have raised this objection in 2015. But Canada first became aware of the claim of lost

Page 2502

profits in 2017. It objected to standing at the earliest possible opportunity in Canada's counter memorial, 90 days after learning.
Now, the third reason that the claimants must not amend and refile their claim now is that it would cause irreparable prejudice to Canada.
The U.S. explained that a respondent state may suffer prejudice when a claimant changes its standing claim under Article 1116 or 1117.
Canada cannot possibly expand in detail but the nature of a damages claim can directly impact litigation defence strategy, and settlement considerations.
At the end of these decade-long proceedings, it would be impossible to repair the prejudice that Canada would suffer if the claimants changed their standing claim now.
Their claim cannot be amended and refiled under Article 1117. It must be denied in its entirety.
Now, the tribunal might choose to award damages for sunk costs in the JRP process. Although Canada offers this as a

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potential alternative it is not the appropriate award for at least three reasons.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 11:47 A.M.

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

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

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

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

Third, the claimants failed to

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

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

[redacted] These expenses would have to be excluded from any sunk costs award to the enterprise.

Mr. Forestieri also acknowledged that Ralph Clayton and Sons Materials LP is a distinct legal entity from Bilcon of Delaware. [redacted]

Since it is not a claimant in this arbitration, neither Bilcon of Delaware nor the claimants can recover damages for expenses paid by [redacted]

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Overall, then, an award for sunk costs in the JRP process is rife with problems that the claimants have not addressed.

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 11:50 A.M.

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

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

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

Page 2506

incurred directly.

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

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

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

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

[redacted]

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

MR. KLAVER: In sum, Canada

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

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

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

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

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

CLOSING ARGUMENT BY MS. ZEMAN:

MS. ZEMAN: Good morning, Judge Simma, Professor McRae, Professor Schwartz.

I will spend the next half hour or so explaining why, even if we leave aside the standing points, when you look at the narrative the claimants have crafted for the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And as you heard this week,

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

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

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

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

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

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

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

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

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

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

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

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

First, the resource.

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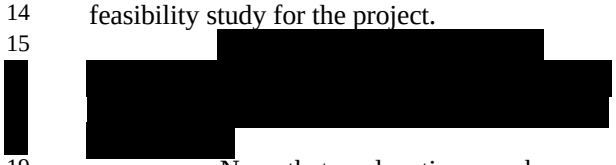
Mr. Rosen and also Mr. Nash this morning pointed to the evidence of Mr. Lizak and Mr. Cullen to support his proposed checkmark here.

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

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



Now, that explanation may be sufficient for the claimants in conducting their business and in taking risks with their money. However, it is nowhere near sufficient to ground a lost profits damages award for hundreds of millions of taxpayer dollars. Much more is needed.

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

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

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

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

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

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

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

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

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

Mr. Bickford explained that [redacted]

Mr. Bickford also explained that [redacted]

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[redacted]

As with the pro forma and operating cost documents, the claimants only had detailed costings prepared for the purposes of the damages phase of this arbitration.

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

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

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

First, [redacted]

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[redacted]

Second, as Mr. Little explained, [redacted]

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

As we heard this week [redacted]

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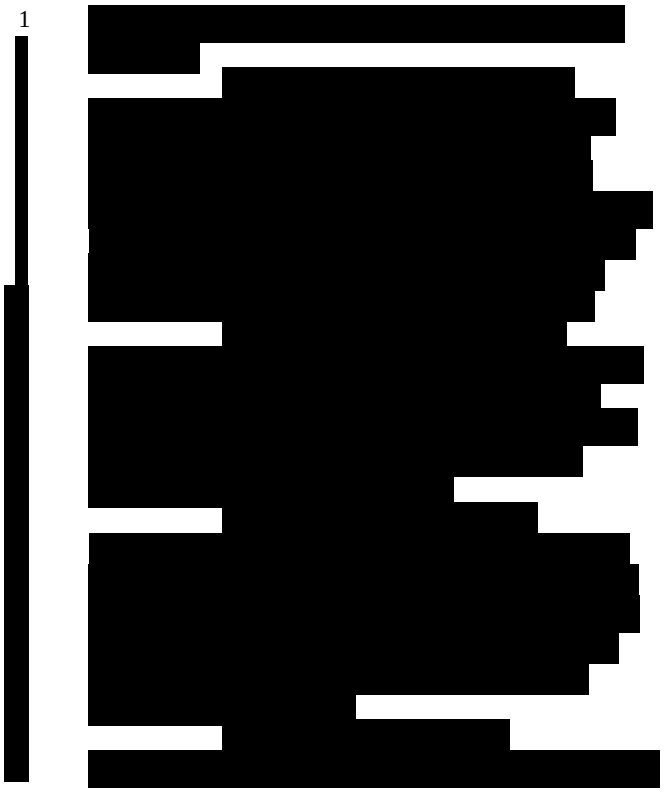

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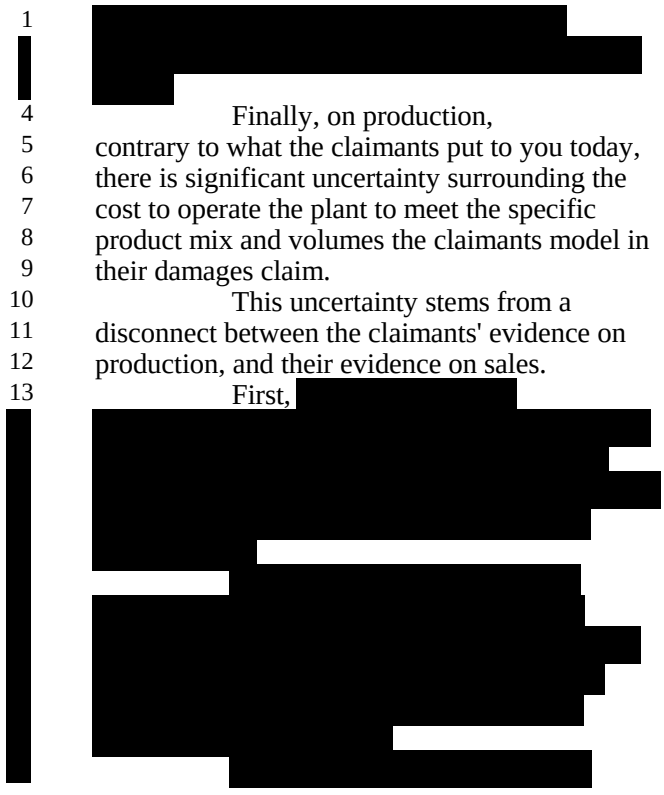

Finally, on production, contrary to what the claimants put to you today, there is significant uncertainty surrounding the cost to operate the plant to meet the specific product mix and volumes the claimants model in their damages claim.

This uncertainty stems from a disconnect between the claimants' evidence on production, and their evidence on sales.

First,

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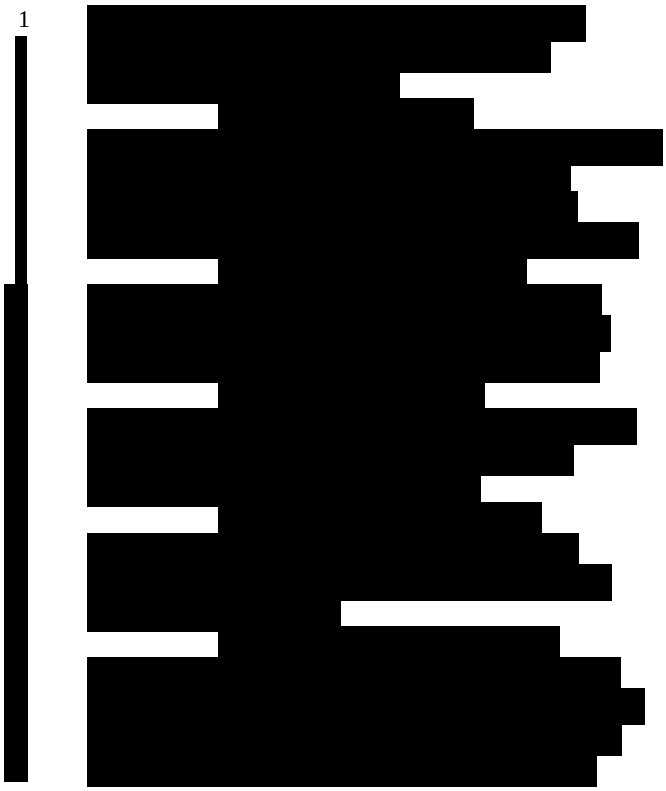

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For all of these reasons, there is no basis on which to change the X to a checkmark for the production risk.

Now, as with the other elements, the parties agree that [redacted] This undisputed fact alone is sufficient to mark this box with an X.

Mr. Rosen pointed to the evidence of Mr. Morrison [redacted] The claimants call this real world evidence.

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

In his view [redacted]

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

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[redacted]

Dr. Sterling explained that [redacted]

With this kind of uncertainty surrounding the largest operating cost of the project, [redacted], there is no basis on which to change this X to a checkmark.

And the uncertainty on this issue is further compounded by the issue of the destination of the product, which Mr. Spelliscy

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will address shortly.

But before we get to that, the parties agree Bilcon had not concluded any sales agreements at the time of the breach. And, as with the other components we have looked at, this fact alone is sufficient to mark the risk with an X. There is no guaranteed revenue.

The claimants argue that their sales would have been certain, but they failed to account for important risks. In particular, their entire quantification rests [redacted]

This is a risky proposition for two main reasons. First, Mr. Dooley confirms [redacted]

In fact, on the claimants' theory [redacted]

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[redacted]

The claimants' sales projections for Whites Point are simply unsupported by [redacted] their sales volumes are inherently unreliable.

The second reason that [redacted] Critical to the claimants' theory on sales and pricing is the notion that [redacted]

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[redacted]

In this way, the claimants believe that Whites Point [redacted]

But as Mr. Chodorow explained, [redacted]

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[redacted]

As Dr. Chereb explains, there is also risk to assuming that what is, is what will be. Indeed, what will be is changed because of [redacted]

Now, SCMA estimates that [redacted]

Dr. Chereb acknowledged that [redacted]

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[redacted]

So, the claimants' sales theory contains incredible risk with respect to sales volumes and prices, and those risks [redacted]

As Mr. Forestieri confirmed, [redacted]

The claimants' damages model assumes sales volumes that are [redacted]

There is no evidence that they could support this volume. Nor is there evidence of [redacted]

Accordingly the claimants' model does not offer anything close to assurance that could stand in for [redacted]

Finally, there is insufficient certainty that Whites Point could have repeated

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the cycle for the entire 50-year life of the project.

For example, the claimants assume they would be constructing the Whites Point project [redacted]

Nor have the claimants accounted for the fact tha [redacted] As Mr. Forestieri explained, there is no evidence of [redacted]

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[redacted]

There is thus insufficient certainty as to whether the whole plan could be repeated in the future on the terms the claimants assume.

This week has made clear that the Whites Point project was at an early stage of development. At the time of the breach, it achieved no contracts, had no detailed budgets.

As a result the claimants' claim for damages on the basis of a DCF is speculative and must be dismissed in its entirety.

If there are any questions? I would suggest that we go to break, after which Mr. Spelliscy will address the last reason why the claimants' claim should be dismissed in its entirety.

PRESIDING ARBITRATOR: I have a question with regards to the structure of the exercise in regard to what we call a lunch break. So we are going to have a short break -- that's what you said, Mr. Little?

And for how long do you think would you go on and what kind of break would we have then? There would only be the rebuttals

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

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

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

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

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

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

I believe this was a true statement.

Now, this morning and throughout this phase, it has been suggested by the claimants again and again that this was always and all the time about [redacted]

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

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

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

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

"Mr. Buxton turns out to

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

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

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

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

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

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

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

This is how Mr. Buxton was honestly spending the Claytons' money in 2003, by studying New Jersey.

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

Now, we need to recall that

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

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

On page 1, in the description of the project, they write:

[redacted]

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[redacted]

Let's just stop there. The Claytons, in their own internal documents, identify the problem their business plan is intended to address.

[redacted]

The problem identified in the business plan of the Claytons is not [redacted] it is that the Claytons [redacted]

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[redacted]

We heard the reason from this from Mr. Lizak at this hearing. Mr. Lizak, whom my colleague Mr. Nash reminded you this morning the Claytons retained in 2002 to go to Nova Scotia to review potential sites, he explained:

"I would also like to point out that it's been 40 years since a new quarry has been developed in Nova Scotia. I spend my time looking globally for new quarries. We can't find them. Okay? I have literally scouring the Maritimes, the Gulf Coast, Columbia, Jamaica, I have clients that are looking for this stuff all over the planet. We can't find them. Okay?"[as read]

And he goes on.

"So my point is that, if

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[redacted]

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

They say:

[redacted]

s read]

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

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[redacted]

They don't just say that in their business plan. I suggest to you they price it.

Let's come to page 5 of the Claytons' business plan, under operating costs, and here we have what the claimants say about shipping. [redacted]

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[redacted]

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[redacted]

That's the Claytons' own explanation of the proposed plan for Whites Point, their own words.

But the story doesn't stop there.

We are going to now go to the EIS. And so we can exit the confidential session.

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 12:52 A.M.

MR. SPELLISCY: In 2004, Mr. Buxton continues his work on the EIS to gather all of the information that he needs.

The story that the claimants told you at this hearing was that he must have just been uninformed of the business plan, didn't know what was going on, didn't know the truth of what the plan was.

Well, what does the evidence tell us about that story?

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 12:52 A.M.

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MR. SPELLISCY: In April of 2005, Mr. Buxton writes to Mr. Clayton, Jr. Mr. Buxton explains to Mr. Clayton that he is writing because they have the final EIS guidelines from March of 2005, and he explains in the letter:

> "We are required to present a section in the EIS on the proponent and parent company, and we intend to use this opportunity to the full."

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 12:53 A.M.

MR. SPELLISCY: And he adds that he will need to visit the Claytons to gather the pertinent information for this section and that he is going to make arrangements to do that in June of 2005 at their convenience.

Now, we know from Mr. Buxton's witness statements to you that he did, in fact, meet with the Claytons and was in regular contact with them all throughout this period while preparing the environmental impact statement.

Not only did Mr. Buxton

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

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

So, with all this information, Mr. Wall there, working with him, what do Mr. -- what does Mr. Buxton put together in the EIS?

They originally file the whole EIS in March of 2006, and we know they filed a revised project description in November of 2006. We have seen how they consistently described their project and these documents from their witnesses.

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

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There were seven volumes, I said. Let's go through some of them.

In Volume 1, the plain language summary, page 4, 4 of the entire document:

> "Bilcon will ship by common carrier the crushed rock and grits to New Jersey for use by its parent company in the manufacture of concrete and concrete block."[as read]

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

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

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

Let's get to the main body of the environmental impact statement, Volumes 4 through 7. Volume 4, still not the project description yet. Volume 4, in the project overview and purpose, Bilcon writes:

> "The purpose of the proposed project is to quarry basalt rock and ship the processed aggregate products to New Jersey."[as read]

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

Let's keep going, Volume 7, chapter 9, which is actually on just environments and impacts analysis. What does Bilcon say:

> "Crushed rock and grits will be loaded via the loading tunnel and the ship loader on a period basis for transshipment

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> to New Jersey.

And, finally, in Volume 7, chapter 10 of their EIS, on cumulative impact where they are writing to explain what the -- how this may impact it all together, the project may impact at all together, and here's what they say:

> "The development of the Whites Point project by Bilcon is designed to supply Bilcon's parent company, Clayton Concrete, Block & Sand, with washed aggregates to be used in the current concrete and block operations in New Jersey. Claytons' requirement is for 2 million tons per year and the capacity of the Whites Point Quarry operation has been designed to supply this."[as read]

Not just where, but why.

Let's come back to the project

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description, the revised project description filed in November.

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

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

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

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

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

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

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

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testified as follows:

> "You will find, with a little more careful reading of the transcript of the panel hearings and the EIS, New York is widely described as being one of the terminals."[as read]

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

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total of nine times.

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

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

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

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

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

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

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

That leaves six.

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

Down to five.

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

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

"And more specifically,

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

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

That leaves four.

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

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

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the shipments coming from New Brunswick. [redacted]

That leaves two references.

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

The explanation is simple. The fact that stone will meet New York standards does not mean that where the raw aggregate is -- that's where the raw aggregate is going to be sold, [redacted] As Mr. Chodorow explained yesterday, a concrete and ready mix manufacturer in New Jersey is going to want to ensure that the aggregate that it is using in its products meets New York standards so that it can bid on New York contracts, supply New York concretes with concrete for roads, overpasses,

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bridges.

The fact that the claimants wanted the stone to meet New York standards does not even remotely establish that the raw aggregates, the raw aggregates, not the finished products the Claytons are making, but the raw aggregates would be shipped into New York for sale [redacted]

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

In contrast, there are numerous times in the environmental impact statement -- and we just looked through some of them -- where not only is New Jersey mentioned, but where it expressly says that the destination of the rock is New Jersey and that the rock is for use in the Clayton companies in their manufacture of concrete products.

You have heard today and you

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have heard before the claimants have been at pains to suggest that the EIS is just an early planning document. The suggestion is that when they said all those times that the aggregates were going to New Jersey exclusively for Clayton Concrete, Block & Sand to use in their manufacturing facilities. What they really meant was that it was going to New York [redacted] That is not a credible argument. Contrary to what you heard, though, the New Jersey story does not end at the EIS. Let's keep going.

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

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

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

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for shipment to the Clayton operations in New Jersey. As we will note later in the presentation, the project is not dependent upon a marketing day process and the search for markets once the project is opened essentially the project has been sold and so the jobs and everything else, the capital costs are secure."[as read]

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

Now, even though this wasn't true for the EIS, I checked that too.

Again, this wasn't accurate.

The handful of references that

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

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

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

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

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

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may be that some rock or aggregate has to be dropped off before it goes to another facility. I can tell you that south Amboy has relatively shallow water and generally, speaking, material has to be offloaded before a ship can get in there. But I could also say that port probably will not be there in five or ten years and that Bilcon, and its affiliate is looking at building an alternative port in New Jersey. New Jersey is the destination, maybe, a little to New York at some point he says, but, in fact, the plan is to build an alternative port that can bring in the big

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ships in New Jersey."[as read]

Claimants have testified, they have put it in the record, they've talked about it here, they have access to another dock in New York and Brooklyn, and when that one at south Amboy no longer becomes available their plan wasn't to use the dock in Brooklyn, but rather to build a brand new one in New Jersey. Why? Because, as all the documents show, the plan was the use the aggregate at the claimants own manufacturing facilities in New Jersey, taking it into New York, unloading it in Brooklyn and somehow bringing it to South Amboy for the claimants to use would have been prohibitively expensive, it wouldn't have made sense.

Now, of course, the claimants could still say this is just all part of the EIS process. This is the hearings, and where the stone was going didn't matter in terms of environmental impacts. Now we could spend time talking about ballast water. We could talk about other impacts. We could talk about other impacts, economic impacts, Buxton referenced one in his answer about the surety of the jobs.

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But what makes this argument so incredible that the claimants are making is really just this simple fact. If it didn't matter, why say it?

Why say it again and again?

If it didn't matter or Mr. Buxton didn't know, why did he write a long, detailed paragraph in the EIS explaining exactly what the rationale for the project was and where the shipments were intended?

If it didn't matter, why say that the destination was New Jersey time and time again?

It did matter. It does matter.

But let's move even beyond the whole environmental assessment process. And to do this, we are going to go back into confidential session.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 1:11 P.M.

MR. SPELLISCY: In 2010, after the Whites Point project had failed to get its environmental approvals, the Claytons [redacted]

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[redacted] The Whites Point project is done at this point, at least according to the testimony in this phase. [redacted]

I suggest to you that the reason is because this is in 2010, and at this point in the case, before the damages phase, the claimants had never actually [redacted] That Whites Point rock was [redacted] was going to their facilities in New Jersey.

We can come out of the confidential session now.

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 1:12 P.M.

MR. SPELLISCY: And we see -- and we can continue. We see how they have presented their positions before this very tribunal prior to the damages phase. In our

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opening arguments, I took you through their Statement of Claim and Mr. Clayton's witness statement. I don't need to do it again. It's just not there. They have reported -- just not there. There is no plan to do it in New York. It's always been New Jersey.

Mr. Little took you this morning to the reply memorial, the reply memorial filed to you, their representations to you in the jurisdiction and liability phase, submitted in 2011. And they represented the quarry was to be 152 hectares to export rock to New Jersey, not New York, New Jersey, their representation to you.

And we have already seen Mr. Lizak's testimony about the depths of the dock and how it was relevant what the depth was in New Jersey, not New York.

I presented Mr. Lizak with this evidence from the liability phase during this phase and his response you will see here. I ask him:

"You would agree with me that, during the planning phase of this project, when you were working on

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it, as reflected in these documents and in your testimony, sworn testimony before this tribunal, [redacted] [as read]

His answer:

"I think it was sir, yes. That was the plan. Well, oh, no, wait. [redacted] as read]

Like Mr. Buxton, it took Mr. Lizak a moment to get back on message, to get back to the story created by the claimants in this phase of the arbitration.

The indisputable fact, not one piece of contemporaneous documentary evidence, not one, refers to a plan to sell the raw aggregate [redacted] in New York. And why would that be the plan? The claimants are also a concrete manufacturer. [redacted]

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[redacted]

Every document refers instead to what the real plan was, supply their own manufacturing facilities in New Jersey with stone from Whites Point. They were honest about their plans to themselves in their own documents. They were honest about their plans with government officials, the JRP, the public, and the ministers. There's no incentive to misrepresent where the crushed rock was going. They were honest with you in the jurisdiction and liability phase, again, because there was no reason for them to misrepresent what the project was.

But in this damages phase, they have not given you an honest story.

They are the ones who have made it up here. And that is the exact reason why they have not relied on any evidence contemporaneous to the situation whatsoever, nothing prior to the alleged breach, because all of that evidence, all of it, directly contradicts the story they are asking you to accept.

Now, why have they failed to

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value the project selling aggregate -- their project, selling aggregates to themselves in New Jersey for the use at their concrete manufacturing facilities there? Why have they failed to value that? Again, the reason is pretty clear from the evidence in the record, and it is as Dr. Chereb explained. Prices are lower in New Jersey. Bilcon of Nova Scotia would not have made the level of profits selling its aggregates in New Jersey, even to itself, that it would in New York. As Dr. Chereb explained the prices are 45, 50 per cent lower in New Jersey, and you wouldn't make any money going into New Jersey.

And, of course, that is exactly why the claimants had offered no evidence at all of the prices that they could have achieved in New Jersey.

I asked Mr. Lizak, and he confirmed tha [redacted] I asked Mr. Wick. He confirmed that he only looked at prices in New York, not New Jersey. I asked Mr. Rosen, and he too confirmed that he did no analysis of the profits that might be earned by selling the

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aggregate to Clayton Concrete in New Jersey.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 1:16 A.M.

MR. SPELLISCY: Why haven't they done that analysis? Because they know what it would show; that this wouldn't have made money, as Dr. Chereb says. So faced with this fact, they tried to change their story, and in an appropriate effort to try and squeeze hundreds of millions of dollars out of Canadian taxpayers.

We can ask ourselves why the claimants might build Whites Point if it couldn't make money, and to do this we are going to go back into confidential session.

The reason is because that, in the ordinary course of their business, it makes perfect sense for the claimants to operate the Whites Point Quarry and not make a single penny doing it. Bilcon of Nova Scotia was never supposed to be a profit engine. It was never about making money at Bilcon of Nova Scotia. [redacted]

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[redacted] It could not be more clear from their 2006 environmental impact statement, and it could not be more clear from what they said at the JRP hearing in 2007, immediately prior to the breach. [redacted]

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

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

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looked at so extensively [redacted] they paid their partner an amount that shows an amount [redacted] an amount that shows that they valued the whole future profitability of Whites Point, the equivalent, in 2004 dollars [redacted]

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

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

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does not value the claimants' project.

The only valuation in the market that we have that reflects both permitting risk and that values the claimants' own business plan is 2004, when they bought them out, when they prepared their business plan.

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

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

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

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

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

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

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

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exactly the problem. These ones have changed, and what do we know? The claimant has absolutely no full idea to meet their burden of proof concerning the accuracy of their calculations.

Mr. Forestieri's answer? I can't answer that to 100 per cent. The code is too new. Mr. Rosen first said he wasn't even aware that the law had come into force, but he also had no idea of its impact, suggesting, instead, that further reports from the experts might be necessary. I would suggest to you that, for these reasons, the tax gross-up claim fails not only because it is based on the DCF premised on a completely false assumption, but it also would fail individually as a matter of law and evidence.

Ultimately, the claimants' decision to craft a new plan, a new project for the damages phase of this arbitration has consequences. They are now seeking damages that they cannot prove were caused by the breach. They are now seeking damages that they do not have standing to pursue. They are now seeking damages based on a methodology that requires too many speculative inputs. And they are now seeking damages that, even if one used the DCF, is

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completely inappropriate because it does not offer a valuation of their business. It offers a valuation of a completely different project.

Awarding damages under such a theory would not put the claimants back in the position they would have in all probability been in but for the breach, and for these reasons, the claim must be dismissed entirely.

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

MR. SPELLISCY: If there are no questions, I will cede the floor to Ms. Kam.

PRESIDING ARBITRATOR: No. So the floor goes to Ms. Kam now.

CLOSING ARGUMENT BY MS. KAM:

MS. KAM: Good afternoon. I will address two final issues: First, the proper approach to valuing the claimants' lost opportunity and, second, the claimants' duty to mitigate their damages. The first issue concerning the proper approach to valuing the claimants' lost opportunity relates to Tribunal Questions Number 11. I will respond to this question in three parts.

First, I will outline what the

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loss of opportunity was and was not in this case. Second, I will provide an overview of the case law and evidentiary standards that should guide this tribunal in its approach to valuing the claimants' lost opportunity. And, third, I will explain how the tribunal might value the claimants' lost opportunity, though, to be clear, the claimants have confirmed that they are not seeking compensation for such losses.

As a starting point, the majority in its award has only taken an issue with the approach taken by the JRP to community core values. Specifically, it found that the claimants' lost opportunity was to have their project considered, assessed, and decided in accordance with applicable laws. This is entirely distinct from the loss of an opportunity with respect to a legal right to operate a project.

With regard to case law, as noted by Mr. Little in Canada's opening, the tribunal's approach should be informed by the Stati case. It held that a high threshold of sufficient probability must be applied to a claim for loss of opportunity. The Stati tribunal also affirmed that the claimants have the burden of

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proof. Where the investment has no legal right to begin a project, the only damage that may be sufficiently certain for a loss of opportunity is the value invested.

While the claimants' position is that this is not a loss of opportunity case, they do rely on two cases, Lemire and Gemplus, that consider such claims. However, neither of these cases provide useful guidance in valuing a loss of opportunity here.

Specifically, the Lemire tribunal expressly found that the injury was not a loss of chance, but that the claimant had lost their radio frequencies because of the breach. This differs from the circumstances of the Whites Point project as it was subject to an EA, the approval of which was never guaranteed. The claimant in Lemire was also a leading radio operator in Ukraine. The tribunal determined that the claimant would have met all of the criteria for the tender, which also differs from the circumstances in this case. The same cannot be said about the claimants, who had no history of established quarry operations in Canada and were only in the early conceptual planning stages.

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

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

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

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

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

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

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

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

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

Now I will just go into confidential session briefly.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 1:29 P.M.

MS. KAM: The claimants bear the burden of proof to substantiate the alleged expenses Bilcon of Nova Scotia invested in the JRP process. Paul Buxton has testified that the total amount expended on the Whites Point Quarry up to and including December 18th, 2007 is about [redacted] However, Mr. Buxton has also made clear in paragraph 69 of his reply witness statement that this amount includes costs incurred in relation to the entire EA and the development of the project. But this tribunal has already determined that the required to undergo an EA and the referral of the project to a JRP were not breaches of the NAFTA. Accordingly, Canada cannot be found liable for the amounts incurred in

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

Furthermore, the claimants' cost must be substantiated. However, based on Mr. Chodorow's review of the record, the claimants have not provided verifiable evidence of actual payment of all invoices. They have also included evidence of payment from entities other than Bilcon of Nova Scotia and the claimants. [redacted] So taking these errors into account, only approximately [redacted] million of Bilcon of Nova Scotia's investment in the JRP process have been properly substantiated.

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

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

MS. KAM: This brings me to

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

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

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

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

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

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

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

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

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

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

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

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

Simply put, nothing in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ultimately, any consideration

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

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

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

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

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

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

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

PRESIDING ARBITRATOR: Thank you, Ms. Kam.

Mr. Little.

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

MR. SCOTT LITTLE: Just a minute to wrap things up.

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

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

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

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

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

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

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

MR. SCOTT LITTLE: We will see

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what he says, but I anticipate, if Mr. Nash has something to say, we will need some time.

PRESIDING ARBITRATOR: So you are not going to -- so you could start right now? I think we should have a break. What do you think? Mr. Nash, what do you think?

MR. NASH: I'm in your hands Judge Simma. I'm easy.

PRESIDING ARBITRATOR: Do you have an estimate of how much -- Mr. Little, do you need more time? Do you have an estimate?

MR. SCOTT LITTLE: It appears that we have how much time left, Dirk?

DR. PULKOWSKI: I have -- on my count, you have 16 minutes left, potentially two minutes more if I subtracted -- 16 to 18 minutes, in that range.

MR. SCOTT LITTLE: So it's really hard to answer the question until we hear what Mr. Nash might have to say, but obviously it's not that much time.

MR. NASH: It would be hard to imagine Mr. Little needing 16 minutes to respond to my five.

PRESIDING ARBITRATOR:

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Mr. Nash, if you are ready to do that without the break, why don't you.

MR. NASH: Happy to.

FURTHER CLOSING ARGUMENT BY MR. NASH:

MR. NASH: Each and every single point that has been raised by Canada today in their closing submission, each and every one, is answered in our memorials, our witness statements, our expert reports, and the evidence that's heard before you -- that's been before you during the past week. And it is impossible, obviously, to answer each and every one now. But if you refer to the evidence, it is clear, going back and putting this all into context, Mr. Dooley, 1999, joins New York Sand & Stone. He is appointed by the Claytons to manage New York Sand & Stone. He is bringing in aggregate from Bayside into New York and to Amboy.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 1:47 P.M.

MR. NASH: [redacted]

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[redacted] In 2002, they do just that. They go to Nova Scotia. They find it a very friendly environment to get stone to bring to the United States, principally to New York City and to New Jersey. The issue here is not how it's described in preliminary documents; it's not how it's described in the EIS. The JRP had no problem finding itself on the JRP record that this stone was going to New Jersey and/or New York. So it was clear. Mr. Lizak is retained to go and find stone in 2002, April 2002, [redacted] We then have, in 2004, the buyout of the partner, and the business plan, [redacted]

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[redacted] From Mr. Buxton's perspective, this is an irrelevant consideration from an environmental impact statement point of view. He said that in his evidence earlier this week. Whether it's going five or ten or 15 miles further from an environmental impact statement point of view is completely irrelevant. The ships are going up the river, back down the river, over to this bay, and then they are leaving that location and going back to Bayside. [redacted] There's no difference between the plan that they -- well, the plan that was already in operation, but the plan for the future for these ships. So, of course, it's going to New Jersey, and it's going to New York City. That was the Claytons' plan. That was their business plan. That was their vision. That's why they sent Mr. Lizak to Nova Scotia with the instruction to

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get stone [redacted] To go to Nova Scotia and get stone, find stone [redacted]. And, of course, why do they want to be in the New York City market? Because it is more lucrative, so it's not made up after the fact. You review all of the evidence and look at the whole of the evidence that's presented and all of the witness statements. You saw these people. They were cross-examined. They are authentic. They are real. They are genuine. And if they make a little mistake around the edges, it doesn't change the core of their testimony. They are telling the truth. That was the plan.

And so, for Mr. Spelliscy to insist upon referring repeatedly to the EIS as being the vision for the future, it was not the vision for the future. It's never intended to be the vision for the future. It's not drafted with that in mind. It is for the purpose of an environmental assessment. This tribunal has said:

"It's an early conceptual document to determine the environmental impacts,

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how they can be mitigated, identify what they are, and how to deal with them."

That's the purpose of that document. And that's the only purpose of that document.

And so you look at environmental issues, and this -- whether the ship is going to New York City or New Jersey or anywhere in that area has zero implications for anything to do with an environmental assessment. It has no implications for ballast water. They're digging from Bayside. [redacted]

And so rather than go through all of the various issues, I can speak to shipping. Mr. Spelliscy turned to it, 2004, shipping document, which is not a document which is based on a contract -- is my time up?

DR. PULKOWSKI: I think you should wrap up, yes.

MR. NASH: Okay. I'm going to wrap up. Those are my submissions in reply. I urge the tribunal to look at the whole of the

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evidence and weigh it and think about the testimony that has been given here by the witnesses on behalf of the investors and weigh it. And if that is done, it is certain that the only result, there was a plan. It was a clear plan to go into New York City, to deliver grits to Amboy, and to develop the Whites Point Quarry for that purpose.

Thank you.

--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 1:54 P.M.

PRESIDING ARBITRATOR: Thank you, Mr. Nash.

Any questions?

Okay. Then the question to you: How much time would you need?

MR. SCOTT LITTLE: I don't think very much at all. Let me confer with Mr. Spelliscy. If we can just be given a minute or two.

PRESIDING ARBITRATOR: Yes. Sure.

--- Short recess taken

MR. SCOTT LITTLE: Mr. Spelliscy, I think, will just be a couple

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minutes.

PRESIDING ARBITRATOR: Okay. Thank you.

Mr. Spelliscy.

FURTHER CLOSING ARGUMENT BY MR. SPELLISCY:

MR. SPELLISCY: Thank you, Judge Simma.

When Mr. Nash got up and asked you to look at the whole of the evidence, I urge you to do the same thing particularly with respect to the plan, because they may try to minimize it. Their story here is look at what these witnesses have said. Perhaps I'm too much of a student of human nature, but there are 500 million reasons why we look to contemporaneous documents instead of testimony. Mr. Nash's explanation is the documents don't mean what they expressly say. His explanation is don't pay attention to them. It's not just the EIS. [redacted] It's what they told regulators. [redacted] It's what they told you, what they represented 2011, in 2013, in front of you in this hearing. I would suggest, when you look at the record, not what's been prepared for this arbitration, there is only one conclusion for you

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

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

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

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

MR. NASH: Only when you are concluded.

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

Okay. The second matter is

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

> "Tribunal shall establish as necessary procedures and schedules for the correction of transcripts, and in the event of disagreement between the disputing parties on corrections to transcripts, the tribunal shall determine whether or not any such corrections are to be adopted."[as read]

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

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

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

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

PRESIDING ARBITRATOR: Mr. Little?

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

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

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

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

MR. SCOTT LITTLE: Yes.

PRESIDING ARBITRATOR: Thank you very much.

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

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

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

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

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

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

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

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

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

PRESIDING ARBITRATOR: Mr. Little?

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

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

PRESIDING ARBITRATOR: Just give me a moment.

--- Off-the-record discussion

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

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

MR. NASH: The only thing I

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

PRESIDING ARBITRATOR: Mm-hmm. Mr. Little.

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

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

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

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citations, or are we --
MR. NASH: No further submissions, just simply citations, references to --
PRESIDING ARBITRATOR: Simply citations.
MR. NASH: Yeah. Certainly what we anticipated coming into this phase of the exercise.
MR. SCOTT LITTLE: So maybe I will propose this: We will reserve the right to provide anything more in terms of an annotation to the actual transcript, but we don't think it's necessary on our part. And obviously it should be limited to nothing more than referencing where the document or excerpt is on the record.
PRESIDING ARBITRATOR: That is what you mean by the reserving the right to further annotations, citations?
MR. SCOTT LITTLE: Yes.
PRESIDING ARBITRATOR: Okay.
MR. NASH: All of that's fine with us.
PRESIDING ARBITRATOR: Okay. So that's fine; right? Any technical problems in

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

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citations within brackets in the text and you prefer endnotes, I think we could apply both. I don't see a big problem there, but maybe you could --
MR. NASH: I believe they were. I think Mr. Little is right. I think they were endnotes last time. That's the advice I'm getting. So we are fine with that.
PRESIDING ARBITRATOR: So you would also --
MR. NASH: Yes.
PRESIDING ARBITRATOR: -- add endnotes?
MR. NASH: Yes.
PRESIDING ARBITRATOR: Okay. Then we are fine; right?
Okay. If there is no further problem, that, then, brings to an end -- okay, Mr. Nash.
MR. NASH: If there's no more business to deal with --
PRESIDING ARBITRATOR: I was just going to go into that, but --
MR. NASH: -- can I just take this opportunity to first thank Dr. Pulkowski for

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

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

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

Mr. Little.

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

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

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

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

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

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

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

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

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

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

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

So thank you very much, and I

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

ALL: Thank you.

--- Whereupon proceedings adjourned at 2:15 p.m.

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