

1 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
2 THE NORTH AMERICAN FREE TRADE AGREEMENT
3 AND THE UNCITRAL ARBITRATION RULES,

4 BETWEEN:

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

Claimants

7 - and -

8 GOVERNMENT OF CANADA

Respondent

9 ARBITRATION HELD BEFORE
10 JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
11 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
12 held at ASAP Reporting Services Inc.,
13 Bay Adelaide Centre, 333 Bay St., Suite 900,
14 Toronto, Ontario
15 on Thursday, October 31, 2013 at 9:00 a.m.

16 VOLUME 8A - PUBLIC
17 CONDENSED TRANSCRIPT WITH INDEX

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<p style="text-align: right;">Page 3</p> <p>1 Toronto, Ontario</p> <p>2 --- Upon resuming on Thursday, October 31, 2013</p> <p>3 at 9:00 a.m.</p> <p>4 PRESIDING ARBITRATOR: I think</p> <p>5 we're all set. Good morning to everybody. I will</p> <p>6 open the eighth and last day of hearing. There</p> <p>7 doesn't seem to be any procedural issue to be</p> <p>8 decided or, right now, so without further ado I</p> <p>9 give the floor to the claimant. Mr. Nash, you have</p> <p>10 the floor.</p> <p>11 SUBMISSIONS BY MR. NASH:</p> <p>12 MR. NASH: Thank you,</p> <p>13 Mr. President, Members of the Tribunal and good</p> <p>14 morning.</p> <p>15 During the course of my</p> <p>16 presentation, which will focus on the facts of this</p> <p>17 case, we will be putting some slides up on the</p> <p>18 screen and hard copies of those slides will be</p> <p>19 provided to you subsequently.</p> <p>20 Mr. President, Members of the</p> <p>21 Tribunal, the testimony of the witnesses you have</p> <p>22 heard over the last seven days confirms that</p> <p>23 everything we said in our opening was true.</p> <p>24 And the story of what happened to</p> <p>25 Bilcon is not only true, it's clear and simple. We</p>	<p style="text-align: right;">Page 5</p> <p>1 interpretation of the word "project", and I say</p> <p>2 that in quotes, with actual legislative and</p> <p>3 constitutional authority.</p> <p>4 And it also confuses the ordinary</p> <p>5 statutory authority of public officials to do</p> <p>6 specific things in specific circumstances in good</p> <p>7 faith with a carte blanche licence to do anything</p> <p>8 they want, to withhold information at will, and to</p> <p>9 abuse the authority entrusted to them.</p> <p>10 But overall what Canada does say</p> <p>11 is much less important, we submit, than what it</p> <p>12 does not say.</p> <p>13 Canada is conspicuously silent on</p> <p>14 the two fundamental issues of this case.</p> <p>15 First, Canada ignores the</p> <p>16 fundamental legal duty and responsibility of all</p> <p>17 public servants who exercise any statutory or</p> <p>18 discretionary authority, to do so fairly,</p> <p>19 reasonably, and in good faith.</p> <p>20 The second thing Canada ignores is</p> <p>21 the constitutional limitations on all federal and</p> <p>22 provincial legislative authority. These are not</p> <p>23 issues of technicality or semantics; these two</p> <p>24 omissions in Canada's presentation go to the heart</p> <p>25 of this case, and both of these omissions go to the</p>
<p style="text-align: right;">Page 4</p> <p>1 said in our opening that the Bilcon story is a</p> <p>2 story of arbitrary standards selectively enforced</p> <p>3 in the service of political expediency, rather than</p> <p>4 public integrity.</p> <p>5 Taken alone, any part of the</p> <p>6 factual matrix we have seen may appear to be</p> <p>7 innocent. Taken together, the parts lose the</p> <p>8 veneer of a regulatory process motivated by</p> <p>9 laudable federal-provincial cooperation and</p> <p>10 harmonization, and paint what we submit is a</p> <p>11 disturbing picture of systemically unfair and</p> <p>12 unlawful regulatory conduct.</p> <p>13 The evidence before you shows</p> <p>14 unequivocally and conclusively what was really</p> <p>15 going on. And what really happened.</p> <p>16 Canada has portrayed the</p> <p>17 claimants' case as being a tall tale. It is far</p> <p>18 from a tall tale.</p> <p>19 Canada's picture confuses</p> <p>20 political expediency with lawful harmonization.</p> <p>21 And respectfully, it confuses what was actually</p> <p>22 going on with a simple 3.9 hectare quarry with what</p> <p>23 was contemplated for a possible future larger</p> <p>24 quarry.</p> <p>25 It confuses a contrived</p>	<p style="text-align: right;">Page 6</p> <p>1 heart of the rule of law.</p> <p>2 The rule of law, which as we've</p> <p>3 heard is the bedrock of international law, is also</p> <p>4 the bedrock of all Canadian law. It applies at all</p> <p>5 times to all public servants, be they elected</p> <p>6 officials or civil servants.</p> <p>7 And the rule of law in</p> <p>8 international law and domestic law is what this</p> <p>9 case is fundamentally about. I will address it</p> <p>10 first in the context of domestic law where it forms</p> <p>11 a critical part of the factual matrix of the case,</p> <p>12 and my colleague, Mr. Appleton, will then address</p> <p>13 it in the context of the law applicable to the</p> <p>14 resolution of the case under the NAFTA.</p> <p>15 At its essence, the rule of law is</p> <p>16 as simple as the basic facts of the case. It</p> <p>17 applies to the exercise of all public authority.</p> <p>18 It says that no public authority, no matter how</p> <p>19 discretionary it may be, is unfettered.</p> <p>20 Put simply, the rule of law</p> <p>21 requires that all public authority must be</p> <p>22 exercised fairly and in good faith, on the basis</p> <p>23 only of relevant considerations assessed</p> <p>24 reasonably, honestly, objectively, transparently,</p> <p>25 and impartially, and only for the purpose for which</p>

<p style="text-align: right;">Page 7</p> <p>1 the authority was granted. 2 Anything else or anything less is 3 an abuse of authority and an abuse of public 4 trust. That makes any resulting act or decision a 5 breach of jurisdiction, and is therefore ultra 6 vires. 7 The unquestionable meaning and 8 practical application of these bedrock principles 9 was eloquently reviewed in these proceedings by 10 Professor Rankin. They not only emanate from the 11 Supreme Court of Canada, but are clearly reflected 12 in the Values and Ethics Code for the Public Sector 13 of the Government of Canada and the Values, Ethics, 14 And Conduct Code for Nova Scotia's Public Servants. 15 And every one of Canada's 16 witnesses acknowledged that these bedrock 17 principles prescribed what was at all times 18 expected of them and indeed of all public servants. 19 What these basic principles of 20 fairness, reasonableness and good faith required of 21 all public servants is the first fundamental fact 22 in this case that Canada ignores. The second 23 fundamental fact that Canada ignores is that the 24 Canadian Constitution divides legislative authority 25 between the federal and provincial governments.</p>	<p style="text-align: right;">Page 9</p> <p>1 construction in the water, the federal government 2 in this case had three possible triggers for an 3 environmental assessment of the marine 4 terminal. One was under the Navigable Waters 5 Protection Act for a permit to construct the marine 6 terminal, section 5 of that Act. 7 The other two were under sections 8 32 and 35 of the Fisheries Act, if the marine 9 terminal would, respectively, kill fish or destroy 10 fish habitat. 11 Since the quarry was on land, the 12 federal government had prima facie no legislative 13 authority over the quarry. Theoretically, it might 14 have had two possible triggers to conduct an 15 environmental assessment of the quarry. Also, 16 under sections 32 and section 35 of the Fisheries 17 Act, if -- but only if -- some land-based activity 18 on the quarry would kill fish or destroy habitat, 19 fish habitat. 20 Otherwise, it could not lawfully 21 include the quarry in its environmental assessment 22 of the marine terminal and that is a fundamental 23 point to the submissions of the claimants in this 24 case. 25 As reviewed in detail by both</p>
<p style="text-align: right;">Page 8</p> <p>1 The basic corollary is that one 2 level of government cannot usurp or trench on the 3 legislative authority of the other and neither can 4 give to itself or confer on the other a legislative 5 authority it does not actually have. 6 Applied to this case, this 7 fundamental constitutional principle means that 8 each government could only conduct an environmental 9 assessment of a project or an undertaking if it, or 10 any component of it, lawfully claimed within its 11 legislative authority. 12 The basic principle is clearly 13 explained in the federal government officials, to 14 the federal government officials in their annotated 15 guide to the Canadian Environmental Assessment Act, 16 referred to by Professor Rankin and accepted as an 17 authority yesterday by Mr. Smith. 18 As the CEAA guide explains, 19 industrial activity that affects rivers and oceans 20 which are habitat for fish and marine life 21 generally comes under federal legislative 22 authority, and industrial activity on land 23 generally comes under provincial legislative 24 authority. 25 Since a marine terminal requires</p>	<p style="text-align: right;">Page 10</p> <p>1 Professor Rankin and Mr. Estrin in their expert 2 reports and in their testimony, Canadian 3 jurisprudence regarding constitutional jurisdiction 4 is conclusive and unequivocal. The existence of 5 actual triggers -- both federally and 6 provincially -- must in fact be real. The Supreme 7 Court of Canada and the Federal Court of Canada in 8 the Red Hill case made it absolutely clear that no 9 pretext of a trigger is sufficient. 10 And any action taken by public 11 officials on the pretext of a trigger is unlawful 12 and ultra vires. And I quote from the Red Hill's 13 case: 14 "The federal government may 15 not use 'the pretext of some 16 narrow ground of federal 17 jurisdiction to conduct a 18 far-ranging inquiry into 19 matters that are exclusively 20 within provincial 21 jurisdiction.' 22 "The Environment Minister's 23 decision to refer this 24 project was not supported by 25 a valid head of power and</p>

<p style="text-align: right;">Page 11</p> <p>1 thus was ultra vires." 2 For its part, Nova Scotia could 3 only conduct an environmental assessment of the 4 quarry if it had a trigger under its provincial 5 legislative authority. 6 As we've heard, quarries under 7 four hectares were exempted from environmental 8 assessments, pursuant to the provisions of the Nova 9 Scotia Environment Act. 10 Mr. Petrie's evidence and the Nova 11 Scotia proponent's guide and other documents are 12 clear. Nova Scotia could only commence an 13 environmental assessment of a quarry larger than 14 four hectares once the registration document was 15 registered under the Act. 16 At the time Minister Anderson 17 referred the Bilcon marine terminal and the Bilcon 18 quarry to a joint review panel, federal officials 19 in both the DFO and CEAA knew that no lawful basis 20 had been established to include the quarry in a 21 federal environmental assessment of the marine 22 terminal. 23 And since Bilcon had not yet 24 registered any quarry under the Nova Scotia 25 environment act, the Nova Scotia officials involved</p>	<p style="text-align: right;">Page 13</p> <p>1 makes everything done by these public officials 2 unlawful, ultra vires at each and every step of the 3 way. 4 I will turn to step 1 which is the 5 insertion of conditions 10(h) and (i) into the 6 approval for the 3.9 hectare quarry. 7 Step 1 was when Mr. Petrie imposed 8 conditions 10(h) and (i) into his otherwise 9 ordinary industrial approval of the 3.9 hectare 10 quarry at the behest and request of the DFO. As 11 I've said, quarries in Nova Scotia under four 12 hectares were entirely exempt from any kind of 13 environmental assessment under Nova Scotia's 14 Environmental Act. 15 Mr. Petrie knew it and the DFO 16 knew it, too, they also knew that Nova Scotia did 17 not have any legislative authority to regulate over 18 fish or marine mammals. 19 They also knew that Canada did not 20 have a legislative trigger for an environmental 21 assessment until a wharf was applied for. And that 22 was clear in an email we will cite in this opening 23 when we deliver the annotated copy. 24 Condition 10(h) required blasting 25 to conform with the published federal blasting</p>
<p style="text-align: right;">Page 12</p> <p>1 also knew that there was no lawful environmental 2 assessment of the quarry underway in Nova Scotia 3 and that they had no lawful trigger under 4 provincial legislation to start one. 5 The 3.9 hectare quarry was exempt 6 and no registration for the larger quarry was filed 7 until 2006. 8 Canada chooses, respectfully, to 9 overlook these facts and to ignore the basic 10 underlying fact of the constitutional 11 infrastructure that governed the legislative 12 jurisdiction of Canada and Nova Scotia in this 13 case. 14 Canada also, I say respectfully, 15 chooses to ignore the basic underlying fact that 16 regardless of what federal or provincial 17 legislative authority the public officials involved 18 purported to act under, all of their actions and 19 all of their decisions were subject to an absolute 20 legal duty to exercise their public authority 21 fairly, reasonably, and in good faith. 22 The manifest failure of the public 23 officials involved to respect and adhere to these 24 two fundamental principles that Canada has 25 tellingly chosen in this arbitration to ignore</p>	<p style="text-align: right;">Page 14</p> <p>1 guidelines, the Dennis Wright guidelines, which 2 required a blasting setback of 35.6 metres and we 3 saw the calculation of that under the guidelines, 4 35.6 metres under the shoreline, from the 5 shoreline. 6 The Nova Scotia blasting 7 guidelines only required a setback of 30 metres. 8 While condition 10(h) was not 9 unreasonable or inappropriate taken in and of 10 itself, it was nonetheless superfluous as Bilcon 11 was proceeding responsibly and had always intended 12 to comply with all lawful federal and provincial 13 blasting guidelines and conditions. 14 And the blasting plan it submitted 15 for what Mr. Petrie acknowledged in an email was a 16 "test blast" clearly showed that it was in full 17 compliance with both the provincial conditions and 18 the federal blasting guidelines. 19 Condition 10(i), however, was 20 clearly ultra vires. It required Bilcon to prove 21 by way of a report -- not to Nova Scotia, but to 22 the DFO in advance of any blasting -- that the 23 blasting would have no adverse effect on marine 24 mammals. And the DFO had to provide written 25 acceptance before blasting could commence.</p>

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<p>1 That turned out, in this case, to 2 be check mate.</p> <p>3 Apart from the practical 4 impossibility of proving such a negative, 5 Mr. Petrie thereby not only fettered his discretion 6 but he completely abdicated all of his discretion 7 and responsibility to the federal DFO.</p> <p>8 Mr. Petrie thereby gave a veto to 9 DFO to prevent any blasting on an ordinary Nova 10 Scotia 3.9 hectare quarry, when he knew and DFO 11 knew that the federal government had no legislative 12 authority whatsoever over the quarry, and when 13 compliance with the only lawful provincial 14 conditions in the April 30th, 2002 approval was 15 readily achievable.</p> <p>16 The DFO veto was much later 17 confirmed to Mr. Buxton by the then Nova Scotia 18 Minister of Environment and Labour who wrote in 19 reference to conditions 10(h) and (i) that and I 20 quote:</p> <p>21 "...it would not be 22 appropriate to remove these 23 conditions without DFO's 24 consent." 25 And the Tribunal will recall that</p>		<p>1 the basis and only on the basis that Mr. Conway, 2 the DFO's marine mammal expert, had expressed a 3 concern about the effect that blasting at the 4 quarry might have on marine mammals.</p> <p>5 It was rather interesting during 6 the course of this hearing to hear testimony in 7 this proceeding that Mr. Conway's credentials were 8 somehow not quite sufficient to allow him to 9 declare that condition 10(i) had been satisfied, 10 when his concern was all that was required to have 11 the condition imposed.</p> <p>12 Mr. Petrie testified here that he 13 himself then expanded the DFO request and you will 14 recall the handwritten note on the email from 15 Mr. Jollymore, which is April 26th, 2002, where 16 Mr. Petrie added words to the condition which, when 17 read fairly, absolve him from any responsibility 18 for ever allowing blasting on the 3.9 hectare 19 quarry by deferring completely to the DFO.</p> <p>20 Mr. Petrie also confirmed at this 21 proceeding that condition 10(i) was designed to 22 deal exclusively with concerns about marine mammals 23 and had nothing to do with fish.</p> <p>24 From that moment forward, however, 25 the federal DFO used Mr. Petrie's condition 10(i)</p>	
<p>1 DFO officials were told that condition 10(i) meant 2 what it said, and moreover, that they could not 3 accept a blasting plan from Bilcon unless the 4 Minister's office approved.</p> <p>5 "I have been advised by the 6 Minister's office that we are 7 not to accept a report..."</p> <p>8 I am quoting here from 9 Mr. Surette.</p> <p>10 "...a report on the effects 11 of blasting on marine mammals 12 as per section (i) of item 10 13 of the Nova Scotia approval 14 issued April 30th until such 15 time as the Minister's office 16 has reviewed the 17 application."</p> <p>18 While there was, with respect, a 19 modest and self-serving retraction in a subsequent 20 email by Mr. Surette, the message could not have 21 been clearer. The climate was clearly established 22 and the temperature had been set.</p> <p>23 The Tribunal will also recall that 24 Mr. Petrie was asked by the DFO to insert condition 25 10(i) into his approval of a 3.9 hectare quarry on</p>	Page 16	<p>1 to prevent the Bilcon quarry from proceeding. As 2 Neil Bellefontaine testified, the DFO viewed and 3 treated Bilcon's 3.9 hectare quarry more 4 stringently based on the fact that someday it might 5 become a larger quarry.</p> <p>6 But Bilcon was never informed that 7 from the very beginning the DFO was conducting a 8 stealth environmental assessment of its test quarry 9 and again without any legal authority.</p> <p>10 It is a basic axiom, we submit, of 11 delegated authority that the person to whom the 12 authority is delegated must himself fairly, 13 reasonably, and in good faith exercise the 14 discretion delegated to him. The deferral of the 15 exercise of discretion to another authority, let 16 alone to another government, is a fetter on the 17 necessary personal exercise of discretion and is 18 fatal to the legal validity of any resulting act or 19 decision.</p> <p>20 By his own conduct and his desire 21 to avoid responsibility, Mr. Petrie not only 22 fettered but totally abdicated all of the 23 discretion he was required to personally exercise 24 resulting in a fundamental breach of lawful 25 provincial jurisdiction from the very beginning of</p>	Page 18

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<p>1 the Bilcon saga.</p> <p>2 I will turn now to the second</p> <p>3 step, which we entitle: "Deception and</p> <p>4 concealment."</p> <p>5 The next unlawful step was the</p> <p>6 deliberate deception and concealment by DFO and</p> <p>7 CEAA officials which, from the outset, obviated</p> <p>8 lawful federal jurisdiction as well.</p> <p>9 Within two weeks of Mr. Buxton</p> <p>10 submitting the first blasting plan in September of</p> <p>11 2002, Dennis Wright, the DFO blasting expert and</p> <p>12 co-author of the federal blasting guidelines, had</p> <p>13 provided Mr. Ross with mitigation measures that</p> <p>14 would have permitted Bilcon to commence blasting</p> <p>15 immediately at the 3.9 hectare quarry.</p> <p>16 Mr. Wright wrote:</p> <p>17 "The explosive guidelines are</p> <p>18 designed chiefly to protect</p> <p>19 fish. The easiest mitigation</p> <p>20 is -- if whales are present</p> <p>21 within visual limits (about 1</p> <p>22 kilometre) the blast is to be</p> <p>23 delayed until the whales</p> <p>24 vacate that perimeter."</p> <p>25 Following Mr. Wright's</p>	<p>1 information the DFO had that there was, in fact, no</p> <p>2 concern about the effect that blasting at the</p> <p>3 quarry might have on marine mammals, the DFO</p> <p>4 repeatedly asked Bilcon for more and more</p> <p>5 information, setting up one road block after</p> <p>6 another in Bilcon's way in the conduct of their</p> <p>7 stealth environmental assessment.</p> <p>8 None of this was about an open,</p> <p>9 transparent, honest and fair process. It was all</p> <p>10 about hindrance, obstruction and delay.</p> <p>11 And it all of course culminated in</p> <p>12 the establishment of the 500 metre setback which</p> <p>13 appears, on the very limited evidence Canada has</p> <p>14 made available, to have been concocted in a matter</p> <p>15 of days.</p> <p>16 To justify the 500 metre setback</p> <p>17 the DFO purported to have a computer simulation, a</p> <p>18 model which Mr. Buxton was told he could review.</p> <p>19 This is in June of 2003. Despite his repeated</p> <p>20 requests -- and there were three of them; one on</p> <p>21 June 6th, one on June 16th, and one on July 21st,</p> <p>22 which Mr. Buxton was told he could review, but</p> <p>23 despite his repeated requests the calculations</p> <p>24 generated by the model were never provided to him,</p> <p>25 and were not produced in this arbitration. They</p>
<p>1 recommendations for mitigation, Bilcon should have</p> <p>2 been allowed, at a minimum, to conduct monitored</p> <p>3 test blasts on the 3.9 hectare quarry starting on</p> <p>4 October 1st, 2002.</p> <p>5 By December 2nd, 2002 Mr. Conway</p> <p>6 confirmed to Mr. Ross that he had no concern about</p> <p>7 the effect that blasting at the quarry might have</p> <p>8 on marine mammals. He wrote simply and clearly</p> <p>9 that:</p> <p>10 "In respect to the Whites</p> <p>11 Cove blasting plan, based on</p> <p>12 the information provided and</p> <p>13 the undertakings that the</p> <p>14 proponent is prepared to</p> <p>15 take, I have no concerns in</p> <p>16 respect to marine mammal</p> <p>17 issues in respect to this</p> <p>18 specific proposal."</p> <p>19 Without any doubt, then, by</p> <p>20 December 2002 there were, in fact, no legitimate</p> <p>21 lingering DFO concerns about blasting at the</p> <p>22 quarry.</p> <p>23 But instead of transparently</p> <p>24 sharing the information from Mr. Wright and</p> <p>25 Mr. Conway with Mr. Petrie and Mr. Buxton that the</p>	<p>1 have never been produced -- it is telling that</p> <p>2 Mr. Wright, apparently the most authoritative</p> <p>3 federal official on blasting near Canadian waters,</p> <p>4 was not the official who, at the critical time, in</p> <p>5 June, May-June of 2003 doing the modelling and</p> <p>6 calculations during that period, after having</p> <p>7 provided his frank advice and recommendations</p> <p>8 earlier in September 2002.</p> <p>9 However, in the event, we now know</p> <p>10 that he advised the DFO that the I-Blast model --</p> <p>11 which the DFO told Mr. Buxton it was relying on --</p> <p>12 was not appropriate because it was designed for</p> <p>13 blasting in water, not on land.</p> <p>14 He was satisfied that a setback of</p> <p>15 about 100 metres would be sufficient to account for</p> <p>16 the possible presence of iBoF.</p> <p>17 But once again, the DFO withheld</p> <p>18 this critical information from Bilcon.</p> <p>19 In the result, the DFO and CEAA</p> <p>20 knew, before the Bilcon quarry was referred to a</p> <p>21 Joint Review Panel, that it had not established, on</p> <p>22 any remotely scientific basis, that there was a</p> <p>23 lawful trigger for any federal environmental</p> <p>24 assessment of the quarry.</p> <p>25 To be lawful, the actions and</p>

<p style="text-align: right;">Page 23</p> <p>1 decisions of the federal officials involved had to 2 be made fairly, reasonably, and in good faith, on 3 the basis of objective, measurable and transparent 4 science. 5 Canada invites the Tribunal to 6 suspend your disbelief and to conclude that DFO 7 officials actually had the science to support their 8 professed conclusions, but there is no evidence 9 whatsoever in this arbitration on the record of any 10 science to support the so-called "conclusions or 11 beliefs" DFO officials had or had made to support 12 their referrals by Minister Thibault and by 13 Minister Anderson. 14 The absence of any evidence of 15 science and scientific assessment compels one to 16 draw one of two possible conclusions: Either 17 Canada had evidence of scientific analysis and 18 assessment and chose not to disclose it; or there 19 never was any real science. 20 One suspects the latter, but in 21 any case, Canada has not satisfied the burden on it 22 to show that DFO officials had a reasonable, good 23 faith basis on which to conclude that there was a 24 real possibility of any significant adverse 25 environmental effects from the quarry engaging a</p>	<p style="text-align: right;">Page 25</p> <p>1 That there was no scientific basis 2 on which to conclude that any iBoF salmon would be 3 harmed by blasting beyond the 100 metre setback 4 from the shoreline; 5 That there was no reasonable good 6 faith basis on which to refer the marine terminal 7 to a federal review panel, because there was no 8 basis, even without taking mitigation measures into 9 account, to conclude that the marine terminal would 10 cause significant adverse environmental effects; 11 That the federal government had no 12 reasonable good faith basis to scope the quarry 13 into any environmental level of environmental 14 assessment of the marine terminal; 15 That a federal assessment of the 16 quarry was "required", and we saw that word used 17 throughout the documents, that there would need to 18 be a requirement for a federal assessment; 19 That Nova Scotia was responsible 20 for the assessment of the larger quarry, that an 21 environmental assessment in Nova Scotia of a larger 22 quarry than four hectares was commenced by 23 registration, and that no registration of a larger 24 158 hectare quarry or any quarry had taken place 25 and did not take place until 2006;</p>
<p style="text-align: right;">Page 24</p> <p>1 federal interest, or, frankly, from the marine 2 terminal, let alone any significant adverse 3 environmental effects that could not be mitigated. 4 Their actions and their decisions 5 and Ministerial decisions which followed were, 6 therefore, also wholly unlawful and ultra vires. 7 Excuse me for a moment, 8 Mr. President. I turn now to step 3, I will come 9 back to the completion of step 2 in a moment. 10 Step 3 is the referral to the 11 Joint Review Panel. The third unlawful step was 12 the referral of the Bilcon quarry to a Joint Review 13 Panel. At the time the referral to a Joint Review 14 Panel was being concocted, both the federal and 15 provincial officials knew: 16 That the 3.9 hectare quarry was 17 not subject to any environmental assessment at all 18 in Nova Scotia, because it was smaller than four 19 hectares; 20 That blasting at the quarry with 21 appropriate mitigation measures would in fact have 22 no adverse effect on marine mammals; 23 That a 500 metre setback for 24 blasting was wrong and completely unnecessary, and 25 that a 100 metre setback was entirely sufficient;</p>	<p style="text-align: right;">Page 26</p> <p>1 That Nova Scotia therefore had no 2 legislative authority to initiate an environmental 3 assessment of the large quarry; 4 That there was in fact no 5 environmental assessment of the quarry going on in 6 Nova Scotia, and that the federal government had no 7 legislative trigger for any environmental 8 assessment of the quarry; 9 That Nova Scotia had not fulfilled 10 the statutory preconditions to enter into an 11 agreement with Canada pursuant to sections 47 and 12 48 of the Nova Scotia Environment Act; 13 With the result that there was no 14 lawful basis, either federal or provincial, for any 15 referral to a Joint Review Panel. 16 And the agreement between the 17 Ministers purportedly made under section 42 -- 40, 18 2 of the Canadian Environmental Assessment Act and 19 sections 47 and 48 of the Nova Scotia Environment 20 Act could not remedy that fatal flaw. 21 As Mr. Rankin, as Professor Rankin 22 explained, and I quote: 23 "The federal government's 24 involvement under CEAA must 25 be related to a federal</p>

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<p>1 trigger. If ... they knew 2 there was no such trigger and 3 yet they still proceeded to a 4 Joint Review Panel, that 5 would be improper in the 6 extreme. There would be no 7 basis for it." 8 "QUESTION: And can an 9 agreement between Ministers 10 create jurisdiction? 11 "ANSWER: Absolutely not." 12 The legal test under the CEEA for 13 referral to a review panel was the same for the 14 federal officials proposing or endorsing the 15 referral as it was for the federal Ministers making 16 the referral. 17 The statute required that "after 18 taking mitigation measures into account" it was 19 likely that the project would cause significant 20 adverse environmental effects and the rule of law 21 required that the decisions of the Ministers, as 22 well as the decisions of the officials, were made 23 fairly, reasonably, and in good faith under, and 24 under legislative authority that was within their 25 legislative jurisdiction.</p>		<p>1 necessary relevant 2 information was noted to 3 likely be unavailable for a 4 long time and might never be 5 available." 6 I am quoting there from the Red 7 Hill case. 8 The evidence in our case is 9 replete to the contrary. 10 The federal officials in the DFO 11 and CEAA knew that the only trigger the federal 12 government had was to undertake an environmental 13 assessment of the marine terminal, and that an 14 environmental assessment of a marine terminal was 15 ordinarily a comprehensive study. Indeed, in the 16 history of Canada, there has never been an 17 environmental assessment of a marine terminal alone 18 that was referred to a review panel. 19 DFO and CEAA officials also knew 20 that the law required and their policy mandated 21 that they scope to their trigger, which was limited 22 to the marine terminal, and that since they had no 23 trigger for the quarry, there was no legislative 24 authority to include the quarry in any federal 25 environmental assessment.</p>	
<p>1 The law also required that the 2 science justifying a referral to a Joint Review 3 Panel had to be real and not illusory, as the 4 Federal Court wrote in Red Hill: 5 "This is not to say that 6 scientific certainty is 7 required ... for a referral 8 to a panel review to be 9 properly grounded. However, 10 there must be a valid basis 11 on which to conclude that a 12 real possibility exists that 13 a panel would be able to 14 conclude that, in this case, 15 there would be a significant 16 adverse effect on migratory 17 bird preservation. In this 18 case there would be a 19 significant adverse 20 environmental effect on fish 21 or fish habitat caused by 22 blasting or other activity on 23 the quarry. That necessary 24 condition to engage the 25 process was absent. The</p>	Page 28	<p>1 Examples of extracts from the 2 documents and evidence show the DFO and/or CEAA 3 officials confirming: 4 "This is like Red Hill where 5 DFO trigger was section 35 6 for realignment of a stream 7 but we scoped in Hwy 8 too ... Judge ruled we had no 9 regulatory authority over the 10 highway & therefore were 11 abusing the CEAA process." 12 "We have NWPA, FA section 35 13 & probably section 32 trigger 14 for marine terminal but no 15 trigger for quarry. 16 Therefore limit scope of 17 project to terminal." 18 "...it is easy to explain why 19 quarry isn't scoped in i.e. 20 we don't have the legal 21 mandate to keep it in -- no 22 trigger." 23 "Don't need to scope-in the 24 quarry no DFO 25 triggers. ...scope to our</p>	Page 30

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<p>1 triggers -- would be wharf 2 and what they need to do to 3 build it." 4 "In fact, DFO has since 5 revised its blasting 6 calculations and determined 7 that it does not have a 8 section 32 trigger." 9 That quote is from Mr. McDonald's 10 journal on August 13th, 2003. 11 This was not a debate going on 12 with DFO as it's been portrayed here. It was a 13 clear expression of DFO's practice and a clear 14 expression of the law. 15 The evidence is also clear that 16 the reason for the federal officials doing what 17 they did and for which they had no good basis or 18 reason or legislative authority, was political. 19 They supported and expedited Minister Thibault's 20 referral to a Joint Review Panel to "take pressure 21 off the Minister's shoulders during the summer 22 months in view of the upcoming provincial election 23 in Nova Scotia." 24 "The project is located in 25 our Minister's riding, as</p>	<p>1 regardless of there being wrong or no science, 2 regardless of whether there was a trigger for the 3 quarry or not, the Minister had no choice to 4 make -- and I am referring here to Minister 5 Anderson -- in his assessment. 6 Not only do we submit that defies 7 common sense and the evidence of Mr. Connelly and 8 Mr. Smith, it also defies the absolute legal 9 requirement of fairness, reasonableness and good 10 faith and plainly defies the statute itself. 11 Section 21(b) is not to be read in 12 a vacuum. It provides for a referral to the 13 Minister. The Minister's obligations are then 14 prescribed in section 3, sorry, 23. As Mr. Estrin 15 clearly explained: 16 "QUESTION: So section 21 17 gets it to the Minister of 18 Environment? 19 "ANSWER: Correct. 20 "QUESTION: Section 23 gets 21 it to the review panel? 22 "ANSWER: Yes." 23 In the result, there was no lawful 24 basis for either the federal government or the Nova 25 Scotia government to refer an environmental</p>
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<p>1 well as in the electoral 2 circumscription of the 3 provincial Minister 4 responsible for making 5 decisions on this project, 6 and the announcement of a 7 joint panel review is of the 8 nature to take a lot of 9 public pressure off the 10 Minister's shoulders for the 11 summer months." 12 There is no evidence that the DFO 13 and CEAA officials ever told Minister Thibault or 14 Minister Anderson that the information they were 15 relying upon for the referral to a Joint Review 16 Panel was either wrong, the 500 metre setback, or 17 did not exist. 18 According to Mr. Chapman, Minister 19 Anderson was, in any event, simply a conduit who 20 had no choice but to do what Mr. Chapman and the 21 DFO had set him up to do. 22 He said this was because section 23 21(b) of the Canadian Environmental Assessment Act 24 contained no express standards for a referral by 25 the Minister to a JRP. Therefore, it goes,</p>	<p>1 assessment of the quarry to a Joint Review Panel. 2 As Professor Rankin answered clearly, an agreement 3 between the Ministers could not confer upon either 4 the federal or provincial government a legislative 5 or constitutional authority they did not 6 have. From start to finish, the referral to the 7 Joint Review Panel was, therefore, unlawful and 8 ultra vires. 9 The decision in the MiningWatch 10 case made no change to the constitutional 11 infrastructure of legislative authority. 12 MiningWatch does not stand for the proposition that 13 the federal government can go beyond its 14 legislative authority to scope in a quarry that is 15 not within its legislative jurisdiction. Indeed it 16 stands for the opposite. It simply affirms another 17 basic jurisdictional axiom, which is that delegated 18 authority must actually be exercised by those to 19 whom it is delegated. 20 And those to whom it is delegated 21 have no discretion to change the authority 22 delegated to them. 23 Since the proposed project in 24 Mining Watch was by regulation on a list of 25 projects requiring comprehensive study, the DFO</p>

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<p>1 could not decide that it only wanted to do a 2 screening.</p> <p>3 This hearing has also made clear 4 that the story of what happened in this case has 5 only partly been told, and it calls for an 6 explanation from the officials who were actually 7 dealing with the quarry.</p> <p>8 In addition to providing no 9 evidence of any real science to support the 10 purported conclusions of the DFO, it is instructive 11 that Canada has sheltered from this arbitration the 12 bureaucrats and scientists who could shed light on 13 what actually happened in the process. To cite a 14 number of names by way of example, Jim Ross, Derek 15 McDonald, Tim Surette, Phil Zamora, Paul Boudreau, 16 Jerry Conway, Brian Jollymore, and Jim Leadbetter, 17 and there are many, many others have not provided 18 any evidence to this Tribunal as to what science 19 they had and why they did what they did.</p> <p>20 From DFO we have heard from 21 Mr. Hood, Mr. Bellefontaine, and Mr. McLean, none 22 of whom were actually dealing with the issues at 23 hand. Mr. Hood was in Ottawa receiving information 24 from the region which he said he relied upon. 25 Mr. Bellefontaine, I will describe by way of</p>	<p>1 whether the Bilcon quarry would result in any 2 "significant adverse environmental effects" that 3 could not be mitigated with appropriate mitigation 4 measures.</p> <p>5 And, of course, the same universal 6 rule of law principles required the panel to give 7 effect to its mandate fairly, reasonably, and in 8 good faith.</p> <p>9 Both the conduct of the panel in 10 the course of its review and the panel's report 11 manifestly failed to give effect to these mandatory 12 principles.</p> <p>13 The environmental impact study 14 prepared by Bilcon was composed of 35 expert 15 reports, seven volumes of detailed responses to 16 additional information requests from the panel, and 17 two volumes of undertakings made to the panel in 18 the course of its hearing process, as well as a 19 summary of expert findings and impact summary and a 20 commitment table.</p> <p>21 It cost millions of dollars to put 22 together that EIS, millions of dollars. Nineteen 23 of the experts attended the public hearings to 24 answer any questions from the panel. 25 Contrary to Mr. Smith's evidence</p>
<p>1 summary was at 30,000 feet.</p> <p>2 The officials on the ground have 3 not been here. In fact, Mr. McLean, although he 4 refers to "we at DFO", had one contact with this 5 file during his exchange from NSDEL.</p> <p>6 The real players have not been 7 available for cross-examination and Canada's 8 witnesses who have appeared have repeatedly told 9 the Tribunal that only DFO scientists could provide 10 an explanation for concerns raised by the DFO about 11 adverse effects of fish and marine mammals at the 12 quarry.</p> <p>13 The investors can be forgiven for 14 asking: Where are the scientists? Where are the 15 documents? Please show us the science.</p> <p>16 Step 4 in our submission is the 17 panel process. The panel's review process and 18 resulting report then itself became unlawful and 19 ultra vires. The test which the review panel was 20 required to apply to its assessment of the Bilcon 21 quarry was mandated by its terms of reference and 22 the legislative infrastructure from which those 23 terms were derived.</p> <p>24 As the Tribunal heard, Mr. Chapman 25 acknowledged, the panel was required to assess</p>	<p>1 yesterday, AMEC prepared an extensive report which 2 was filed with the EIS specifically on 3 socioeconomic conditions.</p> <p>4 The socioeconomic analysis was 5 prepared by a leading expert, Susan Sherk. In its 6 report the panel largely ignored the facts and 7 science presented to it, and did not base its 8 report on any scientific or objective assessment of 9 the information provided to it, instead basing its 10 recommendations on a subjective view of what it 11 described as core values or beliefs and its 12 purposeful view that the Government of Nova Scotia 13 should change its legislative policy and implement 14 a coastal zone policy, prohibiting any quarries on 15 the coast line.</p> <p>16 The notions of core values and 17 beliefs are unknown, are not standards or factors 18 known to environmental law. And they were not in 19 the panel's terms of reference.</p> <p>20 The panel gave no notice to Bilcon 21 that it would consider core values or beliefs, and 22 the panel gave Bilcon no opportunity ever to 23 address these notions.</p> <p>24 Core community values was not in 25 the panel's terms of reference and is not a</p>

<p style="text-align: right;">Page 39</p> <p>1 measurable and mitigable environmental effect 2 within the meaning of either the Canadian 3 Environmental Assessment Act or the Nova Scotia 4 Environment Act. 5 The panel's recommendations came 6 down to personal beliefs about philosophy and 7 politics, and in the result, the panel's report 8 failed to give effect to its legal mandate, and its 9 recommendations were outside the scope of the 10 panel's terms of reference, which were themselves 11 unlawful and ultra vires. 12 It is ironic that the panel 13 chairman also chaired the panel that approved the 14 major Sable Gas pipeline project which we heard 15 about yesterday. There he insisted on actual 16 evidence of adverse effects on the community and 17 the panel concluded they were entirely mitigable. 18 "The panel appreciates the 19 high value that rural 20 residents place on their 21 lifestyle, and the fear that 22 the pipeline could undermine 23 this lifestyle. However, the 24 Panel is not convinced that a 25 properly designed,</p>	<p style="text-align: right;">Page 41</p> <p>1 mandate, ultra vires the scope of its mandate, but 2 the conduct of the hearings was in itself unfair 3 unreasonable and lacking in good faith. 4 I will turn now to step five, the 5 Minister's decisions. 6 The final unlawful steps in the 7 Bilcon saga were the decisions of the federal and 8 provincial Ministers to accept the recommendations 9 of the panel and to respectively deny their 10 approval of the Bilcon quarry. 11 Before the provincial and federal 12 Ministers made their decisions to deny approval, 13 Bilcon asked each of them for an opportunity to 14 make representations about the fundamental 15 procedural and substantial flaws in the panel's 16 process and the errors in the panel's report. 17 Both Ministers denied Bilcon the 18 opportunity to make those representations. 19 Before the provincial Minister 20 decided to not approve the Bilcon quarry, on the 21 basis of accepting the panel's report and 22 recommendations, his own officials had prepared a 23 presentation for him showing that six of the seven 24 panel's recommendations were "outside the scope of 25 the panel's terms of reference".</p>
<p style="text-align: right;">Page 40</p> <p>1 constructed and maintained 2 pipeline would have the 3 significant adverse effects 4 that some intervenors fear." 5 Throughout the hearing process the 6 panel was, also manifested a profound bias against 7 the Bilcon quarry and against Bilcon as an American 8 company. It demonstrated its palpable disdain for 9 Bilcon to everyone present and the panel chairman 10 swivelled his chair and turned his back to 11 Mr. Buxton when Mr. Buxton was speaking. 12 Former Minister Thibault himself 13 appeared at the panel's hearings and made it clear 14 that a reason for his opposition to the quarry was 15 that Nova Scotia rock would be exported to the 16 United States. 17 The panel's bias against Bilcon as 18 an American company was apparent during the panel's 19 conduct of the hearing, and the panel ignored 20 supporters of the quarry and, in the end, upheld 21 the anti-American bias of the Minister who had 22 unlawfully referred the quarry to a panel review in 23 the first place. 24 In the result, not only was the 25 panel's report ultra vires the scope of its</p>	<p style="text-align: right;">Page 42</p> <p>1 The provincial Minister 2 nonetheless made his decision without giving the 3 claimants an opportunity to make representations 4 about this vital decision affecting their rights 5 and their investment. 6 As Professor Rankin observed, the 7 federal and provincial Ministers were the actual 8 statutory decision-makers and for them, 9 "...not to give the 10 opportunity to be heard, in 11 these circumstances, strikes 12 me as contrary to natural 13 justice. Simply writing a 14 couple of letters and having 15 the Minister, provincial, say 16 that I've read them 17 carefully, isn't natural 18 justice." 19 It is an elementary principle of 20 administrative law that the rules of natural 21 justice apply to the Minister's decisions. 22 They would of course not apply 23 directly to other participants in the panel's 24 public hearings as the hearings were about the 25 proponent's proposal. They were not a general</p>

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<p>1 public debate about policy.</p> <p>2 In the result, the decisions of</p> <p>3 both Ministers were also fatally flawed in law and</p> <p>4 ultra vires.</p> <p>5 And I will turn now to a</p> <p>6 discussion of what we call step 6, which is the</p> <p>7 result.</p> <p>8 And we submit that an abuse of</p> <p>9 discretion, however, can never be justified or form</p> <p>10 the basis of a reasonable policy. As Professor</p> <p>11 Rankin put it in his testimony to this Tribunal:</p> <p>12 "Rule of law is one of the</p> <p>13 fundamental components, the</p> <p>14 cornerstones of the Canadian</p> <p>15 Constitution. The rule of</p> <p>16 law requires consistent</p> <p>17 behaviour and people being</p> <p>18 able to plan for their lives</p> <p>19 on the basis of decisions</p> <p>20 that are made within</p> <p>21 jurisdiction and in good</p> <p>22 faith. Good faith is</p> <p>23 understood to be what the</p> <p>24 rule of law connotes.</p> <p>25 Otherwise, it is an abuse of</p>		<p>1 there has never been a quarry in Canada referred to</p> <p>2 a review panel.</p> <p>3 One cannot imagine greater</p> <p>4 serendipity to underscore the different way the</p> <p>5 Bilcon quarry was treated by DFO and NSDEL in the</p> <p>6 same environmental assessment regulatory regime</p> <p>7 than to compare it to Tiverton, located a mere ten</p> <p>8 kilometres down the road from Whites Point.</p> <p>9 In 2003, both quarries had</p> <p>10 approvals for quarries under four hectares. Both</p> <p>11 involved blasting on land near Canadian fisheries</p> <p>12 waters. Blasting at Tiverton commenced before the</p> <p>13 approval was given; blasting was never allowed on</p> <p>14 the Whites Point 3.9 hectare quarry.</p> <p>15 At Tiverton, the officials</p> <p>16 expressed no concerns about whales or iBoF in</p> <p>17 blasting for the Tiverton quarry. Nor did the DFO</p> <p>18 request the inclusion of whale- or fish-related</p> <p>19 conditions in the provincial approval to give them</p> <p>20 a veto over the project or insist on a 500 metre</p> <p>21 setback requirement.</p> <p>22 The Tiverton harbour project</p> <p>23 ultimately involved blasting in the water and the</p> <p>24 destruction of 21000 square metres of fish habitat</p> <p>25 for constructing a breakwater that was</p>	
<p>1 discretion that the courts</p> <p>2 have been resolute, ever</p> <p>3 since Roncarelli v Duplessis,</p> <p>4 is one of the cornerstones of</p> <p>5 our democracy."</p> <p>6 Every year, the federal government</p> <p>7 conduct thousands of basic screenings on</p> <p>8 environmental matters. From 1995 to 2003 there</p> <p>9 were approximately 60,000 environmental assessments</p> <p>10 conducted by the federal government.</p> <p>11 Of those, only 11 were referred to</p> <p>12 joint review panels, including the Sable Gas</p> <p>13 project involving offshore platforms and hundreds</p> <p>14 of kilometres of pipelines in the ocean and across</p> <p>15 two provinces.</p> <p>16 Those are the kind of projects</p> <p>17 which are intended to be dealt with at the highest,</p> <p>18 most complex level of environmental assessment.</p> <p>19 Any sort of review by a panel is</p> <p>20 rare. A Joint Review Panel is rare in the extreme.</p> <p>21 Aside from the Bilcon quarry,</p> <p>22 under the CEAA there has never been a marine</p> <p>23 terminal and quarry referred to a Joint Review</p> <p>24 Panel and there has never been, in Canada, a marine</p> <p>25 terminal alone referred to a review panel. And</p>	Page 44	<p>1 approximately 213 metres long, five metres wide at</p> <p>2 the crest, and approximately 50 metres wide at the</p> <p>3 base compared to in Whites Point 130 affected</p> <p>4 metres for the marine terminal.</p> <p>5 Unlike Whites Point, though,</p> <p>6 Tiverton involved federal funding. So bureaucrats</p> <p>7 from both levels of government rushed to meet the</p> <p>8 funding deadline, ignoring all applicable</p> <p>9 scientific and procedural considerations.</p> <p>10 The decisive difference between</p> <p>11 these two projects is that for Tiverton Minister</p> <p>12 Thibault called asking if there was anything he</p> <p>13 could do to speed up the process. At Whites Point</p> <p>14 Minister Thibault wanted the process dragged out as</p> <p>15 long as possible.</p> <p>16 At the time the Whites Point</p> <p>17 quarry and marine terminal was being assessed by</p> <p>18 the DFO, its policy defended repeatedly</p> <p>19 aggressively and successfully right up to the</p> <p>20 Supreme Court of Canada was to scope to the</p> <p>21 trigger.</p> <p>22 That meant, regardless of whether</p> <p>23 the proposed project was listed on the</p> <p>24 Comprehensive Study List, the DFO would only review</p> <p>25 those specific components that engaged its</p>	Page 46

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<p>1 jurisdiction, typically only conducting a 2 screening.</p> <p>3 For example, in Prairie Acid Rain 4 Coalition and Canada, the proponent TrueNorth 5 announced its plan for an oil sands mine. The 6 proposal revealed that the project would divert a 7 creek bed, causing the destruction of fish habitat.</p> <p>8 Rather than scoping the entire tar 9 sands project which was listed on the Comprehensive 10 Study List into its review, the DFO merely 11 conducted a screening of the creek. This was 12 challenged by environmental activists groups, but 13 the DFO successfully defended its decision in 14 court.</p> <p>15 Before this Tribunal, however, 16 Mr. Hood suggested that the DFO was somehow 17 engaging in an internal debate about different 18 opinions on scoping policy. In fact, with the 19 exception of Red Hill, between 1995 when the CEAA 20 came into effect and the referral of the Bilcon 21 quarry to a JRP, the Tribunal will look in vain to 22 find a single case where the DFO did not scope to 23 its trigger and none has been cited to you by 24 Canada.</p> <p>25 Mr. Hood himself articulated DFO</p>	<p>1 well. The projects had adjacent marine terminals 2 that were assessed under comprehensive studies, but 3 the processing areas were not included in the scope 4 of the project.</p> <p>5 Like Whites Point, Belleoram was a 6 rock quarry with marine terminal designed to ship 7 rock to foreign markets. Both quarries were going 8 to have a 50-year lifespan. While the Whites Point 9 environmental assessment dragged on for nearly five 10 years, Belleoram was permitted in only, permitted 11 in only 1.5 years. The stark difference in 12 treatment is all the more striking given it was 13 recognized early on in the Belleoram project 14 process by the federal officials that "many of the 15 environmental issues will be similar" to the Whites 16 Point quarry, and that some of the same federal 17 officials were involved with both projects at this 18 time.</p> <p>19 Belleoram was also going to 20 produce three times the amount of aggregate per 21 year as Whites Point, and the project received 22 federal government funding. Moreover, even though 23 the DFO had found fish habitat on the quarry site 24 in Belleoram, and stated that it would require a 25 HADD, it still refrained from scoping in the</p>
<p>1 policy at the time in reference to the Bear Head 2 LNG project -- which we discussed yesterday:</p> <p>3 "There is no requirement for 4 DFO approvals of the 5 land-based LNG plant and 6 therefore no CEAA trigger for 7 DFO to conduct an assessment 8 of this portion of the 9 proposal.</p> <p>10 "Based on the above, and our 11 present practice of project 12 scoping to DFO legislative 13 authority, our recommendation 14 is that you restrict the 15 scope of project to the 16 marine infrastructure portion 17 of the proposal and that a 18 screening level assessment of 19 this portion be conducted."</p> <p>20 That quote is from an email which 21 is a mere four or five months after the referral of 22 the Whites Point quarry to a joint panel review.</p> <p>23 And this policy was faithfully 24 applied by the DFO to Belleoram, Eider Rock, 25 Southern Head, and Keltic petroleum projects as</p>	<p>1 quarry.</p> <p>2 The Aguathuna quarry and marine 3 terminal project also bears remarkable similarities 4 to the WPQ project.</p> <p>5 The proponent proposed to develop 6 a quarry that produced 500,000 tons of aggregates 7 per year with an adjacent deepwater marine terminal 8 designed to export rock to foreign countries. But 9 unlike Whites Point, Aguathuna also received 10 government funding. The DFO only reviewed the 11 marine terminal in a comprehensive study and did 12 not require an environmental impact statement.</p> <p>13 Keltic petrochemicals proposed a 14 land-based complex situated on approximately 300 15 hectares of land that included a petrochemical 16 complex, an LNG importation storage and 17 vapourization facility, an electric coal generation 18 plant with a marine terminal, and water supply 19 empowerment with the marine terminal. The 20 estimated capital cost of the project was 45 to 50 21 million dollars.</p> <p>22 The federal EA was scoped to focus 23 on the LNG terminal, marine transfer pipelines, LNG 24 storage tanks, the marginal wharf, temporary marine 25 facilities and structures, docking and deberthing</p>
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<p style="text-align: right;">Page 51</p> <p>1 of vessels, and despite the scale of the project, 2 it was only assessed in a comprehensive study. 3 Bilcon, of course, was treated 4 differently. 5 From start to finish the decisions 6 made by federal and provincial officials are all 7 the more disturbing in light of the red carpet 8 treatment that the Nova Scotia Department of 9 Natural Resources and Gordon Balsler, the Minister 10 of Economic Development, rolled out for Bilcon. 11 The Tribunal will recall that Minister Balsler had 12 numerous meetings with Mr. Buxton and courted the 13 Claytons. The Minister assured them that Nova 14 Scotia was open for business, had a friendly 15 business environment, and welcomed foreign 16 investment. 17 As the Tribunal heard, Mr. Lizak 18 thought he had gone, he "had died and gone to 19 geologist heaven"; he had found the "gem in the 20 Crown". 21 Another rich irony in this case is 22 that at the very same time one arm of the 23 provincial government, Natural Resources, was 24 squiring Mr. Lizak around the province by 25 helicopter, another arm, NSDEL, was plotting with</p>	<p style="text-align: right;">Page 53</p> <p>1 What Bilcon did not expect was to 2 be led down the garden path for five years and to 3 arrive, millions of dollars later in Never Never 4 Land, and it certainly did not expect to be beset 5 by thugs and vandals along the way. 6 As Mr. Buxton wrote to the 7 Minister: 8 "We have had and no doubt 9 will continue to have..." 10 I am quoting here. 11 "...problems with site 12 security. Three of our 13 boreholes were vandalized 14 making it impossible to carry 15 out hydrogeological work in 16 these holes until we get a 17 drill rig in to reopen them. 18 A tree was felled across the 19 Whites Cove Road while the 20 CLC was on site last year and 21 yesterday all of our hay 22 bales were deliberately set 23 on fire. The Minister of 24 Agriculture and Fisheries 25 constituency assistant, who</p>
<p style="text-align: right;">Page 52</p> <p>1 DFO to put the quarry into a JRP. And that is in 2 early June of 2003. 3 Nova Scotia was historically a 4 resource extraction province where quarries were a 5 vital part of the provincial economy. The province 6 had long established policies and marketing 7 programs to encourage investment in marine 8 quarries, which it was proud to share with 9 Mr. Lizak. 10 This quarry was situated on a 11 former quarry site. It is designated on geological 12 maps as a quarry. 13 The quarry could not be seen from 14 any homes in the area and was located on the Bay of 15 Fundy, a major shipping route, through which 800 to 16 900 large industrial ships moved every year. I 17 think tankers, or perhaps bulk carriers. 18 The quarry would have provided 19 Bilcon with a secure supply of high quality 20 aggregate for over 50 years and that is what Bilcon 21 was led to expect when it was invited and 22 encouraged by the Government of Nova Scotia to come 23 to the province and invest in a quarry 24 That is what Bilcon did expect, 25 and that is what Bilcon was entitled to expect.</p>	<p style="text-align: right;">Page 54</p> <p>1 lives in Mink Cove, has had 2 to replace six slashed tires 3 and cannot get mail delivered 4 due to continuous vandalism 5 of her mail box. We have 6 equipment on site which has 7 to be driven off site every 8 evening..." 9 Throughout, the Claytons and 10 Bilcon acted in good faith. They spared no expense 11 to satisfy all of the regulatory requirements, and 12 to be a good corporate citizen of Nova Scotia and 13 Canada. 14 Mr. Buxton believed that the 15 science would ultimately prevail, and there is 16 nothing more and nothing better that he or Bilcon 17 could possibly have done. 18 Until these proceedings, they had 19 no idea of the parallel universe of deception and 20 concealment that was occurring behind their backs 21 to deprive them of fairness and equality. 22 Their only recourse is to seek 23 redress from this Tribunal under the NAFTA. 24 Bilcon always wanted to do 25 monitored test blasts to provide empirical data,</p>

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<p>1 and asked repeatedly to do test blasts over many 2 years. And yet what is now clear is that in 2002 3 the DFO was conducting a stealth environmental 4 assessment under cover of condition 10(i) without 5 giving notice to Mr. Buxton that it was doing so, 6 all the while withholding critical information that 7 Mr. Buxton could have used in order to conduct test 8 blasts to gather valuable data for the purpose of 9 proceeding to a fair and scientifically-based 10 assessment of its project.</p> <p>11 A condition initially inserted, 12 purportedly out of a concern that blasting might 13 cause harm to marine mammals and, in particular, to 14 endangered North Atlantic Right Whales -- I say, 15 parenthetically, when in fact there is evidence 16 that there had been no sightings of North Atlantic 17 Right Whales near Whites Point in over 25 years -- 18 was used to establish a bar which officials ensured 19 that Bilcon could never possibly meet.</p> <p>20 We can all ask ourselves this 21 question. In any of our own dealings with 22 government and government officials, would any one 23 of us feel that we had been treated fairly if 24 government officials knowingly, arbitrarily, and 25 for no proper purpose, in fact for an improper</p>	<p>1 Mr. Chapman knew that the 500 metre setback was 2 wrong, and sat there in the same room across the 3 table from Mr. Buxton allowing Mr. Buxton to 4 continue to believe that the 500 metre setback was 5 still valid, and all of that almost two months 6 after Mr. Thibault had distributed his recent 7 Cabinet confidence letter to the press, two days 8 before provincial election.</p> <p>9 By the time of Mr. Chapman's 10 meeting with Mr. Buxton, almost two months had 11 passed and Bilcon had still not received the 12 courtesy of a letter informing it that the quarry 13 project it had been working on for a year and a 14 half had been referred to the highest, most 15 complex, most elaborate, most onerous, and most 16 expensive forum of environmental assessment in the 17 country.</p> <p>18 This whole process was not carried 19 out in good faith. This was not honesty. This was 20 not fairness. This process, in my respectful 21 submission, was infused with raw politics and abuse 22 of authority.</p> <p>23 And what was it intended to 24 do? It was intended to send Mr. Clayton and his 25 brothers and his father and Bilcon packing, back to</p>
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<p>1 purpose, concealed critically important information 2 preventing us from doing what we are otherwise 3 entitled to do?</p> <p>4 And providing us with new 5 devastating information which very shortly 6 thereafter they knew to be erroneous, the 500 metre 7 setback?</p> <p>8 And then concealing that from us, 9 arriving at a further conclusion, the 100 metre 10 setback, and concealing that from us?</p> <p>11 And then failing to bring the true 12 facts to the attention of the highest officials in 13 the land, all to take pressure off them and their 14 provincial counterparts for the summer months?</p> <p>15 In this context, I ask the 16 Tribunal respectfully to carefully consider the 17 chronology of events and statements made by 18 officials during the period from May 29, 2003, the 19 date of Mr. Zamora's letter to Mr. Buxton saying 20 that the DFO had concluded the proposed work, 21 blasting on the quarry, was likely to cause the 22 destruction of fish.</p> <p>23 From May 29th, 2003 to August 24 28th, 2003, the date of the meeting between 25 Mr. Chapman, Mr. Buxton and others, when</p>	<p>1 New Jersey where they came from, much to the 2 satisfaction of the quarry's detractors; presumably 3 less to the families of the 400 people who applied 4 for jobs.</p> <p>5 The Claytons and Bilcon came to 6 Canada expecting a fair process, a legitimate 7 environmental assessment for this project, of 8 course. But they did not come expecting the system 9 to be rigged against them.</p> <p>10 Public concern is not mob rule. 11 It is not intimidation tactics, it's not vandalism, 12 ostracization and thuggery, whether on Digby Neck 13 or anywhere else in this country. It cannot be 14 allowed to win the day, and politicians and 15 officials whose highest duty is to preserve the 16 rule of law cannot be allowed to abuse the system 17 entrusted to their care, to use the full power and 18 resources of the state to run roughshod over the 19 rights of investors we welcome to this country to 20 invest in legitimate projects and to whom the NAFTA 21 guarantees fair and equitable treatment.</p> <p>22 Thank you.</p> <p>23 QUESTIONS BY THE TRIBUNAL: 24 PROFESSOR SCHWARTZ: Excuse me. I 25 was just going to ask some questions.</p>

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<p>1 PRESIDING ARBITRATOR: All right. 2 So Mr. Schwartz, Professor Schwartz has a question, 3 I also have a question with regard to the, because 4 we are supposed to have a coffee break, a short 5 coffee break in ten minutes. Would you, then, want 6 to be interrupted? Or would you, should we have 7 the coffee break now and you go on in one, to the 8 end? I leave that to you. 9 MR. APPLETON: Mr. President, I 10 actually addressed this with the secretary this 11 morning and we agreed on where would be an 12 appropriate break. And we also confirmed that the 13 break was not at a specific time, but a convenient 14 time. I also discussed it with the court reporter. 15 So if the understanding is 16 incorrect and it is a fixed time, I would like to 17 know that, because I would like to be able to get 18 underway and then take a break where I think would 19 be an appropriate spot. I am in your hands, but 20 that would be my preference. 21 Now with respect, you had a 22 question for Mr. Nash? So I will turn back to 23 Mr. Nash and then we will come back. I will just 24 confirm while we're at it that of course our unused 25 rebuttal time, or sorry, our unused time for the</p>	<p>1 we're dealing with. 2 But I was thinking yesterday, I am 3 interested in the relationships between the various 4 stages. 5 MR. NASH: Yes. 6 PROFESSOR SCHWARTZ: The project 7 that was referred to the joint panel, as I 8 understand it was not the original 3.9 hectare 9 quarry. 10 The project in the joint panel 11 mandate was the big project. 12 MR. NASH: Correct. 13 PROFESSOR SCHWARTZ: So even if 14 mistakes had been made at stage 1 about holding up 15 the 3.9 hectare quarry, what was actually referred 16 was this much larger joint project which was in 17 effect a series of four hectare quarries carried 18 out over a whole series of years. 19 MR. NASH: That part I don't 20 believe is correct. There was one 3.9 hectare 21 quarry. It was within the larger 155 hectare 22 property. And the larger project, the 155 hectare 23 quarry and the marine terminal, were referred to 24 the joint panel review. 25 PROFESSOR SCHWARTZ: I am just</p>
<p>1 presentation would be reserved over to our rebuttal 2 time up to the 30-minute amount. 3 PRESIDING ARBITRATOR: Just so I 4 understood you correctly, you would prefer, after 5 Mr. Nash has replied to the question, to start and 6 then at some moment we have to the coffee break? 7 MR. APPLETON: I would like to 8 proceed as soon as you will allow me to, 9 Mr. President. 10 PRESIDING ARBITRATOR: Okay. 11 MR. APPLETON: And I will stand 12 here while you are questioning Mr. Nash; but 13 Mr. Nash, thank you. You did a wonderful job. 14 Please come back for an encore. 15 MR. NASH: I did have, my notes 16 were mixed up and I may put a few more comments 17 into the record, if I may, but please. 18 PROFESSOR SCHWARTZ: Good morning, 19 Mr. Nash. 20 MR. NASH: Good morning. 21 PROFESSOR SCHWARTZ: If any of 22 these questions are ones where you would like some 23 more time they can be answered later; they can be 24 deferred to Mr. Appleton. I know this is very 25 extensive documentary record and period of time</p>	<p>1 looking at the project description. It talks about 2 approximately four hectares of new quarry would be 3 opened each year. 4 MR. NASH: Oh, in terms of the 5 operation of the quarry? 6 PROFESSOR SCHWARTZ: Yes. 7 MR. NASH: I misunderstood the 8 import of your question. That is what I understand 9 as well. I think it was a little less. It 10 shifted, but it was a small portion of the quarry 11 that would actually be quarried over the 50-year 12 period. 13 PROFESSOR SCHWARTZ: Okay. Now, 14 in terms of carry-forwards, if any, from stage 1 to 15 stage 2, I understand there had been a desire to 16 generate data at stage 1. Then I think you said 17 over many years Bilcon requested to be able to do 18 blasting tests. 19 MR. NASH: Yes. 20 PROFESSOR SCHWARTZ: Did those 21 years include the period of time after the joint 22 panel was commissioned? 23 MR. NASH: Yes. Yes. 24 PROFESSOR SCHWARTZ: Is that 25 somewhere in the record?</p>

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<p>1 MR. NASH: We will get that for 2 you. But what happened is that there was a meeting 3 with DFO officials and Mr. Buxton in November of 4 2004, I believe just before the JRP was empanelled. 5 I'm summarizing and we will get the document but he 6 expressed a desire to collaborate with DFO to 7 conduct test blasts on the quarry site, in 8 collaboration with DFO.</p> <p>9 In other words, to do them, if not 10 together, certainly in consultation with one 11 another so that a test blast or test blasts could 12 be conducted under the auspices, in effect, of the 13 DFO. I am using that term broadly, but at least in 14 collaboration with them, so that they were 15 satisfied at DFO that there would be no adverse 16 effects on fish, marine mammals and so on coming 17 within their jurisdiction.</p> <p>18 DFO said, if it becomes 19 necessary -- again I am paraphrasing -- we will do 20 that. At this point it is not necessary.</p> <p>21 There was then another 22 communication in 2005 on the issue of test blasts 23 and, then it went into the JRP and it just faded 24 away.</p> <p>25 We -- when I say we, Bilcon,</p>	<p>1 So you can see that the issue, 2 again, about the test blast is still going on. 3 This is an email dated January 22, 2007.</p> <p>4 So this issue of the test blast 5 from the beginning permeates its way through and it 6 is because the 3.9 hectare quarry is an integral 7 part of this whole process and the issues from the 8 beginning continue to arise, again and again, as a 9 continuum throughout this entire process.</p> <p>10 Sorry; I did not mean to 11 interrupt, but since there was another piece, I 12 thought we would keep it altogether in one spot in 13 the record.</p> <p>14 PROFESSOR SCHWARTZ: Thank you. 15 Now, Canada already assisted us and provided us 16 with a document about whether there was eventual 17 disclosure to Bilcon about the mistake about the 18 500 metre setback as opposed to 100 metre setback.</p> <p>19 MR. NASH: Yes.</p> <p>20 PROFESSOR SCHWARTZ: I recall 21 receiving a document that said that disclosure was 22 made.</p> <p>23 MR. NASH: Yes.</p> <p>24 PROFESSOR SCHWARTZ: Not 25 immediately, but was in fact disclosed to the</p>
<p>1 always wanted to do test blasting because they 2 believed that if they could get the data from the 3 test blasts which would be monitored, that they 4 could show that there would be no adverse 5 environmental effects that could not be mitigated 6 either on land or on water.</p> <p>7 PROFESSOR SCHWARTZ: Thank you. 8 As I understand it --</p> <p>9 MR. APPLETON: Excuse me, 10 Professor Schwartz.</p> <p>11 PROFESSOR SCHWARTZ: Sure.</p> <p>12 MR. APPLETON: My colleague might 13 not have been aware -- just to finish off what he 14 was saying, there is another document in the record 15 that might assist you. It is identified as C-842, 16 and this is a document sent from Robert Fournier to 17 Debra Myles -- Debra Myles is the panel manager -- 18 copied to the other members of the JRP, Jill Grant 19 and Gunter Muecke. And it says at point 2 of that 20 letter that:</p> <p>21 "What is the status of the 22 two letters that were to be 23 sent to DFO regarding our 24 request for permission for 25 test blasts?"</p>	<p>1 investor.</p> <p>2 MR. NASH: Yes.</p> <p>3 PROFESSOR SCHWARTZ: So any lack 4 of disclosure in the initial stage, whatever we 5 make of that, at least it was disclosed later.</p> <p>6 Another issue was potential impact 7 on marine mammals, especially whales, as I 8 understand it. And I asked, but at that point the 9 witness I asked didn't have the information 10 immediately at hand. Of course Canada has it; 11 they're certainly welcome to provide it to me. But 12 was there a later disclosure about the DFO 13 assessment concerning mitigation risks and 14 whales? Because that was another complaint about 15 non-disclosure, immediate, lack of immediate 16 disclosure at the 3.9 hectare quarry stage.</p> <p>17 MR. NASH: Answering your first 18 question first, timing is everything.</p> <p>19 And in the fall of 2002, had the 20 information been provided to Mr. Buxton at that 21 time, blasting could have commenced when the North 22 Atlantic Right Whale was not even in the area. 23 They had gone south. And blasting could have 24 commenced after Jerry Conway's December 2nd, 2002 25 email to Mr. Ross saying he had no concerns.</p>

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<p>1 It could have commenced through 2 December, January, February, March and probably 3 into April. All in collaboration, all under the 4 watchful eye of DFO to ensure that there would be 5 no adverse effects.</p> <p>6 The 500 metre setback question 7 comes at a critical point in time because the -- it 8 is not clear, because Mr. Zamora did not come to 9 give evidence before the Tribunal, but as of May 10 29th, 2003 he is asserting that he has got 11 calculations that require a 500 metre setback.</p> <p>12 That information apparently is 13 used to justify the June 26th, 2003 referral letter 14 by Minister Thibault to Minister Anderson.</p> <p>15 We know from Derek -- from Dennis 16 Wright's email on July 29th, 2003 that is the 17 latest point at which Fisheries and likely CEAA 18 know that the 500 metre setback is based upon an 19 erroneous calculation. That is over a week before 20 Minister Anderson actually makes the referral.</p> <p>21 And it was then known by DFO that 22 blasting could occur safely on the site without 23 risk of adverse consequences to fish and marine 24 mammals, so long as it was beyond the 100 metre 25 setback.</p>	<p>1 received it at a time when it had waited around for 2 it for now 14 months.</p> <p>3 And remember, there was -- there 4 was no agreement at all between the federal 5 government from August 7th and the provincial 6 government from August 7th, 2003 to November 3rd, 7 2004. There was nothing. There was a referral by 8 Minister Anderson to a Joint Review Panel, but no 9 agreement had been entered into by the two 10 jurisdictions.</p> <p>11 So timing is everything and, in 12 our submission, the concealment of that information 13 did the trick for what was desired by the 14 officials.</p> <p>15 PROFESSOR SCHWARTZ: Thank you 16 very much.</p> <p>17 PRESIDING ARBITRATOR: Break.</p> <p>18 MR. APPLETON: I think we had 19 better take a break, but I believe that Mr. Nash 20 said there was something he wanted to add, just to 21 complete his part of the --</p> <p>22 MR. NASH: I apologize to the 23 Tribunal.</p> <p>24 PRESIDING ARBITRATOR: Are you 25 ready to do that now?</p>
<p>1 So before the actual referral by 2 Minister Anderson and quite possibly the evidence 3 to support and the evidence to show that before the 4 referral by Minister Thibault to Minister Anderson, 5 the information was available to DFO, but it was 6 not available to the proponent.</p> <p>7 The information on a ground which 8 I just simply fail to understand is not then 9 immediately provided to Bilcon and Bilcon would 10 have had a number of options at that point if it 11 had known. Perhaps if it had been timely advised 12 of the JRP's appointment, it could have made 13 submissions to Minister Anderson and said, you 14 know, this is not as complex an issue. It may have 15 had other options.</p> <p>16 That information was not provided 17 until November of 2004, after the JRP is actually 18 appointed.</p> <p>19 And so, yes, it finally receives, 20 14 or 15 months later, the information that was in 21 the hands of the DFO at the time of the referral, 22 and perhaps referrals, but by that time it is in 23 this complex web of an environmental assessment 24 conducted at the most complex level in the country.</p> <p>25 So, yes, it received it, but it</p>	<p>1 MR. NASH: I am. My notes were 2 out of order and I missed some of the submission.</p> <p>3 PRESIDING ARBITRATOR: Yes, go 4 ahead.</p> <p>5 MR. NASH: And that is this. 6 The evidence before the Tribunal 7 is more than sufficient for the Tribunal to 8 conclude that the officials' conduct was driven by 9 political considerations which were irrelevant to 10 the objective science and completely outside the 11 purpose for which discretionary authority in 12 respect to fisheries and the environment was 13 delegated to them.</p> <p>14 The Tribunal will recall that DFO 15 and CEAA officials knew full well that, to quote 16 but a few examples and I will quote: 17 "This file is extremely 18 important to the 19 Minister...the Minister may 20 invoke an inquiry into this 21 matter." 22 "This is such a politically 23 hot file that I don't want to 24 make any wrong decisions." 25 "Thibault wants process</p>
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<p style="text-align: right;">Page 71</p> <p>1 dragged out as long as 2 possible." 3 "Then Minister of Environment 4 determines scope & Min DFO is 5 off hook." 6 Mr. Hood's journal is replete with 7 references to: What does the Minister want? And 8 descriptions of the intrigue being carried on 9 behind the scenes. 10 As Mr. Bellefontaine the DFO's 11 regional director so succinctly put it before the 12 Tribunal and this is a direct quote: "The Minister 13 is God", and that is exactly what the Minister is. 14 There can be no doubt that the 15 evidence in this case shows that the Minister was 16 God and what the Minister wanted the Minister got. 17 As Mr. Smith explained, in 18 addition to being under a microscope from the 19 Minister, the DFO was also motivated by another 20 political purpose, which was to refer the Bilcon 21 quarry to a Joint Review Panel so as to avoid court 22 action by the environmental activist groups in the 23 Minister's riding, it is apparent that political 24 machinations were at work in the province, as well, 25 but provincial officials were in a quandary since</p>	<p style="text-align: right;">Page 73</p> <p>1 Tribunal questions and answers would be handled. 2 We don't intend to handle it minute by minute, in a 3 minute-by-minute way, but a bit by playing it by 4 ear. 5 But I think the principle should 6 be that short questions and short answers would be 7 within the time allocated to the parties, but if a 8 question would be particularly comprehensive and 9 the answer, too, then we will see what we have to 10 do. But maybe it is also a bit of a, let's say, 11 getting to, let's say, succinct answers to our 12 questions, just to remind you of the time frame 13 that we are in. 14 Okay, with that, I give the floor 15 to Mr. Appleton. 16 SUBMISSIONS BY MR. APPLETON: 17 MR. APPLETON: Thank you very 18 much, President Simma. 19 This case is about serious 20 improprieties, omissions and irregularities in the 21 application of the law. It is about manifest 22 unfairness in the regulatory process. At the 23 outset, the investors reiterate that they are not 24 challenging any laws of general application either 25 of Canada or of Nova Scotia.</p>
<p style="text-align: right;">Page 72</p> <p>1 Bilcon had not filed any registration documents for 2 the quarry, Nova Scotia had no legislative basis to 3 conduct an environmental assessment. 4 And those are my final comments. 5 I thank you for your attention. 6 PRESIDING ARBITRATOR: Thank you, 7 Mr. Nash. So we're going to have a coffee break 8 now. It is on my watch it is 10:21 so we will 9 reconvene again at 10:36. Please keep to the time, 10 because...thank you, 10:36. Thank you. 11 --- Recess at 10:20 a.m. 12 --- Upon resuming at 10:35 a.m. 13 PRESIDING ARBITRATOR: So it is 14 now 37 to 38, and the arbitrators are ready to 15 continue. 16 MR. APPLETON: And so is counsel 17 for the claimants. 18 PRESIDING ARBITRATOR: Yes. So 19 will we please all make an effort to keep to the 20 time, because otherwise we won't really find enough 21 time today within the time, let's say, amount of 22 time that we have allocated. 23 Let me just say, with regard to 24 how we handle the questions, maybe we weren't 100 25 percent clear yesterday about how the time used for</p>	<p style="text-align: right;">Page 74</p> <p>1 We'll start with Article 1105, the 2 international law standard of treatment. Article 3 1105 includes fair and equitable treatment and full 4 protection and security. In addition to these two 5 particular heads, there are other well-known 6 expressions of the standard which have been 7 addressed in the pleadings. 8 What amounts to a violation of 9 fair and equitable treatment standard is 10 necessarily specific to each case. However, there 11 are clear patterns, in that there are certain kinds 12 of improper conduct attributable to government that 13 have been repeatedly found, either singularly or 14 cumulatively, by arbitral panels of distinguished 15 jurists to violate the obligation of fair and 16 equitable treatment. 17 For instance, conduct tainted by 18 or connected to political interference or 19 manipulation of the regulatory process and/or by 20 national prejudice or discrimination have 21 consistently been held to violate the standard, as 22 has misrepresentation of material legal and 23 regulatory facts to the investor and to their 24 investments. 25 Such conduct in and of itself</p>

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<p>1 represents serious impropriety. Today contemporary 2 notions of administrative fairness and due process 3 of law form part of the content of that customary 4 standard.</p> <p>5 Now, I would like to turn, 6 briefly, to full protection and security. It 7 requires governments to provide a stable legal and 8 business environment to foreign investors, and full 9 protection and security in itself includes 10 protection of the rule of law and fundamental 11 fairness.</p> <p>12 It also requires that where 13 government has influence or control over 14 non-governmental actors, then it takes at least 15 reasonable measures in the circumstances to ensure 16 that the conduct does not result in physical or 17 serious material economic insecurity for the 18 investment.</p> <p>19 At the very minimum, there is an 20 obligation not to contribute to or to support 21 actions of non-governmental actors that undermine 22 the physical or material economic security of the 23 investor.</p> <p>24 Now, I would like to give some 25 real attention to the protection against the abuse</p>	<p>1 foreseeable.</p> <p>2 For example, in Thunderbird, the 3 NAFTA tribunal spoke of a failure to provide due 4 process, constituting an administrative denial of 5 justice. The protection against discrimination is 6 an essential element that is inherent in the 7 concept of fair and equitable treatment.</p> <p>8 In Waste Management II, the 9 tribunal adopted the language used in the Loewen 10 case when it referred to a customary law 11 prohibition on conduct that is discriminatory and 12 exposes the claimant to sectional or racial 13 prejudice.</p> <p>14 The prohibition against 15 discrimination is a longstanding obligation under 16 classical international law. Conduct that violates 17 the protection against discrimination is conduct 18 that leads to an unfair, arbitrary or unreasonable 19 distinction.</p> <p>20 Many tribunals have found that the 21 guarantee of full protection and security exists 22 beyond physical security and is similar to the 23 protections provided by fair and equitable 24 treatment, and is meant to ensure a stable 25 environment for investors.</p>
<p>1 of rights, which we talked about in the opening.</p> <p>2 The RDC and Guatemala tribunal 3 considered situations of abuse of rights in the 4 administrative context and related issues to the 5 applicable standards of treatment under the 6 equivalent to Article 1105 of the NAFTA.</p> <p>7 In that case, the state imposed 8 circular requirements that an investor meet certain 9 conditions as a prerequisite for other conditions, 10 and then the state refused to allow the investor to 11 meet the first prerequisite conditions. It was, as 12 we say in English, a catch 22.</p> <p>13 This same reasoning and standard 14 applies to Canada's treatment of Bilcon. The lack 15 of transparency and candour were the norm, not the 16 exception, and this lack was most glaring where the 17 investors had the most at stake.</p> <p>18 The situation in which Bilcon has 19 been subjected is arbitrary and unfair, in addition 20 to lacking in transparency and candour.</p> <p>21 The jurisprudence supports the 22 conclusion, on the issue of protection against 23 arbitrary and discriminatory behaviour, that in 24 order not to be arbitrary restrictive measures must 25 some basis in domestic law and be accessible and</p>	<p>1 For example, the tribunal in 2 Eureko found that the Government of Poland, quote, 3 "acted for purely arbitrary reasons linked to the 4 interplay of Polish politics and nationalistic 5 reasons of a discriminatory character".</p> <p>6 Furthermore, the Biwater Gauff 7 tribunal held that in the content of full 8 protection and security standards may extend to 9 matters other than physical security.</p> <p>10 For Bilcon, the failure of Canada 11 to ensure that the Joint Review Panel provides the 12 legal protection afforded by following established 13 legal criteria is clearly a violation of full 14 protection and security.</p> <p>15 As was indicated by Mr. Chapman in 16 his testimony before you yesterday, Canadian 17 officials guided the JRP members concerning the 18 legal and regulatory criteria that they were to 19 apply and how they should deal with the public in 20 the hearings.</p> <p>21 Officials from the Government of 22 Canada had the opportunity to advise the JRP that 23 continuing to entertain public expressions of 24 anti-American hostility and bias were improper and 25 that it needed to be explained to the public that</p>
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<p>1 these were not the kind of "public concerns" that 2 could properly enter into the JRP's deliberations 3 concerning its recommendations on the project. 4 Similarly, they had the 5 opportunity and duty to indicate to the JRP that 6 there was no basis in the legal and regulatory 7 framework to determine that their recommendation 8 that the project be rejected outright, based on 9 community core values, in a process not designed 10 and conducted as an adversarial one, where legal 11 counsel are not regularly present, the duty of 12 diligence on the part of the government officials 13 to provide advice and guidance on keeping the panel 14 process could be expected to be particularly high. 15 The failure to do so is a manifest 16 violation of the obligation of full protection and 17 security owed to the investor. It is also unfair. 18 Canada contends that none of the 19 conduct in question rises to the level of a breach 20 of the international law standard of treatment, but 21 clear examples of just some of the wrongs committed 22 by officials in this case include the following: 23 Failing to remove blasting condition 10(i) from the 24 approval of the 3.9 hectare quarry at a time when 25 there was demonstrably no scientific or legal basis</p>		<p>1 relevant decision makers, through the 2 instrumentality of the Joint Review Panel, 3 disposing of the investor's project by reference to 4 criterion with no basis in law or regulatory 5 practice, namely, community core values, rather 6 than the legally required basis of likely 7 environmental or socioeconomic effects, something 8 which is measurable and mitigatable, rather than 9 subjective beliefs, and the Ministers adopting this 10 fundamental departure from the rule of law without 11 any independent consideration, repeatedly deviating 12 to Bilcon's detriment from consistent past 13 regulatory practice without any objective basis for 14 doing so; countenancing through the instrumentality 15 of the Joint Review Panel considerations of the 16 investor's American nationality and, indeed, 17 national bias and prejudice entering into the 18 proceedings that resulted in a negative disposal of 19 the investor's project; pervasive political 20 interference in the ordinary working of the 21 regulatory process, with key decisions such as 22 whether or when to refer to a JRP, and the 23 protection of the electoral interests of particular 24 politicians with political staffers and handlers 25 regularly running interference hither and dither</p>	
<p>1 for such a condition and effectively blocking any 2 ability for Bilcon to blast on that site, depriving 3 Bilcon of an ability to acquire the baseline 4 information necessary for the environmental 5 assessment process; withholding information that 6 DFO scientists had no continuing concerns over 7 marine mammals, leading Bilcon to believe that 8 there was a valid legislative trigger and 9 jurisdiction to assess the quarry when this was 10 known not to be the case; withholding for 14 months 11 information that would have permitted Bilcon to 12 adjust its setback distances and commence blasting 13 on the smaller quarry site; improperly raising its 14 environmental assessment to the level of a JRP, 15 without any basis for doing so; affording Bilcon 16 experts only 19 minutes out of 90 hours, taking 17 into account irrelevant considerations such as 18 NAFTA testimony, otherwise exceeding jurisdiction 19 by addressing benefits and burdens, the public 20 interest and community core values, all of which 21 find no grounding in the terms of reference for the 22 Joint Review Panel; accepting a factually erroneous 23 JRP report as the basis for rejecting the project; 24 accepting the panel report without providing Bilcon 25 with the opportunity to present its case to the</p>	Page 80	<p>1 with the normal channels of regulatory decision 2 making and giving normal hierarchical processes 3 whereby officials give independent advice and 4 information to Ministers through the established 5 hierarchy of the civil service; and consistently 6 ignoring or not acting upon the advice of the 7 government's own experts and scientists when it 8 pointed in favour of the possibility of Bilcon 9 operating its project in an environmentally sound 10 manner. 11 Both independently and, even more, 12 cumulatively, the wrongs committed by Canada 13 constituted breaches of Canada's obligations under 14 NAFTA Article 1105. 15 I would like to turn now to 16 most-favored nations treatment. In Canada's 17 opening statement, Mr. Little sought to have the 18 Tribunal consider NAFTA Article 1103 and Article 19 1102 together as if they were interchangeable 20 obligations. However, it is absolutely clear that 21 they are two separate obligations. 22 Usually in the case of investment 23 obligations, the issue of most-favored nation 24 treatment arises when an investor seeks to rely on 25 a provision in one treaty, usually an investment</p>	Page 82

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<p>1 treaty, with more favourable substantive and most 2 often procedural provisions.</p> <p>3 In this case, we are primarily 4 concerned with better material treatment of the 5 investors relative to investors from foreign 6 countries.</p> <p>7 This issue arises in the first 8 instance because, amongst the concerns that 9 affected Minister Thibault in the treatment of the 10 investors and the kind of sentiments that 11 influenced the behaviour of the officials toward 12 the investors, was the American nationality of the 13 investors and the aversion to the export of 14 Canadian natural resources or primary materials to 15 the United States.</p> <p>16 This was an important difference 17 with other better-treated permit seekers, such as 18 Tiverton, whose aggregate was not going to the 19 United States.</p> <p>20 The concern with exports going to 21 the United States was a specific subject of inquiry 22 by the Joint Review Panel, which led to questions 23 about whether, if a quarry were approved, Canada 24 could impose export restrictions under the NAFTA. 25 The Joint Review Panel, given</p>	<p>1 inapposite or excessive to 2 achieve an otherwise 3 legitimate objective of the 4 State."</p> <p>5 We emphasize here that the 6 expression "legitimate objective", and explicit 7 preference against a particular NAFTA country or 8 the investors or investments from a particular 9 NAFTA country is not legitimate given the 10 objectives and the principles of the NAFTA.</p> <p>11 And what makes the Bilcon case 12 particularly egregious is not that only there is no 13 objective justification, but there is actual 14 evidence of anti-American concerns in the way the 15 investors' proposal would be dealt with in the 16 regulatory process.</p> <p>17 Less favourable treatment does not 18 mean that Bilcon's environmental assessment needed 19 to produce identical results to those in like 20 circumstances, such as an approval.</p> <p>21 Bilcon did not receive less 22 favourable treatment because its project was 23 rejected. Bilcon received less favourable 24 treatment because of how its project was assessed 25 as compared to projects of investors from third</p>
<p>1 these concerns, did not distance itself in any way 2 from the frequent anti-American comments by 3 participants in the hearings.</p> <p>4 This is an impermissible 5 consideration under both fair and equitable 6 treatment, which deals with some aspects of 7 national bias or prejudice, but also under the MFN 8 obligation of the NAFTA, as well.</p> <p>9 There is little jurisprudence on 10 MFN in the sense of detrimental material treatments 11 under investment treaties. A leading case is 12 Parkerings and Lithuania, which has been filed in 13 this case.</p> <p>14 The tribunal in the Parkerings 15 case said that:</p> <p>16 "Discrimination is to be 17 ascertained by looking at the 18 circumstances of the 19 individual cases. 20 "However, to violate 21 international law, 22 discrimination must be 23 unreasonable or lacking 24 proportionality, for 25 instance, it must be</p>	<p>1 countries in like circumstances.</p> <p>2 Treatment by regulators must be 3 even-handed towards the investor in relation to all 4 like investors and investments. This means the 5 investor is entitled to the most favorable 6 treatment granted to any investor or investment 7 that is in like circumstances from Canada or from a 8 third country.</p> <p>9 The WTO appellate body in Clove 10 Cigarettes held a technical regulation should be 11 applied in an even-handed manner. When the 12 appellate body in Cloves acknowledged that a member 13 country could provide regulations that would fulfil 14 certain legitimate public policy objectives, these 15 same regulations could not be applied in a manner 16 that would constitute a means of arbitrary or 17 unjustifiable discrimination or a disguised 18 restriction on international trade.</p> <p>19 I would now like to turn to 20 national treatment in Article 1102. Here also 21 there is evidence the nationality of the investor 22 was a consideration, which is of great 23 significance. Had Bilcon been a Canadian company 24 servicing a Canadian home market with aggregate, it 25 would not have been treated in this way.</p>

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<p>1 In his uncontroverted witness 2 statement, Hugh Fraser noted the pervasive 3 influence of the American nationality of the 4 investors in this case. Paul Buxton, who testified 5 before, you confirmed that the nationality of the 6 investors was a factor that was frequently raised.</p> <p>7 The Joint Review Panel even went 8 so far as to retain its own expert on the NAFTA in 9 an environmental assessment.</p> <p>10 In addition, the Joint Review 11 Panel asked the Department of Foreign Affairs and 12 International Trade to send an official to provide 13 a statement on the meaning of the NAFTA. It sent 14 Gilles Gauthier, the director of the investment 15 trade policy division, as well as some other 16 counsel from the division, to explain the proper 17 meaning to be given to the obligations of Chapter 18 11 of the NAFTA.</p> <p>19 I would remind the Tribunal that 20 Canada has never directly challenged witnesses or 21 affidavit evidence of anti-Americanism presented by 22 the investor. They have never offered into 23 evidence any explanation of why NAFTA was brought 24 in that would be consistent with a 25 non-discrimination obligation.</p>	<p>1 Secondly, we agree, as Mr. Little 2 put it, that: We aren't saying circumstances have 3 to be identical, just like. That was from the 4 opening at the beginning of this hearing.</p> <p>5 Where the nature and magnitude -- 6 sorry. Third, we agree the national treatment 7 obligation only prohibits less favourable treatment 8 on the basis of nationality. Where the nature and 9 magnitude of differential treatment between the 10 investments can be fully accounted for on the basis 11 of objective considerations unrelated directly or 12 indirectly to the investor's nationality, there is 13 no violation of national treatment. We disagree 14 with Canada as to how to determine whether 15 nationality is the basis.</p> <p>16 Fourth, as stated by Mr. Gauthier, 17 Article 1102 prohibits both de facto and de jure 18 discrimination.</p> <p>19 Those are four areas we agree on. 20 Now let's address where we might have some 21 disagreements.</p> <p>22 First, likeness. Canada purports 23 to restrict these factors that might objectively 24 justify different treatment to the determination of 25 likeness, rather than the analysis of whether</p>
<p>1 The obvious reason that NAFTA was 2 a matter of focus was because of the American 3 nationality of Bilcon of Delaware and the Clayton 4 family.</p> <p>5 We have common ground with Canada, 6 though, on some aspects of how national treatment 7 contained in NAFTA Article 1102 should be 8 interpreted, and we thought it might be helpful to 9 try to narrow down these areas.</p> <p>10 So, first, we agree that national 11 treatment is a standard obligation that we find in 12 just about every trade and investment agreement. 13 This is the position that has been taken by 14 Mr. Gauthier advancing the Government of Canada's 15 official position before the JRP.</p> <p>16 So with respect to this, we would 17 say that NAFTA Article 1102 reflects an <i>acquis</i> of 18 international economic law, and, in light of the 19 official position that Canada took before the JRP 20 regarding the standard nature of NAFTA Article 1102 21 as a provision of international economic law, it is 22 puzzling that Canada in some of their pleadings in 23 this case seemed to suggest that Article 1102 is 24 somehow a self-contained <i>lex specialis</i> to the 25 NAFTA.</p>	<p>1 treatment is less favourable.</p> <p>2 Yet here, where there is the 3 regulatory process of a general application itself 4 that is the focus of concern and not 5 classifications of laws or regulations, it is 6 appropriate to view all entities, domestic and 7 foreign, because the same legal and regulatory 8 framework for determining the process applies to 9 all of them.</p> <p>10 The NAFTA tribunal in Grand River, 11 a case in the material, said, and I quote: 12 "The identity of the legal 13 regime(s) applicable to a 14 claimant and its purported 15 comparators is to be a 16 compelling factor in 17 assessing whether like is 18 indeed being compared to like 19 for purposes of articles 1102 20 and 1103." 21 As noted by the Occidental 22 tribunal assessing like comparators, they said this 23 cannot be done by addressing exclusively the sector 24 in which that particular activity is undertaken. 25 Bilcon was seeking regulatory</p>

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<p>1 permission under both federal and provincial 2 environmental legal regimes. Those other NAFTA 3 party or non-NAFTA party investors, in like 4 circumstances with Bilcon, are those who require to 5 submit to the determination under federal or 6 provincial laws as to whether and in what manner an 7 environmental assessment by one or both, or jointly 8 by both, levels of government may be necessary as a 9 precondition to moving forward with their project.</p> <p>10 Now, Canada wishes to restrict 11 likeness to those identically situated projects 12 subject to a joint Canada-Nova Scotia Joint Review 13 Panel. This is, however, inconsistent with the 14 application of the law and ends up confusing the 15 concepts of likeness and treatment.</p> <p>16 Bilcon, however, challenges 17 amongst other things the very decision to subject 18 it to a Joint Review Panel as lacking in 19 evenhandedness and being politically motivated.</p> <p>20 To say that Bilcon's treatments 21 can only be compared with other projects subject to 22 a JRP is to exclude ab initio one of Bilcon's most 23 important claims of a lack of evenhandedness; 24 namely, that this project was not comparable at all 25 to the exceptional projects that had triggered in</p>	<p>1 government officials followed Bilcon's suggested 2 approach to likeness and considered all proponents 3 seeking environmental permissions as being like 4 with respect to treatment under the regulatory 5 regime.</p> <p>6 So why is our approach then 7 preferable to that which has been offered by 8 Canada?</p> <p>9 In our view, Canada does violence 10 to the very text and structure of NAFTA Article 11 1102, where the core obligation is that of 12 evenhanded treatment. Canada would have those very 13 considerations that need to be taken into account 14 and scrutinized to be determined whether treatment 15 is less favourable that is not evenhanded, 16 converted into the factors establishing unlikeness 17 rather than likeness.</p> <p>18 This would simply cut off at the 19 pass the inquiry by this Tribunal as to whether 20 there is a lack of evenhandedness in the treatment 21 of the investor or its investments.</p> <p>22 Now, this goes to the second 23 disagreement with Canada, which is how we get to a 24 conclusion that the treatment is on the basis of 25 nationality.</p>
<p>1 the past the rare mechanism of a Joint Review 2 Panel.</p> <p>3 The Joint Review Panel is no more 4 than a type or track of an environmental 5 assessment. It is as capricious as saying that the 6 only possible comparators are other quarries on 7 Digby Neck. This is simply absurd.</p> <p>8 National treatment allows a 9 regulatory process to produce different outcomes, 10 as long as the process demonstrably treats the 11 parties with evenhandedness. To ensure that 12 investments are granted equal opportunities, to be 13 evenhanded the treatment need not be identical.</p> <p>14 NAFTA Article 1102(3) makes clear 15 that best in jurisdiction needs to be provided.</p> <p>16 Now, emails evidence that 17 discussions took place between officials where they 18 regularly considered and compared government 19 treatment to different proponents seeking 20 regulatory permissions from them.</p> <p>21 For example, there are documents 22 where officials are comparing the difference in 23 decisions about scoping, or blasting setbacks, or 24 even the type of environmental assessment.</p> <p>25 In all of these documents the</p>	<p>1 Canada has suggested that the 2 investor must prove that subjective national bias 3 was the motivation of the different treatment.</p> <p>4 In other words, there must be 5 proof of national favouritism.</p> <p>6 There is of course no question 7 that such favouritism is an impermissible purpose 8 under NAFTA Article 1102. There is to our 9 knowledge not a single decision of any tribunal in 10 over 50 years of interpreting this standard 11 obligation that is said that the complainant must 12 always prove discriminatory motivation or 13 subjective intent in order to establish a violation 14 of national treatment.</p> <p>15 For example, the NAFTA tribunal in 16 Feldman held that there was no such language in 17 Article 1102 of the NAFTA when that tribunal 18 considered that very question.</p> <p>19 Secondly, to return to Canada's 20 official statements about the meaning of NAFTA 21 Chapter 11 to the Joint Review Panel, de facto 22 discrimination is covered by NAFTA Article 1102.</p> <p>23 This by no means detracts from the 24 strict scrutiny that tribunals often engage when 25 there is evidence of national bias or favouritism</p>
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<p>1 coming into the picture or lurking behind the 2 scenes. And this is certainly the situation that 3 we are dealing with here in the Bilcon situation. 4 This leads to the issue of burden 5 of proof. Common to NAFTA tribunals, and most 6 especially the Feldman tribunal and recent 7 decisions of the WTO appellate body on national 8 treatment, is the notion that once the nature and 9 magnitude of the difference of treatment between 10 likes has been established by the claimant, the 11 burden shifts to the respondent's state to show 12 that this difference, both its nature and its 13 magnitude, can be fully accounted for by legitimate 14 regulatory considerations. That is 15 non-nationality-related considerations. 16 In the present case, not only has 17 Bilcon established the nature and magnitude of the 18 difference of treatments, we've also shown how 19 considerations of nationality lay below the surface 20 and sometimes came up to the surface in relation to 21 Bilcon. 22 There were questions raised by 23 panel members during the Joint Review Panel process 24 concerning the nationality of the proponents, 25 expressions of anti-Americanism from participants,</p>	<p>1 what were the internal deliberations of governments 2 that reveal the exact range and relative weight of 3 considerations that affect the treatment they 4 received. 5 This is a strong reason for 6 putting the onus on the responding state to 7 establish that objective, legitimate considerations 8 can fully account for the difference in treatment. 9 Now I would like to speak a little 10 bit about some of the facts as they apply to 11 most-favored nation treatment and national 12 treatment. While the obligations are different, 13 there are some similarities, so I am going to try 14 to group them together just to make this as easy as 15 we can. 16 NAFTA Article 1102 requires Canada 17 to provide treatment no less favourable than it 18 provides Canadian investors and their investments 19 who are in like circumstances with the claimants. 20 Likeness must be considered for 21 all those who seek such regulatory 22 permissions. The test for likeness in this case 23 that we have expressed must address all those who 24 seek such governmental permissions for projects, 25 where there could be a potential environmental</p>
<p>1 and, not insignificantly, in his presentation 2 before the Joint Review Panel, Minister Thibault 3 spoke about Canada's national interests and 4 questioned US interests in the quarrying of basalt 5 from Whites Point. 6 He said: Is there a lack of these 7 aggregates within the United States, that their 8 economy will tumble if we don't provide it to them? 9 When one examines the less 10 favourable treatment Bilcon received in this case 11 on issues from blasting, to scoping, to decision to 12 refer to the JRP, the Minister's office played a 13 crucial role in these decisions. 14 In these circumstances, it is 15 clearly reasonable to require a full demonstration 16 on Canada's part that all differences of treatment 17 between the investor and the Canadian entity 18 subject to the same regulatory processes are fully 19 accountable on objective regulatory considerations, 20 unrelated to nationality. And this is simply 21 something that Canada has not done. 22 Now, due to the difficulties with 23 the discovery process in this case, and the volume 24 of redacted material that have been produced to the 25 claimants, the claimants can only partially infer</p>	<p>1 review in connection with the permission. 2 So, for example, Bilcon was 3 required to seek permission under the Navigable 4 Waters Protection Act and the Fisheries Act. Both 5 of these federal regulatory regimes could 6 potentially involve an environmental assessment 7 under the CEAA. All those who seek similar 8 permissions would be in like circumstances. 9 In addition, since there were Nova 10 Scotia approvals required for quarries of this 11 size, for those seeking permissions from Nova 12 Scotia that involved potential environmental 13 review, they would also be in like circumstances. 14 The investors have made reference 15 to a number of Canadian investments and investors 16 who were in like circumstances to Bilcon, such as 17 the nearby Tiverton quarry and Keltic. 18 A similar likeness requirement is 19 involved in the consideration of the most-favored 20 nation treatment obligation. 21 And examples of investors or 22 investments of investors from non-NAFTA parties or 23 other NAFTA parties who are in like circumstances 24 would include Rabasca and Miller's Creek. 25 Canada is required to provide</p>
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<p>1 treatment no less favorable to Bilcon than it 2 provided to Canadian investors and their 3 investments. The requirement to provide better 4 treatment is limited to providing the best 5 treatment offered by the jurisdiction where those 6 measures are offered.</p> <p>7 Thus, Canada must provide the best 8 treatment that the federal government provides 9 anywhere in the territory of Canada to those who 10 are in like circumstances.</p> <p>11 Similarly, Nova Scotia must 12 provide treatment as favourable as it provides to 13 others within the territory of Nova Scotia. Nova 14 Scotia need not provide more favourable treatment 15 in its own regulatory measures than other provinces 16 do. That means it doesn't have to go outside its 17 territory with respect to that, but it must provide 18 treatment to Bilcon as favourable as it provides to 19 the best-treated investment or investor within Nova 20 Scotia who was in like circumstances. That's the 21 test.</p> <p>22 An examination of the treatment of 23 those in the universe of like investors and 24 investments shows that the treatment of Bilcon was 25 more strict and more severe than many others within</p>	<p>1 Head case; Keltic, where there was a marine 2 terminal, petrochemical facilities, a dam and a 3 highway, yet the study only underwent a federal 4 comprehensive study in conjunction with a Nova 5 Scotia provincial panel review.</p> <p>6 In the case of Keltic, DFO's 7 approach was to actively advise the proponents 8 about how to avoid the onerous federal panel review 9 of an EA, and in the result, despite numerous 10 significant adverse environmental effects of the 11 Keltic project, the federal comprehensive study and 12 the Nova Scotia review panel recommended approval 13 of the project with appropriate mitigation 14 measures.</p> <p>15 With respect to treatment provided 16 by investors and investments of investors from 17 non-NAFTA parties and other NAFTA parties, for 18 example, Rabasca, where the JRP recommended 19 mitigation measures, rather than where the project 20 simply be rejected.</p> <p>21 And with respect to treatment 22 provided to investments of investors from non-NAFTA 23 parties or other NAFTA parties with respect to 24 provincial government treatments, the following 25 were provided with better treatment: Miller's</p>
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<p>1 the universe of likes.</p> <p>2 As Mr. Rankin noted in his 3 testimony, there were 28 quarry proposals in Nova 4 Scotia between 2000 and 2011. One was the subject 5 of a public review hearing. One was rejected, 6 recommended for a rejection, and ultimately the 7 Ministers chose to reject it.</p> <p>8 Indeed, since the CEAA has come 9 into force in 1995, no quarry in Canada has ever 10 been referred to a review panel, let alone a Joint 11 Review Panel; not one quarry across Canada, other 12 than Bilcon.</p> <p>13 And with respect to federal 14 government treatment under the Fisheries Act, the 15 following were provided with better treatment: 16 Both Eider Rock and the Belleoram projects, where 17 the Department of Fisheries did not scope the main 18 project in with the marine terminal, unlike the 19 treatment provided to Bilcon; Tiverton, where the 20 office of DFO Minister Thibault had asked if there 21 was anything he could do to speed up the process, 22 rather than the clear obstacles and delays that DFO 23 put in the way of Bilcon.</p> <p>24 And the similar approach to speed 25 up the process was also taken by DFO in the Bear</p>	<p>1 Creek where, just after the Joint Review Panel of 2 the Bilcon quarry was concluded, the Miller's Creek 3 mine extension in Nova Scotia was also approved by 4 the Province of Nova Scotia without referral to a 5 review panel.</p> <p>6 So we have covered each of the 7 areas with respect to like and likeness. We have 8 covered each of the areas with respect to the level 9 of jurisdiction to deal with the treatment. In 10 each and every one of the situations, there is 11 better treatment provided to Canadian investments 12 or Canadian investors - that's with respect to 13 national treatment - and there is better treatment 14 that was provided to the investments of investors 15 from non-NAFTA parties, or other NAFTA parties 16 pursuant to the most-favored nation treatment 17 obligation, both by the federal level of government 18 and by the provincial level of government.</p> <p>19 And there are other examples and 20 more details of considerably less severe, less 21 strict and otherwise more favourable treatment of 22 Canadian and third country investors and 23 investments in the relevant universe of likes, and 24 these are all detailed in the Bilcon pleadings.</p> <p>25 But the overall picture is best</p>

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<p>1 described by Mr. Estrin in his expert testimony, 2 based on the treatment of others in the universe of 3 likes. He says:</p> <p>4 "It would have been a total 5 shock and surprise for the 6 proponent of this quarry and 7 that project would have been 8 referred to a review panel." 9 That being said, there is 10 considerable evidence in the pleadings and the 11 testimony that suggest that the differences in 12 treatment in question cannot easily be explained by 13 objective factors. In the case of Tiverton, for 14 example, Canada points to the larger size of 15 Bilcon's 152 hectare proposed quarry.</p> <p>16 Yet, as Mr. Rankin indicates in 17 his expert testimony, the actual factor that bore 18 most directly and dramatically on the diametrically 19 opposed treatment of Tiverton and Bilcon was not 20 the size difference - that is, relative differences 21 in environmental effects in relation to matters of 22 federal jurisdiction that would stem from the size 23 of the project - but something entirely different.</p> <p>24 While it was in the Minister's 25 perceived political interest to block Bilcon, it</p>	<p>1 more severe or strict treatment of Bilcon in 2 comparison with Canadian and third party country 3 investors in a universe of likes is public concern.</p> <p>4 Properly defined, public concern 5 are a legally mandated consideration in determining 6 the kind of environmental review to which a 7 proponent is to be subjected.</p> <p>8 But of course the public concerns 9 in question must be related to perceived 10 environmental effects and those effects must be 11 within federal jurisdiction.</p> <p>12 The mere fact there is a fierce 13 lobby or faction in the community with high 14 political connections and influence is not an 15 objective consideration of the kind contemplated by 16 the statute that could vastly alter the nature of 17 the environmental review from what would be 18 objectively justified on scientific and related 19 considerations connected to environmental risks.</p> <p>20 Further, the national treatment 21 and MFN obligations of NAFTA protected investors 22 from deleterious treatment based on concerns 23 related to its nationality.</p> <p>24 Canada has not denied that the 25 public concerns that were at issue with Bilcon</p>
<p>1 was at the same time in the Minister's perceived 2 political interest to push Tiverton through as soon 3 as possible. And on that basis, the Minister 4 intervened and diverted the regulatory process from 5 its normal course.</p> <p>6 Indeed, as Mr. Rankin has 7 testified, potential effects on the marine 8 environment might well have objectively justified 9 stricter treatment of Tiverton than Bilcon's 10 project. He said:</p> <p>11 "Tiverton involved blasting 12 on the ocean floor... here we 13 had a quarry and a marine 14 terminal, which didn't have 15 nearly that kind of impact on 16 the ocean floor." 17 You will recall in the opening we 18 took you to a video of the blasting, or similar to 19 the blasting that would have taken place in that 20 harbour over by Tiverton.</p> <p>21 Further, there were larger and 22 more complex projects than Bilcon's that were 23 treated less strictly or severely allowed to go 24 forward with mitigation. The other considerations 25 suggested by Canada to explain the considerably</p>	<p>1 included concerns with the investor's nationality. 2 Indeed, in the testimony at the JRP hearing, 3 Minister Thibault legitimated the consideration of 4 nationality, in particular, Bilcon exporting to its 5 home market in the United States.</p> <p>6 Now, in any event, there were 7 projects where consideration of legitimate public 8 policy concerns were at play, and the treatment of 9 the proponent in the universe of likes with Bilcon 10 was considerably less strict or severe.</p> <p>11 For example, in Rabasca, there was 12 significant public concern as Mr. Estrin set out in 13 his report.</p> <p>14 Now, given the stark differences 15 in treatment of Bilcon relative to investments and 16 investors of Canadian nationality, it would be up 17 to Canada to demonstrate that the difference is 18 entirely due to objective, rational considerations 19 unrelated to nationality. This, Canada has not 20 done.</p> <p>21 Canada has also purported that a 22 difference with others in the universe of likes 23 that was an objective consideration of the 24 treatment of Bilcon was the proposed quarry site 25 was in a pristine, protected eco zone.</p>

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<p>1 As our pleadings and the evidence, 2 including the video evidence, presented to the 3 Tribunal, indicates, this was not true, although 4 certainly some of the local residents would have 5 liked it to be true. This was an industrial area, 6 home to other quarries and a marine zone 7 characterized by constant heavy shipping traffic.</p> <p>8 In any case, if we were dealing 9 with a pristine and protected eco zone, the lack of 10 caution and precaution in the treatment of nearby 11 Tiverton would be utterly inexplicable. None of 12 the purported differences alleged by Canada between 13 Bilcon's project and others in the relevant 14 universe of likes comes close to meeting Canada's 15 burden to prove the actual considerations that led 16 to the considerably more severe or stricter 17 treatment of Bilcon were of an objective, rational, 18 fact-based nature and unrelated to the nationality 19 of the investor, either as a foreigner generally 20 under national treatment, or specifically as an 21 American under the most-favored nation obligation.</p> <p>22 Now, I would like to turn to the 23 Free Trade Commission notes of interpretation. 24 Canada contends that the Free Trade Commission note 25 was issued pursuant to Article 1131(2) of the</p>	<p>1 qualifying language.</p> <p>2 The ordinary meaning of 3 international law is, at a minimum, those sources 4 of law included in Article 38 of the statute of the 5 International Court of Justice.</p> <p>6 In sum, either some different 7 import than that suggested by Canada must be given 8 to the interpretive note, or, alternatively, the 9 parties to the NAFTA violated both the Vienna 10 Convention and the NAFTA in attempting to amend the 11 NAFTA other than in conformity with the amending 12 procedures in the NAFTA itself.</p> <p>13 The full constitutional and 14 legislative processes of the NAFTA parties was used 15 to bring the NAFTA into force, and the NAFTA 16 includes explicit rules about how modifications or 17 additions to the treaty can be made.</p> <p>18 In particular, NAFTA Article 2202 19 requires each NAFTA party to respectively complete 20 a process of constitutionally mandated legislative 21 approvals before modifications or additions to the 22 treaty can be made.</p> <p>23 This is further supported by NAFTA 24 Article 601, which confirms the full respect of the 25 NAFTA parties of their domestic constitutional</p>
<p>1 NAFTA, and therefore is a definitive interpretation 2 of Article 1105 that requires no more or no less 3 than the customary international law standard of 4 treatment of aliens.</p> <p>5 An interpretation by its very 6 nature cannot add or subtract from the rights or 7 obligations in the treaty. Only an amendment can 8 do that, or some other particular device like a 9 waiver or a reservation which may or may not be 10 provided for in the text of a particular treaty.</p> <p>11 The Vienna Convention on the Law 12 of Treaties provides: 13 "An amendment to a treaty 14 shall follow any agreed rules 15 within the treaty for 16 amendments." 17 Canada asserts a legal effect to 18 the interpretive note that it would prevent this 19 Tribunal from considering sources of international 20 law other than custom in determining the content of 21 fair and equitable treatment.</p> <p>22 Now, this would clearly truncate 23 the ordinary meaning of NAFTA Article 1105, which 24 refers to treatment in accordance with 25 international law, without any restricting or</p>	<p>1 arrangements.</p> <p>2 None of these domestic approvals 3 were obtained, and the democratically elected 4 members of national legislative bodies of the NAFTA 5 parties were not consulted before the notes were 6 issued.</p> <p>7 They are therefore limited to 8 interpretations that do not amend the treaty. For 9 the treaty to be amended all of the NAFTA parties 10 need to formally agree in the manner that is set 11 out by NAFTA Article 2202.</p> <p>12 By contrast, an interpretation is 13 merely a clarification or an elaboration of a NAFTA 14 provision. The commission notes of interpretation, 15 however, cannot have the effect of amending the 16 NAFTA. Where the notes merely interpret a treaty 17 provision, rather than modifying it, thereby they 18 must be applied.</p> <p>19 However, within the entire 20 customary international law framework of treaty 21 interpretation, and particularly the norms codified 22 in Article 31 of the Vienna Convention, but any 23 note that is in effect an amendment is ultra vires 24 and suffers a democratic deficit by not allowing 25 members of parliament to be engaged in that process</p>
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<p>1 to modify the treaty as this treaty empowers them 2 to do and which they are entitled to do. 3 Now, Canada has raised issue -- 4 sorry, go back. We have also raised an issue with 5 respect to another approach of the most-favored 6 nation treatment obligation, and that deals with 7 better treatment provided by Canada and other 8 investment treaties. 9 Canada is a party to many 10 bilateral investment treaties with non-NAFTA member 11 states. These treaties state a fair and equitable 12 treatment obligation in terms that are similar or 13 even broader than NAFTA Article 1105. However, 14 Canada and the other parties to these treaties have 15 not negotiated interpretive notes or other 16 instruments that are claimed to narrow the meaning 17 of fair and equitable treatment in the treaty 18 itself. 19 If and to the extent that this 20 Tribunal might accept the invocation of the notes 21 of interpretation, as suggested by Canada, to 22 actually operate to narrow Article 1105 obligations 23 to provide lesser treatment, then that same 24 invocation would result in less favourable 25 treatment being provided by Canada to the investor</p>	<p>1 the facts in this claim, there are clearly 2 violations of NAFTA that are inconsistent with the 3 obligations contained in NAFTA Article 1105, even 4 under the narrow and erroneous NAFTA analysis 5 presented by Canada. 6 Canada contends that this Tribunal 7 should apply the test as reflected in Glamis to 8 Article 1105. 9 The test from Glamis is 10 effectively that of the 1920s decision of the US 11 Mexico claims commission in Neer, that a breach 12 only amounts to a breach if it is egregious and 13 shocking, but the Glamis tribunal noted that the 14 conduct that might be found shocking or egregious 15 today could be different than from the time of 16 Neer. 17 So for Glamis, it is a 18 contemporary community standard of propriety that 19 govern, even on what we would find to be an 20 impossible view that customary international law 21 has not evolved from that time. 22 We don't have time for me to -- 23 this is one of my favourite topics. I gave a 24 lecture in it earlier this year at the European 25 University Institute. You could get me really</p>
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<p>1 under NAFTA than to investors of non-NAFTA state 2 parties, in violation of the most-favored nation 3 obligation in NAFTA Article 1103. 4 We set out this argument in 5 paragraphs 97 to 101 of the investors' response to 6 the Article 1128 submission, and here we set out 13 7 investment treaties where Canada provides a better 8 level of international law standard of treatment to 9 investments of foreign investors. 10 We should have a slide here that 11 sets out a list of Canada's treaties with these 12 particular formulations. All of these treaties are 13 in force, and the Canadian treaty office has 14 confirmed the validity of these treaties and these 15 obligations. 16 So the application of the MFN 17 clause in this way is consistent with the object 18 and purpose of the NAFTA. That has a comprehensive 19 economic integration, such as the Pope & Talbot 20 tribunal noted, could not be consistent with a 21 lower standard of treatment under treaties with 22 states with much less close and less interdependent 23 economic relations. 24 Now, I would like to turn to the 25 issue of the threshold for a breach. In light of</p>	<p>1 rolling. I am going to contain myself, because you 2 have imposed time limits on me. 3 However, Canada's position does 4 not take into account any of the more recent 5 interpretations of NAFTA Article 1105. NAFTA 6 practice reflecting Article 1105 is identified by 7 the Tribunal in Waste Management II, which 8 expressed the standard as being one that does not 9 require a claimant to reach the Neer level of 10 egregious and shocking. Instead, relying on 11 numerous previous NAFTA awards, the tribunal 12 endorsed a standard commensurate with the 13 international law standard we have articulated. 14 It is one that protects a claimant 15 from conduct that is arbitrary, grossly unfair, 16 unjust or idiosyncratic, or involves a lack of due 17 process leading to an outcome which offends 18 judicial propriety. 19 In following the Waste Management 20 II standard, this Tribunal should consider the 21 facts as they have been presented in the evidence 22 and render a simple determination. Was the process 23 that Bilcon was subjected to a fair and equitable 24 exercise of Canada's environmental regulatory 25 authority, or was it a politicized process where</p>

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<p>1 science was disregarded, which flew in the face of 2 not only the written legislation, but established 3 norms of environmental review? 4 The Waste Management standard has 5 been identified and adopted by numerous other NAFTA 6 tribunals, such as the Cargill tribunal, the Pope & 7 Talbot tribunal, Mondev, Merrill & Ring and 8 Chemtura. 9 Now, on several occasions in its 10 memorial Canada suggested there should be some form 11 of inference drawn from the failure of the 12 investors to seek redress in a domestic court of 13 Canada. 14 Canada has only raised this issue 15 in connection with NAFTA Article 1105. Canada has 16 rightly not asserted that the exhaustion of local 17 remedies is a condition precedent to the invocation 18 of dispute settlement under NAFTA Chapter 11. 19 Where a special international 20 dispute settlement provision gives an investor 21 direct access to redress at the international level 22 without the need to exhaust local remedies, it is 23 up to that investor to assess the strategy that 24 best serves its needs, and that is likely to be the 25 most fruitful.</p>	<p>1 jurisdictional issues. A number of jurisdictional 2 questions have been raised, but none prevent the 3 investors bringing a meritorious claim pursuant to 4 NAFTA Chapter 11. 5 The first is jurisdiction over the 6 3.9 hectare quarry. Canada suggests that the 7 measures imposed on the 3.9 hectare quarry do not 8 relate to Bilcon. The 3.9 hectare quarry permit 9 was expressly integrated into the April 24th, 2002 10 partnership agreement between Nova Stone and 11 Bilcon. 12 The 3.9 hectare permit was made in 13 contemplation of the 152 hectare project and became 14 a pool of partnership assets, and partnership is 15 defined within the term "enterprise" in the NAFTA, 16 and so it is an investment of an American investor 17 for the purposes of NAFTA Chapter 11. 18 The requirement of NAFTA Article 19 1101 is easy to meet. The failure to grant a 20 licence to operate a 3.9 hectare quarry on April 21 30, 2002 constitutes a measure, which relates 22 directly to the investors and their investments, 23 and there is a legally significant connection 24 between the investors and the measure as described 25 by the Methanex tribunal.</p>
<p>1 It was clear from the witness 2 testimony of Lawrence Smith that the proponents 3 were not necessarily better off seeking judicial 4 review. Mr. Smith was in error, though, when he 5 said there could be an appeal, as there could be no 6 appeal from a Minister's decision with respect to 7 the consideration of environmental assessment of a 8 Joint Review Panel report. 9 What there can be is a judicial 10 review, which is what I assume really that he was 11 referring to, a judicial review which, in Canada, 12 is a limited procedure which would, at best, not 13 result in anything other than remitting the matter 14 to be done again and cannot result in compensation 15 for the losses incurred from the wrongful 16 behaviour. 17 So besides the practical 18 considerations raised by Mr. Smith as to why a 19 proponent might not engage in a domestic legal 20 challenge, there are significant legal impediments 21 that are unique to the Canadian system, and would 22 not arise in other legal regimes in such 23 circumstances, that also would be of some effective 24 consideration in this matter. 25 Now, I would like to turn to</p>	<p>1 So the failure to obtain a permit 2 was directly and specifically related to the 3 investments, and the failure to obtain the permits 4 proved to be fatal to the business of the 5 investors. 6 Let's talk about time. Article 7 14(2) of the ILC articles on state responsibility 8 provides that: 9 "The breach of an 10 international obligation by 11 an act of state having a 12 continuing character extends 13 over the entire period which 14 the act continues and remains 15 not in conformity with the 16 international obligation." 17 Canada's continuous measures 18 extended over the duration of the environmental 19 assessment process beginning with the 3.9 hectare 20 application, all the way to the application for the 21 approval of the quarry when the JRP report was 22 adopted. 23 The critical connection between 24 the smaller and the larger quarries is not 25 contested. From the outset, the primary purposes</p>
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<p>1 of the 3.9 hectare quarry was to gather data about 2 a larger quarry that it was contemplating. 3 As Mr. Buxton stated in his 4 testimony: 5 "That is what we were trying 6 to do for about six years was 7 simply conduct a test blast 8 to provide good, sound 9 empirical data." 10 Bilcon was still continuously 11 hamstrung by regulators and willing to entertain 12 this request to test blast to gather the requisite 13 scientific data that lasted well into January 2007. 14 Bilcon's numerous attempts to 15 obtain the test blast were repeatedly obstructed 16 throughout the entire environmental assessment. 17 When the request ultimately was before the JRP in 18 2007, Bilcon had been trying to obtain the data for 19 five years. 20 It was, in effect, a continuous 21 catch 22, which made it impossible for the investor 22 to ever meet the government-imposed standard of the 23 effects of blasting. 24 You have heard evidence that the 25 Claytons came to Nova Scotia to start a quarry and</p>	<p>1 breach and knowledge of the loss. 2 It is only at the time of the 3 decision by the Minister to deny the Bilcon quarry, 4 with the approval by Canada of the JRP report, that 5 the harm and subsequently the loss or damage could 6 be known. The quarry approval process continued, 7 and the investors had every reason to believe, 8 until 2007, that the environmental assessment 9 process would be carried out in good faith and lead 10 to a successful conclusion. 11 Now I would like to turn to the 12 Joint Review Panel. The actions by the Joint 13 Review Panel are attributable to Canada through its 14 status as an organ of Canada under Article 4 of the 15 articles on state responsibility. 16 Notably, the JRP's appointment by 17 the Government of Canada under statute, the grant 18 of statutory powers, and authority, all relate to 19 ILC Article 4. In addition, Canada's adoption of 20 the JRP's actions and omissions result in 21 responsibility under ILC Article 11. Two different 22 grounds. 23 Canadian courts have also 24 confirmed the Joint Review Panel comes within the 25 meaning of a federal board, commission or other</p>
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<p>1 that the loss of the quarry was not known until 2 December 2007. Continuous and cumulative breaches 3 are of such a nature that only at the end of the 4 series, when the ultimate fate or consequences for 5 an investor or an investment become clear and 6 certain, does the harm or loss from the entire 7 pattern of conduct vest and become known. 8 Indeed, the fate of Bilcon's 9 investment was not known until the regulatory 10 process concluded with the Ministers' respective 11 decisions in 2007. 12 Now, under NAFTA Article 1116(2), 13 a claim cannot be brought after three years once 14 the investor acquires actual or constructive 15 knowledge of the breach, as well as knowledge of 16 the loss. 17 So the complaining party raising a 18 technical defence or as the complaining party 19 raising such a technical defence, Canada has the 20 burden to demonstrate that the investor has 21 acquired knowledge and can be said that the 22 limitation period has begun to run. 23 Canada has not discharged this 24 burden of showing that, prior to June 17, 2005, 25 Bilcon had any actual knowledge of the resulting</p>	<p>1 tribunal under the Federal Courts Act of Canada. 2 The Canadian environmental 3 assessment legislation mandates the Minister to 4 consider the JRP report before making its decision. 5 The Canadian Cabinet accepted the 6 JRP report as a final disposition of the investor's 7 proposal without comment or modification. 8 This was an unambiguous adoption 9 of the JRP report within the meaning of ILC Article 10 11, thereby "acknowledging and adopting the conduct 11 in question as its own". 12 Canada acknowledges that it 13 accepted and supported the ultimate recommendations 14 made by the JRP. The result of this acceptance is 15 an adoption of the JRP's report's principal 16 recommendation to reject the investor's application 17 for a quarry at Whites Point. 18 Now I would like to turn to the 19 issue of mootness. Professor Rankin has addressed 20 this issue of mootness. On day 2, he said, there 21 are two decisions, one federal, one provincial. 22 And the argument was made by 23 Mr. Smith, as I understood it, that after the 24 provincial government had made its decision, no 25 quarry, there really was no point. That is this</p>

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<p>1 question of mootness, that it was all decided by 2 Nova Scotia.</p> <p>3 As Arbitrator Schwartz correctly 4 identified, section 37 of the CEEA would enable the 5 Federal Minister to obtain clarifications from the 6 panel. Bilcon wrote to the Minister to have 7 clarifications in light of the clear factual errors 8 in the report and other serious other procedural 9 concerns.</p> <p>10 Concerns of natural justice and 11 fairness must be addressed in some way. The CEEA 12 process requires a decision by the Minister. The 13 Minister is obligated to make it, and Bilcon is 14 entitled to receive it.</p> <p>15 Canada could have asked the JRP to 16 turn its mind to specific mitigation measures and 17 their costs and benefits, not dogmatically or 18 sweepingly assuming that all mitigation would be 19 ineffective.</p> <p>20 Canada's omission to do this and, 21 instead, its unqualified and unconsidered adoption 22 of the JRP report, caused significant harm to the 23 investor. Canada closed off the possibility of a 24 modified JRP report on the basis of which a range 25 of alternative options might have arisen that would</p>	<p>1 "A plea that the arbitral 2 tribunal does not have 3 jurisdiction shall be raised 4 not later than the statement 5 of defence or, with respect 6 to a counterclaim, in the 7 reply to the counterclaim." 8 Of course Canada didn't make a 9 counterclaim in this case, so Article 21 required 10 Canada to file any jurisdictional challenges on 11 this point by its statement of defence. 12 Canada filed the statement of 13 defence on December 18th, 2009. So it is almost 14 four years too late to raise this new argument. In 15 any event, we note for the Tribunal that 16 information about corporate officers and directors 17 is a matter of public record that was always 18 available to Canada. 19 Also, Canada had the ability to 20 make interrogatories and used the ability to make 21 interrogatories in this case, chose not to make an 22 interrogatory in this area. 23 The evidence is also clear that 24 this was a family business run by William Clayton, 25 Sr., for the benefit of his children.</p>
<p>1 have not required the investor simply to get out of 2 the country.</p> <p>3 Based on the modified report with 4 a detailed analysis of mitigation, and its costs 5 and benefits, both levels of government might have 6 reconsidered and might have accepted the project to 7 go ahead on a conditional, limited or modified 8 basis until all the relevant environmental and 9 related effects were better understood with 10 requirements for monitoring and review.</p> <p>11 Indeed, in almost every case, this 12 has been exactly what has happened where the JRP 13 has identified significant environmental risks.</p> <p>14 Now, during day 4 of the hearing, 15 if you will recall, Canada first raised an issue as 16 a point of procedure about William Clayton, Sr., 17 not being a director of Bilcon.</p> <p>18 I would like to turn to that. If 19 this is indeed to be a jurisdictional defence by 20 Canada, which it appears that it is, then the 21 UNCITRAL arbitration rules provide that all 22 jurisdictional defences must be raised not later 23 than the filing of the statement of defence.</p> <p>24 Paragraph 3 of Article 21 of the 25 UNCITRAL rules states:</p>	<p>1 Mr. Clayton, Jr., testified that 2 Mr. Clayton, Sr., funded the investment in Nova 3 Scotia and he continues funding the ongoing 4 operation, and that his father was involved.</p> <p>5 The documents on the record also 6 indicate that the government was aware that the 7 investment was being made by the Clayton family: 8 For example, the letter of intent from Ralph 9 Clayton and sons to Nova Stone, which is document 10 C-5; the letter from Ralph Clayton and sons to the 11 Honourable Gordon Balser of August 2002, which was 12 Exhibit 2 to Mr. Buxton's witness statement; a 13 letter to Minister Morash, which is Exhibit 9 of 14 Bill Clayton, Jr.'s, witness statement and that is 15 October 24th, 2003.</p> <p>16 There is also evidence from 17 Mr. Buxton on the transcript of day 1 at page 226 18 and from Mr. Lizak's testimony that Bill Clayton, 19 Sr., met with Minister Balser in Nova Scotia. This 20 is also on the record in the affidavit of William 21 Clayton, Jr., at paragraph 16 and 17.</p> <p>22 Now, the term "investment in the 23 NAFTA" is in Article 1139 of the NAFTA. It 24 provides a long list of items that can constitute 25 an investment. Canada has only focussed on one of</p>
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<p>1 many items in that long list.</p> <p>2 An investment includes an equity</p> <p>3 shareholding; a loan to an enterprise where the</p> <p>4 enterprise is an affiliate of the investor; real</p> <p>5 estate or other property, tangible or intangible,</p> <p>6 acquired in the expectation or used for the purpose</p> <p>7 of economic benefit or other purpose.</p> <p>8 It is a broad definition, and the</p> <p>9 term is clear that it was always intended to be</p> <p>10 broad. We know this was a family business.</p> <p>11 Mr. Clayton, Sr., has investments that would</p> <p>12 qualify under NAFTA Article 1139. He is an American</p> <p>13 investor with an investment defined in NAFTA</p> <p>14 Article 1139.</p> <p>15 To the extent that this issue is</p> <p>16 about the damage suffered by Mr. Clayton, Sr., this</p> <p>17 is in our view a matter to be considered in the</p> <p>18 damages phase.</p> <p>19 Now, it is not, though, a</p> <p>20 jurisdictional objection and it is entirely</p> <p>21 inappropriate for such an issue to be brought in</p> <p>22 the middle of the witness phase of this hearing at</p> <p>23 such a late date, and, in our view, cannot under</p> <p>24 the UNCITRAL arbitration rules be considered at</p> <p>25 this time.</p>	<p>1 1102 or 1103 breach?</p> <p>2 MR. APPLETON: Professor Schwartz,</p> <p>3 I am going to think about that and I will deal with</p> <p>4 it in the rebuttal.</p> <p>5 I will point out that, of course,</p> <p>6 one of the other parts of this process was that, in</p> <p>7 the cumulative effects, the cumulative effects that</p> <p>8 are raised by the panel is the cumulative effect of</p> <p>9 a foreign investor being able to operate and having</p> <p>10 the benefit of being a foreign investor in the</p> <p>11 NAFTA, and to the tribunal that would mean that all</p> <p>12 types of future effects would take place.</p> <p>13 Now, we know, because we know what</p> <p>14 NAFTA means and that could not be correct. The</p> <p>15 government told them that couldn't be correct. The</p> <p>16 JRP had its own expert that told them that couldn't</p> <p>17 be correct.</p> <p>18 But despite hearing that again and</p> <p>19 again, they then use a totally impermissible,</p> <p>20 discriminatorily-based focus on the foreign</p> <p>21 nationality of this investor and the investment to</p> <p>22 be able to base that.</p> <p>23 But I will look at that particular</p> <p>24 section and come back to you with respect to that</p> <p>25 in the rebuttal phase.</p>
<p>Page 128</p> <p>1 I will conclude, Mr. President and</p> <p>2 Members of the Tribunal, that the damage suffered</p> <p>3 by the Clayton family is indeed substantial and was</p> <p>4 caused entirely by Canada failing to accord them</p> <p>5 the protection of fairness and equality, and the</p> <p>6 protections that we get from NAFTA Article 1102 and</p> <p>7 1103. These are all protections of the NAFTA</p> <p>8 guarantees to American investors operating in</p> <p>9 Canada.</p> <p>10 With that, I thank you very much</p> <p>11 for your attention today. I am happy to take any</p> <p>12 questions that you might have.</p> <p>13 PRESIDING ARBITRATOR: Thank you,</p> <p>14 Mr. Appleton, are there any questions:</p> <p>15 QUESTIONS BY THE TRIBUNAL:</p> <p>16 PROFESSOR SCHWARTZ: You have</p> <p>17 spoken about the atmosphere at the hearings, and so</p> <p>18 on and so forth, but in the substantive report</p> <p>19 issued by the JRP there is some discussion of</p> <p>20 relative benefits and burdens with respect to the</p> <p>21 investor as opposed to the local community and the</p> <p>22 region.</p> <p>23 Is it your view that that</p> <p>24 substantial analysis is outside of a proper</p> <p>25 environmental assessment or that it constitutes an</p>	<p>Page 130</p> <p>1 PROFESSOR SCHWARTZ: Now, I</p> <p>2 understand at this stage, if there were any</p> <p>3 damages -- if there was a wrong and if there were</p> <p>4 any damages -- we would not quantify them, but we</p> <p>5 would address principles of damages; right?</p> <p>6 MR. APPLETON: That would be my</p> <p>7 understanding, as well.</p> <p>8 PROFESSOR SCHWARTZ: If there was</p> <p>9 a process failure, is it possible that the guiding</p> <p>10 principle of damages would be the money lost on an</p> <p>11 improperly-conducted process, rather than</p> <p>12 speculating whether the outcome would have been</p> <p>13 positive?</p> <p>14 MR. APPLETON: The issue of</p> <p>15 damages is in its own world or its own set of</p> <p>16 issues.</p> <p>17 It would seem to us certainly,</p> <p>18 applying the standard principles of the calculation</p> <p>19 of damages, that there would be an area of damage</p> <p>20 that would result to an improper process. There</p> <p>21 also would be an area of damages that would result</p> <p>22 from the inability to be able to operate, and that</p> <p>23 could be dealt with by way of discounted cash flows</p> <p>24 and other types of scenarios.</p> <p>25 So there are people who are</p>

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<p>1 significantly smarter than me who spend their lives 2 worrying about such matters, and should we have 3 that opportunity, I am sure they would love to 4 educate all of us as to how to deal with it.</p> <p>5 But the answer is the process 6 would be, generally, but for the action, what would 7 the damages have been? That is the general 8 principle of reparation here, and so we think that 9 would probably be -- this is really an issue to be 10 discussed at another time.</p> <p>11 But I understand the 12 consideration, and, yes, certainly we would have 13 damages with respect to this process, I am sure.</p> <p>14 PROFESSOR SCHWARTZ: Thank you. 15 PROFESSOR MCRAE: Mr. Appleton, 16 you mentioned this question of this jurisdictional 17 issue about the 3.9 hectare quarry, and I heard 18 your arguments and obviously the Tribunal has to 19 make a decision.</p> <p>20 I am asking a bit of a 21 hypothetical, but I think it is something that is 22 worth considering, and that is, most of the 23 blasting and the setback issues relate to the 3.9 24 hectare quarry.</p> <p>25 If the Tribunal was to conclude</p>	<p>1 first, on behalf of our team and the Government of 2 Canada to thank each member of the Tribunal, 3 Mr. Pulkowski and Ms. Claussen for all of the work 4 that has been put into the hearing. We recognize 5 the many hours that have been devoted to the case 6 and we appreciate the interest and the thoughtful 7 questions that the Tribunal has asked.</p> <p>8 Thank you also to Ms. Forbes, our 9 court reporter, and her team for staying with us 10 through some long days and who did a superlative 11 job in ensuring that the transcripts were turned 12 around to the parties as quickly as possible; and 13 finally, thank you to the Arbitration Place and its 14 technical staff for hosting such an efficiently run 15 hearing.</p> <p>16 I want to also now briefly provide 17 you with an overview of Canada's closing argument, 18 but before I do so, I want to turn back to those 19 three overarching considerations that I asked you 20 to keep in mind on the very first day of this 21 hearing, and to recall them in light of the 22 evidence that's been presented over the past seven 23 days.</p> <p>24 You can see those considerations 25 on the screen.</p>
<p>Page 132</p> <p>1 that it did not have jurisdiction in respect to the 2 3.9, does that rule out all of this material 3 relating to blasting, or is that in some other way 4 still relevant to the rest of the case?</p> <p>5 MR. APPLETON: Why don't we -- it 6 is a very good question. Why don't we consider a 7 little bit about this and come back to you.</p> <p>8 I think I know what my answer is, 9 but I think we would like to talk about it.</p> <p>10 PROFESSOR MCRAE: Okay, thank you. 11 PRESIDING ARBITRATOR: That gets 12 us to the very short lunch break that we are going 13 to have. It is 11:50 on my watch. So we will 14 start again, and please be back in time at 12:20. 15 12:20, and we will go to the respondent's closing 16 argument statement. Thank you.</p> <p>17 --- Luncheon recess at 11:49 a.m. 18 --- Upon resuming at 12:20 p.m.</p> <p>19 PRESIDING ARBITRATOR: Okay. I 20 think we are ready. Kathleen, we are fine? Thank 21 you. So, Mr. Little, you have the floor.</p> <p>22 SUBMISSIONS BY MR. LITTLE: 23 MR. LITTLE: Thank you, Judge 24 Simma. 25 I want to take the opportunity,</p>	<p>Page 134</p> <p>1 With respect to the first 2 overarching consideration, whether the claimants 3 have proven the facts they must to make out their 4 claim, well, the claimants have now had the 5 opportunity to cross-examine six of Canada's fact 6 witnesses who swore affidavits to explain the 7 decisions made in the Whites Point EA process. 8 They have also had the opportunity to cross-examine 9 Canada's expert witness, Mr. Smith, who has 10 provided his opinion as an EA practitioner that all 11 of these decisions were reasonable and fair.</p> <p>12 Now, the cross-examinations honed 13 in on a remarkably small selection of documents, 14 and implied that government decision-making in the 15 Whites Point EA was infected by Ministerial 16 meddling and improper political considerations 17 imposed from above.</p> <p>18 But the claimants ignored the 19 crucial facts. The claimants chose not to 20 cross-examine the one person they appear to 21 orchestrating the predetermined outcome for Whites 22 Point EA, former Minister Robert Thibault.</p> <p>23 Mr. Thibault swore an affidavit in 24 the arbitration, testifying that he never directed 25 or interfered with the work being conducted on the</p>

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<p>1 EA, and that his only interest was in a full and 2 fair EA that strictly complied with the rules. 3 While the claimants did 4 cross-examine Mr. Neil Bellefontaine, the former 5 Regional Director-General of DFO in the Maritimes 6 who liaised with former Minister Thibault 7 frequently on the Whites Point project, they chose 8 not to even question Mr. Bellefontaine on his sworn 9 evidence that Minister Thibault never provided 10 Mr. Bellefontaine or his staff with any instruction 11 as to decisions that were to be made in the Whites 12 Point EA. 13 They also chose not to question 14 Mr. Bellefontaine on all of the various scientific 15 concerns that he testified both he and his staff 16 had over the Whites Point project. 17 Now, beyond their clear avoidance 18 of the facts Canada has put before you relating to 19 Minister Thibault's role in the EA, the claimants 20 simply ignore a fundamental and bigger picture 21 facts relating to the size and duration of the 22 Whites Point project, its likely adverse 23 environmental impacts on the biophysical and human 24 environment of the Digby Neck, and the significant 25 public concerns that it engaged.</p>	<p>1 devote considerable attention in this hearing to 2 decisions made over the course of the Whites Point 3 EA that were absolutely irrelevant to the issue of 4 whether or not the Whites Point project could 5 proceed. 6 And we were correct. Now, in this 7 regard, you were presented and provided with four 8 days of cross-examination of Canada's witnesses 9 focussing almost exclusively on decisions made 10 regarding blasting on Nova Stone's small 3.9 11 hectare quarry that wasn't the Whites Point 12 project. 13 Strangely, earlier today Mr. Nash 14 described these decisions made in 2000 and 2003 as 15 checkmate in the Whites Point EA process, which was 16 not concluded until December of 2007. 17 Now, when cross-examination didn't 18 focus on decisions regarding blasting on the 3.9 19 hectare quarry, it fixated on this allegation that 20 the federal government over stepped its 21 constitutional authority in making its preliminary 22 decision that the quarry element of the Whites 23 Point project would be included in the scope of 24 project for the purposes of the Whites Point EA. 25 This was also a central</p>
<p>1 Now, the fundamental facts -- 2 sorry, the Digby Neck was simply not, as 3 Mr. Appleton claims, an industrial zone, 4 characterized by heavy marine traffic. And I 5 explained why in my opening. And the fundamental 6 facts that I just listed off explain why the Whites 7 Point project was assessed as it was by a Joint 8 Review Panel. 9 Finally, the claimants ignore that 10 the decision in the Whites Point project would, in 11 the end, not be approved was also based upon 12 factually reasonable and legitimate findings 13 arrived at through the workings of a JRP process, 14 that is that the project would result in a 15 mitigable adverse environmental effects on the 16 Digby Neck environment. 17 Now, in the end the claimants' 18 unfounded assertions are no substitute for all of 19 the uncontroverted facts that Canada has proffered 20 in the arbitration and today we'll explain why. 21 Now, with respect to the second 22 overarching consideration, that the claimants have 23 focussed on a host of alleged controversies that 24 really don't matter in the end. I noted last 25 Tuesday that we anticipated the claimants would</p>	<p>1 preoccupation of the claimants' expert witnesses, 2 Mr. Rankin and Mr. Estrin. There was nothing 3 improper about DFO's decisions regarding blasting 4 on the 3.9 hectare quarry or its scope of project 5 decisions. But as I noted in our opening statement 6 and I have noted just now, these decisions were of 7 no consequence because they had no bearing 8 whatsoever on the outcome of the Whites Point EA. 9 So as we were at the beginning of 10 last week, we're left today questioning why the 11 claimants have spent so much time and effort 12 questioning these decisions when there were so many 13 other decisions that were germane to the outcome of 14 this process. 15 Finally, the third overarching 16 consideration we wanted you to keep in mind was 17 whether the measures that the claimants complain of 18 can possibly amount to NAFTA violations. 19 Whether made in their pleadings or 20 over the course of the past eight days, the 21 claimants' complaints are, at the most, in the 22 words of Mr. Rankin, "questions of Canadian 23 administrative law". 24 The measures in issue were neither 25 wrongful nor a violation of Canada's NAFTA</p>

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<p>1 obligations. At the most, they might be the 2 subject matter of a domestic judicial review in 3 Canadian courts. And as you described it 4 yesterday, Judge Simma, the elephant in the room is 5 why, if the claimants take such issue with the 6 decisions that were made in the Whites Point EA 7 process, they didn't pursue their judicial remedies 8 in the Canadian courts.</p> <p>9 The measures under attack in this 10 case simply don't belong in this forum, a NAFTA 11 arbitration, and we will explain why in greater 12 detail when we address the claimants' Article 1105 13 claims.</p> <p>14 So as we asked you at the outset 15 of this case, please keep these three overarching 16 considerations in mind as we proceed through our 17 closing statement.</p> <p>18 Now I would like to provide you 19 with an overview of Canada's closing statement. 20 Now, as I indicated, in Canada's opening statement, 21 the legal issues to be decided by the Tribunal in 22 this case fall under three general categories. And 23 we will address these three general categories in 24 our closing as follows.</p> <p>25 As you can see on the screen,</p>	<p>1 Point EA in the order that was articulated by 2 Professor Schwartz.</p> <p>3 In the end our request is going to 4 be that this Tribunal must dismiss the claimants' 5 claims in their entirety with the costs of this 6 arbitration to be awarded to the Government of 7 Canada.</p> <p>8 So I will now turn things over to 9 Mr. Douglas and Mr. Spelliscy who will address the 10 jurisdictional bars to many of the claimants' 11 claims. Thank you.</p> <p>12 PRESIDING ARBITRATOR: Thank you, 13 Mr. Little. Mr. Douglas, you have the floor.</p> <p>14 SUBMISSIONS BY MR. DOUGLAS:</p> <p>15 MR. DOUGLAS: Thank you very much, 16 Judge Simma. The claimants chose not to spend much 17 time on jurisdiction in their opening. I am not 18 going to be as short, but I will move quickly, I 19 think more quickly than I would usually for the 20 sake of time, but if you have any questions at all 21 please by all means interject and ask.</p> <p>22 There are four jurisdictional 23 issues the Tribunal must consider: First, whether 24 Nova Stone's 3.9 hectare quarry permit is a measure 25 relating to the claimants under Article 1101(1);</p>
<p>Page 140</p> <p>1 we're going to first explain why many of the 2 claimants' claims in this arbitration are subject 3 to jurisdictional bars in light of certain 4 threshold provisions of the NAFTA.</p> <p>5 My colleagues, Mr. Douglas and 6 Mr. Spelliscy will be addressing these 7 jurisdictional bars.</p> <p>8 We will then turn the claimants' 9 claims under Articles 1102 and 1103. Here I will 10 explain why the claimants have failed to discharge 11 the burden that they must in making out a claim 12 under these provisions; that is, of demonstrating 13 they were accorded treatment less favourable than 14 other EA proponents that were in like circumstances 15 to them.</p> <p>16 My colleagues Mr. Hebert and 17 Mr. Spelliscy will then respond to the claimants' 18 claim that the government decisions and acts of the 19 JRP, taken in the course of the Whites Point EA, 20 breached Canada's minimum standard of treatment 21 obligation under Article 1105.</p> <p>22 And with reference to the 23 suggestion made by Professor Schwartz yesterday, I 24 will note here that our 1105 submissions will 25 indeed address those three stages of the Whites</p>	<p>Page 142</p> <p>1 Second, whether certain measures 2 that the claimants allege breach the NAFTA are 3 time-barred under Article 1016(2) because they 4 occurred prior to June 17th, 2005;</p> <p>5 Third, whether this Tribunal has 6 jurisdiction under Article 1116(1) to consider 7 measures that could not have caused the claimants 8 any losses;</p> <p>9 And, finally, whether the JRP is 10 an organ of the state such that its actions are 11 attributable to the Government of Canada.</p> <p>12 I will address the first three of 13 these issues. The fourth will be addressed by my 14 colleague, Mr. Spelliscy.</p> <p>15 Before we turn to these, I would 16 like to clear up the issue of burden. Mr. Appleton 17 alleged in his opening that Canada has the burden 18 because it is asserting jurisdictional arguments as 19 technical defences.</p> <p>20 This is incorrect. If you look at 21 Article 1122 of the NAFTA, it is the Article 22 dealing with consent to arbitration, and it clearly 23 states that Canada only consents in accordance with 24 the procedures set out in the agreement.</p> <p>25 The claimant bears the burden of</p>

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<p>1 proving that it has complied with these procedures 2 and that the tribunal has jurisdiction to hear the 3 claims submitted. Numerous awards have confirmed 4 this conclusion.</p> <p>5 I refer you to the decision in 6 Gallo on this point at paragraph 87.</p> <p>7 Thus, the first issue we must look 8 at is whether Nova Stone's 3.9 hectare quarry 9 permit is a measure relating to the claimants under 10 Article 1101.</p> <p>11 Pursuant to NAFTA Article 1101, a 12 tribunal only has jurisdiction to consider measures 13 relating to investors of another party or their 14 investments. Measures that do not relate to 15 investors or their investments cannot be subject, 16 cannot be the subject of a claim under Chapter 11.</p> <p>17 Now, what does "relating to" mean? 18 As the claimants acknowledged in 19 their opening and in their reply memorial, the 20 Methanex decision is the governing law on this 21 question.</p> <p>22 And the tribunal in Methanex found 23 that the phrase "relating to" requires a legally 24 significant connection between the measure and the 25 investment or the investor.</p>	<p>1 significant things. First, the letter of intent 2 was signed after the permit was granted. This 3 means that there was no possible connection between 4 Bilcon and the permit when conditions 10(h) and (i) 5 were created.</p> <p>6 Second. Nova Stone's 3.9 hectare 7 quarry permit was a Canadian investment. Nova 8 Stone is a Canadian company. The 3.9 hectare 9 quarry permit was not a foreign investment made by 10 Bilcon. As Mr. Clayton stated in his testimony, 11 Bilcon of Delaware did not invest in Canada to own 12 and operate a 3.9 hectare quarry.</p> <p>13 Third, the letter of intent is not 14 a partnership agreement between Nova Stone and 15 Bilcon. And there never was a partnership 16 agreement between Nova Stone and Bilcon.</p> <p>17 Fourth, and finally, Bilcon had no 18 rights, no privileges under the permit at any 19 time. The permit was granted to Nova Stone and 20 Nova Stone alone. In fact, Nova Stone was not ever 21 allowed to transfer the permit to Bilcon without 22 Ministerial approval. This is pursuant to section 23 59(1) of the Nova Scotia Environment Act.</p> <p>24 And it was for this reason that 25 Mr. Petrie testified that at all times when the</p>
<p>Page 144</p> <p>1 Thus, the question is whether Nova 2 Stone's 3.9 hectare quarry is a measure that has a 3 legally significant connection to Bilcon of 4 Delaware or its investment, Bilcon of Nova Scotia.</p> <p>5 Now I am going to talk briefly 6 about some confidential information, so I didn't 7 know whether the live feed should be turned off for 8 a moment and perhaps we could turn it back on.</p> <p>9 PRESIDING ARBITRATOR: Give us a 10 second.</p> <p>11 --- Upon commencing confidential session under 12 separate cover at 12:34 p.m.</p> <p>13 --- Upon resuming public session at 12:36 p.m.</p> <p>14 MR. DOUGLAS: We can go back.</p> <p>15 PRESIDING ARBITRATOR: We are 16 back.</p> <p>17 MR. DOUGLAS: Thank you. So let 18 me be clear. We have Nova Stone Enterprises on the 19 one hand and we have their permit on the one hand, 20 and we have Bilcon on the other.</p> <p>21 The only connection between Bilcon 22 and the permit is clause 3(c). And this dynamic 23 continued you throughout the life of the permit 24 until it was terminated on May 1st, 2004.</p> <p>25 This fact tells us four</p>	<p>Page 146</p> <p>1 province and DFO were engaged in a review of 2 blasting under conditions 10(h) and 10(i), they 3 were dealing with Nova Stone, and Nova Stone alone.</p> <p>4 Now, despite all of this, the 5 claimants assert that measures taken pursuant to 6 Nova Stone's 3.9 hectare quarry permit were 7 measures relating to the claimants.</p> <p>8 We heard over the course of the 9 arbitration, the claimants made this assertion that 10 DFO used conditions 10(h) and 10(i) in the 3.9 11 hectare quarry permit to establish a trigger on the 12 larger quarry EA process.</p> <p>13 This, however, is not correct. 14 Conditions 10(h) and 10(i) were not used by DFO to 15 establish a trigger at the larger quarry. DFO did 16 find a trigger on the smaller 3.9 hectare quarry 17 site belonging to Nova Stone. And at that time, 18 the claimants had filed a project description that 19 had swallowed Nova Stone's 3.9 hectare quarry site.</p> <p>20 A finding of a trigger on the -- a 21 finding of the trigger on the first, the smaller 22 site by necessity meant that there had to be a 23 trigger on the second, the larger quarry. However, 24 this does not mean that conditions 10(h) and (i) in 25 Nova Stone's 3.9 hectare quarry permit relate to</p>

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<p>1 the claimants.</p> <p>2 As the record makes clear, the</p> <p>3 permit with the conditions was granted to Nova</p> <p>4 Stone and Nova Stone alone.</p> <p>5 The claimants have next argued</p> <p>6 throughout the course of the past couple of weeks</p> <p>7 that the 3.9 hectare quarry permit is a measure</p> <p>8 relating to Bilcon because DFO withheld setback</p> <p>9 distances in its evaluation pursuant to conditions</p> <p>10 10(h) and 10(i), but these setback distances were</p> <p>11 not withheld from Bilcon. They were not withheld</p> <p>12 from Global Quarry Products. They were withheld</p> <p>13 from Nova Stone Exporters.</p> <p>14 Consider this. If DFO did approve</p> <p>15 blasting pursuant to the 3.9 hectare quarry permit,</p> <p>16 who would get the benefit of that blasting? It</p> <p>17 would not be Bilcon. It would not be Global Quarry</p> <p>18 Products. It would be Nova Stone, because the</p> <p>19 permit belonged to Nova Stone.</p> <p>20 Bilcon had no rights or privileges</p> <p>21 under Nova Stone's permit at any time.</p> <p>22 So the operative document is the</p> <p>23 letter of intent of May 2nd, 2002 between Bilcon</p> <p>24 and Nova Stone Exporters. This document merely</p> <p>25 states that Nova Stone intended to transfer the 3.9</p>	<p>1 But the Article limits the</p> <p>2 exercise of that right. And it says that the</p> <p>3 investor has to act within three years of having</p> <p>4 first acquired knowledge of breach and loss arising</p> <p>5 from that breach.</p> <p>6 And in this case the relevant</p> <p>7 cutoff date is June 17th, 2005.</p> <p>8 Now, the claimants state in their</p> <p>9 reply memorial at paragraph 733, and I quote:</p> <p>10 "Article 1116 (2) recognizes</p> <p>11 the interest of the NAFTA</p> <p>12 parties not to be subject to</p> <p>13 potentially limitless claims</p> <p>14 by a foreign investor for</p> <p>15 measures taken too far back</p> <p>16 in the past."</p> <p>17 Now, Canada agrees with that</p> <p>18 statement. Canada agrees with that statement. But</p> <p>19 let's think about that for a moment in the context</p> <p>20 of this case. In preparation for my closing today</p> <p>21 I went through the claimants' indices to their</p> <p>22 cross-examination binders that they used in their</p> <p>23 cross-examination with our witnesses. I looked at</p> <p>24 Mr. Petrie, Mr. McLean, Mr. Hood,</p> <p>25 Mr. Bellefontaine, Mr. Daly and Mr. Chapman and I</p>
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<p>1 hectare quarry permit to the partnership. That is</p> <p>2 the extent of the relationship between Bilcon and</p> <p>3 Nova Stone's 3.9 hectare quarry permit.</p> <p>4 In Canada's view, the mere</p> <p>5 intention to transfer the permit was not enough to</p> <p>6 establish a legally-significant connection between</p> <p>7 Bilcon and Nova Stone's 3.9 hectare quarry permit.</p> <p>8 It is for this reason the Tribunal does not have</p> <p>9 jurisdiction to hear Bilcon's claims relating to</p> <p>10 the permit pursuant to Article 1101(1).</p> <p>11 Now I am going to move on to the</p> <p>12 next jurisdiction issue which deals with time bar.</p> <p>13 The parties dispute the timeliness</p> <p>14 of four measures in this case. First, the 3.9</p> <p>15 hectare quarry permit, which was terminated on May</p> <p>16 1st, 2004; second was the scoping decision of April</p> <p>17 14th, 2003; third was the comprehensive study</p> <p>18 decision, also of April 14th, 2003; and finally,</p> <p>19 the referral, pardon me, that the quarry and marine</p> <p>20 terminal be referred for referral to a JRP, and</p> <p>21 this occurred on June 26th, 2003.</p> <p>22 NAFTA Article 1116 provides the</p> <p>23 right to investors to sue directly a party to the</p> <p>24 NAFTA. Without the Article, the right</p> <p>25 does not exist.</p>	<p>1 looked through to see how many documents they</p> <p>2 referred to that post-date 2004.</p> <p>3 Out of the hundreds of documents</p> <p>4 they took to Canada's witnesses, two of them</p> <p>5 post-dated 2004. And how many times did we hear</p> <p>6 over the past two weeks for both the claimants'</p> <p>7 witnesses and Canada's witnesses that the witness</p> <p>8 could not remember events being questioned because</p> <p>9 they transpired too far in the past? I didn't look</p> <p>10 through the transcript to count, but I think it was</p> <p>11 often.</p> <p>12 This situation is precisely as the</p> <p>13 claimants themselves state, what Article 1116(2) is</p> <p>14 designed to prevent.</p> <p>15 Now, let's turn to the claimants'</p> <p>16 arguments. They advance three arguments as to why</p> <p>17 their claims are not time-barred. First, they</p> <p>18 argue that the four measures at issue under Article</p> <p>19 1116(2) are each continuing measures; second, they</p> <p>20 argue that continuing measures can toll the</p> <p>21 limitation period under 1116 (2); and finally, they</p> <p>22 argue that they did not have knowledge, nor should</p> <p>23 they have had knowledge, that they incurred loss or</p> <p>24 damage from these measures until the JRP released</p> <p>25 its recommendations.</p>

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<p>1 And I will address each one of 2 these arguments in turn.</p> <p>3 First, are the four measures at 4 issue continuing measures?</p> <p>5 Mr. Appleton argued in his 6 opening -- and the claimants made the same argument 7 in their response to the United States' 1128 8 submission -- that a continuing measure is one 9 where the consequences of the measure are not 10 known. In other words, they argue that a measure 11 continues until its consequences are known. This, 12 however, is not the law.</p> <p>13 Article 14, 1 of the ILC Articles 14 on state responsibility states that a completed act 15 occurs at the moment when the act is performed, 16 even though its effects or consequences may 17 continue.</p> <p>18 The commentary to this ILC Article 19 makes the point more clear. An act does not have a 20 continuing character merely because its effects or 21 consequences extend in time.</p> <p>22 And this was adopted by the NAFTA 23 tribunal in Mondev.</p> <p>24 The claimants are, therefore, 25 wrong. The ongoing effect or ongoing impact of a</p>	<p>1 in their oral submissions, as well. That is that 2 the lack of test blasting pursuant to Nova Stone's 3 3.9 hectare quarry permit was relied on by the 4 Joint Review Panel as a reason to recommend against 5 the approval of the investments' quarry.</p> <p>6 There are three things wrong with 7 this statement.</p> <p>8 First, the lack of test blasting 9 on the 3.9 hectare quarry was not relied upon by 10 the Joint Review Panel as a reason to recommend 11 against the approval of the Whites Point project. 12 The project's inconsistency with community core 13 values was the reason underlying the panel's 14 recommendation.</p> <p>15 This was confirmed by both 16 Mr. Rankin and Mr. Estrin in their testimonies, and 17 it was conceded by Mr. Appleton in his opening 18 statement.</p> <p>19 Second. The claimants did not 20 need a 3.9 hectare quarry permit to conduct a test 21 blast. In fact, Mr. Buxton testified that they did 22 not seek to have Nova Stone transfer them the 23 permit, pardon me, transfer the permit to Bilcon 24 precisely so they could explore the possibility of 25 conducting a test blast during the EA process.</p>
<p>1 measure does not give that measure a continuing 2 character.</p> <p>3 In Canada's submission, none of 4 the four measures at issue are continuing and I 5 will briefly go through each one.</p> <p>6 The first measure is Nova Stone's 7 3.9 hectare quarry permit. Nova Stone terminated 8 the permit on May 1st, 2004. This fact is not in 9 dispute.</p> <p>10 In fact, Mr. Buxton in his 11 testimony acknowledged that it was on this date 12 that the permit became, and I quote, "a dead 13 issue." How could a permit that became a dead 14 issue be a continuing measure?</p> <p>15 It can't.</p> <p>16 The termination of the 3.9 hectare 17 quarry permit came well before June 17th, 2005. 18 This Tribunal therefore has no jurisdiction under 19 Article 1116 to hear claims relating to that 20 permit.</p> <p>21 Now, the claimants tried to get 22 around this fact through a variety of arguments, 23 and I would like to address one here.</p> <p>24 And they make this argument in 25 their memorial at paragraph 757, and have made it</p>	<p>1 Moreover, he testified that the 2 claimants did not need to ask DFO for permission to 3 conduct a test blast.</p> <p>4 And finally, he testified to this 5 Tribunal and to the JRP that Bilcon decided not to 6 make a request to conduct a test blast during the 7 EA process.</p> <p>8 This has been confirmed by 9 Mr. Chapman in his testimony and by other evidence 10 as well.</p> <p>11 Moreover, I note that Mr. McLean 12 swears the same at paragraph 44 of his first 13 affidavit. He was present over the course of the 14 entire JRP process, and yet the claimants chose not 15 to cross-examine Mr. McLean on this paragraph last 16 Friday.</p> <p>17 Final point is that it must be 18 remembered that the 3.9 hectare quarry approval was 19 not for a test blast, but it was for quarrying. 20 Thus, the claimants' assertion that they were 21 prevented from conducting a test blast on the 3.9 22 hectare quarry site is disingenuous. They did not 23 need an industrial approval to conduct a test 24 blast, and the 3.9 hectare quarry approval was for 25 quarrying. Not test blasting.</p>

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<p>1 Thus, despite the claimants' best 2 efforts they have not been able to show that the 3 measures taken pursuant to Nova Stone's 3.9 hectare 4 quarry permit are continuing, there is no 5 connection between the 3.9 hectare quarry permit 6 and the EA process for the larger quarry. 7 The permit terminated on May 1st, 8 2004, well before the cutoff date. 9 Now, let me look at the three 10 other measures that are at issue here, to determine 11 and see whether they are continuing. I will deal 12 with them altogether. This is the scoping decision 13 made on April 14th, 2003, the comprehensive study 14 decision made on the same date, and the referral 15 made on June 16th, 2003. 16 The claimants allege in their 17 pleadings that each of these decisions in and of 18 themselves constitute a breach of the NAFTA. 19 They also argue that they suffered 20 effects and consequences from these decisions. 21 However, the continuing effect of these decisions 22 does not make them continuing measures. 23 Each of these decisions are 24 one-time measures, distinct, instantaneous and 25 completed well in advance of June 17th, 2005.</p>		<p>1 this second argument that the measures are in fact 2 continuing. Even if they are, continuing measures 3 do not toll the limitation period under Article 4 1116(2). 5 Now, in their pleadings the 6 claimants cite the UPS case and the Feldman case to 7 support them, for the sake of time I am not going 8 to go through those decisions. The UPS case is 9 wrong and the Feldman decision does not support the 10 claimants' position. I refer you to paragraphs 239 11 to 248 of Canada's counter-memorial. 12 The point I would like to make is 13 this: The United States, Mexico, and Canada have 14 made it abundantly clear that the decision in UPS 15 is wrong and that continuing measures do not toll 16 the limitation period. 17 Up on the slide this is a 18 submission made by the United States pursuant to 19 NAFTA Article 1128 in another NAFTA case called 20 Merrill & Ring. It was supported by Mexico and 21 Canada in that case. The United States has 22 reaffirmed its position in this arbitration, also 23 pursuant to Article 1128. 24 Leave that up there for a moment. 25 Article 31, sub 3, sub (a) of the</p>	
<p>1 Now, yesterday, Judge Simma, you 2 asked a question about the elephant in the room, to 3 bring it up again: Why were these decisions not 4 judicially reviewed in domestic court? Both 5 Mr. Smith and Mr. Rankin testified that each of 6 these decisions referenced above are justiciable. 7 More importantly, they both 8 testified that under domestic law the limitation 9 period for reviewing these decisions has run its 10 course. The claimants chose not to have these 11 decisions judicially reviewed. 12 The role of a NAFTA Chapter 11 is 13 not to provide a legal backup or safeguard to an 14 investor from the consequences of making this 15 choice. 16 If the time limitation period is 17 up domestically, how is it that the time limitation 18 period would not be up internationally? 19 So just by way of summary on this 20 point, it is Canada's position that none of the 21 four measures are continuing measures. 22 And the claimants confuse that 23 with continuing effects. 24 Now, turning to the claimants' 25 second argument, and here we have to assume for</p>	Page 156	<p>1 Vienna Convention mandates that this Tribunal shall 2 take into account subsequent agreement of the 3 parties. The three NAFTA parties have reached a 4 subsequent agreement on the issue of continuing 5 measures and Article 1116(2). 6 Continuing measures do not toll 7 the limitation period. 8 This is a reasonable 9 interpretation of Article 1116(2), which uses the 10 term "first acquired knowledge", not "last acquired 11 knowledge." 12 Moreover, the claimants in this 13 case had advance notice of the NAFTA parties' 14 subsequent agreement which was made back in 2008. 15 In fact, I believe counsel for the 16 claimants in this case was also counsel for Merrill 17 & Ring. 18 For this reason, Canada submits 19 that the Tribunal should give significant weight to 20 the subsequent agreement of the NAFTA parties. 21 Thus, even if this Tribunal believes that the 22 measures at issue under Article 1116(2) are 23 continuing measures, those measures are nonetheless 24 time-barred by Article 1116(2) because continuing 25 measures do not toll the limitation period.</p>	Page 158

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<p>1 I would like to turn to the 2 claimants' last argument with respect to time bar, 3 and the final argument they raise is that under 4 Article 1116(2) they did not incur loss or damage 5 until the JRP made its final decision.</p> <p>6 Now, you will recall that the test 7 under 1116(2) is about knowledge and that is 8 whether the claimants did know, or should have 9 known that they incurred loss as a result of the 10 breach.</p> <p>11 The claimants argue in their reply 12 memorial that what is required by Article 1116(2) 13 is concrete knowledge of actual loss. And what I 14 take them to mean by that and what I take 15 Mr. Appleton to mean in his opening was that, 16 because they did not incur the full extent of their 17 losses until the JRP reached its decision, they did 18 not have the requisite knowledge of breach and loss 19 until that decision was made.</p> <p>20 This, however, is not the law. 21 The tribunal in Grand River made it clear that 22 damage or injury may be incurred even though the 23 amount or extent may not become known until some 24 future time.</p> <p>25 And the decision in Grand River is</p>	<p>1 MR. DOUGLAS: Thank you. Now, the 2 third and final jurisdictional issue the Tribunal 3 must consider is whether it has jurisdiction under 4 Article 1116(1) to consider measures that could not 5 have caused the claimants any losses. I won't 6 spend long on this, but refer you to Canada's 7 pleadings which is paragraphs 298 to 302 of our 8 counter-memorial, and paragraphs 81 to 87 of our 9 reply memorial.</p> <p>10 Article 1116(1) provides the 11 claimants, provides, pardon me, that investors may 12 only submit their claim to arbitration if the 13 investor has incurred loss or damage by reason of 14 or arising out of the alleged breach of the NAFTA.</p> <p>15 It follows that a measure not 16 capable of causing loss or damage may not be 17 considered by the Tribunal.</p> <p>18 The claimants allege that the 19 federal government's December 17th, 2007 20 determination to accept the recommendation of the 21 JRP wasn't lawful.</p> <p>22 However, the federal government's 23 acceptance of the recommendation was incapable of 24 causing the claimants' loss or damage because one 25 month earlier, on November 20th, 2007, Nova</p>
<p>1 the seminal decision on Article 1116(2). 2 Again, all three NAFTA parties 3 agreed with this interpretation in Merrill & Ring. 4 This also constitutes a subsequent agreement 5 between the parties and should be applied here.</p> <p>6 Moreover it is abundantly clear 7 from the record that the claimants did have 8 knowledge of breach and loss prior to June 17th, 9 2005. Again, going to the measures themselves.</p> <p>10 With respect to the 3.9 hectare 11 quarry permit it was terminated by Nova Stone on 12 May 1st, 2004. Whatever loss or damage incurred 13 from that measure had to be known by the claimants 14 on that date. In fact, Mr. Buxton wrote to NSDEL 15 on June 25th, 2003, advising that there had been 16 "serious financial consequences" for not being able 17 to blast on the 3.9 hectare quarry site.</p> <p>18 And there are other examples of 19 this, as well.</p> <p>20 I am going to discuss some 21 confidential information again so perhaps, just 22 briefly.</p> <p>23 --- Upon resuming confidential session under 24 separate cover at 12:56 p.m.</p> <p>25 --- Upon resuming public session at 12:48 p.m.</p>	<p>1 Scotia's Minister of Environment and Labour already 2 rejected the proposal to construct and operate the 3 quarry and marine terminal.</p> <p>4 Now, the claimants have advanced a 5 number of arguments that Nova Scotia's rejection 6 was not dispositive of their application.</p> <p>7 However, it is clear from the 8 testimony, documents and expert reports that there 9 is no evidence to support this assertion.</p> <p>10 The claimants offered no credible 11 argument to the contrary.</p> <p>12 For this reason, a federal 13 decision was not a measure capable of causing 14 damages to the claimants, and this Tribunal has no 15 jurisdiction to hear that claim pursuant to Article 16 1116(1).</p> <p>17 Now, if there are no further 18 questions, I will turn it over to my colleague, 19 Mr. Spelliscy.</p> <p>20 PRESIDING ARBITRATOR: Professor 21 McRae? 22 QUESTIONS BY THE TRIBUNAL: 23 PROFESSOR MCRAE: I have one 24 question arising out of what you said, Mr. Douglas. 25 You talked about a subsequent agreement evidenced</p>

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<p>1 in the submissions of the NAFTA parties in the 2 Merrill & Ring case. What is the difference 3 between that kind of subsequent agreement and 4 another interpretation? Are they exactly the same 5 thing? Is this another way of doing a note of 6 interpretation, just to all agree on a submission 7 to the, in particular NAFTA case? 8 MR. DOUGLAS: No, it would be 9 Canada's submission that under Article 1131 a note 10 of interpretation is binding and that a tribunal 11 must follow that. 12 Under a subsequent agreement the 13 language of the Vienna Convention is "the tribunal 14 shall take into account". Now with the passage of 15 time, Canada argues there is a solidification of 16 that agreement. 17 So it would be our submission that 18 the more reasonable that agreement is, based on the 19 wording of the provision and the more notice a 20 claimant has about that agreement, then the more 21 binding it should be on a tribunal when 22 interpreting the relevant Article. 23 PROFESSOR MCRAE: So we are free 24 to attribute whatever weight we think is 25 appropriate as to subsequent -- as a so-called</p>	<p>1 appropriateness of considering arbitral decisions, 2 and so on, as a source of understanding what the 3 minimal standard is in customary law; is that 4 correct? 5 MR. DOUGLAS: Do you know who -- I 6 don't want to trump him up too much, but you know 7 who knows a lot about this is my colleague, 8 Mr. Hebert. 9 PROFESSOR SCHWARTZ: Okay, fine. 10 MR. DOUGLAS: Who will be 11 discussing the legal aspects of Article 1105. Now 12 I have set you up for this. So if you wouldn't 13 mind holding on to your question, I am sure 14 Mr. Hebert will be happy to address it. 15 PROFESSOR SCHWARTZ: Thank you. 16 PRESIDING ARBITRATOR: Thank you, 17 Mr. Douglas. Mr. Spelliscy, you have the floor. 18 MR. SPELLISCY: Thank you, and 19 good afternoon. I thank Mr. Douglas. 20 --- Laughter 21 SUBMISSIONS BY MR. SPELLISCY: 22 MR. SPELLISCY: I would like to 23 now transition over to those acts over which the 24 Tribunal has no jurisdiction for a different reason 25 than Mr. Douglas was talking about, and those are</p>
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<p>1 subsequent agreement? 2 MR. DOUGLAS: It would be Canada's 3 interpretation or submission, at least in this 4 case, in respect, with respect to this subsequent 5 agreement, that given that it has been there since 6 2008, given that it is a very reasonable 7 interpretation of Article 1116(2), that it's very 8 persuasive. 9 PROFESSOR MCRAE: Thank you. 10 PROFESSOR SCHWARTZ: Just one 11 point about this whole question of the interpretive 12 note, and so on. I think the parties have probably 13 agreed on this; I just want to confirm. 14 My understanding is note of 15 interpretation says that the 1105 standard is the 16 minimal standard of customary international law. 17 And functionally everybody seems 18 to argue how to interpret that on the basis of, 19 largely on the basis of an accumulated body of 20 international arbitral decisions. 21 Now as I understand it, judicial 22 opinions are a legitimate subsidiary source of 23 determining customary international law. So even 24 though the idea is minimum standard under state 25 practice, there is no question of the</p>	<p>1 because they are not the acts of the Government of 2 Canada. 3 Now, the claimant in its argument 4 touched on this really in passing, but as it is an 5 important matter of international law, I hope the 6 Tribunal will afford me some time to do this in a 7 more careful and structured manner so that we 8 understand exactly what legal obligations we're 9 talking about here. So I am going to take a little 10 bit more time. 11 Under Article 1101 of the NAFTA, 12 and there appears to be no dispute here, the 13 obligations in Chapter 11 apply only to measures 14 that are adopted or maintained by a party, in this 15 case, Canada. 16 So the question that this Tribunal 17 has to ask itself when measures are challenged, 18 when actions are challenged, is: Are those 19 measures of the Government of Canada? 20 Now before we launch into a 21 discussion of what the international law is with 22 respect to when measures can be attributed to a 23 state, I do want to pause just to highlight what we 24 are and are not disputing here. 25 We do not dispute that the</p>

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<p>1 government decisions that Mr. Douglas just spoke 2 about, these are measures attributable to the 3 Government of Canada.</p> <p>4 And because it was raised briefly 5 in the claimant's submission, we also to make clear 6 we do not dispute that the Government of Canada is 7 responsible for both it and Nova Scotia's deciding 8 not to allow this project to proceed or not to 9 issue the authorizations based on the conclusion, 10 based on the determination of those government 11 decision-makers, that the project was inconsistent 12 with community core values. We don't challenge 13 that, of course, they can bring a claim against 14 that decision.</p> <p>15 However, the claimants in their 16 written submissions, at least, have also challenged 17 other actions of the Joint Review Panel and we have 18 heard about them here. They have challenged the 19 way the JRP organized and conducted the written and 20 oral phases of the information-gathering process 21 that it was asked to do, and they also challenged 22 how the JRP made its recommendations, how it 23 drafted its report.</p> <p>24 They have challenged those as -- 25 in the pleadings, at least, characterized as</p>	<p>1 actually more relevant to a consideration of some 2 of those other Articles than they are to Article 4 3 and Article 11, so I am going to turn, even though 4 only Article 4 and 11 were addressed today, I am 5 going to take this in more of a structured 6 approach. I will take us through each one of these 7 various Articles and the international law 8 obligations it creates.</p> <p>9 So if we start with Article 4. 10 Article 4 establishes the default rule in 11 international law that a state is responsible for 12 the acts of its organs.</p> <p>13 Now, an organ is a concept at 14 international law that is left undefined, and 15 intentionally so, because it is not considered 16 possible to define all the ways in which a state 17 may internally organize itself. But we do know from 18 the jurisprudence of the International Court of 19 Justice there are generally two types, de jure 20 organs and de facto organs.</p> <p>21 The former, de jure organs, is 22 generally what is thought of as described in 23 paragraph 2 of the ILC Articles: 24 "An organ includes any person 25 or entity which has that</p>
<p>1 breaches themselves of the NAFTA.</p> <p>2 They are not breaches because they 3 are not, those actions are not attributable to 4 Canada.</p> <p>5 So now let me go and explain in a 6 little more detail, in terms of the international 7 law on this, why.</p> <p>8 The general grounds for 9 attributing conduct to a state or often referred to 10 as described in the International Law Commission's 11 Articles on state responsibility.</p> <p>12 Now, for the purposes of this 13 claim, at least in their submissions, the claimant 14 had identified four potential Articles. Today they 15 only identify two. Today they mentioned Article 4, 16 which is conduct of organs of a state, and Article 17 11 which is conduct acknowledged and adopted by a 18 state as its own.</p> <p>19 In their written submissions they 20 also referred to Article 5, which is conduct of 21 persons or entities exercising elements of 22 governmental authority, and Article eight, which is 23 conduct directed or controlled by a state.</p> <p>24 And actually I think some of the 25 facts that were being raised by the claimants are</p>	<p>1 status in accordance with the 2 internal law of the state."</p> <p>3 It seems that the claimants, 4 although I am not sure that I was clear, are 5 primarily focussing on this aspect of whether or 6 not the JRP is an organ of Canada.</p> <p>7 First let me just say, the mere 8 fact that an entity is created by a statute does 9 not in and of itself make it an organ of 10 government.</p> <p>11 The claimants' main arguments here 12 seem to focus on the fact that the JRP must be 13 considered a de jure organ of Canada, based on the 14 fact that Canadian courts are entitled under 15 Canadian law to review its decisions.</p> <p>16 We don't dispute that. It is well 17 known. In fact, as has constantly been discussed, 18 there is a question in this case as to why it 19 wasn't done. However, at Canadian law the Supreme 20 Court itself has recognized that merely because an 21 entity is subject to judicial review in Canada does 22 not mean that it is a part of government.</p> <p>23 If we look at the McKinney case, 24 this is a quote we see. And it is talking about a 25 university being a statutory body created by</p>
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<p>1 statute performing a public service, but it may be 2 to judicial review.</p> <p>3 And if we look at the very last 4 sentence of that, it says:</p> <p>5 "The basis of the exercise of 6 supervisory jurisdiction by 7 the courts is not that the 8 universities are government, 9 but that they are public 10 decision-makers."</p> <p>11 It says:</p> <p>12 "The fact that a university 13 performs a public service 14 does not make it part of 15 government."</p> <p>16 So we would submit to you that the 17 mere fact that an entity is subject, that the 18 Canadian legal system has chosen to make an entity 19 subject to judicial review does not make that 20 entity an organ, a de jure organ of the Government 21 of Canada.</p> <p>22 The second class of organs what 23 are referred to as de facto organs, and the ICJ, 24 the International Court of Justice, explained this 25 concept in the genocide convention case.</p>	<p>1 appropriateness of the room.</p> <p>2 And he further confirmed that it 3 was his understanding, while he wasn't involved, 4 but his understanding that these panel members 5 wrote the report themselves.</p> <p>6 This is not a relationship of 7 dependence and control sufficient to meet the test 8 to be a de facto organ at international law.</p> <p>9 Now, where an organ is not -- 10 where an entity is not an organ of government, 11 international law imposes relatively strict 12 conditions on when its acts will be attributable to 13 the state.</p> <p>14 Here I want to turn now to Article 15 5 of the International Law Commission's rules, even 16 though it wasn't mentioned today.</p> <p>17 Under Article 5, the acts of a 18 private entity are attributable to the state if is 19 it exercising delegated governmental authority, and 20 the act is done in the exercise of that authority.</p> <p>21 In this case, the claimants, in 22 their written submissions at least, have alleged 23 that the Joint Review Panel was performing the 24 information-gathering stage of the EA and therefore 25 that that is an exercise of governmental authority</p>
<p>Page 172</p> <p>1 It explained, a de facto organ is 2 an entity that may be equated with a de jure organ 3 because, and if we go to that case, it acts in such 4 complete dependence on the state and under its 5 essentially complete control, meaning it is merely 6 an instrument of that state's policy.</p> <p>7 In this context, the International 8 Court of Justice explained that a finding of 9 something as a de facto organ would only occur in 10 exceptional circumstances.</p> <p>11 Now let's consider the Joint 12 Review Panel. The Joint Review Panel is not in 13 complete dependence on Canada, and nor is Canada in 14 complete control. In fact, a relationship of such 15 complete dependence and complete control would be 16 antithetical to the very nature of joint review 17 panels, which are supposed to be independent bodies 18 from government.</p> <p>19 And if we look at some of the 20 evidence that has come out in this case, 21 Mr. Chapman confirmed in his testimony that the 22 panel in this case acted independently. He said 23 that they developed all of their own questions, had 24 particular views on everything from the schedule 25 for the scoping meetings that were held to the</p>	<p>Page 174</p> <p>1 and its acts are attributable to Canada under this 2 test.</p> <p>3 They are wrong.</p> <p>4 In particular, if we look at what 5 they have alleged, they said that the 6 governmental -- and this is a slide from paragraph 7 715 of their memorial -- that the governmental 8 authority exercised in this case related to the 9 determination of the agenda, the calling of 10 witnesses, the allocation of time for witnesses, 11 control of the hearings, and the activities 12 involved in making recommendations.</p> <p>13 Here, I think it is important to 14 distinguish between an entity that performs a 15 public service and an entity that exercises 16 governmental authority.</p> <p>17 I think this distinction was best 18 explained or at least appropriately explained in 19 the Jan de Nul v. Egypt in which that considered 20 measures of the Suez Canal Authority in Egypt.</p> <p>21 As that Tribunal explained, what 22 matters is not the service publique element, but 23 the use of the prérogatives de puissance publique, 24 or governmental authority.</p> <p>25 There is a distinction between</p>

<p style="text-align: right;">Page 175</p> <p>1 these concepts. 2 Now, there is no question that the 3 JRP was performing a valuable and needed public 4 service in undertaking the steps that it did in the 5 EA process. 6 That included evaluating the 7 information that came in and making a 8 recommendation to government. 9 But this service was not an 10 exercise of governmental authority, not in the 11 exercise of the public power. 12 And to think about that, in this 13 case there is no dispute that the ultimate public 14 power here was the issuance of authorizations 15 requested, or the assurance of the permit under 16 Nova Scotia to proceed. That final decision was 17 made by government. The Joint Review Panel did not 18 exercise delegated governmental authority in that 19 regard. 20 As Mr. Rankin in his testimony 21 confirmed yesterday: 22 "The Ministers make the 23 decision under this 24 legislation. All they get is 25 a recommendation."</p>	<p style="text-align: right;">Page 177</p> <p>1 power to enforce the 2 attendance of witnesses and 3 to compel them to give 4 evidence as a court of 5 record." 6 Now, forcing witnesses to attend a 7 hearing and forcing subpoenas, forcing summonses, 8 this is a classic example of public power, of 9 governmental authority. 10 Organizing proceedings, 11 determining sequence of talking, that is not an 12 exercise of governmental authority. 13 None of the acts complained about 14 that, we looked at the paragraph from the 15 claimants' memorial, none of the acts complained 16 about relate to any of the elements of this 17 delegated governmental authority. Why? Because 18 this Joint Review Panel didn't exercise it. 19 The Joint Review Panel never 20 issued a summons. It never issued a subpoena. So 21 these are the elements of delegated governmental 22 authority. 23 And accordingly, because they were 24 not exercised, because they are not challenged as a 25 breached, Article 5 doesn't apply here.</p>
<p style="text-align: right;">Page 176</p> <p>1 Now, in its oral submissions 2 today, the claimant made reference to the fact 3 that, in fact, the government is mandated to 4 consider the Joint Review Panel report and that 5 somehow this was relevant to the question of 6 attribution. 7 Again, it is not. 8 They are not mandated to accept 9 it. It is simply a recommendation. The JRP 10 exercises no delegated governmental authority in 11 regards to governmental decision-making. 12 And I think here, to understand a 13 little bit about the distinction between public 14 service and governmental authority, if we turn to 15 section 35 of the Canadian Environmental Assessment 16 Act, we will see whether where, in fact, JRPs are 17 delegated certain aspects of governmental 18 authority. 19 In this section, the government 20 delegates to a Joint Review Panel the power, for 21 example, to summon witnesses and to enforce those 22 summons as if it was a court of law. 23 And you see that enforcement 24 powers in paragraph 35(2) there: 25 "A review panel has the same</p>	<p style="text-align: right;">Page 178</p> <p>1 The claimants claim for the first 2 time in their reply -- and seem to drop it here -- 3 but that also Canada is responsible for the acts of 4 the ICJ, or sorry, of the JFP -- too many 5 acronyms -- because of Article 8 of the Rules on 6 State Responsibility, which is the Article relating 7 to acting under the instructions or effective 8 control. 9 Now again, this Article was 10 expressly considered in the genocide convention 11 case by the International Court of Justice, where 12 it explained that: 13 "In order to meet this test, 14 it would have to be shown 15 that the entity in question 16 acted under the effective 17 control of the government and 18 that such control or 19 instructions were given in 20 respect of each operation in 21 which the alleged violations 22 occurred." 23 Again, we've heard discussion 24 about how the JRP didn't -- acted in violation of 25 international law by violating the minimum standard</p>

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<p>1 of treatment by not talking about mitigation 2 measures, that it acted in violation of 3 international law by not controlling the 4 participants, by not shutting them down. 5 There is no evidence of any 6 government instruction of the Joint Review Panel in 7 that regard. We heard mention just a few hours ago 8 or an hour or so ago about guidance or 9 instructions. 10 The Joint Review Panel, it had a 11 term of reference. No question. But terms of 12 reference are the sort of generalized instructions 13 that are not enough under international law to 14 accord state responsibility. There has to be 15 specific instruction with respect to the acts in 16 question. 17 Finally, the claimants also argued 18 for the first time in their reply and here today, 19 that Canada has acknowledged and adopted the 20 conduct of the Joint Review Panel as its own. 21 Again, the relevant Article here 22 is Article 11 of the International Law Commission's 23 Articles. 24 That Article relates to basically 25 a catch-all, if in fact you acknowledge -- and it</p>	<p>1 process, there is no acknowledgement and adoption 2 of any of the conduct which the claimants claim, in 3 that information-gathering process was, in fact, a 4 breach of Canada's obligations under NAFTA. 5 Accordingly it would be our 6 submission there is no basis at international law 7 for the Tribunal to find that the acts of this 8 independent Joint Review Panel of which the 9 claimants complain are attributable to Canada such 10 that they could constitute a breach of NAFTA 11 Chapter 11. 12 Now, before I ask if there are any 13 questions, I do want to acknowledge that you have 14 heard the claimants' response to our challenge to 15 the inclusion of Clayton, Bill Clayton, Senior in 16 this claim. You have our submission on this. I 17 don't think that I need to say anything in response 18 to what I have heard. If you have questions, I 19 would be happy to answer those as well, but you 20 have our submission. I don't intend to say 21 anything else on it. So now, if there are no other 22 questions on attribution...? 23 PRESIDING ARBITRATOR: Do we 24 have...colleagues have questions on attribution? 25 I don't have a question on</p>
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<p>1 says: "acknowledge and adopt the conduct in 2 question as its own." So there is two points. It 3 has to be the conduct in question. 4 Again, what we're talking about 5 here and now we have to look at what was accepted 6 in the report. And I would say that the mere fact 7 that Canada and Nova Scotia accepted the 8 recommendation with respect to the impact on 9 community core values, the fact that it accepted 10 it, is not an acknowledgement and adoption of the 11 Joint Review Panel's conduct in reaching that 12 recommendation in all of the aspects complained 13 about by the claimants. That is not even mentioned 14 in the government decision-making. 15 If we look to the commentaries 16 were provided on this ILC Article, they 17 specifically say at the end that the language of 18 adoption carries with it the idea that the conduct, 19 the conduct, is acknowledged by the state as, in 20 effect, its own. 21 That did not happen here. 22 Again, we're not talking about the 23 government decision with respect to refuse to issue 24 the authorizations. That is a government decision. 25 But the Joint Review Panel</p>	<p>1 attribution, but I have an uneasy feeling; I just 2 thought that if a state managed under the same 3 regime, under the same limits, et cetera, to 4 establish not a Joint Review Panel but some, a body 5 in order to kill political opponents, I would 6 rather start my, let's say, march through Articles 7 4 to 1 anew. 8 You know, if you took the 9 substance out of the JRP, which of course the 10 substance is great. I mean you look into the 11 question of whether damage would occur, et cetera, 12 if you give it an evil purpose and apply the same 13 legal regime around it and argued as you did, you 14 probably would have a bad conscience, wouldn't you? 15 MR. SPELLISCY: I am not sure you 16 would have a bad conscience. We have to remember 17 what international law is doing here and the limits 18 we want to place on actions of private entities 19 that are in fact attributable to states. 20 So I think, in the example in 21 question, it would depend very much on what, in 22 fact, the instructions or the guidance of the state 23 was. If this body was created, guided, instructed 24 by a state, then yes; I think we would say that in 25 those specific acts it is responsible.</p>

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<p>1 PRESIDING ARBITRATOR: So we would 2 follow Nicaragua, in the sense that even the court 3 came out and said the US is not responsible for the 4 Contras in the sense they were not their own 5 organs. But of course the US did not exercise due 6 diligence, or you know, kind of -- so that would be 7 the analogy?</p> <p>8 MR. SPELLISCY: I think it is not 9 just Nicaragua in that case. I think it is also 10 similar in the genocide convention case where there 11 were similar bodies looked at and the court applied 12 the same analysis to say, look, we have to look at 13 the rules because international law is trying to do 14 something very specific when it is attributing 15 conduct of private actors to states.</p> <p>16 So I think in the case it is 17 always going to be fact-specific, but it would very 18 much depend.</p> <p>19 And there is no question that 20 international law, there are cases where such 21 bodies have been, you know, involved with states 22 and have been found not to be attributable to 23 states.</p> <p>24 I think in Nicaragua and in the 25 genocide convention cases those were both instances</p>	<p>1 similar issue was considered in the Fireman's Fund 2 case, where there was a recommendation by a body 3 actually composed by government officials that was 4 made and it was not considered to be attributable 5 in that case, because it was just a recommendation.</p> <p>6 And I would say that it is not 7 that there is a gap or not that there is a way 8 out. The government is still responsible for its 9 own decision-making at the end. That is the 10 decision that has the effect on the process.</p> <p>11 Now, if the government looks at 12 the process, knows that the process is somehow 13 corrupt or tainted and the government decides to 14 accept anyways, that act then is attributable to 15 the government and that act can be the source of a 16 wrong.</p> <p>17 But the Joint Review Panel's acts 18 in and of itself are not attributable to 19 government. You get the beginning and you get the 20 end.</p> <p>21 I think one thing, way to think 22 about it this is we heard about comprehensive 23 studies, for example. Comprehensive studies are 24 reports often delegated to proponents. They 25 perform that part of the environmental assessment</p>
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<p>1 of that.</p> <p>2 PRESIDING ARBITRATOR: Okay, thank 3 you. Follow-up?</p> <p>4 PROFESSOR MCRAE: That has 5 prompted me, I suppose. The government has a 6 responsibility to hear and consider a proponent, 7 and they do it through an EA process. And in the 8 course of the EA process they set up the JRP.</p> <p>9 But suddenly what is part of a 10 process, it starts as a government act in setting 11 up the JRP, ends in a government act in a decision, 12 and yet somehow, apart from summoning witnesses 13 what happens in between escapes the government act.</p> <p>14 So it seems like there is sort of 15 a way out, of avoiding responsibility by setting up 16 this independent body.</p> <p>17 And is, would you say, at least 18 the recommendation at the end is the government 19 act, because it is called on to perform that, as in 20 a part of a process that starts government, ends 21 government? Then we simply carve this centre piece 22 out?</p> <p>23 MR. SPELLISCY: I guess I will 24 answer that in two ways. No I would not say that 25 the recommendation is a government act. I think a</p>	<p>1 process.</p> <p>2 Just because they are performing 3 an information-gather part of the environmental 4 assessment process doesn't make them, doesn't 5 delegate them as an organ of government. They are 6 still a proponent there. So when you delegate to 7 somebody to perform an information-gathering 8 process, that doesn't turn them into acts of 9 government in what they do in that process.</p> <p>10 PROFESSOR MCRAE: Oh, thank you. 11 I understand.</p> <p>12 PRESIDING ARBITRATOR: Just again 13 to speak to a very quick follow-up. Let's just 14 form the hypothesis.</p> <p>15 If the conclusion was or the 16 result was that the process within the JRP as an 17 autonomous entity had led to illegalities and the 18 government kind of accepted the recommendations 19 that were arrived at on the basis of some let's say 20 process of -- violations of due process, whatever, 21 that would make the government's decisions illegal 22 too? Or would it?</p> <p>23 MR. SPELLISCY: I'm not 24 necessarily sure I would agree with that. When we 25 look at the issue of a process tainted by</p>

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<p>1 illegality it then goes to government 2 decision-makers. They may look at the process, may 3 understand that something went wrong, but may make 4 a decision based on legal grounds in and of 5 themselves, and that is the decision that then can 6 be challenged.</p> <p>7 So it may be the case in certain 8 factual circumstances that there could be a taint 9 implied, but I don't think that that is necessarily 10 always the case, because that government decision 11 is an independent decision. The report of the JRP, 12 the report of a body like this, it is a factor in 13 it.</p> <p>14 But if we look, for example, at 15 the letter from the Nova Scotia Minister, he said 16 he considered all factors. He looked at a number 17 of factors including the report. He looked at the 18 claimants' letters. He agreed with some of the 19 claimants' criticisms. The mere fact he agreed 20 with the claimants' criticisms but still accepted 21 the recommendation shows the independent nature of 22 the government decision-making. And that is the 23 government decision-making that should be 24 challenged, in our view.</p> <p>25 PRESIDING ARBITRATOR: Thank you</p>	<p>1 investments must be no less favourable than that 2 which it accords in like circumstances to its 3 domestic investors and investments.</p> <p>4 Article 1103, the most-favored 5 nation provision, requires that the treatment 6 Canada accords to US investors or investments must 7 be no less favourable than that which it accords in 8 like circumstances to investors and investments of 9 any other party or a non-party to the NAFTA.</p> <p>10 It must be emphasized here that 11 the potential comparators under Article 1103 are 12 investments or investors of a non-party or of any 13 other party to the NAFTA, i.e., in this case, 14 Mexican investors.</p> <p>15 So in other words, a US claimant 16 cannot found a MFN claim on the basis of allegedly 17 more favourable treatment that has been accorded to 18 another US investor. This interpretation would 19 render the MFN clause meaningless.</p> <p>20 Now, it is Canada's position that 21 no decision made in the Whites Point EA process 22 breached the obligations contained under Articles 23 1102 or 1103. There is not a shred of evidence 24 that the claimants suffered nationality-based 25 discrimination.</p>
<p>1 very much. Thank you, Mr. Spelliscy. Now is it 2 the turn of Mr. Little, yes. Mr. Little, you have 3 the floor.</p> <p>4 Mr. Little.</p> <p>5 MR. LITTLE: I think I can 6 probably be done with 1102 and 1103 before we need 7 a break. I think it would be in the realm of 25 8 minutes, 20 to 25 minutes.</p> <p>9 PRESIDING ARBITRATOR: (microphone 10 not activated)</p> <p>11 CONTINUED SUBMISSIONS BY MR. LITTLE:</p> <p>12 MR. LITTLE: All right. So as we 13 can see, we're going to turn now to Canada's 14 response to the claimants' claims made under 15 Articles 1102 and 1103.</p> <p>16 Canada's argument here is quite 17 simple. The titles of Article 1102 and 1103 are 18 respectively national treatment and most-favored 19 nation treatment. And what they are designed to 20 protect against is nationality-based 21 discrimination, and there appears to be some 22 agreement on this point.</p> <p>23 Article 1102, the national 24 treatment provision. It requires that the 25 treatment Canada accords to US investors and</p>	<p>1 No evidence of xenophobia on the 2 part of officials administering the EA, and this 3 was a basic fact that was agreed to by Mr. Estrin 4 in his cross-examination.</p> <p>5 There is no evidence that 6 officials had the improper objective of throwing up 7 road blocks to the export of aggregate from the 8 Digby Neck to the United States.</p> <p>9 There was no evidence that the 10 decisions made in the Whites Point EA were anything 11 but reasonable and lawful.</p> <p>12 Now, the claimants' theory, if I 13 understand them, is that Articles 1102 and 1103 14 provide for a broad protection against any measure 15 taken during the Whites Point EA process that 16 differs from measures taken in other EA processes.</p> <p>17 And that, they say, has some 18 negative impact on them, regardless of the 19 regulatory context or the reasons underlying why 20 the measure was taken.</p> <p>21 But this theory would convert the 22 national treatment and MFN obligations into 23 instruments of deregulation instead of what the 24 NAFTA parties negotiated under Articles 1102 and 25 1103, that is a non-discriminatory obligation that</p>

<p style="text-align: right;">Page 191</p> <p>1 is owed to NAFTA investors, investments when they 2 invest in a NAFTA country. 3 Now, as is illustrated by the 4 United States Article 1128 submission that has been 5 filed in this case, all three NAFTA parties have 6 agreed that the national treatment obligation is 7 intended to protect against nationality based 8 discrimination. 9 This interpretation has been 10 adopted by past NAFTA tribunals, including the 11 Feldman tribunal, that you can see on the screen, 12 and the Loewen tribunal. 13 So a simple identification of 14 differences in treatment accorded in the course of 15 two EA processes don't cut it in making out a claim 16 under NAFTA Articles 1102 and 1103, the claimants 17 must demonstrate that they have been discriminated 18 against on the basis of nationality. 19 I want to make one point clear, 20 and it arises from something that was stated 21 earlier today in the claimants' submissions. 22 Canada has never asserted that the 23 claimants must prove a subjective intent to 24 discriminate on the part of regulators in the 25 Whites Point EA. Proof of subjective intent, if it</p>	<p style="text-align: right;">Page 193</p> <p>1 investments. 2 Second, they have to demonstrate 3 that they were accorded less favourable treatment 4 than other EA proponents, be they Canadian EA 5 proponents or EA proponents of other NAFTA-party or 6 non-NAFTA party. 7 And third, and most critical to 8 the case, the claimants must demonstrate that the 9 treatment in issue was accorded "in like 10 circumstances". 11 Now, contrary to what the 12 claimants allege, these are all the claimants' 13 burdens to discharge. As the UPS tribunal which 14 you can see on the screen stated: 15 "Failure by the investor to 16 establish one of those three 17 elements will be fatal to its 18 case. This is a legal burden 19 that rests squarely with the 20 claimant." 21 The burden never shifts to the 22 responding party, here Canada. For example, it's 23 not for Canada to prove an absence of like 24 circumstances. 25 Now, as I noted in Canada's</p>
<p style="text-align: right;">Page 192</p> <p>1 can be shown to exist, might well be relevant to 2 establishing discrimination on the basis of 3 nationality. 4 But all Canada is saying is that 5 the national treatment and the MFN obligations 6 require objective evidence that they have been 7 discriminated against by reason of their 8 nationality. To do this they must discharge a 9 legal burden that I am going to now turn to. 10 So in a nutshell, to demonstrate 11 that they suffered nationality-based 12 discrimination, what must the claimants do? 13 The ADM tribunal explained that 14 Article 1102 prohibits treatment which 15 discriminates on the basis of the foreign 16 investor's nationality. Nationality discrimination 17 is established by showing that a foreign investor 18 has unreasonably been treated less favourably than 19 domestic investors in like circumstances. 20 In short, breaking this down, the 21 claimants have to satisfy the following legal test. 22 First, they must demonstrate that 23 Canada accorded them treatment with respect to the 24 establishment, acquisition, expansion, management, 25 conduct, operation and sale or other disposition of</p>	<p style="text-align: right;">Page 194</p> <p>1 opening statement last Tuesday, the claimants have 2 failed to discharge each one of these burdens and I 3 am going to explain for you why. 4 But, before doing so, let's look 5 at the many alleged measures that the claimants 6 have challenged in their 1102 and 1103 claims. 7 Now this chart that you can see on 8 the screen shows the alleged government measures 9 that the claimants say breached Canada's national 10 treatment and MFN obligations. They fall into 11 seven broad categories, as you can see, including 12 the scope of project determination, the type of EA, 13 the duration of the EA, blasting authorizations or 14 conditions, factors to be considered in the scope 15 of the EA, and application of the alleged 16 Comprehensive Study List exemptions, and finally, 17 an acceptance of a compensation plan. 18 We have also set out the 19 comparator EA projects in that chart for you. 20 While as Mr. Spelliscy has already 21 explained, the claimants' complaints about the acts 22 of the JRP are beyond this Tribunal's jurisdiction, 23 the chart that you now see on the screen sets out 24 the acts of the JRP that are alleged to have 25 violated Articles 1102 and 1103.</p>

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<p>1 We heard basically nothing about</p> <p>2 them over the course of this hearing, but they fall</p> <p>3 into the following five broad</p> <p>4 categories: Application of the precautionary</p> <p>5 principle; the cumulative effects analysis</p> <p>6 conducted by the JRP; the application of adaptive</p> <p>7 management principle, whether the EA approval</p> <p>8 should be subject to mitigation measures; and the</p> <p>9 issuance of information requests.</p> <p>10 Now, we can't possibly review each</p> <p>11 and every one of the claimants' allegations in</p> <p>12 respect of these allegations and the comparator EAs</p> <p>13 to which they relate, but I will cite to a few of</p> <p>14 them in explaining how and why the claimants have</p> <p>15 failed to discharge the burden that they must. So</p> <p>16 let's now turn to that.</p> <p>17 First, the claimants as I said</p> <p>18 must establish treatment.</p> <p>19 Now, regarding the requirement to</p> <p>20 establish or demonstrate treatment, Canada doesn't</p> <p>21 dispute that at least for many of the government</p> <p>22 decisions made in the Whites Point EA, these</p> <p>23 measures clearly constitute treatment.</p> <p>24 Indeed, the claimants have also</p> <p>25 identified government decisions made in other EAs</p>		<p>1 Canada. So they shouldn't serve as the basis of a</p> <p>2 NAFTA claim.</p> <p>3 Let's give this principle just a</p> <p>4 little bit of illustrative application.</p> <p>5 Canada prepared the exhibit that</p> <p>6 you see on the screen with its counter-memorial to</p> <p>7 provide you with an idea of the locations in Canada</p> <p>8 of the comparator EAs being put forward by the</p> <p>9 claimants in support of their 1102 and 1103</p> <p>10 claims. Now, more comparator EAs were added in the</p> <p>11 claimants' reply, but this map will serve the</p> <p>12 purposes for what I want to discuss.</p> <p>13 We can see from the map that while</p> <p>14 some of the comparator EAs were conducted in Nova</p> <p>15 Scotia, the claimants, they're attempting to</p> <p>16 compare treatment accorded in the Whites Point EA</p> <p>17 to treatment accorded in other EAs that are quite</p> <p>18 literally all over the proverbial map throughout</p> <p>19 Canada.</p> <p>20 Now, this is where we get into the</p> <p>21 problem identified by the Merrill & Ring tribunal.</p> <p>22 The majority of these non-Nova</p> <p>23 Scotia based projects were subject to some form of</p> <p>24 EA at both the federal and provincial level and</p> <p>25 were hence accorded treatment by other provincial</p>	
<p>1 that constitute treatment.</p> <p>2 But there is a threshold issue</p> <p>3 that needs to be met before two instances of</p> <p>4 treatment can be compared. And this threshold</p> <p>5 issue has been no better articulated than by the</p> <p>6 tribunal in the Merrill & Ring case.</p> <p>7 In this case the tribunal</p> <p>8 explained that treatment accorded to foreign</p> <p>9 investors by the national government needs to be</p> <p>10 compared to that accorded by the same government to</p> <p>11 domestic investors, subject to meeting that</p> <p>12 requirement that it is in like circumstances, just</p> <p>13 as the treatment accorded by a province ought to be</p> <p>14 compared to the treatment of that province in</p> <p>15 respect of like investments.</p> <p>16 Now, there is good reason for this</p> <p>17 rule. As I have noted, Articles 1102 and 1103</p> <p>18 prevent against nationality-based discrimination.</p> <p>19 And for discrimination to occur,</p> <p>20 it must be the same government actor affording the</p> <p>21 more favourable and less favourable treatment.</p> <p>22 Differences in treatment accorded</p> <p>23 by different levels or different combinations of</p> <p>24 government actors, they're both inevitable but</p> <p>25 they're also essential in a federal state like</p>	Page 196	<p>1 governments.</p> <p>2 While differences in the treatment</p> <p>3 accorded in these EAs relative to that accorded in</p> <p>4 the Whites Point EA can certainly be identified,</p> <p>5 they can't be considered discriminatory as the</p> <p>6 treatment was accorded by different government</p> <p>7 actors, all of whom have their own policy</p> <p>8 objectives to fulfil.</p> <p>9 Now, this, it is a fact of life in</p> <p>10 a federal state like Canada and it can't serve as</p> <p>11 the foundation for a breach of an Article 1102 or</p> <p>12 1103 claim. So as a threshold matter, none of the</p> <p>13 instances of treatment raised by the claimants in</p> <p>14 EAs conducted in these other provinces are, in our</p> <p>15 view, relevant to the claimants' Articles 1102 or</p> <p>16 1103 claims.</p> <p>17 Now let's move to the second</p> <p>18 burden that the claimants must discharge,</p> <p>19 establishing that they were subjected to less</p> <p>20 favourable treatment than that accorded to other EA</p> <p>21 proponents.</p> <p>22 Now, again, we can agree the</p> <p>23 claimants might have identified differences in</p> <p>24 treatment across EA processes, but different is not</p> <p>25 presumed to be unequal, or less favourable.</p>	Page 198

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<p>1 Nor is there any burden on Canada 2 to show that the differential treatment is less 3 favourable. As the UPS tribunal stated, this is 4 the claimants' burden.</p> <p>5 And in Canada's view the claimants 6 haven't discharged this burden. They've spent the 7 entire hearing complaining and cross-examining over 8 differences that really had no practical effect on 9 the claimants.</p> <p>10 For example, one of the central 11 differences, is the treatment that the claimants 12 appear to be focussed on, was the fact that DFO 13 scoped the quarry elements of the project into the 14 Whites Point EA.</p> <p>15 Now, as I noted in Canada's 16 opening statement, this decision had no practical 17 effect on the claimants and hence can't be 18 considered an instance of less favourable 19 treatment. Why? We have explained: Because the 20 decision was rendered moot just several months 21 later by a reasonable and lawful decision that the 22 Whites Point project would be referred to a Joint 23 Review Panel.</p> <p>24 Now, as a result of the referral 25 to the Joint Review Panel, the scope of project for</p>	<p>1 the potential litigation over 2 scope of project. 3 "Mr. Rankin agrees and I 4 agree with him, that the 5 amount of detail you have to 6 put out in a comprehensive 7 study and a joint panel is 8 not that different. The 9 process can take a little 10 longer, but there is 11 finality. 12 "The problem at that time 13 was, if you got to the ends 14 of a comprehensive study and 15 they decided that this needed 16 to be looked at further, it 17 should have an oral 18 hearing -- which, you know, 19 is fully justified on the 20 record -- then you could be 21 thrown into the oral hearing 22 later". 23 Now, beyond the testimony that you 24 see here, Mr. Smith provided several other reasons 25 why he felt the Joint Review Panel approach</p>
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<p>1 the purposes of the Whites Point at the very 2 minimum had to include both the marine terminal and 3 the quarry. So in the end this scope of project 4 decision carried no practical significance.</p> <p>5 Now another one of the claimants' 6 complaints appears to be that the Whites Point 7 project was referred to a review panel when other 8 projects were not.</p> <p>9 But as Mr. Smith explained 10 yesterday, the referral of the Whites Point project 11 to a review panel in the face of other projects not 12 being subject to a review panel simply does not 13 equate to less favourable treatment.</p> <p>14 Now, in fact under the 15 circumstances of the Whites Point EA, Mr. Smith's 16 view was that the referral carried with it some 17 benefits. Mr. Smith, as we can see testified: 18 "I can tell you I wouldn't 19 have taken the decision to 20 put this into a joint panel 21 to court. In fact, I said in 22 my evidence I think it was -- 23 the best thing they could do 24 was eliminate all the 25 segmentation risks, all of</p>	<p>1 actually benefitted the claimants. 2 Now, I have only touched on two 3 instances of treatment here in the interest of 4 time, the scope of project determination and the 5 referral to the JRP. But after the past seven 6 days, it is clear that these it would appear to be 7 the most important instances of treatment to the 8 claimants' case. 9 But neither measure can just 10 blithely be characterized as less favourable 11 because it's not been demonstrated that they had 12 any practical effect on the claimants, the Whites 13 Point project, or the outcome of the EA process. 14 Now, let's move on to the third 15 burden that must be discharged by the claimants. 16 And this, in our view, is the most important one. 17 In order to distinguish between 18 cases of legitimate regulatory distinction and 19 cases of nationality-based discrimination, the 20 tribunal has to properly consider whether or not 21 the treatment was accorded in like circumstances. 22 Now we heard the claimants' 23 proposed approach today. It's that all of those 24 who, like them, seek regulatory permission from 25 governments are in like circumstances. And that</p>

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<p>1 this is the class of investors and investment whose 2 treatment must be considered. But the like 3 circumstances analysis cannot be confined to this 4 single factor.</p> <p>5 It can't be carried out with 6 complete disregard to the facts that determine the 7 course and conduct of each EA.</p> <p>8 More is required than the 9 claimants' simplistic approach which would really 10 result in a vacuum, and eviscerate the 11 environmental assessment process of any meaning, 12 any purpose, or any utility.</p> <p>13 Now, as Mr. Smith testified just 14 yesterday, he reminded everyone:</p> <p>15 "The important thing is it 16 depends on the project. It 17 depends on the facts. You 18 know, the point I raised in 19 my report... is that I had 20 direct involvement with LNG 21 projects that have been 22 screened that have gone to 23 comp studies and that have 24 gone to panels. I have been 25 involved in pipeline projects</p>	<p>1 the purposes of a NAFTA claim.</p> <p>2 Now, this is why it is 3 inappropriate for the claimants to claim a NAFTA 4 violation due to the alleged treatment accorded in 5 other EAs conducted under other legal regimes and 6 engaging other EA considerations.</p> <p>7 For example, the claimants allege 8 violations of Articles 1102 as a result of 9 treatment accorded in the EAs of the Belleoram and 10 the Aguathuna projects which were carried out in 11 the province of Newfoundland.</p> <p>12 Now these are projects that appear 13 on their face to have some similarities to the 14 Whites Point project but their EA engaged entirely 15 different circumstances that have been outlined in 16 Canada's counter-memorial and rejoinder and the 17 expert reports of Lawrence Smith.</p> <p>18 These circumstances included the 19 fact that they were subject to the Newfoundland, 20 not the Nova Scotia, EA regime. Here I would 21 suggest that the emphasis of the Grand River 22 tribunal cited by Mr. Appleton this morning was 23 actually that differences in legal regimes 24 applicable to investors, could result in unlike 25 circumstances.</p>
<p>1 which have been screened, 2 which have gone to comp 3 studies, which have which 4 have gone to joint panels. 5 It depends on the facts...one 6 of the big facts is 7 location".</p> <p>8 Now, to be clear, Canada is not 9 saying that what places two investors in like 10 circumstances or not is the way Canada treats them, 11 as the claimants have alleged in their reply.</p> <p>12 In other words, Canada is not 13 saying that two EA proponents are not in like 14 circumstances merely because Canada has treated 15 them differently.</p> <p>16 Rather, it is the circumstances 17 underlying the way in which Canada treats two EA 18 proponents that will be determinative of whether or 19 not the treatment was accorded in like 20 circumstances.</p> <p>21 For example, if differences in 22 treatment accorded two EA proponents were the 23 result of specific facts or reasonable and 24 legitimate policy objectives, then it will likely 25 not have been accorded in like circumstances for</p>	<p>1 Now, other differences with the 2 Belleoram and Aguathuna EAs included the fact that 3 they were not proposed in an environment as 4 sensitive as the Digby Neck and the Bay of Fundy 5 and as integral to the well-being of the local 6 economy.</p> <p>7 Now, the fact that the province in 8 these EAs took a different approach than the 9 Province of Nova Scotia in the Whites Point EA to 10 the carrying out of the EA of these projects that 11 it had to under provincial law, as we heard from 12 Mr. Daly, the province's clear desire in the Whites 13 Point case was to work hand in hand with the 14 federal government in the form of a harmonized 15 assessment. And this just is not the way that the 16 provincial and federal EA processes unfolded in the 17 Belleoram and Aguathuna cases.</p> <p>18 Another marked difference between 19 these two projects and the Whites Point project is 20 the absolute lack of public concern engaged by both 21 of these projects, which appears to be admitted by 22 both sides in this case.</p> <p>23 So while the Belleoram and 24 Aguathuna projects may on their face seem similar 25 to the Whites Point project, in assessing like</p>
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<p>1 circumstances, one has to take a closer look. 2 Now, Mr. Smith made the importance 3 of this point clear in the context of an EA 4 conducted under Nova Scotia law yesterday when 5 Mr. Nash questioned him on the science that was 6 available to officials prior to the referral of the 7 Whites Point project to a review panel. 8 Mr. Smith explained: Well, let's 9 go to the science, Mr. Smith said. 10 "But don't lose sight of the 11 socioeconomic, the location, 12 land use, which is a very 13 significant component under 14 the Nova Scotia legislation". 15 So these policy objectives of the 16 Nova Scotia legislation played an integral role in 17 decisions made in the EA of the Whites Point 18 project from the very outset all the way to the 19 Nova Scotia government decision that the project 20 would not be approved. 21 Now, Canada has laid out in great 22 detail in both its counter-memorial and rejoinder 23 why the various measures that the claimants 24 complain of were not accorded in like circumstances 25 in this case.</p>	<p>1 some projects and the environment for which they're 2 proposed will impact the manner in which they're 3 treated in the EA process. 4 Now, for his part, Mr. Estrin 5 wouldn't accept that treatment accorded to this 6 project was, in any way, relevant to treatment 7 accorded to the Whites Point project. 8 As we can see from the slide on 9 the screen, Mr. Estrin testified: 10 "Well, let me tell you why I 11 think that the Kelly's 12 Mountain is not very helpful 13 in terms of comparison. I 14 think, first of all, it was 15 under legislation that we're 16 not dealing with in both 17 cases, okay. Secondly, 18 Kelly's Mountain was -- I 19 have some statistics at hand. 20 It was going to be the 21 third-largest open pit mine 22 in the world. It was going 23 to be, I think, ten times the 24 size of Whites Point quarry 25 in terms of the area, and</p>
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<p>1 Specifically, Canada has explained 2 why the treatment that was accorded in the EAs of 3 the Keltic, the Bear Head, the Rabasca, Miller's 4 Creek, and Eider Rock EAs, which were all mentioned 5 today, was not accorded in like circumstances to 6 that accorded in the Whites Point project. 7 As we heard little about these EAs 8 in the hearing, I am not going to discuss them 9 here. 10 But I would like to briefly touch 11 on some of the testimony that was offered during 12 the hearing and that is relevant to the issue of 13 whether the treatment being complained of in this 14 case was accorded in like circumstances to that 15 accorded to some other EA proponents. 16 As a simple starting point, let's 17 start with Mr. Estrin's comments on the Kelly's 18 Mountain quarry and marine terminal project which 19 was a Nova Scotia project very similar to the 20 Whites Point project that, as we know, was referred 21 to a Joint Review Panel under predecessor EA 22 regimes to the NSEA and CEAA. 23 Now, Mr. Neil Bellefontaine cited 24 to the Kelly's Mountain project in his affidavit 25 merely to illustrate the fact that the nature of</p>	<p>1 three times the amount of 2 gravel taken out." 3 So it seems that Mr. Estrin would 4 agree with Canada's position that the claimants 5 cannot compare the treatment accorded to the Whites 6 Point project under the NSEA and the CEAA to the 7 treatment accorded subject to EA proponents subject 8 to other EA regimes of other projects, which I note 9 is the case with the majority of the claimants' 10 comparator EAs. 11 It would also appear from this 12 testimony that Mr. Estrin doesn't dispute that the 13 size and the duration of two projects might make 14 them less relevant comparators due to the different 15 circumstances that they engage. 16 This point gets us to the Tiverton 17 quarry and harbour projects, relative to the Whites 18 Point EA, much smaller and shorter-term projects 19 down the Digby Neck from Whites Point to which the 20 claimants have devoted so much attention. 21 Now, the claimants' expert 22 Mr. Rankin stated the following, with respect to 23 the Tiverton projects at paragraph 74 of his expert 24 report. 25 Mr. Rankin stated:</p>

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<p>1 "Although no two projects are 2 ever identical, where 3 projects were as obviously 4 similar in scope and location 5 as the Tiverton and Whites 6 Point projects were, and were 7 acknowledged as such by key 8 officials, the law requires 9 approvable and demonstrably 10 appropriate justification for 11 treating them differently. 12 If not, it must be inferred 13 that an abuse of discretion 14 has occurred." 15 Now, Mr. Rankin added in testimony 16 in relation to the Whites Point project the 17 following. 18 "Here we have a situation 19 where, in my judgment, the 20 Tiverton quarry and the 21 Tiverton harbour projects ten 22 miles away were so similar -- 23 not identical, and there is 24 many things to distinguish 25 them -- that it was</p>		<p>1 Point in connection with Nova Stone's 3.9 hectare 2 quarry. Specifically, what did he do? He reached 3 out for initial input on the application from a DFO 4 official who had knowledge of the location of the 5 Tiverton project. 6 The transcript of Mr. Petrie's 7 redirect on his review of the Tiverton quarry 8 project provides as follows: 9 "QUESTION: Did you discuss 10 the issue at Nova Stone and 11 marine mammals with 12 Mr. Winchester? 13 ANSWER: Answer: Certainly. I 14 wanted to make it clear why the amply application 15 was being referred, and the concerns regarding 16 marine mammals that had been engaged in Nova Stone 17 just down the road. I wanted to make sure that he 18 was aware of that perspective and was able to apply 19 that lens to it, if he saw the need." 20 Mr. Petrie conducted the very same 21 initial outreach at Tiverton as he did at Whites 22 Point. 23 Any differences in how the two 24 proposals were treated from this point forward were 25 based upon differences not in the nationality of</p>	
<p>1 remarkable, unusual, that 2 there would be such a 3 difference in treatment for 4 these two projects". 5 Now, what Mr. Rankin ignores is 6 that the same statutes and regulatory approaches 7 that were applied to the review of the Whites Point 8 project were applied equally to the review of the 9 Tiverton projects. Any differences in the 10 treatment accorded were based on differences in the 11 projects themselves, i.e., based on differences in 12 the circumstances presenting themselves to 13 government officials. 14 They were not based on the 15 interjection of Minister Thibault in the Tiverton 16 review process, nor does the one document cited by 17 the claimants in support of their contention that 18 he did so intervene or interject offer any support 19 for their position. 20 Now, looking at the Tiverton 21 projects more closely. With respect to NSDEL's 22 initial review of the application for the 1.8 23 hectare quarry at Tiverton. 24 Mr. Petrie clearly testified that 25 he applied the same approach as he did at Whites</p>	Page 212	<p>1 the proponents, but in the judgment of officials on 2 what was being proposed at each site. And this is 3 not the type of judgment that is to be 4 second-guessed in this forum. 5 Now I would add that in his 6 redirect Mr. Petrie then provided the Tribunal with 7 a long list of differences between the proposed 8 quarrying activities at Tiverton and Whites Point 9 which include differences in the size of the 10 projects, their duration, their production volume, 11 their location, the intensity and frequency of 12 blasting, and public concern. 13 These all played into the 14 differences and the treatment accorded to the 15 Whites Point and Tiverton projects. 16 Now, the marine components of the 17 Whites Point project and the Tiverton harbour were 18 also treated equally, approached equally under the 19 CEAA. 20 However, again, differences in the 21 projects led to differences in the treatment that 22 was accorded. 23 For example, because it was 24 capable of handling post-Panamex-sized vessels, the 25 Whites Point marine terminal, it was listed on the</p>	Page 214

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<p>1 Comprehensive Study List regulations and it 2 required a comprehensive study under the CEAA. 3 The Tiverton harbour, given its 4 size, did not. Now, this led to a screening being 5 conducted of the Tiverton harbour and under the 6 implementation of workable and effective mitigation 7 measures through the unfolding of that screening 8 process. 9 So this fundamental difference 10 resulted in differences in the level of EA applied 11 to each project. 12 This was just one factor 13 justifying the differences in how these projects 14 were assessed. 15 Now, for his part, Mr. Rankin 16 expressed a whole range of reactions to the 17 differences in the treatment of the Whites Point 18 and Tiverton projects. He called them remarkable. 19 He called them utterly staggering. He called them 20 dramatic. And he called them surprising, but 21 putting Mr. Rankin's surprise aside, there were 22 quite simply differences in these projects which 23 explain the differences in the treatment that they 24 were accorded. 25 Now, finally let's consider some</p>	<p>1 revealed that the Whites Point project was the only 2 quarry to have been sent to a hearing and the only 3 one to have been rejected since the year 2000. 4 Mr. Spelliscy and Mr. Rankin had 5 the following exchange regarding Mr. Estrin's 6 chart: 7 "QUESTION: In terms of 8 commenting very briefly on 9 some of these other projects, 10 you didn't actually review 11 any of the other documents 12 associated with those, the 13 primary documents associated 14 with those projects; correct? 15 ANSWER: Counsel, to be totally 16 frank, I can't remember at this stage. I might 17 have looked at a couple of them just in scanning 18 them, but I frankly don't recall. But I do know 19 that he looked at 28 environmental assessments for 20 quarries between 2000 and 2011, and only one was 21 subject to a public review hearing and that was 22 Whites Point quarry. And, you know, I think that 23 standing back from the trees and looking at the 24 forest it is pretty, pretty staggering, because 25 some of them were bigger than this one."</p>
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<p>1 of the other Nova Scotia projects that have been 2 raised by the claimants. 3 In his expert report, Mr. Estrin 4 prepared the chart that you can see on the screen. 5 Are you looking at time, Judge 6 Simma? 7 PRESIDING ARBITRATOR: I am just 8 looking at the expression on the face of our court 9 reporter but I think she, she hopes or she is 10 convinced that you are going to take just a few 11 more minutes. 12 --- Laughter 13 PRESIDING ARBITRATOR: I mean it 14 is just a matter of the coffee break. 15 MR. LITTLE: Absolutely. I would 16 say I am probably about five more minutes, five to 17 six more minutes. 18 PRESIDING ARBITRATOR: Okay, thank 19 you. 20 MR. LITTLE: Okay. In his expert 21 report, Mr. Estrin prepared the chart that you can 22 see on the screen, setting out 28 quarry proposals 23 that were assessed in Nova Scotia since 2000. 24 Now, Mr. Estrin in his reply 25 expert report noted that the chart he compiled</p>	<p>1 Now, Mr. Rankin could offer 2 nothing more than the fact that from his vantage 3 points -- which was standing back from the trees 4 and looking at the forest -- he was once again 5 staggered by the differences in treatment accorded 6 to the Whites Point project. 7 But the chart that you see on the 8 screen now prepared by Lawrence Smith and attached 9 to appendix two to his rejoinder expert report 10 explains three basic differences between the 11 projects Mr. Estrin describes and the Whites Point 12 project. 13 First, none of these quarry 14 projects included the construction of a marine 15 terminal. 16 Second, none were located on the 17 Digby Neck, on the Bay of Fundy. 18 And third, the majority of these 19 projects were expansions of an existing operation. 20 Standing back from the trees and 21 looking at the forest, the approach taken by the 22 claimants' experts is the opposite of what a like 23 circumstances analysis requires under Articles 1102 24 and 1103. 25 With respect to Mr. Rankin, he had</p>

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<p>1 to look closer at just a few of the trees, because 2 they clearly explain the differences between how 3 the Whites Point project and all of these other 4 projects were treated.</p> <p>5 So in sum. The claimants, as I 6 have noted, have been able to identify some 7 differences in the treatment accorded to the 8 claimants in the EA of the Whites Point project 9 relative to that accorded to proponents of other 10 EAs.</p> <p>11 This isn't surprising. The 12 claimants' document requests required Canada to 13 produce close to 25,000 documents from 74 other 14 environmental assessments carried out across 15 Canada. But the differences in treatment that they 16 have identified didn't really result in any real 17 disadvantage or lost opportunity to the claimants.</p> <p>18 Moreover, each of the EAs that 19 have been invoked by the claimants simply engaged 20 different circumstances than were engaged by the 21 Whites Point project and regard must be had to 22 these.</p> <p>23 In the end, what the claimants 24 have provided you does not provide adequate grounds 25 for a finding of a breach under either Articles</p>	<p>1 show that even if Mr. Douglas's confidence in my 2 ability is misplaced and I do a disastrous job with 3 this argument and you accept the claimants' 4 arguments with respect to the standard under 1105, 5 then Mr. Spelliscy will show why, even on the facts 6 -- because of the facts of this case, the 7 claimants' Article 1105 claim must still fail.</p> <p>8 Now, in the interest of time, I 9 will go through briefly the first few slides. I 10 know my good friend, Mr. Spelliscy, is itching to 11 come back up.</p> <p>12 There is no dispute here between 13 the disputing parties that Article 1131 of the 14 NAFTA contains the governing law, and it requires 15 that the Tribunal decide the issues in accordance 16 with this agreement and applicable rules of 17 international law.</p> <p>18 It further provides that a binding 19 interpretation of the Free Trade Commission must be 20 followed by a NAFTA Chapter 11 tribunal.</p> <p>21 Now, Article 1105 is obviously 22 part of the NAFTA and -- sorry, I am going a bit 23 too fast here. It provides that: 24 "Each party shall accord to 25 investments of investors of</p>
<p>1 1102 or 1103.</p> <p>2 And subject to any questions, we 3 will now happily move to a break, thank you.</p> <p>4 PRESIDING ARBITRATOR: Any unhappy 5 questions? 6 --- Laughter</p> <p>7 PRESIDING ARBITRATOR: No. 8 MR. LITTLE: Thank you. 9 PRESIDING ARBITRATOR: Thank you, 10 Mr. Little. We will have our break, coffee break 11 until 2:15. 12 --- Recess at 2:00 p.m. 13 --- Upon resuming at 2:15 p.m.</p> <p>14 PRESIDING ARBITRATOR: Everybody 15 seems to be here, everybody of importance, if I may 16 say so. Mr. Hebert, vous avez la parole.</p> <p>17 SUBMISSIONS BY MR. HEBERT: 18 MR. HEBERT: Merci beaucoup, 19 Mr. President. 20 My presentation this afternoon 21 will address the legal standard set out in Article 22 1105. That is the customary international law 23 minimum standard of treatment or customary MST. 24 My colleague, Mr. Spelliscy, will 25 then discuss the specific facts of this case and</p>	<p>1 another party treatment in 2 accordance with international 3 law..."</p> <p>4 I have underlined here the words 5 "in accordance with international law" because 6 there is much disagreement between the disputing 7 parties as to what those words mean. The claimants 8 allege that these words serve to expand the 9 standard of treatment guaranteed by NAFTA Article 10 1105 beyond that which is provided in customary 11 international law.</p> <p>12 Canada argues that it does not. 13 Canada's interpretation is that these -- of these 14 words is supported in this arbitration by the 15 United States, which has filed non-disputing party 16 submissions pursuant to Article 1128.</p> <p>17 Although Mexico has not filed a 18 similar submission in this arbitration, the 19 position it has adopted in other Chapter 11 20 disputes, notably in the Cargill dispute, is also 21 consistent with the interpretation adopted by 22 Canada and the United States.</p> <p>23 Now, fortunately for this 24 Tribunal, the Free Trade Commission clarified the 25 precise meaning of these words over 12 years ago.</p>
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<p>1 In its 2001 note of interpretation that you now see 2 on the screen, the FTC clarified that Article 1105 3 requires no more and no less than the customary 4 international law minimum standard of treatment. 5 The FTC further clarifies that the concepts of fair 6 and equitable treatment and full protection and 7 security do not require treatment in addition to or 8 beyond that which is required by the customary MST. 9 And the third provision provides 10 that a determination, if there has been a breach of 11 another provision of the NAFTA or of a separate 12 international agreement, does not establish that 13 there has been a breach of 1105. 14 Now, this note of interpretation 15 is binding on NAFTA investor state tribunals 16 pursuant to the provision we just saw, Article 17 1131(2). The French version uses the verb "liera" 18 and the Spanish version uses the expression "sera 19 obligatoria". 20 The plain and ordinary meaning of 21 these words leave no room and no scope for the 22 application of customary international rules of 23 treaty interpretation. 24 The claimants urge this Tribunal 25 to ignore the unambiguous wording of Article</p>	<p>1 represents a minimum threshold below which the 2 treatment of foreign investors may not fall. 3 NAFTA investors are given no 4 greater protection than that which customary 5 international law requires, and the standard is one 6 that guards only against grossly unfair or 7 manifestly arbitrary actions by the state. 8 Again, numerous NAFTA awards 9 establish this threshold and, again, the claimants 10 find themselves swimming against the strong current 11 of consistent NAFTA awards. 12 I won't discuss all of them. One, 13 it would take too long, and secondly, the exercise 14 has already been done recently in the decision on 15 liability rendered by the Mobil tribunal in 2012. 16 But I still want to take a little 17 bit of time to briefly review three awards. 18 The first one is the S.D. Myers 19 decision, and it is always a bit awkward to discuss 20 cases where members of the Tribunal have 21 participated in drafting it, but here I go. 22 --- Laughter 23 MR. HEBERT: So the S.D. Myers 24 tribunal served that: 25 "A breach of Article 1105</p>
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<p>1 1131(2) and the binding nature of the note of 2 interpretation. They are swimming directly against 3 a strong current of NAFTA awards that have all 4 recognized the binding nature of the FTC note. 5 I would also like to point out 6 that a NAFTA Tribunal has no inherent jurisdiction 7 to override a binding interpretation of the FTC. 8 Its role is limited to determining whether an FTC 9 interpretation satisfies the material conditions of 10 Article 1131(2). In other words, the Tribunal 11 should limit its analysis to determine whether the 12 interpretation does, in fact, emanate from the FTC. 13 This has been accepted by numerous 14 Chapter 11 tribunals, such as the ADF, Methanex, 15 Mondev and Mondev tribunals. Even the two 16 Tribunals that have been critical of the FTC note, 17 the Pope & Talbot decision and the Merrill & Ring 18 tribunal, ultimately agreed that it was binding on 19 them. 20 Now that we have established the 21 source of the standard referenced in Article 1105, 22 I would like to turn to the content of the 23 standard. 24 Previous NAFTA Chapter 11 25 tribunals have confirmed that Article 1105</p>	<p>1 occurs only when it is shown 2 that an investor has been 3 treated in such an unjust or 4 arbitrary manner that the 5 treatment rises to the level 6 that it is unacceptable from 7 the international 8 perspective. That 9 determination must be made in 10 the light of the high measure 11 of deference that 12 international law generally 13 extends to the right of 14 domestic authorities to 15 regulate matters within their 16 own borders." 17 And the Tribunal explained the 18 rationale for this high threshold by pointing out 19 that NAFTA tribunals do not have an open-ended 20 mandate to second-guess government decision making, 21 and I submit that this rule or principle is 22 particularly true with respect to the types of 23 government decisions that were made in this case. 24 PROFESSOR SCHWARTZ: I couldn't 25 have said that better myself.</p>

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<p>1 --- Laughter</p> <p>2 MR. HEBERT: Touché.</p> <p>3 The next award I wanted to briefly</p> <p>4 look at is the Mobil award. The recent Mobil</p> <p>5 decision, as I said, conducted an extensive review</p> <p>6 of the NAFTA awards that have interpreted Article</p> <p>7 1105, and this review may be found at paragraphs</p> <p>8 138 to 151 of the award.</p> <p>9 And in light of its review, the</p> <p>10 Tribunal summarized the applicable standard as</p> <p>11 follows, and I won't read all of it, but on the</p> <p>12 second paragraph it describes the type of treatment</p> <p>13 that would breach Article 1105 as treatment that</p> <p>14 was arbitrary, grossly unfair, unjust or</p> <p>15 idiosyncratic or discriminatory and exposes a</p> <p>16 claimant to sectional or racial prejudice, or</p> <p>17 involves a lack of due process leading to an</p> <p>18 outcome which offends judicial propriety.</p> <p>19 The other award I would like to</p> <p>20 briefly touch on is the Cargill award and, more</p> <p>21 precisely, its finding at paragraph 296, where it</p> <p>22 also aptly summarized the minimum standard of</p> <p>23 treatment under custom and the analysis a tribunal</p> <p>24 should conduct when it interprets Article 1105.</p> <p>25 And, again, it wrote using</p>	<p>1 awards on the basis of an alleged agreement between</p> <p>2 the disputing parties as to the relevance of</p> <p>3 customary international law.</p> <p>4 As Canada understands the</p> <p>5 claimants' argument is that the claimants seem to</p> <p>6 be arguing the disputing parties in those cases</p> <p>7 contracted out of NAFTA and decided to apply a form</p> <p>8 of private lex specialis.</p> <p>9 Such an interpretation of the</p> <p>10 Mobil and Cargill awards cannot be sustained. The</p> <p>11 fact that the claimants in those disputes</p> <p>12 recognized the binding nature of the FTC note, a</p> <p>13 fact that should be by now obvious to all, can</p> <p>14 obviously not have had any bearing on the law that</p> <p>15 these tribunals applied. This is because disputing</p> <p>16 parties are powerless to agree to a governing law</p> <p>17 other than that provided by Article 1131(1).</p> <p>18 The claimants also argue that even</p> <p>19 if Article 1105(1) is to be interpreted as</p> <p>20 referring to customary MST, customary MST has</p> <p>21 evolved and has now converged with the autonomous,</p> <p>22 fair and equitable treatment standard found in some</p> <p>23 other investment treaties.</p> <p>24 The claimants' allegations is</p> <p>25 entirely unsubstantiated.</p>
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<p>1 language that is very similar, that 1105 would be</p> <p>2 breached by actions that are:</p> <p>3 "... grossly unfair, unjust</p> <p>4 or idiosyncratic; arbitrary</p> <p>5 beyond a merely inconsistent</p> <p>6 or questionable application</p> <p>7 of administrative or legal</p> <p>8 policy or procedure so as to</p> <p>9 constitute an unexpected and</p> <p>10 shocking repudiation of a</p> <p>11 policy's very purpose and</p> <p>12 goals, or to otherwise</p> <p>13 grossly subvert a domestic</p> <p>14 law or policy for an ulterior</p> <p>15 motive."</p> <p>16 Now, there is a thread flowing</p> <p>17 through all of these cases, of course, and that</p> <p>18 thread is that Article 1105 contains or prescribes</p> <p>19 a very high threshold for liability.</p> <p>20 Now, the claimants have expressed</p> <p>21 great dissatisfaction with both the Mobil and</p> <p>22 Cargill awards, as well as the Glamis decision,</p> <p>23 which endorses essentially the same standard.</p> <p>24 And, in fact, the claimants seek</p> <p>25 to dismiss the relevance of the Mobil and Cargill</p>	<p>1 As Canada explains in its</p> <p>2 counter-memorial at paragraph 313, the claimants</p> <p>3 clearly bear the burden of proving that the rules</p> <p>4 they are alleging are rules of customary</p> <p>5 international law. This burden cannot be passed on</p> <p>6 to the Tribunal, and it certainly cannot be passed</p> <p>7 on to the respondent state.</p> <p>8 The claimants have simply failed</p> <p>9 to meet their burden of proof on this issue.</p> <p>10 Merely pointing to the existence of over 2,580</p> <p>11 bilateral investment treaties is not enough.</p> <p>12 Customary international law cannot be proven by</p> <p>13 merely counting BITs.</p> <p>14 And there are essentially two</p> <p>15 reasons for that. First, UNCTAD in 2012 updated</p> <p>16 its series dealing with fair and equitable</p> <p>17 treatment and conducted a stock-taking exercise of</p> <p>18 BIT practice. And what UNCTAD's survey reveals is</p> <p>19 there is no such thing as a standard fair and</p> <p>20 equitable clause.</p> <p>21 On the contrary, treaties reveal a</p> <p>22 wide variety of clauses with important substantive</p> <p>23 differences. As a result it is simply not possible</p> <p>24 to argue that these BITs represent the type of</p> <p>25 consistent and general state practice required by</p>

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<p>1 customary international law.</p> <p>2 And here on the slide you will see</p> <p>3 that UNCTAD has sort of grouped in five categories</p> <p>4 the results of its survey of BIT practice, and I am</p> <p>5 sure that if one were to put their minds to it, you</p> <p>6 can come up with many different types of</p> <p>7 categories.</p> <p>8 Secondly, and more importantly</p> <p>9 here, the inclusion of fair and equitable treatment</p> <p>10 clauses in BITs is not sufficient to establish a</p> <p>11 change in the minimum standard of treatment of</p> <p>12 customary international law, because such an</p> <p>13 inclusion could equally show the contrary.</p> <p>14 And the International Court of</p> <p>15 Justice in the Diallo case was faced with a similar</p> <p>16 argument. In that case, the court ruled that the</p> <p>17 fact that bilateral investment treaties and</p> <p>18 investment contracts, for that matter, now</p> <p>19 typically allow foreign investors to bring</p> <p>20 derivative claims, such as the one brought here,</p> <p>21 where a foreign investor brings a claim on behalf</p> <p>22 of a foreign incorporated company, was not enough</p> <p>23 to show a change in the customary international law</p> <p>24 of diplomatic protection.</p> <p>25 And here the court reasoned that</p>	<p>1 to a NAFTA 1105 analysis are those which apply the</p> <p>2 same standard as set out in Article 1105; that is,</p> <p>3 customary MST.</p> <p>4 Inasmuch as the CMS Gas, Rumeli</p> <p>5 and Azurix awards and others have held that the</p> <p>6 minimum standard of treatment has evolved to</p> <p>7 converge with the autonomous, fair and equitable</p> <p>8 treatment standard, Canada agrees with the Glamis</p> <p>9 tribunal that this convergence theory is an</p> <p>10 overstatement.</p> <p>11 Moreover, it is an overstatement</p> <p>12 that is not based on any analysis of state practice</p> <p>13 or opinio juris, and should therefore not be</p> <p>14 adopted by this Tribunal.</p> <p>15 Accepting the theory of</p> <p>16 convergence would be accepting that customary</p> <p>17 international law has evolved dramatically within</p> <p>18 the span of a mere 12 years since the issuance of</p> <p>19 the FTC notes to render these notes essentially</p> <p>20 ineffective. Yet the claimants have not offered</p> <p>21 any proof of such a dramatic and rapid evolution.</p> <p>22 Now, the claimants this morning</p> <p>23 have advanced the proposition that NAFTA Article</p> <p>24 1105 imposes on a state an obligation to act</p> <p>25 transparently, in good faith and in a non-arbitrary</p>
<p>1 these BITs and investment contracts, you know,</p> <p>2 instead of showing a change of customary</p> <p>3 international law, could also be used to show that</p> <p>4 the understanding of states that -- to contract out</p> <p>5 a -- out of customary international law.</p> <p>6 As an alternative to state</p> <p>7 practice, the claimants rely on the decisions of</p> <p>8 some non-NAFTA arbitral awards which have applied</p> <p>9 very different treaty provisions than the one found</p> <p>10 in Article 1105.</p> <p>11 Sorry. The Glamis and Cargill</p> <p>12 tribunals provided a detailed and persuasive</p> <p>13 analysis as to why CMS Gas and other non-NAFTA</p> <p>14 awards, such as the Azurix and Rumeli awards,</p> <p>15 relied upon by the claimants are not helpful to</p> <p>16 establish the content of customary MST.</p> <p>17 First and foremost, the Glamis and</p> <p>18 Cargill tribunals pointed out that the non-NAFTA</p> <p>19 arbitral awards relied on by the claimants were</p> <p>20 based on the interpretation of autonomous, fair and</p> <p>21 equitable treatment clauses which contained no</p> <p>22 reference to customary MST.</p> <p>23 The Glamis and Cargill tribunals</p> <p>24 pointed out rightly, in Canada's view, that the</p> <p>25 only arbitral awards that are of direct relevance</p>	<p>1 manner. Article 1105 does no such thing.</p> <p>2 First, with respect to</p> <p>3 transparency, it is true that NAFTA does contain</p> <p>4 certain specific transparency provisions relating</p> <p>5 to the publication of laws and regulations of</p> <p>6 general application.</p> <p>7 These obligations are</p> <p>8 substantially similar to the ones one may find in</p> <p>9 the GATT, the GATS and various other agreements.</p> <p>10 However, these rules and obligations are set out in</p> <p>11 a separate chapter altogether of the NAFTA, namely,</p> <p>12 Chapter 18, which is beyond the scope, beyond the</p> <p>13 jurisdiction of this Tribunal.</p> <p>14 The Metalclad tribunal of course</p> <p>15 ruled that Article 1105 did contain an obligation</p> <p>16 of transparency and that Mexico in that case had</p> <p>17 breached that obligation when local governments</p> <p>18 refused a US investor to a operate hazardous waste</p> <p>19 landfill even though it had obtained permits from</p> <p>20 the federal government.</p> <p>21 However, the award was set aside</p> <p>22 by Mr. Justice Tysoe of the Supreme Court of</p> <p>23 British Columbia on this very same point, and I</p> <p>24 submit that the Metalclad decision is therefore of</p> <p>25 very limited relevance.</p>

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<p>1 Also, the claimants have adduced 2 no evidence of state practice or opinio juris 3 supporting the proposition that customary 4 international law now includes a general obligation 5 of transparency, but even assuming for the sake of 6 argument that customary international law contained 7 an obligation of transparency, the intensity of 8 that obligation cannot possibly be that which the 9 claimants allege.</p> <p>10 Indeed, civil servants cannot be 11 expected to operate in a fish bowl at all times, 12 and it is simply unreasonable to expect that all 13 civil servants will render immediately publicly 14 available every single piece of communication that 15 they exchange in conducting their daily activities.</p> <p>16 Now, with respect to the 17 non-discriminatory obligation, in the context of 18 NAFTA Chapter 11 these obligations are specifically 19 set out in Articles 1102 and 1103, and it would be 20 wrong to import them into Article 1105. Indeed, 21 the FTC note of interpretation has clarified that a 22 breach of another provision of the NAFTA doesn't 23 establish a breach of Article 1105.</p> <p>24 In any case, in the context of 25 this arbitration, the debate is largely academic,</p>	<p>1 be -- I mean, one cannot be against motherhood and 2 apple pie, but I submit to you good faith is not a 3 stand-alone obligation under Article 1105; rather, 4 it is a principle which bears upon the application 5 of other substantive principles, and this principle 6 has been consistently recognized by NAFTA 7 tribunals, most notably by the ADF Tribunal.</p> <p>8 Lastly, I must say a few words of 9 the claimants' argument fleshed out for the first 10 time in its response to the United States' 11 non-disputing party submission to the effect that 12 the MFN obligation found in Article 1103 of the 13 NAFTA serves to import treaty standards found in 14 Canada's FIPAs, and, more particularly, standards 15 that contain allegedly autonomous, fair and 16 equitable treatment standards.</p> <p>17 The claimants' argument must be 18 rejected for three main reasons. First, nothing in 19 the terms of Article 1103 suggests that it can be 20 invoked to import a standard provided for in a 21 different treaty that may potentially or 22 theoretically result in a more favourable treatment 23 of an investor from another party.</p> <p>24 The provision is concerned with 25 treatment, not standards. On this count,</p>
<p>1 because the claimants have specifically claimed a 2 breach of Articles 1102 and 1103.</p> <p>3 Their claims of discrimination 4 must therefore stand or fail on the basis of those 5 provisions.</p> <p>6 With respect to legitimate 7 expectations, Article 1105 does not guarantee a 8 self-standing obligation to protect legitimate 9 expectations. This was recently reaffirmed by the 10 Mobil tribunal at paragraph 152 of its decision on 11 liability.</p> <p>12 Moreover, to make out a claim of 13 the legitimate expectations, a claimant must 14 establish that it was given specific assurances on 15 which it could reasonably rely to make an 16 investment.</p> <p>17 With respect to the claimants' 18 arguments concerning full protection and security, 19 Canada's position is that the obligation is limited 20 to instances of physical security and obligation to 21 provide police protection. It doesn't extend to 22 the type of guarantee that the claimants described 23 this morning.</p> <p>24 Finally, with respect to the good 25 faith principle, I mean, it is always dangerous to</p>	<p>1 Mr. Little has already explained why the 2 allegations that the claimants were discriminated 3 against, in any form, has no factual foundation.</p> <p>4 Secondly, in the Chemtura 5 arbitration involving Canada, the three NAFTA 6 parties, through their pleadings and non-disputing 7 party submissions, firmly opposed the possibility 8 of importing an autonomous, fair and equitable 9 treatment standards from one of Canada's FIPAs.</p> <p>10 Finally, and perhaps more 11 importantly, the standard of treatment guaranteed 12 in Canada's post-NAFTA FIPAs is no different from 13 customary MST. The claimants have failed to 14 explain why the FIPAs in question - and they have 15 alleged a bunch, and they all contain substantially 16 similar language to NAFTA Article 1105 - should be 17 interpreted any differently.</p> <p>18 In summary, Canada urges this 19 Tribunal to hold that the standard of treatment 20 guaranteed by Article 1105 is one that protects 21 against egregious state conduct, such as conduct 22 that is manifestly arbitrary, grossly unfair, 23 unjust or idiosyncratic.</p> <p>24 Canada also urges the Tribunal to 25 reject the claimants' attempts to impose a lower</p>

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<p>1 threshold for state liability, as they have failed 2 to prove that their alleged dramatic -- they have 3 failed to prove their alleged dramatic evolution of 4 customary international law.</p> <p>5 And in closing, I would like to 6 point out the systemic implications of the 7 claimants' arguments in this case. If we stand 8 back again from the trees and look at the forest, 9 as Mr. Rankin would say, the Tribunal will note the 10 striking similarities between the legal standard 11 the claimants allege is applicable before Canadian 12 courts -- sorry, I will just go through here.</p> <p>13 So the Tribunal will note the 14 striking similarities between the legal standard 15 the claimants allege is applicable before Canadian 16 courts tasked with deciding judicial review 17 applications and the one they claim NAFTA tribunals 18 should apply under Article 1105.</p> <p>19 In fact, Mr. Rankin has argued 20 that a Canadian court seized of a judicial review 21 application of the Ministerial decisions at issue 22 would have applied a standard of reasonableness, 23 which is precisely the same standard that 24 Mr. Appleton and the claimants are asking you to 25 apply under NAFTA Article 1105.</p>	<p>1 CONTINUED SUBMISSIONS BY MR. SPELLISCY: 2 MR. SPELLISCY: Good afternoon, 3 again. Thank you, Mr. Hebert, for, I think, the 4 quality introduction which will lighten my load as 5 to what I have to show here.</p> <p>6 What I want to focus on here is 7 something that Mr. Hebert was just explaining. The 8 claimants in this case have alleged that Canada and 9 Nova Scotia have violated the minimum standard of 10 treatment, and we have heard what that means at the 11 international law, what that conduct requires, 12 manifestly arbitrary, grossly unfair, unjust, 13 idiosyncratic.</p> <p>14 Now, in this hearing, instead of 15 focussing on proving a breach of this standard, the 16 claimants have instead argued this case like it is 17 a judicial review.</p> <p>18 In fact, what we saw in their 19 closing argument this morning is that they 20 identified two fundamental principles, two 21 fundamental questions, whether civil servants acted 22 in accordance with domestic codes of conduct - and 23 I would point out here that not only did they all 24 acknowledge that such codes existed, they all 25 confirmed that to the best of their belief everyone</p>
<p>1 In essence, the claimants are 2 asking you to perform the same task that would have 3 been performed by a Canadian court sitting in 4 judicial review of the decisions of the 5 Governor-in-Council and of the Nova Scotia Minister 6 of the Environment and Labour to reject the Whites 7 Point project.</p> <p>8 That is simply not the role of 9 NAFTA Tribunals. In any event, even if you do 10 decide to reject Canada's arguments on this point 11 and accept the claimants' interpretation of Article 12 1105, my colleague Mr. Spelliscy will now explain 13 why you should nevertheless dismiss the claimants' 14 claim on the facts of this case.</p> <p>15 Thank you.</p> <p>16 PRESIDING ARBITRATOR: Thank you, 17 Mr. Hebert.</p> <p>18 MR. HEBERT: I am happy to answer 19 any questions you may have.</p> <p>20 PRESIDING ARBITRATOR: Oh, yes, 21 are there any questions?</p> <p>22 PRESIDING ARBITRATOR: No. Thank 23 you.</p> <p>24 PRESIDING ARBITRATOR: 25 Mr. Spelliscy, you have the floor again.</p>	<p>1 acted in accordance with those codes of conduct. 2 And, second, the question they 3 have asked this Tribunal is: Did the federal 4 government exceed the constitutional limits on its 5 federal legislative authority?</p> <p>6 They are asking this Tribunal to 7 wade into arguments about the constitutional limits 8 of federal jurisdiction in Canada.</p> <p>9 They have asked you to decide 10 issues of Canadian administrative law, like, for 11 example: What is or is not a marine terminal under 12 the Comprehensive Study List Regulations; when an 13 environmental assessment starts in Nova Scotia, is 14 it the registration or is it something earlier?</p> <p>15 They have asked you to interpret 16 what certain Canadian court decisions mean, Red 17 Hill Creek, MiningWatch. We have heard differing 18 opinions. They have asked you to interpret what 19 those mean.</p> <p>20 On some of these issues, the 21 claimants' own expert offering the opinion admitted 22 the answers were in fact uncertain and unclear.</p> <p>23 On others, the claimants' own two 24 experts appeared to disagree and, on most, it 25 seemed Canada's two experts disagreed with the</p>

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<p>1 claimants' two experts.</p> <p>2 These issues may all be complex</p> <p>3 and difficult issues of Canadian law, but this</p> <p>4 Tribunal is not a Court of Appeal. It is not a</p> <p>5 judicial review court. The claimants had that</p> <p>6 remedy available to them. They could have sought</p> <p>7 judicial review of each and every one of the</p> <p>8 decisions that now form the basis of their</p> <p>9 challenge, and the Canadian courts would have been</p> <p>10 well placed to deal with them.</p> <p>11 This is not an argument about</p> <p>12 exhaustion of remedy. This is an argument about</p> <p>13 whether this Tribunal is -- if the job of this</p> <p>14 Tribunal is to interpret complex issues of Canadian</p> <p>15 law and figuring out whether or not they are</p> <p>16 complied with in an international setting when the</p> <p>17 question is a minimum standard of treatment.</p> <p>18 And in these circumstances where a</p> <p>19 judicial review wasn't sought, I think we do have</p> <p>20 to ask ourselves about the credibility of the</p> <p>21 assertions of errors of Canadian law that are being</p> <p>22 asked now and being advocated for by the claimants'</p> <p>23 counsel, being advocated for by Mr. Rankin and</p> <p>24 Mr. Estrin.</p> <p>25 What we submit this Tribunal needs</p>	<p>1 structure I think that Professor Schwartz was</p> <p>2 looking for, so I am hopeful that this will be</p> <p>3 helpful.</p> <p>4 Let's start with the area that was</p> <p>5 really the entire focus of the claimants' case, and</p> <p>6 that is the decisions of the Governments of Nova</p> <p>7 Scotia and Canada prior to the constitution of the</p> <p>8 Joint Review Panel.</p> <p>9 And we spent seven days</p> <p>10 essentially on this in terms of cross-examination,</p> <p>11 so there is a lot to cover here and so you are</p> <p>12 going to see I am going to break this down and</p> <p>13 break it down again. I am going to talk about an</p> <p>14 additional six points in this context.</p> <p>15 What I will show is that Nova</p> <p>16 Scotia imposed conditions on blasting by Nova Stone</p> <p>17 to for the purpose of protecting marine mammals.</p> <p>18 I will show that DFO's</p> <p>19 consideration of Nova Stone's blasting plan for the</p> <p>20 3.9 hectare quarry was done in good faith and was</p> <p>21 based on legitimate concerns.</p> <p>22 Third, I will show that the</p> <p>23 claimants' proposed project required environmental</p> <p>24 assessments under both Nova Scotia and federal law.</p> <p>25 Fourth, I will show that the</p>
<p>1 to do is to focus on what the 1105 standard</p> <p>2 requires. And, again, as Mr. Little highlighted at</p> <p>3 the beginning of this hearing and in the opening</p> <p>4 remarks to this closing statement, the question</p> <p>5 is: Have the claimants proven the facts needed to</p> <p>6 make out that claim, not a claim that there was</p> <p>7 somehow an error of Canadian administrative law.</p> <p>8 So now let's turn to the measures</p> <p>9 that the claimants have challenged and what we have</p> <p>10 learned at this hearing.</p> <p>11 And in what follows, I want to</p> <p>12 show three things. One, the decisions of the</p> <p>13 Governments of Nova Scotia and Canada, prior to the</p> <p>14 constitution of the Joint Review Panel, were</p> <p>15 consistent with Article 1105.</p> <p>16 Two, the information-gathering</p> <p>17 done by the Joint Review Panel during its process,</p> <p>18 if attributable to Canada, was consistent with</p> <p>19 Article 1105.</p> <p>20 And, three, the decisions of the</p> <p>21 Government of Nova Scotia and the Government of</p> <p>22 Canada after the issuance of the JRP report were</p> <p>23 consistent with Article 1105.</p> <p>24 So it has taken us perhaps all</p> <p>25 afternoon to get there, but we have finally got the</p>	<p>1 determination that the scope of project to be</p> <p>2 assessed would be the project as proposed by the</p> <p>3 claimants, which was the quarry and marine terminal</p> <p>4 combined, was appropriate and right.</p> <p>5 Fifth, I will show that the</p> <p>6 decision of the Minister of Fisheries and Oceans to</p> <p>7 refer this project to the Minister of the</p> <p>8 Environment for a referral to a review panel was</p> <p>9 also appropriate and justified in the</p> <p>10 circumstances.</p> <p>11 And, finally, as a last step</p> <p>12 before we get to the actual Joint Review Panel, I</p> <p>13 will show that the appointment of the particular</p> <p>14 members of this Joint Review Panel was also</p> <p>15 entirely appropriate in these circumstances.</p> <p>16 So let's start with the first.</p> <p>17 Nova Stone imposed the conditions that it did -- or</p> <p>18 Nova Scotia imposed the conditions that it did on</p> <p>19 Nova Stone with respect to blasting for the purpose</p> <p>20 of protecting marine mammals.</p> <p>21 Now, the claimants have taken</p> <p>22 issue with the Department of Fisheries and Oceans</p> <p>23 even being consulted on Nova Stone's industrial</p> <p>24 approval. Here, this morning, they seemed to argue</p> <p>25 that Mr. Petrie was somehow in dereliction of his</p>

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<p>1 duties to ask for assistance from DFO.</p> <p>2 But as we have confirmed in this</p> <p>3 hearing, the evidence is to the contrary. Nova</p> <p>4 Scotia requested DFO expertise on the effects of</p> <p>5 blasting next to the Bay of Fundy because of good</p> <p>6 faith concerns over the possibility of effects on</p> <p>7 marine mammals.</p> <p>8 Why? As Bob Petrie explained:</p> <p>9 "Basically the province</p> <p>10 doesn't want to be in a</p> <p>11 position of approving a</p> <p>12 facility that is going to</p> <p>13 generate adverse effects,</p> <p>14 whether it be in a surface</p> <p>15 watercourse or in the Bay of</p> <p>16 Fundy."</p> <p>17 It cannot be that a decision to</p> <p>18 seek help, to seek guidance, to seek to ensure the</p> <p>19 protection of species, including endangered</p> <p>20 species, from relevant experts is a violation of</p> <p>21 the minimum standard of treatment.</p> <p>22 Let's move to the second one,</p> <p>23 DFO's consideration of Nova Scotia Nova Stone's</p> <p>24 blasting plans for the 3.9 hectare quarry.</p> <p>25 Again, this is an example of</p>	<p>1 The facts are to the contrary. As</p> <p>2 confirmed in Canada's evidence, the Bay of Fundy is</p> <p>3 home to one of the most important fisheries in</p> <p>4 Canada and the world. It is a rich and diverse</p> <p>5 ecosystem full of unique and endangered or</p> <p>6 threatened species. Effects on such an area are</p> <p>7 not spurious aquatic issues.</p> <p>8 The claimants seem to want to</p> <p>9 suggest that these issues were spurious because of</p> <p>10 the fact that there are other quarries in Nova</p> <p>11 Scotia and that there are other marine terminals</p> <p>12 around, and around Canada, and that there is</p> <p>13 already shipping in the Bay of Fundy.</p> <p>14 But the facts are that there were</p> <p>15 no similar projects anywhere else on the Neck, no</p> <p>16 quarries, no large marine terminals, and when we</p> <p>17 look to what the specific scientific expertise and</p> <p>18 evaluation is with respect to the evaluation, we</p> <p>19 have to remember the location of the project.</p> <p>20 Putting a marine terminal and a</p> <p>21 quarry of this size on the Digby Neck raised a</p> <p>22 whole host of environmental concerns that were</p> <p>23 simply not present for other quarries and other</p> <p>24 marine terminals in other locations.</p> <p>25 Now, DFO -- I have moved to the</p>
<p>1 officials acting in good faith to the best of their</p> <p>2 abilities based on legitimate concerns. Now,</p> <p>3 there's been a lot made of this topic, so I am</p> <p>4 going to subdivide it yet again. I promise I will</p> <p>5 try to keep track of where we are.</p> <p>6 I am going to talk about four more</p> <p>7 points here. First, DFO's initial concerns about</p> <p>8 marine life being affected by the blasting were</p> <p>9 legitimate.</p> <p>10 Second, DFO continued to have</p> <p>11 science-based concerns about the proposed blasting</p> <p>12 throughout the winter and spring of 2002 and 2003.</p> <p>13 Third, the scientific concerns of</p> <p>14 DFO during the winter and spring of 2002 and 2003</p> <p>15 were right for it to consider in the context of the</p> <p>16 proposed blasting.</p> <p>17 And, fourth, DFO's determinations</p> <p>18 and decisions about the information on setback</p> <p>19 distances were entirely appropriate.</p> <p>20 So, again, let's start at the</p> <p>21 beginning on DFO's concerns about marine life being</p> <p>22 affected by the blasting. In their reply, the</p> <p>23 claimants allege that DFO's concerns about blasting</p> <p>24 were nothing more than, to use their words,</p> <p>25 spurious aquatic issues.</p>	<p>1 second point, DFO's science-based concerns about</p> <p>2 the blasting throughout the winter and spring of</p> <p>3 2002 and 2003.</p> <p>4 In this hearing, the claimants</p> <p>5 have seemed to suggest that even if the concerns</p> <p>6 weren't spurious from the beginning, DFO should</p> <p>7 have had no concerns about the blasting by no later</p> <p>8 than December of 2002.</p> <p>9 What have they pointed to? They</p> <p>10 pointed to comments made by Jerry Conway and Dennis</p> <p>11 Wright. In reality, what we have learned at this</p> <p>12 hearing, Jerry Conway and Dennis Wright are but two</p> <p>13 individuals in the Department of Fisheries and</p> <p>14 Oceans. Their opinions are valued, but they are</p> <p>15 not definitive, and they certainly weren't</p> <p>16 considered definitive for this particular project</p> <p>17 for good reasons.</p> <p>18 With respect to Jerry Conway, the</p> <p>19 claimants have tried to insinuate that he was "the</p> <p>20 marine mammal scientist" at the DFO. That we know</p> <p>21 is not true.</p> <p>22 Mr. McLean explained Mr. Conway's</p> <p>23 role in his testimony. He said:</p> <p>24 "No, mainly because Jerry</p> <p>25 Conway is -- I have to</p>

<p style="text-align: right;">Page 251</p> <p>1 explain the role of the 2 marine mammal advisor. Under 3 a fisheries management 4 program within DFO, we have 5 advisors for each of the 6 critical species that we 7 would assess, things like 8 advisors for lobster, ground 9 fish and things like. So the 10 marine mammal advisor isn't 11 necessarily an expert on 12 marine mammals, noise, 13 blasting, those things. He 14 would be an advisor regarding 15 things like quotas on seals, 16 protection measures under the 17 marine mammal regulations, 18 expert. Any of the expertise 19 related to noise propagation, 20 marine mammals would come 21 from DFO science branch". 22 Mr. Bellefontaine also confirmed 23 for the record that Mr. Conway was not himself a 24 scientist. 25 With respect to Dennis Wright, the</p>	<p style="text-align: right;">Page 253</p> <p>1 aren't that visible to 2 anybody". 3 Now, this is exactly why it was 4 the opinion of DFO, as an organization -- that is 5 relevant -- the expertise that DFO as an 6 organization can bring, not individual scientists. 7 And in this regard the science was 8 being collected and coordinated by the Habitat 9 Management Division of DFO's regional office in 10 Nova Scotia. The person collecting at the 11 beginning was Jim Ross, it changed to Phil Zamora, 12 both of whom are retired, of course. 13 And the documents show and the 14 evidence in this case shows that these individuals, 15 scientists themselves, were relying on the opinions 16 of numerous other scientists who were feeding into 17 the process. 18 As Mr. Hood explained in his 19 testimony, there were hundreds of scientists in the 20 appropriate regional office. 21 Now, the claimants have said that 22 there is no evidence in the record of any science 23 being done. That is simply not true. 24 The record contains multiple 25 examples of evidence of science being done. It is</p>
<p style="text-align: right;">Page 252</p> <p>1 claimants have tried to insinuate that his opinion 2 on the blasting effects on marine mammals and how 3 those effects might be mitigated should have been 4 definitive. We know from the evidence why they 5 were not. 6 As Mr. Bellefontaine explained, 7 Mr. Wright may have been an expert in blasting, but 8 he was not an expert in marine mammals and 9 certainly not in large whales. 10 Further, Mr. Bellefontaine, who 11 was a Regional Director-General of this region and 12 with decades of experience there, explained exactly 13 why the mitigation measures suggested by 14 Mr. Wright, which the claimants suggest were so 15 important to know, would not have worked in the Bay 16 of Fundy. Again, the mitigation measures suggested 17 were sighting whales. 18 Mr. Bellefontaine said: 19 "You have to recall at that 20 time, if you realize, the Bay 21 of Fundy, the inner Bay of 22 Fundy where these whales 23 frequent, quite often it is 24 covered with fog cover and 25 cloud cover, and the whales</p>	<p style="text-align: right;">Page 254</p> <p>1 unclear what the claimants are actually looking for 2 here. 3 We have to remember where we are 4 in the environmental -- in the assessment process. 5 This is a search for whether or not there are 6 potential concerns that might trigger federal 7 jurisdiction. It is not the conclusive search that 8 the claimants suggested. 9 We have evidence on the record. 10 We have heard about the work of scientists who were 11 doing science on this particular project, the 12 concerns they had, including those of Mr. Cochrane 13 and Mr. Stephenson. There were others, they are in 14 the record, including the expert on the endangered 15 inner Bay of Fundy salmon, Peter Amiro. 16 And in suggesting that we look at 17 the opinions of only two individuals, the claimants 18 also ignore the basic nature of science. It is an 19 iterative and a collaborative process that does not 20 depend on the individual opinion of any one person. 21 As Mr. McLean explained in his 22 testimony: 23 "There is no one individual 24 that would actually provide 25 the unequivocal answer. It</p>

<p style="text-align: right;">Page 255</p> <p>1 would be a collection of 2 information from various 3 sources." 4 And as Mr. Bellefontaine similarly 5 confirmed: 6 "Normally when you have a 7 scientific review, a 8 collective approach or a 9 final approach would come 10 from all of this dialogue 11 between scientists." 12 Now, we have heard again and again 13 insinuations from the claimants that because these 14 scientific opinions weren't shared -- the buildup 15 to what would be the final opinion wasn't shared 16 with other departments, with the proponents, that 17 somehow it probably wasn't done. 18 Again, that is not true. The 19 witnesses that we had here have confirmed that they 20 would not normally share scientific opinions before 21 they were final, and that as a proponent and as 22 proponent's counsel, Mr. Smith confirmed he would 23 not normally expect to receive an opinion before it 24 was final. 25 I think if you think about why</p>	<p style="text-align: right;">Page 257</p> <p>1 authority at this stage because -- and we're 2 talking in this time period -- because condition 3 10(i) in the Nova Stone permit related specifically 4 to marine mammals. 5 And, relatedly, they seem to 6 suggest that DFO should not have looked beyond 7 that, because there was no federal environmental 8 assessment. No application to DFO related to 9 blasting on the quarry, they say, had been made. 10 Now, there is no question from the 11 record that what triggered the concerns and what 12 triggered the inclusion and what 10(i) is about is 13 about marine mammals. That was what initially 14 triggered the concern. 15 But let's stop to think about what 16 the claimants are suggesting here about the minimum 17 standard of treatment. It is obvious from the 18 record and from the science done that the DFO 19 officials and scientists started to have concerns 20 about the possibility of significant adverse 21 effects from the blasting on fish, and in fact on 22 endangered iBoF salmon, in the winter and spring of 23 2003. 24 The documents show and Mr. Hood 25 himself testified on the basis of his notes that at</p>
<p style="text-align: right;">Page 256</p> <p>1 that is, it is important, because again you could 2 have individual opinions that disagree. That is 3 also the nature of science and that is how it 4 results in the best possible conclusion. 5 Now, the claimants in their 6 closing openly considered why Mr. Conway's opinion 7 was enough to trigger the inclusion of conditions 8 10(h) and (i) in the Nova Stone permit, but his 9 opinion was not enough to remove it, and they have 10 suggested that that is somehow wrongful. 11 I submit to you that is in fact 12 entirely appropriate. When one has a precautionary 13 approach to science, especially when endangered 14 species are involved, one has a precautionary 15 approach. It is entirely appropriate for one 16 individual to flag a concern, but for that concern 17 not to be removed until all individuals are 18 convinced that that concern is not real. 19 Now, let's talk about the 20 scientific concerns that DFO had and whether it was 21 right for DFO to consider them in the context of 22 the proposed blasting, which is -- I believe I am 23 on number 3. 24 The claimants have suggested that 25 DFO was acting wrongfully and in excess of its</p>	<p style="text-align: right;">Page 258</p> <p>1 least four scientists had specifically identified 2 concerns about the effects of blasting on swim 3 bladders of fish. 4 Should scientists from DFO simply 5 have ignored those concerns and allowed blasting to 6 go on because a permit from Nova Scotia only spoke 7 about marine mammals? 8 As Mr. Bellefontaine has 9 explained, that would have been an abdication of 10 their responsibility as officials and scientists. 11 The minimum standard of treatment does not require 12 officials to wear blinders and ignore the potential 13 harm that a project may cause simply because new 14 concerns that were previously unforeseen have 15 arisen. That is also the nature of science and the 16 nature of assessment. 17 Now, I want to come to DFO's 18 determinations and decisions regarding the setback 19 distances. 20 Much has been made of this, of 21 course, but let's look at what the conclusions of 22 the work of these scientists was. And much has 23 been made of the May 29th letter from Mr. Zamora to 24 Mr. Buxton. 25 What we know from the record --</p>

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<p>1 and we have seen it and it's in the notes of 2 Mr. Hood and it is in emails among DFO 3 scientists -- is that the conclusion that these 4 scientists were able to reach at the end of 2003, 5 the precautionary approach based on the information 6 they had, was that the blasting as proposed by the 7 claimants was going -- would likely have resulted 8 in the death of fish.</p> <p>9 And in good faith, and there is no 10 evidence otherwise, Fisheries officials used a 11 computer model to suggest a setback to protect iBoF 12 salmon of 500 metres from the shore.</p> <p>13 Again, much has been made of this 14 setback distance and how it was arrived at. Today, 15 in their closing statement, the claimants said it 16 was concocted.</p> <p>17 But there's been no evidence of 18 some sort of contrivance or intentional action or 19 arbitrary decision. A model was used.</p> <p>20 Other times, the claimant has 21 described this as an error or a mistake. Well, a 22 mistake is not a violation of the minimum standard 23 of treatment.</p> <p>24 Now, the claimant has put great 25 emphasis on this information, and they have</p>	<p>1 "The I-Blast results we ran 2 for Atlantic Salmon post 3 smolt size fish." 4 What does he ask him on July 3rd: 5 "Would you please look at the 6 results? Are we too 7 conservative?" 8 Now, there is no evidence from 9 that time frame that that communication was had 10 earlier. There is an email from the following year 11 that was put into the record where Mr. Zamora 12 recalls a year later that that conversation might 13 have been in June of 2003, but it was not. It was 14 in July after the DFO Minister had made his 15 referral.</p> <p>16 And when is the response? July 17 29th, 2003. And what does Mr. Wright say? He 18 says: 19 "Further to our telephone 20 conversation this morning, I 21 have a few comments and 22 thoughts concerning the 23 explosives use issue 24 associated with the Whites 25 Point quarry."</p>
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<p>1 consistently insinuated it was wrongful that it not 2 be shared immediately with the claimants.</p> <p>3 They have in fact at times today 4 and at times in the past alleged that DFO was 5 aware -- prior to the DFO Minister requesting that 6 the project be referred or referring the project 7 for referral to a review panel in 2003, that the 8 DFO Minister knew or should have known or officials 9 knew that the blasting setback calculations were 10 wrong.</p> <p>11 The fact is that that assumption 12 is wrong, and the documents show it.</p> <p>13 Next slide. In early July of 14 2003, that is when Mr. Zamora wrote to Mr. Wright, 15 and he says: 16 "Dennis, this is a follow-up 17 to my conversation and Brian 18 Jollymore's with you re Digby 19 quarry blasting plan." 20 Then he provides him the 21 documents, including the blasting plan, iBoF 22 Atlantic Salmon proximity and habitat preferences 23 from Peter Amiro, science branch, some of the 24 science that was being done. 25 Three and four:</p>	<p>1 Here I want to stop, because I 2 want to come back to the idea that this was a fraud 3 or that it was concocted. Why would DFO scientists 4 on their own follow up with other DFO scientists if 5 they had just concocted this 500 metre setback? 6 Why would they go through the hassle? Why would 7 they go through the work? Most of all, why in 2004 8 would they disclose to the claimants that in fact 9 the calculation was in error? 10 Now, again, there's been a lot 11 made of why this information wasn't shared, and I 12 think the explanation was aptly given by 13 Mr. Chapman, and that is that, in his opinion, in 14 Mr. Chapman's testimony, that it would have been 15 inappropriate to discuss -- next slide, please: 16 "It would have been 17 inappropriate to discuss this 18 because the project had been 19 referred and we were very 20 concerned with the integrity 21 of the environmental 22 assessment process." 23 And so I want to stop here again 24 for another reality check. The purpose of 25 environmental assessment is to allow the</p>

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<p>1 governments to consider the environmental effects 2 of proposed projects during EA.</p> <p>3 This case, a proposed project, was 4 a 3.9 hectare quarry, and Mr. Clayton has confirmed 5 that the intention was to start blasting. We heard 6 that again this morning from the claimants' 7 counsel.</p> <p>8 Mr. Clayton also said it was the 9 first phase of the larger project, and there was 10 the difficulty. In their project description 11 submitted in March, which is what the federal 12 officials had before them, they said they would 13 develop ten acres or four hectares a year.</p> <p>14 So what was the plan here? To use 15 a provision of Nova Scotia's regulations that is 16 for small quarries and use it to allow the 17 claimants to develop the first phase of their 18 larger quarry, thereby avoiding the entire purpose 19 of EA, which is to assess the effects before the 20 project begins.</p> <p>21 The minimum standard of treatment 22 does not require the government to countenance such 23 behaviour.</p> <p>24 Now, I know my time is short, so I 25 want to move quickly through some of the other</p>	<p>1 Let's turn quickly to the scope of 2 the project to be assessed. The claimants are 3 pushing a theory that the decision of DFO to scope 4 in the quarry was a violation of Article 1105, and 5 in this regard they are arguing, it seems to be, 6 two things: One, that it was unconstitutional for 7 DFO to scope beyond its triggers, and DFO knew it; 8 and, second, that it was contrary to DFO's 9 practice.</p> <p>10 The evidence doesn't support those 11 assertions, but it also misses a fundamental point. 12 First, as Mr. Chapman confirmed, once this was 13 referred to a Joint Review Panel, it is the 14 Minister of the Environment that determines scope, 15 and he has to scope with his counterpart in Nova 16 Scotia to include all of the elements of the 17 project.</p> <p>18 And, second, as described above, 19 DFO did determine that there were likely to be 20 triggers on the quarry. Mr. Hood and Mr. McLean 21 both testified to that.</p> <p>22 The claimants may not have liked 23 that determination, but that is the determination 24 that they came to with the blasting plan that was 25 actually proposed by the claimants at the time.</p>
<p>1 factors here.</p> <p>2 I want to come to the claimants' 3 proposed project required EAs under both Nova 4 Scotia and federal law, so if we can bring that 5 slide up.</p> <p>6 In their written submissions, the 7 claimants suggested that in fact this had all been 8 contrived, that there was no federal jurisdiction.</p> <p>9 And in their submissions here, 10 they seem to be suggesting that in fact there was 11 no Nova Scotia jurisdiction simply because a 12 registration document had not been filed.</p> <p>13 However, the evidence at this 14 hearing, confirmed by the claimants' own experts, 15 is before this quarry could actually begin 16 operation, before the marine terminal could begin 17 operation, an EA was required. We can argue about 18 the formalities.</p> <p>19 And we have heard about this 20 registration document, and the claimants had a Nova 21 Scotia environmental assessment officer, Mr. Daly, 22 here. He could have testified to it. They didn't 23 ask them. If they had, he would have explained a 24 registration document of that sort is not needed in 25 a Joint Review Panel process.</p>	<p>1 Even if we ignore those two facts, 2 though, their arguments are still not supported by 3 the evidence.</p> <p>4 Now, again, this is where we get 5 into questions of constitutional law. With respect 6 to their argument that it was not constitutional, 7 both Mr. Hood and Mr. Chapman explained that the 8 good faith view of officials at DFO and CEAA was 9 that they were fully entitled to scope a project in 10 a manner which included interrelated aspects of the 11 project even if there were no triggers.</p> <p>12 If we could go to the next slide 13 there; keep going. And so you say -- keep going.</p> <p>14 And this was the testimony of 15 Bruce Hood. It was his understanding in 2003 that 16 the government had the discretion to do it. 17 Mr. Smith -- and Mr. Chapman had the same -- if we 18 move through the slides, Mr. Smith, an expert that 19 Canada has presented, and in fact said from his 20 perspective, the ability to scope is not 21 contingent.</p> <p>22 Now, I don't want to get into a 23 constitutional debate with my colleague, Mr. Nash, 24 but I think he has MiningWatch wrong. MiningWatch, 25 as Mr. Rankin confirmed, was a case where the</p>

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<p>1 Supreme Court was faced with a question of whether, 2 under the same language of CEAA applicable here, 3 the federal government should have scoped a project 4 to include areas over which it had no triggers, and 5 it said "yes".</p> <p>6 We cannot assume that the court in 7 MiningWatch was dumb to the constitutional 8 question. They were not telling the government to 9 do something that was unconstitutional. This is 10 really an issue, I think, of Canadian law, and 11 maybe one day the Supreme Court will even address 12 it.</p> <p>13 I also want to point out, on scope 14 of triggers, it was not in fact the consistent 15 practice of DFO at the time to scope to those 16 triggers. We heard from Mr. Chapman of this fact, 17 that he said that there was a marine terminal, an 18 LNG terminal, that at the same time in fact did 19 have -- was scoped with triggers.</p> <p>20 We heard from Mr. Smith about the 21 Jackpine and Horizon oil projects scoped broader 22 than their triggers on exactly the same day that 23 the Whites Point project was referred.</p> <p>24 Now let's come quickly to the 25 decision of the Minister of Fisheries and Oceans to</p>	<p>1 mentioned when this project was being referred. 2 But we've already heard from Mr. Hood and 3 Mr. Chapman why that is unimportant. 4 Mr. Hood and Mr. Chapman explained 5 that it is unimportant for a simple reason. 6 Everybody knew about the public concern. It wasn't 7 important to put in a letter what everybody knew, 8 especially since this was being referred to 9 under -- referred for a referral under section 21, 10 which didn't require anything to be said. 11 And conscious of my time, I will 12 now come to very quickly the appointment of the 13 particular members of the review panel, because 14 there was some discussion on this. And we have 15 heard from Mr. Chapman exactly why these people 16 were selected. We have heard the claimants have 17 suggested they were manifestly biased, but these 18 facts are baseless. 19 We have heard from Mr. Estrin that 20 while he didn't challenge the actual scientific 21 expertise, he challenged the fact that there wasn't 22 enough regulatory experience. Why? Because 23 Dr. Fournier at the end of the Sable hearings had 24 the modesty to suggest that he learned something. 25 That is not a credible challenge to somebody on a</p>
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<p>1 refer this project to the Minister of the 2 Environment for referral to a review panel.</p> <p>3 Now, the claimants seem to allege 4 that the decision to do so was inappropriate. 5 Again, the evidence is to the contrary. There's 6 evidence in the record that there was concerns 7 about significant adverse environmental effects 8 arising not just from the quarry, not just from the 9 blasting on the quarry, but from the marine 10 terminal and from other aspects of the quarry.</p> <p>11 There is evidence in the record 12 that this was on the Comprehensive Study List, and, 13 as a result as being on the Comprehensive Study 14 List, it could be referred to a review panel for 15 that exact reason.</p> <p>16 Indeed, the claimants' own 17 expert -- and I will see if Chris can keep up with 18 me, where I am -- Mr. Rankin confirmed that there 19 was ample authority under CEAA for the marine 20 terminal to be referred to a review panel.</p> <p>21 It is actually a few slides 22 further down there, and that is at transcript 23 volume 2, on page 601, lines 4 to 8.</p> <p>24 Now, the claimants have made some 25 importance of the fact that public concern was not</p>	<p>1 Joint Review Panel in terms of their expertise. 2 Now let's turn to the second point 3 overall, which is the information-gathering done by 4 the JRP during its process, even if attributable to 5 Canada, was consistent.</p> <p>6 Fortunately, I can be much briefer 7 here, because very little hearing time was actually 8 spent on these issues. What we want to emphasize 9 is that the Joint Review Panel provided the 10 claimants with due process at all times during the 11 information-gathering phase of the EA, and, in 12 making its recommendations, it acted in accordance 13 with the mandate given to it.</p> <p>14 On the adequate notice point, a 15 lot has been made about the notice and the 16 requirements of natural justice, and it's been 17 alleged that the JRP did not provide Bilcon an 18 adequate opportunity to be heard by failing to 19 provide a presentation, by not asking questions of 20 its witnesses.</p> <p>21 The evidence in the record is that 22 the JRP wanted the claimants' participation. They 23 solicited it. They asked for it. The claimants 24 were there. The claimants decided not to 25 participate in a substantial way.</p>

<p style="text-align: right;">Page 271</p> <p>1 Their decision to sit on their 2 hands is one which Mr. Smith has testified was 3 certainly abnormal. 4 Now, the record shows why they 5 were content to sit on their hands; because they 6 saw the EA process as nothing more than hoops to 7 jump through. 8 If we look at the individual 9 claims, as this Tribunal knows, sometimes experts 10 come to a hearing; sometimes there are no questions 11 to ask. 12 We heard again today about the 13 fact that Dr. Fournier turned his back at a time on 14 Mr. Buxton during his presentation. As this 15 Tribunal knows sometimes your books are located 16 behind you. There is no evidence as to why he 17 turned his back. 18 Now, a Tribunal's determination 19 that it has no questions to ask, the way it 20 conducted itself, there has been no breach we would 21 say of Article 1105 here. 22 There has also been allegations of 23 bias against the Joint Review Panel. I don't want 24 to get into these, but what I would commend for the 25 Tribunal to do is to simply read the record. The</p>	<p style="text-align: right;">Page 273</p> <p>1 among the experts. The experts seem to agree that 2 socioeconomic effects can be considered. In his 3 report, Mr. Estrin took it a bit further and said 4 that community core values is a pure socio-economic 5 effect. 6 Mr. Smith in his reports agreed 7 with Mr. Estrin. Mr. Rankin at this hearing and in 8 his reports did not, and last week things got even 9 more confused, because Mr. Rankin confirmed that he 10 disagreed with Mr. Estrin, and Mr. Estrin then 11 appeared to disagree with himself and what he had 12 written, saying that when he wrote it was a 13 socio-economic effect not once, but numerous times, 14 he had really he meant just add a "not" in front of 15 each one of those times. 16 In contrast, Mr. Smith addressed 17 in his testimony -- Mr. Smith has consistently 18 explained why these sort of human environmental 19 effects, values, are appropriate to consider in an 20 EA in Canada, and particularly in Nova Scotia. 21 And he walked you through the 22 guidelines and he walked you through the terms of 23 reference, and we can see directly from there the 24 links. 25 Now let's turn to the last topic,</p>
<p style="text-align: right;">Page 272</p> <p>1 transcripts are available. The report of the Joint 2 Review Panel is available. 3 Were certain people against the 4 project? Certainly. Were uncomfortable questions 5 asked? Certainly. But it is not the role of a 6 Joint Review Panel in a public hearing to shut down 7 public participation. When it got out of hand, 8 Dr. Fournier did, but otherwise the public has to 9 be allowed to participate. That is something that 10 was in fact recognized by both Mr. Estrin and 11 Mr. Smith. 12 Now, let's get quickly to the 13 mandates and how the JRP acted in accordance to the 14 mandate, because this is where we get community 15 core values, which one would think would be the 16 focus of this hearing, and there's been a lot of 17 evidence that I would have to go through otherwise. 18 I don't want to spend the rest of 19 my time on this, but it is important, because a 20 Joint Review Panel decided on the basis of the 21 community's core values. There's been a lot of 22 discussion about whether or not that is an 23 appropriate thing to consider in an environmental 24 assessment in Canada. 25 Here, again, we have disagreement</p>	<p style="text-align: right;">Page 274</p> <p>1 which is the decision of Nova Scotia and Canada to 2 accept the Joint Review Panel recommendation. 3 PRESIDING ARBITRATOR: For which 4 you have exactly five minutes. 5 MR. SPELLISCY: All right. 6 Now, here again, I think it is 7 important to understand the role of the Joint 8 Review Panel and the role of government. As we 9 heard, the Joint Review Panel makes a 10 recommendation. Governments decide. The 11 recommendation is one input. 12 So in looking at the decisions of 13 government, we have to look at them as distinct 14 decisions. In attacking these decisions, the 15 claimants suggested that this was an abdication of 16 responsibility by Ministers. 17 Now, that is false, and I want to 18 focus on what they said at this hearing and what 19 they seemed to focus on here, which was that the 20 failure to meet with the Ministers face to face was 21 a denial of natural justice. 22 Now, they of course admit letters 23 were sent, and they of course admit that from the 24 evidence in the record those letters were read. 25 Mr. Smith had it, I think, exactly</p>

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<p>1 right. Canadian law and natural justice requires 2 one hearing, not two. And, interestingly, of 3 course if they had wanted a second hearing, they 4 had one. It was a judicial review in Canadian 5 courts.</p> <p>6 Now, I will take probably the 7 remaining two minutes I have for a summary here. 8 The claimants' 1105 claim essentially asks this 9 Tribunal to forget what the standard for Article 10 1105 is. They want this Tribunal to assume the 11 role of a Canadian court reviewing as a matter of 12 Canadian law whether each of the decisions made 13 during the course of the EA were correct.</p> <p>14 But in any process, EA process, 15 anywhere in the world, there will be dozens of 16 decisions made. Many of those decisions the 17 proponents of a project will not like. Many they 18 will not agree with. Some they may even challenge 19 in local courts.</p> <p>20 The claimants could have taken 21 these claims to Canadian court and challenged their 22 compliance with Canadian law, but instead they have 23 challenged their compliance with Canadian law in 24 front of this Tribunal.</p> <p>25 However, these decisions, without</p>	<p>1 Why would they rethink the science as part of the 2 Joint Review Panel process? Why would they come to 3 the conclusions ultimately they did? Why not keep 4 the ruse up to the end, if that is what it was?</p> <p>5 The fact is that it was not. 6 What the claimants are really 7 asking this Tribunal to do is second guess the 8 judgment and good faith decision-making of 9 officials and scientists. That is not the role of 10 this Tribunal.</p> <p>11 The claimants may have come 12 believing that this was a slam-dunk, that EA in 13 Canada was merely a permitting process, not an 14 assessment process. They may have been 15 disappointed they were wrong, and they are now 16 looking to this Tribunal to provide them with 17 insurance against a bad business decision to locate 18 a quarry and marine terminal in a place where it 19 had little business being, a bad business decision 20 to ignore the community and seek to run roughshod 21 over their rights.</p> <p>22 Article 1105 is not crafted for 23 these purposes. Stepping even further back, more 24 generally, the claimants' other complaint seem to 25 be based on the fact that their project was subject</p>
<p>1 more, do not rise to the sort of egregious conduct 2 breaching the customary standard of international 3 law.</p> <p>4 So what do the claimants ask you 5 to do? They ask you to assume a conspiracy, a 6 conspiracy orchestrated apparently by a Minister 7 they chose not to cross-examine even though he was 8 available, a conspiracy which is completely 9 improbable given the range of actors involved, the 10 fact that it went to a Joint Review Panel over 11 which the conspirators would have no control, a 12 conspiracy that everyone who testified here has 13 denied.</p> <p>14 And, as a result, what they are 15 essentially asking you to conclude is that all of 16 the witnesses presented here by Canada are lying. 17 There's no reason why these civil servants, many of 18 them long since retired, as well, would lie in 19 these public hearings.</p> <p>20 The claimants have offered no 21 reason why, and the claimants have also offered no 22 reason why, if it was all concocted from the 23 beginning and everyone knew that, why DFO would 24 come back and revise some of its conclusions. Why 25 would they rethink their blasting calculations?</p>	<p>1 to an EA that didn't look identical to other EAs. 2 Mr. Little has explained why.</p> <p>3 But, ultimately, what we ask you 4 to conclude here is that there has been no breach 5 of any of the provisions of Chapter 11.</p> <p>6 And I thank you for your 7 attention, and if there are no questions -- I am 8 happy to answer questions now, but, if not, subject 9 to our right of reply, this will serve as a close 10 to Canada's closing statement.</p> <p>11 PRESIDING ARBITRATOR: Thank you. 12 It looks like...</p> <p>13 PROFESSOR SCHWARTZ: Just one 14 question, and it could be dealt with in 15 sur-rebuttal, if any.</p> <p>16 When I was looking through the 17 Nova Scotia Environment Act, and I might very well 18 be misreading it, it looked to me, in 26(2) of the 19 regs that there is:</p> <p>20 "The proponent shall be 21 provided reasons in writing 22 by the Minister when an 23 undertaking is rejected." 24 That is section 26(2) of the Nova 25 Scotia Regs. We haven't had any input on this. I</p>

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<p>1 am just wondering whether that is applicable here. 2 If you want to just briefly mention it in 3 sur-rebuttal, that is -- 4 MR. SPELLISCY: I can find out 5 whether it is applicable, but I guess, in essence, 6 there was a response in writing from the Nova 7 Scotia government. There was reasons. There was 8 also a courtesy phone call in advance. 9 For the claimants to suggest they 10 didn't understand what the reasons were I think is 11 not credible. There was that writing. Now, there 12 is no indication of how long or how lengthy those 13 reasons have to be, but the Nova Scotia Minister 14 did give reasons. 15 PROFESSOR SCHWARTZ: Thank you 16 very much. 17 PRESIDING ARBITRATOR: Thank you. 18 That gets us to the break, and we are going to have 19 a break of 30 minutes now in preparation for the 20 rebuttals and the sur-rebuttal. 21 I think I am right. 22 MR. PULKOWSKI: That's right. 23 PRESIDING ARBITRATOR: The break 24 will last until 3:50. It is a few minutes shorter, 25 3:50.</p>	<p>1 concluded the proposed work is likely to cause 2 destruction of fish and says, You need a section 32 3 authorization. 4 And on the second page of that 5 document, Mr. Zamora explains that, "The 3.9 6 hectare quarry", I am at the top of the page is: 7 "... within the larger area 8 of the proposed Whites Point 9 quarry and Marine Terminal, 10 which is currently undergoing 11 an environmental assessment." 12 Then on the middle of the page, 13 the full paragraph: 14 "A Fisheries Act Section 32 15 Authorization is in the Law 16 List Regulations of CEAA and 17 therefore DFO would not be 18 able to issue a section 32 19 Authorization for the 20 four-hectare blasting plan 21 until the CEAA assessment for 22 Whites Point Quarry and 23 Marine Terminal Nova Scotia 24 has been completed." 25 Now we are subsumed into the</p>
<p>1 --- Recess at 3:24 p.m. 2 --- Upon resuming at 3:53 p.m. 3 PRESIDING ARBITRATOR: Okay. We 4 are on the record and I will give the floor to 5 Mr. Nash for the rebuttal. 6 REPLY SUBMISSIONS BY MR. NASH: 7 MR. NASH: Thank you, 8 Mr. President. I will be speaking on just one 9 aspect. It relates to the question of the test 10 blasting, and the overall position can be 11 summarized in this, that the prevention of Bilcon 12 and its partner from doing test blasting on the 3.9 13 prevented it from gathering valuable scientific 14 data that it could use for the purpose of 15 developing the larger parcel. 16 So in doing test blasting on the 17 3.9, there was a linkage, a clear linkage, between 18 that and the larger parcel. 19 And perhaps I could just summarize 20 very quickly the short history of it. We've seen 21 the submission of various blasting plans. We've 22 seen the repeated requests for further information. 23 That culminates in the letter of May 29th of 2003, 24 which is Exhibit C-129, and that is the letter in 25 which Mr. Zamora says to Mr. Buxton that DFO has</p>	<p>1 environmental assessment of the whole larger 2 parcel, but there's still a reference to the 3.9. 3 There is, then, the referral, and 4 all of this goes to scoping, jurisdiction, and the 5 whole question of the referral to the JRP, because 6 it's based -- it appears to be based, at least, 7 upon some belief, we say a thin belief, that there 8 is an actual section 32 authorization required. 9 The next document that I would 10 like to draw your attention to is Exhibit C-490, 11 where Mr. Zamora writes, again, this time to 12 Mr. Steve Chapman. It is dated September 17th, 13 2003, and there is a reference to the final 14 agreement for the JRP. Mr. Zamora states: 15 "The draft agreement states 16 that the project consists of 17 a 120 hectare basalt quarry 18 and associated deepwater 19 marine terminal. DFO 20 recommends that the 3.9 ha 21 test quarry associated with 22 this project be included in 23 the scope of the project. 24 The rationale for this 25 recommendation is as follows:</p>

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<p>1 "The 3.9 ha test quarry is 2 located within the proposed 3 120 ha quarry. DFO has 4 determined that the blasting 5 plan for the 3.9 ha test 6 quarry, which was submitted 7 to DFO for review, is likely 8 to have a Fisheries Act 9 section 32 trigger." 10 So here, in September, it is still 11 being maintained, after what we've seen, that there 12 is still a section 32 trigger: 13 "The environmental effects of 14 the operation of the 3.9 ha 15 test quarry are expected to 16 be the same as the 17 environmental effects of the 18 proposed 120 ha quarry." 19 So it gets subsumed into the 20 environmental assessment of the larger territory. 21 And we cited this morning some of the further 22 correspondence between DFO and the proponent with 23 respect to doing a test blast, and, as we've said, 24 Bilcon always wanted to do a test blast. 25 And then, finally, at Exhibit</p>	<p>1 Thank you. 2 MR. APPLETON: Those are our 3 submissions. 4 MR. NASH: Those are mine. 5 MR. APPLETON: Okay. 6 PRESIDING ARBITRATOR: 7 Mr. Appleton. 8 REPLY SUBMISSIONS BY MR. APPLETON: 9 MR. APPLETON: Thank you. I 10 didn't want you to think we were finished with you. 11 Of course we appreciate your patience with us and 12 for giving us the opportunity to be able to address 13 some points. 14 I had a particular order that I 15 thought would be helpful and I have, in the brief 16 break, reorganized my notes by throwing them up in 17 the air. So I will do my best, but if there is -- 18 I don't want you to think this is some masterful 19 plan to be able to get things organized. It is 20 exactly the opposite. It is a bit of 21 disorganization. 22 But there were many points that 23 were raised and a number of items that merit some 24 discussion, and some very good questions that merit 25 some discussion, as well.</p>
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<p>1 C-34, which is the JRP report, at page 64, here we 2 are now years later, five years after the first 3 approval has been given. In the first full 4 paragraph on the right-hand column: 5 "The effects of blasting plan 6 on marine mammals are poorly 7 understood. The potential 8 impact is difficult to 9 characterize with a 10 reasonable degree of 11 certainty without the benefit 12 of a test blast and greater 13 clarity as to the exact 14 nature of the planned 15 operational blasting. Very 16 little is known about the 17 deleterious effects of 18 exposure to noise and marine 19 mammals." 20 So there is this continuous effect 21 of the original prevention of Bilcon being able to 22 conduct a test blast going right through the piece 23 all the way to the end of the JRP report. 24 And those are my submissions, 25 unless you have any further questions.</p>	<p>1 And of course I invite you, if you 2 have some questions, this is a good opportunity to 3 be able to raise those, as well. 4 I think we might first want to 5 start with the issue of jurisdiction. Can you pass 6 me that so I can keep track of time? 7 So there was some discussion about 8 the partnership between Nova Stone and Bilcon. I 9 think it would be important that we're able to 10 discuss that. 11 So I think maybe we might put on 12 the screen, there is partnerships agreement that is 13 in the record. The witnesses were taken through 14 this partnership agreement. 15 The agreement says that it spoke 16 from a date; I believe the date is April 24th, 17 2002. Could you take us to that part, if you know 18 where that is? 19 MR. DICKSON-SMITH: Sorry, 20 Mr. Appleton, is this confidential? 21 MR. APPLETON: It is, but I think 22 that we might be in the position to waive this 23 confidentiality by now, this particular. 24 MR. PULKOWSKI: This version is 25 not confidential.</p>

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<p>1 MR. APPLETON: This is the 2 non-confidential version. We tried to make this as 3 easy as we can, because I would like to make sure 4 those people who are watching at home are able to 5 be able to see transparency in action, and we think 6 that is very important here.</p> <p>7 And so if we look here, you can 8 see that it says Bilcon and NSE formed a 9 partnership on April 24, 2002. If you look -- so 10 it is very clear that there is a partnership. The 11 partnership was formed and it has a name and style, 12 Global Quarry Products.</p> <p>13 So there is an agreement. There 14 is an agreement that is addressed. It takes some 15 time sometimes for some of the other formalities to 16 come. A partnership is well known to be an issue; 17 we look at conduct. We look at what the people do.</p> <p>18 So we have this. It was made 19 under the local Nova Scotia Partnership Act. This 20 is all on the record.</p> <p>21 When you have a partnership, the 22 assets of the partners are commingled. That is the 23 fundamental nature of partnership.</p> <p>24 And then NAFTA itself says 25 something about partners. It says partners and</p>	<p>1 protection, to protect a wide and broad range of 2 investments, actually highly influenced by the case 3 law of the US-Iran Claims Tribunal, which was 4 occurring in a very significant way just before the 5 NAFTA was coming through, and so a lot of those 6 ideas were brought in to bear when they were 7 drafting and negotiating the NAFTA itself.</p> <p>8 So it is clear that we have a 9 partnership in April 2002. The permit is, 10 therefore, held in for the benefit of the 11 partnership. We see that there is money that comes 12 in, and what is the role of Nova Stone is to be 13 able to deal with this permit. That is its job. 14 It is not a transfer. It is a commingling.</p> <p>15 And this definition in Article 16 1139 makes clear that it applies to a person who -- 17 sorry, I should be more precise. If you could put 18 1139 up, the definition of investor, that an 19 investor is a party or state enterprise thereof, or 20 a national or enterprise of such party, and here 21 are the key words, "that seeks to make, is making 22 or has made an investment".</p> <p>23 So, in fact, whether you're 24 seeking to make or whether you have already made, 25 it makes little difference, in this case actually,</p>
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<p>1 joint venturers are enterprises, and that is 2 covered in Article 201 of the NAFTA, which defines 3 enterprise.</p> <p>4 So just to explain this for a 5 moment, NAFTA Article 1139 sets out the definitions 6 for NAFTA Chapter 11. It sometimes refers you to 7 another definition in the treaty, and so it says, 8 with respect to this chapter, that you look at 9 Article 201, which is the general definition of 10 "enterprise".</p> <p>11 So 1139 sends you to 201, and 201 12 says:</p> <p>13 "Enterprise means any entity 14 constituted or organized 15 under applicable law, whether 16 or not for profit, and 17 whether privately-owned or 18 governmentally-owned, 19 including any corporation, 20 trust, partnership, sole 21 proprietorship, joint venture 22 or other association."</p> <p>23 It is an exceptionally broad and 24 encompassing type of idea, because the idea of the 25 NAFTA is to be able to give this type of</p>	<p>1 they will have made the investment at the time 2 before the acts come together, but whether you just 3 intend to make or whether you are making.</p> <p>4 So this is all clear. Now, let's 5 look at the issue about the end of the partnership. 6 Canada admits that there is an intimate link 7 between the smaller and the larger quarries. The 8 trigger on the 3.9 hectare quarry under section 32 9 led to a trigger for the new larger quarry. This 10 is all a continuing act.</p> <p>11 I am going to talk about 12 continuing acts a little bit later, but it is 13 important that we see the interrelationship. One 14 fed into another. They are all related.</p> <p>15 And so it is one inextricable 16 link, and we know that the purpose for this quarry, 17 this was not a quarry that Mr. Clayton or the 18 Clayton family came to Nova Scotia to be able to 19 deal with the existing brownfield site. There was 20 an existing facility there, but they came to do 21 something more because of the quality of the 22 mineral deposit that was there.</p> <p>23 So they wanted to do this to have 24 a test, to have the information, to be able to 25 understand how to deal with the operation. What</p>

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<p>1 would be the best way to go? What types of issues 2 would you want to mitigate?</p> <p>3 These are experienced people, as 4 we heard from Mr. Clayton. Mr. Clayton had 5 mentioned to you about other operations that they 6 have in New Jersey in the Pine Barrens. I think 7 that is what they were called, another UNESCO site, 8 again, with quarries and mines, because UNESCO 9 biosphere sites are large areas that respect these 10 type of activities. It is part of the activities 11 that are respected in a UNESCO biosphere, and that 12 is important to understand.</p> <p>13 It is not that they are excluded. 14 It is part of the protected heritage that fits into 15 a biosphere.</p> <p>16 So the effects of not blasting on 17 the 3.9 hectare quarry resonated throughout this 18 decision to scope. The trigger under DFO, and 19 thereby the 152 hectare quarry, was the basis upon 20 which this 152 hectare project was referred to the 21 JRP. We see this all interconnected and see that 22 is how it all comes together.</p> <p>23 Now, I would like to be able to 24 talk about the JRP, but I am missing my note -- oh, 25 thank you very much -- on the JRP. Thank you.</p>	<p>1 state responsibility, but yet could carry out some 2 function.</p> <p>3 In this context, though, we know 4 that there are specific functions by the Joint 5 Review Panel, and these functions are actually very 6 much in the flavour of governmental types of 7 functions. These are why we believe that these are 8 actually issues covered by ILC Article 4.</p> <p>9 Now, it is dangerous, whenever we 10 want to talk about the ILC articles on state 11 responsibility, to have members of the ILC that 12 you're appearing before, but I will take a stab at 13 this, trying to hope that I understand. And I have 14 been taken to task in the past by the special 15 rapporteur, James Crawford, who says I sort of 16 understand, so I am going to do my best. He says 17 that a lot.</p> <p>18 --- Laughter</p> <p>19 MR. APPLETON: In this situation, 20 the reason why we have a governmental organ is that 21 it is an integral part of the governmental process, 22 a process where decisions are made by a Minister, 23 but where a recommendation by the JRP or by the 24 panel is a requirement for that to be made. 25 And look at the powers.</p>
<p>1 So, oh, I see someone has 2 summarized it. Thank you. So we have a couple of 3 points about the Joint Review Panel.</p> <p>4 First, I would like to talk about 5 anti-American bias. Canada has not provided either 6 affidavit testimony or any witness who was actually 7 involved as an official in the actual JRP process, 8 apart from Mr. Chapman, who testified that his 9 involvement ended with the terms of reference and 10 that he was not involved in advising the JRP during 11 the process.</p> <p>12 We have had no opportunity to hear 13 from any Canadian official who was involved in the 14 actual JRP proceeding or developing the JRP record 15 or the JRP report. We find that all very 16 troubling.</p> <p>17 With respect to the issue of state 18 responsibility in the JRP, Arbitrator McRae had 19 made some very good points about the problems that 20 can ensue if you have a situation where you have a 21 structure or an entity that isn't, in essence, 22 subject to review or to the connections of 23 international law that you could create. In 24 Canada, sometimes we call them off-balance sheet 25 entities, boards and commissions that wouldn't have</p>	<p>1 Mr. Spelliscy took us to paragraph 715 of the 2 investor's memorial, and then to section 35 of the 3 CEAA Act. We saw that the panel has powers of 4 subpoena. It is not that they use the power of 5 subpoena. It helps us to understand the rule and 6 the function of that body within the structure of 7 the state to understand its role.</p> <p>8 Private individuals do not have 9 the power to compel persons to attend. Those are 10 the powers of a state. Those are the powers of 11 quasi-judicial or police powers. They are not the 12 private powers that you would expect a private 13 company to have.</p> <p>14 And so these are the types of 15 emoluments of power, the types of issues we would 16 expect to see from some entity that is an organ of 17 the state and why we would say this is not a 18 delegated power. They didn't delegate to them the 19 powers to deal with this. They granted them the 20 powers in the function that they have because they 21 are part of the state. They are part of the 22 executive branch of the state. It is not 23 legislative and it is not really judicial.</p> <p>24 So it is an executive power, but 25 how, in light of these powers, could the JRP be</p>

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<p>1 considered private? This is a governmental 2 process, a governmental role, and the Federal Court 3 would not be able to have jurisdiction in Canada to 4 be able to review something that is not a part of 5 Canada. And yet the Federal Court, and we put it 6 in the materials, has found jurisdiction and has 7 treated this under the rubric of a Federal Court 8 tribunal and agency, I believe is the expression 9 that they use.</p> <p>10 So we think this is pretty clear, 11 and we thought it would be important to focus for 12 the time before the Tribunal on these relevant 13 issues, which is why we discussed particularly ILC 14 Article 4, and also ILC Article 11, which we also 15 think is relevant.</p> <p>16 And it would be troubling if 17 entities with this type of power to compel 18 attendance, to have coercive force, were to be able 19 to be outside of the rule or outside of the scope 20 for international law, that somehow you could 21 privatize this coercive power of the state.</p> <p>22 I would find that very troubling 23 generally. And so that, to me, is what Article 4 24 of the ILC articles is really about, to capture 25 that type of function.</p>	<p>1 something else at some other time and maybe they 2 can go -- in fact, very often the parties have 3 expressed different positions, depending on the 4 case, that could be contrary. They don't express 5 that to you either. They just say where it lines 6 up and they don't disclose the rest.</p> <p>7 So the parties can deal with items 8 by way of agreements. They know how to do 9 agreements. They have made agreements. So if they 10 make an agreement, we can see how that is and we 11 can adjust it, but what is important here is that 12 Article 1131 of the NAFTA, which has two aspects, 13 it says that we look at the NAFTA and we look at 14 international law, and they both have to be able to 15 have a function.</p> <p>16 And the rules of international law 17 are important. Similarly, the rules of 18 international law not only are brought in through 19 Article 1131, but they are also brought in by 20 Article 31(3)(c) of the Vienna Convention, which is 21 important, and I simply point out, because of my 22 love of Article 31(3)(c), that there are 23 international human rights treaties that have been 24 adopted by the three NAFTA parties that would be 25 relevant to take into account here.</p>
<p>Page 296</p> <p>1 I just have to say that I am just 2 troubled by the -- separate topic now. I am 3 troubled by the interpretation that Canada has 4 given to Article 31(3)(A) of the Vienna Convention. 5 My colleagues don't want me to go there, because 6 they are worried I won't have enough time, but I 7 find if the idea of there being this concept of 8 subsequent agreement, there must be some certainty. 9 There must be some length of time. There needs to 10 be a structure to deal with that.</p> <p>11 If different litigation positions 12 taken in different court cases could be lined up a 13 little bit like going to a slot machine, and if you 14 have a cherry on one side, and maybe the next spin 15 you get another cherry and the third time you get a 16 cherry, that doesn't mean you win. You have to 17 have them all together at the same time and in the 18 same place, and then you can take note of this.</p> <p>19 That's what the Vienna Convention 20 says. That is what treaty practice is about. You 21 take note of that. It doesn't mean that it is 22 binding. It means that you can take into 23 consideration what it means.</p> <p>24 And there is a lot of this where 25 that you see, you know, somebody refers to</p>	<p>Page 298</p> <p>1 I made reference to the 2 international covenant in -- 3 PRESIDING ARBITRATOR: 31(3)(c) is 4 a very, very dangerous lover. 5 --- Laughter</p> <p>6 MR. APPLETON: You are absolutely 7 right, and I have seen from decisions how that 8 could be, and from writing, I understand. 9 And I hope you come to the panel 10 that we're going to have at the American Society of 11 International Law at the next annual meeting on 12 this topic. We might even use your title now. 13 But the fact of the matter is it 14 integrates and harmonizes the law to stop 15 fragmentation, and that is the principle that we're 16 looking at. But to have an interpretation that 17 would make one part inutile is what we want to 18 avoid, and that would be the risk and that is what 19 we are significantly concerned about.</p> <p>20 With respect to the meaning of 21 Article 1105, Canada put up an UNCTAD report. I 22 believe I was actually a special advisor to this 23 UNCTAD report that they put up about fair and 24 equitable treatment. Our words were very 25 particular. We said in the opening that there were</p>

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<p>1 more than 1,000 treaties that had the substantive 2 wording of fair and equitable treatment that we're 3 using here, or actually of the international law 4 standard with fair and equitable treatment and full 5 protection and security.</p> <p>6 Substantively that is what is 7 there, not all 2,870-some-odd treaties. I'm the 8 editor of Westlaw's international investment 9 treaty service, so I have a pretty good idea of 10 what is in these treaties.</p> <p>11 But there is consistent, ongoing 12 understanding. It is used a lot in this 13 formulation. It must have some meaning, and there 14 is meaning that is here. And so we think that is 15 important and we don't want to have that lost.</p> <p>16 There is also the reference to 17 municipal law. It is very common for international 18 tribunals of various types to have to look at 19 questions of municipal law. That is a function 20 regularly that international tribunals do, and they 21 look to see whether the municipal law is consistent 22 with obligations of international law.</p> <p>23 Sometimes states will plead that 24 municipal law is the reason why they didn't do 25 something that there was a requirement that they</p>	<p>1 who were retired as experts to this panel, 2 Mr. Connelly, for example.</p> <p>3 So there are people here who are 4 retired. They could give this type of testimony, 5 but they didn't bring them. There's something that 6 you can infer from the lack of that. There's 7 something we can infer from the lack of all of this 8 information.</p> <p>9 Investors and investments would 10 expect transparency. They would expect fairness. 11 They would expect to know of items that would 12 fundamentally affect their rights. The WTO has 13 called this legal security, that you know your 14 position vis-à-vis others. It is a fundamental due 15 process and fairness norm.</p> <p>16 It is absent here, and the science 17 is absent. And I point out to you that Exhibit 18 R-220, which we can put up, is the reference guide 19 for Canadian Environmental Assessment Act. It is 20 entitled "Determining whether a project is likely 21 to cause significant adverse environmental 22 effects."</p> <p>23 And this is what the document 24 states. It says: 25 "The central test in the Act</p>
<p>1 were to do in international law, and we know that 2 is not a good defence. But that is just a function 3 that international tribunals have.</p> <p>4 It is not something that you 5 should shy away from. It is just part of the job 6 that comes with it.</p> <p>7 In this case, we're actually 8 pleased that rule of law is the fundamental 9 cornerstone of international law and a fundamental 10 cornerstone of Canadian law. That should make it 11 easier, but it doesn't mean we're asking this 12 tribunal to be an appellate court, and we're not 13 asking this tribunal to substitute in the place of 14 a judicial review.</p> <p>15 There are different obligations. 16 They have different functions. There are different 17 remedies. That is what we're looking for.</p> <p>18 I would like to respond to two 19 more points. I think first, where is the 20 science? My colleague, Mr. Nash, had referred to 21 this before. Where are the scientists? Where are 22 the people that could tell us in this case? Surely 23 there is a duty of evenhandedness on the 24 government. Surely they have the information. 25 They control the people. They brought people here</p>	<p>1 is whether a project is 2 likely to cause significant 3 adverse environmental 4 effects. This determination 5 is an objective test from a 6 legal standpoint, which means 7 that all decisions, whether 8 or not projects are likely to 9 cause adverse environmental 10 effects, must be supported by 11 findings based on the 12 requirements set out in the 13 Act."</p> <p>14 I am going to turn, finally, to -- 15 you can draw an adverse inference. You can draw an 16 adverse inference. It is within your abilities to 17 deal with that. We have already pointed out 18 documents in the record that we've been able to 19 obtain that came to us that were not produced by 20 Canada. There's been a history of that in this 21 case, and you can draw an adverse inference from 22 the failure to have this production. And we think 23 that is important here.</p> <p>24 I would like to turn, though, to 25 the questions raised by Professor Schwartz with my</p>
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<p>1 final minutes.</p> <p>2 Oh, sorry, first I would like to</p> <p>3 say that Canada said they could scope in even if</p> <p>4 they had no trigger. And this is contrary to what</p> <p>5 the court said in Red Hill. I really would like to</p> <p>6 make sure we underscore that. I was going to give</p> <p>7 you another quote in Red Hill, but I won't be able</p> <p>8 to do that. Perhaps I can add that in the</p> <p>9 transcript so it is in the record, and we can</p> <p>10 annotate to the point I wanted you to know. But</p> <p>11 Red Hill is very clear that is not acceptable.</p> <p>12 So the last point is Professor</p> <p>13 Schwartz' question. You asked about socio-economic</p> <p>14 effects. Socio-economic factors must be measurable</p> <p>15 and mitigatable. That was really what I took from</p> <p>16 the testimony and the expert reports that we heard.</p> <p>17 It is something that we can tell</p> <p>18 and know. That is not what we ended up seeing in</p> <p>19 this case. Socio-economic effects on the community</p> <p>20 have to be related to and derivative from</p> <p>21 environmental effects.</p> <p>22 These can be considered, but they</p> <p>23 have to be evidence of some type of measurable</p> <p>24 effect, not simply assertions of values and</p> <p>25 beliefs. Otherwise, we can have all types of</p>	<p>1 bifurcated. Damages are for another time.</p> <p>2 There must be damage and there</p> <p>3 must be proof of damage if there's going to be an</p> <p>4 award of costs, if there's going to be an award of</p> <p>5 damages, if there's going to be an award at all.</p> <p>6 In fact, in this case there may very well be moral</p> <p>7 damages, too, from what we heard in this hearing.</p> <p>8 All of these issues are issues</p> <p>9 that would be addressed at that time, but it is</p> <p>10 just not the right time to be able to go and do</p> <p>11 that now.</p> <p>12 So I probably have used up my</p> <p>13 time. I want to thank you all for your</p> <p>14 consideration, and unless you have other questions,</p> <p>15 I am sure it is Canada's turn.</p> <p>16 QUESTIONS BY THE TRIBUNAL:</p> <p>17 PRESIDING ARBITRATOR: A question.</p> <p>18 PROFESSOR SCHWARTZ: Perhaps I</p> <p>19 didn't frame the question clearly enough. My</p> <p>20 question wasn't about socio-economic in general</p> <p>21 versus core values. My question was that the joint</p> <p>22 panel talks about relative distribution of benefits</p> <p>23 and burdens vis-à-vis the local level, regional</p> <p>24 level, and the investor.</p> <p>25 There is evidence, and you have</p>
<p>1 discrimination that we're not allowed to have. And</p> <p>2 evidence-based determinations of costs to the</p> <p>3 community, that is fine, but that is not what was</p> <p>4 going on with this concept of community core</p> <p>5 values.</p> <p>6 And so it is fine to</p> <p>7 differentiate. If your question is, Can you</p> <p>8 differentiate with an investor? The answer of</p> <p>9 course is, yes, but it has to be evenhanded. It</p> <p>10 has to be related to the task at hand. It has to</p> <p>11 follow those very same values and approaches that</p> <p>12 we have been asking about throughout this entire</p> <p>13 hearing.</p> <p>14 And that is what was missing in</p> <p>15 this case, and that led to tremendous negative</p> <p>16 effects, and that is why we're seeking the</p> <p>17 assistance of the Tribunal to be able to find a</p> <p>18 remedy.</p> <p>19 Finally, I point out to the other</p> <p>20 question Professor Schwartz had that of course the</p> <p>21 issue of damages is bifurcated, and so Canada had</p> <p>22 raised an issue about why there hasn't been proof</p> <p>23 of damage with respect to one of the issues, that</p> <p>24 there shouldn't be a merits finding in the absence</p> <p>25 of damage. That is because damages have been</p>	<p>1 alluded to it again, about the atmosphere at the</p> <p>2 hearing. I was wondering what the position of the</p> <p>3 investor was, at least seeking clarification of the</p> <p>4 position of the investor, on whether that relative</p> <p>5 burdens and benefits analysis that we ask how much</p> <p>6 goes to the community, how much of the benefit goes</p> <p>7 to the international investor, whether</p> <p>8 substantively that is part of your complaint about</p> <p>9 the Joint Review Panel deliberations and whether it</p> <p>10 raises 1102 or 1103 issues from the point of view</p> <p>11 of the investor.</p> <p>12 MR. APPLETON: All right. The</p> <p>13 difficulty that one has generally is that we</p> <p>14 understand that there is an interrelationship here.</p> <p>15 The JRP is not meeting in isolation. They are</p> <p>16 meeting together in a place, and there is an</p> <p>17 endemic ongoing set of issues that are about</p> <p>18 anti-Americanism, Yankee, go home. There is a</p> <p>19 whole spirit and approach. They are focussed on</p> <p>20 these questions. They are focussing on the NAFTA</p> <p>21 issue.</p> <p>22 That's not an environmental effect</p> <p>23 that is in any of the various environmental</p> <p>24 assessments that I have seen.</p> <p>25 So when they look at these issues,</p>

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<p>1 they are not in isolation. They didn't look at 2 this issue of burdens and benefits in isolation 3 from those questions, but with that. In other 4 words, it is tainted. The whole issue is tainted 5 because of these other inappropriate 6 determinations.</p> <p>7 And without having the members of 8 the Panel with us, without having someone who was 9 actually there, without having that information, we 10 don't actually know more than what we see. But it 11 is quite likely that, in general, it may be fine, 12 but in this particular case it is probably not.</p> <p>13 In this particular case, where we 14 see the percolation of these discriminatory 15 considerations and the irrelevant considerations 16 and the deviation from the terms of reference that 17 they were supposed to follow, these are the 18 problematic issues.</p> <p>19 I am hoping that this sort of 20 captures the type of issues that you wanted to 21 address in your question. If not, I can sit down 22 and think about it again, but I am sure that Canada 23 would like to get on and have their comments.</p> <p>24 But does that sort of express 25 where our position is on this issue?</p>	<p>1 today, and also there was some reference to 2 testimony in those slides.</p> <p>3 Due to time, Mr. Spelliscy 4 couldn't get to every single one of their slides 5 and we're mindful of that, and that is why we 6 didn't hand it out immediately. We are in your 7 hands. We can take our package of slides home with 8 us and pull out those which were not directly 9 referenced by Mr. Spelliscy, and then provide them 10 to my friends and to yourself later on, or we can 11 hand them up now, but I just wanted to get that 12 issue clarified.</p> <p>13 PRESIDING ARBITRATOR: Let me ask 14 Mr. Appleton if he agreed to us getting the 15 complete set of slides, or whether the --</p> <p>16 My mic is on. Okay. Whether you 17 would agree for us getting the complete pack of 18 slides, even though Mr. Spelliscy didn't get to 19 discuss a few of them, or whether they should be 20 kind of taken out, redacted. That's the word.</p> <p>21 MR. APPLETON: Mr. President, we 22 are in your hands. Whatever you would like to have 23 we are prepared to deal with. On the assumption 24 they were the slides that were brought here and 25 there is not going to be something new, and I am</p>
<p style="text-align: right;">Page 308</p> <p>1 PROFESSOR SCHWARTZ: Yes. Thank 2 you very much.</p> <p>3 PRESIDING ARBITRATOR: Okay. 4 Thank you. Mr. Appleton. Mr. Nash, you wanted --</p> <p>5 MR. NASH: Just at the very end.</p> <p>6 PRESIDING ARBITRATOR: Oh, at the 7 very end, okay. Just a verbal thanks. I mean, the 8 same thing that, Mr. Little, you have done at the 9 outset of the afternoon.</p> <p>10 MR. APPLETON: Yes.</p> <p>11 PRESIDING ARBITRATOR: So Mr. Nash 12 would like to say words of thanks at the end of 13 this exercise. I think we don't have a problem 14 with that. I am going to read out my own thanks to 15 everybody, so that means that this brings to an end 16 the rebuttal.</p> <p>17 MR. APPLETON: Yes.</p> <p>18 PRESIDING ARBITRATOR: You said by 19 the end, you mean later on?</p> <p>20 MR. NASH: Exactly.</p> <p>21 MR. APPLETON: Yes, at the very 22 end.</p> <p>23 MR. LITTLE: I have just one point 24 of procedure. Canada prepared a set of slides 25 providing an overview of all of its submissions</p>	<p style="text-align: right;">Page 310</p> <p>1 sure that is exactly -- that is not a problem. We 2 would have no objection to whatever the Tribunal 3 would like to have in any way.</p> <p>4 PRESIDING ARBITRATOR: I think the 5 Tribunal, even after two weeks of hearing, is still 6 very curious -- sorry, the Tribunal, even after two 7 weeks of hearing, is still curious to see whatever 8 you put before us. So we get the slides.</p> <p>9 MR. LITTLE: We will hand them up 10 to Mr. Pulkowski, then, right now.</p> <p>11 PRESIDING ARBITRATOR: Yes. So we 12 have a break --</p> <p>13 MR. APPLETON: We would like a 14 copy as well, of course.</p> <p>15 PRESIDING ARBITRATOR: Of course, 16 you are going to get a copy.</p> <p>17 MR. LITTLE: Absolutely.</p> <p>18 PRESIDING ARBITRATOR: I think 19 that let's say if we start at 4:45 sharp, that will 20 be... we would be very grateful for that.</p> <p>21 --- Recess at 4:27 p.m.</p> <p>22 --- Upon resuming at 4:43 p.m.</p> <p>23 PRESIDING ARBITRATOR: Welcome 24 back.</p> <p>25 MR. DOUGLAS: Thank you.</p>

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<p>1 PRESIDING ARBITRATOR: 2 Mr. Douglas. 3 REPLY SUBMISSIONS BY MR. DOUGLAS: 4 MR. DOUGLAS: We have a couple of 5 matters in sur-rebuttal and then my friend 6 Mr. Spelliscy will make some comments as well. 7 This is the point of the 8 partnership between, or so-called partnership 9 between Nova Stone and Bilcon, the claimants took 10 you to C-22 as evidence that the claimant formed a 11 partnership on April 24th, 2002. 12 That is up on the screen there 13 under paragraph 1. Forming a partnership does not 14 mean signing a partnership agreement. Mr. Appleton 15 argues that when the partnership was formed there 16 was an automatic commingling of assets. 17 In other words, he argues that on 18 April 24th, 2002 Bilcon took on the benefits and 19 liabilities of the 3.9 hectare quarry permit. 20 Well, let's take a look at the 21 partnership registration document of April 24th, 22 2002. It is respondent Exhibit 291. And you will 23 see there is a registration of a business name, 24 there is a general description of the business 25 activities, and if you flip through the document,</p>	<p>1 Now, schedule A establishes the 2 date of this document. And schedule A is at 3 claimants' Exhibit 5. 4 Now you will see there it is dated 5 March 28th, 2002, but that the signature on the 6 back is in fact May 2nd, 2002. 7 It was, I will just wait for that. 8 This is the document that was 9 taken, that Mr. Clayton was taken to in testimony 10 and it was based on this document that he said that 11 the partnership, at this time, was still in 12 formation. 13 Moreover, there is no further 14 document on the record establishing a relationship 15 between Bilcon and Nova Stone. Clause 3 of this 16 document, clause 3(c) of this document, if you 17 recall, discusses the intention of Nova Stone to 18 transfer its permit to the partnership. This never 19 happened. 20 And it is Canada's submission that 21 the mere intention to transfer a permit to a 22 partnership is not enough to establish a legally 23 significant connection between Bilcon and the 24 permit pursuant to article 1101 of the NAFTA. 25 Those are my comments, and I will</p>
<p>1 you will see the names Bilcon of Nova Scotia, and 2 you will see Nova Stone Exporters. 3 This is not a partnership 4 agreement. 5 There is no discussion in this 6 document of the commingling of any assets. 7 Now, let's go back and take a look 8 at claimants' Exhibit 22 for a moment. You will 9 see under paragraph C -- I'm sorry, this is a lot 10 of flipping back through, apologies for that. 11 Under paragraph C, there is a 12 reference to schedule A which is a letter of 13 intent. However, claimants' Exhibit 22 does not 14 attach schedule A. There is a document missing 15 to this document. And we're going to get to that 16 in just one moment. But before we do, if I could 17 just go down to paragraph 3 of this document. 18 You will see that it states that 19 Bilcon and Nova Stone shall enter into a formal 20 partnership agreement that incorporates the terms 21 of the letter of intent. 22 This document is not evidence of a 23 partnership agreement. If anything, this document 24 is evidence that a formal partnership agreement had 25 not yet been entered into, as of the date.</p>	<p>1 pass it off to Mr. Spelliscy. 2 PRESIDING ARBITRATOR: Thank you. 3 MR. DOUGLAS: You're welcome. 4 REPLY SUBMISSIONS BY MR. SPELLISCY: 5 PRESIDING ARBITRATOR: 6 Mr. Spelliscy. As long as you don't take us to 7 blasting, it's okay. 8 --- Laughter 9 MR. SPELLISCY: Oh... 10 I just have two brief points to 11 make. One, I just want to, I don't even want to 12 respond, but there was an assertion again about 13 document production, an insinuation that Canada has 14 withheld documents or withheld evidence in this 15 case. We definitively reject this assertion. The 16 arguments are in our counter-memorial and we reject 17 it and I don't want to mention it further. 18 What I do really want to come to 19 is the conversation that happened at the end which 20 was about values and beliefs and their role in the 21 context of environmental assessment in Canada, this 22 was an exchange between Mr. Appleton and Professor 23 Schwartz, I think, at the end. 24 And there has been this assertion 25 that somehow consideration of values and beliefs in</p>
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<p style="text-align: right;">Page 315</p> <p>1 environmental assessment is inappropriate because 2 they can't be measured or they're not mitigable. 3 What I think it is useful to turn 4 to here is one of the foundational documents in 5 environmental assessment; not just in Canada, but 6 in fact respected around the world and it is 7 referred to in paragraph 77 of Mr. Connelly's 8 report. A paragraph that in fact the claimants' 9 expert Mr. Rankin took us to and described the 10 report as excellent. 11 It is an older document. It is a 12 report that was prepared by Beanlands and Duinker. 13 It is at R-21, if we can just pull it up. If we 14 can go to the relevant page, please. 15 It talks in the context of 16 environmental assessment and again this is one of 17 the seminal works, early seminal works on 18 environmental assessment about social importance. 19 And it reads: 20 "Any consideration of the 21 significance of environmental 22 effects must acknowledge that 23 environmental impact is an 24 inherently anthropocentric 25 concept. It is centered on</p>	<p style="text-align: right;">Page 317</p> <p>1 through Nova Scotia. 2 And what it's talking about here 3 we have valued ecosystem components. "Valued 4 ecosystem components" is actually language that is 5 used in the Nova Scotia statute. 6 What do these authors in the 7 seminal work say about valued ecosystem 8 components? It says: 9 "Each of the environmental 10 attributes or components 11 identified as a result of a 12 social scoping exercise is 13 referred to as a valued 14 ecosystem component. These 15 may be determined on the 16 basis of perceived public 17 concerns related to social, 18 cultural, economic or 19 aesthetic values. They may 20 also reflect the scientific 21 concerns of the professional 22 community as expressed 23 through social scoping 24 procedures (i.e., public 25 hearings, questionnaires,</p>
<p style="text-align: right;">Page 316</p> <p>1 the effects of human 2 activities and ultimately 3 involves a value judgment by 4 society of the significance 5 or importance of these 6 effects. 7 "Such judgments, often based 8 on social and economic 9 criteria, reflect the 10 political reality of impact 11 assessment in which 12 significance is translated 13 into public acceptability and 14 desirability." 15 This, again, is one of the 16 foundational documents of what EA is about. 17 And in his comments, my colleague 18 Mr. Appleton referred specifically again and tried 19 to link it back, the whole idea back to the 20 specific language in CEAA about environmental 21 effects leading up to socioeconomic effects. 22 In our opening presentation we 23 explained that while that is how socioeconomic 24 effects are brought in through CEAA, is not the 25 case through Nova Scotia. It is not the case</p>	<p style="text-align: right;">Page 318</p> <p>1 interviews, workshops, media 2 reports, et cetera)." 3 We would submit to you that 4 environmental assessment in Canada does consider 5 values and beliefs, and that it is appropriately 6 so. 7 And unless there are any other 8 questions, those are my submissions. 9 PRESIDING ARBITRATOR: Thank you 10 very much. Any further statement on the part of 11 Canada? 12 MR. LITTLE: No further statement. 13 We just want to repeat our thank yous to everyone 14 for hosting, running, administering and presiding 15 over the hearing. It has been a pleasure. 16 PRESIDING ARBITRATOR: Thank you, 17 Mr. Little. And I think Mr. Nash wants to do 18 something similar. 19 MR. NASH: I would like to reflect 20 Mr. Little's comments and thank everybody. We're 21 coming to the end of our epic experience here, our 22 shared experience together, and we're all in this 23 room, participants, together. 24 First I would like to thank 25 Mr. Pulkowski for everything he has done to make</p>

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<p>1 this go smoothly; his colleague, Ms. Claussen; our 2 excellent court reporter, who has been getting the 3 product out to us late at night, and has been very, 4 very helpful. 5 All of the technical people here 6 at Arbitration Place, the whole group. 7 Of course Mr. Appleton's excellent 8 team has been of enormous assistance to me. 9 And our experts on both sides -- 10 Mr. Estrin, Mr. Connelly, Mr. Smith, and Professor 11 Rankin. 12 And of course I would like to 13 congratulate Canada on their very polished and 14 excellent presentation, the quality of their 15 advocacy. It has been a pleasure dealing with them 16 throughout this hearing. 17 And then finally, I would like to 18 thank Members of the Panel, Mr. President, Members 19 of the Panel for being extremely patient and 20 attentive and diligent and obviously engaged with 21 the whole process. It's been a terrific pleasure 22 appearing before you. I appreciate it. Thank you. 23 PRESIDING ARBITRATOR: Thank you, 24 Mr. Nash. 25 It's going to be a bit repetitive</p>	<p>1 and indulgence in bearing with us for longer hours 2 than is usual. 3 The staff of the Arbitration Place 4 has been very helpful through the past two weeks, 5 responding to smaller and larger requests. I 6 remember I asked for the possibility of some warm 7 food on the first day, and since then, we have been 8 fetched with chili and all kind of soups -- 9 --- Laughter 10 ARBITRATOR: -- so I am sure I 11 gained a couple of pounds, which is probably not -- 12 people say, endurance like that, I lost four kilos. 13 So my wife will say, What were you complaining 14 about? 15 --- Laughter 16 PRESIDING ARBITRATOR: And let me 17 also thank the sound and media engineers, that is 18 Mike Dawson, Steve Thom, and Mike Bailey, who have 19 so reliably provided and operated the technology in 20 the hearing room. Thanks to everybody. We will do 21 our best to provide you with an award as quickly as 22 possible and have good flights home, and bye-bye. 23 MR. APPLETON: Thank you very 24 much. 25 MR. LITTLE: Thank you.</p>
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<p>1 now. 2 --- Laughter 3 PRESIDING ARBITRATOR: I think I 4 can really agree with you. I think that the 5 Tribunal really feels that the parties have been -- 6 have really made, the performance was excellent. 7 The quality of the arguments was excellent. And 8 the parties were disciplined and I think you were 9 as cooperative as the adversarial nature of the 10 process which, of course, is always there, allows. 11 So you have done a good job and I 12 think you have facilitated the work of the Tribunal 13 substantially. 14 But let me just also thank the 15 persons responsible for the smooth running of this 16 exercise. 17 First there is a lady back at The 18 Hague, Willemijn van Banning. Maybe some of you 19 know her. She is the case manager of this file at 20 the PCA and she has organized much of the logistics 21 of this hearing, and put together the Tribunal's 22 electronic hearing bundles. So our thanks. I 23 think everybody's thanks going to her. 24 Then our court reporter, Teresa, 25 Ms. Forbes. We are grateful for your flexibility</p>	<p>1 --- Whereupon the hearing concluded at 4:56 p.m. 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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