

**PUBLIC VERSION**

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE 1976 UNCITRAL ARBITRATION RULES**

**BETWEEN**

**RESOLUTE FOREST PRODUCTS INC.**

**Claimant**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

**PCA CASE No. 2016-13**

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**CLAIMANT'S PRE-HEARING MEMORIAL**

**OCTOBER 14, 2021**

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### I. INTRODUCTION

1. But for the aggressive intervention of Nova Scotia, the production and sale of supercalendered paper (“SC paper”) in the province would never have been restarted. But for the reopening of the Port Hawkesbury paper mill (“PHP”), competing mills would not have suffered substantial, accelerated economic damages. [REDACTED]

[REDACTED]  
[REDACTED] but proceeded anyway.

2. This arbitration results from Resolute’s failed attempt to resolve its claims directly and amicably with the Government of Canada (“GOC”), claims arising from the measures taken by Nova Scotia (“Nova Scotia Measures”) to assure the reopening of PHP as “*the* lowest cost producer” in North America. Professor Lévesque questioned at the November 2020 Hearing on the Merits (“2020 Hearing”) whether our emphasis on the definite article — “*the* low cost producer” and “*the* lowest cost producer” — was meaningful or just politically expedient.<sup>1</sup> Words matter and the difference between the definite and indefinite articles here matter a lot because they evidence the extraordinary assistance to create a national champion with deliberate competitive advantage over Resolute’s foreign investment in Canada.

3. The Pacific West Commercial Corporation (“PWCC”) was unambiguous from the beginning: “*a*” low cost producer, one of several competitors, was never going to be good enough because being, in PWCC’s words, “merely competitive” was not going to be good enough. The only way PWCC could be sure it would be the last supercalendered paper mill in operation, the final survivor of an industry in secular

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<sup>1</sup> Hr’g Tr. 1151:18-1152:3 (Lévesque).

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decline, was to be *the* – the one and only “lowest” cost producer. [REDACTED]

[REDACTED]

[REDACTED]

4. PHP was treated by governments deliberately and expressly better than its competitors. Resolute’s foreign investments were treated necessarily less well.

5. Governments can act to encourage or enhance competition. They must not, when they adopt treaties providing basic protections to foreign investors, support and assist a domestic company in a manner that necessarily harms foreign investments in the same industry. They must observe the international law principle of good faith and must not be rewarded for self-contradiction.

6. Following a summary of the essential facts, this pre-hearing Memorial is organized in three parts. Part One addresses liability, what Nova Scotia (and Canada) did in violation of NAFTA. This section includes a refutation of Canada’s denial of responsibility for the electricity rate package indispensable to the reopening of the Port Hawkesbury mill. It also includes discussions of Canada’s breaches of Articles 1102 and 1105.

7. Canada concedes there are damages from restarting PHP but denies they have been caused by Nova Scotia and contests the measurement of them. The second part of this Memorial, then, concerns causation. This discussion relies principally on the expert testimony of Dr. Seth Kaplan. He establishes that, but for the resurrection of PHP and its injection into the market of supply that can meet 25 percent or more of continental demand, Resolute would not have been harmed exceptionally by unfair competition. The Nova Scotia Measures were the principal if not the only cause. Dr.

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Kaplan also testified that, but for the measures, there would have been no PHP in the market (with its abundant supply) driving down prices.

8. Part Three of this Memorial concerns damages, above all their quantification. MIT Economics Professor Jerry Hausman offers two alternative methodologies for calculating Resolute's lost profits as a result of the price effects caused by the reopening of PHP. Canada's expert fails to offer any meaningful "but for" analysis, which is the only way to measure what would be required to restore Resolute to the position it would have been in but for the breaches of NAFTA. Resolute requests damages of \$121,400,000 based on Professor Hausman's conservative calculations.

### II. **ESSENTIAL FACTS**

9. PWCC is a Canadian company that purchased from NewPage Corporation, under supervision of NewPage's bankruptcy monitor, the paper mill located on remote Cape Breton Island in Port Hawkesbury, Nova Scotia. PWCC named this operation Port Hawkesbury Paper ("PHP").

10. Despite having the continent's best and most modern SC paper machine, PHP's cost structure—high fiber, freight, and electricity prices—caused it to lose \$50 million in the year before seeking creditor protection, with [REDACTED] in 2009, [REDACTED] in 2010, and [REDACTED] from January-August 2011.

11. PWCC explained that "{t}he PH mill lost close to \$40M (EBITDA basis) in 2010 and was losing close to \$4M per month prior to being closed in September 2011. In order for the mill to be a long-term economically viable operation, significant cuts must be made in all cost input areas;" while "power may be the biggest challenge, all costs centres, including fibre, labour, logistics, etc., will need to be reviewed from a cost reduction perspective."

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12. GNS Premier Darrell Dexter stated that, “[i]t has become clear that the province will need to work with all levels of government and the private sector to help identify a potential buyer for the Port Hawkesbury mill to ensure its future in the province.”<sup>2</sup>

**A. GNS Promised It Would Take All Necessary Measures To Reopen A Failed Mill**

13. [REDACTED], Resolute was approached by an investment bank, on behalf of NewPage, to [REDACTED] and, [REDACTED], to bid to purchase the Port Hawkesbury mill.<sup>3</sup> [REDACTED]

[REDACTED]<sup>4</sup>

[REDACTED]<sup>5</sup>

14. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>6</sup>

15. Electricity constituted one of the four principal costs making PHP uncompetitive. The first, transportation, was a consequence of geography and

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<sup>2</sup> C-114, *Province to Focus Efforts on Re-Sale of NewPage Port Hawkesbury Mill*, Nova Scotia Press Release (Sep. 6, 2011).

<sup>3</sup> Statement of Claim ¶ 26; C-107, [REDACTED] C-118, [REDACTED]

<sup>4</sup> C-108.7, Resolute [REDACTED] PowerPoint [REDACTED]

<sup>5</sup> C-109.21, Resolute [REDACTED] [REDACTED]

<sup>6</sup> C-119.2-3, 6, 10, Resolute [REDACTED] C-109.13, Resolute [REDACTED] PowerPoint.

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irremediable.<sup>7</sup> It would have to be offset by even more drastic reductions in the other three.

16. Labor costs could be driven down with hard bargaining and abandonment of pension liability. Fiber costs were to be absorbed largely by the government as the owner of most of the resource required. Assistance on fiber costs, therefore, was definitively under the control of GNS. Electricity, however, was delivered by a private corporation and Canada has denied government responsibility.<sup>8</sup>

17. [REDACTED]

[REDACTED]<sup>9</sup> [REDACTED]

[REDACTED] and that the [REDACTED]

[REDACTED]<sup>10</sup>

18. [REDACTED]

[REDACTED]

[REDACTED] In addition, [REDACTED]

[REDACTED]

[REDACTED]<sup>11</sup>

19. Despite the large number of inquiries from the Monitor, only eight parties submitted offers. Only four were invited to continue bidding. Two bidders were liquidators who were going to scrap the mill. PWCC was one of only two bidders

<sup>7</sup> E.g., C-119.2-3, [REDACTED]; Resolute Memorial ¶ 23.

<sup>8</sup> See *supra* ¶ 22 (detailing GNS assistance package); Hr'g Tr. 306:4-15 (Garneau).

<sup>9</sup> C-119.2, Resolute [REDACTED].

<sup>10</sup> C-119.13, Resolute [REDACTED].

<sup>11</sup> C-119.13, Resolute [REDACTED].

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seeking to keep the mill open as a going concern.<sup>12</sup> As the bidding process continued, Premier Dexter announced on November 1, 2011 to the Nova Scotia legislature that GNS would do everything possible to reopen the mill. GNS began negotiations with PWCC even before it was declared the winning bidder.<sup>13</sup>

### **B. PWCC Demanded And Received An Extraordinary Ensemble Of Measures**

20. GNS assembled, as PWCC demanded, an extraordinary ensemble of financial and regulatory measures that, taken together, enabled the resurrection of a business that otherwise could not have been revived and survive. Repeatedly PWCC threatened to break off negotiations and walk away if it were not to receive the benefits of every proposed measure, large or small. PWCC said there would be no deal without long-term preferential electricity rates.<sup>14</sup> PWCC threatened to walk away over [REDACTED],<sup>15</sup> and did walk away over denial of a tax ruling request.<sup>16</sup> In each instance, GNS accommodated. For PWCC it was all or nothing, and GNS made it all.

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<sup>12</sup> C-150.3-4, *In re A plan of Compromise or Arrangement of NewPage Port Hawkesbury*, Sixth Report of Monitor ¶¶ 17-19 (Jan. 13, 2012) (“Sixth Report of Monitor”); C-133.4-5, *In re A plan of Compromise or Arrangement of NewPage Port Hawkesbury*, Fifth Report of Monitor ¶ 16 (Nov. 24, 2011).

<sup>13</sup> C-122,2-3, Nova Scotia Legislature House of Assembly Debates and Proceedings, Third Session (Nov. 1, 2011); Resolute Memorial ¶¶ 39-46 (detailing negotiation history).

<sup>14</sup> See C-165.5-6, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Pre-Filed Evidence of Pacific West Commercial Corporation (NSUARB Apr. 27, 2012) (“Absent approval of the load retention rate requested, PWCC will not be in a position to finalize its arrangements to acquire control of NPPH and cause NPPH to restart the Mill.”); C-184.48, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Decision ¶ 146 (NSUARB Aug. 20, 2012) (“PWCC made it clear throughout the course of the proceedings that it would not proceed with the acquisition of the mill unless it obtains the term and reopener provisions as requested.”).

<sup>15</sup> See Resolute Reply Memorial ¶¶ 58, 65.

<sup>16</sup> See Resolute Reply Memorial ¶ 184; Resolute Memorial ¶¶ 101-102.



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21. Bankruptcy monitor, Alex Morrison of Ernst & Young, testified that, in comparison to other bankruptcy cases “that have occurred in Canada over that ten-year period of time...we haven’t seen the package of all the elements together in any CCAA case with a comprehensiveness of the financial support from the interim financing ... to the exit financing support to the electricity deal. Ultimately, that package is unique to what we have seen in other cases. And the other element to it is the goal of creating the low-cost producer...most competitive business coming out of restructuring is not something we have seen before in other CCAA cases.”<sup>17</sup>

22. The ensemble of measures assembled by GNS “to help the mill become the lowest cost and most competitive producer of super calendar {sic} paper,”<sup>18</sup> included:

- a \$24 million forgivable loan to fund capital projects;
- a \$40 million credit facility that would be [REDACTED];
- a 10-year, \$38 million outreach agreement to fund sustainable forest harvesting;
- \$20 million in a forestland purchase;
- a 20-year Forest Utilization License Agreement allowing PHP to receive more silviculture payments sufficient to make its purchases of GNS timber and wood fiber free;
- An electricity package that included (i) a lower load retention rate (LRR), (ii) the government’s guarantee to assume the risk of increased costs for compliance with Renewable Energy Standard (“RES”) regulations, and (iii) a regulatory mandate for Nova Scotia Power (“NSPI”) to run a biomass electricity plant full-time with the costs being picked up by other ratepayers;
- Harvesting \$1 billion in tax losses beyond Nova Scotia, across Canada;

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<sup>17</sup> Hr’g Tr. 600:22-601:16 (Morrison); *see also generally* CWS-Ernst & Young (Dec. 6, 2019).

<sup>18</sup> C-183, Aug. 20, 2012 Nova Scotia Press Release.

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- No assumption of or consideration for the \$100 million unfunded liability associated with the NewPage pension plan.<sup>19</sup>

**C. GNS Knew Restarting The Mill Would Harm Resolute**

23. [REDACTED]

[REDACTED]

[REDACTED] Canada produced this document only after initial document exchanges had taken place and Resolute already had filed its initial Memorial.<sup>20</sup>

24. The document Canada eventually produced reveals that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>21</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>22</sup> [REDACTED]

[REDACTED]

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<sup>19</sup> See, e.g., Resolute Memorial ¶ 92 (\$24 million loan); ¶¶ 93, 104 (\$40 million credit facility); ¶ 94 (outreach agreement); ¶ 97 (land purchase); ¶ 95 (forest utilization license); ¶¶ 74-88, 106 (electricity package); ¶ 105 (tax loss harvesting); Resolute Reply Memorial ¶ 182 (pension relief).

<sup>20</sup> R-161, [REDACTED]; Resolute Reply Memorial ¶¶ 2-3, 249 (detailing history of production).

<sup>21</sup> R-161.6, 8-10, 15, 53, [REDACTED].

<sup>22</sup> Hr'g Tr. 461:22-462:22 (Chow).

**D. Bowater Mersey: A Different Story**

25. Canada has sought to compare what PWCC demanded and the GNS did for PHP in the SC paper market with what GNS offered to Resolute for Bowater Mersey in the newsprint market.

26. GNS offered assistance to keep Bowater Mersey operating for 5 years.

[REDACTED] Resolute knew there would not be enough assistance to overcome the high-cost conditions of operating in Nova Scotia, returned the offered assistance, and closed its mill.<sup>24</sup>

27. PWCC sought to obtain, and GNS sought to give, all the assistance possible to resurrect a commercially unviable mill. GNS did not assist Bowater Mersey in seeking a load retention rate from the Nova Scotia Utility and Review Board (“NSUARB”) as it did for PWCC. Electricity costs were always listed among the four key obstacles to paper production success in Nova Scotia. GNS hired a negotiator for PHP, testified at the NSUARB hearings, submitted evidence, guaranteed coverage of potential energy costs, and issued regulations that would deflect costs for PHP to ratepayers while ensuring such a measure would not be rejected by NSUARB. None of these interventions was undertaken for Bowater Mersey.<sup>25</sup>

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<sup>23</sup> See Hr’g Tr. 378:19- 385:15 (Montgomerie); *id.* at 460:13-462:22 (Chow);

<sup>24</sup> Compare Resolute Reply Memorial ¶¶ 332-332 (detailing five year time horizon), *with* Hr’g Tr. 480:3-482:25 (Chow) (discussing [REDACTED]). Resolute assured coverage of all pension liabilities and protection of Nova Scotia workers when closing.

<sup>25</sup> Compare Resolute Reply Memorial ¶¶ 30-38, 47-48, 54-67 & Resolute Memorial ¶¶ 180-185 (detailing GNS assistance with respect to electricity package), *with* Hr’g Tr. 530:4-533:16 (Coolican) (explaining lack of assistance GNS provided to Bowater Mersey electricity rate package).

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28. GNS did not adopt a strategic plan for Bowater Mersey that contemplated forcing competing mills to shut down [REDACTED]. The projected horizon for Bowater Mersey was constrained and limited. For PHP, it was boundless.

### **E. PHP Has Driven Down And Continues To Drive Down SC Paper Prices**

29. The PHP mill's return to the SC paper market, subsequent to market adjustment from the NewPage closure, introduced [REDACTED]-360,000 MT of SC paper production capacity to a declining market with moderately elastic demand. The large increase in supply without a significant increase in demand meant that prices for SC paper fell, causing higher-cost mills to exit the market and profit declines for the mills that remained.<sup>26</sup> GNS's measures caused PHP to return, which adversely impacted the profitability of Resolute's three mills, Kénogami, Dolbeau, and Laurentide, and contributed to the Laurentide mill closure.<sup>27</sup>

## **III. CANADA BREACHED NAFTA AND IS LIABLE TO RESOLUTE**

### **A. The Electricity Package Is Attributable To Nova Scotia**

30. Nova Scotia Premier Dexter, other GNS officials, and NSPI all understood that PWCC would walk away from the entire enterprise if it did not get an electricity package with a "discount [that] is greater than the level necessary merely to operate competitively...it is nowhere near sufficient to simply obtain an electricity costing structure that would allow it to 'merely' operate competitively."<sup>28</sup>

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<sup>26</sup> See CWS-Kaplan ¶¶ 50-51 (Dec. 28, 2018).

<sup>27</sup> *E.g.*, CWS-Kaplan. 8 ¶ 17 (Dec. 28, 2018).

<sup>28</sup> C-174, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Redacted Rebuttal Evidence of Pacific West Commercial Corporation at 24 (NSUARB July 9, 2012) ("PWCC Rebuttal Evidence").

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31. PWCC obtained an electricity deal that included a cheap, long-term (more than 7 years) load retention rate (“LRR” or “LRT,” load retention tariff); costs of NSPI service that may change due to RES Regulations; and 24/7 operation of the Biomass Plant on site at the mill. NSPI explained to the NSUARB that “{t}his proposal is the result of a long period of dialogue involving NS Power, PWCC, the CCAA Monitor, and [the Nova Scotia] government, and each of the components is integrally connected with the others.”<sup>29</sup>

32. Canada has not refuted that the electricity package was enacted directly by Nova Scotia State organs. Both the NSUARB, a regulatory body empowered to “exercise elements of [GNS’s] governmental authority,” and the [REDACTED] [REDACTED] [REDACTED], approved the package. GNS later acceded to PWCC’s demands and amended the Nova Scotia Measures to compensate PWCC for revisions to the electricity package.<sup>30</sup>

33. The NSUARB would not have approved the electricity package but for GNS’s interventions to address: (1) PWCC’s potential RES compliance costs; and (2) the mandate that NSPI run the Port Hawkesbury Biomass Plant full-time. The NSUARB explained: “[i]t became clear during the course of the proceeding that, without some resolution to these two issues, the LRT would not likely recover all its incremental costs.”<sup>31</sup> The NSUARB said it could not approve the LRT without controls on additional

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<sup>29</sup> Resolute Memorial ¶¶ 74-88; C-164.2, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Notice of Application For Approval Of A Load Retention Rate ¶ 8 (NSUARB Apr. 27, 2012).

<sup>30</sup> See Resolute Reply Memorial ¶¶ 37-53.

<sup>31</sup> C-184.58, Aug. 20, 2012 NSUARB Dec. ¶ 177.

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costs to ratepayers arising from the Biomass Plant operations and resolution of the renewable energy standards.<sup>32</sup>

34. PWCC was unwilling for PHP to assume these costs. GNS, consequently, amended its RES regulations to require that NSPI run the Port Hawkesbury Biomass Plant full-time. GNS, in [REDACTED], also ensured that PHP would bear no additional renewable energy costs.<sup>33</sup> Mr. Murray Coolican confirmed at the 2020 Hearing that the costs of the Biomass Plant then “were passed along to ratepayers,”<sup>34</sup> a measure the NSUARB on its own had refused to accept. It happened only because GNS made it happen.

35. GNS was involved with [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>35</sup> The outcome of this involvement was the approval of the discounted electricity package, attributable to Nova Scotia directly because PWCC would not have received the LRR but for the approval by the NSUARB and the two GNS interventions.

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<sup>32</sup> See C-184.59-60, Aug. 20, 2012 NSUARB Dec. ¶¶ 156-158 (explaining that PHP needs 24% of steam production from Biomass Plant even though plant would run full-time), 181-183 (discussion effect of must-run on ratepayers).

<sup>33</sup> C-217, Amendments to the *Renewable Electricity Regulations*, N.S. Reg. 155/2010 (Jan. 17, 2013); C-210, [REDACTED]; C-179, *In re an Application by Pacific West Commercial Corporation and Nova Scotia Power Incorporated*, Government of Nova Scotia Letter Regarding PWCC Load Retention Tariff Hearing (NSUARB July 20, 2012).

<sup>34</sup> Hr’g Tr. 527:17-20 (Coolican).

<sup>35</sup> C-323, [REDACTED] see also C-318, [REDACTED]

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36. Canada argues that the NSUARB is a quasi-judicial body independent from the government and, therefore, that its approval of the LRR cannot be attributed to the GNS.<sup>36</sup>

37. That is not the law.<sup>37</sup> Nova Scotia is responsible for the actions of all Nova Scotia State organs acting in their official capacity, including the Premier, his Cabinet, GNS departments and regulatory boards like the NSUARB, all under Article 4 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission (the “ILC Articles”). Article 4 provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercised legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the state.” This principle “extends to organs of government whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at principal or even local level,” and includes Government officials acting in their official capacity.<sup>38</sup>

38. At the 2020 Hearing, Canada made a new argument against attribution, contending that Nova Scotia paid no additional costs for RES and, therefore, no

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<sup>36</sup> Canada Counter-Memorial ¶ 188.

<sup>37</sup> It is also not true. An NSPI official confirmed in his testimony before the NSUARB in October 2015 that GNS’s regulation that required the Biomass Plant to run full-time in support of PHP’s steam needs cost ratepayers \$6-\$8 million annually. C-235.6-14, *In the Matter of A Hearing into Nova Scotia Power Incorporated 2016 Base Cost of Fuel Reset*, Hearing Transcript at 25-33 NSUARB Oct. 19, 2015). Mr. Coolican said Nova Scotia ratepayers benefited from regulations reducing greenhouse gas emissions but acknowledged that the costs were passed on to the ratepayers. Hr’g Tr. 527:21-530:3 (Coolican).

<sup>38</sup> CL-145, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) (“ILC Articles”) at Article 4(1) & commentary ¶¶ 6-7; see also CL-104, *William Ralph Clayton and others v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 306 (Mar. 17, 2015) (“*Bilcon*”).

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government measure exists. “Similarly,” Canada argued, “there has never been any costs being paid {or} assumed by the government of when it comes to biomass,” which Canada argues is a construct solely of a newspaper article, arguing further that the Biomass Plant operation was not subsidized by ratepayers. Canada’s positions apparently require actual payments, not regulatory protections and guarantees, for a measure enacted by government to be a government measure.<sup>39</sup>

39. Whether GNS ultimately paid or did not pay the RES costs is irrelevant. GNS proactively assumed this risk, clearing away an obstacle to the approval of the LRR essential to PHP’s reopening. Canada now ignores the deal that resolved the RES impasse and enabled the enactment of the electricity benefits.<sup>40</sup> GNS removed the final obstacle to the deal by passing regulations for the Biomass Plant to run full-time. PWCC/PHP was not willing to carry those costs and the NSUARB was not willing to deflect those costs onto ratepayers.<sup>41</sup>

40. Canada further argues that PHP pays for the steam it gets from the Biomass Plant<sup>42</sup> so that Nova Scotia’s regulatory change does not make the electricity deal attributable to Canada. That argument misses the point. The Biomass Plant needed to run full-time even though PHP only needed a fraction of its output for steam. Someone had to pay for the additional running time that PHP did not need and for which

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<sup>39</sup> See Hr’g Tr. 1357:13-1359:16 (Canada Argument).

<sup>40</sup> See Resolute Reply Memorial ¶¶ 54-67; C-210, [REDACTED]

<sup>41</sup> C-184.60 ¶ 183 (“No costs related to operating the biomass plant out of the normal economic dispatch order may be passed along to ratepayers unless and until, as a result of legislation or regulations imposed by the province, it becomes a must-run facility.”); R-225, Order in Council, No. 2013-12 (Jan. 17, 2013).

<sup>42</sup> Hr’g Tr. 1358:20-1359:16 (Canada argument).



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it was unwilling to pay.<sup>43</sup> NSPI ratepayers would not have incurred that cost without the GNS revision of the applicable regulation.

41. The hiring and assignment of Todd Williams to broker the deal amongst NSPI, the NSUARB, PWCC and the Minister of Energy was also central to GNS engagement with the electricity deal. The parties agreed his brokering role, on behalf of the government, was both unusual and essential. According to ILC Article 8, it, too, contributed to making the electricity deal attributable to the government.

### **B. Canada Denied Resolute National Treatment (Article 1102)**

42. Canada, through the Nova Scotia Measures, has violated Article 1102(3). Article 1108(7) (the exception for “procurement” or “subsidies”) is not a valid defense.

43. Canada contests Resolute’s position on national treatment at three levels: (1) the general framework of Article 1102, which includes a dispute over which party has the burden to establish certain elements in the analysis; (2) the meaning of “treatment” and “in like circumstances”; and (3) the application of Article 1108(7) to the ensemble of measures and Canada’s ability to invoke that provision in light of its contradictory statements outside these proceedings.

44. Resolute addresses here the general framework of Article 1102 before turning to the specific issues of “treatment,” and “in like circumstances.” Resolute then explains why Canada is unable to justify the differential treatment or escape liability on the basis of Article 1108(7).

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<sup>43</sup> Resolute Memorial ¶¶ 83-85; C-184, NSUARB Aug. 20, 2012 Decision ¶¶ 156-158, 173-175, 181-183.

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### 1. The General Framework Under Article 1102

45. The analysis of Article 1102 proceeds through two stages: (1) in the first, the claimant has the burden of establishing *prima facie* differential treatment; but, (2) if the claimant meets its burden in the first stage, the respondent State has the burden of justifying the differential treatment.

46. In the first stage, the claimant need not demonstrate “nationality-based discrimination” beyond showing that, as a foreign national, it has received treatment less favorable than the most favorable treatment accorded to a domestic investor in like circumstances. The claimant, as foreign investor, needs to prove only three elements in order to establish actionable differential treatment: (1) “treatment,” (2) “in like circumstances,” (3) that is “less favorable” than the most favorable treatment accorded to a domestic investor.<sup>44</sup>

47. In the second stage, when actionable differential treatment has been established as it has been here, the respondent State may justify the differential treatment, but only if it satisfies two conditions: (1) that nationality did not figure into the equation when the measures were adopted; and (2) that the measures “do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”<sup>45</sup>

48. This interpretation of Article 1102 has been endorsed regularly by arbitral tribunals tasked with applying it.<sup>46</sup> As explained in detail in Claimant’s Reply Memorial,<sup>47</sup>

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<sup>44</sup> CL-113, *United Parcel Service v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits ¶ 83 (24 May 2007) (“UPS”).

<sup>45</sup> CL-008, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 ¶ 78 (Apr. 10, 2001) (“Pope & Talbot Phase 2 Award”).

<sup>46</sup> See Resolute Memorial ¶ 185; Resolute Reply Memorial ¶¶ 226-231.

<sup>47</sup> See Resolute Reply Memorial ¶¶ 215-225.

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it is entirely consistent with the primary rule of treaty interpretation in Article 31(1) of the *Vienna Convention on the Law of Treaties* (VCLT): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

49. Canada argues that, according to the coordinated views of the NAFTA Parties (articulated mostly in arbitration briefs), Article 1102(3) requires proof of “nationality-based discrimination,” contrary to the established interpretation of the treaty text. But the NAFTA Parties have never agreed on what “nationality-based discrimination” means and, in these proceedings, they have conceded that a claimant must establish a *prima facie* case of differential treatment but does not require proof of discriminatory intent.<sup>48</sup>

50. Resolute has discharged its burden of showing that the Nova Scotia Measures have resulted in *prima facie* differential treatment, as shown in the next sections on “treatment” and “in like circumstances.” The case on Article 1102, therefore, turns on (1) whether Canada has justified the differential treatment (it has not and cannot, given the deliberately anti-competitive nature of the Nova Scotia Measures); and (2) whether Canada may invoke Article 1108(7) as a defense (it cannot, given the formal position it took outside these proceedings and the nature of the Nova Scotia Measures). Canada is, therefore, liable for a violation of Article 1102.

### 2. “Treatment” And Its Application In Article 1102

51. “Treatment” is an essential element of Article 1102, including Article 1102(3). In advance of the 2020 Hearing, the Tribunal asked Claimant what the exact

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<sup>48</sup> See Resolute Comments on the Article 1128 Submissions of Mexico and the United States ¶¶ 5-7 (May 8, 2020).

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test for “treatment” should be. Claimant stands by the test it articulated then, which is derived from the cases arising out of the measures adopted in Mexico favoring its sugar industry over producers of high-fructose corn syrup: a Party accords “treatment” to a foreign investor or its investment where it adopts a policy favoring its own investor or investment whose objectives can be achieved only when it produces an effect on the foreign investor or its investment. The tribunals’ finding in respect of the corn-syrup tax on bottlers in Mexico is analogous to the situation here.<sup>49</sup>

52. For the reasons explained in the 2020 Hearing, in answering the Tribunal’s Question 14<sup>50</sup> on the basic standard for an actionable claim under Article 1102, the foreign investor’s burden is limited to establishing that the State’s conduct harmed the foreign investor.<sup>51</sup> It is not necessary for the claimant to show that the State has acted with intent to harm or with knowledge of likely harm.<sup>52</sup>

53. The foreign investor need only demonstrate that the State’s harmful conduct affected the foreign national at some level of significance. It is not necessary for the claimant to show that the harm caused by the State conduct was exclusive to the foreign national nor primarily affected the foreign national.

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<sup>49</sup> See Resolute Memorial ¶¶ 204-208; Resolute Reply Memorial ¶ 251.

<sup>50</sup> By letter from the PCA dated October 16, 2020, the Tribunal issued a list of 27 questions that it invited the Parties to address in their oral submissions at the 2020 hearing, including questions 12 to 18 on Article 1102(3).

<sup>51</sup> The level of harm that the foreign investor is required to show is dictated by the notion of “treatment”, discussed in section III.B.4 below.

<sup>52</sup> The government’s intent or knowledge becomes relevant only at the second stage of the Tribunal’s analysis, when the Tribunal must determine whether the State has advanced a reasonable justification for the discrimination. Resolute need not establish “nationality-based discrimination” (to the extent this treatment suggests anything more than demonstrating harm to the foreign national) in order to meet the requirements for actionable differential treatment. See Resolute Memorial ¶¶ 223-227; Reply Memorial ¶¶ 226-237.

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54. The test for “treatment” is not meant to capture mere incidental effects, but rather probable and foreseeable adverse effects. As the Tribunal itself found in paragraph 248 of its jurisdictional decision, in connection with its decision on the threshold issue under Article 1101 that the Nova Scotia Measures “related to” Resolute and its investments outside Nova Scotia, the Nova Scotia Measures “were intended to put the purchaser [of the mill at Port Hawkesbury] in a favorable position, and in a small and saturated market it was to be expected that competitors would be affected.” The Tribunal rejected Canada’s argument that it was impossible for Nova Scotia to accord any treatment to Resolute or its investments because those investments are in Québec, not Nova Scotia. The Tribunal reasoned that, even though Resolute “does not suggest that it was specifically targeted by the Nova Scotia measures, it is open to it to establish on the merits a breach of Article 1102 on some other basis.”<sup>53</sup>

55. Whereas the notion of “treatment” in Article 1102 does not require the State’s intent to harm the foreign national, it does require the State’s intent to favor the domestic investor. As long as the State has adopted a policy intended to benefit a domestic investor where it is probable and foreseeable that the foreign national will be affected, the test of treatment is met. In the context of a provincial or a state measure under 1102(3), it is irrelevant that the measure produces an adverse effect not only on the foreign investor, but also on other domestic investors.

56. Resolute satisfies this test for treatment. Nova Scotia adopted measures intended to benefit a Canadian investor – PWCC – with an investment in Nova Scotia – the Port Hawkesbury mill. It was probable and foreseeable that those measures would

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<sup>53</sup> *Resolute v. Canada* Decision on Jurisdiction & Admissibility ¶ 290.

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harm Resolute. That was the case Claimant advanced in its Memorial, based on the expert testimony of Dr. Seth Kaplan.<sup>54</sup> Resolute discharged its burden to establish treatment.

57. Independent of Dr. Kaplan's analysis, Canada eventually revealed that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Even were this Tribunal to adopt a more stringent test for "treatment," requiring knowledge of harm, Resolute would discharge its burden. GNS knew and proceeded with reckless disregard for the foreseeable and foreseen consequences.

### 3. The Notion Of "In Like Circumstances" And Its Application

58. Resolute must show not only that it was accorded treatment, but that such treatment was less favorable than the most favorable treatment accorded to a domestic investor "in like circumstances." Numerous tribunals and reviewing courts have recognized that determining whether a claimant is in "like circumstances" to a particular domestic investor is a highly fact-specific exercise.<sup>55</sup>

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<sup>54</sup> It is Dr. Kaplan's expert economic opinion that (1) the very substantial benefits afforded to PHP enabled it to produce at a lower cost than its competitors; (2) prices for SC paper were reduced as a direct and inevitable consequence of PHP's re-entry into the North American supercalendered paper market with significant additional capacity; and (3) Resolute's losses in Québec were proximate to – were the direct consequence of – the benefits package provided to PHP, based on straightforward economic analysis. The Nova Scotia Measures had extra-provincial effects that constituted "treatment" for Resolute and its investments by distorting market competition, [REDACTED]. CWS-Kaplan ¶¶ 17-18; *supra* ¶ 24.

<sup>55</sup> For example, in *Pope & Talbot*, the tribunal wrote: "It goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept

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59. For purposes of the 2020 Hearing, Resolute organized the numerous issues that bear on the “like circumstances” analysis into relevant factors, and then applied those factors to the circumstances of this case. Resolute identified six factors:

- **Market:** Are the foreign investor and domestic investor operating in the same market?<sup>56</sup>
- **Product:** How similar are the products or services being offered by the foreign investor and domestic investor?<sup>57</sup>
- **Policy:** What is the Government’s goal in adopting and implementing the measures?<sup>58</sup>
- **Jurisdictional:** Is it relevant that the foreign and domestic investor are located in the same jurisdiction? This factor is important in certain cases, notably where a claimant is complaining about a regulatory measure of general application.<sup>59</sup>
- **Implementation:** Are the measures a law or regulation of general application in the territory, or are the measures targeted and specific in scope or effect?
- **Temporal:** Is there a timing issue as regards the investors and investments being compared?

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of ‘like’ can have a range of meanings, from ‘similar’ all the way to ‘identical....’” CL-008, *Pope & Talbot* Phase 2 Award ¶ 75.

<sup>56</sup> *Pope & Talbot* referred to the “same economic or business sector.” CL-008, *Pope & Talbot* Phase 2 Award ¶ 78. The sector should take into account the definition of the market, its size, and the number of firms in the market.

<sup>57</sup> In CL-107, *Corn Products Int’l v. Mexico*, Decision on Responsibility ¶ 126, the Tribunal wrote: “where the products at issue are interchangeable and indistinguishable from the point of view of the end-users [...], the products, and therefore the respective investments, are in like circumstances.”

<sup>58</sup> Again, in the *Corn Products* case, the Tribunal wrote (CL-107 ¶ 136) that it “cannot escape the conclusion that the producers of like products which were directly competitive were in like circumstances as regards a measure designed expressly for the purpose of affecting that competition.”

<sup>59</sup> In CL-101, *Merrill & Ring Forestry L.P. v. Canada*, Award ¶¶ 89-93, the tribunal found that an investor subject to federal restrictions applicable to all operators on private timberlands was in like circumstances with other operators subject to the same regulations, not to operators on British Columbia’s publicly owned timberlands that were subject to provincial regulations on the public lands.

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60. No single factor is dispositive in the like-circumstances analysis. The Tribunal must ultimately consider all the circumstances against these factors to determine whether the comparators are in like circumstances. The following observations are apposite and give the Tribunal a basis to conclude that Resolute and its Québec mills were in “like circumstances” to PWCC and the Port Hawkesbury mill in Nova Scotia:

- As the Tribunal acknowledged in the jurisdictional phase, Port Hawkesbury and several of Resolute’s Québec mills were in the same North American market for supercalendered paper: they were **direct competitors** (a combination of market and product factors).<sup>60</sup>
- The Nova Scotia Measures were intended to have, and did have, a **direct impact on the price of SC paper**, which affected all producers of this commodity, including the mills owned by Resolute producing this product (a combination of product and policy factors).
- It does not matter that the relevant Québec mills were not in Nova Scotia inasmuch as **Nova Scotia’s main policy goal was to ensure PHP’s long term success by making it a national champion in the market for SC paper**, a goal it achieved through a combination of targeted and specific regulatory and spending measures whose main objective was to make PHP the lowest cost producer in North America of the relevant products (a combination of policy, jurisdictional and implementation factors).
- The revival of PHP by the Government of Nova Scotia happened **at the very time** when Resolute was itself hoping for better times at its SC paper mills (temporal factor).<sup>61</sup>

61. Resolute has met its burden of establishing actionable differential treatment. It has proven that it was accorded (1) “treatment” (2) “in like circumstances”

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<sup>60</sup> That Resolute was seen by an investment bank working with the CCCA Monitor as a potential bidder for PHP reinforces the “like circumstances” analysis. See Resolute Reply Memorial ¶¶ 345-358. Resolute was a player in this market and in this product. But because it was, it had no interest in being part of a scheme that would cannibalize its own sales through price erosion.

<sup>61</sup> Garneau Witness Statement ¶ 17 (“We continued to produce high quality supercalendered paper in Québec for the North American market, managing costs to remain competitive.”).



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(3) that was “less favorable” than the most favorable treatment accorded to a domestic investor (*i.e.*, PWCC/PH).

#### 4. Canada’s Inability To Justify The Differential Treatment

62. Canada would need to satisfy two conditions to justify the differential treatment of Resolute by the Nova Scotia Measures. Perhaps because it knows it is unable to do so, Respondent has insisted that the burden never shifts to Canada and that it is Resolute’s burden to disprove any possible justification for the Nova Scotia Measures.

63. Canada is mistaken. Once the basic case of differential treatment is made out, Canada must justify the offending measures in accordance with the test set out in

#### *Pope & Talbot*:

Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.<sup>62</sup>

64. In the case before this Tribunal, Canada meets neither of the conditions of the *Pope & Talbot* test. First, the Nova Scotia Measures were unreasonable and had a devastating *de facto* effect on Resolute, a foreign investor in the SC paper market. Second, the Nova Scotia Measures unduly undermine the investment liberalizing objectives of NAFTA as they directly violate a core NAFTA objective found in Article 102 to “promote conditions of fair competition in the free trade area.”

65. Nova Scotia heaped largesse on Port Hawkesbury knowing it was creating a national champion in the continental supercalendered paper market. [REDACTED]

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<sup>62</sup> CL-008, *Pope & Talbot* Phase 2 Award ¶ 78.

[REDACTED]

66. [REDACTED]

[REDACTED]. Even if Canada were to convince the Tribunal that the Nova Scotia Measures were neutral as to nationality, they cannot pass the second part of the *Pope & Talbot* test as “not otherwise unduly undermin[ing] the investment liberalizing objectives of NAFTA.”

67. Article 102(1) of NAFTA sets out expressly that a key objective of the treaty, including as elaborated more specifically through Article 1102 and the national-treatment guarantee, is to “promote conditions of fair competition in the free trade area.” Canada cannot justify the conduct of the Government of Nova Scotia when its officials knew they were subverting, not promoting, conditions of fair competition.

5. Canada’s Inability To Invoke Article 1108(7)

68. Canada seeks to invoke Article 1108(7) as a defense to the breach of Article 1102. Article 1108(7) states that Article 1102 (among other provisions) does not apply to “(a) procurement by a Party or a state enterprise” or “(b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.”

69. There are two independent reasons why Canada cannot invoke successfully Article 1108(7) within the meaning of “procurement” and “subsidies.” First, Canada is precluded from reliance on Article 1108(7) because of its prior statements to the effect that no subsidies were involved in Nova Scotia (notably through formal negative notifications under the WTO Agreement on Subsidies and Countervailing Measures – “ASCM”). Second, even if Canada could rely on Article 1108(7) (which it

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cannot), it fails as a defense in this case because, by Canada's own admission, not all the Nova Scotia Measures fall within the categories of "procurement" under Article 1108(7)(a) or "subsidies or grants" under Article 1108(7)(b).

### a. The Notions Of "Procurement" And "Subsidies"

70. The terms "procurement" and "subsidies" are not defined in NAFTA. The dictionary defines "procurement" as "the action of obtaining or procuring something".<sup>63</sup> It defines "subsidy" as "a sum of money granted by the government or a public body to assist an industry or business so that the price of a commodity or service may remain low or competitive".<sup>64</sup>

71. The dictionary definition of "subsidy" (*i.e.*, the plain meaning of the term) points to a narrow category of government support ("a sum of money granted by the government"), excluding other forms of government action or policy that might be directed at supporting or favoring a particular business. In the *UPS* case, Dean Cass made a similar observation about the meaning of "subsidy" in Article 1108(7):

Simply put, the scope of government activity that has the effect of increasing returns to a particular business is too vast for that of itself to bring all such activity within the ambit of Article 1108(7).

Article 1108(7)(b) does not appear intended to cover the entire, broad sweep of government activity that might reduce the costs or increase the benefits of a particular business - what might in more colloquial terms be referred to as a "subsidy." Instead, the Article appears intended more narrowly to reach only self-conscious and overt decisions by government to expressly convey cash benefits to a particular business, enterprise, or activity. The list of government actions that come within the scope of the provision is not exclusive, but it is certainly suggestive.

Decisions to provide direct, clear subsidies of the sort averted to in Article 1108(7)(b) typically have substantial political costs and, thus, are

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<sup>63</sup> <https://www.lexico.com/en/definition/procurement> (consulted on October 13, 2021).

<sup>64</sup> <https://www.lexico.com/en/definition/subsidy> (consulted on October 13, 2021).

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commonly subjects of intense debate. The evident belief in drafting the subsidies exception to NAFTA was that the political processes for evaluating considerations relevant to such decisions would guarantee public scrutiny and, if appropriate, discipline under WTO provisions for addressing trade-distorting subsidies.<sup>65</sup>

72. Consistent with these observations, it seems reasonable to interpret Article 1108(7) as being aimed at excluding from NAFTA scrutiny under Article 1102 those specific measures that the NAFTA Parties knew would be subject to WTO discipline and other trade remedies.<sup>66</sup> Such exclusion would require the definition of “subsidy” under the WTO system to be consistent with the measures that fall within Article 1108(7), and it is. “Subsidy” is defined in Article 1 of the WTO ASCM and refers to narrow categories of overt decisions by government to expressly convey a “financial contribution” or “income or price support” to particular enterprises.<sup>67</sup>

### b. Canada’s Prior Inconsistent Position On Subsidies

73. The general principle of good faith in international law precludes a State from “blowing hot and cold.”<sup>68</sup> Canada is precluded from relying on the subsidy exception in Article 1108(7)(b) because of its prior statements to the effect that there were no subsidies in Nova Scotia. Canada denied the existence of subsidies in connection with Port Hawkesbury no fewer than five times, and over a period of more than five years:

- In three consecutive official notifications to the WTO pursuant to the ASCM, in 2013, 2015 and 2017, Canada reported “Nil” for Nova Scotia

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<sup>65</sup> CL-113.133, *UPS*, Separate Statement of Dean Cass ¶¶ 158-160.

<sup>66</sup> See also the preamble of NAFTA, where the NAFTA Parties expressly recognized that NAFTA was meant to “[b]uild on their respective rights and obligations under the General Agreement on Tariffs and Trade [now the WTO] and other multilateral and bilateral instruments of cooperation.”

<sup>67</sup> See C-367, World Trade Organization, Agreement on Subsidies and Countervailing Measures.

<sup>68</sup> CL-239, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II ¶ 7.107 (Aug. 30, 2018).

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subsidies.<sup>69</sup> In these notifications, “Nil” is specifically defined as “in accordance with Article 25 of the ASCM and Article XVI:1 of the GATT 1994, Governments of each Province and Territory informs that they do not grant or maintain within their territory any subsidy within the meaning of Article 1:1 of the Agreement which is specific within the meaning of Article of the Agreement, or which operates directly or indirectly to increase exports from or reduce imports into their territory within the meaning of Article XVI:1 of GATT 1994.” [emphasis added]

- [REDACTED]<sup>70</sup>
- The US and EU both objected to Canada’s failure to notify the Nova Scotia Measures as subsidies, especially given that “the new owner made it clear, that absent a certain level of government assistance, the plant was not economically viable and would not be re-opened” and that “the production and sales of this plant had begun to have serious negative consequences in the market for U.S. paper producers.” Canada disagreed with the need to notify.<sup>71</sup>

74. Canada should be held to a standard of consistency in characterizing its actions in legal proceedings. In the *UPS* case, Dean Cass wrote: “It is, at a minimum, reasonable to ask a NAFTA Party seeking to avail itself of the subsidy exclusion from Chapter 11 to clearly designate its conduct as a subsidy somewhere other than in defense of its conduct before a tribunal.”<sup>72</sup> Canada did not do so here. Instead, Canada took every opportunity, over a span of more than five years, and during the very time that Port Hawkesbury was receiving advantageous treatment through the Nova Scotia Measures, to deny expressly that these measures, individually or collectively, were subsidies. Canada should not be permitted to invoke the subsidy exception in Article 1108(7) now to avoid liability for those same measures.

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<sup>69</sup> C-021 § 12; C-359 § 12; C-361 § 12.

<sup>70</sup> C-212, [REDACTED].

<sup>71</sup> C-353, WTO Committee on Subsidies and Countervailing Measures Minutes ¶¶ 128-132.

<sup>72</sup> CL-113.134-135, *UPS v. Canada*, Separate Statement of Dean Cass ¶ 163.

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c. The Nova Scotia Measures Are Not All Covered by Article 1108(7)

75. Even if Canada could rely on Article 1108(7) (which it cannot), it fails as a defense in this case because not all the Nova Scotia Measures fall within the categories of “procurement” under Article 1108(7)(a) or “subsidies or grants” under Article 1108(7)(b).

76. These measures include the 24/7 “must run” order for the biomass boiler and the waiver of the Renewable Energy Standard. No matter how broad Canada would like the definitions of subsidy, grant or procurement to be, these measures do not qualify. Canada has not taken a contrary position.

77. Resolute is not complaining separately and in isolation about any individual measure that Canada claims is a subsidy or a procurement program. Nor is Resolute complaining only about those individual measures.

78. Instead, Resolute is complaining about Nova Scotia’s decision to make Port Hawkesbury the lowest cost producer through the adoption of a program that, by express design of the State as a willing partner of the buyer of PHP, involved an indivisible ensemble of coordinated measures, some of which Canada does not even claim qualify under Article 1108(7), such as the adoption of the load-retention rate (LRR) and related regulatory measures.

**C. Canada Denied Resolute Fair And Equitable Treatment (Article 1105)**

79. State conduct that is unjust, arbitrary, unfair, inequitable or discriminatory, that infringes a sense of fairness, equity, good faith, and reasonableness to a degree that is more than imprudent discretion or outright mistakes, but not necessarily egregious, shocking or outrageous, is cognizable as a breach of fair and equitable

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treatment.<sup>73</sup> A determination of a breach of fair and equitable treatment cannot be made in the abstract. It must be made in view of the facts of the particular case.<sup>74</sup>

80. Canada has not argued that there are no limits on the nature, purpose and extent of support that Nova Scotia could provide to place its own company ahead of the few competitors in the North American supercalendered paper market. Canada asserted at the 2020 Hearing that GNS provided “some appropriate level of government support,” “of course, there were limits on what the Nova Scotia government was willing and able to do,” and that “what the government could do was provide a reasonable amount of financial assistance.”<sup>75</sup>

81. Whether the Nova Scotia Measures were reasonable and within appropriate limits is subject to the judgment of this Tribunal, based on the facts and the totality of the circumstances. Because violations of fair and equitable treatment are so fact-specific, in most cases it is not possible to apply a bright-line standard, in the abstract, for when state conduct constitutes a breach.<sup>76</sup> However, the specific facts of this case demonstrate conduct by Nova Scotia that infringes a basic sense of fairness, equity and reasonableness to a degree that is more than imprudent discretion or outright mistakes.

82. GNS did not make an unknowing mistake by ensuring that PHP had all the assistance it needed to be the lowest cost SC paper producer in North America. [REDACTED]

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<sup>73</sup> See generally Resolute Reply Memorial ¶ 88(c) (citing cases detailing legal standard).

<sup>74</sup> See generally Resolute Reply Memorial ¶ 88(d) (citing cases that assessment of whether breach occurred must be determined “*in concreto*”).

<sup>75</sup> Hr’g Tr. at 173:17, 174:7-8, 175:5, 1220:3 (Canada argument).

<sup>76</sup> See generally Resolute Reply Memorial ¶¶ 94-95.

[REDACTED] 77

PWCC's Ron Stern told the NSUARB, with GNS representatives present, that the market already had too much capacity. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

83. Canada argues that GNS was taking "reasonable and prudent" actions to save a mill and protect jobs and a local economy, but [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

84. Canada argues that Resolute might have gotten all the assistance that PWCC did for PHP had Resolute only bid to acquire it, but this argument is based on false premises that are inconsistent with the object and purpose of NAFTA. The facts are that Resolute studied PHP and reasonably believed it was not commercially viable.

85. The package of assistance that GNS ultimately provided was not any part of the bidding. Rather, it was an ensemble of measures demanded by PWCC once it emerged as the only bidder who would take the company on as a going concern, and other measures subsequently developed with GNS when it was determined that the NSUARB would not approve the electricity package without changes, or that the Canadian Revenue Agency would not approve the tax strategy that PWCC initially

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<sup>77</sup> See *supra* ¶ 24 (citing R-161, [REDACTED]).



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contemplated as part of that package.<sup>78</sup> Alex Morrison found the Nova Scotia measures to be “unique” because they sought to resurrect a bankrupt PHP to become “the low-cost producer” and “most competitive” SC paper producer – something he had not seen previously in his career as a bankruptcy monitor.

86. Resolute already had three supercalendered paper mills that had outlasted NewPage-Port Hawkesbury. It had no reason to bid for an additional SC paper mill in Nova Scotia with non-competitive transportation costs far from markets, where electricity and labor costs were especially high, and that would have introduced more production capacity than what the market could bear.<sup>79</sup> There was no obligation, let alone a business rationale, why Resolute should have bid for PHP. NAFTA does not require foreign investors to bid against their own businesses to protect themselves.

87. Canada also suggests that the problem for Resolute is its unwillingness to invest in a Nova Scotia-based SC paper mill. Otherwise, GNS would have helped Resolute as it offered to help Resolute with Bowater Mersey. But NAFTA does not require a foreign investor to invest in a particular province in order to ensure that its other investments receive fair and equitable treatment, and the Bowater Mersey comparison is factually too different to matter.<sup>80</sup>

88. NAFTA protects the freedoms of foreign investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or

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<sup>78</sup> See *generally* Resolute Memorial ¶¶ 35-36 (discussing bidding process), 71-115 (describing assistance package).

<sup>79</sup> See Resolute Memorial ¶¶ 131-132 (describing capacity at Dolbeau, Laurentide, and Kénogami mills); Garneau Witness Statement ¶ 17; C-119.9, [REDACTED]; Hr'g Tr. 361:22-361:11 (Garneau).

<sup>80</sup> See Garneau Witness Statement ¶¶ 18-19; Resolute Reply Memorial ¶¶ 320-340.

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other disposition of their foreign investments in the host country. NAFTA prohibits restrictions that would require foreign investors to purchase goods or services in a particular territory or achieve a given level of domestic content.

89. Canada contends that GNS was merely trying to help its own company and constituents, but the Nova Scotia Measures were designed to make PHP a national champion, the lowest cost SC paper producer in North America, at the expense of a few competitors and particularly to the detriment of Resolute.

90. [REDACTED]

[REDACTED]. The multitude of statements about PHP being *the* “lowest cost producer” are more than political puffery—they are relevant because they demonstrate that the measures PWCC demanded and GNS provided were intended to be “more than merely competitive.”<sup>81</sup> They were measures taken expressly relative to the other few producers in the oversupplied and declining SC paper market, all for a mill that already had failed to compete on its own.

91. Nova Scotia’s knowing, intentional, and extraordinary measures to resurrect and advance PHP to the harm of Resolute were fundamentally unfair, unjust, and a violation of the minimum standard of treatment under NAFTA Article 1105.

**IV. THE NOVA SCOTIA MEASURES CAUSED RESOLUTE HARM**

92. Resolute was harmed by PHP’s reentry into the market. PHP’s reentry and the harm to Resolute both were the foreseeable [REDACTED] consequences of the

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<sup>81</sup> See C-160.10, *In re Application by PWCC* (NSUARB); C-163.6, [REDACTED]; C-183, Aug. 20, 2012 Nova Scotia Press Release; C-199, *Nova Scotia mill revived in 11th hour twist*; C-147.129, PWCC meeting notes; C-167, [REDACTED]; C-158, [REDACTED].

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Nova Scotia Measures. [REDACTED]

[REDACTED]. Dr. Kaplan testified:

PHP added over 20 percent to industry capacity that resulted in negative effects on Resolute's prices and shipments. ...

As a consequence, and directly attributable to the benefits package that enabled PHP to fully re-enter the market, Resolute suffered lost profits through lower prices and lower shipments than it otherwise would have enjoyed. This is the simplest of economic stories: "but for" the increased SCP supply from PHP, Resolute's SCP operations would have experienced higher prices and shipments, and enjoyed a concomitant increase in profits.<sup>82</sup>

[REDACTED]<sup>83</sup> [REDACTED]

[REDACTED],<sup>84</sup> [REDACTED]

93. Canada has tried to disaggregate the Nova Scotia Measures, removing them from the context and purpose of the assistance package and their apparent results. The measures, however, cannot easily be disaggregated. Ms. Chow from the GNS Department of Economic, Rural Development and Tourism said, with respect to the elements of assistance in the measures provided to PHP, "I don't feel comfortable looking at one amendment because there was so many, that some looked like it might be in favour of the company, some looked like it might be in favour of the province. You can't take them in isolation. I think you really have to view it as a package."<sup>85</sup>

94. NSPI similarly explained to the NSUARB that the different elements of the electricity package were integrally connected. The ensemble of measures, taken as a whole, brought the PHP mill from being a bankrupt, commercially non-viable operation,

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<sup>82</sup> CWS-Kaplan ¶¶ 37, 47, 17.

<sup>83</sup> R-161.53, [REDACTED].

<sup>84</sup> CWS-Kaplan-2 ¶ 33 (Dec. 6, 2019).

<sup>85</sup> Hr'g Tr. 480:21-481:7 (Chow).

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to the status of a national champion positioned to be the lowest cost producer in the North American market and progressively put competitors out of business.

95. Even if some government measures could be separated and distinguished as non-actionable, any that remain would be necessary and sufficient causes of harm to Resolute. Each measure contributed to PHP's reopening.

96. The Tribunal need not find that every measure, independently, was harmful. A State remains liable for damage caused by the breach of its international obligations even when concurrently there might be other contributing causes not attributable to the State as a breach: "In international law, where a State has caused damage by a breach of its international obligations, and where the claimant has shown that its losses are sufficiently and reasonably linked to the State's breach, causation is held to have been established. Other possible concurrent events that are not attributable to the State are irrelevant; such events do not diminish the State's responsibility, nor do they reduce the amount of compensation for damages due."<sup>86</sup> "{U}nless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the [State] is held responsible for all the consequences, not being too remote, of its wrongful conduct."<sup>87</sup>

97. Canada has argued, but has been unable to demonstrate, that other intervening factors were proximate causes of Resolute's harm:

98. Grade substitution. Dr. Kaplan, relying on the U.S. International Trade Commission's year-long study and report, found that different grades of SC Paper (e.g.,

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<sup>86</sup> CL-218, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award ¶ 269 (Apr. 18, 2017).

<sup>87</sup> CL-214, *CME Czech Republic B.V. v. The Czech Republic, UNCITRAL*, Partial Award ¶ 583 (Sept. 13, 2001) .

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SCA and SCB) belong to a single SC paper market.<sup>88</sup> There is an “extremely high correlation” between SCA and SCB grades during 2012-2017<sup>89</sup> so that “any change involves an incipient price increase or decline of the other product to keep them in the same market and with a price differential that remains the same.”<sup>90</sup> [REDACTED]

[REDACTED]<sup>91</sup> Absent that price differential, grade switching would increase to the higher quality product.<sup>92</sup> Pöyry’s Timo Suhonen testified that the return of PHP’s 360,000 MT supply caused the price of SCA to drop to the level of SCB, which would increase grade substitution from SCB to SCA—hurting Resolute, primarily a SCB producer.<sup>93</sup>

99. Mr. Suhonen argued at the 2020 Hearing that there was a combined market for coated mechanical paper and SC paper, suggesting the former might be an intervening cause, but the [REDACTED]

[REDACTED]<sup>94</sup> and the focus of PWCC and GNS alike was to make PHP the lowest-cost and most competitive producer of SC paper, not coated mechanical paper.<sup>95</sup> Mr. Suhonen conceded that the prices for coated mechanical paper and supercalendered paper were as different as wheat and barley flour and could not be combined in one market.<sup>96</sup>

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<sup>88</sup> CWS-Kaplan ¶¶ 36-41.

<sup>89</sup> CWS-Kaplan-2 ¶ 42.

<sup>90</sup> Hr’g Tr. 851:15-18 (Kaplan).

<sup>91</sup> R-146.65, [REDACTED]  
[REDACTED]).

<sup>92</sup> See Hr’g Tr. 929:24-930:4 (Suhonen).

<sup>93</sup> See Hr’g Tr. 934:25-935:21, 937:5-11 (Suhonen),

<sup>94</sup> See R-146.42, 43, [REDACTED]; R-161.13, 16, 23, 33, [REDACTED].

<sup>95</sup> See *surpa* n.81.

<sup>96</sup> Hr’g Tr. 946:18-949:11 (Suhonen) (“I mean, the combined barley and wheat flour price...doesn’t really make any sense.”).

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100. “Increased Demand” For PHP’s Products. Canada’s experts argued that

[REDACTED]

[REDACTED]. But basic principles of economics explain that demand did not increase; rather, the supply curve shifted due to the addition of PHP’s significant capacity, which eroded prices.<sup>97</sup>

101. Imports. Canada incorrectly argued that Dr. Kaplan’s causal analysis neglected to consider SC paper imports as an intervening cause. Dr. Kaplan did consider imports in both of his witness statements and in his direct hearing testimony. He found that SC paper imports were a part of the North American market “but they did not have an offsetting effect on the entry of Port Hawkesbury, which did not offset the but-for price effects” of PHP’s erosion of prices and harm to Resolute.<sup>98</sup> That “imports neither offset the decline in PHP production in 2012 nor offset the increase in PHP production caused by the re-entry in 2013” is confirmed by Figures 3-2 and 3-3 of the Pöyry Expert Report.<sup>99</sup> Mr. Suhonen agreed that imports from Europe actually increased after PHP returned online in 2013 (as compared to the period 2007-12).<sup>100</sup>

### **V. RESOLUTE IS ENTITLED TO DAMAGES TO REDRESS THE NOVA SCOTIA MEASURES**

102. Canada criticizes Resolute’s damages analysis, but Canada’s own expert, Peter Steger, acknowledged that the re-opening of Port Hawkesbury caused prices to fall for a certain period of time and thereby caused damages to Resolute.<sup>101</sup> His

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<sup>97</sup> See Hr’g Tr. 770:10-771:9 (Kaplan).

<sup>98</sup> Hr’g Tr. 856:25-857:5 (Kaplan); see also Hr’g Tr. 777:19-778:6 (Kaplan).

<sup>99</sup> CWS-Kaplan-2 ¶ 69; RWS-Pöyry.18.

<sup>100</sup> Hr’g Tr. 893:21-894:1, 902:20-903:22 (Suhonen). These figures came from Figure 3-3 of Mr. Suhonen’s first expert report. See *id.* at 897:8-14 (Suhonen).

<sup>101</sup> Hr’g Tr. 993:17-22 (Steger).

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disagreement, therefore, on behalf of Canada, is not over whether damages exist, but over their quantification.

103. Mr. Steger referred to his damages analysis as a “price erosion analysis”, and acknowledged that, in principle, his analysis was a method for assessing the injury that Professor Hausman was calculating through his “price effects analysis.”<sup>102</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Looking only at 2013, Mr. Steger observed “[a] price decline in the first half of the year, followed by a rebound in the second half of 2013 to the price levels of 2012 before PHP re-entered.”<sup>103</sup> He referred to this temporary dip in prices as a “price bucket” (given the bucket-like profile of the resulting graph). Mr. Steger calculated Resolute’s lost profits from price erosion in this short period at \$9.419 million.<sup>104</sup>

104. In his second report, Mr. Steger asserted that his analysis of the “price bucket” that he observed in the first half of 2013 is an assessment of the but-for world.<sup>105</sup> But PHP and its extra capacity did not go away after 2013, and economic theory dictates that the impact of PHP’s supply necessarily had lasting effects. As Professor Hausman explained:

Mr. Steger concludes: “[REDACTED]”  
[REDACTED] Again, even if this statement were correct, it fails to answer the fundamental economic question of what would SCP prices have been

<sup>102</sup> See RWS-Steger-2.17 ¶ 28(a) (March 4, 2020); Hr’g Tr. 987:5-11 (Steger).

<sup>103</sup> See RWS-Steger.38 ¶ 85 (Apr. 17, 2019).

<sup>104</sup> See RWS-Steger.38 ¶ 90; Hr’g Tr. 995:6-16 (Steger).

<sup>105</sup> See RWS-Steger-2.17 ¶ 28(a).

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if PHP had not re-opened? This question forms the economic basis of any estimation of damages.<sup>106</sup>

105. Professor Hausman explained that his analysis “is based on a ‘but for’ world (BFW) – the SC paper market that would have existed but for PHP’s reopening and introduction of █████-360k mt of increased SC paper capacity and production, guaranteed to survive through the government guarantee of being in perpetuity the low cost producer in North America.”<sup>107</sup> His approach to damages is to estimate what Resolute’s profits would have been absent the Nova Scotia Measures (*i.e.*, the profits in the “but for” world) and then to subtract actual profits to estimate damages owed to Resolute by Canada.<sup>108</sup>

106. The Tribunal has only one expert, Professor Hausman, who has taken into account the longer-term price effects in a proper but-for analysis.<sup>109</sup> Mr. Steger, whose “methodology” amounts to scanning a graph that does not extend past 2013, has necessarily failed to perform such an analysis. The Steger Report and the █████ Pöyry Report prepared for this arbitration to answer Prof. Hausman do not explain how increased supply in a market experiencing secular decline would not depress prices when compared to a scenario without an increase in supply. Nor do they adequately

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<sup>106</sup> CWS-Hausman-3.6 ¶ 8 (Dec. 6, 2019).

<sup>107</sup> CWS-Hausman-3.2 (Executive Summary).

<sup>108</sup> CWS-Hausman-3.3-4 ¶ 3.

<sup>109</sup> The *Chorzow Factory (Indemnity)* (RL-183) case established that “reparation [for an illegal act] must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” NAFTA Chapter 11 tribunals consistently have applied this principle. See *e.g.*, CL-118, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award ¶ 439 n. 145, ¶¶ 444-448 (Sep. 18, 2009) (“*Cargill*”) (citing RL-179, *SD Myers v. Canada*, Second Partial Award ¶ 140); see also CL-231, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award ¶¶ 362-363 (Dec. 17, 2015) (finding that the claimant was entitled to “be placed in the same situation” that would have existed but for the treaty violations).



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address standard, widely accepted economic understandings of the relationship among capacity, supply and price. [REDACTED]

107. Professor Hausman used two separate approaches to calculate damages from the price effects.<sup>110</sup> His “forecasting approach” uses RISI price forecasts to estimate Resolute’s profits in the “but for” world, leading to damages in the range of \$103 to \$149 million.<sup>111</sup> His “economic approach” uses price-elasticity analysis (applied to actual prices reflecting the increased capacity in the market with PHP) to calculate Resolute’s profits in the “but for” world without that increased capacity. Using [REDACTED] [REDACTED] of additional SC paper capacity (a conservative underestimate), the price-elasticity analysis resulted in damages in the range of \$90 million to \$153 million.<sup>112</sup>

108. Under either approach, Professor Hausman estimated that approximately 77% of the damages would already have been incurred by the time of the 2020 Hearing, with the smaller remaining portion being future damages.<sup>113</sup>

109. Professor Hausman provided a range of damages for each of his calculations because he used two different methodologies for calculating variable costs:

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<sup>110</sup> Prof. Hausman’s damages calculation includes only the price effects of PHP’s reopening, which results in a conservative assessment of damages. CWS-Hausman-2.11 ¶ 23 (December 28, 2018); see also *id.* at 10 ¶ 22 (“As an initial matter, my analysis does not include PHP’s negative effects on Resolute’s quantities via lowered shipments and market related downtime at its three mills”).

<sup>111</sup> CWS-Hausman-3.3 ¶ 2; Hr’g Tr. 619:4-8 (Hausman).

<sup>112</sup> CWS-Hausman-3.21-22 ¶ 33; Hr’g Tr. 619:9-21 (Hausman).

<sup>113</sup> Hr’g Tr. 620:2-5 (Hausman). In respect of future damages, it is appropriate to use reasonable projections, as Professor Hausman did. See, e.g., CL-118, *Cargill* ¶¶ 444-445 (holding that the appropriate measure of damages was the “present value of the net lost cash flows,” and found that making projections to do so was not “so unusual or difficult that employment of the method is inappropriate in this proceeding”).

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RISI cost estimates for one; a 2% annual increase in costs for the other. Neither methodology is inherently better and they are mutually validating with closely overlapping results. Resolute suggests, therefore, that the Tribunal accept the midpoint for each range (\$126 million for the forecast; \$121.4 million for the price-elasticity approach), and asks that, consistent with Resolute's overall conservative approach to damages (using the [REDACTED] for increased capacity; limiting losses to price erosion), the Tribunal award the more conservative \$121.4 million in addition to costs and fees.

Respectfully submitted,



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