PUBLIC VERSION
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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

GOVERNMENT OF CANADA

SUMMARY MEMORIAL

October 14, 2021

Government of Canada
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I. INTRODUCTION

1. In this submission, Canada summarizes its arguments on why the Tribunal must reject the claim by Resolute Forest Products Inc. ("Resolute" or "Claimant"). The Claimant's case relies on a false narrative, without factual and legal merit. It argues that "extraordinary, possibly unprecedented and unparalleled [m]easures" of the Government of Nova Scotia ("GNS") transformed Port Hawkesbury Paper Inc. ("PHP"), a private company, into a "national champion" that is "crushing foreign competition", an "invulnerable giant that no other SC paper producer could out-compete".[1] The Claimant argues the GNS provided a "guarantee" that PHP would be "*the* lowest cost" supercalendered ("SC") paper producer, and that "never before […] has any government extended so much, in so many different forms, on such a scale, to a single company."[2]

2. These misrepresentations have been disproven. As demonstrated in Canada's written submissions and at the November 2020 hearing, the GNS sought to support a critical industry in circumstances where the simultaneous closure of two paper mills (including one owned by the Claimant) would have caused widespread and serious economic damage to the province. In pursuing this legitimate policy objective, it acted in a fair and non-discriminatory manner. After an open bidding process in which the Claimant was encouraged to participate (it chose not to), PHP was bought by a private company, Pacific West Commercial Corporation ("PWCC"), from its private U.S. owner, NewPage. PWCC had innovative ideas on how to run the mill more efficiently to make a better grade of SCA+ paper that [redacted]. The evidence firmly establishes that the GNS' support for PHP was not "extraordinary" or "unprecedented", and the GNS did not attempt to target or cause harm to the Claimant's SC paper mills located in Québec, a different province where the GNS has no authority. The GNS had no control over and did not dictate in any way PHP's actions in the market and this fact was never contested by the Claimant. The evidence also

[1] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Memorial on Merits and Damages, 28 December 2019 ("Claimant's Memorial"), ¶¶ 156, 192, 308; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Reply Memorial on Merits and Damages, 6 December 2019 ("Claimant's Reply Memorial"), ¶¶ 17, 133, 198.

[2] Claimant's Memorial, ¶¶ 4-6, 156, 262; Claimant's Reply Memorial, ¶¶ 31-32 (*emphasis* added).

shows that the North American paper market "[redacted]"[3]

3. Nothing in the facts comes close to a violation of the minimum standard of treatment of aliens in customary international law (Article 1105). There is no rule in customary international law prohibiting or regulating the provision of financial assistance to domestic companies. Nor is there any evidence of behavior that is "egregious, unjust, arbitrary, grossly unfair, idiosyncratic, discriminatory, that exposes a claimant to sectional prejudice, or that violates due process," the threshold even the Claimant accepts as necessary to implicate the minimum standard of treatment.[4] The GNS' measures were done in good faith, rationally connected to legitimate public policy objectives, and reasonable in light of the alternative consequences. There was no arbitrariness, no denial of justice and the Claimant was deprived of nothing to which it had any legal right.

4. Canada has also established that the Claimant's unprecedented national treatment claim cannot even be considered by this Tribunal. With the exception of the electricity rate which PHP negotiated with the private electricity company, Nova Scotia Power Inc. ("NSPI"), which is not a measure attributable to the GNS, all of the Nova Scotia measures fall squarely into Article 1108(7)(a) or (b), which explicitly removes "procurement by a Party", "government-supported loans" and "grants" from any national treatment obligation. The capital and credit facility loans provided by the GNS are obviously "government-supported loans", the workforce training and marketing grants are "grants", and the purchase of land and payment for silviculture and other forestry-related services are "procurement by a Party." Applying the plain language of Article 1108(7) leaves the Tribunal with no measures to consider under Article 1102(3).

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[3] **R-263,** [redacted] p. 24. *See* Expert Report of Peter Steger, Cohen Hamilton Steger, 17 April 2019) ("Steger-1"), ¶ 86 for contemporaneous market assessments confirming that PHP did not have a significant impact on the market when it reopened, [redacted]
See Resolute Forest Products v. Canada (UNCITRAL) Canada's Counter-Memorial on Merits and Damages, 17 April 2019 ("Canada's Counter-Memorial"), ¶ 392; *Resolute Forest Products v. Canada* (UNCITRAL) Canada's Rejoinder Memorial on Merits and Damages, 4 March 2020 ("Canada's Rejoinder Memorial"), ¶¶ 15, 176; Rejoinder Expert Report of AFRY/Pöyry, 4 March 2020 ("AFRY/Pöyry-2"), Section 4.

[4] Claimant's Reply Memorial, ¶¶ 88, 128.

5. In any event, even if the national treatment obligation applied to the challenged measures, there is no evidence of nationality-based discrimination or less-favourable "treatment […] in like circumstances." Given that the Tribunal has already decided Article 1102(3) cannot be read to require uniform treatment of foreign investors as between Nova Scotia and Québec and that it applies only to "the same regulatory measures under the same jurisdictional authority,"[5] it is untenable for the Claimant to argue that the GNS was obligated under Article 1102(3) to either withhold all support for PHP or give Resolute's Québec mills equal treatment. No NAFTA tribunal has never found measures of a province or sub-national government with respect to an investor within its own jurisdiction to violate the "treatment […] in like circumstances" test with respect to a foreign investor in a different jurisdiction. There is no factual or legal basis to find a breach of Article 1102(3) in this case.

II. THE CONTEXT FOR THE GNS' DECISION TO SUPPORT PHP

6. In 2011, the NewPage-owned Port Hawkesbury newsprint and SC paper mill and the Claimant-owned Bowater Mersey newsprint mill both faced the possibility of closure, which threatened to inflict more than [redacted] in damage to Nova Scotia's GDP.[6] Given the serious economic consequences, the GNS was prepared to consider requests for financial assistance from the mills' owners to become sustainable in challenging market conditions.

7. Resolute itself was a willing participant in these efforts. In 2011, the Claimant partnered with Port Hawkesbury in a successful application to the Nova Scotia Utility and Review Board ("UARB") for a lower electricity rate charged by the private electricity supplier, Nova Scotia Power ("NSPI"). The Claimant itself argued publicly that both its mill and PHP should pay less for power because they were in economic distress (similar "load retention rates" are common in various jurisdictions in North America) and that "the public interest is far better served if [both]

[5] *Resolute Forest Products Inc. v. Government of Canada (UNCITRAL)* Decision on Jurisdiction and Admissibility, 30 January 2018 ("Decision on Jurisdiction and Admissibility"), ¶ 290, and sources cited therein.

[6] **R-145**, [redacted]); **R-160**, [redacted] **R-157**, [redacted] **R-148**, [redacted] **C-158**, [redacted] **R-309**, [redacted]

these mills can remain in operation."[7] Furthermore, in December 2011, the Claimant accepted a $50 million financial assistance package (with the potential of $40 million more) from the GNS to help Bowater Mersey become more efficient and survive difficult market conditions.[8]

8. [redacted][11] [redacted][12] Accepting government assistance to save its own mill in Nova Scotia belies the credibility of the Claimant's position that the GNS should have done nothing to assist PHP. It also demonstrates that the GNS' actions with respect to PHP ([redacted]) were also undertaken in good faith, consistent with its policy objective of a sustainable industry, and reasonable given PHP's particular circumstances.

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[7] **R-319**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company,* M04175, Closing Submission (Nov. 9, 2011), p. 68. *See* Canada's Counter-Memorial, ¶¶ 39-41; Canada's Rejoinder Memorial, ¶ 154-155; **R-383**, *Re NewPage Port Hawkesbury Corporation, Direct Evidence and Exhibits of Dr. Alan Rosenberg*, M04175 NPB-3 (June 22, 2011), p. 3 ("Many North American jurisdictions have provisions for load retention tariffs."); **R-429**, *In re an Application by NewPage Port Hawkesbury and Bowater Mersey Paper Company*, M04175, Opening Statement of Dr. Alan Rosenberg in the Matter of a Load Retention Rate for NPB ("Rosenberg Opening Statement") (Oct. 26, 2011), p. 1 ("As I noted in my direct evidence, there are many examples of load retention rates in other jurisdictions[…]").

[8] *See* Canada's Counter-Memorial, ¶¶ 42-62; Canada's Rejoinder Memorial, ¶ 9; and exhibits cited therein.

[9] **R-149**, [redacted] November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 318:14-319:4 (referring to the aforementioned statement: "A. [redacted]").

[10] November 2020 Hearing Transcript, Day 2, Garneau Testimony, p. 320:21-321:12 ("Q[redacted]").

[11] November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 321:13-25, 322: 20-333:2 ("Q. [redacted]").

[12] November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 323:16-19 ("Q. [redacted]").

III. THE BIDDING FOR PHP

9. In September 2011, NewPage decided to enter creditor protection with the goal of selling Port Hawkesbury as a going-concern.[13] A bidding process was established by NewPage, its financial advisor Sanabe and the court-appointed monitor Ernst & Young ("E&Y). It is common ground that the Claimant was encouraged to bid on PHP by both the GNS[14] [redacted][15] [redacted].[16] But the Claimant decided not to bid by the required deadline of September 28, 2011, [redacted][17]

10. [redacted]"[18] a plan that was shared with PWCC and the 20 other companies which submitted bids to purchase the mill.[19] [redacted]

[13] **R-024**, Re NewPage Port Hawkesbury Corp., Affidavit of Tor E. Suther (S.C.N.S.) (Sep. 6, 2011), ¶ 8 ("[…] to preserve the greatest benefit and value for its creditors, employees and other stakeholders and for the local community as a whole.").

[14] Witness Statement of Duff Montgomerie, 17 April 2019 ("Montgomerie First Statement"), ¶ 20.

[15] **R-360** [redacted]

[16] **C-119,** [redacted] November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 351:12-352:1 ("Q. [redacted] ").

[17] **C-118,** [redacted] (September 26, 2011), p. 3; **C-119,** [redacted] (September 26, 2011), p. 11; November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 344:21-25 ([redacted]

[18] **R-360**, [redacted] **R-361**, Sanabe Confidential Information Memorandum (Sept. 2011), p. 47.

[19] **C-120,** *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.,* Second Report of the Monitor, ¶¶ 15-17.

[redacted][20] [redacted]

[redacted][21] In other words, the Claimant's allegation that PHP was seen as a "commercially unviable mill"[22] is misleading.

11. The Monitor (E&Y), Sanabe and NewPage – *not* the GNS – chose PWCC as the preferred bidder for PHP in January 2012.[23] The Claimant had the same opportunity as everyone else to participate in the bidding for PHP, but chose not to. It was aware that another buyer might re-enter the SC paper market with a new SCA+ product, but took the risk that it would not happen. The Claimant could have asked the GNS for financial assistance to buy PHP, but chose not to. Had it done so, the GNS would have considered Resolute's request.[24] The Claimant cannot use NAFTA Chapter Eleven as an insurance policy for the results of its own business decisions.

IV. THE GNS MEASURES

Claims Related to GNS Measures Already Ruled Outside the Tribunal's Jurisdiction and Claims Lacking Any Evidentiary Basis

12. The Tribunal previously ruled that measures to support forestry workers and to keep PHP's SC paper machine in "hot idle" were "in no way relating to the Claimant's investment in different plants, in a different province"[25] and thus outside its jurisdiction.[26] The Claimant failed to inform its expert witness Mr. Morrison of this fact, who was unaware that such measures should have been excluded from his analysis.[27] Despite the Tribunal's ruling that such measures (plus a

[20] **C-163**, [redacted]

[21] **R-146**, [redacted]

[22] Claimant's Memorial, ¶¶ 271, 273.

[23] **R-031,** *Re NewPage Port Hawkesbury Corp.*, Sixth Report of the Monitor (S.C.N.S.) (Jan.13, 2012), ¶ 19; R-159, Re NewPage Port Hawkesbury Corp., Twelfth Report of the Monitor (S.C.N.S.) (Aug. 8, 2012), ¶ 48.

[24] Montgomerie First Statement, ¶ 24.

[25] Decision on Jurisdiction and Admissibility, ¶ 244.

[26] Decision on Jurisdiction and Admissibility, ¶¶ 55-56; 243-248 (deciding that the Forestry Infrastructure Fund, hot idle funding and municipal taxation measures were outside the Tribunal's jurisdiction).

[27] November 2020 Hearing Transcript, Day 3, Morrison Testimony, pp. 574:11-17 (referring to the Forestry Infrastructure Fund and hot idle funding: "Q. Just to confirm, you were not aware that those two measures were

municipal tax measure) cannot form part of its claim, the Claimant continues to include them.[28]

13. In addition, the Claimant also continues to make several misleading allegations that have no evidentiary basis, including statements that the GNS assumed PHP's pension and severance liabilities[29] (which is false[30]), gives free Crown timber to PHP[31] (which is false[32]) and furnished $6-8 million in savings for PHP's biomass plant[33] (which is false[34]). The Tribunal should disregard the Claimant's unsupported mischaracterizations of GNS measures.

PHP's Electricity Rate is Not a Measure Attributable to the GNS

14. The Claimant argues that the load retention electricity rate ("LRR") that PHP negotiated with NSPI is a measure of the GNS, which is a necessary condition for it to be challenged under NAFTA Chapter Eleven and international law. It is not. Acts of private parties, like those of a private paper mill and a private electrical utility, are not attributable to a State under international law unless the parties and the specific acts complained of are under the State's "effective control."[35] It is clear from the factual record that PHP and NSPI and their negotiated LRR were not under the effective control of the GNS.[36]

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judged by the Tribunal to be outside of its jurisdiction, right?" A. I don't believe, when we prepared the report, we were aware of that.").

[28] Claimant's Memorial, ¶ 71 (referring to hot-idle and forestry infrastructure funding as part of the GNS' "bailout package"); November 2020 Hearing Transcript Day 1, Elliott J. Feldman, p. 31:1-6 ("But NewPage could not have made the sale to PWCC under other circumstances. As Mr. Morrison has explained, government payments to keep the mill running are exceptional, an important part of the story of what makes the story unique.").

[29] Claimant's Memorial, ¶ 71; Claimant's Reply, ¶¶ 182, 340.

[30] **R-465,** CTV News, "N.S. won't bail out pension plan for NewPage workers: Dexter" (Jan. 5, 2012).

[31] Claimant's Memorial, ¶ 96.

[32] Canada's Counter-Memorial, ¶¶ 127-130; Canada's Rejoinder Memorial, ¶¶ 10, 66; Witness Statement of Julie Towers, April 17, 2019 ("Towers First Statement"), ¶ 36; and Rejoinder Witness Statement of Julie Towers, March 4, 2020 ("Towers Rejoinder Statement"), ¶ 3.

[33] Claimant's Memorial, ¶ 122; Claimant's Reply, ¶ 166.

[34] As Canada has previously explained PHP pays $4.72 million annually for the steam it gets from NSPI and UARB found that to be "reasonable and not subsidized by ratepayers." Canada's Counter-Memorial, ¶¶ 194, 208. **R-062**, Re Pacific West Commercial Corporation, 2012 NSUARB 126 (Aug. 20, 2012) ("UARB Decision"), ¶¶ 156-158.

[35] Canada's Counter- Memorial, ¶¶ 172-188; Canada's Rejoinder Memorial, ¶¶ 29-36.

[36] Canada's Rejoinder Memorial, ¶¶ 29-45.

15. NSPI is a private company that supplies electricity in Nova Scotia.[37] The GNS does not set electricity prices in the Province.[38] By law, the "price, terms and conditions" of a LRR must be "established jointly by NSPI and the customer" on a "customer by customer basis."[39] NSPI and PHP (NSPI's biggest customer) negotiated for six months to devise a variable rate formula that served each of their interests ([redacted] PHP bore all the risk for NSPI's fuel costs, [redacted]).[40] In the context of a challenge by Canada under the WTO subsidies agreement regarding the LRR, the *Supercalendered Paper* panel affirmed that the LRR came about from "vigorous negotiations" and was "based on market considerations" and rejected the argument that NSPI had been entrusted or directed by the GNS to provide PHP with a new electricity rate.[41] International law sets "a very demanding threshold" which requires "both general control of the State over the entity, and specific control of the State over the particular act in question."[42] Nothing in the evidence establishes effective control over NSPI and PWCC.

16. The Claimant attempts to circumvent the effective control test by arguing that an electricity rate negotiated between private parties is transformed into a measure of the GNS because it was reviewed by the UARB for compliance with regulatory requirements. This has no legal merit.[43] There is no dispute that the UARB is a state organ,[44] but it is not the conduct of the UARB which

[37] The Claimant's mills in Québec are supplied with electricity by Hydro-Québec.

[38] Canada's Counter-Memorial, ¶ 163, **R-061,** *Public Utilities Act*, R.S.N.S. 1989, c. 380 ("*Public Utilities Act*").

[39] *See* **R-162,** *Re NewPage Port Hawkesbury Corporation*, Letter re: Proposed Amendments to Nova Scotia Power Inc.'s. Load Retention Tariff, M04175 NPB-1 (Jun. 6, 2011).

[40] Under the variable rate formula it negotiated with NSPI, [redacted] See Canada's Counter-Memorial, ¶ 170; Canada's Rejoinder Memorial, ¶ 147; **C-222,** [redacted]

[41] **R-238**, *United States – Countervailing Measures on Supercalendered Paper from Canada*, Report of the Panel (Jul. 5, 2018) ("WTO Panel Report"), ¶¶ 7.68, 7.77.

[42] **RL-069**, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, ¶ 179. *See* Canada's Counter-Memorial, ¶¶ 176-177; Canada's Rejoinder Memorial, ¶ 30; and sources cited therein.

[43] Canada's Counter-Memorial, ¶ 163; Canada's Rejoinder Memorial, ¶¶ 37-45.

[44] ILC Article 4 (*Conduct of Organs of a State*) reads in relevant part: "1. *The conduct of any State organ* shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function […]" (emphasis added). ILC Article 8 (*Conduct directed or controlled by a State*) states: "*The conduct of a person or group of persons* shall be considered an act of a State under international law if the person

is alleged to be the internationally wrongful act in this case. That is a critical distinction lost on the Claimant.[45] ILC Articles 2, 4 and 8 require an analysis focused on the *specific conduct* at issue.[46] The UARB, in carrying out its adjudicative function in adversarial proceedings, did not devise the formula that NSPI uses to charge PHP for electricity – that was a deal struck as between them.[47] Rather, the UARB's conduct was limited to applying a statutory legal test of whether other ratepayers would be better off if the industrial customer remained on the system with the proposed PHP-NSPI LRR, than without it.[48] As noted during the November 2020 hearing,[49] accepting the Claimant's argument would create unlimited vicarious State responsibility for acts of private actions over which they have no effective control.

17. The Claimant makes the same error by trying to conflate the private acts of NSPI and PHP with the conduct of the GNS Department of Energy ("DOE") informing the UARB of its renewable energy policies which pre-dated the LRR negotiations between PWCC and NSPI.[50]

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or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." (emphasis added).

[45] The Claimant's reliance on the *Bilcon* case is misplaced. *See* Canada's Rejoinder Memorial, ¶ 44.

[46] ILC Article 2 (*Elements of an internationally wrongful act of a State*) states: "There is an internationally wrongful act of a State when *conduct* consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." (emphasis added).

[47] *See* **R-238**, WTO Panel Report, ¶ 7.77, where the WTO highlights PWCC's willingness (a) to become 'priority interruptible'; (b) to pay for its electricity in part on the basis of the most expensive incremental source of energy in the stack in any given hour that it purchased electricity; and (c) to pre-pay its bill on a weekly basis. *See* also **C-163**, [redacted] **C-138**, (Re) NewPage-Port Hawkesbury and Bowater Mersey Paper Company, Decision ("UARB Decision, Nov. 29, 2011") (Nov. 29, 2011), ¶ 185.

[48] **R-061**, *Public Utilities Act*, s. 18. *See* **R-062**, UARB Decision, ¶ 69, *citing* **C-138**, UARB Decision, Nov. 29, 2011, ¶¶ 174-185. The test to be applied by the Board when considering an application for a Load Retention Rate considers whether the proposed LRR is necessary and sufficient for NSPI to retain the load of the customer and whether the total revenue received from the customer (PHP) exceeds the incremental costs associated with NSPI serving the customer. *See* also **R-062,** UARB Decision, ¶ 114 confirms this inquiry, stating that "[t]he Board finds, on a balance of probabilities, that the proposed LRT pricing will recover all the incremental costs without subsidization from the other ratepayers, thereby meeting the sufficiency test."

[49] *See* November 2020 Hearing Transcript, Day 6, p. 1324:15-1326:6. Professor Lévesque noted that "governments and organs approve thousands of private transactions on a regular basis, whether it's a matter of competition law, bankruptcy law, utility law. So is your argument that all such transactions, then, can be attributed to the state as a matter of international law? […] [l]et's say the government of Canada approves a merger between two, say, big tech companies and then they go on to doing anticompetitive behavior and a US competitor then complains to the US government which in turn says 'Canada, you approved this merger, you're responsible for the anticompetitive behaviour'. So that seems to go too far to me".

[50] Canada's Counter-Memorial, ¶¶ 202-208; Canada's Rejoinder Memorial, ¶¶ 46-50.

The GNS was not a co-applicant with PWCC and NSPI for the LRR.[51] When the UARB asked for input from the GNS as to whether the NSPI-PHP LRR would result in additional renewable energy costs, the GNS merely confirmed its belief that, under pre-existing policies and targets, it would not (which, as predicted, has proven true).[52] The GNS also informed the UARB that policies regarding biomass developed between 2007 and 2011 (i.e., before PHP entered creditor protection) "had not changed".[53] Again, there is no relevant wrongful conduct by the GNS DOE since the RES and biomass policies predated LRR negotiations and did not result in financial benefit to PHP[54] and is, in any event, distinct from the negotiated commercial terms of how much PHP pays to NSPI for power, which is what the Claimant alleges to be a NAFTA violation. None of this conduct makes the LRR attributable to the GNS under the rules of international law.[55]

GNS Loans, Grants and Procurement

18. The remaining measures alleged to violate NAFTA Chapter Eleven were legitimate and reasonable government measures aimed at assisting a major industry and employer in a rural area remain operational while simultaneously advancing public policy goals of sustainable forestry management. They were not calculated to give PHP a "guarantee" of being "*the* lowest cost producer" and to empower PHP to "crush" Resolute.

19. The GNS measures at issue fall into two categories: (1) procurement by the GNS of land and forestry-related services from PHP in furtherance of environmental and other policy goals, and (2) government loans and grants to assist PWCC with the purchase of the Port Hawkesbury

[51] Witness Statement of Murray Coolican, 17 April 2019 ("Coolican First Statement"), ¶¶ 17-18.

[52] Canada's Counter-Memorial, ¶ 186, Canada's Rejoinder Memorial, ¶ 28; Coolican First Statement, ¶ 17, *citing to* **C-147**, PWCC Meeting Notes, Redacted PWCC LRT Application NSPI (Avon) IR-1 Attachment 2 (2011-2012), p. 108 of 165.

[53] Canada's Counter-Memorial, ¶¶ 202-208. **C-179**, Pacific West Commercial Corporation (Re), Letter Regarding PWCC Load Retention Tariff Hearing M04862 P-69 (July 20, 2012), pp. 1-2.

[54] PHP pays $4.72 million annually for the steam it gets from NSPI and UARB found that to be "reasonable and not subsidized by ratepayers." **R-062**, UARB Decision, ¶¶ 156-158.

[55] The Claimant has sought other means to attribute private acts of private parties to the GNS, all of which are equally unfounded. *See* November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 473:11-21, 474:5-13, stating that "[redacted]

mill. The first category of measures are as follows:

- [redacted][56] the GNS purchased 51,500 acres of land from NPPH and PHP for $20 million through a pre-existing government procurement program aimed at buying privately-owned land to keep as public property for sustainable forest conservation purposes and negotiations with First Nations in the Province.[57] It is undisputed that the land purchase was at fair market value.[58] [redacted][59]
- [redacted] – The GNS agreed to pay up to $3.8 million per year for PHP to perform, [redacted].[60] PHP did not seek out this agreement for the benefit of its SC paper operations, rather, it is unrefuted testimony [redacted].[61] The Claimant's expert admitted that "it's not an unusual circumstance to see forestry businesses having this type of arrangement."[62]
- **Forest Utilization License Agreement** – the GNS required PHP to enter into a modernized license agreement for which it pays for timber acquired on Crown land [redacted][63] Separately, the FULA requires PHP to perform silviculture activities on Crown land for which it is paid [redacted] PWCC did not seek out this agreement for the benefit of its SC paper operations,[64] rather, it is unrefuted testimony that the GNS regularly enters into

[56] **R-216**, [redacted]

[57] Towers First Statement, ¶¶ 5-16, 22-30; Towers Rejoinder Statement, ¶¶ 10-11; and exhibits cited therein.

[58] **R-207,** Forestry Transition Land Acquisition Program, Guidelines for Applicants (Apr. 2008); **R-216**, [redacted] **C-209,** [redacted] Towers First Statement, ¶¶ 22-30; Towers Rejoinder Statement, ¶¶ 10-11. The Claimant did not cross-examine Deputy Minister of Natural Resources Julie Towers at the November 2020 hearing.

[59] November 2020 Hearing, Transcript, Day 2, Garneau Testimony, pp. 321:13-25.

[60] **C-206**, [redacted] Towers First Statement, ¶¶ 22-30; Towers Rejoinder Statement, ¶¶ 10-11. 2022 [redacted]

[61] Towers First Statement, ¶¶ 31-34, 38-39; Towers Rejoinder Statement, ¶¶ 5-6.

[62] November 2020 Hearing Transcript, Day 3, Morrison Testimony, pp. 577:23-578:19.

[63] **R-192**, [redacted] Towers First Statement, ¶¶ 31-37; Towers Rejoinder Statement, ¶¶ 2-9. The Claimant has never alleged such rates are lower than that paid by its mills in Québec.

[64] Indeed, the pre-existing regime which had been in place since 1965 would have been far more favourable to PHP that the FULA. *See* Towers First Statement, ¶¶ 31-34.

similar forest licensing agreements with private companies for use of Crown land.[65] The Claimant's own expert Mr. Morrison admitted that "[f]orestry companies typically have those type of license arrangements on cutting timber on Crown land."[66] [redacted] [67]

20. The Claimant has no coherent explanation as to how these measures have any relevance to its mills in Québec or how they breach the NAFTA. Port Hawkesbury's land was sold to the GNS for fair market value, which the Province has kept for public ownership and usage. The Outreach Agreement and FULA are, in the words of the Claimant's expert Mr. Morrison, "typical" and "not unusual" and serve not to benefit PHP but for the GNS to procure forest maintenance services in accordance with government standards. These services are unrelated to PHP's production of paper, and since the GNS does not own land in Québec for which it could pay the Claimant to maintain, it could not provide equivalent treatment to the Claimant.

21. [redacted] [68] [redacted] ([redacted] [69] [redacted] [70]

[65] Towers Rejoinder Statement, ¶ 3.

[66] November 2020 Hearing Transcript, Day 3, Morrison Testimony, pp. 582:20-25.

[67] **R-149**, [redacted] November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 330:10-25, 331:2-10 ([redacted]

[68] **C-182**, [redacted] **C-195**, [redacted] Witness Statement of Jeannie Chow, April 17, 2019 ("Chow First Statement"), ¶¶ 6-14.

[69] **C-182** [redacted] **R-149**, [redacted]); November 2020 Hearing Transcript, Day 2, Garneau Testimony, p. 323: 16-19 [redacted]).

[70] **R-149**, [redacted] Chow First Statement, ¶ 13.

22. [redacted] The first was a $24 million capital loan to help improve productivity and efficiency at the mill. [redacted].[71] At the November 2020 hearing, the Claimant's expert Mr. Morrison admitted that this capital loan was similar to other situations when governments gave money "to assist with the modernization of mills and efficiency improvements […] provided in conjunction with pre-existing government programs or industry-wide programs."[72] [redacted].[73] [redacted][74]

23. As witnesses from the GNS testified and the documentary evidence confirms, the GNS felt this was a "reasonable and prudent" amount of financial support for PHP in light of all the circumstances and which served a rational and legitimate public interest objective.[75]

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[71] **C-182**, [redacted] **C-195**, [redacted] Chow First Statement, ¶¶ 4-5, 11 and exhibits cited therein.

[72] November 2020 Hearing Transcript, Day 3, Morrison Testimony referring to Expert Witness Statement of Ernst and Young Inc. (Dec. 6, 2019) ("E&Y Expert Report"), ¶ 84 ("Q. And still at paragraph 84, you write that: 'Monetary assistance to assist with the modernization of mills and efficiency improvements was generally provided in conjunction with pre-existing government programs or industry-wide programs" Right? A. Correct, yes. Q. And given what we discussed earlier, the fact that the same programs were used to provide financial assistance to mills, this is what happened in PHP's case, correct? A. Yes. As it relates to the capital investments, yes.")

[73] November 2020 Hearing Transcript, Day 2, Garneau Testimony, pp. 320:18-321:12.

[74] **C-182**, [redacted] **C-195** [redacted]). Chow First Statement, ¶¶ 4-5, 8-10 and exhibits cited therein. The Claimant has wrongly characterized one of the conditions of the credit facility as a separate "$1 billion tax loss harvesting" measure. Canada has explained this is a false characterization as [redacted] if PWCC were to ever use tax losses from outside Nova Scotia, it would have to pay the GNS to do so. *See* Canada's Counter-Memorial, ¶¶ 116, 226, 318; Canada's Rejoinder, ¶ 186; and Chow 1st Statement, ¶ 16. As Ms. Chow testified at the November 2020 hearing, "[Y]ou can't pull out one piece of a [loan] amendment without looking at all the items that were amended at that time […] so 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 [the loan amendments] as a package"). *See* November 2020 Hearing Transcript, Chow Testimony, pp. 479:25-480:1-2, 480:25-481:1-7.

[75] November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 498:17-499:195 ("[O]our Department of Finance […] ran modelling for us based on the permanent shutdown of that mill, and it was significant. […] if that

V. GNS SUPPORT FOR PHP DID NOT BREACH THE MINIMUM STANDARD OF TREATMENT OF ALIENS IN CUSTOMARY INTERNATIONAL LAW

24. In 2001, the NAFTA Free Trade Commission adopted a note of interpretation, which is binding on this Tribunal, that Article 1105 requires nothing more than the "the customary international law minimum standard of treatment of aliens."[76] As Canada has explained in its pleadings, Article 1105 sets "a *higher* threshold of liability than an unqualified FET clause".[77] The customary minimum standard serves as a floor, an absolute bottom below which conduct is not accepted by the international community.[78] NAFTA tribunals have consistently emphasized that only egregious behaviour in breach of the customary minimum standard can give rise to a violation of Article 1105.[79]

25. Customary international law affords substantial deference to States when they make policy decisions[80] and does not require a State to elevate the interests of the foreign investor above all other considerations.[81] There may be reasonable differences of opinion on what a government

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mill or that company can stay in business, the impact of a permanent shutdown was certainly reduced significantly, and it was a huge impact to our consideration as to what reasonable funding would be to help the mill restart."); November 2020 Hearing Transcript, Day 2, Montgomerie Testimony, p. 432:10-15 ("It was focused on Nova Scotia, in a rural community that had a modern machine as to whether or not a company could go in there, be a good corporate citizen and make it work with reasonable and prudent support. That was our goal.").

[76] **RL-001**, NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter Eleven Provisions" (Jul. 31, 2001). The interpretation by the FTC of a provision of the NAFTA is binding on the Tribunal. *See* NAFTA Article 1131(2); Canada's Counter-Memorial, ¶¶ 281-284; Canada's Rejoinder Memorial, fns. 254 and 262.

[77] **CL-141**, Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), pp. 262-263 (*italics* in original). *See* Canada's Counter-Memorial, ¶ 284; Canada's Rejoinder Memorial, ¶¶ 124, 130, 137 and fn. 226, 242, 262; **CL-118**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept.18, 2009) ("*Cargill – Award*"), ¶ 276 ("[S]ignificant evidentiary weight should not be afforded to autonomous [fair and equitable treatment] clauses as it could be assumed that such clauses were adopted precisely because they set a standard other than required by custom.").

[78] Article 1105(1) does not create an open-ended obligation but rather a minimum standard of treatment for investors as determined by the rules of customary international law. The party alleging the existence of a rule of custom has the burden of proving it. *See* Canada's Counter-Memorial, ¶¶ 283-284; Canada's Rejoinder Memorial, ¶ 125; November 2020 Hearing Transcript, Day 1, Mark Luz, pp. 212:24-214:5; and Day 6, Mark Luz, pp. 1239:5-25.

[79] Canada's Counter-Memorial ¶¶ 285-286; Canada's Rejoinder Memorial ¶¶ 123-125; Hearing Transcript, Day 1, Mark Luz, pp. 211:20-212:23.

[80] Canada's Counter-Memorial ¶¶ 272, 287; Canada's Rejoinder Memorial ¶¶ 113, 128-132, 140; **RL-021,** *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award (Dec 16, 2002), ¶ 103 ("[G]overnments must be free to act in the broader public interest through […] the granting or withdrawal of government subsidies […]. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.").

[81] Canada's Rejoinder Memorial, ¶¶ 130, 152; Hearing 2020 Transcript, Day 1, Mark Luz, pp. 215:22-217:9.

preferable policy could have been, but unless a State acts in a manner that is "sufficiently egregious and shocking",[82] for instance through denial of justice, there is no violation of the customary international law minimum standard of treatment. The Claimant accepts that a breach Article 1105 requires behavior that is "egregious, unjust, arbitrary, grossly unfair, idiosyncratic, discriminatory, that exposes a claimant to sectional prejudice, or that violates due process."[83]

26. The Claimant seeks to transform the minimum standard of treatment into a discipline on subsidies allowing a broad review of the "fairness" of governments' interventions in the economy. However, Resolute has not established that such disciplines exist in customary international law. The Claimant has conceded that government subsidies and grants are commonplace and admits that it is "not extraordinary" for governments to provide financial assistance to important industries when doing so is in the public interest.[84] This contradicts its original argument that "customary practice among NAFTA Parties, and in market-oriented companies generally, is for companies that are not commercially viable to be allowed to fail."[85] But the Claimant cannot on the one hand agree that international law permits States to support domestic companies with subsidies, but on the other hand argue that international law places a limit on their form and amount. While the Claimant exaggerates the size, nature and effects of the GNS' support for PHP,[86] Article 1105 does not in any event empower a NAFTA Chapter Eleven tribunal to adjudicate that a State's financial assistance was too "generous" as the

[82] Canada's Counter-Memorial, ¶ 285; Canada's Rejoinder Memorial, ¶¶ 124, 134; **RL-169**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017 ("*Eli Lilly – Award*"), ¶ 222.

[83] Claimant's Reply Memorial, ¶ 88(c).

[84] Claimant's Memorial, ¶ 156; Canada's Counter-Memorial, ¶ 290; Hearing 2020 Transcript, Day 1, Elliott J. Feldman, pp. 42:25-43:3 ("It's not extraordinary for a government to keep a sector or even a particular business alive and to enable it to compete."); Michael Snarr, p. 88:5-9 ("Resolute does not contest that a government may provide some assistance to a company or a whole industry when it determines that such assistance is in the public interest."); p. 108:12-14 ("Governments can help companies in their territory, particularly as to matters they regulate within their territory."); and p. 109:17-22 ("Is it unfair and inequitable that there is competitive effect from government measures? No. Most business government interactions will have some effect on the business and may or may not affect other businesses in the market.").

[85] Claimant's Memorial, ¶ 274. *See* Canada's Counter-Memorial, ¶¶ 291-292, 296; Canada's Rejoinder Memorial, ¶¶ 187-188; and Hearing 2020 Transcript, Day 1, Mark Luz, pp. 212:24-214:11.

[86] Canada's Counter-Memorial, ¶¶ 311-324; Canada's Rejoinder Memorial, ¶¶ 182-186.

Claimant requests this Tribunal to pronounce.[87]

27. While some domestic and international frameworks regulate subsidies (e.g., competition law, EU state aid rules and WTO subsidies disciplines), those rules are not at issue before this Tribunal, which can only consider the minimum standard of treatment in customary international law. There is no customary international law rule prohibiting States from treating domestic investors more favourably than foreign investors, including with respect to subsidies.[88]

28. The Claimant alleges that the GNS measures were disproportionate, but conceded at the November 2020 hearing that such a test is not part of the minimum standard of treatment in customary international law.[89] No NAFTA tribunal has ever concluded differently because there is no state practice and *opinio juris* to support the existence of such a rule.[90] The Claimant cannot ask the Tribunal to replace the rational policy decisions of a NAFTA Party with its own judgment through a "proportionality" analysis.[91] *Eli Lilly* and other NAFTA tribunals have rejected the introduction of such a test as part of the minimum standard of treatment and instead considered that a tribunal need only determine whether a measures has a rational connection to a legitimate public policy goal, i.e. that a measure is not arbitrary or irrational.[92]

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[87] Claimant's Reply Memorial, ¶ 317 (arguing that the GNS "opened its coffers more generously" for PHP than for Resolute's mill); November 2020 Hearing Transcript, Day 1, Elliott J. Feldman, p. 61:15-19 ("The Tribunal must decide whether Nova Scotia's *extraordinary generosity* to PWCC breached norms and obligations of international law […]"); and Day 6, Michael Snarr, pp. 1113:18-20 ("Nova Scotia provided *a large package* of assistance that, as an ensemble, provided benefits to Port Hawkesbury *on non-commercial terms*") (emphasis added).

[88] Canada's Counter-Memorial, ¶¶ 288-292; Canada's Rejoinder Memorial, ¶¶ 71, 120, 128 and fn. 122; **RL-019**, *River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶ 209 ("[N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.").

[89] November 2020 Hearing Transcript, Day 6, Michael Snarr, p. 1127:9-13: "So I think there is some evidence, maybe an emerging body of evidence, of proportionality playing a role in customary international law. There's probably not enough yet to preclude us having this discussion."

[90] *See* Canada's Rejoinder Memorial, ¶¶ 134-138; *Resolute Forest Products v. Canada* (UNCITRAL) Second Submission of the United States of America, 10 April 2020, ¶ 23 ("The United States has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States."); *Resolute Forest Products v. Canada* (UNCITRAL) Comments by the Government of Canada in Response to the Second NAFTA Article 1128 Submissions, 8 May 2020, ¶ 4; November 2020 Hearing Transcript, Day 1, Mark Luz, pp. 214:23-216:17, and Day 6, Mark Luz, pp. 1237:18-1238:23.

[91] Canada's Counter-Memorial, ¶¶ 272, 287; Canada's Rejoinder Memorial, ¶¶ 113, 128-132, 140.

[92] Canada's Rejoinder Memorial, ¶¶ 140-146 and fn. 266-270; **RL-169**, *Eli Lilly – Award*, ¶¶ 423 ("The Tribunal need not opine on whether the promise doctrine is the only, or the best, means of achieving those objectives. The

29. The Claimant argues that the GNS violated customary international law because its financial assistance was "extraordinary", "unprecedented" and "unique".[93] As noted at the November 2020 hearing,[94] the Claimant has no evidence of international practice to support this assertion, which would be necessary in order to implicate an international minimum standard of treatment. But even within the purposely circumscribed parameters of his report,[95] the Claimant's expert concluded that with "large industrial companies that offer significant regional employment, governments have provided both monetary and non-monetary assistance to a purchaser to complete a [CCAA] transaction and continue the business as a going concern", and that "monetary assistance is usually in the form of loans and grants to the debtor/purchaser upon exit of the CCAA proceedings."[96] Had the Claimant not withheld information from Mr. Morrison regarding the GNS's measures, including PHP's importance for the provincial economy,[97] the inevitable conclusion would have been that the GNS' actions were comparable to what other governments had done for other large employers in key industries.

30. The Claimant cannot argue that it was acceptable for the GNS to provide $50 million to help Bowater Mersey lower its costs and become more competitive, but a breach of customary international law to do the same for PHP;[98] or that it was "unprecedented" for PHP to negotiate

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relevant point is that, in the Tribunal's view, the promise doctrine is rationally connected to these legitimate policy goals."); ¶ 426 ("[I]t is not the role of a NAFTA Chapter Eleven tribunal to question the policy choices of a NAFTA Party."); and ¶ 428 ("Respondent has advanced a legitimate justification for this distinction […] Whether or not this is the preferred approach, it is plainly not an irrational one.").

[93] Claimant's Memorial, ¶¶ 275, 277, 308; November 2020 Hearing Transcript, Day 6, Elliott J. Feldman, pp. 1082:23-25 and 1084:6-8. See: Canada's Counter-Memorial, ¶¶ 311-320 and Canada's Rejoinder Memorial, ¶¶ 187-200.

[94] *See* November 2020 Hearing Transcript, Day 6, Professor Lévesque, pp. 1117:3-7 ("But the line crossing has to be the international law standard, right. It's the customary international law standard for the treatment of aliens and not what might be usual or unusual in Canada.")

[95] Canada's Rejoinder Memorial, ¶¶ 188-194; November 2020 Hearing Transcript, Day 3, Morrison Testimony, pp. 550:5-553:9,-564:3-9, 568:12-570:14, and 579:14-582:13; and November 2020 Hearing Transcript. Day 6, Mark Luz, pp. 1230:13-1237:7.

[96] E&Y Expert Report, ¶¶ 76, 78; November 2020 Hearing Transcript, Day 3, Morrison Testimony, pp. 583:1-589:184.

[97] November 2020 Hearing Transcript, Day 3, Morrison Testimony, p. 584:16-22 ("Q. […] While you were preparing your report, were you provided with any documents about the economic impact of the closure of the Port Hawkesbury mill in terms of either job losses or consequences for the local and regional economy? A: No.").

[98] Canada's Rejoinder Memorial, ¶¶ 141-145, 150, 166-170; November 2020 Hearing Transcript, Day 1, Mark Luz, pp. 182:4-187:2 and 217:10-218:7.

a reduced electricity rate with NSPI when Resolute previously argued before the UARB that LRRs were common in other North American jurisdictions and that *both* its own mill *and Port Hawkesbury* should receive a reduced electricity rate because of economic distress.[99]

31. The Claimant also suggests that the GNS violated customary international law because the GNS "guaranteed" to PHP that it would be "*the*" lowest cost producer of SC paper so it could "unfairly" compete against Resolute.[100] This argument lacks factual basis and in any event could not amount to a breach of the minimum standard of treatment. The GNS' goal was, as Mr. Montgomerie testified, to find a "good corporate citizen" that could restart PHP with "reasonable and prudent" financial assistance.[101] Being "*the*" lowest cost producer [redacted] but, as Ms. Chow testified, for the GNS "[redacted] and "you don't have to be the lowest-cost producer to gain benefit as the province" because "as long as the company continues to be viable, there are benefits to the province."[102] [redacted]"[103] Ms. Chow explained that, for

[99] Canada's Counter-Memorial, ¶¶ 7, 95, 162, 316; Canada's Rejoinder Memorial, ¶¶ 7, 155-157; Coolican First Statement, ¶¶ 6-10; November 2020 Hearing Transcript, Day 1, Mark Luz, pp. 201:19-209:7. *See also* Jurisdiction Transcript (15 August 2017), Dr. Hausman Testimony, pp. 97:10-98:5 and November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 755:4-13

[100] Canada's Rejoinder Memorial, ¶¶ 11, 121, 146-150; November 2020 Hearing Transcript, Day 1, Elliott J. Feldman, p. 9:21-25 ("[W]e think the Tribunal may find that the entire dispute is about the letter "A" when used as an indefinite article and the letters "T", "H", and "E" when combined into a definite article.").

[101] November 2020 Hearing Transcript, Day 2, Montgomerie Testimony, p. 385:6-15 ("[T]he whole purpose of this exercise was to determine if there was possibilities for success in Port Hawkesbury for somebody to come in with knowledge of the sector and a good corporate citizen to run the mill."), p. 410:16-21 ("[redacted] Again, my role was bigger than that, quite frankly, recommending to the government on a go-forward basis that this was a strong corporate citizen that would benefit the province of Nova Scotia in the long term."), and p. 432:10-15 ("It was focused on Nova Scotia, in a rural community that had a modern machine as to whether or not a company could go in there, be a good corporate citizen and make it work with reasonable and prudent support. That was our goal."); Montgomerie First Statement, ¶¶ 8, 22, 24-25, 30-34.

[102] November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 483:7-10; 484:7-11.

[103] November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 454:17-455:8 and pp. 484:18-20 ("[redacted]").

the GNS, [redacted][104]

The GNS "can't guarantee or control whether or not a company actually is viable,"[105] let alone be "*the*" lowest cost producer.

32. Indeed, the GNS has no role in controlling PHP's costs in [redacted][106] For example, as Ms. Chow observed,[107] [redacted][108] Furthermore, it was PHP, not the GNS, [redacted][109] [redacted][110] and

[104] November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 456:4-458:11 ("[redacted]").

[105] November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 484:22-485:4.

[106] **C-318**, [redacted]). *See* November 2020 Hearing Transcript, Day 3, Garneau Testimony, pp. 364:18-365:21; Day 6, Mark Luz, pp. 1273:11-24 and 1276:12-1285:6.

[107] **R-431**, [redacted] November 2020 Hearing Transcript, Day 2, Chow Testimony, pp. 489:21-490:2 and 496:10-497:14 ("[redacted]").

[108] When PHP first approached NSPI, it aspired to pay $30/MWH. [redacted] under the LRR it negotiated, PHP agreed to assume all of NSPI's risk of fuel cost fluctuations. *See* Canada's Counter-Memorial, ¶¶ 169-170; Canada's Rejoinder Memorial, ¶¶ 28, 147.

[109] **C-163**, [redacted] Canada's Counter-Memorial, ¶¶ 70, 85, 101; November 2020 Hearing Transcript, Day 2, Montgomerie Testimony, pp. 441:13-21 ("Q. PWCC's goal was to [redacted] is that right? A. [redacted] Q. And that was the company's decision to [redacted]? A. It was, yes.").

[110] **C-163**, [redacted]

[redacted][111] As the Claimant's own expert Dr. Hausman emphasized, "government support is not sufficient to make a company successful."[112]

33. [redacted][113] This allegation has no credibility.

- [redacted].[114] [redacted].[115] Mr. Montgomerie [redacted].",[116] [redacted]",[117] [redacted].[118]
- As Ms. Chow explained, [redacted],[119] and [redacted]"[120] The Claimant itself has argued that "[f]orecasts about

[111] **C-163**, [redacted]

[112] Jurisdiction Hearing Transcript, Day 1 (15 August 2017), Dr. Hausman Testimony, pp. 96:16-97:2 ("So, you know, U.S. government has supported all sort of enterprises in the last administration […] They just couldn't make a profit. So government support is not sufficient to make a company successful. […] [G]iven its previous history of shutting down, I would say there should have been significant doubt about whether Port Hawkesbury was going to succeed."); November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, pp. 755:18-756:7.

[113] November 2020 Hearing Transcript, Day 1, Martin Valasek, pp. 140:3-141:1.

[114] **R-146**, [redacted] **R-161**, [redacted] Montgomerie First Statement ¶¶ 19, 30; Montgomerie Rejoinder Statement ¶¶ 10; Chow Rejoinder Statement, ¶¶ 7-9.

[115] *See* Canada's Rejoinder Memorial ¶¶ 171-181, November 2020 Hearing Transcript, Day 1, Mark Luz, pp. 219:5-225:15, and November 2020 Hearing Transcript, Day 6, Mark Luz, pp. 1290:15-1292:6.

[116] November 2020 Hearing Transcript, Day 2, Montgomerie Testimony, pp. 421:4-10, 426:8-12.

[117] **R-161**, [redacted]

[118] Steger-1, ¶ 17, Table 2 (Kénogami profits); Steger-1, Schedule 10 (indicating Kénogami operating at or very close to full capacity of 133,000MT).

[119] November 2020 Hearing Transcript, Day 2, Chow Testimony, p. 461:12-21.

[120] November 2020 Hearing Transcript, Day 2, Chow Testimony, p. 497:8-23 ("[redacted]").

markets are always speculative,"[121] Mr. Garneau conceded that "no one is able to predict what the market is going to be when you have […] a declining demand for your product",[122] and Dr. Hausman agreed that "it's hard to predict the future".[123]

- [redacted][124] [redacted]"[125]

34. The Claimant suggests that the GNS breached customary international law when it did not withdraw its support for PHP [redacted]. But this would have required the GNS to ignore all the other relevant factors the GNS had to take into account, [redacted],[126] increased electricity rates throughout the province,[127] the mill's creditors and owner (NewPage, a U.S. corporation) being deprived of the value of the "going concern" sale,[128]

[121] *Resolute Forest Products v. Canada* (UNCITRAL) Claimant's Rejoinder Memorial on Jurisdiction, 3 May 2017, ¶ 57. *See Resolute Forest Products Inc. v. Canada* (UNCITRAL) Claimant's Counter-Memorial on Jurisdiction, 22 February 2017 , ¶ 87; Canada's Counter-Memorial, ¶¶ 109, 379-380; Canada's Rejoinder Memorial, ¶¶ 108, 179-181, 252.

[122] November 2020 Hearing Transcript, Day 2, Garneau Testimony, p. 336:11-18.

[123] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 735:9-23 ("A: […] No one, I think, expected prices to go up like they did in 2018. […] Q: It's hard to predict the future? A: Absolutely.").

[124] Canada's Counter-Memorial, ¶¶ 363-372; Canada's Rejoinder Memorial, ¶¶ 15, 176-177, 216, 238-245, 252.

[125] **R-263**, [redacted] **R-261**, [redacted] For a list of the contemporaneously market assessments, *see* Steger-1, ¶ 86.

[126] **C-158**, [redacted] Canada's Counter-Memorial, ¶¶ 29, 306; Canada's Rejoinder Memorial, ¶¶ 153-154; Towers First Statement, ¶¶ 18-19; Montgomerie First Statement, ¶ 7; November 2020 Hearing, Day 2, Chow Testimony, pp. 498:17-499:19 ("So just like [redacted] is one piece of information, we have a group within our Department of Finance that actually looks at economic impact, and they ran modelling for us based on the permanent shutdown of that mill, and it was significant. […] If that mill or that company can stay in business, the impact of a permanent shutdown was certainly reduced significantly, and it was a huge impact to our consideration as to what reasonable funding would be to help the mill restart.").

[127] Canada's Counter-Memorial, ¶¶ 194-195, 309, 316; Canada's Rejoinder Memorial, ¶¶ 154-157; **R-429**, Rosenberg Opening Statement, p. 4 ("So a closure of this magnitude has rippling effects throughout the economy, that would inevitably lead to still more lost fixed cost recovery, which would in turn lead to still higher rates.")

[128] Canada's Counter-Memorial, ¶¶ 4-5, 27, 31, 72-74, 108, 305; Canada's Rejoinder Memorial, ¶¶ 14, 158, 180; November 2020 Hearing Transcript, Day 3, Morrison Testimony, pp. 606:17-607:12 ("[W]hen we deal with

and other public interest considerations that hinged on the continued operation of a large industrial employer in rural Nova Scotia. The Claimant does not explain how a government acting in good faith in balancing difficult and competing interests with a rational connection to legitimate policy objectives can even come close to a breach of Article 1105.

35. Finally, Resolute has not even attempted to explain how actions of a private company in a marketplace could even be attributable to the GNS, which has no control over PHP's business decisions or prices.[129] Furthermore, the Claimant has given no evidence of "predatory pricing"[130] or anti-competitive behaviour by PHP, nor has it demonstrated any lost sales or lost contracts. The Claimant had no legal right to a SC paper market with one less competitor, nor did it have a legal right to higher SC paper prices or higher profits. The GNS' financial support for PHP deprived the Claimant of nothing to which it had any right to.

36. The Claimant has failed to demonstrate any action by the GNS that violates the minimum standard of treatment in customary international law. This claim should be dismissed.

VI. THE NATIONAL TREATMENT OBLIGATION DOES NOT APPLY TO THE GNS MEASURES BY VIRTUE OF ARTICLE 1108(7)

37. By virtue of Articles 1108(7)(a) and (b), the GNS measures at issue (i.e., loans, grants and procurement) are not subject to the national treatment obligation in Article 1102(3). There could not be a more straightforward application of Article 1108(7) than the case before this Tribunal.

38. The Tribunal should assess the application of Article 1108(7) first with respect to each measure. If it finds a GNS measure falls under either subparagraphs (a) or (b), the question of national treatment under Article 1102(3) is moot. Previous NAFTA tribunals have followed this approach. In *Mesa,* referring to Article 1108(7)(a) with reasoning equally applicable to Article

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restructurings of businesses, firstly, a going-concern outcome where we preserve the business, if it can be preserved, usually produces the best value for the financial creditors, so we always […] try to go a going-concern route if we can. And then there's obviously all the other benefits to the employees and the communities, which are an important part of trying to save a business, if you can -- if you can save it.").

[129] Canada's Counter-Memorial, ¶¶ 323, 342-343, 360-362; Canada's Rejoinder Memorial, ¶¶ 148-149; November 2020 Hearing Transcript, Day 6, Mark Luz, pp. 1126:13-1227:19, 1240:8-23, 1273:11-20, 1276:12-1285:6.

[130] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Claimant's Notice of Arbitration and Statement of Claim, 30 December 2015, ¶¶ 55, 96.

1108(7)(b)), the award states that "*Article 1108(7)(a) is a 'carve-out' rule. Its function is to exclude all procurement activities from the scope of some of the obligations in Chapter 11*."[131] In that case, the tribunal first considered whether the measure constituted "procurement by a Party" and, concluding that it did, dismissed the claim without the need to address whether the measure was consistent with Article 1102.[132] The *Mercer* tribunal did the same: once it determined a generator baseline contractual term was "procurement by a Party," the measure was excluded from the national treatment analysis.[133] This Tribunal should follow the same approach.

39. Article 1108(7) states that Article 1102 "[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." The explicit reference in subparagraph (b) to "grants" and "government-supported loans" removes any doubt as that the NAFTA Parties intended to exclude such measures from the national treatment obligation in Article 1102(3).[134]

40. With respect to Article 1108(7)(a), the *Mercer* tribunal stated "the English word 'procurement', as a matter of ordinary English language, is the general act of buying goods and services. It is a broad term […] its ordinary meaning is broad and not restrictive."[135] The *Mesa* tribunal called "procurement" a "broad notion" "commonly understood to refer to a formal acquisition, without a requirement that the acquisition be for the government's own use […] it

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[131] **CL-005**, *Mesa Power Group v. Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 427 (emphasis added).

[132] **CL-005**, *Mesa – Award,* ¶ 465 ("[T]he Tribunal holds that the FIT Program constitutes procurement by the Government of Ontario under Article 1108(7)(a) of the NAFTA [...] Consequently, the acts of the Government of Ontario cannot be challenged under Articles 1102 or 1103 of the NAFTA. The claims in respect of these provisions are, therefore, dismissed.").

[133] **RL-122**, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018 ("*Mercer – Award*"), Part VI, p. 14, ¶¶ 6.50-6.51.

[134] The equally authentic Spanish and French NAFTA texts show the same intention through the use of the terms "compras" and "achats" ("purchases") as the equivalent term for "procurement." In 1108(7)(b), they use "subsidios o aportaciones, incluyendo los préstamos, garantias y seguros respaldados por el gobierno, otorgados por una Parte o por una empresa del Estado" and "aux subventions ou aux contributions fournies par une Partie ou par une entreprise d'État, y compris les emprunts, les garanties et les assurance bénéficiant d'un soutien gouvernmental," respectively.

[135] **RL-122**, *Mercer – Award,* ¶ 6.34. *See* also **CL-113**, *United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award on the Merits,* 24 May 2007, ¶ 134 ("NAFTA Article 1108(7) does not require […] that the fee for the service provided be paid according to a specific formula or in a particular manner in order to fall within the scope of the exception. There is no basis for such a requirement in the text of the article.").

would make no difference at all whether such goods and services, once purchased, are used solely by the Government, or by any other entity."[136] The same reasoning applies to Article 1108(7)(b). As a matter of ordinary English language, "government-supported loan" and "grant" are broad terms and have no limits as to their form or purpose.[137] As noted in *Mesa*, "the NAFTA Parties sought to protect their ability to exercise nationality-based preferences […]".[138]

41. In this case, all the measures at issue (other than electricity, which is not a measure attributable to the GNS) match perfectly with the ordinary meaning of the terms "procurement by a Party," "government-supported loan" and "grants."[139] The purchase of land by the GNS is plainly "procurement by a Party." The purchase by the GNS of silviculture and other forestry-related services under the Outreach Agreement and FULA for a fee is also "procurement by a Party."[140] The credit facility and capital loan provided by the GNS to PHP in August 2012 are plainly "government-supported loans." The money for workforce training and marketing are

[136] **CL-005**, *Mesa – Award*, ¶¶ 424, 437.

[137] See Canada's Counter-Memorial, ¶ 225 fns. 473, 476. In its Award on Jurisdiction, this Tribunal cautioned against adding words that are not in the treaty text in its decision that "taxation measure" is subject to a "broad interpretation." Decision on Jurisdiction and Admissibility ¶¶ 326-329. The same approach should be taken here with respect to Article 1108(7) because, just like "taxation measure," the terms "procurement by a Party," "government-supported loan" and "grant" are broad in their ordinary meaning. It is acknowledged that Arbitrator Cass took a narrower view of the term "taxation measure." (Decision on Jurisdiction and Admissibility ¶ 328 fn. 507). However, Canada respectfully submits that because the terms "grants" and "government-supported loans" were intentionally added to the NAFTA text to ensure there would be no confusion as to whether such measures are subsumed within the undefined term "subsidy," the application of Article 1108(7)(b) is more straightforward; hence, the narrower reading Arbitrator Cass felt appropriate with respect to Article 2103 need not result in the non-application of Article 1108(7).

[138] **RL-052**, *Mesa – Award*, ¶¶ 419-420 ("[T]he NAFTA Contracting Parties sought to protect their ability to exercise-nationality based preferences in cases of procurement. As noted in ADF, the NAFTA Contracting Parties, like many other countries, maintain domestic preference policies when procuring goods and services […] it appears reasonable that a State be free to procure goods and services in a manner that yields maximum benefits for the local economy. Government purchasing of good and services is an extremely important function, and procurement by way of formal purchasing procedures is frequently utilised as an instrument of policy."). The same reasoning applies to Article 1108(7)(b).

[139] As noted by the *Mesa* tribunal, whether Article 1108(7) is an "exception" to Article 1102 or not does mean it should be interpreted restrictively; rather, Article 1108(7) is subject to the same international law rules of interpretation as any other provision in the NAFTA. *See* **CL-005**, *Mesa – Award,* ¶ 405.

[140] *See* **CL-113**, *UPS – Award*, ¶¶ 134-136 (finding that Canada Post's performance of services for Customs Canada for a fee is "procurement by a Party.").

obviously "grants." Not even the Claimant contests the characterization of the GNS measures.[141]

42. This is not a case where there is a genuine debate as to whether a complex government program falls into the ordinary meaning of "procurement by a Party or a state enterprise" (as in *UPS, Mercer* and *Mesa*) or a "subsidy" (as in *UPS*). In this case, because the ordinary meaning of "procurement," "government-supported loans" and "grants" so clearly apply to each measure at issue, the Tribunal need not delve into the hypothetical confines of the term "subsidy" or engage in a debate as to the appropriate level of subsidies to domestic industry. There is no discretion to exercise here: Article 1108(7) compels the inevitable result that the GNS' loans, grants and procurement are immune from challenge under Article 1102(3). The Tribunal need not consider the matter further.

43. The Claimant maintains that the Tribunal should ignore Article 1108(7). First, because Canada did not notify the measures at the WTO pursuant to Article 25 of the WTO *Agreement on Subsidies and Countervailing Measures*, Resolute says the Tribunal should not apply Article 1108(7). Canada has explained in detail in its pleadings and at the hearing why this technical argument must be rejected.[142] A NAFTA tribunal cannot refuse to apply the explicit text of Article 1108(7) because of an alleged non-compliance with a different treaty that contains a different set of obligations and over which this Tribunal has no jurisdiction and under which the Claimant has no standing. There is no requirement in NAFTA for a Party to notify measures at the WTO for Article 1108(7) to apply. Indeed, even at the WTO itself, failure to notify is not determinative of a measure's status under the SCM Agreement.[143] The Claimant has cited no legal authority or precedent supporting the non-application of an explicit treaty provision due to an alleged non-compliance with a completely different treaty.

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[141] The Claimant does argue that money paid to PHP under the Outreach Agreement should be considered a "grant" even though the testimony of Deputy Minister Towers, who the Claimant did not cross-examine, plainly establishes that the GNS is [redacted]
See Canada's Counter-Memorial, ¶¶ 131-132; Canada's Rejoinder Memorial, ¶¶ 10, 68; Towers First Statement, ¶ 38-39; and Towers Rejoinder Statement, ¶ 5-7. But the Claimant's argument does nothing to change the fact that the Outreach Agreement would be equally immune from national treatment under Article 1108(7)(b) as it would be under Article 1108(7)(a).

[142] *See* Canada's Counter-Memorial, ¶ 239; Canada's Rejoinder Memorial, ¶ 71.

[143] *See* Canada's Counter-Memorial, ¶¶ 14, 239; Canada's Rejoinder Memorial, ¶¶ 84-85.

44. Second, the Claimant says that Canada previously "denied that [the] GNS provided any subsidies (including grants, loans, and procurement to PHP/PWCC."[144] Canada has consistently demonstrated in its pleadings that this allegation is wholly untrue.[145] Canada's position was borne out at the November 2020 hearing when, in response to a request from the Tribunal for direct evidence,[146] the Claimant was unable to find any document or statement supporting its allegation.[147] The Claimant's misrepresentation of Canada's positions in different proceedings, involving different treaties and laws, cannot release this Tribunal from its duty to apply the text of NAFTA Article 1108(7)(a) and (b) as it is written.

45. There is no legal basis to circumvent Article 1108(7)(a) and (b). The GNS measures cannot be challenged under Article 1102(3) and the claim should be dismissed.

VII. EVEN IF ARTICLE 1108(7) DID NOT APPLY, THERE IS NO VIOLATION OF ARTICLE 1102(3)

46. As Canada has explained,[148] the purpose of the national treatment obligation in Article 1102 is to prevent nationality-based discrimination. NAFTA tribunals, the NAFTA Parties and scholars have consistently referred to this as a necessary element to find a national treatment violation.[149] The irrelevance of the Claimant's U.S. nationality is evidenced by the GNS'

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[144] Claimant's Reply, ¶ 277.

[145] Canada's Counter-Memorial, ¶ 238; Canada's Rejoinder Memorial ¶¶ 83-85.

[146] Tribunal Letter to the Parties, October 16, 2020, Question 8: "Irrespective of the relevance given by this Tribunal to WTO obligations, does the Claimant have direct evidence (other than the alleged lack of notifications of subsidies under the SCM agreement) that Canada denied the existence of (any and all) subsidies in relation to the assistance provided by GNS to PHP?").

[147] Nowhere in the documents relied on by the Claimant (Exhibits **C-212**, [redacted] **R-078,** WTO, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 23 October 2012", WTO Doc. G/SCM/M/83 (Jan. 10, 2013); and **C-353,** World Trade Organization, Committee on Subsidies and Countervailing Measures, "Minutes of the Regular Meeting held on 22 April 2013", WTO Doc. G/SCM/M/85 (Aug. 5, 2013) does Canada "deny" that the Nova Scotia measures were subsidies.

[148] Canada's Counter-Memorial, ¶¶ 250-253; Canada's Rejoinder Memorial ¶¶ 90-102; November 2020 Hearing Transcript, Day 1, pp. 234-238.

[149] *See* Canada's Counter-Memorial, ¶¶ 250-253 and Canada's Rejoinder Memorial, ¶¶ 90-102 and sources cited therein; *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 20 April 2020, ¶ 4 ("Article 1102 is intended to prevent discrimination on the basis of nationality […] it is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties to not treat entities that are in like circumstances differently based on their nationality"); *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Second Submission of the

encouragement of the Claimant to bid on PHP and Mr. Montgomerie's testimony that the GNS would have considered requests for financial assistance had Resolute asked.[150] The Claimant concedes that its U.S. nationality was not a factor in the GNS' actions and that other Canadian-owned SC paper producers (Irving and Catalyst) were similarly impacted, while Resolute "just happened to be the only foreign participant with an investment in Canada […]."[151] To argue that there is a national treatment violation in a situation where several enterprises in the same sector were accorded the same treatment and similarly impacted, regardless of their nationality, transforms Article 1102 into a guarantee for foreign investors that places them above domestic investors, which is not its purpose.[152]

47. Furthermore, the Claimant has failed to establish the elements of the national treatment test.[153] First, the facts demonstrate that the GNS did not accord "treatment" to the Claimant's investments in Québec, as that term should be properly interpreted, which requires a measure to apply to an investor or its investment or specific conduct or behaviour towards a specific investor or its investment.[154] That is not the case here. The Claimant voluntarily removed itself from the

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United Mexican States, 23 April 2020, ¶ 3 ("As a general principle, the national treatment obligation precludes discriminatory treatment on the basis of nationality."); Canada Response to U.S.A. and Mexico Article 1128 Submissions, 8 May 2020, ¶ 2.

[150] Montgomerie First Statement, ¶ 24.

[151] Jurisdiction Hearing Transcript Day 1, pp. 350:12-25-351: 1-4 (Professor Lévesque: "[H]ere in Canada, the two other competitors, Irving and Catalyst, are Canadian. So does that make a difference in the sense that can you say that the measures from Nova Scotia relate to Irving, Catalyst and Resolute, even though the nationality is different? […]; Mr. Valasek: "Sure. They relate to the industry. This is a market intervention. We are not saying necessarily that Nova Scotia had in mind to support Port Hawkesbury because it wanted to impact Resolute as a foreign investor only. This was a market intervention. They wanted Port Hawkesbury to be the champion as against any other producer, be it Canadian or foreign. We just happened to be the only foreign participant with an investment in Canada, so we qualified for protection under NAFTA.").

[152] *See* e.g., **CL-113**, *UPS – Award*, ¶¶ 176-177, 181 (noting that Canadian courier companies were treated in an identical manner as the claimant and that "the rationale for providing distribution assistance through Canada Post does not comprise any nationality-based discrimination.").

[153] Canada's Counter-Memorial, ¶¶ 245-279; Canada's Rejoinder Memorial ¶¶ 90-119. As noted in *UPS*, "failure to establish one of the three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove an absence of like circumstances between UPS Canada and Canada Post regarding Article 1102." *See***CL-113**,, *UPS – Award*, ¶ 84

[154] Canada's Counter-Memorial, ¶¶ 257-262 and sources cited therein. As noted in Canada's Counter-Memorial ¶ 257 fn. 541, the ordinary meaning of "treatment" is "[c]onduct or behavior towards a person". The Tribunal did not define the term "treatment" in its Decision on Jurisdiction ¶ 291 and considered the threshold question of whether the GNS measures were "in relation to" the Claimant's investments as being "close to the line" (¶ 248).

bidding process and never asked for financial assistance to buy PHP, so it cannot complain of "treatment" by the GNS insofar as it did not receive financial assistance in Nova Scotia, nor has it ever been alleged that Resolute requested financial assistance from the GNS for its mills in Québec. [redacted]. Nor can the Claimant allege treatment by the GNS based on PHP's behaviour in the market because, as the Tribunal noted in its Award on Jurisdiction, paper prices offered by PHP "did not involve state action of any kind."[155] The Claimant's notion of "treatment" is actually a remote indirect adverse effect argument which no previous NAFTA tribunal has ever endorsed under Article 1102.

48. Second, the Claimant fails the "treatment […] in like circumstances" test. Merely being in a competitive relationship is insufficient.[156] As NAFTA tribunals like *UPS*, *Cargill* and *Mercer* established, a claimant must do more than just show that two investments are in like circumstances; it must prove that the *treatment* accorded to those investments was "in like circumstances,"[157] and all of the relevant context and circumstances in which the treatment was accorded must be taken into account, including public policy objectives for the measure.[158] Similarly, the *Mercer* tribunal endorsed the reasoning in *Cargill*:

> Thus, in both GAMI and Pope & Talbot, *'like circumstances' was determined by reference to the rationale for the measure that was being challenged. It was not a determination of 'like circumstances' in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective.* Indeed, it is possible that in respect of other, different

[155] Decision on Jurisdiction and Admissibility, ¶ 312 ("The [Laurentide] closure decision was allegedly made because of the low paper prices offered by PHP, and did not involve state action of any kind. The Claimant has not alleged that PHP: (a) was a state agency, (b) exercised governmental powers delegated to it; or (c) was controlled by government officials in taking its pricing decisions.").

[156] Canada's Counter-Memorial, ¶¶ 266-277.

[157] Canada's Counter-Memorial, ¶¶ 265-268; Canada's Rejoinder Memorial, ¶ 110 and authorities cited therein. For example, in *UPS*, the purpose of the program was considered key in determining that the Claimant and domestic investor Canada Post were not in like circumstances. *See* **CL-113**, *UPS – Award*, ¶¶ 173-181.

[158] **CL-113**, *UPS – Award*, ¶ 87; Canada's Counter-Memorial ¶¶ 268-269; Canada's Rejoinder Memorial ¶¶ 111-114.

> measures, the mills in GAMI and the lumber producers in Pope & Talbot could have been found in 'like circumstances'[…][159]

49. The evidence is clear that the GNS' support for PHP had a reasonable nexus to rational government policy which made no distinctions between Canadian and foreign investors. Further, the fact that the Claimant's mills allegedly "treated" by the GNS are in a completely different province is decisive for the "in like circumstances" test. The rationale and policy objective of the GNS' financing program was focused on a major industry and employer on Cape Breton Island, not in a different province where it has no jurisdiction, authority or presence. The GNS could not have extended "no less favourable treatment" to the Claimant's Québec mills as it did to PHP. The GNS has no Crown land in Québec and it would [redacted] The GNS cannot implement renewable energy regulations that apply to the Claimant's biomass plants in Québec. The Claimant's mills are in Québec, so the GNS could not offer municipal property tax relief. NSPI, a private company which the GNS does not own or control, cannot supply the Claimant's mills with electricity since it does not operate in Québec and Resolute already buys cheaper power from Hydro-Québec. The differences in circumstances are manifest and justified by the rationales and policy objectives explained in the testimony of Ms. Towers, Ms. Chow, Mr. Montgomerie and Mr. Coolican.

50. The Claimant's position is also at odds with reasoning that has already adopted by this Tribunal. In the Decision on Jurisdiction, the Tribunal stated that "Article 1102(3) should not be read so as to impose, vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to the NAFTA."[160] This being true, there could be no obligation under Article 1102(3) for the GNS to have withheld support from PHP to ensure uniform treatment with the Claimant's mills in Quebec, but this is precisely what the Claimant alleges the GNS should have done.[161] The Tribunal also stated that "it agrees with the tribunal in *Merrill & Ring* that Article 1102(3) applies only to 'the same

[159] **RL-122,** *Mercer – Award,* ¶ 7.20, citing **CL-118**, *Cargill – Award*, ¶ 206 (*emphasis* added).

[160] Decision on Jurisdiction and Admissibility, ¶ 290.

[161] Claimant's Reply Memorial, ¶ 263.

regulatory measures under the same jurisdictional authority'".[162] Accordingly, there could be no obligation under Article 1102(3) for the GNS to somehow extend, outside its provincial borders, government funding programs like the Nova Scotia Jobs Fund (from which the loans and grants were funded[163]) and the Large Land Purchase Program and Forestry Transition Land Acquisition Program (where the funds for the land purchase came from[164]). Nor could there be any obligation under Article 1102(3) for NSPI, a private company operating in Nova Scotia, to somehow ensure the Claimant's mills in Québec paid the same for electricity as PHP, which would make little sense since the Claimant does not contest that it pays less for electricity in Québec (further confirming the Claimant's failure to establish less-favourable treatment). In other words, the Tribunal has already circumscribed Article 1102(3) such that it cannot be read to support either scenario demanded by the Claimant: withhold all support for PHP or give the Claimant the same.

51. The Tribunal did accept the possibility that a measure could fall within the scope of Article 1102(3) (but not necessarily violate) if a state or province took measures to keep an investor or its investment out of its jurisdiction.[165] But that never happened here: the GNS actively encouraged the Claimant to consider investing in the PHP mill.[166] The Tribunal also contemplated the possibility that a measure could fall within the scope of Article 1102(3) if an investor outside a state or province's borders was "the specific target of a provincial campaign to cause it loss."[167] The suggestion by the Claimant [redacted] is wholly without merit – [redacted] discredit that argument. The Claimant's Article 1102(3) claim has no factual or legal basis and should be dismissed.

[162] Decision on Jurisdiction and Admissibility, ¶ 290.

[163] Chow First Statement, ¶¶ 4-5.

[164] Towers First Statement, ¶¶ 14, 22-30.

[165] Decision on Jurisdiction and Admissibility ¶ 290. The Tribunal noted at ¶ 291 that it would still be up to the Claimant to establish a breach of the in like circumstances test.

[166] Montgomerie First Statement, ¶¶ 20; November 2020 Hearing Transcript Day 2, p. 337:12-16.

[167] Decision on Jurisdiction and Admissibility ¶ 290.

VIII. THE CLAIMANT IS NOT ENTITLED TO ANY DAMAGES

52. As Canada has explained,[168] in order for the Claimant to be entitled to damages pursuant to NAFTA Articles 1116 and 1117, it must prove that a measure of Canada breached an obligation of Part A of Chapter Eleven of NAFTA, *and* that: (1) the specific breach was the proximate cause of the Claimant's losses; and (2) its losses are quantified with reasonable certainty, through a rational and non-speculative methodology.

53. In this case, even if the Claimant were able to show a breach of Article 1102(3) or Article 1105, it has not presented a case that allows the Tribunal to award any damages. The Claimant has not proven that it actually suffered any loss by reason of the alleged breach. The damages theory that the Claimant chose to advance – price erosion – is not able to isolate its alleged harm from other potential causes that its own experts have admitted are relevant in the real-world.[169] As a result, the Claimant does not establish factual or legal causation. Equally fatal are the Claimant's confusing and speculative calculations of quantum that lack the reasonable certainty and reliability necessary to be awarded by this Tribunal.

The Claimant Has Failed to Establish Factual Causation

54. Despite the requirement in NAFTA and customary international law that the Claimant prove proximate causation, it has failed to address this matter in its written and oral submissions. Resolute has advanced no legal case of causation whatsoever; it relies exclusively on an economic theory of factual causation advanced by its experts.[170] Beyond that, it has adduced no evidence of actual harm flowing from the alleged breach.

55. Indeed, it is questionable whether the Claimant suffered *any* harm arising from the GNS' support of PHP. Resolute did not identify a single contract lost to PHP or to diminished revenues.

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[168] Canada's Counter-Memorial, ¶ 325, Canada's Rejoinder Memorial, ¶ 202; November 2020 Hearing, Day 6, Rodney Neufeld, pp. 1296:11-1297:17 and pp. 1298:24-1301:20.

[169] NAFTA Article 1116(1) limits recoverable damages to those which occur "by reason of, or arising out of" the wrongful act. Canada recalls that it is important to isolate the effects of the breaches from those resulting from other causes, such as general market decline or changes in raw material costs, "in order to differentiate between damage proximately caused by the breaches and damage resulting from other causes." **RL-223**, *Hochtief A.G. v. Argentine Republic* (ICSID Case No. ARB/07/31) Award, 19 December 2016, ¶ 22.

[170] Claimant's Memorial, ¶¶ 280-288; Claimant's Reply Memorial, ¶¶ 367-369.

On the contrary, Dr. Hausman agreed that Resolute's mills have made "better than […] stable" profits since the re-entry of PHP into the market in late 2012.[171] In fact, they have been more profitable with PHP in the SC paper market than when it had exited. With PHP idle during creditor protection proceedings, [redacted] [172] However, [redacted][173] The Claimant's [redacted] amount which Dr. Hausman thought amounted to a "good year" of profit for Resolute.[174]

56. An analysis of quantities sold by Resolute tells a similar story. With PHP back in the market in 2012, [redacted][175] Although the amount the [redacted][176] When asked why he did not rely on financial profitability or quantities sold to conduct a regression analysis of damages, Dr. Hausman said "it's a very complicated story […] and I wasn't able to separate things out sufficiently in my mind."[177]

57. The Claimant rejected the use of actual evidence to calculate past damages, including the two means above, because they do not demonstrate *any* fact of damage. Instead, it chose a different approach: price erosion, relying on the economic theory of supply and demand coupled with a faulty forecast by RISI (the "forecasting approach"), and backed up by "consistency checks" using ever changing price elasticity assumptions (the "economic approach").

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[171] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, pp. 647:3-20, 649:19-652:14, 654:3-11 and 655:19-656:20.

[172] Together, [redacted] See Steger-1, ¶ 17, Table 2.

[173] Together, [redacted] See Steger-1, ¶ 17, Table 2.

[174] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 652:8-12.

[175] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, pp. 659:24-660:11, referring to Steger-1, Sch. 11.

[176] When it was put to him on cross-examination, [redacted]" See November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, pp. 677:5-678:3 referring to **R-235**, [redacted]

[177] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, pp. 690:24-691:12.

58. The Claimant's case for factual causation advanced by its expert, Dr. Kaplan, is that the package of measures caused PHP's re-entry and an increased supply of SC paper, which necessarily led to an erosion of SC paper prices. To measure that erosion, the Claimant insisted that Dr. Hausman look to the price that SC paper would have been without PHP in the market, compared to Resolute's actual sale prices. [redacted]. This is not evidence: it is a theory coupled with a speculative forecast. The Claimant uses this purely theoretical approach despite Dr. Hausman recognizing its "inherent uncertainty"[178] and [redacted][179]

59. The Claimant is mistaken that the notion of supply and demand is sufficient to prove factual or legal causation of its damages. It provides no evidence of harm, nor does it provide Resolute with the ability to isolate any price erosion caused by the measure from erosion caused by all other market events. The Claimant ignores real-world price drivers and market developments that its own experts admit played a role in SC paper price movements. For example, material costs have dramatic effects on SC paper prices.[180] But in response to a question on whether the cost of bleached softwood kraft pulp (BSKP) (the most expensive part of the finish in SC paper) affected prices, Dr. Kaplan replied, "[i]t appears that it may have. I did not do an econometric examination; […]. The problem with looking at granular data without all the supply and demand drivers present and without doing a statistical analysis, is that you could get a casual empiricism and pick and choose which variables and which changes as your explanation ex-post of the events."[181] Here, Dr. Kaplan himself identifies the flaw inherent in his model: it does not isolate harm caused by the alleged breach – the re-entry of PHP – from all other price drivers, including the cost of BSKP, which Dr. Kaplan agreed had a dramatic effect on prices in 2011 while PHP

[178] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, p. 625:24-626:2.

[179] Canada's Counter-Memorial, ¶ 385; Canada's Rejoinder Memorial, ¶ 246.

[180] Canada's Rejoinder Memorial, ¶ 205; AFRY/Poyry-1 ¶ 79 ("Bleached Softwood Kraft Pulp ('BSKP') constitutes a significant cost item in SC-paper manufacturing. […] [T]he relationship between pulp prices and SC paper prices demonstrate that SC paper prices move in parallel with market pulp prices.").

[181] November 2020 Hearing Transcript, Day 4, Dr. Kaplan Testimony, p. 845:8-16.

was not operational.[182]

60. A second important factor not examined is exchange rates. Dr. Hausman states that "[t]he reason I didn't build an econometric model […] is I know that you can't really forecast exchange rates at all well. I am just picking out one variable, and there are a lot of other variables you have to do."[183] In other words, both of the Claimant's experts recognize that it is not possible to isolate the one variable the Claimant relies on exclusively for its damages calculation – the effect of PHP's re-entry on paper prices – from other variables like foreign exchange rates. Despite this obvious and fatal flaw, [redacted] which has been shown to have employed many incorrect assumptions,[184] with no justification other than "Yeah. Well, the world changed. What do you expect?"[185]

61. A third factor ignored by the Claimant was that major purchasers downgraded from the more expensive coated mechanical paper to cheaper grades of SC paper in 2013.[186] This was a critical factor that [redacted] When discussing [redacted][187] a consequential decision that prompted others to do the same, Dr. Hausman admitted that "[redacted]"[188] Such downgrading to the high quality SC paper made by PHP had a significant effect on consumption, [redacted] and the Claimant ignores it. Dr. Hausman's

[182] *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Reply of Seth T. Kaplan, Ph.D., 6 December 2019, ¶ 54.

[183] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, p. 721:5-10.

[184] AFRY/Poyry-1, ¶ 111, Table 7-1.

[185] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, p. 722:5-6.

[186] Canada's Counter-Memorial, ¶ 359: "[redacted] As one market expert observed [redacted]."

[187] Canada's Counter-Memorial, ¶ 142. In the words of [redacted] **R-242**, Email from B. Blaine to M. Savoie re: SCA Prices (Feb. 15, 2012).

[188] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 689:16-17.

view that PHP's addition of [redacted][189] necessarily caused prices to decline fails to consider whether PHP's re-entry actually contributed to greater SC paper consumption and the stabilizing effect this would have had on prices. The Claimant's approach totally overlooks the strength of the SC market in 2013 when there was not enough supply to satisfy demand,[190] and the fact that SC paper suppliers [redacted] and yet Resolute decided to undercut them [redacted][191] Dr. Hausman and Dr. Kaplan did not even attempt to account for these market developments in their theoretical models.

62. Yet another factor that the Claimant's theory ignores is the role that European imports would have played in a market without PHP. The Claimant pretends that overseas imports are irrelevant, despite Dr. Hausman's acknowledgement that they have [redacted] in a single year and he "can't guarantee that that wouldn't have happened" had PHP not re-entered the market.[192] Incredibly, the Claimant's model ignores this factor despite i[redacted][193] and the contemporaneous views of market commentators that the restart of the PHP machine was "[redacted]"[194] The Claimant's theory conveniently ignores the decrease in European imports after PHP's re-entry and the likely effect that imports would have had on prices absent PHP.

63. Input costs, exchange rates, increased demand and imports are just a few of the relevant price drivers that the Claimant's theory of price erosion ignores, making it unreliable as a basis

[189] Dr. Hausman conceded he does not know the amount of paper actually supplied by PHP after its re-entry; November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 679:2-8, 740:5-11, 741:11-23.

[190] **R-415**, [redacted]

[191] Canada's Counter-Memorial, ¶ 361; **R-415**, [redacted]

[192] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, pp. 668:3-10, 687:15-688:6.

[193] **C-180**, [redacted] p. 13.

[194] November 2020 Hearing Transcript, Day 4, Dr. Kaplan Testimony, pp. 796:17-798:21, **R-236**, [redacted]

of factual causation. Attributing all possible price decline of SC paper solely to the re-entry of PHP and not to any other factor is factually incorrect.

The Claimant Has Failed to Establish Legal Causation

64. The requirement of causation comprises a sufficient link between the alleged wrongful act and damage, as well as a threshold beyond which damage is considered too indirect or remote.[195] Resolute's damages claim is too uncertain, remote and indirect to be awarded by this Tribunal.

65. Resolute's damages request is based entirely on future lost profits. Dr. Hausman arrives at the amount of "at least US$103,967,000", which Resolute requests in relief,[196] [redacted] In other words, every penny of damages sought by the Claimant is based [redacted] which everybody recognizes is filled with uncertainty. Dr. Hausman himself stated "it's very difficult to predict future damages. We had this anomalous event. Now we have the pandemic. Prices are coming down. You know, the economies of both Canada and the US are in horrible shape. So, you know, trying to predict out to 2028, I'm the first to say, is very difficult. I mean […] what economist would have predicted the pandemic?"[197] The Claimant's methodology in fact does not assess past damages, only "difficult to predict" future damages.

66. If there was any damage to Resolute caused by PHP's re-entry (which has not been proven with actual evidence), it is too indirect to be awarded as compensation. As Canada argued in its written submissions, [redacted] which competes with standard uncoated mechanical paper like high bright news at the low end of the paper spectrum, whereas PHP's high quality SCA+ paper is in direct competition not with the Claimant, but with high quality European imports and the more expensive coated mechanical paper.[198] Resolute admits that it does not make the same high quality paper as PHP. At the November 2020 hearing, the Claimant admitted that it had recently decided to upgrade its mill in Kénogami (with

[195] **RL-180**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Award,* 24 July 2008, ¶ 785.

[196] Claimant's Reply Memorial, ¶ 397(e).

[197] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 736:6-19.

[198] Canada's Rejoinder Memorial, ¶ 238; Steger-1, Schedule 11, p. 54.

Canada's and Quebec's government financial assistance[199]) in order to respond to its customers who "have urged Resolute to raise the quality of its product".[200] Despite its own admission that it sells a different quality of paper, Resolute maintains that it was damaged because "SCA and SCB prices rise and fall together",[201] failing to see that an argument based on correlation cannot satisfy the requirement to show harm caused *directly* by the measure.

67. The Claimant has never advanced a case for legal causation. If it had, it would have had to contend with numerous flaws of proximity, remoteness, indirectness and contributory fault to justify its view that (i) a package of measures collectively breached NAFTA (even if individually each one did not); (ii) causing PHP's re-entry into the market; (iii) which caused an over-supply of SCA+ paper (despite evidence that PHP took market share from coated mechanical paper producers and European imports); (iv) which in turn caused the prices of Resolute's lower grade paper to fall; (iv) over a 16-year period; and (v) during this period, no other factors caused price erosion other than PHP's re-entry in late 2012 (i.e., ignoring the effect of slower economic growth, competition with Resolute from non-SC paper suppliers, Resolute's own decision to drop its prices[202] and the COVID-19 pandemic). The inherent uncertainty and lack of accuracy embedded in the Claimant's causal theory makes it far too tenuous to be reliable.

The Claimant Cannot Calculate Its Alleged Damages with Reasonable Certainty

68. Calculating quantum requires "reasonable certainty",[203] but the Claimant produces a web of numerous, confusing and internally inconsistent quantum calculations that lack coherent corroboration and produce results which confused their own expert.[204] When asked at the

[199] Resolute's news release documents that $11.6 of the $38 million of the investment was provided by the governments of Québec and Canada. **R-427,** Resolute News Release, "Resolute invests $38 million in its Kénogami mill in Québec" (Jan. 15, 2020).

[200] November 2020 Hearing Transcript Day 1, Elliott J. Feldman, p. 57:14-19.

[201] November 2020 Hearing Transcript, Day 6, Elliott J. Feldman, p. 1095:10-11.

[202] Canada's Counter-Memorial, ¶ 361 and **R-415**, Reel Time , p. 7.

[203] Canada's Rejoinder Memorial, ¶ 249.

[204] In its Notice of Arbitration, ¶ 121, Resolute claimed damages of $70 million. Despite dropping a number of claims, the Claimant's Memorial, ¶ 310(e), cited to Dr. Hausman's figure of $163.7 million, which he calculated using his forecasting method. In his Reply report, Dr. Hausman advances another forecasting approach, incorporating new 2018 price information to obtain four different numbers. The Claimant's Reply, ¶ 397(e), relies on Dr. Hausman's "preferred" amount of $104 million. Resolute requested $216 million during its opening argument

November 2020 hearing how the Claimant came to request $216 million in damages, Dr. Hausman replied that he had "no idea under creation",[205] saying that the Claimant's "lawyers […] didn't ask me to review anything. So they say what they say."[206] This surprising statement demonstrates the lack of credibility in Resolute's damages claim.

69. Part of the Claimant's confusion stems from the modification that Dr. Hausman made to apparently account for "anomalous data" from 2018. That so-called anomalous data was in fact real-world data which showed that SC paper prices *increased significantly* in 2018, despite the Claimant's assertion that prices would only decline with PHP in the market. Dr. Hausman stated "[n]o one, I think, expected prices to go up like they did in 2018. You know, prices had been going down for 20 years. They would occasionally blip up, but continue down. But they went up a lot in 2018. And so, yeah, I am, again, I am an economist. I am willing to say I am wrong."[207] With the Claimant's forecasting model showing that it was actually better off with PHP in the market,[208] Dr. Hausman had to salvage the model by smoothing Resolute's 2018 actual results with less robust results from earlier years. This is an inappropriate manipulation which demonstrates the inherent flaws of a damages model built exclusively on a speculative and incorrect RISI forecast.[209]

70. During cross-examination at the November 2020 hearing, Dr. Hausman appeared to abandon the forecasting model, stating "[m]y preferred approach is actually the economic approach, but the claimant does put out the forecasting approach."[210] However, Dr. Hausman's economic approach is not a model at all. It is set out in a single paragraph of his first report, estimating price elasticity of -2.0 and -2.1, which Dr. Hausman suggests is sound because the

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at the hearing (November 2020 Hearing Transcript, Day 1, Elliott J. Feldman, p. 165:1) and $121.4 million during its closing argument (November 2020 Hearing Transcript, Day 6, Elliott J. Feldman, p. 1103:9).

[205] November 2020 Hearing Transcript Day 3, Dr. Hausman Testimony, p. 734:19-23.

[206] November 2020 Hearing Transcript Day 3, p. 732:11-25.

[207] November 2020 Hearing Transcript Day 3, p. 735:9-16.

[208] Canada's Rejoinder Memorial, ¶ 256; Steger-2, ¶¶ 4(b), 18(a)(i).

[209] As noted in Canada's Rejoinder Memorial, ¶ 206, "RISI's forecast was not based on accurate predictions of economic growth or exchange rates, but even more significantly [redacted]"

[210] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 693:16-18.

U.S. ITC estimated price elasticity "within range of -2 to -4".[211] However, in his second report, Dr. Hausman replaced the price elasticity from his first report with a new elasticity of -1.5 without any explanation or analysis.[212] When questioned about this, Dr. Hausman acknowledged that even slight variations in price elasticity produced swings of tens of millions of dollars: "No one says anybody knows that number for sure. You know, if you go back and look at the ITC, they thought -- they got very different numbers, and Mr. Kaplan got a different number, and the staff got a different number."[214] In other words, price elasticities are inherently uncertain and vary depending on who is calculating them with even slight variations producing vastly different amounts of damages. As noted by Canada's expert Timo Suhonen, "one can enter whatever number there to get a satisfactory damage estimate and make afterwards some sort of, some sort of a justification for the used demand elasticity. So it is very sensitive to that kind of an assumption. And I would say that this kind of model […] in the consulting business, we call it garbage in, garbage out models."[213]

71. The Claimant appears to have abandoned the relief requested in the Memorial, Reply Memorial and during its opening argument at the November 2020 hearing based on Dr. Hausman's forecasting approach.[214] Instead, the Claimant has argued during closing arguments at the hearing that the Tribunal should award damages based on Dr. Hausman's economic approach.[215] However, as Dr. Hausman himself explained, the economic approach was never intended to be the principal theory upon which to award damages: he was clear that the economic approach was merely meant as be a consistency "check" on the numbers arrived at through the forecasting approach.[216] In other words, not only is the economic approach internally inconsistent, lacking the data to be empirically tested, and highly sensitive to minor changes, it also did not produce the number that the Claimant seeks as damages in either of its requests for

[211] Expert Witness Report of Jerry Hausman, Ph.D. (December 28, 2018) ("Hausman-2"), ¶ 25.

[212] Reply Expert Witness Statement of Jerry Hausman, Ph.D, 6 December 2019 ("Hausman-3"), ¶ 31.

[213] November 2020 Hearing Transcript, Day 4, Suhonen Testimony, pp. 952:21-953:10.

[214] Claimant's Memorial, ¶ 310(e); Claimant's Reply Memorial, ¶ 397(e); November 2020 Hearing Transcript, Day 1, Elliott J. Feldman, p. 164:22-165:3; Hausman-2, ¶ 48; and Hausman-3, ¶ 30(d).

[215] November 2020 Hearing Transcript, Day 6, Elliott J. Feldman, p. 1103:9.

[216] November 2020 Hearing Transcript, Day 3, Dr. Hausman Testimony, p. 613:13-15. See also Hausman-2, ¶ 25.

relief. As such, the Claimant has no legal basis to request an award based on a number derived from it and the Tribunal would be acting *ex aequo et bono* if it rendered such an award.

72. The Claimant's request for damages fails to satisfy the requirements of NAFTA to show that the breach factually and legally caused the damages that it seeks,[217] and that they have been calculated with reasonable certainty.

IX. CONCLUSION AND ORDER REQUESTED

73. Canada respectfully requests that this Tribunal reject all claims by the Claimant and order it to bear the costs of the arbitration and indemnify Canada its incurred legal fees and costs.[218]

October 14, 2021

Respectfully submitted on behalf of the Government of Canada,

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[217] **RL-032**, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, Article 36, ¶ 27. **RL-030,** *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 640-642.

[218] *Resolute Forest Products Inc. v. Government of Canada (UNCITRAL),* Canada's Submission on Costs, 2 February 2021.