PCA Case No. 2016-13

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.

and

GOVERNMENT OF CANADA

SEPARATE STATEMENT OF DEAN RONALD A. CASS

July 25, 2022

Registry:
Permanent Court of Arbitration
Ms. Ashwita Ambast, Tribunal Secretary

I. INTRODUCTION

1. I join the Award of the Tribunal ("**Award**") in all respects except as indicated in this statement. I do not recount matters of fact or arguments of the Parties addressed in the Award except as essential to points of disagreement with the Award.

2. I generally concur with the Tribunal's conclusions on attribution and State responsibility, with one exception discussed below.

3. I also concur in the Tribunal's conclusion that Canada has not violated its obligation under NAFTA Article 1105 to provide a minimum standard of treatment to investors of other NAFTA Parties and investments of other NAFTA Parties in Canada.

4. I dissent, however, from parts of the Tribunal's conclusions respecting Articles 1108(7) and 1102 and from parts of the Tribunal's discussion of the standards used to address potential violations of these Articles and evaluation of some of the evidence presented in respect of these Articles during the course of this arbitration.

5. Although I would have reached different results on aspects of the merits indicated above—and therefore different outcomes on the award of damages and allocation of costs between the Parties—I concur in the allocation of costs based on the conclusions reached by the Tribunal.

II. ATTRIBUTION

6. I concur with the basic standard set out by the Tribunal for determining whether specific acts are attributable to a NAFTA Party. This includes the Tribunal Award's determination that each act must be considered separately in assessing whether it can be attributed to the State party, regardless of how the acts will be treated in evaluating whether they constitute a breach of NAFTA obligations.[1]

7. The standards followed by the Tribunal's Award also, rightly in my view, reject the arguments that only consistent acts that form part of a unified whole or that are taken by one level or division of the government should be considered as attributable to the State in assessing challenges under NAFTA.[2]

8. I do not, however, agree with the manner in which the Tribunal's Award applies this standard

[1] See Award, at paras 293 *et seq*.
[2] See Award, at paras 298 *et seq*.

to the NSUARB's approval of the electricity rate requested by and on behalf of PWCC. The Tribunal's Award states:

> If the electricity contract or price itself were attributable to the State, it would mean many run-of-the-mill private conduct (e.g. the purchase of real property) would be rendered State acts simply because it is rubberstamped by the State (e.g. the registration in the land register). The same principle would apply to government approvals done for instance under competition laws, utility laws, or bankruptcy laws (which are closer in nature to the NSUARB's determination).[3]

9. I agree with the Tribunal majority that the fact of State approval of a private arrangement is not always enough to make the conduct approved attributable to the State for purposes of applying NAFTA's strictures. For example, where the authority granted to State officers or agencies is limited to assuring that certain technical requirements have been met, as is generally the case for recording land purchases, the prospect of finding a violation of NAFTA from the State's action is negligible.[4] The State is responsible for carrying out the recording function in that case in an even-handed manner, but it is not responsible for the substantive nature of the transaction recorded. A complaint about the substance of the transaction rather than about discriminatory conduct in recording land purchases, thus, would not be cognizable as a challenge to State action.

10. The issue before this Tribunal, however, does not turn on a mere ministerial act similar to recording a land deed. Unlike that setting, NSUARB is empowered to exercise judgment on the propriety of rates and to reject rate packages it concludes are not in the best interest of ratepayers.[5] There is no mechanical formula for this decision. That is why the Award recognizes that other approvals requiring judgment exercised under authority granting officials a substantial degree of discretion are closer to the NSUARB's determination at issue here than to a ministerial act such as recording land purchases. Indeed, in the instant case the Parties have referenced earlier instances of the NSUARB's rejection of requested rates and the NSUARB's refusal to accept a rate proposal agreed to by PWCC and NSPI in the absence of substantive changes that the NSUARB deemed desirable.[6] Thus, any implication that acts

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3 Award, at para 303.

4 Cases where the State nonetheless could be subject to NAFTA strictures would include, for example, circumstances in which officers of such a tribunal have not applied technical requirements equally to domestic investors and to investors of another NAFTA Party. The word "negligible" in the text above both allows for such circumstances and acknowledges that these are highly unlikely.

5 *Public Utilities Act*, RSNS 1989, c.380 (**C-101**; **R-164**); Respondent's Counter-Memorial, at para 188; Hearing on the Merits and Damages, November 9, 2020, at 202:23–203:4.

6 See, e.g, Claimant's Memorial, at paras 83–85, 125–26. This event is cited by the Tribunal majority in discussing the attribution of responsibility to NSUARB. Award, at para 297.

of the NSUARB can be treated as a "rubberstamp" of private agreements—or as any other characterization of an act whose consequences are not attributable to the approving officials because of the severely limited ambit of official authority—would be unsupportable. Neither I nor the Tribunal's Award take the position that this arbitration involves an act of severely limited, rubberstamp-like authority.

11. In the absence of a conclusion that the NSUARB decision is merely a mechanical "rubberstamp," however, the NSUARB's decision respecting PWCC's application for approving a new LRR for Port Hawkesbury constitutes a State act that must be assessed with respect to its implications for potential violations of legal undertakings by the State. A limitation of State acts to a mere rubberstamp-like process, consisting only of a nearly automatic acceptance of filings regardless of the agency's substantive concurrence, might suffice to circumscribe the conduct's attribution to the State. The Award rejects that description of the NSUARB's act; but its further conclusions are at odds with that determination. In my view, treating NSUARB approval as more in the nature of a ministerial act would provide the only reasonable basis for providing attribution to the State of an approval shorn of any State responsibility for the approval's effects. Once an act such as the approval at issue here is attributed to the State, the Tribunal must consider the approval's contribution to any conduct that may have violated NAFTA, including Article 1102's national treatment requirements.[7]

12. For that reason, I do not subscribe to the distinction drawn in the Tribunal's Award between attribution of the conduct of NSUARB (including its *approval* of the LRR) to the State, on the one hand, and the absence of potential liability connected to the *rate arrangement* (referred to in the Award as the "the rate itself, or the price paid for electricity by PHP") that the NSUARB approved, on the other hand. In my view, the approval of a rate arrangement by NSUARB necessarily carries with it State responsibility for its reasonably foreseeable consequences, including here those associated with facilitating the restart of operations at the PHP mill.[8] Any contrary implication in the Tribunal's Award is, in my judgment, improper.[9]

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[7] That requirement also includes analysis of violation of the minimum standard of treatment guaranteed under Article 1105.

[8] See discussion *infra*, at Paragraphs 67–198 (discussing appropriate analysis of asserted violations, including the standard for finding a violation and the conduct to be addressed in evaluating whether there has been a violation of State obligations).

[9] As noted above, see Footnote 7, *supra*, my disagreement with the Award's treatment of the effects of NSUARB's decision extends to its implications for the analysis of violation of both NAFTA Article 1102(3) and Article 1105. See Award, at para 743 (excepting effects of NSUARB approval of the LRR from analysis of potential violation of Article 1105). I do not, however, believe that the Award's limitation

13. I do not address here whether the LRR approved by the NSUARB (and the NSUARB's approval of it) constitutes a violation of NAFTA obligations on its own. That is a question that should not be addressed separately from, and antecedent to, analysis of the substantive requirements for decision on specific NAFTA Articles. As discussed below, I also do not believe that such a separate inquiry into the LRR and its approval presents the legally correct question to ask in a case where multiple, related acts are challenged.[10]

14. In addition, in my view, the Tribunal Award's emphasis on the limited nature of the assignment given by Canada to the NSUARB wrongly grants domestic law final scope over the degree to which conduct of a State actor, such as NSUARB, can trigger obligations under international law, including NAFTA. Each State, of course, is free to tailor the authority granted to any State agency. International agreements cannot preclude this exercise of state sovereignty. And any State is free to enter into or withhold its consent to any international agreement. Yet, once a State has granted authority to an agency to employ its discretion in making decisions, the State must be responsible for the agency's acts performing that function, including acts that engender liability under international accords entered into by the State.[11]

15. For these reasons, saying that a State agency such as the NSUARB has merely concluded that the rate offered served the interest of provincial ratepayers—as the Respondent asserts[12] and the Tribunal's Award accepts[13]—is insufficient to shield its exercise of discretionary authority from review under NAFTA's provisions.

16. Saying this much, however, does not require a conclusion that the approval by the NSUARB constituted or contributed to a violation of the Respondent's NAFTA obligations. The question whether NSUARB conduct violated NAFTA calls for our judgment on the merits of the claims before this tribunal. As with other elements of the complaint respecting violation of substantive protections of NAFTA Chapter 11, disposition of this question properly turns on the specific meaning of those provisions, not on a decision respecting the assignment of

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on consideration of the effects of NSUARB approval affects the Award's conclusions respecting Article 1105 and, thus, do not disagree with the Award's ultimate treatment of the Article 1105 claim.

10 See discussion *infra*, at Paragraphs 68–83 (discussing the analysis of asserted violations based on related acts attributable to the State).

11 See, e.g, Ronald A. Cass, "Trade and Sovereignty: What You Can See by Looking", (2022) 45 Harvard Journal of Law and Public Policy 17 (discussing relationship between state sovereignty and international trade regimes).

12 Respondent's Rejoinder Memorial, at para 40; Hearing on the Merits and Damages, November 9, 2020, at 201:19–203:4.

13 See Award, at paras 303–304.

attribution to the Respondent. The Tribunal's Award accepts this understanding,[14] and I concur in that judgment.

III. LIABILITY UNDER ARTICLE 1102

17. The cornerstone of many international trade agreements is the promise to accord "national treatment"—that is, treatment of other contracting parties' investors and investments that is "no less favorable" than treatment accorded to similarly situated investors and investments of the State whose conduct is at issue.[15] This is the commitment that is incorporated in NAFTA Article 1102.

18. The Tribunal's Award, first, takes a very narrow view of what constitutes "treatment;" second, analyzes individually a small portion of the accused measures with respect to conduct attributed to the Respondent so far as possible violation of the national treatment undertaking is concerned;[16] and, third, concludes that there is no violation of Article 1102 because (a) the Claimant is not in like circumstances with the relevant domestic investor (PWCC); (b) the Claimant has been treated equally to the relevant domestic investor; or (c) the Respondent had valid purposes for any differences in treatment between the Claimant and the domestic investor.[17] As explained below, I disagree with aspects of each of these elements of the majority's opinion.

A. TREATMENT OF INVESTORS AND INVESTMENTS

19. At the outset of its Article 1102 analysis, the Tribunal's Award analyzes the question of what constitutes "treatment" in order to determine whether the Claimant has received "treatment" from the Respondent, limiting its focus to the behavior of the Government of Nova Scotia ("**GNS**").[18] The Award, disagreeing expressly with the approach to identifying treatment taken by the Claimant, appears to determine that the Claimant did not receive treatment from GNS, making this conclusion explicit (or, at least, reasonably so) with respect to pensions and

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14 See Award, at para 304.

15 Claimant's Memorial, at para 191; *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 109 (**CL-107**).

16 The Tribunal's Award does, in passing at the conclusion of its discussion of liability under Article 1102, briefly provide the Tribunal majority's analysis of how that would be addressed if the Tribunal accepted the Claimant's request to treat the accused measures as an "ensemble" rather than analyzing them on a disaggregated basis. See Award, at paras 601–602. This analysis is discussed *infra*, at Paragraphs 67–84 (and, particularly, at Paragraphs 79–80).

17 See Award, at paras 540–603.

18 See Award, at paras 551–557.

tax measures[19] and leaving the conclusion implicit with respect to aspects of the complaint respecting other matters, including FULA payments and aspects of electricity regulation.[20] As explained below, the Tribunal's Award does not address the question with respect to most other actions of the Respondent included in the complaint.

20. In evaluating the question of treatment, after its initial discussion of the topic and statement of its disagreement with the Claimant's approach, the Tribunal's Award combines that question with the question whether the Claimant was in "like circumstances" to the investor and investment asserted to have received more favorable treatment.[21] The Award also in spots conflates the treatment question with the question of the appropriateness of the Respondent's actions.[22]

21. Combination of the different questions is understandable, given the relationship among the issues and the frequency with which other tribunals have found it difficult to separate the considerations apposite to the various inquiries.[23] I find it more helpful, however, to separate these issues. Despite their relationship, the issues are analytically distinguishable, and the discussion below proceeds by addressing the relevant issues separately.

1. Standard for Assessing "Treatment"

22. As to "treatment", the appropriate standard is not an unwavering requirement of direct regulatory imposition on a claimant. Instead, as the Claimant urges[24] and as found in other decisions, such as *Corn Products International*,[25] treatment also occurs when a natural and foreseeable consequence of a State action includes an effect on an investor or investment of another NAFTA Party located within the respondent State.

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19 See Award, at paras 595, 598–599.

20 See Award, at paras 584–585, 590–591. The more general statement of the Tribunal Award's position on "treatment" appears at para 555.

21 See Award, at para 558.

22 See Award, at paras 555–567, 575–576. The same combination of these analytical strands also is seen in para 555, fn. 1195's distinction of other cases on the basis that those cases "recognized that nationality-based discrimination was present"—implying that the ultimate conclusion on this matter should be read backward into a decision on "treatment". Because I believe that a decision on treatment is both logically and legally prior to a decision on the merits, I do not share this approach to decision on treatment nor the Tribunal majority's reading of the relationship between this case and the cases cited in fn. 1195 of the Tribunal's Award.

23 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, November 13, 2000, at para 246 (**RL-059**); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at paras 78–79 (**CL-114**).

24 Claimant's Reply Memorial, at paras 244 *et seq*.

25 *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (**CL-107**).

23. The Tribunal's Award rightly says that the consequential effect cannot be merely incidental and unforeseen by the Respondent to a NAFTA Article 11 proceeding.[26] That certainly is an appropriate line to be drawn, and it is consistent with the positions taken in this proceeding by both the Claimant and the Respondent.[27]

24. The Tribunal's Award, however, suggests that the Claimant in the instant case stands in a different position from the claimants in *Corn Products* and related cases involving efforts by Mexico to improve the financial condition of the Mexican sweeteners industry, especially with respect to sugar producers.[28] In particular, the Award states that *Corn Products* and other "Mexican sweeteners" cases recognized that the impugned tax measure was designed to put pressure on U.S.-based producers of high fructose corn syrup ("**HFCS**") which competed with Mexican sugar and that the international panels addressing complaints from U.S. HFCS producers succeeded in establishing violations of NAFTA's national treatment guarantee.[29] The Award notes as well that *Corn Products* observed that the Mexican tax measure at issue was defended by Mexico, among other things, as a countermeasure against U.S. violations of WTO and NAFTA obligations.[30]

25. These distinctions noted in the Tribunal's Award certainly are based on correct statements of fact about Mexican sweeteners cases such as *Corn Products*. Yet, the statements miss the critical similarity of those cases to the case before us for purposes of identifying whether "treatment" exists within the meaning of Article 1102. As the *Corn Products* decision makes clear, it sufficed for purposes of treatment that the understood and intended effect of the measure at issue there was through consequences for the U.S. HFCS producers, even though these producers were not the entities directly acted upon by the impugned measure.[31]

26. The *Corn Products* decision first observes that "the tax was […] intended […] to assist the Mexican sugar industry at a time of crisis and to respond to what Mexico considered was a U.S. violation of other NAFTA provisions".[32] The decision, after making clear that its reasoning applied to *either* of the purposes of the tax at issue—assisting Mexican sugar

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[26] See Award, at paras 549, 554.
[27] Hearing on the Merits and Damages, November 9, 2020, at 134:23–25; Hearing on the Merits and Damages, October 19, 2021, at 385:24–386:7; Respondent's Pre-Hearing Memorial, at para 47.
[28] See Award, at para 555, fn. 1195.
[29] See Award, at para 555, fn. 1195.
[30] See Award, at para 555, fn. 1195.
[31] See *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (**CL-107**).
[32] See *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (**CL-107**).

producers or responding to an alleged U.S. violation of NAFTA—adds that "it would be a triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of the sweeteners, precluded it from amounting to treatment of the latter for the purposes of Article 1102".[33]

27. That is, despite the arguments advanced by the Respondent and accepted by the Tribunal's majority, the *Corn Products* decision stands for the proposition that, to find treatment under Article 1102, it is not necessary to conclude that the State's impugned measures acted directly on the Claimant or were undertaken because of a State purpose to harm the Claimant.[34]

28. In the instant case, there is no allegation by the Claimant that harm to the Claimant as a U.S. investor was the purpose of the Respondent's acts in support of PWCC. But, in keeping with *Corn Products*, neither the Respondent nor the Claimant asserts that such a purpose would be necessary to find a *violation* of Article 1102.[35] (As discussed below, however, the Respondent's argument, while admitting that intent is not a necessary ingredient to violation of Article 1102, reintroduces something equivalent—or nearly equivalent—to that requirement in asserting that nationality-based discriminatory reasons are needed.)[36]

29. In the absence of a construction of Article 1102 that requires intent for violation of the Article, it also should not be necessary to require intent for a conclusion that the impugned actions constituted *treatment* of the Claimant and its investment. Making the threshold requirement of treatment more onerous than the ultimate determination of violation of Article 1102 would seem to put the emphasis on the wrong part of the legal test.

30. What remains, then, is a requirement of something that is more than a minor and incidental effect on the Claimant and its investment but less than a purpose to harm the Claimant and its investment.

31. That intermediate requirement for treatment is a *knowledge* or *expectation* of significant consequences for the Claimant and its investment, or, in the absence of that, a prospect of significant consequences that are so likely, viewed at the time the impugned acts were taken, as to make it unreasonable for the State actor not to have foreseen the effects on the investor

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33 See *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (**CL-107**).

34 Moreover, given the disjunction in the decision's statement of reasons for Mexico's acts, it also is not necessary to conclude that the State is acting in response to another NAFTA Party's conduct.

35 Claimant's Reply Memorial, at paras 226–231; Respondent's Rejoinder Memorial, at para 92.

36 Respondent's Rejoinder Memorial, at para 92; Hearing on the Merits and Damages, October 19, 2021, at 494:3–496:9.

or investment at issue. (This might be termed a *reasonable foreseeability* test, which is at the least an easier term than the more grammatically accurate "unreasonable lack of foresight" to describe the concept).

32. Despite the Claimant's references to actual knowledge, this reasonable foreseeability test is the test for "treatment" that is most consistent with what is advocated by the Claimant.[37] Moreover—and, obviously, more important to our decision in this matter—I believe that it is the correct test, as it is the test most consistent with the text and purpose of NAFTA Article 1102 and authorities implementing that Article.[38]

2. Applying the Test for "Treatment"

33. During the course of the arbitration, there has been considerable discussion of [redacted]

34. As set out above, however, just as I do not find in Article 1102 a requirement for intent, I also do not find in that Article a requirement of actual knowledge of effects. There is, in other words, no need for claimants to provide evidence in the form of a "smoking gun" or similar level of proof respecting knowledge of a measure's effect. As set out above, this would overstate the requirements for claims under Article 1102.

35. For that reason, while adverting to the "smoking gun" arguments, I will focus my discussion here on whether the evidence is consistent with a showing that significant consequences for the Claimant were so likely, viewed at the time the impugned acts were taken, as to make it unreasonable for State officials—especially responsible officials of GNS—not to have foreseen significant adverse effects on the Claimant and its investments.

36. In this proceeding, ample evidence has been introduced that there was both (a) a sufficient likelihood that the impugned measures would have significant effects on the Claimant and its

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[37] See Claimant's Memorial, at para 207; Hearing on the Merits and Damages, November 9, 2020, at 137:4–10; Hearing on the Merits and Damages, October 18, 2021, at 64:1–3, 79:23–80:6. See also discussion *infra*, at Paragraph 45 *et seq* (respecting evidence introduced by the Claimant respecting reasonable foreseeability of adverse effects).

[38] See *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 109 (**CL-107**) (discussing the importance of NAFTA's protection of national treatment and its role in trade agreements more generally).

[39] See, e.g, Hearing on the Merits and Damages, October 18, 2021, at 66:1–67:22. See also Claimant's Reply Memorial, at paras 3–7, 23, 103–104.

investments that it would not be reasonable for officials to have been unaware of their prospect and (b) an understanding by GNS officials that this would be the likely consequence of these measures. I discuss the relevant considerations in that order.

(a) Reasonable Expectation of Adverse Consequences

37. The starting point for evaluating likely consequences is the nature of the industry and the place of the Claimant's investments in it.

38. In the time frame relevant to this case, the SC paper industry in North America—and more particularly in Canada—had only a handful of producers.[40] Moreover, at the time preceding and leading up to the relevant decisions, the Claimant was one of the two top producers of SC paper in North America and, after the idling of the Port Hawkesbury ("**PHP**") mill, [redacted] as well as the only American firm producing in Canada.[41]

39. In addition, the industry is (and was at the relevant time) in secular (long-term) decline, as demand for paper has been (and continues to be) reduced by pronounced shifts of business to electronic publication and advertising.[42] The decline in the SC industry's fortunes has resulted in the serial bankruptcy or similar demands for protection against creditors for most of the firms in the industry (including both the Claimant and NewPage, which had owned and operated the PHP mill before deciding to cease operations at this facility due to mounting losses at that mill).[43]

40. Further, the industry is unusual in that it relies on equipment that, given the nature of paper production and the machinery used, must run continuously (or nearly so) to be efficient.[44] The machines used for SC production are capable of very large production runs, so that a

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40 Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 34 *et seq*. See also *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 15–19 (**C-237**).

41 See Claimant's Memorial, at paras 17, 127, 131–132, citing information from [redacted] (**C-215**). See also *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 15, 16, 19 (**C-237**).

42 Reply Expert Witness Report of Seth Kaplan, Ph.D., December 6, 2019, at paras 34–35, citing USITC Pub. 4583, Staff Report, at IV-5 (**C-237**).

43 See, e.g., Resolute Forest Products, "Resolute to Indefinitely Idle Mersey Mill in Nova Scotia", June 15, 2012 (**R-153**); Resolute Forest Products, News Release, "Resolute Announces Permanent Closure of Laurentide Mill in Shawinigan, Québec, September 2, 2014 (**R-016**).

44 See, e.g, Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 17, 34, 38–39, fn. 66.

production line will have only one SC machine and a mill typically will have only one or two machines.[45] Although machinery episodically is off-line for repairs, SC mills generally run machinery at levels exceeding 90 percent of capacity.[46]

41. As a result, SC mills do not calibrate production as evenly or as finely as most businesses—they do not decide in the face of fluctuating demand or prices or input costs to produce only at 40 or 50 or 60 percent of capacity. The critical decision for SC mills is whether to operate a mill or a machine, rather than the proportion of capacity at which to produce. This also means that SC businesses are more affected than ordinary businesses by the decisions of competing businesses to enter or exit the relevant market.[47]

42. Finally, the market for SC paper appears to be moderately price sensitive.[48] The Respondent's experts argue for a lower degree of price sensitivity and a higher degree of consumer response to qualitative differences in SC products than the Claimant's experts found.[49] The analysis by the Claimant's experts on this matter, however, better accounts for the cross-price elasticity and correlation of price movements among different grades of paper, as well as industry norms respecting classification of different paper categories, in describing the relationship of different grades of SC paper and the sensitivity of consumers to price.[50]

43. As a result, the availability of additional sources of SC paper in the North American market, especially at prices reduced by government-provided advantages on inputs to SC paper production (and particularly advantages that would lower marginal costs of production), naturally would depress prices for SC paper sales by other producers.[51] Even though prices could fluctuate, due to a variety of factors that affect demand and cost, additional production for the relevant SC market can systematically be expected to reduce prices for SC paper compared to the prices that would prevail without the additional production under any given

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45 Claimant's Memorial, at para 2; Expert Report of Pöyry, April 16, 2019, at paras 58–59.

46 See, e.g, Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 39, fn. 66.

47 Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 39; Reply Expert Witness Report of Seth Kaplan, Ph.D., December 6, 2019, at para 18.

48 Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 37; Expert Witness Report of Jerry Hausman, December 28, 2018, at para 9.

49 Compare Expert Report of Pöyry, April 16, 2019, at para 32 with Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 37 and Expert Witness Report of Jerry Hausman Ph.D., December 28, 2018, at para 24.

50 See, e.g, Reply Expert Witness Report of Seth Kaplan, Ph.D., December 6, 2019, at paras 36–48. These findings by Dr. Kaplan also accord with the descriptions of the North American SC industry by the U.S. International Trade Commission. See *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 15–16 (**C-237**).

51 Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 41 *et seq*.

circumstances.[52]

44. In addition to explaining price effects of additional production, these economic factors together explain why SC paper producers were all facing economic difficulties, why government support played a critical role in producers' decisions to keep a mill in production or to shut a mill down, and why decisions on entry or exit from the industry have—and routinely could be predicted to have—unusually pronounced impact on other competitors.

45. Prior to its shutdown by NewPage, the PHP mill was one of the largest producers of SC paper in the North American market.[53] It had what is considered to be the most efficient SC machine in North America.[54]

46. Nonetheless, the high costs of critical inputs for SC production where the PHP mill is located resulted in mounting losses for the business, causing its owners to shut down production and seek creditor protection under Canada's Companies' Creditors Arrangement Act (equivalent to a bankruptcy proceeding in the United States).[55]

47. Although GNS officials were hopeful that there would be interest from other firms in purchasing the mill's assets and restarting SC production at the PHP mill, there was little interest—in fact, virtually no interest—in this prospect as a matter of private investment.[56] The record in this case leaves no doubt that there would not have been any resurrection of production at the PHP mill if it had depended solely on private investment.

48. Although the Respondent makes much of PWCC's ideas for improving performance at the PHP mill, neither PWCC nor any other private entity was interested in taking over the PHP mill without substantial government support.[57] The record demonstrates conclusively that PWCC had no expectation that its ideas for improving operation of the PHP mill would suffice to put that mill on an economically sustainable footing.

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52 Reply Expert Witness Report of Jerry Hausman, Ph.D., December 6, 2019, at para 5; Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at para 8.

53 Expert Report of Pöyry, April 16, 2019, at para 53. Prior to NewPage's decision to shut down the PHP mill, that mill had the largest production capacity in North America (considering its two lines together) and one of the largest if considering only the line associated with its higher quality machine. Expert Report of Pöyry, April 16, 2019, at para 56.

54 Expert Report of Pöyry, April 16, 2019, at paras 10, 56.

55 *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Notice of Application in Chambers, Supreme Court of Nova Scotia, September 6, 2011 (**R-026**); NewPage Port Hawkesbury Corp. Application for an Initial Order pursuant to the Companies' Creditors Arrangement Act, Supreme Court of Nova Scotia, September 6, 2011 (**C-113**).

56 Hearing on the Merits and Damages, November 9, 2020, at 181:23–182:3.

57 Claimant's Reply Memorial, at paras 8–10.

49. The expected impact of acts designed to underwrite and encourage reopening of the PHP mill must be appreciated against this background.

50. Given the nature of demand for SC paper and the very small number of producers in the relevant market, actions by GNS that were intended to—and in fact did—facilitate the restart of the PHP mill predictably would have a significant negative effect on other competing firms, especially on the Claimant, as the largest competitor in this market. The restart of the PHP mill, even reduced to operating a single SC paper machine, would add between [redacted] more production to the North American market above the pre-restart level.[58]

51. This magnitude of additional product in the North American market naturally would exert downward pressure on prices for SC paper in this market. The impact of this price pressure would be felt by competing producers, including notably the Claimant, no matter what other changes took place simultaneously in the SC paper market.[59]

52. The expert report from Dr. Seth Kaplan, explaining this, provides a clear, cogent, and correct analysis of the natural, predictable impact of a restart of PHP on the Claimant.[60] It draws on and is consistent with the most basic, widely accepted predicates of economic analysis.[61]

53. This understanding of the natural, predictable effect of restarting the PHP mill is sufficient under the conditions of this case to conclude that GNS's impugned acts *did* provide treatment to the Claimant and its investments in Canada.

54. Of course, the nature of competition in the industry and the size and composition of production at different mills, understood through basic precepts of economic analysis, could not guarantee perfect predictions of the magnitude of effects on other competitors from the contemplated restart of the PHP mill.[62] Perfect predictability, however, is not the relevant

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[58] This figure is based on the expected increase in production if the PHP mill restarted with [redacted] See [redacted] at RFP0011573 (**C-215**) (providing figures for North American producers as of that time). The figure in text, above, is for the percent *added*; the resulting percent of the *total* market (including what was added) would equal approximately 20–25 percent of the expanded market. See Expert Report of Seth Kaplan, at December 28, 2018, at para 11. For purposes of analyzing the *impact of the added product*, the relevant figure is that used in text above.

[59] Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at para 8; Hearing on the Merits and Damages, November 11, 2020, at 616:15–617:8; Hearing on the Merits and Damages, November 12, 2020, at 766:13–767:19.

[60] Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 17.

[61] Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 5 *et seq*.

[62] Respondent's Rejoinder Memorial, at para 109.

legal standard in any area of law I know, including under Article 1102.[63] The appropriate standard, as discussed above, is reasonable foreseeability, and the nature of the industry together with an understanding of basic economic functions made it reasonably foreseeable that restarting the PHP mill would result in significant harm to the Claimant and its investments in Canada.[64]

55. The Respondent criticizes this approach to analysis of "treatment".[65] The Tribunal's Award takes a similar view, criticizing the Claimant's argument as relying "on an economic approach

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[63] For example, criminal law determinations resting on recklessness and negligence turn on evaluations of predictable harm from certain conduct, (see, e.g., *State v. Thomas*, 211 A.3d 274, 293 (2019) ("the standard for criminal gross negligence requires the State to demonstrate a higher 'probability of harm'"); *People v. Hall*, 999 P.2d 207, 218 (2000) ("in order to determine whether a risk is substantial, the court must consider the likelihood that the harm will occur and the magnitude of potential harm"); *People v. Reagan*, 256 A.D.2d 487, 489–490 (1998); *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 305 (1980).) as does a variety of tort law rules. (See, e.g., *Graham v. M & J Corp.*, 424 A.2d 103, 105 (1980) ("Foreseeability is a key element in establishing a landlord's duty to use reasonable care to keep safe those common areas of building retained under his control"); *Sloan on behalf of Est. of Sloan v. Providence Health System-Oregon*, 364. Or. 635, 643 (2019) ("In ordinary negligence claims, foreseeability plays a role in determining whether a defendant's conduct is negligent"); *T. and P. Ry. Co. v. Bigham*, 38 S.W. 162 (1896) ("It is usually laid down, in cases of negligence, that, in order to constitute the proximate cause of an injury, the injury must be the natural and probable result of the of the negligent act or omission").) In the context of defamation, see *Van-Go Transport Co., Inc. v. New York City Board of Education*, 971 F.Supp. 90 (1997); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (1988); *Lewis v. Equitable Life Assurance Society of the United States* 389 N.W.2d 876 (1986).) The same is true for determinations under antitrust and competition law. (*Procaps S.A. v. Patheon Inc.*, 141 F. Supp. 3d 1246 (S.D. Fla. 2015), aff'd, 845 F.3d 1072 (11th Cir. 2016) ("plaintiff alleging violation of Sherman Act's restraint of trade provision may either prove that defendants' behavior had actual detrimental effect on competition, or that behavior had potential for genuine adverse effects on competition"); *Federal Trade Commission v. Peabody Energy Corporation et al.*, No. 4:2020cv00317 (E.D. Mo. 2020) ("The FTC has satisfied its burden of showing a "reasonable probability" that a JV between the two largest SPRB coal suppliers would harm competition in the SPRB coal market").) All of these rules of law turn on reasonable prediction based on facts, often interpolated through economic understandings, see, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), but none requires perfect predictability.

[64] Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 50–51; Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 70–73. I note that Professor Hausman's Expert Report and Reply Report attempt to estimate the magnitude of harm to the Claimant and its investments from the restart of the PHP mill induced by (or, at a minimum, made possible by) the Respondent's impugned acts. (Expert Witness Report of Jerry Hausman, Ph.D., December 28, 2018, at para 15; Reply Expert Witness Report of Jerry Hausman, Ph.D., December 6, 2019, at paras 3–5.) Professor Hausman's calculations of damages have been challenged by the Respondent. (Respondent's Counter-Memorial, at paras 325–328; Respondent's Rejoinder Memorial, at paras 202–207; Hearing on the Merits and Damages, November 14, 2020, at 1298:13 *et seq.*) The criticisms by the Respondent may have some validity respecting precise calculation of damages—a matter no longer relevant in light of the Tribunal's Award and, hence, not one on which I will offer an opinion (although I do note Professor Hausman's excellent reputation and standing in the academic community, which suggest that criticisms should not be accepted lightly). Whatever their merit, these criticisms do not affect the basic understandings articulated by Professor Hausman as well as by Dr. Kaplan of the interactions of production decisions by the few firms participating in the North American SC market and the price effects and consequent harm to other firms in the market.

[65] Respondent's Rejoinder Memorial, at para 109.

to define 'treatment' more so than a legal one".[66] Like the Respondent, the Tribunal's Award also criticizes the Claimant for focusing on the effect on the Claimant of the restart of the PHP mill, rather than focusing more narrowly on the relation between specific, individual impugned measures and discriminatory treatment of the Claimant's relevant investments.[67]

56. For reasons given above respecting the proper approach to determination whether there has been treatment within the meaning of Article 1102 as well as those discussed below respecting the conduct to be addressed,[68] I believe that these criticisms are misplaced.

(b) Actual Expectation of Adverse Consequences

57. In addition to the evidence respecting the reasonably predictable effects restarting the PHP mill would have on the Claimant and its investments in Canada, the Claimant introduced evidence arguably demonstrating the Respondent officials' understanding of these effects.[69]

58. The Claimant's evidence shows that [redacted][70] Mr. Duff Montgomerie, Deputy Minister of Natural Resources for GNS during the time decisions were being made respecting GNS support for restart of the PHP mill, [redacted][72] [redacted][73] On re-direct examination, Mr. Montgomerie [redacted][74]

66 Award, at para 551.
67 Award, at paras 551–553.
68 See discussion *infra*, at Paragraphs 68–83.
69 See text and notes, *infra*, at Paragraphs 58–61.
70 Claimant's Reply Memorial, at paras 103–104; Hearing on the Merits and Damages, November 9, 2020, at 140:3–141:1. The Claimant relies principally on [redacted] (**R-161**).
71 Hearing on the Merits and Damages, November 10, 2020, at 379:7–19.
72 Hearing on the Merits and Damages, November 10, 2020, at 379:29–380:21.
73 Hearing on the Merits and Damages, November 10, 2020, at 423:19–428:4.
74 Hearing on the Merits and Damages, November 10, 2020, at 437:4–440:15.

59. The Claimant emphasizes that [redacted][75] [redacted][76] [redacted][77] [redacted][78]

60. The Respondent, to the contrary, [redacted][79] The Respondent notes, for example, that [redacted][80] The Respondent also argues that [redacted][81]

61. After reviewing the evidence submitted by both parties on this point, I conclude that the evidence falls between the poles marked out by the Parties to this dispute. The evidence, on balance, supports the argument advanced by the Claimant. [redacted]

62. The evidence, however, does not make out a conclusive case on actual views of the relevant GNS officials respecting the *extent* of the impact of PHP's restart on the Claimant and its

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75 [redacted] (**R-161**).

76 Hearing on the Merits and Damages, November 9, 2020, at 14:9–24.

77 See, e.g, Hearing on the Merits and Damages, November 14, 2020, at 1180:9–1184:17.

78 Claimant's Reply Memorial, at para 3; Hearing on the Merits and Damages, November 9, 2020, at 52:25–54:10; 99:11–100:25.

79 Hearing on the Merits and Damages, November 9, 2020, at 219:5–222:16.

80 Respondent's Rejoinder Memorial, at para 176; Hearing on the Merits and Damages, November 9, 2020, at 223:23–224:2.

81 Respondent's Rejoinder Memorial, at paras 171–179.

investments.[82]

63. [3]

64. Having said that, however, I stress that the Claimant does not have to establish that proposition to prevail on the claim of receiving treatment from the Respondent in the acts undertaken by GNS to support restart of the PHP mill.

65. That finding on reasonable foreseeability is sufficient under the conditions of this case to conclude that GNS's impugned acts did provide treatment to the Claimant and its investments in Canada.

66. To the extent that analysis in the Tribunal's Award diverges from the analysis of treatment in this Statement, I dissent from that part of the Tribunal's Award.

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[82] See *supra,* at Paragraphs 58–61.

[83] (Claimant's Reply Memorial, at paras 3, 103–104; Hearing on the Merits and Damages, November 9, 2020, at 54:2–55:2, 99:16–100:25; Hearing on the Merits and Damages, October 19, 2021, at 9:3–12:1.) See *supra*, at Paragraphs 22–32.

B. CONDUCT TO BE ADDRESSED

67. The Claimant repeatedly has argued that the case before the Tribunal must be understood by considering the entire panoply of impugned acts.[84] These measures are described in the Tribunal's Award, along with a summary description of the Claimant's position respecting them.[85] The Tribunal's Award also notes that the Respondent, in contrast, has urged the Tribunal to consider only a small subset of these measures.[86]

1. Selecting the Appropriate Scope of Conduct: General View

68. As noted in the Tribunal's Award, several arbitral decisions invoked by the Claimant as authorities support the Claimant's argument that various aspects of determining whether violations of international obligations have occurred are better examined by reference to the entire course of conduct of the State, rather than by focusing on individual acts disaggregated from the whole.[87] For example, the Claimant quotes from the award in *GAMI Investments, Inc. v. Mexico*, that it is preferable to consider "the record as a whole—not dramatic incidents in isolation—[to] determine whether a breach of international law has occurred".[88]

69. Similarly, the Claimant refers to the views expressed by Professors Michael Reisman and Robert Sloane, speaking of violations of international law through expropriation.[89] Reisman and Sloane declare:

> Discrete acts, analyzed in isolation rather than in the context of the overall flow of events, may, whether legal or not in themselves, seem innocuous vis-à-vis a potential expropriation. Some may not be expropriatory in themselves. Only in retrospect will it become evident that those acts comprised part of an accretion of deleterious acts and omissions, which in the aggregate expropriated the foreign investor's property rights.[90]

70. Although Reisman and Sloane were discussing difficulties in identifying "creeping expropriation," the point they make, taken up by the Claimant, is that excessive focus on the

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84 Claimant's Memorial, at paras 155–161; Claimant's Reply Memorial, at paras 8–11; Hearing on the Merits and Damages, November 9, 2020, at 25:24–27:19; Hearing on the Merits and Damages, October 18, 2021, at 22:16–25.

85 See Award, at paras 114–142, 170–173. See also Claimant's Memorial, at paras 71, 91.

86 See Award, at paras 128–142. See also Respondent's Counter-Memorial, at paras 111–139.

87 See Award, at para 292.

88 Claimant's Memorial, at para 157, quoting *GAMI Investments Inc. (U.S.) v. Mexico*, UNCITRAL, Final Award, November 15, 2004, at para 103 (**CL-100**).

89 Claimant's Memorial, at para 157, fn. 240.

90 W. Michael Reisman & Robert D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation", (2004) 115 British Yearbook of International Law, at 123–24 (**CL-103**).

effects of individual State acts—disaggregated and considered as independent events—risks missing the important effect of a collection of related acts.[91] That is the point made in *GAMI Investments* and the other authorities that the Claimant cites.[92]

71. The fact that the point has been made in different settings, addressing disparate asserted violations of international accords or elements of international law, does not diminish the force of the observation that too narrow a focus can obscure truths that would be apparent from a more capacious vantage. To the contrary, the generality of the point made in these different contexts reinforces its importance. Nor is the observation respecting focusing too narrowly to appreciate what one is seeing confined to specific aspects of international law: it perhaps is most often identified with the well-known parable of the blind men and the elephant.[93]

72. In its first discussion of the point, the Tribunal's Award is not dismissive of the argument that it is appropriate to consider the entire array of impugned conduct as a potentially worthwhile (lawful) approach to assessing whether a NAFTA Article has been violated. After reviewing some of the arguments advanced by the Claimant and the counter-arguments made by the Respondent, the Tribunal's Award states: "Overall, the Tribunal considers that the Claimant's arguments to the effect of treating the impugned measures as an ensemble may well inform the question whether these measures, considered as a whole, amounted to a breach of the Respondent's obligations under NAFTA".[94]

73. This statement appears during the Award's discussion of attribution, rather than violation, and rightly leads on to a statement of the difference between evaluation of violations and decisions on attribution. I agree with the statement's importance with respect to determining whether there has been a violation of NAFTA and agree as well with the Tribunal Award's distinction of this method from the approach that is proper in addressing questions of attribution. In my view, the apparent endorsement of looking at a set of measures, taken as a whole rather than broken into individual acts, captures an appropriate manner of treating claimed *violations* of

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91 Claimant's Memorial, at paras 153–161.

92 In addition to *GAMI Investments* and the article by Professors Reisman and Sloane, the Claimant specifically points to arbitration decisions in *Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 144 (**CL-101**), and *S.D. Myers, Inc. (U.S.) v. Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 161 (**CL-102**). See Claimant's Memorial, at para 157, fn. 240.

93 The parable was famously retold in the poem of John Godfrey Saxe. Each blind man feels the elephant to see what it is like, but each feels only one part, coming away convinced, variously, that an elephant is like a wall (having felt its side), a spear (tusk), a snake (trunk), a tree (leg), a fan (ear), or a rope (tail).

94 See Award, at para 297.

international undertakings.[95] Insofar as that is what the Tribunal's Award is saying, I concur.

2. The Bigger Picture: All the Elephant's Parts

74. Despite its salutary recognition of the benefits of considering together related aspects of an asserted violation, later in the Tribunal's Award—when the Tribunal majority addresses the question of whether the Respondent has violated Article 1102—the majority follows a different approach. At that point, when discussing the decision to which aggregation rather than disaggregation has been said to be appropriate, at least putatively, the majority disaggregates the various impugned measures and analyzes each one separately.[96]

75. This decision by the Tribunal majority may have been a natural analytical derivative of the inversion of the Award's analysis of possible *violation* of Article 1102 (which the Tribunal's Award addresses second) and potential *exceptions* to liability for violation of that Article (which the Tribunal's Award addresses first). Understandably, having decided that certain acts are excepted under Article 1108(7), the Tribunal majority was reluctant to analyze those acts' effects on the Claimant and its investments and to discuss whether those acts violate the Respondent's national treatment obligation under NAFTA.

76. To be clear, the Tribunal's Award does address the broader set of impugned measures in passing at the conclusion of its discussion of the asserted violation of Article 1102, briskly noting that considering the impugned measures as an ensemble would have made no difference to the Tribunal majority's conclusions.[97] Yet, the Award's summary discussion of why, even considered as an ensemble, the Tribunal majority concludes that the acts challenged by the Claimant do not amount to a violation of Article 1102, in my view, does not reach the right conclusion respecting "like circumstances".

77. As discussed more fully below respecting the meaning of "like circumstances," this demonstrates that even starting with the same predicates respecting what the correct issues are does not guarantee agreement on a decision. That is to be expected in settings such as this—after all, arbitration decisions at bottom are matters of judgment respecting the weight

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95 See also *Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, at para 144 (**CL-101**); *GAMI Investments Inc. (U.S.) v. Mexico*, UNCITRAL, Final Award, November 15, 2004, at para 103 (**CL-100**); *S.D. Myers, Inc. (U.S.) v. Canada*, UNCITRAL, Partial Award, November 13, 2000, at para 161 (**CL-102**); W. Michael Reisman & Robert D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation", (2004) 115 British Yearbook of International Law, at 123–24 (**CL-103**).

96 See Award, at paras 543 *et seq*, 557, 577–600.

97 See Award, at paras 601–603.

of evidence and differing constructions of the law.

78. Yet, to a considerable degree, my difference with the Tribunal's Award follows from the Tribunal majority's choice of predicates. That is, the Award's analysis of whether the Respondent's acts violate undertakings embodied in Article 1102 is framed by its focus on narrow factors of regulatory design for specific features of the State conduct at issue.[98] The analysis in the Tribunal's Award largely puts aside consideration of the various impugned acts in the broader context of what those acts were *collectively* designed to accomplish and what their *collective effects* were—even though that is the heart of the Claimant's complaint.[99]

79. In my judgment, as explained below, for the reasons articulated by Professors Reisman and Sloane, by the Final Award in *GAMI Investments*, and by others, looking at the full array of related measures produces a different picture from taking the impugned measures one by one. This is especially true because, as is clear from the record in this proceeding, the ensemble of measures that is challenged here was put together precisely with one overarching goal: to assure that PWCC would agree to take on a restart of the PHP mill, that it would carry through with that undertaking, and that the restart would be successful for far longer than the term discussed between government officials and private businesses in other instances.[100]

80. Saying that the measures were put together with the goal of securing a restart (and longer-term operation) of the PHP mill does not mean that every official who played a role in the process shared that goal or was motivated in his or her actions by that goal.[101] It does, however, anchor analysis in the fact that the GNS officials who were leading the effort to restart the PHP mill consciously sought to address each aspect of mill operation that was of concern to PWCC.[102]

81. Further, when difficulties were encountered in securing any element of the package of support items, regulatory accommodations, or other government actions sought by PWCC, GNS officials were instrumental in making adjustments to (or securing adjustments for) the package (the "ensemble") of provisions and undertakings that PWCC wanted in order to proceed. GNS

98 See Award, at paras 563, 575–600.

99 Indeed, the Tribunal's Award recognizes that this is "[t]he heart of the Claimant's case". See Award, at para 541.

100 Claimant's Reply Memorial, at paras 8–11, 335–340; Hearing on the Merits and Damages, November 9, 2020, at 25:24–29:2, 173:8–175:13; Hearing on the Merits and Damages, October 18, 2021, at 165:24–167:14.

101 This is evident, for example, in the action of the CRA disapproving requested tax treatment of a proposed joint venture between PWCC and NPSI. See Claimant's Memorial, at paras 77, 100.

102 Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 25–33.

officials' conduct was critical to maintaining PWCC's interest in and commitment to the project.[103] For example, the CRA denied requested treatment of the proposed joint venture between NSPI and PWCC,[104] and the NSUARB signaled concern about additional aspects of PWCC's application for approval of its LRR and other aspects of its energy plan.[105] After each potential stumbling block to completing arrangements with PWCC to restart the PHP mill, GNS renegotiated parts of its agreement with PWCC to ensure that the deal would go forward.[106]

82. The impugned measures were considered by GNS officials as parts of a collective set of measures needed to ensure that PWCC would complete the purchase of the PHP mill and would restart and operate the mill rather than dismantle it and sell what parts it could.[107] Even measures subject to approval by government officials who did not share the same level of commitment to that goal as was shown by the Premier of Nova Scotia and Minister of Natural Resources for GNS should be included in this ensemble, as each measure needed to be approved at a level within the capability and commitment of the State to ensure its goal of a PWCC restart of the PHP mill.

83. The sole exception to a consideration of all parts of the package of impugned measures, in my view, is the accusation that GNS arranged for PWCC to be relieved of responsibility for pension payments incurred by the PHP mill's former owner.[108] The evidence provided by the Claimant in support of this accusation, in my estimation, does not demonstrate that measures were undertaken by GNS or other State officials in this regard. This matter is addressed by the Tribunal's Award.[109]

84. To the extent that analysis in the Tribunal's Award diverges from the analysis of treatment in this Statement, I dissent from that part of the Tribunal's Award.

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[103] See Claimant's Memorial, at paras 62–112.
[104] See Claimant's Memorial, at paras 77, 100.
[105] See Claimant's Memorial, at paras 82–88.
[106] See Claimant's Memorial, at paras 77–113. See also Hearing on the Merits and Damages, November 10, 2020, at 480:25–481:7 (speaking of an amendment to the assistance provisions, Ms. Chow said: "You can't take [provisions or amendments] in isolation. I think you really have to view it as a package").
[107] See, e.g [redacted] (**C-139**) [redacted] (**C-182**); Witness Statement of Duff Montgomerie, April 17, 2019, at paras 6–8.
[108] Claimant's Memorial, at para 49; Hearing on the Merits and Damages, October 19, 2021, at 310:24–312:10.
[109] See Award, at paras 592–595.

C. ANALYZING CLAIMED VIOLATION OF ARTICLE 1102(3)

85. I turn next to differences with the Tribunal Award's determination respecting violation of Article 1102, both as to the analytical framework and to its application to the collection of impugned acts of the Respondent, with the exception just noted.

1. Standard for Violation of Article 1102(3)

86. As noted above and in the Tribunal's Award, violation of Article 1102 requires a showing that a claimant (or its investment) (1) has received treatment from a NAFTA Party (2) that is less favorable than that which is accorded to a domestic investor or investment (of the accused NAFTA Party) (3) in like circumstances.

87. With respect to Article 1102(3), respecting conduct by a state or province (i.e., governmental sub-jurisdictions within a State that is a NAFTA Party), the language used in the NAFTA differs slightly from that used in other sections of Article 1102. It requires that the treatment received by the foreign investor or investment be "no less favorable than *the most favorable* treatment" received by an investor or investment of the NAFTA Party of which the state or province "forms a part".[110]

88. As the Tribunal's Award recounts, this wording difference gave rise to disagreement between the Parties on two grounds: *first*, whether something more needs to be shown than merely differential treatment in like circumstances; *second*, whether an investor can ever be in like circumstances if it does not have an investment in the province whose actions are at issue.[111]

(a) Beyond Differential Treatment?

89. The Parties' arguments on the meaning of Article 1102(3) are starkly different. Relevant parts are described below before turning to the approach taken in the Tribunal's Award.

i. The Parties' Approaches to Construing Article 1102(3)

90. The Claimant urges a construction that hews to the wording of the Article, requiring only that a claimant show that there has been less favorable treatment to a foreign investor or investment

[110] See NAFTA Article 1102(3). See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 83 (**CL-113**) (expounding three-part test for violation of Article 1102(3)).
[111] See Award, at paras 544–546, 548–550.

than that received by the most favored domestic investor or investment, whether or not that investor or investment is located within the state or province and without regard for the reason behind the differential treatment.[112] Underscoring its argument, the Claimant states: "Had the NAFTA Parties wanted to limit the scope of the prohibited conduct in Article 1102(3) to nationality-based discrimination, they could have chosen to add the criterion 'by reason of nationality' in Article 1102(3) as they did in Article 1102(4)".[113]

91. The Respondent, in opposition, stakes out the position that a requirement of nationality-based discrimination is implicit in Article 1102(3).[114] The Respondent particularly relies, first, on its reading of submissions of NAFTA Parties in other Chapter 11 NAFTA arbitrations.[115] Second, it invokes the language of the *Pope & Talbot* decision, quoting its statement that "the treatment of states and provinces in Article 1102(3) is expressly an elucidation of the requirement placed on the NAFTA Parties by Article 1102(1) and (2)" and also that the meaning of 1102(3) is identical to that of the other two sections "save for the limitations to states and provinces".[116]

92. The Claimant disagrees with the Respondent's reading of the NAFTA Parties' submissions.[117] It also disagrees with the weight to be given to them.[118]

93. Both Parties agree that Article 1102(3) can be violated by a NAFTA Party, through conduct of a state or province, without any requirement that the relevant state or provincial officials intend to harm an investor or investment of another NAFTA Party.[119]

94. The Respondent, however, states that there must be *nationality-based* discrimination against a claimant—that is, the less favorable treatment of a claimant must be due to claimant's nationality, even if harm to the claimant is not the motivation for the discrimination.[120] Moreover, in the Respondent's view, public policy choices by a state or province can provide justification for any differences in treatment and, so long as there is a rational connection of

[112] See, e.g, Claimant's Reply Memorial, at paras 214–225.
[113] Claimant's Reply Memorial, at para 225.
[114] See, e.g, Respondent's Rejoinder Memorial, at paras 94–102.
[115] See Respondent's Counter-Memorial, at para 250, fns. 523–525; Respondent's Rejoinder Memorial, at para 95.
[116] See Respondent's Rejoinder Memorial, at para 95, quoting *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at paras 41–42 (**RL-058**).
[117] See Claimant's Reply Memorial, at para 240.
[118] See Claimant's Reply Memorial, at paras 241–243.
[119] See Claimant's Memorial, at para 190; Respondent's Rejoinder Memorial, at para 92; Hearing on the Merits and Damages, November 9, 2020, at 45:18–25, 111:3–114:2, 236:7–22; Hearing on the Merits and Damages, October 19, 2021, at 384:25–384:4.
[120] See, e.g., Respondent's Rejoinder Memorial, at paras 96–98.

the policy to the treatment given, these considerations overcome complaints over differences in treatment.[121]

95. The Claimant takes the opposite position with respect to what is necessary to state a claim under Article 1102(3).[122] The Tribunal's Award characterizes the Claimant as merely arguing that no nationality-based reason is required for its case in chief—what a claimant must show in order to shift the evidentiary burden to a respondent.[123] I do not believe that this sufficiently captures the strength of the position advocated by the Claimant.

96. Unlike the Tribunal's Award, I read the Claimant's submissions in this case as stating the stronger proposition that under Article 1102(3) no nationality-based reason for less favorable treatment is necessary to recover against the State. In other words, the Claimant's position is that: (i) it is not necessary for a claimant stating a claim under Article 1102(3) to show nationality-based treatment as a part of its case, and (ii) a demonstration by a respondent that there were other reasons for disparate treatment and no nationality-based treatment would not overcome a showing of less favorable treatment.[124]

97. To that end, the Claimant declares that a state or province must treat a foreign NAFTA investor as well as the most well-treated investor, regardless of the treatment given to other domestic investors or even other state or provincial investors.[125] The Claimant pointedly adds that, if a respondent fails that test, "[t]he motive for the difference in treatment does not matter, whether from nationality, provincial considerations, or something else".[126]

ii. The Tribunal Award's Construction of Article 1102(3)

98. The Tribunal's Award takes the position advocated by the Respondent, with one qualification. The Award states that a claimant, though bearing the *legal* burden of demonstrating differential treatment under like circumstances on the basis of nationality, does not have the *evidential* (I will use the term "evidentiary") burden of providing evidence that nationality constituted the reason for differential treatment.[127]

99. The Tribunal's Award elaborates on the precise meaning of this, saying that "a tribunal will

[121] See, e.g., Respondent's Counter-Memorial, at paras 267–270, 272.
[122] See, e.g., Claimant's Memorial, at para 226; Claimant's Reply Memorial, at paras 214–215, 226–237.
[123] See Award, at paras 466, 468.
[124] See, e.g., Claimant's Reply Memorial, at paras 214–237.
[125] See, e.g., Claimant's Reply Memorial, at para 222.
[126] See, e.g., Claimant's Reply Memorial, at para 222.
[127] See Award, at paras 570, 573–576.

conclude the less favorable treatment proven *prima facie* by the Claimant was not provided 'in like circumstances' where the Respondent can provide evidence that the differences in treatment have a 'reasonable nexus to rational government policies' that do not distinguish on their face or de facto between foreign and domestic investors or investments".[128] If a respondent cannot demonstrate a non-nationality-based reason for the difference in treatment, however, a tribunal should conclude that the reason for the difference was nationality-based.[129]

100. I agree with the Tribunal's Award that there is a difference between the legal burden and the evidentiary burden. I agree as well that once a claimant shows that less favorable treatment has been given to a foreign investor or investment (of another NAFTA Party) in like circumstances, the evidentiary burden shifts to the respondent. I also agree that, at that point, a respondent must make a convincing demonstration that the difference in treatment of domestic and foreign investors or investments was not based on nationality, but on a public purpose of some kind unrelated to nationality-based discrimination.

101. I part company with my colleagues, however, on the question whether *any* "rational government policy" suffices to insulate differential treatment from liability under Article 1102(3) and whether a merely "reasonable nexus" to that policy ends the inquiry respecting the legitimacy of differential treatment.

102. The formula advocated by the Respondent and accepted by the Tribunal's Award would provide scope for any NAFTA Party to undermine the important protections provided by Article 1102—and, if accepted more generally as a mode for interpretation of national treatment obligations, would deprive investors of one of the most important safeguards in trade and investment treaties. Simply put, the use of a mere "rationality plus reasonable nexus" approach makes protection turn almost entirely on preferences of the State rather than the terms it agreed to in the NAFTA accord.

103. This approach is at odds with the commitment undertaken in NAFTA. In my view, it is not an acceptable test for compliance with Article 1102(3)—neither with respect to the text of that Article nor to the purpose served by it in the context of a free trade agreement.

104. As I wrote in a previous NAFTA arbitration responding to a similar formula urged by Canada, "There must be limits to the reach of policy justifications offered to support national treatment

[128] Award, at para 575.
[129] See Award, at para 575.

discriminations—that is, of justifications offered to establish the unlikeness of circumstances under Article 1102".[130]

105. These limits should not require arbitral tribunals' intrusion into the domain of domestic policy committed to national governments' discretion and, secondarily, to subnational units of government.[131] Yet, some measure of consideration must be given to claimants' arguments that an asserted policy does not justify discrimination against a foreign investor or its investment.

106. It cannot suffice for a NAFTA Party or its subnational unit of government to assert that differential treatment—treatment that, as the Claimant urges, contravenes the text of Article 1102(3) so long as the compared domestic and foreign entities are in like circumstances—is justified simply by the government's assertion that circumstances are not "like" if the government declares them to be different on policy grounds.[132] This construction of Article 1102(3) gives almost conclusive weight to a State's assertion of the scope of its policy-based justification for preferential treatment of a domestic investor or investment over a foreign competitor. A NAFTA Party cannot plausibly be entitled, under the terms and purposes of NAFTA, to decide whether it wants to be subject to Article 1102(3)'s strictures in any given case.

107. This consideration may explain why the *Pope & Talbot* tribunal added a purpose-related requirement to its base test of rationality-plus-reasonable nexus in construing Article 1102(2)—a provision textually less restrictive than 1102(3).[133] It may explain as well the contention advanced by the Claimant that more must be considered than rationality and nexus, including specifically the purpose of NAFTA to support cross-border investment by protecting against discriminatory treatment—which is the point of the Claimant's argument that the *Pope & Talbot* formula constitutes a two-part test that sets the proper parameters for assessing alleged violations of Article 1102(3).[134]

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[130] NAFTA Article 1102(3). See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 120 (**CL-113**).

[131] NAFTA Article 1102(3). See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 120 (**CL-113**).

[132] See, e.g., Claimant's Reply Memorial, at para 222.

[133] See Claimant's Reply Memorial, at para 272, quoting *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78 (**CL-058**).

[134] See Claimant's Reply Memorial, at para 272, quoting *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 78 (**CL-058**).

108. The Tribunal's Award rejects the second part of the *Pope & Talbot* formula focusing on underlying purposes of NAFTA.[135] It observes that other tribunals that have accepted that formula, notably in the *Feldman* and *Bilcon* cases, could have disposed of the matters before them without reliance on the second part of the *Pope & Talbot* test, having separately determined that respondents in those cases failed to satisfy requirements to defend against liability under the first part of the test.[136] The Tribunal, then, reasonably concludes that the second part of the *Pope & Talbot* test should not stand on its own as an independent standard for assessing whether there has been a violation of Article 1102(3). I concur with this assessment.

109. At the same time, I do not believe that the second part of this test should be ignored. It recognizes an important element in interpreting the text of NAFTA provisions, including Article 1102(3). As with other legal documents, the text of NAFTA provisions should be interpreted in light of the context in which the provisions appear and the goals to be served by the language used in the various NAFTA Articles.[137]

110. In my judgment, having sensibly put the second part of the *Pope & Talbot* test aside as a *separate and independent* test, the Tribunal's Award then errs in failing to interpret the provisions at issue with due regard for the investment-protecting purposes of NAFTA.

iii. Relating the Award to the Claimant's Arguments

111. In this section, I address issues raised by two other arguments by the Claimant respecting the standard for application of Article 1102(3), issues on which the Claimant's position and the approach followed in the Tribunal's Award diverge. I do not similarly address differences between the Tribunal's Award and arguments of the Respondent because, in respect of the standards for application of Article 1102(3), the Tribunal's Award very largely accords with positions advocated by the Respondent.

112. In this case, the Claimant argues alternatively: first, that government policy reasons cannot justify differential treatment of foreign investors and investments under Article 1102(3) (no

[135] See Award, at para 546–547.

[136] See Award, at para 547, fn. 1179, citing *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at paras 182–184 (**RL-021**); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, at para 724 (**RL-025**).

[137] See VCLT Article 31(1). See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West Pub. Co., 2012) at 56–58, 63–66.

matter how rational the policy and how reasonable the nexus); and, second, that, even if reasonable government policies do insulate NAFTA Parties against judgments based on differential treatment—by supporting findings that foreign and domestic investors or investments are not in like circumstances—the policies at issue here "are unreasonable and undermine NAFTA's core value of fair competition".[138]

113. The Claimant has presented strong arguments based on the text of Article 1102(3). It explains that by requiring in this part of Article 1102 that foreign investors or investments receive treatment comparable to the most favorable treatment accorded to a domestic investor or investment, Article 1102(3) assumes that it applies (or may apply) in settings where not all domestic investors or investments are treated the same.[139] The Claimant elaborates that this assumption necessarily means that the provision assumes a case where nationality-based discrimination does not explain all differences in treatment of investors or investments—otherwise, there would not be differences in treatment given to domestic investors or investments.[140]

114. Although there is considerable force to this argument, it raises the question why NAFTA includes Article 1102(3) within the broader Article 1102 framework, dealing with "National Treatment". Perhaps the answer is that differential treatment, even if not based on *reasons* tied to nationality, nonetheless can constitute *a departure from the obligation of national treatment*. This seems the best reading of Article 1102(3), giving it the meaning that is most consistent with the text while keeping the meaning within the ambit of concerns about differential treatment to investors or investments of other NAFTA Parties.

115. The Claimant's textual argument also raises the question why the requirements of Article 1102(3) are prefaced with the statement, "The treatment accorded by a Party under paragraphs 1 and 2 [of Article 1102] means […]". Perhaps the answer to this question is that drafters, contemplating situations in which a state or province discriminates in favor of a state or provincial investor or investment, wanted to make clear that the national treatment requirement did not permit less favorable treatment of a foreign investor or investment simply because a state or province permissibly discriminates among domestic investors and investments.

116. In either case, giving the Claimant's textual argument its due requires concluding that a

[138] See, e.g., Claimant's Reply Memorial, at para 213.
[139] See, e.g., Claimant's Reply Memorial, at paras 218–219.
[140] See, e.g., Claimant's Reply Memorial, at para 218.

violation of Article 1102(3) is possible without a strong form of nationality-based discrimination. Consider, for example, an industry composed of five firms (within the relevant market), two of which are considerably larger than the others. In this example, one of these large firms is domestic, the other foreign. All other firms are domestic. A state or province could not seek to benefit the large domestic firm at the expense of all other firms, even if that would injure domestic firms as well as the foreign firm.[141] If that were permitted, a state or province could effectively promote what it considered to be the most important domestic firm at the expense of a foreign firm that was its principal competitor—what would seem to be an obvious violation of national treatment. This approach logically would include a setting in which the favored domestic firm is the sole firm located in the state or province whose actions are challenged under Article 1102(3).

117. Thus, although explicit or clearly intended nationality-based discrimination strengthens the case for a violation of Article 1102(3), a purpose to distinguish among investors or investments on the basis of nationality is not required to make out a violation of this provision. Moreover, the logic of this understanding of Article 1102(3) also means that the location of an investor or investment within or outside the state or province that takes the impugned actions cannot conclusively establish the legitimacy of those actions against a charge of violating Article 1102(3).

(b) Location and the Standard for Like Circumstances

118. Given the reasoning above respecting the construction of Article 1102(3) and the significance of the location of investors and investments within or outside of the state or province taking the impugned actions, it also follows that location alone cannot be dispositive for the inquiry into "like circumstances". The Respondent has asserted throughout this arbitration that location should be dispositive with respect to that inquiry.[142]

119. In part, this argument has turned on the stated inability of a state or provincial government (in this case, GNS) to provide the same treatment to investments located outside of that jurisdiction as to investments within that jurisdiction. For example, as the Respondent observes, a jurisdiction can grant exemptions from certain regulations such as land use restrictions or relief from provincial taxes on items or activities taking place within the

[141] NAFTA Article 1102(3). See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 60 (**CL-113**).

[142] See, e.g., Respondent's Pre-Hearing Memorial, at paras 2, 20.

jurisdiction but cannot grant the same benefits to activities located outside of its domain.[143]

120. The Tribunal's Award follows this same line of analysis, asserting that the Claimant is not subject to regulatory regimes under the control of GNS because its mills producing SC paper are not located in Nova Scotia.[144] Having decided to look at specific impugned actions one by one, the Tribunal's Award seeks to identify how particular regulatory measures work and, unless those measures directly are imposed on the Claimant, the Award deems their effects on the Claimant insufficient to constitute either treatment or differential treatment of investors and investments in like circumstances to PWCC and the PHP mill.[145]

121. I believe that this approach cannot help but overlook the actual work being done by the GNS measures as a collective and the effects those measures had on PWCC's major competing producer of SC paper—effects that were both reasonably foreseeable and expected at the time the relevant official actions were taken. Those effects are what produced the harms complained of by the Claimant by diminishing the ability of the Claimant and its investments to compete on an equal footing in Canada with a favored domestic investor and investment.

122. Because the claim is that those effects were produced by conferring special benefits on PWCC rather than by directly imposing special burdens on the Claimant,[146] the proper question to ask was not whether the Claimant was subject to exactly the same regulatory frameworks as PWCC and the PHP mill. That question addresses whether the specific regulatory frameworks functioned in a discriminatory manner. This, however, is not the claim that has been advanced. Answering that question cannot resolve the contention advanced in this case; it cannot meet the objection based on Article 1102(3).

123. Instead, the proper approach to the "like circumstances" inquiry, in my view, has two parts. The first is whether the nature of the competition between the Claimant's mills in Canada was such that, as a *prima facie* matter, those mills were in like circumstances to the PHP mill and the Claimant was in like circumstances to PWCC. The second part of this inquiry asks whether a neutrally selected and applied legal framework—one not designed to advantage a domestic firm at the expense of a foreign firm (a firm that operates under the umbrella of NAFTA's regime)—required (or justified) the acts that disadvantaged and harmed the Claimant and its

[143] See, e.g., Respondent's Pre-Hearing Memorial, at para 20.
[144] See, e.g, Award, at paras 590, 598 (explaining that the Claimant could not be in like circumstances with PWCC respecting payments for stumpage and silviculture under FULA or respecting tax relief via reassessments because its SC paper mills are not located in Nova Scotia).
[145] See, e.g, Award, at paras 546, 555, 573–591, 596–598.
[146] Claimant's Reply Memorial, at paras 244–254.

Canadian investments.

124. Although this approach is similar in some respects to that taken by the Tribunal's Award, I believe that its differences are both important and better correspond to the text and purpose of Article 1102(3).

2. Applying the Test: Less Favorable Treatment and Nationality

125. During negotiations over PWCC's potential purchase of the PHP mill, GNS offered a package of measures to PWCC. These included, as the Claimant recounts:

> a $24 million forgivable loan
>
> a $40 million credit facility
>
> a $1.5 million workforce training grant
>
> a $1 million marketing grant
>
> a $38 million Outreach Grant [under the Outreach Agreement]
>
> $1.5 million in additional funding to prepare for the restart of the mill
>
> $20 million to purchase land from the mill
>
> the ability to use [approximately $1 billion in] tax losses to offset gains from PWCC investments outside of Nova Scotia
>
> a 50% reduction on [annual] property taxes, from $2.6 million to $1.3 million
>
> a 20-year forest license [FULA] that: (1) permitted PHP to harvest fiber for paper and biomass for fuel; and (2) reimbursed PHP for silviculture payments
>
> indemnification of costs [in the event that] […] PWCC [were] not to complete purchase of the mill
>
> pension liability relief
>
> statutory rights to run the Biomass Plant 24/7
>
> regulatory protection from the costs and obligations of renewable energy standards.[147]

126. The Claimant also includes among the benefits given to PWCC advantageous electricity terms, which were supported by GNS and which the Claimant asserts GNS was instrumental in securing.[148]

127. The Claimant has maintained throughout these proceedings that these benefits were both designed as inducements for PWCC to restart the PHP mill and as cost-reducing measures to

[147] Claimant's Memorial, at para 219.
[148] See, e.g., Claimant's Memorial, at para 219; Claimant's Reply Memorial, at para 34.

make the PHP mill the lowest-cost SC paper producer in North America.[149] The Claimant also maintains that this strategy was responsive to PWCC's insistence that government subventions and regulatory changes in combination have the effect of lowering its costs in order to make the PHP mill (if not *the* lowest-cost SC paper producer) sufficiently profitable that it would remain in operation as the industry continued to contract and marginally successful mills—those that are making less profit or amassing larger deficits—are forced to close.[150]

128. In this regard, the Claimant's principal message has not been that the Respondent provided benefits to PWCC that were of a *type* not made available to other SC paper producers in Canada. Instead, it has been that the benefits made available to PWCC, primarily by GNS, were of a *magnitude* that substantially exceeds what the Respondent or GNS provided to other firms with Canadian investments in financial distress.[151] The Claimant's witness, Mr. Alexander Morrison of Ernst & Young, Inc., testified that he had reviewed a large data set respecting assistance to firms that had filed for protection under the CCAA over a ten-year period and found that no other firm had received assistance from government comparable to that granted to PWCC with respect to its purchase of the PHP mill.[152]

129. The Respondent takes a contrary position, claiming that there was nothing unusual about the assistance granted to PWCC by GNS.[153] In this regard, the Respondent emphasizes the similarity of relief granted to PWCC in respect of its purchase of the PHP mill and relief offered to the Claimant by GNS in respect of financial difficulties at its Bowater Mersey mill.[154]

130. The Respondent also asserts that much of the assistance provided to PWCC actually served interests of the citizens of Nova Scotia (by protecting against lost tax revenues needed to fund government services in Nova Scotia),[155] of ratepayers of NSPI (by preventing a loss of

[149] See, e.g., Claimant's Memorial, at paras 252–253; Claimant's Reply Memorial, at paras 32, 38, 104, 112, 132.
[150] See, e.g., Claimant's Memorial, at paras 86–87; Claimant's Reply Memorial, at paras 36, 209.
[151] See, e.g., Claimant's Memorial, at paras 156, 161; Claimant's Reply Memorial, at paras 335, 395; Hearing on the Merits and Damages, November 9, 2020, at 11:19–25; 25:24–26:15; Hearing on the Merits and Damages, October 18, 2021, at 140:7–18; Hearing on the Merits and Damages, October 18, 2021, at 24:22–25:23.
[152] See Hearing on the Merits and Damages, November 11, 2020, at 560:16-561:14. See also Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at para 89.
[153] Respondent's Counter-Memorial, at para 16.
[154] See, e.g., Respondent's Counter-Memorial, at paras 37 *et seq*; Respondent's Rejoinder Memorial, at paras 166 *et seq*; Hearing on the Merits and Damages, October 18, 2021, at 178:24–179:8.
[155] Respondent's Counter-Memorial, at para 116; Respondent's Rejoinder Memorial, at para 113.

contributions from the PHP mill to defray joint costs of energy provision),[156] or of broader sets of interested persons (through forest preservation, protection against harm to climate, and other publicly beneficial goals).[157]

131. In addition, for some of the items listed by the Claimant, the Respondent disputes whether in fact any benefit was conferred on PWCC.[158] For example, the Respondent states that there was no pension relief provided to PWCC, although there were steps taken to protect the PHP mill's workers from loss of pension benefits.[159] Whatever the strength of this argument in respect to other matters, given the state of the record evidence on the issue of pension relief, I believe it is proper to remove this item from the list of benefits that GNS and the Respondent provided as assistance to PWCC.

132. The questions remain, however, as to whether the magnitude of assistance given to PWCC was different from that provided by GNS to entities such as Bowater Mersey and, if so, what follows from that conclusion.

(a) Comparison to Bowater Mersey Episode

133. Notwithstanding the similarity of many of the items of assistance for PWCC's investment in the PHP mill and the Claimant's investment in the Bowater Mersey mill, I find the evidence clearly demonstrates that the magnitude of assistance given to PWCC and the PHP mill greatly exceeds that offered to the Claimant with regard to Bowater Mersey or to any comparable investment.

134. Simply at the most basic level of evidentiary showings, it is apparent on the face of the items offered to the two investors in respect of these investments that the assistance offered was both broader and a great deal more substantial in the case of PWCC and the PHP mill than in the case of the Claimant and the Bowater Mersey mill. In contrast to the long list of assistance measures set out above,[160] the offer to Bowater Mersey consisted of five specific components:

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[156] Respondent's Counter-Memorial, at para 157; Respondent's Rejoinder Memorial, at para 113.

[157] See, e.g., Respondent's Counter-Memorial, at paras 110, 115–136, 304; Respondent's Rejoinder Memorial, at para 113; Hearing on the Merits and Damages, November 9, 2020, at 173:8–21; Hearing on the Merits and Damages, October 18, 2021, 165:24–166:11.

[158] See, e.g., Respondent's Counter-Memorial, at paras 133–135 (arguing that no benefit was conferred by the reduction in annual municipal property tax from $2.6 million to $1.3 million because the reduction reflected reduced production at the PHP mill and, without special negotiation of the rate, would have been even lower (by 50 percent)).

[159] Respondent's Counter-Memorial, at para 138; Respondent's Rejoinder Memorial, at para 184.

[160] See *supra*, at Paragraph 125.

[redacted][161]

[redacted][162]

135. Exclusive of land purchases, which the Respondent characterizes as purchases-for-value rather than as assistance measures,[163] the package of assistance measures for Bowater Mersey amounted to [redacted][164] This compares to a value for the package of assistance measures given to PWCC in respect of the PHP mill of at least [redacted] (excluding land purchases, excluding pension relief, and counting only items that do not require (contested) estimates of value—thus, reducing the list of items counted with respect to impugned measures of assistance to PWCC by more than half).[165] The Claimant places the total expected value of the assistance measures to PWCC—and the value of assistance actually received[166]—considerably higher than this figure.[167] Even without adding amounts reflecting the assistance that was not readily quantified, the amount of assistance provided to PWCC for the PHP mill dwarfs the amount given to the Claimant for Bowater Mersey.

136. The obvious difference in the magnitude of assistance offered by GNS to the Claimant's Bowater Mersey mill and PWCC for its purchase of the PHP mill suggests that, so far as the Respondent urges comparison of those two incidents as relevant, the comparison demonstrates considerably less favorable treatment for the Claimant's investment. The difference appears even starker when results are taken into account. While the PHP mill continues to operate, the package of measures for Bowater Mersey was insufficient to prevent the Claimant from announcing that mill's closure a mere six months later.[168]

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[161] See Hearing on the Merits and Damages, November 10, 2020, at 313:10–328:15 (testimony of Mr. Richard Garneau, former Chief Executive Officer of Resolute Forest Products, Inc., formerly AbitibiBowater, Inc.)

[162] See [redacted] (**R-149**).

[163] Respondent's Rejoinder Memorial, at para 184.

[164] This figure includes [redacted]

[165] This figure includes the benefit of the $1.3 million annual reduction in municipal taxes for a 5-year period. I recognize that the Respondent argues that the benefit listed for municipal taxes was both justified and, ultimately, worth less than the assigned figure, as the Respondent claims the reduction actually set a figure above what might have been owed by PWCC. See Respondent's Counter-Memorial, at paras 134–135; see also *supra* at Paragraph 131, fn. 158. It is included in the items that do not have contested value estimates because, as with the similar figure on tax relief for Bowater Mersey, it is based on a specific, assigned numerical statement of the amount of tax reduction negotiated or offered.

[166] For example, see Claimant's Memorial, at paras 117–120 (estimating the value of the energy savings to PWCC from the LRR at more than [redacted] for the period 2013 to 2015).

[167] Claimant's Memorial, at para 91.

[168] Claimant's Reply Memorial, at para 339.

137. Beyond the specific comparison of the treatment of the Claimant's Bowater Mersey mill and PWCC's negotiations over its purchase of the PHP mill, I credit the evidence submitted in the Witness Statement and testimony of Mr. Morrison and Ernst & Young that the package of assistance measures provided to PWCC exceeds State assistance provided to any comparable firm or investment for a firm seeking to emerge from CCAA proceedings.[169] Although one can argue over selection of the precise parameters for the Ernst & Young study,[170] the basic information of the study is persuasive that the package of assistance measures provided to PWCC is of considerably larger magnitude than the support (if any) normally made available in comparable circumstances.[171] This information adds to the picture of disparate treatment presented by comparing the Bowater Mersey and PWCC/PHP episodes.

138. The differences between the treatment of PWCC and the PHP mill, on the one hand, and the Claimant and the Bowater Mersey mill, on the other hand, while establishing less favorable treatment, do not establish that this differential treatment occurred with respect to investors or investments in like circumstances. Before turning to that issue, I address the less favorable treatment issue with respect to the Claimant's other relevant investments.

(b) Comparison to the Claimant's Other SC Investments

139. As noted in the Tribunal's Award, the Claimant had investments in other mills that produced SC paper that were more closely competitive with the PHP mill, notably mills at Dolbeau, Kénogami, and Laurentide.[172] The comparative treatment of these investments and PWCC's investment in the PHP mill also demonstrates the less favorable treatment accorded to the Claimant and its investments.

140. As discussed above, the evidence produced in this proceeding is clear that the Claimant's other SC investments did not receive from GNS treatment in any way comparable to that

[169] See discussion *supra*, at Paragraph 128.

[170] See, e.g., Respondent's Rejoinder Memorial, at paras 187–200. Much of the criticism of the report's parameters by the Respondent is directed to the report's utility to the Claimant's contention that the Respondent violated Article 1105's guarantee of respect for a minimum standard of treatment that accords with international law. Indeed, the Respondent's critique of the Ernst & Young report in its Rejoinder Memorial appears under the heading "The EY Report is of No Value in Establishing a Breach of the Minimum Standard of Treatment of Aliens in Customary International Law". Respondent's Rejoinder Memorial at part IV.H. Insofar as the criticisms relate to the report's failure to look outside of Canada or outside the context of companies in sufficient economic distress to invoke CCAA processes, I do not find that they contradict the central conclusion of the Ernst & Young report respecting the unusually generous support provided to PWCC in comparison to norms for similarly situated firms in Canada.

[171] Expert Witness Statement of Ernst & Young Inc., December 6, 2019, at para 89.

[172] Award, at paras 71 *et seq*.

accorded PWCC and the PHP mill. The disparity in treatment goes beyond what is explicable on the obvious observation, much underscored by the Respondent,[173] that some forms of assistance GNS could make available for the PHP mill—for example, municipal tax relief—could not be made available by GNS to operations outside of Nova Scotia.

141. The critical point for assessment of the disparity in treatment—the "less favorable treatment" part of the test enunciated in the *United Parcel Service* (*UPS*) arbitration[174] and accepted by both Parties here[175]—is that the differential treatment was not merely the grant of extraordinarily generous benefits to PWCC that were not made available in equal measure to the Claimant. Rather, it was the decision to make this package of assistance available in circumstances where it was reasonably foreseeable (and, in fact, foreseen) that the result would be substantial harm to the Claimant and its Canadian investments that constitutes the treatment of the Claimant and its investments.[176]

142. In this context, detailed comparison of the manner in which assistance to PWCC and the PHP mill was provided and of the regulatory purposes associated with the form particular parts of the assistance took is neither necessary nor relevant to the disparate treatment part of the *UPS* test.[177]

143. The separate question of whether the less favorable treatment was provided in "like circumstances"—including what role regulatory programs and governmental goals play in that determination—remains to be answered. I turn to that question next.

3. Applying the Like Circumstances Test

144. The like circumstances test generally requires the claimant to show that the less favorable treatment accorded to the claimant or its investments discriminated among investors or investments that compete with one another. If the differential treatment occurs between investors and investments that are not in competition, like circumstances as a rule will not exist. Where an investor and its investments are in competition—and specifically where the

[173] Respondent's Counter-Memorial, at para 275.
[174] See *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at para 83 (**CL-113**).
[175] Claimant's Memorial, at para 189; Respondent's Counter-Memorial, at para 246.
[176] See discussion *supra*, at Paragraphs 22–65.
[177] In this regard, the instant case presents a question that is markedly different from the disparate treatment question presented in the context of *UPS*, where domestic and foreign firms were subject to regulatory provisions that gave disparate treatment by virtue of the provisions' own terms. See *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, at paras 80 *et seq* (**CL-113**). See also discussion *supra*, at Paragraphs 118–122.

competitive relationship is such that products are direct substitutes—a *prima facie* case of like circumstances generally will be found.[178]

(a) Competition and *Prima Facie* Showing of Like Circumstances

145. In this case, the Claimant has demonstrated that (at the time of the relevant acts) its products competed directly with those of NewPage's PHP mill and, afterward, continued to compete with those of PWCC's PHP mill.[179] Among other things, its expert, Dr. Seth Kaplan, explained in his reports and testimony the degree of competition among different grades of SC paper, looking at cross-price elasticities and industry reports.[180] He drew as well on the evidence gathered in the U.S. investigation of allegations of subsidies that were not compliant with Canada's international undertakings and potentially were dutiable under U.S. countervailing duty law.[181]

146. The information from these sources provides solid ground for Dr. Kaplan's conclusion—and the Claimant's argument—that despite differences among SC grades, the grades of SC paper are sufficiently competitive and their prices sufficiently correlated, that they form a single market.[182] Moreover, in the U.S. investigation, the United States International Trade Commission ("**US ITC**") specifically concluded that SC paper consists of a single market composed of all SC paper grades.[183] It also pointedly noted that the only respondent participating in that proceeding, PHP, did not challenge this conclusion.[184] As that is the same

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[178] Claimant's Memorial, at paras 210–211; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, May 24, 2007, at para 17 (**CL-113**).

[179] See, e.g., Claimant's Memorial, at paras 116, 127–130; Claimant's Reply Memorial, at paras 255–256; Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 34–35, citing [redacted] (**C-216**); USITC Pub. 4583 fn. 11, at I-6, citing "Port Hawkesbury's post-conference brief, exhibit 1, attachment F" (**C-237**) (citing statistics from the Pulp and Paper Counsel); Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 17 *et seq*; [redacted] May 27, 2015, at 8 (**R-373**).

[180] Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 34–40; Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 36–48; Hearing on the Merits and Damages, November 12, 2020, at 769:18–770:8. These findings by Dr. Kaplan also accord with the descriptions of the North American SC industry by the U.S. International Trade Commission. See *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 6–7 (**C-237**).

[181] Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 37 *et seq*; Hearing on the Merits and Damages, November 12, 2020, at 773:14–22.

[182] Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 37–45.

[183] See *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 6–7 (**C-237**).

[184] See *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 7 (**C-237**).

operation directly relevant to this proceeding, its failure to demur from that conclusion is particularly telling.

147. The US ITC stated in its decision that there are no clear divisions in the competition among different grades of SC paper, but the market for SC paper does have characteristics that separate it from markets for coated mechanical paper and other relatively similar types of paper.[185] The result is that, given the characteristics of this market, additional sources of supply necessarily depress prices (compared to what they would have been) for all of the grades of SC paper.[186]

148. In contrast to the US ITC's conclusion, the Respondent has argued that differences in grades of SC paper make lower grades of SC paper uncompetitive with (and, hence, unlike) higher grades.[187]

149. It is open to the Respondent to urge the Tribunal to draw conclusions at odds with what the US ITC did, especially as the question before us differs from that before the US ITC. The question before the US ITC was how to define a "like product" class for purposes of addressing issues respecting potential violation of anti-subsidy/countervailing duty law.[188] The question before the Tribunal in the instant proceeding is whether the Claimant and its investments were in "like circumstances" with PWCC and the PHP mill.

150. Insofar as that is the gravamen of the Respondent's argument, I would agree with the Respondent that these two questions are not identical—in part, for reasons I address below.[189] But the argument advanced by the Respondent does not differentiate these questions along

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[185] Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at para 37; Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at paras 34, 36–48; Hearing on the Merits and Damages, November 12, 2020, at 773:1–774:4. These findings by Dr. Kaplan also accord with the descriptions of the North American SC industry by the U.S. International Trade Commission. See *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 6–7 (**C-237**).

[186] Expert Witness Report of Seth T. Kaplan, Ph.D., December 28, 2018, at paras 41–49; Reply Expert Witness Report of Seth T. Kaplan, Ph.D., December 6, 2019, at para 49.

[187] See, e.g., Respondent's Counter-Memorial, at paras 147–151; Respondent's Rejoinder Memorial, at paras 238–245; Hearing on the Merits and Damages, November 9, 2020, at 264:22–267:24; Hearing on the Merits and Damages, October 18, 2021, at 275:14–277:14.

[188] See *In re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination, Commission Opinion, United States International Trade Commission, December 2015, at 1–2 (**C-237**).

[189] While the issue is addressed below, it is worth noting here that the difference between the US ITC findings and the Respondent's argument goes beyond a distinction between "like product" and "like circumstances," as the US ITC reached conclusions on the nature of product competition and product markets that overlap with but go beyond a narrow focus on products' comparability. See also discussion *supra*, at Paragraphs 86, 144.

the lines I find apposite.

151. Instead, as relevant to this part of the analysis, the Respondent argues that the different grades of SC paper are not sufficiently competitive to constitute a single market[190]—a conclusion directly opposite the US ITC's finding. The Respondent also urges that grades of paper routinely treated as of lesser quality than SC paper should be combined with lower SC grades in one market while higher rated grades (including some coated mechanical paper) should be combined with higher grades of SC paper in another market[191]—again, a conclusion diametrically at odds with the US ITC's determination.

152. The Tribunal's Award declares that "the Tribunal does not have much difficulty concluding that at least one of Resolute's mills and the PHP Mill were in a competitive relationship (to a more or less high degree)".[192] Ultimately, however, the Tribunal majority does not feel required (in order to resolve this dispute) to assess how close the competitive relationship is, how broadly it applies to the Claimant's investments, or what it means for the case at hand.[193] I disagree with that approach.

153. The arguments of the Respondent on this score do not convince me that the analysis and conclusions of the US ITC or those articulated by Dr. Kaplan are in error. And, although the Respondent and the Tribunal's Award note aspects of the US ITC decision that are contrary to the conclusions drawn by a WTO dispute settlement panel,[194] those differences are not on matters affecting definition of the relevant product market (which essentially is the equivalent of identifying a "like product," the term used in "unfair trade" law implementation by the US ITC).

154. After considering the evidence and arguments on both sides, along with the views of my colleagues, my view is that the Claimant has made a convincing showing respecting the competitive equivalence of its investments and the PHP Mill—based on evidence and logical

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[190] Respondent's Counter-Memorial, at paras 147–151; Respondent's Rejoinder Memorial, at paras 238–245; Hearing on the Merits and Damages, November 9, 2020, at 264:22–267:24; Hearing on the Merits and Damages, October 18, 2021, at 275:14–277:14.

[191] Respondent's Counter-Memorial, at para 347; Respondent's Rejoinder Memorial, at para 176.

[192] Award, at para 558.

[193] The Tribunal's Award does not draw a conclusion on this issue, finding it unnecessary given its approach to determining whether "like circumstances" exist. See Award, at para 558, fn. 1198.

[194] See Award, at paras 200–207, 337–338; Respondent's Counter-Memorial, at para 238; Respondent's Rejoinder Memorial, at para 83 ("Canada and Nova Scotia's positions before the United States Department of Commerce ("DOC"), as well as before the NAFTA Chapter Nineteen and WTO panels, have been consistent […] As for the subsequent NAFTA Chapter Nineteen and WTO proceedings, they dealt with a narrower range of issues, namely the electricity rate negotiated by NSPI and PWCC, the provision of stumpage and biomass to PHP and payments made by the GNS under the Outreach Agreement).

relationships among products, bolstered by common usage in the industry of the market definition advanced by the Claimant and its experts and accepted elsewhere by the very company at issue in this proceeding as having received preferred treatment. Therefore, I conclude that the Claimant has satisfied the basic requirements for a *prima facie* showing that it is in like circumstances with its comparator.

(b) Other Considerations: Regulatory Regime and Location

155. At this point, the evidentiary burden shifts to the Respondent to demonstrate that the less favorable treatment of the Claimant and its investments is justified. The Respondent's arguments on this matter are reviewed in the Tribunal's Award.[195] Rather than reprise those arguments, I turn to the reasoning of the Tribunal's Award respecting its determination that the Respondent had adequately rebutted the Claimant's *prima facie* case.

156. As noted above, the Tribunal's Award, following the argument of the Respondent, looks at only a few of the impugned actions: protection from renewable energy standards ("**RES issue**"); the requirement that the Biomass plant run continuously (which it combines with the RES issue); stumpage fees under the FULA; pension relief; and municipal property tax relief.[196] Four of these five measures are described in the Tribunal's Award by reference to a regulatory framework, excepting only the description of municipal property taxation.[197]

157. The Award concludes that all five measures are both reasonable under the terms of the relevant legal framework—the regulatory frameworks and the rules respecting property taxation—and, because the regulatory and tax frameworks apply only within Nova Scotia, demonstrate that the Claimant's investments and the PHP mill are not in like circumstances.[198] I turn first to the Tribunal Award's assessment of the importance of an identity of regulatory supervision to define "like circumstances".

158. Resting on its reading of other arbitration awards, the Tribunal's Award finds "'the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of

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[195] Award, at paras 526–527.
[196] See Award, at paras 540, 578–603.
[197] See Award, at paras 540, 578–595.
[198] See Award, at paras 578–603. The Award also emphasizes the Claimant's decision not to bid to acquire the PHP mill, which, in the Tribunal majority's view, would have brought the Claimant within the ambit of the regulatory and tax frameworks relevant to this dispute. See Award, at para 565. This argument is discussed *infra*, at Paragraphs 179 *et seq*.

Article[] 1102.'"[199] This statement quotes the tribunal award in *Grand River Enterprises Six Nations, Ltd. v. United States*[200] a decision the Tribunal's Award here invokes for support.

159. Yet, *Grand River* presents almost exactly the opposite situation from the instant case. Far from being a situation where the argument is that like circumstances cannot exist where investors and investments are not subject to identical regulatory regimes, a "core element" of the claimant's case in *Grand River*, according to the award in that case, was that "he and his distribution companies should *not* have been subject to the disputed measures applicable to other similarly situated investors and investments".[201] That is, the "core" argument in *Grand River* was not whether investors and investments needed to have been (but were not) subject to the same regulatory regime in order to satisfy the requirements for "like circumstances". Instead, it was whether the claimant and his investments should have been *relieved* from being subject to the generally applicable regulatory regime.

160. Of course, as the Tribunal's Award states, regulatory regimes and location can be relevant to assessing whether a particular comparator is in like circumstances with the entity or individual asserted to have received different treatment that violates Article 1102. That point is accepted by both Parties here.[202]

161. The importance of regulatory regimes, like the importance of location, however, is not an abstract need for investors and investments to be located in the same place and subject to exactly the same regulatory strictures in order to be in like circumstances. Instead, the requisite consideration is entirely contextual: the question arbitral tribunals must address is whether differences in regulatory regimes or location matter in the evaluation of the particular claim asserted in each case.[203] If the claim advanced asserting a specific violation of Article 1102 cannot be evaluated apart from recognition of similarities or differences based on location and regulatory regimes, then those factors become relevant for the like circumstances determination.

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[199] Award, at para 559.

[200] See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, January 12, 2011, at para 167 (**RL-019**).

[201] See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, at para 169 (**RL-019**) [emphasis added].

[202] Claimant's Memorial, at para 213; Respondent's Counter-Memorial, at paras 267–268.

[203] See, e.g., *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, at para 75 (**CL-114**) ("[T]he meaning of the term ["like circumstances"] will vary according to the facts of a given case. […] '[C]ircumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations"). Although I do not endorse the entirety of *Pope & Talbot*'s construction and application of Article 1102, I find its recognition of the contextual nature of "like circumstances" inquiries both apt and well-stated.

162. The claim asserted in this case, at its core, does not turn on challenges to details respecting the application of one or more regulatory regimes. The Claimant has not filed a complaint asserting simply that Canada and GNS applied one or another particular program—for example, the FULA or renewable energy rules—in a discriminatory manner. If that had been the essence of the Claimant's complaint, it would be reasonable to respond that the specific program or programs existed prior to PWCC's selection as the preferred bidder for the PHP mill and had been used generally in a similar manner in other circumstances.

163. Instead, as discussed above[204] and recognized by the Tribunal's Award,[205] the essence of the Claimant's case is: first, that GNS officials chose to utilize various measures to construct a package of benefits to PWCC and the PHP mill that was much greater than the Respondent (and, specifically, GNS) had bestowed on other entities; and, second, that, in light of the conditions of the market, it was more than reasonably foreseeable that granting PWCC and the PHP mill this package of benefits would do significant harm to the Claimant and its competing investments in Canada.[206]

164. The issue presented, thus, is not whether one or another specific program was designed or applied in a manner that violates Article 1102(3) but whether the *combination* of all of the various measures together violates Article 1102(3). In my judgment, in focusing primarily not on that question but on narrower, program-by-program analysis,[207] the Tribunal Award's analysis of the "like circumstances" inquiry largely addresses differences in the Claimant's and its investments' circumstances that are factually accurate and obvious but beside the point for the case before us.[208]

(c) Significance of Bowater Mersey's Treatment

165. The Respondent places considerable significance on the treatment given by GNS to the

[204] See discussion *supra*, at Paragraphs 67–82.
[205] See, e.g, Award, at para 541.
[206] Claimant's Memorial, at paras 1–14; Claimant's Reply Memorial, at para 1; Hearing on the Merits and Damages, November 9, 2020, at 10:1–7; Hearing on the Merits and Damages, October 18, 2021, at 7:8–22:2.
[207] See Award, at paras 540, 557.
[208] As noted earlier, see discussion *supra*, at Paragraphs 67–84 (and, particularly, at Paragraphs 79–80), in my judgment, the Tribunal Award's summary treatment of the "ensemble" approach at the end of its like circumstances analysis, see Award, at paras 601–602 (even considered together with its earlier statements at paras 542–543), does not engage sufficiently with the Claimant's arguments on this score.

Claimant's Bowater Mersey mill,[209] as does the Tribunal's Award.[210] The Respondent, the Claimant, and the Tribunal's Award all agree that Bowater Mersey does not constitute the appropriate investment comparator to the PHP mill, given the absence of the sort of direct competition that exists between the PHP mill and the Claimant's other mills.[211] Yet, the Respondent and the Tribunal's Award find it instructive that GNS was willing to provide support to the Claimant and its Bowater Mersey mill.[212]

166. Further, the Respondent argues that the support provided to Bowater Mersey was comparable to that provided to PWCC in respect of the PHP mill.[213] Indeed, the Respondent suggests that [redacted] [14] As discussed below in the section immediately following, the Respondent also relies on the asserted comparability of GNS support for Bowater Mersey and the PHP mill in urging the Tribunal to find that the Claimant's decision not to bid on the PHP mill cannot be ascribed in any way to issues related to nationality.[215]

167. The Respondent's arguments about Bowater Mersey's treatment complement its arguments that the Claimant's mills located *outside* Nova Scotia cannot be compared to the PHP mill because the measures used to support PWCC and the PHP mill are not entirely available to investments outside the province.[216] Indeed, the logic of that argument by the Respondent is that we should look only at a comparison of the treatment afforded to PWCC and the PHP mill and to the Claimant and its Bowater Mersey mill.

168. Again, even recognizing that neither the Respondent nor the Claimant has urged us to use Bowater Mersey as the proper comparator, the comparison of the Bowater Mersey experience with the PHP mill experience does have utility in judging some of the arguments that have been put forward.

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[209] Respondent's Counter-Memorial, at paras 37 *et seq*; Respondent's Rejoinder Memorial, at paras 166 *et seq*; Hearing on the Merits and Damages, November 9, 2020, at 182:4–187:2; Hearing on the Merits and Damages, October 18, 2021, at 16:18–161:1.

[210] Award, at paras 562–563.

[211] See, e.g., Award, at para 563; Claimant's Pre-Hearing Memorial, at para 60; Respondent's Counter-Memorial, at para 271; Hearing on the Merits and Damages, October 18, 2021, 90:25–91:6.

[212] Respondent's Counter-Memorial, at paras 37 *et seq*; Respondent's Rejoinder Memorial, at paras 166 *et seq*; Hearing on the Merits and Damages, November 9, 2020, at 182:4–187:2; Hearing on the Merits and Damages, October 18, 2021, at 16:18–161:1; Award, at paras 562–563.

[213] See, e.g., Respondent's Counter-Memorial, at para 253.

[214] Hearing on the Merits and Damages, October 19, 2021, at 433:15–24.

[215] See also discussion *infra*, at Paragraphs 176–177.

[216] See, e.g., Respondent's Counter-Memorial, at para 259.

169. Despite the Respondent's assertions about the similarity of GNS's willingness to support both the Claimant's Bowater Mersey mill and PWCC's PHP mill, it should be clear, as already noted,[217] that the commitment of GNS to these two situations, and to the investors in these two situations, was far from comparable.

170. As set forth above, the package of support for Bowater Mersey (apart from the land acquisitions, which the Respondent argues are simply ordinary purchases for value)[218] was [redacted] the size of the package provided for PWCC and the PHP mill.[219] It was intended to provide merely transitional assistance, allowing the Bowater Mersey mill to survive a short additional time as opposed to providing for its long-term survival and success.[220] [redacted][221]

171. Mr. Garneau characterized the feedback after discussions with "the bureaucrats," as related to Mr. Garneau by Brad Pelley (the Claimant's primary liaison to GNS), as likely to be providing support that was "not going to be substantial" or "not going to be significant" or "not going to be material" or "not going to be helpful".[222] Mr. Garneau testified as well that with respect to power costs—the item he regarded as most important to lowering the mill's ongoing costs—that the cost reduction that would have been possible from the assistance offered would have been only in the range of approximately [redacted] of what he and his team thought was required to keep that mill operating.[223]

172. Further, Mr. Garneau cast most of the statements about support for Bowater Mersey—from GNS officials and even the Claimant's statements at the time—as more face-saving measures than accurate depictions of a serious commitment to the company and the mill.[224] Finally, the results are strikingly different for the two projects: Bowater Mersey announced its closure a

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[217] See discussion *supra*, at Paragraphs 133–138.

[218] Respondent's Rejoinder Memorial, at para 184. Mr. Garneau's testimony states that the [redacted]. See Hearing on the Merits and Damages, November 10, 2020, at 321:17–322:24. See also discussion *supra*, at Paragraph 135 (discussing the question of the appropriate valuation of the potential land acquisition).

[219] See *supra*, at Paragraph 135.

[220] Hearing on the Merits and Damages, November 14, 2020, at 1201:10–1203:10; Claimant's Pre-Hearing Memorial, at para 26.

[221] See Hearing on the Merits and Damages, November 10, 2020, at 316:11–317:23.

[222] Hearing on the Merits and Damages, November 10, 2020, at 304:8–307:22.

[223] See Hearing on the Merits and Damages, November 10, 2020, at 359:24–360:2.

[224] Hearing on the Merits and Damages, November 10, 2020, at 312:11–21. See also discussion *supra*, at Paragraph 170, and *infra*, at Paragraphs 185–186.

mere half-year after the package of measures to support it was arranged,[225] while the PHP mill continues to operate a decade later.

173. Circumstances are not identical for PHP and Bowater Mersey, but they are "like" in some relevant ways. The Respondent cannot reasonably argue, on the one hand, that firms must be entirely subject to the same regulatory regimes and enjoy the same opportunities for specific assistance measures by virtue of their location and, on the other hand, that differences in the degree of competition among their products makes the situations for the two mills unlike.

174. The appropriate question for analysis in this case is not whether the mills that are being compared for differences in State treatment produce *products* that are fully equivalent or are sufficiently alike to be very close substitutes. That is the question for "like product" analysis in ordinary trade cases, to be sure, where the competitive effects of changes in pricing of one product can be evaluated with respect to products of the complaining party.[226] For purposes of NAFTA Article 1102(3), however, the question is only whether the equivalence among products is sufficient to assess the similarity or difference in the *treatment* received by the entities producing them.

175. The Respondent advances, and the Tribunal's Award accepts, the argument that this inquiry should not focus on the *effects* of a State's impugned measures on a claimant and the comparison of actions that produce those effects with the treatment of other, competing entities.[227] The Respondent's argument is that analysis instead should focus on certain similarities or differences in the investors' and the investments' circumstances with respect to the impugned government actions.[228] The analysis that follows from this approach then considers differences along those margins as bases for differential treatment.[229] Yet, without deeming the Bowater Mersey mill and the PHP mill in like circumstances for evaluation of

[225] Claimant's Reply Memorial, at para 333; CBC, News Release, "Bowater mill postpones upgrades", June 14, 2012 (**C-331**).

[226] Won-Mog Choi, *'Like Products' in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence* (Oxford University Press, 2003). See cases such as *Japan—Alcoholic Beverages II*, WTO Doc WT/DS8/AB/R, Review of the Appellate Body, 4 October 1996; *Korea—Taxes on Alcoholic Beverages*, WTO Doc WT/DS75, Review of the Appellate Body, 18 January 1999; *Chile—Taxes on Alcoholic Beverages*, WTO Doc WT/DS87/R, Review of the Appellate Body, 15 June 1999. See also, Won-Mog Choi and Freya Baetens, Max Planck Encylcopedias of Public International Law—'Like Products'.

[227] Respondent's Counter-Memorial, at para 260; Hearing on the Merits and Damages, October 18, 2021, 243:15–22; Award, at paras 557–559.

[228] Respondent's Counter-Memorial, at para 265 [the Respondent's emphasis removed]. See also Respondent's Counter-Memorial, at fn. 553; Hearing on the Merits and Damages, November 9, 2020, at 244:19–23; Hearing on the Merits and Damages, October 18, 2021, at 246:13–22.

[229] Respondent's Counter-Memorial, at para 268.

the application of Article 1102(3), the Respondent casts the overall treatment of PHP and Bowater Mersey as comparable, given the investments' circumstances.[230]

176. Even if that approach frames the analytical posture for this proceeding, however, I do not find the Respondent's arguments regarding the lessons to be drawn from the Bowater Mersey experience persuasive. Instead of concluding that the treatment of the Claimant and Bowater Mersey and of PWCC and the PHP mill are so similar as to support a conclusion that nationality cannot have played any role, I believe that the differences in treatment are so substantial and so obviously oriented to producing different outcomes as to support the Claimant's position that these do violate the national treatment obligation.

177. This is not a statement that differences were solely the product of nationality or were based primarily on nationality—and certainly is not a statement that the differences flowed from animus toward the Claimant.

178. The record before the Tribunal, however, including the obviously preferential treatment given to PWCC, in my view does not provide a basis for concluding that the Bowater Mersey story contradicts the Claimant's arguments respecting liability under Article 1102(3).

(d) Claimant's Decision Not to Bid on the PHP Mill

179. A final part of the Respondent's position on violation of Article 1102(3), also repeated in the Tribunal's Award, declares that the Claimant's decision not to bid to purchase the PHP Mill precludes a finding that the Claimant was in like circumstances to PWCC respecting treatment given in the package of measures provided to PWCC for the PHP Mill's purchase.[231]

180. The Award emphasizes that Sanabe & Associates LLC ("**Sanabe**"), the firm hired to assist with the sale of the PHP mill, had contacted the Claimant, among the 110 parties formally approached respecting the submission of bids, to inquire whether the Claimant would want to submit a bid.[232] Although the Claimant considered that possibility, [redacted][233]

[230] Respondent's Counter-Memorial, at para 319.
[231] Respondent's Counter-Memorial, at para 278; Respondent's Rejoinder Memorial, at para 117; Award, at paras 564–567.
[232] See Award, at para 565. See also [redacted] at RFP0005610 (**C-107**).
[233] See Award, at para 565. See also [redacted] at RFP0011526 (**C-119**).

181. The essence of the position taken by the Respondent and adopted by the Tribunal's Award is: (1) that the Claimant willingly and independently decided not to bid for the PHP mill, which was tantamount to deciding not to seek the same benefits that were provided to PWCC (to the Claimant's detriment); (2) therefore, the Claimant should not be permitted to complain that providing those benefits to PWCC constituted more favorable treatment than the Claimant received in like circumstances.[234]

182. In my view, however, this argument should not carry the day with respect to the like circumstances analysis, as it suffers from two flaws. First, it makes factual assumptions that go beyond the evidence before us, relying on inferences from the evidence that are not the ones most compatible with the evidence. Second, it rests on a construction of "like circumstances" that is justified only by importing questionable conclusions respecting national treatment into analysis of what should be a predicate to the conclusion rather than a derivative of it.

i. Fact Inferences Respecting Claimant's Decision Not to Bid

183. The first error is that the evidence does not comport with the Claimant deciding not to seek benefits comparable to those accorded to PWCC and the PHP mill, as if the Claimant turned down an invitation to enter an open contest for those benefits. [redacted][235] Indeed, it was so difficult that the mill's owners faced bankruptcy despite having the most efficient, most advanced SC-paper machine in North America.[236]

184. [redacted][237] (Notably, this view was shared by all of the entities invited to bid on the PHP mill.)[238] The

[234] See Award, at para 567.

[235] [redacted] September 26, 2011, at RFP0011526, 2, 5, 9 (**C-119**).

[236] CBC News, News Release, "NewPage Port Hawkesbury mill to be sold" (Sept. 7, 2011) (**C-115**); Novia Scotia Premier's Office, News Release, "Province Invests in Jobs, Training and Renewing the Forestry Sector", August 20, 2012 (**C-183**). See also Respondent's Counter-Memorial, at paras 69, 144; Claimant's Memorial, at para 22.

[237] [redacted] September 26, 2011 at RFP0011526, at 8 (**C-119**); Hearing on the Merits and Damages, November 10, 2020, at 347:1–348:6.

[238] See *In re A Plan of Compromise or Arrangement of NewPage Port Hawkesbury Corp.*, Second Report of the Monitor, Supreme Court of Nova Scotia, October 3, 2011, at paras 15–19 (**C-120; R-030**) (110 firms

Claimant recognized that [redacted][239] It recognized that [redacted][240] And, finally, it recognized that [redacted][241]

185. [redacted][242] [redacted][243]

186. [redacted]".[244]

187. As the Tribunal's Award rightly notes, Mr. Montgomerie testified that, if the Claimant had decided to submit a bid and had been "selected […] as a qualified bidder, […] the GNS would have been ready to discuss reasonable requests for financial assistance".[245] The Award also recounts Mr. Montgomerie's statement that "the December 2011 financial support of Resolute's Bowater Mersey mill by the GNS demonstrates that the Province was willing to engage constructively and in good faith with respect to reasonable requests for financial assistance".[246]

188. Mr. Montgomerie was, no doubt, stating his belief based on his view of what the GNS did with respect to Bowater Mersey. But a very different picture emerges from looking at the

invited to bid; only four submitted bids; only two proposed to treat mill as going concern). See also Claimant's Memorial, at para 35.

239 Hearing on the Merits and Damages, November 10, 2020, at 348:22–349:23.

240 Hearing on the Merits and Damages, November 10, 2020, at 354:20–355:15.

241 Hearing on the Merits and Damages, November 10, 2020, at 351:12–352:13.

242 See Hearing on the Merits and Damages, November 10, 2020, at 308:23–309:2, 354:20–355:9.

243 Hearing on the Merits and Damages, November 10, 2020, at 354:20–355:15.

244 Hearing on the Merits and Damages, November 10, 2020, at 355:6–9.

245 Award, at para 567, *quoting* Witness Statement of Duff Montgomerie, April 17, 2019, at para 24.

246 Award, at para 567, *quoting* Witness Statement of Duff Montgomerie, April 17, 2019, at para 24.

relative paucity of support for Bowater Mersey, its insufficiency to produce a substantial change in the economic viability of that mill, and the vast disparity in the treatment of Resolute's Bowater Mersey mill and of PWCC respecting the PHP mill. The combination of these factors underscores the absence of a factual basis for the Claimant to have expected that GNS would provide an assistance package to the Claimant comparable to what GNS provided to PWCC. This highlights the reasonableness of Mr. Garneau's expectation that sufficient assistance would not be made available to the Claimant.

189. Further, even in stating his views regarding GNS's likely support for a possible bid by the Claimant, Mr. Montgomerie's position was far from unqualified. Stating that, based on the Bowater Mersey experience, Mr. Garneau could have expected similar support for a PHP bid[247] did not convey a commitment of support remotely close to what was provided to PWCC. So, too, stating that GNS would have been "willing to engage constructively" on "reasonable requests"[248] did not express a commitment of support comparable to what GNS provided to PWCC.

190. In my judgment, the record does not demonstrate a simple choice by the Claimant to forego the opportunity to receive support of the kind and magnitude provided to PWCC for its acquisition and operation of the PHP mill. Inferences based on that assumption, thus, are not well grounded.

ii. Fit with "Like Circumstances" Determination

191. The second flaw in the argument advanced by the Respondent and accepted by the Tribunal's Award in respect of the Claimant's decision not to bid to acquire the PHP mill is its supposition that no firm could be in like circumstances unless it participated in the bidding process. That supposition rests on two analytical assumptions. One is that a State—or, for Article 1102(3), a sub-national government for a state or province—has unlimited ability to decide how to structure its support for industry; the other is that whatever choice is made conclusively frames the like circumstances determination.

192. The first assumption is largely correct. NAFTA generally does not direct States and their subnational units to adopt any particular organization of industry. In this respect, GNS was free to decide to support employment in Nova Scotia through a broad-based program of business development, wage support, tax reduction, or other mechanisms, or, as it did, through

[247] Witness Statement of Duff Montgomerie, April 17, 2019, at para 24.
[248] Witness Statement of Duff Montgomerie, April 17, 2019, at para 24.

provision of more concentrated benefits to specific firms.[249]

193. The second assumption, however, does not follow inexorably from the first. A decision to invest massive support in one project does not mean that the decision's effects on other firms are immune from consideration under NAFTA's provisions. It does not, in other words, mean that competing investors and investments cannot be in like circumstances. If that were true, NAFTA Parties would be free to elide the constraints of Article 1102.[250]

194. Putting the point in more concrete terms, the choice of the *form* for distributing benefits to businesses cannot conclude the inquiry into whether it provides disparate treatment to investors and investments that diminishes the terms of competition protected in NAFTA.[251] Likewise, the decision respecting the *magnitude* of benefits granted to a business cannot foreclose analysis of the fit of a state or province's decision with Article 1102(3). The analysis here exactly parallels the obvious conclusion that a state's or province's decision to impose a specific *burden* on a foreign investor or investment would not be rendered immune by its fit with the state or province's preferences, as the grant of a benefit of substantial proportions to a competitor in circumstances such as those presented here is effectively identical to the imposition of a burden on the affected competiting party.[252]

195. Because I find that the Claimant and its investments are in a directly competitive relationship to PWCC and the PHP mill, that the Claimant has not chosen to forego a clearly available set of benefits, and that the regulatory provisions relied on by the Respondent to distinguish between the Claimant and its investments and PWCC and the PHP mill are not themselves in issue—as opposed to a decision narrowly focused on the award of benefits utilizing those regulatory provisions—I conclude that the Claimant and its investments are in like circumstances with the PWCC and the PHP mill.

4. Conclusion Respecting Article 1102(3)

196. As noted previously, while a state or province is free to choose from among a variety of mechanisms for accomplishing its goals, it is not free to violate the commitment to treat investors and investments of other NAFTA Parties equally.[253] GNS made a conscious decision to select one firm to receive extremely generous benefits to reduce its costs of operation in a

[249] Award, at para 576.
[250] Claimant's Reply Memorial, at para 223.
[251] See *supra*, at Paragraph 128.
[252] Claimant's Reply Memorial, at para 208.
[253] See discussion *supra*, at Paragraphs 98–117.

market where the primary competitor among a small set of firms was an investor of another NAFTA Party operating other investments in Canada and where the reasonably foreseeable result of the Respondent's decision would be to harm significantly the Claimant by depressing prices for its competitive products.

197. As also explained above, this is the same approach as that taken by Mexico that led to the *Corn Products* case and related cases.[254] This decision, in each instance, preferenced a domestic investor and investment at the expense of a foreign competitor and its investments. And it did so in a manner that was not incidental and minor but in a manner that produced substantial adverse consequences as a direct, foreseeable effect of the government's decision.[255]

198. As also noted, under Article 1102(3) an intention to advantage one investor or investment (and to burden another) on grounds of nationality is not required.[256] Given this understanding, accepted by both Parties,[257] a reasonably foreseeable, substantial injury to the foreign (other NAFTA Party's) investor or investment from a choice to manifestly advantage a domestic investor and investment satisfies the requisites for a claim under Article 1102(3).[258] In my judgment, the evidence produced in this case fulfils that requirement.

199. To the extent that analysis in the Tribunal's Award diverges from the analysis in this Statement of the Respondent's violation of Article 1102, I dissent from that part of the Tribunal's Award.

IV. EXCEPTIONS TO RESPONSIBILITY UNDER ARTICLE 1108(7)

200. Having found that the impugned acts of the Respondent violated Article 1102(3), it is necessary to consider whether impugned acts are excepted from liability under Article 1102(3) by virtue of Article 1108(7).

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254 See discussion *supra*, at Paragraphs 25–28.
255 See discussion *supra*, at Paragraphs 37–66, 141.
256 See discussion *supra*, at Paragraphs 85–117.
257 See Claimant's Memorial, at para 190; Respondent's Rejoinder Memorial, at para 92; Hearing on the Merits and Damages, November 9, 2020, at 45:18–25, 111:3–114:2, 236:7–22; Hearing on the Merits and Damages, October 19, 2021, at 384:25–384:4.
258 *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, at para 119 (**CL-107**); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, November 21, 2007, at paras 209–211 (**RL-092**).

A. INTERPRETIVE ISSUES

1. Approach and Scope

201. At the outset, I agree with the Tribunal's Award that the proper interpretive guidance is contained in VCLT Article 31, which directs that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis supplied).[259] Although I disagree with the Award's conclusions on the meaning to be attributed to the terms, I agree that this is the formula that should guide our interpretation of NAFTA Article 1108(7). [260]

202. I also agree with the Tribunal Award's conclusion that application of the interpretive approach laid out in VCLT Article 31 coheres with the decision that each impugned act must be examined individually to determine whether it is excluded from liability under NAFTA Article 1102(3).[261] As discussed above, NAFTA Article 1102, by its terms directly prohibits States—and in 1102(3), subnational states and provinces—from *according treatment* of a specific nature.[262] It does not, by its terms, speak to individual acts of the States or subnational units whose behavior is at issue.

203. In contrast, the language of Article 1108(7) speaks to *specific acts*. It says:

> Articles 1102, 1103 and 1107 do 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.[263]

204. This language, on its face, requires attention to the particular acts taken by the Respondent. I view the implication of that direction to require inquiry into the acts individually, not collectively, unlike the proper interpretation of Article 1102(3) in cases such as this.

2. Interpretive Predicate: Considerations

205. Before turning to the definition of the two subsections of Article 1108(7), I take up another predicate issue: whether a tribunal interpreting those provisions should begin with a presupposition that, so far as the terms do not have precise, unambiguous meanings, the

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[259] VCLT Article 31(1).
[260] See, e.g., Award, at para 373.
[261] See Award, at para 372.
[262] See discussion *supra*, at Paragraphs 83–117.
[263] NAFTA Article 1108(7).

language should be given a broad or a restrictive meaning.

206. Although both the Claimant and the Respondent purport to offer accurate interpretations of the critical terms of Article 1108(7) based on the ordinary meaning and context of the provisions, they plainly shade their readings in divergent directions.

207. The Respondent asserts that, looking to the ordinary meaning of the terms, the word "procurement" in Article 1108(7)(a) broadly covers payments in exchange for a good or service, without any restrictive requirements to meet the relevant definition[264] and that the term "subsidies" in Article 1108(7)(b) (and its associated terms, including "grants" and "loans") similarly should be given a broad reading extending to government provision of funds to underwrite activities or of valuable benefits for commercial enterprises, again without clear restrictive requirements as to their form.[265] The Respondent, thus, characterizes all of the measures impugned in the Complaint, with the lone exception of the electricity measures, as excepted by Article 1108(7) from the Tribunal's consideration respecting the Claimant's allegations that these measures violate Article 1102's guarantees pertaining to national treatment.[266]

208. The Claimant, in contrast, looking to the relation of Article 1108(7) to Article 1102 and to the object and purpose of NAFTA to facilitate trade among the nations of North America, argues that Article 1108(7) should not be construed broadly to insulate the NAFTA Parties from liability under Chapter 11's provisions, as an overbroad reading of the terms used in Article 1108(7) would interfere with accomplishment of NAFTA's purpose.[267] The Claimant further urges that, because the provisions in Article 1108(7) constitute exceptions to general rules of liability contained in NAFTA Chapter 11, the excepting provisions of Article 1108(7) should be construed narrowly.[268]

209. The Tribunal's Award declares that the Award takes neither a broad nor a narrow reading of

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[264] Respondent's Counter-Memorial, at para 230, fn. 486; Hearing on the Merits and Damages, November 14, 2020, at 1251:16–1255:3 and particularly 1254:19–1255:3 ("In the context of 1108(7), it's a broad meaning. It's procurement by a party. It's not covered by other chapters in the NAFTA which deal with procurement or WTO rules on procurement and so on. In the case of 1108(7), the exception is broad. It's procurement by a party, and anything that falls into that, the ordinary rules of interpretation qualifies. And we think, in this case, it's straightforward".)

[265] Respondent's Counter-Memorial, at para 225.

[266] Respondent's Counter-Memorial, at para 224; Respondent's Rejoinder Memorial, at para 64.

[267] Claimant's Memorial, at para 228, referring to Respondent's Statement of Defence, at para 88; Claimant's Reply Memorial, para 276; Hearing on the Merits and Damages, November 14, 2020, at 1206:4–1211:15.

[268] See Award, at para 372.

the terms of Article 1108(7) except as required to give a faithful interpretation of them.[269] Nonetheless, it adopts readings of both Articles 1108(7)(a) and 1108(7)(b) that broadly exclude State actions—and, as respects application of Article 1102(3), state and provincial actions—from liability under Article 1102.[270]

210. Although I do not disagree with much of the discussion in the Tribunal's Award respecting the definition and application of the terms in Article 1108(7), I depart sufficiently from the Award's approach to feel impelled to explain my different views.

211. Two competing considerations inform my construction of the terms' meanings below. First, while the critical terms used in Article 1108(7), which are not defined in NAFTA, have potentially broad meanings in ordinary discourse, their use in the context of a free trade agreement cannot be thought to invoke the most expansive versions of those meanings where those meanings are not consistent with the operation of NAFTA as a free trade agreement. Legal texts do not simply encapsulate the broadest possible version of ordinary usages where narrower meanings also exist and constitute equally valid definitions of those terms.

212. Further, arguments in favor of broad meanings for the terms at issue should be questioned where accepting those meanings would confer expansive discretion on Parties to the treaty to characterize actions in ways that minimize protection for other Parties' investors and reduce the treaty's ability to expand trade and investment within North America.

213. Of course, although the terms chosen by the Parties should not be artificially narrowed or broadened to avoid consequences that seem unfortunate, neither should they be expanded unnecessarily where equally valid renditions of their meaning better suit the framework of the document in which they appear. That is the essence of the argument for looking to the context and purpose of NAFTA urged by the Claimant here and the meaning of the second phrase from VCLT Article 31 italicized in the quotation of it above.[271]

214. Second, and perhaps militating in the opposite direction, while the terms' use in the context of a free trade agreement with trade- and investment-expanding purposes should inform their construction, the terms should not be given meanings that conflict with the understanding that NAFTA's goals of expanding trade and investment are encapsulated in a treaty that permits Parties to limit their obligations in specific ways. In other words, consideration of the purposes

[269] See Award, at paras 373 *et seq.*
[270] See Award, at paras 381, 417.
[271] See *supra*, at Paragraph 201.

of the treaty should not emphasize positive goals of the treaty to the exclusion of a recognition that the treaty also reserves the right of Parties to adopt exceptions.

215. Still, a tribunal reading the terms of NAFTA provisions in light of their context and purpose, as VCLT Article 31 (along with commonly accepted rules of interpretation) directs, must take care not to leap from one evidentiary fragment respecting the purpose of a provision to a vision of the complete picture of the treaty's broader mosaic. In my view, as explained below, that is the mistake made by the Tribunal's Award in its construction of NAFTA Article 1108(7).

B. PROCUREMENT BY A PARTY

1. Article 1108(7)(a)'s Meaning

216. Drawing primarily on four prior decisions by NAFTA arbitral tribunals (three of them challenging actions of Canada, its subnational units, or its state enterprises),[272] the Tribunal's Award asserts that procurement, as used in Article 1108(7)(a), has a broad meaning covering any acquisition of goods or services.[273] It rejects limitations on the term "procurement by a Party" that would bring it more in line with the scope of Chapter 10's regulation of procurement,[274] in part because Article 1108(7)(a) does not explicitly reference or rely on that chapter[275] and in part because limitations would conflict with the ability of NAFTA Parties "to exercise nationality-based preferences in cases of procurement".[276]

217. I disagree with the Award's reasoning on three grounds.

218. First, although "procurement" can have a broad meaning in common usage, "procurement by a Party"—meaning *government* procurement—generally has a more limited connotation. This point is addressed further below.

219. Second, the failure of the text of Article 1108(7) specifically to refer to Chapter 10, and

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[272] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018 (**RL-122**); *Mesa Power Group v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016 (**CL-005**); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007 (**CL-113**); *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, January 4, 2003 (**CL-130**).

[273] See Award, at paras 376–390.

[274] See Award, at paras 383–387.

[275] See Award, at paras 384–385.

[276] See Award, at para 386, citing *Mesa Power Group v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, at para 419 (**CL-005**).

expressly to make its treatment of "procurement by a Party" coextensive with Article 1108(7)(a)'s use of the term, should be no more dispositive of the term's definition than the text's failure specifically to state that the term does *not* relate to Chapter 10's treatment of procurement by NAFTA Parties. That is, NAFTA's drafters could have chosen to explicitly include *or* exclude that meaning of "procurement by a Party", but did neither. Emphasizing one side of that choice, in my view, does not answer any question about Article 1108(7)(a)'s meaning.

220. Third, the cases cited by the Tribunal's Award, while accurately quoted in the Award respecting their view on interpretation of the provision's meaning, generally do not turn on the interpretive issue relevant to this arbitration. A brief review of the precedents follows before turning to other means of resolving the interpretive dispute.

(a) Precedents Respecting "Procurement"

221. Consider, for example, the decision in *Mesa Power Group*.[277] This addresses the question of Article 1108(7)(a)'s interpretation, including the meaning of "procurement", in the context of answering whether the term covers government purchases that are not entirely consumed by the purchasing entity or are subsequently paid for in whole or in part by private consumers.[278] In other words, the critical questions respecting procurement in *Mesa* were *who* and *how* questions, rather than the *what* question that is central here.[279]

222. *ADF*[280] also presented *who* and *how* questions. *ADF* addressed whether Article 1108(7)(a)'s exception applied to purchases made in connection with a highway building project jointly funded by the U.S. Department of Transportation ("**USDOT**") and the Commonwealth of Virginia. The question turned on which of the entities in the joint project could be said to have made the purchases at issue: the United States federal government (through the USDOT), the government of Virginia, or the private entities engaged in supervising and carrying out the construction project.[281] The question whether the underlying contracting activity constituted

[277] *Mesa Power Group v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016 (**CL-005**).

[278] See *Mesa Power Group v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, at paras 403, 406-421 (**CL-005**).

[279] The *Mesa* decision also notes the importance of formality to other decisions on the meaning of "procurement", while observing that there is no conclusive basis for deciding the level of formality required solely on a definitional basis. See *Mesa Power Group v. Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, at paras 413–415 (**CL-005**).

[280] *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, January 4, 2003 (**CL-130**).

[281] *ADF Group Inc. v. United States*, Case No. ARB(AF)/00/1, Award, January 4, 2003, at paras 160–168 (**CL-130**).

"procurement" was not in dispute, as the claimant in *ADF* acknowledged that fact subject only to the question of whether the acting party was a government covered by the procurement exception.[282] Moreover, as discussed further below, the specific conduct at issue in *ADF* fits a more exacting definition of "procurement" that is in keeping with the understood meaning of the term in other contexts, including other parts of NAFTA.[283]

223. So, too, in *Mercer*,[284] the question for the arbitration tribunal did not hinge on the scope of the term "procurement by a Party" but on the facts relevant to its application. The parties to the arbitration agreed on the definition of procurement and on its application to BC Hydro and Power Authority (BC Hydro), "a British Columbia state-owned electricity utility and state enterprise".[285] Their disagreement was whether a particular impugned term in an arrangement setting terms of purchases and sales of energy by a mill owned by Mercer should be regarded as part of a contract for procurement or as a separate measure derived from regulatory initiatives.[286] The *Mercer* tribunal's resolution of that issue, thus, determined its disposition of the application of Article 1108(7)(a).[287]

224. The exception among the cases cited by the Tribunal's Award in support of its broad reading of the term "procurement by a Party" in relation to Article 1108(7)(a) is *UPS v. Canada.* [288] The majority decision in *UPS* found an agreement between Canada and Canada Post Corporation (a Crown corporation with special privileges and responsibilities with respect to mail and parcel delivery, among other matters) also fell within the scope of the procurement exclusion under Article 1108(7)(a).[289] The tribunal decision relied on the language from *ADF* as well as on a decision from a domestic Canadian court, *Dussault v. Canada (Customs and*

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[282] *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, January 4, 2003, at para 171 (**CL-130**).

[283] See discussion *infra*, at Paragraphs 233–234. See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, paras 68–70 (**CL-113**).

[284] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at paras 6.40–6.41 (**RL-122**).

[285] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para 2.7 (**RL-122**).

[286] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at paras 6.29–6.31 (**RL-122**).

[287] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at paras 6.43–6.49 (**RL-122**).

[288] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007 (**CL-113**).

[289] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, at para 136 (**CL-113**).

Revenue Agency) and Canada Post Corporation.[290] *Dussault* discussed terms of the agreement between Canada and Canada Post at issue in *UPS*, stating that it required services to be performed by Canada Post and payments to be made by Canada.[291] Based on its readings of *ADF* and *Dussault* and the test it deemed appropriate to the application of Article 1108(7)(a), the *UPS* majority concluded that the agreement constituted a procurement. One member of the tribunal disagreed with the test used, the relevance of *ADF* and *Dussault*, and the conclusion reached in *UPS*.[292]

225. As actual precedent for the interpretation of Article 1108(7)(a)—interpretations of that provision that are not just observations but determinations essential to the decision being made—this group of decisions provides thin support for the broad reading of "procurement" given in the Tribunal's Award. At the same time, it is fair to say that the cases dealing with the meaning of Article 1108(7)(a) also do not make a strong case for resting a narrow reading of the provision on the ground of arbitral precedent.

226. Interpreting Article 1108(7)(a), thus, must rest more on direct construction of the terms in that provision than on what others have said. This is the task taken up next.

(b) Interpreting "Procurement by a Party" to Fit Context and Purpose

227. Although there is no definition of "procurement" in NAFTA, the treaty does include a chapter on "Procurement".[293] That chapter, Chapter 10, also does not define "procurement", and, as already noted, Article 1108(7)(a) does not expressly incorporate or reference Chapter 10, but that chapter's provisions offer additional information that can illuminate the term's meaning in Article 1108(7). Notably, Chapter 10 includes rules on tendering procedures,[294] qualification of suppliers,[295] advertising and invitations to potential suppliers to participate in government procurement programs,[296] and detailed provisions respecting timing,[297]

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[290] *Dussault v. Canada (Customs and Revenue Agency) and Canada Post Corporation*, 238 FTR 280, 2003 FC 973 (2003).
[291] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, paras 131–136 (**CL-113**).
[292] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at paras 64–80 (**CL-113**).
[293] NAFTA Chapter 10.
[294] NAFTA Articles 1008, 1011–1012.
[295] NAFTA Article 1009.
[296] NAFTA Article 1010.
[297] NAFTA Article 1012.

procedures,[298] contract awards,[299] and bid protests.[300]

228. Given its intense focus on the processes generally apposite to government procurement, the term "procurement" as used in Chapter 10 is most sensibly read as referring to a more formal and regularized process of government acquisition of goods and services rather than covering any acquisition of any item in any manner so long as payment in some form was made by the government.[301]

229. Further, when governments follow more formal and regularized processes for purchasing goods and services, there is likely to be a far more certain basis for valuation of the goods or services provided as well as greater precision in the description of what the government is purchasing. That is why governments routinely follow these procedures.

230. Focusing more directly on the conflict before us, requirements of regularity and formality—the procedures commonly associated with government procurement—as predicates for government procurement can serve to reduce the scope for manipulation of characterizations of government actions as falling inside or outside the ambit of provisions protecting against violations of obligations, including national treatment.[302] In other words, a more grounded, less open-ended meaning for this term serves better not only to construe procurement's meaning in Chapter 10 but also to facilitate implementation of the term's use in other parts of the treaty.

231. This reading of the term "procurement", thus, should apply to the term's meaning in Article 1108(7)(a). The limitations on liability in Article 1108 are specific exceptions to general obligations under NAFTA. The meaning of a term that appears in more than one part of a legal document, specifically (but not exclusively) a treaty, should not vary unless there is a direction to alter the term's meaning or clear reason for giving the term different interpretations in different parts of the document.

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298 NAFTA Articles 1011, 1013, 1016.

299 NAFTA Article 1015.

300 NAFTA Article 1017.

301 See *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at paras 71–74 (**CL-113**). See also *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/R, *Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS426/AB/R, Reports of the Appellate Body, May 6, 2013, at para 5.59 (reversing the Dispute Resolution Panel's conclusion respecting the equivalence of "government purchase" and "government procurement" under Article III:8(a) of the GATT).

302 See *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at paras 71–74 (**CL-113**).

232. The Parties to the arbitration have not provided reasons why the meaning of the term "procurement" (or its equivalents in other authentic languages for NAFTA) should differ in distinct provisions of the treaty. Repetition of the phrase that one provision (Article 1108(7)) constitutes a "carve-out" while the other provisions (of Chapter 10) constitute a "carve-in" does not, for me, amount to more than a semantic juxtaposition of the appearance of "procurement" within the treaty; the opposed characterizations of the provisions are not, in my view, accompanied by the sort of substantial analysis needed to support giving different meanings to the term in its appearances within a single treaty.

233. As already noted, it also is the case that many of the arbitral decisions that are invoked for the proposition that "procurement" in Article 1108(7)(a) must have a broad meaning would fit comfortably within an interpretation of that term that is narrowed to fit the requirement of more formal procedures as provided in Chapter 10.[303] For example, the *ADF* arbitration, which did much to set the pattern for later interpretations of the term "procurement" in Article 1108(7)(a), involved precisely the sort of formal and regularized process of government acquisition of goods and services that is comprehended by Chapter 10.[304]

234. Moreover, for any procurement subject to Chapter 10's requirements, NAFTA imposes a separate "national treatment" obligation that essentially serves as a stand-in, or replacement, for the national treatment requirements of Article 1102.[305] Given that Article 1108(7)(a) defines an exception to otherwise applicable obligations, it seems most plausible that the exception would apply where the treaty incorporated separate but similar obligations. This approach would minimize potential conflict between two similar provisions and also would minimize the extent of departures from important trade- and investment-protective provisions in the treaty. Although this is not a conclusive basis for construing Article 1108(7)(a)'s meaning, I believe that it is a better basis than offered by other proposed interpretations.

235. Finally, in this instance, the burden lies on the Respondent to establish the exception just as it lies on the Claimant to establish the affirmative case of a violation of the treaty. The allocation of burdens of persuasion logically extends as well to persuasion regarding the meaning of relevant treaty language. I conclude that the Respondent, which bears that burden in respect of Article 1108(7), has not provided a convincing reason to expand the interpretation of "procurement by a Party" in Article 1108(7)(a) to encompass acts not covered by Chapter 10,

[303] See *supra,* at Paragraphs 220–223.
[304] *ADF Group Inc. v. United States*, Case No. ARB(AF)/00/1, Award, January 4, 2003, at paras 145–159 (**CL-130**).
[305] NAFTA Article 1003.

nor has the Respondent, in my judgment, adequately articulated a reason to treat the term as departing from acquisition of goods and services through the sort of formal and regularized processes that generally are associated with government procurement.

2. Applying 1108(7)(a)

236. The Respondent claims that three measures—(a) the $20 million Land Purchase Agreement, (b) the Outreach Agreement, and (c) payments made for silviculture under the FULA—constitute procurement.[306] In the Respondent's submission, each of these measures involved an exchange whereby GNS "paid money and received [something of value] in return".[307] As discussed below, in response to the Claimant's arguments, the Respondent also submits that, to the extent PWCC and PHP received payments from GNS that were in excess of the value of goods and services provided, these measures constituted subsidies or grants which also would be excluded from liability under Article 1102.[308]

237. The Claimant disputes these claims, arguing that none of these measures falls within Article 1108(7)'s scope *either* as procurement by a Party within the meaning of Article 1108(7)(a) or as a subsidy or grant appropriately excluded under the terms of Article 1108(7)(b).[309]

238. The Tribunal's Award concludes that all three measures claimed by the Respondent should be excluded under the terms of Article 1108(7)(a),[310] although it excepts payments for stumpage under the FULA from this decision.[311]

239. I agree that that each of these measures has some attributes necessary to invocation of the exception under Article 1108(7)(a)—notably, each of the measures asserted by the Respondent to fall within the procurement exception does involve both a payment from the government and receipt of some item of value, whether a tangible good (as in the Land Purchase Agreement) or services (as in the Outreach Agreement and FULA).[312] Only one of

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306 Respondent's Counter-Memorial, at paras 230–234.
307 Respondent's Counter-Memorial, at paras 230–232, 234; Respondent's Rejoinder Memorial, at paras 68, 87.
308 Respondent's Counter-Memorial, at paras 232–234, 236; Respondent's Rejoinder Memorial, at paras 65–68, 87. See discussion *infra*, at Paragraph 243.
309 Claimant's Memorial, at para 228; Claimant's Reply Memorial, at para 276. The Claimant also asserts that the Respondent's failure to provide specific information on expenditures under parts of its package provided for PWCC in respect of its acquisition of the PHP Mill precludes determination whether the matter should be analyzed under procurement or subsidies considerations. See Claimant's Reply Memorial, at paras 309–310.
310 See Award, at paras 392–410.
311 See Award, at para 411.
312 Respondent's Counter-Memorial, paras 230–232, 234; Respondent's Rejoinder Memorial, at paras 68, 87.

these measures, however, meets the requirements I conclude are needed to qualify for Article 1108(7)(a)'s exclusion from liability.

240. I concur in the Tribunal Award's discussion respecting the Land Purchase Agreement's relation to the exception for procurement. Although land purchases are not typically thought of as government procurement, as the Award explains, the purchases at issue here fall within the scope of the Award's interpretation of the meaning of Article 1108(7)(a) and also constitute acquisition of a good in exchange for a fixed payment that meets the terms of both formality and regularity consistent with the interpretation of "procurement by a Party" that I advanced in the *UPS* decision and restated above in this Separate Statement.[313]

241. I do not, however, find that the other measures—the Outreach Agreement and parts of the FULA accepted by the Tribunal's Award as constituting "procurement by a Party"—meet the requirements of Article 1108(7)(a). Neither of these measures has the combination of regular procedures for procurement of specifically defined services for set prices nor the requisite formality of decision-making to constitute activities that would fall within the exclusion from liability represented by Article 1108(7)(a).

242. In this regard, consider the difficulty the record before us presents in fixing what has been bought by GNS in more than general terms. The Claimant and the Respondent have offered differing views of the value of each of the features addressed in the Outreach Agreement and the FULA.[314] Statements from both parties (including witness statements) respecting the valuation of specific items are of a conclusory nature. None of the assessments of the value of goods or services is supported by specific, critically detailed evaluation of the components of value.

243. The Claimant, for example, notes that under the Outreach Agreement, [redacted][315] but the Claimant also states that [redacted][316] The Respondent contests these claims,

[313] See Award, at paras 383–390. See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at paras 159–160 (**CL-113**), and discussion *supra*, at Paragraphs 227–235.

[314] Claimant's Memorial, at paras 94–98, 219; Claimant's Reply Memorial, at paras 309–310; Respondent's Counter-Memorial, at paras 232–234; Respondent's Rejoinder Memorial, at paras 66–68; Witness Statement of Julie Towers, April 17, 2019; Rejoinder Witness Statement of Julie Towers, March 4, 2020.

[315] Claimant's Memorial, at para 94, referring to [redacted] (**C-206**).

[316] Claimant's Memorial, at para 94.

[redacted][317] [redacted] [redacted][318] The Claimant asserted that payments by GNS to PHP under the Outreach Agreement for [redacted]" fall outside the scope of procurement and protested that it had sought information from the Respondent to facilitate better calculation of amounts attributable to specific activities.[319] Even if the information sought by the Claimant could have led to a more reliable calculation of the value of individual parts of the Outreach Agreement, it is unlikely that those calculations would have resolved arguments over these values.

244. Further underscoring the lack of clear, formal, regularized procurement processes in connection with these measures, submissions from both the Claimant and the Respondent posit *either* that the activities and tangible items provided by PHP and PWCC pursuant to impugned arrangements with GNS are worth what is being given by the Government as payment *or* that the Government is providing funds in excess of those values.[320] Whether these positions reflect strategic choices by the parties or sincere difficulties with concrete valuations, they are at odds with the sort of characterizations that should be readily provided with respect to routine government procurements. This difference between the situation that obtains here and, in contrast, with the formality and regularity of routine government procurements reinforces the practical importance of a clearer definition of procurement by a Party than is advocated by the Respondent and accepted in the Award.

C. SUBSIDIES OR GRANTS PROVIDED BY A PARTY

245. In my judgment, similar considerations respecting the requisites for exclusion from liability—related to both clarity and consistency—should apply to interpretation of Article 1108(7)(b). The following sections address, first, that provision's interpretation and, subsequently, its application.

[317] Respondent's Counter-Memorial, at para 131, citing [redacted] (**C-206**).
[318] Respondent's Counter-Memorial, at para 131; Rejoinder Witness Statement of Julie Towers, March 4, 2020, at paras 5–8.
[319] Claimant's Reply Memorial, at para 310.
[320] Claimant's Memorial, at para 228; Claimant's Reply Memorial, at para 276; Respondent's Counter-Memorial, at paras 232–234, 236; Respondent's Rejoinder Memorial, at paras 65–68, 87.

1. Interpreting Article 1108(7)(b)

246. I agree with the Tribunal's Award taking as its starting point the understanding that, as with consideration of the meaning of NAFTA Article 1108(7)(a)'s exception for state procurement, consideration of Article 1108(7)(b)'s exception for state "subsidies or grants" is guided by VCLT Article 31 (although, as noted below, I do not subscribe to all of the inferences drawn from this understanding). Article 31 directs that interpretation of treaty terms must be based on *both* the ordinary meaning of the terms *and* their use in the context of NAFTA along with its understood purposes to expand trade and investment within North America. I depart from the Award, however, in my reading of what the term "subsides or grants" means as used in Article 1108(7)(b).

(a) Interpreting "Subsidies or Grants"

247. As with "procurement", NAFTA does not expressly define the terms "subsidies" or "grants". Article 1108(7)(b) does declare that these terms include "government supported loans, guarantees and insurance". Those terms, likewise, are not specifically defined, either in the general definitions provided in Chapter 2, the specific provision on export subsidies for agricultural products in Article 705, or in Article 1108(7)(b) itself.

248. The Award considers that the absence of a more precise definition of these terms along with the absence of an explicit reference to other provisions of NAFTA or to other treaties indicates that the terms of Article 1108(7)(b) confirm its view that the provision is intended to comprehend broad meanings and not to incorporate limitations on those meanings associated with provisions defining or implementing regulations of the items mentioned in Article 1108(7).[321] I disagree with the Award's discussion on this point.

(b) Context and Purpose: One Purpose or More?

249. Much of the Award's reasoning respecting the meaning of the term "subsidies or grants" in Article 1108(7)(b) rests on the assumption that this provision must be interpreted by reference to the NAFTA Parties' purpose of exempting subsidies from disciplines such as national treatment that are otherwise applicable under NAFTA.[322] The Award first declares: "NAFTA specifically does not include disciplines on subsidies, and the derogation at Article 1108(7)(b)

[321] See Award, at paras 415–417.
[322] See Award, at paras 416, 420.

should be interpreted in that light".[323] Then, after discussing dictionary definitions and other evidence that is at best ambiguous respecting the precise meaning of Article 1108(7)(b)'s exclusion, the Award states that: "the object and purpose of Article 1108(7)(b), as discussed above, is to permit nationality-based preferences in relation to subsidies and grants; which is the opposite of seeking to discipline subsidies".[324]

250. In effect, the Tribunal's Award begins with the predicate that the purpose of Article 1108(7)(b) was to create a broad exemption of subsidies from NAFTA discipline, and—having found that to be its purpose—the Award concludes that the exemption must be construed broadly to give that purpose its effect.[325] This circular reasoning, in my view, hardly constitutes a basis on which to resolve a difficult issue of interpretation. If the reasoning is based on the fact that Article 1108(7)(b) excepts *some* governmental actions from liability, that thought does not axiomatically require that this exception apply broadly to a large array of governmental actions. Article 1108(7)(b) may create exceptions to what is prohibited by other NAFTA provisions, but that fact is not equivalent to a bold directive that those other provisions should be severely limited in scope—which would be the effect of creating a broad exception to them.

i. Relation to Other Provisions and Agreements

251. In addition to the decisive weight given to this broad construction of Article 1108(7)(b)'s purpose, the Tribunal's Award makes two other declarations that are relied on to determine the clause's meaning. First, the Award determines that the NAFTA Parties knew that the term would be interpreted through VCLT Article 31, so they must have assumed that any relation to other parts of NAFTA or to other agreements would not be relied on for interpretation of NAFTA in the absence of express statements to that effect in the document.[326] Second, the Award states that other international agreements, such as the WTO ASCM, "come[] with "baggage" […] that cannot properly be imported into the interpretation of NAFTA Article 1108(7)(b)".[327]

252. As explained above with respect to the definition of "procurement by a Party", neither VCLT Article 31 nor other accepted bases for interpretation of legal texts requires every related

[323] See Award, at para 416.
[324] See Award, at para 420.
[325] See Award, at para 420.
[326] See Award, at para 415.
[327] See Award, at para 420.

provision or every element of a legal rule to be expressly stated in order for it to be understood as part of a provision's meaning.[328] Where the relation among provisions helps clarify a provision's meaning, it is preferable to rely on that as a basis for interpretation than to lean on a circular derivation of assumed meaning from an assumed—and textually unstated—purpose.

253. In other words, the Award reads as if the purpose it assigns to Article 1108(7) is stated in the text, while the relation of the Article to other NAFTA and related provisions is not. Certainly, the first part of that assumption is not correct. The understanding that Article 1108(7) was intended to permit *some* acts by NAFTA Parties that are at odds with a strong version of the national treatment norm is undeniable. But that understanding also is *not* expressly stated in the text. In this respect, it is entirely on par with implications respecting the relation of this provision to other parts of NAFTA and other international agreements that might be implicated in NAFTA's terms.

254. Further, NAFTA Article 1902 specifically provides that each NAFTA Party retains the right to apply its own antidumping and countervailing duty laws to goods of the other Parties:

> Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.[329]

255. This reservation is at odds with the notion that NAFTA comprehended an open field for a State to provide whatever preference it chose for subsidies to its own investors and investments. The entire point of reserving the prospect of the NAFTA Parties' application of countervailing duty (anti-subsidy) law is to provide a mechanism for penalizing certain subsidies of just that sort.[330]

256. In addition, this reservation also implicates the definitions respecting subsidies contained in the WTO ASCM, which provides the background rules implemented by national countervailing duty laws.[331] With respect to the "baggage" that accompanies other NAFTA

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[328] See *supra*, at Paragraphs 201–202, 213–215, 227–234.

[329] NAFTA Article 1902(1).

[330] See WTO, *Agreement on Subsidies and Countervailing Measures* (**RL-193**). See also Bruce A. Blonigen, The Effects of NAFTA on Antidumping and Countervailing Duty Activity, (2005) 19 *World Bank Economic Review* 407 (explaining the continued vitality of domestic antidumping and countervailing duty proceedings in the NAFTA region).

[331] For example, the United States changed its rule on injury from subsidies to make domestic countervailing duty law more congruent with GATT (later WTO) rules. See Trade Agreements Act of 1979, Pub. L. 96-39, §701(a), 98 Stat. 144, 151 (July 26, 1979). The relation between domestic and international law is

provisions and agreements on related matters, such as the WTO's subsidies regime, that characterization is simply a way of saying that each internationally agreed regulation of a practice has definitional requisites and rules for what is permitted or prohibited. Those, of course, are the essential attributes of the agreements and give context to the terms at issue.

257. Nothing about that observation precludes one agreement from relying on the understanding that, because another agreement will regulate something (such as the extent to which a government subsidy is permitted), the *already regulated* matter does not need to be separately regulated in *each* international accord. If the regulated practices were merely identified in an *ipse dixit* declaring them to be prohibited, that would hardly constitute a regime that could be relied on to assess which practices merit what sort of treatment under which specific conditions. "Baggage", thus, is far more appropriately treated as *qualifying* than disqualifying another accord as a matter to be depended on as a substitute for establishing another regulatory mechanism.

ii. Reading Text: Terms and Context

258. To be sure, the Tribunal's Award accurately observes that "subsidies" and "grants" are listed in Article 1108(7)(b) as separate items, while "grants" could be subsumed under the term "subsidies" in the ASCM.[332] I agree with the Tribunal's Award that, if these are understood in NAFTA as separate types of State activity, that would suggest that "subsidies" has a broader scope in the WTO regulatory regime than in NAFTA.

259. At the same time, however, the phrasing of the provision obscures whether the terms "subsidies" and "grants" in fact are given distinctive meanings, as the qualifying list of examples is not divided between them but appended to both, referring to "subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance".[333] A list of examples for two terms suggests that they were understood by the drafters as overlapping or coextensive, rather than distinct.

260. Further diminishing a distinction between NAFTA and the ASCM, two widely accepted canons of interpretation—*noscitur a sociis* and *ejustem generis*—suggest that the terms used

illustrated as well by the fact that nations signatory to the WTO ASCM (including the US and Canada) engage in dispute resolution under the WTO with respect to terms and application of domestic CVD laws. See Francois-Charles Laprévote & Sungjin Kang, Subsidies Issues in the WTO—An Update, (2011) 10 *European State Aid Law Quarterly* 445.

[332] See Award, at para 421.

[333] NAFTA Article 1108(7)(b).

in Article 1108(7)(b) all have similar meanings and present related means of providing direct financial benefit from government to another party.[334] *Noscitur a sociis* suggests that any ambiguity in the meaning of "subsidies" should be resolved by interpreting it as of similar kind to the other terms in the same list.[335] *Ejustem generis* suggests that so far as other terms in the list have more precise meanings, "subsidies" should be interpreted in light of those precise meanings to have similar character.[336] Both canons help resolve the difficulty that the Award supposes exists if the meaning of Article 1108(7)(a) is interpreted as related to that of the ASCM. Given this construction, it is entirely reasonable to read Article 1108(7)(a) in that light as a limited, not an expansive, exception to Article 1102 liability, with the list of included items giving greater clarity and more limited definition to the meaning of "subsidies" in this context.

261. That understanding is implicit in the passage from my Separate Statement in *UPS* that is cited by the Claimant in its Pre-Hearing Memorial, which in turn is quoted by the Tribunal's Award.[337] After stating that "the scope of government activity that has the effect of increasing returns to a particular business is too vast for that of itself to bring all such activity within the ambit of Article 1108(7)",[338] the Statement referenced by the Claimant states:

> Article 1108(7)(b) does not appear intended to cover the entire, broad sweep of government activity that might reduce the costs or increase the benefits of a particular business—what might in more colloquial terms be referred to as a "subsidy." Instead, the Article appears intended more narrowly to reach only self-conscious and overt decisions by government to expressly convey cash benefits to a particular business, enterprise, or activity. The list of government actions that come within the scope of the provision is not exclusive, but it is certainly suggestive.[339]

262. Although the word "cash" in the quoted excerpt might better have been rendered as "direct financial benefits", nothing in the Tribunal's Award persuades me that the position taken in that Statement was ill-considered. Some grounding for the meaning of "subsidies or grants"

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[334] See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West Pub. Co. 2012) at 195–213.

[335] See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West Pub. Co. 2012) at 195–198.

[336] See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West Pub. Co. 2012) at 199–213.

[337] See Award, at para 417; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at paras 158–160 (**CL-113**); Claimant's Pre-Hearing Memorial, at paras 71–72.

[338] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 158 (**CL-113**).

[339] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 159 (**CL-113**).

is required if the error of overly expanding the meaning of those terms is to be avoided.

263. In addition to the explanation based on the language of the exception itself, the *UPS* Statement explains the logic behind the limited exception in Article 1108(7)(b):

> Decisions to provide direct, clear subsidies of the sort averted to in Article 1108(7)(b) typically have substantial political costs and, thus, are commonly subjects of intense debate. The evident belief in drafting the subsidies exception to NAFTA was that the political processes for evaluating considerations relevant to such decisions would guarantee public scrutiny and, if appropriate, discipline under WTO provisions for addressing trade-distorting subsidies.[340]

264. The Tribunal's Award detours from its discussion of the meaning of Article 1108(7)(b) to disagree with that part of the *UPS* Statement. It declares that "references to 'overt decisions' and the 'express' conveying of financial contributions that are subject to political processes as well as public debate and scrutiny do not match the reality of the many methods that different levels of government use to provide financial support to enterprises, which methods meet the ordinary meaning of 'subsidies'".[341]

265. Yet, the reality of governments using many methods to provide financial support to enterprises does not mean that NAFTA's exception for "subsidies or grants" of the sort listed in Article 1108(7)(b) excepts all of those means from NAFTA disciplines such as national treatment. As discussed above, the emphasis in the Tribunal's Award on the purpose of NAFTA Parties in retaining flexibility to provide advantages to domestic investors and investments free from the disciplines of NAFTA seems to me to lay excessive stress on the importance of that goal while diminishing the importance of other NAFTA goals such as promoting increased cross-border investment by protecting investors against certain distortions of economic competition.[342]

266. I conclude that the approach taken in the Separate Statement in *UPS* and further explained here better interprets the understanding encapsulated in NAFTA Article 1108(7)(b) than the approach taken by the Tribunal's Award in this case. In my judgment, the Award's approach builds its edifice on only one piece of the interpretive puzzle: the States' interest in limiting liability under NAFTA for national treatment violations committed through government subsidies. That approach ignores—or, at best, dramatically minimizes—contrary interests in limiting the scope of exceptions from certain disciplines and in coordinating the scope of those

[340] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 160 (**CL-113**).
[341] See Award, at para 420.
[342] See *supra*, at Paragraphs 247–250.

limitations with the operation of related international agreements.

267. For the reasons stated in this section, I dissent from the portion of the Tribunal's Award addressing the interpretation of Article 1108(7)(b).

2. Applying 1108(7)(b)

268. Despite disagreement with the Tribunal Award's analysis of the proper interpretation of the term "subsidies or grants" in Article 1108(7)(b), I do not dissent from the Award's treatment of several individual items defended as excludable by the Respondent. Specifically, measures that fit both parties' descriptions of items that are within Article 1108(7)(b) and also fall within the Tribunal's reading of the exclusion for "subsidies or grants" are: (1) the $40 million working capital loan; (2) the $24 million productivity loan; (3) the $1.5 million training grant; (4) the $1 million marketing grant; and (5) [redacted][343]

269. Each of these measures meets the requisites of being self-conscious and overt decisions by the Respondent expressly to convey direct financial benefits to a particular business (PWCC) in respect of its operation of a specific enterprise (the PHP mill). Each would qualify under either the interpretation of Article 1108(7)(b) set out above or the approach taken in the Tribunal's Award.[344]

270. [redacted] ("**Indemnity Agreement**") was not characterized by the Respondent as a subsidy, nor clearly characterized by the Claimant in that language, but it was plainly regarded by the Claimant as an effective subsidy to PWCC.[345] Although the Respondent asserted that the Indemnity Agreement was of no real value to PWCC,[346] [redacted][347]

271. Despite a lack of clarity in the Parties' descriptions of the Indemnity Agreement, the

[343] Claimant's Memorial, at paras 92–104, 219, 252–253; Respondent's Counter-Memorial, at paras 111, 225, 227; Respondent's Rejoinder Memorial, at para 64.
[344] See Award, at paras 424–432. See also *supra*, at Paragraphs 251–261
[345] See Claimant's Memorial, paras 42, 229–230, 276–280; Claimant's Reply Memorial, para 181, Respondent's Counter-Memorial, paras 136, 222–234, 238.
[346] Respondent's Counter-Memorial, para 136.
[347] See Claimant's Reply, para 181.

[redacted] The clear nature of the guarantee in the Indemnity Agreement and the inclusion of "insurance" as an example of what falls within the subsidies exception, in my view, satisfy the requirements of Article 1108(7)(b). For that reason, I also agree with the Award's treatment of this provision.

272. The Tribunal's Award notes that the Claimant has argued that PWCC received $1 billion in GNS's grant of authority for it to use tax losses to offset taxes on gains outside Nova Scotia.[348] It notes as well that the Respondent, although contesting the assertion that PWCC received a benefit from the ability to use tax losses to offset taxes, also characterized this as falling within the scope of Article 1108(7)(b)'s exception from liability.[349] The Award did not state a separate conclusion on this matter with respect to its inclusion or exclusion from Article 1108(7)(b), but the assimilation of this matter to the Award's discussion of government-supported loans more generally suggests the Award's conclusion that tax losses are excluded from liability.[350]

273. I do not view PWCC's ability to use tax losses to offset taxes as falling within the scope of the 1108(7)(b) exclusion—at least, not without further explication of its relation to the attributes required for this exception.[351] I do not find it necessary in the current posture of the case to examine further the details of the arguments respecting the magnitude of benefit to PWCC, but I would not treat it as excepted from liability to the extent that it is part of the ensemble of measures considered in their effect on the Claimant and its investments that are in like circumstances to PWCC's PHP mill.

274. In contrast, the municipal tax reduction for the PHP mill that was part of the agreement between PWCC and GNS,[352] subsequently confirmed by legislation,[353] in my view could fall within the scope of Article 1108(7)(b). Unlike the more ambiguous opportunity to benefit from tax loss offsets, the municipal measure has the attributes of express provision of direct financial benefit to PWCC. Although the record before us does not clearly resolve some issues

[348] See Award, at paras 426-427, fn. 892.
[349] See Award, at para 426, citing Respondent's Counter-Memorial, at paras 226, 318; Respondent's Pre-Hearing Memorial, at para 22, fn. 74; Hearing on the Merits and Damages, October 19, 2021, at 459:14–25.
[350] See Award, at para 427, citing Hearing on the Merits and Damages, October 19, 2021, at 415:19–25.
[351] See *supra*, at Paragraph 235 (discussing the evidentiary burden on the Respondent respecting this determination).
[352] See Claimant's Memorial, at paras 115, 219.
[353] See Claimant's Reply Memorial, at para 176.

respecting the actual implementation of this accord, its availability—akin to the Indemnity Agreement—should qualify as a subsidy or grant within the meaning of Article 1108(7)(b).[354]

3. Equitable Considerations: Estoppel and Self-Contradiction

275. Before leaving Article 1108(7), it is necessary to address the argument advanced by the Claimant, and rejected by the Tribunal's Award, that equitable considerations militate against acceptance of the Respondent's invocation of Article 1108(7)(b)'s exclusion of "subsidies and grants".

276. The Claimant's principal argument against the assertion that Article 1108(7) operates to insulate most of the impugned measures as subsidies (including some measures first claimed by the Respondent as procurements) is that the Respondent should not be heard to raise this argument after having made assertions in other fora that conflict with it. The Respondent should not, in the Claimant's words, "be permitted to 'blow hot and cold'—claiming in one forum that GNS provided no subsidies while, in another forum, asserting [that] subsidies were provided".[355]

277. The Respondent states that it has not denied that GNS' measures constituted subsidies and also states that, even if it had, it would not be prevented from claiming insulation against liability for the impugned measures by reason of Article 1108(7)(b).[356] The Respondent declares that the answers it gave and positions it took in other fora cannot be judged in this proceeding and urges that the only relevant bar to its reliance on Article 1108(7)(b) would be the doctrine of estoppel, which it claims can only be invoked when there is detrimental reliance on prior statements.[357]

278. Although the Claimant does assert harm from Canada's embrace of inconsistent positions in proceedings before different tribunals,[358] the point raised by the Claimant is not focused primarily on that harm. Instead, it is focused on principles of equity that require fair dealing. The Claimant frames this argument in these terms:

> Canada is not free, under the norms of good faith and self-

[354] See *supra*, at Paragraphs 235 (discussing the evidentiary burden on the Respondent respecting this determination).
[355] Claimant's Reply Memorial, at para 278.
[356] Respondent's Counter-Memorial, at paras 14, 236–239; Respondent's Rejoinder Memorial, at para 77, fn. 137.
[357] Respondent's Counter-Memorial, at paras 15, 240–244; Respondent's Rejoinder Memorial, at paras 72–80.
[358] Claimant's Reply Memorial, at para 280.

> contradiction in international law, to deny certain measures as subsidies so as to avoid proceedings against subsidies in two forums (an effort in which Canada failed), and then to claim the identical measures are subsidies in order to escape consequences of those measures.[359]

279. The dispute between the Parties on the question of equitable limits on Canada's ability to avail itself of the protections of Article 1108(7) revolves around three questions: (1) did the Respondent's statements in the WTO proceedings and the United States' countervailing duty proceedings contradict its statements in this arbitration proceeding? (2) if so, is there an equitable principle that prohibits such self-contradiction? (3) would any such principle prevent the Respondent's invocation of exclusions under Article 1108(7)?

280. Although rejecting the majority of the Respondent's arguments on this score, the Tribunal's Award finds that there has not been any contradiction by Canada respecting its characterization of its (and its province's) actions.[360] Understandably, having rejected the argument that the Respondent *in fact* took contradictory positions, it did not reach the other questions respecting the effect of taking contradictory positions.

281. I agree with much of the Award's reasoning explaining why the Respondent's arguments respecting statements made by the Respondent in other fora are unavailing, but I disagree with the Award's ultimate conclusion on the Respondent's denials that conduct challenged here constituted subsidies.

(a) Statements about Subsidies

282. The Claimant states that the Respondent's positions in two other fora contradicted its position with respect to subsidies in this proceeding. First, the Claimant states that, in its reporting to the WTO Subsidies and Countervailing Measures Agreement Committee for the period July 2011 to July 2013, Canada reported "nil" to the existence of GNS subsidies.[361] (Indeed, the Claimant notes that the Respondent reported "nil" to GNS subsidies over a longer period that extended from 2010 to 2016 in reports filed in 2013, 2015, and 2017.)[362] Second, the Claimant further states that in the countervailing duty investigation ("**CVD Proceeding**") before the

[359] Claimant's Reply Memorial, at para 280.
[360] See Award, at paras 436–460.
[361] Claimant's Memorial, at para 229; Claimant's Reply Memorial, at paras 277, fn. 418, referring to World Trade Organization, New and Full Notification Pursuant to Article XIV:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures–Canada, WTO Doc. G/SCM/N/253/CAN, July 1, 2013, section 12 (**C-021**). See also Claimant's Reply Memorial, at paras 283–285, fns. 426–428.
[362] Claimant's Reply Memorial, at para 285.

United States Department of Commerce ("**US DOC**") and US ITC, the Respondent defended itself against "any and all subsidy allegations".[363]

283. With respect to its reports to the WTO, the Respondent asserts that its report of "*nil*" subsidies by GNS should not be construed as a denial that GNS was providing subsidies to PHP and PWCC.[364] The Respondent also says that it fully informed the WTO about the subsidies GNS has provided to PHP and PWCC.[365] Finally, the Respondent urges that reports to the WTO on subsidies are not conclusive as to the legal status of reported measures and therefore are not relevant to the meaning of "subsidies" in other proceedings.[366]

284. Unlike the Tribunal, I am not persuaded by the Respondent's argument that a report of "*nil*" to a request to list any subsidies by GNS had no meaning. The Respondent urged that it had not denied the existence of the subsidy because no "such inference can be read from a simple reporting of the word 'nil'".[367] The Respondent also argued that the Tribunal cannot set aside its reading of Article 1108(7)(b) "for the sake of […] three letters in a separate agreement".[368] The Respondent further emphasized that the reports of subsidies that the Respondent makes to the WTO in respect of the SCM Agreement are products of a complicated process of compiling information from its provinces.[369]

285. I do not question the sincerity of the Respondent's answers in this proceeding, nor do I doubt the complexity of governmental processes that generate reports to other international bodies. Nonetheless, I conclude that the Respondent should be accountable for its clear denial that GNS did provide subsidies to PHP and PWCC.

286. The Respondent's denials were repeated over a period of years and were advanced to the very forum focused on and dedicated to addressing disputes respecting subsidies. The meaning of the "*nil*" reports is clear, and, contrary to the Respondent's arguments in this case and the Award's characterization of them,[370] I cannot read them as mere technical statements

[363] Claimant's Memorial, at para 229. The Claimant also refers to this proceeding in noting that the Respondent did not raise its Article 1108(7) defense in this arbitration until after the US DOC proceeding was closed. Claimant's Reply Memorial, at para 277.
[364] Hearing on the Merits and Damages, November 14, 2020, at 1243:10–1248:11.
[365] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 85; Hearing on the Merits and Damages, November 14, 2020, at 1244:2–5.
[366] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 84, citing WTO, *Agreement on Subsidies and Countervailing Measures* (**RL-193**).
[367] Hearing on the Merits and Damages, November 14, 2020, at 1246:7–13.
[368] Hearing on the Merits and Damages, November 14, 2020, at 1246:15–20.
[369] Respondent's Rejoinder Memorial, at para 85; Hearing on the Merits and Damages, November 14, 2020, at 1247:16–1248:9.
[370] See Award, at paras 456–457.

respecting a small subset of the measures at issue here.

287. Accepting the Respondent's assertions, the Tribunal's Award suggests that the Respondent has been consistent in its acceptance that the GNS measures were subsidies.[371] The Award declares that the Respondent's statements respecting whether the GNS measures were subsidies were "uncontradicted," quoting the Respondent's assertions that it "did not dispute a number of the elements that led to the DOC's Final Determination that some of the measures at issue in this case were countervailable subsidies under U.S. domestic law" and that "NAFTA Chapter Nineteen and WTO Proceedings […] dealt with a narrower range of issues" than are involved in the proceedings here.[372]

288. The Respondent's statements, however, even if uncontradicted in the narrow sense of not being precisely refuted for what they say, elide the central question at issue here. The Respondent says that it "did not dispute a number of the elements" that led the US DOC to conclude that Canada was providing, through its province Nova Scotia, subsidies that violate US law and Canada's international obligations. That does not say that it admitted those elements to be subsidies, much less that it did not dispute *any* of the contested elements. Similarly, the Respondent's statement that proceedings before WTO dispute resolution tribunals dealt with a subset of subsidy issues does not state that Canada did not deny that other measures were subsidies.

289. As befits good lawyering, the Respondent's statements are carefully framed. But they do not directly refute the Claimant's assertion that Canada denied its provision of subsidies to PWCC in respect of its purchase and operation of the PHP mill.

290. Further, looking at the proceedings where other nations contested the "nil" declaration respecting subsidies provided during the time period at issue here produces a different picture than that painted by the Respondent and the Tribunal's Award. The minutes of the first meeting of the WTO ASCM Committee addressing Canada's "nil" declaration contains the following entry:

> 61. The US raised concern the provincial government of Nova Scotia in Canada intended to provide significant government assistance to Port Hawkesbury Paper, a manufacturer of supercalendered paper located in Nova Scotia, because of the commercial impact that such assistance would have on the depressed market for printing paper in North America. This Mill had been shut down by its previous owner and was being restarted under new ownership with the help of a

[371] See Award, at paras 456–458.
[372] Award, at para 457, citing Respondent's Rejoinder Memorial, at para 83.

> substantial provincial government assistance package. Many of the measures taken by the provincial government might constitute actionable subsidies. The assistance package was particularly disturbing because it would keep uneconomic capacity on line. The US invited Canada to provide details regarding each of the elements of the assistance package that had been or would be provided to this company.
>
> 62. The EU shared the US concerns.
>
> 63. Canada stated that it was working with the provincial government on replies to the questions that the US had sent regarding this issue and expected to provide such replies in November 2012. Canada was ready to have further dialogue on this matter with interested Members.[373]

291. The minutes of the meeting do not in any way indicate that Canada acknowledged that it was providing subsidies or even that it was providing assistance that might be considered to be subsidies. The minutes do not show that Canada retracted or qualified its "nil" statement respecting provision of subsidies.

292. Similarly, the minutes of the next meeting to take up this matter provide evidence of continued US and EU concern, but not evidence that Canada acknowledged its provision of subsidies or qualified its "nil" statement in any way:

> Certain possible government assistance provided to a pulp and paper mill in Nova Scotia, Canada - Item requested by the US and EU
>
> 128. The US noted its continued serious concern over a provincial government assistance package given to a paper mill in Port Hawkesbury, Nova Scotia, Canada. The assistance package at issue was given after the paper mill went bankrupt and was sold to a new owner. In the press, the new owner made it clear that, absent a certain level of government assistance, the plant was not economically viable and would not be re-opened. Negotiations with the Provincial Government resulted in what appeared to be a very generous assistance package that led to the re-opening of the plant and the start-up of production, sales and exports.
>
> 129. As had been feared at the Committee's previous meeting, the production and sales of this plant had begun to have serious negative consequences in the market for U.S. paper producers. […] All of this had happened after the receipt of a government assistance package that the new owner admitted in the press was needed for the plant to survive. But for the receipt of the government assistance package, it appeared that the plant at Port Hawkesbury would not be in production. The US urged the Canadian Government and the Provincial Government of Nova Scotia to re-consider this generous support package […]
>
> 130. The EU requested information from Canada on the aid package reportedly given to the Port Hawkesbury paper mill by the provincial government of Nova Scotia. The EU presumed that this scheme

[373] WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 23 October 2012, January 10, 2013, WTO Doc. G/SCM/M/83, at paras 61–63 (**R-078**).

> would be notified in Canada's 2013 new and full subsidy notification.
>
> 131. Canada stated that it took the concerns seriously and reiterated that the circumstances of the sale of the Port Hawkesbury mill and its re-opening were a matter of public record in the context of court-sanctioned creditor protection proceedings in which US creditors and other stakeholders had figured prominently in the decision-making. Canada indicated that the Federal Government and the Government of Nova Scotia had worked with the US and the EU to resolve this issue and had already provided responses to the US government's first set of questions in November, and to a second set of questions in February. It had provided as much information as possible while respecting the business confidentiality of the information.[374]

293. The Respondent argues that, whatever meaning would attach to its "nil" reports to the WTO standing alone, in context they should not be considered to be denials that the GNS measures were subsidies. That is, the Respondent says, because the Respondent engaged in discussions with trade partners, including the United States, respecting the GNS measures at issue and revealed the nature of the measures to trade partners, those steps should erase its plain denial that these measures were subsidies.[375] I do not find this argument persuasive.

294. What the record shows is some (very slight) degree of engagement by the Respondent after trade partners questioned the measures taken by GNS, with those partners strongly expressing concerns that the measures constituted subsidies that violated SCM Agreement undertakings. In my judgment, this in no way reverses the Respondent's clear declaration in the WTO-ASCM forum that GNS had *not* given subsidies. As is evident from the passages quoted above, the materials the Respondent cites to primarily consist of its trading partners' expressions of displeasure at the Respondent's apparent violation of WTO subsidy strictures and at least one request from a major trading partner that the Respondent correct its report denying the subsidy.[376]

295. Nor does the fact that the Respondent, on such inquiries, provided a description of *some* of the GNS measures constitute an admission that the GNS measures constitute subsidies or a retraction of its "nil" statements to WTO-SCM.[377] Indeed, the Respondent's filing disclosing

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[374] WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 22 April 2013, August 5, 2013, WTO Doc. G/SCM/M/85, at paras 128–131 (**C-353; R-079**).

[375] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 84; Hearing on the Merits and Damages, November 14, 2020, at 1243:23–1244:5.

[376] WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 22 April 2013, August 5, 2013, WTO Doc. G/SCM/M/85, at paras 128–131 (**C-353; R-079**); WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 23 October 2012, January 10, 2013, WTO Doc. G/SCM/M/83, at paras 61–63 (**R-078**).

[377] WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 22 April 2013, August 5, 2013, WTO Doc. G/SCM/M/85, at para 131 (**C-353; R-079**); WTO, Committee on

terms of GNS measures, responding to USTR questions, emphasizes the value of the measures to GNS as an investment rather than an admission that the measures constitute subsidies.[378]

296. The Respondent further argues that its position respecting subsidies in WTO-ASCM processes are not to be taken as conclusive respecting the legal status of reported measures and that any position taken in that forum is not relevant to the meaning of "subsidies" in other proceedings.[379] The Respondent quotes from Article 25.7 of the WTO's SCM Agreement: "Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself".[380] In the Respondent's view, "[i]f the notification of a measure does not prejudge its nature, the lack of notification cannot have that effect either".[381]

297. The Tribunal's Award rightly states that this argument is not persuasive, noting moreover that the provision quoted by the Respondent does not serve its argument. Instead, it undercuts the Respondent's argument. The language of the SCM Agreement Article 25.7 prompts parties to the SCM Agreement to disclose subsidies without being bound to any inference that the subsidies violate ASCM strictures, which proscribe only some subsidies. In other words, the quoted language should encourage broader, not narrower, disclosure of subsidies. The Respondent's denial of subsidies in that forum, thus, should be taken especially seriously.

298. The Claimant also asserts that the Respondent denied that impugned GNS measures were subsidies when those measures were challenged in U.S. CVD Proceedings before the US DOC and US ITC.[382] Given the clarity of the denial in the context of the Respondent's ASCM filings, I do not find it necessary to address that additional assertion of contradiction.

(b) Self-Contradiction

299. The Claimant asserts that the Respondent, having previously denied that impugned GNS measures constitute subsidies, is prevented by the principle against self-contradiction, from

Subsidies and Countervailing Measures, Minutes of the Regular Meeting held on 23 October 2012, January 10, 2013, WTO Doc. G/SCM/M/83, at para 63 (**R-078**).

[378] [redacted] (**C-212**).

[379] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 84, citing WTO, *Agreement on Subsidies and Countervailing Measures* (**RL-193**).

[380] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 84, citing WTO, *Agreement on Subsidies and Countervailing Measures* (**RL-193**).

[381] Respondent's Counter-Memorial, at para 239.

[382] Claimant's Memorial, at para 229. See also Claimant's Memorial, at para 149 (describing Joint Defense Agreement between Canada and companies implicated in investigation, excluding Resolute).

asserting the opposite in this proceeding.[383] The Claimant further declares that this principle is part of the long-accepted obligation of good faith.[384] In the Claimant's view, this principle against self-contradiction applies even where a narrower application of estoppel rules would not, specifically by not requiring a showing of detrimental reliance.[385]

300. The Respondent argues to the contrary that the Claimant's proposed test is incorrect.[386] The Respondent asserts that the estoppel doctrine requires detrimental reliance as a condition for its operation.[387] The Respondent asserts that there is no separate principle against self-contradiction in international law.[388]

301. There is some merit to each contention. As the Respondent argues, there is a line of cases applying a rule for estoppel that requires several conditions including either that the complainant relied on a prior, contrary position to its detriment or that the entity that has changed positions has received a benefit from its inconsistency.[389] Many of these cases concern matters that raise questions within the special competence of State determination on relations between States. In such matters, it may be more critical to limit review by others, whether for consistency or other grounds, though even these judgments are contested[390] and may differ depending on the length of time over which a determination has been in place.[391]

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383 Claimant's Memorial, at para 230; Claimant's Reply Memorial, at paras 278–280.

384 Claimant's Reply Memorial, at paras 280, 292, 301, 302.

385 Claimant's Reply Memorial, at paras 279–280, 291–301.

386 Respondent's Counter-Memorial, at para 240.

387 Respondent's Counter-Memorial, at para 240, referring to James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 8th ed., 2012) at 420 (**RL-124**).

388 Respondent's Counter-Memorial, at para 240; Respondent's Rejoinder Memorial, at para 79.

389 Respondent's Counter-Memorial, at para 240, referring to *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge LLC*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, at para 261 (**RL-126**); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, October 14, 2016, at para 8.47 (**RL-127**); *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, March 30, 2010, at para 353 (**RL-128**); *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, at paras 159–160 (**RL-129**); *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, September 7, 2005, at para 168 (**RL-130**); *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, November 27, 2000, at para 20.2 (**RL-131**); and *Československa obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, at para 47 (**RL-132**).

390 Iain C. MacGibbon, "Estoppel in International Law" (1958), 7 International and Comparative Law Quarterly 468, at 469, 473–475 (**CL-204**).

391 Respondent's Counter-Memorial, at para 240, referring to *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgement, May 23, 2008, ICJ Reports (2008) 12, at para 228 (**RL-133**). Compare *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening)*, Judgment, June 11, 1998, ICJ Reports (1998), at para 275 (**RL-134**).

302. At the same time, cases stretching back over a century embrace a general principle against self-contradiction, including cases not involving detrimental reliance.[392] Some expressly note that the doctrine of estoppel is related to the broader principle against self-contradiction.[393] Estoppel is a specific application of the principle in law derivative of English jurisprudence.[394] Decisions of international tribunals, however, do not uniformly hew to the requisites of English-law estoppel and at times have specifically distinguished the two. For example, in *Chevron Corp. v. Republic of Ecuador*, the tribunal stated:

> 7.106. Applying Article 26 of the VCLT and customary international law, the Tribunal decides that the Parties are bound to act in good faith in the exercise of their rights and the performance of their respective obligations under the Arbitration Agreement […]. That duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice […] to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.
>
> 7.107. The Tribunal here bases its decision on the general principle of good faith under international law applied to the Parties' obligations under their Arbitration Agreement, rather than upon any specific doctrine derived from the Anglo-Saxon concept of equitable estoppel by conduct or representation. […] [A]lthough estoppel is consistent with the general principle of good faith, it is a different doctrine under international law. As Lord McNair wrote in regard to *The Fur Seal Arbitration* [395], that decision did not involve "*estoppel eo nominee*", but a broader principle precluding a State, in his words, from 'blowing hot and cold'; i.e. the principle of good faith.[396]

303. Certainly, there is reason for concern about excessively broad applications of restraints on consistency for State decisions and positions taken. Too broad an application of requirements of good faith can interfere with the functioning of States in making important decisions on matters of public policy. But State freedom to frame, and to change, positions on matters of

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[392] *Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Concurring Opinion of Vice-President Alfaro, June 15, 1962, ICJ Reports 1962, 39, at 39 (**CL-136**); *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, November 18, 1960, ICJ Reports 1960, 192, at 192 (**CL-207**); *The S.S. Lisman (United States v. United Kingdom)*, Award, October 5, 1937, 3 R.I.A.A. 1767, 1790 (**CL-202**); and *Award between the United States and the United Kingdom relating to the rights of jurisdiction of the United States in the Bering's sea and the preservation of fur seals*, Ad hoc, Award, XXVII R.I.A.A. 263, August 15, 1893 (**CL-200**). See also James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 9th ed., 2019) at 407 (**CL-244**).

[393] *Chevron Corp. v. Republic of Ecuador*, UNCITRAL, Second Partial Award on Track II, August 30, 2018, at paras 7.106–7.107, 7.112 (**CL-239**).

[394] Iain C. MacGibbon, "Estoppel in International Law", (1958) 7 International and Comparative Law Quarterly 468, at 469, 471–473 (**CL-204**).

[395] *Award between the United States and the United Kingdom relating to the rights of jurisdiction of the United States in the Bering's sea and the preservation of fur seal*s, Ad hoc, Award, XXVII R.I.A.A. 263, August 15, 1893 (**CL-200**).

[396] *Chevron Corp. v. Republic of Ecuador*, UNCITRAL, Second Partial Award on Track II, August 30, 2018, at paras 7.106–7.107, 7.112 (**CL-239**).

public policy is distinguishable from a requirement that States adhere to consistent positions taken in legal proceedings. In such proceedings, it is reasonable to insist on a measure of consistency rather than to permit States to take positions of convenience even if contradictory.

304. A requirement of good faith dealing in matters that are subjects of formal proceedings is a central feature of numerous legal principles, including due process of law.[397] It provides a basis for taking seriously the representations of States, and also for limiting the scope of judgments that are made during legal proceedings, when unbiased information may be especially difficult to obtain.[398]

305. I conclude that the Claimant has properly identified a basis in international law for requiring consistency sufficient to indicate good faith in dealing with formally undertaken international obligations.

(c) Application of Principle Against Self-Contradiction

306. The question remains whether the Respondent should be barred from pressing its contentions respecting exclusion of impugned measures under NAFTA Article 1108(7)(b). Even if there is a general principle against self-contradiction, the Respondent urges that it is not applicable where the inconsistency derives from representations to a different entity in a different forum concerned with enforcement of obligations under a different international instrument.[399]

307. The Respondent's arguments on this score largely consist of reprising its denial of inconsistent representations or of urging a very limited concept of the principle against self-contradiction. The Respondent's one additional argument is that the principle against self-contradiction should not be applied to statements to different tribunals under different legal instruments.[400] That argument proves too much. It essentially eliminates the restriction against self-contradiction in all but the most extreme cases of conscious misleading of international legal process in a proceeding before a single tribunal.

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[397] Claimant's Reply Memorial, at para 293, citing *Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Concurring Opinion of Vice-President Alfaro, June 15, 1962, ICJ Reports 1962, 39, at 39 (**CL-136**); Claimant's Reply Memorial, at para 296, referring to *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, November 18, 1960, ICJ Reports 1960, 192, at 192 (**CL-207**); James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 9th ed., 2019) at 407 (**CL-244**).

[398] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007, Separate Statement of Dean Ronald A. Cass, at para 163 (**CL-113**).

[399] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 71.

[400] Respondent's Counter-Memorial, at para 239; Respondent's Rejoinder Memorial, at para 71.

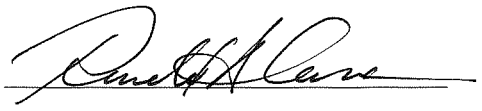
308. I conclude that the Respondent, having made contrary representations over a period of years respecting the GNS measures in other proceedings, should not be heard to invoke Article 1108(7)(b)'s exclusion of subsidies here.

309. To the extent that analysis in the Tribunal's Award diverges from the analysis in this Statement of Article 1108(7) exceptions to the Respondent's responsibility under Article 1102, I dissent from that part of the Tribunal's Award.

V. CONCLUSION

310. Because I conclude that the Respondent cannot avail itself of exceptions for much of the set of impugned measures that otherwise might be excepted as subsidies or grants, I reaffirm my conclusion that the Respondent did violate its obligations under NAFTA Article 1102(3) and, in my judgment, should be required to compensate the Claimant for that violation. Given the opposite conclusion in the Tribunal's Award, however, I will not address issues of causation and damages.

311. Apart from the matters addressed above, I join the Tribunal's Award.



Dean Ronald A. Cass

Date: July 25, 2022